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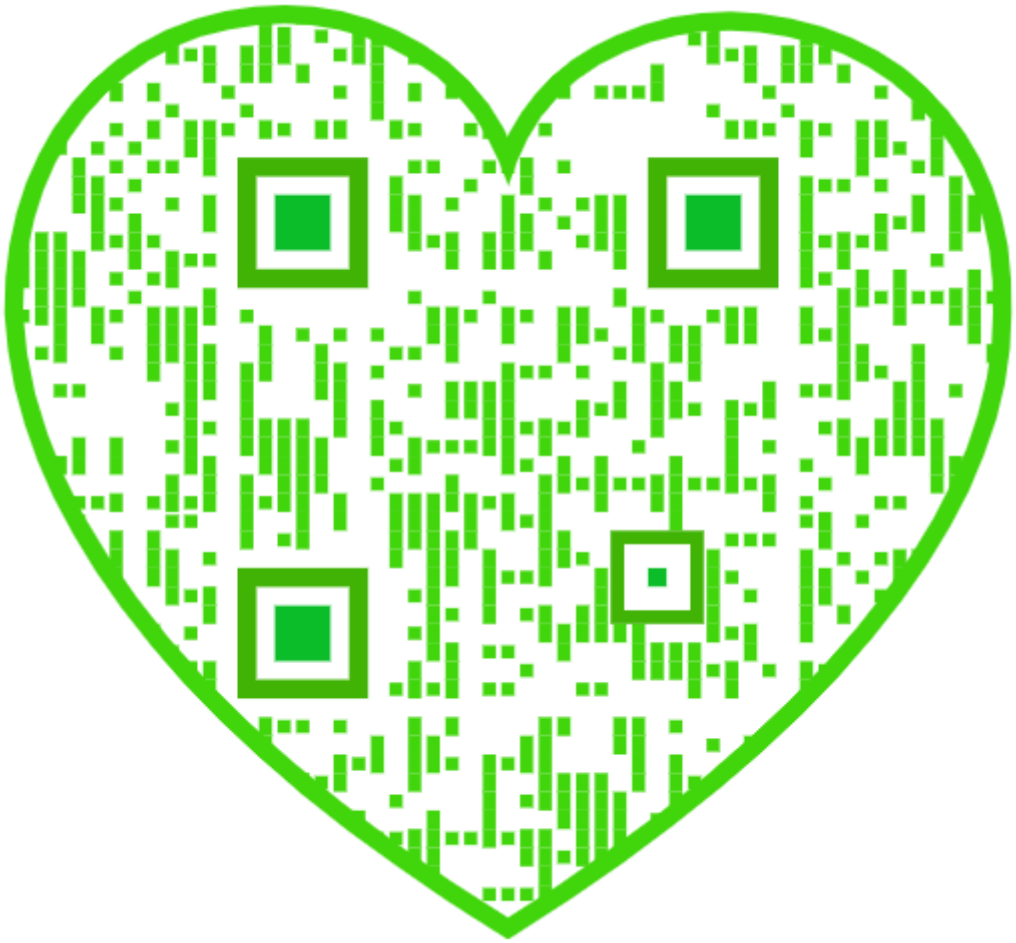

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Explosion:
As Cause of Loss, see FIRE INSURANCE.
Master's Duty to Guard Against, see MASTER AND SERVANT.
Explosive:
Judicial Notice of, see EVIDENCE.
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As Nuisance, see NUISANCES.
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For Malicious Injury, see MALICIOUS MISCHIEF.
In Firearm, see WEAPONS.
Gas, see GAS.
Nuisance Generally, see NUISANCES.
Steam, see STEAM.

I. DEFINITION.

An "explosive" may be defined as any substance by whose decomposition or combustion gas is generated with such rapidity that it can be used for blasting or in firearms.[1]

1. Century Dict. And see Washburn *v.* Miami Valley Ins. Co., 2 Fed. 633, 2 Flipp. 664. See also Hobbs *v.* Northern Assur. Co., 8 Ont. 343, 346.

As defined by statute, the term "explosive" shall be understood to include guncotton, nitroglycerine or any compound thereof, and any fulminate, or any substance intended to be used, by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder (1 Mass. Rev. Laws (1902), p. 880, c. 102, § 105), gunpowder, nitroglycerine, dynamite, guncotton, blasting powders, fulminate of mercury, or of other metals, colored fires, and every other substance, whether similar to those described herein or not, used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect; and the term includes fog-signals, fireworks, fuses, rockets, percussion caps, detonators, cartridges, ammunition of all descriptions, and every adaptation or preparation of an explosive as defined herein (38 Vict. c. 17, § 3, subs. 1).

Fog-signals are included in "explosive preparation or composition" within the meaning of 23 & 24 Vict. c. 139.

"Explosive compound," as defined by statute, includes guncotton, nitroglycerine, or any other compound of the same; any fulminate, or, generally, any substance intended to be used, by exploding or igniting the same, to produce a force to propel missiles or to rend apart substances, except gunpowder. S. C. Civ. Code (1902), § 2156.

II. STATUTORY AND MUNICIPAL REGULATIONS.

In many jurisdictions the manufacture, keeping, or sale of explosives or dangerously inflammable materials has been greatly restricted or otherwise regulated either by direct statutory provisions or by municipal ordinances.[2]

III. CRIMINAL PROSECUTIONS.[3]

A. In General. Whether an offense growing out of the illegal manufacture, sale, etc., of an explosive constitutes a misdemeanor[4] or a felony[5] depends upon the particular statute or ordinance.

B. Sale of Oil Below Test. Where one is charged with selling oil in violation of a statute, the illegal intent need not be alleged or proved, but will be presumed upon proof of sale;[6] nor will ignorance of the law excuse defendant charged with this offense;[7] and each sale is a distinct offense, and a convic-

An "explosive substance," as defined by statute, includes any materials for making any explosive substance; also any apparatus, machine, implement, or materials used, or intended to be used, or adapted for causing, or aiding in causing, any explosion in or with any explosive substance; also any part of any such apparatus, machine, or implement. 46 Vict. c. 3, § 9.

2. *Alabama.*— Kinney *v.* Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497 and note.

Georgia.— Anderson *v.* Savannah, 69 Ga. 472; Williams *v.* Augusta, 4 Ga. 509.

Illinois.— Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837; Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200.

Kansas.— National Oil Co. *v.* Rankin, 68 Kan. 679, 75 Pac. 1013.

Louisiana.— Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824.

Maine.— Wadsworth *v.* Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588.

Massachusetts.— Somerville *v.* Walker, 168 Mass. 388, 47 N. E. 127.

New Jersey.— McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.— People *v.* Murray, 175 N. Y. 479, 67 N. E. 1087 [*affirming* 76 N. Y. App. Div. 118, 78 N. Y. Suppl. 721 (*reversing* 37 Misc. 687, 76 N. Y. Suppl. 373)]; Ricker *v.* McDonald, 89 N. Y. App. Div. 300, 85 N. Y. Suppl. 825; Foote *v.* New York Fire Dept., 5 Hill 99.

Pennsylvania.— Donahue *v.* Kelly, 181 Pa. St. 93, 37 Atl. 186, 59 Am. St. Rep. 632.

Virginia.—Davenport *v.* Richmond City, 81 Va. 636, 59 Am. Rep. 694.

United States.— Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

England.—Eliott *v.* Majendie, L. R. 7 Q. B. 429, 41 L. J. M. C. 147, 26 L. T. Rep. N. S. 504, 20 Wkly. Rep. 721; Webley *v.* Woolley, L. R. 7 Q. B. 61, 41 L. J. M. C. 38, 25 L. T. Rep. N. S. 629; Bliss *v.* Lilley, 3 B. & S. 128, 9 Jur. N. S. 410, 32 L. J. M. C. 3, 7 L. T. Rep. N. S. 319, 113 E. C. L. 128; Biggs *v.* Mitchell, 2 B. & S. 523, 8 Jur. N. S. 817, 31 L. J. M. C. 163, 6 L. T. Rep. N. S. 242, 10 Wkly. Rep. 559, 110 E. C. L. 523.

See 23 Cent. Dig. tit. "Explosives," § 1; and, generally, MUNICIPAL CORPORATIONS. See also cases cited *infra*, note 53.

The validity of such regulations has been sustained as being reasonable (Standard Oil Co. *v.* Danville, 199 Ill. 50, 64 N. E. 1110 [*affirming* 101 Ill. App. 65]) and as being within the police power of the state (People *v.* Lichtman, 65 N. Y. App. Div. 76, 72 N. Y. Suppl. 511).

3. See, generally, CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

Possession of explosives as constituting the offense of having in possession burglarious implements see BURGLARY, 6 Cyc. 239 note 3.

4. See People *v.* Lichtman, 173 N. Y. 63, 55 N. E. 854 [*reversing* 65 N. Y. App. Div. 76, 72 N. Y. Suppl. 511].

A manufacturer of soda water in the basement of a tenement-house used carbonic acid gas in the process. Such gas is a compressed gas, but there was no evidence that it was manufactured on the premises, and none to show that soda water is an explosive, or that its manufacture was dangerous. It was held not to support a conviction under N. Y. Pen. Code, § 389, before the amendment by Laws (1902), c. 486, prohibiting the manufacture of compressed gases or of any explosive articles. People *v.* Lichtman, 173 N. Y. 63, 55 N. E. 854 [*reversing* 65 N. Y. App. Div. 76, 72 N. Y. Suppl. 511].

5. Thus in Illinois the improper use of explosives in certain ways is made a felony. Hronek *v.* People, 134 Ill. 139, 23 Am. St. Rep. 652, 24 N. E. 861, 8 L. R. A. 837, holding that one convicted under such a statute should be imprisoned in the penitentiary.

Indictable nuisance at common law.— The careless or negligent keeping of gunpowder in large quantities, near dwelling-houses, or where the lives of persons are thereby endangered, is a nuisance at common law. Bradley *v.* People, 56 Barb. (N. Y.) 72; People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296. See, generally, NUISANCES. In such a case the indictment should allege a careless or negligent keeping. People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296.

6. Downing *v.* State, 66 Ga. 160.

7. Downing *v.* State, 66 Ga. 160.

tion for selling to one is no defense in a prosecution for a subsequent sale to another.[8]

IV. CIVIL LIABILITY.

A. For Injuries From Accidental Explosions — 1. In General. Accidental explosions incidental to the negligent or illegal handling, storage, or use of explosives often result in injuries for which a civil liability arises.[9]

2. Illegal or Negligent Manufacture. Liability for injuries resulting from the explosion of explosives manufactured in a negligent manner or manufactured in violation of some statute or ordinance rests upon the same principles as liability for such injuries where explosives are illegally or negligently stored or kept.[10] Thus the manufacture of an explosive under such circumstances or in such places as to constitute a public nuisance will authorize a recovery by any one injured by an explosion of such explosives without proof of negligence on the part of the manufacturer;[11] but in the absence of the creation of such a nuisance negligence on the part of the manufacturer must be shown in order to warrant a recovery.[12]

3. Illegal or Negligent Storage or Keeping — a. Temporary Storage. A regulation prohibiting the storage of explosives beyond a certain amount has been held to be violated, even though the storage was only temporary or in due course of transportation,[13] and although no damage resulted therefrom.[14]

b. Permanent Storage. If the erection of powder-houses or magazines, or the keeping of more than a certain amount of explosives in a certain locality, be in violation of an ordinance, the courts usually declare their existence to be a nuisance;[15] but where their maintenance is not in violation of some law, whether or

8. Downing *v.* State, 66 Ga. 160.

9. See *infra*, IV, A, 2 *et seq.*

Care required of master see MASTER AND SERVANT.

Injury to vessel by explosion see SHIPPING.

10. See *infra*, IV, A, 3.

11. Huntington, etc., Land Development Co. *v.* Phœnix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037; Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. *Compare* Benfield *v.* Vacuum Oil Co., 75 Hun (N. Y.) 209, 27 N. Y. Suppl. 16; Nichols *v.* Brush, etc., Mfg. Co., 53 Hun (N. Y.) 137, 6 N. Y. Suppl. 601.

12. Cosulich *v.* Standard Oil Co., 122 N. Y. 118, 25 N. E. 259, 19 Am. St. Rep. 475. *Compare* Favo *v.* Remington Arms Co., 67 N. Y. App. Div. 414, 73 N. Y. Suppl. 788, holding that the manufacturer of a dangerous article intended for use is liable to the purchaser, at least for damages resulting from his negligence in using defective material or from want of proper care or skill in the manufacture.

The manufacturer must exercise a certain degree of care toward all persons. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718, where it is said that the duty which the law enjoins upon such a manufacturer and the duty enjoined upon all other persons in the conduct of their business differs only in the degree of care to be exercised.

The manufacturer of a dangerous explosive oil who sells it for illuminating purposes is responsible to any person injured thereby. McKain *v.* Elkin, 27 Pittsb. Leg. J. (Pa.) 169.

The manufacturer of a steam boiler which explodes in consequence of its defective construction and injures a third person is not liable for such injuries if they occurred after the boiler had been completed and accepted by the employer. Losee *v.* Clute, 51 N. Y. 494, 10 Am. Rep. 638 [*distinguishing* Thomas *v.* Winchester, 6 N. Y. 397, 57 Am. Dec. 455, and *explaining* Loop *v.* Litchfield, 42 N. Y. 351, 1 Am. Rep. 513].

Where a company selling fireworks does not manufacture a certain shell, and makes a careful examination before its delivery, from which it appears that it is in perfect condition, the company is not liable for an injury caused by a defect therein. Consolidated Fireworks Co. of America *v.* Koehl, 190 Ill. 145, 60 N. E. 87 [*reversing* 92 Ill. App. 8].

13. Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200; Foote *v.* New York Fire Dept., 5 Hill (N. Y.) 99. *Contra*, Biggs *v.* Mitchell, 2 B. & S. 523, 8 Jur. N. S. 817, 31 L. J. M. C. 163, 6 L. T. Rep. N. S. 242, 10 Wkly. Rep. 559, 110 E. C. L. 523.

14. Foote *v.* New York Fire Dept., 5 Hill (N. Y.) 99.

15. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130. See also Ricker *v.* McDonald, 89 N. Y. App. Div. 300, 85 N. Y. Suppl. 825. But see Fillo *v.* Jones, 2 Abb. Dec. (N. Y.) 121, where a different view seems to have been taken.

not they will be declared nuisances depends upon their structure, proximity to other property, and other attending circumstances.[16]

c. Negligence in Keeping. When the keeping of an explosive becomes unlawful and *per se* a nuisance, one is liable for the injuries occasioned by an explosion thereby, regardless of the degree of care exercised in the keeping thereof;[17] but when the attending circumstances are such that the keeping cannot be said to be *per se* unlawful, it is necessary, in order to authorize a recovery for injuries caused by their explosion, to show some negligence or want of due care, upon the part of the party keeping them.[18]

4. Illegal or Negligent Transportation[19] — a. Notice of Dangerous Character. It is the duty of one, in transporting or shipping explosives, to give notice of their dangerous character to the carrier; and the failure to perform such duty renders him liable for injuries caused by a resulting explosion.[20] It is not incum-

16. In the following cases they were so declared:

Alabama.— Rudder *v.* Koopman, 116 Ala. 332, 22 So. 601, 37 L. R. A. 489; Kinney *v.* Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497.

New Jersey.— McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.— Reilly *v.* Erie R. Co., 177 N. Y. 547, 69 N. E. 1130 [*affirming* 72 N. Y. App. Div. 476, 76 N. Y. Suppl. 620]. But see Heeg *v.* Licht, 16 Hun 257; Myers *v.* Malcolm, 6 Hill 292, 41 Am. Dec. 744.

Pennsylvania.— Wier's Appeal, 74 Pa. St. 230.

South Carolina.—Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

Tennessee.— Cheatham *v.* Shearon, 1 Swan 213, 55 Am. Dec. 734.

Texas.— Ft. Worth, etc., R. Co. *v.* Beauchamp, 95 Tex. 496, 68 S. W. 502, 93 Am. St. Rep. 864; Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556.

Washington.—Nelson *v.* McLellan, 31 Wash. 208, 71 Pac. 747, 96 Am. St. Rep. 902, 60 L. R. A. 793.

West Virginia.—Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890 [*criticizing* People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296].

England.— Rex *v.* Taylor, 2 Str. 1167.

See 23 Cent. Dig. tit. "Explosives," § 3 *et seq.* But *compare* Georgetown Telephone Co. *v.* McCullough, 80 S. W. 782, 26 Ky. L. Rep. 72.

The keeping of powder by a manufacturer of fuse is not necessarily a nuisance, so as to make it liable for an explosion thereof; but the business when commenced having been located in a proper place, and having been carried on with care, and the explosion having been caused by a stranger going into the magazine and wilfully blowing it up, the manufacturer is not liable. Kleebauer *v.* Western Fuse, etc., Co., 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, (1902) 69 Pac. 246, 60 L. R. A. 377.

17. *Illinois.*— Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262.

New Jersey.— McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.— Prussak *v.* Hutton, 30 N. Y. App. Div. 66, 51 N. Y. Suppl. 761; Lounsbury *v.* Foss, 80 Hun 296, 30 N. Y. Suppl. 89; Myers *v.* Malcolm, 6 Hill 292, 41 Am. Dec. 744.

Ohio.— St. Marys' Woolen Mfg. Co. *v.* Bradford Glycerine Co., 14 Ohio Cir. Ct. 522.

Tennessee.— Cheatham *v.* Shearon, 1 Swan 213, 55 Am. Dec. 734.

West Virginia.— Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

United States.— Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

See 23 Cent. Dig. tit. "Explosives," § 3 *et seq.*

Negligence per se.— To put a number of slaves into a room to cook, eat, and sleep, with an open keg of powder under their sleeping bunk, unknown to them, is negligence, and subjects the negligent bailee to damages for an injury to the slaves by reason of the explosion of the powder. Allison *v.* Western North Carolina R. Co., 64 N. C. 382.

18. Collins *v.* Alabama Great Southern R. Co., 104 Ala. 390, 16 So. 140; Cook *v.* Anderson, 85 Ala. 99, 4 So. 713; Lee *v.* Vacuum Oil Co., 54 Hun (N. Y.) 156, 7 N. Y. Suppl. 426; Heeg *v.* Licht, 16 Hun (N. Y.) 257; People *v.* Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296. See also Clarkin *v.* Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020.

Liability of landlord where a child of tenant is injured by explosives so stored as to be within his reach see Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

Where defendant purchased a house in which dynamite was stored but did not know that the dynamite was there, and nailed up the windows and locked the house so as to keep children out of it, he is not liable for injury to a trespassing child, who climbed into the house through a window and while playing with the dynamite was injured by its explosion. Ball *v.* Middlesborough Town, etc., Co., 68 S. W. 6, 24 Ky. L. Rep. 114.

19. Carriers' obligation with respect to transportation of explosives see Carriers, 6 Cyc. 372.

20. Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568; Barney *v.* Burnstenbinder, 64 Barb. (N. Y.) 212; Parrott *v.* Wells, 15 Wall. (U. S.) 524, 21 L. ed. 206.

When carrier has notice.— If the shipper

bent upon a carrier to require information as to the character of a package before carrying the same.[21]

b. Degree of Care Required. It is said that the same degree of care is required of those transporting explosives or combustible oils as is exercised by merchants and those handling them,[22] which means only that considering the risk run as many precautions must be taken as would be taken by men of ordinary prudence.[23] But if a carrier be uninformed as to the dangerous character of an explosive package, it is not negligence to handle it as similar looking packages are handled.[24]

5. Illegal or Negligent Sale — a. Notice of Dangerous Character. There is an implied duty on the part of one who sells explosives to give notice of their dangerous character,[25] which duty is sometimes expressly enjoined by statute.[26]

and carrier enter into an agreement by which the explosive is to be shipped under some other than its real name, and it is so shipped with nothing to indicate to the employees of the carrier its dangerous nature, and injury to an employee results, the shipper is liable, regardless of the agreement with the carrier. Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677.

21. Parrott *v.* Wells, 15 Wall. (U. S.) 524, 21 L. ed. 206.

22. Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426.

Gas naphtha, being a dangerous article, a company shipping a tank of it to a city was liable for the death of a city employee, caused, while attempting to unload the tank, by the negligent manner in which said company had closed the discharge pipe of the tank. Standard Oil Co. *v.* Wakefield, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792.

23. Furth *v.* Foster, 7 Rob. (N. Y.) 484. See also Walker *v.* Chicago, etc., R. Co., 71 Iowa 658, 33 N. W. 224; Foley *v.* Chicago, etc., R. Co., 48 Mich. 622, 12 N. W. 879, 42 Am. Rep. 481.

Where a railroad company after a collision with an oil train, whereby some of the tanks of oil were set on fire, neglects for two hours to remove the remaining cars, whereby they are subsequently ignited and explode, they are liable to one injured by such explosion. Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426.

Where a railroad company, by failing to use ordinary care, allows a car of explosives to be unnecessarily or unreasonably delayed at a station, or fails to use ordinary care in keeping or caring for such car, it creates a nuisance rendering the company liable for damages resulting to adjacent property from an explosion thereof. Ft. Worth, etc., R. Co. *v.* Beauchamp, (Tex. Supp. 1902) 68 S. W. 502.

24. Parrott *v.* Wells, 15 Wall. (U. S.) 524, 21 L. ed. 206.

25. Barney *v.* Burnstenbinder, 64 Barb. (N. Y.) 212, 7 Lans. (N. Y.) 210.

Where the common law imposed on the vendor of eighty-seven-degree gasoline, which was not in common use, and was inherently dangerous, the duty of notifying and warning purchasers of such quality, the fact that the sale or manner of delivery of such article was not prohibited or regulated by statute did not affect the rights of plaintiffs to recover of the seller of such gasoline for the death of their son from an explosion of the gas from the gasoline, while in the employ of the purchaser thereof. Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

Liability for misrepresenting the nature of an explosive sold to plaintiff see Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607.

Responsibility of a manufacturer attaches from his putting a dangerous illuminating oil on the market and holding it out as safe to be used for illuminating purposes. Elkins *v.* McKean, 79 Pa. St. 493.

Where plaintiff purchased a siphon of seltzer water, manufactured by a third party, and filled in the usual manner, he cannot recover of the vendor for injuries received from an explosion of such siphon, where there is no other evidence of negligence on the part of the vendor than the explosion itself. Glaser *v.* Seitz, 35 Misc. (N. Y.) 341, 71 N. Y. Suppl. 942.

Kan. Gen. St. (1901) c. 72a, gives a right of action against the seller of oil for damages sustained by an explosion only when the oil was sold without having been properly tested. National Oil Co. *v.* Rankin, 68 Kan. 679, 75 Pac. 1013.

26. Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824.

Under Iowa Code, § 2505, providing that no gasoline shall be sold unless the vessel containing it has been marked "gasoline," a seller's failure to label a jug containing gasoline in the manner required constitutes negligence *per se*, so as to render the seller liable for injuries sustained by a daughter of the purchaser, who uses the gasoline to start a fire under the belief that it is coal oil. Ives *v.* Welden, 114 Iowa 476, 87 N. W. 408, 89 Am. St. Rep. 379, 54 L. R. A. 854.

Sufficiency of notice.— It has been held that if the difference in the dangerous character or use of two explosive fluids be scarcely perceptible, it would not be actionable deception, in filling an order, for one to substitute the other, although branded as the article ordered. Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824.

Constructive notice.— Neither the retail dealer in illuminating oils, nor the purchaser

b. Liability to Subsequent Vendees. Where one sells oil in violation of a statute, his liability is not confined to the immediate vendee, but extends to subsequent purchasers.[27]

c. Selling to Infant. If one sells gunpowder or other explosives to children, or to others whom he knows to be incapable of taking proper care of them, he is liable for injuries resulting from their improper use by such persons.[28]

6. Illegal or Negligent Use. One whose business requires the use of explosives must use such care and caution in handling or guarding them as prudent and careful persons whose business requires the use of such explosives ordinarily exercise.[29]

B. For Injuries From Blasting — 1. General Rule of Liability. It may be said to be the rule that one who in blasting upon his premises casts rocks or other *débris* upon the land of another is liable for such invasion, regardless of the degree of care or skill used in doing the work.[30]

2. Limitations of Rule[31] — a. Injuries by Vibrations. The courts in some cases recognize a distinction between an injury caused by blasting *débris* directly upon the property of another, and by injuring it from vibrations in the air or

from him is chargeable, as a matter of law, with knowledge that naphtha is highly explosive, in such sense as to relieve the original seller from liability. Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64.

27. Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64; Elkins *v.* McKean, 79 Pa. St. 493.

28. Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508; Carter *v.* Towne, 98 Mass. 567, 96 Am. Dec. 682.

29. Lanza *v.* Le Grand Quarry Co., 124 Iowa 659, 100 N. W. 488, holding, however, that the care required of persons whose business requires the use of dynamite is greater than that required with respect to the use of less dangerous explosives. *Compare* Makins *v.* Piggott, 29 Can. Supreme Ct. 188, where the explosive was negligently left within the reach of a child who in handling it was injured by its explosion.

Illustration.— A defendant, sued for having accidentally exploded a blast of dynamite by hammering on an adjacent rock, is not chargeable with negligence in not having first examined the ledge of rock to see whether another blast, which had exploded six feet away, scattering *débris*, had not produced a fissure in the rock leading into the hole drilled for the unexploded blast, and also loosened the rock adjacent thereto, so as to make his hammering the possible occasion of the second explosion. Murphy *v.* Hallinan, 93 N. Y. App. Div. 48, 86 N. Y. Suppl. 927.

30. *California.*— Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248.

Colorado.— G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696.

Illinois.— Fitz Simons, etc., Co. *v.* Braun, 94 Ill. App. 533.

Maryland.— Scott *v.* Bay, 3 Md. 431.

New Jersey.— McAndrews *v.* Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.— St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258; Tremain *v.* Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; Gourdier *v.* Cormack, 2 E. D. Smith 200.

Ohio.— Tiffin *v.* McCormick, 34 Ohio St. 638, 32 Am. Rep. 408; Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399.

See 23 Cent. Dig. tit. "Explosives," § 9.

But *compare* Klepsch *v.* Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936, where, although this doctrine was not repudiated, the circumstances of the case took it without the rule.

Reason for rule.— In Hay *v.* Cohoes Co., 2 N. Y. 159, 161, 15 Am. Dec. 279, the court, per Gardiner, J., said: "It is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. . . . If the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property." In G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 546, 13 Pac. 696, the court said: "In general, if a voluntary act, lawful in itself, may naturally result in the injury of another, or the violation of his legal rights, the actor must at his peril see to it that such injury or such violation does not follow, or he must expect to respond in damages therefor; and this is true regardless of the motive or the degree of care with which the act is performed."

While a contractor may lawfully blast rocks in a right of way, he cannot throw the rocks on persons rightfully occupying or using neighboring property. Cary *v.* Morrison, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659.

31. Where damages have been assessed for right of way for a railroad a limitation of the rule arises. See Eminent Domain, 15 Cyc. 543.

earth, caused by the blast, holding that in the latter case it is necessary, to recover for the injury, to show that the work was done negligently or carelessly.[32]

b. Blasting in Mine. One cannot, while lawfully blasting in a mine, in the absence of negligence, be held liable for injuries to property upon the surface, so long as the land in its natural state be not disturbed.[33]

3. Blasting in Cities. Where one, in doing certain blasting within the limits of a city, injures property of another, the fact that the former has fully complied with the regulations of the city authorities as to the manner in which the blasting should be done will not relieve him of liability if the blasting was done without due care.[34]

4. Blasting Near Highways. It has been held that where one is injured by falling stones or other *débris*, caused by blasting, while traveling upon the highway, the persons conducting the work are liable therefor, regardless of the care used in its prosecution and a recovery cannot be defeated by the fact that there was no negligence in the prosecution of the work;[35] in some jurisdictions, how-

32. Simon *v.* Henry, 62 N. J. L. 486, 41 Atl. 692; French *v.* Vix, 143 N. Y. 90, 37 N. E. 612 [*affirming* 2 Misc. 312, 21 N. Y. Suppl. 1016, 30 Abb. N. Cas. 158]; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Benner *v.* Atlantic Dredging Co., 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220; Holland House Co. *v.* Baird, 49 N. Y. App. Div. 180, 63 N. Y. Suppl. 73; Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 36 N. Y. Suppl. 327. *Contra*, Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556; Fitzsimons *v.* Braun, 199 Ill. 390, 65 N. E. 249 [*affirming* 94 Ill. App. 533]; Morgan *v.* Bowers, 17 N. Y. Suppl. 22, where it is said that blasting with an explosive so powerful as to injure the property of adjoining owners by atmospheric concussions creates a nuisance, and liability attaches therefor.

Reason for limitation.— The maxim "*Sic utero tuo ut alienum non lædas*" does not prevent an owner of property from making proper use thereof, although such use may inflict damages upon his neighbor; the real meaning of the rule is that a person may not use his own property to the injury of any legal right of another. Newell *v.* Woolfolk, 91 Hun (N. Y.) 211, 36 N. Y. Suppl. 327. In Benner *v.* Atlantic Dredging Co., 134 N. Y. 156, 162, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L. R. A. 220, the court said: "One cannot confine the vibration of the earth or air within inclosed limits, and hence it must follow that if in any given case they are rightfully caused, their extension to their ultimate and natural limits cannot be unlawful, and the consequential injury, if any, must be remediless." While in Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 278, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105, the court reason thus: "May the man who has first built a store or warehouse or dwelling on his lot and has blasted the rock for a basement or cellar, prevent his neighbor from doing the same thing when he comes to build on bis lot adjoining, on the ground that by so doing his own structure will be injured? Such a rule would enable the first occupant to control the uses of the adjoining property, to the serious injury of the owner, and prevent or tend to prevent the improvement of property."

33. Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322.

Blasting on government land.—Contractors, making rock excavations on government property for river improvements, are to be considered, so far as their duty to avoid injuring third persons is concerned, as owners of the premises. Smith *v.* Day, 86 Fed. 62.

34. Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394. *Compare* Holland House Co. *v.* Baird, 169 N. Y. 136, 62 N. E. 149 [*reversing* 49 N. Y. App. Div. 180, 63 N. Y. Suppl. 73], where plaintiff sued to recover for injuries to a vault of a building constructed under a sidewalk, alleged to have been caused by negligence of defendant in blasting while constructing a trench in front of the building under a municipal contract providing that blasting should be conducted in conformity with the city ordinances. There was no evidence showing negligence, or that the injury to the building did not naturally result from the blasting in connection with some weakness in the construction of the building. It was held that a nonsuit was properly granted.

A subcontractor engaged in excavating for the rapid transit subway in New York city drilled holes for blasting within a foot of a water-pipe, and nearer to the pipe than the rules of the water department permitted, and exploded in the holes a quantity of dynamite, without turning off the water or protecting the pipe in any way. The rock which was blasted could have been removed by breaking it with a hammer without injury to the pipe. It was held that he was guilty of negligence making him liable for the damages sustained by reason of the breaking of the pipe, thereby permitting water to escape therefrom and to flow on to the premises of another. Wheeler *v.* Norton, 92 N. Y. App. Div. 368, 86 N. Y. Suppl. 1095 [*affirming* 84 N. Y. Suppl. 524].

35. Wright *v.* Compton, 53 Ind. 337; Sullivan *v.* Dunham, 161 N. Y. 290, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715.

Reason.— In Sullivan *v.* Dunham, 161 N. Y.

ever, the person engaged in blasting is liable only for injuries resulting from negligence.[36]

5. Blasting by Independent Contractor.[37] The liability of a principal for the negligence of an independent contractor cannot be said to be settled. By the weight of authority it seems that he is not liable, although the work to be done is intrinsically dangerous, so long as no negligence can be imputed to him in employing such contractor, and the work itself be lawful, and will not necessarily result in injury to another.[38] In some jurisdictions where the work is done as contemplated he is liable as a joint wrong-doer;[39] so also is he liable if he contracts with one whom he knows to be in the habit of blasting in violation of an ordinance.[40]

6. Observance of Precautions — a. Covering of Blast. It is a duty of those blasting in dangerous places to restrict within safe limits the flight of blasted rocks by properly covering the blast;[41] and in some jurisdictions this duty is expressly imposed by ordinance,[42] a failure to comply with which is evidence of negligence.[43]

290, 300, 55 N. E. 923, 76 Am. St. Rep. 274, 47 L. R. A. 715, plaintiff's intestate, while walking along the highway, was killed by a falling stump, as the result of a blast in an adjoining field. The court, in holding defendant liable regardless of negligence, said: "[This doctrine] rests upon the principle, founded in public policy, that the safety of property generally is superior in right to a particular use of a single piece of property by its owner. . . . It makes human life safer by tending to prevent a landowner from casting, either with or without negligence, a part of his land upon the person of one who is where he has a right to be. . . . The public travel must not be endangered to accommodate the private rights of individuals."

36. Mills *v.* Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114, where it is held that plaintiff's right to recover depends upon proof of the negligence of defendant. See also Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 35.

37. Independent contractor generally see Master and Servant.

38. *Missouri.*— Blumb *v.* Kansas City, 84 Mo. 112, 54 Am. Rep. 87.

New Hampshire.— Carter *v.* Berlin Mills, 58 N. H. 52, 42 Am. Rep. 572.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.— French *v.* Vix, 143 N. Y. 90, 37 N. E. 612 [*affirming* 2 Misc. 312, 21 N. Y. Suppl. 1016, 30 Abb. N. Cas. 158]; Herrington *v.* Lansingburg, 110 N. Y. 145, 17 N. E. 728, 6 Am. St. Rep. 348; McCafferty *v.* Spuyten Duyvil, etc., R. Co., 61 N. Y. 178, 19 Am. Rep. 267; Kelly *v.* New York, 11 N. Y. 432; Pack *v.* New York, 8 N. Y. 222; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 43 N. Y. Suppl. 1; Wiener *v.* Hammell, 14 N. Y. Suppl. 365; Brennan *v.* Gellick, 20 N. Y. St. 1023, 30 Abb. N. Cas. 166. *Contra*, Buddin *v.* Fortunato, 16 Daly 195, 10 N. Y. Suppl. 115; Booth *v.* Rome, etc., R. Co., 17 N. Y. Suppl. 336.

Pennsylvania.— Edmundson *v.* Pittsburg, etc., R. Co., 111 Pa. St. 316, 2 Atl. 404; Ardesco Oil Co. *v.* Gilson, 63 Pa. St. 146.

See 23 Cent. Dig. tit. "Explosives," § 9.

Contra.— *Illinois.*— Joliet *v.* Harwood, 86 Ill. 110, 29 Am. Rep. 17.

Indiana.— Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166.

Massachusetts.— Murphy *v.* Lowell, 124 Mass. 564.

Ohio.— Tiffin *v.* McCormack, 34 Ohio St. 638, 32 Am. Rep. 408.

United States.— St. Paul Water Co. *v.* Ware, 16 Wall. 566, 21 L. ed. 485.

"Where the work contracted for is lawful, and necessary for the improvement and use of the real property of the owner, such as blasting out rock in a city lot for the purpose of building thereon, and the owner has not interfered in the work, and there is no statute binding him to efficiently perform it, and it does not constitute a public nuisance, the owner is not responsible to the owner of adjoining premises for injuries resulting from the negligence of the contractor or his employees." Berg *v.* Parsons, 156 N. Y. 109, 50 N. E. 957, 66 Am. St. Rep. 542, 41 L. R. A. 391.

39. Carman *v.* Steubenville, etc., R. Co., 4 Ohio St. 399.

Statement of rule.— "It is important to bear in mind that it [the rule of *respondeat superior*] does not apply where the contract directly requires the performance of a work intrinsically dangerous, however skillfully performed. In such case a party authorizing the work is regarded as the author of the mischief resulting from it, whether he does the work himself or lets it out by contract." Dillon Mun. Corp. § 792 [*cited* in Joliet *v.* Harwood, 86 Ill. 110, 111, 29 Am. Rep. 17].

40. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451.

41. Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166; Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182; Gates *v.* Latta, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

42. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451; Koster *v.* Noonan, 8 Daly (N. Y.) 231; Devlin *v.* Gallagher, 6 Daly (N. Y.) 494.

43. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451; Devlin *v.* Gallagher, 6 Daly

b. Warning Previous to Blast. It is incumbent upon those who are engaged in blasting to give timely notice of each blast, that one may have sufficient time to escape the danger.[44] A failure to give such notice is in some jurisdictions made negligence *per se* by statute,[45] while in others the question of negligence from such omission is for the jury.[46] Whether or not a certain warning was sufficient has also been held to be a question of fact for the jury.[47]

c. Effect of Previous Warning. Giving fair and timely warning of an impending blast is held to discharge one from liability if the injured party fails to heed such warning.[48]

C. For Injuries From Discharge of Fireworks — 1. In Street or Highway. The display of fireworks upon a street or public highway, in the absence of a statute or ordinance permitting it, is *per se* unlawful, and renders the participants liable for damages resulting therefrom.[49]

2. In Park or Other Place of Amusement. The owner or manager[50] of a park or other place of amusement who gives an exhibition of fireworks therein

(N. Y.) 494, 496, in which latter case the court said: "It . . . failed to recognize the axiomatic truth that every person, while violating an express statute (and an ordinance if duly passed, is of like effect), a wrongdoer, and, as such, '*ex necessitate*' negligent in the eye of the law."

44. *Arkansas.*—Cameron *v.* Vandergriff, 53 Ark. 381, 13 S. W. 1092.

Indiana.— Wright *v.* Compton, 53 Ind. 337.

Maine.— Wadsworth *v.* Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588; Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450.

Michigan.— Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182; Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

New Jersey.— Belleville Stone Co. *v.* Mooney, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834.

New York.— St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258; Driscoll *v.* Newark, etc., Lime, etc., Co., 37 N. Y. 637, 97 Am. Dec. 761.

North Carolina.— Gates *v.* Latta, 117 N. C. 189, 23 S. E. 173, 53 Am. St. Rep. 584; Blackwell *v.* Lynchburg, etc., R. Co., 111 N. C. 151, 16 S. E. 12, 32 Am. St. Rep. 786, 17 L. R. A. 729.

South Carolina.— Harris *v.* Simon, 32 S. C. 593, 10 S. E. 1076.

Washington.—Graetz *v.* McKenzie, 9 Wash. 696, 35 Pac. 377.

See 23 Cent. Dig. tit. "Explosives," § 10.

45. Wadsworth *v.* Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588.

Statute construed.— Where the statute provided that persons engaged in blasting rock should before each explosion give notice thereof, so that all persons that might be approaching should have time to retire to a safe distance, and that any one injured through a failure to give such notice may recover therefor from the owner of the quarry, if the persons doing the blasting are unable to pay, it was held that such statute was not intended to furnish a remedy to workmen in stone quarries, especially as a construction giving such a remedy would be in derogation of the common law, by which an employer is exempt from liability for the negligence of a fellow servant. Hare *v.* McIntire, 82 Me. 240, 19 Atl. 453, 17 Am. St. Rep. 476, 8 L. R. A. 450.

46. Driscoll *v.* Newark, etc., Lime, etc., Co., 37 N. Y. 637, 97 Am. Dec. 761.

Knowledge of blast.—In Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182, defendants were not negligent in failing to give every one who resided or worked within a radius of five hundred feet notice of an intended blast, especially after the blasting had been going on, to the knowledge of such persons for several weeks.

47. Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Harris *v.* Simon, 32 S. C. 593, 10 S. E. 1076.

48. Graetz *v.* McKenzie, 9 Wash. 696, 35 Pac. 377. See also Wright *v.* Compton, 53 Ind. 337 (where the same was impliedly held); St. Peter *v.* Denison, 58 N. Y. 416, 17 Am. Rep. 258. See also *infra*, IV, E, 2, b.

Premature notice.— Notice of a blast from three to five minutes before the blast is discharged is not sufficient, when a person who is not near enough to hear the notice comes within range and is killed. Logansport *v.* Dick, 70 Ind. 65, 36 Am. Rep. 166.

49. Jenne *v.* Sutton, 43 N. J. L. 257, 39 Am. Rep. 578; Conklin *v.* Thompson, 29 Barb. (N. Y.) 218. But see Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598, where the fact that the display was from the court-house in a public square, instead of the street, seemed to take it without the rule. *Compare* Scanlon *v.* Wedger, 156 Mass. 462, 31 N. E. 642, 16 L. R. A. 395, where a distinction is made between a voluntary spectator and a traveler.

50. Liability for acts of third person.— Defendant owned and managed a park for public amusement for an admission fee. Plaintiff paid the admission fee and entered the park to witness an exhibition of fireworks as advertised by defendant. During the exhibition a rocket was discharged which struck plaintiff and injured her. A third

must use the care and prudence exercised by an ordinarily prudent and intelligent man to protect not only his guests and patrons[51] but all others[52] from unnecessary risks from the discharge or attempted discharge of such fireworks.

3. Liability of Municipality For Acts of Its Servants. In many jurisdictions the manner, place, and time of using fireworks is expressly regulated by statute or ordinance.[53] But it has been held that in the gratuitous provision of such amusement for the public a city would not be liable for an injury sustained by one through the negligence of its servants;[54] and especially would this be true if the ordinance authorizing the display be not regularly passed,[55] or the display be in violation of the ordinance.[56] On the other hand where the mayor was authorized by ordinance to permit displays in certain public squares and he issued a permit for a display in a street, the city was held liable for resulting damage.[57]

4. Liability For Acts of Infants. Where a parent through lack of care or watchfulness permits an infant of tender age to discharge fireworks he is liable for injuries resulting from a negligent use of them.[58] And the rule has been held to apply to a schoolmaster, should he permit their use by small pupils under his care.[59]

D. Who May Sue and Persons Liable.[60] In an action to recover for damages to property caused by an explosion the title is not involved; proof of actual and peaceable possession by the tenant is sufficient to maintain the action.[61] A

person whose business was that of exhibitor of fireworks did all the work in connection with the sending off fireworks, under a contract with defendant to give the exhibition, and defendant had no control over the details of the work nor over the men who performed it. It was held that defendant was not liable, although the third person was negligent. Deyo *v.* Kingston Consol. R. Co., 94 N. Y. App. Div. 578, 88 N. Y. Suppl. 487.

One who merely permits the display of fireworks upon his private grounds and who did not procure or explode them is not liable for an injury caused by them to one who complains only of their quality and the manner in which they are handled. Waixel *v.* Harrison, 37 Ill. App. 323.

51. Sebeck *v.* Plattdeutsche Volksfest Verein, 124 Fed. 11, 59 C. C. A. 531.

It is not unlawful or a nuisance per se in giving a fireworks exhibition to shoot off sky-rockets, bombs, and other explosives in a careful and suitable manner upon one's own premises. Bianki *v.* Greater American Exposition Co., 3 Nebr. (Unoff.) 656, 92 N. W. 615.

Proper care.— If defendant by its amusement committee, who were not experts, exercised due care to employ a competent and skilful person to manufacture, produce, and discharge the fireworks, and exercised proper precautions to protect spectators by keeping them at a reasonable distance from the place of discharge, it was not guilty of negligence. Sebeck *v.* Plattdeutsche Volksfest Verein, 124 Fed. 11, 59 C. C. A. 531.

52. It is negligence for a corporation, giving a fireworks exhibition on its own grounds, to use dynamite bombs and other explosives, which are so improperly prepared and manufactured that they will not explode while in the air, and fire or propel them into the air at such an angle that they will fall outside of its grounds upon public or private premises, and permit them to remain where children and persons unacquainted with their dangerous nature can pick them up, handle them, and thus cause them to explode, to their injury and damage. Bianki *v.* Greater American Exposition Co., 3 Nebr. (Unoff.) 656, 92 N. W. 615.

53. *Iowa.*— Ball *v.* Woodbine, 61 Iowa 83, 15 N. W. 846, 47 Am. Rep. 805.

Massachusetts.— Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289; Morrison *v.* Lawrence, 98 Mass. 219.

New York.— Speir *v.* Brooklyn, 18 N. Y. Suppl. 170.

North Carolina.— Hill *v.* Charlotte, 72 N. C. 55, 21 Am. Rep. 451.

England.— Bliss *v.* Lilley, 3 B. & S. 128, 9 Jur. N. S. 410, 32 L. J. M. C. 3, 7 L. T. Rep. N. S. 319, 113 E. C. L. 128.

See 23 Cent. Dig. tit. "Explosives," § 8; and cases cited *supra*, note 2.

54. Tindley *v.* Salem, 137 Mass. 171, 50 Am. Rep. 289.

55. Morrison *v.* Lawrence, 98 Mass. 219.

56. Ball *v.* Woodbine, 61 Iowa 83, 15 N. W. 846, 47 Am. Rep. 805. In this case the town council and officers of the town and a majority of the citizens actively participated in the display and the officers made no attempt to stop the unlawful proceedings.

57. Speir *v.* Brooklyn, 18 N. Y. Suppl. 170.

58. Mullins *v.* Blaise, 37 La. Ann. 92.

59. King *v.* Ford, 1 Stark. 421, 18 Rev. Rep. 794, 2 E. C. L. 163.

60. Parties generally see PARTIES.

61. Buddin *v.* Fortunato, 16 Daly (N. Y.) 195; Ulrich *v.* McCabe, 1 Hilt. (N. Y.) 251; Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523; Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

The tenant in such case recovers for the injury to his possession and not for the loss

company and its employee,[62] a principal and an independent contractor,[63] or two manufacturers[64] may under certain circumstances be jointly liable for damages caused by an explosion. And all those concerned in the maintenance of a powder-house or magazine are liable for the damage from its explosion should it be declared a nuisance.[65] The general rules of liability incidental to the relation of master and servant obtain with regard to the handling of dangerous or explosive materials;[66] and so too with respect to the non-liability for injuries caused by a fellow servant.[67]

E. Defenses — 1. In General. While any legitimate defense, such as contributory negligence,[68] may be set up by defendant in actions of this character, it has been held in certain cases that under the particular circumstances neither a license to sell,[69] ignorance or mistake of fact,[70] infancy of defendant,[71] permission

to the freehold. Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200.

62. Pine Bluff Water, etc., Co. *v.* McCain, 62 Ark. 118, 34 S. W. 549.

Where gunpowder is consigned to be sold on commission, and such consignee has the exclusive management and control of the storage of the goods, the consignor cannot be held for damages caused by an explosion of the consignment. Ahrahams *v.* California Powder Works, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

63. See *supra*, IV, B, 5.

64. In Boston, etc., R. Co. *v.* Shanly, 107 Mass. 568, a contractor of blasting ordered one manufacturer to send him a quantity of dualin, and another to send him certain explosives. Each manufacturer, without the other's knowledge, delivered the respective articles, in harmless-looking packages to the carrier, who was ignorant of their character. An explosion having occurred while being carried with due care, it was held that the manufacturers were jointly liable in tort to the carrier.

65. Prussak *v.* Hutton, 30 N. Y. App. Div. 66, 51 N. Y. Suppl. 761; Cumminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556.

66. *Georgia.*— Houston *v.* Culver, 88 Ga. 34, 13 S. E. 953.

New Jersey.— Belleville Stone Co. *v.* Mooney, 60 N. J. L. 323, 33 Atl. 835, 39 L. R. A. 834.

New York.— Spelman *v.* Fisher Iron Co., 56 Barb. 151.

Pennsylvania.— Allison Mfg. Co. *v.* McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613.

Virginia.— Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869.

United States.— Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464; McGowan *v.* La Plata Min., etc., Co., 9 Fed. 861, 3 McCrary 393.

England.— Sword *v.* Cameron, 1 Sc. Sess. Cas. 493.

See 23 Cent. Dig. tit. "Explosives," § 8; and, generally, Master and Servant.

The measure of care imposed upon the master for the safety of his servant in the use of dynamite is that ordinary care which reasonable and prudent men would exercise under like circumstances. Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869.

67. *Connecticut.*— Sullivan *v.* New York, etc., R. Co., 62 Conn. 209, 25 Atl. 711.

Montana.— Mulligan *v.* Montana Union R. Co., 19 Mont. 135, 47 Pac. 795.

New Mexico.— Deserant *v.* Cerrillos Coal R. Co., 9 N. M. 495, 55 Pac. 290.

New York.— Spelman *v.* Fisher Iron Co., 56 Barb. 151.

Pennsylvania.— Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432.

Utah.— Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815.

Canada.— Matthews *v.* Hamilton Powder Co., 14 Ont. App. 261.

See 23 Cent. Dig. tit. "Explosives," § 8; and, generally, Master and Servant.

As regards the risks assumed by a servant in accepting such dangerous employment as the handling of explosives see Henderson *v.* Williams, 66 N. H. 405, 23 Atl. 365; Belleville Stone Co. *v.* Mooney, 61 N. J. L. 253, 39 Atl. 764, 39 L. R. A. 834; Prentice *v.* Wellsville, 21 N. Y. Suppl. 820; Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815; McGowan *v.* La Plata Min., etc., Co., 9 Fed. 861, 3 McCrary 393.

Limit of risk.— One assumes the risk of personal injury in blasting with the ordinary appliances used for that purpose, but not those risks attendant upon the use of an unusual, untested, and exceedingly dangerous article, which could not be tamped without inevitable explosion, the dangerous quality of which was unknown to him. Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151.

68. See *infra*, IV, E, 2.

69. Carter *v.* Towne, 98 Mass. 567, 96 Am. Dec. 682, holding that the fact that one is duly licensed to sell gunpowder is no defense for selling to one incapable of taking proper care of it.

70. The rule that ignorance or mistake of fact constitutes a good defense does not apply where there is a duty to know, as far as possible, the dangerous character of a substance (Tissue *v.* Baltimore, etc., R. Co., 112 Pa. St. 91, 3 Atl. 667, 56 Am. Rep. 310), nor when a statute has been violated (Hourigan *v.* Nowell, 110 Mass. 470).

71. Conklin *v.* Thompson, 29 Barb. (N. Y.) 218, holding that, in an action for an injury caused by the unlawful use of an explosive, infancy of defendant would not constitute a good defense.

given by the landowner to blast rocks over land,[72] the conduct of the business in the usual and customary manner,[73] nor the unprofitableness of the business if otherwise conducted[74] would constitute a valid defense.

2. CONTRIBUTORY NEGLIGENCE[75] — a. In General. The established doctrine of contributory negligence as a defense applies in this class of actions.[76] But one cannot be said to be guilty of contributory negligence who is merely present and observing a display of fireworks;[77] nor is it *per se* contributory negligence for one to go upon premises where a fire is likely to cause an explosion, if he does so in good faith, intending to save life or property.[78]

b. Disregard of Warning. Where one has been properly warned of the danger, and disregards the same, he cannot recover.[79]

72. Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30, where the owner habitually allowed persons to pass over such land.

73. The fact that blasting was conducted in the usual manner is no defense in an action for an injury caused by alleged negligence (Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838), nor is it a defense that ordinary care was used (Tiffin *v.* McCormack, 34 Ohio St. 638, 32 Am. Rep. 408).

74. It is no defense in an action for damages from negligent blasting that the use of proper care or a change in the manner of doing the work would have decreased the profit thereof, or rendered it unprofitable altogether. Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30; Booth *v.* Rome, etc., R. Co., 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L. R. A. 105; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 43 N. Y. Suppl. 1.

75. Contributory negligence generally see NEGLIGENCE.

76. *Alabama.*— Birmingham Water-Works Co. *v.* Hubbard, 85 Ala. 179, 4 So. 607, 7 Am. St. Rep. 35.

Colorado.— Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Louisiana.— Scola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824.

Maine.— Wadsworth *v.* Marshall, 88 Me. 263, 34 Atl. 30, 32 L. R. A. 588.

Massachusetts.— Frost *v.* Josselyn, 180 Mass. 389, 62 N. E. 469.

Montana.— Mulligan *v.* Montana Union R. Co., 19 Mont. 135, 47 Pac. 795.

New York.— Sullivan *v.* Dunham, 10 N. Y. App. Div. 438, 41 N. Y. Suppl. 1083, 3 N. Y. Annot. Cas. 324.

United States.— Cleveland, etc., R. Co. *v.* Ballentine, 84 Fed. 935, 28 C. C. A. 572.

Plaintiff's knowledge that blasting was done in disregard of an ordinance requiring the rock to be first covered with timber may be shown in determining what would be due care on the part of plaintiff. Brannock *v.* Elmore, 114 Mo. 55, 21 S. W. 451.

77. Colvin *v.* Peabody, 155 Mass. 104, 29 N. E. 59; Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598; Bradley *v.* Andrews, 51 Vt. 530.

78. Henry *v.* Cleveland, etc., R. Co., 67 Fed. 426.

But the rule is otherwise where he goes through mere curiosity, although he voluntarily renders some service. Cleveland, etc., R. Co. *v.* Ballentine, 84 Fed. 935, 28 C. C. A. 572. So too where one, although in the prosecution of his own business, goes voluntarily upon premises where blasting is being done. Smith *v.* Day, 86 Fed. 62.

79. Mills *v.* Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114. It is the duty of one lawfully using property near to that on which another is legally engaged in blasting, and who is warned of a coming explosion, to use reasonable diligence to escape danger on account of it, and a failure to exercise such care constitutes contributory negligence, fatal to his action for damages for any injury. Cary *v.* Morrison, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659. See also *supra*, IV, B, 6, c.

Attending circumstances may excuse a failure to heed such warning. Clarkin *v.* Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020. In this case plaintiffs were remaining in possession of a boarding camp as bare licensees, and defendant stored a quantity of dynamite in a building near by, and notified plaintiffs that if they remained in the camp they would do so at their own risk. It was held that the severity of the weather, sickness of a member of the family, and financial embarrassment could all be considered by the jury in determining whether they had reasonable opportunity to remove before the explosion, which occurred three weeks after the warning.

Sufficiency of notice of danger.— An oil company, sending its wagon to a repairing firm for repairs, notified the agent in charge of the shop, who in turn notified one of the partners, that the tank ought to be washed out before work was commenced. Such partner failed to notify his copartner, who did the work and was injured by the explosion of vaporized oil from the tank. It was held that the injured partner had notice of the dangerous condition of the tank, and that the proximate cause was the negligence in undertaking the repairs, which precludes a recovery. King *v.* National Oil Co., 81 Mo. App. 155. In Bertha Zinc Co. *v.* Martin, 93 Va. 791, 22 S. E. 869, it is held not to be

c. Proximity to Dangerous Property. One is not guilty of contributory negligence in living in his home near a magazine, although he has knowledge of its dangerous character;[80] nor in continuing to carry on business near by after an explosion has occurred.[81] Neither is it a defense that plaintiff has leased or sold a portion of his property to another for the purpose of manufacturing powder.[82] Nor would the fact that the injured property was not adjacent in itself defeat a recovery.[83]

F. Action to Recover Damages — 1. Form of Action. Case is the proper action to recover damages for injuries caused by an explosion.[84]

2. Jurisdiction.[85] Where one is injured by negligent blasting, the cause of action accrues in the jurisdiction where the injury occurred, although the work is conducted within another jurisdiction.[86]

3. Pleading[87] **— a. In General.** If the complaint sets out facts which would render the keeping of explosives a nuisance, negligence need not be alleged;[88] but when negligence becomes material and defendant is sought to be held for the negligent performance of certain acts recovery can be had for those acts only where the negligence is charged in the declaration.[89] But a complaint which charges negligence in general terms is good on demurrer,[90] a motion to make more specific being the proper remedy. So also must the duty be alleged if one is sought to be held for a negligent breach thereof.[91]

such contributory negligence that will defeat recovery for workmen, with the knowledge and consent of the master, to go to a fire to warm where dynamite is being thawed.

80. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Prussak *v.* Hutton, 30 N. Y. App. Div. 66, 51 N. Y. Suppl. 761; Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

81. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718.

82. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718; Laflin, etc., Powder Co. *v.* Tearney, 30 Ill. App. 321.

83. Bradford Glycerine Co. *v.* St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. Rep. 740, 45 L. R. A. 658.

84. *Delaware.*— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Michigan.— Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 15 N. W. 65, 45 Am. Rep. 30.

New Hampshire.— Henderson *v.* Williams, 66 N. H. 405, 23 Atl. 365.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New Mexico.— Abrahams *v.* California Powder Works, 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

New York.— Myers *v.* Malcolm, 6 Hill 292, 41 Am. Dec. 744.

Pennsylvania.— Tissue *v.* Baltimore, etc., R. Co., 112 Pa. St. 91, 3 Atl. 667, 56 Am. Rep. 310.

But *compare* Scott *v.* Bay, 3 Md. 431, which holds that when the injury is immediate and constitutes a forcible breaking the action is trespass.

Case generally see Case, Action on.

85. Jurisdiction generally see Courts.

Where the explosion caused damage to both personalty and realty, the action was held to be transitory in its nature, and defendant might be sued wherever found and served. Barney *v.* Burstenbinder, 7 Lans. (N. Y.) 210.

86. Cameron *v.* Vandegriff, 53 Ark. 381, 13 S. W. 1092.

87. Pleading generally see Pleading.

88. Rudder *v.* Koopman, 116 Ala. 332, 22 So. 601, 37 L. R. A. 489; Kinney *v.* Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497; Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262.

89. Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182.

90. Mississinewa Min. Co. *v.* Patton, 129 Ind. 472, 28 N. E. 1113, 28 Am. St. Rep. 203.

Sufficiency.— Where the complaint averred that H was the managing agent and superintendent of the company, that the powder for blasting was furnished by the company through him, and that he furnished the same to plaintiff for use, it was held that these allegations of fact were equivalent to a direct and simple averment that the company furnished the powder. Spelman *v.* Fisher Iron Co., 56 Barb. (N. Y.) 151. A declaration, alleging defendant's knowledge of the dangerous character of naphtha, and the use to which it would probably be put and affirming the absence of negligence on plaintiff's part, states a good cause of action at common law. Wellington *v.* Downer Kerosene Oil Co., 104 Mass. 64.

91. Hill *v.* Callahan, 82 Ga. 109, 8 S. E. 730.

Sufficient allegation.— Where, in an action against a seller of gasoline for the death of the buyer's servant, caused by an explosion, it was alleged that the gasoline was eighty-

b. Where Special Damages Are Sought. Where special damages are sought to be recovered, as for suffering and anxiety of mind,[92] or for loss of time,[93] there must be a special allegation as to such damages.

c. Variance. The general rule that it is necessary for the proof to substantially correspond with the allegation applies in this class of actions.[94]

4. Evidence[95]— a. Presumptions and Burden of Proof. The usual rules as to presumptions[96] and burden of proof govern.[97] Thus it has been held that a presumption of negligence may arise from the fact of the explosion itself[98] or the injury resulting therefrom,[99] especially in connection with other circumstances, such as the nature of the explosive or the manner of its use,[1] although as a rule the question of negligence is purely one of fact which should be submitted to the jury.[2] The burden of proof to establish negligence in the handling of explosives rests of course upon plaintiff.[3]

seven-degree gasoline, the most dangerous on the market, and that defendant did not notify plaintiff's employer of its dangerous qualities, a demurrer to the petition, on the ground that one selling merchandise is not responsible for damages to an employee of the purchaser resulting therefrom, was properly overruled, since the gasoline sold was a substance inherently dangerous to human life, which it was defendant's duty to have warned purchasers against. Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

92. Wright *v.* Compton, 53 Ind. 337, holding that one can recover for suffering and anxiety of mind, caused by an injury from negligent blasting, without such special allegation in the complaint.

93. Hunter *v.* Farren, 127 Mass. 481, 34 Am. Rep. 423, holding that one cannot recover compensation for loss of time of men employed about his works, without making allegation of such loss, a declaration alleging only the interruption of use and occupation of his buildings being insufficient.

94. See, generally, Pleading.

Fatal variances see Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200; Elkins *v.* McKean, 79 Pa. St. 493; King *v.* Ford, 1 Stark. 421, 18 Rev. Rep. 794, 2 E. C. L. 163.

Immaterial variances see Mills *v.* Wilmington City R. Co., 1 Marv. (Del.) 269, 40 Atl. 1114; Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508; Colvin *v.* Peabody, 155 Mass. 104, 29 N. E. 59.

95. Evidence generally see Evidence.

96. Presumptions generally see Evidence, 16 Cyc. 1050.

97. Burden of proof generally see Evidence, 16 Cyc. 926.

98. Judson *v.* Giant Powder Co., 107 Cal. 549, 40 Pac. 1020, 48 Am. St. Rep. 146, 29 L. R. A. 718 [*citing* Shearman & R. Negl. § 60], holding that in the absence of any explanation of the real cause, an explosion of nitroglycerine, or dynamite in process of manufacture raises a presumption of negligence. In this case numerous authorities in analogous cases are reviewed and the rule of the text upheld.

99. It is sometimes held that the fact of an injury caused by a blast raises a presumption of negligence on the part of those conducting it. Ulrich *v.* McCabe, 1 Hilt. (N. Y.) 251; Klepsch *v.* Donald, 8 Wash. 162, 35 Pac. 621.

1. It has been held that evidence of the dangerous qualities of fireworks, their discharge by defendant, and the injury therefrom, raises a presumption of negligence. Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

Gasoline.— An employee of defendant, in putting on a tin roof, was using a gasoline fire-pot in which to heat his irons, and in so doing put up a tin wind-brake to protect the flame, which, becoming heated, reflected the heat in such a manner that the gasoline can exploded, severely burning another workman. It was held to be a negligent use, for which defendant should respond in damages. Evans *v.* Hoggatt, 9 Kan. App. 540, 59 Pac. 381.

Paint.— Where an explosion occurred while the workmen were painting the inside of a tank, and the evidence was that the paint had been used by the company for twelve or fifteen years and no such thing had before been heard of, it was held to be error to submit the question of negligence to the jury. Allison Mfg. Co. *v.* McCormick, 118 Pa. St. 519, 12 Atl. 273, 4 Am. St. Rep. 613.

Torpedoes.— It is negligence for the servants of a railroad company without notice or other precaution to place and leave exposed to observation at such places on its track as children are likely to pass an explosive and dangerous object like a signal torpedo. Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

Fog-signal.— In Jones *v.* Grand Trunk R. Co., 45 U. C. Q. B. 193, plaintiff who was suing for an injury to his eye caused by the explosion of a fog-signal which had been placed on the track was nonsuited, it appearing that no one to the knowledge of several of defendant's employees, who were called as witnesses, placed it on the track, which would have been wholly unnecessary for defendant's purpose, and that it might have been obtained from defendant's servants by some third person.

2. See *infra*, IV, F, 5, a.

3. *Alabama.*— Cook *v.* Anderson, 85 Ala. 99, 4 So. 713.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 259, 40 Atl. 1114.

b. Admissibility — (I) *In General.* The competency, relevancy, or materiality of evidence is controlled by the general rules governing the admissibility of evidence.[4] These rules have been applied to the admissibility of declarations of persons injured [5] or killed [6] in actions for personal injuries or for death caused by explosions; of evidence as to the effect of other injuries [7] or other explosions;[8] of evidence as to the financial condition of the parties;[9] of evidence as to the *quantum* of damages;[10] and of evidence as to general custom and usage in regard to keeping explosives,[11] as well as to the admissibility of positive and negative testimony.[12]

(II) *To Show Intent.* Where the exercise of proper care constitutes a valid defense full opportunity should be given defendant to show acts of caution and good faith on his part;[13] but where the exercise of care would not be a defense evidence of such care is inadmissible when no claim is made for exemplary damages.[14] On the trial of one for the unlawful manufacture of an explosive the nature of the substance itself, the concealment of it, and the fact that it is unnecessary in his lawful business, and contemporancous declarations, may all be considered in determining his unlawful intent.[15]

(III) *To Show Proper Construction of Magazine or Storehouse.* In an action against one for the alleged negligent construction and maintenance of

Iowa.— Walker *v.* Chicago, etc., R. Co., 71 Iowa 658, 23 N. W. 224.

Massachusetts.— Hourigan *v.* Nowell, 110 Mass. 470.

Missouri.— Dowell *v.* Guthrie, 116 Mo. 646, 22 S. W. 893.

New Mexico.— Deserant *v.* Cerrillos Coal R. Co., 9 N. M. 495, 55 Pac. 290.

Utah.— Anderson *v.* Daly Min. Co., 16 Utah 28, 50 Pac. 815.

4. See, generally, Evidence. See also Fisk *v.* Wait, 104 Mass. 71.

5. Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007, holding that statements made by plaintiff as to the manner of the occurrence of his injury are inadmissible to support his subsequent statements consistent with his testimony.

6. Where, in an action against a seller of eighty-seven-degree gasoline for injuries caused by an explosion, deceased had no knowledge of the dangerous qualities of such gasoline, and had been told that defendant's agent had said there was no danger therefrom, evidence that deceased had stated that he had been told, by a person whose name was not disclosed, that the gasoline was safe at the point where it was stored, was admissible to show the state of decedent's mind as to the danger. Waters-Pierce Oil Co. *v.* Davis, (Tex. Civ. App. 1900) 60 S. W. 453. See also Monroe *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, holding that it is admissible to show that the deceased, after the injuries which resulted in his death, complained of vertigo and dizziness.

7. Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, holding that in an action for an injury from negligent blasting evidence is admissible showing the effect of the explosion upon adjoining property.

8. Fillo *v.* Jones, 2 Abb. Dec. (N. Y.) 121, holding that, where one is injured by an explosion of fireworks alleged to have been wrongfully kept, it is not permissible to show that other fires caused by fireworks had occurred at other times on the premises of other persons; at least without proof that the fireworks and the conditions of ignition were similar.

9. Myers *v.* Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744 (evidence of defendant's wealth not admissible in action for nuisance); Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838 (evidence of plaintiff's financial condition admissible).

10. Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200; Simmons *v.* McConnell, 86 Va. 494, 10 S. E. 838.

11. Barnes *v.* Zettlemoyer, (Tex. Civ. App. 1901) 62 S. W. 111, where dynamite kept for the purpose of trade in a hardware store exploded and injured the property of an adjoining owner.

12. Beauchamp *v.* Saginaw Min. Co., 50 Mich. 163, 5 N. W. 65, 45 Am. Rep. 30, holding that, where there was positive testimony that proper warning had been given, it is not clearly error to allow witnesses to testify that they heard no warning. In Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200, where a violation of a city ordinance in the storage of oil was complained of, it was held an error not to permit plaintiff to prove the condition of defendant's warehouse, and that the floor thereof was soaked with oil.

13. Furth *v.* Foster, 7 Rob. (N. Y.) 484, holding that, in an action against defendant for an injury resulting from the alleged negligently carrying of gunpowder through the streets, evidence that he submitted the powder for examination to persons familiar with its use in blasting and was told by them that it was harmless is admissible.

14. Tremain *v.* Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284.

15. Hronek *v.* People, 134 Ill. 139, 24 N. E. 861, 23 Am. St. Rep. 652, 8 L. R. A. 837.

a magazine, it has been held,[16] and likewise denied,[17] that evidence of the manner of construction of other magazines is admissible.

c. Weight and Sufficiency. In like manner the general rules as to the weight and sufficiency of evidence control.[18] Thus a written notice of an intention to blast rock at a certain place,[19] or giving orders and superintending the blasting, is *prima facie* evidence that the parties are themselves the actors.[20] So evidence of a failure to comply with an ordinance regarding blasting is sufficient evidence of negligence to go to the jury.[21] It is sufficient to show that the rocket was set in motion by defendant's negligence without pointing out the particular negligent act that caused the injury.[22]

5. TRIAL[23] — a. Questions of Law and Fact. Under the usual rule with respect to questions of law and fact[24] defendant's negligence,[25] plaintiff's contributory negligence,[26] the sufficiency of notice of the dangerous character of an explosive given to a carrier,[27] and whether the keeping or storage of explosives is or is not a nuisance *per se*,[28] have been very properly held to be questions which

16. Emory *v.* Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730.

17. Bradley *v.* People, 56 Barb. (N. Y.) 72.

18. See EVIDENCE, 17 Cyc. 753. See also Cameron *v.* New England Telephone, etc., Co., 182 Mass. 310, 65 N. E. 385; Holland House Co. *v.* Baird, 49 N. Y. App. Div. 180, 63 N. Y. Suppl. 73. And *compare* Socola *v.* Chess-Carley Co., 39 La. Ann. 344, 1 So. 824.

Expert testimony.— In the absence of direct evidence as to the cause of an explosion, expert testimony as to its probable cause is sufficient to warrant its submission to the jury. Badcock *v.* Freeman, 21 Ont. App. 633.

19. Gourdier *v.* Cormack, 2 E. D. Smith (N. Y.) 200.

20. Hardrop *v.* Gallagher, 2 E. D. Smith (N. Y.) 523.

21. Koster *v.* Noonan, 8 Daly (N. Y.) 231.

22. Dowell *v.* Guthrie, 99 Mo. 653, 12 S. W. 900, 17 Am. St. Rep. 598.

23. Trial generally see TRIAL.

24. See, generally, TRIAL.

Sufficiency of warning as a question for the jury see *supra*, IV, B, 6, b.

25. Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607; Ft. Worth, etc., R. Co. *v.* Beauchamp, 95 Tex. 496, 68 S. W. 502, 93 Am. St. Rep. 864; Sebeck *v.* Plattdeutsche Volksfest Verein, 124 Fed. 11, 59 C. C. A. 531. And see Holland House Co. *v.* Baird, 169 N. Y. 136, 62 N. E. 149 [*reversing* 49 N. Y. App. Div. 180, 62 N. Y. Suppl. 73]. See also, generally, NEGLIGENCE.

Negligence from omission to give warning of blast as a question for the jury see *supra*, IV, B, 6, b.

Negligence in blasting.—Redmund *v.* Butler, 168 Mass. 367, 47 N. E. 108; Neveu *v.* Sears, 155 Mass. 303, 29 N. E. 472; Berg *v.* Boston etc., Consol. Copper, etc., Min. Co., 12 Mont. 212, 19 Pac. 545; Koster *v.* Noonan, 8 Daly (N. Y.) 231. And see Holland House *v.* Baird, 169 N. Y. 136, 62 N. E. 149 [*reversing* 49 N. Y. App. Div. 180, 62 N. Y. Suppl. 73].

Negligence in keeping or storing explosives. —Denver, etc., R. Co. *v.* Conway, 8 Colo. 1, 5 Pac. 142, 54 Am. Rep. 537; Clarkin *v.* Biwabik-Bessemer Co., 65 Minn. 483, 67 N. W. 1020; Twohey *v.* Fruin, 96 Mo. 104, 8 S. W. 784; Rollins *v.* Farley, 100 N. Y. 620, 3 N. E. 87; Tissue *v.* Baltimore, etc., R. Co., 112 Pa. St. 91, 3 Atl. 667, 56 Am. Rep. 310.

When a question for the court.— In Berg *v.* Boston, etc., Consol. Copper, etc., Min. Co., 12 Mont. 212, 215, 19 Pac. 545, it is said: "The question of negligence is a fairly disputed question of fact, it must be resolved by the jury, but that, if the evidence is perfectly clear to the effect that there was no negligence, the matter is for the court." To the same effect see Walker *v.* Chicago, etc., R. Co., 71 Iowa 658, 33 N. W. 224; Foley *v.* Chicago, etc., R. Co., 48 Mich. 622, 12 N. W. 879, 42 Am. Rep. 481; Hughes *v.* Boston, etc., R. Co., 71 N. H. 279, 51 Atl. 1007, 93 Am. St. Rep. 518; Travell *v.* Bannerman, 174 N. Y. 47, 66 N. E. 583 [*reversing* 71 N. Y. App. Div. 439, 75 N. Y. Suppl. 866]; Afflick *v.* Bates, 21 R. I. 281, 43 Atl. 539, 79 Am. St. Rep. 801.

26. *Alabama.*— Birmingham Water-Works Co. *v.* Hubbard, 85 Ala. 179, 4 So. 607, 7 Am. St. Rep. 35; Eureka Co. *v.* Bass, 81 Ala. 200, 8 So. 216, 60 Am. Rep. 152.

Colorado.— Davis *v.* Graham, 2 Colo. App. 210, 29 Pac. 1007.

Georgia.— Smith *v.* Clarke Hardware Co., 100 Ga. 163, 28 S. E. 73, 39 L. R. A. 607.

Massachusetts.— Frost *v.* Josselyn, 180 Mass. 389, 62 N. E. 469; Fisk *v.* Wait, 104 Mass. 71.

Michigan.— Powers *v.* Harlow, 57 Mich. 107, 23 N. W. 606.

New York.— Koster *v.* Noonan, 8 Daly 231.

Virginia.— Standard Oil Co. *v.* Wakefield, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792.

United States.— Cary *v.* Morrison, 129 Fed. 177, 63 C. C. A. 267, 65 L. R. A. 659.

Canada.— Makins *v.* Piggott, 29 Can. Supreme Ct. 188.

But *compare* Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

See also, generally, NEGLIGENCE.

27. Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677.

28. Barnes *v.* Zettlemoyer, 25 Tex. Civ. App. 468, 62 S. W. 111, where a quantity of

under instructions from the court should be submitted to and determined by the jury.

b. Instructions. The instructions of the court must comply with the rules governing instructions in civil actions generally.[29] Thus while instructions should not ignore matters in evidence and material to the issue,[30] they must be based upon some evidence[31] and must be consistent.[32]

c. Judgment.[33] It is error to enter a judgment for damages caused by unlawful blasting, in excess of the verdict, and such error will be modified on appeal.[34]

6. Damages.[35] Compensatory damages[36]—including proximate and remote damages,[37] damages for interruption of business,[38] and damages for physical pain, mental anguish, and impairment of mental capacity[39]—exemplary damages,[40]

dynamite was kept in a store for the purpose of trade.

29. See, generally, Trial.

30. See Hill *v.* Meyer Bros. Drug Co., 140 Mo. 433, 31 S. W. 909, holding that an instruction must not ignore the care required of plaintiff to use ordinary diligence and prudence to inform himself of or to recognize the dangers incidental to certain work. But *compare* Sebeck *v.* Plattdeutsche Volksfest Verein, 124 Fed. 11, 59 C. C. A. 531, to the effect that an additional instruction need not be given when other instructions already given wholly cover the rules of law and the questions of fact involved.

Not material to the issue.— Where a blacksmith was injured by a kick from a horse which was frightened by an explosion in the vicinity of the shop, it was error, in an action against the excavators who caused the explosion, to permit a recovery upon the ground that the charge of dynamite was excessive, or that it was not properly covered, when the only ground of negligence set up in the declaration was the failure of defendants to give notice of the blast. Mitchell *v.* Prange, 110 Mich. 78, 67 N. W. 1096, 64 Am. St. Rep. 329, 34 L. R. A. 182.

31. Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248, holding that where there is no evidence of contributory negligence the doctrine may be properly ignored. And to the same effect see Mather *v.* Rillston, 156 U. S. 391, 15 S. Ct. 464, 39 L. ed. 464.

32. Kelley *v.* Cable Co., 7 Mont. 70, 14 Pac. 633. *Compare* Georgia Cent. R. Co. *v.* Bernstein, 113 Ga. 175, 38 S. E. 394, holding that in an action for damages occasioned by blasting in a city, a charge that, while in a given instance a permit to do blasting should have been in writing, the party acting under an oral permit should not be "chargeable with laches," is not hurtful to such party as intimating that he had not complied with the law unless he had obtained a written permit.

33. **Judgment** generally see Judgments.

34. Colton *v.* Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556.

35. **Damages** generally see Damages.

36. See Damages, 13 Cyc. 22.

37. See Damages, 13 Cyc. 25. See also the following cases:

California.— Taylor *v.* Baldwin, 78 Cal. 517, 21 Pac. 124.

Colorado.— G. B. & L. R. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696.

Delaware.— Mills *v.* Wilmington City R. Co., 1 Marv. 269, 40 Atl. 1114.

Illinois.— Wright *v.* Chicago, etc., R. Co., 27 Ill. App. 200.

Indiana — Binford *v.* Johnston, 82 Ind. 426, 42 Am. Rep. 508.

Massachusetts.— Carter *v.* Towne, 103 Mass. 507.

New Jersey.— Cuff *v.* Newark, etc., R. Co., 35 N. J. L. 17, 10 Am. Rep. 205.

New York.—Conklin *v.* Thompson, 29 Barb. 218.

Ohio.— Harriman *v.* Pittsburgh, etc., R. Co., 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507.

United States.—Sofield *v.* Sommers, 22 Fed. Cas. No. 13,157, 9 Ben. 526.

38. See Damages, 13 Cyc. 57. See also Hazard Powder Co. *v.* Volger, 58 Fed. 152, 7 C. C. A. 130.

One can recover for temporary interruption of his business, and loss of time of his workmen, caused by the negligent blasting of a near-by contractor, the measure of damages being the value to plaintiff of the work and the time lost. Hunter *v.* Farren, 127 Mass. 481, 34 Am. Rep. 423.

39. See Damages, 13 Cyc. 38 *et seq.*, 47.

While imaginary suffering and fanciful anxiety of mind would not be ground for damages, in an action for injuries from a negligent explosion (Wright *v.* Compton, 53 Ind. 337), yet impaired physical ability and pain and anxiety of mind unavoidably incurred may properly be considered (Cameron *v.* Vandegriff, 53 Ark. 381, 13 S. W. 1092; Wright *v.* Compton, 53 Ind. 337; Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677).

40. See Damages, 13 Cyc. 105.

In an action to recover for injuries from a negligent explosion exemplary or vindictive damages can be recovered only on the proof of negligence or other aggragavating circumstances. Munro *v.* Pacific Coast Dredging, etc., Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Cerrillos Coal R. Co. *v.* Deserant, 9 N. M. 49, 49 Pac. 807; Myers *v.* Malcolm, 6 Hill (N. Y.) 292, 41 Am. Dec. 744.

excessive damages,[41] and the computation of the amount of damages[42] follow the general rules relating to damages in all civil actions.

G. Injunction.[43] In some jurisdictions parties have resorted to a court of equity to restrain another from blasting, or from erecting or maintaining a powder-house or magazine.[44]

EXPORT.[1] In its primary, general or essential meaning, as a verb, to carry or send out of a place.[2] In its secondary, specific or especial meaning, as a verb, to carry from a state or country, as wares in commerce;[3] to send out from one country to another;[4] to send goods and merchandise from one country to another;[5] to send or carry out of the state, for the purpose of sale, trade or disposition.[6] As a noun, a thing exported — the article itself;[7] the correlative of "import," or "impost."[8] Here, the word conveys the idea of something carried out of the United States.[9] As used in the Constitution and laws of the United States, generally, the transportation of goods from this to a foreign country,[10] and the term

41. See DAMAGES, 13 Cyc. 121. Where plaintiff, a vigorous man of thirty years, was so badly burned about the face by an explosion of oil as to disfigure him for life, suffered for several months, and lost the use of his left arm, a verdict of twenty-five thousand dollars was held to be excessive. Standard Oil Co. *v.* Tierney, 92 Ky. 367, 17 S. W. 1025, 13 Ky. L. Rep. 626, 36 Am. St. Rep. 595, 14 L. R. A. 677.

42. See DAMAGES, 13 Cyc. 252.

In an action for injuries caused by the improper use of explosives, damages accrued up to the time of bringing the action only can be recovered (Morgan *v.* Bowes, 17 N. Y. Suppl. 22); but in Texas another rule prevails where the damages are necessarily continuous (Comminge *v.* Stevenson, 76 Tex. 642, 13 S. W. 556).

43. **Injunction** generally see INJUNCTIONS.

44. Whether or not injunction will issue will depend upon the facts and circumstances of each particular case.

Kentucky.— Dumesnil *v.* Dupont, 18 B. Mon. 800, 68 Am. Dec. 750.

New York.— Marvin *v.* Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Hill *v.* Schneider, 13 N. Y. App. Div. 299, 43 N. Y. Suppl. 1; Rafter *v.* Tagliabue, 21 N. Y. Suppl. 107, 29 Abb. N. Cas. 1.

Pennsylvania.— Dilworth's Appeal, 91 Pa. St. 247; Wier's Appeal, 74 Pa. St. 230; McDonough *v.* Roat, 8 Kulp 433.

West Virginia.— Huntington, etc., Land Development Co. *v.* Phœnix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037.

England.— Crowder *v.* Tinkler, 19 Ves. Jr. 617, 13 Rev. Rep. 267, 34 Eng. Reprint 645.

Estoppel.— Where a company engaged in the manufacture of powder and other explosives without misrepresentation or concealment on its part is induced by a company to locate its works at great expense on lands adjacent to the property of such company, and for its prospective benefit, the company cannot, on discovering that the proximity of such powder works has diminished instead of enhanced the value of its adjoining territory, enjoin the continuance of such work as a nuisance. Huntington, etc., and Development Co. *v.* Phœnix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037.

1. **"Export" and "import"** "have a technical meaning in the law." U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81, 94.

2. Swan, etc., Co. *v.* U. S., 190 U. S. 143, 145, 23 S. Ct. 702, 47 L. ed. 984.

3. Webster Dict. [*quoted* in Kidd *v.* Flagler, 54 Fed. 367, 369].

4. Swan, etc., Co. *v.* U. S., 190 U. S. 143, 145, 23 S. Ct. 702, 47 L. ed. 984.

5. Kidd *v.* Flagler, 54 Fed. 367, 369 [*quoting* U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 8, and *citing* Bouvier L. Dict.; Rapalje & L. L. Dict.].

6. State *v.* Turner, 5 Harr. (Del.) 501, 502.

7. Dooley *v.* U. S., 183 U. S. 151, 174, 22 S. Ct. 62, 46 L. ed. 128.

8. Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 131, 19 L. ed. 382 [*citing* Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678]; U. S. *v.* The Forrester, 25 Fed. Cas. No. 15,132, Newb. Adm. 81.

9. Dooley *v.* U. S., 183 U. S. 151, 154, 22 S. Ct. 62, 46 L. ed. 128.

The term has been held not to include: A bill of exchange (*Ex p.* Martin, 7 Nev. 140, 143, 8 Am. Rep. 707 [*citing* Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 131, 19 L. ed. 382]); a dead body of a human being (*In re* Wong Yung Quy, 2 Fed. 624, 631, 6 Sawy. 442); an excise laid on tobacco, before its removal from the factory (Turpin *v.* Burgess, 117 U. S. 504, 506, 6 S. Ct. 835, 29 L. ed. 988 [*citing* Coe *v.* Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715]); persons and passengers (*Ex p.* Martin, 7 Nev. 140, 142, 8 Am. Rep. 707; 7 Cyc. 472 note 52); pork (Powell *v.* Madison, 21 Ind. 335, 339); a shipment of goods from New York to Puerto Rico (12 Cyc. 1108 note 6); and timber which is cut in the forest and intended for exportation (Coe *v.* Errol, 116 U. S. 517, 528, 6 S. Ct. 475, 29 L. ed. 715. But see Clarke *v.* Clarke, 5 Fed. Cas. No. 2,846, 3 Woods 408, 412).

10. Swan, etc., Co. *v.* U. S., 190 U. S. 143, 145, 23 S. Ct. 702, 47 L. ed. 984.

embraces only articles exported to foreign countries, and does not include those exported from one state into another.[11] (Export: In General, see Customs Duties. Regulations by State as Constituting the Levying of Duties on Exports, see Commerce. Taxation, see Commerce. See also Exportation; Exported.)

Exportation.[12] A severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other;[13] the transportation of merchandise from one country to a foreign country.[14] (See Export; and, generally, Commerce; Customs Duties.)

Exported. In its ordinary sense, carried out of the port.[15] A term applied to merchandise when it is unloaded at a foreign port.[16] (See Export; and, generally, Commerce; Customs Duties.)

Exporting. As used in an indictment for exporting a slave, the taking or carrying of the slave out of the state as an article of trade or merchandise.[17]

Expose.[18] To remove from shelter; to place in a situation to be affected or acted on.[19] In reference to pain, to make liable; to subject; and (referring to the custom of some nations to expose their children) to cast out to chance; to place abroad, or in a situation unprotected.[20] (See Exposed; Exposure.)

Exposed.[21] A word which may have different meanings according to the circumstances of the different cases in which it is used; it may mean exposed to the air; it may mean exposed to water; it may mean exposed to view.[22] (See Expose.)

11. Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 132, 19 L. ed. 382 [*cited* in *Ex p.* Martin, 7 Nev. 140, 143, 8 Am. Rep. 707; Rothermel *v.* Meyerle, 136 Pa. St. 250, 262, 26 Atl. 583, 9 L. R. A. 366; Dooley *v.* U. S., 183 U. S. 151, 153, 22 S. Ct. 62, 46 L. ed. 128; Patapsco Guano Co. *v.* Board of Agriculture, 171 U. S. 345, 350, 18 S. Ct. 862, 43 L. ed. 191; Pittsburg, etc., Coal Co. *v.* Louisiana, 156 U. S. 590, 600, 15 S. Ct. 459, 39 L. ed. 544]; 12 Cyc. 1108; 7 Cyc. 472.

"The word is susceptible of being applied to articles introduced from one State into another." Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 132, 19 L. ed. 382. See also Dooley *v.* U. S., 183 U. S. 151, 153, 22 S. Ct. 62, 46 L. ed. 128 (where it is said: "The words 'import' and 'export' are sometimes used to denote goods passing from one State to another"); Muller *v.* Baldwin, L. R. 9 Q. B. 457, 461, 43 L. J. Q. B. 164; 7 Cyc. 472 note 51.

12. "At the period of the exportation to the United States" see Sampson *v.* Peaslee, 20 How. (U. S.) 571, 578, 15 L. ed. 1022.

"Shipped for exportation" see Stockton, etc., R. Co. *v.* Barrett, 11 Cl. & F. 590, 8 Eng. Reprint 1225, 2 M. & G. 134, 163, 40 E. C. L. 528, 2 Scott N. R. 337; Stockton, etc., R. Co. *v.* Barrett, 7 M. & G. 870, 879, 8 Scott N. R. 641, 49 E. C. L. 870.

13. 17 Op. Attys.-Gen. 583 [*quoted* in Swan, etc., Co. *v.* U. S., 190 U. S. 143, 145, 23 S. Ct. 702, 47 L. ed. 984].

14. Swan, etc., Co. *v.* U. S., 190 U. S. 143, 146, 23 S. Ct. 702, 47 L. ed. 984.

It is not the clearance outward, but the actually going out of port. U. S. *v.* Lyman, 26 Fed. Cas. No. 15,647, 1 Mason 482; Atty.-Gen. *v.* Pougett, 2 Price 381, 393. See also Rex *v.* Dixon, 11 Price 204, 209.

15. Muller *v.* Baldwin, L. R. 9 Q. B. 457, 461, 43 L. J. Q. B. 164.

16. Kidd *v.* Flagler, 54 Fed. 367, 370.

17. State *v.* Turner, 5 Harr. (Del.) 501, 502.

18. Compared with "exhibit" see Reg. *v.* Webb, 2 C. & K. 933, 940, 61 E. C. L. 933.

Distinguished from "deposit" in State *v.* Pratt, 54 Vt. 484, 486; Barlow *v.* Terrett, [1891] 2 Q. B. 107, 109, 55 J. P. 632, 60 L. J. M. C. 104, 65 L. T. Rep. N. S. 148, 39 Wkly. Rep. 640.

19. Webster Dict. [*quoted* in Shannon *v.* People, 5 Mich. 71, 90].

20. Shannon *v.* People, 5 Mich. 71, 90 [*quoting* Webster Dict.; Encycl. Brit.].

21. "The distinction between selling and exposing and depositing for sale is well known to the legislature." Barlow *v.* Terrett, [1891] 2 Q. B. 107, 109, 55 J. P. 632, 60 L. J. M. C. 104, 65 L. T. Rep. N. S. 148, 39 Wkly. Rep. 640.

22. Crane *v.* Lawrence, 25 Q. B. D. 152, 154, 17 Cox C. C. 135, 54 J. P. 471, 59 L. J. M. C. 110, 63 L. T. Rep. N. S. 197, 38 Wkly. Rep. 620, where it is said: "In each case one must look to the surrounding circumstances in order to ascertain what the word means."

"Exposed for sale" see Com. *v.* Byrnes, 158 Mass. 172, 33 N. E. 343; Com. *v.* Atkins, 136 Mass. 160, 161; Com. *v.* McCue, 121 Mass. 358, 359; State *v.* Wells, 69 N. H. 424, 425, 45 Atl. 143, 48 L. R. A. 99; Reg. *v.* Dennis, [1894] 2 Q. B. 458, 18 Cox C. C. 21, 58 J. P. 622, 63 L. J. M. C. 153, 160, 71 L. T. Rep. N. S. 436, 10 Reports 316, 42 Wkly. Rep. 586; Wheat *v.* Brown, [1892] 1 Q. B. 418, 421, 56 J. P. 153, 61 L. J. M. C. 94, 66 L. T. Rep. N. S. 464, 40 Wkly. Rep. 462; Crane *v.* Lawrence, 25 Q. B. D. 152, 154, 17 Cox C. C. 135, 54 J. P. 471, 59 L. J. M. C. 10, 63 L. T. Rep. N. S. 197, 38 Wkly. Rep. 620; White *v.* Yeovil, 61 L. J. M. C. 213, 214.

Exposed to contagious diseases see *In re*

EXPOSED PLACES. As applied to streets, dangerous places.[23] (See, generally, MUNICIPAL CORPORATIONS.)

EXPOSITIO, QUAE EX VICERIBUS CAUSAE NASCITUR, EST APTISSIMA ET FORTISSIMA IN LEGE. A maxim meaning "An exposition, which springs from the vitals of a cause, is the fittest and most powerful in law."[24]

EXPOSITORY STATUTE. A statute which is substantially in the nature of a mandate to the courts to construe and apply a former law not according to judicial, but according to legislative, judgment.[25] (See, generally, STATUTES.)

EX POST FACTO LAW. See CONSTITUTIONAL LAW.

EXPOSURE. The state of being exposed; openness to danger; accessibility to anything that may affect, especially detrimentally.[26] (Exposure: Of Children, see HOMICIDE; INFANTS. Of Person, see OBSCENITY. Of Poison, see POISONS. To Danger, see ACCIDENT INSURANCE; NEGLIGENCE.)

EXPOSURE TO UNNECESSARY DANGER. A term which is equivalent to negligence.[27]

EXPRESS.[28] As an adjective, given in direct terms; definite; explicit; manifest; not implied; not dubious;[29] directly stated; not implied or left to inference; distinctly and pointedly given; made unambiguous by special intention;[30] direct; not ambiguous;[31] clear; plain;[32] stated or declared; that which is made known and not left to implication.[33] As a noun, a messenger sent on a particular errand or occasion; usually, a courier sent to communicate information of an

Smith, 146 N. Y. 68, 76, 40 N. E. 497, 48 Am. St. Rep. 769, 28 L. R. A. 820.

"**Exposed to injury**" see Treat's Appeal, 40 Conn. 288, 291.

"**Exposed to sale**" see Eberle *v.* Mehrbach, 55 N. Y. 682; Boyton *v.* Page, 13 Wend. (N. Y.) 425, 429; Adams Express Co. *v.* Schlessinger, 75 Pa. St. 246, 256.

"**Exposed to view**" see Centre Turnpike Co. *v.* Smith, 12 Vt. 212, 216.

"**Exposed or deposited for sale.**"—White *v.* Redfern, 5 Q. B. D. 15, 44 J. P. 87, 49 L. J. M. C. 19, 23, 41 L. T. Rep. N. S. 524, 28 Wkly. Rep. 168. See also Reg. *v.* Dennis, [1894] 2 Q. B. 458, 465, 18 Cox C. C. 21, 58 J. P. 622, 71 L. T. Rep. N. S. 436, 10 Reports 316, 42 Wkly. Rep. 586.

23. Hubbell *v.* Yonkers, 104 N. Y. 434, 440, 10 N. E. 858, 58 Am. Rep. 522.

24. Adams Gloss.

Applied in Sutton's Hospital Case, 10 Coke 23*a*, 24*b*.

25. Endlich Building Assoc. (2d ed.) § 43 [*quoted* in Lindsay *v.* U. S. Savings, etc., Assoc., 120 Ala. 156, 168, 24 So. 171, 42 L. R. A. 783].

26. Davis *v.* Western Home Ins. Co., 81 Iowa 496, 498, 46 N. W. 1073, 25 Am. St. Rep. 509, 10 L. R. A. 359. See also Hoffman *v.* Standard L., etc., Ins. Co., 127 N. C. 337, 341, 37 S. E. 466.

Synonymous with "building" see Chaffee *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 376, 381; Wilson *v.* Standard F. Ins. Co., 29 U. C. C. P. 308, 315.

Exposure to unnecessary danger see Shevlin *v.* American Mut. Acc. Assoc., 94 Wis. 180, 185, 68 N. W. 866, 36 L. R. A. 52.

"**Exposure or occupation**" see Miller *v.* Travelers' Ins. Co., 39 Minn. 548, 550, 40 N. W. 839.

27. Sawtelle *v.* Railway Pass. Assur. Co., 21 Fed. Cas. No. 12,392, 15 Blatchf. 216.

28. "**Express**" and "**special**" as used in the statute distinguished from "implied" and "general" see Howcott *v.* Kilbourn, 44 Ark. 213, 215.

29. Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93; McGuire *v.* Allen, 108 Mo. 403, 414, 18 S. W. 282].

The word is used in its ordinary legal signification in contradistinction to implied (McGuire *v.* Allen, 108 Mo. 403, 409, 18 S. W. 282; McCoy *v.* Conrad, 64 Nebr. 150, 161, 89 N. W. 665), or opposed to implied (Bouvier L. Dict. [*quoted* in State *v.* Denney, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65]).

30. Webster Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Hovey *v.* State, 119 Ind. 395, 412, 21 N. E. 21; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93; McGuire *v.* Allen, 108 Mo. 403, 415, 18 S. W. 282].

31. Zell Cycl. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

32. Webster Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Hovey *v.* State, 119 Ind. 395, 412, 21 N. E. 21; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93; McGuire *v.* Allen, 108 Mo. 403, 415, 18 S. W. 282]; Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93]; Zell Cycl. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 32 N. E. 644; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

33. Bouvier L. Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65].

"**Express declaration**" see *In re* Peake,

important event, or to deliver important despatches;[34] in postal affairs, every kind of conveyance employed to carry letters on behalf of the post office other than the usual mail.[35] As a verb, to set forth in words;[36] to represent in words; to exhibit by language; to show or make known in any manner;[37] to designate.[38] (Express: Malice as Element of — Time, see CRIMINAL LAW; Homicide, see HOMICIDE; Libel or Slander, see LIBEL AND SLANDER; Malicious Mischief, see MALICIOUS MISCHIEF; Malicious Prosecution, see MALICIOUS PROSECUTION. See also EXPRESSLY.)

EXPRESS AGREEMENT. See CONTRACTS.

EXPRESS AIDER. See PLEADING.

EXPRESSA NOCENT, NON EXPRESSA NON NOCENT. A maxim meaning "Things expressed are [may be] prejudicial; things not expressed are not."[39]

EXPRESSA NON PROSUNT, QUAE NON EXPRESSA PRODERUNT. A maxim meaning "Things expressed do no good, which, not expressed, do no harm."[40]

EXPRESS BUSINESS. A branch of the carrying trade.[41] (See, generally, CARRIERS.)

EXPRESS COMPANY. A species of common carrier.[42] (Express Company: As Carrier, see CARRIERS. Collecting Bill or Note, see BANKS AND BANKING. Interference With Interstate Commerce, see COMMERCE.)

EXPRESS CONDITION. A condition by which an estate is created.[43] (Express Condition: In Contract, see CONTRACTS. In Deed, see DEEDS.)

EXPRESS CONSIDERATION. See CONTRACTS.

EXPRESS CONTRACT. See CONTRACTS.

[1893] 3 Ch. 430, 431, 63 L. J. Ch. 109, 69 L. T. Rep. N. S. 281, 3 Reports 722, 42 Wkly. Rep. 125.

"Express dedication" see Kent *v.* Pratt, 73 Conn. 573, 578, 48 Atl. 418; Dunn *v.* Sanford, 51 Conn. 443; Noyes *v.* Ward, 19 Conn. 250, 264; Close *v.* Swanson, 64 Nebr. 389, 393, 40 N. W. 1043 [*citing* Bouvier L. Dict.]; *Ex p.* Leonard, 39 S. C. 518, 519, 18 S. E. 216, 22 L. R. A. 302; Athens *v.* Burkett, (Tenn. Ch. App. 1900) 59 S. W. 404, 408; San Antonio *v.* Sullivan, 23 Tex. Civ. App. 619, 623, 57 S. W. 42.

"Express" directions in a will see Greenough *v.* Greenough, 11 Pa. St. 489, 496, 51 Am. Dec. 567.

"Express facility" see Wells *v.* Oregon R., etc., Co., 19 Fed. 20, 22, 9 Sawy. 601.

"Express or implied" see Gutta-Percha, etc., Mfg. Co. *v.* Houston, 108 N. Y. 276, 278, 15 N. E. 402, 2 Am. St. Rep. 412 [*citing* Nazro *v.* McCalmont Oil Co., 36 Hun (N. Y.) 296].

"Express or implied liability" see McGaffin *v.* Cohoes, 74 N. Y. 387, 389, 30 Am. Rep. 307.

"Express mandate" see Woodhouse *v.* Crescent Mut. Ins. Co., 35 La. Ann. 238, 242.

"Express provision to the contrary" in a will see *In re* Lewis, [1900] 2 Ch. 176, 179, 69 L. J. Ch. 406, 82 L. T. Rep. N. S. 291, 48 Wkly. Rep. 426.

"Express provisions of any statute" see *In re* Fisher, [1894] 1 Ch. 450, 453, 63 L. J. Ch. 235, 70 L. T. Rep. N. S. 62, 42 Wkly. Rep. 241.

34. Century Dict.

35. 1 Vict. c. 36, § 47.

36. Zell Cycl. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

"Express the subject" thereof see Durkee *v.* Janesville, 26 Wis. 697, 700.

37. Johnson Dict. [*quoted* in Halford *v.* Cameron's Coalbrook Steam Coal Co., 16 Q. B. 442, 445, 15 Jur. 335, 20 L. J. Q. B. 160, 71 E. C. L. 442].

38. Scipio *v.* Wright, 101 U. S. 665, 670, 25 L. ed. 1037.

39. Adams Gloss. [*citing* Calvini Lex.].

Applied in Cromelien *v.* Mauger, 17 Pa. St. 169, 172, where it is said to be "a rule of law, because it is sound logic, and it is of very general application."

40. Adams Gloss. [*citing* Wingate Max. 66, § 1].

Applied in Boroughe's Case, 4 Coke 72*b*, 73*b*.

41. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 182, 11 Pac. 686, 59 Am. Rep. 404.

The term involves the idea of regularity as to route or time, or both. Retzer *v.* Wood, 109 U. S. 185, 187, 3 S. Ct. 164, 27 L. ed. 900; Pacific Express Co. *v.* Seibert, 44 Fed. 310, 319.

42. Alsop *v.* Southern Express Co., 104 N. C. 278, 288, 10 S. E. 297, 6 L. R. A. 271. See also Southern Express Co. *v.* McVeigh, 20 Gratt. (Va.) 264, 286 [*citing* Redfield Carriers, p. 45, § 58].

Defined by statute see N. M. Comp. Laws (1897), § 3926.

43. Raley *v.* Umatilla County, 15 Oreg. 172, 179, 13 Pac. 890, 3 Am. St. Rep. 142, where the term is distinguished from an "implied" condition or "condition in law."

"Express condition" in a devise see Wright *v.* Wilkin, 2 B. & S. 232, 31 L. J. Q. B. 196, 6 L. T. Rep. N. S. 221, 10 Wkly. Rep. 403, 110 E. C. L. 232.

"Upon express condition" see Brown *v.* Chicago, etc., R. Co., (Iowa 1900) 82 N. W. 1003, 1004.

EXPRESS CORPORATION. An individual or body expressly constituted and declared to be a body politic or corporate, by a given name, and for a specified object.[44] (See, generally, CORPORATIONS.)

EXPRESS COVENANT. See COVENANTS.

EXPRESSED. Stated or declared in direct terms; that which is made definitely known in direct terms, and not left to implication.[45] (See EXPRESS; EXPRESSLY.)

EXPRESSED OILS. A term which includes olive oils, both salad and lamp.[46] (See, generally, CUSTOMS DUTIES.)

EXPRESSIO EORUM QUÆ TACITÈ INSUNT NIHIL OPERATUR. A maxim meaning "The expression of what is tacitly implied is inoperative."[47]

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS. A maxim meaning "The expression of one thing is the exclusion of another."[48] Broom in his "Legal

44. Warner *v.* Beers, 23 Wend. (N. Y.) 103, 176, where the term is distinguished from "implied" corporation.

45. Bullard *v.* Smith, 28 Mont. 387, 410, 72 Pac. 761.

"**Expressed in the title**" see O'Leary *v.* Cooke County, 38 Ill. 534, 537; Tabor *v.* Commercial Nat. Bank, 62 Fed. 383, 387, 10 C. C. A. 429.

"'**Briefly expressed by the title**' as required by the constitution" see State *v.* Hoadley, 20 Nev. 317, 321, 22 Pac. 99.

46. Hartranft *v.* Oliver, 125 U. S. 525, 527, 8 S. Ct. 958, 31 L. ed. 813.

47. Broom Leg. Max. [*citing* 2 Inst. 365].

Applied in the following cases:

Arkansas.— Spencer *v.* Halpern, 62 Ark. 595, 597, 37 S. W. 711, 36 L. R. A. 120.

Minnesota.— Anderson *v.* Southern Minnesota R. Co., 21 Minn. 30, 32; Taylor *v.* Taylor, 10 Minn. 107.

New York.— Childs *v.* Seabury, 35 Hun 548, 550.

North Carolina.— Davidson *v.* Powell, 114 N. C. 575, 579, 19 S. E. 601.

Pennsylvania.— Slegel *v.* Lauer, 148 Pa. St. 236, 242, 23 Atl. 996, 15 L. R. A. 547; Aull *v.* Bonnell, 2 Pennyp. 324, 327.

England.— Henwood *v.* Oliver, 1 Q. B. 409, 411, 1 G. & D. 25, 10 L. J. Q. B. 158, 41 E. C. L. 601; Joyce *v.* Swann, 17 C. B. N. S. 84, 104, 112 E. C. L. 84; Ive's Case, 5 Coke 11*a*; Boroughe's Case, 4 Coke 72*b*, 73*b*; Harvy *v.* Aston, 1 Comyns 726, 748; Oriental Inland Steam Co. *v.* Briggs, 4 De G. F. & J. 191, 197, 8 Jur. N. S. 201, 31 L. J. Ch. 241, 5 L. T. Rep. N. S. 477, 10 Wkly. Rep. 125, 65 Eng. Ch. 148, 45 Eng. Reprint 1157; Lawrance *v.* Boston, 7 Exch. 27, 35, 21 L. J. Exch. 49; Lee *v.* Pain, 4 Hare 201, 221, 30 Eng. Ch. 201; Winchcombe *v.* Winchester, Hob. 231, 237; Idle *v.* Cooke, 2 Ld. Raym. 1144, 1154; Fenton *v.* Hampton, 11 Moore P. C. 347, 365, 6 Wkly. Rep. 341, 14 Eng. Reprint 727; Blackborn *v.* Edgley, 1 P. Wms. 600, 606, 24 Eng. Reprint 534.

Canada.— *In re* Sproule, 12 Can. Supreme Ct. 140, 210; Paint *v.* Gillies, 26 Nova Scotia 526, 540; Fisher *v.* Archibald, 8 Nova Scotia 298, 299; Turnbull *v.* Merriam, 14 U. C. Q. B. 265, 270.

48. State *v.* Arnold, 140 Ind. 628, 632, 38 N. E. 820; Pray *v.* Great Falls Mfg. Co., 38 N. H. 442, 446 [*citing* Broom Leg. Max. 505; Coke Litt. 210*a*, 183*b*]; *In re* Atty.-Gen., 2 N. M. 49, 57 [*citing* Sedgwick Const. & St. L. 30]. See also Broom Leg. Max. 607; 9 Cyc. 584.

Applied or explained in the following cases:

Arkansas.— State *v.* Martin, 60 Ark. 343, 355, 30 S. W. 421, 28 L. R. A. 153; St. Louis, etc., R. Co. *v.* Branch, 45 Ark. 524, 527; Thomas *v.* Hinkle, 35 Ark. 450, 457; Watkins *v.* Turner, 34 Ark. 663, 676; *Ex p.* Osborn, 24 Ark. 479, 481; State *v.* Buzzard, 4 Ark. 18, 27; Hall *v.* State, 1 Ark. 201, 203.

California.— Spier *v.* Baker, 120 Cal. 370, 376, 52 Pac. 659, 41 L. R. A. 196; Boyce *v.* California Stage Co., 25 Cal. 460, 476.

Colorado.— Loveland *v.* Clark, 11 Colo. 265, 269, 18 Pac. 544.

Connecticut.— Geer *v.* Rockwell, 65 Conn. 316, 323, 32 Atl. 924; Barnes *v.* Starr, 64 Conn. 136, 154, 28 Atl. 980; Southard *v.* Railway Pass. Assur. Co., 34 Conn. 574, 579, 22 Fed. Cas. No. 13,182; Edgerton *v.* Moore, 28 Conn. 600, 605; Allen *v.* Gray, 11 Conn. 95, 101; Avery *v.* Chappel, 6 Conn. 270, 275, 16 Am. Dec. 53; Leavitt *v.* Peck, 3 Conn. 124, 129, 8 Am. Dec. 157.

Florida.— Caro *v.* Caro, (1903) 34 So. 309, 315; Harrell *v.* Durrance, 9 Fla. 490, 504.

Idaho.— Jack *v.* Grangeville, (1903) 74 Pac. 969, 973.

Illinois.— Chicago Dock, etc., Co. *v.* Garrity, 115 Ill. 155, 165, 3 N. E. 448.

Indiana.— Couchman *v.* Prather, 162 Ind. 250, 253, 70 N. E. 240; Scott *v.* Laporte, 162 Ind. 34, 54, 68 N. E. 278, 69 N. E. 675; Hart *v.* Smith, 159 Ind. 182, 189, 64 N. E. 661, 95 Am. St. Rep. 280, 58 L. R. A. 949; State *v.* Arnold, 140 Ind. 628, 632, 38 N. E. 820.

Kansas.— Olmstead *v.* Masonic Mut. Ben. Soc., 37 Kan. 93, 97, 14 Pac. 476; Beebe *v.* Doster, 36 Kan. 666, 673, 14 Pac. 150; Snavely *v.* Abbott Buggy Co., 36 Kan. 106, 111, 12 Pac. 522; State *v.* Wilson, 30 Kan. 661, 673, 2 Pac. 828; Marion County School Dist. No. 73 *v.* Dudley, 28 Kan. 160, 163; Intoxicating Liquor Cases, 25 Kan. 751, 758, 37 Am. Rep. 284; Kansas Pac. R. Co. *v.* Wood, 24 Kan. 619, 623; State *v.* Ewing, 22 Kan. 708, 711; Morehead *v.* State, 20 Kan. 626, 637; Crawford *v.* Lehr, 20 Kan. 509, 511; Hall *v.* Draper, 20 Kan. 137, 140; State *v.* Freeland, 16 Kan. 9, 10; Brown County *v.* Barnett, 14 Kan. 627, 628; Casey *v.* Kilgore, 14 Kan. 478, 482; Haynes *v.* Heller, 12 Kan.

Maxims" says that no maxim of the law is of more general and uniform applica-

381, 392; Bennett *v.* Hutchinson, 11 Kan. 398, 410; Prouty *v.* Stover, 11 Kan. 235, 256 [*citing* McCafferty *v.* Guyer, 59 Pa. St. 109; Page *v.* Allen, 58 Pa. St. 338, 98 Am. Dec. 272].

Maine.— Holden *v.* Veazie, 73 Me. 312, 314; Wilson *v.* European, etc., R. Co., 62 Me. 112, 113; State *v.* Knight, 43 Me. 11, 117; Lord *v.* Chadbourne, 42 Me. 429, 438, 66 Am. Dec. 290.

Maryland.— Johns *v.* Hodges, 62 Md. 525, 538; De Atley *v.* Senior, 55 Md. 479, 482; Thanhauser *v.* Savins, 44 Md. 410, 414; Weckler *v.* Hagerstown First Nat. Bank, 42 Md. 581, 593, 20 Am. Rep. 95; Grinder *v.* Nelson, 9 Gill 299, 306, 52 Am. Dec. 694.

Massachusetts.— Leonard *v.* Stickney, 131 Mass. 541, 544; Somerby *v.* Buntin, 118 Mass. 279, 283, 19 Am. Rep. 459; New Bedford *v.* Hingham, 117 Mass. 445, 448; Com. *v.* Berkshire L. Ins. Co., 98 Mass. 25, 29; Hills *v.* Bearse, 9 Allen 403, 406; Gage *v.* Tirrell, 9 Allen 299, 305; Earle *v.* De Witt, 6 Allen 520, 528; Haven *v.* Adams, 4 Allen 80, 92; Higginson *v.* Weld, 14 Gray 165, 172; Jones *v.* Robbins, 8 Gray 329, 372; Hiss *v.* Bartlett, 3 Gray 468, 472, 63 Am. Dec. 768; Lee *v.* Howard F. Ins. Co., 11 Cush. 324, 328; Jordan *v.* Dennis, 7 Metc. 590, 591; Johnson *v.* Jordan, 2 Metc. 234, 241, 37 Am. Dec. 85; Atkins *v.* Bordman, 20 Pick. 291, 304; Pearson *v.* Lord, 6 Mass. 81, 84.

Michigan.— Smith *v.* Lake Shore, etc., R. Co., 114 Mich. 460, 470, 72 N. W. 328; Williams *v.* Detroit, 2 Mich. 560, 563.

Minnesota.— Mathews *v.* Lincoln County, 90 Minn. 348, 353, 97 N. W. 101; Kelly *v.* Minneapolis, 63 Minn. 125, 133, 65 N. W. 115, 30 L. R. A. 281; Maine Trust, etc., Co. *v.* Butler, 45 Minn. 506, 509, 48 N. W. 333, 12 L. R. A. 370; Farmers, etc., Bank *v.* Baldwin, 23 Minn. 198, 207, 23 Am. Rep. 683; Taylor *v.* Taylor, 10 Minn. 107; Williams *v.* Lash, 8 Minn. 496.

Missouri.— Taylor *v.* Pullen, 152 Mo. 434, 438, 53 S. W. 1086; Nichols *v.* Nichols, 147 Mo. 387, 409, 48 S. W. 947; Citizens' Nat. Bank *v.* Graham, 147 Mo. 250, 257, 48 S. W. 910; Kansas City *v.* Mercantile Mut. Bldg., etc., Assoc., 145 Mo. 50, 53, 46 S. W. 624; Millar *v.* Madison Car Co., 130 Mo. 517, 529, 31 S. W. 574; Murphy *v.* Carlin, 113 Mo. 112, 120, 20 S. W. 786, 35 Am. St. Rep. 699; Maguire *v.* State Sav. Assoc., 62 Mo. 344, 346; Matthews *v.* Skinker, 62 Mo. 329, 334, 21 Am. Rep. 425; Oster *v.* Jefferson, 57 Mo. App. 485, 489; Plattsburg *v.* Riley, 42 Mo. App. 18, 23; Binde *v.* Klinge, 30 Mo. App. 285, 288; Hemelreich *v.* Carlos, 24 Mo. App. 264, 273; State *v.* Police Com'rs, 14 Mo. App. 297, 305.

Montana.— Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 25, 24 Pac. 626, 25 Pac. 278.

Nebraska.—State *v.* Insurance Co. of North America, (1904) 99 N. W. 36, 41; Darst *v.* Griffin, 31 Nebr. 668, 673, 48 N. W. 819; State *v.* Babcock, 19 Nebr. 223, 237, 27 N. W. 94; State *v.* Dodge County, 8 Nebr. 124, 127, 30 Am. Rep. 819; State *v.* Lancaster County, 4 Nebr. 537, 540, 19 Am. Rep. 641; Hallenbeck *v.* Hahn, 2 Nebr. 377, 399.

New Hampshire.— Union Ins. Co. *v.* Smart, 60 N. H. 458, 460; Pray *v.* Great Falls Mfg. Co., 38 N. H. 442, 446; State *v.* Ferguson, 33 N. H. 424, 430.

New Jersey.— Hancock *v.* Singer Mfg. Co., 62 N. J. L. 289, 352, 41 Atl. 846, 42 L. R. A. 852; Seward *v.* Orange, 59 N. J. L. 331, 333, 35 Atl. 799; State *v.* Kelsey, 44 N. J. L. 1, 45; Ware *v.* State, 35 N. J. L. 553, 557; Horner *v.* Webster, 33 N. J. L. 387, 395; State *v.* Jersey City, 29 N. J. L. 170, 175; State Treasurer *v.* Somerville, etc., R. Co., 28 N. J. L. 21, 23; James *v.* Dubois, 16 N. J. L. 285, 299; Meeker *v.* Arrowsmith, 16 N. J. L. 227, 231; Berger *v.* U. S. Steel Corp., 63 N. J. Eq. 809, 823, 53 Atl. 68; Greer *v.* Van Meter, 54 N. J. Eq. 270, 273, 33 Atl. 794; Kitchell *v.* Young, 46 N. J. Eq. 506, 509, 19 Atl. 729; Jacqui *v.* Johnson, 26 N. J. Eq. 321, 328; Schenck *v.* Vail, 24 N. J. Eq. 538, 546; Carris *v.* Carris, 24 N. J. Eq. 516, 528; Denton *v.* Leddell, 23 N. J. Eq. 64, 67; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 409.

New Mexico.— *In re* Atty.-Gen., 2 N. M. 49, 57.

New York.— People *v.* Terry, 108 N. Y. 1, 9, 14 N. E. 815; Smith *v.* Brooklyn Sav. Bank, 101 N. Y. 58, 62, 4 N. E. 123, 54 Am. Rep. 653; Delaware Canal Co. *v.* Pennsylvania Coal Co., 50 N. Y. 250, 260; People *v.* Draper, 15 N. Y. 532, 568; Sill *v.* Corning, 15 N. Y. 297, 306; Curtis *v.* Leavitt, 15 N. Y. 1, 259; Morey *v.* Farmers' L. & T. Co., 14 N. Y. 302, 306; Talmage *v.* Pell, 7 N. Y. 328, 345; Wait *v.* Wait, 4 N. Y. 95, 101; New York L. Ins., etc., Co. *v.* Covert, 3 Abb. Dec. 350, 354, 3 Transcr. App. 24, 6 Abb. Pr. N. S. 154; People *v.* New York, 92 N. Y. App. Div. 126, 129, 87 N. Y. Suppl. 334; Angevine *v.* Fleischmann, 55 N. Y. App. Div. 106, 109, 67 N. Y. Suppl. 182; Press Pub. Co. *v.* Associated Press, 41 N. Y. App. Div. 493, 495, 58 N. Y. Suppl. 708; Matter of Steinway, 31 N. Y. App. Div. 70, 79, 52 N. Y. Suppl. 343; Weiss *v.* Herlihy, 23 N. Y. App. Div. 608, 618, 49 N. Y. Suppl. 81; Matter of Townsend, 83 Hun 200, 202, 31 N. Y. Suppl. 409; Fitzgerald *v.* Burden Benev. Assoc., 69 Hun 532, 533, 23 N. Y. Suppl. 647; Matter of Frothingham, 63 Hun 430, 437, 18 N. Y. Suppl. 695; People *v.* Barber, 48 Hun 198, 201; People *v.* Angle, 47 Hun 183, 189, 14 N. Y. St. 199; *In re* Slingerland, 36 Hun 575, 577; People *v.* Finn, 26 Hun 58, 60; Scott *v.* Brown, 24 Hun 620, 622; People *v.* New York Fire Com'rs, 23 Hun 317, 320; People *v.* French, 12 Hun 254, 257; California Bank *v.* Collin, 5 Hun 209, 213; Cooke *v.* State Nat. Bank, 1 Lans. 494, 504; Muller *v.* Orden Germania, 61 N. Y. Super. Ct. 43, 49, 18 N. Y. Suppl. 749; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 1 Sweeny 109, 130; Van Allen *v.* Illinois Cent. R. Co., 20 Bosw. 515, 530; Tracy *v.* New York, etc., R. Co., 9 Bosw. 396, 403 [*citing* Rockwell *v.* Saunders, 19 Barb. 474; Woodburn *v.* Chamberlain, 17 Barb. 446]; Archer

tion; and it is never more applicable than in the construction and interpretation

v. Boudinet, Code Rep. N. S. 372; Hoyt *v.* Shelden, 3 Bosw. 267, 293; Rich *v.* Ilusson, 1 Duer 617, 621; Tucker *v.* St. Clement's Church, 3 Sandf. 242, 249; People *v.* Green, 5 Daly 254, 272; Dowdney *v.* McCollom, 5 Daly 240, 241; Brennan *v.* Lowry, 4 Daly 253, 255; Gillilan *v.* Spratt, 3 Daly 440, 452; Clements *v.* Babcock, 26 Misc. 90, 96, 56 N. Y. Suppl. 527 [*citing* Chamberlain *v.* Chamberlain, 43 N. Y. 424]; Wood *v.* Furtick, 17 Misc. 561, 563, 40 N. Y. Suppl. 687; Bixby *v.* Casino Co., 14 Misc. 346, 347, 35 N. Y. Suppl. 677; Carlson *v.* Winterson, 10 Misc. 388, 391, 31 N. Y. Suppl. 430; Brooklyn *v.* Furey, 9 Misc. 193, 197, 30 N. Y. Suppl. 349; Flanagan *v.* Fox, 6 Misc. 132, 134, 26 N. Y. Suppl. 48; *In re* Crane, 42 N. Y. Suppl. 904, 907 [*citing* Chamberlain *v.* Chamberlain, 43 N. Y. 424]; Waterman *v.* Bowler, 19 N. Y. Suppl. 491, 492; Gorton *v.* U. S., etc., Mail Steam-Ship Co., 13 N. Y. Suppl. 653, 654, 20 N. Y. Civ. Proc. 202; Farnsworth *v.* Halstead, 10 N. Y. Suppl. 763, 764, 18 N. Y. Civ. Proc. 227; People *v.* Webb, 5 N. Y. Suppl. 855; Peck *v.* Rochester, 3 N. Y. Suppl. 872, 875; Matter of Bellesheim, 1 N. Y. Suppl. 276, 278, 6 Dem. Surr. 60; People *v.* Angle, 16 N. Y. St. 647, 655; Peck *v.* Brooklyn Fire, etc., Dept., 8 N. Y. St. 634, 636; Wehrhane *v.* Nashville, etc., R. Co., 4 N. Y. St. 541, 555; Matter of Connor, 1 N. Y. St. 144, 148; Aultman, etc., Co. *v.* Syme, 30 N. Y. Civ. Proc. 334, 336; Post *v.* Grant, 13 N. Y. Civ. Proc. 305, 312 [*citing* Pitt *v.* Davison, 37 N. Y. 235]; Demarest's Estate, 1 N. Y. Civ. Proc. 302, 303 [*citing* Emerson *v.* Bowers, 14 N. Y. 449; McGregor *v.* McGregor, 3 Abb. Dec. 92, 95, 1 Keyes 133, 33 How. Pr. 456]; Fitzgerald *v.* Quann, 1 N. Y. Civ. Proc. 273, 277; Kantrowitz *v.* Kulla, 20 Abb. N. Cas. 321, 324; Gilbert El. R. Co. *v.* Anderson, 3 Abb. N. Cas. 434, 460; Seeley *v.* Garrison, 10 Abb. Pr. 460, 463; Devries *v.* McKoan, 1 Code Rep. 6, 7; Allen *v.* Dykers, 3 Hill 593, 597; Van Steenbergh *v.* Jortz, 10 Johns. 167, 170; *In re* Bliss, 9 Johns. 347, 349; Rogers *v.* Warner, 8 Johns. 119, 120; Baker *v.* Ludlow, 2 Johns. Cas. 289, 290; Methodist Episcopal Church Trustees *v.* Jaques, 3 Johns. Ch. 77, 110; Callaghan *v.* New York Atlantic Ins. Co., 1 Edw. 64, 76; Wardlow *v.* Home For Incurables, 4 Dem. Surr. 473, 480; People *v.* Markell, 12 N. Y. Cr. 312, 316; People *v.* Duff, 1 N. Y. Cr. 307, 312; Behan *v.* People, 3 Park. Cr. 686, 690; People *v.* Holcomb, 3 Park. Cr. 656, 665; Van Zant *v.* People, 2 Park. Cr. 168, 174; Rich *v.* Husson, 11 N. Y. Leg. Obs. 119, 121; Devries *v.* McKoun, 6 N. Y. Leg. Obs. 203, 205; Edwards *v.* Union Bank, 4 N. Y. Leg. Obs. 173, 175.

Ohio.— Southward *v.* Jamison, 66 Ohio St. 290, 312, 64 N. E. 135; McNeill *v.* Hagerty, 51 Ohio St. 255, 265, 37 N. E. 526, 23 L. R. A. 628; Sargent *v.* Steubenville R. Co., 32 Ohio St. 449, 451; Mack *v.* Brammer, 28 Ohio St. 508, 515; Williams *v.* Welton, 28 Ohio St. 451, 470; Lowry *v.* Barelli, 21 Ohio St. 324, 332; Courson *v.* Courson, 19 Ohio St. 454, 461; Atty.-Gen. *v.* Taylor, 15 Ohio St. 137, 142; Baker *v.* Cincinnati, 11 Ohio St. 534, 541; Bricker *v.* Bricker, 11 Ohio St. 240, 246; Rogers *v.* Tucker, 7 Ohio St. 418, 430; Citizens' Bank *v.* Wright, 6 Ohio St. 318, 329; Scovern *v.* State, 6 Ohio St. 288, 291; Lamb *v.* Lane, 4 Ohio St. 167, 178; Exchange Bank *v.* Hines, 3 Ohio St. 1, 18; Morningstar *v.* Selby, 15 Ohio 345, 363, 45 Am. Dec. 579; Lindsley *v.* Coats, 1 Ohio 243, 246.

Pennsylvania.— Redman's Appeal, 173 Pa. St. 59, 63, 33 Atl. 703; *In re* Little Beaver Tp. School Directors' Election, 165 Pa. St. 233, 237, 30 Atl. 955, 27 L. R. A. 234; Shrewsbury Sav. Institution's Appeal, 94 Pa. St. 309, 312; Chester County Mut. F. Ins. Co. *v.* Coatesville Shoe Factory, 80 Pa. St. 407, 412; Earp's Appeal, 75 Pa. St. 119, 125; Johnson *v.* Philadelphia, 60 Pa. St. 445, 451; Erie *v.* Erie Canal Co., 59 Pa. St. 174, 178; Kneedler *v.* Lane, 45 Pa. St. 238, 321; Com. *v.* Lancaster, 5 Watts 152, 156; Strickler *v.* Todd, 10 Serg. & R. 63, 72, 13 Am. Dec. 649; Respublica *v.* McClean, 4 Yeates 399, 411; Lansdowne Borough *v.* Springfield Water Co., 16 Pa. Super. Ct. 490, 495; *In re* French Creek, 8 Pa. Dist. 702, 704; Ingram *v.* Chester County, 5 Pa. Dist. 747, 748; Green *v.* Whitehead, 5 Pa. Dist. 613, 617; *In re* Pike Election, 5 Pa. Dist. 519, 521; Strang *v.* Adams, 4 Pa. Dist. 212, 214; Weidknecht *v.* Hawk, 3 Pa. Dist. 123, 125; Com. *v.* Lesher, 2 Pa. Dist. 859, 860; Levy's Estate, 1 Pa. Dist. 217, 219; Harrisburg City Pass. R. Co. *v.* Harrisburg, 2 Chest. Co. Rep. 333, 339; Martin *v.* Clinton County, 8 Kulp 83, 84; Wilkes-Barre *v.* Crystal Spring Water Co., 7 Kulp 31, 35; Engle *v.* Reichard, 4 Kulp 361, 371; McClintock *v.* Dana, 3 Kulp 178, 181; *In re* Redman, 37 Wkly. Notes Cas. 392, 394; Matter of Antes, 1 Pearson 87, 88; Paine *v.* Fesco, 18 Phila. 637, 639; West *v.* O'Callaghan, 15 Phila. 165, 166; U. S. *v.* Simons, 3 Pittsb. 261, 264; Geiger *v.* Perkiomen, etc., Turnpike Road, 11 Montg. Co. Rep. 25, 27; Simpson *v.* Philadelphia, etc., R. Co., 4 Montg. Co. Rep. 102, 104; Com. *v.* Reed, 37 Wkly. Notes Cas. 121, 127; Moody *v.* Alexander, 29 Wkly. Notes Cas. 399, 402; Mt. Pleasant *v.* Baltimore, etc., R. Co., 27 Wkly. Notes Cas. 177, 179; Pepper's Estate, 21 Wkly. Notes Cas. 271, 275; Metropolitan Base Ball Club *v.* Simmons, 17 Wkly. Notes Cas. 153, 156; Thielens *v.* White, 13 Wkly. Notes Cas. 194; Shrewsbury Sav. Institution's Appeal, 9 Wkly. Notes Cas. 166, 168; Hartranft's Appeal, 5 Wkly. Notes Cas. 105, 118.

Rhode Island.— Smith *v.* Westerly, 19 R. I. 437, 446, 35 Atl. 526.

Tennessee.— Wood *v.* Polk, 12 Heisk. 220, 230.

Vermont.— Hackett *v.* Amsden, 56 Vt. 201, 206; Wing *v.* Cooper, 37 Vt. 169, 183; Benton *v.* Fletcher, 31 Vt. 418, 428; Nimblet *v.* Chaffee, 24 Vt. 628, 629; Bradley *v.* Pratt, 23 Vt. 378, 382; Cox *v.* Johns, 12 Vt. 65, 67.

Virginia.— Chesterfield County *v.* Hall, 80 Va. 321, 327; Frank *v.* Lilienfeld, 33 Gratt. 377, 395; Robertson *v.* Triggs, 32 Gratt. 76, 86; Justis *v.* English, 30 Gratt. 565, 571; McChesney *v.* Brown, 25 Gratt. 393, 401; Martin *v.* Snowden, 18 Gratt. 100, 148; Robin-

of statutes.[49] Whenever a statute limits a thing to be done in a particular form,

son *v.* Allen, 11 Gratt. 785, 789; Lee *v.* U. S. Bank, 9 Leigh 200, 208; Williamson *v.* Beckham, 8 Leigh 20, 24.

West Virginia.—State *v.* Gilman, 33 W. Va. 146, 150, 10 S. E. 283, 6 L. R. A. 847; Radford *v.* Carwile, 13 W. Va. 572, 590.

Wisconsin.—Perrault *v.* Minneapolis, etc., R. Co., 117 Wis. 520, 524, 94 N. W. 348; J. I. Case Plow Works *v.* Niles, etc., Co., 90 Wis. 590, 604, 63 N. W. 1013; McCaul *v.* Thayer, 70 Wis. 138, 142, 35 N. W. 353; State *v.* Keaough Treasurers, etc., 68 Wis. 135, 142, 36 N. W. 723; Farrall *v.* Shea, 66 Wis. 561, 565, 29 N. W. 634; Webster *v.* Morris, 66 Wis. 366, 382, 28 N. W. 353, 57 Am. Rep. 278; Towsley *v.* Ozaukee County, 60 Wis. 251, 252, 18 N. W. 840; Vincent *v.* Starks, 45 Wis. 458, 461; Sitzman *v.* Pacquette, 13 Wis. 291, 307; State *v.* Hastings, 10 Wis. 525, 531; Atty.-Gen. *v.* Brunst, 3 Wis. 787, 793.

United States.—Shurtleff *v.* U. S., 189 U. S. 311, 316, 23 S. Ct. 535, 47 L. ed. 828; Arthur *v.* Cumming, 91 U. S. 362, 364, 23 L. ed. 438; Philadelphia, etc., R. Co. *v.* Howard, 13 How. 307, 340, 14 L. ed. 157; Wood *v.* U. S., 16 Pet. 342, 364, 10 L. ed. 987; Kendall *v.* U. S., 12 Pet. 523, 651, 9 L. ed. 1181; Thomas *v.* Winne, 122 Fed. 395, 400, 58 C. C. A. 613; Cohn *v.* Gorchakoff, 121 Fed. 544, 546, 57 C. C. A. 606; *In re* The Annie Faxon, 66 Fed. 575, 581; American Well Works *v.* Rivers, 36 Fed. 880, 881; The Cherokee, 5 Fed. Cas. No. 2,640, 2 Sprague 235; Dutton *v.* Freeman, 8 Fed. Cas. No. 4,210; Pullan *v.* Cincinnati, etc., Air-Line R. Co., 20 Fed. Cas. No. 11,461, 4 Biss. 35, 42; U. S. *v.* Morse, 27 Fed. Cas. No. 15,820, 3 Story 87, 89.

England.—Thorn *v.* London, 1 App. Cas. 120, 121, 45 L. J. Exch. 487, 34 L. T. Rep. N. S. 545, 24 Wkly. Rep. 932; Lawrence *v.* Great Northern R. Co., 16 Q. B. 643, 653, 15 Jur. 652, 20 L. J. Q. B. 293, 6 R. & Can. Cas. 656, 4 Eng. L. & Eq. 265, 71 E. C. L. 643; Reg. *v.* Prest, 16 Q. B. 33, 46, 15 Jur. 554, 20 L. J. Q. B. 17, 1 Eng. L. & Eq. 250, 71 E. C. L. 32; Reg. *v.* Caledonian R. Co., 16 Q. B. 19, 31, 15 Jur. 396, 20 L. J. Q. B. 147, 3 Eng. L. & Eq. 285, 71 E. C. L. 19; Colquhoun *v.* Brooks, 19 Q. B. D. 400, 406, 57 L. J. Q. B. 70, 57 L. T. Rep. N. S. 448, 36 Wkly. Rep. 332; Dixon *v.* London Small Arms Co., 1 Q. B. D. 384, 390; Beckett *v.* Sutton, 19 Ch. D. 646, 648, 51 L. J. Ch. 432, 46 L. T. Rep. N. S. 481, 30 Wkly. Rep. 490; Brantom *v.* Griffits, 1 C. P. D. 349, 355; London Joint Stock Bank *v.* London, 1 C. P. D. 1, 17, 45 L. J. C. P. 213, 33 L. T. Rep. N. S. 781; Doe *v.* Burdett, 4 A. & E. 1, 11, 6 L. J. K. B. 73, 6 N. & M. 259, 31 E. C. L. 1; Spong *v.* Spong, 3 Bligh N. S. 84, 4 Eng. Reprint 1271, 1 Dow. & Cl. 365, 375, 6 Eng. Reprint 562; Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 930, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917; Burdett *v.* Doe, 10 Cl. & F. 340, 397, 8 Eng. Reprint 772; Eastern Archipelago Co. *v.* Reg., 2 C. L. R. 145, 2 E. & B. 856, 878, 18 Jur. 481, 2 Wkly. Rep. 77, 22 Eng. L. & Eq. 328, 75 E. C. L. 856; Willis *v.* Elliott, 3 C. & P. 117, 120, 14 E. C. L. 480; Spry *v.* Flood, 2 Curt. Eccl. 353, 365; Barbat *v.* Allen, 7 Exch. 609, 617, 16 Jur. 339, 21 L. J. Exch. 155, 10 Eng. L. & Eq. 596; Witham *v.* Lynch, 1 Exch. 391, 17 L. J. Exch. 13; *Re* Holmes, 3 Giff. 337, 348, 8 Jur. N. S. 252, 5 L. T. Rep. N. S. 378; Bliss *v.* Woods, 3 Hagg. Eccl. 486, 499; Atty.-Gen. *v.* Sillem, 2 H. & C. 431, 607; Saunders *v.* Evans, 8 H. L. Cas. 721, 729, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly Rep. 501, 11 Eng. Reprint 611; Dewhurst *v.* Feilden, 9 Jur. 376, 377, 14 L. J. C. P. 126, 1 Lutw. Reg. Cas. 274, 7 M. & G. 182, 8 Scott N. R. 1013, 49 E. C. L. 181; Hougham *v.* Sandys, 6 L. J. Ch. O. S. 67, 77, 2 Sim. 95, 2 Eng. Ch. 95; Hardwicke *v.* Sandys, 13 L. J. Exch. 233, 234, 12 M. & W. 761; The Amalia, 32 L. J. P. & M. 191, 194; Doe *v.* Ingleby, 15 M. & W. 465, 472; Vernon *v.* Vernon, 2 P. Wms. 594, 597, 24 Eng. Reprint 875; Atty.-Gen. *v.* Hooker, 2 P. Wms. 338, 24 Eng. Reprint 756; Williams *v.* Evans, 8 T. R. 246, 254; Rex *v.* North Nibley, 5 T. R. 21, 24; Mansell *v.* Mansell, Wilm. 36, 57; Matthew *v.* Blackmore, 5 Wkly. Rep. 363, 364; Thompson *v.* West Somerset Mineral R. Co., 5 Wkly. Rep. 296, 299.

Canada.—Virgo *v.* Toronto, 22 Can. Supreme Ct. 447, 466; Whelan *v.* Ryan, 20 Can. Supreme Ct. 65, 75; *In re* Sproule, 12 Can. Supreme Ct. 140, 210; Schliehauf *v.* Canada Southern R. Co., 28 Grant Ch. (U. C.) 236, 242; Davis *v.* Clifton Municipality, 8 U. C. C. P. 236, 238; Crowe *v.* Steeper, 46 U. C. Q. B. 87, 92; Miller *v.* Grand Trunk R. Co., 45 U. C. Q. B. 222, 226; Leprohon *v.* Ottawa, 40 U. C. Q. B. 478, 492 [*citing* Saunders *v.* Evans, 8 H. L. Cas. 721, 729, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611]; Matter of North Dumfries Tp., 12 U. C. Q. B. 507, 509; Reg. *v.* Ryan, 12 N. Brunsw. 116, 120; Warner *v.* Symon-Kaye Syndicate, 27 Nova Scotia 340, 343; Paint *v.* Gillies, 26 Nova Scotia 526, 540; Fraser *v.* Salter, 7 Nova Scotia 424, 431; Lawson *v.* McGeoch, 20 Ont. App. 464, 474; Ryan *v.* McCartney, 19 Ont. App. 423, 431; Waterous *v.* Palmerston, 19 Ont. App. 47, 52; Reg. *v.* Wellington County, 17 Ont. App. 421, 444; *In re* Moulton Tp., 12 Ont. App. 503, 519; Daniels *v.* Grand Trunk R. Co., 11 Ont. App. 471, 475; Grand Junction R. Co. *v.* Midland R. Co., 7 Ont. App. 681, 688; *Re* Lincoln Election, 2 Ont. App. 324, 345; Morris Tp. *v.* Huron County, 27 Ont. 341, 343; Argles *v.* McMath, 26 Ont. 224, 240; Sawyer *v.* Pringle, 20 Ont. 111, 114; Matter of Bell Telephone Co., 9 Ont. 339, 345; Hobbs *v.* Guardian F. Ins. Co., 7 Ont. 634, 639; Walsh *v.* Elliott, 11 Ont. Pr. 520, 525; Bradley *v.* Clarke, 9 Ont. Pr. 410, 416; Leeson *v.* Higgins, 4 Ont. Pr. 340, 341; Standard Light, etc., Co. *v.* Montreal, 10 Quebec Super. Ct. 209, 219.

49. Broom Leg. Max. [*quoted* in Matter of Atty.-Gen., 2 N. M. 49, 57; Hackett *v.* Amsden, 56 Vt. 201, 206].

it necessarily includes in itself a negative, viz.: that the thing shall not be done otherwise.[50]

EXPRESSLY. In an express,[51] clear or distinct,[52] direct or pointed manner;[53] with distinct purpose;[54] in direct terms;[55] not by implication;[56] plainly;[57] distinctly;[58] directly; pointedly;[59] particularly.[60] (See EXPRESS.)

"But this maxim is not of universal application." Argles *v.* McMath, 26 Ont. 224, 240 [*cited* in Morris Tp. *v.* Huron County, 27 Ont. 341, 343]; Reg. *v.* Wellington County, 17 Ont. App. 421, 444 [*citing* Saunders *v.* Evans, 8 H. L. Cas. 721, 729, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611]; Leprohon *v.* Ottawa, 40 U. C. Q. B. 478, 492.

"The maxim is sensible and useful in logic and law." Matter of Connor, 1 N. Y. St. 144, 148.

It has been referred to as: "An axiom of law." Saunders *v.* Evans, 8 H. L. Cas. 721, 729, 7 Jur. N. S. 1293, 31 L. J. Ch. 233, 5 L. T. Rep. N. S. 129, 9 Wkly. Rep. 501, 11 Eng. Reprint 611. "The familiar maxim." Allen *v.* Dykers, 3 Hill (N. Y.) 593, 597; Payne *v.* Fresco, 17 Wkly. Notes Cas. (Pa.) 502, 504. "The legal maxim." Suydam *v.* Merrick County, 19 Nebr. 155, 159, 27 N. W. 142. "The old maxim." State *v.* Gilman, 33 W. Va. 146, 150, 10 S. E. 283, 6 L. R. A. 847. "The well known maxim." Scott *v.* Brown, 24 Hun (N. Y.) 620, 622; Hackett *v.* Amsden, 56 Vt. 201, 206; Miller *v.* Grand Trunk R. Co., 45 U. C. Q. B. 222, 226. "A well settled legal maxim." State *v.* Knight, 43 Me. 1, 117. "The well established principle or maxim of law." Williamson *v.* Beckham, 8 Leigh (Va.) 20, 24. "That universal and familiar rule." Curtis *v.* Leavitt, 15 N. Y. 9, 259, dissenting opinion. "A rule both of law and equity." Bundy *v.* Newton, 19 N. Y. Suppl. 734, 737. "A very familiar maxim of interpretation." State *v.* Police Com'rs, 14 Mo. App. 297, 305. "The well known maxim of construction, and a very sound one." Johnson *v.* Jordan, 2 Metc. (Mass.) 234, 241, 37 Am. Dec. 85.

50. District Tp. *v.* Dubuque, 7 Iowa 202, 265 [*quoted* in Matter of Atty.-Gen., 2 N. M. 49, 57]. See also New Haven *v.* Whitney, 36 Conn. 374, 375.

51. Encyclopedic Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65]; Webster Dict. [*quoted* in Magone *v.* Heller, 150 U. S. 70, 74, 18 S. Ct. 18, 37 L. ed. 1001].

52. Encyclopedic Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65].

53. Webster Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Hovey *v.* State, 119 Ind. 395, 412, 21 N. E. 21 (per Berkshire, J.); Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

54. Webster Dict. [*quoted* in Magone *v.* Heller, 150 U. S. 70, 74, 18 S. Ct. 18, 37 L. ed. 1001].

55. Encyclopedic Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65]; Webster Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; Hovey *v.* State, 119 Ind. 395, 412, 21 N. E. 21 (per Berkshire, J.); Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93; Magone *v.* Heller, 150 U. S. 70, 74, 18 S. Ct. 18, 37 L. ed. 1001]; Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

56. Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93.

57. Encyclopedic Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65]; Webster Dict. [*quoted* in Hovey *v.* State, 119 Ind. 395, 412, 21 N. E. 21]; Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 34, 22 N. E. 644; State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65; Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93]; Zell Cycl. [*quoted* in Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

58. Zell Cycl. [*quoted* in Evansville *v.* State, 118 Ind. 426, 443, 21 N. E. 267, 4 L. R. A. 93].

59. Encyclopedic Dict. [*quoted* in State *v.* Denny, 118 Ind. 449, 464, 21 N. E. 274, 4 L. R. A. 65].

60. Webster Dict. [*quoted* in Magone *v.* Heller, 150 U. S. 70, 74, 14 S. Ct. 18, 37 L. ed. 1001].

In its primary meaning, it denotes precision of statement, as opposed to ambiguity, implication, or inference, and is equivalent to in an express manner, or in direct terms. It is also commonly used to designate purpose, and as equivalent to especially, or particularly, or for a distinct purpose or object. Magone *v.* Heller, 150 U. S. 70, 74, 14 S. Ct. 18, 37 L. ed. 1001.

In connection with other words this term has often received judicial interpretation; for example as used in the following phrases: "Expressly named" (see Taylor *v.* Nicholls, 6 M. & W. 91, 95); "expressly prescribed" (see Inland Revenue Com'rs *v.* Scott, [1892] 2 Q. B. 152, 160, 56 J. P. 580, 632, 61 L. J. Q. B. 432, 67 L. T. Rep. N. S. 173, 40 Wkly. Rep. 632); "expressly provided" (see Thames Conservators *v.* Smeed, [1897] 2 Q. B. 334, 355); "expressly purchased" (see Errington *v.* Metropolitan Dist. R. Co., 19 Ch. D. 559, 569, 51 L. J. Ch. 305, 46 L. T. Rep. N. S. 443, 30 Wkly. Rep. 663); "expressly ratified" (see Iowa State Sav. Bank *v.* Black, 91 Iowa 490, 494, 59 N. W. 283); "expressly refer to" (see *In re* Phillips, 41 Ch. D. 417, 419, 58 L. J. Ch. 448, 60 L. T. Rep. N. S. 808, 37 Wkly. Rep. 504); "expressly referring to" (see Phillips *v.* Caylcy, 43 Ch. D. 222, 232, 59 L. J. Ch. 177, 62 L. T. Rep. N. S. 86, 38 Wkly. Rep. 241; *In re* Marsh, 38 Ch. D. 630, 633, 57 L. J. Ch. 639,

EXPRESS MALICE. See Criminal Law; False Imprisonment; Homicide; Libel and Slander; Malicious Prosecution.

EXPRESS MATTER. Everything that an express company can get or afford to carry under its agreement with the transportation companies.[61] (See Express Company; and, generally, Carriers.)

EXPRESS MESSENGER. See Carriers.

EXPRESS NOTICE. See Notices.

EXPRESS OBLIGATION. As applied to a railroad corporation, an obligation which is declared in positive terms in the charter.[62] (See, generally, Railroads.)

EXPRESS PROMISE. The express stipulation of the party making it to do or not to do a particular thing.[63] (See, generally, Contracts.)

EXPRESS REVOCATION. An act performed when the change of mind or intention of the testator to revoke is declared by a subsequent will or codicil.[64] (See, generally, Wills.)

EXPRESS TRUST. See Trusts.

EXPRESSUM FACIT CESSARE TACITUM. A maxim meaning "A thing expressed puts an end to tacit implication."[65]

EXPRESSUM SERVITIUM REGAT VEL DECLARET TACITUM. A maxim of

59 L. T. Rep. N. S. 595, 37 Wkly. Rep. 10); "expressly stipulated" (see *In re* Lysaght, [1898] 1 Ch. 115, 119, 67 L. J. Ch. 65, 77 L. T. Rep. N. S. 637; Tyrrell *v.* Clark, 2 Drew. 86, 2 Eq. Rep. 333, 18 Jur. 323, 324, 23 L. J. Ch. 283, 2 Wkly. Rep. 152); "expressly used" (see Magone *v.* Heller, 150 U. S. 70, 75, 14 S. Ct. 18, 37 L. ed. 1001); "expressly varied" (see Metropolitan Dist. R. Co. *v.* Sharpe, 5 App. Cas. 425, 441, 44 J. P. 716, 50 L. J. Q. B. 14, 43 L. T. Rep. N. S. 130, 29 Wkly. Rep. 617; Weld *v.* South Western R. Co., 32 Beav. 340, 345, 9 Jur. N. S. 510, 33 L. J. Ch. 142, 8 L. T. Rep. N. S. 13, 1 New Rep. 415, 11 Wkly. Rep. 448); "expressly withheld" (see Lightfoot *v.* Bass, 2 Tenn. Ch. 677, 681).

61. Wells *v.* Oregon, etc., R. Co., 18 Fed. 667, 671, 9 Sawy. 426, where it is said: "In the nature of things, there can be no absolute and prescribed definition of 'express matter.' Like the phrase 'express facilities,' its scope and meaning may be modified by circumstances. And so long as the express company pays the railway company an agreed sum for so much space in a car, or weight carried therein, or one and a half times first-class railway rates for whatever it carries over its road, there is no need of any definition. It defines itself, and includes everything that the express company can get or afford to carry on those terms."

62. People *v.* Albany, etc., R. Co., 37 Barb. (N. Y.) 216, 218, where the term is distinguished from "implied" obligation.

63. Foute *v.* Bacon, 24 Miss. 156, 164, where the term is distinguished from "implied" promise.

64. Langdon *v.* Astor, 3 Duer (N. Y.) 477, 561, where the term is distinguished from "implied" revocation.

65. Trayner Leg. Max.

Applied or explained in the following cases:

Alabama.— Hollingsworth *v.* Hollingsworth, 65 Ala. 321, 330; Morrow *v.* Wood, 56 Ala. 1, 11.

Arkansas.— Jeffery *v.* Underwood, 1 Ark. 108, 116.

Connecticut.— Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 454, 465, 44 Am. Dec. 556; Perkins *v.* Catlin, 11 Conn. 213, 228, 27 Am. Dec. 282; Willoughby *v.* Raymond, 4 Conn. 130, 133; Vandenheuvel *v.* Storrs, 3 Conn. 203, 208; Miller *v.* Ward, 2 Conn. 494, 500.

Maine.— Stuart *v.* Walker, 72 Me. 145, 154, 39 Am. Rep. 311; Smith *v.* Morrill, 54 Me. 48, 52 [*citing* Perkins *v.* Catlin, 11 Conn. 213, 226, 29 Am. Dec. 282].

Maryland.— Rice *v.* Forsyth, 41 Md. 389, 405.

Massachusetts.— Gage *v.* Tirrell, 9 Allen 299, 306; Pratt *v.* Sanger, 4 Gray 84, 87.

Michigan.— Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243, 262; Williams *v.* Detroit, 2 Mich. 560, 563.

Missouri.— Kansas City Planing Mill Co. *v.* Brundage, 25 Mo. App. 268, 272.

New Jersey.— Parker *v.* Butterworth, 46 N. J. L. 244, 247, 50 Am. Rep. 407; State *v.* Kelsey, 44 N. J. L. 1, 45; Taylor *v.* Griswold, 14 N. J. L. 222, 228, 27 Am. Dec. 33; Farley *v.* Craig, 11 N. J. L. 262. 282; Spinning *v.* Spinning, 43 N. J. Eq. 215, 235, 10 Atl. 270.

New York.— Black *v.* White, 42 N. Y. Super. Ct. 446, 450; People *v.* Fuerst, 13 Misc. 304, 306, 34 N. Y. Suppl. 1115; Flanagan *v.* Fox, 6 Misc. 132, 134, 26 N. Y. Suppl. 48; Bebee *v.* State Bank, 1 Johns. 529, 571, 3 Am. Dec. 353.

Ohio.— Crist *v.* Dice, 18 Ohio St. 536, 542; Creighton *v.* Toledo, 18 Ohio St. 447, 451; Bricker *v.* Bricker, 11 Ohio St. 240, 246.

Pennsylvania.— Slegel *v.* Lauer, 148 Pa. St. 236, 242, 23 Atl. 996, 15 L. R. A. 547; Kneedler *v.* Lane, 45 Pa. St. 238, 321; Scott *v.* Fields, 7 Watts 360, 362; Weiser *v.* Weiser, 5 Watts 279, 284, 30 Am. Dec. 313; Sanderson *v.* Lamberton, 6 Binn. 129, 132; Rousset *v.* Insurance Co. of North America, 1 Binn. 429, 432; Yard *v.* Lea, 3 Yeates 335, 341; Paine *v.* Fesco, 18 Phila. 637, 639.

Tennessee.— Wood *v.* Polk, 12 Heisk. 220, 230.

Virginia.— Justis *v.* English, 30 Gratt. 565, 571.

Lord Bacon, which literally translated means "Let service expressed rule or declare what is silent." [66]

EXPRESS UNDERSTANDING. Express contract, or EXPRESS AGREEMENT,[67] *q. v.* (See, generally, CONTRACTS.)

EXPRESS WAGON. A wagon commonly known as a four-wheeled vehicle, with a straight body, commonly hung on springs, with a foot-board, a movable seat and a dumping tail-board, a vehicle of light construction.[68]

EXPRESS WAIVER. A waiver made by release.[69]

EX PROCEDENTIBUS ET CONSEQUENTIBUS OPTIMA FIT INTERPRETATIO. A maxim meaning "The best interpretation is made from things proceeding and following (i. e. the context)." [70]

EXPROMISSIO. See NOVATION.

EXPROPRIATION. In Mexican law, a seizure of so much of the owner's property as is necessary for the public purpose.[71] (See, generally, EMINENT DOMAIN.)

EXPULSION. A putting out;[72] DISFRANCHISEMENT, *q. v.*; severing the connection between the expelled member and an association.[73] (Expulsion: Of Alien, see ALIENS. Of Foreign Corporation, see CORPORATIONS. Of Member — Of Association, see ASSOCIATIONS; Of Club, see CLUBS; Of Corporation, see CORPORATIONS; Of Religious Society, see RELIGIOUS SOCIETIES; Of Stock Exchange, see EXCHANGES. Of Passenger, see CARRIERS. Of Tenant, see LANDLORD AND TENANT. See also AMOTION; EVICTION.)

EX QUÂ PERSONÂ QUIS LUCRUM CAPIT, EJUS FACTUM PRAESTARE DEBET. A maxim meaning "One who takes gain, profit or advantage on account of a person, ought to be answerable for his act or deed." [74]

EXSCINDED. Cut off or expelled.[75] (See, generally, PARTNERSHIP.)

EXTEMPORE DISCOURSE. An expression used as the antipode of a premeditated discourse.[76]

EXTEND.[77] This term has a wide variety of meanings and has been defined as

United States.— *In re* Herzikopf, 121 Fed. 544, 546, 57 C. C. A. 606; American Well Works *v.* Rivers, 36 Fed. 880, 881; Gilman *v.* Brown, 10 Fed. Cas. No. 5,441, 1 Mason 191.

England.— Chambers *v.* Davidson, L. R. 1 P. C. 296, 305, 12 Jur. N. S. 967, 36 L. J. P. C. 17, 15 Wkly. Rep. 534; Tanner *v.* Smart, 6 B. & C. 603, 609, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274; Rex *v.* Westwood, 4 B. & C. 781, 10 E. C. L. 799, 7 Bing. 1, 29, 20 E. C. L. 1, 4 Bligh N. S. 213, 5 Eng. Reprint 76, 2 Dow. & Cl. 21, 6 Eng. Reprint 637, 7 D. & R. 267; Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 930, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917; Whitbread *v.* Smith, 3 De G. M. & G. 727, 739, 2 Eq. Rep. 377, 18 Jur. 475, 23 L. J. Ch. 611, 2 Wkly. Rep. 177, 53 Eng. Ch. 567, 43 Eng. Reprint 286; 23 Eng. L. & Eq. 551; Eastern Archipelago Co. *v.* Reg., 2 E. & B. 856, 879, 18 Jur. 481, 2 Wkly. Rep. 77, 22 Eng. L. & Eq. 328. 75 E. C. L. 856; Greenbirt *v.* Smee, 35 L. T. Rep. N. S. 168, 171; Merrill *v.* Frame, 4 Taunt. 329, 330, 13 Rev. Rep. 612; Cates *v.* Knight, 3 T. R. 442, 444; Doe *v.* Barber, 2 T. R. 749, 750; Matthew *v.* Blackmore, 5 Wkly. Rep. 363, 364.

Canada.—Attrill *v.* Platt, 10 Can. Supreme Ct. 425, 507; Dulmage *v.* Douglas, 3 Manitoba L. Rep. 562, 567; Billings *v.* Rust, 1 Nova Scotia 88, 98; Steinhoff *v.* Royal Canadian Ins. Co., 42 U. C. Q. B. 307, 324.

66. Adams Gloss. [*citing* Bacon Works v, 73].

67. Spence *v.* Spence, 17 Wis. 448, 455.

68. Walker *v.* Carkin, 88 Me. 302, 304, 34 Atl. 29.

69. Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110, 124, where the term is distinguished from an "implied waiver."

70. Bouvier L. Dict.

Applied in Griscom *v.* Evens, 40 N. J. L. 402, 415, 29 Am. Rep. 251.

71. Brownsville *v.* Cavazos, 4 Fed. Cas. No. 2,043, 2 Woods 293.

72. Vanderpool *v.* Smith, 4 Abb. Dec. (N. Y.) 461, 464.

73. Palmetto Lodge No. 5 I. O. O. F. *v.* Hubbell, 2 Strobh. (S. C.) 458, 462, 49 Am. Dec. 604, where the term is distinguished from "suspension." See also New York Protective Assoc. *v.* McGrath, 5 N. Y. Suppl. 8, 10, where the term is distinguished from "voluntary withdrawal."

74. Adams Gloss. [*citing* Ulpian Dig. L, 17, fr. 149].

75. Robinson *v.* Floyd, 159 Pa. St. 165, 175, 28 Atl. 258, as used in a partnership agreement providing that a partner might, by resolution of the board of control, be excluded from the concern.

76. People *v.* Clark, 11 N. Y. Leg. Obs. 4, 13.

77. "It is derived from '*ex*,' from or out of, and '*tendere*,' to stretch or stretch out." Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 91, 36 N. W. 843.

follows: To prolong;[78] to continue,[79] or continue in any particular direction;[80] stretch out,[81] or over;[82] to stretch or reach;[83] to draw forth or stretch;[84] to protract;[85] to expand;[86] to enlarge;[87] to widen;[88] to widen or enlarge;[89] to project;[90] to make larger in space, time or scope; carry out farther than the original point or limit; enlarge or lengthen the bounds or dimensions of; lengthen.[91] And it is sometimes used as equivalent to the word "exceed."[92] In English practice, to value the lands or tenements of a person bound by a statute or recognizance which has become forfeited, to their full extended value.[93] (See CREATE; ENLARGE; EXTENSION.)

EXTENDED.[94] Prolonged.[95] (See EXTEND.)

EXTENDI FACIAS. See EXTENT.

Distinguished from "renew" in Orton *v.* Noonan, 27 Wis. 272, 282.

"Extend and regulate the liability of employers" see Rosin *v.* Lidgerwood Mfg. Co., 89 N. Y. App. Div. 245, 246, 86 N. Y. Suppl. 49.

"Extend," nor "be extended" in an arbitration act see *In re* Yeadon Local Bd., 41 Ch. D. 52, 58, 58 L. J. Ch. 563, 60 L. T. Rep. N. S. 550, 37 Wkly. Rep. 360.

"Extend to and include" see Portsmouth *v.* Smith, 53 L. J. Q. B. 92, 95.

"The judicial power shall extend to all cases in law and equity arising under this constitution" see Bruen *v.* Ogden, 11 N. J. L. 370, 379, 20 Am. Dec. 593; Hunter *v.* Martin, 4 Munf. (Va.) 1, 36; Houston *v.* Moore, 5 Wheat. (U. S.) 1, 68, 5 L. ed. 9; Martin *v.* Hunter, 1 Wheat. (U. S.) 304, 331, 4 L. ed. 97.

78. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 25, 70 N. Y. Suppl. 956 [*quoting* Standard Dict.]; Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 91, 36 N. W. 843 [*citing* Webster Dict.]; Orton *v.* Noonan, 27 Wis. 272, 282; Goulding *v.* Hammond, 54 Fed. 639, 643, 4 C. C. A. 533 [*citing* Century Dict.; Webster Dict.].

Under a stipulation to "extend" the time for taking testimony entered into after the time has expired, the extension runs from the date of the stipulation and is not merely an "enlargement" of the time first limited. James *v.* McMillan, 55 Mich. 136, 137, 20 N. W. 826.

79. Campbell *v.* Jimenes, 7 Misc. (N. Y.) 77, 78, 27 N. Y. Suppl. 351; Orton *v.* Noonan, 27 Wis. 272, 282.

80. Piqua Branch State Bank *v.* Knoup, 6 Ohio St. 342, 356.

81. Goulding *v.* Hammond, 54 Fed. 639, 643, 4 C. C. A. 533 [*citing* Century Dict.; Webster Dict.].

82. Campbell *v.* Jimenes, 7 Misc. (N. Y.) 77, 78, 27 N. Y. Suppl. 351.

83. Piqua Branch State Bank *v.* Knoup, 6 Ohio St. 342, 356.

84. Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 91, 36 N. W. 843 [*citing* Webster Dict.]; Orton *v.* Noonan, 27 Wis. 272, 282.

85. Orton *v.* Noonan, 27 Wis. 272, 282.

86. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 25, 70 N. Y. Suppl. 956 [*quoting* Imperial Dict.]; Goulding *v.* Hammond, 54 Fed. 639, 643, 4 C. C. A. 533 [*citing* Century Dict.; Webster Dict.].

87. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 25, 70 N. Y. Suppl. 956 [*quoting* Standard Dict.]; Goulding *v.* Hammond, 54 Fed. 639, 643, 4 C. C. A. 533 [*citing* Century Dict.; Webster Dict.].

88. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 25, 70 N. Y. Suppl. 956 [*quoting* Standard Dict.].

89. Hunter *v.* Martin, 4 Munf. (Va.) 1, 37 [*citing* Johnson Dict.].

90. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 157, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

91. Flagler *v.* Hearst, 62 N. Y. App. Div. 18, 25, 70 N. Y. Suppl. 956 [*quoting* Standard Dict.].

To "extend a charter" is to give one which now exists greater or longer time to operate in than that to which it was originally limited. Moers *v.* Reading, 21 Pa. St. 188, 201. See also Cooper *v.* Oriental Sav., etc., Assoc., 100 Pa. St. 402, 406.

To extend a street is to prolong and extend it in the direction to which it already points. Monroe *v.* Ouachita Parish Police Jury, 47 La. Ann. 1061, 1063, 17 So. 498.

The word is relative in its application, refers to something already begun, and implies a continuation of the same act. Clement *v.* Dickey, 5 Fed. Cas. No. 2,883, 1 Paine 377.

When applied to an existing thing, like a street, it means to construct it in the same direction, and with the same width. Seattle, etc., R. Co. *v.* State, 7 Wash. 150, 157, 34 Pac. 551, 38 Am. St. Rep. 866, 22 L. R. A. 217.

When applied to a railroad track or other line, it imports a continuation of the line without a break. South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485, 489 [*cited* in Monroe *v.* Ouachita Parish Police Jury, 47 La. Ann. 1061, 1063, 17 So. 498]. As used in a statute giving a railroad company the right to extend its course, the term means to continue or prolong its course, and not to build independent branch roads. People *v.* New York, etc., R. Co., 45 Barb. (N. Y.) 73, 79 [*cited* in Williams *v.* Odessa, etc., R. Co., 7 Del. Ch. 303, 364, 44 Atl. 821].

92. Campbell *v.* Jimenes, 7 Misc. (N. Y.) 77, 78, 27 N. Y. Suppl. 351.

93. Burrill L. Dict.

94. **"Lands included in said extended limits"** see Perkins *v.* Burlington, 77 Iowa 556, 556, 42 N. W. 441.

95. State *v.* Scott, 113 Mo. 559, 561, 20 S. W. 1076.

"A mortgage is 'extended' only when it is made to stand as security for some debt or

EXTENDING. Reaching or stretching.[96]

EXTENSION. The act of extending or stretching out;[97] enlargement in any direction, in length, breadth, or circumference;[98] the continuance of an existing thing.[99] In commercial law, an indulgence by giving time to pay a debt, or perform an obligation;[1] an agreement made between a debtor and his creditors, by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims should become due and payable, before they will demand payment.[2] As applied to a railroad, a prolongation of it from one of its termini to some other designated point;[3] enlargement of an existing road by adding to its length or its breadth.[4] (Extension: Effect of — As Discharge of Guarantor or Surety, see GUARANTY; PRINCIPAL AND SURETY; As Waiver of Right to Cancel Instrument, see CANCELLATION OF INSTRUMENTS. Of Copyright, see COPYRIGHT. Of Corporate Existence, see CORPORATIONS; MUNICIPAL CORPORATIONS. Of Mortgage, see MORTGAGES. Of Negotiable Instrument, see COMMERCIAL PAPER. Of Patent, see PATENTS. Of Railroad, see RAILROADS; STREET RAILROADS. Of Street or Highway, see STREETS AND HIGHWAYS. Of Term — Of Contract, see CONTRACTS; Of Court, see COURTS; Of Lease, see LANDLORD AND TENANT. Of Time — For Entering Appearance, see APPEARANCES; For Execution of Commission to Take Deposition, see DEPOSITIONS; For Filing or Service of Record on Appeal, see APPEAL AND ERROR; For Filing Security For Costs, see COSTS; For Making Application For New Trial, see CRIMINAL LAW; NEW TRIAL; For Making, Settling, and Filing Bill of Exceptions, see APPEAL AND ERROR; CRIMINAL LAW; For Performance of Contract, see CONTRACTS; For Surrendering Principal by Bail, see BAIL. Of Usurious Loan, see USURY.)

EXTENT. Space or degree to which a thing is stretched, or extended;[5] length; as, an extent of line; communication, distribution.[6] In law, a writ of

obligation not originally included therein." People's State Bank *v.* Francis, 8 N. D. 369, 375, 79 N. W. 853 [*citing* Stoddard *v.* Hart, 23 N. Y. 556].

"The word . . . implies something to be extended, and must necessarily be connected with that something." Wisconsin Cent. R. Co. *v.* Comstock, 71 Wis. 88, 91, 36 N. W. 843.

"'To be holden should the time of payment be extended,' naturally and by the ordinary force of language . . . means a reasonable extension for a definite time, and not a series of extensions indefinite in number and endless in repetition." Rochester Sav. Bank *v.* Chick, 64 N. H. 410, 411, 13 Atl. 872.

When the "judicial power is extended to any particular subject, it is simply empowered to take jurisdiction over it, whenever it is invoked by the commencement of a suit or other proceeding." Piqua State Bank *v.* Knoup, 6 Ohio St. 342, 356, dissenting opinion.

96. Steelman *v.* Atlantic City Sewerage Co., 60 N. J. L. 461, 464, 38 Atl. 742.

97. Cincinnati Gas-Light, etc., Co. *v.* Avondale, 43 Ohio St. 257, 268, 1 N. E. 527.

98. Monroe *v.* Ouachita Parish Police Jury, 47 La. Ann. 1061, 1063, 17 So. 498 [*citing* South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485, 489].

"Extension of a line already defined as straight, implies that it is to be continued, or, in mathematical language, produced as a straight line to the point indicated for intersection." *In re* Charlotte St., 23 Pa. St. 286, 288.

The term conveys to the mind an enlargement of the main body, the addition of something of less import than that to which it is attached. New York Cent., etc., R. Co. *v.* Buffalo, etc., Electric R. Co., 96 N. Y. App. Div. 471, 475, 89 N. Y. Suppl. 418.

99. Brooke *v.* Clarke, 1 B. & Ald. 396, 403.

1. Brewer *v.* Harrison, 27 Colo. 349, 351, 62 Pac. 224. See also Wellington Nat. Bank *v.* Thomson, 9 Kan. App. 667, 59 Pac. 178.

2. Bouvier L. Dict. [*quoted* in Strouse *v.* American Credit Indemnity Co., 91 Md. 244, 276, 46 Atl. 328, 1063].

3. Trenton St. R. Co. *v.* Pennsylvania R. Co., 63 N. J. Eq. 276, 49 Atl. 481. See also South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485, 489; Laconia Street R. Co.'s Petition, 71 N. H. 355, 356, 52 Atl. 458; Bohmer *v.* Haffen, 35 N. Y. App. Div. 381, 388, 54 N. Y. Suppl. 1030; Volmer's Appeal, 115 Pa. St. 166, 177, 8 Atl. 223.

4. Shanghai Municipal Council *v.* McMurray, [1900] A. C. 206, 209, 69 L. J. P. C. 19, 82 L. T. Rep. N. S. 101.

Extension of street see Illinois Cent. R. Co. *v.* Chicago, 141 Ill. 586, 595, 30 N. E. 1044, 17 L. R. A. 530; Matthiessen, etc., Sugar Refining Co. *v.* Jersey City, 26 N. J. Eq. 247, 255.

5. Wilson *v.* Rousseau, 30 Fed. Cas. No. 17,832, 1 Blatchf. 3 [*quoting* Johnson Dict.; Walker Dict.; Webster Dict.].

"Extent of each county" see Com. *v.* Costley, 118 Mass. 1, 25.

6. Webster Dict. [*quoted* in Wilson *v.* Rousseau, 30 Fed. Cas. No. 17,832, 1 Blatchf. 3].

"Metaphorically or poetically, the word

execution,[7] or extendi facias;[8] a writ, issuing from the exchequer, by which the body, goods, and lands of the debtor may all be taken at once to satisfy the judgment;[9] an execution writ in the nature of a final process.[10] (See, generally, EXECUTIONS.)

EXTENUATE. To lessen; to palliate; to mitigate.[11]

EXTERNAL.[12] A term used in contradistinction to "internal."[13] It can only apply to something which has an outside and an inside,[14] and as applied to a house,

'extent' is sometimes used to express duration; but it is never so used in a professional sense or in common parlance. . . . No definition signifying duration is given to the word 'extent,' by the best lexicographers." Wilson *v.* Rousseau, 30 Fed. Cas. No. 17,832, 1 Blatchf. 3, 107.

7. Kimball *v.* Russell, 56 N. H. 488, 493; Webster Dict. [*quoted* in Wilson *v.* Rousseau, 30 Fed. Cas. No. 17,832, 1 Blatchf. 3].

8. Hence the definition of "extendi facias" which is, literally, "That you cause to be appraised at their full or extended value." Wharton L. Lex.

"In England, an extent, or extendi facias, is the peculiar remedy to recover debts of record due to the crown. It differs from an ordinary execution at the suit of a subject, in that under it, the body, lands and goods of the debtor may all be taken at once, to compel payment of the debt. There are two kinds of extents there, in chief and in aid. An extent in chief issues from the Court of Exchequer, and directs the sheriff to take an inquisition or inquest of office on the oath of lawful men, to ascertain the lands, etc., of the debtor, and seize them into the Queen's hands. The writ is usually preceded by a scire facias, that the debtor may have opportunity to appear and show cause against it; but when the debt is in danger of being lost, it will issue immediately on an affidavit of debt and danger and a fiat, in which case, after the writ is returned, the debtor, if he disputes the debt, may enter an appearance and plead thereto. There is also an extent in chief in the second degree, which is a hostile proceeding by the crown against the debtor, of a crown-debtor, against whom also an extent in chief has issued." Hackett *v.* Amsden, 56 Vt. 201, 206.

"Under our statute an extent may be likened to an extent in chief in England. It is so to speak, prerogative process, affording a summary remedy for recovering public revenue from public officers who have committed a breach of public duty, and in case of state taxes for recovery from the inhabitants of the town as well. No notice is given to show cause against the State Treasurer's extent." Hackett *v.* Amsden, 56 Vt. 201, 206 [*citing* Waldron *v.* Lee, 5 Pick. (Mass.) 328, and *quoted* in Mt. Holly *v.* French, 75 Vt. 1, 4, 52 Atl. 1038].

"An extent in aid issues, not at the suit of the crown, like an extent in chief, but at the suit or instance of a crown-debtor against a person indebted to himself; and it is grounded on the Statute of Extent, 33 Hen. IV. c. 39, and on the principle that the crown is entitled to the debts due to the debtor. But when a crown-debtor ceases to be liable to the crown, he ceases to be entitled to crown process. Extents in chief have priority over extents in aid, and both have priority over subject creditors. By the treaty of Union, extents were introduced into Scotland in revenue matters." Hackett *v.* Amsden, 56 Vt. 201, 207.

"The writ seems to have taken its name from the fact that the sheriff is to cause the lands to be appraised at their full extended value before he delivers them to the plaintiff." Mt. Holly *v.* French, 75 Vt. 1, 3, 52 Atl. 1038 [*citing* Bouvier L. Dict.].

Blackstone says: "Upon some prosecutions given by statute; as in the case of recognizances for debts acknowledged on statutes merchant, or statutes staple . . . upon forfeiture of these, the body, land and goods may all be taken at once in execution, to compel the payment of the debt. The process thereon is usually called an extent, or extendi facias, because the sheriff is to cause the lands, &c., to be appraised to their full extended value, before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied." 3 Blackstone Comm. 420.

Distinguished from "execution."—While this process is in the nature of an execution, as is also a warrant for the collection of taxes, it is very unlike the process commonly called an execution, which is issued on judgments recovered in suits *inter partes*. Extent proceedings are not *inter partes*, but rather in the nature of criminal proceedings. Hackett *v.* Amsden, 56 Vt. 201, 206 [*citing* *In re* Hackett, 53 Vt. 354; State Treasurer *v.* Holmes, 2 Aik. (Vt.) 48].

9. Bouvier L. Dict.

10. Nason *v.* Fowler, 70 N. H. 291, 293, 47 Atl. 263 [*citing* Kimball *v.* Russell, 56 N. H. 488, 495].

11. Burrill L. Dict.

"Extenuating circumstances" see State *v.* Davis, 52 W. Va. 224, 226, 43 S. E. 99.

12. "External" as used in a corporation contract see *In re* Wedgwood Coal, etc., Co., 26 Wkly. Rep. 442, 447.

"External parts of premises" are those parts which form the enclosure of them. Green *v.* Eales, 2 Q. B. 225, 237, 1 G. & D. 468, 6 Jur. 436, 11 L. J. Q. B. 63, 42 E. C. L. 648.

13. Hamlyn *v.* Crown Accidental Ins. Co., [1893] 1 Q. B. 750, 753, 57 J. P. 663, 62 L. J. Q. B. 409, 68 L. T. Rep. N. S. 701, 4 Reports 407, 41 Wkly. Rep. 531; Perry *v.* Davis, 3 C. B. N. S. 769, 777, 91 E. C. L. 769.

14. Perry *v.* Davis, 3 C. B. N. S. 769, 775, 91 E. C. L. 769.

everything external to the house, or, as it is popularly called, "out of doors."[15] (See, generally, Accident Insurance.)

EXTERNUS NON HABET TERRAS; HABET RES SUAS, ET VITAM ET LIBERTATEM. A maxim meaning "A foreigner has no lands; he has his personal effects, and life, and liberty."[16]

EXTERUS NON HABET TERRAS. A maxim meaning "A foreigner or alien holds no lands."[17]

EXTINCT.[18] Extinguished; put out; quenched.[19]

EXTINCTION. Ademption,[20] *q. v.* (See, generally, Wills.)

EXTINCTO SUBJECTO, TOLLITUR ADJUNCTUM. A maxim meaning "When the substance is gone, the adjuncts disappear."[21]

EXTINGUISH.[22] The words "extinguish," "extinguished," "extinguishment" when used in their exact sense express the idea of a complete wiping out, destruction, or annihilation,[23] and not a mere suspension;[24] a termination.[25] It is in this sense that the terms are properly applied to contracts,[26] rights, titles, interests,[27] or a debt;[28] or other obligation;[29] whether the effect produced is by the act of God, by operation of law,[30] or by an act of a person.[31] The meaning of these terms as frequently used, varies with the subject-matter to which they are applied. The words, "merger," "suspension" and "abatement," would, in many instances where "extinguishment" is used, much more accurately and felicitously express the idea intended to be conveyed.[32] (Extinguishment: Of Debt, see Payment; Novation. Of Ground-Rent, see Ground-Rents. Of Levy or Lien of Attachment, see Attachment. Of Liens, see Liens. Of Mortgage, see Chattel Mortgages; Mortgages.)

15. Perry *v.* Davis, 3 C. B. N. S. 769, 777, 91 E. C. L. 769.

"Exterior and interior of building" see May *v.* Ennis, 78 N. Y. App. Div. 552, 554, 70 N. Y. Suppl. 896.

16. Adams Gloss. [*citing* Lofft. 153].

17. Trayner Leg. Max.

18. "'Extinct' . . . 'cometh of the verb extinguere, to destroy or cut off.'" Robinson *v.* Lane, 19 Ga. 337, 380; Moultrie *v.* Smiley, 16 Ga. 289, 300, 342; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 101, 17 Am. Dec. 710.

19. Century Dict.

20. King *v.* Sheffey, 8 Leigh (Va.) 614, 617.

"Extinction of any prior interests" as used in a succession duty act see *Ex p.* Sitwell, 21 Q. B. D. 466, 470, 59 L. T. Rep. N. S. 539, 37 Wkly. Rep. 238.

21. Adams Gloss. [*citing* Pothier Traité du Con. de Soc. Nos. 140–143].

Applied in Griswold *v.* Waddington, 16 Johns. (N. Y.) 438, 492.

22. "Extinguishment and release" distinguished from "assignment" in Darragh *v.* Stevenson, 183 Pa. St. 397, 402, 39 Atl. 37.

23. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8, 14; Robinson *v.* Lane, 19 Ga. 337, 385, 397; Moultrie *v.* Smiley, 16 Ga. 289, 357; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 101, 17 Am. Dec. 710.

"Power released or extinguished" see *In re* Radcliffe, [1892] 1 Ch. 227, 61 L. J. Ch. 186, 188, 66 L. T. Rep. N. S. 363, 40 Wkly. Rep. 323.

24. Taylor *v.* Hampton, 4 McCord (S. C.) 96, 101, 17 Am. Dec. 710.

Distinguished from "suspension" in Moultrie *v.* Smiley, 16 Ga. 289, 352.

"Extinguishment and suspension is very well illustrated by the two cases put by Domat, Lib. 1, Sec. 6, fo. 207, Tit. Services." Taylor *v.* Hampton, 4 McCord (S. C.) 96, 102, 17 Am. Dec. 710.

25. Barlow *v.* Ross, 24 Q. B. D. 381, 386, 54 J. P. 660, 59 L. J. Q. B. 183, 62 L. T. Rep. N. S. 552, 38 Wkly. Rep. 372.

26. Bouvier L. Dict. [*quoted* in Moultrie *v.* Smiley, 16 Ga. 289, 343].

27. Moultrie *v.* Smiley, 16 Ga. 289, 343 [*citing* 3 Bacon Abr. tit. "Extinguishment"]; Taylor *v.* Hampton, 4 McCord (S. C.) 96, 101, 17 Am. Dec. 710 [*citing* Jacob L. Dict.; Termes de la Ley].

28. Bouvier L. Dict.

The original debt must be destroyed. Planters' Bank *v.* Calvit, 3 Sm. & M. (Miss.) 143, 195, 41 Am. Dec. 616.

"Extinguishment of the principal of the State debt" see Auditor-Gen. *v.* State Treasurer, 45 Mich. 161, 168, 7 N. W. 716.

29. Commercial Bank *v.* Lockwood, 2 Harr. (Del.) 8, 14 [*citing* Coke Litt. 147*b*; 1 Rolle Abr. 933].

30. Baker *v.* Baker, 28 N. J. L. 13, 20, 75 Am. Dec. 243, where the term is distinguished from "release."

31. Taylor *v.* Hampton, 4 McCord (S. C.) 96, 101, 17 Am. Dec. 710 [*citing* Jacob L. Dict.; Termes de la Ley]; 3 Bacon Abr. "Extinguishment" [*quoted* in Moultrie *v.* Smiley, 16 Ga. 289, 343]. See also Louisville Trust Co. *v.* Kentucky Nat. Bank, 102 Fed. 442, 445.

32. Moultrie *v.* Smiley, 16 Ga. 289, 302.

The idea of merger see Moultrie *v.* Smiley, 16 Ga. 289, 320 [*citing* Burrill L. Dict.]; Andrews *v.* Smith, 9 Wend. (N. Y.) 53, 54 [*citing* Harvey *v.* Wood, 5 Wend. (N. Y.) 221, 222]; Jackson *v.* Shaffer, 11 Johns. (N. Y.) 513, 517, where it is said: "A se-

EXTINGUITUR OBLIGATIO QUE RITE CONSTITERET SI IN EUM CASUM INCIDERIT A QUO INCIPERE NON POTUIT. A maxim meaning "An obligation which has been sealed in due form is extinguished if it fall into that state from which it cannot arise." [33]

EXTORT. To obtain from a holder desired possessions or knowledge by force or compulsion; to wrest from another by force, menace, duress, etc.;[34] to obtain money or other valuable thing either by compulsion, by actual force, or by the force of motives applied to the will, and often more overpowering and irresistible than physical force.[35] A term which necessarily implies the adoption of illegal means.[36] (See, generally, EXTORTION.)

EXTORTIO EST CRIMEN QUANDO QUIS COLORE OFFICII EXTORQUET QUOD NON EST DEBITUM, VEL SUPRA DEBITUM, VEL ANTE TEMPUS QUOD EST DEBITUM. A maxim meaning "Extortion is a crime when, by colour of office, any person extorts that which is not due, or more than is due, or before the time when it is due." [37]

curity of a higher nature extinguishes inferior securities, but not securities of an equal degree."

Suspension.— As used in relation to the extinguishment of the debts to and from a defunct corporation the word is synonymous with a "suspension." Moultrie *v.* Smiley, 16 Ga. 289, 304.

33. Adams Gloss. [*citing* Halkerston Max. 6].

34. Cohen *v.* State, 37 Tex. Cr. 118, 120, 38 S. W. 1005 [*citing* Century Dict.].

35. Com. *v.* O'Brien, 12 Cush. (Mass.) 84, 90.

36. Rex *v.* Hollingberry, 4 B. & C. 329, 10 E. C. L. 601, 6 D. & R. 345, 16 E. C. L. 262, 3 L. J. K. B. O. S. 226, per Abbott, C. J.

37. Wharton L. Lex.

Applied in Beawfage's Case, 10 Coke 99*b*, 102*a*.

EXTORTION

By Frank E. Jennings*

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CROSS-REFERENCES

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Receiving Excessive Fee, see OFFICERS.
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Conspiracy, see CONSPIRACY.
False Personation of Officer, see FALSE PERSONATION.
Threats, see THREATS.

I. DEFINITION.

Extortion is the unlawful taking, by any officer, by color of his office, of any money or thing of value that is not due him, or more than is due, or before it is due.[1]

1. *Alabama.*— Collier *v.* State, 55 Ala. 125, 127.
Massachusetts.— Com. *v.* Bagley, 7 Pick. 279, 281.
New York.— People *v.* Whaley, 6 Cow. 661, 663.
Pennsylvania.— Com. *v.* Saulsbury, 152 Pa. St. 554, 559, 25 Atl. 610.
United States.— U. S. *v.* Waitz, 28 Fed. Cas. No. 16,631, 3 Sawy. 473, 474.
England.— 4 Blackstone Comm. 141; Coke Litt. 363*b*.
See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*
Other definitions are: "The corrupt demanding or receiving by a person in office, of a fee for services which should be rendered gratuitously; or when compensation is permissible, of a larger fee than the law justifies, or a fee not yet due." 2 Bishop Cr. L. § 390 [*quoted* in Com. *v.* Brown, 23 Pa. Super. Ct. 470, 491, where the court further said: "Under our statute the criminality consists in the wilfully and fraudulently receiving and taking of the reward or fee as aforesaid by color of his office"].
"The obtaining property from another with his consent induced by wrongful use of force or fear or under color of official right." Mont. Pen. Code, § 910; N. Y. Pen. Code, § 552.
"The ordinary meaning of the word extortion is the taking or obtaining of anything from another by means of illegal compulsion

II. NATURE AND ELEMENTS.

A. In General. Extortion is a misdemeanor at common law.[2] In many jurisdictions the offense is defined and the punishment regulated by express statutory provisions.[3]

B. By Whom Committed. Any person, upon whom the mantle of office has fallen, or who acts as an officer and has assumed an officer's duties, or a quasi-official position, may commit this offense.[4] Hence officers of a municipal corporation[5] or of the customs,[6] constables,[7] or school directors[8] may render themselves liable. The offense may be committed jointly.[9]

or oppressive exaction. But the word has acquired a technical meaning in the common law, and, in this sense, may be defined to be the corrupt and unlawful taking by any officer of the law, under color of his office, of any money, or thing of value, that is not due to him, or the corrupt or unlawful taking of any money or thing of value, under color of his office, in excess of what is due to him, or before it is due to him." State *v.* Logan, 104 La. 760, 762, 29 So. 336.

Compared with and distinguished from robbery see People *v.* Barondess, 61 Hun (N. Y.) 571, 576, 16 N. Y. Suppl. 436, where it is said: "Robbery is the unlawful taking against the will by means of force or violence or fear of injury, immediate or future, to one's person or property, while extortion is the obtaining with consent by similar means." It was robbery at common law to extort money under the threat of charging one with an unnatural crime. Rex *v.* Jones, 1 Leach C. C. 164. See, generally, ROBBERY.

Distinguished from bribery see 5 Cyc. 1039 note 1. See also People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005, 11 N. Y. Cr. 97; and, generally, BRIBERY.

2. Hawkins P. C. c. 68, § 5. In Reg. *v.* Buck, 6 Mod. 306, the court said: "It is an offence of dangerous consequence, and very pernicious to the Government."

3. *Alabama.*— Collier *v.* State, 55 Ala. 125.

Louisiana.— State *v.* Logan, 104 La. 760, 29 So. 336.

Massachusetts.— Runnells *v.* Fletcher, 15 Mass. 525.

Missouri.— State *v.* Vasel, 47 Mo. 416.

New Hampshire.— Wilcox *v.* Bowers, 36 N. H. 372.

North Dakota.— State *v.* Bauer, 1 N. D. 273, 47 N. W. 378.

Texas.— State *v.* Smythe, 33 Tex. 546.

Utah.— People *v.* Monk, 8 Utah 35, 28 Pac. 1115.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

Extortion is regarded as a very odious crime, and when made out should be punished by the courts with rigor. Williams *v.* State, 2 Sneed (Tenn.) 160.

Whether misdemeanor or felony.— As defined by the statutes of United States it is the same as at common law (U. S. *v.* Deaver, 14 Fed. 595), while in New York (People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105), Arizona (Ariz. Rev. St. (1887) § 808), and perhaps a few other states, it is made a felony.

Oppression.— N. Y. Pen. Code, § 556, provides that a public officer, or a person pretending to be such who, unlawfully and maliciously, under pretense or color of official authority, "1. Arrests another, or detains him against his will; or, 2. Seizes or levies upon another's property; or, 3. Dispossesses another of any lands or tenements; or, 4. Does any other act whereby another person is injured in his person, property or rights; Commits oppression, and is guilty of a misdemeanor." Under this section a police captain and three patrolmen who came into a person's shop, did not exhibit any warrant, and remained there during business hours for eleven days and refused to leave and thereby injured the business of the proprietor are guilty of oppression. People *v.* Summers, 40 Misc. (N. Y.) 384, 82 N. Y. Suppl. 297, 17 N. Y. Cr. 321, construing section 315 of the city charter making it the duty of the police "at all times of the day and night" to "carefully observe and inspect all places of public amusement," etc.

4. Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610; Roy *v.* Eyres, 1 Sid. 307. See also Rex *v.* Higgins, 4 C. & P. 247, 19 E. C. L. 498.

Under modern statutory provisions private individuals may be guilty of extortion. Mont. Pen. Code, § 910; N. Y. Pen. Code, § 552. See also THREATS.

"Attorneys, while receiving compensation in their offices for services rendered by them for their clients in matters preliminary to proceedings before a judicial tribunal, cannot be regarded as public officers, demanding and receiving compensation for services rendered in the discharge of official duty." Wilcox *v.* Bowers, 36 N. H. 372.

Where one is neither a de jure nor de facto officer (Herrington *v.* State, 103 Ga. 318, 39 S. E. 931, 68 Am. St. Rep. 95), as where he is the incumbent of an office which an unconstitutional statute purported to create (Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213), he cannot be guilty of extortion.

5. State *v.* Critchett, 1 Lea (Tenn.) 271.

6. U. S. *v.* Carr, 25 Fed. Cas. No. 14,730, 3 Sawy. 302.

7. State *v.* Bevans, 37 Iowa 178.

8. Com. *v.* Brown, 23 Pa. Super. Ct. 470, at least at common law if not under the Pennsylvania act of March 31, 1860.

9. Reg. *v.* Tisdale, 20 U. C. Q. B. 272.

C. Existence of Evil Intent. An evil intent or unlawful design was a necessary element of this offense at common law,[10] and is usually held to be a requisite to a criminal prosecution under statutory provisions.[11] It is not enough that the officer act carelessly or inadvertently, from which a criminal intent might be presumed. He must act knowingly or designedly.[12] Whether the accused did or did not have an evil intent in the taking of illegal fees is a question for the jury.[13]

D. The Taking — 1. Must Be by Officer. It is essential in the perpetration of this offense that the taking be by an officer, although he need not be an officer *de jure*.[14] It may be committed by a *de facto* officer,[15] but some official character or authority is essential.[16]

2. By Color of Office. To constitute extortion it is also essential that the taking be under color of office. In other words the one taking the fees must have acted in his official capacity, not as a private individual,[17] and for his own benefit.[18]

3. Before Due. It was a principle of the common law,[19] which has, it is believed, received universal recognition and sanction in the United States that the thing must not be demanded or taken before it is due.[20] It follows that if a

10. Cobbey *v.* Burks, 11 Nebr. 157, 8 N. W. 386, 38 Am. Rep. 364; Respublica *v.* Hannum, 1 Yeates (Pa.) 71; Bowman *v.* Blyth, 7 E. & B. 26, 3 Jur. N. S. 359, 26 L. J. M. C. 57, 5 Wkly. Rep. 86, 90 E. C. L. 26.

11. Collier *v.* State, 55 Ala. 125; Cleaveland *v.* State, 34 Ala. 254; State *v.* Cutter, 36 N. J. L. 125; State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50. See also State *v.* Cansler, 75 N. C. 442, where the same view is intimated.

12. Cleaveland *v.* State, 34 Ala. 254. In U. S. *v.* Highleyman, 26 Fed. Cas. No. 15,361, it is said: "By the use of the word 'knowingly' something more is meant than what is implied, in the legal presumption that every man must know the law. In order to find the defendant guilty of demanding or receiving greater sums than he was entitled to under the law, you should be satisfied that he knew he was violating the law, and the fact that he demanded or received the several amounts charged in the indictment, is not of itself sufficient to sustain the indictment."

13. Hurd *v.* Atkins, 1 Colo. App. 449, 29 Pac. 528; State *v.* Cutter, 36 N. J. L. 125; People *v.* Whaley, 6 Cow. (N. Y.) 661; State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50; Rex *v.* Gilham, 1 Esp. 285, 6 T. R. 265. But *compare* Wilson *v.* Barrett, 24 Pa. Super. Ct. 68.

14. White *v.* State, 56 Ga. 385; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610.

15. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; State *v.* McEntyre, 25 N. C. 171; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

De facto or de jure.— In Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360, defendant, who was county judge, was reëlected on November 6. The offense charged was committed on November 15, and he did not qualify under his reëlection until the 21st day of November. It was held that defendant might be held liable either as *de facto* or *de jure*.

Estoppel.— "The officer need not possess a legal title to the office whose functions he executes. A person who serves as an officer and claims to be one is estopped to deny his official appointment." Kirby *v.* State, 57 N. J. L. 320, 321, 31 Atl. 213.

Failure to take oath of office.— It will not avail the defendant if, although duly elected, he has not at the time of the offense taken the oath of office. State *v.* Cansler, 75 N. C. 442.

16. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; State *v.* Bauer, 1 N. D. 273, 47 N. W. 378.

17. Collier *v.* State, 55 Ala. 125; Cleaveland *v.* State, 34 Ala. 254; State *v.* Cansler, 75 N. C. 442; State *v.* Bauer, 1 N. D. 273, 47 N. W. 378.

What constitutes "color of office."— If an officer arrests a man on a warrant which he knows to be forged and thereby extorts money from him, he takes it under color of his office, and so commits this offense. Reg. *v.* Tracy, 6 Mod. 30.

18. White *v.* State, 56 Ga. 385; Ferkel *v.* People, 16 Ill. App. 310. But see People *v.* Whaley, 6 Cow. (N. Y.) 661, where it is said to be sufficient if the extorting was by color of office.

Private gain.— In White *v.* State, 56 Ga. 385, it is said that if the money be used in good faith to settle a dispute, and not for the officer's own use, he is not liable. *Compare* also Rex *v.* Dobson, 7 East 218, 3 Smith K. B. 213.

19. Com. *v.* Bagley, 7 Pick. (Mass.) 279; Rex *v.* Harrison, 1 East P. C. 382; Rex *v.* Loggen, 1 Str. 73. See Rex *v.* Harrison, 1 East P. C. 382, where a coroner was held to be guilty who refused to take the view of a dead body until his fee had been paid.

20. *Indiana.*— State *v.* Burton, 3 Ind. 93.
Missouri.— State *v.* Vasel, 47 Mo. 444.
New Jersey.— State *v.* Maires, 33 N. J. L. 142. See also Lane *v.* State, 49 N. J. L. 673, 10 Atl. 360.

county treasurer exacts a fee from a taxpayer for a distress and sale of his goods when none has been made,[21] or a justice refuses to take a recognizance and grant an appeal unless the fees for granting be first paid[22] or denies an adjournment because a defendant refuses to pay his fees for drawing a bond,[23] he is guilty of extortion.

4. For Services Not Rendered. Constructive costs cannot be charged, and when an officer claims costs for official services he must be able to show that the services charged for have been actually rendered.[24] Therefore if defendant in execution pay the amount due thereon to plaintiff in person, the officer can demand nothing as fees for collecting.[25]

5. Thing Taken — a. Must Be of Value. While in the perpetration of this offense money is usually taken, yet in the absence of statutory provisions it need not be that alone,[26] but it is essential that it be something of real value.[27]

b. Note or Promise Insufficient. Therefore a mere promise[28] or a note[29] will not be sufficient, at least while in the hands of the promisee.[30]

III. Criminal Prosecution.[31]

A. In General. Extortion being a public wrong at common law was punished by an indictment and prosecution at the instance of the king;[32] and under

New York.— People *v.* Calhoun, 3 Wend. 420.

Tennessee.— State *v.* Merritt, 5 Sneed 67.

England.— Hescott's Case, 1 Salk. 330.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

Compare Com. *v.* Bagley, 7 Pick. (Mass.) 279, 281 (where the court said: "There is certainly no right in a prison-keeper to demand a fee for letting a man out of prison the moment he is put in, and it is extortion at the common law to receive, by color of office, a fee before it is due, though no more is taken than will in all probability soon become due. And the common law is not repealed by the statute which prescribes and limits the penalty"); State *v.* Raynolds, Tapp. (Ohio) 213 (where it is said: "Receiving fees before they are due, at the instance, and for the accommodation, of the person paying them, I should not think extortion").

Where the head of a labor organization threatened and did put into operation a scheme termed a "boycott" for lessening and damaging the business of a manufacturing firm because they failed to obey his commands in reference to the number of their employees, and when they submitted, demanded, and received money as the price for abandoning the scheme, he was guilty of extortion. People *v.* Hughes, 137 N. Y. 29, 32 N. E. 1105.

21. State *v.* Burton, 3 Ind. 93.

22. Levy *v.* Inglish, 4 Ark. 65.

23. People *v.* Calhoun, 3 Wend. (N. Y.) 420.

24. Williams *v.* State, 2 Sneed (Tenn.) 160; Cross *v.* State, 1 Yerg. (Tenn.) 261; Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360.

No fees are due until the service is rendered. It is extortion in any officer to take any money by color of his office, where he has not done the particular service for which the fee is allowed. Williams *v.* State, 2 Sneed (Tenn.) 160.

25. Cross *v.* State, 1 Yerg. (Tenn.) 261. In Brackenridge *v.* State, 27 Tex. App. 513, 528, 11 S. W. 630, 4 L. R. A. 360, a statute allowed the county judge three dollars for each criminal action "tried and finally disposed of" before him. It was held that a criminal action dismissed was not a criminal action "tried and finally disposed of." The court saying: "It is a final disposition of that particular case, but not a trial of it," and a presentation of an account for such amounts to a demand, and renders the party liable by the statute.

26. Rex *v.* Burdett, 1 Ld. Raym. 148; Roy *v.* Eyres, 1 Sid. 307.

27. Roy *v.* Eyres, 1 Sid. 307, in which case it was held to be extortion for a church warden to obtain a silver cup by color of his office.

28. Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165.

"[A] promise of a bribe to a bailiff to take bail, is illegal, and will not maintain an action." Stotesbury *v.* Smith, 2 Burr. 924.

29. Com. *v.* Cony, 2 Mass. 523; Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165.

Reason.— It was a doctrine of the common law, founded in public policy, that an officer shall be confined to the compensation or fee prescribed, and therefore a promise to pay money for doing that which the law did not suffer him to take anything for, or to pay more than was allowed by law, was void, however freely and voluntarily made. And this principle is followed by the highest courts in this country. Jackson *v.* Siglin, 10 Oreg. 93.

30. Com. *v.* Cony, 2 Mass. 523; Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165.

31. Criminal prosecution generally see Criminal Law.

32. 1 Hawkins P. C. c. 68, § 5.

the statutes, with but few exceptions,[33] this offense is similarly punishable at the instance of the commonwealth.[34]

B. Indictment[35]**— 1. Form.** While at common law certain words seem to have been necessary in the indictment for this offense,[36] yet it seems that no fixed form has ever been required, even by statute.[37]

2. Description of Offense. The indictment, as upon any criminal charge, must be laid with certainty.[38] It must contain a definite description of the crime charged, and a statement of the facts which constitute it,[39] specifically setting forth the merits of the complaint.[40]

3. Intent. An evil intent being a necessary element of the act,[41] an indictment must allege the existence of such intent.[42] For this purpose it is sufficient to allege that defendant took the money "extorsively"[43] or "wilfully and knowingly."[44] It has been held, however, that in charging this intent it is not necessary, in the absence of some special statutory requirement to that effect, to allege that the act was committed by defendant "knowingly"[45] or that it

33. **In a few jurisdictions** the courts seem to have, under certain statutes, held the common law to be repealed and the remedy a civil one only. See Pankey *v.* People, 2 Ill. 80. *Compare* Ferkel *v.* People, 16 Ill. App. 310.

Civil action for extortion see *infra*, IV.

34. See cases cited *supra*, note 3.

35. **Indictment or information** generally see Indictments and Informations.

36. Leeman *v.* State, 35 Ark. 438, 444, 37 Am. Rep. 44, where it is said: "The technical words in an indictment for extortion at common law are 'extort' and 'by color of office.'" See also 2 Bishop New Cr. Proc. § 358.

An indictment against school directors for conspiracy to commit extortion by taking fees and rewards for procuring the election of persons to the position of school-teacher is not bad because it does not contain the words "extort" or "extorsively" as descriptive of the offense. Com. *v.* Brown, 23 Pa. Super. Ct. 470.

37. Reg. *v.* Tisdale, 20 U. C. Q. B. 272. But see 2 Bishop New Cr. Proc. §§ 357, 358.

38. Davy *v.* Baker, 4 Burr. 2471.

39. Garner *v.* State, 5 Yerg. (Tenn.) 160; State *v.* Fields, Mart. & Y. (Tenn.) 137; Cohen *v.* State, 37 Tex. Cr. 118, 38 S. W. 1005. In State *v.* Packard, 4 Oreg. 157, 160, the court said: "An indictment cannot be said to describe the offense in the words of the statute, or in any words, unless it charges the acts which constitute the offense, and when an act is not criminal, unless done under particular circumstances referred to in the statute, the indictment does not follow the statute, or describe the offense in the words of the statute unless it is direct and certain as to those particular circumstances mentioned in the statute." An indictment for extortion charging a constable with having collected more than was due on an execution should set out the recital in the execution showing the judgment on which the execution was issued, and the names of both parties to the execution should be alleged. Seany *v.* State, 6 Blackf. (Ind.) 403.

Effect of failure to describe.— The judgment will be arrested upon the findings of a jury on an indictment against a constable for extortion in "that he oppressively sued out an execution," unless the facts which constituted the oppression are set forth in the indictment and found by the jury. State *v.* Fields, Mart. & Y. (Tenn.) 137.

If a statute specifies the thing forbidden to be taken, the indictment to be good thereunder must specify the particular thing and it must be proved. Garner *v.* State, 5 Yerg. (Tenn.) 160.

40. Oliveira *v.* State, 45 Ga. 555.

Conspiracy to extort — alleging taking of money.— An indictment against school directors for conspiracy to commit extortion by taking fees and rewards for procuring the election of persons to the position of school-teacher is not bad because it does not allege that any money was taken from the persons appointed school-teachers as a fee for official services. Com. *v.* Brown, 23 Pa. Super. Ct. 470.

41. See *supra*, II, C.

42. Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44; Loftus *v.* State, (N. J. Err. & App. 1890) 19 Atl. 183; State *v.* Cansler, 75 N. C. 442; Mann *v.* State, 47 Ohio St. 556, 26 N. E. 226, 11 L. R. A. 656. In State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50, it is said: "In indictments for both bribery and extortion, it is essential to allege, and, upon the trial, to prove, that the act charged was done with a wilful and corrupt intent. It is also necessary, in an indictment for extortion, to charge, and, upon the trial, to prove, that the unlawful fees were demanded 'under color of office.'"

43. Loftus *v.* State, (N. J. Err. & App. 1890) 19 Atl. 183.

"Extorsively" is a technical word used in indictments for extortion (Bouvier L. Dict.) and is a term which is descriptive of the crime and charges a corrupt purpose (Loftus *v.* State, (N. J. Err. & App. 1890) 19 Atl. 183, 184 [*citing* State *v.* Cutter, 36 N. J. L. 125; Reg. *v.* Baines, 2 Ld. Raym. 1265, 2 Salk. 680; 2 Starkie Cr. Pl. 140]. See also Leeman *v.* State, 35 Ark. 438, 444, 37 Am. Rep. 44.

44. Ridenhour *v.* State, 75 Ga. 382.

45. State *v.* Jones, 71 Miss. 872, 15 So. 237.

was committed by him "corruptly," [46] an allegation of the evil intent being sufficient.

4. Color of Office and Official Capacity. As extortion can be committed by one only under color of his office,[47] it is necessary to allege an official capacity, and that the act was done under color thereof,[48] and a failure so to do constitutes ground for an arrest of judgment.[49]

5. Time and Place of Commission. Time and place of commission are material averments and must be alleged and proved.[50]

6. Services For Which Fees Were Exacted. It is also necessary that the indictment should designate the services for which the illegal fees were charged.[51]

7. When No Fees Are Allowed. If the prosecution is for taking fees for services for which no compensation is by law given, the indictment should allege that no fees were allowed by law.[52]

8. When Excessive Fees Are Taken. If the prosecution is for the taking of fees in excess of those allowed by law, the indictment must show the excess and the legal charge.[53]

46. Reg. *v.* Tisdale, 20 U. C. Q. B. 272.

47. See *supra*, II, D, 2.

48. *Arkansas.*— Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44.

Georgia.— Herrington *v.* State, 103 Ga. 318, 29 S. E. 931, 68 Am. St. Rep. 95.

Minnesota.— State *v.* Brown, 12 Minn. 490.

Montana.— Territory *v.* McElroy, 1 Mont. 86.

New Jersey.— Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213.

North Carolina.— State *v.* Cansler, 75 N. C. 442.

Oregon.— State *v.* Packard, 4 Oreg. 157.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

Sufficient allegation see Rex *v.* Hollond, 5 T. R. 607, where it is said: "In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer without shewing his appointment."

Insufficient allegation see State *v.* Pritchard, 107 N. C. 921, 12 S. E. 50, where it is said that an indictment for extortion which fails to charge that the money was taken "under color of office" is insufficient.

49. State *v.* Lubin, 42 La. Ann. 79, 7 So. 68.

50. Ferkel *v.* People, 16 Ill. App. 310; Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165; Halsey *v.* State, 4 N. J. L. 324; Rex *v.* Roberts, 4 Mod. 101.

Sufficient averment.— An averment in an indictment that defendant did "then and there" do the acts alleged as an offense when the only place mentioned in the indictment is in the description of the court as "district court for the county of Nicollet," and of the office held by defendant as "judge of probate of the county of Nicollet," does not show the county in which the offense was committed. State *v.* Brown, 12 Minn. 490.

51. State *v.* Couch, 40 Mo. App. 325; State *v.* Perham, 4 Oreg. 188; State *v.* Packard, 4 Oreg. 157.

52. State *v.* Coggswell, 3 Blackf. (Ind.) 54, 23 Am. Dec. 379; Halsey *v.* State, 4 N. J. L. 324; Poole *v.* State, 22 Tex. App. 685, 3 S. W. 476.

In New Jersey, in State *v.* Maires, 33 N. J. L. 142, it is said that in a case where by force of the general statute an officer is entitled to no fee for particular service or for a fee, the amount of which is unchangeably prescribed, the indictment need not allege the absence of a right to any fee, or the lawful fee. For similar views see Loftus *v.* State, (N. J. Err. & App. 1890) 19 Atl. 183; State *v.* Dickens, 2 N. C. 406; State *v.* Packard, 4 Oreg. 157.

53. *Georgia.*— Oliveira *v.* State, 45 Ga. 555.

Indiana.— State *v.* Coggswell, 3 Blackf. 54, 23 Am. Dec. 379.

Minnesota.— State *v.* Brown, 12 Minn. 490.

New York.— People *v.* Rust, 1 Cai. 131.

Texas.— Smith *v.* State, 10 Tex. App. 413.

England.— Ashby *v.* Harries, 5 Dowl. P. C. 742, 2 M. & W. 673.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

Compare State *v.* Perham, 4 Oreg. 188.

Insufficient allegation.— An indictment alleging that defendants did "demand and receive fees more than was due" is insufficient. State *v.* Couch, 40 Mo. App. 325.

Following the language of the statute will not, it seems, be sufficient. Oliveira *v.* State, 45 Ga. 555. See also cases cited *supra*, this note.

In New Jersey and Oregon it has been held that where the lawful fee is certain, and unchangeable by circumstances, in order to show the amount of the overcharge it is only necessary for the indictment to aver the amount actually demanded and received. Where, however, the law does not thus fix the legal fee, but establishes a rate of lawful charge to be applied to varying circumstances, as a rate per folio, applicable to the number of folios written, it would plainly be necessary, in order to show the unlawful excess taken for the indictment, to aver the amount of that which might lawfully be taken, or at least the facts by which it could

9. Reference to Statute Violated. The indictment need not specify the section of the statute violated. It is good if the offense falls within any section.[54]

C. Defenses[55] **— 1. Ignorance or Mistake of Fact.** One is not guilty of this offense if in acting under an honest mistake of fact he does that which would otherwise be extortion.[56]

2. Ignorance or Mistake of Law. The general rule that ignorance or mistake of law excuses no one is, it is believed by the weight of authority, held to apply to this offense.[57] But in New Jersey it is held that, inasmuch as a guilty intent is a necessary constituent of the particular offense, the rule would be misapplied;[58] and the same view is taken in Arkansas.[59]

3. Thing Taken of No Value. That the thing taken was not of sufficient value to constitute the offense constitutes a good defense.[60]

4. Irregularity of Qualification. If one is elected to an office and assumes the duties thereof, it is no defense that he has not taken the oath of office.[61]

5. Non-Existence of Office. That the office never had a legal existence has been held to be a good defense to a criminal prosecution under a statute.[62]

D. Evidence[63] **— 1. Admissibility — a. As to Intent.** In order to throw light upon the question of guilty intention the officer's experience and acquaintance

be ascertained. Loftus *v.* State, (N. J. Err. & App. 1890) 19 Atl. 183, 184; State *v.* Packard, 4 Oreg. 157. See also State *v.* Maires, 33 N. J. L. 142.

Under Tex. Pen. Code, art. 240, prohibiting the reception of "higher fees than are allowed by law," it has been held that an indictment was bad if on its face it showed services for which no fees were allowed. State *v.* Smythe, 33 Tex. 546; Smith *v.* State, 10 Tex. App. 413.

54. Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509. In this case the district attorney indorsed on the margin of the indictment the sections under which he conceived the crime to fall. The indictment was good, although the offense fell under another section, the indorsements being regarded as mere surplusage.

But if the existence of the offense depends upon some certain statute such statute must be valid and constitutional or the indictment will be dismissed. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610. *Compare* Herrington *v.* State, 103 Ga. 318, 29 S. E. 931, 68 Am. St. Rep. 95.

55. Confusion of fees as a defense see *infra*, IV, D, 3.

56. Smith *v.* State, 10 Tex. App. 413; People *v.* Monk, 8 Utah 35, 36, 28 Pac. 1115 (where it is said: "A distinction should be made when the act sought to be punished arises from a mistake of fact, rather than from a mistake of law. 'One who, while careful and circumspect, is led into a mistake of fact, and doing what would be in no way reprehensible were they what he supposed them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime'"); Bowman *v.* Blyth, 7 E. & B. 26, 3 Jur. N. S. 359, 26 L. J. M. C. 57, 5 Wkly. Rep. 86, 90 E. C. L. 26.

57. *Georgia.*— Levar *v.* State, 103 Ga. 42, 29 S. E. 467.

Massachusetts.— Com. *v.* Bagley, 7 Pick. 279.

North Carolina.— State *v.* Dickens, 2 N. C. 406.

Tennessee.— State *v.* Merritt, 5 Sneed 67.

Utah.— People *v.* Monk, 8 Utah 35, 28 Pac. 1115.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

But *compare* Ryan *v.* State, 104 Ga. 78, 30 S. E. 678, holding that where a prosecutor falsely pretending to the wife of one accused of crime induces the wife to pay him money to bring about such compromise, in a prosecution of the prosecutor as a cheat and swindler, the wife's ignorance of the law as to the prosecutor's power to compromise crime is no defense.

Usage not a defense.— It was held in Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165, that usage could not be set up by one as a defense in a criminal prosecution.

58. State *v.* Cutter, 36 N. J. L. 125. In this case, however, it is intimated that the rule might be otherwise, where the law is plain and settled.

59. Leeman *v.* State, 35 Ark. 438, 37 Am. Rep. 44. See also Cleaveland *v.* State, 34 Ala. 254; Reg. *v.* Tisdale, 20 U. C. Q. B. 272, where it is intimated that extraordinary ignorance of the law might be a defense.

60. As for example the reception of a note or promise. Com. *v.* Cony, 2 Mass. 523; Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165. See *supra*, II, D, 5.

61. State *v.* Cansler, 75 N. C. 442.

Who may commit offense see *supra*, II, B.

62. Herrington *v.* State, 103 Ga. 318, 29 S. E. 931, 68 Am. St. Rep. 95; Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610. But it seems that this defense would not be valid against an indictment for the common-law offense. See *supra*, II, A, B.

63. Evidence generally see Criminal Law; Evidence.

with his duties may be shown.[64] Likewise, for the same purpose, a prior indictment against one for a like offense has been held admissible.[65]

b. **Memorandum.** A memorandum, to be admissible as independent evidence of the payment of an illegal fee, must be free from ambiguity or uncertainty.[66]

c. **Return Upon Process.** The return which an officer makes upon an execution of process is not conclusive evidence of its truth, but may be contradicted by extrinsic evidence.[67]

2. **Burden of Proof.** Defendant has the right on a trial for extortion to show that the fees were taken through a mistake, and the burden of proof is on him to show the same.[68]

3. **Involuntary Payment.** It has been held that a failure to offer evidence that the payment was involuntary was fatal.[69]

4. **Variance.** In the prosecutions for this offense the rules against variance apply, it being necessary that the allegations and proof correspond.[70] But it has been held that the exact sum alleged need not be proven.[71]

E. Motion in Arrest of Judgment. Where the indictment fails to contain any essential allegation,[72] as where it fails to state the time, to properly set forth the facts of the offense, or to state that the accused was an officer, these being defects of substance, a motion in arrest of judgment will be sustained.[73]

F. Appeal.[74] The recognizance on appeal must recite the offense contained in the indictment.[75]

G. Punishment. At common law extortion was punished by a fine and imprisonment, and also by forfeiture of the office under color of which it was

64. White *v.* State, 56 Ga. 385.

Parol evidence to this effect is not secondary. White *v.* State, 56 Ga. 385. See Evidence, 17 Cyc. 465 *et seq.*

For evidence of guilty intent see People *v.* McLaughlin, 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005, 11 N. Y. Cr. 97; Cohen *v.* State, 37 Tex. Cr. 118, 38 S. W. 1005; Reg. *v.* Cooper, 3 Cox C. C. 547.

65. Brackenridge *v.* State, 27 Tex. App. 513, 11 S. W. 630, 4 L. R. A. 360, to which purpose the said evidence was expressly limited by the court.

66. People *v.* McLaughlin, 150 N. Y. 365, 44 N. E. 1017 [*overruling* 2 N. Y. App. Div. 419, 37 N. Y. Suppl. 1005, 11 N. Y. Cr. 97]. *Compare* Williams *v.* U. S., 168 U. S. 382, 18 S. Ct. 92, 42 L. ed. 509, where an affidavit and bank-book were held to be irrelevant evidence of payment and receipt of money claimed to have been obtained by extortion.

67. Williams *v.* State, 2 Sneed (Tenn.) 160. See Executions, 17 Cyc. 1379.

68. Fowler *v.* Tuttle, 24 N. H. 9; State *v.* Cutter, 36 N. J. L. 125. See also Triplett *v.* Munter, 50 Cal. 644, where the same rule was held to obtain in civil cases.

69. U. S. *v.* Harned, 43 Fed. 376. See also Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165.

70. Seany *v.* State, 6 Blackf. (Ind.) 403; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610. *Compare* Williams *v.* U. S., 93 Fed. 396, 35 C. C. A. 369, where, the indictment alleging that money was extorted from one person, and the evidence showing that when the extorsive demand was made on such person he obtained the money from another in defendant's presence and handed it to defendant, the variance was not fatal.

For illustrations of fatal variance see State *v.* Bisaner, 97 N. C. 503, 2 S. E. 368 (charged as tax-collector but shown to be a deputy sheriff); Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610 (charged with extortion from three persons and evidence showing extortion from a fourth not named in the indictment); Garner *v.* State, 5 Yerg. (Tenn.) 160 (charged with having received "lawful money of the State of Tennessee" but shown to have received a bank-note); State *v.* Smythe, 33 Tex. 546 (defining two offenses, one of which was the charging of "other" fees, and the second the charging of "higher" or "greater" fees, proof of one will not sustain an indictment for the other).

71. Rex *v.* Gilham, 1 Esp. 285, 6 T. R. 265.

72. See *supra*, III, B.

73. State *v.* Fields, Mart. & Y. (Tenn.) 137. See also State *v.* Lubin, 42 La. Ann. 79, 7 So. 68; Rex *v.* Roberts, 4 Mod. 101. But in Moore *v.* Boswell, 5 Mass. 306, it is said: "Judgment will not be arrested after verdict for the plaintiff if a sufficient title to the action be set forth, though it be defectively declared."

74. **Appeal** generally see Appeal and Error.

75. Schoonmaker *v.* State, 37 Tex. Cr. 424, 35 S. W. 969, in which case the recognizance recited that appellant was convicted of "extortion," when in fact the charge against him was for "demanding and receiving, as an officer, higher fees than are allowed by law." "Extortion" not being an offense *eo nomine* in that state, it was held to be bad.

committed.[76] In the United States the punishment is generally regulated by statute, although in some instances modifying the common law but little.[77]

IV. ACTION TO RECOVER PENALTIES.[78]

A. Statutory Provisions — 1. NATURE AND OBJECT. While extortion in its larger sense signifies any oppression under color of right, yet technically it is an official misdemeanor.[79] Statutes have been passed, both in England[80] and the United States,[81] imposing a penalty upon officers who under certain circumstances take illegal or excessive fees. Owing to the construction or interpretation of these statutes one may be guilty of extortion at common law, although not subject to the penalty.[82] As the offense consists in the oppressive misuse of the exceptional power with which the incumbent of an office is by law invested, the object of the statute is a punishment for the abuse of such official power, not improper conduct or fraud.[83]

2. CONSTITUTIONALITY. In some jurisdictions questions have arisen concerning the constitutionality of these statutes, but they have been uniformly upheld.[84]

3. EFFECT UPON COMMON-LAW LIABILITY. It is generally held that the statutes imposing a penalty are merely enabling, and do not repeal the common law.[85]

4. HOW CONSTRUED. These statutes being penal in their nature[86] are usually subjected to a strict construction by the courts.[87]

B. Requisites to Liability — 1. CERTAINTY OF AMOUNT. It is generally necessary before one incurs the penalties prescribed by statute for the taking of illegal fees that they be fixed and provided for by law.[88] It has consequently been held that if no compensation is fixed for one's services, nor any provision

76. 1 Hawkins P. C. 171.

77. See the statutes of the several states. See also *supra*, II, A.

78. Action to recover penalty generally see PENALTIES.

79. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213; 1 Hawkins P. C. c. 68, § 1.

80. 29 Eliz. c. 4, § 1. See also Wrightup *v.* Greenacre, 10 Q. B. 1, 59 E. C. L. 1.

81. See the statutes of the several states. Mills Annot. St. Colo. § 1301, imposes upon any officer who shall wilfully and knowingly demand or receive any fee or compensation where no fee or compensation is authorized or prescribed by law the penalty of imprisonment, fine, and liability to civil action for three times the value or the amount of the fee or compensation so taken. Mitchell *v.* Wheeler, (Colo. App. 1904) 77 Pac. 361.

82. Shattuck *v.* Woods, 1 Pick. (Mass.) 171; Com. *v.* Dennie, Thach. Cr. Cas. (Mass.) 165; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610; Garber *v.* Conner, 98 Pa. St. 551.

83. Kirby *v.* State, 57 N. J. L. 320, 31 Atl. 213. See also Collier *v.* State, 55 Ala. 125; Fox *v.* Whitney, 33 N. H. 516.

84. Ryan *v.* Johnson, 5 Cal. 86; Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455.

85. Levy *v.* Inglish, 4 Ark. 65; Com. *v.* Bagley, 7 Pick. (Mass.) 279; Shattuck *v.* Woods, 1 Pick. (Mass.) 171; State *v.* Jones, 71 Miss. 872, 15 So. 237; Com. *v.* Saulsbury, 152 Pa. St. 554, 25 Atl. 610; Garber *v.* Conner, 98 Pa. St. 551. *Contra*, Pankey *v.* People, 2 Ill. 80. But see Ferkel *v.* People, 16 Ill. App. 310.

86. *Colorado.*— Mitchell *v.* Wheeler, (App. 1904) 77 Pac. 361; Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050.

Connecticut.— Stoddard *v.* Couch, 23 Conn. 238.

Pennsylvania.—Aechternacht *v.* Watmough, 8 Watts & S. 162 [*overruling* Jackson *v.* Purdue, 3 Penr. & W. 519]; Gallagher *v.* Neal, 3 Penr. & W. 183; Reed *v.* Cist, 7 Serg. & R. 183.

Texas.— Smith *v.* State, 10 Tex. App. 413.

Vermont.— Wheelock *v.* Sears, 19 Vt. 559.

England.—Woodgate *v.* Knatchbull, 2 T. R. 148, 1 Rev. Rep. 449.

See 23 Cent. Dig. tit. "Extortion," § 11.

87. *Alabama.*— Lee *v.* Lide, 111 Ala. 126, 20 So. 410.

Connecticut.— Stoddard *v.* Couch, 23 Conn. 238.

New Hampshire.— Scammon *v.* Tilton, 23 N. H. 434.

North Dakota.— See State *v.* Bauer, 1 N. D. 273, 47 N. W. 378.

Oregon.— Jackson *v.* Siglin, 10 Oreg. 93.

Pennsylvania.— Gallagher *v.* Neal, 3 Penr. & W. 183. *Compare* Wilson *v.* Barrett, 24 Pa. Super. Ct. 68.

Texas.—Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639; Hays *v.* Stewart, 8 Tex. 358.

See 23 Cent. Dig. tit. "Extortion," § 11; cases cited *supra*, note 86; and, generally, STATUTES.

88. *Colorado.*— Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050.

Massachusetts.—Shattuck *v.* Woods, 1 Pick. 171; Runnells *v.* Fletcher, 15 Mass. 525.

Nebraska.— Lydick *v.* Palmquist, 31 Nebr. 300, 47 N. W. 918.

made,[89] the remedy against him would be an action for money had and received, and not for the penalty.[90]

2. **Liability of One Paying.** It is also necessary, to incur the penalty, that the fees be taken from one who is liable therefor.[91]

3. **Rendition of Services a Duty.** It is not unlawful for an officer to receive compensation for services, the performance of which is not a part of his official duty.[92]

4. **Transaction Not Severable.** Where an officer makes several illegal charges he is liable to but one penalty if they can all be considered as one bill or transaction.[93]

5. **Right to Demand.** While, to be guilty of extortion, it is only necessary that the one taking be an officer, yet to incur the penalty it is, in some jurisdictions at least, necessary that he also have a right to charge fees for his services.[94]

6. **Liability For Deputy's Acts.** While an officer cannot be held criminally liable for his deputy's acts, he is liable for the penalty incurred by the latter's official misconduct.[95] Nor is it necessary to show that the officer has

New Hampshire.— Wilcox *v.* Bowers, 36 N. H. 372.

Pennsylvania.— Simmons *v.* Kelly, 33 Pa. St. 190.

Texas.— See Smith *v.* State, 10 Tex. App. 413.

See 23 Cent. Dig. tit. " Extortion," § 11 *et seq.*

89. Chenault *v.* Walker, 15 Ala. 605. In Walker *v.* Ham, 2 N. H. 238, a sheriff demanded and received of defendant three dollars over and above the ordinary fees on account of extra trouble and expense in executing the writ. The statute of New Hampshire did not prescribe any compensation for such services, nor deny the sheriff the right to receive it. It was held that the sheriff was not liable for the penalty. But see Martin *v.* Bell, 6 M. & S. 220, 1 Stark. 413, 18 Rev. Rep. 354, 2 E. C. L. 160.

Does not vitiate transaction.— If a sheriff in making an extent of an execution upon land charges illegal fees and deducts them from the sum at which the lands are appraised and applies the residue to the satisfaction of the execution, he incurs the penalty prescribed for taking illegal fees, and may be compelled by an action to refund the amount, but the validity of the extent is not affected by the illegal fees. Burnham *v.* Aiken, 6 N. H. 306.

90. Walker *v.* Ham, 2 N. H. 238. *Contra,* Simmons *v.* Kelly, 33 Pa. St. 190, in which jurisdiction the law contains an express prohibition of all compensatory fees.

91. Marshall *v.* Byram, 1 Bibb (Ky.) 341; Lincoln *v.* Shaw, 17 Mass. 410; Dunlap *v.* Curtis, 10 Mass. 210.

As to voluntary payment.— In Illinois (People *v.* Rainey, 89 Ill. 34), it was held by a divided court that to render one liable for the penalty the payment must not have been voluntary. But in Montana (Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498) and in Pennsylvania (Evans *v.* Harney, 17 Pa. St. 460) the rule is laid down as otherwise.

92. Dutton *v.* Philadelphia, 9 Phila. (Pa.) 597.

What constitutes a rendition of services.— In Jackson *v.* Siglin, 10 Oreg. 93, F obtained a judgment in the circuit court for a large sum, and upon execution sold property to the amount of forty-one thousand dollars. A, as agent of F, bid off the property, but no money was paid to the sheriff except his fees, the credit being indorsed on the execution and thus returned. J, the county clerk, considered this return as equivalent to the return of the money made on execution, and claimed the legal commissions " for receiving, keeping, and disbursing " the amount. It was held that, inasmuch as no money was actually received or disbursed, he was not so entitled, and a promise to pay him such commissions was void.

93. Bristow *v.* Sullivan, 6 B. Mon. (Ky.) 143; Lydick *v.* Palmquist, 31 Nebr. 300, 47 N. W. 918; Tanner *v.* Croxall, 17 N. J. L. 332.

94. Garber *v.* Conner, 98 Pa. St. 551. In Ferkel *v.* People, 16 Ill. App. 310, the averment was that defendant was a " town marshal or police officer." It was held insufficient, as the term " police officer " did not designate any one authorized by law to charge any fee.

Need not be convicted criminally.—It is not necessary in a civil suit to recover the penalty for the taking of illegal fees that the officer be first convicted in a criminal action. Ming *v.* Truett, 1 Mont. 322.

Services not rendered.— Whether or not an officer would be liable to the penalty for taking fees for services in no way performed depends upon the statutes. See Shattuck *v.* Woods, 1 Pick. (Mass.) 171; Dean *v.* Todd, 49 S. C. 461, 27 S. E. 471.

95. Lee *v.* Lide, 111 Ala. 126, 20 So. 410; Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549; McIntyre *v.* Trumbull, 7 Johns. (N. Y.) 35; Overholtzer *v.* McMichael, 10 Pa. St. 139; Blake *v.* Newburn, 5 D. & L. 601, 12 Jur. 882, 17 L. J. Q. B. 216, 2 Saund. & C. 263. See also Fowler *v.* Tuttle, 24 N. H. 9. In Sanderson *v.* Baker, 2 W. Bl. 832, 3 Wils. C. P. 309, 316, the court, per Gould, J., said:

recognized or adopted the acts of his deputy in order to fix his liability therefor.[96]

7. Liability of Sureties on Bond. The liability of the sureties on an officer's bond for a penalty depends upon statutory provisions.[97] Such liability is, however, never extended by implication.[98]

C. The Action — 1. Form.[99] At common law debt was the action to recover the penalty prescribed by a statute.[1]

2. By Whom Brought.[2] The statutes generally require that the action for the penalty be instituted by the party injured,[3] although in some jurisdictions such does not seem to be the case,[4] and it is sometimes difficult to determine who constitutes the injured party within the meaning of the particular statute.[5]

3. Declaration[6] — a. Statement of Services. In an action to recover the

"As to the sheriff's liability to answer *civiliter*, and not *criminaliter* for the acts of his officers, the books mean that the sheriff is not liable to an indictment."

Must be in ordinary line of duty.— The sheriff is answerable *civiliter* for all acts of his deputy done "*virtute officii*," but he cannot be rendered liable on a contract between plaintiff and deputy by which the latter binds himself to acts or omissions not authorized or required by law. He is not answerable for the acts of his deputy unless they are performed in the ordinary line of his official duty. Gorham *v.* Gale, 7 Cow. (N. Y.) 739, 17 Am. Dec. 549.

Both not liable.— The sheriff and the bailiff are not both answerable in an action for a penalty for the same act, and actions having been brought against both, and a verdict obtained in each, the court stayed the proceedings on payment of one penalty and one costs in one action. Peshall *v.* Layton, 2 T. R. 712.

96. McIntyre *v.* Trumbull, 7 Johns. (N. Y.) 35.

97. See McElhaney *v.* Gilleland, 30 Ala. 183; Monte Vista State Bank *v.* Brennan, 7 Colo. App. 427, 43 Pac. 1050.

98. *Alabama.*— Brooks *v.* Governor, 17 Ala. 806.

Illinois.— Tappan *v.* People, 67 Ill. 339.

Michigan.— Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456.

Mississippi.— State *v.* Baker, 47 Miss. 88.

New Jersey.— State *v.* Conover, 28 N. J. L. 224, 78 Am. Dec. 54.

North Carolina.— Holt *v.* McLean, 75 N. C. 347.

Wisconsin.— Taylor *v.* Parker, 43 Wis. 78.

See 23 Cent. Dig. tit. "Extortion," § 1 *et seq.*

99. Debt generally see Debt, Action of.

1. Spence *v.* Thompson, 11 Ala. 746; Stilson *v.* Tobey, 2 Mass. 521; Detroit Sav. Bank *v.* Ziegler, 49 Mich. 157, 13 N. W. 496, 43 Am. Rep. 456; Martin *v.* Bell, 6 M. & S. 220, 1 Stark. 413, 18 Rev. Rep. 354, 2 E. C. L. 160. Counts in debt for the statute penalties may be joined with one for money had and received where the entire recovery goes to the party aggrieved. Spence *v.* Thompson, *supra*.

2. Parties generally see Parties.

3. *Alabama.*— Lee *v.* Lide, 111 Ala. 126, 20 So. 410.

Nebraska.— Iler *v.* Cronin, 34 Nebr. 424, 51 N. W. 970.

Pennsylvania.— Evans *v.* Harney, 17 Pa. St. 460; Miller *v.* Lockwood, 17 Pa. St. 248.

South Carolina.— Tinsley *v.* Kirby, 8 S. C. 113.

Texas.— Orton *v.* Engledow, 8 Tex. 206.

Vermont.— Johnson *v.* Burnham, 22 Vt. 639.

England.— Troy's Case, 1 Mod. 5; Woodgate *v.* Knatchbull, 2 T. & R. 148, 1 Rev. Rep. 449.

See 23 Cent. Dig. tit. "Extortion," § 11.

Cannot be brought by two.— Where the statute awarded the penalty "to the person who will sue for same," it was held that the action could not be maintained in the name of two suing as partners. Fowler *v.* Tuttle, 24 N. H. 9.

4. *In re* Marks, 45 Cal. 199.

5. Evans *v.* Harney, 17 Pa. St. 460; Miller *v.* Lockwood, 17 Pa. St. 248; Johnson *v.* Burnham, 22 Vt. 639, where it is said: "An officer, who charges a greater amount of fees than is allowed by law, for serving a writ, and who receives the amount so charged from the plaintiff in that suit, while that suit is pending in court, is liable to the plaintiff, from whom he so receives payment, for the penalty imposed by statute for receiving illegal fees, notwithstanding the plaintiff subsequently obtained judgment in his favor, in the suit in which the fees were charged, and the fees, as charged by the officer, were taxed in the bill of cost and paid to the attorney of the plaintiff by the defendant in that suit."

Cannot be brought by administrator.— The action to recover a penalty cannot be brought by an administrator for illegal fees charged against the decedent, although they might recover back the sum paid beyond what was due. Reed *v.* Cist, 7 Serg. & R. (Pa.) 183; Orton *v.* Engledow, 8 Tex. 206.

Costs due plaintiff.— In actions to recover treble damages under 29 Eliz. c. 4, costs are allowed plaintiff, and he is entitled to three times the full amount of damages found by jury. Buckle *v.* Bewes, 4 B. & C. 154, 6 D. & R. 1, 10 E. C. L. 522; Tyte *v.* Glode, 7 T. R. 267.

6. Pleading generally see Pleading.

penalty for the taking of illegal fees, the declaration must set out the service for which the fees were taken.[7]

b. Allegations of Legal Fee and Excess. Since to render one liable for the penalty it is generally held that the fees must be fixed by law,[8] it has been held to be sufficient to allege that a certain sum higher than allowed by law was exacted,[9] although the contrary has also been maintained;[10] nor need the declaration set forth the entire transaction.[11]

c. Fee Received by Whom. A declaration which omitted to state who received the illegal fee has been held to be fatally defective.[12]

4. VARIANCE. It is not necessary to prove the exact sum as alleged in the declaration,[13] but the evidence and allegations must correspond respecting the parties.[14]

D. Defenses — 1. GUILTY KNOWLEDGE. In some jurisdictions the statutes by express provision make it a necessary element of liability that the act shall have been "wilfully" or "knowingly" done.[15] It such case the lack of an evil intent is of course a defense. But when the statute provides that if any officer or other person shall take any fee greater than allowed by law they shall forfeit to the party aggrieved, etc. (omitting the words "wilfully or knowingly"), the courts are divided as to whether or not a good and honest intent would be a defense. By the weight of authority it seems it would not,[16] although in several states it has been held to the contrary.[17]

7. Ross *v.* Palmer, 4 Pa. St. 517; Aechternacht *v.* Watmough, 8 Watts & S. (Pa.) 162; Orton *v.* Engledow, 8 Tex. 206.

Limitation of rule.— It seems that if the action be to recover the penalty for taking fees for services for which no fees are allowed by law, it is sufficient to aver that they were taken for services not allowed to be compensated for, without specifying the services for which they were demanded. Overholtzer *v.* McMichael, 10 Pa. St. 139. *Compare* Mitchell *v.* Wheeler, (Colo. App. 1904) 77 Pac. 361.

8. See *supra*, IV, B, 1.

9. Spence *v.* Thompson, 11 Ala. 746; Miller *v.* Lockwood, 17 Pa. St. 248. *Compare* Mitchell *v.* Wheeler, (Colo. App. 1904) 77 Pac. 361.

10. Berton *v.* Lawrence, 5 Exch. 816, 1 L. M. & P. 668, where it is said: "In debt against the sheriff under 29 Eliz. c. 4, to recover treble damages for taking greater fees than are allowed by that act, on several different writs of fi. fa., it is not sufficient to allege generally that the defendant took —— *l.*, being a large sum, &c.; but the declaration should state what he ought to have taken, and what was the excess, on each writ."

11. Livermore *v.* Boswell, 4 Mass. 437; Henry *v.* Tilson, 17 Vt. 479.

12. Stilson *v.* Tobey, 2 Mass. 521.

13. Spence *v.* Thompson, 11 Ala. 746. But see Bristow *v.* Sullivan, 6 B. Mon. (Ky.) 143.

14. Lincoln *v.* Shaw, 17 Mass. 410.

15. Lee *v.* Lide, 111 Ala. 126, 20 So. 410; Runnells *v.* Fletcher, 15 Mass. 525; Millar *v.* Douglass, 42 Tex. 288; Parsons *v.* Crabbe, 31 U. C. C. P. 151.

16. *Montana.*— Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498.

Nebraska.— Cobbey *v.* Burks, 11 Nebr. 157, 8 N. W. 386, 38 Am. Rep. 364.

New Jersey.—Tanner *v.* Croxall, 17 N. J. L. 332.

New York.—McIntyre *v.* Trumbull, 7 Johns. 35.

Oregon.— Jackson *v.* Siglin, 10 Oreg. 93.

Pennsylvania.— Miller *v.* Lockwood, 17 Pa. St. 248; Coates *v.* Wallace, 17 Serg. & R. 75; Prior *v.* Craig, 5 Serg. & R. 44. See also Wilson *v.* Barrett, 24 Pa. Super. Ct. 68.

South Carolina.— Dean *v.* Todd, 49 S. C. 461, 27 S. E. 471.

United States.— U. S. *v.* Moore, 18 Fed. 686.

Reasons for this view are stated in Leggatt *v.* Prideaux, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498; Coates *v.* Wallace, 17 Serg. & R. (Pa.) 75; Prior *v.* Craig, 5 Serg. & R. (Pa.) 44; Dean *v.* Todd, 49 S. C. 461, 27 S. E. 471.

17. Triplett *v.* Munter, 50 Cal. 644; Fox *v.* Whitney, 33 N. H. 516; Haynes *v.* Hall, 37 Vt. 20; Henry *v.* Tilson, 17 Vt. 479.

Reason for this view.— In New Hampshire, the statute was: "If any person shall demand and take," etc., it is said: "It would be against the policy of the law to subject judicial officers, acting in their judicial capacity, to any responsibilities on account of their judicial action beyond such as may attach upon proper proceedings against them for corruption in office. A magistrate may, indeed, make himself liable for the penalty on account of an illegal fee included in his judgment for costs; but it can be only when the demand for the fee can be considered as made by him, independent of his judicial act in rendering the judgment." Fox *v.* Whitney, 33 N. H. 516, 519. In Vermont, where the statute was, "if any officer, or other person, shall receive any greater fees," etc., it is said: "If a sheriff serving process charge and receive fees for services not enumerated in the statute, in good faith and with no intent to vio-

2. Usage or Custom.[18] In an action to recover a penalty for taking illegal fees one cannot rely on usage or custom as a defense,[19] except in those jurisdictions where an evil intent is held necessary.[20]

3. Confusion of Fees. An officer cannot evade the penalty by so commingling together legal and illegal fees or charges that they cannot be readily separated. And the rule applies also in criminal prosecutions.[21]

4. Failure to Receive Fee. If an officer makes a charge of illegal fees, he is liable for the penalty, although collected by his deputy and not paid over to him.[22]

5. Omission of Lawful Fees or Tender. It is no defense in an action of this kind to set up that lawful fees were omitted from the bill which on the whole was not so large as permitted by law to be charged.[23] Nor would a tender to plaintiff of any amount less than the statutory penalty avail defendant.[24]

6. Expiration of Term of Office. Neither would it be a defense that one's term of office had expired when the alleged extortion was committed.[25]

E. Jurisdiction. If the sum of the charges against an officer for the taking of illegal fees amounts to enough to give a certain court jurisdiction, the demand may be sued for in that court.[26] If the court wrongfully refuses to exercise its jurisdiction it may be compelled so to do by mandamus.[27]

EX TOTÂ MATERIÂ EMERGAT RESOLUTIO. A maxim meaning "The explanation, construction or resolution should arise out of the whole subject-matter."[1]

EXTRA.[2] A Latin preposition, occurring in many legal phrases,[3] meaning without, or outside of.[4]

EXTRA ALLOWANCE. See Costs.

EXTRA COMPENSATION. See Extra Work.

late the law, he is not liable to the penalty imposed by statute . . . for taking illegal fees." Haynes *v.* Hall, 37 Vt. 20.

18. **Usage and custom** generally see Customs and Usages.

19. Shattuck *v.* Woods, 1 Pick. (Mass.) 171; Lincoln *v.* Shaw, 17 Mass. 410.

20. Henry *v.* Tilson, 17 Vt. 479, where it is said: "A constable, who commits a person to jail by virtue of a tax warrant, is only entitled to charge fees for actual travel, one way, in the commitment,—there being no return necessary." But he may prove, in an action against him to recover the penalty for the taking of illegal fees, that it has been the custom of collectors of taxes to charge such fees.

21. Benson *v.* Christian, 129 Ind. 535, 29 N. E. 26. If a register of a land-office undertakes to act as an attorney for an applicant in procuring a patent, and receives from him a gross sum, and this sum is taken as well for the execution of his official duties as the doing of some other things relating to the procurement of the patent, and no specific portion of it is taken as compensation for the one or the other, and the sum so taken is in excess of the fees allowed him by law, such taking of the money is extortion. U. S. *v.* Waitz, 28 Fed. Cas. No. 16,631, 3 Sawy. 473.

22. Jackson *v.* Purdue, 3 Penr. & W. (Pa.) 519.

23. Turner *v.* Blount, 49 Ark. 361, 5 S. W. 589.

24. Turner *v.* Blount, 49 Ark. 361, 5 S. W. 589; McConahy *v.* Courtney, 7 Watts (Pa.) 491.

25. Jackman *v.* Bentley, 10 Mo. 293.

26. Jones *v.* Buntin, 1 Blackf. (Ind.) 322. For other cases concerning jurisdiction see State *v.* Lawrence, 45 Mo. 492; McConahy *v.* Courtney, 7 Watts (Pa.) 491; U. S. *v.* Carr, 25 Fed. Cas. No. 14,730, 3 Sawy. 302. See also Courts, 11 Cyc. 774 *et seq*; and, generally, Penalties.

In Florida, although the amount involved is less than one hundred dollars, the circuit court has jurisdiction to determine the correctness of any charge for costs in cases pending in said court. State *v.* Reeves, 44 Fla. 179, 32 So. 814.

27. State *v.* Reeves, 44 Fla. 179, 32 So. 814.

Mandamus generally see Mandamus.

1. Adams Gloss. [*citing* Wingate Max. 68].

Applied in *In re* Lincoln College Case, 3 Coke 58*a*, 59*b*.

2. **The word is Latin.** Carpenter *v.* State, 39 Wis. 271, 284.

3. Black L. Dict.

4. Carpenter *v.* State, 39 Wis. 271, 284, where it is said: "In its simple form, it has been but lately admitted into English dictionaries; but its compound use is ancient. Extraordinary [*q. v.*] gives a familiar instance of its use."

"**Extra**" **contract** see Russell *v.* Sa da Bandeira, 13 C. B. N. S. 149, 32 L. J. C. P. 68, 106 E. C. L. 149.

"**Extra**" **in a lease** see Library Bureau *v.*

EXTRA CONDUCTOR. In railroad parlance, the position in which a man is called upon to act in the capacity of conductor, without having continuous employment as such conductor.[5] (See CONDUCTOR; and, generally, CARRIERS; RAILROADS.)

EXTRA COSTS. See COSTS.

EXTRACT. A portion or fragment of a writing.[6] As used in a customs tariff act, anything drawn from a substance by heat, solution, distillation, or chemical process, as essences, tinctures, and the like.[7] (See DECOCTION; and, generally, CUSTOMS DUTIES.)

Lothrop Pub. Co., 180 Mass. 372, 373, 62 N. E. 380.

"**Extra pay**" see U. S. *v.* North, 112 U. S. 510, 513, 5 S. Ct. 285, 28 L. ed. 808.

"**Extra pilot service**" see The Servia, [1898] P. 36, 48, 8 Aspin. 353, 67 L. J. P. & Adm. 36, 78 L. T. Rep. N. S. 54, 46 Wkly. Rep. 492.

"**Extra services**" see Miami County *v.* Blake, 21 Ind. 32, 34.

5. Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 279, 33 S. W. 133.

6. Black L. Dict. *Compare* McCracken *v.* Graham, 14 Pa. St. 209, 210, construing the words "transcript and extract."

7. Sykes *v.* Magone, 38 Fed. 494, 497.

EXTRADITION (INTERNATIONAL)

By Frederick Van Dyne*
Assistant Solicitor, Department of State

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* Author of "Citizenship of the United States."

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I. DEFINITION.

International extradition is the surrender by one nation to another, for trial and punishment, of a person accused or convicted of an offense within the jurisdiction of the latter.[1]

II. DUTY OF EXTRADITION.

A. No Obligation Under International Law. There is no obligation upon a government, under the law of nations, to surrender fugitive criminals to a foreign power.[2]

B. No Authority in United States to Extradite, Independently of Statute or Treaty. In the United States, it is well settled that, independently

1. See Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; Fong Yue Ting *v.* U. S., 149 U. S. 698, 13 S. Ct. 1016, 37 L. ed. 905; Lawrence Princ. Int. L. § 132.

Another definition is "the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished." Fong Yue Ting *v.* U. S., 149 U. S. 698, 709, 13 S. Ct. 1016, 37 L. ed. 905, distinguishing "extradition" from "deportation."

2. U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425; *Re* Metzger, 5 How. (U. S.) 176, 12 L. ed. 104; *Ex p.* McCabe, 46 Fed. 363, 12 L. ed. 589; U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482; 2 Wharton Int. L. Dig. 746; Wheaton Int. L. (Dana ed.) 182 note.

of statutory or treaty provision, no authority exists in any branch of the government to surrender a fugitive criminal to a foreign government.[3] And it is the present doctrine in England and Canada that the extradition of a fugitive criminal cannot be granted in the absence of specific legal authority.[4]

C. Extradition Not Requested From Foreign Government in Absence of Treaty. As the United States does not surrender fugitive criminals in the absence of treaty stipulation, its practice is to decline to request extradition from a foreign government with which this government has no treaty providing for surrender.[5]

D. Extradition Granted or Requested Only For Treaty Offense. As no authority exists in any branch of this government to surrender a fugitive criminal in the absence of a treaty stipulation, it results that, where a treaty exists, extradition can be granted only for an offense enumerated in the treaty. And this government, where there is a treaty, will request extradition from a foreign government, only for an offense included in the treaty.[6]

E. Provision For Extradition May Be Made by Statute as Well as by Treaty. It is within the power of congress to provide by statute for the extradition of fugitives from the justice of a foreign country without regard to any reciprocal treaty obligation.[7]

III. TREATIES.

A. With United States. International extradition in the United States, as stated,[8] is based on treaty stipulation. The United States has treaties of extradition with thirty-six governments.[9]

3. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *Ex p.* McCabe, 46 Fed. 363, 12 L. ed. 589; *Ex p.* Dos Santos, 7 Fed. Cas. No. 4,016, 2 Brock. 493; U. S. *v.* Davis, 25 Fed. Cas. No. 14,932, 2 Sumn. 482; 6 Op. Atty.-Gen. 85; 2 Wharton Int. L. Dig. 745, 746. See also *In re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382. The only case in which a fugitive criminal has been surrendered by the United States to a foreign government in the absence of an extradition treaty was that of Arguelles. Arguelles was lieutenant-governor of a district in Cuba, where a cargo of African slaves had been landed and set free by the authorities. Arguelles reported to the government that one hundred and forty-one of them had died of smallpox; but it was discovered that he had sold them into slavery, with the aid of forged papers, and had fled to New York. There was then (1864) no treaty of extradition between the United States and Spain, but the Cuban authorities requested Arguelles' surrender as an act of comity. Mr. Seward, with the sanction of President Lincoln, directed the arrest of Arguelles upon his arrival in New York, as a purely executive act, and he was delivered up to the agent appointed by the Cuban authorities and taken to Cuba. Mr. Seward's action was strongly criticized, although a condemnatory resolution offered in the house of representatives was rejected. See Wheaton Int. L. (Dana ed.) 183 note.

4. Clarke Extrad. (4th ed.) 93, 126, 128.

5. 6 Op. Atty.-Gen. 85. There are isolated cases in which this government has requested of foreign governments the surrender of fugitive criminals as an act of comity, but in these cases the request has been accompanied by the statement that under our law reciprocity cannot be granted.

6. 6 Op. Atty.-Gen. 85. In *Ex p.* Foss, 102 Cal. 347, 36 Pac. 669, 41 Am. St. Rep. 182, 25 L. R. A. 593, however, it was held that the existence of an extradition treaty between the United States and the Hawaiian Islands did not prohibit the surrender by either government of a person charged with a crime not enumerated in the treaty.

7. *In re* Neely, 103 Fed. 626 [*affirmed* in 180 U. S. 126, 21 S. Ct. 308, 45 L. ed. 457]; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257.

This power is not affected by the character of the criminal procedure of the foreign country or by the fact that the alleged offender is a citizen of the United States. *In re* Neely, 103 Fed. 626.

8. See *supra*, II, B.

9. *Argentine Republic* (1896). 31 U. S. St. at L. 1883.
Austria (1856). 11 U. S. St. at L. 691.
Baden (1857). 11 U. S. St. at L. 713.
Bavaria (1853). 10 U. S. St. at L. 1022.
Belgium (1901). 32 U. S. St. at L. 1894.
Bolivia (1900). 32 U. S. St. at L. 1857.
Brazil (1898). 33 U. S. St. at L. 2091.
Bremen (1852). 10 U. S. St. at L. 970.
Chile (1900). 32 U. S. St. at L. 1850.
Colombia (1888). 26 U. S. St. at L. 1534.
Cuba (1904). 33 U. S. St. at L. 2265.
Denmark (1902). 32 U. S. St. at L. 1906.
Ecuador (1872). 18 U. S. St. at L. 756.
France (1843). 8 U. S. St. at L. 580. (1845). 8 U. S. St. at L. 617. (1858). 11 U. S. St. at L. 741.
Great Britain (1842). 8 U. S. St. at L.

B. Power to Make Extradition Treaties. A treaty stipulation, on the part of the government of the United States, to surrender fugitives from justice, is a lawful stipulation, and within the authority of the treaty-making power.[10] A treaty is of equal force with an act of congress, and the provisions of a treaty of extradition are binding on the courts.[11] Such treaties are obligatory upon the tribunals of the several states as well as those of the federal government.[12] A statute of a state providing for the surrender of fugitives from the justice of foreign countries is unconstitutional and void.[13]

C. Retroactive Effect. A treaty of extradition operates retroactively unless it contains a provision expressly declaring that its stipulations shall not apply to crimes committed prior to the conclusion of the treaty.[14] A person who has committed a crime abroad and come to the United States before the conclusion of a treaty of extradition authorizing surrender for such a crime does not thereby acquire a right of asylum.[15] Nor is a treaty, construed as covering a crime committed before the conclusion of the treaty, obnoxious to the objection that it is an *ex post facto* law.[16]

576. (1889). 26 U. S. St. at L. 1508. (1900). 32 U. S. St. at L. 1864.

Guatemala (1903). 33 U. S. St. at L. 2147.

Italy (1868). 15 U. S. St. at L. 629. (1869). 16 U. S. St. at L. 767. (1884). 24 U. S. St. at L. 1001.

Japan (1886). 24 U. S. St. at L. 1015.

Luxemburg (1883). 23 U. S. St. at L. 808.

Mecklenburg-Schwerin (1852). 10 U. S. St. at L. 971.

Mecklenburg-Strelitz (1852). 10 U. S. St. at L. 970.

Mexico (1899). 31 U. S. St. at L. 1818.

Netherlands (1887). 26 U. S. St. at L. 1481. (1904). 33 U. S. St. at L. 2257.

North German Confederation (1868). 15 U. S. St. at L. 616.

Norway (1893). 28 U. S. St. at L. 1187.

Oldenburg (1852). 10 U. S. St. at L. 971.

Ottoman Empire (1874). 19 U. S. St. at L. 572.

Panama (1905).

Peru (1899). 31 U. S. St. at L. 1921.

Prussia (1852). 10 U. S. St. at L. 964.

Russia (1887). 28 U. S. St. at L. 1071.

Schaumburg-Lippe (1854).

Servia (1901). 32 U. S. St. at L. 1890.

Sweden (1893). 27 U. S. St. at L. 972.

Switzerland (1900). 31 U. S. St. at L. 1928.

Wurtemburg (1851). 10 U. S. St. at L. 971. (1868). 16 U. S. St. at L. 736.

A violation of a law of the German empire against crime, such as forgery, is an offense extraditable under the treaty of the United States with Prussia, when such offense is committed in Prussia, and such law is recognized and enforced in that kingdom as its law on that subject. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534.

The treaty of extradition of the United States with Bavaria of 1853 was not abrogated by the operation of the constitution of the German Empire, adopted in 1871. *In re* Thomas 23 Fed. Cas. No. 13,887, 12 Blatchf. 370.

10. People *v.* Curtis, 50 N. Y. 321, 10 Am. Rep. 483; Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 614, 10 L. ed. 579, 618; *In re* De Giacomo, 7 Fed. Cas. No. 3,747, 12 Blatchf. 391; U. S. *v.* Robins, 27 Fed. Cas. No. 16,175, Bee 266.

11. *In re* Metzger, 17 Fed. Cas. No. 9,511.

12. Blandford *v.* State, 10 Tex. App. 627. See also Goldfon *v.* Allegheny County, 8 Pa. Dist. 387.

13. People *v.* Curtis, 50 N. Y. 321, 10 Am. Rep. 483. See also People *v.* Columbia County, 134 N. Y. 1, 31 N. E. 322; *In re* Vogt, 44 How. Pr. (N. Y.) 171; *Ex p.* Holmes, 12 Vt. 631.

14. *In re* De Giacomo, 7 Fed. Cas. No. 3,747, 12 Blatchf. 391. See also CONSTITUTIONAL LAW, 8 Cyc. 1032 note 24.

15. *In re* De Giacomo, 7 Fed. Cas. No. 3,747, 12 Blatchf. 391. The treaties of extradition to which the United States are parties do not guarantee a fugitive from the justice of one of the countries an asylum in the other. They only make provision that for certain crimes he shall be deprived of that asylum, and surrendered to justice, and they prescribe the mode in which this shall be done. Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421.

16. *In re* De Giacomo, 7 Fed. Cas. No. 3,747, 12 Blatchf. 391.

Article 3 of the treaty of 1874 with Belgium provided that the stipulations of the treaty should not apply to any crime committed prior to the date of the treaty, and article 8 provided that the treaty should take effect twenty days after the day of the date of the exchange of ratifications. It was decided that the treaty was applicable to a crime committed the day after the date of the exchange of ratifications, the court holding that "the reference in article 3 was to the date of the treaty, which was either the date of the signing, or the date of the exchange of ratifications, and not the time of its taking effect." *In re* Vandervelpen, 28 Fed. Cas. No. 16,844, 14 Blatchf. 137.

D. Offenses — 1. In General. The first treaty stipulation providing for the extradition of criminals, to which the United States was a party,[17] included only the crimes of murder and forgery. In our earlier treaties crimes of violence predominated, such as murder, robbery, arson, etc. Later these were supplemented by crimes of fraud, as embezzlement, breach of trust, obtaining money by false pretenses, etc. The latest offense included in our extradition treaties is bribery. The list of offenses embraced in our various extradition treaties numbers more than thirty.[18]

17. Treaty with Great Britain (1794), art. 27.

18. Abduction, abortion, arson, assault with intent to murder, bigamy, bribery, burglary, child stealing, conspiracy to revolt on the high seas, counterfeiting, destruction of a vessel at sea, destruction or obstruction of railroads endangering human life, embezzlement by persons hired or salaried, to the detriment of their employers, embezzlement of funds of a bank or trust company, embezzlement of public moneys, forgery or utterance of forged papers, fraud or breach of trust, housebreaking, kidnapping, larceny, manslaughter, mayhem, murder, obtaining money, etc., by false pretenses, perjury or subornation of perjury, piracy, rape, receiving money, etc., known to have been stolen or fraudulently obtained, revolt on ship at sea, robbery, shop-breaking, sinking a ship at sea, slave-trading. See Compilation Treat. 1904.

Child stealing.— *Canada.*— Where the prisoner and his wife were absolutely divorced in the United States, the decree awarding the custody of their child to the wife, with permission to the father to take it out in the daytime, returning it each day, and the prisoner having thus obtained the child carried it away to Canada, this was held to be "child stealing" under the extradition treaty between the United States and Great Britain, and sufficient to warrant the extradition of the father. Rex *v.* Watts, 3 Ont. L. Rep. 368.

Embezzlement.—Where defendant subscribed for one share of the stock of a French corporation, and agreed with the other subscribers to devote his entire time to the management of the corporation's affairs, and in consideration of his services receive forty per cent of the profits, he was a person "hired or salaried" by the corporation, within the French extradition treaty, authorizing extradition for embezzlement by any person or persons, hired or salaried, to the detriment of their employers. *In re* Balensi, 120 Fed. 864.

Embezzlement of public moneys.— The embezzlement of the funds of a savings bank established, maintained, and owned by a city in Germany, by a cashier who is a public official appointed by the city, is an embezzlement of public moneys, within the treaty of 1852 between Prussia and the other states of the Germanic confederation and the United States. *In re* Reiner, 122 Fed. 109. The funds of a private corporation are not "public moneys" within the meaning of the extradition treaty between Mexico and the United States, providing for extradition for the offense of embezzling public moneys. Blandford *v.* State, 10 Tex. App. 627.

Falsely certifying invoices.— Under Cuba Pen. Code, art. 401, which makes it a crime for a public employee to take public funds of which he has charge by virtue of his office, a public officer who, by falsely certifying the invoices in which certain coupons are inclosed, obtains possession of money paid out by the Spanish bank, which could not pass from the bank's possession to his own except as a consequence of his official act, is guilty of an extraditable offense under the treaty between the United States and Spain. *In re* Cortes, 42 Fed. 47 [*affirmed* in 136 U. S. 330, 10 S. Ct. 1031, 34 L. ed. 464].

Forgery.— False entries made in the usual books of account, or memoranda on slips directing such entries by others, made by an official or employee of a bank for the purpose of concealing his embezzlements, do not constitute forgery, as defined and recognized by the courts of England. *In re* Tully, 20 Fed. 812; Reg. *v.* Blackstone, 4 Manitoba 296. A clerk in a city controller's office, whose duty it was to make proper entries of moneys received from taxes in the official books provided for that purpose, having received a sum of money for taxes, at first entered the correct amount and then erased the true figures and inserted a less sum, with intent to benefit himself by the abstraction of the difference between the two. This was held to be forgery at common law and extraditable under the Ashburton treaty. *In re* Hall, 8 Ont. App. 31, 2 Can. L. T. 592. See also *In re* Phipps, 8 Ont. App. 77; *In re* Murphy, 2 Can. Cr. Cas. 562.

Larceny — *Canada.*— The abandonment of the term "larceny" in Canadian jurisprudence does not affect the liability to extradition of a person charged with what was larceny at common law and is by the Canadian criminal code still an offense in Canada under the name of "theft" or "stealing." *In re* Gross, 2 Can. Cr. Cas. 67.

Robbery.— The treaty between the United States and Salvador defines robbery as "the act of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear." Taking money or goods from the presence or view of the party robbed, by violence, or by putting him in fear, is robbery, within the meaning of such treaty. *In re* Ezeta, 62 Fed. 972.

Uttering forged paper.— *Canada.*— Where

2. Political Offenses. While it is a well recognized principle, irrespective of treaty stipulation, that governments do not deliver up fugitives for political crimes,[19] most of the extradition treaties to which the United States is a party expressly declare that their provisions shall not apply to crimes or offenses of a political character.[20] It is the duty of the committing magistrate to determine whether the offense charged is of a political character.[21] Several of the treaties of the United States provide that an attempt against the head of a foreign government or member of his family, when such act comprises the act of murder, assassination, or poisoning, shall not be considered a political offense.[22]

E. Citizens — 1. General Exemption by Treaty. Nearly all of the extradition treaties of the United States contain a provision declaring that neither of the contracting parties shall be bound to surrender its own citizens.[23] In Great Brit-

it appeared that the accused presented to a young woman a false letter of introduction, with the intent that she should believe and act upon it as genuine to her prejudice, and she, believing the letter to be a genuine recommendation of the accused to her favor from the vice-president of the company by which she was employed, allowed the accused to pay his addresses to her and became engaged to marry him under the false name given him in that letter, although he had a wife living, it was held that the facts constituted a *prima facie* case of utterance of forged paper under the criminal code of Canada, and that the offense was extraditable under the treaty with the United States. *Re* Abeel, 7 Ont. L. Rep. 327. See also *In re* Murphy, 2 Can. Cr. Cas. 552.

19. What constitutes an offense of a political character has not yet been determined by judicial authority. *In re* Ezeta, 62 Fed. 972. It depends upon the particular circumstances of each case. The decision of the question whether or not an offense is political is by express provision of several of the treaties of the United States declared to rest with the authorities of the government upon which the demand for surrender is made. But in the absence of such a conventional provision the right to determine the question undoubtedly inheres in the government of which the extradition is requested.

20. The British law expressly provides that a fugitive criminal shall not be surrendered if the offense in respect to which his surrender is demanded is one of a political character. St. 33 & 34 Vict. c. 52, § 3. To bring an offense within the meaning of the words "of a political character" in this act, it must be incidental to and form part of political disturbances. *In re* Meunier, [1894] 2 Q. B. 415, 18 Cox C. C. 15, 63 L. J. M. C. 198, 71 L. T. Rep. N. S. 403, 10 Reports 400, 42 Wkly. Rep. 637; *In re* Castioni, [1891] 1 Q. B. 149, 17 Cox C. C. 225, 55 J. P. 328, 60 L. J. M. C. 22, 64 L. T. Rep. N. S. 344, 39 Wkly. Rep. 202.

21. *In re* Ezeta, 62 Fed. 972. In this case the testimony showed that the hanging of four persons by officers of President Ezeta, the killing of another person by President Ezeta and the other defendants, his officers, the robbery of a bank by President Ezeta, and the killing of a sixth person by President Ezeta and his officer were all committed during the existence of a state of siege in the republic of Salvador, and the progress of actual hostilities between the contending forces, wherein Ezeta and his companions were seeking to maintain the authority of the then existing government against a revolutionary uprising; that such acts were associated with the actual conflict of such armed forces; that the four persons were hung because they did not assist in defending the government; that the fifth was killed because he was considered a spy; that the robbery of the bank was for the purpose of paying Ezeta's soldiers; and that the killing of the sixth person was the result of a report that he had gone over to the enemy. It was decided that such offenses were of a political character, and not subject to extradition. In the case of Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787, a band of over one hundred men crossed from Texas into Mexico and attacked about forty Mexican soldiers, killing and wounding some of them, burning their barracks, and taking away their horses and equipments. The same band violently assaulted private citizens, taking their horses, and burning houses, extorted small sums of money from the women, and appropriated clothes and provisions. The members of the band, who were without uniform or flag, but had red bands on their hats, remained in Mexico about six hours, and then recrossed. There was evidence, on the other side, that there had been on that border a revolutionary movement directed against the Mexican government the year before, and that the aim and purpose of the expedition in question was the same. It was held that the magistrate was justified in finding that the offense was not "of a purely political character" within the meaning of the extradition treaty with Mexico.

22. See *supra*, note 9.

23. See *supra*, note 9. Where a treaty provides that neither of the contracting parties shall be bound to surrender its own citizens under the stipulations of the treaty, this government cannot surrender a citizen of the United States. *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

ain, unless there is an express treaty stipulation to the contrary, subjects of the British government may be surrendered.[24]

2. Executive Discretion by Special Treaty Provision. Some treaties contain a provision that neither of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention, but they shall have the power to deliver them up if in their discretion it be deemed proper to do so.[25]

F. Requisitions — 1. In General. Extradition treaties usually provide for the presentation to the executive of the government of which the surrender of a fugitive criminal is sought, of a requisition therefor, by the chief diplomatic or consular officer of the demanding government.[26]

2. Previous Indictment Not Necessary. It is not necessary, under the extradition treaty between the United States and Great Britain of 1842, that an application for extradition shall have been preceded by an indictment in the country requesting the surrender.[27]

3. In Extradition to United States — a. Form. The manner in which requisitions and the accompanying papers, in the case of applications for the extradition from foreign countries of fugitives from the justice of the United States, should be prepared, is shown in the subjoined note.[28]

24. Reg. *v.* Wilson, 3 Q. B. D. 42, 13 Cox C. C. 630, 37 L. T. Rep. N. S. 354, 26 Wkly. Rep. 44. In *In re* Galwey, [1896] 1 Q. B. 230, 18 Cox C. C. 213, 60 J. P. 87, 65 L. J. M. C. 38, 73 L. T. Rep. N. S. 756, 44 Wkly. Rep. 313, arising under the treaty between England and Belgium of 1887, suppressing the exception contained in article 1 of the treaty of 1876, and providing that the contracting parties shall not be bound to surrender their own subjects, it was held that the surrender of a British subject to Belgium under the extradition act of 1870 rests in the discretion of the secretary of state. Where a treaty provided that the contracting parties should reciprocally surrender any persons, who being accused of any of certain specified crimes committed within the jurisdiction of the requesting party should be found in the territories of the other party, and further provided that neither party should be bound to deliver up its own subjects, it was held that the provisions of the treaty were not confined to persons who are subjects of the state requesting jurisdiction, but applied to all persons who had committed any of the specified crimes within the jurisdiction of such state, of whatever nationality they might be, except subjects of the state from which extradition was requested. Reg. *v.* Ganz, 9 Q. B. D. 93, 51 L. J. Q. B. 419, 46 L. T. Rep. N. S. 592.

25. 24 U. S. St. at L. 1015 (treaty between the United States and Japan); 31 U. S. St. at L. 1818 (treaty between United States and Mexico); 31 U. S. St. at L. 1883 (treaty between United States and the Argentine Republic); 33 U. S. St. at L. 2147 (treaty between United States and Guatemala).

26. *In re* Heilbronn, 11 Fed. Cas. No. 6,323, 12 N. Y. Leg. Obs. 65.

Between the United States and Canada.— Under the practice between the United States and Great Britain, a request for extradition from the Dominion of Canada is made by the secretary of state upon the British ambassador at Washington.

Between the United States and Mexico.— By stipulation of treaty between the United States and Mexico, in the case of crimes committed in the frontier states or territories, requisitions may be made through the chief civil authority of the respective border state or territory. 31 U. S. St. at L. 1824.

Between the United States and the Netherlands.— By the treaty between the United States and the Netherlands of 1904, it is provided that requisitions for extradition between the island possessions and colonies of the respective governments may be made directly to the respective chief insular or colonial authority. 33 U. S. St. at L. 2257.

27. Muller's Case, 17 Fed. Cas. No. 9,913, 5 Phila. (Pa.) 289; *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66. In *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83, it was held that a person against whom a complaint has been made and accepted before a judge of instruction in France is a person accused, within the meaning of the treaty of extradition, although no indictment has been found against him. In State *v.* Rowe, 104 Iowa 323, 73 N. W. 833, under the treaty of the United States with Mexico providing for the surrender of persons "to justice . . . who being accused of the crimes enumerated," etc., it was held that such provision means that they are to be accused in due form of law; and that it applies to one who is accused on information, as well as one charged by indictment, since an information is one of the forms prescribed by statute.

28. **Address.**— All applications for requisitions should be addressed to the secretary of state. When extradition is sought for an offense within the jurisdiction of the state or territorial courts, the application must come from the governor of the state or territory.

b. Agent. The act of March 3, 1869, authorizes the president to appoint an agent to receive from a foreign government and convey to this country for trial a fugitive whose extradition has been requested, and clothes such agent with the powers of a marshal of the United States, in the districts through which it may

When the offense is against the United States, the application should come from the attorney-general. Mem. Dept. State.

Offense and place of commission.— In every application for a requisition it must be made to appear that one of the offenses enumerated in the extradition treaty between the United States and the government from which extradition is sought has been committed within the jurisdiction of the United States, or of some one of the states or territories, and that the person charged therewith is believed to have sought an asylum or has been found within the dominions of such foreign government. Mem. Dept. State.

Evidence of criminality.— The extradition treaties of the United States ordinarily provide that the surrender of a fugitive shall be granted only upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her commitment for trial if the crime or offense had been there committed. If the person whose extradition is desired has been convicted of a crime or offense and escaped thereafter, a duly authenticated copy of the record of conviction and sentence of the court is ordinarily sufficient. If the fugitive has not been convicted, but is merely charged with crime, a duly authenticated copy of the indictment or information, if any, and of the warrant of arrest and return thereto, accompanied by a copy of the evidence upon which the indictment was found, or the warrant of arrest issued, or by original depositions setting forth as fully as possible the circumstances of the crime, are usually necessary. Many of our treaties require the production of a duly authenticated copy of the warrant of arrest in this country; but an indictment, information, or warrant of arrest alone, without the accompanying proofs, is not ordinarily sufficient. It is desirable to make out as strong a case as possible, in order to meet the contingencies of the local requirements at the place of arrest. If the extradition of the fugitive is sought for several offenses, copies of the several convictions, indictments, or informations and of the documents in support of each should be furnished. Mem. Dept. State.

Designation of fugitive, of offense, and of person to receive prisoner.— Application for the extradition of a fugitive should state his full name, if known, and his alias, if any, the offense or offenses in the language of the treaty upon which his extradition is desired, and the full name of the person proposed for designation by the president to receive and convey the prisoner to the United States. Mem. Dept. State.

Certification and authentication of papers. — Copies of the record of conviction, or of the indictment, or information, and of the warrant of arrest, and the other papers and documents going to make up the evidence are required by the department of state in the first instance, as a basis for requesting the surrender of the fugitive, but chiefly in order that they may be duly authenticated under the seal of that department, so as to make them receivable as evidence where the fugitive is arrested upon the question of his surrender. Copies of all papers going to make up the evidence, including the record of conviction, or the indictment, or information, and the warrant of arrest, must be duly certified and then authenticated under the great seal of the state making the application or the seal of the department of justice, as the case may be; and the department of state will authenticate the seal of the state or of the department of justice. For example, if a deposition is made before a justice of the peace, the official character of the justice and his authority to administer oaths should be attested by the county clerk or other superior certifying officer; the certificate of the county clerk should be authenticated by the governor or secretary of state under the seal of the state, and the latter will be authenticated by the state department. If there is but one authentication, it should plainly cover all the papers attached. Mem. Dept. State.

Transmission of papers in duplicate or in triplicate.— All of the papers required in the way of evidence must be transmitted in duplicate, one copy to be retained in the files of the department of state, and the other, duly authenticated by the secretary of state, will be returned with the president's warrant, for the use of the agent who may be designated to receive the fugitive. As the governor of the state or the department of justice also ordinarily requires a copy prosecuting attorneys should have all papers made in triplicate. Mem. Dept. State.

Agent's declaration under oath as to truth of copies of papers.— By the practice of some of the countries with which the United States has treaties, in order to entitle copies of depositions to be received in evidence the party producing them is required to declare under oath that they are true copies of the original depositions. It is desirable therefore that such agent, either from a comparison of the copies with the originals or from having been present at the attestations of the copies, should be prepared to make such declaration. When the original depositions are forwarded such declaration is not required. Mem. Dept. State.

Applications by telegraph or letter.— Applications by telegraph or letter are frequently made to obtain the provisional arrest and detention of fugitives in foreign coun-

be necessary for him to pass, so far as such power is requisite for the safe-keeping of the prisoner.[29]

G. Preliminary Mandate — 1. Not Necessary Where Not Required by Treaty. In the United States it is established by judicial decisions and executive practice that, in cases where the treaty does not require a previous executive mandate, the issuing of such a mandate is not essential as a prerequisite to the entertaining of proceedings and the issuing of a warrant of arrest by a magistrate.[30] The secretary of state does not now issue mandates except where provision is made therefor by treaty.[31]

tries in advance of the presentation of the formal proofs upon which a demand for their extradition may be based. Such applications should state specifically the name of the fugitive, the offense with which he is charged, the circumstances of the crime as fully as possible, and a description and identification of the accused. It is always helpful to show that an indictment has been found or a warrant of arrest has been issued for the apprehension of the accused. In Great Britain the practice makes it essential that it shall appear that a warrant of arrest has been issued in this country. Mem. Dept. State.

Compliance with provisions of treaty.— Care should be taken to observe the provisions of the particular treaty under which extradition is sought, and to comply with any special provisions contained therein. The extradition treaties of the United States may be found in the several volumes of the statutes at large, in the Revised Statutes of the United States relating to the District of Columbia and post roads, together with public treaties in force on the 1st day of December, 1873, and in the volume of Public Treaties (1887). Mem. Dept. State.

Delivery of prisoner to what authorities.— If the offense charged be a violation of a law of a state or territory, the agent authorized by the president to receive the fugitive will be required to deliver him to the authorities of such state or territory. If the offense charged be a violation of a law of the United States, the agent will be required to deliver the fugitive to the proper authorities of the United States for the judicial district having jurisdiction of the offense. Mem. Dept. State.

29. U. S. Rev. St. (1878) §§ 5275–5277 [U. S. Comp. St. (1901) pp. 3596, 3597].

30. *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370.

Prior to 1852 (the time when the case of *In re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345, arose in the supreme court of the United States), it was the practice of extradition magistrates generally to entertain complaints in cases of extradition without the prior presentation of a mandate. The majority of the court did not agree in this case as to the interpretation to be given to the treaty and law, and the case came before Mr. Justice Nelson at chambers (*Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1) who held that the previous authority of the executive should have been obtained to warrant the interposition of the judiciary. In *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414, 425, it was stated that "it would seem indispensable that a demand for the surrender of the fugitive should be first made upon the Executive authorities of the Government, and a mandate of the President be obtained, before the Judiciary is called upon to act." The same view was expressed in *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34. In *Ex p.* Ross, 20 Fed. Cas. No. 12,069, 2 Bond 252 [*followed* in *In re* Dugau, 7 Fed. Cas. No. 4,120, 2 Lowell 367; *In re* Kelley, 14 Fed. Cas. No. 7,655, 2 Lowell 339; *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370], however, it was held that prior authorization of the executive was not necessary to enable the magistrate to act. In *In re* Thomas, *supra*, Blatchford, J., said: "So far as my own action is concerned, it is not, for the purposes of the present case, or of future like cases, (that is, cases where the treaty does not require a previous mandate,) to be regarded as the law, that the issuing of an executive mandate, in a case of extradition, is a prerequisite to the entertaining of proceedings, and the issuing of a warrant of arrest by a magistrate." The same view was taken in *In re* Orpen, 86 Fed. 760; *In re* Herres, 33 Fed. 165; Castro *v.* De Uriarte, 16 Fed. 93.

31. A few of our treaties contain a provision declaring that it shall be lawful for any competent judicial authority of the United States upon production of a certificate issued by the secretary of state that request has been made by the foreign government for the provisional arrest of a person accused of a crime extraditable under the treaty, and, upon legal complaint that such crime has been committed, to issue his warrant for the apprehension of such person. In a case arising under the former treaty of 1877 with Spain, which contained a similar provision, no preliminary mandate was obtained, and it was held that the language of the treaty was permissive and not necessarily obligatory, and that U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591], provided other means for obtaining a judicial investigation. Castro *v.* De Uriarte, 16 Fed. 93, 97, where the court said: "The procedure indicated by section 5270, . . . is in substance identical with that contemplated by the treaty with Spain, except that it dispenses with any preliminary executive warrant. Had there been no law of congress upon the subject, such an executive warrant would have been necessary in order to authorize the magistrates to proceed; but, inasmuch as the law of this country

2. By Whom Issued. The mandate may be issued under the hand of the secretary of state and the seal of the department of state.[32]

3. Form. There is no special form prescribed by law. It is sufficient if the offense is described in the terms of the treaty.[33]

4. How Long Operative. A mandate issued by the executive remains operative until recalled by the executive or until he signifies in some way that its functions are exhausted.[34]

H. "Jurisdiction" and "Territory" — 1. Construction of Terms. Treaties of extradition provide for the surrender of persons charged with crimes committed within the "jurisdiction" of one of the contracting parties, who may be found within the "territory" of the other. These words, as construed by this government, mean "territorial jurisdiction."[35] One accused of poisoning, resulting in death in Canada, may be extradited, although it appears that the poison, if administered at all, was given in this country.[36]

2. Vessels. Vessels upon the high seas and ships of war everywhere are within the jurisdiction of the nations to which they belong.[37] A British subject

expressly authorizes the magistrates to proceed, 'whenever there is a treaty or convention for extradition,' without reference to any preliminary executive warrant, such a warrant seems to me clearly unnecessary, if the demanding government chooses to avail itself of the law existing outside of the treaty, and proceed without the preliminary mandate."

32. The executive authority of the United States, particularly in its intercourse with foreign powers and in matters which concern foreign relations, acts through the medium of the secretary of state and the seal of that department. *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34; *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,858, 4 Dill. 411.

33. *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79. See also *In re* Grin, 112 Fed. 790.

34. *In re* Kelly, 26 Fed. 852.

35. 14 Op. Atty.-Gen. 281; 8 Op. Atty.-Gen. 215; 1 Op. Atty.-Gen. 83. See also Reg. *v.* Lavaudier, 15 Cox C. C. 329. Carl Vogt, a Prussian subject, charged with crimes committed in Belgium, fled to the United States, from whence his extradition was demanded by the German government, for trial and punishment in Germany, under the treaty between the United States and Prussia which provides for extradition for crimes "committed within the jurisdiction" of either party. Vogt having been arrested brought habeas corpus proceedings before Justice Blatchford of the United States circuit court for the southern district of New York. The court held that Vogt was subject under Prussian law to punishment in Prussia for the crimes committed by him in Belgium, and that there was nothing in the language of our treaty with Prussia, or of other treaties containing like language, or in the rules of interpretation laid down in decisions on the subject, to prevent giving to the word "jurisdiction" an enlarged meaning, equivalent to the words "authority, cognizance, or power of the courts." He accordingly committed the prisoner for extradition. *In re* Stupp, 23 Fed. Cas. No. 13,562, 11 Blatchf. 124. When the case came before the executive, he referred the question to the attorney-general, who decided that the words "committed within the jurisdiction," as used in the treaty, do not refer to the personal liabilities of the criminal, but to locality; and that the place where the crime is committed must be within the jurisdiction of the party demanding the fugitive — in other words, within the territorial jurisdiction. 14 Op. Atty.-Gen. 281. The executive refused to grant a warrant for Vogt's surrender. See *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501.

In Great Britain.—One who sent from England letters containing alleged false pretenses to persons carrying on business in Germany, thereby inducing them to part with certain goods and deliver them to his order in Hamburg, and who also sent to the same persons certain alleged forged checks in payment, is a fugitive criminal within the act of 33 & 34 Vict. c. 52, § 26, and was rightly committed by the police magistrate to await the warrant of the secretary of state for his extradition. Reg. *v.* Nillins, 53 L. J. M. C. 157. And in Reg. *v.* Jacobi, 46 L. T. Rep. N. S. 595 note, where the accused were charged with conspiring in Holland to obtain by false pretenses property to be sent to them in Germany, and they obtained the property and sent it to England, whither the accused soon after went, it was decided that their extradition was due upon demand of Germany as for a crime committed in German jurisdiction.

36. Sternaman *v.* Peck, 83 Fed. 690, 28 C. C. A. 377.

37. 14 Op. Atty.-Gen. 281.

A murder committed on board a British vessel of war on the high seas is committed within the jurisdiction of Great Britain, within the meaning of the extradition treaty between the United States and Great Britain of 1794. U. S. *v.* Cooper, 25 Fed. Cas. No. 14,865; U. S. *v.* Robins, 27 Fed. Cas. No. 16,175, Bee 266.

In Great Britain.— A crime committed by a Chinese subject on a French ship at sea is an offense committed within French juris-

on a British merchant vessel within the territorial waters of the United States is within the territory of the United States, and he may be arrested upon a warrant issued by an extradition magistrate in pursuance of proceedings for his extradition.[38]

3. PLACE MUST HAVE BEEN WITHIN JURISDICTION WHEN CRIME WAS COMMITTED. The treaty of 1889 between Great Britain and the United States providing for the extradition of persons charged with offenses "committed within the jurisdiction of" either party does not authorize the extradition of a person charged with the commission of an offense in a place or country which was not at the time within the jurisdiction of the country seeking the extradition, although it has since been brought within such jurisdiction.[39]

IV. STATUTORY PROVISIONS.

A. In General — 1. IN THE UNITED STATES. Until 1848 there was no legislation in the United States on the subject of extradition. Extradition was granted under the provisions of the treaties with Great Britain and France, although there was some difference of opinion upon the question whether a fugitive could be legally surrendered in the absence of an act of congress passed to carry out the provisions of the treaty.[40] The question ceased to be a practical one, however, with the passage of the act of Aug. 12, 1848,[41] which provided the machinery for a judicial examination in every case arising under any extradition treaty then in force or which might in the future be entered into by this government. It is not in conflict with the treaty of 1842 with Great Britain, but supplements that treaty.[42] This statute was supplemented by the act of Aug. 3, 1882.[43]

2. IN GREAT BRITAIN. An act of parliament is essential to carry an extradition treaty into effect. The act of parliament of 1870, which repeals acts passed to carry prior treaties into operation, contains a provision which keeps those treaties in full force.[44]

B. Extradition to Country Occupied by United States. The act of June

diction, and the accused cannot be surrendered to the Chinese government on the ground that Chinese law provides for the punishment of a Chinese subject for a crime committed on a foreigner within foreign territory. Atty.-Gen. *v.* Kwok-A-Sing, L. R. 5 P. C. 179, 12 Cox C. C. 565, 42 L. J. P. C. 64, 29 L. T. Rep. N. S. 114, 21 Wkly. Rep. 825.

38. *In re* Newman, 79 Fed. 622.

39. *In re* Taylor, 118 Fed. 196, holding that the territory of the South African republic was not a part of the dominions of Great Britain, in an ordinary or unqualified sense, prior to the proclamation of Lord Roberts of 1900, making it a British colony, nor in such sense as to bring it within the purview of the extradition treaty of 1889 between Great Britain and the United States; and under that treaty Great Britain cannot require from the United States the extradition of a person for an offense alleged in the complaint to have been committed at Johanneshurg prior to the date of such proclamation.

40. In *In re* Metzger, 1 Barb. (N. Y.) 248, 1 Park. Cr. (N. Y.) 108, it was held that the treaty with France in relation to the extradition of fugitive criminals could not be executed without an act of congress. But in the case of *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66, arising under the treaty of 1842 with Great Britain, it was decided that fugitives in the United States charged with crimes committed within British jurisdiction could be arrested and surrendered without special legislation to carry the treaty into execution. See also to the same effect *Re* Metzger, 5 How. (U. S.) 176, 12 L. ed. 104; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257; U. S. *v.* Robins, 27 Fed. Cas. No. 16,175, Bee 266. In Muller's Case, 5 Phila. (Pa.) 289, it was held that the application for extradition under the treaty with Great Britain may be sustained under a law of the state enacted after the date of the treaty, but in force at the time the offense was committed and at the time of the hearing under the application.

41. U. S. Rev. St. (1878) §§ 5270–5273 [U. S. Comp. St. (1901) pp. 3591–3596]. Section 5270 was intended to apply to treaties thereafter made as well as to existing treaties. Castro *v.* De Uriarte, 16 Fed. 93; *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,858, 4 Dill. 411.

42. *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257.

43. 22 U. S. St. at L. 215 [U. S. Comp. St. (1901) p. 3593].

44. *Ex p.* Bouvier, 12 Cox C. C. 303, 42 L. J. Q. B. 17, 27 L. T. Rep. N. S. 844.

6, 1903, provides for extradition from the United States to a foreign country or territory occupied by or under control of the United States.[45]

C. In the Philippines. And the act of Feb. 6, 1905, provides the necessary machinery for the execution in the Philippine Islands of the extradition treaties of the United States applicable thereto.[46]

D. Magistrates — 1. Who Are Competent — a. In the United States. The statute confers power and jurisdiction to act in extradition cases upon the justices of the supreme, circuit, and district courts of the United States, judges of courts of record of general jurisdiction of the states, and commissioners authorized by any of the courts of the United States.[47] A United States commissioner appointed by the federal circuit court is a "magistrate" within the treaty with Great Britain of Aug. 9, 1842, regulating the arrest and commitment of fugitives.[48] Only judges of courts of the United States are empowered to act in proceedings for extradition to a foreign country or territory under control of the United States.[49] Commissioners possessing general power to arrest and commit for offenses against the United States, who have not been specially authorized by courts of the United States to perform that duty, are not empowered to act in extradition cases. A commissioner competent to act in the matter must be specially appointed or authorized by the federal courts for that purpose.[50] A commissioner authorized by a district court to discharge all the duties and exercise all the powers which may be performed by a justice of the supreme court, or a circuit or district judge, under the statute,[51] is a magistrate specially empowered

45. 31 U. S. St. at L. 656 [U. S. Comp. St. (1901) p. 3591]. In *In re* Neely, 103 Fed. 626, it was contended that this statute was unconstitutional, as applied to Cuba, on the ground that since its inhabitants are free and independent the United States could not occupy or exercise control over the island; but the court held that the act is constitutional and that the United States, which was in military occupation of the island as enemy's territory at the time it compelled Spain to relinquish her sovereignty over it, might constitutionally continue its occupancy until the political branch of the government should determine that it was no longer necessary. And in Neely *v.* Henkel, 180 U. S. 109, it was decided that Cuba was foreign territory, within this statute, notwithstanding the fact that the island was at that time under a military government appointed by and representing the president of the United States in assisting the inhabitants of the islands to establish a government.

46. 33 U. S. St. at L. 698.

47. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591]. And see Matter of Heilbonn, 1 Park. Cr. (N. Y.) 429.

A complaint for forgery made by a Mexican consul against a fugitive from that country may be heard by a United States circuit court commissioner, and, if he deems the evidence sufficient to sustain the charge, to commit the accused until a warrant for his surrender be issued, as forgery is one of the crimes enumerated in the extradition treaty with Mexico. Benson *v.* McMahon, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234.

48. *In re* Kaine, 14 Fed. Cas. No. 7,598.

49. 31 U. S. St. at L. 656 [U. S. Comp. St. (1901) p. 3591]. And see Neely *v.* Henkel, 180 U. S. 109, 21 S. Ct. 302, 45 L. ed. 448.

50. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130; *In re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345; *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414.

However, the view was taken in the case of *In re* Mineau, 45 Fed. 188, that a commissioner, under the general authority given by statute to hold for security of the peace and good behavior, may issue a warrant for the arrest of a person, in a proceeding under an extradition treaty. See also *Re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345. In *In re* Grin, 112 Fed. 790, it was held that an oath taken before a United States commissioner to a complaint made under U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591] for the arrest of one who has committed a crime in a foreign country is sufficient, such officer being authorized to administer oaths by 29 U. S. St. at L. 184 [U. S. Comp. St. (1901) p. 652].

The power to appoint extradition commissioners is vested in the courts by congress in Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591], under the authority of U. S. Const. art. 2, § 2, par. 2. Rice *v.* Ames, 180 U. S. 371, 21 S. Ct. 406, 45 L. ed. 577. Until June 30, 1897, these extradition commissioners were appointed by the circuit courts, but the act of May 28, 1896 (29 U. S. St. at L. 184), provided that the office of circuit court commissioner should cease to exist on June 30, 1897, vested the appointment of United States commissioners in the district courts, and declared that such United States commissioners shall have the same powers and perform the same duties as were then imposed upon commissioners of the circuit courts.

51. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

to act in extradition cases.[52] The jurisdiction of a United States commissioner to hear and consider the evidence, and certify the proceedings to the secretary of state, is not dependent upon the fact that he issued the warrant of arrest.[53] An extradition magistrate has jurisdiction, and it is his duty, to determine whether an offense charged is political within the meaning of the treaty provision.[54]

b. In Great Britain. Police magistrates and justices of the peace are authorized to act in extradition cases.[55]

c. In Canada. Judges of the superior and county courts of any province, and all commissioners appointed for the purpose in any province by the governor in council under the great seal, are authorized to act judicially in extradition matters.[56]

2. HEARINGS. The act of 1882 provides that hearings in extradition proceedings shall be held publicly, and in a room or office easily accessible to the public.[57] The hearing must be had within the state, district, or territory where the accused is found.[58]

3. ADJOURNMENTS. The magistrate may in the exercise of a just and reasonable discretion grant adjournments.[59] On an examination on a warrant of arrest of an alleged fugitive from justice of a foreign state, an adjournment to enable the prisoner to obtain evidence from abroad[60] to be used on the examination is properly refused if the affidavits in support of the motion do not show that there is any evidence on the part of the prisoner that exists or is accessible or is likely to be obtained.[61]

4. PROVISIONAL DETENTION. In most treaties of extradition express provision is

52. *In re* Grin, 112 Fed. 790 [*affirmed* in 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130].

53. *In re* Grin, 112 Fed. 790. See also Matter of Counhaye, L. R. 8 Q. B. 410, 42 L. J. Q. B. 217, 28 L. T. Rep. N. S. 761, 21 Wkly. Rep. 883, in Great Britain.

54. *In re* Ezeta, 62 Fed. 972.

55. Extradition Act (1870), §§ 8–11, 13.

56. Can. Rev. St. c. 142, § 5. Where a commissioner has been appointed under the great seal of Canada, and his appointment as such commissioner has appeared in the official Gazette, and he is thereby "authorized to act judicially in extradition matters under the Extradition Act, within the province," and he describes himself in a warrant of commitment, as "a judge under the Extradition Act," his jurisdiction is sufficiently disclosed. *In re* Debaum, 4 Montreal Q. B. 145, 16 Rev. Leg. 612.

The jurisdiction of an extradition magistrate extends over the whole province for which he has been appointed; he may therefore order a prisoner to be brought before him from any part of the province in which he has been arrested. *In re* Greene, 22 Quebec Super. Ct. 91.

The jurisdiction of a county judge under the Extradition Act is limited only by the bounds of the province and not by those of his county. *In re* Parker, 10 Can. L. T. 373.

Second arrest.— In *Ex p.* Seitz, 8 Quebec Q. B. 392, it was held that a prisoner who has been discharged on habeas corpus because the extradition commissioner had no jurisdiction in the province in which the prisoner was arrested may subsequently be arrested in the province of such commissioner, and tried before him, if the prior arrest has not been fraudulently made for the purpose of getting him within the jurisdiction.

57. 22 U. S. St. at L. 215 [U. S. Comp. St. (1901) p. 3593].

58. *In re* Walshe, 125 Fed. 572.

59. *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79. The continuation of proceedings before an extradition commissioner for a longer period than an examining magistrate is authorized to continue a case under the state laws does not invalidate proceedings for extradition under the treaty with Great Britain, which provides that extradition shall be carried out "in conformity with the laws regulating extradition for the time being in force in the surrendering States," as the laws contemplated therein are those of the United States, and not the laws of the particular state within which the proceedings are taken. Rice *v.* Ames, 180 U. S. 371, 21 S. Ct. 406, 45 L. ed. 577.

Abuse of discretion.— A prisoner is not entitled to discharge on habeas corpus on the ground that an adjournment of the hearing by a commissioner is unreasonable unless it is shown that the commissioner has abused his discretion. *In re* Ludwig, 32 Fed. 774.

60. To procure depositions.— Refusal of a commissioner to grant an adjournment to enable the accused to procure depositions from a foreign country to show an alibi is a legitimate exercise of discretion. *In re* Wadge, 16 Fed. 332, 21 Blatchf. 300.

61. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

made for the provisional arrest and detention of a criminal fugitive, in advance of the presentation of a formal requisition with proofs. Such stipulation is usually accompanied by a proviso that unless the formal requisition and proofs are presented within a limited period after the arrest of the accused the prisoner shall be discharged from custody.[62]

5. TRANSLATION OF DOCUMENTS. Accurate and verified translations of documents in foreign languages should be furnished in extradition proceedings.[63]

6. RECORD OF PROCEEDINGS. The commissioner should keep a record of all the oral evidence taken before him, together with the objections made to the admissibility of the evidence.[64]

7. BAIL. There is no statutory provision for the admission of a criminal fugitive to bail in international extradition proceedings in the United States, and it is the practice not to admit to bail in such cases.[65]

8. COMMITMENT FOR EXTRADITION. The statute[66] directs the magistrate, if he deems the evidence sufficient to sustain the charge, to "issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."[67] In a subsequent section of the statute it is further

62. See *supra*, note 9.

In Great Britain.— In a case arising under the treaty of 1872 between Great Britain and Germany which contains a stipulation providing that "if sufficient evidence for the extradition be not produced within two months from the date of the apprehension of the fugitive, he shall be set at liberty," a prisoner is not entitled to his release where in the magistrate's opinion sufficient evidence for extradition upon one charge has been produced within two months; and in such a case it is competent to the magistrate, after the expiration of two months, to take evidence in other cases against the prisoner and commit him for extradition upon all of them. *In re* Bluhm, [1901] 1 K. B. 764, 70 L. J. K. B. 472, 49 Wkly. Rep. 464.

63. *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414, holding that parties seeking the extradition of the fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before such commissioner or some other magistrate authorized to act in extradition cases, that the translation is correct.

64. *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414, holding, however, that he should exclude from the record the arguments and disputes of counsel.

65. In *In re* Carrier, 57 Fed. 578, the United States circuit court for the district of Colorado on habeas corpus upheld the refusal of the extradition commissioner to admit the prisoner to bail during a continuance of a hearing to secure further evidence, the court holding that the matter was dependent upon statute, and, as there was no express statutory authority for bail in such cases, it could not be granted. The same view was taken by the circuit court for the southern district of New York, in the case of *In re* Wright, 123 Fed. 463, the court stating that applications to admit to bail in international proceedings had on several occasions been made to it, and had been uniformly denied; and, upon appeal in this case to the United States supreme court, it was held that no error was committed in refusing to admit to bail, but the court added that while bail should not ordinarily be granted in cases of foreign extradition, we are unwilling to hold that the circuit courts possess no power in respect of admitting to bail, other than as specifically vested by statute, or that those courts may not in any case, and whatever the special circumstances, extend that relief. Wright *v.* Henkel, 190 U. S. 40, 63, 23 S. Ct. 781, 47 L. ed. 948.

66. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

67. When complaint is made on oath the magistrate is to examine the evidence of criminality, and, if he deems it sufficient to sustain the charge, to certify the same to the secretary of state. The magistrate has nothing to do with the question whether the government of the foreign country has duly authorized an application for the extradition. *In re* Dugau, 7 Fed. Cas. No. 4,120, 2 Lowell 367.

In Canada.—A warrant of commitment under the extradition treaty, which omits to state that the accused was brought before the magistrate, or that the witnesses against him were examined in his presence, is bad upon the face of it, and must be set aside. *Ex p.* Brown, 2 L. C. L. J. 23. A warrant of commitment for extradition should in its terms conform to the requirements of 31 Vict. c. 94, § 1, in directing the person accused to be committed until surrendered on the requisition of the proper authority or duly discharged according to law. *Ex p.* Zink, 6 Montreal Q. B. 260, where it is held that the judge is required to decide whether he deems the evidence adduced before him sufficient to justify the apprehension and commitment for trial of the person accused if the crime had been committed in Canada; that if he finds in the affirmative, he should so state it in his com-

provided[68] that if the prisoner is not delivered up and conveyed out of the United States within two calendar months after such commitment, over and above the time actually required to convey him from the jail to which he was committed, by the readiest way, it shall be lawful for any judge of the United States, or of any state, upon application made to him by or on behalf of the prisoner, and upon proof that reasonable notice of the intention to make such application has been given to the secretary of state, to order the prisoner to be discharged, unless sufficient cause is shown to such judge why such discharge ought not be be ordered.[69]

9. Certificate to Secretary of State. Where the magistrate deems the evidence sufficient to sustain the charge, the statute provides that "he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State."[70]

E. Complaint — 1. By Whom Made. The statute[71] provides that proceedings before extradition magistrates shall be begun "upon complaint made under oath." This complaint must be made by someone acting under the authority or sanction of the executive of the foreign government.[72] Ordinarily complaints of this character are made through the consul[73] of the foreign government, or directly upon papers sworn to by the foreign officers representing the executive.[74] It is not necessary that the complaint should be made by officers of the executive department of the foreign government. Any person authorized by the executive department to act is a proper person to appear and file a complaint.[75] It is sufficient if it be shown at any time while the proceedings are pending before the commissioner that the person who initiated the proceedings was acting under the authority of the foreign government.[76]

2. Oath. The complaint must be made "under oath."[77] It is not necessary that the oath to the complaint be taken before a commissioner authorized to act in extradition proceedings, or even before the judge or commissioner who issues the warrant of arrest.[78]

mitment, and certify the fact to the proper executive authority; and that his functions do not extend to determining whether the accused should be extradited, as that rests with the governor-general after the evidence has been reported to him; and further that if the judge fails to state in the commitment that he deems the evidence sufficient the commitment will be defective and insufficient.

68. U. S. Rev. St. (1878) § 5273 [U. S. Comp. St. (1901) p. 3596].

69. Where a fugitive had been committed and detained in jail for more than two months, his application for discharge under the provisions of the above statute was granted, although it appeared at the time of the application that an agent from the government requesting the extradition was on his way to remove the prisoner, there being no sufficient cause shown why the coming of the officer had been so long delayed. *In re* Dawson, 101 Fed. 253. See also Matter of Washburn, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548, where Chancellor Kent, in a learned opinion reviews authorities on the law of nations.

70. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

Where the evidence is not deemed sufficient to sustain the charge, the magistrate does not certify the evidence to the secretary of state. The action of the magistrate releasing the prisoner being final, there is no occasion to certify the evidence to the secretary of state.

71. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

72. *In re* Ferrelle, 28 Fed. 878.

In Canada the extradition magistrate may receive the complaint of any one who, if the alleged offense had been committed in Canada, might have made it. *In re* Lazier, 30 Ont. 419.

73. Where a complaint is made by a consul, his official character is sufficient evidence of his authority. Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; *In re* Grin, 112 Fed. 790 [*affirmed* in 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130]; *In re* Adutt, 55 Fed. 376.

74. *In re* Ferrelle, 28 Fed. 878.

75. *In re* Ferrelle, 28 Fed. 878; *In re* Kelly, 26 Fed. 852.

If made by a private individual, it must appear that he is acting under the authority of the foreign government. Com. *v.* Deacon, 10 Serg. & R. (Pa.) 125; *In re* Herres, 33 Fed. 165; *In re* Ferrelle, 28 Fed. 878.

76. *In re* Herres, 33 Fed. 165; *In re* Ferrelle, 28 Fed. 878.

77. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591]. And see *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

78. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 787. In this case the complaint

3. Essentials — a. Authority of Commissioner and Knowledge of Complainant. The complaint should show the authority of the commissioner to act in the proceedings,[79] and should also sufficiently set forth the knowledge of complainant on which he makes the complaint.[80]

b. Charge of Offense. The complaint need not set forth the crime with the particularity of an indictment. It is sufficient if it fairly apprises the party of the crime with which he is charged.[81] It should set forth clearly, but briefly, the substance of the offense charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed.[82] A complaint charging an offense at common law is sufficient, notwithstanding it concludes "against the form of the statute."[83]

was sworn to before a United States commissioner, the warrant of arrest was issued by a district judge, and made returnable to the commissioner, the latter having been specially authorized to act in extradition cases subsequently to the date of the oath but on the same day the warrant was issued. In *In re* Heilbronn, 11 Fed. Cas. No. 6,323, under the treaty between the United States and Great Britain of 1842, it was held that it was not essential that the complaint under oath should be made directly to a magistrate in the country to which the fugitive has fled, but that it is sufficient if made in the country where the crime was committed, to a magistrate having power to administer oaths and investigate the charge made, and the same or a duly certified copy thereof transmitted to the government where the fugitive has fled.

Affidavit for warrant taken by clerk of court see Affidavits, 2 Cyc. 11 note 42.

79. The complaint should describe the commissioner as a commissioner specially authorized to act in extradition proceedings. *Ex p.* Lane, 6 Fed. 34.

80. While a complaint in an extradition proceeding may be made upon information and belief, the party making the complaint should set forth with particularity the sources and details of his information, or the grounds for supposing defendant to be guilty. *Ex p.* Lane, 6 Fed. 34. See also *In re* Roth, 15 Fed. 506; *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107; *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414.

A complaint upon telegrams and depositions from the authorities of the government demanding the extradition, made by a consular officer of a foreign country, is sufficient. *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,859, 4 Dill. 415. See also *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370, where the complaint was made solely upon telegraphic information.

81. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130 [*affirming* 112 Fed. 790]; *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79; *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,858, 4 Dill. 411. See also *In re* Adutt, 55 Fed. 376.

It should be sufficiently specific, clear, and distinct in its averments to enable the party accused to understand precisely what he is charged with. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

82. *In re* Adutt, 55 Fed. 376; *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34; *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414. See also *In re* Roth, 15 Fed. 506.

Charging assault with intent to commit murder.— A complaint charging "assault with intent to kill and murder" brings the case within the terms of an extradition treaty providing for surrender for "assault with intent to commit murder." U. S. *v.* Piaza, 133 Fed. 998.

Charging embezzlement.— The accused in extradition proceedings, while in Russia, received money from his employer to deliver to a certain company. Instead he appropriated the money to his own use and fled to the state of California, where he was arrested, charged with embezzlement. Under Cal. Pen. Code, §§ 503, 508, defining "embezzlement" as "the fraudulent appropriation of property by a person to whom it has been intrusted," or who received it "by virtue of his employment," it was held that the omission of the word "fraudulently" from the complaint did not render such complaint defective, where it alleges that the accused "wrongfully, unlawfully, and feloniously" appropriated the property; and that the complaint did not insufficiently charge the crime of embezzlement, because it alleged that the money embezzled was intrusted to and received by the accused "in his capacity as clerk," instead of charging, in the language of that section, that such money came into his control or care "by virtue of his employment as such clerk." Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130 [*affirming* 112 Fed. 790].

Charging forgery.— In a case of forgery, it is not enough to charge in the complaint the crime of forgery generally, but time and place and the nature of the forgery and of the forged instrument must be sufficiently specified. *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34. A complaint in extradition proceedings for forgery, which sets forth the note alleged to be forged, its amount, date, and names of the parties, and the bank which discounted it, is sufficient in substance and form. *In re* Charleston, 34 Fed. 531. Where the crime is forgery, the complaint may charge more than one forgery. *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414.

83. *Ex p.* Lane, 6 Fed. 34.

c. Reference to Mandate. A few of the treaties of the United States provide for the issuance by the executive of a preliminary mandate or certificate that requisition has been made by the foreign government for extradition.[84] It is not necessary that the complaint should state that a mandate has been issued by the executive.[85] A variance between the mandate and the complaint, the former referring to the accused as "George Macdonell," and the latter as "George Macdonell, otherwise Macdonnell," was held not to be fatal.[86]

d. Allegation That Warrant Has Issued in a Foreign Country. It is not a necessary preliminary to an investigation, under an extradition treaty, that a warrant shall have been issued abroad, and it is not essential that the complaint should make such an averment.[87] Where the treaty requires as a prerequisite to a requisition for the surrender of a fugitive criminal that a warrant of arrest shall have issued in the foreign country, the judicial department will presume, from the mandate of the secretary of state, that such a warrant was issued.[88] A complaint on oath by a duly authorized officer, alleging that the accused had been charged before a justice of the peace in the foreign country with murder there committed, and a warrant issued for her arrest, the original warrant being

84. *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79.

85. See *supra*, note 9.

No preliminary requisition from the demanding government is essential to the jurisdiction of a United States commissioner, under U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591], over extradition proceedings. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130 [*affirming* 112 Fed. 790]. Nor is a requisition from the foreign government and mandate from this government necessary, under the statute, to initiate proceedings in extradition before a committing magistrate. *In re* Orpen, 86 Fed. 760. The judges and commissioners, on whom the act of 1848 confers authority over proceedings for the extradition of persons charged with crimes in a foreign country have jurisdiction of a complaint made for that purpose, by a consul of Great Britain, without a previous requisition by his government upon the president of the United States. *In re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257.

The initiative in proceedings for the extradition of an alleged criminal does not necessarily rest on a requisition by the foreign government, but may be commenced by the arrest of the person charged, under a warrant issued by a United States commissioner on complaint of a foreign consul. Benson *v.* McMahon, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234; *In re* Adutt, 55 Fed. 376.

In Canada it is not necessary in proceedings for a committal for extradition to prove a demand for the fugitive from the foreign government. *In re* Hoke, 15 Rev. Lég. 99.

86. *In re* Macdonnell, 116 Fed. Cas. No. 8,771, 11 Blatchf. 79.

87. *In re* Farez, 11 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107; *In re* Thomas, 23 Fed. Cas. No. 13,887, 12 Blatchf. 370.

In Great Britain to enable a justice of the peace to issue a warrant for the apprehension and committal for trial of an accused person, it need not appear that there was an original warrant for his apprehension in the foreign country or depositions taken against him there. *In re* Tivnan, 5 B. & S. 645, 9 Cox C. C. 522, 11 Jur. N. S. 34, 33 L. J. M. C. 201, 10 L. T. Rep. N. S. 499, 12 Wkly. Rep. 858, 117 E. C. L. 645.

88. *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,859, 4 Dill. 415.

An order by a magistrate in Russia, stating that he had investigated the preliminary examination in regard to the offense for which the extradition of the accused was sought, and found certain facts, and directed the arrest of the accused pursuant to law; and a second order, which, after reciting the same preliminary statement, found that the accused was arraigned pursuant to law for the offense for which he was examined, ordered his arrest, contain all the essentials of a warrant of arrest or other judicial document issued by a judge or magistrate, as required by treaty. *In re* Grin, 112 Fed. 790.

The production of a certified copy of an order purporting to be signed and sealed by a Russian examining magistrate, which, although not in the form of a warrant of arrest as used in the United States, was evidently designed to secure the apprehension of the accused and his production before an examining magistrate, satisfies the requirement of the extradition treaty with Russia that applications for extradition shall be accompanied by an authenticated copy of the warrant of arrest, or of some other equivalent judicial document issued by a judge or magistrate duly authorized to do so. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130.

Congress has dispensed with the requirement of the extradition treaty with Russia with respect to the production of a copy of a warrant of arrest, or other equivalent document issued by a magistrate of the Russian empire, by Rev. St. (1878) § 5270 [U. S.

attached to the complaint, and that the officer believes the charge as stated in the warrant to be true, is sufficient to give the commissioner jurisdiction to issue a warrant of arrest.[89]

e. Averment That Offense Is Subject to Infamous Punishment. Where a treaty provides for the surrender of persons charged with the crimes therein specified, "when these crimes are subject to infamous punishment," it is regarded as doubtful whether it is necessary to aver in the complaint that the offense for which the extradition is sought is subject to infamous punishment.[90]

f. Amendment. An extradition commissioner is not authorized to amend a complaint after the conclusion of the proceedings before him, by interlining the word "extradition" before the word "commissioner," in the description of the magistrate, in the complaint.[91]

F. Warrant of Arrest — 1. In General. The law authorizes the magistrate upon compliance with the prescribed conditions to "issue his warrant for the apprehension of the person charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered.[92]

2. Must Be Based on Sufficient Complaint. A warrant issued without a sufficient complaint on oath is invalid.[93]

3. Must Show Authority of Commissioner. A warrant which does not show on its face that the commissioner issuing it is a commissioner authorized to act in extradition cases is void.[94]

4. Should Recite Issuance of Mandate, if Any. Where a mandate has been issued by the executive the warrant of arrest should recite that fact.[95]

5. Previous Requisition Not Necessary A magistrate is authorized to issue a warrant for the arrest of a supposed criminal under the extradition treaty with Great Britain of 1842, and the statutes passed to aid in carrying that and similar treaties into effect, when due complaint is made to such magistrate, with-

Comp. St. (1901) p. 3591], which is applicable to all foreign governments with which extradition treaties have been considered. Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130.

89. *Ex p.* Sternaman, 77 Fed. 595.

90. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

91. *Ex p.* Lane, 6 Fed. 34, holding that the commissioner has no power to amend the complaint or warrant, or to supply defects by his certificate, after the case is closed and a writ of certiorari is served upon him to produce the record of his proceedings.

92. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

In Great Britain under the Extradition Act (1870), § 8, a fugitive criminal who is already in custody may be detained for an offense coming within the act, even though he was originally arrested without a warrant. The word "apprehension" includes "detention." Reg. *v.* Weil, 9 Q. B. D. 701, 15 Cox C. C. 189, 53 L. J. M. C. 74, 47 L. T. Rep. N. S. 630, 31 Wkly. Rep. 60.

In Canada in order to give jurisdiction to a judge to issue a warrant of arrest under the Extradition Act (1886), c. 142, § 6, either a foreign warrant of arrest must be proved or an information or complaint must be laid before the judge at or before the time of the issuance of the warrant; and in the case of a foreign warrant it must be shown to be outstanding and in full force. *In re* Bongard, 6 Can. Cr. Cas. 74, 5 Terr. L. R. 10. See also *In re* Weir, 14 Ont. 389.

93. Matter of Heilbonn, 1 Park. Cr. (N. Y.) 429; *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589. An extradition warrant, reciting that the accused is charged "by complaint" with forgery is based on an affidavit, a complaint being equivalent thereto. *Ex p.* White, 39 Tex. Cr. 497, 46 S. W. 639.

94. *In re* Kelley, 25 Fed. 268; *Ex p.* Lane, 6 Fed. 34; *In re* Farez, 8 Fed. Cas. Nos. 4,644, 4,645, 2 Abb. 346, 7 Blatchf. 34, 345, 40 How. Pr. (N. Y.) 107. Upon the extradition of a person charged to be a fugitive from justice, under the treaty with Mexico, a warrant for his arrest issued by the "county judge and extradition agent" is not invalid because it fails to show his authority as an extradition agent, under article 4 of the treaty, providing that within the frontier states and territories of each country the surrender may be made by the chief civil authority thereof, or by such chief civil or judicial authority of the districts or counties bordering on the frontier as may for this purpose be authorized by said chief civil authority of said frontier state or territory. *Ex p.* McCabe, 46 Fed. 363, 12 L. R. A. 589.

95. *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34; *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79.

out a previous application having been made to the executive for a preliminary mandate.[96]

6. Charge of Offense. The warrant need not state with particularity the offense with which defendant is charged. It is sufficient if it follow the terms of the statute or treaty.[97]

7. How Far Operative. A commissioner authorized by a court of the United States to act in extradition cases has no power to issue a warrant upon which a marshal of a district in another state may arrest a fugitive and return him for examination to the court of the commissioner who issued the warrant.[98]

8. Rearrest. Where an alleged fugitive has been discharged, a new complaint may be made, and a new warrant issued for his arrest, with a view to a reëxamination of the case.[99] Where an extradition commissioner has committed the accused for extradition and the commitment has been set aside on habeas corpus for errors on the examination, the accused is not necessarily released, but may be held under the warrant of arrest with a view to a new examination before the commissioner.[1] Where the first warrant of arrest is of questionable regularity, and no order is entered upon the first complaint and warrant, under the statute,[2] a second warrant may be issued.[3] Where the accused has been arrested with a view to extradition, a second warrant for his arrest cannot be executed while habeas corpus proceedings are pending.[4]

96. *In re* Kelley, 14 Fed. Cas. No. 7,655, 2 Lowell 339; *Ex p.* Ross, 20 Fed. Cas. No. 12,069, 2 Bond 252.

In Canada under the Extradition Act of 1877, a requisition from the United States government is not necessary as a preliminary condition to the arrest and commitment of a person charged with an extradition offense. *Ex p.* Cadby, 26 N. Brunsw. 452. The arrest may be made before proceedings have been begun in the foreign country. *In re* Anderson, 11 U. C. C. P. 9.

97. Castro *v.* De Uriarte, 16 Fed. 93; *In re* Macdonnell, 16 Fed. Cas. No. 8,771, 11 Blatchf. 79.

In Great Britain.—Where a requisition was made by the French government for "*abus de confiance,*" and the warrant issued by the British magistrate described the crime as "fraud by an agent," this was held sufficient. *Ex p.* Piot, 15 Cox C. C. 208, 47 J. P. 247, 48 L. T. Rep. N. S. 120. A warrant issued under the Extradition Act of 1870 for the apprehension of a native of Switzerland charging him with "crimes against bankruptcy laws" contains a sufficient description of the offense to justify the apprehension and detention of the accused. *Ex p.* Terraz, 4 Ex. D. 63, 14 Cox C. C. 153, 48 L. J. Exch. 214, 39 L. T. Rep. N. S. 502, 27 Wkly. Rep. 170.

In Canada.—In an extradition case the date of the commission of the offense is an essential element in describing it, and if the warrant does not mention such date it is defective. *Ex p.* Gaynor, 22 Quebec Super. Ct. 109.

98. Pettit *v.* Walshe, 194 U. S. 205, 24 S. Ct. 657, 48 L. ed. 938 [*affirming* 125 Fed. 572]. Prior to this decision, the circuit court of the United States for the southern district of New York, in the case of *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414, had decided that a warrant issued by a justice of the supreme court of the United States in New York and returnable before an extradition magistrate in that city, was legally served in the state of Wisconsin, and that the return of the accused person from Wisconsin to New York was warranted by the treaty with Great Britain and the statutes. See also *In re* Baruch, 41 Fed. 472; Fergus, Petitioner, 30 Fed. 607. The supreme court in Pettit *v.* Walshe, *supra*, while expressing the view that it was competent for the marshal for the district of Indiana to execute within his district the warrant issued by the extradition commissioner in New York, declared that it was the marshal's duty to take the accused before the nearest magistrate in his district who was authorized by the treaty and the acts of congress to hear and consider the evidence of criminality.

99. 10 Op. Atty.-Gen. 501; 6 Op. Atty.-Gen. 91. See Miller's Case, 5 Phila. (Pa.) 289; *In re* Kelly, 26 Fed. 852; *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 170.

In Canada the same doctrine obtains. Reg. *v.* Morton, 19 U. C. C. P. 9; *In re* Parker, 10 Can. L. T. 373.

1. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

2. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

3. Fergus, Petitioner, 30 Fed. 607.

In Canada a prisoner who has been discharged upon habeas corpus because the extradition commissioner had no jurisdiction to act judicially on the complaint laid before him may be rearrested and tried before a commissioner having jurisdiction over the complaint. *Ex p.* Seitz, 3 Can. Cr. Cas. 127, 8 Quebec Q. B. 392.

4. *In re* Farez, 8 Fed. Cas. No. 4,644, 7 Blatchf. 34.

G. Evidence — 1. Authentication — a. Under Act of 1848 and Revised Statutes of 1874. The Revised Statutes of the United States[5] provide that in every case of complaint [as aforesaid], and of a hearing upon the return of the warrant of arrest, copies of the depositions upon which an original warrant in any [such] foreign country may have been granted, certified under the hand of the person [or persons] issuing such warrant, and attested upon the oath of the party producing them to be true copies of the original depositions, may be received in evidence of the criminality of the person so apprehended,[6] "if they are authenticated in such manner as would entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party escaped. The certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any paper or other document so offered is authenticated in the manner required by this section."[7] The act of Aug. 12, 1848, authorizing a copy of the original deposition to be used in extradition proceedings before a magistrate is not in conflict with the treaty of Great Britain.[8]

b. Under Acts of 1860 and 1882. The act of Aug. 3, 1882,[9] provides that in all cases where any depositions, warrants, or other papers, or copies thereof,[10] shall be offered in evidence upon the hearing of [any extradition case under title

5. U. S. Rev. St. (1874) § 5271 [U. S. Comp. St. (1901) p. 3593].

6. This provision, commencing with the words "In every case" and ending with the words "person so apprehended," is an exact copy of section 2 of the act of 1848, being the first statutory provision relating to the admission of documentary evidence in extradition proceedings in the United States. 9 U. S. St. at L. 302 [U. S. Comp St. (1901) p. 3593].

In Great Britain if the original warrant for the arrest of an accused person only requires a seal to justify his arrest according to the French law, such warrant is sufficient without signature. *In re* Coppin, L. R. 2 Ch. 47, 12 Jur. N. S. 867, 36 L. J. M. C. 10, 15 L. T. Rep. N. S. 165, 16 Wkly. Rep. 24, opinion by Chelmsford, the Lord Chancellor.

In Canada the omission, in the jurat, of the place where the depositions were taken is not material, where the place is mentioned in the heading or margin, and is otherwise certified to. *In re* Debaum, 4 Montreal Q. B. 145, 16 Rev. Lég. 612.

Custom to act as justice of the peace.—Evidence that the justice of the peace who took affidavits of the commission of the crime and issued the warrant in the foreign country for the apprehension of the person charged was accustomed to act as justice of the peace is sufficient evidence *prima facie* of his authority to take the affidavits and issue the warrant. *Re* Kaine, 14 How. (U. S.) 103, 14 L. ed. 345.

Copies of papers presented by a foreign minister.— When papers purporting to be copies of certain proceedings had before a foreign magistrate are presented by the foreign minister to our government with a requisition for the extradition of an alleged fugitive from justice, the good faith of the nation is pledged that the foreign magistrate had authority to act, and had jurisdiction over the crime charged, and that the facts stated in them are true; and, when received by this government upon such pledge, it is sufficient to establish the fact as to the official position of the magistrate, and that he had jurisdiction over the crime charged, and power to administer the oaths in question. *In re* Heilbronn, 11 Fed. Cas. No. 6,323, 12 N. Y. Leg. Obs. 65.

7. This provision with the exception of the words in brackets [ ] is a copy of section 5271 of the revision of 1874. This statute, while embodying section 2 of the act of Aug. 12, 1848, did not affect the act of June 22, 1860, which applied to depositions, documents, and papers from abroad, offered in evidence in extradition cases, other than the deposition on which an original warrant of arrest was issued in the foreign country. *In re* Stupp, 23 Fed. Cas. No. 13,563. 12 Blatchf. 501.

8. *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257. Upon the hearing of a case arising under the treaty of 1842 with Great Britain, copies of warrants and other papers, certified under the hand of the person issuing the same, and attested upon the oath of the party producing them to be true copies of the originals, are admissible as evidence of the criminality of the person apprehended. *Ex p.* Ross, 20 Fed. Cas. No. 12,069, 2 Bond 252.

9. 22 U. S. St. at L. 215 [U. S. Comp. St. (1901) p. 3593].

10. **Enlargement of class of documentary evidence.**— The act of 1860 enlarges the class of documentary evidence which may be adduced in support of the charge of criminality beyond that authorized by the act of 1848, so as to admit any depositions, warrants, or other papers, or copies of the same, which are so authenticated that the tribunals of the country where the offense was committed would receive them for the same purpose. *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414.

sixty-six of the Revised Statutes of the United States],[11] such depositions, warrants, and other papers, or the copies thereof [shall be received and admitted as evidence on such hearing for all the purposes of such hearing],[12] if they shall be properly and legally authenticated,[13] so as to entitle them to be received for similar purposes[14] by the tribunals of the foreign country from which the accused party shall have escaped and the certificate[15] of the principal diplomatic or consular officer[16] of the United States resident in such foreign country shall be proof that [any deposition, warrant, or other paper or copies thereof, so offered, are authenticated][17] in the manner required by this act. To render papers admissible in evidence under the act of 1860, it is not necessary that they should be papers on which a warrant of arrest was issued abroad.[18] Duly certified or attested depositions taken abroad are admissible here, if they would be admissible in the

11. Instead of the words in brackets [ ] the act of 1860 reads: "An extradition case under the second section of the act entitled 'An act for giving effect to certain treaty stipulations between this and foreign governments for the apprehension and delivery up of certain offenders,' approved August twelfth, eighteen hundred and forty-eight." 12 U. S. St. at L. 84 [U. S. Comp. St. (1901) p. 3593].

12. Instead of the words in brackets [ ] the act of 1860 read: "shall be admitted and received for the purpose mentioned in said section." 12 U. S. St. at L. 84 [U. S. Comp. St. (1901) p. 3593].

13. Mode of authentication.— The act of 1882 substantially restores the provisions of the act of 1860, as respects the mode of authentication of documentary evidence. *In re* Behrendt, 22 Fed. 699, 23 Blatchf. 40. Under the act of 1882 depositions and copies require the same kind of authentication. *In re* McPhun, 30 Fed. 57.

14. "**Similar purposes**" means "proof of criminality." *In re* Charleston, 34 Fed. 531; *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414.

15. Consular certification of each piece of evidence.— It was held in the case of *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414, that each piece of the documentary evidence offered in support of the charge against the accused should be accompanied by a certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country from which the fugitive has escaped, stating that it is properly and legally authenticated so as to entitle it to be received in evidence in support of the same oral charge by the tribunals of such foreign country. But in *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107, the court held that it is not essential that each deposition should be separately certified, if the court can ascertain with reasonable certainty what papers are referred to in the certificate.

Insufficient consular certification.— A consular certification that depositions are so authenticated as "to enable them to be used in evidence, and as proof that the originals were duly received in evidence [in proof] of the criminality of the accused" is insufficient under the act of 1882. *In re* McPhun, 30 Fed. 57.

Sufficient consular certification.— The case being one under a treaty with Belgium, in respect to offenses committed in Belgium, the certificate of the minister resident of the United States to Belgium, purporting to be made under the act of 1860, which permits such officer to certify that the documents from abroad are properly and legally authenticated, so as to entitle them to be received in evidence of the criminality of the accused by the tribunals of the foreign country from which the accused escaped, certified that they were legally and properly authenticated, so as to entitle them to be received in evidence in support of the criminal charges mentioned therein, and for similar purposes mentioned in the act of 1848, and omitted the words "by the tribunals of Belgium." The documents were from the records of the tribunals of Belgium, and were authenticated by functionaries of Belgium. It was held that this was a sufficient compliance with the statute. *In re* Stupp, 23 Fed Cas. No. 13,563, 12 Blatchf. 501.

16. Principal diplomatic or consular officer. —Where the certificate required by the act of 1882 to depositions, warrants, or other papers offered in evidence in extradition cases is signed by the *chargé d'affaires ad interim*, the court will take judical notice that such *chargé* was, at the time such certificate was given, the principal diplomatic officer of the country where it was given. *In re* Orpen, 86 Fed. 760.

In Canada.— The governor of a state in the United States of America is not a minister of a foreign state within section 9 of the Extradition Act, so as to make depositions authenticated by him evidence in this province. *Ex p.* Cadby, 26 N. Brunsw. 452.

17. Instead of the words in brackets [ ] the act of 1860 read: "any paper or other document so offered is authenticated." 12 U. S. St. at L. 84 [U. S. Comp. St. (1901) p. 5271].

18. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

In Canada it is not necessary that the depositions be taken before the magistrate who issued the original warrant. *Ex p.* Worms, 22 L. C. Jur. 109, 7 Rev. Lég. 319.

foreign country, in support of the charge of crime.[19] Copies of depositions from abroad, taken subsequently to the date of the original warrant of arrest issued abroad, may be admissible in evidence under the act of 1860, as constituting, with oral evidence taken before the commissioner, legal testimony tending to prove the criminality of the accused, and material for a decision of the commissioner on the question of fact, as to the criminality of the accused.[20] Forged papers produced to and deposed to by witnesses giving depositions abroad, where the charge is forgery, need not be produced here before the commissioner.[21] It is not necessary, otherwise than by the certificate of the consul, to prove that the law of the foreign country would allow copies of depositions taken before a magistrate to be received as proof of criminality.[22] An authentication in the very language of the statute is sufficient.[23] Where the authentication recites that the papers "are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes" in the foreign country, this is sufficient.[24] Under the act of 1882, where the authentication of the diplomatic or consular officer does not comply with the requirements of the statute, other proof may be resorted to to assist the certificate.[25]

c. Under Act of 1876. The act of June 19, 1876,[26] amending the Revised Statutes, provided that "in every case of complaint and of a hearing upon the return of the warrant of arrest, any depositions, warrants, or other papers offered in evidence, shall be admitted and received for the purpose of such hearing if they shall be properly and legally authenticated so as to entitle them to be received as evidence of the criminality of the person so apprehended, by the

19. *In re* Muller, 17 Fed. Cas. No. 9,913, 5 Phila. (Pa.) 289.

Papers purporting to be depositions, so certified, are admissible on a hearing in an extradition proceeding, although the recitals contained in the introductory part thereof show that they are mere statements and not depositions. *In re* Ezeta, 62 Fed. 972.

In Canada statements on oath, sworn before a judge of a county court of the state of Illinois, whose signature is certified by the clerk of the court under the seal of the court, are admissible as evidence in extradition proceedings, and it is immaterial whether the witness has been sworn prior to his evidence being reduced to writing, as in a deposition, or whether he has been sworn thereto after it has been written down, as in an affidavit. *Re* Hoke, 15 Rev. Lég. 99. An affidavit sworn to before a commissioner of the United States, proved to be a magistrate having authority in the matter according to the law where taken, may be received, if properly proved, as evidence against the prisoner on proceedings for extradition. *Ex p.* Phelan, 6 Montreal Leg. N. 261. Information, warrant, and depositions, certified under the hand and seal of a justice of the peace, and certificate of the clerk of the county, and of the circuit court of said county and official seal of said circuit court, certifying that the said justice of the peace was at the time of signing the certificate a duly elected and qualified justice of the peace and his seal entitled to full credit, are sufficiently authenticated. *In re* Weir, 14 Ont. 389. Copies of indictments and true bills found by the grand jury of New York state cannot be admitted as *prima facie* evidence in Canada against the accused on a demand for extradition. *In re* Eno, 10 Montreal Q. B. 194; *In re* Rosenbaum, 18 L. C. Jur. 200; Reg. *v.* Browne, 6 Ont. App. 386.

20. *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501.

21. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatch. 345, 40 How. Pr. (N. Y.) 107.

22. *In re* Charleston, 34 Fed. 531.

Copies of depositions taken in London before the lord mayor, and certified by him to be copies of the depositions on which he issued a warrant of arrest against the person charged, and further certified by the minister of the United States in Great Britain to be sufficiently authenticated to entitle them to be received for a similar purpose by the tribunals of Great Britain, are competent evidence in an inquiry under a warrant of arrest in an extradition case under the act of 1848, as supplemented by the act of 1860. *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 170.

23. *In re* Krojanker, 44 Fed. 482; *In re* Herres, 33 Fed. 165; *In re* Behrendt, 22 Fed. 699, 23 Blatchf. 40; *In re* Wadge, 15 Fed. 864; *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107; 10 Op. Atty.-Gen. 501.

24. *In re* Breen, 73 Fed. 458. See also *In re* Grin, 112 Fed. 790.

25. *In re* McPhun, 30 Fed. 57; *In re* Wadge, 16 Fed. 332, 21 Blatchf. 300. See also *In re* Wadge, 15 Fed. 864.

Oral proof that the authentication is proper may be given before the magistrate by an expert. *In re* Benson, 34 Fed. 649.

26. 19 U. S. St. at L. 59 (amending U. S. Rev. St. (1878) § 5271 [U. S. Comp. St. (1901) p. 3593]).

tribunals of the foreign country from which the accused party shall have escaped, and copies of any such depositions, warrants, or other papers, shall, if authenticated according to the law of such foreign country, be in like manner received as evidence; and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any such deposition, warrant or other paper, or copy thereof, is authenticated in the manner required by this section."[27]

2. AMOUNT OF EVIDENCE. The statute contains no specification of the amount of evidence necessary to warrant the commitment of a fugitive for extradition.[28] The following provision, however, substantially appears in most of the extradition treaties of the United States, after the stipulation that extradition shall be granted in accordance with the provisions of the treaty: "Provided, that this shall only be done upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged, shall be found, would justify his apprehension and commitment for trial if the crime or offense had been there committed."[29] It is now[30] well settled that in the proceeding before the extradition magistrate, to warrant holding the prisoner for extradition, it is only necessary to adduce such evidence as would be deemed sufficient to justify holding him for trial if the offense had been committed in this country.[31] It is enough if it appears that there was legal evidence on which the commissioner might properly conclude that the accused had committed an offense within the treaty as charged.[32]

27. This section, as thus amended, provides for two classes of documentary evidence: (1) Original depositions, original warrants, and original other papers; (2) copies of "any such depositions, warrants or other papers." *In re* Fowler, 4 Fed. 303, 18 Blatchf. 430.

28. The provision being: "If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention," etc. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

29. See *supra*, note 9.

30. In some of the earlier cases it was held that in cases under a treaty of extradition the proof that the offense has been committed by the fugitive in the foreign jurisdiction should be sufficient to warrant a conviction. *In re* Risch, 36 Fed. 546; *Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1. In *In re* Calder, 2 Edm. Sel. Cas. (N. Y.) 374, the court held that a warrant could be granted only where by the laws of the state the evidence of guilt is strong enough to justify an indictment. But in the case of Farez, the court declined to adopt the view announced in Kaine's case, and declared that evidence to justify commitment for trial only is sufficient. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

31. Benson *v.* McMahon, 127 U. S. 457, 462, 8 S. Ct. 1240, 32 L. ed. 234 (where Miller, J., in delivering the opinion of the court in this case said: "Taking this provision of the treaty, and that of the Revised Statutes . . . [Rev. St. § 5270] we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him"); *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107. See also Matter of Washburn, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548; *In re* Ezeta, 62 Fed. 972; *In re* Charleston, 34 Fed. 531; *In re* Wadge, 15 Fed. 864; *In re* Metzger, 17 Fed. Cas. No. 9,511, 5 N. Y. Leg. Obs. 83; U. S. *v.* Warr, 28 Fed. Cas. No. 16,644, 3 N. Y. Leg. Obs. 346.

In Canada see *Ex p.* Lamirande, 10 L. C. Jur. 280; Reg. *v.* Burke, 6 Manitoba 121; *Re* Stanbro, 1 Manitoba 263, 2 Manitoba 1; *Ex p.* Cadby, 26 N. Brunsw. 452; *Re* Garbutt, 21 Ont. 179; Reg. *v.* Hovey, 8 Ont. Pr. 345. A *prima facie* case is sufficient to warrant extradition, and this may be established by circumstantial evidence. *Re* Hoke, 15 Rev. Lég. 99. See also *Ex p.* Lanctot, 5 Quebec Q. B. 422.

32. Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; U. S. *v.* Piaza, 133 Fed. 998; *In re* Neely, 103 Fed. 631; *In re* Herres, 33 Fed. 165. Circumstantial evidence as to the manner of drawing checks and posting books by an employee is sufficient to justify the commissioner in committing him on a charge of forgery to await the action of the secretary of state. *In re* Bryant, 80 Fed. 282.

The identity of the prisoner is sufficiently established when, on being brought before

Where the accused is found and arrested in a state in which indictment is not required, it is not necessary to produce the indictment, although it appears by the record that one was found in the country in which the crime was committed.[33] The old doctrine that proceedings for the extradition of an alien are to be conducted with extreme technicality has been abandoned. The proceedings before the commissioner are not to be treated as if it were a trial before a petit jury.[34]

3. EVIDENCE FOR THE ACCUSED. Section three of the act of 1882 provides that "on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpœnaed; and in such cases the costs incurred by the process, and the fees of witnesses shall be paid in the same manner that similar fees are paid in the case of witnesses subpœnaed in behalf of the United States."[35] The accused has a right to be examined as a witness in his own behalf on an investigation before a commissioner,[36] and to examine witnesses in his own behalf.[37] While the statutes contemplate the production and examination of defendant's witnesses before the extradition magistrate, there is no warrant in the law or practice for receiving testimony by commission, or by the depositions of witnesses taken abroad.[38] Section five of

the commissioner, he admits that he is the person named in the complaint, and that he executed the note therein described, and alleged to be forged. *In re* Charleston, 34 Fed. 531.

33. *In re* Grin, 112 Fed. 790.

34. *In re* Breen, 73 Fed. 458. See also Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; Grin *v.* Shine, 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130; *In re* Neely, 103 Fed. 626.

35. 22 U. S. St. at L. 215 [U. S. Comp. St. (1901) p. 5271].

The phrase, "he cannot safely go to trial without them," cannot be construed as giving a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was already allowable under the existing practice, such as is appropriate to a hearing having reference only to a commitment for future trial. *In re* Wadge, 15 Fed. 864.

36. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

The examination must be conducted according to the laws of the state in which the proceeding is had, in the particulars in which such proceedings are not specially regulated by a statute of the United States. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 364, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107. See also *In re* Kelley, 25 Fed. 268.

37. *In re* Kelley, 25 Fed. 268.

Right to be confronted with witnesses.— The treaty of extradition with Great Britain does not give the accused the right to be confronted with the witnesses against him. *In re* Dugan, 7 Fed. Cas. No. 4,120, 2 Lowell 367.

Right to cross-examine affiant.— Where the complaint is made upon information and belief the accused cannot demand the right to cross-examine the affiant before the prosecution gives evidence. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107.

In Canada in proceedings for the extradition of a fugitive, evidence to contradict that of the prosecution is not admissible. The accused is only entitled to show that the offense charged is not a crime mentioned in the treaty. *Re* Stanbro, 1 Manitoba 263, 2 Manitoba 1; *In re* Debaum, 4 Montreal Q. B. 145, 16 Rev. Lég. 612. See also *Ex p.* Lanctot, 5 Quebec Q. B. 422.

38. *In re* Wadge, 15 Fed. 864.

In Great Britain under the Extradition Act of 1870, foreign depositions, if duly authenticated, may be received in evidence in proceedings under the act, although taken in the absence of the person accused and without his having had an opportunity to cross-examine the witnesses. Matter of Counhaye, L. R. 8 Q. B. 410, 42 L. J. Q. B. 217, 28 L. T. Rep. N. S. 761, 21 Wkly. Rep. 883. See also Reg. *v.* Ganz, 9 Q. B. D. 93, 51 L. J. Q. B. 419, 46 L. T. Rep. N. S. 592.

In Canada see Reg. *v.* Burke, 10 Can. L. T. 28; *In re* Parker, 19 Ont. 612; *In re* Hoke, 14 Rev. Lég. 705. See also *Re* Garbutt, 21 Ont. 179. In a proceeding for extradition the judge or magistrate has no authority to hear the prisoner's defense, although in the exercise of his discretion he may hear any evidence which may be tendered to show that the offense is of a political character, or one not comprised in the treaty, or that the accuser is not to be believed on oath, or that the demand for the prisoner's extradition is the result of a conspiracy. *Re* Rosenbaum, 20 L. C. Jur. 165.

the act of 1882[39] applies only to documentary evidence submitted by the prosecution to establish the criminality of the accused and not to papers offered on the part of the accused.[40]

4. Proof of Offense. The usual treaty provision is that the alleged criminal shall be arrested and delivered up on such evidence of criminality as, according to the laws of the place where he is found, would justify his apprehension and commitment for trial if the crime or offense had been there committed.[41] Under this provision it is uniformly held that the laws of the state or place where the criminal is found furnish the rule as to what evidence is necessary to authorize his arrest and commitment.[42] Where the treaty provides for extradition for certain acts "made criminal by the laws of both countries," extradition is not limited to persons charged with acts made criminal by the laws of the United States. An act made criminal by the law of the foreign country and the law of the state of the Union in which the fugitive is found is extraditable.[43]

V. Habeas Corpus.[44]

A. May Issue With Certiorari. In a case where a person is held in custody

39. 22 U. S. St. at L. 215 [U. S. Comp. St. (1901) p. 5271].

40. Oteiza *v.* Jacobus, 136 U. S. 330, 10 S. Ct. 330, 34 L. ed. 464.

41. See *supra*, note 9.

42. Pettit *v.* Walshe, 194 U. S. 205, 24 S. Ct. 657, 48 L. ed. 938 [*affirming* 125 Fed. 572]; Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *In re* Frank, 107 Fed. 272; *In re* Ezeta, 62 Fed. 972; *In re* Muller, 17 Fed. Cas. No. 9,913, 5 Phila. (Pa.) 289; U. S. *v.* Warr, 28 Fed. Cas. No. 16,644, 3 N. Y. Leg. Obs. 346.

In Canada see *Ex p.* Worms, 22 L. C. Jur. 109, 7 Rev. Lég. 319; *Ex p.* Lamirande, 10 L. C. Jur. 280; *Re* Murphy, 26 Ont. 163.

We have no common-law crimes in the United States. The penal code enacted by congress is very limited. The great bulk of the crimes that are defined by statutes are found in the penal codes of the states alone; and so if an accused person is found in a particular state of the Union, and his return to a foreign country is demanded, the right of extradition depends upon whether or not the offense with which he is charged is an offense against the laws of the state in which he is found. Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948; *In re* Walshe, 125 Fed. 572 [*affirmed* in 194 U. S. 217, 24 S. Ct. 657, 48 L. ed. 938]. But *compare In re* Adutt, 55 Fed. 376, where it was held in a case arising under the treaty between the United States and Austria-Hungary, that "forgery" should have, so far as this government is concerned, its common-law definition.

Where an extradition treaty uses general names, such as "murder" or "arson," in defining the classes of crimes for which extradition may be granted thereunder, such names are not necessarily confined to their meaning at common law, but the question whether a given offense comes within the treaty must be determined by the law as it exists in the two countries at the time the extradition is applied for. Cohn *v.* Jones, 100 Fed. 639. See also *In re* Ezeta, 62 Fed. 972; *In re* Cross, 43 Fed. 517; *In re* Windsor, 6 B. & S. 522, 10 Cox C. C. 118, 11 Jur. N. S. 807, 34 L. J. M. C. 163, 12 L. T. Rep. N. S. 307, 13 Wkly. Rep. 655, 118 E. C. L. 522; Reg. *v.* Phipps, 3 Can. L. T. 55.

In Canada it has been held that where it appears that the offense with which the fugitive is charged is a crime in Canada, it will be presumed, in the absence of proof to the contrary, to be a crime in the state of the United States where the offense is alleged to have been committed. *Ex p.* Zink, 6 Quebec 260.

43. Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948 [*affirming* 123 Fed. 463]. *Compare* Reg. *v.* Phipps, 3 Can. L. T. 55.

Absolute identity of statutes in the foreign country and in the United States defining the offense is not necessary. It is sufficient if the essential character of the transaction is the same. Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948.

In Canada a commitment under extradition proceedings is valid where the crime committed is shown by expert evidence to be one demanding extradition under the law of the foreign country, and the extradition commissioner is aware from his own knowledge that the same facts established a crime in his country for which extradition may be allowed, although it bears a different name. *Ex p.* Seitz, 3 Can. Cr. Cas. 127, 8 Quebec Q. B. 392. See also *Re* McCartney, 8 Manitoba 367.

A crime subject to infamous punishment in Switzerland is an extraditable crime under the treaty with that country, although not subject to such punishment in this country. *In re* Farez, 8 Fed. Cas. No. 4,645, 2 Abb. 346, 7 Blatchf. 345, 40 How. Pr. (N. Y.) 107, holding also that the crime is shown to be subject to infamous punishment in Switzerland by showing that it is punishable by imprisonment in the state prison, by the laws of the canton of Berne, in which it was committed.

44. **Habeas corpus** generally see Habeas Corpus.

under commitment by an extradition commissioner for surrender under a treaty of extradition writs of habeas corpus and certiorari may both be issued.[45]

B. Office of the Writ — 1. In the United States — a. Cannot Perform the Office of a Writ of Error. A writ of habeas corpus cannot perform the office of a writ of error. If the committing magistrate, in extradition proceedings, has jurisdiction of the subject-matter and of the accused, and the offense charged is within the terms of the treaty, and the magistrate has before him competent legal evidence on which to exercise his judgment, such decision cannot be reviewed on habeas corpus.[46] But where an alleged criminal who has been committed by an extradition commissioner for surrender but has been discharged upon the determination of the executive that the evidence of criminality is insufficient is again arrested and committed for the same offense and it should be apparent that the magistrate had no clearer or more convincing testimony than was presented on the first examination, the court on habeas corpus has power to review the testimony and correct the error.[47] Extradition proceedings should not be conducted in a technical spirit with a view to prevent extradition.[48]

Certiorari generally see Certiorari.

Jurisdiction of federal court to issue habeas corpus to test extradition proceedings see Courts, 11 Cyc. 1008.

The supreme court of the United States has no jurisdiction to issue a writ of habeas corpus in an extradition case. *In re* Metzger, 5 How. (U. S.) 176, 12 L. ed. 104.

That it is not contempt to take the prisoner out of the state by virtue of extradition proceedings pending an application for habeas corpus see 9 Cyc. 8 note 23.

45. *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501.

46. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *Ex p.* Bryant, 167 U. S. 104, 17 S. Ct. 744, 42 L. ed. 94; Ornelas *v.* Ruiz, 161 U. S. 502, 16 S. Ct. 689, 40 L. ed. 787; Oteiza *v.* Jacobus, 136 U. S. 330, 10 S. Ct. 1031, 34 L. ed. 464; Benson *v.* McMahon, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234; U. S. *v.* Piaza, 133 Fed. 998; *In re* Reiner, 122 Fed. 109; *In re* De Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42; *In re* Bryant, 80 Fed. 282; *In re* Adutt, 55 Fed. 376; *In re* Behrendt, 22 Fed. 699, 23 Blatchf. 40; *In re* Wadge, 16 Fed. 332, 21 Blatchf. 300; *In re* Fowler, 4 Fed. 303, 18 Blatchf. 430; *In re* Heilbronn, 11 Fed. Cas. No. 6,323, 12 N. Y. Leg. Obs. 65; *In re* Kaine, 14 Fed. Cas. No. 7,598, 10 N. Y. Leg. Obs. 257; *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501; *Ex p.* Van Aerman, 28 Fed. Cas. No. 16,824, 3 Blatchf. 160; *In re* Vandervelpen, 28 Fed. Cas. No. 16,844, 14 Blatchf. 137; *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,859, 4 Dill. 415; *In re* Veremaitre, 28 Fed. Cas. No. 16,915, 9 N. Y. Leg. Obs. 137; *In re* Wahl, 28 Fed. Cas. No. 17,041, 15 Blatchf. 334; *In re* Wiegand, 29 Fed. Cas. No. 17,618, 14 Blatchf. 370. *Contra*, *In re* Henrich, 11 Fed. Cas. No. 6,369, 5 Blatchf. 414; *Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1.

Error in reception of evidence.— Where the commissioner in an extradition case has acquired jurisdiction of the subject-matter and of the prisoner, the latter may be lawfully held, although the commissioner committed an error in the reception of evidence while conducting the inquiry. *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 170.

Unsatisfactory evidence.— When an officer authorized to entertain proceedings for extradition has before him evidence which, although not satisfactory, and far from convincing, authorizes conflicting presumptions and probabilities as to the guilt of the accused, such evidence, being sufficient to call for the exercise of his judgment upon the facts, gives him jurisdiction of the subject-matter, and his determination cannot be reviewed. Sternaman *v.* Peck, 80 Fed. 883, 26 C. C. A. 214.

Under the treaty with Mexico a person arrested on complaint of a consular agent for the crime of forgery alleged to have been committed in Mexico is not entitled to be discharged on habeas corpus where the undisputed evidence shows that petitioner, knowing of the future engagement of a theatrical company in the city of Mexico, falsely represented himself to be its agent, printed and sold tickets of admittance, and then escaped with the money, as the treaty with Mexico provides for the surrender of fugitives if the evidence would justify committal for trial if the crime had been committed in the country where the fugitive was apprehended, and forgery may be committed by printing as well as writing instruments purporting to be the act of another. Benson *v.* McMahon, 127 U. S. 457, 8 S. Ct. 1240, 32 L. ed. 234.

Under the treaty with the Swiss confederation it is immaterial what prior charges have been made in Switzerland against the accused, if the complaint presented charge a treaty offense, and, if the commission of the offense be duly established before the commissioner, he cannot be discharged on habeas corpus, although it should appear that a proceeding for a different and less offense, not included in the treaty, had been previously taken against him in Switzerland. *In re* Roth, 15 Fed. 506.

47. *In re* Kelly, 26 Fed. 852.

48. *In re* Herres, 33 Fed. 165, 167, where it is said: "While the courts should review the

b. Inquiry as to Legality of Detention — (i) *In General.* The legality of the detention of a prisoner may be examined on habeas corpus after the issuance of a warrant for his surrender by the executive.[49] And the proceedings may be reviewed to see that no extradition is consummated upon a mere pretext or to subserve private malice.[50]

(ii) *Irregularity in Issuance of Warrant.* Under the extradition treaty of 1874 with Belgium it is no ground of discharge of the alleged fugitive on habeas corpus that the warrant of arrest was issued by the proper judicial officer instead of by the president.[51] The objection that the judge issuing the warrant of arrest in extradition proceedings made the warrant returnable before a United States commissioner specially designated, as required by statute,[52] to act in such cases, is not available when first made on habeas corpus, even though such section seems technically to require the warrant to be made returnable before the magistrate issuing it.[53]

c. Pendency of Proceedings on Second Complaint of Demanding Government. The dismissal of an appeal from an order of a United States circuit court dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings is not required because of the pendency of proceedings on a second complaint by the demanding government, which reiterates the original charge with some amplification, and charges an additional offense.[54]

d. Prisoner Held Under Several Commitments. Where a prisoner brought up on habeas corpus is held under several commitments, one under state authority for an offense against the state, and the other under United States authority by virtue of a treaty of extradition with a foreign nation, the United States court will dismiss the habeas corpus, that portion which relates to offenses against the state, for want of jurisdiction, and the other portion because the commitments and warrant of extradition comply substantially with the treaty and the act of congress.[55]

e. Effect of Rehearing on Habeas Corpus Proceedings. Where a warrant of surrender had been issued, after the circuit court had dismissed a writ of habeas corpus, sued out by the prisoner, the secretary of state, upon being notified that the habeas corpus proceedings would be reheard by a justice of the supreme court of the United States, refused an application on behalf of the prisoner to recall the warrant.[56]

f. Jurisdiction of State Court Over Prisoner in Custody of United States Marshal. Where a person is in custody of a United States marshal for the purpose of determining whether or not he should be extradited under the treaty between the United States and Great Britain, the state court has no jurisdiction to compel the production of the prisoner before it to enable it to review the proceedings of the federal tribunal.[57]

proceedings to see that no extradition is consummated upon a mere pretext, or to subserve private malice, yet, if it appears that a crime has been committed, and probable that the accused has fled to this country for refuge, then a spirit of fairness, expecting that the foreign country will treat extradition proceedings from this country in the same spirit, requires that we act reasonably and justly, having reference more to the substance than to the form of the proceedings."

49. *Ex p.* Kaine, 14 Fed. Cas. No. 7,597, 3 Blatchf. 1; *In re* Macdonnell, 16 Fed. Cas. No. 8,772, 11 Blatchf. 170; *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66.

50. *In re* Herres, 33 Fed. 165, where Brewer, J., delivered the opinion.

51. *Ex p.* Van Hoven, 28 Fed. Cas. No. 16,859, 4 Dill. 415.

52. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

53. *In re* Grin, 112 Fed. 790 [*affirmed* in 187 U. S. 181, 23 S. Ct. 98, 47 L. ed. 130].

54. Wright *v.* Henkel, 190 U. S. 40, 23 S. Ct. 781, 47 L. ed. 948.

55. U. S. Rev. St. (1878) §§ 752, 753 [U. S. Comp. St. (1901) p. 592]; *In re* Veremaitre, 28 Fed. Cas. No. 16,915, 9 N. Y. Leg. Obs. 137.

56. Mr. Sherman to Mr. Morgan, April 10, 1897, in the case of Bryant MSS. Dom. Let. Dept. State.

57. People *v.* Fiske, 45 How. Pr. (N. Y.) 294.

g. Arrest in Civil Action Before Return to Place of Extradition. An extradited person arrested in a civil action before he has had time, after his acquittal of the offense for which he was extradited, to return to the place from which he was brought, is "in custody in violation of the constitution or of a law or treaty of the United States," within the meaning of the statutes,[58] relating to writs of habeas corpus in the federal courts, although the prisoner is held under process from a state court.[59]

2. In Great Britain — a. In General. Upon an application for a habeas corpus in the case of a fugitive criminal committed by a police magistrate under the Extradition Act, the court has no power to review the decision of the magistrate on the ground that it was against the weight of the evidence laid before him, there being sufficient evidence before him to give him jurisdiction in the matter.[60]

b. Offenses of a Political Character. The decision of a magistrate who commits a prisoner for extradition that the offense charged is not of a political character is subject to review by the court on an application for habeas corpus.[61] Where a prisoner has been committed for extradition in respect to crimes *prima facie* divested of any political character, and there is no evidence that they are of political character, or that his extradition is demanded in order to punish him for an offense of a political character, but only a suggestion of that effect, the court will grant no habeas corpus.[62]

3. In Canada. Upon habeas corpus the court should see that the facts alleged by the prosecution constitute an extraditable offense, and the court should examine the evidence so far as to see that there is such proof as would warrant a grand jury in finding a true bill, or a justice of the peace in committing for trial.[63] An alleged irregularity in the proceedings for his arrest cannot, on an application for habeas corpus, avail a prisoner committed for extradition. It is sufficient that, being under arrest before proper authority, a case has been made out against him to justify his commitment.[64]

58. U. S. Rev. St. (1878) §§ 752, 753 [U. S. Comp. St. (1901) p. 592].

59. *In re* Reinitz, 39 Fed. 204, 4 L. R. A. 236.

60. Reg. *v.* Maurer, 10 Q. B. D. 513, 52 L. J. M. C. 104, 31 Wkly. Rep. 609.

By the Extradition Act of 1870, when a fugitive criminal is brought before a police magistrate, the latter is to hear the case in the same manner and to have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him charged with an indictable offense committed in England. Upon a committal by a police magistrate, as a court of common law is not a court of appeal in such a case, it will not question the judgment of the magistrate if the case was within his jurisdiction and there was any evidence to support his decision. *Ex p.* Huguet, 12 Cox C. C. 551, 29 L. T. Rep. N. S. 40.

Newly discovered evidence.— On an application for a habeas corpus to bring up a fugitive criminal committed for extradition by a police magistrate under the Extradition Act of 1870, it is not competent for the court to review the decision of the magistrate on the ground that further evidence has come to light, provided that there was evidence upon which the magistrate could act and that it is not shown that he had not jurisdiction. Observations in *In re* Castioni, [1891] 1 Q. B. 149, 17 Cox C. C. 225, 55 J. P. 328, 60 L. J. M. C. 22, 64 L. T. Rep. N. S. 344, 39 Wkly. Rep. 202 [*questioned* in Rex *v.* Holloway Prison, 71 L. J. K. B. 935, 87 L. T. Rep. N. S. 332, 51 Wkly. Rep. 191].

61. *Ex p.* Castioni, [1891] 1 Q. B. 149, 17 Cox C. C. 225, 55 J. P. 328, 60 L. J. M. C. 22, 64 L. T. Rep. N. S. 344, 39 Wkly. Rep. 202.

62. Considerations as to whether a demand for a prisoner's surrender by a friendly foreign power under a treaty has been made in good faith and in the interests of justice rest with the government, and the court has no authority to entertain them judicially. *In re* Arton, [1896] 1 Q. B. 108, 65 L. J. M. C. 23, 73 L. T. Rep. N. S. 687, 44 Wkly. Rep. 238.

63. *In re* Hoke, 15 Rev. Lég. 93.

64. *Ex p.* Phelan, 6 Montreal Leg. N. 261.

In Ex p. Gaynor, 22 Quebec Super. Ct. 109, Justice Caron of the superior court of Quebec decided, where a writ of habeas corpus issued by a judge in an extradition case had been rescinded, that another writ might be issued and that the judge seized of the proceedings thereon might issue an auxiliary writ of certiorari addressed to the extradition commissioner who issued the warrant, requiring him to return the whole record. He further held that after the return of the record the judge, in dealing with the merits

VI. SURRENDER.

A. By Whom Made. The Revised Statutes of the United States[65] authorize the secretary of state under his hand and seal of office to order the person committed by an extradition magistrate pursuant to the statute[66] to be delivered to such person as shall be authorized, in the name and on behalf of such foreign government, to be tried for the crime of which such person shall be so accused, and such person shall be delivered up accordingly.

B. Duty Not Ministerial. It was at first held that this duty of the executive was merely ministerial.[67] It is now well established, however, that the executive has power to revise the opinion of the extradition magistrate.[68]

C. Grounds For Refusal. This authority has on numerous occasions been exercised by the executive, generally upon the ground of insufficiency of the evidence to establish the charge under the treaty.[69]

VII. EXPENSES.

A. Borne by Demanding Government. Every treaty of extradition to which the United States is a party contains a provision that the expenses of extradition shall be borne by the demanding government,[70] and it is the practice for the demanding government to defray the expenses of the proceedings whether the fugitive is eventually surrendered or not.[71]

of the habeas corpus, is not restricted to examination of the warrant of arrest in order to ascertain whether the commissioner had jurisdiction, but may go behind it and examine the grounds upon which it issued. But upon an appeal on behalf of the United States, the demanding government, to the British privy council, this judgment was reversed and it was declared that where a prisoner is brought before a competent tribunal, and is charged with an extradition offense and remanded for the purpose of affording the prosecution the opportunity of bringing forward the evidence by which the accusation is to be supported, a court upon habeas corpus cannot treat the remand warrant as a nullity and adjudicate upon the case as though the whole evidence were before it. Op. Privy Council in U. S. *v.* Gaynor, Feb. 8, 1905. In this case the prisoners were discharged from custody by Justice Caron, but after the rendition of the opinion of the privy council they were rearrested and brought before the extradition magistrate.

65. U. S. Rev. St. (1878) § 5272 [U. S. Comp. St. (1901) p. 3593].

66. U. S. Rev. St. (1878) § 5270 [U. S. Comp. St. (1901) p. 3591].

The governor of the Philippine Islands is empowered to issue, under his hand and seal of office, warrants for the surrender of fugitive criminals committed for extradition from the Philippine Islands. 33 U. S. St. at L. 698.

The treaty with Great Britain of 1842, which made provision for the arrest and judicial examination of criminal fugitives, provided also that the magistrate, if he deemed the evidence sufficient to sustain the charge, should certify the same to the proper executive authority, that a warrant might issue for the surrender of such fugitive. Under this treaty provision it was held that the order of surrender might be signed by the secretary of state and issue from the state department. Terlinden *v.* Ames, 184 U. S. 270, 22 S. Ct. 484, 46 L. ed. 534; *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66.

67. *In re* Sheazle, 21 Fed. Cas. No. 12,734, 1 Woodb. & M. 66.

68. *In re* Ezeta, 62 Fed. 972. Where, under an extradition treaty, an accused party is held for surrender, and even after the refusal of his discharge on habeas corpus, the president may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of criminality. *In re* Stupp, 23 Fed. Cas. No. 13,563, 12 Blatchf. 501.

69. Moore Extrad. §§ 363–365.

Charge not embraced in the requisition.— In one case the refusal to grant the surrender was based upon the fact that the charge for which the extradition magistrate had committed the accused was not embraced in the requisition of the foreign government for the extradition of the fugitive. Mr. Gresham to Mr. Guzman, Oct. 26, 1894; MSS. Notes to Salvador, Dept. State.

70. See *supra*, note 9.

71. In several of our treaties the proviso is added that the demanding government shall not be compelled to bear any expense for the services of such officers of the government from which extradition is sought as receive a fixed salary, and that in cases where such officers receive only fees, the charge for their services shall not exceed the fees to which they would be entitled under the laws of the country for services rendered

B. By Whom Paid in Extradition to United States. In the United States the expenses incurred in securing the extradition from foreign countries of offenders against the federal laws are borne by the government of the United States, an annual appropriation being made, "for actual expenses incurred in bringing home from foreign countries persons charged with crime." Where the offense is against the law of a state or territory the expenses are paid by the state or territory.[72]

VIII. PROPERTY FOUND ON FUGITIVE.

A provision common to extradition treaties[73] is that all articles found in the possession of the accused, whether being the proceeds of the crime charged, or material as evidence in making proof of the crime, shall so far as practicable and in conformity with law be given up when the extradition takes place. A proviso is generally inserted that the rights of third parties to such articles shall nevertheless be respected.[74]

in ordinary criminal proceedings. See *supra*, note 9. As indicated *supra*, IV, G, 3, in certain cases under section 3 of the act of 1882 the costs and fees incurred in obtaining witnesses for the accused in extradition proceeding are borne by this government. Section 4 of this act requires the magistrate to certify witness' fees and costs of every nature, including his own fees, to the secretary of state, who is authorized to allow payment thereof out of the appropriation to defray the expenses of the judiciary, and to obtain reimbursement of the amount thereof from the foreign government by whom the proceedings may have been instituted.

72. In article 10 of the treaty of 1842 between the United States and Great Britain, providing that on extradition the expense of apprehension and delivery shall be borne by the "party who makes the requisition, and receives the fugitive," the word "party" refers to the contracting parties to the treaty, and has no reference to any question which may arise between the government which receives the fugitive and its officers or citizens. People *v.* Columbia County, 56 Hun (N. Y.) 17, 8 N. Y. Suppl. 752. In the case of Goldfon *v.* Allegheny County, 8 Pa. Dist. 387, it was held that under the statutes of Pennsylvania, a person named by the governor and by the president of the United States to receive from the Canadian authorities and return to Allegheny county under the extradition treaty between the United States and Great Britain one charged with crime in that county, cannot hold the state or county for expenses and services in securing the return of the prisoner.

N. Y. Pen. Code, § 51, forbidding an officer to ask or receive any fee or compensation for expenses incurred in procuring from the government a demand on the executive authority of a state or territory or of a foreign government does not apply to international extradition proceedings. Ellis *v.* Jacob, 17 N. Y. App. Div. 471, 45 N. Y. Suppl. 177.

The agent representing the state is the only person who can make expenditures in extradition proceedings which the county from which the fugitive fled will be required to repay; and where the county has paid such agent it will not be called upon to reimburse its county attorney for expenses incurred by him in the proceedings. Rucker *v.* Coffey County, 7 Kan. App. 470, 54 Pac. 141.

73. See *supra*, note 9.

74. In Great Britain.— At the hearing of an application for the extradition of a person charged with a theft committed abroad certain articles forming part of the stolen property were produced under a subpœna duces tecum by a witness who claimed the property in them under a *bona fide* purchase from the prisoner in England. The magistrate committed the prisoner for extradition, and gave a verbal direction that the articles produced by the witness should be detained by the police for the purposes of the prosecution abroad. On an application by such witness under 11 & 12 Vict. c. 44, § 5, for an order to the magistrate to direct the delivery up of the articles, it was held: (1) That the magistrate was *functus officio* the moment he made the committal for extradition; (2) that the verbal direction for the detention of the articles being given without jurisdiction, the court had no power under 11 & 12 Vict. c. 44, § 8 (which deals solely with acts relating to the duties of magistrates), to make the order asked; (3) that even if the court had power the applicant would require to establish his title to the articles; and (4) that the applicant's possessory title to the articles had been lawfully divested by their production under the subpœna duces tecum. Reg. *v.* Lushington, [1894] 1 Q. B. 420, 17 Cox C. C. 754, 58 J. P. 282, 70 L. T. Rep. N. S. 412, 10 Reports 418, 42 Wkly. Rep. 411.

The trustee in bankruptcy of a fugitive criminal domiciled in England, against whom an order for committal on an extradition warrant has been made, is not entitled to a transfer of the property in the possession of the prisoner at the time of his arrest until the magistrate who makes the order for committal has decided what, if any, portions of such property are required for the purposes of the foreign trial. The concurrence of the secretary of state in handing over such portions to the country requesting the

IX. RIGHTS AND LIABILITIES OF ACCUSED AFTER SURRENDER.

A. Criminal Prosecutions For Other Offenses — 1. IN ABSENCE OF TREATY — a. In the United States. A person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he has been taken.[75] The immunity from trial for any other offense than that for which extradition has been granted cannot be waived by the accused.[76]

b. In Great Britain. In Great Britain it is expressly provided by law that a person whose extradition has been granted to that government for one crime cannot be tried for another.[77]

c. In Canada. In Canada, however, in the absence of treaty stipulation preventing it, an extradited person may be tried for an offense other than that for which his surrender is granted.[78]

2. TREATY PROVISIONS. The treaties of the United States almost uniformly contain express provisions prohibiting the trial or punishment of an extradited criminal for any offense committed prior to his extradition other than that for which his extradition is granted.[79] Under a treaty which contained a provision

extradition should be obtained and a stipulation made for the return of the same upon the conclusion of the trial to the trustee in bankruptcy in this country. *In re* Borovsky, [1902] 2 K. B. 312, 71 L. J. K. B. 992, 87 L. T. Rep. N. S. 184, 9 Manson 346, 51 Wkly. Rep. 48.

75. U. S. *v.* Rauscher, 119 U. S. 407, 16 S. Ct. 1120, 41 L. ed. 215 [*followed* in *Ex p.* Coy, 32 Fed. 911]. In this case it was held that a person extradited to this country from Great Britain, under the treaty of 1842, upon the charge of murder on the high seas, could not lawfully be tried upon an indictment charging him with inflicting cruel and unusual punishment. See articles by William Beach Lawrence (14 Alb. L. J. 85, 15 Alb. L. J. 224, 16 Alb. L. J. 361), by Judge Lowell (10 Am. L. Rev. 617), by David W. Field (Field Int. Code, § 237); and also the following cases:

California.— People *v.* Gray, 66 Cal. 271, 5 Pac. 240.

Kentucky.— Com. *v.* Hawes, 13 Bush 697, 26 Am. Rep. 242.

New York.—Bacharach *v.* Lagrave, 47 How. Pr. 385; Matter of Lagrave, 45 How. Pr. 301.

Ohio.— State *v.* Vanderpool, 39 Ohio St. 273, 48 Am. Rep. 431.

Texas.— Blandford *v.* State, 10 Tex. App. 627.

United States.— *Ex p.* Hibbs, 26 Fed. 421; U. S. *v.* Watts, 14 Fed. 130, 8 Sawy. 370. The only cases in which an opposite view has been taken by courts in the United States are *In re* Miller, 23 Fed. 32; U. S. *v.* Caldwell, 25 Fed. Cas. No. 14,707, 8 Blatchf. 131; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,573, 13 Blatchf. 295.

76. *Ex p.* Coy, 32 Fed. 911.

77. Extrad. Act (1870), § 19.

78. Reg. *v.* Van Aerman, 4 U. C. C. P. 288; *In re* Rosenbaum, 18 L. C. Jur. 200; Reg. *v.* Paxton, 10 L. C. Jur. 212. See also Reg. *v.* Waddell, 25 N. Brunsw. 93.

79. See *supra*, note 9. Several of the treaties qualify the restriction by this proviso: "Until he shall have had an opportunity of returning to the country from which he was surrendered." Some of the treaties stipulate for exemption from prosecution during a period of thirty days after final release upon the charge for which the accused was extradited. Our treaties with Chile, Denmark, Norway, Servia, Sweden, and Switzerland make prosecution and punishment for another offense dependent upon the consent of the fugitive; while our treaty with Peru requires the consent of the surrendering government. Our treaties with Belgium, Brazil, Guatemala, Luxemburg, and Mexico authorize trial and punishment for any other offense included in those treaties, upon notice with specification of the offense charged and production of documentary evidence of the charge, if required.

Charge of forgery.— Where a warrant of extradition recites that the party was accused of the crime of forgery, and had been committed for extradition thereon, without saying what forgery, resort may be had to the proceedings before the committing magistrate and his report on which the warrant issued to ascertain what and how many forgeries the extradition was intended to apply to or include. *Ex p.* Hibbs, 26 Fed. 421.

Charge of vol qualifie.— A commitment by a United States commissioner, and a warrant of extradition by the secretary of state, charging an individual with "having committed, within the jurisdiction of France, the crime of *vol qualifie* . . . one of the crimes enumerated and provided for in the treaty of

prohibiting trial or punishment for any other offense than that for which extradition has been granted until the accused shall have had an opportunity to return to the country from which he has been extradited, it was held that a person who while at liberty on bail goes to the country from which he was extradited and subsequently voluntarily returns cannot be arrested for another offense committed prior to his extradition, but is entitled to a reasonable time to depart to the country from which he was surrendered, after his discharge from custody or imprisonment on account of the offense for which he has been extradited.[80] A person surrendered for assault with intent to murder cannot be tried and convicted of assault in the second degree.[81] So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner who committed him for extradition, and upon one of the charges for which he was surrendered, it is immaterial whether he is indicted on all of such charges.[82] Where a person is extradited as an accomplice in the commission of the crime of embezzlement, his trial for embezzlement is not a trial for an offense different from that for which he is extradited.[83]

B. Civil Suits. An extradited person, after his acquittal of the charge upon which he was surrendered, is not liable to arrest in a civil action, before the expiration of a reasonable time for his return to the country from which he was extradited.[84]

extradition between that government and the United States," contain a sufficient allegation of crime, under the treaty. The words imply the commission of an extensive larceny attached to which is an infamous punishment, like confinement at hard labor. *In re* Veremaitre, 28 Fed. Cas. No. 16,915, 9 N. Y. Leg. Obs. 129.

Charge of burning a "house."— Where defendant was extradited from Canada for setting fire to and burning a certain brick "house," occupied and inhabited as a retail shoe store, and was indicted for setting fire to a certain store "building" then and there occupied as a store, the objection that the crimes charged in the information and in the indictment were not the same was without merit. State *v.* Spiegel, 111 Iowa 701, 83 N. W. 722.

Misnomer.— T was received into custody from the Swedish police in Stockholm, where he was in prison, having been arrested under the name of D under which name he was extradited. D had previously been connected with T and it was proved that T and D were different persons. It was held that, the court having jurisdiction to try the indictment, it was immaterial under what name T was extradited. Reg. *v.* Finkelstein, 16 Cox C. C. 107.

80. Cosgrove *v.* Winney, 174 U. S. 64, 19 S. Ct. 598. 43 L. ed. 897, British treaty of 1890. Where an indicted person who has escaped to Canada and against whom an extradition warrant has been issued returns to this country voluntarily, under an agreement that he shall only be tried for the offense for which he has been indicted, and he is thereupon tried and convicted, the objection that the crime for which he was tried was not an extraditable offense must be raised at the trial in order to be available. *In re* Cross, 43 Fed. 517.

81. People *v.* Stout, 81 Hun (N. Y.) 336, 30 N. Y. Suppl. 898; People *v.* Hannan, 9 Misc. (N. Y.) 600, 30 N. Y. Suppl. 370.

Greater crime does not include lesser.— In the treaty of 1842 with Great Britain manslaughter is not one of the enumerated crimes, and it is not included in murder, which is mentioned therein. In an extradition treaty the greater crime does not include the lesser, because the intent is to deliver up great criminals only. *In re* Kelley, 14 Fed. Cas. No. 7,655, 2 Lowell 339.

82. *Ex p.* Bryant, 167 U. S. 104, 17 S. Ct. 744, 42 L. ed. 94.

83. *In re* Rowe, 77 Fed. 161, 23 C. C. A. 103. In this case it was held that the finding of a new indictment to remedy a technical defect in a former one does not charge another or different offense, so as to prevent the trial, on the good indictment, of a defendant who has been extradited from a foreign country on the defective one.

84. *In re* Reinitz, 39 Fed. 204, 4 L. R. A. 236. See also Compton *v.* Wilder, 6 Ohio Dec. (Reprint) 630, 7 Am. L. Rec. 212. In Adriance *v.* Lagrave, 1 Hun (N. Y.) 689, 4 Thomps. & C. (N. Y.) 215, the first case in which this question arose, the view stated in the text was taken. The court of appeals reversed the decision of the general term (59 N. Y. 110, 17 Am. Rep. 317). See also Martin *v.* Woodhall, 56 N. Y. Super. Ct. 439, 4 N. Y. Suppl. 539. The grounds of the decision of the court of appeals in the Lagrave case were disapproved, however, by the supreme court of the United States in the case of U. S. *v.* Rauscher, 119 U. S. 407, 7 S. Ct. 234, 30 L. ed. 425. In the case of Baruch, who was arrested in New Jersey and taken to New York, upon a warrant issued by an extradition commissioner in New York charging him with embezzlement in Austria, and who immediately after his discharge by the commissioner in the extradition proceedings, was arrested by the sheriff of New York upon

C. Questioning Good Faith of Extradition Proceeding. In the tribunals of his own country the surrendered fugitive cannot question the good faith of the extradition proceedings.[85]

X. RIGHTS OF PERSONS ILLEGALLY BROUGHT WITHIN THE JURISDICTION.

A person brought from a foreign country by force, without reference to the treaty of extradition between that country and the United States, cannot allege that irregularity to defeat his trial for an offense with which he is charged in a regular indictment in the United States.[86] Nor can a party claim immunity on the ground that he was enticed from a foreign country into the United States by stratagem.[87] For the injury done to a fugitive from justice brought back to the United States against his will and without reference to an extradition treaty, he has a remedy against the wrong-doers by a civil suit.[88]

an order of arrest in a civil suit in that state, brought by the Austrian consul to recover the funds which the prisoner was charged with having embezzled, it was held that the prisoner was entitled to immunity from arrest for a reasonable time to enable him to return to New Jersey, the place from which he had been taken by the federal authority. *In re* Baruch, 41 Fed. 472. But in the case of Moesz *v.* Hermann, 8 N. Y. Suppl. 667, it was held that an Austrian subject, who is arrested in New Jersey, on a warrant obtained by the Austrian consul from a United States commissioner, for embezzlement, brought to New York, given a hearing, and discharged, can be arrested in a civil action by another person against him for conversion. See also ARREST, 3 Cyc. 921 note 24.

In Great Britain.—An attachment issued by the high court of justice for disobedience of an order of the court in a civil action is not an offense within the meaning of the nineteenth section of the Extradition Act of 1870. And where a party to an action in the chancery division was arrested in Paris for a crime committed under the Extradition Act, and while in prison in England was served with an attachment for disobedience to an order in the action, it was held that the attachment was valid and that the prisoner was not entitled to his discharge until he had cleared his contempt, although he had been acquitted of the criminal charge. Pooley *v.* Whetham, 15 Ch. D. 435, 50 L. J. Ch. 236, 43 L. T. Rep. N. S. 267, 29 Wkly. Rep. 296. If a warrant under the Extradition Act is obtained, not for the *bona fide* purpose of punishing a person for a crime but with the indirect object of making him amenable to an attachment in a civil action, the court will relieve against such an abuse of the process of the court. *In re* Galwey, [1896] 1 Q. B. 230, 18 Cox C. C. 213, 60 J. P. 87, 65 L. J. M. C. 38, 73 L. T. Rep. N. S. 756, 44 Wkly. Rep. 313.

85. *In re* Miller, 23 Fed. 32. See also Adriance *v.* Lagrave, 59 N. Y. 110, 17 Am. Rep. 317; Hall *v.* Patterson, 45 Fed. 352.

86. Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421 [*affirming* 110 Ill. 627, 51 Am. Rep. 706]. See also People *v.* Pratt, 78 Cal. 345, 20 Pac. 731; Matter of Lagrave, 45 How. Pr. (N. Y.) 301; People *v.* Rowe, 4 Park. Cr. (N. Y.) 253; Ward *v.* State, 102 Tenn. 724, 52 S. W. 996; State *v.* Brewster, 7 Vt. 118.

87. *Ex p.* Brown, 28 Fed. 653. See also *In re* Newman, 79 Fed. 622; *In re* Ezeta, 62 Fed. 964.

88. Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421; *Ex p.* Ker, 18 Fed. 167.

EXTRADITION (INTERSTATE)

By W. Rodman Peabody *

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CROSS-REFERENCES

For Matters Relating to:
International Extradition, see EXTRADITION (INTERNATIONAL).

I. FOUNDATION AND NATURE OF RIGHT.

The right of a state to demand the extradition or rendition by another state of persons who have committed offenses against its laws and have thereafter fled to the other state is founded upon the constitution of the United States.[1] It is not dependent on interstate comity, curtesy, or contract.[2] As the constitution, however, applies only to fugitives from justice[3] a state may in the exercise of its reserved sovereign power provide for the surrender of persons indictable for crime in another state, but who have never fled from it.[4]

II. LEGISLATION.

A. Federal Statutes. The provisions of the constitution are general only, and congress has passed statutes which state the course of action to be pursued in taking advantage of the constitutional power.[5]

B. State Statutes. Although the United States constitution and the acts of congress are part of the law of each state[6] states may pass laws in aid of the federal statutes and not inconsistent therewith. Such acts are not unconstitutional because congress has already acted in the matter.[7]

III. EXTRADITION TO OR FROM TERRITORIES.

The constitution is silent as to extradition from territories.[8] However, there is a statutory provision[9] for the extradition of fugitives from justice to a territory as well as to a state, and this part of the statute has been declared to be constitutional.[10]

1. "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime." U. S. Const. art. 4, § 2.

2. People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706 [*reversing* 72 N. Y. App. Div. 629, 76 N. Y. Suppl. 1026]; Com. *v.* Johnston, 12 Pa. Co. Ct. 263; *Ex p.* Morgan, 20 Fed. 298. *Compare In re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382. "It is not necessary, as under the comity of nations, to examine into the facts alleged against him [the fugitive] constituting the crime." Ham *v.* State, 4 Tex. App. 645, 664.

3. *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63; State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

4. State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

5. U. S. Rev. St. (1874) §§ 5278, 5279 [U. S. Comp. St. (1901) p. 3597]. See also 1 U. S. St. at L. 302 [U. S. Comp. St. (1901) p. 3597]. This statute has been declared constitutional. Prig *v.* Pennsylvania, 16 Pet. (U. S.) 539, 10 L. ed. 1060; *Ex p.* Morgan, 20 Fed. 298.

6. *Ex p.* Morgan, 20 Fed. 298.

7. The power of a state to enact such legislation has been accepted by the federal courts (*In re* Roberts, 24 Fed. 132), and repeatedly declared by state courts (*In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63; *In re* Rosenblat, 51 Cal. 285; *Ex p.* White, 49 Cal. 433; *In re* Knowlton, 5 Cr. L. Mag. 250; Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173; Robinson *v.* Flanders, 29 Ind. 10; Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285; Com. *v.* Tracy, 5 Metc. (Mass.) 536; *Ex p.* Ammons, 34 Ohio St. 518; *Ex p.* Butler, 18 Alb. L. J. 369).

8. U. S. Const. art. 4, § 2.

9. U. S. Rev. St. (1874) § 5278 [U. S. Comp. St. (1901) p. 3597].

10. *Ex p.* Morgan, 20 Fed. 298. *Compare In re* Romaine, 23 Cal. 585; State *v.* Loper, 2 Ga. Dec. Pt. II, 33.

IV. OFFENSES WHICH ARE GROUND FOR EXTRADITION.

The words of the constitution "treason, felony or other crime" include every offense made punishable by the law of the state in which it was committed, from the highest to the lowest in the grade of offenses,[11] including misdemeanors[12] and statutory crimes.[13] It must, however, be a definite and specific offense.[14]

V. PERSONS SUBJECT TO EXTRADITION.

A. Persons Charged With Crime. No person is subject to extradition until a criminal charge is pending against him by regular judicial proceedings in the state which demands jurisdiction of him.[15]

B. Fugitives From Justice — 1. IN GENERAL. To be a fugitive from justice, in the sense of the act of congress, it is not necessary that the person charged should have left the state in which the crime is alleged to have been committed, for the purpose of avoiding a prosecution anticipated or begun, but simply that,

Conversely a requisition may be made under U. S. Rev. St. (1874) § 5278, on a governor of a territory by a governor of a state. *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

District of Columbia.— A federal statute has provided for the extradition of fugitives from the District of Columbia (U. S. Rev. St. (1874) § 843 [U. S. Comp. St. (1901) p. 646]); and the chief justice of the District of Columbia has the same power to act within the District in extradition proceedings as has the governor of a state within his state (Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450).

Indian Territory.— By act of congress passed May 2, 1890 (Indian Terr. Annot. St. (1899) p. 13, § 41), the judge of Indian Territory was given the same powers in extradition proceedings as the governor of Arkansas had in that state. This power is shared by new judges on their appointment. *Ex p.* Dickson, (Indian Terr. 1902) 69 S. W. 943.

Indian tribes.— An Indian tribe is not a territory within the meaning of the statute, and the chief of such a tribe may not authorize or demand the extradition of a fugitive from justice. *Ex p.* Morgan, 20 Fed. 298.

11. *Georgia.*— Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

Massachusetts.— *In re* Brown, 112 Mass. 409, 17 Am. Rep. 114. *Compare* Com. *v.* Green, 17 Mass. 515.

New York.— People *v.* Donohue, 84 N. Y. 438.

Wisconsin.— State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; *In re* Hooper, 52 Wis. 699, 58 N. W. 741.

United States.— Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717; *In re* Burke, 4 Fed. Cas. No. 2,158.

See 23 Cent. Dig. tit. "Extradition," § 30.

12. *Indiana.*— Morton *v.* Skinner, 48 Ind. 123.

New York.— People *v.* Brady, 56 N. Y. 182; Matter of Heyward, 1 Sandf. 701, 1 Code Rep. 47.

Ohio.— State *v.* Hudson, 2 Ohio S. & C. Pl. Dec. 41, 2 Ohio N. P. 1.

Pennsylvania.— Com. *v.* Johnston, 12 Pa. Co. Ct. 263.

United States.— *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

See 23 Cent. Dig. tit. "Extradition," § 30.

By the Vermont supreme court it has been said that "or other crime" should include only crimes of a similar *genus* to those which may be denominated felonies. *In re* Greenough, 31 Vt. 279.

13. *In re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; *In re* Clark, 9 Wend. (N. Y.) 212; *In re* Hughes, 61 N. C. 57; *In re* Greenough, 31 Vt. 279. That an act has been made a crime by statute since the adoption of the constitution and the passage of U. S. Rev. St. (1878) § 5278 [U. S. Comp. St. (1901) p. 3597] is immaterial. *In re* Voorhees, 32 N. J. L. 141; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197.

14. *Ex p.* Slauson, 73 Fed. 666.

"Theft" is sufficiently specific. People *v.* Donohue, 84 N. Y. 438.

"Fraudulent appropriation of money" is not sufficient. *Ex p.* Slauson, 73 Fed. 666.

Sufficiency of indictment or affidavit see *infra*, VII, C.

15. *Ex p.* White, 49 Cal. 433; State *v.* Hufford, 28 Iowa 391; People *v.* Brady, 56 N. Y. 182; Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717; *Ex p.* Morgan, 20 Fed. 298.

One is charged with crime even though he has been convicted and imprisoned for the offense. Drinkall *v.* Spiegel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *In re* Hope, 10 N. Y. Suppl. 28, 7 N. Y. Cr. 406, opinion of David B. Hill, Governor.

Proof of charge of crime.— The governor should be satisfied by competent proof that defendant was charged with crime. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717. It is the indictment or affidavit not the issuing of a warrant which constitutes the charge against the fugitive. Tullis *v.* Fleming, 69 Ind. 15. The certificate of the governor that the act alleged constituted

having within a state committed a crime against its laws, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction, and is found within the territory of another state.[16] Thus he is a fugitive, although he left the state on legitimate business[17] or was returning to his home in another state.[18] If the accused was only "constructively" in a state, committing a crime against it, although not personally within its borders, he has not fled from it and is not a fugitive from justice.[19] The fact that since the date of the alleged crime he has been in the state and then left it does not make him a fugitive.[20] But if a crime consists of several acts or parts, and the accused commits within the state any one of them but departs before the happening of other acts authorized or contemplated by him, he is a fugitive from the justice of that

a crime is *prima facie* proof of charge of crime. Tullis *v.* Fleming, *supra.*

16. *Indian Territory.*— *Ex p.* Dickson, (1902) 69 S. W. 643.

Maine.— Op. Gov. Fairfield, 24 Am. Jur. 226.

Minnesota.— State *v.* Richter, 37 Minn. 436, 35 N. W. 9.

New Jersey.— *In re* Voorhees, 32 N. J. L. 141.

New York.— People *v.* Pinkerton, 17 Hun 199.

Ohio.— Johnson *v.* Ammons, 4 Cinc. L. Bul. 189, 6 Ohio Dec. (Reprint) 747, 7 Am. L. Rec. 662.

Pennsylvania.— Hall's Case, 6 Pa. L. J. 418.

Texas.— Hibler *v.* State, 43 Tex. 197.

United States.— Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *In re* Bruce, 132 Fed. 390; *In re* Bloch, 87 Fed. 981; *In re* White, 55 Fed. 54, 5 C. C. A. 29; *Ex p.* Brown, 28 Fed. 653.

See 23 Cent. Dig. tit. "Extradition," § 32.

Compare Degant *v.* Michael, 2 Ind. 396, where it is said that the person sought to be arrested should be shown to have left the state for the purpose of escaping punishment for his crime.

It seems to be the law of Massachusetts that consciousness of guilt may be a necessary element in proving the accused to be a fugitive. "The material point is the nature of the crime alleged to have been committed. The theory that a person is a fugitive if he commits a crime in one state and is found in another is true when the crime charged is a crime known to the entire world, as murder and the vast majority of crimes. The theory that conscious fleeing from the justice of a state may be an essential element to constitute one a fugitive is true of a certain class of crimes known to a single locality (not general, or even usual)." Op. Atty.-Gen. in Vinal Case (1890). *Compare* Op. Atty.-Gen. in Wilson Case, (1896) 1 Op. Atty.-Gen. 386.

17. *In re* White, 55 Fed. 54, 5 C. C. A. 29.

If persons alleged to be his victims are his employers, and he leaves with their knowledge and on their business, he is not a fugitive. *In re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566.

18. *Kansas.*— *In re* Hess, 5 Kan. App. 763, 48 Pac. 596.

Massachusetts. — Kingsbury's Case, 106 Mass. 223.

Ohio.— Johnson *v.* Ammons, 6 Ohio Dec. (Reprint) 747, 7 Am. L. Rec. 662.

South Carolina.— *Ex p.* Swearingen, 13 S. C. 74.

United States. — Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544 [*affirming* 24 Fed. 132]; *In re* Keller, 36 Fed. 681.

See 23 Cent. Dig. tit. "Extradition," § 32.

19. *Alabama.*— *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63.

Indiana.—Hartman *v.* Aveline, 63 Ind. 344, 30 Am. Rep. 217, by statute.

Iowa.— Jones *v.* Leonard, 50 Iowa 106, 32 Am. Rep. 116.

Kentucky.— *Ex p.* Knowles, 16 Ky. L. Rep. 263.

New York.— People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706; Matter of Mitchell, 4 N. Y. Cr. 596.

North Carolina.— State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

Ohio.— Wilcox *v.* Nolze, 34 Ohio St. 520.

Pennsylvania.— Com. *v.* Trach, 3 Pa. Co. Ct. 65.

United States.— Tennessee *v.* Jackson, 36 Fed. 258, 1 L. R. A. 370. In Hyatt *v.* People, 188 U. S. 691, 713, 23 S. Ct. 456, 47 L. ed. 657, it was said: "We have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who had not been in the State at the time when, if ever, the offence was committed, and who had not, therefore in fact, fled therefrom."

See 23 Cent. Dig. tit. "Extradition," § 32.

Compare Storey's Case, 3 Cent. L. J. 636.

In the absence of a statute requiring him to do so, a governor may not surrender one who is charged with crime in but is not an actual fugitive from another state. State *v.* Hall, 115 N. C. 811, 20 S. E. 729, 44 Am. St. Rep. 501, 28 L. R. A. 289.

20. People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706 [*affirmed* in 188 U. S. 691, 23 S. Ct. 456, 47 L. ed. 657, and *criticizing* and *explaining* Adams *v.* People, 1 N. Y. 173].

state.[21] A convicted prisoner who escapes is a fugitive from justice,[22] even though out of prison on parole.[23]

2. PROOF OF FLIGHT.[24] That the accused is a fugitive from justice is a fact of which the governor who receives a requisition must satisfy himself by evidence.[25] It should be shown by competent evidence making a *prima facie* case.[26] A statement in the affidavit annexed to the requisition that the accused is a fugitive is sufficient *prima facie* evidence,[27] but if this statement is rebutted there must be sufficient supplementary evidence to overcome the evidence introduced by the defense.[28]

VI. AUTHORITY TO DEMAND EXTRADITION OF A FUGITIVE.

The authority to demand the extradition of fugitives from justice is vested in the governor or chief executive of the state from which the accused has fled.[29]

21. See cases cited *infra*, this note.

False pretenses partially accomplished while out of the state. *In re* Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. St. Rep. 433, 28 L. R. A. 294. And *compare* Simmons *v.* Com., 5 Binn. (Pa.) 617, goods stolen in the state and removed to another state, the offense being larceny in the first state.

Running a bank known to be insolvent, and taking deposits, the particular deposit on which the charge was brought being made when the accused was out of the state. *In re* Cook, 49 Fed. 833 [*affirmed* in 146 U. S. 983, 13 S. Ct. 40, 36 L. ed. 934].

Running a gambling house in Maryland and being on the date named in the requisition in Washington. Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450.

So where several counts in an indictment allege different acts and some acts were committed after the alleged flight, accused is subject to extradition, although liable to be tried on all the counts. State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

22. Drinkall *v.* Spiegel, 68 Conn. 411, 36 Atl. 830, 36 L. R. A. 486; *In re* Hope, 10 N. Y. Suppl. 28, 7 N. Y. Cr. 406.

23. Drinkall *v.* Spiegel, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486.

A convicted prisoner being taken from place of trial to jail by the only passable route is not a fugitive from justice on leaving the state, because that route necessarily takes the prisoner and his guard outside of the state limits. *In re* Maney, 20 Wash. 509, 55 Pac. 930, 72 Am. St. Rep. 130.

24. **Identity of prisoner with fugitive** see *infra*, XIX, B.

25. The accused is entitled to insist upon proof that he was within the demanding state at the time he was alleged to have committed the crime charged and subsequently withdrew, so that he could not be reached by her criminal process. Upon the executive rests the responsibility in some legal mode to determine whether he is a fugitive. *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250. See also Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679.

By Mass. Rev. Laws, c. 217, § 11, sworn proof of flight is necessary. An affidavit before a justice of the peace meets the requirements of the statute. State *v.* Clough, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

By N. H. Pub. St. (1901) c. 263, §§ 7, 8, the governor must be satisfied by proof before issuing the warrant. Evidence before him need not be legal evidence. State *v.* Clough, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

The issuance of his warrant is sufficient evidence that the governor is satisfied that the accused is in fact a fugitive. Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679.

26. *In re* Jackson, 13 Fed. Cas. No. 7,125, 2 Flipp. 183.

27. *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250. And *compare Ex p.* Manchester, 5 Cal. 237; *Ex p.* Sheldon, 34 Ohio St. 319. In *Ex p.* Swearingen, 13 S. C. 74, the court said that an allegation of flight need not be a part of the affidavit if the fact of flight sufficiently appeared from the other papers in the case. To the same effect see Hibler *v.* State, 43 Tex. 197; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 179. But in Hartman *v.* Aveline, 63 Ind. 344, 30 Am. Rep. 217, it was said that there must be some better foundation for arrest than recitals in the governor's requisition. Flight is commonly shown by an affidavit.

28. *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; Tennessee *v.* Jackson, 36 Fed. 258, 1 L. R. A. 370.

Weight of evidence.— That the alleged crimes were committed six years previous to the requisition is not necessarily sufficient evidence to rebut a *prima facie* case contained in the affidavit that accused is a fugitive. State *v.* Clough, 71 N. H. 594, 53 Atl. 1036, 67 L. R. A. 946.

Parol evidence admissible to show that accused is not a fugitive in fact. Wilcox *v.* Nolze, 34 Ohio St. 520.

29. U. S. Const. art. 4, § 2; U. S. Rev. St. (1878) § 5278 [U. S. Comp. St. (1901) p. 3597].

Chief executive of the District of Columbia, for extradition purposes, is the chief justice of the district. Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450.

Judges of Indian Territory have authority of the chief executive in the territory (Indian Terr. Annot. St. (1899) p. 13, § 41).

VII. REQUISITION.

A. Form.[30] To procure the extradition of a criminal the chief executive of the state from which the accused has fled must send a written demand to the chief executive of the state where the criminal is alleged to be, demanding him as a fugitive from justice.[31] This demand or requisition must show on its face that the accused was in the demanding state at the time when the offense charged was committed[32] and that prosecution has been begun in the demanding state before some court or magistrate.[33]

B. Necessity of Indictment or Affidavit. The requisition must be accompanied by a copy of an indictment found or an affidavit made before a magistrate charging the person demanded with having committed a crime, which shall be duly certified by the governor or chief magistrate of the state or territory from which the person has fled.[34] A requisition unaccompanied by such a paper is no justification for the arrest of a fugitive.[35] Whether a complaint or an information is an affidavit within the meaning of the statute, the courts of different states do not agree.[36]

C. Sufficiency of Indictment or Affidavit — 1. INDICTMENT.[37] The indictment, a copy of which accompanies the requisition must set out the substance of a crime against the law of the demanding state.[38] If it states clearly the facts which constitute the crime the requisition does not become invalid because the indictment has technical faults which could be taken advantage of on a trial for the crime.[39] If a crime is apparently set out in the indictment, it need not be

Ex p. Dickson, (Indian Terr. 1902) 69 S. W. 943.

Change of governor.— The demand being the governor's official act, a change of governors does not affect a requisition already issued. *In re* Knowlton, 5 Cr. L. Mag. 250.

Acting governor.— A requisition signed by an "acting governor" is valid, it appearing that by a state statute a lieutenant-governor is given the power of the governor on the latter's disability. State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325.

Any person may begin prosecution in the demanding state. *Ex p.* Swearingen, 13 S. C. 74.

30. For forms of requisitions prescribed by statute consult the statutes of the several states.

31. U. S. Rev. St. (1874) § 5278.

32. People *v.* Conlin, 15 Misc. (N. Y.) 303, 36 N. Y. Suppl. 888.

33. *Ex p.* White, 49 Cal. 433. *Compare* State *v.* Hufford, 28 Iowa 391.

Requisition itself need not recite all the facts if they are found in papers which are annexed to it and duly certified to be correct. *In re* White, 45 Fed. 237.

34. U. S. Rev. St. (1874) § 5278 [U. S. Comp. St. (1901) p. 3597].

See also the following cases:

Colorado.— *In re* Knowlton, 5 Cr. L. Mag. 250.

Florida.— *Ex p.* Powell, 20 Fla. 806.

Indiana.— *Ex p.* Pfitzer, 28 Ind. 450.

Minnesota.— State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

New York.— Matter of Rutter, 7 Abb. Pr. N. S. 67.

Ohio.— *In re* Hampton, 2 Ohio S. & C. Pl. Dec. 579, 1 Ohio N. P. 180.

United States.— *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; *Ex p.* Morgan, 20 Fed. 298; *In re* Jackson, 13 Fed. Cas. No. 7,125, 2 Flipp. 183.

See 23 Cent. Dig. tit. "Extradition," § 36.

35. *Ex p.* Powell, 20 Fla. 806; Matter of Rutter, 7 Abb. Pr. N. S. (N. Y.) 67.

The mere recital that an indictment is annexed is of no avail, there being in fact none attached. *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801.

36. A complaint is not a valid substitute for an affidavit or indictment. State *v.* Richardson, 34 Minn. 115, 24 N. W. 354. *Contra, In re* Strauss, 126 Fed. 327, 63 C. C. A. 99, holding that "a verified complaint or affidavit charging a person with an infamous crime is sufficient."

An information has been held to be a valid substitute. People *v.* Stockwell, (Mich. 1904) 97 N. W. 765; *In re* Hooper, 52 Wis. 699, 58 N. W. 741. *Contra, Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801 [*reversing* 59 Fed. 894].

Under Mass. Gen. St. c. 177, § 1, the indictment need not be annexed to the requisition if it accompanies it. Kingsbury's Case, 106 Mass. 223.

37. Sufficiency of indictment generally see INDICTMENTS AND INFORMATIONS.

38. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex p.* Reggel, 114 U. S. 692, 5 S. Ct. 1148, 29 L. ed. 250.

39. An indictment is sufficient for extradition purposes, although there are objections not apparent on its face which could be shown by evidence at a trial (Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544); although it is faulty in criminal pleading as not accurately setting out the time of

accompanied by the statutes of the demanding state, the presumption being that the acts charged constitute an offense against the laws of the demanding state.[40]

2. AFFIDAVIT. The affidavit must set out the alleged crime with sufficient explicitness to apprise the governor who receives it of the facts which constitute the offense.[41] It is not insufficient, however, merely because it is defective in form[42] or has not the technical exactness of an indictment.[43] It must be a statement of facts, the existence of which is sworn to; a statement "on information" or "on belief" is insufficient to support a requisition.[44] The offense alleged must be a crime by the law of the demanding state, not necessarily of the state to which the fugitive has fled.[45] An affidavit must show on its face that it was taken before a magistrate who is authorized to issue process for arresting persons charged with crime,[46] and also that the person demanded is a fugitive from justice.[47] It is not necessary to forward the original affidavit with the requisition; a copy is sufficient.[48]

the offense (*Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250), or not accurately describing goods alleged to have been stolen (*Ex p.* Reggel, *supra*); or has technical defects of language (Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450; *In re* Baker, 21 Wash. 259, 57 Pac. 827); or defects in criminal pleading (State *v.* O'Connor, 38 Minn. 243, 36 N. W. 462); or in a charge of obtaining by false pretenses does not state how defenses became operative (*In re* Voorhees, 32 N. J. L. 141; *Ex p.* Sheldon, 34 Ohio St. 319); or the name is not set out in full (People *v.* Byrnes, 33 Hun (N. Y.) 98); or is bad in form (*Ex p.* Sheldon, *supra*); or fails to state which of two principals did the act and which was present abetting (Jackson *v.* Archibald, 12 Ohio Cir. Ct. 155, 5 Ohio Cir. Dec. 533); or a date was written in wrongly by the clerk of court (State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946). *Compare* Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

Indictment for obtaining by false pretense sufficient on the fact see *In re* Greenough, 31 Vt. 279.

40. *In re* Renshaw, (S. D. 1904) 99 N. W. 83. The fact that an indictment was found is *prima facie* evidence that act charged constituted a crime. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; *In re* Van Sciever, 42 Nebr. 772, 60 N. W. 1037, 47 Am. St. Rep. 730.

Constitutionality of practice of the demanding state may not be gone into if the indictment appears to be in accordance with its laws. State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

It is a presumption that facts stated to be a crime in the indictment do constitute a crime by the law of the demanding state. *In re* Renshaw, (S. D. 1904) 99 N. W. 83.

41. People *v.* Brady, 56 N. Y. 182.

Facts must constitute a crime — they are insufficient if crime is alleged and facts show only civil wrong. *Ex p.* Hart, 59 Fed. 894.

The charge must be of a specific crime and not of an indefinite wrong. Smith *v.* State, 21 Nebr. 552, 32 N. W. 594; *Ex p.* Slauson, 73 Fed. 666.

False pretenses. — The facts which constitute the pretense must be set out in the affidavit. People *v.* Brady, 56 N. Y. 182; *In re* Burke, 4 Fed. Cas. No. 2,158. Although it need not appear from the affidavit that obtaining by these false pretenses constitutes a statutory crime in the demanding state. People *v.* Brady, *supra*.

42. State *v.* Patterson, (Mo. 1892) 20 S. W. 9.

43. *Ex p.* Manchester, 5 Cal. 237; State *v.* Goss, 66 Minn. 291, 68 N. W. 1089; Webb *v.* York, 79 Fed. 616, 25 C. C. A. 133.

It must have that degree of certainty which would justify a magistrate in committing the accused. *Ex p.* Morgan, 20 Fed. 298.

Embezzlement alleged with sufficient certainty see *In re* Keller, 36 Fed. 681.

False pretenses alleged with sufficient accuracy see *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99.

44. *Ex p.* Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. St. Rep. 341; *Ex p.* Rowland, 35 Tex. Cr. 108, 31 S. W. 651; *Ex p.* Morgan, 20 Fed. 298; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121. So "verily believes, and has good reason to believe" is insufficient. *Ex p.* Baker, 43 Tex. Cr. 281, 65 S. W. 91, 96 Am. St. Rep. 871. But an affidavit charging a crime directly and positively is not vitiated by the conclusion, "as said deponent verily believes." *In re* Keller, 36 Fed. 681.

45. *In re* Renshaw, (S. D. 1904) 99 N. W. 83; *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99; Webb *v.* York, 79 Fed. 616, 25 C. C. A. 133.

46. *Ex p.* Powell, 20 Fla. 809; State *v.* Richardson, 34 Minn. 115, 24 N. W. 354. A police magistrate of the city of New York has such power (Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173), as has a clerk of a municipal court (*In re* Keller, 36 Fed. 681), or a Nebraska county judge (*Ex p.* Martin, (Tex. Cr. App. 1901) 65 S. W. 910).

47. *Ex p.* Manchester, 5 Cal. 237; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

48. Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173; Johnston *v.* Vanamringe, 5 Blackf. (Ind.) 311.

D. Authentication of Indictment or Affidavit. These papers[49] must be certified to be authentic by the governor or chief magistrate of the state or territory from which the person charged has fled.[50] The certificate need not state that the papers are genuine but only that they are duly authenticated,[51] and it need not be in any particular form so long as it makes clear the fact that the documents are what they purport to be.[52]

VIII. POWERS AND DUTIES OF EXECUTIVE TO WHOM REQUISITION IS ADDRESSED.

On receipt of a requisition it is the duty of an executive to examine it and the accompanying papers and, if he finds them to be in due form, thereupon to issue his warrant for the arrest of the alleged fugitive.[53] If the requisition is in

49. Certifying to the authenticity of an information is not sufficient to meet the requirements of the law. *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801 [*reversing* 59 Fed. 894].

50. U. S. Rev. St. (1878) § 5278 [U. S. Comp. St. (1901) p. 3597]. And see the following cases:

Colorado.— *In re* Knowlton, 5 Cr. L. Mag. 250.

Florida.— *Ex p.* Powell, 20 Fla. 809.

Indiana.— *Ex p.* Pfitzer, 28 Ind. 450.

Massachusetts.— Kingsbury's Case, 106 Mass. 223.

Minnesota.— State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

New York.— Soloman's Case, 1 Abb. Pr. N. S. 347.

Ohio.— *In re* Hampton, 2 Ohio S. & C. Pl. Dec. 579, 1 Ohio N. P. 180.

Texas.— Hibler *v.* State, 43 Tex. 197.

United States.— *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801; *Ex p.* Morgan, 20 Fed. 298; *In re* Jackson, 13 Fed. Cas. No. 7,125, 2 Flipp. 183.

See 23 Cent. Dig. tit. "Extradition," § 37.

Necessity of authentication.— The evidence to be produced that the party demanded is charged with crime and the mode of proof is particularly prescribed and limited by the act. It must be by copy of an indictment or affidavit certified by the governor of the state making the demand as authentic. Under the statute clearly no other evidence is sufficient or can be received by the governor on whom the demand is made as sufficient in proof of fact that such indictment or affidavit exists as the basis of the charge of crime. No other authentication is necessary. *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197.

Evidence of authentication.— Certification of a copy accompanied by the original bill is a sufficient authentication to meet the requirements of the statute. State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325. A certificate of the secretary of state of Louisiana that the person before whom an affidavit was made was a justice of the peace and that his attestation was in due form of law was insufficient to meet the requirements of the statute. Soloman's Case, 1 Abb. Pr. N. S. (N. Y.) 347.

51. Hackney *v.* Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

Sufficiency of authentication.— "Whereas, it appears by the annexed papers, which I certify to be authentic and duly authenticated in accordance with the laws of this state," meets requirements of the statute. *Ex p.* Dickson, (Indian Terr. 1902) 69 S. W. 943. A certificate that an affidavit "is duly authenticated according to the laws" of the demanding state is sufficient. *Ex p.* Manchester, 5 Cal. 237.

Magistrate.— A certificate that an affidavit was made before a trial justice sufficiently authenticates the capacity of the person as a magistrate. Kingsbury's Case, 106 Mass. 223.

52. *Ex p.* Sheldon, 34 Ohio St. 319; *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354.

Effect of authentication.— If an affidavit is duly certified to be authentic, the governor receiving it cannot hear evidence that it is a forgery (*Ex p.* Manchester, 5 Cal. 237), or that an indictment is not genuine because it has no seal or file-mark (Hibler *v.* State, 43 Tex. 197).

53. *Georgia.*— Johnston *v.* Riley, 13 Ga. 97.

New Jersey.— *In re* Voorhees, 32 N. J. L. 141.

New York.— People *v.* Brady, 56 N. Y. 182.

Pennsylvania.— *In re* Dows, 18 Pa. St. 37.

South Carolina.— State *v.* Anderson, 1 Hill 327.

United States.— Kentucky *v.* Dennison, 24 How. 66, 16 L. ed. 717.

See 23 Cent. Dig. tit. "Extradition," § 28.

Governor's authority exclusive.— A fugitive may not be arrested and delivered up by private persons. Botts *v.* Williams, 17 B. Mon. (Ky.) 687. The warrant is properly issued by the governor alone without the consent of the council. Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285. His authority is one which cannot be delegated (*In re* Payne, 7 Ohio Dec. (Reprint) 288, 2 Cinc. L. Bul. 76; *In re* Tod, 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566), although a warrant is not invalid because the governor signs it in blank and it is filled out by his secretary (*Ex p.* Camp, 8 Ohio S. & C. Pl. Dec. 681, 7 Ohio N. P. 614).

By statute in Ohio the court is given the power of examination of the requisition. Its

due form the governor has no authority to determine whether the charge is well founded.[54] His authority to act is derived from the constitution and laws of the United States and is not dependent on the existence of any state statute,[55] and as it is to the requisition a governor looks for authority to issue his warrant[56] no copy of the laws of the demanding state need be submitted to him to prove that the requisition is properly founded.[57] The duty to issue his warrant, however, is a moral one and there is no force which can compel him to do so.[58] As his duty is absolute, he may not, because of facts which do not appear on the face of the requisition, use his discretion whether to obey it or not.[59] If the requisition appears on its face to be defective, an executive has no authority to cause the arrest of the accused.[60] If a prisoner escapes from arrest before being taken from the state, the governor may issue a second warrant without waiting for a new requisition.[61]

IX. WARRANT FOR ARREST.

A. Requisites and Sufficiency — 1. In General. The warrant of the executive who surrenders a fugitive must show that the requirements of the laws have been complied with, viz., that the person to be surrendered has been charged with crime and is demanded as a fugitive from justice, and that the requisition was accompanied by a copy of an indictment or of an affidavit made before a magistrate and certified to be authentic.[62]

2. That Accused Is Charged With Crime. A warrant need not show on its face that the act charged as a crime in the requisition is in fact a crime by the law or

jurisdiction is limited to the duties which the executive ordinarily has. *Ex p.* Van Vleck, 6 Ohio Dec. (Reprint) 636, 3 Cinc. L. Bul. 763, 7 Am. L. Rec. 275, although the papers examined by the court need not be the originals sent to the governor.

Presence of accused.— Accused has no right to be heard before the governor in his determination in the first instance whether he is a fugitive. State *v.* Clough, 72 N. H. 178, 55 Atl. 554, 67 L. R. A. 946.

54. People *v.* Byrnes, 33 Hun (N. Y.) 98.

55. People *v.* Brady, 56 N. Y. 182; Matter of Briscoe, 51 How. Pr. (N. Y.) 422; Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

56. Hibler *v.* State, 43 Tex. 197.

57. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544.

58. Kentucky *v.* Dennison, 24 How. (U. S.) 66, 16 L. ed. 717.

59. When a requisition comes to the governor which shows on its face that all requirements of the acts of congress have been complied with, it is the duty of the proper authorities of this state to recognize the statements of fact made therein as true, and to surrender to the agent of the state making the demand the person demanded, in the fullest confidence that he will receive ample justice at the hands of the authorities of such state. *Ex p.* Swearingen, 13 S. C. 74. To the same effect see Johnston *v.* Riley, 13 Ga. 97; People *v.* Pinkerton, 17 Hun (N. Y.) 199; *Ex p.* Van Vleck, 6 Ohio Dec. (Reprint) 636, 7 Am. L. Rec. 275. Thus if the requisition and accompanying papers are good on their face the governor cannot refuse to issue his warrant because of defects in the indictment of which the accused might take advantage at a trial. People *v.* Byrnes, 33 Hun (N. Y.) 98.

State statutes authorizing a governor to use his discretion in issuing a warrant have been held to be constitutional. Kimpton Case [*cited* in Moore Extrad. 993]; *In re* Perry, 2 Cr. L. Mag. 84.

In Ohio evidence is admissible in habeas corpus to show that the requisition, although on its face valid, was issued in order that jurisdiction of the accused may be obtained for illegal purposes, and there is then no duty to extradite him. *In re* Hampton, 2 Ohio S. & C. Pl. Dec. 579, 1 Ohio N. P. 180. *Compare Ex p.* Van Vleck, 6 Ohio Dec. (Reprint) 636, 7 Am. L. Rec. 275.

Time when duty arises.— The obligation to issue the warrant arises when the governor is apprised of the facts which make accused a fugitive. People *v.* Brady, 56 N. Y. 182.

60. *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

61. *Ex p.* Hobbs, 32 Tex. Cr. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

So too if he is delivered up, allowed bail, and again becomes a fugitive. *In re* Hughes, 61 N. C. 57.

62. *In re* Romaine, 23 Cal. 585; *In re* Sylvester, 21 Wash. 263, 57 Pac. 829; *In re* Baker, 21 Wash. 259, 57 Pac. 827; *In re* Foye, 21 Wash. 250, 57 Pac. 825; Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354.

It is only necessary as a condition precedent to the issuing of the warrant to establish two propositions, first that the appellant was substantially charged with crime, second

statntes of the demanding state.[63] But it must specify the offense alleged to have been committed by the accused.[64]

3. That Accused Is a Fugitive From Justice.[65] Although it was once apparently required that the warrant show that in the opinion of the executive issuing it the accused was a fugitive from justice,[66] it is now generally settled that it need show only that the accused is demanded as a fugitive.[67]

4. That Copies of Indictment or Requisition Accompany It. If a warrant shows on its face that a copy of an indictment or of an affidavit accompanied the requisition, the copy need not be set out in the warrant.[68] Analogously the facts on which the indictment was based need not be set out in the warrant.[69] So if it appears that an affidavit did accompany the requisition it need not set out the form of the affidavit,[70] but it must appear to be a true affidavit and not a mere complaint.[71] There is moreover no method of forcing an executive to produce for the benefit of the accused the papers which accompanied the requisition if he does not desire so to do.[72]

5. Language of Warrant. There is no form fixed or language prescribed for the warrant issued by the executive for the arrest of a fugitive,[73] and the warrant

that he was a fugitive from justice. *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501.

63. *Massachusetts.*—*In re* Brown, 112 Mass. 409, 17 Am. Rep. 114.

New York.— *In re* Clark, 9 Wend. 212.

Texas.— *Ex p.* Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440.

Wisconsin.— *In re* Hooper, 52 Wis. 699, 58 N. W. 741.

United States.— *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197.

See 23 Cent. Dig. tit. "Extradition," § 4.

Contra.— People *v.* Shea, 27 Chic. Leg. N. 214; *Ex p.* Butler, 7 Luz. Leg. Reg. (Pa.) 209. But *compare Ex p.* Ackerman, 3 Del. Co. (Pa.) 406.

Even if the warrant ought to show the act to be a crime and does not, it is not invalid if filed with it are the requisition papers which set out the offense in full. People *v.* Shea, 27 Chic. Leg. N. 214. And *compare* Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943.

64. *Ex p.* Cubreth, 49 Cal. 435.

But it need only be stated substantially— thus a warrant which recites "uttering a forged will" is valid, although crime alleged in requisition is "forging will" (State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946); and it is sufficient if it is based on the same transaction (People *v.* Stockwell, (Mich. 1904) 97 N. W. 765).

65. Sufficiency of warrant to identify a prisoner see *infra*, XIX, B.

66. *In re* Jackson, 13 Fed. Cas. No. 7,125, 2 Flipp. 183.

67. *In re* Brown, 112 Mass. 409, 17 Am. Rep. 114; Kingsbury's Case, 106 Mass. 223; State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325; *Ex p.* Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440. *Compare Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250.

68. *Indiana.*— Nichols *v.* Cornelius, 7 Ind. 611.

Massachusetts.— Com. *v.* Hall, 9 Gray 262, 69 Am. Dec. 285.

Minnesota.— State *v.* Richardson, 34 Minn. 115, 24 N. W. 354.

New York.— People *v.* Pinkerton, 17 Hun 199.

Texas.— *Ex p.* Martin, (Cr. App. 1901) 65 S. W. 910; *Ex p.* Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440 [*disapproving dictum* in *Ex p.* Thornton, 9 Tex. 635].

United States.— *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197. *Contra, In re* Doo Woon, 18 Fed. 898, 9 Sawy. 417.

See 23 Cent. Dig. tit. "Extradition," § 41.

Compare Ex p. Lewis, 79 Cal. 95, 21 Pac. 553.

69. "We can see no reason why the warrant of the Executive should be required to go beyond a substantial statement of the existence of the conditions necessary to its issue." People *v.* Donohue, 84 N. Y. 438, 445. To the same effect see State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946.

It seems to be the rule in South Carolina that if the requisition is in fact in due form the warrant need not recite that a copy of an indictment or affidavit accompanied it. *Ex p.* Moscato, 44 S. C. 335, 22 S. E. 308.

70. *In re* Moore, 7 Ohio Dec. (Reprint) 272, 2 Cinc. L. Bul. 42.

71. State *v.* Richardson, 34 Minn. 115, 25 N. W. 354.

72. In New York apparently it is necessary only that the warrant recite that "the requisition is accompanied by the required papers" if those papers show accused to be charged with crime and a fugitive. Matter of Scrafford, 59 Hun 320, 12 N. Y. Suppl. 943.

Even if a warrant is prima facie invalid because of the absence of the necessary allegations it is cured if accompanied by the affidavit which shows the facts. *In re* Romaine, 23 Cal. 585.

73. "Direct his delivery" or "take" is as good as "arrest." Com. *v.* Hall, 9 Gray

will not be invalid because it has technical faults which do not materially affect its clearness or purport.[74]

6. Issuance of Warrant. The statute does not name the officer to whom the warrant shall be directed. This is left to the discretion of the governor issuing it.[75]

B. Conclusiveness of Warrant For Arrest. The executive who issues a warrant for the arrest of a fugitive must have passed upon two questions: (1) Is the accused charged with crime in the demanding state; and (2) is he a fugitive from justice from the demanding state.[76] Whether he is "charged with crime" is a question of law and the opinion of the executive may be reviewed by the court under a writ of habeas corpus.[77] In such a proceeding the court may examine the affidavit or indictment on which the charge is based.[78] Whether he is a "fugitive from justice" is a question of fact upon which the opinion of the governor expressed in the warrant itself is *prima facie* evidence; which, however, may be rebutted under a writ of habeas corpus by admissions or other conclusive evidence.[79] A statute, however, may provide that the governor's decision

(Mass.) 262, 69 Am. Dec. 285; *Ex p.* Swearingen, 13 S. C. 74. "Duly certified" or "certified to be in due form" is equivalent to "certified [by governor] as authentic." *Ex p.* Stanley, 25 Tex. App. 372, 8 S. W. 645, 8 Am. St. Rep. 440; *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354.

74. Slight misnomer will not invalidate warrant. Matter of Scrafford, 59 Hun (N. Y.) 320, 12 N. Y. Suppl. 943. Nor will lack of seal. *In re* Baker, 21 Wash. 259, 57 Pac. 827. *Contra,* Vallad *v.* St. Louis County Sheriff, 2 Mo. 26.

For sufficiency of name in warrant see *Ex p.* Ackerman, 3 Del. Co. (Pa.) 406.

75. It need not be directed to any named officer. Robinson *v.* Flanders, 29 Ind. 10. It may be addressed to the sheriff of the county (State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946), or to the agent of the demanding state (Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

76. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501.

Duty of executive to whom requisition is addressed see *supra,* VIII.

77. Whether a person is substantially charged with a crime by indictment or affidavit duly certified is a question of law, and after the issuing of a warrant is open upon the face of the papers to judicial inquiry upon the application for discharge under a writ of habeas corpus. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501.

78. *California.*— *Ex p.* Manchester, 5 Cal. 237.

Florida.— Kurtz *v.* State, 22 Fla. 36, 1 Am. St. Rep. 173. *Compare Ex p.* Powell, 20 Fla. 806.

Georgia.— Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

Illinois.— People *v.* Shea, 27 Chic. Leg. N. 214.

United States.— Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501. But *compare In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197, *dictum.*

See 23 Cent. Dig. tit. "Extradition," § 46.

Accordingly a recital in a warrant that a requisition "is accompanied by a copy of the indictment" is not conclusive, and the papers may be examined to see whether a copy did in fact accompany the requisition. *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801.

In New York it was once established that the finding of the governor was final, and that he could not be required to produce the evidence on which the warrant was issued. People *v.* Pinkerton, 77 N. Y. 245; People *v.* Reilley, 11 Hun 89; Leary's Case, 6 Abb. N. Cas. 43. It seems now settled that, although the governor may withhold the papers upon which his decision is based, that decision is not conclusive. People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706; People *v.* Donohue, 84 N. Y. 438; People *v.* Brady, 56 N. Y. 182; Soloman's Case, 1 Abb. Pr. N. S. 347.

Comparative value of indictment and affidavit.— A distinction has been suggested between the review of a warrant founded on an affidavit and one founded on an indictment, the governor's decision in the latter case being final but in the former *prima facie* only. People *v.* Brady, 56 N. Y. 182; *In re* Greenough, 31 Vt. 279.

79. "We are of opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, . . . or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the State." Hyatt *v.* People, 188 U. S. 691, 711, 23 S. Ct. 456, 47 L. ed. 657; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; Eaton *v.* West Virginia, 91 Fed. 760, 34 C. C. A. 68; *In re* Bloch, 87 Fed. 981. See also People *v.* Hyatt, 172 N. Y. 176, 64 N. E. 825, 92 Am. St. Rep. 706; Jackson *v.* Archibald, 12 Ohio Cir. Ct. 155, 5 Ohio Cir. Dec. 533; Com. *v.* Trach, 3 Pa. Co. Ct. 65; *In re* Tod, 12 S. D. 386, 81

shall be final,[80] in which case the warrant issued by him will constitute conclusive evidence of the right to arrest and remove the fugitive to the state from which he fled.

C. Revocation of Warrant For Arrest. If a warrant has been issued in a case in which it should not have been issued, the governor may revoke it whether it was issued by himself or his predecessor.[81]

X. EXTRADITION OF PERSONS ALREADY IN CUSTODY IN THE STATE TO WHICH THEY HAVE FLED.

A. On Criminal Charge. If at the time of the demand the accused is held on a criminal charge in the state where he is a fugitive, he need not be surrendered until after the judgment of that state is satisfied.[82] But the executive of that state may waive its jurisdiction and relinquish the prisoner.[83] Even if custody of the prisoner has been obtained by requisition he may be extradited to another state on the receipt of a requisition from that state.[84]

B. On Civil Charge. That the accused is already in custody on a civil charge in the state to which he has fled is no excuse for a refusal by the executive of that state to comply with the requisition of the governor of another state.[85]

XI. DETENTION OF FUGITIVES PENDING DEMAND FOR EXTRADITION.

A fugitive from justice may by common law be arrested and detained by judicial proceedings pending the arrival of a demand from the state from which he fled.[86] But he may be detained only for the time within which a requisition

N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566. *Compare* Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406; Cook *v.* Hart, 146 U. S. 183, 13 S. Ct. 40, 36 L. ed. 934 [*affirming*, 49 Fed. 833]; Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544. *Contra*, State *v.* Schlemn, 4 Harr. (Del.) 577; State *v.* Buzine, 4 Harr. (Del.) 572; *In re* Greenough, 31 Vt. 279.

Burden of showing he is not a fugitive rests on the prisoner when a proper warrant has issued. State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325; State *v.* Clough, 71 N. H. 594, 53 Atl. 1086, 67 L. R. A. 946; Katyuga *v.* Cosgrove, 67 N. J. L. 213, 50 Atl. 679.

Evidence must be conclusive, which is introduced by the prisoner to refute the *prima facie* case made by executive. Hayes *v.* Palmer, 21 App. Cas. (D. C.) 450.

80. Davis' Case, 122 Mass. 324; Kingsbury's Case, 106 Mass. 223.

81. Work *v.* Corrington, 34 Ohio St. 64, 32 Am. Rep. 345. *Compare* Wyeth *v.* Richardson, 10 Gray (Mass.) 240. It is a matter of common knowledge that governors of states have been and are in the habit of recalling and revoking such warrants whenever they become satisfied that they were improvidently issued. It has become what may be called the common law on the subject. The officer who has exclusive power to issue the warrant should have the power to remedy the wrong by revoking it. State *v.* Toole, 69 Minn. 104, 72 N. W. 53, 65 Am. St. Rep. 553, 38 L. R. A. 224; *In re* Carroll, 11 Chic. Leg. N. 14. But see *contra*, Hosmer *v.* Loveland, 19 Barb. (N. Y.) 111.

The revocation to be effective must be issued before the alleged fugitive is taken from the state. State *v.* Toole, 69 Minn. 104, 72 N. W. 53, 65 Am. St. Rep. 553, 38 L. R. A. 224.

82. *Kansas.*— *In re* Hess, 5 Kan. App. 763, 48 Pac. 596.

New York.— People *v.* Hagan, 34 Misc. 85, 69 N. Y. Suppl. 475.

Tennessee.— State *v.* Allen, 2 Humphr. 258.

Texas.— *Ex p.* Hobbs, 32 Tex. Cr. 312, 22 S. W. 1035, 40 Am. St. Rep. 782.

United States.— Taylor *v.* Taintor, 16 Wall. 366, 21 L. ed. 287.

See 23 Cent. Dig. tit. "Extradition," § 33.

83. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544 (here the accused had committed a crime against the state to which he had fled, but was not under arrest); *In re* Hess, 5 Kan. App. 763, 48 Pac. 596; People *v.* Hagan, 34 Misc. (N. Y.) 85, 69 N. Y. Suppl. 475.

Bail is discharged if the prisoner is relinquished to be extradited to another state. State *v.* Allen, 2 Humphr. (Tenn.) 258.

Because he owes a sentence to the state where he is, the accused cannot escape extradition. People *v.* Hagan, 34 Misc. (N. Y.) 85, 69 N. Y. Suppl. 475.

84. Hackney *v.* Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

85. *In re* Rosenblat, 51 Cal. 285. *Contra*, *In re* Troutman, 24 N. J. L. 634; Matter of Briscoe, 51 How. Pr. (N. Y.) 422, by statute. And *compare In re* Harriott, 18 R. I. 12, 25 Atl. 349, subject discussed, not decided.

86. *Alabama.*— Morrell *v.* Quarles, 35 Ala. 544.

Delaware.— State *v.* Buzine, 4 Harr. 572.

Georgia.— State *v.* Loper, Ga. Dec. Pt. II, 33; State *v.* Howell, R. M. Charlt. 120.

might reasonably arrive.[87] If the fugitive happens to be an escaping felon he may be arrested by a private citizen without a warrant and afterward detained by order of court.[88] This right of detention is now generally dealt with by statute.[89] Although bail may not be given for a prisoner held under a requisition, a statute may provide for bail of the accused pending the arrival of a requisition.[90]

XII. BAIL.[91]

A person who is arrested as a fugitive from justice on the warrant of the executive must be securely held. He is therefore not entitled to bail.[92] If while on bail for another offense he is given up on extradition proceedings to the agent of another state his bail is discharged,[93] but if while on bail for a crime he goes to another state and is there arrested on extradition proceedings from a third state his bail is forfeited.[94]

XIII. REARREST AFTER DISCHARGE.

If an alleged fugitive has been discharged from arrest through habeas corpus proceedings, after a trial on the merits, he may, if rearrested for extradition for

Indiana.— Hackney *v.* Welch, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101.

New Jersey.— *In re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382.

New York.— *Ex p.* Smith, 5 Cow. 273; People *v.* Schenck, 2 Johns. 479; Matter of Goodhue, 1 Wheel. Cr. 427. But see People *v.* Wright, 2 Cai. 213.

Ohio.— Rea *v.* Smith, 2 Handy 193, 12 Ohio Dec. (Reprint) 398.

Pennsylvania.— Simmons *v.* Com., 5 Binn. 617; Com. *v.* Rhodes, 8 Pa. Dist. 732; Com. *v.* Wilson, 1 Phila. 80. *Compare In re* Dows, 18 Pa. St. 37; Com. *v.* Deacon, 10 Serg. & R. 125.

South Carolina.— State *v.* Anderson, 1 Hill 327.

Utah.— *Ex p.* Romanes, 1 Utah 23.

See 23 Cent. Dig. tit. "Extradition," § 34.

"The denial of the power to arrest and detain an offender until the demand for his surrender be actually made, would, it is manifest, render the provision of the constitution well nigh nugatory. If a person committing murder, robbery, or other high crime in one state, may, by crossing a river, or an imaginary line, avoid arrest or detention until an executive requisition and order for his surrender may be obtained, the execution of the criminal law would be impotent indeed. Sound public policy, good faith, a fulfilment of the requirements of the constitution, all require that the arrest and detention be made of the offender, wherever he may be found, preparatory to a demand and surrender." *In re* Fetter, 23 N. J. L. 311, 317, 57 Am. Dec. 382.

In Pennsylvania he may be arrested on a magistrate's warrant. It is not necessary that it be a judge of a court of record. Com. *v.* Rhodes, 8 Pa. Dist. 732.

87. *Delaware.*— State *v.* Buzine, 4 Harr. 572.

Georgia.— State *v.* Loper, Ga. Dec. Pt. II, 33.

New York.— People *v.* Schenck, 2 Johns. 479.

Ohio.— Rea *v.* Smith, 2 Handy 193, 12 Ohio Dec. (Reprint) 398.

Utah.— *Ex p.* Romanes, 1 Utah 23.

See 23 Cent. Dig. tit. "Extradition," § 34.

88. State *v.* Anderson, 1 Hill (S. C.) 327.

89. *Ex p.* Cubreth, 49 Cal. 435; *Ex p.* Lorraine, 16 Nev. 63.

For interpretation of state statutes see the following cases:

California.— *Ex p.* Rosenblat, 51 Cal. 285; *Ex p.* White, 49 Cal. 433.

Georgia.— Lavina *v.* State, 63 Ga. 513.

Iowa.— State *v.* Hufford, 28 Iowa 391.

Missouri.— State *v.* Swope, 72 Mo. 399.

Nebraska.— Forbes *v.* Hicks, 27 Nebr. 111, 42 N. W. 898; Smith *v.* State, 21 Nebr. 552, 32 N. W. 594.

New York.— People *v.* City Prison, 83 N. Y. App. Div. 456, 82 N. Y. Suppl. 439; Matter of Heyward, 1 Sandf. 701 [*citing Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121. See also Matter of Rutter, 7 Abb. Pr. N. S. 67; Matter of Leland, 7 Abb. Pr. N. S. 64.

North Carolina.— Complaint must be before two justices. Price *v.* Graham, 48 N. C. 545. And see State *v.* Shelton, 79 N. C. 605.

United States.— *Ex p.* McKean, 16 Fed. Cas. No. 8,848, 3 Hughes 23.

90. State *v.* Hufford, 23 Iowa 579.

91. Bail generally see BAIL.

92. "The right of bail guaranteed by the Bill of Rights does not obtain in extradition cases originating under that clause of the United States Constitution which requires the rendition of fugitives from justice." *Ex p.* Erwin, 7 Tex. App. 288. See also *Ex p.* Hobbs. 32 Tex. Cr. 312, 22 S. W. 1035, 40 Am. St. Rep. 782; *In re* Foye, 21 Wash. 250, 57 Pac. 825.

93. State *v.* Allen, 2 Humphr. (Tenn.) 258.

94. Taylor *v.* Taintor, 16 Wall. (U. S.) 366, 21 L. ed. 287.

the same offense, plead *res judicata*.[95] But if his discharge was by a decree which was a nullity,[96] or was on the technical ground of inadequate requisition papers,[97] he may be rearrested after the papers have been perfected.

XIV. AGENTS TO RECEIVE PERSONS SURRENDERED.

The United States statute infers that the agent to receive a fugitive should be appointed by the governor of the demanding state,[98] and in practice he is so appointed. Although his authority is derived from the laws of the United States, he is an officer of the state whose governor appoints him.[99] Thus the right by which he holds a fugitive may be inquired into by a state court.[1] But he is subject to federal courts if he exceeds the authority given him by United States statutes.[2] His duty is to conduct the fugitive to the governor of the demanding state, and if he does this without unreasonable delay he is not liable to an action for false imprisonment,[3] even if his feelings toward the prisoner are in fact malicious.[4]

XV. COSTS AND EXPENSES.[5]

All costs incurred in apprehending, securing, and transmitting a fugitive by the terms of the statute must be paid by the demanding state.[6]

XVI. IMMUNITY OF PERSONS SURRENDERED FROM PROSECUTION FOR ANOTHER OFFENSE.

Although there has long been a conflict in the decisions of courts of the several states, it is now generally accepted that a fugitive from justice, surrendered by one state upon the demand of another, is not protected from prosecution for offenses other than that for which he was surrendered but may be tried for any crimes committed in the demanding state either before or after extradition.[7]

95. *In re* White, 45 Fed. 237.

96. *In re* Burke, 4 Fed. Cas. No. 2,158.

97. Requisition alleged "burglary" when it should have alleged "grand larceny." *In re* White, 45 Fed. 237.

Void warrant.— If two warrants for extradition are issued and one is void, a fugitive may be rearrested on the valid warrant. Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

98. U. S. Rev. St. (1878) §§ 5278, 5279 [U. S. Comp. St. (1901) p. 3597].

99. *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63; Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542.

His authority to hold a fugitive is *prima facie* proved by a precept from the governor who appoints him. Com. *v.* Hall, 9 Gray (Mass.) 262, 69 Am. Dec. 285.

Scope of agency.— His acts in declining to demand a fugitive or withdrawing a requisition will be presumed to be under instructions from his principal. *In re* Troutman, 24 N. J. L. 634.

1. Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542.

2. *In re* Bull, 4 Fed. Cas. No. 2,119, 4 Dill. 323; *In re* Burke, 4 Fed. Cas. No. 2,158.

3. Pettus *v.* State, 42 Ga. 358. Telling fugitive that payment of a debt might stop extradition is not necessarily abuse of office. *In re* Burke, 4 Fed. Cas. No. 2,158.

4. *In re* Titus, 23 Fed. Cas. No. 14,062, 8 Ben. 411.

Liability of agent.— If a fugitive is arrested but the warrant bears another name the agent is a trespasser. Johnston *v.* Riley, 13 Ga. 97.

5. Costs generally see COSTS.

6. U. S. Rev. St. (1878) §§ 5278, 5279 [U. S. Comp. St. (1901) p. 3597].

The several states have by statutes fixed the costs and limited the expenses which their agents may incur. Kroutinger *v.* Board of Examiners, 8 Ida. 463, 69 Pac. 279; Wilson *v.* Bradley, 105 Ky. 52, 48 S. W. 166, 1088, 20 Ky. L. Rep. 1118; Booker *v.* Stevenson, 8 Bush (Ky.) 39; State *v.* Allen, 180 Mo. 27, 79 S. W. 164; Steckman *v.* Bedford County, 84 Pa. St. 317; Andrus *v.* Warren County, 32 Pa. St. 540; Douthett *v.* Lawrence County, 16 Pa. Co. Ct. 406; Bose *v.* York County, 11 York Leg. Rec. (Pa.) 77.

7. *Alabama.*— Carr *v.* State, 104 Ala. 4, 16 So. 150.

Georgia.— Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Iowa.— State *v.* Kealy, 89 Iowa 94, 56 N. W. 283; State *v.* Ross, 21 Iowa 467.

Massachusetts.— Com. *v.* Wright, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206.

Missouri.— State *v.* Walker, 119 Mo. 467, 24 S. W. 1011.

Nebraska.— Petry *v.* Leidigh, 47 Nebr. 126, 66 N. W. 308.

New York.— People *v.* Cross, 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; Matter of Noyes, 17 Alb. L. J. 407.

Texas.— Ham *v.* State, 4 Tex. App. 645.

Therefore, although he be tried for a different offense against his objection, no right, privilege, or immunity secured to him by the laws and constitution of the United States is thereby denied.[8] But in those states which will not permit a fugitive to be held on civil process when jurisdiction of his person is gained through extradition proceedings, the offense for which he is held must be an indictable one.[9] If a fugitive is surrendered, tried, and convicted, he may be extradited to a third state without an opportunity to leave after serving his sentence.[10]

XVII. IMMUNITY OF PERSONS SURRENDERED FROM CIVIL PROCESS.

As the federal law neither expressly nor by implication protects the accused from prosecution for crimes other than that for which he was brought back to the state, it should not be construed as affording exemption to him from being subject to civil suits.[11] The courts of several states have decided, however, that

Wisconsin.— State *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388.

United States.— Lascelles *v.* Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. ed. 549.

See 23 Cent. Dig. tit. "Extradition," § 52.

8. *Colorado.*— Williams *v.* Weber, 1 Colo. App. 191, 28 Pac. 21.

Massachusetts.— Com. *v.* Wright, 158 Mass. 149, 33 N. E. 82, 35 Am. St. Rep. 475, 19 L. R. A. 206.

Missouri.— State *v.* Walker, 119 Mo. 467, 24 S. W. 1011; State *v.* Patterson, 116 Mo. 505, 22 S. W. 696.

North Carolina.— State *v.* Glover, 112 N. C. 896, 17 S. E. 525.

United States.— Lascelles *v.* Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. ed. 549.

See 23 Cent. Dig. tit. "Extradition," § 52.

Extent and limit of rule.— Certain states have protected him from prosecution for any offense other than that for which he was extradited before he has had a reasonable opportunity to leave the state. State *v.* McNaspy, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756; State *v.* Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. St. Rep. 200; State *v.* Simmons, 39 Kan. 262, 18 Pac. 177, *semble*. But see State *v.* Dunn, 66 Kan. 483, 71 Pac. 811, where defendant was not protected when the different offenses constituted one course of crime. *Compare* State *v.* Meade, 56 Kan. 690, 44 Pac. 619 (two offenses held sufficiently similar to hold prisoner); Matter of Cannon, 47 Mich. 481, 11 N. W. 280; *Ex p.* McKnight, 48 Ohio St. 558, 28 N. E. 1034, 14 L. R. A. 128 (deciding on habeas corpus after trial that court had no jurisdiction to have tried prisoner for any offense other than that for which he was extradited). And see *In re* Brophy, 4 Ohio S. & C. Pl. Dec. 391, 2 Ohio N. P. 230; *Ex p.* McKnight, 4 Ohio S. & C. Pl. Dec. 284, 3 Ohio N. P. 255. Even if a narrower view is adopted, the prisoner could be tried for the lesser crime included in that for which he was extradited (State *v.* Walker, 119 Mo. 467, 24 S. W. 1011, *semble*; Com. *v.* Johnston, 2 Pa. Dist. 673, 12 Pa. Co. Ct. 263); and in some states for different crimes growing out of the same transaction (Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885; Waterman *v.* State, 116 Ind. 51, 18 N. E. 63; Harland *v.* Territory, 3 Wash. Terr. 131, 13 Pac. 453). So if he returns voluntarily, knowing that if he resists he will be extradited, he will not be protected from arrest on a second charge. State *v.* McNaspy, *supra*. Under the narrower rule the fugitive had only reasonable time to leave the state (*Ex p.* McNight, *supra*, twelve days sufficient), and was not protected if he lost his opportunity by his own fault (*In re* Fitton, 55 Fed. 271).

Federal courts.— It was formerly the ruling of federal courts that a fugitive was entitled to be released by habeas corpus if he were tried for a crime other than that for which he was extradited, without an opportunity to leave. *In re* Feitton, 45 Fed. 471. But these decisions have been overruled. Lascelles *v.* Georgia, 148 U. S. 537, 13 S. Ct. 687, 37 L. ed. 549.

9. Matter of Cannon, 47 Mich. 481, 11 N. W. 280.

10. The governor was under no duty to return him to New York or guarantee him a safe return, when he was discharged from the proceedings under which he was brought here. By what rule of law, if he was here as a fugitive, he could be exempt from such process I confess myself unable to understand. People *v.* Sennott, 20 Alb. L. J. 230. And *compare* Hackney *v.* Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101. But see *contra*, *In re* Hope, 10 N. Y. Suppl. 28, 7 N. Y. Cr. 406, *dictum*.

11. Reid *v.* Ham, 54 Minn. 305, 56 N. W. 35, 40 Am. St. Rep. 333, 21 L. R. A. 232; *In re* Walker, 61 Nebr. 803, 86 N. W. 510; Browning *v.* Abrams, 51 How. Pr. (N. Y.) 172; Williams *v.* Bacon, 10 Wend. (N. Y.) 636; Com. *v.* Daniel, 4 Pa. L. J. Rep. 49. But see Pavona *v.* De Jorio, 23 Pa. Co. Ct. 382.

He is therefore not entitled to exemption from service for a reasonable time to return to the state from which he was brought by requisition. *In re* Walker, 61 Nebr. 803, 86 N. W. 510.

service in a civil suit obtained by the surrender of the fugitive was void.[12] If the requisition was issued in order to obtain jurisdiction of the accused in a civil suit process procured by the fraud would be void.[13] Of course, if it were known before his surrender that the requisition was issued in order to subject him to a civil suit, the governor who received it would have no authority to issue a warrant for his arrest.[14]

XVIII. RIGHTS OF PERSONS ILLEGALLY BROUGHT INTO JURISDICTION.

It is not a cause for exemption from prosecution for a crime that the accused was illegally arrested in another state and unlawfully brought within the jurisdiction of the state against which he offended.[15] He is not protected from prosecution even if he is kidnapped in the other state and brought into the state without a semblance of right.[16] It follows therefore that he is not wronged by being subjected to its jurisdiction, although the requisition proceedings were not strictly legal.[17] As the state to which a person has been illegally brought may hold him to answer for his offenses against it, it may arrest and surrender him on extradition proceedings to answer for his offenses against another state.[18] The state from which he was wrongfully taken has no redress except to demand the extradition of the abductors that they in turn may be prosecuted by it.[19]

XIX. EXAMINATION AND REVIEW OF PROCEEDINGS BY COURTS.

A. In General — 1. **Federal Courts.** A fugitive arrested on extradition proceedings is held under authority derived from the constitution and laws of the United States. He is therefore entitled by a writ of habeas corpus to demand the judgment of the United States courts on the lawfulness of his arrest and imprisonment.[20] The court should be clearly satisfied that an error has been com-

12. Compton *v.* Wilder, 40 Ohio St. 130; Deuber Watch Co. *v.* Dalzell, 10 Ohio Dec. (Reprint) 227, 19 Cinc. L. Bul. 269; Moletor *v.* Sinnen, 76 Wis. 308, 44 N. W. 1099, 20 Am. St. Rep. 71, 7 L. R. A. 817. And *compare* Murray *v.* Wilcox, 122 Iowa 188, 97 N. W. 1087, 101 Am. St. Rep. 263, 64 L. R. A. 534; White *v.* Marshall, 23 Ohio Cir. Ct. 376, by statute.

13. Slade *v.* Joseph, 5 Daly (N. Y.) 187; Underwood *v.* Fetter, 6 N. Y. Leg. Obs. 66. See also Browning *v.* Abrams, 51 How. Pr. (N. Y.) 172 (*semble*); Williams *v.* Bacon, 10 Wend. (N. Y.) 636.

14. *Ex p.* Slauson, 73 Fed. 666.

15. "As to the removal from the State of the fugitive from justice in a way other than that which is provided by the second section of the fourth article of the Constitution . . . it is not perceived how that fact can affect his detention upon a warrant for the commission of a crime within the State to which he is carried. The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it." Mahon *v.* Justice, 127 U. S. 700, 707, 8 S. Ct. 1204, 32 L. ed. 283. To the same effect see State *v.* Ross, 21 Iowa 467; *In re* Dows, 18 Pa. St. 37; State *v.* Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679; Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735; Ker *v.* Illinois, 119 U. S. 436, 7 S. Ct. 225, 30 L. ed. 421. But see *contra*, *In re* Robinson, 29 Nebr. 135, 45 N. W. 267, 26 Am. St. Rep. 378, 8 L. R. A. 398.

16. State *v.* Smith, 1 Bailey (S. C.) 283, 19 Am. Dec. 679.

17. *Ex p.* Barker, 87 Ala. 4, 6 So. 7, 13 Am. St. Rep. 17 (where defendant was not properly "charged with crime"); State *v.* Justus, 84 Minn. 237, 87 N. W. 770, 55 L. R. A. 325 (where accused was detained without authority pending arrival of requisition); *Ex p.* Baker, 43 Tex. Cr. 281, 65 S. W. 91, 96 Am. St. Rep. 871 (where the affidavit accompanying the requisition was insufficient).

Arrest improper see New Jersey *v.* Noyes, 18 Fed. Cas. No. 10,164.

18. *Ex p.* Brown, 28 Fed. 653.

19. Mahon *v.* Justice, 127 U. S. 700, 8 S. Ct. 1204, 32 L. ed. 283.

Comity.— If the governor of the state from which a fugitive has been taken by artifice or force demands such fugitive's release, the court of the state to which he is taken ought in comity to discharge him. Norton's Case, 15 Wkly. Notes Cas. (Pa.) 395, 6 Cr. L. Mag. 245. And *compare Ex p.* Barker, 87 Ala. 4, 6 So. 7, 13 Am. St. Rep. 17.

20. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544 [*affirming* 24 Fed. 132]; *Ex p.* Brown, 28 Fed. 653; *Ex p.* Morgan, 20 Fed. 298; *Ex p.* Robb, 19 Fed. 26, 9 Sawy. 568; *In re* Doo Woon, 18 Fed. 898, 9 Sawy. 417; *Ex p.* McKean, 16 Fed. Cas. No. 8,848, 3 Hughes 23; *Ex p.* Smith, 22 Fed. Cas. No. 12,968, 3 McLean 121.

Effect of judgment of state court.— He is not deprived of its protection even if a state court has acted on this federal ques-

mitted by the executive who has caused the fugitive's arrest before setting his act aside,[21] exercising its power to interfere with the utmost caution and only in cases of emergency.[22] A court has no jurisdiction to pass upon the question whether the accused is guilty of the crime of which he is charged, or go into disputed questions of fact.[23] The court may not consider therefore whether the statute under which he is indicted in the demanding state is constitutional.[24]

2. State Courts. Although a fugitive is restrained under authority derived from the constitution of the United States, he is not in the custody of or under restraint by an officer of the United States and therefore state courts have concurrent jurisdiction with federal courts to determine by writ of habeas corpus the validity of his imprisonment.[25] State courts have repeatedly declared that they have this concurrent jurisdiction.[26] Some states have by statute delegated the duties of the executive in determining the validity of a requisition to the state courts,[27] and in such a case that state court may not consider the guilt or innocence of the accused.[28] State courts like federal courts, although they may look into the papers before the governor and determine whether upon their face a crime was charged, cannot go further and determine the question of the accused's guilt.[29]

B. Identity of Prisoner. The question of the identity of the person arrested with the fugitive demanded is open to state and federal courts on habeas corpus.[30]

EXTRADOTAL PROPERTY. See Husband and Wife.

EXTRAHAZARDOUS. See Fire Insurance; and the particular insurance titles.

tion, although such a court's judgment is entitled to great respect and is strongly advisory. *In re* Roberts, 24 Fed. 132.

A federal court will not, however, on habeas corpus after defendant has been convicted in a state court, review questions touching the legality of his extradition on the basis of facts alleged to have been presented to the state court at the trial. Eaton *v.* West Virginia, 91 Fed. 760, 34 C. C. A. 68.

21. *Ex p.* Brown, 28 Fed. 653. And *compare* Whitten *v.* Tomlinson, 160 U. S. 231, 16 S. Ct. 297, 40 L. ed. 406, Mr. Justice Gray delivering the opinion of the court.

22. *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99. It will not discharge a prisoner if no right, privilege, or immunity secured by the constitution will be violated by remanding him. *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354.

Whether prosecution was instigated by malice is for the courts of the demanding state and is a question into which a federal court on habeas corpus has no right to inquire. *In re* Bloch, 87 Fed. 981.

23. *In re* Strauss, 126 Fed. 327, 63 C. C. A. 99; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; *Ex p.* Dawson, 83 Fed. 306, 28 C. C. A. 354. It will not consider whether facts stated in the affidavit constitute the crime alleged. *Ex p.* Hart, 59 Fed. 894.

In the absence of conflicting testimony, the federal court will not consider whether the evidence on which the executive issued his warrant ought to have been satisfactory to him. Jackson *v.* Archibald, 12 Ohio Cir. Ct. 155, 5 Ohio Cir. Dec. 533.

24. Pearce *v.* Texas, 155 U. S. 311, 15 S. Ct. 116, 39 L. ed. 164 [*affirming* 32 Tex. Cr. 301, 23 S. W. 15]. *Compare* Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113.

25. Roberts *v.* Reilly, 116 U. S. 80, 6 S. Ct. 291, 29 L. ed. 544; Robb *v.* Connolly, 111 U. S. 624, 4 S. Ct. 544, 28 L. ed. 542; Bruce *v.* Rayner, 124 Fed. 481, 62 C. C. A. 501; *Ex p.* Hart, 63 Fed. 249, 11 C. C. A. 165, 28 L. R. A. 801.

Court passes on the validity of extradition proceedings as of the time of the arrest, and an unjustified arrest cannot be remedied by a subsequent issue of the proper papers. *In re* Knowlton, 5 Cr. L. Mag. 250.

26. *In re* Mohr, 73 Ala. 503, 49 Am. Rep. 63; Hartman *v.* Aveline, 63 Ind. 344, 30 Am. Rep. 217 (statute); People *v.* City Prison, 3 N. Y. Cr. 370; Com. *v.* Trach, 3 Pa. Co. Ct. 15.

For questions as to Ohio practice see Sheldon *v.* McKnight, 34 Ohio St. 316.

Under Ind. Acts (1867), p. 126, "to regulate the arrest and surrender of fugitives from justice," the state has no appeal from the decision of the trial court. State *v.* Morgan, 31 Ind. 66.

27. See 72 Ohio Laws 79.

28. Barranger *v.* Baum, 103 Ga. 465, 30 S. E. 524, 68 Am. St. Rep. 113; Wilcox *v.* Nolze, 34 Ohio St. 520 (*semble*); *Ex p.* Van Vleck, 3 Cinc. L. Bul. 763, 6 Ohio Dec. (Reprint) 636, 7 Am. L. Rec. 275. *Compare* People *v.* City Prison, 3 N. Y. Cr. 370. On appeal the regularity of proceedings in the lower court is the only matter to be considered. Thatcher's Requisition, 18 Pa. Super. Ct. 533.

29. *In re* Palmer, (Mich. 1904) 100 N. W. 996.

30. People *v.* Byrnes, 33 Hun (N. Y.) 98; People *v.* City Prison, 3 N. Y. Cr. 370; State

EXTRAJUDICIAL. Something which is done without judicial proceedings.[1] (Extrajudicial: Admission or Declaration, see EVIDENCE. Confession, see CRIMINAL LAW. Judgment or Opinion, see APPEAL AND ERROR; COURTS; DICTUM. Oath, see OATHS AND AFFIRMATIONS.)

EXTRA JUDICIUM. Out of court.[2]

EXTRA LEGEM POSITUS EST CIVILITER MORTUUS. A maxim meaning "One who is put out of the law [i. e. outlawed] is civilly dead."[3]

EXTRANEUS EST SUBDITUS QUI EXTRA TERRAM, I. E. POTESTATEM REGIS, NATUS EST. A maxim meaning "A foreigner is one who is born out of the territory, that is, the government of the king."[4]

EXTRAORDINARY.[5] Beyond or out of the common order or rule; not usual, regular or of a customary kind; not ordinary;[6] above ordinary; so in an eminent degree;[7] outside of the ordinary, not greater or less;[8] exceeding the common degree or measure;[9] remarkable, uncommon;[10] rare;[11] wonderful.[12] It does not

v. Daniels, 6 Pa. L. J. 417 note; *In re* Greenough, 31 Vt. 279; *In re* Leary, 15 Fed. Cas. No. 8,162, 10 Ben. 197.

It cannot be raised by demurrer to a writ of habeas corpus in a federal court. *In re* Bloch, 87 Fed. 981.

Identity of the name of the prisoner with the name in the requisition is sufficient proof until it is rebutted by evidence. *Ex p.* Ackerman, 3 Del. Co. (Pa.) 406.

1. As, when we speak of extrajudicial evidence, or say that a distress is an extrajudicial remedy. Something which is said by a judge or judicial officer in a judicial proceeding, but beyond its scope. Sweet L. Dict. See 16 Cyc. 939.

2. Adams Gloss. [*citing* Thomas *v.* Sorrell, Vaugh. 330, 333].

3. Adams Gloss. [*citing* Coke Litt. 130*a*]. See also International Bank *v.* Sherman, 101 U. S. 403, 406, 25 L. ed. 866; and 9 Cyc. 871.

4. Adams Gloss.

5. **"'Extraordinary' is a strong word. . . .** It is a much stronger word than prudent, or ordinarily prudent." Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 239, 12 So. 439.

"Difficult or extraordinary" distinguished from "common or ordinary" see 14 Cyc. 288 note 76.

Ambassadors styled "extraordinary" see 2 Cyc. 261 note 1.

"Unusual and extraordinary" see Blue *v.* Aberdeen, etc., R. Co., 116 N. C. 955, 960, 21 S. E. 299.

6. Ten Eyck *v.* Rector, 65 Hun (N. Y.) 194, 197, 20 N. Y. Suppl. 157.

7. Fox *v.* Fox, 22 How. Pr. (N. Y.) 453, 458.

8. Carpenter *v.* State, 39 Wis. 271, 284, where it is said: "For a thing may be extraordinary for greatness, or for littleness, or for neither. So it is of extra compensation, which is also properly a compound phrase. Extra compensation is such, not merely for being greater or less than the contract, but properly because it is outside of the contract."

9. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 239, 12 So. 439.

10. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 239, 12 So. 439; Ten Eyck *v.* Rector, 65 Hun (N. Y.) 194, 197, 20 N. Y. Suppl. 157; Fox *v.* Fox, 22 How. Pr. (N. Y.) 453, 458, per Potter, J.

11. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 239, 12 So. 439; Ten Eyck *v.* Rector, 65 Hun (N. Y.) 194, 197, 20 N. Y. Suppl. 157.

12. Gadsden, etc., R. Co. *v.* Causler, 97 Ala. 235, 239, 12 So. 439.

In connection with other words the word "extraordinary" has often received judicial interpretation; for example, as used in the following phrases: "Extraordinary and unforeseen accident" (see Viterbo *v.* Friedlander, 120 U. S. 707, 732, 7 S. Ct. 962, 30 L. ed. 776); "extraordinary care" (see East Tennessee, etc., R. Co. *v.* Bridges, 92 Ga. 399, 405, 17 S. E. 645; Toledo, etc., R. Co. *v.* Baddeley, 54 Ill. 19, 24, 5 Am. Rep. 71; Willoughby *v.* Chicago, etc., R. Co., 37 Iowa 432, 435; Paducah St. R. Co. *v.* Adkins, 14 Ky. L. Rep. 425, 429; Cowden *v.* Shreveport Belt R. Co., 106 La. 236, 239, 30 So. 747); "extraordinary case" (see Sands *v.* Sands, 6 How. Pr. (N. Y.) 453, 455; Howard *v.* Rome, etc., Plank Road Co., 4 How. Pr. (N. Y.) 416; Colton *v.* Morrissy, 6 N. Y. Wkly. Dig. 165; *In re* Mahon, [1893] 1 Ch. 507, 512); "extraordinary charge" (see Reg. *v.* Leigh Rural Dist. Council, [1898] 1 Q. B. 836, 843, 62 J. P. 355, 67 L. J. Q. B. 562, 78 L. T. Rep. N. S. 604, 46 Wkly. Rep. 471; Waddington *v.* London Union, 1 E. B. & E. 370, 390, 96 E. C. L. 370; 49 & 50 Vict. c. 54, p. 149); "extraordinary circumstances" (see Whalen *v.* Sheridan, 10 Fed. 661, 662, 18 Blatchf. 324 [*citing* Muller *v.* Ehlers, 91 U. S. 249, 23 L. ed. 319]); "extraordinary diligence" (see Alabama Midland R. Co. *v.* Guilford, 119 Ga. 523, 525, 46 S. E. 655; East Tennessee, etc., R. Co. *v.* Miller, 95 Ga. 738, 740, 22 S. E. 660; Chattanooga, etc., R. Co. *v.* Huggins, 89 Ga. 494, 500, 15 S. E. 848; Richmond, etc., R. Co. *v.* White, 88 Ga. 805, 812, 15 S. E. 802; Chicago, etc., R. Co. *v.* Johnson, 103 Ill. 512, 526); "extraordinary," ditching, grading, gravelling (see Clark Civil Tp. *v.* Brookshire, 114 Ind. 437, 442, 16 N. E. 132); "extraordinary efforts" (see Hatch *v.* Mann, 15 Wend. (N. Y.) 44, 49); "extraordinary employment" (see Welton *v.* Gavin, 16 Q. B. 48, 64, 15 Jur. 329, 20 L. J. Q. B. 73, 71 E. C. L. 48); "extraordinary expenditures" (see Arverne-by-

mean what has never been previously heard of, or within former experience, but only what is beyond the ordinary, usual, or common.[13] (Extraordinary: Average, see SHIPPING. Care, see NEGLIGENCE. Diligence, see NEGLIGENCE. Motion, see MOTIONS. Remedy,[14] see HABEAS CORPUS; INJUNCTIONS; MANDAMUS; NE EXEAT; PROHIBITION; QUO WARRANTO; SPECIFIC PERFORMANCE. Risk, see MARINE INSURANCE; and the particular insurance titles. Towage, see TOWAGE.)

EXTRAORDINARY AND ACCIDENTAL CIRCUMSTANCES. Terms sometimes construed to mean something in opposition to the act of man.[15] (See ACT OF GOD.)

EXTRAORDINARY AVERAGE. See SHIPPING.

EXTRAORDINARY CARE. See NEGLIGENCE.

EXTRAORDINARY FLOOD. Such a flood as is of such unusual occurrence as could not have been foreseen by men of ordinary experience and ordinary prudence.[16] (See ACT OF GOD; and, generally, CARRIERS; NEGLIGENCE; RAILROADS.)

EXTRAORDINARY MOTION. See MOTIONS.

EXTRAORDINARY or SPECIAL MEETING. As applied to corporations, a meeting of the shareholders called upon emergencies, and for the transaction of particular business.[17] (See, generally, CORPORATIONS.)

EXTRAORDINARY or SPECIAL PURPOSE. As used in a city charter in relation to the raising of public moneys, a term which refers only to a strictly municipal purpose.[18] (See, generally, MUNICIPAL CORPORATIONS.)

EXTRAORDINARY TRAFFIC.[19] As applied to a highway, something unusual in weight,[20] or extraordinary in the kind of traffic, either as compared with what

the-Sea *v.* Shepard, 20 N. Y. App. Div. 12, 14, 46 N. Y. Suppl. 653; Robertson *v.* Tillman, 39 S. C. 298, 306, 17 S. E. 678; Walker *v.* State, 12 S. C. 200, 302, 312); "extraordinary expenses" (see Wallington *v.* Hoskins, 6 Q. B. D. 206, 213, 45 J. P. 173, 50 L. J. M. C. 19, 43 L. T. Rep. N. S. 597, 29 Wkly. Rep. 152. See Rome *v.* McWilliams, 67 Ga. 106, 112, where the term is distinguished from "ordinary current expenses"; Ga. Code (1895), § 720); "extraordinary expenses incurred by the high constable in case of riot" (see Rex *v.* Leicester, 7 B. & C. 6, 13, 14 E. C. L. 13); "extraordinary general meeting" (see Alexander *v.* Simpson, 43 Ch. D. 139, 148, 59 L. J. Ch. 137, 61 L. T. Rep. N. S. 708, 1 Meg. 457, 38 Wkly. Rep. 161); "extraordinary increase" (see Millen *v.* Guerrard, 67 Ga. 284, 291, 44 Am. Rep. 720); "extraordinary motion or case" (see Cox *v.* Hillyer, 65 Ga. 57, 59); "extraordinary nature" (see Payne *v.* James, 45 La. Ann. 381, 385, 12 So. 492); "extraordinary occasions" (see Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514, 524, 33 Am. Dec. 411; 1 Wis. St. (1898) § 4); "extraordinary perils" (see The Titania, 19 Fed. 101, 105 [*citing* Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159, 170); "extraordinary and unforeseen perils" (see Moses *v.* Sun Mut. Ins. Co., 1 Duer (N. Y.) 159, 170); "extraordinary sacrifice" (see Svensden *v.* Wallace, 53 L. J. Q. B. 385, 393); "extraordinary or special purpose" (see Perrin *v.* New London, 67 Wis. 416, 430, 30 N. W. 623 [*distinguished* in State *v.* Tomahawk Common Council, 96 Wis. 73, 78, 71 N. W. 86]); "extraordinary service" (see Holman *v.* Sims, 39 Ala. 709, 711; Allen *v.* Martin, 36 Ala. 330, 332; Wisner *v.* Mabley, 74 Mich. 143, 153, 41 N. W. 835; Steel *v.* Holladay, 20 Oreg. 462, 465, 26 Pac. 562); "extraordinary session" (see People *v.* Rice, 135 N. Y. 473, 485, 31 N. E. 921, 16 L. R. A. 836); "extraordinary traffic" and "excessive weight" (see Hill *v.* Thomas, [1893] 2 Q. B. 333, 340, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85; Wallington *v.* Hoskins, 6 Q. B. D. 206, 215, 45 J. P. 173, 50 L. J. M. C. 19, 43 L. T. Rep. N. S. 597, 29 Wkly. Rep. 152).

"Dangerous" and "extraordinarily inconvenient to passengers or carriages" for a railroad company to lay down rails and run trains along a portion of a highway see Atty.-Gen. *v.* Widnes R. Co., 30 L. T. Rep. N. S. 449, 450, 22 Wkly. Rep. 607.

13. The Titania, 19 Fed. 101, 105.

14. 16 Cyc. 56; 1 Cyc. 704.

15. "As storms." Hazeltine *v.* Edgmand, 35 Kan. 202, 214, 10 Pac. 544, 57 Am. Rep. 157.

16. Gulf, etc., R. Co. *v.* Pool, 70 Tex. 713, 717, 8 S. W. 535.

17. Austin Min. Co. *v.* Gemmel, 10 Ont. 696, 706 [*quoting* Brice Ultra Vires (2d ed.), p. 40, where the term is distinguished from "ordinary or general meeting"].

18. Perrin *v.* New London, 67 Wis. 416, 420, 30 N. W. 623.

19. **Specifically distinguished** from other traffic see Hill *v.* Thomas, [1893] 2 Q. B. 333, 340, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85 [*quoted* in Wolverhampton *v.* Salop County Council, 64 L. J. M. C. 179, 180, 43 Wkly. Rep. 494].

20. As distinct from excessive weight it will include all such continuous or repeated

is usually carried over roads of the same nature in the neighborhood, or as compared with that which the road in its ordinary and fair use may be reasonably subjected to;[21] something which goes beyond the ordinary user of the particular road;[22] something exceptional and abnormal, and beyond the ordinary character of traffic to which a road was subject;[23] extraordinary with reference to the ordinary use and traffic upon and over the road;[24] a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common.[25]

EXTRA QUATUOR MARIA. A term used as the equivalent of "beyond the seas."[26]

EXTRA REGNUM. Out of the kingdom.[27]

EXTRA SERVICES. As applied to services of officers, services incident to their offices for which compensation is not provided by law.[28] (See, generally, OFFICERS.)

EXTRATERRITORIAL. Beyond the territory.[29] (Extraterritorial: Jurisdiction, see COURTS.)

EXTRA TERRITORIUM. Beyond, without the territory.[30]

user of a road by a person's vehicles as is out of the common order of traffic, and as may be calculated to damage the highway and increase the expenditure on its repair. Hill *v.* Thomas, [1893] 2 Q. B. 333, 340, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85. See also Reg. *v.* Ellis, 8 Q. B. D. 466, 469, 46 J. P. 295, 30 Wkly. Rep. 613; Wallington *v.* Hoskins, 6 Q. B. D. 206, 213, 45 J. P. 173, 50 L. J. M. C. 19, 43 L. T. Rep. N. S. 597, 29 Wkly. Rep. 152.

21. Pickering Lythe East Highway Bd. *v.* Barry, 8 Q. B. D. 59, 62, 46 J. P. 215, 51 L. J. M. C. 17, 45 L. T. Rep. N. S. 655, 30 Wkly. Rep. 246, per Lopes, J. [*cited* in Whitebread *v.* Sevenoaks Highway Bd., [1892] 1 Q. B. 8, 14, where it is said: "That expression of opinion, however, was unnecessary for the decision of the case, and cannot be treated as amounting to more than a *dictum*, and in Reg. *v.* Ellis, [8 Q. B. D. 466, 469, 46 J. P. 295, 30 Wkly. Rep. 613], Bowen, J., considered the definition suggested by Lopes, J., and he did not agree with it, for he said, 'I have had occasion to consider this passage in the judgment of my Brother Lopes, and I cannot adopt it to its full extent'"].

22. Etherley Grange Coal Co. *v.* Auckland Dist. Highway Bd., [1894] 1 Q. B. 37, 42, 58 J. P. 102, 69 L. T. Rep. N. S. 702, 9 Reports 88, 42 Wkly. Rep. 198 [*citing* Hill *v.* Thomas, [1893] 2 Q. B. 333, 340, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85].

23. Turnbridge Highway Dist. Bd. *v.* Sevenoaks Highway Dist. Bd., 33 Wkly. Rep. 306, 307 [*citing* Aveland *v.* Lucas, 5 C. P. D. 351, 44 J. P. 360, 49 L. J. C. P. 643, 42 L. T. Rep. N. S. 788, 28 Wkly. Rep. 571].

24. Hill *v.* Thomas, [1893] 2 Q. B. 333, 343, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85, per Bowen, L. J. [*citing* Aveland *v.* Lucas, 5 C. P. D. 211].

25. Hill *v.* Thomas, [1893] 2 Q. B. 333, 340, 57 J. P. 628, 62 L. J. M. C. 161, 69 L. T. Rep. N. S. 553, 42 Wkly. Rep. 85, per Bowen, L. J.

"'By whose order the traffic is conducted' must be interpreted as meaning 'at whose instance' or 'for whose benefit' the traffic is conducted." Kent County Council *v.* Gerard, [1897] A. C. 633, 638, 61 J. P. 804, 66 L. J. Q. B. 677, 77 L. T. Rep. N. S. 109, 46 Wkly. Rep. 111. The term is "capable of including more than one party." Colchester *v.* Gloucestershire County Council, 66 L. J. Q. B. 290, 292. See also Epsom Urban Dist. Council *v.* London County Council, [1900] 2 Q. B. 751, 755, 64 J. P. 726, 69 L. J. Q. B. 933, 83 L. T. Rep. N. S. 284; Kent County Council *v.* Vidler, [1895] 1 Q. B. 448, 451, 59 J. P. 548, 64 L. J. M. C. 77, 72 L. T. Rep. N. S. 77, 14 Reports 240, 43 Wkly. Rep. 273.

Proceedings to recover expenses of "extraordinary traffic" see Wirral Highway Bd. *v.* Newell, [1895] 1 Q. B. 827, 831, 59 J. P. 183, 64 L. J. M. C. 181, 72 L. T. Rep. N. S. 535, 15 Reports 309, 43 Wkly. Rep. 328; Story *v.* Sheard, [1892] 2 Q. B. 515, 517, 56 J. P. 760, 61 L. J. M. C. 178, 67 L. T. Rep. N. S. 433, 41 Wkly. Rep. 31; Whitebread *v.* Sevenoaks Highway Bd., [1892] 1 Q. B. 8, 14.

26. Forsyth *v.* Hall, Draper (U. C.) 291, 298, where the term is compared with "extra regnum." See also Ward *v.* Hallam, 1 Yeates (Pa.) 329, 331; Ward *v.* Hallam, 2 Dall. (Pa.) 217, 218, 1 L. ed. 355; Alexandria Bank *v.* Dyer, 14 Pet. (U. S.) 141, 145, 10 L. ed. 391; Green *v.* Neal, 6 Pet. (U. S.) 291, 300, 8 L. ed. 402; Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 368, 6 L. ed. 495; Murray *v.* Baker, 3 Wheat. (U. S.) 541, 545, 4 L. ed. 454; Faw *v.* Roberdeau, 3 Cranch (U. S.) 174, 176, 2 L. ed. 402; Peck *v.* Pease, 19 Fed. Cas. No. 10,894, 5 McLean 486, 487.

27. Forsyth *v.* Hall, Draper (U. C.) 291, 298.

28. Miami County *v.* Blake, 21 Ind. 32, 34.

29. Anderson L. Dict. See also 12 Cyc. 197; 10 Cyc. 352, 661, 670, 1128, 1144.

30. Adams Gloss. [*citing* 1 Erskine Inst. tit. 2, § 4; 2 Kent Comm. 407]. See also

EXTRA TERRITORIUM JUS DICENTI NON PARETUR IMPUNE.[31] A maxim meaning "One who exercises jurisdiction out of his territory cannot be obeyed with impunity."[32]

EXTRA TRAIN or WILD TRAIN. A train which is not classified on the time-tables, and is required to keep entirely out of the way of all regular trains of whatever class.[33]

EXTRA VIAM. Out of the way.[34]

EXTRA WORK. As used in a contract for the furnishing of materials and performance of labor, a term applicable to labor or materials not called for by such contract.[35] (Extra Work: Compensation[36] For, see BUILDERS AND ARCHITECTS. See also COMPENSATION.)

EXTREMA POTIUS PATI QUAM TURPIA FACERE. A maxim meaning "Extremities are rather to be suffered than to do disgraceful, infamous or scandalous things."[37]

EXTREME. The best or worst; most urgent; greatest; highest; immoderate; excessive; most violent.[38] (Extreme: Cruelty, see DIVORCE; HOMICIDE. Hazard, see MARINE INSURANCE.)

EXTREMIS PROBATIS PRÆSUMUNTUR MEDIA. A maxim meaning "Extremes being proved, those things which fall within or between them are presumed."[39]

EXTRINSIC EVIDENCE. Evidence not legitimately before the tribunal in which the determination of a cause is made.[40] (See, generally, EVIDENCE.)

EX TURPI CAUSA NON ORITUR ACTIO.[41] A maxim meaning "No action

Milne *v.* Moreton, 6 Binn. (Pa.) 349, 353, 6 Am. Dec. 466.

31. This has been referred to as "an old and well-established" (Reg. *v.* Keyn, 2 Ex. D. 63, 160, 13 Cox C. C. 403, 46 L. J. M. C. 17), "general" (Cookney *v.* Anderson, 9 Jur. N. S. 736, 32 L. J. Ch. 427, 8 L. T. Rep. N. S. 295, 2 New Rep. 140, 11 Wkly. Rep. 629), and "known" maxim (Barkman *v.* Hopkins, 11 Ark. 157, 163; Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 598, 18 S. W. 286, 32 Am. St. Rep. 624).

"The maxim in regard to process issued to enforce judgments in external jurisdictions" see Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130, 133.

32. Bouvier L. Dict. [*citing* Broom Leg. Max. 100, 101; Story Confl. L. § 539].

Applied or explained in the following cases:

Arkansas.— Barkman *v.* Hopkins, 11 Ark. 157, 163.

Missouri.—Wilson *v.* St. Louis, etc., R. Co., 108 Mo. 588, 598, 18 S. W. 286, 32 Am. St. Rep. 624; *Ex p.* Marmaduke, 91 Mo. 228, 258, 4 S. W. 91, 60 Am. Rep. 250.

New Jersey.— Elizabethtown Sav. Inst. *v.* Gerber, 34 N. J. Eq. 130, 133.

New York.— Hoyt *v.* Thompson, 5 N. Y. 320, 340.

England.— Reg. *v.* Keyn, 2 Ex. D. 63, 160, 13 Cox C. C. 403, 46 L. J. M. C. 17; Jackson *v.* Monro, 2 Bro. C. P. 411, 417, 1 Eng. Reprint 1031; *In re* Mansergh, 1 B. & S. 400, 411, 7 Jur. N. S. 825, 30 L. J. Q. B. 296, 4 L. T. Rep. N. S. 469, 9 Wkly. Rep. 703, 101 E. C. L. 400; Marshalsea's Case, 10 Coke 68*b*, 77*a*; Reg. *v.* Lewis, 7 Cox C. C. 277, 1 Dears. & B. 182, 186, 3 Jur. N. S. 525, 26 L. J. M. C. 104, 5 Wkly. Rep. 572; Reg. *v.* Serva, 5 Den. C. C. 104, 149; Cookney *v.* Anderson, 9 Jur. N. S. 736, 32 L. J. Ch. 427, 8 L. T. Rep. N. S. 295, 2 New Rep. 140, 11 Wkly. Rep. 629; Yelverton *v.* Yelverton, 6 Jur. N. S. 24, 26, 29 L. J. P. & M. 34, 1 L. T. Rep. N. S. 194, 1 Swab. & Tr. 574, 8 Wkly. Rep. 134.

33. Hall *v.* Chicago, etc., R. Co., 46 Minn. 439, 442, 49 N. W. 239.

34. Bouvier L. Dict. See also Stott *v.* Stott, 16 East 343, 350, 14 Rev. Rep. 354.

35. Casgrain *v.* Milwaukee Co., 81 Wis. 113, 117, 51 N. W. 88.

"Extra work" distinguished from "additional work" under a contract in Shields *v.* New York, 84 N. Y. App. Div. 502, 505, 82 N. Y. Suppl. 1020. See also 6 Cyc. 16, 76.

36. "Granting of extra compensation" see Swift *v.* State, 26 Hun (N. Y.) 508, 510 [*reversed* in 89 N. Y. 52].

37. Adams Gloss. [*citing* Lofft 213].

38. Webster Int. Dict.

39. Trayner Leg. Max.

Applied in McCarthy *v.* Whalen, 19 Hun (N. Y.) 503, 506.

40. Baldwin *v.* Buffalo, 35 N. Y. 375, 382.

41. This has been referred to as "the familiar maxim" (Robinson *v.* Robinson, 17 Ohio St. 480, 484; U. S. Bank *v.* Owens, 2 Pet. (U. S.) 527, 539, 7 L. ed. 508); "the old law maxim" (De Groot *v.* Van Duzer, 20 Wend. (N. Y.) 390, 404); "the common law maxim" (Church *v.* Muir, 33 N. J. L. 318, 320; Harris *v.* Runnels, 12 How. (U. S.) 79, 83, 13 L. ed. 901); "a very ancient and very important maxim of the common law" (State *v.* Buttles, 3 Ohio St. 309, 319); "a rule both in law and equity" (Gray *v.* Hook, 4 N. Y. 449, 455; Weckerly *v.* Lutheran Congregation, 3 Rawle (Pa.) 172, 175).

"This and other kindred maxims of the Roman law have been adopted by all civilized nations, whether governed by that system of laws or by the common law of England." Consumers Cordage Co. *v.* Connolly, 31 Can. Supreme Ct. 244, 298. See also 1 Cyc. 675 note 88.

arises out of an immoral consideration." It is intimately related to the maxim IN ÆQUALI JURE MELIOR EST CONDITIONI POSSIDENTIS,[42] *q. v.*

EX TURPI CONTRACTU NON ORITUR ACTIO. A maxim meaning "No action arises on an immoral contract."[43]

EX VI TERMINI. From, or by the force of the term.[44]

EYE-SPLICE. In shipping, a sort of eye or circle formed by splicing the end of a rope into itself.[45]

EYE-WITNESS. One who saw the act, fact, or transaction to which he testifies.[46] (See, generally, WITNESSES.)

F. A letter which often stands for something abbreviated;[47] a letter wherewith felons, &c., are branded and marked with a hot iron, on their being admitted to the benefit of clergy.[48]

FABRIC. As used in a custom revenue act, a term which includes elastic cords and braids manufactured of silk and india rubber.[49] (See, generally, CUSTOMS DUTIES.)

42. Broom Leg. Max.; Bouvier L. Dict. [*citing* Selw. N. P. 63].

Applied or explained in the following cases:

Alabama.— Keel *v.* Larkin, 83 Ala. 142, 146, 3 So. 296, 3 Am. St. Rep. 702.

Arkansas.— Horn *v.* Foster, 19 Ark. 346, 357.

Connecticut.— Barnes *v.* Starr, 64 Conn. 136, 154, 28 Atl. 980.

Maryland.— Lester *v.* Howard Bank, 33 Md. 558, 562, 3 Am. Rep. 211.

Massachusetts.— Nickerson *v.* Wheeler, 118 Mass. 295, 299; Phelps *v.* Decker, 10 Mass. 267, 276.

Michigan.— Quirk *v.* Thomas, 6 Mich. 76, 109.

Missouri.— Woolfolk *v.* Duncan, 80 Mo. App. 421, 427; Wirt *v.* Schuman, 67 Mo. App. 163, 170; Lewis *v.* Walker, 61 Mo. App. 550, 554; Hatch *v.* Hanson, 46 Mo. App. 323, 330; Duke *v.* Harper, 2 Mo. App. 1, 10.

New Jersey.— Hope *v.* Linden Park Blood Horse Assoc., 58 N. J. L. 627, 631, 34 Atl. 1070, 55 Am. St. Rep. 614; Union Locomotive, etc., Co. *v.* Erie R. Co., 35 N. J. L. 240, 247; Church *v.* Muir, 33 N. J. L. 318, 320; Wooden *v.* Shotwell, 24 N. J. L. 789, 791; Brittin *v.* Freeman, 17 N. J. L. 191, 205; Pennington *v.* Todd, 47 N. J. Eq. 569, 571, 21 Atl. 297, 24 Am. St. Rep. 419, 11 L. R. A. 589; Watson *v.* Murray, 23 N. J. Eq. 257, 261; Marlatt *v.* Warwick, 19 N. J. Eq. 439, 454.

New York.— Wetmore *v.* Porter, 92 N. Y. 76, 85; Hull *v.* Ruggles, 56 N. Y. 424; Gray *v.* Hook, 4 N. Y. 449, 455; Vincent *v.* Moriarty, 31 N. Y. App. Div. 484, 494, 52 N. Y. Suppl. 519; Pepper *v.* Haight, 20 Barb. 429, 438; Hartford, etc., R. Co. *v.* New York, etc., R. Co., 3 Rob. 411, 416; Rudderow *v.* Huntington, 3 Sandf. 252, 256; Irving *v.* Britton, 8 Misc. 201, 28 N. Y. Suppl. 529; Bundy *v.* Newton, 19 N. Y. Suppl. 734, 737; Steinfeld *v.* Levy, 16 Abb. Pr. N. S. 26, 27; Nellis *v.* Clark, 4 Hill 424, 436; De Groot *v.* Van Duzer, 20 Wend. 390, 404.

Ohio.— Kahn *v.* Walton, 46 Ohio St. 195, 212, 20 N. E. 203; Harper *v.* Crain, 36 Ohio St. 338, 343, 38 Am. Dec. 589; Hooker *v.* De Palos, 28 Ohio St. 251, 261; Allen *v.* Xenia First Nat. Bank, 23 Ohio St. 97, 103; Robinson *v.* Robinson, 17 Ohio St. 480, 484; Rogers *v.* Tucker, 7 Ohio St. 417, 430; State *v.* Buttles, 3 Ohio St. 309, 319; Goudy *v.* Gebhart, 1 Ohio St. 262, 266.

Pennsylvania.— Weckerly *v.* Lutheran Congregation, 3 Rawle 172, 175; Deacon *v.* Harris, 8 Wkly. Notes Cas. 403, 405.

United States.— Collins *v.* The Steamer Florida, 101 U. S. 37, 43, 25 L. ed. 898; Harris *v.* Runnels, 12 How. 79, 83, 13 L. ed. 901; U. S. Bank *v.* Owens, 2 Pet. 527, 539, 7 L. ed. 508; Kansas Sav. Bank *v.* National Bank of Commerce, 38 Fed. 800, 803.

England.— Pearce *v.* Brooks, L. R. 1 Exch. 213, 218, 12 Jur. N. S. 342, 35 L. J. Exch. 134, 14 L. T. Rep. N. S. 288, 14 Wkly. Rep. 614; Aubert *v.* Maze, 2 B. & P. 371, 373, 5 Rev. Rep. 624; Holman *v.* Johnson, 1 Cowp. 341, 343.

Canada.— Consumers Cordage Co. *v.* Connolly, 31 Can. Supreme Ct. 244, 298; Cameron *v.* Domville, 17 N. Brunsw. 647, 655.

43. Bouvier L. Dict. [*citing* Dig. 2, 14, 27, 4; 2 Kent Comm. 466; 1 Story Contr. § 592].

Applied or explained in Bissell *v.* Michigan Southern, etc., R. Co., 22 N. Y. 258, 272; Trimble *v.* Doty, 16 Ohio St. 118, 129.

44. Burrill L. Dict. See also Hitch *v.* Patten, 8 Houst. (Del.) 334, 346, 16 Atl. 558, 2 L. R. A. 724; Sheren *v.* Mendenhall, 23 Minn. 92, 93; Schenck *v.* Vail, 24 N. J. Eq. 538, 542; Strang *v.* Adams, 4 Pa. Dist. 212, 214; Miller *v.* Stewart, 9 Wheat. (U. S.) 680, 704, 6 L. ed. 189; Bloomley *v.* Grinton, 1 U. C. C. P. 309, 311; and 16 Cyc. 1080; 2 Cyc. 142, 342.

45. Trapp *v.* McClellan, 68 N. Y. App. Div. 362, 363, 74 N. Y. Suppl. 130 [*citing* Century Dict.], where the term is distinguished from a "bowling knot" or a "bowline-knot."

46. Black L. Dict. See 12 Cyc. 549.

47. As, first, French. Anderson L. Dict.

48. Jacob L. Dict.

49. *In re* Mills, 49 Fed. 726, 727, where it is said that "the word 'fabric' is rather a broad one in common speech. It is certainly as broad, if not broader, than the word 'cloth.'" See also Converse *v.* U. S., 113 Fed. 817.

FABRICATE. In criminal law, a word which has been said to import a criminal intention — a *mens rea*, a wrongful act, an act done with a *mens rea*, fraud or falsehood, a false or fraudulent concoction, knowing it to be wrong and contrary to statute.[50] (See, generally, CRIMINAL LAW; EVIDENCE.)

FABRICATED EVIDENCE. Evidence manufactured or arranged after the fact, and either wholly false or else warped and discolored by artifice and contrivance with a deceitful intent.[51] (Fabricated Evidence: In General, see FORGERY. Presumptions, see CRIMINAL LAW; EVIDENCE.)

FABRICA TOBACOS. In Spanish-speaking communities, words of common use in the tobacco trade applied to all known manufactured products of the plant.[52]

FACE.[53] In commercial law, the words in their apparent or obvious meaning;[54] as applied to an instrument, that which is shown by the mere language employed, without any explanation, modification, or addition from extrinsic facts or evidence;[55] the principal sum which it expresses to be due or payable, without any additions in the way of interest or costs.[56]

FACE VALUE. As applied to commercial paper, the value expressed on the face of the writing.[57] (See DISCOUNT; FACE; and, generally, BONDS; COMMERCIAL PAPER.)

FACILIS EST LAPSUS JUVENTUTIS. A maxim meaning "Youth is very liable to err."[58]

FACILITIES.[59] A term applied to certain notes made payable two years after the war of 1812, which were issued by some of the Connecticut banks.[60] Applied to railroads, it means everything necessary for the convenience of passengers and the safety and prompt transportation of freight.[61] As applied to a ferry fran-

50. Aberdare Local Bd. of Health *v.* Hammett, L. R. 10 Q. B. 162, 165, 166, 44 L. J. M. C. 49, 32 L. T. Rep. N. S. 20, 23 Wkly. Rep. 617.

51. Black L. Dict. See also 12 Cyc. 386, 1058.

52. The Solis Cigar Co. *v.* Pozo, 16 Colo. 388, 393, 26 Pac. 556, 25 Am. St. Rep. 279.

53. "The face of the work that shows to be measured" see St. Martin *v.* Thrasher, 40 Vt. 460, 466.

"To meet the witnesses against him face to face" see State *v.* McO'Blenis, 24 Mo. 402, 414, 69 Am. Dec. 435; Johnston *v.* State, 2 Yerg. (Tenn.) 58, 59; Miller *v.* State, 25 Wis. 384, 387.

54. "As, face of a note, bill, bond, check, draft, judgment, record or contract." Bouvier L. Dict. [*quoted* in Olson *v.* Tanner, 117 Wis. 544, 548, 94 N. W. 305]. See also Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 300, 27 S. E. 975 (face of policy); Osgood *v.* Bringolf, 32 Iowa 265, 270 (face of judgment); State *v.* Haines, 51 La. Ann. 731, 735, 25 So. 372, 44 L. R. A. 837 (face of record); Marriner *v.* John L. Roper Co., 112 N. C. 164, 166, 16 S. E. 906; Evans *v.* Tillman, 38 S. C. 238, 17 S. E. 49; Ffinch *v.* Combe, [1894] P. 191, 203, 63 L. J. P. & Adm. 143, 70 L. T. Rep. N. S. 695, 6 Reports 545.

55. Black L. Dict. [*cited* in Olson *v.* Tanner, 117 Wis. 544, 548, 94 N. W. 305].

56. Black L. Dict. [*quoted* in Olson *v.* Tanner, 117 Wis. 544, 548, 94 N. W. 305].

57. Marriner *v.* John L. Roper Co., 112 N. C. 164, 166, 16 S. E. 906 [*cited* in Olson *v.* Tanner, 117 Wis. 544, 548, 94 N. W. 305]. See also Com. *v.* Bethlehem Steel Co., 11 Pa. Dist. 88, 91; Mowry's Petition, 16 R. I. 514, 516, 17 Atl. 553; Supreme Council A. L. of H. *v.* Storey, (Tex. Civ. App. 1903) 75 S. W. 901, 905; Olson *v.* Tanner, 117 Wis. 544, 548, 94 N. W. 305.

As used in an act authorizing a sale of bonds at not less than par or face value, the term means merely the denomination or amount printed on their face, without including the accumulated interest. Evans *v.* Tillman, 38 S. C. 238, 243, 17 S. E. 49.

Face value of shares of stock see 1 Cyc. 461.

58. Morgan Leg. Max. [*citing* Jenkins Cent. 47].

59. "Facilities for improvement" see Lingwood *v.* Gyde, L. R. 2 C. P. 72, 75, 36 L. J. C. P. 10, 16 L. T. Rep. N. S. 229, 15 Wkly. Rep. 311.

60. English L. Dict. See also Springfield Bank *v.* Merrick, 14 Mass. 322, 325.

61. English L. Dict. See also Little Rock, etc., R. Co. *v.* Oppenheimer, 64 Ark. 271, 274, 43 S. W. 150, 44 L. R. A. 353; Northwestern Imp., etc., Co. *v.* O'Brien, 75 Minn. 335, 340, 77 N. W. 989; State *v.* Missouri Pac. R. Co., 29 Nebr. 550, 559, 45 N. W. 785; U. S. *v.* Delaware, etc., R. Co., 40 Fed. 101, 103 [*citing* Scofield *v.* Railroad Co., 2 Inter.-St. Com. Rep. 90, 116]; Singer Mfg. Co. *v.* London, etc., R. Co., [1894] 1 Q. B. 833, 837, 63 L. J. Q. B. 411, 70 L. T. Rep. N. S. 172, 42 Wkly. Rep. 347; Winsford Local Bd. *v.* Cheshire Lines Committee, 24 Q. B. D. 456, 458, 59 L. J. Q. B. 372, 62 L. T. Rep. N. S. 268, 7 R. & Can. Cas. 72, 38 Wkly. Rep. 511; South Eastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 592, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203; South Eastern R. Co. *v.* Railway Com'rs, 5 Q. B. D. 217, 220;

chise, everything incident to the general, prompt, and safe carriage of passengers, boats in good repair, appliances answering the purpose, and readiness and willingness to perform the services incident to the grant.[62] (See, generally, CARRIERS; FERRIES.)

FACILITY.[63] The quality of being easily performed; ease in performance; that which promotes the ease of any action; ADVANTAGE, *q. v.*; valuable aid; AID, *q. v.*; assistance, and help;[64] the means by which the performance of anything is rendered more easy; CONVENIENCE, *q. v.*; that which aids, assists or makes more easy the acquisition of knowledge.[65]

FACINUS QUOS INQUINAT ÆQUAT. A maxim meaning "Guilt makes equal those whom it stains."[66]

FACSIMILE. See SIGNATURES.

FACT.[67] A term having a variety of meanings; thus it may signify either a state of things, that is, an existence, or a motion, that is, an event;[68] an ACT,[69] *q. v.*; action, deed;[70] a thing done;[71] an effect produced or achieved;[72] something fixed, unchangeable;[73] a reality as distinguished from supposition or opinion;[74] a truth as distinguished from fiction or error;[75] a CIRCUMSTANCE,[76] *q. v.*; an

Barry R. Co. *v.* Taff Vale R. Co., [1895] 1 Ch. 128, 139, 64 L. J. Ch. 230, 71 L. T. Rep. N. S. 688, 12 Reports 76, 43 Wkly. Rep. 372; Eastern Union R. Co. *v.* Eastern Counties R. Co., 2 E. & B. 530, 542, 22 L. J. Q. B. 371, 75 E. C. L. 530; West Ham Corp. *v.* Great Eastern R. Co., 64 L. J. Q. B. 340, 343, 72 L. T. Rep. N. S. 395, 9 R. & Can. Cas. 7; Great Western R. Co. *v.* Railway Com'rs, 50 L. J. Q. B. 483, 486.

"Reasonable facilities" see Darlaston Local Bd. *v.* London, etc., R. Co., [1894] 2 Q. B. 694, 698, 63 L. J. Q. B. 826, 71 L. T. Rep. N. S. 461, 8 R. & Can. Cas. 216, 9 Reports 712, 43 Wkly. Rep. 29; Singer Mfg. Co. *v.* London, etc., R. Co., [1894] 1 Q. B. 833, 837, 63 L. J. Q. B. 411, 70 L. T. Rep. N. S. 172, 42 Wkly. Rep. 347; Winsford Local Bd. *v.* Cheshire Lines Committee, 24 Q. B. D. 456, 458, 59 L. J. Q. B. 372, 62 L. T. Rep. N. S. 268, 7 R. & Can. Cas. 72, 38 Wkly. Rep. 511; South Eastern R. Co. *v.* Railway Com'rs, 6 Q. B. D. 586, 592, 45 J. P. 388, 50 L. J. Q. B. 201, 44 L. T. Rep. N. S. 203; Didcot, etc., R. Co. *v.* Great Western R. Co., 66 L. J. Q. B. 33, 35: West Ham Corp. *v.* Great Eastern R. Co., 64 L. J. Q. B. 340, 344, 72 L. T. Rep. N. S. 395, 9 R. & Can. Cas. 7; Great Western R. Co. *v.* Railway Com'rs, 50 L. J. Q. B. 483, 486; Monetary Advance Co. *v.* Cater, 4 T. L. R. 464.

62. Com. *v.* Sturtevant, 182 Pa. St. 323, 333, 37 Atl. 916.

63. It is not a technical word, but one in common use, and its meaning is to be found in the sense attached to it by approved usage. State *v.* Cave, 20 Mont. 468, 475, 52 Pac. 200 [*quoting* Mont. Pol. Code, § 15, and *citing* State *v.* Johnson, 20 Mont. 367, 51 Pac. 820].

64. State *v.* Cave, 20 Mont. 468, 475, 52 Pac. 200 [*quoting* Roget Thesaurus; Webster Dict.].

65. Century Dict. [*quoted* in State *v.* Cave, 20 Mont. 468, 475, 52 Pac. 200].

The meaning of the word is not limited to inanimate bodies or things. Men are often facilities. State *v.* Cave, 20 Mont. 468, 475, 52 Pac. 200, where it is said: "Without a crew to man his vessel, the master of a ship would not have the necessary facilities."

66. Wharton L. Lex.

67. Derived from the Latin *facere*, to make to do. Century Dict. See also Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218.

As distinguished from the law, a fact may be taken as that out of which the point of law arises; that which is asserted to be or not to be, and is to be presumed or proved to be or not to be, for the purpose of applying or refusing to apply a rule of law. Hulings *v.* Hulings Lumber Co., 38 W. Va. 351, 371, 18 S. E. 620 [*citing* Cooley Torts (2d ed.) 800, 801; 2 Thompson Tr. §§ 1662, 1705].

Distinguished from "allegation" in State *v.* Harris, 97 Iowa 407, 409, 66 N. W. 728.

Distinguished from "truth" in Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34, 37.

68. 1 Bentham Jud. Ev. 48.

69. Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34, 37; Webster Dict [*quoted* in Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218].

70. Lackley *v.* Vanderbilt, 10 How. Pr. (N. Y.) 155, 161.

71. Bouvier L. Dict. [*quoted* in Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218]; Walker Dict. [*quoted* in Lackey *v.* Vanderbilt, 10 How. Pr. (N. Y.) 155, 161].

72. Webster Dict. [*quoted* in Gates *v.* Haw, 150 Ind. 370, 372, 50 N. E. 299].

73. Huber *v.* Guggenheim, 89 Fed. 598, 601.

74. Walker Dict. [*quoted* in Lackey *v.* Vanderbilt, 10 How. Pr. (N. Y.) 155, 161].

75. Lackey *v.* Vanderbilt, 10 How. Pr. (N. Y.) 155, 161.

76. Clare *v.* People, 9 Colo. 122, 124, 10 Pac. 799 [*citing* Bouvier L. Dict.] (where it is said: "Instances sometimes arise when it would puzzle a professional philologist to tell which of the two words would more accurately characterize a given 'action' or 'thing done'"); Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218 [*quoting* Bouvier L. Dict.; Webster Dict.; Worcester Dict.].

occurrence or event;[77] an incident;[78] an event or incident.[79] The term is sometimes used as the equivalent of "matter."[80] (Fact: Accessaries Before or After, see CRIMINAL LAW. Attorney in, see ATTORNEY AND CLIENT. Conclusion of Fact, see EVIDENCE. Finding of Fact, see TRIAL. Fraud in, see FRAUD. Judicial Notice of, see EVIDENCE. Mistakes of, see EQUITY. Necessity — Of Finding of, see APPEAL AND ERROR; Of Recital of, see APPEAL AND ERROR. Presumption of, see EVIDENCE. Question of Law or Fact, see CRIMINAL LAW; TRIAL. Rebuttal of Presumption of, see EVIDENCE.)

FACTA SUNT POTENTIORA VERBIS. A maxim meaning "Facts are more powerful than words."[81]

FACTA TENENT MULTA QUÆ FIERI PROHIBENTUR. A maxim meaning "Deeds contain many things which are prohibited to be done."[82]

FACTORIZING PROCESS. See GARNISHMENT.

FACT OR MATTER IN ISSUE. A fact or matter on which the plaintiff proceeds by his action and which the defendant controverts in his pleadings.[83] (See, generally, PLEADING.)

77. Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218 [*quoting* Webster Dict.]; Woodfill *v.* Patton, 76 Ind. 575, 579, 40 Am. Rep. 269, where the term is distinguished from "evidence."

78. Boyle *v.* State, 105 Ind. 469, 494, 5 N. E. 203, 55 Am. Rep. 218 [*quoting* Webster Dict.; Worcester Dict.].

79. Drake *v.* Cockroft, 4 E. D. Smith (N. Y.) 34, 37.

"Facts constituting a cause of action or a defence" see Lawrence *v.* Wright, 2 Duer (N. Y.) 673, 674.

"That he has knowledge of the facts therein stated" see Nordine *v.* Knutson, 62 Minn. 264, 64 N. W. 565.

"There are two kinds of facts — 'evidentiary facts and inferential facts.'" Woodfill *v.* Patton, 76 Ind. 575, 579, 40 Am. Rep. 269 [*citing* Locke *v.* Merchants' Nat. Bank, 66 Ind. 353, 362]. (See EVIDENTIARY FACT.)

"Fact in an insurance policy" see Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 339, 26 N. E. 877, 11 L. R. A. 598.

"Facts detailed," as referring to the facts detailed by counsel in drawing up a case, should be construed as synonymous with the word "testimony." Potter *v.* Washburn, 13 Vt. 558, 565, 37 Am. Dec. 615.

Facts must be material to contract see 8 Cyc. 524 note 86.

80. Whelpley *v.* Van Epps, 9 Paige (N. Y.) 332, 333, 37 Am. Dec. 400 [*cited* in State *v.* Grinstead, 10 Kan. App. 74, 61 Pac. 975].

81. Bouvier L. Dict.

82. Wharton L. Lex.

Applied in Warcombe's Case, 12 Coke 124, 125.

83. Lillis *v.* Emigrant Ditch Co., 95 Cal. 553, 559, 30 Pac. 1108; Garwood *v.* Garwood, 29 Cal. 514, 521; Glenn *v.* Savage, 14 Oreg. 567, 575, 13 Pac. 442. See also King *v.* Chase, 15 N. H. 9, 15, 41 Am. Dec. 675.

A fact in issue as distinct from a fact in controversy see Caperton *v.* Schmidt, 26 Cal. 479, 494, 85 Am. Dec. 187; McDonald *v.* Bear River, etc., Water, etc., Co., 15 Cal. 145, 148; Betts *v.* Starr, 5 Conn. 550, 554, 13 Am. Dec. 94; Potter *v.* Baker, 19 N. H. 166, 167; King *v.* Chase, 15 N. H. 9, 17, 41 Am. Dec. 675; Towns *v.* Nims, 5 N. H. 259, 261, 20 Am. Dec. 578.

FACTORS AND BROKERS

By Ernest H. Wells* and Louis Lougee Hammon†

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* Author of "Contribution," 9 Cyc. 792; "Court Commissioners," 11 Cyc. 622; "Disorderly Houses," 14 Cyc. 479; "Drunkards," 14 Cyc. 1089; "Dueling," 14 Cyc. 111; "Escrows," 16 Cyc. 561, etc.
† Author of "Disturbance of Public Meetings," 14 Cyc. 539; "General Principles of the Law of Contract," etc.

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CROSS-REFERENCES

For Matters Relating to:
Agent, Generally, see PRINCIPAL AND AGENT.
Auctioneer, see AUCTIONS AND AUCTIONEERS.
Broker as Member of Exchange, see EXCHANGES.
Forwarder, see CARRIERS.
Forwarding Agent, see PRINCIPAL AND AGENT.
Grounds For Arrest of Broker in Civil Action, see ARREST.
Insurance Broker, see INSURANCE.
License or Privilege Tax as Interference With Commerce, see COMMERCE.
Money Paid Broker on Procuring Volunteer as Bounty, see BOUNTIES.
Pawnbroker, see PAWNBROKERS.
Right to Commission on:
Gambling Contract, see GAMING.
Lottery Contract, see LOTTERIES.
Ship-Broker, see SHIPPING.
Shipmaster as Factor, see SHIPPING.
Supercargo as Broker, see SHIPPING.

I. FACTORS.*

A. General Nature of Agency — 1. DEFINITION. A factor is generally defined to be an agent who as a business sells goods or merchandise consigned and delivered to him by or for his principal for a compensation commonly called factorage or commission.[1]

1. *Alabama.*—Lehman *v.* Pritchett, 84 Ala. 512, 513, 4 So. 601.
Missouri.— State *v.* Thompson, 120 Mo. 12, 20, 25 S. W. 346 [*quoting* Story Agen. (9th ed.) § 33].
Oklahoma.— See Peoples' Bank *v.* Frick Co., 13 Okla. 179, 185, 73 Pac. 949.
Pennsylvania.— Com. *v.* Keller, 9 Pa. Co. Ct. 253, 255 [*quoting* 6 Bacon Abr. 558]. See also Com. *v.* Shober, 3 Pa. Super. Ct. 554, 556 [*quoting* Bouvier L. Dict.]; Higgins *v.* Grindrod, 16 Phila. 200, 201.
Texas.— See Milburn Mfg. Co. *v.* Peak, 89 Tex. 209, 211, 34 S. W. 102.
Wisconsin.— Edgerton *v.* Michels, 66 Wis. 124, 130, 26 N. W. 748, 28 N. W. 408.
See 23 Cent. Dig. tit. "Factors," § 1.

As defined by statute "a factor is an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser." Cal. Civ. Code, § 2026 [*cited* in Lehmann *v.* Schmidt, (Cal. 1889) 22 Pac. 973, 24 Pac. 120].

The term "commission merchant" is synonymous with "factor." Perkins *v.* State, 50 Ala. 154; State *v.* Thompson, 120 Mo. 12, 20, 25 S. W. 340; Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401, 405 [*citing* Bouvier L. Dict.]. See also Lehman *v.* Pritchett, 84 Ala. 512, 513, 4 So. 601; Burton *v.* Goodspeed, 69 Ill. 237; Dugnid *v.* Edwards, 50

*By Ernest H. Wells.

2. Possession of Goods. A factor must be in actual or constructive possession of the property which he sells for his principal.[2]

3. Fiduciary Relation. The usual rule that an agent cannot make a profit out of his position applies of course to a factor who is entitled only to his commission and must strictly account to his principal for all profits made.[3] He cannot place himself in any position which is antagonistic to his relation as agent for his principal.[4]

4. Distinguished From Broker. The features which mainly distinguish a factor from a broker are: The former is intrusted with the possession, disposal, and control of the property and may sell it in his own name and bind the principal; the broker usually does not have possession, disposal, and control, and should sell in the name of his principal.[5] The broker is strictly speaking a middleman or intermediate negotiator between the parties,[6] and is not in the fiduciary relation of an agent to his principal, but must favor neither the one nor the other of the parties between whom he effects a transaction.[7]

B. Regulation of Business; Licenses,[8] Penalties,[9] Etc. Those who wish

Barb. (N. Y.) 288. A commission merchant, within the meaning of the revenue law, has been defined to be: "One who buys and sells on commission, and may sell any personal property which is left with or consigned to him for sale, except such as is expressly excepted by the act." White *v.* Com., 78 Va. 484, 485. The mere agent to sell the goods of others for a commission. Alabama Fertilizer Co. *v.* Reynolds, 79 Ala. 497, 502.

An agent employed to sell or to purchase and sell personal property intrusted to his possession for commission is a factor. Beardsley *v.* Schmidt, 120 Wis. 405, 98 N. W. 235 [*citing* Reinhard Agen. § 449].

An agent merely for collecting debts is not a factor. Hopkirk *v.* Bell, 3 Cranch (U. S.) 454, 2 L. ed. 497.

Distinguished from "forwarding agent" see Perkins *v.* State, 50 Ala. 154.

Distinguished from "warehouseman" see White *v.* Boyd, 124 N. C. 177, 32 S. E. 495; Philadelphia Nat. Bank *v.* Pennsylvania Warehousing, etc., Co., 141 Pa. St. 517, 21 Atl. 651.

Relation of debtor and creditor distinguished from that of factor and principal see Stieglitz *v.* O. J. Lewis Mercantile Co., 76 Mo. App. 275.

Salary may be given a factor for his services instead of a commission. See Winne *v.* Hammond, 37 Ill. 99; State *v.* Thompson, 120 Mo. 12, 25 S. W. 346; Anderson L. Dict. See *infra*, I, E. See also Perkins *v.* State, 50 Ala. 154 [*citing* 1 Parsons Contr. 78]; Spears *v.* Loague, 6 Coldw. (Tenn.) 420; Edgerton *v.* Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408; Baring *v.* Corris, 2 B. & Ald. 137, 20 Rev. Rep. 383.

2. People's Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949. See also Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 38 N. Y. Suppl. 449 [*affirmed* in 158 N. Y. 672, 52 N. E. 1126]; Edgerton *v.* Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

Direct consignment of goods to a person is not necessary to give him the status of a factor. It is necessary only that he should have possession of the property with authority to sell on commission. Beardsley *v.* Schmidt, 120 Wis. 405, 98 N. W. 235.

3. *Kansas.*— Thayer *v.* Hoffman, 53 Kan. 723, 37 Pac. 125.

Louisiana.— Payne *v.* Waterson, 16 La. Ann. 239; Denson *v.* Stewart, 15 La. Ann. 456.

Maryland.— Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

New York.— Hidden *v.* Waldo, 55 N. Y. 294 [*reversing* 7 Alb. L. J. 79].

North Carolina.— Mealor *v.* Kimble, 6 N. C. 272.

Virginia.— Alexander *v.* Morris, 3 Call. 89.

Wisconsin.— See Gaveney *v.* Gates, 68 Wis. 1, 31 N. W. 223.

See 23 Cent. Dig. tit "Factors," § 43.

4. Gordon *v.* Goodrich, 11 La. Ann. 410.

A fiduciary relation see Assignments For Benefit of Creditors, 4 Cyc. 417.

5. See the following cases:

Alabama.— Lehman *v.* Pritchett, 84 Ala. 512, 4 So. 601.

Kentucky.— Graham *v.* Duckwall, 8 Bush 12.

Missouri.— Third Nat. Bank *v.* Snyder, 10 Mo. App. 211, 215 [*citing* Bouvier L. Dict.; 2 Kent Comm. 622 note *b*].

New York.— Ladd *v.* Arkell, 37 N. Y. Super. Ct. 35.

Oklahoma.— People's Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949.

Wisconsin.— Edgerton *v.* Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

United States.— Slack *v.* Tucker, 23 Wall. 321, 23 L. ed. 143 [*citing* 2 Kent Comm. 622; Story Agen. § 34; Story Sales, § 91].

England.— Baring *v.* Corrie, 2 B. & Ald. 127, 20 Rev. Rep. 383.

Brokers generally see *infra*, II, A.

6. See Edgerton *v.* Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

7. Beal *v.* McKiernan, 6 La. 407 [*citing* La. Civ. Code, art. 2987].

8. **Licenses** generally see Licenses.

Legislative regulation of factors see also Commerce, 7 Cyc. 444.

9. **Penalties** generally see Penalties.

to engage in the business of factor or commission merchant are often required to obtain a license for conducting such a business.[10] Statutes which require merchants who sell farm produce upon commission to obtain a license and execute a bond for the faithful performance of their contract are held constitutional in some states,[11] but in others such a provision is held unconstitutional as an unjustifiable interference with the right of citizens to carry on a legitimate business.[12] Statutory regulations of the duties of a factor which impose upon him penalties for failure to comply with the regulations provided for are subject to the usual rule of strict construction.[13] A statute declaring any commission merchant who fails on demand to deliver to the consignor the proceeds of a sale of goods guilty of misdemeanor makes an actual demand for the proceeds a necessary prerequisite to a conviction.[14] Under a statute which provides a penalty for the embezzlement of proceeds of a sale of merchandise by consignees and factors, horses are merchandise, and the factor who embezzles the proceeds of the sale of a horse is subject to the prescribed penalty.[15]

C. Revocation or Termination of Agency — 1. In General. In the absence of any time fixed for the continuation of the factor's employment it may be terminated at any time,[16] and the principal may repossess himself of the goods at any time before sale on payment of his indebtedness to the factor.[17] In case of an agreement as to the continuation of employment, a default in his obligations by the factor may of course release the principal.[18]

2. By Death of Either Party or by Insolvency of Factor.[19] The factor's power of sale to reimburse himself for advances made or expenses incurred is not revoked by the death of the principal.[20] But the death of the factor necessarily

10. See Kansas City *v.* Grush, 151 Mo. 128, 52 S. W. 286; Neal *v.* Com., 21 Gratt. (Va.) 511.

Arbitrary discrimination.—A statute which requires commission merchants in cities of population of a certain size to be licensed is not unconstitutional as an arbitrary discrimination, because it excepts from its operation dealers of grain, live stock, and dressed meats where other laws sufficiently provide for the inspection of grain, live stock, and dressed meats. Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802.

When license unnecessary.— Such a statute does not render it necessary for one who may gratuitously assume the duties of a commission merchant or who may in one or more instances incidentally discharge such duties to obtain a license; it is only the person who intends to engage in the business of a factor or commission merchant as a source of profit who is subject to the statute. Perkins *v.* State, 50 Ala. 154.

11. State *v.* Wagener, 77 Minn. 483, 80 N. W. 633, 778, 1134, 77 Am. St. Rep. 681, 46 L. R. A. 442.

12. People *v.* Berrien Cir. Judge, 124 Mich. 664, 83 N. W. 594, 83 Am. St. Rep. 352, 50 L. R. A. 493.

13. Wright *v.* People, 61 Ill. 382; McMasters *v.* Burnett, 92 Ky. 358, 17 S. W. 1021, 13 Ky. L. Rep. 617; Holman *v.* Frost, 26 S. C. 290, 2 S. E. 16. See, generally, Statutes.

14. Wright *v.* People, 61 Ill. 382.

Conviction as prerequisite to recovery of penalty.— Under a statute which provides that a factor who fails on demand to pay to his principal the proceeds of a sale shall be guilty of a misdemeanor and be liable to double the value of the property sold, a factor is not liable for the double value until he has been convicted. Hope *v.* Hull, 60 Mo. App. 61.

15. Com. *v.* Keller, 9 Pa. Co. Ct. 253.

16. Outerbridge *v.* Campbell, 87 N. Y. App. Div. 597, 84 N. Y. Suppl. 537.

What does not amount to revocation.— A delivery of goods to a factor who has advanced money on them on a contract that they should be consigned to him for sale is not revoked by the fact that the consignor pays the charges of forwarding. Brown *v.* Wiggin, 16 N. H. 312.

17. Gragard *v.* Metropolitan Bank, 106 La. 298, 30 So. 885; Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235.

If the withdrawal from the factor of his power to sell was made before he took any steps to execute the power or acquire any interest in the goods, before he incurred any expense or liability, and before the possession of the goods was transferred to him, he is not entitled to commissions. Roberts *v.* Andrews, 15 Pa. Super. Ct. 311.

18. Nalle *v.* Conrad, 30 La. Ann. 503, where an agreement by a planter to consign and pay commissions on his entire crop was held not binding after the factor's refusal to fulfil the stipulations as to paying certain drafts and taxes.

19. See *infra*, I, F, 1, e, (II).

20. Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. 130; Merry *v.* Lynch, 68 Me. 94, opinion of the court by **Libbey, J.**

terminates the agency, and payment for goods sold previous to death cannot be received by his administrator.[21] The insolvency of the factor terminates his authority over goods consigned to him,[22] and the property remaining in his hands and the proceeds of such as has been sold are, with the exception of the value of the factor's lien which he may have, the property of the consignor and subject to his order.[23]

D. Powers and Authority, and Duties and Liabilities to Principal — 1. General Rules. Emergencies may arise in which a factor may from the necessities of the case be justified in assuming extraordinary powers and his acts fairly done under such circumstances bind the principal.[24] A factor after completing a sale cannot bind his principal by submitting to arbitration the claim for damages for a breach of implied warranty of the property sold.[25] It has been held that consignors are bound by stipulations made by their factors that perishable goods would keep good and marketable during a certain period of time.[26] Factors may transact their business in accordance with definite and notorious usages of trade unless the usages or customs be in contravention of a rule at law.[27] A factor must if he accept a consignment comply with the conditions imposed by the consignor.[28] If the factor has notice that the principal has drawn on him in anticipation of the avails of the consignment the factor becomes bound by accepting the consignment to pay the bill and in case of non-payment he is bound to refund to the drawer the damages and costs which he may have been compelled to pay by reason of his bill having been protested.[29] If factors are employed to sell goods in a foreign market they are not liable to the principal for the negligence and delay of the carrier, provided they exercise reasonable skill and ordinary diligence in selecting the carrier and attending to the shipping of the goods.[30] A factor employed by the general agent of a corporation to sell the goods manufactured and to purchase stock has power to buy on credit, but not to give the note of the corporation.[31]

2. Skill and Care Required. A factor is held only to reasonable care and diligence in his employment;[32] that is, the same degree of care and diligence

21. Merrick's Estate, 8 Watts & S. (Pa.) 402.

Delegation of authority see *infra*, I, D, 4.

22. Audenried *v.* Betteley, 8 Allen (Mass.) 302. See also Cushman *v.* Snow, 186 Mass. 169, 71 N. E. 529.

23. Audenried *v.* Betteley, 8 Allen (Mass.) 302; London, etc., Bank *v.* Parke, etc., Machinery Co., 64 Fed. 637.

A note taken by a factor in his own name for a debt due his principal belongs to the principal in the event of the factor's bankruptcy. Messier *v.* Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316. See also Price *v.* Ralston, 2 Dall. (Pa.) 60, 1 L. ed. 289, 1 Am. Dec. 260, holding that a bond likewise belonged to the principal.

24. Amongst other emergencies acts done in a *bona fide* effort to save perishing property is one. Jervis *v.* Hoyt, 2 Hun (N. Y.) 637 [*citing* Story Agen. § 141].

25. Carnochan *v.* Gould, 1 Bailey (S. C.) 179, 19 Am. Dec. 668.

26. Flash *v.* American Glucose Co., 38 La. Ann. 4.

27. Phillips *v.* Moir, 69 Ill. 155; Rapp *v.* Grayson, 2 Blackf. (Ind.) 130.

Customs and usages generally see Customs and Usages.

Sufficient proof of usage.— Proof that a particular mode of selling cotton in Mobile "was very common in the trade, but that a few factors in Mobile would not do so," is not proof of a usage of trade. Austill *v.* Crawford, 7 Ala. 335.

28. Thus if two lots of goods are consigned by a single bill of lading for account of two different persons the consignee cannot accept the consignment as to one lot and refuse it as to the other. If he accepts as to one he accepts as to the other. Chaffe *v.* Heyner, 31 La. Ann. 594.

29. Urquhart *v.* McIver, 4 Johns. (N. Y.) 103. See *infra*, I, D, 14.

If a consignment is drawn against in favor of the third person the rule is the same. See *infra*, I, D, 14.

30. McCants *v.* Wells, 4 S. C. 381.

31. Emerson *v.* Province Hat Mfg. Co., 12 Mass. 237, 7 Am. Dec. 66. See Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118.

32. Phillips *v.* Moir, 69 Ill. 155; Kelley *v.* Maguire, 99 Ill. App. 317; Darlington *v.* Fredenhagen, 18 Ill. App. 273; Bogert *v.* Dorsey, 14 La. 430; Jervis *v.* Hoyt, 2 Hun (N. Y.) 637, 5 Thomps. & C. (N. Y.) 199.

Where a person undertakes without reward to sell the property of another, he is held liable only for gross negligence. McLean *v.*

which a prudent man would exercise in the management of his own business.[33] If he fails to employ this degree of care and diligence he may be held liable in damages.[34] Thus a factor will be liable if he does not employ faithful and diligent efforts to ascertain and procure the highest market value of the property consigned;[35] but if he be diligent, a mistake in judgment made in good faith will not render him liable.[36]

3. Following Instructions. If a consignee accept a consignment, he accepts on the terms prescribed by the shipper and cannot after acceptance refuse a compliance with the orders which accompanied it;[37] and if he disobeys the instructions of his principal he is liable for the loss which accrues from his acts.[38] Not only must he obey orders but he must strictly adhere to his orders and generally must at his peril pursue them literally.[39] If he follows instructions any loss which may occur falls on the principal.[40] A factor, however, is bound to obey only such instructions as are definite.[41] Whether a factor has followed instructions is a question for the jury.[42]

4. Delegation of Authority. A factor's power and authority are subject to the maxim *potestas delegata non delegari potest.*[43] At least a factor cannot

Rutherford, 8 Mo. 109. See also Patterson *v.* McIver, 90 N. C. 493.

After reasonable notice to the principal to take back goods, after the termination of the agency, the factor is liable only for gross negligence. Barrows *v.* Cushway, 37 Mich. 481.

33. Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

34. Roberts *v.* Cobb, 76 Minn. 420, 79 N. W. 540; Benedict *v.* Inland Grain Co., 80 Mo. App. 449; Bernet *v.* Hockaday, 61 Mo. App. 627.

35. See Linsley *v.* Carpenter, 4 Rob. (N. Y.) 200, where, however, the factor was under written contract to make extraordinary effort to obtain the highest market price. See also Francis *v.* Castleman, 4 Bibb (Ky.) 282; Roberts *v.* Cobb, 76 Minn. 420, 79 N. W. 540; Bernet *v.* Hockaday, 61 Mo. App. 627.

36. Lesesne *v.* Cook, 16 La. 58.

Sufficient proof of negligence and want of due skill see Savage *v.* Birckhead, 20 Pick. (Mass.) 167.

37. Loraine *v.* Cartwright, 15 Fed. Cas. No. 8,500, 3 Wash. 151.

A mistake as to or misapprehension of the instructions is no excuse. Rundle *v.* Moore, 3 Johns. Cas. (N. Y.) 36.

38. *Georgia.*— Day *v.* Crawford, 13 Ga. 508.

Louisiana.— Copes *v.* Phelps, 24 La. Ann. 562.

Missouri.— Sigerson *v.* Pomeroy, 13 Mo. 620.

New York.— Evans *v.* Root, 7 N. Y. 186, 57 Am. Dec. 512 (holding that a disobedience of instructions to "sell on arrival" renders the factor liable for loss sustained through a fall in prices); Leverick *v.* Meigs, 1 Cow. 645.

United States.— Courcier *v.* Ritter, 6 Fed. Cas. No. 3,282, 4 Wash. 549 (holding that an instruction to "make sale immediately on arrival" requires the agent to sell immediately on arrival, no matter at what loss, if he could sell at all, or as soon as he could sell); Loraine *v.* Cartwright, 15 Fed. Cas. No. 8,500, 3 Wash. 151.

See 23 Cent. Dig. tit. "Factors," § 13.

39. See Leverick *v.* Meigs, 1 Cow. (N. Y.) 645. See also Sigerson *v.* Pomeroy, 13 Mo. 620.

Departing from written instructions to follow verbal instructions of a general agent to whom the factor is referred in the written instructions does not render the factor liable. Manella *v.* Barry, 3 Cranch (U. S.) 415, 2 L. ed. 484.

40. See Sigerson *v.* Pomeroy, 13 Mo. 620; Hagan *v.* Paine, 2 N. C. 272.

41. His principal cannot impose uncertain liabilities on him by obscure and contradictory orders. In such case the factor is left to his own judgment which is to be honestly and diligently exerted. Bessent *v.* Harris, 63 N. C. 542.

42. Sigerson *v.* Pomeroy, 13 Mo. 620, holding further that where there has been a deviation from the orders of the principal, attended by loss, and the deviation is the act of agents to whom the goods were sent, it is for the jury to determine whether they were agents of the principal or of the commission merchants.

43. *Nebraska.*— Burke *v.* Frye, 44 Nebr. 223, 62 N. W. 476; Housel *v.* Thrall, 18 Nebr. 484, 25 N. W. 612.

Oklahoma.— People's Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949.

Tennessee.— Insurance Co. of North America *v.* East Tennessee, etc., Co., 97 Tenn. 326, 37 S. W. 225; Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

United States.— Warner *v.* Martin, 11 How. 209, 13 L. ed. 667; Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 244, 44 Conn. 558.

England.— Solly *v.* Rathbone, 2 M. & S. 298.

An assignee for the benefit of creditors does not become the factor of persons who

delegate his authority or employment beyond the usual course of business.[44] If a factor attempts to delegate his employment to another, he cannot raise any privity between that other and his principal.[45] If a factor employs a subagent without the authority of his principal, the factor is responsible for the subagent.[46]

5. RIGHTS IN AND TITLE TO GOODS. A factor's right in goods consigned to him is a limited one. It is sometimes called a special property and is never regarded as a general ownership.[47] He acquires no right of property whatever until the delivery thereof or of the bill of lading therefor.[48] It is sometimes difficult to determine whether the transaction has been a sale or a mere consignment.[49] If it appears that the depositor of the goods reserves a right to take them back, the transaction is considered a consignment and the consignee a factor;[50] but if there is no right reserved by the depositor to take back the goods the transaction is a sale.[51] If a consignee is at liberty according to the contract between him and the consignor to sell at any price he likes and to receive payment at any time he likes, but is to be bound if he sells the goods to pay the consignor for them at a fixed price and at a fixed time, the transaction is a contract of purchase for the

consigned goods to his consignor for sale. Cameron *v.* Crouse, 11 N. Y. App. Div. 391, 42 N. Y. Suppl. 58. See also Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 244, 44 Conn. 558.

44. Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 244, 44 Conn. 558.

A sale through clerks or other employees in the regular course of business can be made, the factor being responsible for their acts. Nugent *v.* Martin, 1 Tex. App. Civ. Cas. § 1173. *Contra,* Warner *v.* Martin, 11 How. (U. S.) 209, 13 L. ed. 667, holding that the factor cannot delegate his employment to his clerk, in which case, however, the decision rested on other reasons at least as potent as this one.

45. Warner *v.* Martin, 11 How. (U. S.) 209, 13 L. ed. 667; Solly *v.* Rathbone, 2 M. & S. 298.

46. Loomis *v.* Simpson, 13 Iowa 532; Reynolds *v.* Kirkman, 8 Mart. N. S. (La.) 464; Mark *v.* Bowers, 4 Mart. N. S. (La.) 95; Housel *v.* Thrall, 18 Nebr. 484, 25 N. W. 612.

47. U. S. *v.* Villalonga, 23 Wall. (U. S.) 35, 23 L. ed. 64; Walters *v.* Ross, 29 Fed. Cas. No. 17,122, 2 Wash. 283, holding that a factor, as between him and his principal, has no property or interest in the goods beyond his commissions, and cannot control the right of the principal over them.

Assignment for benefit of creditors by a factor does not pass to the assignee title to goods consigned to the factor. See ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 217.

Factor's interest is not subject to levy on attachment or execution at the suit of his individual creditors. Relf *v.* Boro, 17 La. Ann. 258; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Shaughnessey *v.* Lininger, etc., Co., 34 Nebr. 747, 52 N. W. 717; Hampton, etc., R., etc., Co. *v.* Sizer, 31 Misc. (N. Y.) 499, 64 N. Y. Suppl. 553.

His rights are those of a bailee and his possession constitutes an exception to the rule that a necessary element of the contract of bailment is that the bailee is under obligation to restore the specific things deposited; for, although the factor in performing his duties to his principal may and usually does pay over the price for which he has sold the goods in his keeping instead of returning the goods themselves, the transaction is not one of sale to the factor. Blood *v.* Palmer, 11 Me. 414, 26 Am. Dec. 547. See, generally, BAILMENTS.

48. Brown *v.* Wiggin, 16 N. H. 312; Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489], decided under the Factors Act. See *infra,* I, F, 2.

49. A statement in the invoice of the value of the merchandise shipped does not of itself indicate a sale rather than a consignment, especially where the shipment was the first transaction between the parties and the shipper was a foreign merchant. Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235.

That the parties by their correspondence after the shipment construed it as a consignment for sale is conclusive. Pam *v.* Vilmar, 54 How. Pr. (N. Y.) 235.

50. W. O. Dean Co. *v.* Lombard, 61 Ill. App. 94; Berry *v.* Allen, 59 Ill. App. 149; Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468; Milburn Mfg. Co. *v.* Peak, 89 Tex. 209, 34 S. W. 102. See also Lenz *v.* Harrison, 148 Ill. 598, 36 N. E. 567; Brown *v.* Church Co., 55 Ill. App. 655; Bush *v.* Fry, 15 Ont. 122; Mitchell *v.* Sykes, 4 Ont. 501.

51. Dorsh *v.* Lea, 18 Pa. Super. Ct. 447; Wheeler, etc., Mfg. Co. *v.* Laus, 62 Wis. 635, 23 N. W. 17. See also Norton *v.* Fisher, 113 Iowa 595, 85 N. W. 801, holding that where goods are consigned to a factor, to be sold and accounted for by him as provided by a written contract, stipulating that he shall buy at a fixed price all goods remaining unsold on a certain date, and that the title shall not vest in him until the purchase-price shall be paid in full, the goods remaining unsold after said date are held by him as owner under a conditional sale, and not as agent, and his mortgagee for value, without notice, after such date, is entitled to such goods as against the consignor.

purpose of reselling, and the relation of principal and factor does not exist.[52] The fact that goods are consigned for sale with the provision that the factor may retain on a sale of the property all the money in excess of the invoice price does not destroy the relation of factor and principal and render the transaction a conditional sale.[53] A person to whom property is consigned for sale is none the less a factor because he bestows labor upon it before it is ready for sale, although the character of the property is thereby entirely changed.[54] Where there is no question as to whether the goods have been sold to the consignee, but an ordinary consignment for sale is admitted, the consignor ordinarily does not part with his title by the consignment; he continues to be the true owner until the goods are sold by the consignee,[55] and the rule is the same whether the consignee is a *del credere* factor,[56] is under advances for the principal,[57] or is simply an agent for sale.[58] If in pursuance of an agreement goods are shipped to a factor in satisfaction of antecedent advances and are thus set apart and specifically appropriated

52. *Ex p.* White, L. R. 6 Ch. 397, 40 L. J. Bankr. 73, 24 L. T. Rep. N. S. 45, 19 Wkly. Rep. 488 [*affirmed* in 29 L. T. Rep. N. S. 78, 21 Wkly. Rep. 465, and *followed* in Northern Electrical Mfg. Co. *v.* J. C. Wagner Co., 108 Wis. 584, 84 N. W. 894].

53. Bridgeport Organ Co. *v.* Guldin, 3 Pa. Dist. 649. See W. O. Dean Co. *v.* Lombard, 61 Ill. App. 94.

Estoppel to show true relation.— Upon the trial of an action to recover possession of personal property delivered to defendant's intestate under an agreement to sell the same within a certain time and for a price certain and to pay to plaintiffs the proceeds therefor, and in case of failure to effect sale to return the property to plaintiffs, an unsigned memorandum produced by plaintiffs as agreed by them at the time of delivering the goods, by which memorandum it appeared that the goods were sold, did not estop plaintiffs from showing the true nature of the transaction, even though it differed from the statement made of it by their written admission. Errico *v.* Brand, 9 Hun (N. Y.) 654 [*distinguishing* Durgin *v.* Ireland, 14 N. Y. 322; Bonesteel *v.* Flack, 41 Barb. (N. Y.) 435, which were cases of completed contracts of sale], the court saying, however, that the memorandum would have been an estoppel in favor of *bona fide* purchasers.

54. Elgin First Nat. Bank *v.* Schween, 127 Ill. 573, 20 N. E. 681, 11 Am. St. Rep. 174 (where milk was changed into butter and cheese); Shaw *v.* Ferguson, 78 Ind. 547 (where hogs were slaughtered and converted into pork); State *v.* Thompson, 120 Mo. 12, 25 S. W. 346 (where according to contract the factor manufactured one-stave material into barrels for sale).

55. Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701. See also Britton *v.* Ferrin, 171 N. Y. 235, 63 N. E. 954.

Estoppel to deny principal's title based on admissions of factor subsequent to conversion by him see Kennedy *v.* Strong, 14 Johns. (N. Y.) 128, which was an action of trover for the conversion of merchandise.

The action of a consignee in accepting or refusing a consignment cannot affect the consignor's title to the goods consigned. Chaffe *v.* Heyner, 31 La. Ann. 594.

56. Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701. See also Cushman *v.* Snow, 186 Mass. 169, 71 N. E. 529.

The title to the unpaid purchase-money of goods sold by a *del credere* agent is in the principal, not in the factor. Moore *v.* Hillabrand, 37 Hun (N. Y.) 491. See also Stanwood *v.* Sage, 22 Cal. 516, holding that money received by the administrator in payment for goods sold by his intestate as a *del credere* factor forms no part of the assets.

57. Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701. See also McDonald-Crowley-Farmer Commission Co. *v.* Boggs, 78 Mo. App. 28 (holding that under an agreement between the commission house and one R that R should buy cattle and ship to the commission house, which should make sales and, after deducting commission and expenses, credit balance or charge loss as the case might be to R to account, the cattle were the property of R); Cameron *v.* Crouse, 11 N. Y. App. Div. 391, 42 N. Y. Suppl. 58 (where the factors had given their notes to the consignors as advances on the shipments). But see Hall *v.* Hinks, 21 Md. 406, where it was held that consignees who *bona fide* advance money on the credit of consignments made to them by bills of lading acquire an interest in the property, and are purchasers for value; there being, however, no evidence that the consignees were factors.

A mere confidence or expectation entertained by a factor that a bill accepted by him will be paid out of the proceeds of a particular crop of cotton will not take from the drawer of the bill the right to make an adverse disposition of the crop, at least in a court of law. Mauldin *v.* Armistead, 14 Ala. 702.

That factor had advanced more than the value of the goods, under an express agreement that he should be allowed to sell them and apply the proceeds in payment of the advance, does not change the title. Lehmon *v.* Warren, 53 Ala. 535. See, however, *infra*, I, D, 9, c.

58. Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701.

for this particular purpose the title to the goods vests in the factor upon the receiving thereof by the carrier.[59] The fact that the consignor retains the bill of lading or takes it in his own name does not prevent the title from vesting in the consignee;[60] but it must appear that the delivery to the carrier was made with the intent to transfer the property.[61]

6. Care and Custody of Goods.[62] A factor is required to exercise only ordinary care of the goods which have been consigned to him,[63] ordinary care being due diligence under the circumstances of the case;[64] that is, such care as a reasonably prudent man would take of his own property in a similar situation.[65] He is not liable if the goods are taken from his possession by a *vis major*.[66] A factor is at liberty to incur all such expenses for the benefit of the goods as a prudent man would find necessary in the discreet management of his own affairs.[67] He may follow the usage or custom of trade in his care of the goods consigned unless instructed to the contrary.[68] The custom, however, must be a reasonable one,[69] must have the quality of certainty,[70] and must be consistent with the law.[71] He is bound to follow the instructions of his principal as to the place to

59. Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Heard *v.* Brewer, 4 Daly (N. Y.) 136; Holbrook *v.* Wight, 24 Wend. (N. Y.) 169, 35 Am. Dec. 607 (holding that where a party consigns goods to the factor with a letter of advice and immediately draws on him for funds and the drafts are accepted, the jury may imply contracts and that the title to the goods has vested in the factor); Straus *v.* Wessel, 30 Ohio St. 211. See also Dows *v.* Greene, 16 Barb. (N. Y.) 72; Haille *v.* Smith, 1 B. & P. 563.

60. Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Heard *v.* Brewer, 4 Daly (N. Y.) 136 (holding that in the absence of a bill of lading the intention to vest title in the factor upon the shipment so as to give him a constructive possession and subject only to the equitable right of stoppage and transit may be inferred from other documents, such as receipts or orders or correspondence which has taken place between the parties); Straus *v.* Wessel, 30 Ohio St. 211.

61. Until this is done the agreement of the parties is executory and the title remains in the consignor and he has the power to transfer the property to whomsoever he pleases. See Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Vertue *v.* Jewell, 4 Campb. 31.

62. **Exhibition of a bicycle — Motive of pleasure immaterial.** — Where a factor was given charge of a bicycle for sale and told to use it if necessary and "to show it to the boys" to effect a sale, the fact that when he was upon an excursion for the purpose of exhibiting the machine he was induced partly by considerations of pleasure to select that opportunity for exhibition was immaterial and he was held not liable for damages to the machine incurred during the excursion. Whittingham *v.* Owen, 19 D. C. 277.

63. Foster *v.* Bush, 104 Ala. 662, 16 So. 625 (holding that a factor is not liable for damage to cotton caused by exposure on the wharf to the weather, he being unable to procure immediate warehouse room, owing to the destruction by fire of the warehouses in the city); Weaver *v.* Poyer, 70 Ill. 567 (holding that a factor was not liable for goods lost in the great Chicago fire); Hill *v.* White, 11 La. Ann. 170 (where plaintiff sent a slave by her agent to defendant to sell on commission and the agent was aware that more than ordinary diligence would be required to prevent the slave's escape, but did not inform defendant, and where it was held that defendant having exercised ordinary prudence was not responsible for the escape of the slave).

64. Chenowith *v.* Dickinson, 8 B. Mon. (Ky.) 156.

If a factor advertises that he will store cotton in a fireproof warehouse, he is liable if he stores it in a wooden warehouse, where it is exposed to fire and loss. Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516.

In case goods are lost it is the duty of the factor to show that he has exercised due care or he will be held liable. Bartle *v.* Phelps, 39 Iowa 498.

65. Ives *v.* Freisinger, 70 N. J. L. 257, 57 Atl. 401.

66. Wilkinson *v.* Williams, 35 Tex. 181.

Where goods are wrongfully seized by an officer under an execution against the factor, the latter is not answerable to the owner for the goods so taken, since such taking is wrongful; and the owner has a complete remedy by an action against the officer. Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

67. Colley *v.* Merrill, 6 Me. 50.

A factor may inspect certain classes of goods before putting them on the market. See Spruill *v.* Davenport, 116 N. C. 34, 20 S. E. 1022, where the goods were fish.

68. Davis *v.* Kobe, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663, holding that a factor may store grain consigned to him in a mass with other grain of the same grade and quality.

Customs and usages generally see CUSTOMS AND USAGES.

69. Vincent *v.* Rather, 31 Tex. 77, 98 Am. Dec. 516.

70. Wallace *v.* Morgan, 23 Ind. 399.

71. Kaufman *v.* Edwards, 2 Tex. Unrep. Cas. 132. But see Wallace *v.* Bradshaw, 6

which the goods are to be shipped.[72] If with due diligence he is unable to ship the goods to the place designated by his principal, it is his duty to retain them, and, in case the consignor should fail at a reasonable time after request to pay advances, the factor may sell the goods.[73]

7. Insurance of Goods. It is not the duty of a factor to insure the goods of his principal unless instructed so to do, unless a usage of trade makes it his duty so to do,[74] unless some understanding exists between the principal and the factor that the goods in question shall be insured,[75] or unless it is a custom of the factor himself to insure, which custom is brought to the notice of the principal.[76] If a factor is instructed to insure[77] or if he has agreed to insure as a part of his contract as agent,[78] he will be liable for any loss for failure to carry out the instructions or agreement. An agreement to insure is presumed to mean full insurance[79] — at least in the absence of evidence of what the custom of merchants is in such cases and in the absence of any showing that there is a difficulty in obtaining full insurance.[80] A factor who has on his own responsibility effected insurance on goods may be held liable for the amount of insurance effected,[81] or in some instances as himself the insurer of the property.[82]

8. As to Pledging Goods.[83] By the common-law rule, which still widely obtains, a factor to whom his principal is not indebted cannot pledge the goods of his principal for his own debt,[84] and this is true although the pledgee has no notice of his

Dana (Ky.) 382, where such a custom was not considered inconsistent with the law.

72. Ferguson *v.* Porter, 3 Fla. 27 (where a factor was instructed to ship certain goods to New Orleans for sale, and shipped the same to Charleston, contrary to his instructions, and the goods were lost at sea, and were not insured, and the factor was held liable for the same); Rapp *v.* Grayson, 2 Blackf. (Ind.) 130.

73. See Bessent *v.* Harris, 63 N. C. 542.

74. Shoenfeld *v.* Fleisher, 73 Ill. 404; Schaeffer *v.* Kirk, 49 Ill. 251; Duncan *v.* Boye, 17 La. Ann. 273; Patterson *v.* Leake, 5 La. Ann. 547; Brisban *v.* Boyd, 4 Paige (N. Y.) 17. See also Lee *v.* Adsit, 37 N. Y. 78.

If a usage of the trade to insure can be proved a failure to insure renders the factor liable for a loss (Kingston *v.* Wilson, 14 Fed. Cas. No. 7,823, 4 Wash. 310); but it has been held that the usage must be established by the most conclusive proof or it will not be recognized (Tonge *v.* Kennett, 10 La. Ann. 800).

75. Lee *v.* Adsit, 37 N. Y. 78.

Where the jury has found upon doubtful evidence that there was no agreement to insure, the factor will not be liable for not insuring. Huguenin *v.* Legare, 11 Rich. (S. C.) 204.

76. Area *v.* Milliken, 35 La. Ann. 1150, holding that the principal has a right to assume that he will follow his ordinary custom until he receives notice of a change.

77. Gordon *v.* Wright, 29 La. Ann. 812; De Tastett *v.* Crousillat, 7 Fed. Cas. No. 3,828, 2 Wash. 132. See Thorne *v.* Deas, 4 Johns. (N. Y.) 84.

78. Shoenfeld *v.* Fleisher, 73 Ill. 404.

A subsequent parol undertaking by a factor to "see to" or provide for insurance does not render him liable for the loss of goods by fire where there was no agreement in the contract as to the factor's agency that the factor should keep the goods insured and where there was no showing that the factor had been instructed to insure or that there was a usage of trade or habit of dealing between them requiring insurance. Odorless Rubber Co. *v.* North Bennington Boot, etc., Co., 18 Fed. Cas. No. 10,438.

79. Ela *v.* French, 11 N. H. 356.

80. Beardsley *v.* Davis, 52 Barb. (N. Y.) 159.

81. The amount of the insurance plus the interest thereon from the time payment was demanded of him will be held to be the amount of his liability. Fish *v.* Seeberger, 154 Ill. 30, 39 N. E. 982 [*affirming* 47 Ill. App. 580].

82. Gordon *v.* Wright, 29 La. Ann. 812 (holding that a factor who insured the property in his own name and failed to collect the insurance money became liable as insurer); Miller *v.* Tate, 12 La. Ann. 160 (holding that, where a factor effected insurance in several different companies at a rate which was equal to one eighth of one per cent per month, and in the accounts rendered of sales charged one fourth of one per cent per month, he was not to be considered as his principal's agent in his insurances effected but as being an insurer himself at the rate of one fourth of one per cent per month and as having reinsured at the best terms obtainable).

For insurance money received he must of course account to the principal. Fish *v.* Seeberger, 47 Ill. App. 580.

83. Rights of pledgee under Factors Act see *infra*, I, F, 2, e.

84. *Alabama.*— Commercial Bank *v.* Lee, 99 Ala. 493, 12 So. 572, 19 L. R. A. 705; Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 568, 19 L. R. A. 701, 42 Am. St. Rep. 38; Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

California.— Wright *v.* Solomon, 19 Cal.

character as factor.[85] The rule appears to rest on the doctrine of special agency.[86] To pledge the goods of the principal is beyond the scope of the factor's power, and every attempt to do it under color of the sale is tortious and void.[87] The rule does not allow him to pledge by the indorsement and delivery of the bill of lading[88] or other symbol of title[89] any more than by the delivery of the goods themselves. Although a factor cannot pledge the goods of his principal as his own, yet he may deliver them to a third person as security with notice of his lien and as his agent to keep possession for him in order to preserve the lien.[90] Thus where he has made advances he may pledge the goods to the amount of the advances for his own use.[91] So too it has been held that a factor may pledge

64, 79 Am. Dec. 196 [*overruling* Horr *v.* Barker, 11 Cal. 393, 70 Am. Dec. 791; Glidden *v.* Lucas, 7 Cal. 26; Hutchinson *v.* Bours, 6 Cal. 383, which decisions limited the common-law rule to cases of technical factors where the rights of third persons were involved].

Georgia.— Macon First Nat. Bank *v.* Nelson, 38 Ga. 391, 95 Am. Dec. 400.

Kentucky.— Louisville First Nat. Bank *v.* Boyce, 78 Ky. 42, 39 Am. Rep. 198.

Louisiana.— Lallande *v.* His Creditors, 42 La. Ann. 705, 7 So. 895; Young *v.* Scott, 25 La. Ann. 313; Miller *v.* Schneider, 19 La. Ann. 300, 92 Am. Dec. 535; Bonniot *v.* Fuentes, 10 La. Ann. 70; Hadwin *v.* Fisk, 1 La. Ann. 74.

Massachusetts.— Michigan State Bank *v.* Gardner, 15 Gray 362 (holding that St. (1845) c. 193, did not change the common law); Kinder *v.* Shaw, 2 Mass. 398.

Missouri.— Wheeler, etc., Mfg. Co. *v.* Givan, 65 Mo. 89; Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 293; Singer Mfg. Co. *v.* Hudson, 4 Mo. App. 145.

New Hampshire.— See Martin *v.* Moulton, 8 N. H. 504, where the court said that a factor could not pledge property to a partnership of which he is a member.

New York.— Stevens *v.* Wilson, 3 Den. 472; Kennedy *v.* Strong, 14 Johns. 128; Rodriguez *v.* Heffernan, 5 Johns. Ch. 417.

Pennsylvania.— Newbold *v.* Wright, 4 Rawle 195.

South Carolina.— Bowie *v.* Napier, 1 McCord 1, 10 Am. Dec. 641, holding, however, that a subagent whom the factor within the scope of his authority employed may have a lien on the goods for advances made by the subagent.

Tennessee.— Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

Texas.— McCreary *v.* Gaines, 55 Tex. 485, 40 Am. Rep. 818.

Virginia.— Skinner *v.* Dodge, 4 Hen. & M. 432.

United States.— Union Stock-Yards Nat. Bank *v.* Gillespie, 137 U. S. 411, 11 S. Ct. 118, 34 L. ed. 724; Mechanics, etc., Ins. Co. *v.* Kiger, 103 U. S. 352, 26 L. ed. 433; Van Amring *v* Peabody, 28 Fed. Cas. No. 16,825, 1 Mason 440.

England.— Cole *v.* North Western Bank, L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. Rep. N. S. 733; Queiroz *v.* Trueman, 3 B. & C. 342, 10 E. C. L. 161; Phillips *v.* Huth, 10 L. J. Exch. 65, 6 M. & W. 572; Shipley *v.* Kymer, 1 M. & S. 484; Martini *v.* Coles, 1 M. & S. 140; Paterson *v.* Tash, 2 Str. 1178; Daubigny *v.* Duval, 5 T. R. 604; De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211, 31 Eng. Reprint 551.

See 23 Cent. Dig. tit. "Factors," § 20.

The fact that the active member of a firm of factors is also a partner of consignors of goods in working their cotton plantations will not validate a pledge of the goods by the factors to secure a debt due by them, if such partner was not held out by the consignors as the owner of the property, or as authorized by them to dispose of it otherwise than as a factor, and was not understood by the pledgee to be acting in any other capacity. Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573.

85. Gray *v.* Agnew, 95 Ill. 315; Berry *v.* Allen, 59 Ill. App. 149; Rodriguez *v.* Heffernan, 5 Johns. Ch. (N. Y.) 417; Warner *v.* Martin, 11 How (U. S.) 209, 13 L. ed. 667.

86. De Bouchout *v.* Goldsmid, 5 Ves. Jr. 211, 213, 31 Eng. Reprint 551, where the lord chancellor said: "I take it, not merely to be a principle of the law of England, but by the Civil Law that if a person is acting *ex mandato*, those dealing with him must look to his mandate."

87. 2 Kent Comm. 626.

88. Shipley *v.* Kymer, 1 M. & S. 484; Martini *v.* Coles, 1 M. & S. 140. See also Graham *v.* Dyster, 6 M. & S. 1, 2 Stark. 21, 3 E. C. L. 299.

89. Commercial Bank *v.* Lee, 99 Ala. 493, 12 So. 572, 19 L. R. A. 705; Commercial Bank *v.* Hurt, 99 Ala. 130, 12 So. 568, 42 Am. St. Rep. 38, 19 L. R. A. 701; Holton *v.* Hubbard, 49 La. Ann. 715, 22 So. 338; Allen *v.* St. Louis Nat. Bank, 120 U. S. 20, 7 S. Ct. 460, 30 L. ed. 573; Mechanics, etc., Ins. Co., *v.* Kiger, 103 U. S. 352, 26 L. ed. 433.

90. Urquhart *v.* McIver, 4 Johns. (N. Y.) 103. See also Silverman *v.* Bush, 16 Ill. App. 437; 2 Kent Comm. 626.

91. *Illinois.*— Silverman *v.* Bush, 16 Ill. App. 437.

Louisiana.— Chambers *v.* Hubbard, 51 La. Ann. 887, 25 So. 536. See Holton *v.* Hubbard, 49 La. Ann. 715, 22 So. 338.

Oregon.—Merchants' Nat. Bank *v.* Pope, 19 Oreg. 35, 26 Pac. 622.

Tennessee.— See Blair *v.* Childs, 10 Heisk. 199.

United States.— Boyce *v.* Bank of Com-

the property of his principal for the payment of duties accruing on specific goods.[92]

9. As to Sale of Goods — a. General Rules. If a factor neglects to give his principal the necessary information concerning a sale to enable the principal to protect himself when the sale was not consummated the factor is liable to account to the principal at the price for which the sale was made.[93] A factor cannot sell or transfer his principal's goods in discharge of his own debt or obligation; such an act confers no title on the transferee.[94] If no advances have been made or liabilities incurred by the consignee the consignor has an undoubted right to direct and control the sale;[95] but if one consigns goods to a person whose sole business is to sell goods of that nature, the presumption is that the consignment was made for sale, no instructions having been given; and if the goods are sold in good faith and the proceeds remitted to the sender and apparent owner the consignee has performed his duty in the premises.[96] A factor who has effected a sale and delivered the goods and remitted the proceeds to his principal has no power to rescind the contract of sale.[97] A factor is not responsible to his principal by reason of the established grades of grain being different in the market where he is to sell from the grades at other places.[98]

b. Effect of Instructions by Principal. A factor who has made no advances on the goods or incurred no liability therefor is bound to follow the instructions of his principal as to their sale or he will be liable for any resulting loss.[99] Thus it has been properly held that the factor is liable for not following the instructions of his principal as to the terms of the sale[1] and as to the time of making the

merce, 22 Fed. 53; Steiger *v.* Third Nat. Bank, 6 Fed. 569, 2 McCrary 494. *Compare* Halsey *v.* Bird, 99 Fed. 525, 39 C. C. A. 638.

See 23 Cent. Dig. tit. "Factors," § 20 *et seq.*

Contra.— Benny *v.* Pegram, 18 Mo. 191, 59 Am. Dec. 298; Skinner *v.* Dodge, 4 Hen. & M. (Va.) 432.

A hypothecation in excess of his advances to and charges against the consignor makes the factor bound to account to the consignor for the whole amount received on the hypothecation. Halsey *v.* Bird, 99 Fed. 525, 39 C. C. A. 638.

92. Evans *v.* Potter, 8 Fed. Cas. No. 4,569, 2 Gall. 12.

93. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496.

94. *Missouri.*— Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 293.

Nebraska.— Regier *v.* Craver, 54 Nebr. 507, 74 N. W. 830.

New Hampshire.— Martin *v.* Moulton, 8 N. H. 504.

New York.—Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, 57 N. Y. Suppl. 520; Stimermann *v.* Cowing, 7 Johns. Ch. 275.

North Carolina.— Hoffman *v.* Kramer, 123 N. C. 566, 31 S. E. 828.

Oklahoma.— Peoples Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949.

Virginia.— Alexander *v.* Morris, 3 Call 89.

See 23 Cent. Dig. tit. "Factors," § 21.

95. See Capron *v.* Adams, 28 Md. 529.

96. Dows *v.* McCleary, 14 Ill. App. 137.

97. Smith *v.* Rice, 1 Bailey (S. C.) 648.

98. Davis *v.* Kobe, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 675.

99. *Connecticut.*— See Weed *v.* Adams, 37 Conn. 378.

Missouri.— See Pomeroy *v.* Sigerson, 22 Mo. 177.

New York.— Scott *v.* Rogers, 4 Abb. Dec. 157.

Pennsylvania.—Porter *v.* Patterson, 15 Pa. St. 229.

United States.— Marshall *v.* Williams, 16 Fed. Cas. No. 9,136, 2 Biss. 255. See also Rice *v.* Brooks, 20 Fed. 611.

See 23 Cent. Dig. tit. "Factors," § 23.

An instruction as to goods "to do the same in like manner as if it were his own," which instruction was given in furtherance of former instructions, does not authorize the sale of the goods by the consignee and the substitution in its place of other goods of like nature. Seymour *v.* Wykoff, 10 N. Y. 213. See, however, Bailey *v.* Bensley, 87 Ill. 556, where the goods were grain stored in an elevator.

If a factor is instructed to sell according to his own discretion, he is bound to exercise good faith and reasonable care and diligence; that is, the care and diligence which a prudent man acting on his own account would exercise under the circumstances. Milbank *v.* Dennistoun, 1 Bosw. (N. Y.) 246 [*reversed* on other grounds in 21 N. Y. 386]. If he fulfils this requirement he cannot be held liable. Capron *v.* Adams, 28 Md. 529.

1. Singer Mfg. Co. *v.* Hudson, 4 Mo. App. 145; Barksdale *v.* Brown, 1 Nott & M. (S. C.) 517, 9 Am. Dec. 720.

Where goods are consigned, in pursuance of a previous understanding, to be sold on joint speculation, the consignee is not bound by the directions of the consignor as to the

sale.[2] Neither a custom of the trade[3] nor the intention of benefiting his principal by violating the instructions[4] is a good defense. But if it is impossible for the factor to follow instructions it is no defense to his action to recover excess advances that he had violated instructions.[5] Where instructions as to a sale have been many and conflicting it is a question for the jury whether the sale made was against orders or not.[6]

c. Effect of Advances. Although the general rule is that a factor is bound by the instructions of his principal, yet it is held by a line of authorities under the leadership of Justice Story[7] that a factor who has made advances on the credit of goods consigned to him for sale has the right to sell enough of the goods to reimburse himself for his advances, unless restrained by some agreement with the consignor;[8] and that after the advancements are made the factor is not bound to obey the subsequent instructions of his principal as to the sale of the goods; his right of sale is not suspended by any subsequent order of his principal,[9]

terms of sale; and a sale made in good faith will bind the consignor, although the vendee should become insolvent before payment. Cunningham *v.* Littlefield, 1 Edw. (N. Y.) 104 [*following* Lyles *v.* Styles, 15 Fed. Cas. No. 8,625, 2 Wash. 224].

2. See cases cited *infra*, this note.

Sale too late.— If a factor receives a peremptory order from his principal to sell goods consigned to him, he must sell at once, or, if a sale cannot be made, inform his principal, and await instructions. Spruill *v.* Davis, 116 N. C. 34, 20 S. E. 1022. See also Weed *v.* Adams, 37 Conn. 378 (where a factor disobeyed the order to sell goods as fast as received); Johnson *v.* Wade, 2 Baxt. (Tenn.) 480 (where the factor was instructed to sell the goods consigned before or at the maturity of a bill drawn against the goods and where his failure to obey the instructions rendered him liable for the loss). A reasonable time, when the consignees have been instructed to use their own judgment in holding or selling the goods, is given to the consignees and they are liable for a loss for failure to sell the goods within a reasonable time. Atkinson *v.* Barton, 4 Bush (Ky.) 299, where fifteen months elapsed.

Sale too soon.— Where goods are sent to a factor under a contract that they are not to be sold until so ordered by the consignor, he is liable for any loss resulting for a violation of instructions. Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124. See also Marfield *v.* Goodhue, 3 N. Y. 62 [*reversing* 1 Sandf. 360]. Where a factor at Liverpool was instructed to withhold grain from the market until the passage of an act of parliament had produced its results upon the market, he is not chargeable with breach of instructions from selling prematurely if he waited a considerable time after the passage of the act and then sold in good faith and with reasonable prudence. Milbank *v.* Dennistoun, 21 N. Y. 386.

3. Hatcher *v.* Comer, 73 Ga. 418; Barksdale *v.* Brown, 1 Nott & M. (S. C.) 517, 9 Am. Dec. 720.

Disposing of elevator receipt.— Under the custom of trade in Chicago, a commission man to whom grain is consigned may dispose of the warehouse receipt given him for the same, although directed by the consignor not to sell, but to hold the grain for further orders, if he keeps on hand ready for delivery when called on other receipts for a like quantity and grade of grain. The receipts do not represent the consignor's property, but are merely evidences of debt to the consignee. Bailey *v.* Bensley, 87 Ill. 556.

4. Hatcher *v.* Comer, 73 Ga. 418.

5. Lippmann *v.* Brown, 43 Misc. (N. Y.) 632, 88 N. Y. Suppl. 141, where defendant consigned oranges with instructions not to sacrifice the fruit but, if the factors could not get an average price of between three and four dollars, they should place the fruit in cold storage, but where on arrival the fruit was so decayed that it could not have been preserved by cold storage and the only possible course of action was to reassort and sell as soon as possible which the factor did.

6. Fagin *v.* Conoly, 25 Mo. 94, 69 Am. Dec. 450.

7. Brown *v.* McGran, 14 Pet. (U. S.) 479, 10 L. ed. 550.

8. Capron *v.* Adams, 28 Md. 529; Beadles *v.* Hartmus, 7 Baxt. (Tenn.) 476; Rice *v.* Brook, 20 Fed. 611; Fordyce *v.* Peper, 16 Fed. 516, 5 McCrary 221 [*reversed* on the ground that the federal court had no jurisdiction in 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435]. See Weed *v.* Adams, 37 Conn. 378.

9. Whitney *v.* Wyman, 24 Md. 131; Gill *v.* Beattie, 29 Wkly. Notes Cas. (Pa.) 459; Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359 (holding that the principal cannot subsequently limit the price at which the goods are to be sold); Bell *v.* Hannah, 3 Baxt. (Tenn.) 47; Blair *v.* Childs, 10 Heisk. (Tenn.) 199; Feild *v.* Farrington, 10 Wall. (U. S.) 141, 19 L. ed. 923; Talcott *v.* Chew, 27 Fed. 273; Eichel *v.* Sawyer, 44 Fed. 845, holding that when a factor has made advancements on the property consigned, the property is thereby removed from the absolute control of the consignor and the factor is invested with discretion to deal with it so as to indemnify himself first, provided his dealing is in good faith as respects the interest of the consignor. *Contra*, Smart *v.* Sandars, 5 C. B. 895, 918, 12 Jur. 751, 17 L. J. C. P. 258, 57

except as to the surplus not necessary to reimbursement.[10] Of course if the factor is under agreement not to sell,[11] or if at the time of the consignment certain instructions are given before any advances are made, which instructions are expressly or impliedly assented to by the factor,[12] he will be liable for violating the agreement or disobeying the instructions in case any loss results; and as in other cases an existence of a usage to sell to pay advances will not control an express contract between the parties as to the sale of the goods.[13] Other authorities do not give a factor who has made advances such an unqualified power of sale, but hold that he cannot sell the goods of his principal contrary to instructions, unless the principal after reasonable notice fails to repay the advances.[14] If the principal refuses or neglects to comply with the factor's demands to repay or secure him for the advances the factor may, after a reasonable notice to his principal, sell enough of the property of his principal to reimburse himself, although he thereby violates the instructions of his principal.[15] In some jurisdictions, which may or may not recognize the unqualified rule that

E. C. L. 895. See also George *v.* McNeill, 7 La. 124, 26 Am. Dec. 498 (where the court said that, although a factor is the creditor of his consignor and has made his advances, which must be covered, this fact will not justify of itself a sale below the limited price); Bean *v.* Adams, 1 Disn. 388, 12 Ohio Dec. (Reprint) 688.

Factor must act in good faith, so as to promote his principal's interest, as well as to indemnify himself. Rice *v.* Brook, 20 Fed. 611.

Necessity of sale to be shown.— "The mere fact, therefore, that advancements have been made by the factor, without evidence to show that a sale within his own discretion is necessary to reimburse him, cannot remove the limitations which the implied contract in this case imposes." Phillips *v.* Scott, 43 Mo. 86, 93, 97 Am. Dec. 369.

10. Nelson *v.* Chicago, etc., R. Co., 2 Ill. App. 180; Whitney *v.* Wyman, 24 Md. 131; Bell *v.* Hannah, 3 Baxt. (Tenn.) 47. See also Weed *v.* Adams, 37 Conn. 378; Marfield *v.* Goodhue, 1 Sandf. (N. Y.) 360 [*reversed* on other grounds in 3 N. Y. 62].

11. Heard *v.* Russell, 59 Ga. 25.

A subsequent agreement of the factor to wait for repayment, on his principal's promise that he should lose nothing thereby and that they would jointly endeavor to sell the goods, does not take away the factor's right to protect himself in recovering his advances. Blaisdell *v.* Lee, 127 N. C. 365, 37 S. E. 509.

12. Hatcher *v.* Comer, 73 Ga. 418; Blot *v.* Boiceau, 1 Sandf. (N. Y.) 111 [*reversed* on other grounds in 3 N. Y. 78, 51 Am. Dec. 345]; Hornsby *v.* Fielding, 10 Heisk. (Tenn.) 367; Brown *v.* McGran, 14 Pet. (U. S.) 479, 10 L. ed. 550.

13. Porter *v.* Patterson, 15 Pa. St. 229; Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124.

Customs and usages generally see CUSTOMS AND USAGES.

14. *Iowa.*— Hallowell *v.* Fawcett, 30 Iowa 491.

New Hampshire.— See Frothingham *v.* Everton, 12 N. H. 239.

New York.— Hilton *v.* Vanderbilt, 82 N. Y. 591; Marfield *v.* Goodhue, 3 N. Y. 62 [*reversing* 1 Sandf. 360]; Casson *v.* Field, 52 N. Y. Super. Ct. 196.

Ohio.— See Landis *v.* Gooch, 1 Disn. 176, 12 Ohio Dec. (Reprint) 559.

Texas.— Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124.

See 23 Cent. Dig. tit. "Factors," § 23 *et seq.*

Thus if he sells below the price limited by his principal, he will be liable unless his principal has failed to pay after reasonable notice. Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345 [*reversing* 1 Sandf. 111].

Right to notice affected by contract.— A consignee advanced money under an agreement that if the consignor failed to pay him a stipulated sum in case of a decline in the price of the goods he should be at liberty to sell the goods "at public or private sale or otherwise." It was held that this was more than a mere pledge; that the consignor having failed to comply with his stipulation could not require notice of the time and place of sale; and that the consignee must give notice of the decline in price and demand the deposit of the margin, but such demand might be made of the consignor's clerk, who in fact negotiated the consignment. Milliken *v.* Dehon, 27 N. Y. 364 [*reversing* 10 Bosw. 325].

15. Cummins *v.* Boston, 25 Ga. 277; Mooney *v.* Musser, 45 Ind. 115; Davis *v.* Kohe, 36 Minn. 214, 30 N. W. 662, 1 Am. St. Rep. 663; Campbell Co. *v.* Angus, 91 Va. 438, 22 S. E. 167.

Thus if the goods have been consigned to be sold at a certain limited price and the consignor has failed to indemnify the factor after a reasonable notice, the factor may, in the exercise of a sound discretion, sell so much of the consignment as is necessary for his protection at the current rates, even though that rate be lower than the rate previously fixed by the principal. Parker *v.* Brancker, 22 Pick. (Mass.) 40; Howard *v.* Smith, 56 Mo. 314; Columbian Nat. Bank *v.* White, 65 Mo. App. 677 [*following* Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369]; Frothingham *v.* Everton, 12 N. H. 239; Blaisdale Co. *v.* Lee, 127 N. C. 365, 37 S. E. 509.

a factor may sell to reimburse himself for his advances, it is held that he cannot refuse to obey the instructions of his principal to sell, that his having advanced money on the goods does not give him a discretion to hold them off the market.[16] In other courts it has been said that a factor should follow the instructions of his principal to sell as soon as the goods may be made to realize sufficient to reimburse him.[17] The fact that a factor has been garnished does not deprive him of his right of selling to reimburse himself for advances; the creditor is by the process only subrogated to the rights of the debtor.[18]

d. Place, Time, and Manner of Sale. Neither under the common law[19] nor under the factors acts[20] can a factor barter his principal's goods for other goods. By the general rule a principal who ships goods to a particular place is held as intending that the sale of the goods are to be conducted by his factor according to the general usages and customs of the place.[21] If a factor be authorized to direct the destination of the goods with a view to the best market, he must make all necessary inquiries to find the best market;[22] but if the consignment be general he is not bound to look for any other market than that to which the goods are consigned;[23] indeed it is held positively that under a general consignment he cannot ship goods to another market,[24] and if he does so he will be liable for the loss incurred from selling at a less price than he could have obtained in the market where he had authority to sell.[25] A factor under general instructions is liable for ordinary diligence as to the time and manner of the sale of the goods.[26] If no

Contra, Smart *v.* Sandars, 5 C. B. 895, 12 Jur. 751, 17 L. J. C. P. 258, 57 E. C. L. 895.

16. Butterfield *v.* Stephens, 59 Iowa 596, 13 N. W. 751; La Farge *v.* Kneeland, 7 Cow. (N. Y.) 456; Bell *v.* Palmer, 6 Cow. (N. Y.) 128. See also Howland *v.* Davis, 40 Mich. 545, holding that the fact that consignees had made advances on a lot of wool which they had been instructed to sell according to their judgment of the market, "unless otherwise advised," was not sufficient to justify their refusal to sell immediately on being ordered to do so, unless the sale was directed on terms that would prejudice them. *Contra*, see Weed *v.* Adams, 37 Conn. 378; Lockett *v.* Baxter, 3 Wash. Terr. 350, 19 Pac. 23.

17. Benny *v.* Rhodes, 18 Mo. 147, 59 Am. Dec. 293, holding that a sale by a factor where delivery was made to the vendee at cash prices and the sale reported to the principal as a sale of six months so as to give the factor time in his account with his principal was not a sale on account of advances made but a mere tortious appropriation of the goods of the principal.

18. White Mountain Bank *v.* West, 46 Me. 15.

An attachment by a creditor of the consignor does not affect the power of a factor to sell, for the attaching creditor cannot arrest the sale without tendering the factor the amount of his advances. Baugh *v.* Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675.

If the goods are out of the jurisdiction of the court, the fact that plaintiff brought an action in the forum of defendant's residence for the amount of his advances and asked that the goods be sold under an order of court does not affect the factor's rights to sell for reimbursement. Blaisdale Co. *v.* Lee, 127 N. C. 365, 37 S. E. 509.

19. Wing *v.* Neal, (Me. 1886) 2 Atl. 881 (holding that if he does so his authority as factor ceases and he becomes liable to account for their value to his principal); Wheeler, etc., Mfg. Co. *v.* Givan, 65 Mo. 89; Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265.

20. Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265 [*distinguishing* Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267].

21. Kelley *v.* Maguire, 99 Ill. App. 317.

Customs and usages generally see CUSTOMS AND USAGES.

22. Kingston *v.* Wilson, 14 Fed. Cas. No. 7,823, 4 Wash. 310.

23. Kingston *v.* Wilson, 14 Fed. Cas. No. 7,823, 4 Wash. 310.

24. Phillips *v.* Scott, 43 Mo. 86, 97 Am. Dec. 369.

Question for jury.— In some jurisdictions it is held that it is a question for the jury, under all the circumstances of the case, to determine whether a factor has authority to ship goods to another market. McMorris *v.* Simpson, 21 Wend. (N. Y.) 610.

25. Phy *v.* Clark, 35 Ill. 377.

26. Spruill *v.* Davenport, 116 N. C. 34, 20 S. E. 1022.

Act of God.— If for any reason not tortious, a commission merchant delays selling the goods consigned to him he cannot be held liable for a subsequent loss occurring through an act of God, for in such case the act of God is the proximate cause of loss and the failure to obey instructions is the remote cause. Dunbar *v.* Gregg, 44 Ill. App. 527.

Loss by fire.— Where a price is agreed upon for certain cotton, which is neither weighed nor delivered on Saturday, the day of the sale, and on the night of Tuesday the cotton is consumed by fire without any other fault or neglect of factor but the alleged fault of failing to deliver, he is not liable to the con-

time within which the goods should be sold is stipulated between the parties, the law implies that they should be sold within a reasonable time,[27] and if the factor fails so to do he is liable for any loss that occurs as a direct result of his conduct.[28] A person who has not possession of the goods of another cannot, as factor, bind that other as principal by a contract providing for the delivery of a certain amount of goods within a certain time at an agreed price, for a factor can sell only property in his possession or under his control.[29] Under the factors acts a contract of sale by a factor intrusted with goods for the purpose of sale is valid, although no money or obligation is given at the time of the contract, if an obligation is sufficiently entered into on the faith of the contract at any time while it remains unrescinded.[30]

e. Price. If goods are consigned without any instructions[31] as to the prices to be obtained, the factor may sell them whenever, in the exercise of a sound discretion, he deems it best to sell.[32] Under such circumstances it is his duty to sell for the highest price obtainable and to use reasonable and diligent efforts to that end.[33] He is, however, liable only for ordinary care and diligence in obtaining a price for the goods.[34] He is not bound to anticipate an extraordinary rise in the price of the article which might subsequently occur.[35] The instructions of his principal as to the price to be obtained for the goods consigned is binding on the factor and if he sells for less than the price limited he will be liable for the loss,[36] especially where he has made no advances.[37] But if the consignor directs his goods to be sold at a price which will pay advances, freight, and commissions and the factor sells for less than that amount, the consignor has no right of action against

signor for the value of the cotton. Lamoureau *v.* Fowler, 2 La. 174.

27. Seibert *v.* Albritton, 101 Ky. 241, 40 S. W. 698, 19 Ky. L. Rep. 402; Atkinson *v.* Burton, 4 Bush (Ky.) 299; Prokop *v.* Gourlay, 65 Nebr. 504, 91 N. W. 290.

When bills are drawn upon a consignee against a certain shipment of goods, he has no right without orders to hold up the sale of the goods after the time of payment of the bill, but should sell to meet the payment of the bills. Potts *v.* Findlay, 19 Fed. Cas. No. 11,345, 1 Cranch C. C. 514.

28. Atkinson *v.* Burton, 4 Bush (Ky.) 299.

29. Harbert *v.* Neill, 49 Tex. 143. See *supra*, I, A, 2.

30. Jennings *v.* Merrill, 20 Wend. (N. Y.) 9, holding, however, that until the liability is assumed the contract is inoperative.

31. If the goods have been consigned without instructions the fact that the factor writes to the consignor asking for instructions will not prevent him from selling before receiving an answer. Conway *v.* Lewis, 120 Pa. St. 215, 13 Atl. 826, 6 Am. St. Rep. 700.

32. Given *v.* Lemoine, 35 Mo. 110; Conway *v.* Lewis, 120 Pa. St. 215, 13 Atl. 826, 6 Am. St. Rep. 600.

33. Craig *v.* Harrison-Switzer Milling Co., 103 Ill. App. 486; Drumm-Flato Commission Co. *v.* Union Meat Co., (Tex. Civ. App. 1903) 77 S. W. 634.

Effect of draft on factor.— If the price of a consignment is not positively restricted, a draft by the consignor on the consignee is sufficient to justify a sale to meet it, although without the drawing of the draft the state of the market might demand a delay. Briggs *v.* Ripley, 7 Mart. (La.) 57.

Sufficient evidence of price obtainable.— In an action against a factor for damages caused by a wrongful delay in selling goods shipped to him, evidence showing the value of the goods at the date of shipment at a subsequent sale at the same price is enough, in the absence of any counter proofs, to show that the price could have been obtained in the interval. Howland *v.* Davis, 40 Mich. 545.

34. Milbank *v.* Dennistoun, 21 N. Y. 386; Drumm-Flato Commission Co. *v.* Union Meat Co., (Tex. Civ. App. 1903) 77 S. W. 634.

35. Milbank *v.* Dennistoun, 21 N. Y. 386.

36. Cotton *v.* Hiller, 52 Miss. 7; Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345; Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507.

A consignee of goods of different qualities, authorized to sell only the whole in one lot, at a limited price per ton, who sells a part of average quality at a price above the limit, but does not sell the rest, is liable to account to the consignor for the whole at the price limited. Levison *v.* Balfour, 34 Fed. 382, 13 Sawy. 223.

An agreement not to sell below a certain price is of course as binding as instructions by the principal. Mackenzie *v.* Hodgkin, 126 Cal. 591, 59 Pac. 36, 77 Am. St. Rep. 209.

37. Cotton *v.* Hiller, 52 Miss. 7. *Contra*, George *v.* McNeill, 7 La. 124, 26 Am. Dec. 498, holding that where a factor sold below the limited price and this was the highest market price obtainable at any time between the sale and suit brought, the price at which the goods were actually sold is all the principal can recover, especially where the sale appears to have been for the benefit of the principal, inasmuch as the commodity subse-

his factor, for he has sustained no loss by the violation of his instructions.[38] The true meaning of the principal's instructions or of the correspondence between the parties is often a matter of dispute.[39]

f. Giving Credit — (1) *In General.* By the general rule[40] a factor without special instructions to sell for cash and not on credit may sell on credit according to the general usage of the trade in the market where the goods are sold; and if he sells in conformity with the usage and uses due diligence to ascertain the solvency of the purchaser he is not responsible if the purchaser subsequently becomes insolvent.[41] If therefore a factor sells goods on credit and has exercised due prudence both in making the sale and in attempting to collect the money due for the goods, he is not responsible to his principal until the money is actually received.[42] Although a factor is not a guarantor of the responsibility of persons with whom he deals, he must exercise all reasonable diligence to ascertain

quently sold for very much less than the price obtained by the factor.

Effect of advances see *supra*, I, D, 9, c.

38. Osburn *v.* Delafield, 75 Hun (N. Y.) 246, 27 N. Y. Suppl. 10.

39. See Mann *v.* Laws, 117 Mass. 293 (holding that where a manufacturer consigned a lot of boots saying that he had invoiced them at the lowest selling prices and would duplicate the shipment "if prices obtained warrant," but gave no direction to sell at the invoice price, correspondence indicated that the goods were sent in order to make an experiment upon the market and that the invoice prices were for the information and to some extent perhaps for the guidance of the consignee, but as there was no direction to hold the goods if these prices could not be obtained, a declaration which alleged no misconduct on the part of defendant but simply a violation of an order not to sell at less than the invoice prices could not be recovered upon); Harrison *v.* Glover, 4 Hun (N. Y.) 121 (holding that where goods are consigned not to be sold for less than the price obtained for goods made by a third person at the proper time for selling them, the fair meaning of the language employed is that the market price of the third person's goods is to be the minimum price of the consignor); Dusar *v.* Perit, 4 Binn. (Pa.) 361 (holding that where a factor was instructed to sell a vessel only at a certain sum, free from all charges whatsoever, the charges referred to must be considered as belonging to the voyage rather than the ship, and that the factor was not required to sell free from all charges on account of the previous voyage such as seamen's wages, provisions, etc.). See also Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359; Levison *v.* Balfour, 34 Fed. 382, 13 Sawy. 223.

The expression of a mere wish or expectation that a certain price may be obtained does not amount to a binding command (Vianna *v.* Barclay, 3 Cow. (N. Y.) 281; Harper *v.* Kean, 11 Serg. & R. (Pa.) 280), especially where the matter is afterward submitted to the factor's discretion (Harper *v.* Kean, *supra*).

40. In some jurisdictions, however, it is held that it is the duty of a factor in the absence of instructions to the contrary to sell for cash on delivery. Babcock *v.* Orbison, 25 Ind. 75. See also Furth *v.* Miller, 67 Mo. App. 241.

Cotton factors and general commission merchants in Galveston have no authority, by law or usage, to deal with cotton consigned to them, except for sale in Galveston for cash, unless under instructions from the owner; and persons dealing with such a factor are chargeable with notice of the extent of and limitations upon his power. Kauffman *v.* Beasley, 54 Tex. 563.

41. *Iowa.*— Walker Co. *v.* Dubuque Fruit, etc., Co., 113 Iowa 428, 85 N. W. 614, 53 L. R. A. 775.

Kentucky.— Byrne *v.* Schwing, 6 B. Mon. 199.

Louisiana.— Fisk *v.* Offit, 3 Mart. N. S. 553; Reano *v.* Mager, 11 Mart. 636.

Maine.— Pinkham *v.* Crocker, 77 Me. 563, 1 Atl. 827.

Massachusetts.— Dwight *v.* Whitney, 15 Pick. 179; Etheridge *v.* Binney, 9 Pick. 272; Clark *v.* Van Northwick, 1 Pick. 343; Clark *v.* Moody, 17 Mass. 145; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

New York.— Douglass *v.* Leland, 1 Wend. 490; Van Alen *v.* Vanderpool, 6 Johns. 69, 5 Am. Dec. 192; McKinstry *v.* Pearsall, 3 Johns. 319.

Pennsylvania.— Geyer *v.* Decker, 1 Yeates 486; Percival *v.* Cooper, 6 Phila. 48.

South Carolina.— James *v.* McCredie, 1 Bay 294.

Tennessee.— May *v.* Mitchell, 5 Humphr. 365.

Virginia.— McConnico *v.* Curzen, 2 Call 358, 1 Am. Dec. 540.

See 23 Cent. Dig. tit. "Factors," § 27.

Compare Burton *v.* Goodspeed, 69 Ill. 237.

Knowledge of course of dealing presumed. —The consignor is presumed by law to be acquainted with and to assent to the course of dealing which is usually practised at the same market by others in the same line of business. Leach *v.* Beardslee, 22 Conn. 404; Dwight *v.* Whitney, 15 Pick. (Mass.) 179; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

42. Bird *v.* Dix, 4 Mart. N. S. (La.) 254.

the pecuniary solvency of the purchaser of the property of the principal except where the sale is concluded by the payment of cash,[43] and it is his duty to keep the principal advised as to the pecuniary responsibility of the purchaser whenever the interest of the principal would be advanced by such knowledge,[44] and furthermore it is the duty of the factor to inform his principal of the name of the purchaser of the goods.[45] If the principal is notified by the factor that the goods have been sold on credit and the principal does not answer the notice within a reasonable time he will be deemed to have acquiesced in the sale.[46] If a factor has been instructed to sell for cash[47] or if he has been instructed to take security in case he sells on credit[48] he will be liable for any loss which may occur in giving credit contrary to instructions.

(II) *TAKING BOND OR NOTE.* In the absence of instructions or of a contract[49] a factor may take a note in payment for goods sold, in accordance with trade usage, and if the vendee becomes insolvent before the note falls due the factor who has been properly diligent in ascertaining the financial responsibility of the vendee will not be held liable.[50] If the factor takes the note for his

43. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496 [*citing* Foster *v.* Waller, 75 Ill. 464]; Bonham *v.* Overton, 6 La. Ann. 765; Housel *v.* Thrall, 18 Nebr. 484, 25 N. W. 612; Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360. See also Durant *v.* Fish, 40 Iowa 559, holding that an order to a factor to sell at once, accepting a certain offer, will not authorize him to sell upon credit to a person known to him to be irresponsible, and he is not liable if the goods depreciate in his hands before a sale can be effected.

A very high degree of vigilance in learning the pecuniary ability of the purchaser has been held necessary where a factor in Chicago makes a sale on 'change for his principal. To protect himself, in case of a loss growing out of the insolvency or failure of the purchaser to pay for the goods sold, he must resort to all available sources of information that are accessible, and inattention or carelessness in this respect will render him liable for any loss sustained thereby; but he will not be held as a guarantor of such a sale. Foster *v.* Waller, 75 Ill. 464.

To affect the factor with the imputation of negligence it is not necessary that he should absolutely know that the purchaser was discredited. It is sufficient if he had notice of facts which ought to put a person of ordinary prudence on his guard. A sale therefore made under circumstances of real or constructive notice will be considered as made at the risk and on the account of the factor. Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360.

44. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496. See also Babcock *v.* Orbison, 25 Ind. 75.

If the purchaser becomes insolvent subsequent to the sale of the goods, it is the factor's duty to give notice of that fact to the owner within a reasonable time or he will be responsible for the damage the owner suffers in consequence of not receiving the notice. Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43. See also Babcock *v.* Orbison, 25 Ind. 75.

45. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496.

No usage or custom of trade will excuse the factor's default, for as in other cases, a custom is never valid if it conflicts with the rules of law defining the rights of the party. Western Union Cold Storage Co. *v.* Winona Produce Co., 197 Ill. 457, 64 N. E. 496.

46. Geyer *v.* Deckler, 1 Yeates (Pa.) 486. See also De Lazardi *v.* Hewitt, 7 B. Mon. (Ky.) 697.

47. Barksdale *v.* Brown, 1 Nott & M. (S. C.) 517, 9 Am. Dec. 720; Howatt *v.* Davis, 5 Munf. (Va.) 334, 7 Am. Dec. 681; Hall *v.* Storrs, 7 Wis. 253.

A custom among commission merchants to deliver articles under cash sales and then wait a certain number of days for payment does not give the factor any authority to sell upon such terms. Barksdale *v.* Brown, 1 Nott & M. (S. C.) 517, 9 Am. Dec. 720; Catlin *v.* Smith, 24 Vt. 85; Bliss *v.* Arnold, 8 Vt. 252, 30 Am. Dec. 467. See also Hatcher *v.* Comer, 73 Ga. 418. At least to have the benefit of such a custom the factor must show that the custom was so certain, uniform, and notorious that it must be presumed to have been understood by the parties. Steward *v.* Scudder, 24 N. J. L. 96. Even admitting that the principal is bound by such a trade usage, the factor must exercise due prudence to collect the purchase-price of the goods. Montgomery *v.* Wood, 4 La. Ann. 298.

48. Wilkinson *v.* Campbell, 1 Bay (S. C.) 169.

49. A breach of a contract to sell for cash will of course render the factor liable. Sheffield *v.* Linn, 62 Mich. 151, 28 N. W. 761.

A contract by the principal to accept notes does not oblige him to accept notes for goods not yet sold by the factor. Childs *v.* Waterloo Wagon Co., 37 N. Y. App. Div. 242, 57 N. Y. Suppl. 520.

50. *Alabama.*—Goldthwaite *v.* McWhorter, 5 Stew. & P. 284.

own use and has it discounted for his own accommodation he will of course be liable for the amount in the event of the insolvency of the maker.[51] The taking of a note payable to himself and for an amount to cover the debt due the principal and a debt due himself operates as an appropriation of the debt by the factor, and he will be held liable therefor to his principal.[52] The factor must use diligent efforts to collect a note received by him for a consignment of his principal or he will be liable.[53] If he fails to give notice of the non-payment of the note at maturity he becomes responsible for the debt.[54]

g. Failure to Sell. If a factor agrees to sell goods whenever directed so to do by the owner, he must use every reasonable effort to make the sale or he will be liable.[55] If the owner seeks to recover for conversion against a factor who has failed to sell his goods, it must be alleged and shown that reasonable time has expired for making a sale.[56] If it is agreed between the parties that all goods not returned to the principal within a certain time with express charges prepaid

Connecticut.— Leach *v.* Beardslee, 22 Conn. 404.

Maine.— Greely *v.* Bartlett, 1 Me. 172, 10 Am. Dec. 54.

Massachusetts.— Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22.

New York.— McKinstry *v.* Pearsall, 3 Johns. 319.

United States.— See Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350.

See 23 Cent. Dig. tit. "Factors," § 30.

Customs and usages generally see CUSTOMS AND USAGES.

51. Byrne *v.* Schwing, 6 B. Mon. (Ky.) 199; Brown *v.* Delk, 132 Pa. St. 152, 19 Atl. 31; Myers *v.* Entriken, 6 Watts & S. (Pa.) 44, 40 Am. Dec. 538; Johnson *v.* O'Hara, 5 Leigh (Va.) 456. See also Porter *v.* Zeitinger, 1 Pennyp. (Pa.) 505, where the factor took the note to his own order and discounted it and credited it on his own books to his principal, but on the subsequent failure of the maker charged it back to his principal.

The mere act of taking the note in his own name would not *per se* render the factor liable (see Goldthwaite *v.* McWhorter, 5 Stew. & P. (Ala.) 284; Amory *v.* Hamilton, 17 Mass. 103; Goodenow *v.* Tyler, 7 Mass. 36, 5 Am. Dec. 22; Brown *v.* Delk, 132 Pa. St. 152, 19 Atl. 31; Porter *v.* Zeitinger, 1 Pennyp. (Pa.) 505. *Contra,* Symington *v.* McLin, 18 N. C. 291); but this fact and others which together tend to show an intention to make the debt his own may fix his liability (Amory *v.* Hamilton, *supra*). See also Richardson *v.* Weston, 4 Mart. N. S. (La.) 244, holding that a factor who after a sale extends the debtor's term of credit by taking a note payable at a more distant day to himself and for more than the amount due his principal makes the debt his own.

52. Symington *v.* McLin, 18 N. C. 291; Brown *v.* Delk, 132 Pa. St. 152, 19 Atl. 31; Brown *v.* Arrott, 6 Watts & S. (Pa.) 402. See also Johnson *v.* O'Hara, 5 Leigh (Va.) 456. But see Hapgood *v.* Batcheller, 4 Metc. (Mass.) 573.

Where a factor takes a bond for a simple contract debt due to him for goods sold on commission, and includes in the same instrument a debt due to himself, he makes himself answerable in an action of *indebitatus assumpsit* to his principal for the amount of the goods, as he has deprived him of the means of pursuing his claim against the debtor by extinguishing the debt due by simple contract. Jackson *v.* Baker, 13 Fed. Cas. No. 7,129, 1 Wash. 394.

53. Kinney *v.* Crane, 17 La. 417; Skillman *v.* Leverich, 11 La. 517; Folsom *v.* Mussey, 8 Me. 400, 23 Am. Dec. 522.

Proving the note under the insolvent law and taking a dividend thereon does not render the factor liable for the full amount of the note, if he uses reasonable care and skill, although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency. Gorman *v.* Wheeler, 10 Gray (Mass.) 362.

54. Harvey *v.* Turner, 4 Rawle (Pa.) 223.

That a factor may release a note see West Boylston Mfg. Co. *v.* Searle, 15 Pick. (Mass.) 225.

55. Pulsifer *v.* Shepard, 36 Ill. 513.

If he uses reasonable diligence and is not able to effect the sale he is not liable. Burnard *v.* Voss, 8 Ohio Dec. (Reprint) 221, 6 Cinc. L. Bul. 339, holding that whether the factor has used due diligence in endeavoring to effect a sale is a question for the jury.

56. Prokop *v.* Pourlay, 65 Nebr. 504, 91 N. W. 290.

Where the property was burned a long time after it was received by the factor, it is a question for the jury whether the factor had been negligent in not selling more promptly. Usborne *v.* Stephenson, 36 Oreg. 328, 58 Pac. 1103, 78 Am. St. Rep. 778, 48 L. R. A. 432. But see Lehman *v.* Pritchett, 84 Ala. 512, 4 So. 601, holding that where the factor neglected to sell the goods within a reasonable time after being instructed to sell and the goods were destroyed by fire, the delay was not the proximate cause of the loss, and in the absence of fraud the factor is not liable, in which case, however, defendant did not have actual or constructive possession of the goods.

shall be deemed as sold to the factor, a substantial compliance with the contract is all that is necessary.[57]

10. Del Credere Agency.[58] A factor with a *del credere* commission or agency is one who in consideration of a higher compensation expressly engages to pay to his principal the price of all goods sold by himself if the purchaser fails so to do.[59] There is, however, no covenant of guaranty, but a rate of commission is fixed for selling and guaranteeing, in the ordinary course of commission business, the price for which goods are to be sold less agreed commissions; but no security is given to make this guaranty good.[60] The obligation under a *del credere* commission always arises under an express contract and is not implied by law.[61] Both the obligation of the factor and his right to *del credere* commissions can arise only where sales are made upon credit, never when a sale is made for cash, for in such case the factor has incurred no personal liability of payment to his principal and the *del credere* contract was without consideration as to such cash payments.[62] The liability of a factor with a *del credere* commission for goods sold is said to be that of a surety, the purchaser being the primary debtor.[63] But a demand

57. Main *v.* Oien, 47 Minn. 89, 49 N. W. 523.

58. Del credere agent distinguished from vendee.— Where a contract provides for the sale of goods on commission at prices fixed by the consignor and requires the terms at stated periods, the consignee guaranteeing payment, the relation created is that of agency on a *del credere* commission and not that of vendor and vendee (National Cordage Co. *v.* Sims, 44 Nebr. 148, 62 N. W. 514, holding that there was not a sale within the statute requiring registration of conditional sales); but where the consignee gives the acceptance for the value of the goods and agrees to account for the whole price, guaranteeing the sales, and is to receive a commission, the transaction is a consignment on sale as distinguished from a consignment on a *del credere* commission (*Ex p.* Flannagans, 9 Fed. Cas. No. 4,855, 2 Hughes 264 [*citing* Story Agen. § 215]).

59. Wittkowski *v.* Harris, 64 Fed. 712. See Morris *v.* Cleasby, 4 M. & S. 566, 574, 14 Rev. Rep. 531, where the court said: "In correct language a commission *del credere* is the premium or price given by the principal to the factor for a guarantee, it presupposes a guarantee. . . . This term, however, commonly, although incorrectly, is used to express the guarantee itself. But whatever term is used, the obligation of the factor is the same; it arises on the guarantee." In Grove *v.* Dubois, 1 T. R. 112, 115, Lord Mansfield says that a commission *del credere* is "an absolute engagement to the principal from the broker, and makes him liable in the first instance." In Leverick *v.* Meigs, 1 Cow. (N. Y.) 645, 663, it is said that the legal effect of a *del credere* agreement is that "a factor," for an additional premium beyond the usual commission, when he sells the goods of his principal, becomes bound to pay the price at all events."

60. Gould *v.* Lee, 55 Pa. St. 99.

61. Wittkowski *v.* Harris, 64 Fed. 712. See also Cushman *v.* Snow, 186 Mass. 169, 173, 71 N. E. 529, where the court said: "It cannot be inferred from the meagre statement of the custom of the firm not to disclose the names of customers to their principals that they thus rendered themselves liable for the purchase price of all goods sold through their agency, for if they undertook to guarantee the sales and solvency of purchasers it should have appeared in the contract."

62. Wittkowski *v.* Harris, 64 Fed. 712; Kingston *v.* Wilson, 14 Fed. Cas. No. 7,823, 4 Wash. 310, holding that a *del credere* commission is not demandable when the sale is made on credit, but the price is nevertheless paid in consideration of a deduction of a certain percentage.

63. Gindre *v.* Kean, 7 Misc. (N. Y.) 582, 28 N. Y. Suppl. 4. 31 Abb. N. Cas. (N. Y.) 100. See *Ex p.* Flannagans, 9 Fed. Cas. No. 4.855, 2 Hughes 264 [*citing* Story Agen. § 215]; Morris *v.* Cleasby, 4 M. & S. 566, 14 Rev. Rep. 531. *Contra*, under Cal. Civ. Code, § 2029. See Tustin Fruit Assoc. *v.* Earle Fruit Co., (Cal. 1898) 53 Pac. 693.

That the factor at times remitted for goods sold by him before the price became due from the purchaser does not show such a course of dealing between him and his principal as will alter the original relation and render the agent primarily liable for goods sold by him, where the principal instructs him to make no more remittances before maturity. Gindre *v.* Kean, 7 Misc. (N. Y.) 582, 28 N. Y. Suppl. 4, 31 Abb. N. Cas. (N. Y.) 100. But see Heubach *v.* Rother, 2 Duer (N. Y.) 227, where the court said that when the goods were sold on long credit and on the very day of the sale the factor charged himself with their price and it was for the purpose of satisfying the balance which, deducting interest and commission, was thus created in favor of the principal that the factor purchased and remitted the bills, the remittance was not made by him in his capacity as agent or covered by his supposed instructions, but was a remittance which was made in discharge of his own debt.

What is the exact liability of a del credere agent has been the subject of much contro-

upon the purchaser is not a necessary prerequisite to holding the factor liable, if the purchase-money be due.[64] When the factor and principal have treated a sale as complete and binding, the factor will not be permitted to say that the sale is incomplete.[65] The guaranty of sales under a *del credere* agency does not extend to the remittance of funds in the hands of the factor;[66] but if by agreement of the parties the factor is authorized to charge a commission for the guaranty of bills of exchange remitted his omission to charge the commission does not absolve him from his liability as guarantor of the remittance.[67] A factor who agrees to indorse all notes taken from customers is not bound to indorse a note taken for goods sold by a general agent of his principal against the factor's protest and after his statement that he would not indorse the note.[68] If the goods consigned are not in accordance with the contract, the *del credere* agent is not bound, for the purpose of putting his principal in a better position, to insist on the buyer's accepting the goods.[69] Nor can he be charged with the price of the goods which he had sold but afterward received back from the buyers, pursuant to authority given by his principal to settle a dispute as to the quality of the goods in question.[70] And he is not liable for the price of goods recovered from buyers who had fraudulently procured a sale to themselves.[71] If the factor guarantees a sale at a fixed profit, he is liable for that profit irrespective of the market value of the goods.[72]

11. Keeping and Rendering Accounts.[73] The factor must account to his principal for goods sold;[74] he cannot refuse to account for sales on the ground that in making the sale of the goods he violated the law;[75] and he must, when reasonably requested, present to his principal a full, complete,[76] and specific[77] account

versy. See Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190, where the cases are reviewed.

Liability under statute of frauds see Frauds, Statute of.

64. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9; Milliken *v.* Byerly, 6 How. Pr. (N. Y.) 214.

65. For, as between him and his principal, the factor in effect becomes the purchaser when the purchase-money is due or he may be said to be substituted for the purchaser. Cartwright *v.* Greene, 47 Barb. (N. Y.) 9. See also Blakely *v.* Jacobson, 9 Bosw. (N. Y.) 140.

66. Leverick *v.* Meigs, 1 Cow. (N. Y.) 645; Muller *v.* Bohlens, 17 Fed. Cas. No. 9,914, 2 Wash. 378. See also Heuhach *v.* Rother, 2 Duer (N. Y.) 227. *Contra*, Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190.

A bill received in part payment for the sale of the goods is included in the guaranty. Muller *v.* Bohlens, 17 Fed. Cas. No. 9,914, 2 Wash. 378.

67. Heubach *v.* Rother, 2 Duer (N. Y.) 227.

68. Springfield Fertilizer Co. *v.* Thompkins, 16 Ind. App. 403, 45 N. E. 615.

69. Albion Phosphate Min. Co. *v.* Wyllie, 77 Fed. 541, 23 C. C. A. 276.

70. Talcott *v.* Canton Mills Co., 30 N. Y. Suppl. 421, 31 Abb. N. Cas. (N. Y.) 97.

71. Talcott *v.* Canton Mills Co., 30 N. Y. Suppl. 421, 31 Abb. N. Cas. (N. Y.) 97.

72. Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772. See also Tustin Fruit Assoc. *v.* Earle Fruit Co., (Cal. 1898) 43 Pac. 693.

Evidence insufficient to support a claim of del credere agency see Wise-Kottwitz Commission Co. *v.* Bond, (Tenn. Ch. App. 1898) 47 S. W. 174.

73. Account stated between factor and principal see Accounts and Accounting, 1 Cyc. 387.

Right to adjust account in his own city.— If a New Orleans factor adjusts his account in Boston, and promises to pay the balance as soon as he can negotiate exchange on New Orleans, he thereby waives any privilege of paying it in New Orleans. Jellison *v.* Lafonta, 19 Pick. (Mass.) 244.

74. Lindley *v.* Downing, 2 Ind. 418.

Until the true owner appears and establishes his right to the proceeds a factor is bound to account to the person from whom he has received goods for sale. Bain *v.* Clark, 39 Mo. 252.

75. Tate *v.* Pegues, 28 S. C. 463, 6 S. E. 298 [*distinguishing* McConnell *v.* Kitchens, 20 S. C. 430, 47 Am. Rep. 845, holding that where a merchant sold a fertilizer without a tag stating the chemical compositions of the fertilizer and the date of analysis and took a note for the purchase-money, an action on the note was forbidden by statute]; Andersons *v.* Moncrieff, 3 Desauss. (S. C.) 124.

76. Terwilliger *v.* Beals, 6 Lans. (N. Y.) 403. See also Brown *v.* Clayton, 12 Ga. 564.

77. Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600; Boston Carpet Co *v.* Journeay, 36 N. Y. 384 [*affirming* 1 Daly 190]; Nugent *v.* Martin, 1 Tex. App. Civ. Cas. § 1173.

Date for striking balance should not be arbitrary. Cushman *v.* Snow, 186 Mass. 169, 71 N. E. 529.

of his dealings between themselves and between the factor and the purchasers. It is held that it is the factor's duty to be prompt in rendering an account of his sales whether requested to do so or not,[78] and that a failure to render an account for an unreasonable time will render him liable[79] — especially where a demand is impracticable or highly inconvenient.[80] That he may render a satisfactory account, it is his duty to keep books in which are entered correct accounts of his transactions,[81] and the books should be subject to the principal's inspection,[82] and the principal is entitled to a correct copy of the entries in the books including all memoranda connected therewith.[83] Accounts current are necessarily provisional until settled and even after settlement may be rectified for errors or omissions, subject to which every settlement is made;[84] but if the factor renders his account in good faith and the principal makes no objection to it, the principal's assent to it as correct is presumed;[85] and unless objection is made within a reasonable time[86] his principal will be bound by the accounting rendered.[87] The account rendered may be conclusive against the factor himself in the matter of his charges for commissions, but if it is challenged by the principal it is then open for correction by the factor.[88]

It is not an unreasonable refusal to account when after a person drew an order directing his factor to deposit the proceeds of certain lumber to the credit of another, he next day demanded an account of the proceeds from his factor, who replied that he had nothing to do with the demandant and referred him to the other person. Torrey *v.* Bryant, 16 Pick. (Mass.) 528.

78. Langley *v.* Sturtevant, 7 Pick. (Mass.) 214.

79. Langley *v.* Sturtevant, 7 Pick. (Mass.) 214; Deans *v.* Scriba, 2 Call (Va.) 415.

Presumption raised by not rendering an account for many years.— If a factor has rendered no account of sales for many years and at the trial of an action against him by his consignor offers no evidence to prove what part was sold and at what prices, it will be presumed that the goods were sold at the invoice price. Field *v.* Moulson, 9 Fed. Cas. No. 4,770, 2 Wash. 155.

80. Eaton *v.* Welton, 32 N. H. 352.

Factors abroad must render an account within a reasonable time, and their neglect to do so will be considered a breach of their contract. See Eaton *v.* Welton, 33 N. H. 352.

81. Keighler *v.* Savage Mfg. Co.. 12 Md. 383, 71 Am. Dec. 600; Armour *v.* Gaffey, 30 N. Y. App. Div. 121, 51 N. Y. Suppl. 846 [*affirmed* in 165 N. Y.630, 59 N. E. 1118].

Factors destroyed their books before an examination of them was finished. The examination disclosed that the factors had reported sales at less than the actual price received and the factors maintained that they were entitled to the amount of shortage found as reimbursement for allowances made to customers and for bad debts. It was held that the court was justified in disregarding the explanation and in finding a wrongful misappropriation; that the factors having admitted pursuing the same course as to the balance of goods shipped to and sold by them, the shortage as to such balance may properly be estimated by taking as a basis the rate of shortage found to exist as to the rest of the goods. Armour *v.* Gaffey, 30 N. Y. App. Div. 121, 51 N. Y. Suppl. 846 [*affirmed* in 165 N. Y. 630, 59 N. E. 1118].

82. Armour *v.* Gaffey, 30 N. Y. App. Div. 121, 51 N. Y. Suppl. 846 [*affirmed* in 165 N. Y. 630, 59 N. E. 1118].

83. Keighler *v.* Savage Mfg. Co., 12 Md. 383, 71 Am. Dec. 600.

84. Dunbar *v.* Bullard, 2 La. Ann. 810.

85. Ledoux *v.* Porche, 12 Rob. (La.) 543. See also Dunbar *v.* Bullard, 2 La. Ann. 810.

86. Austin *v.* Ricker, 61 N. H. 97. See also Keighler *v.* Savage Mfg. Co., 12 Md. 383. 71 Am. Dec. 600, holding that it is unreasonable for a principal to demand of his factor the names of purchasers of goods, the accounts of which have been long settled; such demand should be made, if at all, at the time of such settlements, and cannot be made afterward, unless fraud is charged upon the factor.

87. Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220; Austin *v.* Ricker, 61 N. H. 97; Vantries *v.* Richey, 8 Watts & S. (Pa.) 87.

By accepting a general account of all transactions, including the commission of the factor, in which are expressed what accounts have been and what remain to be collected, the principal discharges the factor and the agency from that moment is at an end and the principal cannot call for payment of any item which he complains that the factor neglected to collect. Rion *v.* Gilly, 6 Mart. (La.) 417, 12 Am. Dec. 483.

Where a consignor of goods, who is the legal donee, assents to an account rendered by the factor, it binds the equitable owner of the goods, although unknown to the consignee. Bevan *v.* Cullen, 7 Pa. St. 281.

88. Wood Mower, etc., Co. *v.* Thayer, 50 Hun (N. Y.) 516, 3 N. Y. Suppl. 465, holding that, where a factor did not charge in his account for commissions lost because of defective goods, it was some evidence that he did not intend to make such charges but was not conclusive.

12. Collection of Money — a. In General. A factor intrusted with the possession of property or other *indicia* of authority to transfer it has implied power to receive for the vendee the purchase-money.[89] A factor must exercise due diligence in collecting the money due for the sale of his principal's goods or he will be held liable for the resulting loss.[90] If a factor intermingles his principal's goods with his own and consigns the whole cargo to a third person to be sold, it is incumbent on the factor to show that the proceeds of sale of his principal's goods were not paid by remittances made on the cargo.[91] A factor cannot discharge a debt due his principal by agreeing to take in payment that which is worthless and void.[92]

b. Medium of Payment.[93] In the absence of the authorization of the principal the factor cannot receive in payment anything but legal currency.[94] This rule has been modified in extraordinary circumstances.[95] A factor with a *del credere* commission must account for the goods sold by him at the full specie value, although there was a suspension of specie payments in the state.[96]

13. Assumption of Liability For Price. If the consignee sells some of the goods on credit and settles with the consignor and pays him the full amount for the purpose of closing the account between the parties, he thereby assumes the outstanding debts due the principal on the consignment, and cannot afterward claim reimbursement for any part on the ground of a bad debt made in the sale.[97]

14. Proceeds in Hand. The factor is liable to the principal for the proceeds of

89. Adams *v.* Fraser, 82 Fed. 211, 27 C. C. A. 108. See also Pickering *v.* Busk, 15 East 38, 13 Rev. Rep. 364.

This does not prevent the principal from controlling its collection, and if the factor has no lien on the money the principal may order payment to be made solely to himself. Kelly *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47.

90. Gilly *v.* Logan, 2 Mart. N. S. (La.) 196; Dickson *v.* Screven, 23 S. C. 212; Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 43. See also Brown *v.* Arrott, 6 Watts & S. (Pa.) 402, 6 Whart. (Pa.) 9.

In the proper exercise of diligence, he should keep his principal informed as to the failure of the vendee to pay for the goods sold. See Arrott *v.* Brown, 6 Whart. (Pa.) 9.

If a factor undertakes to collect checks given by a purchaser of goods sold for his principal, it is not a fair legal inference that he gave notice of their dishonor to his principal because he knew it himself. Park *v.* Miller, 27 N. J. L. 338.

Where there is no evidence that any loss was incurred by reason of the neglect of the factor for a period of nine months to give his principal notice of a loss on a consignment the factor is not liable. Myers *v.* Brice, 2 Pennyp. (Pa.) 382.

He should not sue or put the owner to expense unless there is reasonable ground to believe that a benefit will result (Forrestier *v.* Bordman, 9 Fed. Cas. No. 4,945, 1 Story 143); but if he fails to sue in a case where due diligence requires this course of action he will be liable to the consignor for his failure so to do (Leach *v.* Bush, 57 Ala. 145).

91. For if the principal's goods were sold before remittances were made and the sum remitted was sufficient to pay for the goods, the factor must be regarded as having received the proceeds of the sale of the goods of his principal and liable for the full amount. Williams *v.* White, 70 Me. 138.

92. Sangston *v.* Maitland, 11 Gill & J. (Md.) 286.

A consignee on joint account may compromise a claim arising upon a sale of the goods consigned so as to bind the consignor, if the compromise is reasonable and made in good faith. Cunningham *v.* Littlefield, 1 Edw. (N. Y.) 104.

93. Medium of payment generally see Payment.

94. Thomas *v.* Thompson, 19 La. Ann. 487, holding that payment in Confederate notes would not discharge the factor.

A factor with instructions to sell for gold cannot discharge his liability to his principal by accounting for the proceeds in depreciated currency, although the currency be a legal tender. Poindexter *v.* King, 21 La. Ann. 697.

95. Greenleaf *v.* Moody, 13 Allen (Mass.) 363, where a factor during the Civil war shipped goods to New Orleans for sale and sold a portion to the military officers of the United States for cash and the remainder was seized by military authority and the officers refused to make payment except in certificates of indebtedness in the United States which were accepted and sold by the factor at a small discount; and where it was shown that the factor acted in good faith and according to the trade usage at that time and it appeared that to obtain the payment for the goods in specie would not have been worth the expense.

96. Dunnell *v.* Mason, 8 Fed. Cas. No. 4,179, 1 Story 543.

97. Oakley *v.* Crenshaw, 4 Cow. (N. Y.) 250; Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587. See also Jackson *v.* Bissonette, 24 Vt. 611.

the goods,[98] although the sale as between the principal and the purchaser be illegal,[99] and although the consignor obtained the goods under an illegal contract.[1] A factor cannot justify his detention of the proceeds of a sale by setting up outstanding equities between the principal and a third person, in which he has no concern.[2] He has a right to pay to the owner the proceeds of property sold, although he may know that the owner has promised them to his creditors.[3] A factor who pays the proceeds to a third person without instructions from his principal so to do acts at his peril;[4] and so does a factor who pays over money of the estate of a deceased principal to a person who has not qualified as administrator.[5] By usage of trade the consignor has the right to draw on the effects placed in the hands of the factor and the factor must pay the bill if the shipper places the funds in his hands.[6] A factor in accepting a consignment is bound to comply with the conditions imposed upon him by his principal in relation to the appropriation of the proceeds.[7] When a

The mere giving to his principal a note for the balance due which he states was for the accommodation of the principal and which was payable a few days after the note of the buyer fell due is not an assumption of the buyer's debt, but is a mere liquidation of the account. Robertson *v.* Livingston, 5 Cow. (N. Y.) 473. See also Hapgood *v.* Batcheller, 4 Metc. (Mass.) 573.

98. See cases cited *infra*, this and succeeding notes.

Advances on a duplicate bill of lading deposited with a third person — No authority from principal.— The principal consigned goods and took from the carrier both an original and a duplicate bill of lading wherein he was named as consignor and the factor as consignee and indorsed both in blank, mailing the original to the factor without any accompanying letter and depositing the duplicate with his banker without any authority given to the banker to sell or part with it. The banker without the consignor's knowledge or consent indorsed and sent the duplicate to the factor, assuming to control the consignment as his own, advising the factor as to the shipment, etc. Under these circumstances the factor paid the banker's drafts drawn, not specifically against the consignment, but generally, to an amount exceeding the value of the consignment, believing it to be the property of the banker and having received no instructions whatever from the consignor. It was held upon insolvency of the banker that the factor was liable to the principal for the proceeds and that he had obtained no right to withhold the proceeds to repay himself for the advances made to the banker. Tison *v.* Howard, 57 Ga. 410.

The proceeds of a second sale after replevin from the first vendee belong to the principal and the factor is liable therefor, when, after replevying from the first vendee, to whom he negligently allowed possession without first having obtained payment, the factor becomes involved in a litigation with the persons to whom the first vendee had pledged the goods. Deshler *v.* Beers, 32 Ill. 368, 83 Am. Dec. 274.

That the factor has prosecuted a claim to judgment cannot give him, as against his principal, title to the money recovered if the recovery was for the use of the principal. Matter of Merrick, 2 Ashm. (Pa.) 445.

99. Baldwin *v.* Potter, 46 Vt. 402.

1. Alvord *v.* Latham, 31 Barb. (N. Y.) 294.

2. Aubery *v.* Fiske, 36 N. Y. 47, 1 Transcr. App. (N. Y.) 245, 36 How. Pr. (N. Y.) 279.

3. Pearce *v.* Roberts, 27 Mo. 179.

4. Post *v.* Houston Rice Milling Co., (Tex. Civ. App. 1904) 80 S. W. 1025.

5. Malone *v.* Hill, 68 Ala. 225, where money which ought to have been paid in discharge of a mortgage was paid over to a distributee.

6. See Schimmelpennich *v.* Bayard, 1 Pet. (U. S.) 264, 7 L. ed. 138, holding, however, that where directions were given to charge the bill duly to the account of the consignor the factors are not bound to accept or pay the bill in consequence of the proceeds of the shipment having been received by them.

Order of payment of several drafts.—Where a factor brought suit on drafts accepted by him in favor of his principal, some of which were due and some of which had not matured, and thereafter funds of his principal came into his hands by reason of the sale of goods belonging to him as the principal's factor, such funds should be first applied in payment of the drafts which were due, they being the oldest claims; and the factor had no right to apply them to drafts not yet matured in order to keep alive the debt on which suit was brought. Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153. A factor, with the proceeds of the goods of his principal in his hands, cannot apply such proceeds to the payment of the bills of his principal alone, drawn against the proceeds, in preference to bills drawn by his principal and a surety, which surety was obtained on the credit of the goods in the factor's hands. Brander *v.* Phillips, 16 Pet. (U. S.) 121, 10 L. ed. 909.

Customs and usages generally see CUSTOMS AND USAGES.

7. Godon *v.* Goodrich, 11 La. Ann. 410; Palmer *v.* Horner, 10 La. Ann. 782; Jones *v.* Fellows, 3 La. Ann. 47; Walker *v.* Birch, 6 T. R. 258; Weymouth *v.* Boyer, 1 Ves. Jr. 416, 30 Eng. Reprint 414.

For example, if a factor promised (Cohen *v.* Hart, 2 Hill (S. C.) 304. See also Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346 [*affirming* 3 Bosw. 505]) or is directed

draft is drawn in favor of a third person on proceeds of a specific consignment, of which draft the factor has notice, this constitutes an appropriation of the proceeds to the third person which is binding on the factor.[8] If the consignment is made without instructions, the factor may apply the proceeds to the payment of a debt due him from the consignor.[9] A factor who deposits in his own name the consignor's funds without notice to the consignor has been held liable for loss due to the insolvency of the bank[10] or to the depreciation of the currency deposited.[11] It has been held that a factor is liable for not following instructions as to the investment of proceeds of goods sold in a foreign market;[12] and that a factor in a foreign country is liable for a rightful seizure of goods for breach by him of a revenue law unless he can show special instructions to act as he did or that he could not obey his instructions in any other way a fact which his principal knew.[13] A factor's duties as to the proceeds may of course be modified or controlled by a special contract between the parties.[14]

15. Remitting. If a factor has a portion of the proceeds in hand, it is his

(Farmers, etc., Bank *v.* Franklin, 1 La. Ann. 393) to appropriate the proceeds of a consignment to the payment of a debt due a third person, he cannot apply the proceeds to the payment of his own debt; and where factors have promised to apply the proceeds to the payment of the debt of the third person, the fact that the consignor had written to them that they should be paid for the sales of the goods does not give to the factors any preference (Cohen *v.* Hart, *supra*. See also Seckel *v.* York Nat. Bank, 57 Ill. App. 579).

A principal has the right to countermand an order to pay proceeds to some particular person at any time before the factor has entered into an engagement with the person to hold the proceeds for his use. Walton *v.* Tims, 7 Ala. 470, where a direction by a father to pay his son's creditor was countermanded.

8. McCausland *v.* Wheeler Sav. Bank, 43 Ill. App. 381; Fisher *v.* Shenandoah First Nat. Bank, 37 Ill. App. 333; Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346 [*affirming* 3 Bosw. 505]. See also Parks *v.* Ingram, 22 N. H. 283, 55 Am. Dec. 153.

Notice.— If a factor has no notice of the draft drawn on the proceeds of a specific consignment, he may appropriate the proceeds to his own debt, and where goods were shipped to a factor and a bill of lading was sent to him with a letter that the shipper had drawn on the factor at thirty days for a certain amount in favor of the cashier of the bank, "please protect," it was held that it was properly submitted to the jury whether the draft and letter constituted an instruction to defendant by commercial usage to appropriate the proceeds of the goods to the payment of the draft. New Hanover Bank *v.* Williams, 79 N. C. 129.

9. Copes *v.* Perkins, 6 Tex. 150.

If he has made advances upon a particular consignment he has no right to apply the proceeds therefrom to a debt due him which had not been made by specific advances and for which he had no lien. Owen *v.* Iglanor, 4 Coldw. (Tenn.) 15.

10. Cartmell *v.* Allard, 7 Bush (Ky.) 482.

11. Pinckney *v.* Dunn, 2 S. C. 314.

If the factor notifies his principal that the funds are so deposited and are subject to his order at any time, he is not liable if the currency deposited depreciates. Ansley *v.* Anderson, 35 Ga. 8.

A custom of passing over to his general account the proceeds of the property sold and becoming a debtor of the consignor for such proceeds must be shown to have been known to the consignor and assented to by him. Banning *v.* Bleakley, 27 La. Ann. 257, 21 Am. Rep. 554. See Farmers', etc., Nat. Bank *v.* Sprague, 52 N. Y. 605; Duguid *v.* Edwards, 50 Barb. (N. Y.) 288. Of course if the factor accounts to his principal no harm is done. Snell *v.* State, 50 Ga. 219.

12. Cunningham *v.* Bell, 6 Fed. Cas. No. 3,479, 5 Mason 161 [*affirmed* in 3 Pet. 69, 7 L. ed. 606].

Cotton factors and commission merchants of cotton are not agents in the extended sense in which factors and commission merchants are usually understood to be, but their agency is limited to cotton; and an order on such factors to purchase gold and remit it to Canada for one of their customers, whose money they have in their hands arising from the sale of cotton, does not render them responsible for a failure to carry out the instructions, unless they agreed to do so. Thompson *v.* Woodruff, 7 Coldw. (Tenn.) 401.

13. Wellman *v.* Nutting, 3 Mass. 434.

14. See White *v.* Rucker, 9 La. Ann. 114.

Effect of subsequent guaranty.— If a factor agrees to receive consignments, make sales thereof, collect the proceeds, hold them, whether in the shape of money or evidences of debts, as property of his principal, and deliver them up to him on demand at the termination of the agency, his duty so to deliver them up is not affected by his further agreement to guarantee the debts if not paid by the debtors within a fixed time, although at the day of the demand the time has not expired. Nickerson *v.* Soesman, 98 Mass. 364.

duty to transmit it promptly and not to wait until the remainder is collected.[15] If the factor innocently makes a remittance to a person of the same name as the true owner he acts without authority and will be liable to the true owner if the remittance be lost by the carrier.[16] If a factor fails to remit the proceeds in his hands from the sale of a portion of goods sold according to the terms of his contract[17] he cannot hold his principal liable for failure to consign the balance, although the factor was obliged to buy at an advanced price to fulfil the contract of the purchaser, and although he should be considered as the principal's agent in making the contract of sale.[18] If a factor remits by specie, his shipment and transmission of the specie must be made with proper care or he will be liable for its loss.[19] If he is instructed to remit by bill of exchange he is not obliged to indorse or guarantee the bills remitted unless the principal can show that custom or usage requires an indorsement or guaranty.[20] If he remits by the purchase of a draft on a house in good credit he cannot be held liable if the draft is protested.[21] The factor is liable for a bill drawn by the bank in which he has deposited the proceeds to his own credit[22] and for a bill which he has not purchased but has received in payment of a debt to himself,[23] if such bills are not paid. If without any consideration the factor indorses the bill which he remits, this fact does not make him responsible to the principal in case the bill is protested.[24] In the absence of instructions from his principal the factor may remit according to the business custom.[25] And it has been held that a factor of goods

15. Brown *v.* Arrott, 6 Watts & S. (Pa.) 402.

16. Yon *v.* Blanchard, 75 Ga. 519, where two persons of the same name both resided in the same county in Florida, and both had consignments due the factor in Georgia, who did not know that there were two persons of the same name, although they lived in separate places in the same county.

17. Ernest *v.* Stoller, 8 Fed. Cas. No. 4,520, 5 Dill. 438, 2 McCrary 380.

18. Curtis *v.* Gibney, 59 Md. 131, where the court said that assuming that the contract of sale was made by the factor as agent and that the principal dealt with him in that capacity alone, the factor had no legal right to retain his principal's money as a "margin" or security for the performance of the contract on the principal's part, there being no such stipulation in the contract and no evidence of any custom binding the principal to justify it.

19. Parker *v.* Harrison, 26 La. Ann. 751 (where the principal directed specie to be sent by a certain carrier and where the factor sent the package of money, addressed to the principal as directed, by one of his clerks to be put on board the steamer designated by the principal, which was then at the wharf and about to leave, and within a short distance of the steamer the clerk was knocked down and robbed of his money, and where the court held that the factor had not exercised proper vigilance in guarding the money and that inasmuch as the money never was in actual or constructive possession of the principal the loss must be borne by the factor); Smith *v.* Ward, 3 La. Ann. 76 (holding that where a shipment of specie was made without a bill of lading, letter of advice, or other notice, it was not made with proper care and that the factor was liable for loss).

20. Potter *v.* Morland, 3 Cush. (Mass.) 384.

21. Chandler *v.* Hogle, 58 Ill. 46; Leverick *v.* Meigs, 1 Cow. (N. Y.) 645; Byers *v.* Harris, 9 Heisk. (Tenn.) 652.

The factor is not bound to inquire into the responsibility of the drawee unless circumstances of suspicion appear enough to put a man of ordinary care upon his guard. Leverick *v.* Meigs, 1 Cow. (N. Y.) 645, holding, however, that where a factor remitted to his principal a bill drawn by a partnership in Savannah upon one of the firm who transacted business for the firm in New York, and both drawers and drawee failed before the bill became due, it was not enough for the factor to prove that the house in Savannah was in good credit; that he must also show, to escape liability for negligence, that the partner in New York who was the drawee of the bill was solvent and of good credit.

22. Cartmell *v.* Allard, 7 Bush (Ky.) 482, holding that by depositing the proceeds to his own credit he created a liability therefor of the bank to himself and thus placed the money beyond the control of his principal.

23. Akin *v.* Bedford, 5 Mart. N. S. (La.) 502.

24. Sharp *v.* Emmet, 5 Whart. (Pa.) 288, 44 Am. Dec. 554; Byers *v.* Harris, 9 Heisk. (Tenn.) 652.

A prima facie liability may be inferred from his indorsement, but he may show as a matter of defense that it was not his intention that he should be personally charged by his indorsement. Lewis *v.* Brehme, 33 Md. 412, 3 Am. Rep. 190.

25. Goldsmith *v.* Manheim, 109 Mass. 187.

A custom of his own not to remit any part of the proceeds of the consignment until all has been collected does not excuse him for not remitting any part of the proceeds at the

"to sell the same and render a reasonable account" is not liable for not remitting when exchange was favorable.[26]

16. Liability For Interest. In the absence of any contract or usage which may be evidence of contract, a factor is not liable for interest unless he is in some default,[27] and as a general rule a factor is held to be in no default before demand is made upon him by the principal for the proceeds of sales made.[28] If the factor makes a tortious sale and is sued for the proceeds in assumpsit he is still liable for interest upon the amount from the time of receiving the proceeds of the sale.[29]

17. Liabilities to True Owner. The true owner of goods in a factor's hands may require an account of the factor, although the true owner was previously unknown to the factor.[30] A factor cannot apply the proceeds of goods to the debt of the person in whose name they were consigned, if the goods were not the property of such person.[31] If a factor sells goods in the innocent belief that they are the property of a person who is not in fact the true owner, he may be held liable upon the refusal to deliver the proceeds to the true owner in an action for conversion.[32] That the factor acted in good faith is no defense;[33] nor is it any defense that he did not have the custody of the goods at the time the suit was instituted but had previously in good faith without notice of the title of the true owner sold them in due course of trade.[34] But in some jurisdictions a

earliest opportunity where such is the usage of trade. Brown *v.* Arrott, 6 Watts & S. (Pa.) 402.

26. Pope *v.* Barrett, 19 Fed. Cas. No. 11,273, 1 Mason 117.

27. Ellery *v.* Cunningham, 1 Metc. (Mass.) 112.

If a factor omits to render an account of sales made when reasonably required be is presumed to have received the money and is accountable therefor, and in all cases of unreasonable delay he will generally be charged with interest, whether he has made interest or not. See Brown *v.* Clayton, 12 Ga. 564 [*citing* Story Agen. § 204], holding that where a factor has rendered an account of the sale of goods with expenses and disbursements thereon, etc., and has paid the amount reported due, and his principal brings suit for a balance of the proceeds of the goods alleged to be due, there is no ground for charging the factor with interest upon the score of negligence under the common law or upon the ground of illegal charges of expenses and commissions or of a false rendition of the account of sale or of any other ground of like character which involves an undetermined and uncertain issue.

If a principal has been negligent in calling his factor to an account and has suppressed statements of the account rendered by the factor and subjected himself to a strong suspicion of bad faith, the court will not charge the factor with interest on the balance due from him. McLin *v.* McNamara, 36 N. C. 75.

28. Ellery *v.* Cunningham, 1 Metc. (Mass.) 112; Cheesborough *v.* Hunter, 1 Hill (S. C.) 400. See Tyree *v.* Parham, 66 Ala. 424, holding that the rule laid down in Williams *v.* McConnico, 44 Ala. 627, that a factor is liable for interest for a balance in his hands in favor of his principal in the absence of proof of some contract or usage of trade to the contrary is not universally correct.

A del credere factor who has become liable to pay the price of the goods to his principal through default of the purchasers is chargeable with interest without demand. See Blakely *v.* Jacobson, 9 Bosw. (N. Y.) 140.

29. Ricketson *v.* Wright, 20 Fed. Cas. No. 11,805, 3 Sumn. 335.

30. Bullitt *v.* Walker, 12 La. Ann. 276.

31. Byers *v.* Johnson County Sav. Bank, 64 Ill. App. 168; Norton's Succession, 24 La. Ann. 218.

32. Hughes *v.* Abston, 105 Tenn. 70, 58 S. W. 296 (holding that it is immaterial what the factor had done with the proceeds); Moore *v.* Hill, 38 Fed. 330. See also Tucker *v.* Utley, 168 Mass. 415, 47 N. E. 198; Peeples *v.* Werner, 51 S. C. 401, 29 S. E. 2.

Rule applied where the goods were stolen and the proceeds innocently paid to the thief see Johnson *v.* Martin, 87 Minn. 370, 92 N. W. 221, 94 Am. St. Rep. 706, 59 L. R. A. 733; Miller *v.* Laws, 6 Ohio Dec. (Reprint) 736, 7 Am. L. Rec. 606.

Liability in an action for money had and received see Cobb *v.* Dows, 10 N. Y. 335 [*reversing* 9 Barb. 230].

33. Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765; Johnson *v.* Martin, 87 Minn. 370, 92 N. W. 221, 94 Am. St. Rep. 753, 59 L. R. A. 733; Moore *v.* Hill, 38 Fed. 330.

Where a tutor ships cotton belonging to a minor to be sold on commission, the proceeds can be recovered from the merchant, less the expenses incurred, even though the merchant showed that the cotton was shipped in the individual name of the tutor, and that the tutor was indebted to him on his own account in an amount above the proceeds of the sale. Norton's Succession, 24 La. Ann. 218.

34. Flannery *v.* Harley, 117 Ga. 483, 43 S. E. 765 [*following* Miller *v.* Wilson, 98 Ga. 567, 25 S. E. 578, 58 Am. St. Rep. 319]. See also Arkansas City Bank *v.* Cassidy, 71 Mo. App. 186. *Contra*, Roach *v.* Turk, 9 Heisk.

public warehouseman who receives and sells goods and accounts for the proceeds to the consignors without notice that the goods belonged to another cannot be held liable.[35] If a factor has been misled through the act of the owner[36] or of his agent[37] he cannot be held liable. A factor with notice that the property belongs to another than the consignor is of course liable in any event.[38]

18. Liabilities to Several Principals. The sale by a factor of several lots of goods belonging to several principals respectively and taking from the vendee one note for the whole, payable to himself, will not *per se* render him liable to his principals;[39] for this manner of doing business is in accordance with the general usage.[40] A factor who knows that orders given him by a broker are made in behalf of various customers cannot apply the profits of one of the customers in offsetting the losses of the others.[41] And where the goods of different shippers are covered by the same bill of lading he has no right to hold the goods of one shipper for charges on the goods of the other.[42]

19. Conversion by Factor.[43] If a factor pledges goods of his principal for his own debt he is liable for conversion.[44] He may render himself liable for conversion by disobeying the instructions of the factor as to the sale of the goods.[45] A sale by the factor before notice of revocation of his authority does not render him liable for conversion.[46] In the absence of a lien by a factor the principal has the right to retake possession of his unsold goods whenever he sees fit, and if the factor refuses to deliver on demand he is guilty of conversion.[47] If

(Tenn.) 708, 24 Am. Rep. 360 [*overruling* Taylor *v.* Pope, 5 Coldw. (Tenn.) 413].

35. Abernathy *v.* Wheeler, 92 Ky. 320, 17 S. W. 858, 13 Ky. L. Rep. 713; Fields *v.* Blane, 37 S. W. 850, 18 Ky. L. Rep. 675. But see Phelps *v.* Bartley, 40 S. W. 384, 19 Ky. L. Rep. 346 [*distinguishing* Fields *v.* Blane, *supra*], holding that where goods jointly owned were consigned by one of the owners and sold and the proceeds credited to the consignor, the other joint owner might recover his proportion from the warehouseman, if the latter had notice of the joint ownership.

36. Duncan *v.* Blood, 5 La. Ann. 11.

37. Bullitt *v.* Walker, 12 La. Ann. 276; Hays *v.* Warren, 46 Mo. 189.

38. Ledoux *v.* Anderson, 2 La. Ann. 558. See also Phelps *v.* Bartley, 40 S. W. 384, 19 Ky. L. Rep. 346.

39. Corlies *v.* Cumming, 6 Cow. (N. Y.) 181, holding further that the factor's giving up the note and taking others payable earlier or at the same time will not make him liable, if he still retains the name of the vendee as maker or indorser.

40. Hamilton *v.* Cunningham, 11 Fed. Cas. No. 5,978, 2 Brock. 350 [*citing* Beawes Lex Mercatoria (6th Dublin ed.) 36].

41. Baxter *v.* Allen, 46 Ill. App. 464.

42. Hale *v.* Barrett, 26 Ill. 195, 39 Am. Dec. 367. See also Schenkhouse *v.* Gibbs, 4 Dall. (Pa.) 136, 1 L. ed. 773, holding that a factor employed by several foreign merchants not connected with each other may remit by a general bill payable to one merchant, with separate drafts in favor of each of the other merchants, where notice of such a remittance is given to all the merchants; and where a special loss occurs, it must be borne as a general average by all concerned.

43. Conversion generally see Trover and Conversion.

44. *Illinois.*— Ludden *v.* Buffalo Batting Co., 22 Ill. App. 415.

New York.— Kennedy *v.* Strong, 14 Johns. 128.

Tennessee.— Merchants' Nat. Bank *v.* Trenholm, 12 Heisk. 520.

United States.— Kelly *v.* Smith, 14 Fed. Cas. No. 7,675, 1 Blatchf. 290. See also Halsey *v.* Bird, 99 Fed. 525, 39 C. C. A. 638.

England.— Fielding *v.* Kymer, 2 B. & B. 639, 6 E. C. L. 309; McCombie *v.* Davies, 7 East 5, 3 Smith K. B. 3, 8 Rev. Rep. 534; Graham *v.* Dyster, 6 M. & S. 1, 2 Stark. 21, 3 E. C. L. 299; Daubigny *v.* Duval, 5 T. R. 604.

See 23 Cent. Dig. tit. "Factors," § 41.

45. Scott *v.* Rogers, 31 N. Y. 676; Comley *v.* Dazian, 53 N. Y. Super. Ct. 516 [*affirmed* in 114 N. Y. 161, 21 N. E. 135], holding that a sale without first submitting the price to his principal for approval, as instructed, is a conversion.

Conversion by shipping goods to another place contrary to instructions and there selling them see Marr *v.* Barrett, 41 Me. 403, where the factor had no lien on the goods. See also Galbreath *v.* Epperson, (Tenn. Sup. 1886) 1 S. W. 157.

Ambiguous contracts or instructions as affecting liability for conversion see Hassett *v.* Cooper, 20 R. I. 585, 40 Atl. 841.

46. Jones *v.* Hodgkins, 61 Me. 480.

47. Anker *v.* Smith, 87 N. Y. Suppl. 479, holding that in an action for conversion against the factor failure to allege as a defense that he had sold property unaccounted for raised a presumption that he did not sell it but concealed it with a view to appropriating it to his own use.

Sufficiency of demand and refusal.— Where a factor sold part of the goods consigned to

a factor has possession of goods with the right to a lien for advances[48] or for a general balance beyond the charges against the goods,[49] it requires a tender and demand on the part of the principal as well as a refusal on the part of the factor to constitute a conversion. If the factor disposes of the goods by a delegation of his authority to a third person without the sanction of his principal or of a usage of trade he is guilty of a conversion of the goods.[50] The placing of grain in a warehouse and taking a receipt therefor, whereby the property in the grain is parted with by its loss of identity, does not amount to a conversion, although the factor becomes thereby a debtor instead of a bailee.[51] The mere statement of account sent by a factor in which the principal is credited with the goods consigned at a certain valuation is not sufficient evidence of their conversion.[52] Acquiescence in the action of a factor when it is brought to the principal's notice precludes the principal from holding the factor liable in conversion for his action.[53] The old rule that an action for conversion cannot be maintained against a person who receives money in a fiduciary capacity unless he is bound to return the identical money has been held applicable to a factor;[54] but under the New York code, defining the causes of action upon which are given the right of arrest[55] and the right to a body execution,[56] an action to recover from the factor the proceeds of a sale wrongfully detained by him is an action in tort.

20. Ratification or Repudiation of Acts of Factor.[57] If a factor buys the goods of his principal, the latter may elect whether he will ratify or repudiate the sale.[58] A principal may ratify the factor's disobedience of instructions or his other wrongful act either by actual approval[59] or by failure to disapprove within a reasonable time after notice.[60] The principal may be considered as having rati-

him, and while in possession of the remainder, and with a right to sell them, sued his principal for commissions, a demand for such goods, contained in a letter delivered to him, the contents of which he did not know until the person delivering it had departed, and when the goods, with the knowledge of the principal, were three thousand miles away, did not render the factor guilty of conversion of the unsold goods. Parmentier *v.* American Box Mach. Co., 44 N. Y. App. Div. 47, 60 N. Y. Suppl. 432.

48. Lehmann *v.* Schmidt, (Cal. 1889) 22 Pac. 973, (Cal. 1890) 24 Pac. 120. See Walker *v.* Dubuque Fruit, etc., Co., 106 Iowa 245, 76 N. W. 673, where a factor sold goods after having been notified that the principal had already sold them, it having been previously agreed between them that the principal might sell, and where the principal offered to pay all charges against the property for advances, etc., and where the sale of the factor was held to amount to a conversion.

49. Wagenblast *v.* McKean, 2 Grant (Pa.) 393.

Right to lien for general balance see *infra*, I, E, 3, b, (II), (C).

50. Campbell *v.* Reeves, 3 Head (Tenn.) 226.

51. Bailey *v.* Bensley, 87 Ill. 556, where the factor disposed of the receipt and afterward failed to keep warehouse receipts for the same amount and grade of grain, and where it was held that the only effect produced was that his course of conduct would be a bar to his charges for storage and insurance.

52. Nonantun Worsted Co. *v.* Webb, 124 Pa. St. 125, 16 Atl. 632.

53. Eichel *v.* Sawyer, 44 Fed. 845, where factors put into a pool goods consigned to them for sale on commission and where the consignors were at liberty to withdraw from the pool but acquiesced in the factors' action.

54. Britton *v.* Ferrin, 171 N. Y. 235, 243, 62 N. E. 954.

55. N. Y. Code Civ. Proc. § 549, subd. 2.

56. N. Y. Code Civ. Proc. § 1487.

57. **Ratification or repudiation as affecting rights of third persons** see *infra*, I, F, 1, f.

58. Wadsworth *v.* Gay, 118 Mass. 44; Sims *v.* Miller, 37 S. C. 402, 16 S. E. 155, 34 Am. St. Rep. 762, where the factor had made advances and brought the goods to save himself from loss.

59. Howland *v.* Fosdick, 4 La. Ann. 556; Eichel *v.* Sawyer, 44 Fed. 845; Rice *v.* Brook, 20 Fed. 611, holding that a consignor who, with full knowledge of the facts and uninfluenced by concealment or fraud on his factor's part, authorizes the latter to sell at his discretion, thereby ratifies the action of the factor in having delayed the sale a very long time.

60. *Alabama.*— Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 96.

California.— Kendall *v.* Earl, (1896) 44 Pac. 791.

Louisiana.—Kehlor *v.* Kemble, 26 La. Ann. 713; Ward *v.* Warfield, 3 La. Ann. 468.

Mississippi.— Meyer *v.* Morgan, 51 Miss. 21, 24 Am. Rep. 617.

New York.— Vianna *v.* Barclay, 3 Cow. 281.

Pennsylvania.— Porter *v.* Patterson, 15 Pa. St. 229 (where the court said that the true

fied the act of his factor, although in violation of the principal's instruction, in making a sale, if he receives the proceeds or benefits of the sale,[61] unless it was understood by both parties at the time of the receipt of the proceeds that the right of action against the factor was not to be affected.[62] If the principal sues for the price of goods sold on credit, he ratifies the act of his factor in selling on credit instead of for cash contrary to instructions.[63]

21. Remedies of Principal — a. Right of Action and Accrual Thereof. If goods are delivered to freighters and factors to be transported to market and there sold, an action will not lie against them, unless a sale of the goods and a receipt of the proceeds by the factors is proved[64] or may be presumed from the lapse of time and other circumstances.[65] In the absence of some agreement[66] as to when the proceeds of goods sold should be paid, a demand upon the factor is a prerequisite to a right of action for the proceeds;[67] and if the factor has not

rule was that the principal, on being informed of a sale contrary to his instructions, was not bound to return an immediate answer but must express his dissent within a reasonable time or he would be considered as ratifying the act); Smedley *v.* Williams, 1 Pars. Eq. Cas. 359.

United States.— Dunbar *v.* Miller, 7 Fed. Cas. No. 4,130, 1 Brock. 85; Marshall *v.* Williams, 16 Fed. Cas. No. 9,136, 2 Biss. 255.

England.— Prince *v.* Clark, 1 B. & C. 86, 2 D. & R. 266, 1 L. J. K. B. O. S. 69, 25 Rev. Rep. 352, 8 E. C. L. 80.

See 23 Cent. Dig. tit. "Factors," § 42.

The principal must have been fully informed as to the factor's transactions or he cannot be deemed to have ratified them (Byrne *v.* Doughty, 13 Ga. 46. But see Bell *v.* Cunningham, 3 Pet. (U. S.) 69, 7 L. ed. 606, where Marshall, C. J., held that if a principal, after knowing that his orders had been violated, received merchandise purchased contrary to orders and sold the same without signifying any intention of disavowing the acts of the agent, an inference in favor of the ratification of the acts of the agent may fairly be drawn by the jury; but if the merchandise was received by the principal under a just confidence that his orders to his agent had been faithfully executed, the inference would be in a high degree unreasonable); but in making disclosure of his transactions the factor is not bound to relate facts of a general nature of which he may reasonably presume the principal has knowledge (Norris *v.* Cook, 18 Fed. Cas. No. 10,305, 1 Curt. 464).

A subsequent consignment to a factor who has violated instructions is not a ratification of the factor's conduct. Maggoffin *v.* Cowan, 11 La. Ann. 554.

What is a reasonable time within which a principal may dissent from an unauthorized sale is for the jury to determine. Porter *v.* Patterson, 15 Pa. St. 229.

61. Reynolds *v.* Fenton, 2 Phila. (Pa.) 222; Smith *v.* Boyce, Dudley (S. C.) 248.

Drawing on the factor for a part of the price of an unauthorized sale is not a ratification. Loraine *v.* Cartwright, 15 Fed. Cas. No. 8,500, 3 Wash. 151.

If a principal draws the balance of an account rendered and makes no objection to the account, it is a ratification of the sales accounted for. Woodward *v.* Suydam, 11 Ohio 360; Richmond Mfg. Co. *v.* Starks, 20 Fed. Cas. No. 11,802, 4 Mason 296.

If the principal receives the benefit of advances made by his factor, he cannot subsequently object to them as not being in compliance with the agreement between them, whatever may be the form in which the advances have been made. Bradley *v.* Richardson, 30 Fed. Cas. No. 17,846, 2 Blatchf. 243, 23 Vt. 720.

62. Smith *v.* Boyce, Dudley (S. C.) 248.

63. Surgat *v.* Potter, 12 Mart. (La.) 365.

64. Brink *v.* Dolsen, 8 Barb. (N. Y.) 337.

65. Brink *v.* Dolsen, 8 Barb. (N. Y.) 337. See Eaton *v.* Welton, 32 N. H. 352, holding that a neglect by a foreign factor to account for goods in any way after a reasonable time raises a presumption that the goods have been sold and the money received for them.

Parties.— Where two joint owners of cotton consign it to a merchant for sale, and inform him that each owned a moiety, and give separate instructions, each as to his share, one may maintain a separate action against the consignee for violation of his separate instructions. Hall *v.* Leigh, 8 Cranch (U. S.) 50, 3 L. ed. 484.

66. If there is an agreement to remit within a fixed period of time, no demand is necessary before bringing an action for failure to remit within the time agreed. Haebler *v.* Luttgen, 2 N. Y. App. Div. 390, 37 N. Y. Suppl. 794 [*affirmed* in 158 N. Y. 693, 53 N. E. 1125].

67. *California.*— Kane *v.* Cook, 8 Cal. 449.

Indiana.— Judah *v.* Dyott, 3 Blackf. 324, 25 Am. Dec. 112.

Missouri.— Burton *v.* Collin, 3 Mo. 315.

New Hampshire.— Burns *v.* Pillsbury, 17 N. H. 66.

New York.—Baird *v.* Walker, 12 Barb. 298, Code Rep. N. S. 329, 2 Edm. Sel. Cas. 268; Halden *v.* Crafts, 4 E. D. Smith 490, 2 Abb. Pr. 301; Cooley *v.* Betts, 24 Wend. 203; Ferris *v.* Paris, 10 Johns. 285. See Lillie *v.* Hoyt, 5 Hill 395, 40 Am. Dec. 360.

England.— See Topham *v.* Braddick, 1 Taunt. 571, 10 Rev. Rep. 610.

rendered an account within a reasonable time after sale he may be liable for an action to account without a previous demand.[68] If goods are in the hands of the factor and unsold, a demand and a refusal must be made before the owner can maintain an action for them.[69] A total rescission of a compromise and settlement between a principal and the factor at the termination of the agency is not always necessary to give the principal a right of action to reclaim goods, where in the compromise and settlement the factor has been guilty of fraud.[70] If a factor who had instructions to remit the proceeds of a sale of the goods forwards no account of the sale, the right of action of the principal accrues for the purpose of limitation, only on his knowledge of the sale and of the receipt of the proceeds by the factor.[71]

b. Forms of Actions or Remedies. The principal may enforce his rights against the factor by several forms of actions, as by action on the case,[72] or by trover,[73] or he may waive the tort[74] and bring an action to compel the factor to account,[75] or he may bring book-account,[76] or the principal may sue in assumpsit,[77] by common counts, as by account stated,[78] by money had and received,[79] or in some

See 23 Cent. Dig. tit. "Factors," § 47.

A factor of a foreign principal has been said to be liable in an action for the proceeds of sales without a previous demand, after he has rendered an account in which he says the balance is subject to the order of the principal, unless there is an understanding that the principal should draw for the balance. Clark *v.* Moody, 17 Mass. 145. See also Fulkerson *v.* White, 22 Tex. 674. But this distinction between the factor of a foreign and domestic principal has been flatly repudiated. Halden *v.* Crafts, 4 E. D. Smith (N. Y.) 490, 2 Abb. Pr. (N. Y.) 301. See also Ferris *v.* Paris, 10 Johns. (N. Y.) 285.

No demand to remit will be presumed from lapse of time. Walden *v.* Crafts, 2 Abb. Pr. (N. Y.) 301.

A demand made after the date but before the service of the writ against the factor is properly made when no cost for the writ is demanded. Hall *v.* Peck, 10 Vt. 474.

68. Langley *v.* Sturtevant, 7 Pick. (Mass.) 214; Eaton *v.* Welton, 32 N. H. 352; Burns *v.* Pillsbury, 17 N. H. 66. See also Cooley *v.* Betts, 24 Wend. (N. Y.) 203. *Contra*, Topham *v.* Braddick, 1 Taunt. 571, 10 Rev. Rep. 610, holding that an action does not lie until demand made of an account at least for the purpose of reckoning the running of the statute of limitations.

69. Martin *v.* Webb, 5 Ark. 72, 39 Am. Dec. 363. See also Stahl *v.* Ansley, 7 Ill. 32.

70. Gay *v.* Osborne, 102 Wis. 641, 78 N. W. 1079, where a factor employed to sell goods on commission for a stated period pretended at the end thereof to exhibit an account for all unsold goods, thereby showing a considerable shortage in his accounts representing apparently property sold and the proceeds converted by him to his own use, and then gave a note and mortgage to the principal for a part of the shortage. The principal thereafter discovered other unsold goods in the possession or under the control of the factor of less value than the balance of the shortage in excess of the amount represented by the note and mortgage and subsequently enforced the mortgage, but did no other act in ratification of the settlement. It was held that the principal might rescind the settlement as to the goods discovered and reclaim them.

Arrest of factor in civil action for fraudulent acts see ARREST, 3 Cyc. 909.

71. Kane *v.* Cook, 8 Cal. 449.

72. Frothingham *v.* Everton, 12 N. H. 239.

Case generally see CASE, ACTION ON.

73. *Indiana.*— Lindley *v.* Downing, 2 Ind. 418 [*citing* Russell Fact. 270, 271].

Maine.— Marr *v.* Barrett, 41 Me. 403.

New Jersey.— Binsse *v.* Ohl, 51 N. J. L. 47, 16 Atl. 305.

Tennessee.— Galbreath *v.* Epperson, (Sup. 1886) 1 S. W. 157.

United States.— See Kelly *v.* Smith, 14 Fed. Cas. No. 7,675, 1 Blatchf. 290.

Trover generally see TROVER AND CONVERSION.

74. Lubert *v.* Chauviteau, 3 Cal. 458, 58 Am. Dec. 415. See also Mitchell *v.* Allen, 38 Conn. 188.

75. Lubert *v.* Chauviteau, 3 Cal. 458, 58 Am. Dec. 415; Wetmore *v.* Woodbridge, Kirby (Conn.) 164; Newman *v.* Homans, Quincy (Mass.) 5 (holding that the remedy of a principal to recover interest on the price received by a factor for goods sold may be by an accounting); Hall *v.* Peck, 10 Vt. 474.

Accounting generally see ACCOUNTS AND ACCOUNTING.

76. Hall *v.* Peck, 10 Vt. 474.

Book debt generally see ACCOUNTS AND ACCOUNTING.

77. Wetmore *v.* Woodbridge, Kirby (Conn.) 164; Newman *v.* Homans, Quincy (Mass.) 5; Hall *v.* Peck, 10 Vt. 474.

Assumpsit generally see ASSUMPSIT, ACTION OF.

78. Mitchell *v.* Allen, 38 Conn. 188.

Account stated generally see ACCOUNTS AND ACCOUNTING.

79. Johnson *v.* Totten, 3 Cal. 343, 58 Am. Dec. 412 (where the factor sold on credit without authority); English *v.* Devarro, 5 Blackf. (Ind.) 588. See Eaton *v.* Welton, 32

cases by goods sold and delivered.[80] Where all but two portions of a consignment were sold and the proceeds paid to the principal, an action in assumpsit for goods sold and delivered or for money had and received will not lie if there is no evidence of a sale or of failure to deliver the goods upon request.[81] The principal may sometimes have a remedy by setting off his damages in a suit by the factor to recover for advances,[82] or by an adjustment of his claim in a settlement of account without being driven to a cross action.[83] He may have an injunction and a receiver against his factor in case of misconduct or insolvency, whereby the property is endangered, although the consignment be to sell on a *del credere* commission.[84]

c. Defenses — (i) *In General.* A factor may set up the consignor's want of title to the goods consigned as a defense to an action for the price received by him.[85] In an action to recover insurance money collected by the factor on a consignment of goods the factor cannot show that the goods were not in fact damaged.[86] Where factors inform their principal that there is a balance due him for goods sold by them and he draws for it and his bill is protested, they may show in defense to his suit for the balance that they were mistaken as to there being a balance due and that they had sold the goods on credit and had not yet been paid for them.[87] A factor cannot set up his own fraud to shield him from responsibility for the proceeds of a sale.[88] It is no defense to a suit for an accounting by a factor that there is pending against him a suit by the government to recover as a penalty the value of part of the goods consigned to him because they had been undervalued by the principal in fraud of the revenue law.[89] That the proceeds of a sale have been seized on an attachment against a third person or that they have been paid over in pursuance of an order in supplementary proceedings against the same person is no defense where either the seizure under the attachment or the payment under the order was without authority of law.[90]

N. H. 352. See, however, Selden *v.* Beale, 3 Me. 178.

Money received generally see MONEY RECEIVED.

Money received by an administrator for goods sold by his intestate as a factor on a *del credere* commission is not a part of the assets and may be recovered in an action for money had and received. Stanwood *v.* Sage, 22 Cal. 516.

80. Wadsworth *v.* Gay, 118 Mass. 44. See also, generally, SALES.

Extent and limits of rule.— But a count for goods sold and delivered is not supported by proof that the goods were consigned to defendant for sale and that he sold them and unreasonably refused or neglected to account for the proceeds after demand made. Ayres *v.* Sleeper, 7 Metc. (Mass.) 45. A factor will not be liable for goods sold and delivered in consequence merely of an unauthorized disposition of the goods. See Lindley *v.* Downing, 2 Ind. 418. And a person suing in assumpsit for goods sold and delivered cannot recover the value of goods sent to a factor for sale and for which he fails to account; defendant should be declared against as factor. Selden *v.* Beale, 3 Me. 178. And where goods in the hands of a factor have been exchanged for others, with the owner's consent, assumpsit does not lie for goods sold and delivered, as to the goods which the factor received in exchange and still remain in his hands unsold. Grover *v.* Clark, Wright (Ohio) 350.

81. Stahl *v.* Ansley, 7 Ill. 32.

82. Frothingham *v.* Everton, 12 N. H. 239.

Set-off generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

83. Kelly *v.* Smith, 14 Fed. Cas. No. 7,675, 1 Blatchf. 290, where the principal's claim was for conversion by the factor.

84. Micklethwaite *v.* Rhodes, 4 Sandf. Ch. (N. Y.) 434.

Injunction generally see INJUNCTIONS.

Receiver generally see RECEIVERS.

85. Floyd *v.* Bouvard, 6 Watts & S. (Pa.) 75.

86. Fish *v.* Seeberger, 154 Ill. 30, 39 N. E. 982 [*affirming* 47 Ill. App. 580].

87. Sneed *v.* Kelly, 3 Dana (Ky.) 538.

88. Standard Sugar Refinery Co. *v.* Dayton, 70 N. Y. 486.

89. Monnet *v.* Merz, 127 N. Y. 151, 27 N. E. 827, holding that this was so because no recovery could be had against the factor in such suit unless actual intent on his part to defraud the government should be shown, in which case he would have had no claim against the principal for reimbursement or contribution, under the usual rule that there is no contribution between tort-feasors. See also CONTRIBUTION, 9 Cyc. 804.

90. Barnard *v.* Kobbe, 54 N. Y. 516 [*affirming* 3 Daly 35].

(II) *Counter-Claim.*[91] A factor who refuses on demand to surrender the proceeds of a sale cannot in an action of conversion defeat a recovery by purchasing a claim of a third person against the principal and interposing it as a counter-claim, because the principal's action is in tort,[92] and because defendant by such purchase assumes a position incompatible with his duty as an agent and in direct conflict with his principal's interest.[93] But a factor may counter-claim for expenses incurred by him upon the consignments the proceeds of which are being sued for.[94]

d. Pleading.[95] In actions by the principal against the factor the usual rules of pleading govern.[96] Thus the complaint need not anticipate defenses;[97] and a declaration which is curable by amendment cannot be objected to after verdict.[98] In an action to recover for negligence or other breach of duty the declaration or complaint must sufficiently state the breach of duty.[99] Where the purchaser refused to accept the goods upon their arrival and the factor resold for a less amount but refused to tell his principal the name of the original purchaser, thus depriving him of resort against such purchaser, it need not be alleged in an action for the difference between the two prices that the original purchasers were financially responsible.[1] When goods are received to be sold at certain prices or returned on demand and they are sold and the money received, no special demand need be alleged in an action for the money.[2] If a factor defends on the ground that the goods of plaintiff were destroyed by fire without defendant's fault, an allegation that he had used proper diligence to sell the goods and had failed is necessary.[3] In an action for goods sold and delivered by a factor to

91. Counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

92. Britton *v.* Ferrin, 171 N. Y. 235, 62 N. E. 954 [*affirming* 67 N. Y. Suppl. 1129].

93. Britton *v.* Ferrin, 171 N. Y. 235, 62 N. E. 954 [*affirming* 67 N. Y. Suppl. 1129].

94. Vandelle *v.* Rohan, 36 Misc. (N. Y.) 239, 73 N. Y. Suppl. 285. But see Britton *v.* Ferrin, 171 N. Y. 235, 62 N. E. 954 [*affirming* 67 N. Y. Suppl. 1129]. And see Sims *v.* Miller, 37 S. C. 402, 16 S. E. 155, 34 Am. St. Rep. 762.

Defendant may set up as a counter-claim "return commissions" on goods taken away by plaintiff before sale where there was a custom of allowing return commissions, as plaintiff knew. Botany Worsted Works *v.* Wendt, 22 Misc. (N. Y.) 156, 48 N. Y. Suppl. 1024, holding that the phrase "return commissions" means "that on goods taken away by a consignor before sale the consignee receives the equitable allowance to cover the expenses of handling, insuring and storing the goods while in his charge."

95. Pleading generally see Pleading.

96. See, generally, Pleading.

97. Hardy *v.* Kansas Mfg. Co., (Tex. Sup. 1897) 18 S. W. 157.

98. Moss *v.* Stokeley, 95 Ga. 675, 22 S. E. 692.

99. Sufficient allegations.— If the gravamen of the action is the alleged negligence of defendant, it is sufficient if the complaint aver facts out of which the duty to act springs and that defendant negligently failed to do and to perform; it is not necessary to define the *quo modo* or the particular acts of diligence defendant should have employed. Leach *v.* Bush, 57 Ala. 145. A complaint which sets forth that defendants as factors received from plaintiff certain described goods for sale for a reward, under instructions not to sell them for less than a specified price, which they promised to observe, but that they did afterward sell the said goods for less than that amount, to wit, the sum of —— dollars, etc., is in case, and sufficiently states a breach of duty. Beavers *v.* Hardie, 48 Ala. 95.

Insufficient allegations.— A declaration alleging that defendant received plaintiff's goods for sale, and agreed to render, as the amount brought by said goods, five hundred dollars, and assigning as a breach of the agreement a neglect to render an account or pay the sum of five hundred dollars is bad for want of an averment of the sale of the goods. Wolfe *v.* Luyster, 1 Hall (N. Y.) 146.

Special assumpsit.— Under the rule that where the promise or agreement is not for the payment of money but for the doing of some other matter or thing the remedy is by special assumpsit, the declaration in assumpsit against the factor for negligence for breach of duty must be special. Darlington *v.* Fredenhagen, 18 Ill. App. 273. See Young *v.* Woodward, 44 N. H. 250, holding that in general, in declaring in assumpsit upon a consignment of goods for the purpose of sale, there should be a special count, which should set out the promise and undertaking of defendant, the consideration upon which it was founded, the breach of that contract by defendant, or his neglect or carelessness, and the loss caused to plaintiff thereby. See also, generally, Assumpsit, Action of.

1. Mobile Trust, etc., Co. *v.* Potter, 78 Minn. 487, 81 N. W. 392.

2. Wyman *v.* Fowler, 30 Fed. Cas. No. 18,114, 3 McLean 467.

3. Francis *v.* Castleman, 4 Bibb (Ky.) 282.

himself disbursements for storage prior to the sale must be pleaded affirmatively in set-off.[4]

e. Issues, Proof, and Variance. The mere form in which the issues are presented will not prevent plaintiff from recovering a balance due him.[5] The proof must be confined to the issues,[6] and, although a material variance will be fatal,[7] an immaterial variance will be disregarded.[8]

f. Burden of Proof and Presumptions. If the market for goods is composed of a single buyer, factors who have made advances on the goods cannot be charged with negligence for not selling unless it is shown that this buyer made them a reasonable offer for the goods, sufficient to cover their advances thereon, and that they refused it.[9] The mere fact that one sells products as a factor does not impose upon him the burden of proving due diligence in the sale.[10] He will not be presumed to have negligently and fraudulently violated his duty, without proof.[11]

g. Evidence.[12] In an action for a negligent sale shortly before a sudden rise in the market price, evidence of the original cost of the article is inadmissible;[13] and proof of the holding of other consignments by other persons for a better market is not relevant in regard to the propriety of the sale in controversy;[14] neither is an expression by defendant to plaintiff, after the sale in question, of hopes to do better with another cargo which plaintiff had consigned at about the same time, nor evidence of the times and prices at which the second cargo is sold.[15] Evidence of a long delay in selling in a constantly falling market is admissible on the question of good faith and reasonable diligence of the factor.[16] Proof of the market value at the place of sale under the contract is proper for the purpose of showing that the factor obtained the best price; but evidence of its value at the place of shipment is inadmissible.[17] In an action for damages for selling below the invoice price defendant may show in reduction of damages that

4. Wadsworth *v.* Gay, 118 Mass. 44, holding that the disbursements are not admissible under a general denial.

5. Anderson *v.* Fetzer, 75 Wis. 562, 44 N. W. 838, where plaintiff sued for the proceeds of cedar posts sold for him by defendants on commission and defendants pleaded a counter-claim for money paid and advanced plaintiff on ties and posts indiscriminately, and where the court found that the amount so paid and advanced was less than the proceeds of ties and posts received by defendants from plaintiff and where it was held that the mere form of the issues did not prevent plaintiff from recovering the balance due him on account of both ties and posts.

6. Winters *v.* January, Litt. Sel. Cas. (Ky.) 12; Mobile Trust, etc., Co. *v.* Potter, 78 Minn. 487, 81 N. W. 392.

Evidence that plaintiff had authorized the factors to use and dispose of the goods as their own is admissible under allegations in an answer that plaintiff sent goods to the factors to sell or otherwise dispose of as they might think proper for their interest and in the usual course of business and according to the custom of the trade, and that the factors held themselves out as the owners of the goods with plaintiff's consent. Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390, Hobby, J., delivering the opinion of the court.

7. Ayres *v.* Sleeper, 7 Metc. (Mass.) 45, holding that a count for goods sold and delivered is not supported by proof that the goods were consigned to defendant for sale and that he sold them and unreasonably refused or neglected to account for the proceeds after demand.

8. Howland *v.* Davis, 40 Mich. 545, holding that where a declaration for damages for delay in selling goods averred that the direction for an immediate sale was given at the time and place of shipment, while the evidence showed a subsequent direction, the variance was immaterial.

9. Eichel *v.* Sawyer, 44 Fed. 845.

10. Govan *v.* Cushing, 111 N. C. 458, 16 S. E. 619.

11. Gaither *v.* Myrick, 9 Md. 118, 66 Am. Dec. 316.

12. See, generally, EVIDENCE.

13. Milbank *v.* Dennistoun, 1 Bosw. (N. Y.) 246.

14. Milbank *v.* Dennistoun, 1 Bosw. (N. Y.) 246.

15. Milbank *v.* Dennistoun, 1 Bosw. (N. Y.) 246.

16. Benedict *v.* Inland Grain Co., 80 Mo. App. 449.

17. Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772, holding that the errors in rejecting evidence of the value at the place of sale and admitting evidence of its value at the place of shipment were not cured by evidence offered by the factor of the value of the fruit at the latter place, as he was entitled to show that the market value at the place of sale was different from what the witnesses stated it to be at the place of shipment.

the goods at the time of sale and down to the time of trial were worth no more than the price at which they were sold.[18] Where a consignor who had made advances to a crop raiser brings an action against the factor for the proceeds of a crop shipped by him in his own name with instructions accompanying the bill of lading to sell for his account, a prior agreement between the factor and the raiser of the crop as to forwarding the crop and making advances thereon is inadmissible.[19] In an action against a factor for fraudulently selling goods on credit to an insolvent person, evidence of the pecuniary circumstances of the buyer of the goods and of his acts and conduct in respect to the goods after the purchase is admissible in connection with other evidence showing fraud in the sale, although it might be inadmissible if standing alone.[20] In an action for the value of goods destroyed by fire, where the factor defends on the ground that he was instructed not to insure consignments until further notice, evidence as to the settlement and discontinuance of business between the parties after the instruction and before the consignment in question is admissible.[21] Where the principal seeks by way of counter-claim to recover damages for plaintiff-factor's breach of contract to ship and sell fruit on his account, the fact that plaintiff inspected the fruit before entering into the contract does not preclude him from showing for the purpose of reducing damages that the fruit was of inferior quality.[22] In an action against a factor to recover the proceeds of a sale of merchandise alleged to have been sent him under an agreement for a *del credere* commission, documentary and real evidence which have a definite bearing upon the terms and conditions of the agency are admissible.[23]

h. Damages[24] — (1) *In General.* A factor who obtains a larger price than designated by the principal by exceeding his authority in contracting for a sale may be held liable for the price obtained.[25] If the principal suffers loss through the negligence of the factor, the factor must reimburse the principal to the amount of the loss.[26] If goods are consigned with instructions or under an agreement

18. Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345 [*reversing* 1 Sandf. 111].

19. Brown *v.* Combs, 63 N. Y. 598.

20. Castle *v.* Bullard, 23 How. (U. S.) 172, 16 L. ed. 424.

21. Burbridge *v.* Gumbel, 72 Miss. 371, 16 So. 792.

22. Earl Fruit Co. *v.* Curtis, 116 Cal. 632, 636, 48 Pac. 793.

23. Whitaker *v.* Chapman, 3 Lans. (N. Y.) 155, holding that a circular which defendant had given plaintiffs when soliciting from them their business and which set forth particulars of defendant's business, and a form of bill of invoice and a stencil plate for marking goods with defendant's firm name which were given to plaintiffs at the same time were admissible because they had an important bearing on the terms and conditions upon which the goods were sent and the character in which defendant purposed to act and did act in the transaction.

24. See, generally, DAMAGES.

25. Guy *v.* Oakley, 13 Johns. (N. Y.) 332, where the factor obtained his price by means of an agreement made without the consent of his principal that the amount of the sale should be set off against a debt due from his principal to the consignee.

26. See cases cited *infra*, this note.

Obtaining price.— In the absence of special directions as to price, a factor is to sell for the fair value or market price; and if the factor acts in utter disregard of his duty as factor by selling at an under price he will be compelled to account for the goods at their value or market price. Bigelow *v.* Walker, 24 Vt. 149, 58 Am. Dec. 156.

If a consignment has been lost through the factor's negligence, the measure of damages in the absence of proof of a partial loss is the entire value of the goods or the proceeds of the sale. Brown *v.* Arrott, 6 Watts & S. (Pa.) 402, where the court said that the burden of showing the amount of the loss was upon the factor.

If a factor returns goods damaged through his negligence, the consignor may recover the difference between the value of the articles as returned and their value undamaged; and their value as returned is determined by the amount they would bring at a fair sale in the usual course of trade. Ives *v.* Freisinger, 70 N. J. L. 257, 57 Atl. 401, holding that the jury were not bound by the price the damaged articles brought at auction.

Neglect to require margin of vendee.—Where a factor under instructions from his principal sold grain upon a time contract and negligently failed to require a margin in accordance with the rules of the board of trade or to notify his principal to demand a margin, and where he also neglected to notify his principal that the grain had been sold to persons operating a corner, which to be successful would have to be maintained thirty-

that they shall not be sold until a certain time, a factor is liable for damages resulting from the sale of the goods before the time designated or agreed upon, and the measure of damages is the difference between the price at the sale and the price at the time a sale was authorized.[27]

(II) *For Conversion.*[28] By some authorities, particularly the earlier ones, it is held that, where a factor converts goods of his principal to his own use, the measure of damages is the value of the goods at the time of the conversion;[29] but by the better rule the measure of damages is in most instances the highest price of the goods within a reasonable time after the conversion.[30] These different rules are of course applied to the various acts of conversion by the factor.[31]

two days, he was held liable to his principal for the amount of the loss resulting in the failure of the vendee. Howe *v.* Sutherland, 39 Iowa 484.

Neglect to insure.— If it is the duty of a factor to insure and he fails so to do, the measure of damages upon loss of goods is the amount for which he should have insured. Morris *v.* Summerl, 17 Fed. Cas. No. 9,837, 2 Wash. 203. See also Beardsley *v.* Davis, 52 Barb. (N. Y.) 159.

27. Gray *v.* Bass, 42 Ga. 270; Fordyce *v.* Peper, 16 Fed. 516, 5 McCrary 221 [*reversed* in 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435, ou the ground that the circuit court had no jurisdiction].

28. Damages for conversion generally see DAMAGES, 13 Cyc. 170; TROVER AND CONVERSION.

29. Kennedy *v.* Strong, 14 Johns. (N. Y.) 128; Kelly *v.* Smith, 14 Fed. Cas. No. 7,675, 1 Blatchf. 290.

30. Monnet *v.* Nerz, 127 N. Y. 151, 27 N. E. 827; Whelan *v.* Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Scott *v.* Rogers, 31 N. Y. 676; Wilson *v.* Matthews, 24 Barb. (N. Y.) 295; Clark *v.* Miller, 4 Wend. (N. Y.) 628.

If the principal waives the tort and sues in assumpsit he can recover only the net proceeds of the sales made by the factor, for having elected to proceed against defendants as factors instead of tort-feasors he must be considered as having authorized their acts. Luhert *v.* Chauviteau, 3 Cal. 458, 58 Am. Dec. 415. *Contra*, see Scott *v.* Rogers, 31 N. Y. 676. See also Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. 772.

As to fixing limits of a reasonable time see Scott *v.* Rogers, 31 N. Y. 676.

The highest price up to the time of bringing suit has been held to be the proper rule. See Dalby *v.* Stearns, 132 Mass. 230; Maynard *v.* Pease, 99 Mass. 555. See also Nelson *v.* Morgan, 2 Mart. (La.) 256, 5 Am. Dec. 729, where a consignee unable to sell goods at the price limited returned them without orders, and they were sold for his account by the consignor, and the consignee was held liable for the difference between the price the goods brought and the highest price they might have brought up to the time of the suit and for the return freight. In some of the New York cases, *supra*, it was held that the highest price up to the time of bringing suit is the proper measure of damages provided the action is brought within a reasonable time.

Average market price.—See Winters *v.* January, Litt. Sel. Cas. (Ky.) 13, where the factor in answer to a bill against him stated that he sold the property consigned to him according to the instructions of the consignor's agent, but he omitted to file the instructions, although he prayed that they might be taken as a part of the advances, and the court held that it ought to be presumed that the instructions were not observed by the factor.

31. Thus where goods consigned to a factor to be sold at a fixed price are disposed of at a less price, it is held in some jurisdictions that the factor is responsible to his principal for the price fixed by the latter, notwithstanding it may be above the market price. Switzer *v.* Connett, 11 Mo. 88, where a factor had made no advances. See also Union Hardware Co. *v.* Plume, etc., Mfg. Co., 58 Conn. 219, 20 Atl. 455. But other jurisdictions hold that the measure of damages is not the difference between the price fixed by the principal and the price received, but the actual injuries sustained by breach of contract. Ainsworth *v.* Partillo, 13 Ala. 460; Frothingham *v.* Everton, 12 N. H. 239; Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345 [*reversing* 1 Sandf. 111]; Short *v.* Skipworth, 22 Fed. Cas. No. 12,809, 1 Brock. 103. And by the better rule this damage is properly measured by the difference between the amount actually received for the goods and the highest market price obtainable within a reasonable time after the sale. Rollins *v.* Duffy, 18 Ill. App. 398; Hinde *v.* Smith, 6 Lans. (N. Y.) 464. *Compare* Maynard *v.* Pease, 99 Mass. 555; Scott *v.* Rogers, 31 N. Y. 676. See Dalby *v.* Stearns, 132 Mass. 230, holding that where the goods were sold in good faith for the best price that could be obtained for them and that from that time to the date of the writ their market value was not greater than the price for which they were sold, the measure of damages was the price for which they were sold, less the amount of advances, commissions, etc. The rule giving the principal the benefit of the highest market price between the time of conversion and trial is not, however, an unqualified one. Matthews *v.* Coe, 49 N. Y. 57 [*reversing* 56 Barb. 430] (holding that where the

(III) *SALE AT IMPROPER PLACE AS MARKET.* If a factor reships goods, without instructions from his principal, to another place to be sold there, he is liable for any loss which may occur, and the measure of damages is the difference between the market value at the original market and the price for which the goods were sold.[32] A factor, who in disobedience of instructions sells his principal's goods and when subsequently directed to ship to another place[33] does not inform his principal of the sale but buys other goods and ships them to the place designated, is liable for the difference in price for which the goods were sold at the place designated and the price obtained for the original consignment.[34]

E. Compensation, Reimbursement of Factor, and Security Therefor — 1. COMPENSATION — a. In General. A factor's right to compensation for his conduct of his agency rests only upon a contract express or implied,[35] and usually takes the form of commissions upon the goods sold or upon incidental services rendered in the course of his agency.[36] So long as he acts in good faith and exercises reasonable skill and diligence the principal is liable to him for proper com-

evidence showed that it was the intent of the principal and the agreement between the parties to have the property sold when it reached a certain price, and it also appeared that it would have been difficult if not impossible to have preserved the property until the time when the price was fixed, an allowance by this rule in damages of a price greater than that agreed upon is erroneous); Blot *v.* Boiceau, 3 N. Y. 78, 51 Am. Dec. 345 (holding that where the factor sells below the price named by his principal, to cover his advances, without having called on his principal for repayment, and the consignment is of articles which have no market value, such as antique paintings, statues, or vases, the principal may recover according to the invoiced prices).

Where a factor sells cotton under a specified price, the measure of damages is not the price limited but the price at which it might have been sold during the season. Austill *v.* Crawford, 7 Ala. 335; Porter *v.* Heath, 2 Tex, App. Civ. Cas. § 124.

32. Comer *v.* Way, 107 Ala. 300, 19 So. 966, 54 Am. St. Rep. 93; Grieff *v.* Cowguill, 2 Disn. (Ohio) 58. See Wallace *v.* Bradshaw, 6 Dana (Ky.) 382, where an instruction that if a factor ships goods without orders he would be liable in the absence of any proof of a custom allowing him so to do for the amount for which the goods might have been sold at the original market was held unobjectionable.

In estimating this difference between the two markets, the highest value which the goods could have been sold for at the original market within a reasonable time after the conversion should be taken. Scott *v.* Rogers, 31 N. Y. 676; Wilson *v* Mathews, 24 Barb. (N. Y.) 295.

That evidence of a custom to reship to another place, where the factor has made advances, is admissible see Wallace *v.* Bradshaw, 6 Dana (Ky.) 382.

33. **Inability to ship as instructed.**— If a factor be ordered to ship a consignment upon which he has made advances to a place other than his residence for sale and in the exercise of due diligence he is unable to ship to the designated place and ships to another place where the goods are sold, the measure of damages is not the difference between the price obtainable at the place designated and the place of sale but the difference between the price which might have been obtained at his residence and the price at the place of sale. See Bessent *v.* Harris, 63 N. C. 542, the court pointing out that this is the proper rule of damages because under such circumstances it was the duty of the factor in the absence of other instructions to have retained the goods at his place of residence, and in case the principal failed within a reasonable time after request to repay the advance the factor might have sold it at his place of residence.

34. Austill *v.* Crawford, 7 Ala. 335.

35. McKean *v.* Wagenblast, 2 Grant (Pa.) 462; Taylor *v.* Rose, 30 Tex. Civ. App. 471, 70 S. W. 1022.

Offer of commission rejected.— Defendants offered the factor a commission to sell goods and sent him a warehouse order for them. The factor rejected the offer but procured the goods by means of the order and sold them and defendants accepted payment. It was held that the rejected offer of defendants was not revived and the factor was not entitled to the commission stipulated in it. Rapp *v.* Livingston, 14 Daly (N. Y.) 402, 13 N. Y. St. 74.

The contract may be implied from the general course of dealings between the parties. Thompson *v.* Matthews, 56 Miss. 368.

An unauthorized sale which the owner rescinded gives no claim for commission. Miller *v.* Price, (Cal. 1895) 39 Pac. 781.

36. **If goods have been procured from others** by a factor acting on a *del credere* commission, the principal having been unable to fulfil a contract made by the factor for the principal, the factor is entitled to commissions on the whole amount of merchandise contracted for. Albion Phosphate Min., etc., Co. *v.* Wyllie, 77 Fed. 541, 23 C. C. A. 276.

missions;[37] but as a general rule he is entitled to commissions as such only on the amount of goods actually sold,[38] unless by special contract or under special circumstances the principal's liability is extended to cover goods not sold.[39] Of course if the factor does not fulfil his part of a special contract he cannot expect to be paid commissions.[40] If the principal has received advances on a consignment he cannot at his mere pleasure withdraw the sale of his goods from the factor on the repayment of advances and interest. The factor has an interest in making the sales and earning his commissions which in general forms the effective consideration of his advances and it does not rest in the power of the principal to deprive him of his advantage without showing some substantial reason for so doing;[41] and therefore, in the absence of substantial reason, the factor is entitled to receive the same commissions as if the sale had been effected.[42] The factor's compensation is payable and is estimated in money, not in the goods of his principal.[43]

b. For Services — (i) *Contract Rate and Amount.* Where a factor has charged his commissions and deducted them from the gross proceeds of the sales and his accounts have been regularly rendered from time to time and no objection thereto made by the consignor, an agreement for commissions at the rate charged in the accounts rendered may be inferred.[44] A contract by which the factor is to receive a certain per cent commission on the sale of his prin-

37. Brown *v.* Clayton, 12 Ga. 564; Thompson *v.* Packwood, 2 La. Ann. 624; Gorman *v.* McGowan, 44 Oreg. 597, 76 Pac. 769; Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359.

38. Sawyer *v.* Lorillard, 48 Ala. 332; Lyons *v.* Lallande, 9 La. Ann. 601; Ware *v.* Hayward Rubber Co., 3 Allen (Mass.) 84.

Loss by fire does not entitle a factor to commissions. Miller *v.* Tate, 12 La. Ann. 160.

39. Haven *v.* Hudson, 12 La. Ann. 660; Thornhill *v.* Picard, 24 La. 159 (where a factor made advances to a planter under an agreement that the latter was to ship his entire crop to a merchant, but the planter shipped a portion of his crop to another merchant and the planter was allowed to recover the usual commissions which he would have charged on the part of the crop so shipped); Chaffe *v.* Hughes, 57 Miss. 256; Moore *v.* Lawrence, 16 Fed. 87 (holding that a contract by defendants that all their shipments of cotton to a certain place during the season shall be made to plaintiffs and that said shipments shall amount to at least two hundred bales is not fulfilled by the shipment of two hundred bales to plaintiffs, and that plaintiffs are entitled to recover full commissions upon all other shipments of cotton made by defendants to that place during the season); Foster *v.* Goddard, 9 Fed. Cas. No. 4,970, 1 Cliff. 158.

Sale by principal.— Plaintiffs consigned goods to defendants to be sold on a certain commission. Defendants sold a part on which they received commission. Plaintiffs through their traveler sold a quantity of their goods and ordered defendants to forward the same to the purchaser, which they did and entered all the sales on their books. Subsequently they refused to deliver the balance in their hands until paid their commissions on the amount in their hands and upon the goods sold by plaintiffs' traveler, and it was held that defendants were entitled to the commissions demanded. Briggs *v.* Boyd, 65 Barb. (N. Y.) 197 [*affirmed* in 56 N. Y. 289].

40. Bramblett *v.* Feltman, 35 S. W. 633, 18 Ky. L. Rep. 457.

Breach of collateral promise.—It was agreed in writing between plaintiffs and defendant that defendant should for the next three years ensuing, unless the agreement should be dissolved by plaintiffs, on three months' notice, consign exclusively to plaintiffs all the blankets of his manufacture, to be sold by plaintiffs at a certain commission. Plaintiffs sued defendant for their commission on certain blankets sold by defendant to the United States government without having been consigned to plaintiffs, pursuant to said agreement. It was held that it was no defense to such action that plaintiffs promised to be defendant's sureties on such contract of sale to the government, as plaintiffs had a right to recede from such promise, if made, and it could have no effect on the agreement sued on. Baden *v.* Dimick, 31 How. Pr. (N. Y.) 196 [*reversed* on other grounds in 48 N. Y. 661, 13 Abb. Pr. N. S. 135].

41. Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359, 366, where the court said that nothing probably would be deemed such a substantial reason, except such a state of facts as would enable plaintiff to sustain an action of trover or replevin against defendants for the goods.

42. Smedley *v.* Williams, 1 Pars. Eq. Cas. (Pa.) 359.

43. McCune *v.* Erfort, 43 Mo. 134, holding that the factor had no right to take his pay for transportation out of the gold dust of his principal.

44. Gore *v.* Campbell, 4 Ill. App. 661. See also Archer *v.* Dunn, 2 Watts & S. (Pa.) 327.

cipal's crop does not justify the factor in charging commissions on the amount of bounty paid by the government to the planter of the crop.[45] A contract by which the factor is to be sole agent of his principal in a certain territory for the sale of manufactured tobacco to be manufactured in a particular manner does not entitle the factor to commissions on stemmed-leaf tobacco put up in small packages consigned to another person in the same territory, there to be manufactured by the purchasers into cigars and cigarettes.[46]

(II) *Customary Rate and Quantum Meruit.* In the absence of an express agreement the rate usually charged for like services must be paid,[47] provided the customary rate be just and reasonable.[48] If the customary rate does not appear the factor should receive such compensation as his services are reasonably worth.[49] This may be the rule of compensation, although the rate of compensation was fixed by a previous contract, if it is no longer operative owing to the resignation of the factor.[50]

(III) *Subagent and Cumulative Commissions.* It is improper for the factor without special authority to deliver the goods to another factor to be sold and charge for both his own and the other factor's commission.[51]

c. For Advances. In addition to commissions for services rendered factors are generally entitled to commissions for funds advanced for the principal's benefit in the course of the business;[52] but not for disbursements of the principal's money,[53] for payment of the factor's debt to the principal,[54] or for the balance against the principal in their mutual accounts.[55]

d. Del Credere Commission. Factors may by express contract, in consideration of a greater commission, become liable for the price of goods sold by them if not paid for by the buyer.[56] The factor's right to a *del credere* commission rests only on the terms of the contract and extends only to sales on credit.[57] A *del credere* commission is earned when the guaranty is made, not when the

45. Romero *v.* Newman, 50 La. Ann. 80, 23 So. 493.

46. Wittkowski *v.* Harris, 64 Fed. 712.

47. Sawyer *v.* Lorillard, 48 Ala. 332; Brown *v.* Harrison, 17 Ala. 774; Masterson *v.* Masterson, 121 Pa. St. 605, 15 Atl. 652.

Purchaser insolvent.— Whether a factor is entitled to commissions on a sale on credit, where the purchaser failed, depends on usage. Clark *v.* Moody, 17 Mass. 145.

48. Spear *v.* Newell [*cited* in Burton *v.* Blin, 23 Vt. 151, 159].

49. Sawyer *v.* Lorillard, 48 Ala. 332; Kennedy *v.* Gibbs, 15 Ill. 406; Mills *v.* Johnston, 23 Tex. 308 (holding that the jury must be satisfied that the factor's claim for compensation was a reasonable one and for a service rendered in the regular course of a legitimate business, not for usury in disguise); Marshall *v.* Parsons, 9 C. & P. 656, 38 E. C. L. 382.

50. Goddard *v.* Foster, 17 Wall. (U. S.) 123, 21 L. ed. 589.

51. Vandyke *v.* Brown, 8 N. J. Eq. 657. See also Spear *v.* Newell [*cited* in Burton *v.* Blin, 23 Vt. 151, 159].

52. Kennedy *v.* Gibbs, 15 Ill. 406; Mills *v.* Johnston, 23 Tex. 308, holding that a commission merchant may charge a commission for accepting a draft and further commission for paying it. See also Smetz *v.* Kennedy, Riley (S. C.) 218. *Contra*, Cheesborough *v.* Hunter, 1 Hill (S. C.) 400, where a factor who advanced funds in anticipation of produce to be forwarded was not allowed commissions on such advances.

Indorsing note.— A factor who receives a note for a debt due him cannot charge a commission for indorsing it; otherwise, if the note be negotiated for the drawer's benefit through the factor's credit. Patterson *v.* Leake, 5 La. Ann. 547.

53. Lee *v.* Byrne, 75 Ala. 132, where defendants agreed to pay a fixed price at the end of each month for lumber delivered by plaintiff "after deducting for all advances" and commissions thereon at a certain rate. They were held not entitled to commissions on disbursements by them made from plaintiff's money, or when they were indebted for lumber delivered under the contract.

54. Pavret *v.* Perot, 2 Yeates (Pa.) 185, holding that a factor is not entitled to a commission on payment of his own debts to his principal, unless he remits by bills of exchange.

55. Walters *v.* McGirt, 8 Rich. (S. C.) 287. See also Lee *v.* Byrne, 75 Ala. 132.

56. See *supra*, I, D, 10. See also Gould *v.* Lee, 55 Pa. St. 99; Solly *v.* Weiss, 2 Moore C. P. 420, 8 Taunt. 371, 4 E. C. L. 189.

57. Wittkowski *v.* Harris, 64 Fed. 712.

Procuring the release of a contract which the principal is unable to fulfil entitles a *del credere* agent to a proportionate share of his agreed commissions. Albion Phosphate Min., etc., Co. *v.* Wyllie, 77 Fed. 541, 23 C. C. A. 276.

account is collected, where the factor agrees to sell and guarantees prompt payment by the purchaser or purchasers.[58]

e. Payment. A factor who has received his commission out of the proceeds has no further claim on his principal.[59]

f. Forfeiture. The factor's right to a commission is forfeited by fraud or gross negligence in the conduct of the business,[60] by rendering a false account with fraudulent intent,[61] by failure to account,[62] by selling below the guaranteed price,[63] and in accordance with the general law of agency by accepting a commission from the buyer without the knowledge and approval of his principal.[64]

2. Reimbursement — a. The Right Thereto — (i) *For Charges, Expenses, Losses, Etc.* The principal is liable to his factor for all necessary charges, expenses, disbursements, and advancements made and accruing in the course of the agency and for the principal's benefit.[65] This liability rests also upon the contract relation between the parties, and in the absence of a contract express or implied there is no liability.[66] The right to reimbursement for expenses extends

58. Springfield Mfg. Co. *v.* Lincoln, 16 Daly (N. Y.) 318, 11 N. Y. Suppl. 75.

59. Indianapolis Rolling Mill Co. *v.* Addy, 5 Ohio Dec. (Reprint) 588, 6 Am. L. Rec. 764, 3 Cinc. L. Bul. 293, where factors took a separate note payable to themselves to cover the commissions on goods sold and discounted the same and appropriated the proceeds, and it was held to amount to a payment of commissions as between consignor and factor.

60. Adams *v.* Capron, 21 Md. 186, 83 Am. Dec. 566; Talcott *v.* Chew, 27 Fed. 273; Norman *v.* Peper, 24 Fed. 403; Fordyce *v.* Peper, 16 Fed. 516, 5 McCrary 221 [*reversed* for want of jurisdiction in 119 U. S. 469, 7 S. Ct. 287, 30 L. ed. 435]. See also Indianapolis Rolling Mill. Co. *v.* Addy, 5 Ohio Dec. (Reprint) 588, 6 Am. L. Rec. 764, 3 Cinc. L. Bul. 293.

Waiver of tort.— Where the consignee of a cargo to be sold on commission sells them on legal process to apply on a debt due him from the former owner of the ship, the consignor by bringing assumpsit for the proceeds waives the tort, and the consignee is entitled to the customary commissions but is chargeable with interest from the time he received the proceeds. Ricketson *v.* Wright, 20 Fed. Cas. No. 11,805, 3 Sumn. 335.

61. Brack *v.* Hart Commission Co., 57 Mo. App. 605.

Mistake.— A factor cannot be deprived of commissions on account of an honest mistake in rendering his account. Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220.

62. Brannan *v.* Strauss, 75 Ill. 234.

Failure to account for insurance money collected on the principal's goods works a forfeiture of the factor's right to commissions. Fish *v.* Seeberger, 154 Ill. 30, 39 N. E. 982 [*affirming* 47 Ill. App. 580].

Failure to remit.— Goods were consigned under an agreement that the factor was to receive his commissions on sales within a certain time after receipt of bills for the same. The factor on his part agreed to keep all entries as to such sales in separate books, to collect and remit the accounts upon respective dates of maturity by check, the remittances to be made daily, if collections reached one thousand dollars, and payments made before maturity to be remitted, less discount, for anticipation of payment. It was held that the factor was entitled to commissions only upon the amounts actually remitted. Hockanum *v.* Lincoln, 16 Daly (N. Y.) 325, 11 N. Y. Suppl. 79.

Delayed remittance — Insolvency.— Goods were sent to a factor to be sold, the proceeds to be remitted "from time to time." The proceeds of goods thus sold were received by him, but he neglected to remit at once to his principal, and in the meantime he became insolvent. It was held that the failure of the factor to remit was not equivalent to embezzlement, so as to deprive him of his right to commissions. Springville Mfg. Co. *v.* Lincoln, 16 Daly (N. Y.) 318, 11 N. Y. Suppl. 75.

63. Dalton *v.* Goddard, 104 Mass. 497.

64. Talcott *v.* Chew, 27 Fed. 273, holding that ordinarily a factor who takes commissions from his principal, who employs him to sell, would violate his contract should he also take commissions from the person to whom he sells; but, when it is clearly understood by all the parties that one who is paid commissions to sell cotton is also to charge commissions from the buyer, the transaction is not illegal, and this is especially true where he advances all the money to conduct the business himself, and looks to the sales for his reimbursement.

65. Sawyer *v.* Lorillard, 48 Ala. 332; Howard *v.* Behn, 27 Ga. 174; Brown *v.* Clayton, 12 Ga. 564; Kelley *v.* Maguire, 99 Ill. App. 317.

An implied promise arises upon a request on a consignee to make an advance on goods and binds the promisor to make good any deficiency if the goods are insufficient to pay for the advance. Hart *v.* Otis, 41 Ill. App. 431.

66. See cases cited *infra*, this note.

Contract ratified see Groos *v.* Brewster, (Tex. Civ. App. 1903) 78 S. W. 359.

Shipwreck contract implied see Buchanon *v.* Switzer, 14 La. Ann. 501.

Contract rescinded through failure of factor to remit see Curtis *v.* Gibney, 59 Md. 131.

to payments actually made on account of the goods for freight,[67] storage,[68] drayage, labor, weighing,[69] insurance,[70] and customs duties;[71] and to losses incurred or rebates paid on account of unsound or improperly packed goods,[72] as well as to other necessary and usual expenses incidental to the marketing of the goods[73] or to the general conduct of the agency.[74] But this does not ordinarily include legal expenses not expressly contracted for[75] or improper inducements to the purchaser's agent.[76]

(II) *For Advances.* The principal is in like manner liable for advances to him by the factor on the faith of the goods made by the factor's payment of the

67. Paul *v.* Birch, 2 Atk. 621, 26 Eng. Reprint 771.

Demurrage refunded see Everingham *v.* Halsey, 108 Iowa 709, 78 N. W. 220.

68. Brander *v.* Lum, 11 La. Ann. 217; Higgins *v.* Grindrod, 16 Phila. (Pa.) 200; Sims *v.* Miller, 37 S. C. 402, 16 S. E. 155, 34 Am. St. Rep. 762.

69. Brander *v.* Lum, 11 La. Ann. 217, holding that expense for drayage, labor, storage, weighing, etc., of defendant's cotton cannot be recovered unless actually paid by the factor.

70. Peyton *v.* Heinekin, 131 U. S. appendix ci, 20 L. ed. 679.

71. Higgins *v.* Grindrod, 16 Phila. (Pa.) 200.

Duty paid after accounts settled.— Where goods are shipped to a consignee in a foreign country, and he pays the then customary duties, makes up his accounts accordingly, and transmits them to consignor, and the intendant of the foreign country by an order dated prior to the arrival of the goods but not made public until some time after directed vessels entering the port to pay an additional duty, and the consignee was compelled to do so after the settlement of his accounts, he was entitled to recover the same from his consignor. Drake *v.* Hudson, 7 Harr. & J. (Md.) 399.

72. Bull *v.* Sigerson, 24 Mo. 53; Groos *v.* Brewster, (Tex. Civ. App. 1903) 78 S. W. 359.

Damaged goods.— The consignor of flour which reaches the consignee in an unmarketable condition is liable for the difference between the amount realized by its sale and the amount of drafts previously paid by the consignee on the strength of the shipment, which he received as the commission merchant of the consignor. Blandford *v.* Wing Flour Mill Co., 24 Ill. App. 596.

Unsound goods — Resale.— Under a local custom to allow a vendee of flour to rescind the sale and return the flour within ten days if it proves unsound, a commission merchant who after such return sells it as unsound at its full real value, without laches on his part, may recover from his consignor the actual loss sustained thereby. Randall *v.* Kehlor, 60 Me. 37, 11 Am. Rep. 169.

Resale, in violation of instructions, of goods which the factor has been compelled to take back as not being equal to the sample, without at once notifying the consignor and demanding repayment, forfeits the factor's right to recover the loss on the resale at a price below that named in the instructions. Maxwell *v.* Audinwood, 15 Hun (N. Y.) 111.

False packing.— When a factor to whom cotton was consigned, after it has been sold and the account between him and the consignors settled by draft, is compelled to refund to the purchaser on account of the false packing of some of the cotton, he can recover therefor from the consignors, if reclamation be made according to the custom of the business and within such reasonable time as would enable defendants to reclaim from the parties from whom they purchased. Beach *v.* Branch, 57 Ga. 362.

Unmerchantable goods — Waiver.— In an action for the value of machines delivered to defendant as a factor for sale, it appeared that many of the machines proved unmerchantable, resulting in the loss of many sales made by defendant; that subsequently defendant consented, at plaintiff's request, to do the best he could with the machines; that thereupon the prices were reduced, and defendant endeavored to make the loss to both parties as little as possible, agreeing to account for what he could realize out of the defective machines. It was held that this was no waiver of his rights for the injury already caused by plaintiff's failure to deliver salable machines. Wood Mower, etc., Co. *v.* Thayer, 50 Hun (N. Y.) 516, 3 N. Y. Suppl. 465.

73. Talcott *v.* Smith, 142 Mass. 542, 8 N. E. 413, expenses of printing cloths, it appearing that the printing had been done under the usage of commission merchants.

74. Carter *v.* Cunningham, 7 Metc. (Mass.) 491, the expenses of remitting the proceeds, including a premium on exchange incurred prudently and in accordance with the course of mercantile dealing.

75. Fidelity Ins., etc., Safe-Deposit Co. *v.* Roanoke Iron Co., 91 Fed. 19.

Payment for compromising a suit by the government is not chargeable to the principal in the absence of any evidence of authority from plaintiff to defendant to make the compromise on joint account. Monnet *v.* Merz, 61 N. Y. Super. Ct. 120, 18 N. Y. Suppl. 780.

76. Waterman *v.* Bowler, 19 N. Y. Suppl. 491, holding that a contract for the sale of plaintiff's horses by defendant empowering the latter to "handle the team" as he should "see fit" did not render plaintiff liable for a present made by defendant to the purchaser's coachman to effect the sale.

principal's drafts drawn on him[77] or indorsed by him;[78] and this is sometimes extended to acceptances not yet paid[79] and to money paid in the principal's behalf.[80] A settlement in full between a factor who has sold goods on credit and his principal in the absence of fraud or mistake bars any claim thereafter for advances.[81]

(III) *INTEREST.* The factor is in general further entitled to interest on advances made by him[82] over and above his proper commissions for the advances,[83] but not upon his own charges and commissions.[84] If a factor by breach of the contract of agency causes loss to the principal, he forfeits his right to interest on his advances.[85]

77. Howard *v.* Behn, 27 Ga. 174.

Draft of third person.— Where the owner of goods consigned them for sale to a factor, and advances on the consignment were made by C to the consignor on an undertaking of the latter to refund any excess of the advances over the net sales of the consignments, and the advances were made by draft of C upon the factor and were paid by the latter on C's agreement to refund the amounts of any overdraft, and the net sales were insufficient to cover the drafts, the factor, if he performed his duty with care and skill, was entitled to be reimbursed to the amount of the advances, either against the consignor or C. Adams *v.* Capron, 21 Md. 186, 83 Am. Dec. 566.

Forged draft paid by factor see BANKS AND BANKING, 5 Cyc. 544 note 31.

Payment of purchaser's note.— Where a principal draws on his factor before the sale of the goods, and the factor, to meet the draft, sells the goods on credit, to a merchant in good standing and takes the note of the purchaser, payable to himself, which note he indorses and sells, and the maker becomes insolvent, and the factor pays the note, he can recover the money in an action against the principal. Greely *v.* Bartlett, 1 Me. 172, 10 Am. Dec. 54.

78. Carson *v.* Alexander, 34 Miss. 528.

79. Turpin *v.* Reynolds, 14 La. 473.

Advances after suit commenced.— A factor made advances on goods, before he had received the proceeds of any sales thereof, brought an action against the principal, and attached his property, to secure the amount advanced, and afterward made further advances on the same goods, according to the original consignment. It was held that the factor might apply the proceeds of the goods, as they were received, toward the discharge of the sums advanced after the action was commenced. Upham *v.* Lefavour, 11 Metc. (Mass.) 174.

80. See cases cited *infra*, this note.

Advance to several principals.— Where a general advance is made by a factor on a general deposit of goods owned by various persons. it must be borne ratably by all. Newbold *v.* Wright, 4 Rawle (Pa.) 195.

Advances outside of the contract.— If the principal procures and has the benefit of the advances, he is thereby precluded from objecting to them as not answering the agreement, whatever may have been the form in which they are made. Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720.

Payment of principal's debts.— Payments made by a factor of debts due by his principal are considered as money advanced by the factor, and, without a subrogation to the rights of the creditor, the factor cannot claim any privilege arising from the nature of the debts thus paid. Shaw *v.* Knox, 12 La. Ann. 41.

81. Consequa *v.* Fanning, 3 Johns. Ch. (N. Y.) 587; Jackson *v.* Bissonette, 24 Vt. 611.

Application of payments.— While a factor making advances and receiving payments from time to time can claim only the balance as an existing debt and payments are applied by him to the debts in the order of time in which they accrue, the rule is not inflexible; and if a different application of payments is shown or is to be inferred from the course of dealing between the parties then the rule does not apply. Alabama Gold L. Ins. Co. *v.* Sledge, 62 Ala. 566.

82. Walters *v.* McGirt, 8 Rich. (S. C.) 287; Sollee *v.* Meugy, 1 Bailey (S. C.) 620.

An advance in anticipation of produce to be forwarded entitles the factor to interest on such advance. Cheesborough *v.* Hunter, 1 Hill (S. C.) 400.

Interest on any surplus of cash paid over cash received may be claimed, if the factor pays the draft of the planter, drawn on him for cotton consigned for sale. Howard *v.* Behn, 27 Ga. 174.

Interest on a general balance against the principal for advances is allowable. Smetz *v.* Kennedy, Riley (S. C.) 218.

Discount of principal's paper.— Although a factor is entitled to a discount when notes given him by his principal are really discounted, yet if they remain in the hands of the merchant and he advances the money he is not entitled to such discount. Kahn *v.* Becnel, 108 La. 296, 32 So. 444.

A del credere agent is not entitled to interest for advances, since he is by his contract bound for the payment of the price of the goods. Wittkowski *v.* Harris. 64 Fed. 712.

83. Mills *v.* Johnston, 23 Tex. 308.

84. Kennedy *v.* Gibbs, 15 Ill. 406.

85. Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124.

Interest allowed until breach see Willis *v.* Thacker, 20 Tex. Civ. App. 233, 49 S. W. 128.

b. Forfeiture of Right to Be Reimbursed. Breach of his contract or of his principal's orders will make the factor responsible for the resulting damage,[86] and his claim for reimbursement may also be forfeited by tort.[87]

3. Security of Factor — a. Joint Liability of the Fund and of the Principal Personally. A factor in the absence of a special agreement to the contrary has the personal security of his principal as well as a lien on the goods for his advances,[88] but an agent under a *del credere* commission, after selling the goods, cannot sue his principal for advances covered by the selling price which he has guaranteed.[89] Either security[90] may be waived,[91] although the factor is sometimes required to exhaust the fund in his hands before enforcing the personal liability of the principal.[92]

b. Lien[93] — (i) *Right to and Existence of in General.* A factor has a lien on the goods of his principal in his hands for his compensation and reimbursement.[94] It rests upon the terms of the contract between factor and

86. Bell *v.* Palmer, 6 Cow. (N. Y.) 128. See also Hardeman *v.* Ford, 12 Ga. 205 (shipment to another port); Hott's Estate, 4 Del. Co. (Pa.) 363 (sale below agreed price); Porter *v.* Heath, 2 Tex. App. Civ. Cas. § 124 (sale without order).

Mistake.— In an action to recover the difference between the prices at which factors were instructed to sell and the lower prices at which they did sell, where it appears that the factors acted in good faith and under a mistake as to their instructions, they are entitled, on an accounting for the goods so sold at the prices fixed by the instructions, to an allowance for any charges and advances existing in their favor. Charley *v.* Watson, 23 N. Y. Wkly. Dig. 189.

Subagent — Instructions.— Where a factor who undertakes to ship and sell cotton in another market by an agent of his selection sells it for a sum less than his advances and charges, and seeks to recover the deficit from the principal, he must show that he promptly and faithfully imparted to such agent the identical injunctions imposed upon him. Strong *v.* Stewart, 9 Heisk. (Tenn.) 137.

87. Nugent *v.* Hickey, 2 La. Ann. 358, holding that where the crops of a plantation managed by an agent are sold by factors who, instead of applying the proceeds to the payment of their advances for the plantation, appropriate them to a private debt of the agent, they have no claim against the planter.

Forfeiture of the factor's lien see *infra*, I, E, 3, b, (VII).

88. Corlies *v.* Cumming, 6 Cow. (N. Y.) 181; Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9; Graham *v.* Ackroyd, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046, 1 Wkly. Rep. 107, 44 Eng. Ch. 186.

Where goods are lost at sea and the insurance thereon is void the factor who made advances on the faith of the bill of lading and insurance certificate can recover from his consignor. Knfeke *v.* Kehlor, 19 Fed. 198.

89. Graham *v.* Ackroyd, 10 Hare 192, 17 Jur. 657, 22 L. J. Ch. 1046, 1 Wkly. Rep. 107, 44 Eng. Ch. 186. See also Balderston *v.* National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772.

90. Waiver of lien see also *infra*, I, E, 3, b, (VI).

91. Waiver of lien.— Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66 (holding that a factor may renounce his lien on the goods without affecting his remedy against the person); Wilmerding *v.* Hart, Lalor (N. Y.) 305; Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163.

Waiver of personal claim.— If a consignee agrees that for advances made "he will hold for reimbursement on the amount and net proceeds of said goods, which are only considered answerable for said amount advanced," it is a waiver of any personal claim against the owner for reimbursement. Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

Taking a purchaser's note to the factor's own order for the amount of the commissions, storage, and for a balance due him from the consignor on a past account, and retaining the same, remitting the balance to the consignor, bars the factor from recovering from the consignor, although the maker of the note becomes insolvent before its maturity. Indianapolis Rolling Mill Co. *v.* Addy, 5 Ohio Dec. (Reprint) 588, 6 Am. L. Rec. 764, 3 Cinc. L. Bul. 293.

92. Denney *v.* Wheelwright, 60 Miss. 733; Gihon *v.* Stanton, 9 N. Y. 476; Corlies *v.* Cumming, 6 Cow. (N. Y.) 181.

Under an agreement by which a factor was to sell under a del credere commission, and which also bound him to make advances to a certain per cent on the goods consigned him, he cannot resort to the consignor for such advances before exhausting the property in his hands, although the agreement provides that he shall have interest on his advances. Balderston *v.* National Rubber Co., 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772, opinion by Tillinghast, J.

Factor must elect.— Where goods are sold by a factor after making advances thereon, and he has received the proceeds from the sale, he cannot, while retaining the fund, sue the consignor for the advances. Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163.

93. See, generally, Liens.

94. Duguid *v.* Edwards, 50 Barb. (N. Y.) 288.

principal,[95] and therefore does not exist if the advances were made upon personal credit exclusively,[96] or if the factor acquired the property in bad faith.[97] No express agreement for a lien is necessary.[98] A principal or his assignee who demands a return of the goods must first satisfy the factor's lien thereon for advances, disbursements, etc.[99] The lien is a personal privilege and cannot be transferred, and no question can arise upon it except between the principal and the factor.[1]

(II) *Causes Giving Rise to Lien* — (A) *Services.* The factor's commissions or other compensations are secured by the lien.[2]

(B) *Expenses and Advances.* The lien secures his advances made on the faith of the consignment[3] and all disbursements made to preserve and protect

A factor has a special property only, and, subject to the lien for factorage charges, the owner may dispose of the goods as he pleases, and the conveyance will carry the right. The Packet, 18 Fed. Cas. No. 10,655, 3 Mason 334.

A subagent employed by the factor to sell the goods has no lien as against the principal. Phelps *v.* Sinclair, 2 N. H. 554.

A factor who has made purchases for his principal has a lien for all advances, for balances due, or for liabilities incurred in course of business. Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145.

95. Winter *v.* Coit, 7 N. Y. 288, 57 Am. Dec. 522. *Compare* Byrd *v.* Johnson, 38 Ga. 113, where under a Georgia statute a lien created by parol is good against the maker of it and his agents and purchasers with notice.

Advances or engagements not contemplated by the principal give the factor making them no privilege under La. Civ. Code, art. 3214. Smith *v.* McCall, 14 La. 7.

96. Wilmerding *v.* Hart, Lalor (N. Y.) 305.

97. People's Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949.

98. Haebler *v.* Luttgen, 61 Minn. 315, 63 N. W. 720.

An agreement to accept bills drawn upon him by the consignor for the amount of the goods on hand gives the factor a lien on the goods to the amount of acceptances outstanding. Nagle *v.* McFeeters, 97 N. Y. 196.

Instructions to apply the proceeds of a consignment to a bill give the factor who pays it before selling the property a privilege for his reimbursement, under La. Civ. Code, art. 3214. Cutters *v.* Baker, 2 La. Ann. 572.

99. Lehmann *v.* Schmidt, (Cal. 1889) 22 Pac. 973, (1890) 24 Pac. 120, 87 Cal. 15, 25 Pac. 161.

1. Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75. See also Ames *v.* Palmer, 42 Me. 197, 66 Am. Dec. 271; Barnes Safe, etc., Co. *v.* Bloch Bros. Tobacco Co., 38 W. Va. 158, 18 S. W. 482, 45 Am. St. Rep. 846, 22 L. R. A. 850; McCombie *v.* Davies, 7 East 5, 3 Smith K. B. 3, 8 Rev. Rep. 534; Daubigny *v.* Duval, 5 T. R. 604.

The factor's assignee for the benefit of the creditors is entitled to retain possession of a consignment to his assignors until all the outstanding notes given by him as advancements and negotiated by the assignors are paid. Cameron *v.* Crouse, 11 N. Y. App. Div. 391, 42 N. Y. Suppl. 58.

2. *Alabama.*— Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66.

Georgia.— Brown *v.* Clayton, 12 Ga. 564.

Illinois.—Winne *v.* Hammond, 37 Ill. 99.

Pennsylvania.—Smedley *v.* Williams, 1 Pars. Eq. Cas. 359. See also Watson *v.* Beatty, 10 Pa. Cas. 108, 13 Atl. 521.

United States.—Wolf *v.* Smythe, 30 Fed. Cas. No. 17,928, 7 Biss. 365.

See 23 Cent. Dig. tit. "Factors," § 65 *et seq.*

An intermeddler who sells the personal property of another on credit and takes notes for the purchase-price in his own name, and also a mortgage on the property securing said notes, acquires no lien on the property, and can confer none by assignment of the notes and mortgage to one who has notice of the facts. People's Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949.

3. *Alabama.*— Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Sawyer *v.* Lorillard, 48 Ala. 332; Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66.

Georgia.— Heard *v.* Russell, 59 Ga. 25.

Louisiana.— Bowker *v.* Connolly, 17 La. Ann. 12, under Civ. Code, art. 3214.

Maine.— Gragg *v.* Brown, 44 Me. 157.

New York.— Dows *v.* Greene, 32 Barb. 490 [*affirmed* in 24 N. Y. 638].

Ohio.— Landis *v.* Gooch, 1 Disn. 176, 12 Ohio Dec. (Reprint) 559.

Pennsylvania.—Smedley *v.* Williams, 1 Pars. Eq. Cas. 359; Higgins *v.* Grindrod, 16 Phila. 200.

South Carolina.— Frost *v.* Weathersbee, 23 S. C. 354.

Tennessee.— Owen *v.* Iglanor, 4 Coldw. 15.

United States.— De Wolf *v.* Howland, 7 Fed. Cas. No. 3,852, 2 Paine 356. See also Villialonga *v.* U. S., 8 Ct. Cl. 452, where it was said that there is no difference in principle between the case of an administrator and of a factor in possession with a lien upon the property for the advances made. The factor is entitled to hold the property. He may sell it to repay his advances, or maintain an action of trover or replevin to the exclusion of any action by his principal, and on recovering its value he becomes a trustee of the original owner to the extent of his residuary interest.

the property,[4] including payments for customs duties,[5] freight,[6] insurance,[7] salvage,[8] storage in the factor's warehouse,[9] and interest on advances made by him.[10]

(c) *General Balance.* In addition to the factor's commission, expenses, and advances on account of specific consignments, his lien protects his general balance against his principal growing out of similar dealings,[11] including therein the factor's liabilities incurred in the exercise of his agency.[12] It follows that when the general balance is against the factor he has no lien for commissions and dis-

A factor's acceptance of a draft on the faith of a consignment is an advance on it, giving the same privilege under La. Civ. Code, art. 3214, as an advance in money, and ordinary creditors cannot take the property from him without paying such advance. Lambeth *v.* Turnhull, 5 Rob. (La.) 264, 39 Am. Dec. 536; Powell *v.* Aiken, 18 La. 321; Turpin *v.* Reynolds, 14 La. 473.

Bad faith in making acceptances and the fact that the consignee is not hound to pay them must be shown by the consignee's creditor to defeat the consignee's privilege under La. Civ. Code, art. 3214, on property in his hands for acceptances made on the faith of a consignment. Lambeth *v.* Turnbull, 5 Rob. (La.) 264, 39 Am. Dec. 536.

An agent under a del credere commission has a lien for all commissions and advances to his principal. New York City Fourth Nat. Bank *v.* American Mills Co., 29 Fed. 611, 30 Fed. 420 [*affirmed* on other grounds in 137 U. S. 234, 11 S. Ct. 52, 34 L. ed. 655].

4. Sawyer *v.* Lorillard, 48 Ala. 332; Brown *v.* Clayton, 12 Ga. 564.

Expenses of converting a security into money are first to be deducted from the gross proceeds, and it is the balance only which is applicable to the discharge of the debt; and this is especially true when the creditor is a factor of the goods, for he has a lien for all these charges which cannot be divested without his consent. Sheldon *v.* Raveret, 49 Barb. (N. Y.) 203.

5. Higgins *v.* Grindrod, 16 Phila. (Pa.) 200.

6. Buchanan *v.* Suitzer, 14 La. Ann. 495 (under La. Civ. Code, art. 3214, as amended by St. [1841]); Paul *v.* Birch, 2 Atk. 621, 26 Eng. Reprint 771.

7. Wolf *v.* Smythe, 30 Fed. Cas. No. 17,928, 7 Biss. 365.

8. Buchanan *v.* Suitzer, 14 La. Ann. 495, holding that salvage paid on the reshipment of goods after shipwreck are proper charges under La. Civ. Code, art. 3214, as amended by St. (1841).

9. Higgins *v.* Grindrod, 16 Phila. (Pa.) 200.

10. Heins *v.* Peine, 6 Roh. (N. Y.) 420.

11. *Alabama.*— Schiffer *v.* Feagin, 51 Ala. 335; Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66.

Illinois.—Winne *v.* Hammond, 37 Ill. 99.

Indiana.— Johnson *v.* Clark, 20 Ind. App. 247, 50 N. E. 762.

Louisiana.— Cator *v.* Merrill, 16 La. Ann. 137. Before the act of 1841 was passed there was no lien for a general balance under Civ. Code, art. 3214. Gray *v.* Bledsoe, 13 La. 489; Collins *v.* Austin, 3 La. 301. See Goodhue *v.* McClarty, 3 La. Ann. 447. But see Price *v.* Bradford, 4 La. 35, holding that where a consignee is advised of successive shipments for each of which a draft is drawn on him, the balance of the first shipment in his hands will secure the second draft in preference to an attaching creditor. Before the promulgation of the Code (1824), it was held that a factor has a lien on the principal's goods for the general balance of his account. Patterson *v.* McGahey, 8 Mart. 486, 13 Am. Dec. 298.

Massachusetts.— Baker *v.* Fuller, 21 Pick. 318.

Missouri.— Parker *v.* Thompson, 120 Mo. 12, 25 S. W. 346.

New York.— Whitman *v.* Horton, 46 N. Y. Super. Ct. 531; Chapman *v.* Kent, 3 Duer 224; Myer *v.* Jacobs, 1 Daly 32; Brooks *v.* Bryce, 21 Wend. 14, holding that a factor in actual possession of two parcels of goods, obtained under distinct orders, for both of which he is in advance, although paid for one of the parcels, has a lien on both.

Ohio.— Jordan *v.* James, 5 Ohio 88; Grieff *v.* Cowguill, 2 Disn. 58.

Pennsylvania.—Wagenblast *v.* McKean, 2 Grant 393.

United States.— McCobb *v.* Lindsay, 15 Fed. Cas. No. 8,704, 2 Cranch C. C. 199.

England.— Kruger *v.* Wilcox, Ambl. 252, 27 Eng. Reprint 168, Dick. 269, 21 Eng. Reprint 272, 1 Ken. K. B. 32.

See 23 Cent. Dig. tit. "Factors," § 66.

12. Knapp *v.* Alvord, 10 Paige (N. Y.) 205, 40 Am. Dec. 241.

Unpaid drafts drawn and accepted in the course of the agency are within the protection of the lien. Parker *v.* Thompson, 120 Mo. 12, 25 S. W. 346, the opinion of the court being delivered by Black, J.

Unpaid notes given by the factor and negotiated by the consignor give the right of retention of possession of the goods. Cameron *v.* Crouse, 11 N. Y. App. Div. 391, 42 N. Y. Suppl. 58.

Factors who make divers purchases for their principal have no lien on goods thus purchased for damages arising from the principal's refusal to receive other goods purchased by them, which on such refusal their own vendor had retained and resold, leaving a claim for damages against them. Beakley *v.* Rainier, (Tex. Civ. App. 1903) 78 S. W. 702, 703.

bursements in respect to any specific consignment.[13] And under no circumstances can the lien for a general balance exist in opposition to the terms of a special contract under which the goods are received;[14] nor can there be a lien for a general balance where the relation of principal and factor does not exist,[15] as where there was a single transaction between the parties.[16] After the principal's death, the factor's lien for a general balance then accrued does not attach to property coming into the factor's possession thereafter by order of the principal's representative.[17] The doctrine of a factor's lien for a general balance of account never went so far as to embrace the price of goods sold by a factor to his principal, the transaction not being connected with the general purposes of their relations of principal and agent.[18]

(III) *Facts Necessary to Existence* — (A) *Principal's Ownership or Title.* As the lien is derived from the contract, it cannot exist unless the consignor is the lawful owner of the goods, especially if the factor has notice of any defect in the title,[19] and if the principal, after shipping the goods, parts with the title

13. Enoch *v.* Wehrkamp, 3 Bosw. (N. Y.) 398, holding that a factor who is indebted to his principal for moneys received on sales of goods has no lien upon goods subsequently consigned for expenses paid on account thereof, unless such expenses exceed the amount of such indebtedness.

In Louisiana, although Civ. Code, art. 3214, gave no lien for a general balance before its amendment in 1841 (*supra,* note 11), it was held that a consignee having mutual accounts with the consignor could claim no lien without showing a balance in his favor. So, without such showing he could claim no privilege for expenses on property consigned, there being between him and the consignor an unliquidated account. Russell *v.* Gale, 4 La. 182; Russell *v.* Buckles, 2 La. 417.

14. Schiffer *v.* Feagin, 51 Ala. 335; Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 10 Am. Dec. 363; Walker *v.* Birch, 6 T. R. 258. See Cowell *v.* Simpson, 16 Ves. Jr. 275, 280, 10 Rev. Rep. 181, 33 Eng. Reprint 989.

Where goods are consigned for a special purpose, the question whether the factor has or has not a lien for a general balance due him on his account depends upon the fact whether he did or did not receive notice of this special purpose. Archer *v.* McMechan, 21 Mo. 43.

Accepting a consignment with instructions as to payment of the proceeds defeats the factor's lien for a general balance under La. Civ. Code, art. 3214, as amended by the act of 1841. Goodhill *v.* McClarty, 3 La. Ann. 447. See also Walker *v.* Birch, 6 T. R. 258.

Written notice of intention to draw on the factor, given by the consignor when the goods were shipped, does not impair the factor's privilege under the Louisiana act of 1841, amending Civ. Code, art. 3214, as against an attaching creditor of the consignor, to secure himself for any balance due him. Buddecke *v.* Spence, 23 La. Ann. 367.

After refusing to accept a draft, with bill of lading attached, drawn against the consignment and discounted on the faith thereof, the factor was not at liberty to appropriate the property or its proceeds to his own use on account of advances made on prior shipments. Davenport Nat. Bank *v.* Homeyer, 45 Mo. 145, 10 Am. Dec. 363.

Joint ownership of goods consigned by one of the owners to a factor who has knowledge thereof, with instructions to put to the other owner's credit his fourth part when sold, precludes any lien on such part for a balance against the consignor. Branch *v.* Du Bose, 55 Ga. 21.

15. McKean *v.* Wagenblast, 2 Grant (Pa.) 462, where a person claiming liens was allowed a special one contracted for but where a lien for a general balance was denied.

16. De Wolf *v.* Howland, 7 Fed. Cas. No. 3,852, 2 Paine 356.

17. Wylly *v.* King, Ga. Dec. 7, Pt. II.

18. See Thacher *v.* Hannahs, 4 Rob. (N. Y.) 407.

19. *California.*— D. O. Mills, etc., Nat. Bank *v.* Porter, 73 Cal. 430, 11 Pac. 693, 15 Pac. 53.

Illinois.— Darlington *v.* Chamberlain, 120 Ill. 585, 12 N. E. 78.

Louisiana.— Hyams *v.* Smith, 6 La. Ann. 362.

New York.— Buckley *v.* Packard, 20 Johns. 421. See Cooper *v.* Hong Kong, etc., Banking Corp., 107 N. Y. 282, 14 N. W. 277 [*reversing* 13 Daly 183].

South Carolina.— Slater *v.* Gaillard, 1 Treadw. 248.

England.— Hammonds *v.* Barclay, 2 East 227.

See 23 Cent. Dig. tit. "Factors," § 65 *et seq.*

Death of principal.— Under Ky. Gen. St. c. 39, art. 2, § 33, providing that the estate of an insolvent, after satisfying certain expenses and prior liens, shall be distributed *pro rata* among all his creditors, where an administrator of an insolvent ships to certain commission merchants tobacco purchased with money advanced by them under an agreement between them and deceased that such tobacco should be shipped to and sold by them, and that they should retain their advancements and commission and have a lien for the same on such tobacco, such shipment does not perfect the lien of the commission merchants, and the proceeds of the sale

before the factor gets possession no lien arises.[20] But the principal's fraud in obtaining title does not affect a factor who has no notice thereof, and in such case the lien attaches as if the title were unquestioned.[21]

(B) *Possession by Factor*[22] — (1) NECESSITY OF. Possession, actual or constructive, is an essential element in the factor's lien.[23] Necessarily then it cannot be acquired before the goods come into his possession,[24] or be retained after his

of such tobacco should be distributed *pro rata* among all the creditors of deceased. Cook *v.* Brannin, 87 Ky. 101, 7 S. W. 877, 9 Ky. L. Rep. 955.

Notice — Shipping receipt.— A planter consigned cotton to a factor, taking from the railroad company both an original and a duplicate receipt, naming him as the consignor and the factor as consignee. He indorsed both receipts in blank, forwarded the original by mail to the factor without any accompanying letter, and deposited the duplicate in the hands of his own banker, without any authority to him to sell or part with it. The banker, without the consignor's knowledge or consent, indorsed and sent the duplicate to the factor, assuming to control the cotton as his own, advising him relative to the shipment, etc. Under these circumstances the factor paid the banker's drafts to an amount exceeding the value of the cotton, believing it to be the property of the banker, and having received no instructions whatever from the consignor. The banker became insolvent. It was held that the factor obtained no lien on the cotton for his advances. Tison *v.* Howard, 57 Ga. 410. See also Solly *v.* Rathbone, 2 M. & S. 298.

Evidence of title — Measurer's return.— A contracted to deliver to B two canal-boat loads of grain. The contract was entire in form, but after A had delivered one load he asked B for his check in payment for the same, having previously sent to B the measurer's return. B asked a few days' delay, in which A acquiesced, allowing B to retain the measurer's return. On the strength of this return (which, according to the practice then prevailing, entitled the holder to a bill of lading from the master of the vessel on board of which the grain was delivered) B obtained from C, a commission merchant, an advance of five thousand dollars. The next day B failed. It was held that C was entitled to retain the wheat as security for the money advanced by him. Winne *v.* McDonald, 39 N. Y. 233.

20. Swilley *v.* Lyon, 18 Ala. 552; Mauldin *v.* Armistead, 14 Ala. 702; Ruhl *v.* Corner, 63 Md. 179; Grove *v.* Brien, 8 How. (U. S.) 429, 12 L. ed. 1142; Ryberg *v.* Snell, 22 Fed. Cas. No. 12,190, 2 Wash. 403.

Capture at sea while the goods are in transit to the factor extinguishes his lien as against the captors. The Frances, 8 Cranch (U. S.) 418, 3 L. ed. 609.

21. Hoffman *v.* Noble, 6 Metc. (Mass.) 68, 39 Am. Dec. 711 (holding that if one obtains goods by fraudulent representations, and consigns them to a third party for sale, and he advances money thereon before the first seller interposes, the consignee will hold the goods against the first seller); Williams *v.* Tilt, 36 N. Y. 319; Bates *v.* Cunningham, 12 Hun (N. Y.) 21; Dows *v.* Greene, 32 Barb. (N. Y.) 490.

22. **An equitable lien** does not arise where parties attempt by an agreement to give one a factor's lien on property of the other, because possession of the property remained in the debtor, although the agreement was made in good faith. Ryttenberg *v.* Schefer, 131 Fed. 313.

23. *Georgia.*— Kollock *v.* Jackson, 5 Ga. 153.

Illinois.— Warren *v.* Columbus First Nat. Bank, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746 [*reversing* 50 Ill. App. 193].

Massachusetts.— Farnum *v.* Boutelle, 13 Metc. 159.

New Jersey.— Elwell *v.* Coon, (Ch. 1900) 46 Atl. 580.

Tennessee.— Woodruff *v.* Nashville, etc., R. Co., 2 Head 87, holding that if the goods consigned to the factor are *in transitu*, or if the factor has only a right of possession, the lien does not attach.

Texas.— Frost *v.* Deutsch, (Sup. 1890) 13 S. W. 981.

Vermont.— Elliot *v.* Bradley, 23 Vt. 217.

England.— Dixon *v.* Stansfeld, 10 C. B. 398, 70 E. C. L. 398.

See 23 Cent. Dig. tit. "Factors," § 67.

But in Mobile a factor who sells cotton for cash has a lien (under Ala. Rev. Code, §§ 1164, 1167) for the payment of the purchase-money, which continues for fifteen days from the time he gives a "final order" for delivery to the purchaser and is superior to the title of a subpurchaser who buys it before the expiration of the fifteen days. Beyer *v.* Bush, 50 Ala. 19.

24. Hamilton *v.* Campbell, 9 La. Ann. 531 (a case arising under La. Civ. Code, art. 3214); Bruce *v.* Andrews, 36 Mo. 593; Winter *v.* Coit, 7 N. Y. 288, 57 Am. Dec. 522; Oliver *v.* Moore, 12 Heisk. (Tenn.) 482.

A change of destination while in transitu bars a lien by the first consignee for any general balance against the consignor if he does not obtain possession before the carrier has received notice of the change. Strahorn *v.* Union Stock Yards, etc., Co., 43 Ill. 424, 92 Am. Dec. 142.

Although the advance be not simultaneous with the possession, the privilege, if made on the promise of a consignment, attaches as soon as possession is acquired under La. Civ. Code, art. 3214, in pursuance of the antecedent promise, and is effective where adverse rights are not in the meantime acquired. Campbell *v.* Penn, 7 La. Ann. 371.

possession has ceased,[25] and such possession must be lawful and not obtained by bad faith.[26]

(2) What Constitutes. What constitutes possession within the meaning of this rule depends on the circumstances of the case. In general the property must be so appropriated to the factor as to be under his control.[27] The mere acceptance by the factor of bills drawn against the goods gives no lien in the absence of other evidence of actual or constructive possession.[28] A mere agreement to ship goods in satisfaction of antecedent advances will not in general give the factor a lien upon them until they come into his actual possession; but if there is a specific pledge or appropriation of ascertained goods with the intention that they shall be a security for the advances, and they are deposited with a common carrier and the consignee notified, the latter has constructive possession and the lien is complete.[29] The case is somewhat strengthened if a shipper's receipt or bill

25. Ermeling *v.* Gibson Canning Co., 105 Ill. App. 196 (holding that a factor cannot acquire a lien upon goods or other proceeds by making advances after the possession of the goods has passed to a purchaser); Matthews *v.* Menedger, 16 Fed. Cas. No. 9,289, 2 McLean 145 (holding that the lien which a factor has for advances for purchases is extinguished if the property is voluntarily delivered unless the delivery be special so that the factor still retains the control of the property, in which case the lien is not relinquished. See also *infra*, I, E, 3, b, (VII).

26. Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290.

27. Rosenbaum *v.* Hayes, 10 N. D. 311, 86 N. W. 973, under N. D. Rev. Codes (1901), § 4836.

Delivery of a small part of a large quantity of iron sold by factors, where the buyers were, by a settlement with the principal, released from their contract as to the remainder of the iron by paying a certain bonus, entitled the factors, as against an assignee of the principal, to a lien for their commissions on this bonus in the hands of the purchaser, although the factors were never in actual possession of the undelivered iron. Lafferty *v.* Hall, 44 S. W. 426, 19 Ky. L. Rep. 1777.

Delivery to a warehouseman subject to the factor's control gives the factor a lien. Kollock *v.* Jackson, 5 Ga. 153. See also Pegram *v.* Carson, 10 Bosw. (N. Y.) 505, a case arising under the New York Factors Act.

Placing goods upon drays of an agent of factors for the purpose of having them transported to their warehouse places them in their possession sufficiently to support their lien. Burrus *v.* Kyle, 56 Ga. 24.

Transfer on the books of a cotton press by a usage in New Orleans prevents delivery to any but the transferee, and where cotton is so transferred it is a symbolical delivery, so that a commission merchant to whom it has been transferred can enforce his privilege against it for advances. Hamilton *v.* Campbell, 9 La. Ann. 531.

Where a factor is a joint occupant with his principal of certain premises, goods there found consigned to the factor and accounts for sales thereof are in his possession and subject to his lien, and those purchased of the principal and accounts for sales thereof are free of the lien, although all accounts are made payable to the factor by directions on the invoice sent to purchasers and the factor has made advances on all the goods. Ryttenberg *v.* Schefer, 131 Fed. 313. *Contra*, see *dictum* in Woodruff *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 87.

28. Dodge *v.* Wilbur, 10 N. Y. 579.

A lien on goods in transitu does not arise from a consignee's acceptance of bills drawn upon him by the consignors upon the understanding that goods should be shipped to him to be sold to meet the bills, he not having them in his possession either constructively by bill of lading or by actual delivery. Lewis *v.* Galena, etc., R. Co., 40 Ill. 281.

By letter of advice.— A draft on a commission merchant for a sum "as an advance on my crop of cotton," without advice of actual or intended shipment at any particular period, is not such a letter of advice as, under La. Civ. Code, art. 3214, gives the accepter a privilege over a creditor who attaches before the cotton comes into his hands. Baldwin *v.* Bracy, 1 La. 359. See also Hyde *v.* Smith, 12 La. 144.

29. *Alabama.*— Desha *v.* Pope, 6 Ala. 690, 41 Am. Dec. 76.

Georgia.— Hardeman *v.* De Vaughn, 49 Ga. 596. See also Elliott *v.* Cox, 48 Ga. 39.

Louisiana.— Hyde *v.* Smith, 12 La. 144. See also Ouachita Nat. Bank *v.* Weis, 49 La. Ann. 573, 21 So. 857.

New York.— Bailey *v.* Hudson River R. Co., 49 N. Y. 70; Holbrook *v.* Wight, 24 Wend. 169, 35 Am. Dec. 607.

Vermont.— Davis *v.* Bradley, 28 Vt. 118, 65 Am. Dec. 226, holding that a consignment in terms to a factor with advances on the strength of that consignment gives the factor a lien.

United States.— Nesmith *v.* Dyeing, etc., Co., 18 Fed. Cas. No. 10,124, 1 Curt. 130.

England.— Anderson *v.* Clark, 2 Bing. 20, 9 E. C. L. 463; Bryan *v.* Nix, 1 H. & H. 480, 8 L. J. Exch. 137, 4 M. & W. 775.

See 23 Cent. Dig. tit. "Factors," § 67.

The contrary rule seems to prevail in some states. Baker *v.* Fuller, 21 Pick. (Mass.) 318; Booner *v.* Marsh, 10 Sm. & M. (Miss.) 376, 48 Am. Dec. 754; Clemson *v.* Davidson, 5 Binn. (Pa.) 392.

of lading is assigned to the consignee,[30] but even this is sometimes held to be inconclusive.[31]

(iv) *Subject-Matter.* The lien is available against the goods,[32] and against the proceeds of the goods in the factor's hands,[33] and, it has been held, against the debt of the purchaser for goods sold on credit,[34] as well as against securities in the factor's possession.[35] The lien is restricted to no more than enough to secure the claim.[36]

(v) *Priorities.* The factor's lien once acquired is subordinate only to an outstanding legal title or to a paramount equity of which he has notice.[37] It is preferred to the claim of the principal's vendor, who has not received the price of his goods;[38] to the claim of the principal's vendee or assignee when the sale or assignment takes place after the lien has attached, especially if the purchaser has notice of the factor's claim;[39] to the claim of a subsequent *bona fide* holder of the

30. Adams *v.* Bissell, 28 Barb. (N. Y.) 382; Davis *v.* Bradley, 28 Vt. 118, 65 Am. Dec. 226 (holding that sending to a factor an ordinary shipper's receipt, without more, with acceptances on its faith, gives the factor a lien); Haille *v.* Smith, 1 B. & P. 563.

31. Saunders *v.* Bartlett, 12 Heisk. (Tenn.) 316, where a factor to whom cotton had been consigned by his debtor to be sold, and the proceeds applied on the debt, received the bill of lading, but the cotton was intercepted by an attachment, and it was held that possession of the bill of lading was not possession of the cotton, so as to confer any lien.

A delivery of property to a carrier by the owner, to be shipped to another point not the place of business of the factor, and the taking by the owner from the carrier of a bill of lading in the name of such factor and forwarding it to him are not conclusive on the question of the intent of the owner to deliver possession to the factor, so as to entitle the latter to a lien on the property, where there are other facts in the case tending to show that it was not the purpose of the owner to surrender possession to the factor, but that the object of shipping in the name of the factor was to obtain the benefit of a through rate. Rosenbaum *v.* Hayes, 5 N. D. 476, 67 N. W. 951.

32. Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66; Brown *v.* Clayton, 12 Ga. 564; Bowker *v.* Connolly, 17 La. Ann. 12; Jolly *v.* Blanchard, 13 Fed. Cas. No. 7,438, 1 Wash. 252.

33. *Alabama.*—Sawyer *v.* Lorillard, 48 Ala. 332; Martin *v.* Pope, 6 Ala. 532, 41 Am. Dec. 66.

Georgia.— Brown *v.* Clayton, 12 Ga. 564.

Indiana.— Shaw *v.* Ferguson, 78 Ind. 547.

South Carolina.— Frost *v.* Weathersbee, 23 S. C. 354.

United States.—McCobh *v.* Lindsay, 15 Fed. Cas. No. 8,704, 2 Cranch C. C. 215.

England.— Hudson *v.* Granger, 5 B. & Ald. 27, 24 Rev. Rep. 268, 7 E. C. L. 27; *In re* Pavy's Patent Felted Fabric Co., 1 Ch. D. 631, 45 L. J. Ch. 318, 24 Wkly. Rep. 507.

Insurance money.— One who has made advances on goods consigned to him and effected insurance for the benefit of the consignor has, on the destruction of the goods by fire without his fault, the same lien upon the insurance money that he had upon the goods themselves. Johnson *v.* Campbell, 120 Mass. 449. See also Man *v.* Shiffner, 2 East 523.

34. Bard *v.* Stewart, 3 T. B. Mon. (Ky.) 72; Drinkwater *v.* Goodwin, 1 Cowp. 251. But see *supra*, I, E, 3, b, (III), (B).

35. Brown *v.* Clayton, 12 Ga. 564.

Principal's note.— A commission merchant advanced money to his principal on his indorsement of a note, and charged the note in his general account. It was held that the mere charging of the note to the principal did not entitle the latter to its possession, and that the agent might retain it until he was paid the balance of his general account. Myer *v.* Jacobs, 1 Daly (N. Y.) 32.

36. Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. 130; Sewall *v.* Nichols, 34 Me. 582; Jolly *v.* Blanchard, 13 Fed. Cas. No. 7,438, 1 Wash. 252.

Shares in a ship and cargo or their proceeds, where several owners constitute one of their number their agent to receive and sell the cargo and distribute the proceeds, are subject to the lien of such agent as factor for a general balance of account. Bradford *v.* Kimberly, 3 Johns. Ch. (N. Y.) 431.

37. Barnett *v.* Warren, 82 Ala. 557, 2 So. 457; Eaton *v.* Truesdail, 52 Ill. 307; Phillips *v.* Feliciana Cotton Oil Co., 48 La. Ann. 404, 19 So. 258.

Preference.— A consignor of property to be sold on commission, when he has placed it in the hands of his creditor consignee without conditions, cannot, by drawing on the latter to cover the proceeds in favor of another creditor as payee, prefer the latter's claim. Johnson *v.* Clark, 20 Ind. App. 247, 50 N. E. 762.

38. Levering *v.* Clark, 22 La. Ann. 376; Rawls *v.* Deshler, 4 Abb. Dec. (N. Y.) 12, 3 Keyes (N. Y.) 572, 3 Transcr. App. (N. Y.) 91; Laughlin *v.* Ganahl, 11 Rob. (La.) 140. See, however, Patten *v.* Thompson, 5 M. & S. 350, 17 Rev. Rep. 350, holding that an unpaid vendor may stop *in transitu* goods sent by the vendee to his factor (both being insolvent), although the bill of lading is in the hands of the factor and there is a running account between him and the vendee.

39. *Illinois.*— Nelson *v.* Chicago, etc., R. Co., 2 Ill. App. 180.

bill of lading;[40] to the claim of a creditor of the consignor or owner levying a subsequent attachment or execution;[41] to the claim of a second factor, with notice, to whom a part of the goods are consigned in violation of the original contract;[42] to the claim of a banker to whom the factor is instructed to transmit the proceeds but of whose advancements the factor has no notice;[43] to the claim of the factor's vendee to whom the goods have not been delivered;[44] and to the claim of a general creditor of the principal for supplies furnished in producing the goods.[45] It is inferior to the claim of the government for taxes due from the principal upon the goods[46] and to a prior mortgage.[47]

Kentucky.— Bard *v.* Stewart, 3 T. B. Mon. 72.

New York.— Dows *v.* Greene, 16 Barb. 72.

Ohio.— Jordan *v.* James, 5 Ohio 88.

United States.— De Wolf *v.* Howland, 7 Fed. Cas. No. 3,852, 2 Paine 356.

40. Wolf *v.* Smythe, 30 Fed. Cas. No. 17,928, 7 Biss. 365; Man *v.* Shiffner, 2 East 523.

Prior holder of bill of lading.— Where a consignor, being indebted to the consignee for advances, agreed to give him a prior security on the property shipped, the lien is good as between the parties, but does not affect the rights of a *bona fide* pledgee of the bill of lading for value, made prior to the delivery of the property to the consignee. Chicago Mar. Bank *v.* Wright, 48 N. Y. 1 [*affirming* 46 Barb. 45].

Duplicate bills of lading.— When a shipper has shipped goods to his factor in the usual course of business, and has sent forward with the shipment or by mail one of the bills of lading consigning the goods to him, the shipper cannot destroy the lien and privilege that the factor and consignee will have for advances upon the goods under La. Civ. Code, art. 3214, by transferring other bills of lading to secure other debts. Funkhouser *v.* Dutcher, 14 La. Ann. 494.

41. Burrus *v.* Kyle, 50 Ga. 24; Printup *v.* Johnson, 19 Ga. 73; Maxen *v.* Landrum, 21 La. Ann. 366; Park *v.* Porter, 2 Rob. (La.) 342; Skillman *v.* Bethany, 2 Mart. N. S. (La.) 104; McNeill *v.* Glass, 1 Mart. N. S. (La.) 261; Canfield *v.* McLaughlin, 9 Mart. (La.) 303; Kirkman *v.* Hamilton, 9 Mart. (La.) 297 (some of which cases arose before the enactment of La. Civ. Code, art. 3214, and others thereafter); Brownell *v.* Carnley, 3 Duer (N. Y.) 9; Grosvenor *v.* Phillips, 2 Hill (N. Y.) 147; Harrison *v.* Mora, 150 Pa. St. 481, 24 Atl. 705. But *compare* Gray *v.* Bledsoe, 13 La. 489, 491; Baker *v.* Fuller, 21 Pick. (Mass.) 318.

An attachment fails where the consignor has lost control over the goods and his right to change their destination before his creditor levies his attachment. Cammack *v.* Floyd, 10 La. Ann. 351; Hill *v.* Simpson, 8 La. Ann. 45; Oliver *v.* Lake, 3 La. Ann. 78; St. Mary's Bank *v.* Morton, 12 Rob. (La.) 409; Urie *v.* Stevens, 2 Rob. (La.) 251; Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206; Russell *v.* Gale, 4 La. 183; Babcock *v.* Malbie, 7 Mart. N. S. (La.) 137.

The bill of lading must have been received by the consignee before the creditors of the consignor levy their attachment. Delop *v.* Windsor, 26 La. Ann. 185; Magoun *v.* Davis, 8 La. Ann. 315; Wilson *v.* Smith, 12 La. 375; Hyde *v.* Smith, 12 La. 144; Lee *v.* Davis, 3 La. 561; Woolsey *v.* Cenas, Mart. (La.) 26. *Compare* Grove *v.* Brien, 8 How. (U. S.) 429, 12 L. ed. 1142. See also Peters *v.* Elliott, 78 Ill. 321.

Execution takes priority when it is in the sheriff's hands before the bill of lading is in the factor's hands. Desha *v.* Pope, 6 Ala. 690, 41 Am. Dec. 76.

In Louisiana the lien must be recorded as required for all mortgage and privileges by Const. § 123 and Rev. St. § 3039; otherwise it has no priority over a creditor seizing by judgment before such record. Loeb *v.* Blum, 25 La. Ann. 232.

Merely placing grain on board the cars consigned to a commission merchant under an agreement that he was to sell it and apply the proceeds to repay advances previously made does not give to the consignee priority over a creditor levying an attachment before the shipping receipts were forwarded. Hodges *v.* Kimball, 49 Iowa 577, 31 Am. Rep. 158.

42. Triest *v.* Noval, 32 Misc. (N. Y.) 386, 66 N. Y. Suppl. 717.

The second factor has priority where the notes deposited with the first factor are by him transferred with the maker's consent to the second factor to secure the latter's advances. Walmsley *v.* Resweber, 105 La. 522, 30 So. 5.

43. Reynolds *v.* Davis, 5 Duer (N. Y.) 611.

44. Harrison *v.* Mora, 150 Pa. St. 481, 24 Atl. 705.

45. Clark *v.* Dibbins, 52 Ga. 656, holding that the lien of a warehouseman and factor who has made advances on cotton produced on rented land and stored with him by the tenant is superior to that of the landlord for rent, or of a merchant for fertilizers sold to the debtor, of which the factor had no notice.

46. Atty.-Gen. *v.* Trueman, 13 L. J. Exch. 70, 11 M. & W. 694.

47. Booker *v.* Jones, 55 Ala. 266. See also Frost *v.* Deutsch, (Tex. Sup. 1890) 13 S. W. 981. See, however, Richardson *v.* Dinkgrave, 26 La. Ann. 651, holding that where a factor having a mortgage upon a plantation to secure an antecedent debt makes advances to a planter and receives the crop, a lien rests upon the crop, and must first be discharged before any part of the proceeds can be applied to the discharge of the mortgage.

(VI) *WAIVER.* The factor may waive his lien, once acquired, by contract express or implied,[48] by voluntarily parting with the possession of the goods or suffering them to be attached,[49] by selling them in his own name and advancing the purchase-price to the owner,[50] by pledging them,[51] or by taking other security for the debt.[52]

(VII) *EXTINGUISHMENT.* The lien cannot be extinguished or lost without the consent of the factor or his neglect to enforce it,[53] but ceases on the payment[54] or tender[55] of the amount of his debt; and it may be extinguished by his fraud or other wrongful act.[56] An assignment of the lien after proceedings to enforce

48. Sawyer *v.* Lorillard, 48 Ala. 332; Parker *v.* Thompson, 120 Mo. 12, 25 S. W. 346, holding that a factor's lien is not waived by the failure to reserve it in the written contract creating the agency, as it is only waived by express terms or necessary implication.

Contract implied.— A refusal by a factor to deliver goods consigned to him, assigning reasons therefor, but not alleging a lien, is equivalent to a waiver of such lien. McPherson *v.* Neuffer, 11 Rich. (S. C.) 267.

Holding out the principal as owner does not divest a factor of his lien. Seymour *v.* Hoadley, 9 Conn. 418.

Pleading ownership.— In an action to enforce a factor's lien an amendment of the complaint asserting plaintiff's ownership of the goods, which is offered but afterward withdrawn by plaintiff and disallowed by the court, is not a waiver of the lien. Rosenbaum *v.* Hayes, 8 N. D. 461, 79 N. W. 987.

It is a question for the jury whether defendant has waived a lien on goods for advances. Buckley *v.* Handy, 2 Miles (Pa.) 449.

49. Sawyer *v.* Lorillard, 48 Ala. 332; Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; Pallen *v.* Bogy, 78 Mo. App. 88; Kruger *v.* Wilcox, Ambl. 252, 27 Eng. Reprint 168, Dick. 269, 21 Eng. Reprint 272, 1 Ken. K. B. 32.

Knowingly permitting the owner to take the property in his possession for several weeks and treat it as his own and in his own interest and largely denude it of value and ship a portion of it in his own name raises a conclusive presumption that the factor's lien was lost; but, if thereafter the remnant of the property be again placed in the hands of the factors as such, his lien will again attach. Rosenbaum *v.* Hayes, 8 N. D. 461, 79 N. W. 987.

Shipping the goods on the principal's account and at his risk is a waiver of the factor's lien. Sweet *v.* Pym, 1 East 4, 5 Rev. Rep. 497.

50. Ermeling *v.* Gibson Canning Co., 105 Ill. App. 196; Walker *v.* Dubuque Fruit, etc., Co., 106 Iowa 245, 76 N. W. 673; Houghton *v.* Matthews, 3 B. & P. 485.

51. Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303; McCombie *v.* Davies, 7 East 5, 3 Smith K. B. 3, 8 Rev. Rep. 534.

A mere deposit in the hands of a third person does not extinguish the lien. Ganseford *v.* Dutillet, 1 Mart. N. S. (La.) 284. See also McCombie *v.* Davies, 7 East 5, 3 Smith K. B. 3, 8 Rev. Rep. 534.

52. Darlington *v.* Chamberlain, 20 Ill. App. 443.

Offered security must be accepted. Rosenbaum *v.* Hayes, 10 N. D. 311, 86 N. W. 973.

Acceptance of draft.— Where a purchasing factor had transmitted two distinct orders for goods, and on the arrival of the first parcel delivered an invoice of the same to his principal and accepted his draft for the amount thereof, payable at a future day, he thereby waived his lien, which otherwise would have existed on the first parcel, for the price paid or responsibility assumed on account of the second parcel. Bryce & Rennie *v.* Brooks, 26 Wend. (N. Y.) 367.

Drawing on the principal for the debt does not destroy the lien. De Wolf *v.* Howland, 7 Fed. Cas. No. 3,852, 2 Paine 356.

53. Grieff *v.* Cowgull, 2 Disn. (Ohio) 58.

54. Woodruff *v.* Nashville, etc., R. Co., 2 Head (Tenn.) 87.

Where a second factor obtains as collateral for his advances notes and mortgages given to secure advances by the first factor, his mortgage rights are unaffected by the fact that the accounts between the first factor and the common debtor may be subsequently settled and paid. Walmsley *v.* Resweber, 105 La. 522, 30 So. 5.

55. Miller *v.* Price, (Cal. 1895) 39 Pac. 781.

56. Cotton *v.* Hiller, 52 Miss. 7 (violation of the principal's orders); Terwilliger *v.* Beals, 6 Lans. (N. Y.) 403 (refusal to disclose the amount of his advancement for freight on a consignment of goods when the principal offers to reimburse him).

A wrongful sale of the principal's goods waives the factor's lien for advances and charges. Walker *v.* Dubuque Fruit, etc., Co., 113 Iowa 428, 87 N. W. 614, 53 L. R. A. 775. See also Miller *v.* Price, (Cal. 1895) 39 Pac. 781.

Denial of principal's interest.— A factor who, having a lien on goods for a sum far exceeding their value, when the goods are attached by a creditor certifies in good faith that he holds no goods for the benefit of the consignor, does not thereby lose his lien. Mutual Redemption Bank *v.* Sturgis, 9 Bosw. (N. Y.) 660.

Omission to inform the purchaser that advances had been made on the cotton purchased does not estop the factor from claiming reimbursement out of the proceeds of

are begun and the rights of the parties are fixed does not destroy it, for it is merged in the suit.[57]

(VIII) *ENFORCEMENT.*[58] The lien may be enforced by the factor's holding the goods, proceeds, or securities until paid[59] and by suit to regain possession of them when he has been wrongfully deprived thereof,[60] or to recover their value.[61]

4. ACTION FOR COMPENSATION AND REIMBURSEMENT[62] — **a. Right of Action.** As a general rule[63] the factor must look first to the goods for his reimbursement for advances made; he cannot charge the consignor personally without having first shown the fund to be insufficient.[64] Advancements on account beyond the amount agreed upon between the parties constitute a present legal debt giving a present legal right of action;[65] and in some jurisdictions it is held that in the absence of an agreement or other sufficient circumstance a factor's right of action accrues immediately upon making advances of any amount.[66] In any jurisdiction it would seem that the factor could not maintain an action for his advances without accounting for or showing what has become of the principal's goods or funds intrusted to the factor's care.[67] Where goods have been consigned to be sold at a price limited, a factor may after a reasonable time, if the price cannot be

the sale, where the purchaser deposited the receipts for the cotton with him and directed that it be sold on the purchaser's account. Daniel *v.* Swift, 54 Ga. 113.

57. Rosenbaum *v.* Hayes, 10 N. D. 310, 86 N. W. 973.

58. Affidavit after qualification of representative.— A factor, in order to preserve a lien held by him under Ga. Code, § 1977, the principal having died, and also his priority in the distribution, may make the affidavit required by law for its enforcement, within twelve months after the qualification of the representative of the estate, provided there be no levy thereon till after the twelve-months' period of exemption from suit allowed executors and administrators. Moring *v.* Flanders, 49 Ga. 594.

59. Bowker *v.* Connolly, 17 La. Ann. 12; Jolly *v.* Blanchard, 13 Fed. Cas. No. 7,438, 1 Wash. 252, holding that a factor who is ordered by his principal to ship goods, on which he has a lien for advances, to a third person, may instruct such third person to deliver the goods as ordered by the principal only on payment of the amount of such advances.

Bill of sale by principal.— An agent under a *del credere* commission has a lien for all commissions and advances to his principal, and if these exceed the value of the goods, a bill of sale to him by the insolvent principal, although perhaps technically illegal, will be sustained as a foreclosure of the lien. New York City Fourth Nat. Bank *v.* American Mills Co., 29 Fed. 611, 30 Fed. 420 [*affirmed* in 137 U. S. 234, 11 S. Ct. 52, 34 L. ed. 655].

60. Sewall *v.* Nichols, 34 Me. 582; Lewis *v.* Mason, 94 Mo. 551, 5 S. W. 911, 8 S. W. 735; Valle *v.* Cerre, 36 Mo. 575, 88 Am. Dec. 161, all holding that the factor may maintain replevin. See People's Bank *v.* Frick, 13 Okla. 179, 73 Pac. 949, holding that a factor having a lien on notes in his hands belonging to his principal, for commission, can satisfy his lien only by some proceeding recognized by law to foreclose his interest and to extinguish the title of his principal.

61. Adams *v.* Bissell, 28 Barb. (N. Y.) 382, holding that consignees holding the bill of lading have an action against the carrier for the loss or conversion of the goods. See also Urquhart *v.* McIver, 4 Johns. (N. Y.) 103.

A factor may sue in equity to enforce his lien upon the goods of his consignor in his possession for the general balance of his account, and is entitled to judgment in such suit for any deficiency after the sale of such goods. Whitman *v.* Horton, 46 N. Y. Super. Ct. 531 [*affirmed* in 94 N. Y. 644].

62. Venue.— If an issue be made in the foreclosure of a factor's lien under the Georgia act of 1866, or if there be a claim to the property, the papers are to be returned to and the issue tried in the county of the residence of defendant. Hardeman *v.* De Vaughn, 49 Ga. 596.

63. In the absence of any express agreement to look exclusively to the fund arising from the consigned property, the factor may have recourse to the principal for the balance due after the fund is exhausted. Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360; Peisch *v.* Dickson, 19 Fed. Cas. No. 10,911, 1 Mason 9.

64. Gihon *v.* Stanton, 9 N. Y. 476. See also Corlies *v.* Cumming, 6 Cow. (N. Y.) 181.

65. Bradley *v.* Richardson, 3 Fed. Cas. No. 1,786, 2 Blatchf. 343, 23 Vt. 720, where the court said that the amount of advances agreed upon might be treated as a payment in advance of so much toward the goods and so far the one might be set off against the other.

66. Beckwith *v.* Sibley, 11 Pick. (Mass.) 482. See also Dolan *v.* Thompson, 126 Mass. 183.

For storage of goods, although still in his possession, the factor may maintain an action of debt or *indebitatus assumpsit* against the owner. Mobile, etc., R. Co. *v.* Whitney, 39 Ala. 468, holding that therefore the owner is liable as garnishee.

67. See Mertens *v.* Nottebohms, 4 Gratt. (Va.) 163.

obtained, call for payment or further security and may sue for the amount due.[68] Inasmuch as a factor has both the security of his lien on the goods and the personal security of the principal for advances made[69] he may waive his lien without affecting his personal remedy against the principal.[70]

b. Defenses. *Res judicata* is a good defense as in other cases.[71] In an action by a factor for his advances, the principal may show in bar of or in reduction of the claim of the factor want of diligence in selling to a buyer of doubtful solvency.[72] After the factor has rendered his monthly statements for a long period of time, which statements have been admitted to be correct, it is too late to plead usury in defense of an action for a balance due the factor.[73] In an action by a factor against his principal for commissions on sales made by the principal in violation of an agreement that the factor should be sole agent of the principal's goods, a breach of a subsequent promise of the factor to be the principal's surety upon a contract obtained by defendant of the United States government for a sale of goods thereto is no defense, since the factor had the right to recede from the promise and since the promise could have no effect upon the contract between the principal and the factor.[74] Where a factor took a note in his own name from a purchaser who subsequently failed and made an assignment by an indenture which contained a release of all debts due the creditors who executed the same, among whom was the factor, the principal may in an action by the factor for advances avail himself of the factor's release of the purchaser.[75]

c. Pleading.[76] The ordinary rules of pleading relating to amendments[77] and to aider by verdict[78] have been applied in actions of this character. An averment that defendants promised to pay plaintiffs their "reasonable costs, charges and commissions" relating to the contract is insufficient without a statement of what the services were reasonably worth, as in the *quantum meruit* counts.[79] To a declaration by a factor to recover the balance of an account principally for advances a plea which sets up a violation of an agreement to sell the goods at a certain price whereby defendant was damaged to a greater amount than the sum sued for is insufficient if it does not state at what time the agreement was made.[80]

68. Upham *v.* Lefavour, 11 Metc. (Mass.) 174; Frothingham *v.* Everton, 12 N. H. 239.

69. Corlies *v.* Cumming, 6 Cow. (N. Y.) 181. See *supra*, I, E, 3, a.

70. Martin *v.* Hope, 6 Ala. 532, 41 Am. Dec. 66.

71. White *v.* Savage, 94 Me. 138, 47 Atl. 138.

72. Burrill *v.* Phillips, 4 Fed. Cas. No. 2,200, 1 Gall. 360. See Brown *v.* Clayton, 12 Ga. 564, holding, however, that in an action of assumpsit brought by the principal against the factor for money in his hands arising from the sale of a consignment, if the factor sets up in reduction of plaintiff's claim an account for expenses incurred by him in fitting the goods for sale in market, plaintiff cannot set up in rejoinder the negligence of the factor, but must bring his action for damages. See also Dodge *v.* Tileston, 12 Pick. (Mass.) 328.

73. Woodward *v.* Jewell, 25 Fed. 689.

74. Hadden *v.* Dimick, 31 How. Pr. (N. Y.) 196 [*reversed* on other grounds in 13 Abb. Pr. 135].

75. Deland *v.* Amesbury Woolen, etc., Mfg. Co., 7 Pick. (Mass.) 244, holding that parol evidence was not admissible to show that the factor intended to release only the debts due to himself.

76. See, generally, PLEADING.

77. In *indebitatus assumpsit* against a factor to recover the amount of sales under a *del credere* commission, the original counts were for balance of account, money had and received, and on an *insimul computassent*. Plaintiff was permitted to amend by declaring against defendant as a simple factor, and also as a factor with a *del credere* commission. It was held that all the counts were for the same cause of action, and that the amendment was allowable. Swan *v.* Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282.

78. A declaration that defendant is indebted to plaintiff for commissions due for his having guaranteed the payment of the price of goods sold by him as factor of defendant to third persons and at defendant's request is sufficient after verdict. Solly *v.* Weiss, 2 Moore C. P. 420, 8 Taunt. 371, 4 E. C. L. 189.

79. Rice *v.* Montgomery, 20 Fed. Cas. No. 11,753, 4 Biss. 75.

Sufficiency of complaint: For the deficiency of the proceeds of a consignment to pay a draft drawn against it see Blackmar *v.* Thomas, 28 N. Y. 67. For commissions on sales and leases under a special contract see Singer Mfg. Co. *v.* Wood, 1 Tex. App. Civ. Cas. § 1177.

80. Grimes *v.* Reese, 30 Ga. 330.

d. Evidence[81] — (I) *In General.* With respect to the burden of proof,[82] the indulgence of presumptions,[83] the admissibility of evidence,[84] and the weight and sufficiency of evidence[85] the usual rules of evidence govern.

(II) *Custom or Usage.* Evidence may be given to show the customs of merchants so far as they concern the transactions between the parties and the questions at issue between them.[86] The usual rule that the custom must be so generally long established and notorious that the party against whom it is to operate will be presumed to have knowledge of it is applied.[87] So also is the rule

81. See, generally, Evidence.

Variance see Mixer *v.* Williams, 17 Vt. 457.

82. See cases cited *infra*, this note.

That factor was negligent.— Where in an action to recover for overdrafts defendant raises the issue that the goods had been sold for less than their value through the negligence and mismanagement of plaintiff, the burden of proof is upon defendant. Govan *v.* Cushing, 111 N. C. 458, 16 S. E. 619.

The burden of adducing evidence is not shifted on the ground that the market price is peculiarly within plaintiff's knowledge, for this is a matter susceptible of easy proof, although the market be in a foreign country, the communications with that country and the means of obtaining proofs being attended with less trouble than they would be in many parts of the United States. Govan *v.* Cushing, 111 N. C. 458, 461, 16 S. E. 619. See Evidence, 16 Cyc. 936, 937.

That items of account are correct.— In an action by a factor on an account current for a part of which balance in favor of the factor a promissory note had been given by defendant, an answer containing a general denial and a special averment that at the time defendant signed the promissory note he had not examined the accounts of plaintiff against him imposes upon plaintiff the burden of proof as to the correctness of the items of the account under consideration. Byrne *v.* Grayson, 15 La. Ann. 457.

That advancement was for advantage of principal.— Where a factor voluntarily pays the amount of a reclamation made upon him for overdrafts on those who sold the goods and sues to recover the amount from his principal he must make proof of the state of the account in order to show that the money advanced by plaintiffs was paid for the advantage of defendants. Blakely *v.* Frazier, 11 S. C. 122.

Where a factor claims a privilege under La. Code, art. 3214, for advances he must show affirmatively that the property was at his disposal or that he had received a bill of lading or letter of advice previous to seizure by a creditor of his consignor. Hyde *v.* Smith, 12 La. 144.

Defendants in replevin, claiming a factor's lien on property of which they obtained possession by trespass must prove that the work and labor were done, and the care bestowed, on the property, under a contract, express or implied, with the owner, that he should render compensation therefor. Pallen *v.* Bogy, 78 Mo. App. 88.

83. Earl Fruit Co. *v.* Thurston Cold-Storage, etc., Co., 60 Minn. 351, 62 N. W. 439.

84. See cases cited *infra*, this note.

An account of sales rendered not in accordance with the contract between the principal and factor is inadmissible in evidence. Coe *v.* Nash, 28 Mich. 259.

Best and secondary evidence.—General rule applied see Myers *v.* Brice, 2 Pennyp. (Pa.) 382, where in an action by a factor for advances the defense was that the transaction was a sale, and defendant offered in evidence the books of original entry showing the charges of the goods of plaintiff at the time of the transaction, and the hooks were rejected on the ground that defendant could testify as to the nature of the transaction. See Evidence, 17 Cyc. 480.

Immateriality.— Plaintiff having given evidence by his agent, who contracted with defendant, that the contract was one of consignment on advances, a question by defendant, whose theory of the case was that the transaction had been a sale, whether the witness had not said to plaintiff that he had orders for goods of the kind at certain prices and that the prices were guaranteed was properly rejected as not being proper or material on cross-examination. Myers *v.* Brice, 2 Pennyp. (Pa.) 382.

In an action for advances over and above what the consignment realized, evidence of a proposition made by plaintiff to a third person to purchase her goods at a certain sum has no bearing on the question as to what he had sold defendant's goods for. Mason *v.* Bradley, 74 Wis. 189, 42 N. W. 229.

85. Ract *v.* Duviard-Dime, 4 N. Y. Suppl. 157.

Proof as to real consignor.— In an action to recover for advances, proof that the cashier of a bank, guaranteeing advancements to be made by a factor to a shipper of goods, stipulated that all remittances should be made through the guarantor's bank was not sufficient to prove that the shipper was an agent of the bank, and that the latter was the real consignor. Hogan *v.* Mississippi Valley Bank, 28 La. Ann. 550.

86. Brown *v.* Harrison, 17 Ala. 774; Holmes *v.* Gayle, 1 Ala. 517; Thompson *v.* Packwood, 2 La. Ann. 624.

87. Earl Fruit Co. *v.* Thurston Cold-Storage, etc., Co., 60 Minn. 351, 62 N. W. 439, where in pleading and proofs the factor relied on a custom of commission merchants to receive reimbursement where a deficit is caused by the excess of expenses incurred by

that a custom is not admissible which is in contravention of a settled rule of law.[88]

(III) *Receipts.* Where the defense to an action for advances is that the transaction was a sale and not a consignment, receipts signed by the bookkeeper of defendant, who was his "business man" and to whom the advances were paid, the receipts being to the effect that money had been received from plaintiff, for advances from consignments, are admissible without proof of express authority of the bookkeeper to sign receipts in this form,[89] and it is not competent for defendant to prove by the bookkeeper that he executed the receipts in this form without authority.[90]

e. Trial.[91] The court cannot charge the jury on evidence not given on the issue.[92] An instruction which authorizes the jury in a suit for advances over and above the realization of consignments to find for plaintiff on a certain hypothesis without regard to whether plaintiff exercised due care and diligence is erroneous.[93] Whether commissions contracted for were a mere cover for usury under the contract is a question for the jury.[94]

f. Judgment[95] **and Recovery.**[96] Judgment cannot be given for a greater amount than that to which plaintiff shows he is entitled.[97] Where defendant failed to ship goods as agreed, to be sold on commission by plaintiff, who sold on report, plaintiff cannot recover from defendant damages for which he might be liable to the person to whom he sold, before payment of said damages voluntarily or involuntarily.[98]

F. Rights, Liabilities, and Protection of Third Persons[99] **— 1. Generally — a. General Rules.** As against the principal, all who deal with the factor are chargeable with notice of the limits fixed by law to his powers.[1] In the absence of special authority the factor cannot bind his principal in the disposition he makes of a consignment except within the ordinary and accustomed modes of transacting business.[2] Thus the barter by a factor of his principal's goods for land or other goods,[3] or a promise by a factor that he would write to his principal

the factor in handling the goods over the receipts from their sale.

88. Indianapolis Rolling Mill Co. *v.* Addy, 5 Ohio Dec (Reprint) 588, 6 Am. L. Rec. 764, 3 Cinc. L. Bul. 293.

89. Myers *v.* Brice, 2 Pennyp. (Pa.) 382.

90. Myers *v.* Brice, 2 Pennyp. (Pa.) 382.

91. See, generally, Trial.

Instructions generally see Trial.

92. Mason *v.* Bradley, 74 Wis. 189, 42 N. W. 229.

93. Adams *v.* Capron, 21 Md. 186, 83 Am. Dec. 566.

94. Cockle *v.* Flack, 93 U. S. 344, 23 L. ed. 949.

95. See, generally, Judgments.

96. Damages generally see Damages.

97. Berkowitz *v.* Mitenthal, 30 Misc. (N. Y.) 772, 62 N. Y. Suppl. 484; Beakley *v.* Rainier, (Tex. Civ. App. 1903) 78 S. W. 702, holding that where factors have purchased for their principal a large quantity of goods at different times, from different persons, and at different prices, and they sue for money advanced to purchase a particular car-load, judgment, in the absence of the evidence identifying the car-load, for more than the average rate per pound paid for all the goods, is erroneous.

98. Otter Creek Lumber Co. *v.* McElwee, 37 Ill. App. 285.

Costs.— Plaintiffs received goods on commission from defendant, and made advances thereon, for which the latter gave receipts, stating that the goods were to be sold without limit as to time and price. In an action to recover the difference between what the goods realized and the advances, defendant claimed that plaintiffs guaranteed a stipulated price, and counter-claimed therefor. The court ignored the counter-claim but found for defendant without costs. This was error; for, if defendant's testimony was to be believed at all, he was entitled to both his counter-claim and costs. Wise *v.* Rosenblatt, 9 N. Y. Suppl. 500. See, generally, Costs.

99. Where a factor's building was destroyed by the order of the mayor of New York to arrest the great fire of 1835, the factor cannot claim damages under section 81 of the act relating to New York city for the goods of his principal which were destroyed except to the amount of his lien for charges, etc. Stone *v.* New York, 25 Wend. (N. Y.) 157 [*affirming* 20 Wend. 139.]

1. Kaufman *v.* Edwards, 2 Tex. Unrep. Cas. 132.

2. Potter *v.* Dennison, 10 Ill. 590; Fourie *v.* Fraser, 2 Bay (S. C.) 269. See also Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701.

3. Potter *v.* Dennison, 10 Ill. 599; Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 255.

to get insurance done,[4] does not bind the principal. A factor who has advanced generally on the goods in his hands cannot, in the absence of special authority, sell a debt existing in open account arising from the sale of a portion of the consignment so as to transfer a good title to the claim, especially when the debt has not yet matured and when the principal is not in default and has not been called upon to repay the advances.[5] Where on attachment factors of defendant certify that they have no goods belonging to him, this does not affect the rights of other creditors who before the certificate was given had acquired an equitable right to have any such goods applied to pay acceptances of defendant held by them; and this, even though the factor be deemed to have lost his lien by making the certificate.[6] A consignee cannot, in discharge of the freight, abandon to the master of the carrier vessel goods which have greatly deteriorated on the voyage;[7] nor can he, after receiving the goods, withhold a part of the freight for a partial damage and thereby to that extent discharge the freight. If he receives the goods he becomes with his principal liable for the freight thereon.[8] The rule that an agent for an undisclosed principal may be treated as principal is of course applicable to a factor and is not affected by the fact that the factor is known to be a commission merchant.[9] A factor, by settling with his principal, cannot avoid a previously admitted liability to a third person for expenses incurred in forwarding goods, without the consent of the third person.[10] If the factor is notified that a consignment has been drawn against in favor of a third person who advanced the purchase-price to the consignor, the proceeds cannot be applied on a debt due the factor from the consignor on drafts drawn against other shipments which he has paid at the consignor's request.[11]

b. Foreign Factor Dealt With. By the usage of trade factors acting for merchants resident in a foreign country are held personally liable for contracts made by them for their principals, notwithstanding they fully disclose at the time the character in which they act.[12] The rule has been held not applicable to the case

4. Randolph *v.* Ware, 3 Cranch (U. S.) 503, 2 L. ed. 512, holding that the promise is a mere personal engagement of the factor.

5. Commercial Nat. Bank *v.* Heilbronner, 108 N. Y. 439, 15 N. E. 701 [*reversing* 52 N. Y. Super. Ct. 388].

6. Mutual Redemption Bank *v.* Sturgis, 9 Bosw. (N. Y.) 660.

Goods of the principal debtor in the hands of his factor are liable to attachment for his debts as against any claim or interest of third persons in or to the goods or their proceeds, unless some constructive possession or lien has been acquired by such third persons, or some facts have occurred which create an obligation on the part of the factor to hold them for such third persons, or which divest the debtor's control over them. Goodhue *v.* McClarty, 3 La. Ann. 56.

7. Brown *v.* Clayton, 12 Ga. 564.

8. Brown *v.* Clayton, 12 Ga. 564.

9. Wheeler *v.* Reed, 36 Ill. 81.

A factor for distillers undisclosed as principals who contracts to sell and deliver on board freight cars by a transfer of bill of lading barreled spirits in bond for export and does so deliver them undertakes by implication that the barrels should be fit and properly filled for such transportation and is liable for leakage caused by the breach of his undertaking, although the leakage was due to latent defects in the wood of which the barrels were made. Stevens *v.* Pincoffs, 9 Ohio Dec. (Reprint) 479, 14 Cinc. L. Bul. 110.

10. Johnson *v.* McCampbell, 6 Baxt. (Tenn.) 294.

11. Evans-Snider-Buell *v.* Amarillo First Nat. Bank, 15 Tex. Civ. App. 163, 39 S. W. 213. See also Cairo First Nat. Bank *v.* Crocker, 111 Mass. 163; De Wolf *v.* Gardner, 12 Cush. (Mass.) 19, 59 Am. Dec. 165 (holding that where notice of an intended consignment was given to the factor and that the warehouse receipt for the goods was attached to a draft drawn on him and discounted by a bank and he assented to the conditions of the consignment, he became the agent of the bank to receive, hold, sell, and account for the goods or their proceeds); Rochester Bank *v.* Jones, 4 N. Y. 497, 55 Am. Dec. 290 [*reversing* 4 Den. 489].

Notice, whether actual or constructive, of an agreement between the principal and a third person that the third person should be reimbursed for advances by a draft drawn on the consignment to the factor is sufficient to make the factor liable to the third person for payment of the draft when so drawn. Cordell *v.* Hall, 34 Fed. 866.

12. McKenzie *v.* Nevius, 22 Me. 138, 38 Am. Dec. 291. See also Rogers *v.* March, 33 Me. 106; Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 244.

The ordinary presumption in such cases "not only is that credit is given to the agents, but that it is exclusively given to

of a principal domiciled in another state of the Union as the interests of trade do not require it.[13] When a written contract is made and expressed to be with a foreign principal and not with the agent, the latter is not liable, although the contract be signed by him for and on account of the foreign principal.[14] Under the more modern decisions this distinction between a foreign and domestic factor is being obliterated.[15]

c. Pledge of Goods by Factor. A pledge of the principal's goods by a factor for his own use passes as against the principal no title or right under the common law to the innocent pledgee.[16] A pledgee may be held liable to account to the principal for the goods,[17] or he may be held liable in conversion.[18] But the innocent pledgee is generally held to have the right to recoup by the sum due from the principal to the factor for advances, expenses, commissions, etc.[19] The factor himself is estopped from setting up his own tortious act.[20] If after pledging the goods the factor sells them, the purchaser gets a good title and can enforce his rights against the pledgee.[21] And it has been held that a lien created by the

them, to the exoneration of their employers. Still, however, this presumption is liable to be rebutted by proofs that credit was given to both principal and agent or to the principal only." Story Agen. §§ 265, 268 [*quoted* in Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 244, 254].

The reason of this rule according to Justice Story is founded on "the presumption, that the party dealing with the agent intends to trust one who is known to him, and resides in the same country, and subject to the same law as himself, rather than one, who if known, cannot from his residence in a foreign country, be made amenable to those laws, and whose liability may be affected by local institutions, and local exemptions, which may put at hazard both his rights and his remedies." Story Agen. § 290 [*quoted* in Rogers *v.* March, 33 Me. 106, 112].

13. Vawter *v.* Baker, 23 Ind. 63; New Castle Mfg. Co. *v.* Red River R. Co., 1 Rob. (La.) 145, 36 Am. Dec. 686. See also Kirkpatrick *v.* Stainer, 22 Wend. (N. Y.) 254.

14. Story Agen. § 268 [*quoted* in Maury *v.* Ranger, 38 La. Ann. 485, 489, 58 Am. Rep. 197].

15. Barry *v.* Page, 10 Gray (Mass.) 398. See also Maury *v.* Ranger, 38 La. Ann. 485, 488, 58 Am. Rep. 197.

16. *Alabama.*—Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

Illinois.— See Silverman *v.* Bush, 16 Ill. App. 437.

Massachusetts.— See Michigan State Bank *v.* Gardner, 15 Gray 362.

New York.— Bonito *v.* Mosquera, 2 Bosw. 401; Walther *v.* Wetmore, 1 E. D. Smith 7.

Texas.— See Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390.

United States.—Warner *v.* Martin, 11 How. 209, 13 L. ed. 667.

See 23 Cent. Dig. tit. "Factors," § 83.

Where a merchandise broker to whom goods are delivered with power to sell and receive payment deposits them in the usual course of business with a commission merchant connected in business with a licensed auctioneer who advances his notes thereon, the deposit binds the principal. Laussatt *v.* Lippincott, 6 Serg. & R. (Pa.) 386, 393, 9 Am. Dec. 440.

If a pledgee has notice of the principal's interest (Bonniot *v.* Fuentes, 10 La. Ann. 70) or such facts as should put him upon inquiry, as that the relation of consignor and consignee exists (Clarke *v.* Edwards, 44 Miss. 778, where a factor transferred goods in his hands belonging to consignor to another to secure a debt owing by factor, asserting that consignor had authorized him to use the goods or their proceeds in his business, such statement being false); or that the pledgor is a factor (St. Louis Nat. Bank *v.* Ross, 9 Mo. App. 399) the pledgee of course obtains no title or right.

17. Warner *v.* Martin, 11 How. (U. S.) 219, 13 L. ed. 667.

18. See Wootiers *v.* Kaufman, 73 Tex. 395, 11 S. W. 390.

Conversion generally see TROVER AND CONVERSION.

19. Ludden *v.* Buffalo Batting Co., 22 Ill. App. 415; Louisville First Nat. Bank *v.* Boyce, 78 Ky. 42, 39 Am. Rep. 198; Macky *v.* Dillinger, 73 Pa. St. 85. *Contra*, Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401. See Walther *v.* Wetmore, 1 E. D. Smith (N. Y.) 7.

The purchase of property by a factor in his own name makes him to all the world an apparent owner, and so far as the rights of third persons are affected his power is unlimited and he has the right to sell or pledge. Leet *v.* Wadsworth, 5 Cal. 404. See, however, Wright *v.* Solomon, 19 Cal. 64, 79 Am. Dec. 196.

20. Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

Estoppel generally see ESTOPPEL.

21. Nowell *v.* Pratt, 5 Cush. (Mass.) 111, where the goods were not delivered to the purchaser, and subsequently the pledgee sold them and received the proceeds, and he was held liable for the proceeds on demand to the purchaser in an action of assumpsit. *Contra*, Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223, holding that as between the pledgee and a subsequent transferee of the goods the pledgee's title so long as the principal does not complain is superior.

consignor previous to the pledge would follow the goods into the hands of the innocent pledgee.[22]

d. Rights and Liabilities Arising From Sale[23] by Factor — (i) *GENERALLY.* A factor with a general authority to sell goods intrusted to him or a factor held out to the world by his principal as possessing that authority may pass a good title to an innocent purchaser, although he sells in violation of his duty and of the secret instructions of his principal.[24] But the mere possession of goods by a factor is not evidence to the world that he has an unlimited authority to sell them so as to preclude the owner from impeaching a sale made by him by showing that goods were intrusted to him for a wholly different purpose, such as transportation to another place or temporary custody.[25] A *bona fide* sale by a factor of the goods of his principal for a valuable consideration by assigning over the bill of lading is valid as against the principal if the factor has the bill of lading in his possession;[26] and this is true, although the goods had not at the time of the transfer of the bill of lading come into the factor's hands.[27] But if the authority of a factor to sell has not yet been exercised the owner may countermand the consignment and sell the goods *in transitu*, and the purchaser's title will be valid.[28] If, however, the factor sells and delivers the property before notice of the revocation of his authority, the purchaser who has bought *bona fide* acquires a good title as against a prior purchaser from the consignor without delivery.[29] If the factor sells in his own name as owner and does not disclose his principal and acts ostensibly as the real and sole owner, the purchaser in an action by the principal upon the contract will be entitled, if he *bona fide* dealt with the factor as owner, to set off any claim he may have against the factor in answer to the demand of the principal.[30] But if the purchaser knew that the factor was

22. Michigan State Bank *v.* Gardner, 15 Gray (Mass.) 362.

23. Sale generally see SALES.

24. See Cook *v.* Beal, 1 Bosw. (N. Y.) 497; Gibbs *v.* Linsley, 13 Vt. 208, holding that where a person delivers property, all of the same kind, to a merchant acting as his factor, who sells the same, the owner cannot avoid the sale by showing that in truth he authorized the sale of only a part of the articles.

Notice in general.— A purchaser from a factor with knowledge of the agency and that the agent is selling to raise money for his own purposes and to apply it to his own uses acquires no title as against the principal. Easton *v.* Clark, 35 N. Y. 225.

Notice, not of agency, but of insolvency.— A purchaser who does not know of the factor's agency but does know him to be insolvent at the time acquires no title. Warner *v.* Martin, 11 How. (U. S.) 209, 13 L. ed. 667.

The delivery by the factor of goods in payment of an antecedent debt due to a person who knew that the goods belonged to another passes no title as against the true owner, to whom the deliveree may be made liable. Scriber *v.* Masten, 11 Cal. 303. But it has been held that where the principal allows his goods to be so managed by the factor as to indicate to third persons that the factor is the owner, the factor may make a valid sale in discharge of a previous debt to one who has no notice, actual or constructive. Morris *v.* Sellers, 46 Tex. 391.

25. Cook *v.* Beal, 1 Bosw. (N. Y.) 497. See Dias *v.* Chickering, 64 Md. 348, 1 Atl. 709, 54 Am. Rep. 770 (Alvey, C. J., dissenting), holding that where a member of a firm selling pianos on commission took one to his home and after keeping it a few months sold it to an innocent purchaser for cash, the seller being at the time financially embarrassed, the sale was legal, and upon replevin by the consignor the purchaser was entitled to the piano.

26. Walter *v.* Ross, 29 Fed. Cas. No. 17,122, 2 Wash. 283. But see Canadian Bank of Commerce *v.* Baum, 187 Pa. St. 48, 40 Atl. 975, holding that where the factor sent an invoice and bill of sale of goods to defendant without and previous notice to defendant and not in pursuance of any previous contract of sale, and the transfer of the *indicia* of title was in anticipation of a fraudulent failure and the reason for sending the *indicia* of title was that the factor had spent funds which defendant had sent him to pay notes not yet due, and he knew that he would be unable to pay them, defendant took no title to the goods as against the owner of the legal title.

27. Ryberg *v.* Snell, 21 Fed. Cas. No. 12,190, 2 Wash. 403.

28. Ryberg *v.* Snell, 21 Fed. Cas. No. 12,190, 2 Wash. 403.

29. Jones *v.* Hodgkins, 61 Me. 480.

30. *Alabama.*— Gardner *v.* Allen, 6 Ala. 187, 41 Am. Dec. 45.

Maine.— See Traub *v.* Milliken, 57 Me. 63, 2 Am. Dec. 14.

Missouri.— Crocker *v.* Irons, 3 Mo. App. 486.

selling the goods as agent he has no right to set off in an action by the principal for the price of the goods a debt due to him from the factor, although the purchaser did not at the time of the purchase know or have the means of knowing who was the principal.[31] The mere fact that the vendor is a factor does not in the absence of other facts tend to show that he is not the real principal.[32] A factor with actual or constructive notice of a lien of a third person upon his principal's goods is liable to the owner of the lien for the loss thereof occurring through a sale made by the factor and his subsequent action.[33] A factor who innocently sells a consignment of goods which were stolen is liable to the purchaser to whom he sells if the goods are subsequently recovered by the true owner.[34] Where a factor makes a contract of sale for the benefit of his principal of goods to arrive within a certain period, the factor may, as against one who discounted drafts drawn on the goods consigned and to whom the bills of lading were delivered, substitute other goods of the same character in fulfilment of the contract.[35]

(II) *Warranty by Factor.* A factor, in the absence of authority from his principal or a custom or usage of trade, cannot give a warranty of the goods of his principal which he sells, so as to bind the principal.[36] But if the factor gives a warranty without designating that he acted as agent[37] or even if without authority he gives a warranty and the purchasers knew that he was acting as agent only,[38] he may be held personally liable on the warranty. The mere fact that the purchaser knew the name of the real owner of the goods does not preclude his right of holding the factor liable, where the purchaser intended to give credit to the factor.[39] That the factor was dealing with the property of a third person does not affect the right of the purchaser to retain the goods and seek his remedy founded upon a breach of warranty instead of returning the goods.[40]

New York.— Hogan *v.* Shorb, 24 Wend. 458.

England.— Borries *v.* Imperial Ottoman Bank, L. R. 9 C. P. 38, 43 L. J. C. P. 3, 29 L. T. Rep. N. S. 689, 22 Wkly. Rep. 92; *Ex p.* Dixon, 4 Ch. D. 133, 46 L. J. Bankr. 20, 35 L. T. Rep. N. S. 644, 25 Wkly. Rep. 105; George *v.* Claggett, 2 Esp. 557, Peake Add. Cas. 131, 7 T. R. 359, 4 Rev. Rep. 462; Rabone *v.* William, 7 T. R. 360 note, 4 Rev. Rep. 463 note.

31. Semenza *v.* Brinsley, 18 C. B. N. S. 467, 11 Jur. N. S. 409, 34 L. J. C. P. 161, 12 L. T. Rep. N. S. 265, 13 Wkly. Rep. 634, 114 E. C. L. 467. See also Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602, Shepley, C. J., delivering the opinion of the court.

32. Crocker *v.* Irons, 3 Mo. App. 486, where the factor was engaged in the business of buying and selling cattle for his own account and as a factor.

33. Merchants', etc., Bank *v.* Meyer, 56 Ark. 499, 20 S. W. 406, holding that where a factor sells cotton for the planter, knowing that the planter is lessee of the plantation on which the cotton was grown and having reason to believe that he was without funds sufficient to grow the crops, he has constructive notice of the landlord's lien for rent and is liable to the landlord as for conversion of the cotton; and that where the cotton was subject to a mortgage which was recorded, the factor is liable to the mortgagee for damages which he may sustain by the factor's action in depositing the proceeds of the cotton in bank to the credit of the principal. See White *v.* Boyd, 124 N. C. 177, 32 S. E. 495.

34. Edgerton *v.* Michels, 66 Wis. 124, 26 N. W. 748, 28 N. W. 408.

35. Hong Kong, etc., Banking Corp. *v.* Cooper, 114 N. Y. 388, 21 N. E. 994.

36. Upton *v.* Suffolk County Mills, 11 Cush. (Mass.) 586, 59 Am. Dec. 163, holding that a general factor has no implied authority to bind his principal by warranty that flour sold on his account will keep sweet during a sea voyage from Massachusetts to California.

Unless the character or quality of the goods consigned to him is communicated by the consignors, it is the business of the factor to ascertain what they are in that respect and put them upon the market only as such; and when he goes beyond that he is not, as between him and his principal, within the authority presumptively conferred by the latter upon him. Argersinger *v.* MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687.

37. Hastings *v.* Lovering, 2 Pick. (Mass.) 214, 13 Am. Dec. 420, holding factor liable, although he had settled with his principal before notice of any breach of warranty, and although before the property was delivered the owner had informed the vendee that it was sold on his account.

38. Argersinger *v.* MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687.

39. Sprague *v.* Rosenbaum, 38 Fed. 386.

40. Argersinger *v.* MacNaughton, 114 N. Y. 535, 21 N. E. 1022, 11 Am. St. Rep. 687.

(III) *PROCEEDS OF SALE.*[41] Factors have a right to receive payment from the purchaser of the principal's goods and to give receipts for payment, and a payment to the factor discharges *pro tanto* the claim of the principal unless notice is given to pay to the principal.[42] When payment is not made at the time of the purchase, a sale by a factor creates a contract between his principal and the purchaser,[43] and the latter has a right to pay the owner in spite of the objection of the factor,[44] and after notice of the claim of his principal the purchaser is bound to pay the proceeds to the principal.[45] In a suit against a factor, the buyer is not subject to garnishment for the debt due to the principal, whether the factor acts under a *del credere* commission or not.[46] A factor is liable to the true owner of goods for their proceeds unless he has actually and without notice of their true ownership paid over the proceeds to his principal or done something equivalent.[47] A mere entry on the factor's books to the credit of the principal is no answer to the claim of the true owner if the factor has not parted with anything of value.[48] If a bill of exchange is drawn against a consignment an indorser cannot claim that the factor is bound to apply the proceeds of the consignment to the payment of the bill, unless a letter of advice accompanying the consignment expressly directs a specific application of the proceeds of the consignment to the payment of the bill.[49] And even though a specific appropriation has been made, an indorser who had no notice of it and who did not negotiate and indorse the bill on the faith that the proceeds would be applied to its payment, has no other rights than those of an ordinary indorser.[50] Where a shipper assigns a bill of lading to a bank which discounts the draft drawn on a particular consignment, and the consignee has notice, he cannot apply the proceeds of the consignment to the payment of a draft of the consignor to himself, for the title to the consignment and the proceeds thereof belong to the bank to the extent of the draft discounted on the security thereof.[51] But if a bank discounts a draft and obtains no property in

Right to return goods upon breach of a warranty or to sue upon the breach see, generally, SALES.

41. **Proceeds in Confederate currency** see West *v.* Miltenberger, 23 La. Ann. 408.

42. Graham *v.* Duckwall, 8 Bush (Ky.) 12 [*citing* Story Agen. 112]; Traub *v.* Milliken, 57 Me. 63, 2 Am. Rep. 14; Rice *v.* Groffmann, 56 Mo. 434. See also Golden *v.* Levy, 4 N. C. 141, 6 Am. Dec. 555.

A payment to the factor's administrator is no payment, as the authority of the factor does not descend to his administrator. Merrick's Estate, 8 Watts & S. (Pa.) 402.

43. Edmond *v.* Caldwell, 15 Me. 340; Titcomb *v.* Seaver, 4 Me. 542; Kelley *v.* Munson, 7 Mass. 319, 5 Am. Dec. 47.

44. Golden *v.* Levy, 4 N. C. 141, 6 Am. Dec. 555. But see Toland *v.* Murray, 18 Johns. (N. Y.) 24, holding that where a non-resident consigns goods for sale on his account, and the factor sends them to defendants for sale, defendants are bound to account to the factor for the proceeds and cannot retain them to satisfy a demand of their own against the non-resident.

45. Edmond *v.* Caldwell, 15 Me. 340.

46. Titcomb *v.* Seaver, 4 Me. 542.

47. Taylor *v.* Turner, 87 Ill. 296; Weld *v.* Shaw, 2 La. Ann. 559.

Where the goods were purchased with money obtained from a third person, the consignor agreeing that the third person should be reimbursed out of the proceeds when the goods were sold by the factors and the factors know of the agreement, the latter cannot apply any part of the proceeds to the debt of the principal until the debt due to the third person is paid. Cordell *v.* Hall, 34 Fed. 866, holding that whether the factor's knowledge was actual or constructive was immaterial, the question being whether he knew that the principal had obtained advances from the third person.

48. Weld *v.* Shaw, 2 La. Ann. 559, Slidell, J. delivering the opinion of the court.

49. See Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. 416], where the consignor drew bills on the consignment and advised the consignee thereof, but the letter contained no specific application of the proceeds of the consignment, and the bills contained nothing on their faces indicative of their having been drawn on the specific fund but were in the ordinary form of negotiable bills of exchange, and the bills were presented before the goods arrived and were refused acceptance, and subsequently after selling the goods the factor paid the proceeds to the consignors.

50. Cowperthwaite *v.* Sheffield, 3 N. Y. 243 [*affirming* 1 Sandf. 416].

51. Batavia First Nat. Bank *v.* Ege, 109 N. Y. 120, 16 N. E. 317, 4 Am. St. Rep. 431, where the assignment was made by duplicate bills of lading. See also Holmes *v.* German Security Bank, 87 Pa. St. 525, where the bill of lading was attached to the draft.

the consignment by the assignment of the bill of lading or by the attachment thereof to the draft or by other means, it cannot enforce the promise of the factor made to the consignor to accept the draft and to pay it, but the factor may apply the proceeds of the consignment to the debt of the principal to himself.[52] A correspondent and agent who, under contract with the consignee and for a consideration moving from the consignee, discounts bills drawn by the shipper on the consignee, cannot, as against the shipper, claim of the proceeds of the consignments the surplus remaining after deducting all the advances made on the goods.[53]

e. Right of Principal to Follow Goods or Proceeds — (i) *GENERALLY.* In the absence of statutes which furnish protection to persons dealing with factors,[54] the principal can recover his property wherever he can trace it as distinct from that of the factor into whomsoever's hands it may have come.[55] He is entitled to recover the specific goods themselves if they can be had,[56] and if the goods themselves cannot be recovered he may recover their proceeds if they can be traced.[57] Thus if a factor barters his principal's goods in a manner not author-

Control of contract made with purchaser of goods "to arrive."— Where a factor in his own name makes a sale for the benefit of his principal of goods "to arrive" within a certain time, and the principal assigns the bills of lading for goods actually shipped to a bank discounting drafts drawn against the goods, and the bank has no knowledge of the contract of sale made by the factor, the bank has control of the consignment thenceforth, but it has no control over or rights in the contract made by the factor, and the factor may, as against the bank, upon the failure of his principal, treat the contract as his own, and substitute other goods of the same kind and apply the profits of the transaction to the debt owed him by his insolvent principal. Hong Kong, etc., Banking Corp. *v.* Cooper, 114 N. Y. 388, 21 N. E. 994.

If a factor has actual or constructive notice of an agreement between the consignor and the person making advances to him that the latter should be reimbursed out of the proceeds of the goods, he cannot apply any part of the proceeds of the goods to the payment of the debt of the consignor to himself until the draft drawn for the advances made has been paid. Cordell *v.* Hall, 34 Fed. 866.

52. St. Louis Exch. Bank *v.* Rice, 107 Mass. 37, 9 Am. Rep. 1.

53. Dodge *v.* Wilbur, 10 N. Y. 579, 586 [*affirming* 5 Sandf. 397].

54. See *infra*, I, F, 2.

Where the factors act furnishes protection, the principal may equitably follow the proceeds of his consignment into the hands of any person who receives them with knowledge of their trust character. Bills *v.* Schliep, 127 Fed. 103, 62 C. C. A. 103.

55. See Stetson *v.* Gurney, 17 La. 162; Thompson *v.* Perkins, 23 Fed. Cas. No. 13,972, 3 Mason 232. See also Bills *v.* Schliep, 127 Fed. 103, 62 C. C. A. 103, holding that where factors received goods for sale from a forwarder for the shippers, and were thereafter notified that certain car-loads of the shipments belonged to defendant's assignors, and were directed to report sales of such cars to them direct, after which the forwarder became bankrupt, the shippers of such cars were entitled to recover the proceeds of the sale thereof from the factors, notwithstanding the latter mingled the funds received from the various shipments, since, after notice of the forwarder's want of title in the particular cars, it would be presumed in equity that the factors would satisfy their claims out of the other shipments in their hands before resorting to the cars in question, or they would be deemed to have held the entire proceeds not necessary to satisfy their claims for the use of the consignors of the cargoes in question.

Identity not lost.— Where pork packed in barrels is consigned to a factor for sale, it does not lose its identity as the particular property of the consignor by being stowed in a warehouse with a large quantity of pork of the same quality and brand; and the factor will not be entitled to dispose of it as his own and apply the ownership of his principal to other pork of the same quality. Seymour *v.* Wyckoff, 10 N. Y. 213.

56. Alexander *v.* Morris, 3 Call (Va.) 89; Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212. See also Bloodworth *v.* Jacobs, 2 La. Ann. 24.

57. *Louisiana.*— Taylor *v.* De Goicouria, 20 La. Ann. 30. See Stetson *v.* Gurney, 17 La. 162, holding, however, that when money is advanced to an agent to be employed in the purchase of goods, etc., the latter becomes indebted to that amount and the relation of debtor and creditor exists between them.

Massachusetts.— Chesterfield Mfg. Co. *v.* Dehon, 5 Pick. 7, 16 Am. Dec. 367.

Missouri.— Richardson *v.* St. Louis Nat. Bank, 10 Mo. App. 246.

Virginia.— Alexander *v.* Morris, 3 Call 89.

United States.— Hourquebie *v.* Girard, 12 Fed. Cas. No. 6,732, 2 Wash. 212.

See 23 Cent. Dig. tit. "Factors," § 95.

One of several principals may have his pro rata share of the proceeds of consignments if he can trace them. Hutchinson *v.* Reed, Hoffm. (N. Y.) 216. See Chesterfield Mfg.

ized by the principal and not within the ordinary modes of transacting business, the principal may follow and reclaim the property whether the person dealing with the factor knew him to be such or not.[58] But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods the principal cannot reclaim them.[59] The principal may recover goods[60] or the proceeds of a consignment[61] of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back.[62]

(II) *Factor Insolvent*—(A) *In General.* If a consignor can trace his property into the hands of his factor, whether it be the identical article which came into the hands of the factor or other property purchased for the principal by the factor with the proceeds, he may follow it either into the hands of his factor or the factor's receiver or assignee for the benefit of the creditors.[63] A receiver or assignee of a factor who has become insolvent merely succeeds to his rights, and is under the same obligation to restore to the consignor the proceeds of his goods, which are distinguishable, as the factor himself.[64] All that the factor can transfer to the assignee is his lien on the goods for advances or commissions.[65]

(B) *Under Del Credere Commission.* That the factor has a *del credere* commission does not alter the rule just stated, the goods in the hands of the assignee for creditors belonging none the less to the consignor.[66] If a factor under a *del*

Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367, holding that a usage of commission merchants to mix goods from different consignors in making sale did not prevent any one of the consignors from recovering his share of the proceeds of such a sale after the assignment of the factor.

58. Potter *v.* Dennison, 10 Ill. 590.

59. Potter *v.* Dennison, 10 Ill. 590.

60. Holton *v.* Smith, 7 N. H. 446, where the buyer of the goods had notice of the terms on which the factor received the goods.

61. Long *v.* Bussell, 45 N. Y. Super. Ct. 484 [*affirmed* in 83 N. Y. 606].

62. Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

The creditor of a consignee of goods cannot by attachment defeat the right of the consignor to stop the goods *in transitu*. Landauer *v.* Cochran, 54 Ga. 533; Naylor *v.* Dennie, 8 Pick. (Mass.) 198, 19 Am. Dec. 319; Schwabcher *v.* Kane, 13 Mo. App. 126. *Compare* Fenkhausen *v.* Fellows, 20 Nev. 312, 21 Pac. 886, 4 L. R. A. 732. See also Hepp *v.* Glover, 15 La. 461, 35 Am. Dec. 206; Lane *v.* Jackson, 5 Mass. 157.

63. Fahnestock *v.* Bailey, 3 Metc. (Ky.) 48, 77 Am. Dec. 161; Veil *v.* Mitchel, 28 Fed. Cas. No. 16,908, 4 Wash. 105. See also Thompson *v.* Perkins, 23 Fed. Cas. No. 13,972, 3 Mason 232.

If the factor confuses the goods of several of his principals and thereby obliterates all traces of the property, the consignors are entitled to the proceeds of the goods in proportion to the values of the respective shipments. Trumbull *v.* Union Trust Co., 33 Ill. App. 319.

If the factor takes one note for the goods of several consignors and afterward assigns a note in trust for his creditors, each consignor may recover his proportion of the proceeds from the assignee if it can be distinguished. Chesterfield Mfg. Co. *v.* Dehon, 5 Pick. (Mass.) 7, 16 Am. Dec. 367; Denston *v.* Perkins, 2 Pick. (Mass.) 86.

If the proceeds cannot be traced or identified the consignors have no privilege for their debt. Ward *v.* Brandt, 11 Mart. (La.) 331, 13 Am. Dec. 352. See also Beach *v.* Forsyth, 14 Barb. (N. Y.) 499.

64. Francklyn *v.* Sprague, 10 Hun (N. Y.) 589 [*citing* 2 Kent Comm. 623]. See also Cushman *v.* Snow, 186 Mass. 169, 71 N. E. 529.

Where a factor is insolvent a court of equity will ordinarily compel the payment of a debt due for goods sold by the factor to be made to the principal. *In re* Merrick, 5 Watts & S. (Pa.) 9 [*reversing* 2 Ashm. 485], where it was said that the court would probably not compel payment to be made to the principal if he has sued the factor for the value of the goods and obtained an award of arbitrators for his claim and prosecuted him to bankruptcy for the debt and has himself become assignee of the bankrupt.

Bona fide sale and distribution.—If the property of the principal was included by a factor in his assignment to the benefit of the creditors, and the assignee without notice of the claim of the principal made a *bona fide* sale thereof and distributed the money according to the trust, the assignee is not responsible therefor. Fahnestock *v.* Bailey, 3 Metc. (Ky.) 48, 77 Am. Dec. 161.

65. Terry *v.* Bamberger, 23 Fed. Cas. No. 13,837, 14 Blatchf. 234, 44 Conn. 558. See also Thompson *v.* Perkins, 23 Fed. Cas. No. 13,972, 3 Mason 232.

66. Converseville Co. *v.* Chambersburg Woolen Co., 14 Hun (N. Y.) 609; Gindre *v.*

credere commission fails after having made advances in the form of notes or acceptances, his assignee is entitled to retain amounts arising from the sale of goods until the notes or acceptances are surrendered or destroyed.[67]

f. Ratification by Principal of Agent's Acts. After sale made by a factor by sample contrary to instructions, the acknowledgment of liability by the principal, on the failure of the goods to comply with the sample, is a ratification of the sale.[68] As in other cases the act of ratification must be with knowledge.[69]

2. Under the Factors Acts — a. The Relieving Statutes. Owing to the hardship imposed by the common law upon third persons who entered into contracts without notice of the true ownership of the goods in the custody or control of factors, statutes have been passed for the protection of such persons.[70] The object of this remedial legislation was to protect innocent persons who dealt in reliance upon the apparent ownership of the factor resting upon the possession either of the merchandise itself[71] or the documentary evidence[72] of ownership.[73] It is said that the factors acts, being in derogation of the common law, should be strictly construed.[74]

b. Factor's Possession of Goods[75] — (i) *In General.* It has been held that the word "possession" as used in that portion of the Factors Act which provides "that a factor intrusted with the possession of any merchandise for the purpose of sale," etc., shall be deemed the true owner thereof" means actual possession as distinguished from constructive possession.[76] But the word is said to mean such control of or dominion over merchandise as to enable a factor rightfully to take possession of it without the aid of any new authority or document furnished by the owner.[77] Goods in a warehouse subject to be withdrawn at pleasure by a factor on discharging the lien of the government for duties may be regarded as in his possession so as to support a pledge thereof made by him independent of the provisions of the act in regard to documentary evidences of title.[78] The

Kean, 7 Misc. (N. Y.) 582, 28 N. Y. Suppl. 4, 31 Abb. N. Cas. (N. Y.) 100.

67. Francklyn *v.* Sprague, 10 Hun (N. Y.) 589. See also Vail *v.* Durant, 7 Allen (Mass.) 408, 83 Am. Dec. 695.

68. Rogers *v.* Kneeland, 10 Wend. (N. Y.) 218.

69. See Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223.

70. The first act was passed in the fourth year of George IV. Russell Fact. 122 [*quoted* in Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267]. This act was followed by several enlarging and amendatory acts, viz., 6 Geo. IV, c. 94; 5 & 6 Vict. c. 39; 40 & 41 Vict. c. 39; and finally the entire preceding legislation was amended and consolidated by 52 & 53 Vict. c. 45, entitled the Factors Act (1889). L. R. 26 St. 186. St. 6 Geo. IV, c. 94 was followed more or less closely by several states in this country, New York having enacted a Factors Act by Laws (1830), c. 179. The New York statute has been copied more or less closely in a number of states. Price *v.* Wisconsin M. & F. Ins. Co., *supra*. And with the exception of the repeal of three of the less important sections (N. Y. Laws (1897), c. 418, repealing sections 1 and 2; N. Y. Laws (1886), c. 593, repealing section 7), it constitutes at the present time in its original form a part of the statutory law of the state of New York (2 Birdseye Rev. St. (3d ed. 1901) p. 1). In England the different amendments just enumerated were necessary because the courts refused to relax the rules of the common law any further than they were absolutely required to do by a very narrow and literal construction of the statutes in question. See Russell Fact. 140 [*quoted* in Price *v.* Wisconsin M. & F. Ins. Co., *supra*. The English factors acts have been introduced into Canada and English authorities are to be looked to in the construction of the factors' clauses of the Canadian code. City Bank *v.* Barrow, 5 App. Cas. 664, 43 L. T. Rep. N. S. 393.

71. Possession of goods see *infra*, I, F, 2, b.

72. Possession of documentary evidence of title see *infra*, I, F, 2, c.

73. New York Security, etc., Co. *v.* Lipman, 157 N. Y. 551, 52 N. E. 595 [*affirming* 91 Hun 554, 36 N. Y. Suppl. 355]; Cartwright *v.* Wilmerding, 24 N. Y. 521; Pegram *v.* Carson, 10 Bosw. (N. Y.) 505; Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

74. See Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265.

75. Effect of pledge under statute see *infra*, I, F, 2, e.

76. Howland *v.* Woodruff, 60 N. Y. 73, 16 Abb. Pr. N. S. (N. Y.) 411, holding that where a factor obtained an advance while the goods were still in the carrier's possession, persons making the advances obtained no title as against the consignor.

77. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505.

78. Cartwright *v.* Wilmerding, 24 N. Y. 521. See also Pegram *v.* Carson, 10 Bosw.

factors acts apply only to mercantile transactions. Not every agent intrusted with goods is an agent within the meaning of the statutes.[79] Not only must the factor be intrusted with the possession of the goods but he must be intrusted with their possession "for the purpose of sale or as security for any advances to be made or obtained thereon."[80] The section of the Factors Act which provides

(N. Y.) 505; Gorum *v.* Carey, 1 Abb. Pr. (N. Y.) 285.

79. It does not include a mere servant or caretaker or one who has possession of goods for carriage or safe custody or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class from which the act has taken its name. Levi *v.* Booth, 58 Md. 305, 42 Am. Rep. 332 (holding that a person to whom a diamond ring was given for the purpose of obtaining a match for it, or, failing in that, to get an offer for it, that person being a dealer in jewelry but having no regular place of business, was not an agent within Md. Code, art. 4, relating to agents and factors, and that the mere possession of the ring did not give him power to dispose of it as though he were owner, and the vendee to whom he sold it could be held liable for conversion to the true owner); Stollenwerck *v.* Thacher, 115 Mass. 224 (holding that the statute does not apply to a cotton broker whose commission is a fixed sum per bale from a firm of buyers, each party paying his own expenses on receiving from them a bill of lading with draft attached with instructions not to deliver the bill until the draft is paid by the purchaser to whom the invoice has been sent); Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny (N. Y.) 433 (holding that where goods are in possession of an agent who has charge of the shop of his principal and is authorized to sell goods only in the name and for account of his principal, the goods so sold are in law in the possession of the principal at the time of the sale and hence the agent is not a factor within the meaning of the Factors Act); City Bank *v.* Barrow, 5 App. Cas. 664, 43 L. T. Rep. N. S. 393 (holding that a person to whom hides are sent to be tanned at an agreed price, such person undertaking to procure freight for the leather from Canada to England, is not a person intrusted with the goods, within the meaning of the factors clauses of the Canada code, so as to bind his principal by a pledge of the goods even if a sale by him would have been good under the clauses of the code); Heyman *v.* Flewker, 13 C. B. N. S. 519, 9 Jur. N. S. 895, 32 L. J. C. P. 132, 1 New Rep. 479, 106 E. C. L. 519 (holding, however, that a person whose ordinary business was that of an agent for procuring business for two insurance offices and with whom pictures were deposited with instructions by the depositor to sell them for a certain commission is an agent "intrusted with the possession of goods" within the meaning of the Factors Act, 5 & 6 Vict. c. 39, and consequently the depositor is bound by a contract of pledge *bona fide* made with the agent); Wood *v.* Rowcliffe, 6 Hare 183, 11 Jur. 707, 915, 31 Eng. Ch. 183 (holding that 6 Geo. IV, c. 94, and 5 & 6 Vict. c. 39, was not applicable to the case of advances made upon the security of furniture used in a furnished house — not in the way of trade — to the apparent owner of such furniture, such apparent owner afterward appearing to be the agent intrusted in the custody of the furniture by the true owner). See also Tremoille *v.* Christie, 69 L. T. Rep. N. S. 338 [*distinguishing* Hastings *v.* Pearson, [1893] 1 Q. B. 62, 67 L. T. Rep. N. S. 553, 41 Wkly. Rep. 127, as being decided under the Factors Act (1889), whereas the principal case is subject to 5 & 6 Vict. c. 39, and is bound by the authority of Heyman *v.* Flewker, 13 C. B. N. S. 519, 9 Jur. N. S. 895, 32 L. J. C. P. 132, 1 New Rep. 479, 106 E. C. L. 519].

In Canada by Code, arts. 1487, 1488, 1489, a sale by a person who is not the true owner is valid "if it be a commercial matter" or if the sale be in a market overt or from a trader dealing in such articles. City Bank *v.* Barrow, 5 App. Cas. 664, 43 L. T. Rep. N. S. 393. A music teacher who induces a manufacturer to ship to him a piano that he may sell it to a customer which he represents himself as having and who pawns the piano under an assumed name is not an agent within the meaning of the Factors Act. Bush *v.* Fry, 15 Ont. 122, construing Ont. Rev. St. (1887) c. 121, §§ 2, 4, 5.

80. Thacher *v.* Moors, 134 Mass. 156 (holding that a warehouseman who was also a broker with authority only to receive offers for merchandise stored with plaintiff and report it to his principal "is not a factor or other agent intrusted with merchandise for the purpose of sale" within Mass. Gen. St. c. 54, § 2, or "a person entrusted with merchandise and having authority to sell or consign the same" within section 3. See N. Y. Laws (1830), c. 179, § 3; Wis. Acts (1863), c. 91, § 3. See also Frankinstein *v.* Thomas, 4 Daly (N. Y.) 256; Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267; Biggs *v.* Evans, [1894] 1 Q. B. 88, 58 J. P. 84, 69 L. T. Rep. N. S. 723 (holding that a person who is a dealer in jewelry and gems and does business both on his own account and as agent for others and with whom an opal matrix table-top is deposited on the terms that it should not be sold to any person or at any price without the owner's authority is not an agent intrusted with goods for the purpose of sale); Cole *v.* North Western Bank, L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. Rep. N. S. 733 [*affirming* 22 Wkly. Rep. 861]); Monk *v.* Whittenbury, 2 B. & Ad. 484, 1 M. & Rob. 81, 22 E. C. L. 205 (holding that a

that "nothing contained in this act shall authorize a common carrier, warehouse-keeper or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same" comprehends a factor intrusted with the possession for transportation or storage only.[81] Under 5 & 6 Vict. an agent in possession of goods but whose authority to sell has been revoked and who wrongfully retained them after a demand for them by the principal is not deemed in possession for the purposes of sale or pledge, although the pledgee knew nothing of the revocation of authority;[82] but at the present time any sale, pledge, or other disposition of the goods by an agent in possession is valid, although his authority has been revoked, provided that the person who claims the protection of the statute had no notice that the authority had been determined.[83]

(II) *UNDER CONDITIONAL SALE OR SIMILAR TRANSACTION.* Where a person who is in possession of goods under a conditional sale sells and delivers them before all the rent has been paid to one who receives them in good faith and without notice of the rights of the conditional vendor, the sale and delivery are within the provisions of the English Factors Act of 1889, section 9,[84] and the second vendee gets a good title;[85] but a person who has agreed to hire goods on condition that he may terminate the contract at any time by returning them to the owner but that upon the payment of certain instalments they shall become his property is not a person who has "agreed to buy goods" within said act,[86] and consequently a pledge by him to a third person without notice of the rights attaching to the goods is invalid as against the owner.[87] Where a debtor makes an assignment for the benefit of

wharfinger without any authority to sell is not within 6 Geo. IV, c. 94, § 4, even though he sometimes transacted business as a factor with some persons).

An agent whose duty it is to solicit orders and then to see that the goods are forwarded to the customers in accordance with the orders is not an agent intrusted with the possession of goods within the meaning of the factors acts. Hellings *v.* Russell, 33 L. T. Rep. N. S. 380 [*following* Cole *v.* North Western Bank L. R. 10 C. P. 354, 44 L. J. C. P. 233, 32 L. T. Rep. N. S. 733], where it was held that a pledge of the principal's goods was in fraud of instructions and, although the pledgee made advances *bona fide* and without knowledge of the fraud, the principal could recover from the pledgee.

81. Cook *v.* Beale, 1 Bosw. (N. Y.) 497, 505, construing N. Y. Laws (1830), § 6, where the court said: "We are unable to see that there are any grounds whatever for limiting the application of the words, 'or other person,' &c., to any particular class of persons; to those, for example, whose ordinary business is the transportation or storage of goods entrusted to their charge . . . It seems to us plain, that it is the special purpose for which merchandise or other property is committed, and not the special character or business of the person to whom it is committed, that takes from him the authority to sell that he might otherwise be held to possess. We are therefore convinced that no court of justice has the right to say that the words, 'or other person,' &c., are not just as applicable to commission merchants and factors, to whom goods are entrusted for transportation or storage only, as to any other class or description of persons whatever." See also Moors *v.* Kidder, 34 Hun (N. Y.) 534 [*affirmed* in 106 N. Y. 32, 12 N. E. 818], holding that it is not enough that the person intrusted with the goods should be intrusted for the purpose of storing them in the owner's name.

82. Fuentes *v.* Montis, L. R. 4 C. P. 93, 38 L. J. C. P. 95, 19 L. T. Rep. N. S. 364, 17 Wkly. Rep. 208.

83. See Factors Act of 1889 (St. 52 & 53 Vict. L. R. 26 St. 187).

84. Factors Act (1889), § 9 (L. R. 26 St. 186, 188) provides: "Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."

85. Lee *v.* Butler, [1893] 2 Q. B. 318, 62 L. J. Q. B. 591, 69 L. T. Rep. N. S. 370, 4 Reports 563, 42 Wkly. Rep. 88. See also Shenstone *v.* Hilton, [1894] 2 Q. B. 452, 63 L. J. Q. B. 584, 71 L. T. Rep. N. S. 339, 10 Reports 390, holding that an auctioneer who receives goods from a person in possession of them under such a contract is protected by the Factors Act of 1889, section 9.

86. Factors Act (1889), § 9.

87. Helby *v.* Matthews, [1895] A. C. 471, 60 J. P. 20, 64 L. J. Q. B. 465, 72 L. T. Rep.

his creditors, a chattel in his possession under a hire-purchase agreement, of which chattel there is no specific delivery, does not pass to the assignee under the Factors Act of 1889, section 9, as against the true owner.[88]

c. Factor's Possession of Documents of Title[89]—(I) *In General.* Under the New York statute it is unnecessary that the principal should have intrusted the factor with the identical evidence of title on the faith of which he procures a lien. Intrusting him with the primary document is equivalent to intrusting him with all others which in ordinary usage of trade grow out of it.[90] The English courts construed 6 Geo. IV, c. 94, to mean that the identical document must have been intrusted by the owner to the factor.[91] Immediately upon these decisions parliament passed an act for the purpose of preventing their force, so that whether the document in question was derived immediately from the owner of the goods or obtained by reason of the factor having been intrusted with other documents the factor was deemed to have been intrusted with the derivative document.[92] To entitle a person to the protection of the statute, it is necessary that the relation of principal and factor should exist.[93] Thus it was held in England before 40 & 41 Vict.[94] that a vendor who retained the documents of title was not a person intrusted therewith within the meaning of the statute.[95]

N. S. 841, 11 Reports 232, 43 Wkly. Rep. 561 [*distinguishing* Lee *v.* Butler, [1893] 2 Q. B. 318, 62 L. J. Q. B. 591, 69 L. T. Rep. N. S. 370, 4 Reports 563, 42 Wkly. Rep. 88]. See also Payne *v.* Wilson, [1895] 2 Q. B. 537, 65 L. J. Q. B. 150, 73 L. T. Rep. N. S. 12, 15 Reports 239 note, 43 Wkly. Rep. 657 (holding that where the hirer sold the goods to a *bona fide* purchaser before all instalments had been paid and the hirer was prosecuted to conviction for larceny as bailee, the owner can maintain an action for conversion against the purchaser); Thompson *v.* Veale, 74 L. T. Rep. N. S. 130. But see Hull Ropes Co. *v.* Adams, 65 L. J. Q. B. 114, 73 L. T. Rep. N. S. 446, 44 Wkly. Rep. 108 [*following* Lee *v.* Butler, [1893] 2 Q. B. 318, 62 L. J. Q. B. 591, 69 L. T. Rep. N. S. 370, 4 Reports 563, 42 Wkly. Rep. 88, and *distinguishing* Helby *v.* Matthews, [1895] A. C. 471, 60 J. P. 20, 64 L. J. Q. B. 465, 72 L. T. Rep. N. S. 841, 11 Reports 232, 43 Wkly. Rep. 561], holding that where the hirer agrees to pay a stated sum per month till the full price of the subject-matter be paid, when it is to become his own property, the agreement is, in the absence of a provision that he might terminate the hiring by delivering up to the owner, an agreement to buy, within the Factors Act of 1889, section 9, notwithstanding provisions of the contract that the owner might put an end to the arrangement for sale upon various contingencies.

88. Kitto *v.* Bilbie, 72 L. T. Rep. N. S. 266, 2 Manson 122, 15 Reports 188.

89. What is a document of title see *infra*, I, F, 2, c, (II).

Effect of pledge under a statute see *infra*, I, F, 2, e.

90. Cartwright *v.* Wilmerding, 24 N. Y. 521, holding that one who makes advances upon the faith of a documentary evidence of title furnished by a warehouse-keeper's receipt of imported goods procured by a factor by his being intrusted with an invoice of the goods is protected, although the invoice showed that the goods belonged to the shipper. See Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401, where the court said that the document must have been delivered to the factor by the owner or his agent or obtained by the factor in the ordinary mode of discharging the trust.

91. Lamb *v.* Attenborough, 1 B. & S. 831, 8 Jur. N. S. 280, 31 L. J. Q. B. 41, 10 Wkly. Rep. 211, 101 E. C. L. 831; Hatfield *v.* Phillips, 12 Cl. & F. 343, 14 M. & W. 665, 8 Eng. Reprint 1440; Phillips *v.* Huth, 10 L. J. Exch. 65, 6 M. & W. 572; Close *v.* Holmes, 2 M. & Rob. 22.

92. St. 5 & 6 Vict. c. 39, § 4. See Cartwright *v.* Wilmerding, 24 N. Y. 521, opinion of the court by Gould, J.

93. Toledo First Nat. Bank *v.* Shaw, 61 N. Y. 283 (holding that where an intermediate consignee named in a bill of lading, with power simply to receive and forward the property, without authority issues and sends a new bill of lading to one not the consignee named in the original bill, the person so receiving such new bill does not thereby become the factor or agent of the owner and the title of the latter is not affected by any contract made by the former for money advanced on the faith thereof); Zachrisson *v.* Ahman, 2 Sandf. (N. Y.) 68 (holding that a general clerk of a merchant who kept his accounts, negotiated charter-parties and purchases, but was empowered to do so only when under the supervision of and in consultation with another who was empowered by letter of attorney to manage all financial transactions, execute contracts, etc., and effect charter-parties for said merchant, was not a factor intrusted with the possession of documents of title).

94. St. 40 & 41 Vict. c. 39.

95. Johnson *v.* Credit Lyonnais Co., 3 C. P. D. 32, 47 L. J. C. P. 241, 37 L. T. Rep. N. S. 657, 26 Wkly. Rep. 195, where the vendor of merchandise lying in bond in a custom-house was allowed by the vendee to retain the dock warrants and the merchandise

This defect in the law was remedied.[96] The document must be actually transferred, at the time the advance is made, to the person advancing the money, and the transfer must vest in the transferee either a title to the goods or the exclusive means or right of obtaining actual possession.[97] The provisions of the statute that a factor intrusted with the possession of the document of title shall be deemed the true owner thereof so far as to give validity to his contracts made with third persons for money advanced or written obligations given by them "on the faith thereof" intend to refer merely to such evidences of title as that alone on the faith of which such advances are made.[98] The protection of persons dealing with any agent intrusted with the possession of a document of title does not apply where the possession was obtained without the owner's consent.[99] The fact that a person to whom documentary evidence of title is intrusted is called a trustee in a secret agreement under which he is intrusted with the document does not make him a trustee as to third persons having no notice of the agreement.[1]

(II) *As to What Are Such Documents.* By the New York statute, the documents of title, the possession of which entitles a person dealing with the factor to treat him as owner, are: (1) "A bill of lading;" (2) "a custom-house permit;[2]" and (3) "a warehouse-keeper's receipt[3] for the delivery of any such merchandise;" that is, the merchandise described in the first and second sections as shipped from some other port, foreign or domestic.[4] Under an arrangement whereby delivery should be made to persons producing cash receipts from the cashiers and holders of a bill of lading the receipts were held not to be documents of title within the meaning of 40 & 41 Vict. c. 39.[5] A delivery

was allowed to remain entered in the books of the dock company in the name of the vendor.

96. See Johnson *v.* Credit Lyonnais Co., 3 C. P. D. 32, 47 L. J. C. P. 241, 37 L. T. Rep. N. S. 657, 26 Wkly. Rep. 195, where the court said that since the appeal of the case parliament, by statute 40 & 41 Vict. c. 39, had extended the protection to persons acquiring title from agents to innocent persons purchasing or making advances in such cases as the present. See also the Factors Act of 1889 (52 & 53 Vict. c. 45), § 8, L. R. 26 St. 188, where the protection in such cases is provided for.

97. Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

98. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505.

99. Sage *v.* Shepard, etc., Lumber Co., 4 N. Y. App. Div. 290, 39 N. Y. Suppl. 449 (holding that a traveling salesman who has power to solicit and accept orders and agree on prices for the goods and to direct shipment of the goods and also to buy goods from other dealers to fill such orders is not a factor within the meaning of the act where he had procured by fraud bills of lading in his employer's name but did not show them to the buyer); Hazard *v.* Fiske, 18 Hun (N. Y.) 277 [*affirmed* in 83 N. Y. 287] (holding that the principal's mere neglect to take all precautions against fraud will not be deemed a voluntary consent).

1. New York Security, etc., Co. *v.* Lipman, 157 N. Y. 551, 52 N. E. 595 [*affirming* 91 Hun 554, 36 N. Y. Suppl. 355].

2. The term "custom-house permit" does not include the "permit" for the landing of goods on which the duties are not paid, to the end that they may be stored in a bonded warehouse as authorized by the act of congress of Aug. 6, 1846. Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401, holding that the only custom-house permit known to the law at the time of the passage of the statute was that which was granted to the consignee when the goods mentioned in his invoice and bill of lading had been duly entered at the custom-house and the duties thereon had been paid or secured to be paid.

3. The term "warehouse-keeper's receipt" means the receipt of a keeper of a private warehouse in which the person named in the receipt has deposited goods for safe-keeping which by its terms binds the warehouse-keeper upon the surrender of the receipt to deliver the goods to the bearer of it or to the holder of it if duly indorsed to him. It does not include the receipt of a keeper of a government bonded warehouse. Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401 (holding that a receipt given for goods deposited in a bonded warehouse upon which the duties due were unpaid was not included); George *v.* Louisville Fourth Nat. Bank, 41 Fed. 257 (holding that a receipt for whisky stored in a bonded warehouse is not a document of title within the Kentucky act of May 5, 1880, since whisky in a bonded warehouse is subject to the regulations of congress and is in charge of the officers of the government). See Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267, holding that the term applies to receipts of private warehouses and not merely to the receipts of custom-houses or bonded warehouses.

4. Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

5. Kemp *v.* Falk, 7 App. Cas. 573, 5 Aspin. 1, 52 L. J. Ch. 167, 47 L. T. Rep. N. S. 454, 31 Wkly. Rep. 125.

order is not equivalent to a bill of lading within the meaning of 6 Geo. IV, c. 94, § 2.[6]

d. Rights Derived From Person in Whose Name Goods Have Been Shipped. One of the provisions of the Factors Act is that every person in whose name merchandise shall be shipped shall be deemed to be the true owner thereof so far as to entitle the consignee to a lien thereon for money advanced or negotiable security given by such consignee to or for the use of the person in whose name the shipments shall have been made or for any money or negotiable security received by the persons in whose name such shipments shall have been made to one for the use of such consignee. This provision applies only where the owner consents to have the shipments in the name of a third person.[7] It does not apply where such shipment has been made without his consent,[8] as where goods have been stolen,[9] or where the property has been intrusted to an agent to ship in the owner's name and the agent shipped it in his own name and obtained advances thereon.[10] Nor does the provision apply to or include one who discounts a draft drawn by the consignor on the consignee but not accepted, since the act is designed only to protect factors, agents, and consignees appearing to be such on the bill of lading and who are induced by the bill to pay money or incur liabilities.[11] This particular part of the Factors Act has been repealed in New York.[12]

e. Pledge by Factor of Goods or Documents of Title. By the general rule the Factors Act protects the pledgees, whether the pledge has been made of the goods themselves[13] or of documentary evidences of title.[14] But a pledgee is not protected where the factor-pledgor obtained the goods from the owner by fraudulent representations and on forged conditional contracts of sale.[15] And it has been said that the Factors Act was framed for the regulation of the conduct of factors within the jurisdiction where the act was passed and for the protection of those who dealt with them there and not for the determination of questions arising upon the pledge by a factor in a foreign country, although the delivery of the goods in pursuance of the contract made in the foreign country may have been consummated by the agents of the parties in the jurisdiction of the forum.[16] In England the statute validating a pledge by a mercantile agent refers to a person of a class ordinarily carrying on that description of business or a person held out to the world as belonging to that class.[17] The statute does not apply to pledges for antecedent liabilities,[18] except to the extent defined therein.[19]

6. Jenkyns *v.* Usborne, 7 M. & G. 678, 13 L. J. C. P. 196, 8 Scott N. R. 505, 49 E. C. L. 678.

7. Hazard *v.* Fiske, 18 Hun (N. Y.) 277 [*affirmed* in 83 N. Y. 287].

8. Hazard *v.* Fiske, 18 Hun (N. Y.) 277 [*affirmed* in 83 N. Y. 287].

9. Miller *v.* Laws, 6 Ohio Dec. (Reprint) 736, 7 Am. L. Rec. 606.

10. Covill *v.* Hill, 4 Den. (N. Y.) 323.

11. Manufacturers', etc., Bank *v.* Farmers', etc., Nat. Bank, 2 Thomps. & C. (N. Y.) 395 [*reversed* on other grounds in 60 N. Y. 40].

12. N. Y. Laws (1897), c. 418. See Birdseye Rev. St. (3d ed. 1901) p. 1.

13. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505; Henry *v.* Philadelphia Warehouse Co., 81 Pa. St. 76, construing La. Civ. Code, § 3,133 *et seq.*

14. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505; Cleveland *v.* Shoeman, 40 Ohio St. 176 (construing the Ohio act of March 12, 1844); Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267 (construing Factors Act (1863); Warehouse Receipt Act (1860) as amended by Wis. Acts (1863), c. 73). *Contra*, Young *v.* Scott, 25 La. Ann. 313, holding that under the Louisiana act of 1868, No. 150, entitled "An Act to Prevent the Issue of False Receipts by Bills of Lading, etc.," a factor cannot secure his individual creditor by pledging the planter's cotton, which had been confided to him for sale.

15. H. A. Prentice Co. *v.* Page, 164 Mass. 276, 41 N. E. 279.

16. Walther *v.* Wetmore, 1 E. D. Smith (N. Y.) 7.

17. Hastings *v.* Pearson, [1893] 1 Q. B. 62, 67 L. T. Rep. N. S. 553, 41 Wkly. Rep. 127, holding that a traveler intrusted with jewelry for the purpose of selling the same, and paid a small salary and commission, and without any authority to pledge the goods is not a mercantile agent acting in the ordinary course of business of a mercantile agent within the statute, so as to bind his principal by pledging the goods to a pawnbroker.

18. Macnee *v.* Gorst, L. R. 4 Eq. 315, 15 Wkly. Rep. 1197. See also Learoyd *v.* Robinson, 13 L. J. Exch. 213, 12 M. & W. 745.

19. N. Y. Laws (1830), c. 179, § 4, 2 Birdseye Rev. St. (3d ed. 1901), providing that

Where a factor makes an agreement with a warehouse owner that negotiable receipts shall be made out without bale marks, so that other goods equal in kind and quality may be substituted for those in storage, the substitution of other goods than those receipted for subsequent to the pledge of the receipts does not operate as a pledge for an antecedent debt.[20] In such case the release of the older bales of goods constitutes a valuable consideration for subjecting the new bale as deposited to the same lien.[21]

f. Consideration For the Transfer, Pledge, Etc. Under 6 Geo. IV, c. 94, § 3,[22] the deposit or pledge of a document of title must be for money or a negotiable instrument.[23] In Wisconsin it is held that the act does not apply to a barter by the factor for his own use of his principal's goods in his possession.[24] But in England the consideration necessary for the validity of a sale, pledge, or other disposition of goods may be any valuable consideration; but where the goods are pledged by the factor, the pledgee acquires no right or interest in the goods so pledged in excess of the value of whatever is transferred in exchange.[25]

g. Notice of Agency. It is held that the statute gives no protection to one who makes advances with notice that the factor has possession only as agent of his principal the intent being to protect only innocent purchasers.[26] To render valid a contract made on the faith of the document of title, the language thereof must not be inconsistent with the supposition that the factor owns the goods.[27] In

the pledgee for an antecedent debt shall not acquire or enforce any right or interest in or to the merchandise or documents pledged other than was possessed or might have been enforced by the agent at the time of the pledge. See also the Factors Act of 1889 (52 & 53 Vict. c. 45), § 4, L. R. 26 St. 187, to the same effect.

20. New York Security, etc., Co. *v.* Lipman, 91 Hun (N. Y.) 554, 36 N. Y. Suppl. 355 [*affirmed* in 157 N. Y. 551, 52 N. E. 595] (holding that the security of the assignee of the receipts is not affected by Factors Act, § 4, which provides that every person accepting any merchandise in deposit from a factor as security for an antecedent debt shall not acquire thereby any interest therein not held by the factor at the time of making the deposit); Blydenstein *v.* New York Security, etc., Co., 67 Fed. 469, 15 C. C. A. 14.

21. New York Security, etc., Co. *v.* Lipman, 157 N. Y. 551, 52 N. E. 595 [*affirming* 91 Hun 554, 36 N. Y. Suppl. 355]; Blydenstein *v.* New York Security, etc., Co., 67 Fed. 469, 15 C. C. A. 14.

22. Under 6 Geo. IV, c. 94, § 4, it has has been held that it is not necessary that money should actually pass in order that a purchaser may be protected. The section applies equally to a case where the goods are transferred in consideration of an antecedent debt. Thackrah *v.* Fergusson, 25 Wkly. Rep. 307.

23. See Taylor *v.* Kymer, 3 B. & Ad. 320, 1 L. J. K. B. 114, 23 E. C. L. 145, holding that a warrant given on the faith of the documents of title set out in the statute is not a negotiable instrument within the meaning of the act.

24. Victor Sewing Mach. Co. *v.* Heller, 44 Wis. 265, under Wis. Acts (1863), c. 91, § 3, which provides that a factor in possession of goods shall be deemed a true owner so as to give validity to any contract made by him with another for the sale of such goods for any money advanced or other obligation in writing given by such other person on the faith thereof.

25. Factors Act of 1889 (52 & 53 Vict. c. 45), L. R. 26 St. 186.

26. Florence Sewing Mach. Co. *v.* Warford, 1 Sweeny (N. Y.) 433; Stevens *v.* Wilson, 3 Den. (N. Y.) 472 [*affirming* 6 Hill 512]; Macky *v.* Dillinger, 73 Pa. St. 85.

Sufficiency of notice.— It is said that inasmuch as the factor has by the statute both the power of sale and of pledge and that a contract can be invalidated only by the nonexistence of both of these powers, since either is sufficient, it must be shown, to disprove reliance on the factor's possession as evidence of proper authority, that the purchaser had knowledge of such entire want of statutory authority on the part of the factor or of circumstances sufficient to put him upon inquiry and naturally leading to its discovery. The mere knowledge of the factor's employment in a particular case is not enough to put the purchaser or pledgee on inquiry as to the exact nature of the factor's authority. Pegram *v.* Carson, 10 Bosw. (N. Y.) 505.

27. Bonito *v.* Mosquera, 2 Bosw. (N. Y.) 401.

In Wisconsin it is held that notice that the holder of a negotiable warehouse receipt holds it as a factor is not notice of any limit of the factor's power of disposition by sale or pledge, but that if the vendee or pledgee has notice that the factor holds title for the principal and that he sells or pledges in violation of the principal's intruction, the principal will not be bound. Price *v.* Wisconsin M. & F. Ins. Co., 43 Wis. 267. *Compare* Stevens *v.* Wilson, 3 Den. (N. Y.) 472.

England[28] a contract with a factor for the pledge of goods is held valid as against the principal, although the person dealing with the factor knows him to be only an agent, if the person so dealing with the factor acts *bona fide* and without notice that the factor is acting *mala fide* and beyond his authority.[29] The provision of 6 Geo. IV, c. 94, § 5, authorizing the agent or factor to pledge the goods of his principal to the extent of the factor's lien to persons who are aware of his fiduciary character and of the want of authority from the principal to pledge the goods was not preserved in the New York statute[30] or in the English Factors Act of 1889.[31]

3. Actions By and Against Principals and Factors — a. Right of Action and Parties.[32] Factors in possession of goods may maintain an action in their own name for any damage done to the goods,[33] particularly where they have a lien for advances and for their guaranty;[34] and they may maintain an action against the carrier of the goods for injuries thereto during transportation[35] or an action to enforce a contract made by them for the storage of the goods,[36] or to recover goods which have been wrongfully taken from the place where they had stored them;[37] and where goods are delivered to a carrier to be transported to meet advances and in pursuance of a special agreement for that purpose invoices for the goods are sent to the factor by the consignor, a vested interest passes to the factor entitling him to maintain replevin against the sheriff who levies, subsequent to the delivery to the carrier, on the goods on execution against the consignor.[38] Factors compelled to pay an illegal exaction to a government officer for permission to ship goods in their possession may maintain a suit to recover the amount of the exaction in cases where the owner might do so.[39] A factor has a special property in goods consigned to him and in the proceeds of a sale thereof, and he has a right to sue in his own name for the recovery of the purchase-price of the goods.[40] A factor who makes a contract of sale for his principal is a trustee of an express trust within the meaning of the code or statutory provision

28. St. 5 & 6 Vict. c. 39, § 3, provides: "That this Act, and every Matter and Thing herein contained, shall be deemed and construed to give Validity to such Contracts and Agreements only, and to protect only such Loans, Advances, and Exchanges, as shall be made *bona fide*, and without Notice that the Agent making such Contracts or Agreements as aforesaid has not Authority to make the same, or is acting *mala fide* in respect thereof against the Owner of such Goods and Merchandize."

29. Navulshaw *v.* Brownrigg, 2 De G. M. & G. 441, 16 Jur. 979, 21 L. J. Ch. 908, 51 Eng. Ch. 345, 42 Eng. Reprint 943, holding that the pledgee must be fixed with knowledge that the agent is acting *mala fide* to lose the benefit of the statute and no mere suspicion will amount to notice. See also Sheppard *v.* Union Bank, 7 H. & N. 661, 8 Jur. N. S. 264, 31 L. J. Exch. 154, 5 L. T. Rep. N. S. 757, 10 Wkly. Rep. 299; Gobind Chunder Sein *v.* Administrator-Gen., 8 Jur. N. S. 343, 5 L. T. Rep. N. S. 559, 9 Moore Indian App. 140, 10 Wkly. Rep. 155, 19 Eng. Reprint 695, holding that where an agent intrusted with a document of title pledges it *mala fide*, it is necessary to deprive the transaction of the protection of 5 & 6 Vict. c. 39, § 1, and to bring it within the proviso of section 3 that the jury should find categorically that the pledgee had notice of the agent's *mala fides* or want of authority.

30. See Stevens *v.* Wilson, 3 Den. (N. Y.) 472.

31. L. R. 26 St. 186.

32. Parties generally see Parties.

Party defendant.— A national bank that makes a loan on the security of a warehouse receipt is a proper party defendant to a suit in replevin by the consignor and owner against the warehouse-keeper to whom the goods have been committed by the consignee for storage. Cleveland *v.* Shoeman, 40 Ohio St. 176.

33. Robinson *v.* Webb, 11 Bush (Ky.) 464.

34. Porter *v.* Schendel, 25 Misc. (N. Y.) 779, 55 N. Y. Suppl. 602. See also Illinois Cent. R. Co. *v.* Schenk, 64 Ill. App. 24, holding that a factor may recover for wrongful destruction of goods held by him for another at his own risk, he having paid the owner their value in compliance with his contract.

35. Morgan *v.* Bell, 4 Mart. (La.) 615.

36. Allen *v.* Steers, 39 La. Ann. 586, 2 So. 199.

37. Fowler *v.* Cooper, 3 La. 215.

38. Grosvenor *v.* Phillips, 2 Hill (N. Y.) 147.

39. Hamilton *v.* Dillin, 11 Fed. Cas. No. 5,979 [*affirmed* in 21 Wall. 73, 22 L. ed. 528], laying down the rule as to voluntary and involuntary payment.

40. *Georgia.*— Groover *v.* Warfield, 50 Ga. 644.

that a trustee of an express trust may sue without joining with him a person for whose benefit the action is prosecuted.[41] The principal may sue for the recovery of the purchase-price whether at the time of the sale the vendee knew that the factor was acting as agent,[42] or whether the agency was undisclosed.[43] And where the factor sues in his own name, the principal may control the litigation, saving the rights of the factor, unless the latter's legitimate charges against the subject of the action exceed the amount recoverable.[44] The principal may maintain an action against the sheriff for taking goods from the possession of the factor[45] or for taking the proceeds of the sale of the goods upon an attachment against the factor.[46] A foreign principal may sue in his own name for goods sold by his agent in the jurisdiction of the forum, although no agency was disclosed at the time of the sale, unless it is made affirmatively to appear that exclusive credit was given to the agent by proof other than the mere fact that the principal resided in another state or country;[47] and if the purchaser of a consignment becomes insolvent, the non-resident consignor is not affected by the discharge of the insolvent but can sue to recover the price for which the goods were sold.[48]

b. Condition Precedent. If a pledge of goods is made irrespective of the factor's lien for advances, or in other words without the pledgee's having any

Kentucky.— See Graham *v.* Duckwall, 8 Bush (Ky.) 12 [*quoting* Story Agen. 110].

New York.— Ladd *v.* Arkell, 37 N. Y. Super. Ct. 35; Murray *v.* Toland, 3 Johns. Ch. 569.

North Carolina.— Whitehead *v.* Potter, 26 N. C. 257.

Wisconsin.— Beardsley *v.* Schmidt, 120 Wis. 405, 98 N. W. 235, 102 Am. St. Rep. 991.

England.—Drinkwater *v.* Goodwin, 1 Cowp. 251.

See 23 Cent. Dig. tit. "Factors," § 100.

Upon an express promise to pay to the factor for the use of the principal the factor may maintain an action in his own name. Van Staphorst *v.* Pearce, 4 Mass. 258.

Warranty by factor — Rescission.— Where a factor who has made advances sells the goods under a warranty and the purchaser rescinds the sale because the goods do not correspond with the warranty, the rescission being with the consent of the principal and without notice to the factor, the factor cannot maintain an action against the purchaser for the price of the goods. Robinson *v.* Talbot, 121 Mass. 513.

A mere merchandise broker not acting under a del credere commission cannot maintain an action in his own name to recover the price of goods sold by him for the owner; but if he has made advances or guaranteed the sale he may sue in his own name. White *v.* Chouteau, 10 Barb. (N. Y.) 202.

The foreign factor may begin suit in his own name or in his principal's name. See Meyer *v.* Littell, 2 Pa. St. 177.

41. Grinnell *v.* Schmidt, 2 Sandf. (N. Y.) 706; Beardsley *v.* Schmidt, 120 Wis. 405, 98 N. W. 335, 102 Am. St. Rep. 991. See N. Y. Code Civ. Proc. § 449.

42. Edmond *v.* Caldwell, 15 Me. 340.

43. Burton *v.* Goodspeed, 69 Ill. 237; Brooks *v.* Doxey, 72 Ind. 327; Huntington *v.* Knox, 7 Cush. (Mass.) 371; Parker *v.* Donaldson, 2 Watts & S. (Pa.) 9.

Part of consignment belonging to principal, part to factor.— If, however, a factor under an entire contract for a gross sum sells goods, some of which belong to himself and the rest to his principal, who is undisclosed to the vendee, the principal has no right to sever his claim from the factor's and maintain an action in his own name and thus subject the vendee to a separate suit for the value of the goods belonging to him and included in the contract of sale. Roosevelt *v.* Doherty, 129 Mass. 301, 37 Am. Rep. 356.

44. Beardsley *v.* Schmidt, 120 Wis. 405, 98 N. W. 235, 102 Am. St. Rep. 991. See also Merrill *v.* Thomas, 7 Daly (N. Y.) 393, holding that where the factor's advances have been paid the principal is entitled to collect the proceeds of the sale of the goods by the factor.

45. Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

46. Moore *v.* Hillabrand, 16 Abb. N. Cas. (N. Y.) 477.

47. Barry *v.* Page, 10 Gray (Mass.) 398, 399, where the court said: "It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is, that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is, that there is no such absolute presumption." *Contra, In re* Merrick, 5 Watts & S. (Pa.) 9 [*reversing* 2 Ashm. 485], holding that where a principal is in a foreign country exclusive credit is presumed to be given to the factor.

48. Ilsley *v.* Merriam, 7 Cush. (Mass.) 242, 54 Am. Dec. 721.

notice of the factor's lien, the principal may have replevin or trover against the pledgee without a previous demand for the goods.[49] A creditor of the consignor cannot, by foreign attachment, arrest a sale of the goods by the factor without first tendering him the amount of his advances.[50]

c. Form of Action. If a factor pledges goods of his principal the principal may bring trover against both the factor and his pledgee or either of them,[51] or he may replevy the goods from the pledgee.[52] A factor who has advanced money on goods has sufficient interest in them to support an action of replevin.[53]

d. Defenses. The lien of a factor is a personal privilege and cannot be set up by any other person in defense to an action by the principal.[54] It is no defense to an action by the factor for the price of goods sold that the sale was made by the factor's agent without authority from the principal, as such objection can be raised only by the principal.[55]

e. Pleading.[56] Where a factor claims to have paid a balance due his principal by notes of the principal, in a bill by the principal's assignee against the factor for an account the latter must answer particularly interrogatories as to how he came into possession of the notes and upon what terms.[57]

f. Evidence.[58] The general rules of evidence control the burden of proof[59] as well as the presumptions[60] which arise in such actions; and the same is true with respect to the admissibility of evidence,[61] as well as its weight and suf-

49. Silverman *v.* Bush, 16 Ill. App. 437; Steiger *v.* Third Nat. Bank, 6 Fed. 569. 2 McCrary 494.

Under a Missouri statute if a pledge was made for the amount of the factor's advances and charges, this amount must first be tendered by the consignor before he can maintain suit for the conversion of the goods. Steiger *v.* Third Nat. Bank, 6 Fed. 569, 2 McCrary 494, under the act of March 13, 1868, authorizing the transfer of a warehouse receipt by indorsement and providing that the transferee shall be deemed the owner of the goods so far as to give validity to any pledge, lien, or transfer made.

50. Baugh *v.* Kirkpatrick, 54 Pa. St. 84, 93 Am. Dec. 675.

51. Bott *v.* McCoy, 20 Ala. 578, 56 Am. Dec. 223; Van Amringe *v.* Peabody, 28 Fed. Cas. No. 16,825, 1 Mason 440.

Trover generally see TROVER AND CONVERSION.

52. Gray *v.* Agnew, 95 Ill. 315.

Replevin generally see REPLEVIN.

53. Williams *v.* Bugg, 10 Mo. App. 586.

54. Holly *v.* Huggeford, 8 Pick. (Mass.) 73, 19 Am. Dec. 303. See also Jones *v.* Sinclair, 2 N. H. 319, 9 Am. Dec. 75.

55. Harralson *v.* Stein, 50 Ala. 347.

56. See, generally, PLEADING.

57. Farnum *v.* Farrell, 2 Phila. (Pa.) 368.

58. See, generally, EVIDENCE.

59. Kauffman *v.* Beasley, 54 Tex. 563, holding that where the owner of goods brings in question the transaction by which a third person obtains the goods from the factor, the burden of proving the factor's authority to transfer the goods in the manner questioned is upon the transferee.

60. Where the principal claims goods seized for his factor's debt and it is in evidence that some of the consignments of which the goods in question formed a part had been sold by the factor and that part of the consignment had been paid for by the factor, the presumption is that the factor had paid only to the extent of the goods he had sold. Powell *v.* Brunner, 86 Ga. 531, 12 S. E. 744, where plaintiff insisted that it was incumbent upon the claimant to prove the amount paid, as it was within his power to do so by his books or otherwise, and that as he failed to produce the evidence the presumption would arise not only that the goods sold by the factor had been paid for but also the whole or a part of that which remained unsold; and where the court held that, inasmuch as the factor's contract was to pay for the goods when and as he sold it, plaintiff's contention could not be sustained.

61. See cases cited *infra*, this note.

Telegram.— Where goods in the hands of the factor have been seized for his debts, a telegram from the factor to his principal informing him that he, the factor, had failed and that the sheriff was moving "your goods" was not admissible, upon a claim by the principal, to show title in the principal; but since it shows that it was sent after levy was made it must be considered as a mere declaration on the factor's part recognizing title in the claimant principal after the factor had virtually lost possession of the property and after the matter in controversy between plaintiff and claimant had arisen. But the error in admitting the telegram in evidence is not sufficient to reverse the judgment where evidence of title in the claimant was shown to be ample and uncontradicted. Powell *v.* Brunner, 86 Ga. 531, 12 S. E. 744.

Usages of the trade.— In an action by a factor for insurance money covering goods consigned to him which he had insured without express direction from his principal, evidence that it was the usage of the trade to effect insurance on consignments without ex-

ficiency.[62] In an action by a shipper against a railroad for damages to the goods shipped, evidence as to the condition of the account between plaintiff and the factor to whom the goods were consigned is irrelevant, since the factor is not the owner of the goods, although he may have advanced money equal to or even exceeding their value.[63]

g. Trial.[64] Whether the possession of the factor is fraudulent is a question for the jury.[65] In an action for the proceeds of goods sold by a factor who claimed a lien for advances, where the issue is whether a certain transaction between the consignor and plaintiffs, who were third persons, constituted a sale, the question is for the jury.[66]

II. BROKERS.*

A. Definition. A broker is one who is engaged for others on a commission negotiating contracts relative to property with the custody of which he has no concern.[67]

press instructions from the principal is admissible to show the factor's right to effect the insurance. De Forest *v.* Fulton F. Ins. Co., 1 Hall (N. Y.) 84.

62. Seymour *v.* Hoadley, 9 Conn. 418, where it was held that in trover by the factor for goods taken from his possession by the creditors of his consignor upon which goods he had made his advances, the fact that plaintiff held out the goods to the world as his own and kept them in a store in a foreign jurisdiction was not conclusive evidence of fraud.

63. Hill *v.* Georgia, etc., R. Co., 43 S. C. 461, 21 S. E. 337.

64. See, generally, TRIAL.

65. Seymour *v.* Hoadley, 9 Conn. 418.

66. Hunter *v.* Mathewson, 27 Ill. App. 192, holding further that an instruction that the question for the jury to try was whether the factor was a *bona fide* purchaser of the goods to the extent of his claim against the consignor was erroneous, as defendant's position was that of a factor enforcing his lien and not of a purchaser, and holding further that it was error to charge them that, if the jury found that when the goods were sold by defendant the consignor urged that a draft he had drawn on defendant to deliver to plaintiffs be paid and protested against defendant deducting his advances, then there was no defense.

67. See Braun *v.* Chicago, 110 Ill. 186; Higgins *v.* Grindrod, 16 Phila. (Pa.) 200; Pott *v.* Turner, 6 Bing. 702, 8 L. J. C. P. O. S. 282, 4 M. & P. 551, 19 E. C. L. 316.

Other definitions are: A special agent who derives his power and authority to bind his principal from the instructions the latter gives him. Clark *v.* Cumming, 77 Ga. 64, 67, 4 Am. St. Rep. 72.

A negotiator between other parties, never acting in his own name, but in the names of those who employ him. He is strictly a middleman, and, for some purposes, the agent of both parties. Henderson *v.* State, 50 Ind. 234, 239.

A person whose business it is to bring buyer and seller together. He need have nothing to do with negotiating the bargain. Keys *v.* Johnson, 68 Pa. St. 42, 43.

An agent employed to make bargains and contracts between other persons in matters of trade, commerce, and navigation for a compensation commonly called brokerage. He is strictly a middleman or intermediate negotiator between the parties. Edgerton *v.* Michels, 66 Wis. 124, 130, 26 N. W. 748, 28 N. W. 408 [*citing* Story Agen. §§ 28, 34].

A person employed to settle a claim against a city, for which he was to receive a certain percentage of the amount obtained, was not a broker, so as not to be entitled to recover for his services unless they were successful. Miller *v.* Haskell, 179 Mass. 312, 60 N. E. 982.

A person who buys claims for himself is not a broker. Gast *v.* Buckley, 64 S. W. 632, 23 Ky. L. Rep. 992. See also Com. *v.* Holmes, 11 Pa. St. 468; State *v.* Duncan, 16 Lea (Tenn.) 75. However, the fact that one occasionally operates on his own account will not denude him of the character of a broker, if he really acts notoriously as such. Bragg *v.* Meyer, 4 Fed. Cas. No. 1,801, McAll. 408.

A salaried agent who does not act for a fee or rate per cent is not a broker. Portland *v.* O'Neill, 1 Oreg. 218.

Employment agents.— A person who hires or procures for another persons to be employed by him in the laying out and surveying of a line of railway is not a broker. Milford *v.* Hughes, 16 L. J. Exch. 40, 16 M. & W. 174.

A stock-broker is one who, for a commission, attends to the purchase and sale of stocks and other securities for the account of clients. Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 633, 40 L. R. A. 611. A person who for brokerage and hire negotiates and concludes bargains for stocks is a broker in point of law. Janssen *v.* Green, 4 Burr. 2103. Stock-brokers are in some aspects an exceptional class of brokers. A stock-broker who purchases stocks for his client on margin "is a Broker because he has no interest in the transaction, except to the extent of his com-

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B. Regulation of Business[68] — **1. License-Tax — a. In General.** In some states by constitution,[69] and in others by statute,[70] the occupation of brokerage is subject to taxation as a privilege. The imposition of a license-tax is a valid exercise of the police power of the state,[71] and the power to tax may lawfully be delegated to a municipality.[72]

b. Persons Liable to Tax. Any person who acts as middleman or negotiates commercial transactions in behalf of clients is ordinarily deemed a broker within the meaning of a statute or ordinance imposing a license-tax on brokers.[73] The

missions [Hays *v.* Currie, 3 Sandf. Ch. (N. Y.) 585]; he is a pledgee, in that he holds the stock, etc., as security for the repayment of the money he advances in its purchase [see *infra*, II, D, 5, b]; so he is a trustee, for the law charges him with the utmost honesty and good faith in his transactions; and whatever benefit arises therefrom inures to the *cestui que trust* [*Ex p.* Cooke, 4 Ch. D. 123, 46 L. J. Bankr. 52, 35 L. T. Rep. N. S. 649, 25 Wkly. Rep. 171; Taylor *v.* Plumer, 3 M. & S. 562, 2 Rose 457, 16 Rev. Rep. 361]." Dos Passos Stock-Br. & Stock-Exch. 180. "It is entirely clear that in these transactions [purchases on long account on margin] the party employed, though he belongs to a class commonly called 'brokers,' does not act as broker merely. In such business they are more than brokers, according to the legal signification of that term; and all arguments, imputing to them a mere agency so far as they rest upon the facts, that they are called 'brokers,' are unsound and fallacious. A broker, is a mere intermediate agent, negotiating between buyer and seller. As broker, he is not entitled to the possession of the property, which is the subject of sale or purchase; nor does he, in the character of broker, receive or pay the price, nor is he authorized to do so. It is his office to negotiate contracts between others, which they carry into execution, by performance (Higgins *v.* Moore, 34 N. Y. 417; and cases cited). The business we are considering is of a widely different character, to which the whole responsibility of the broker (so called), is committed. In some of its analogies his relation to the transaction is far more like that of a factor holding goods for sale, under a *del credere* commission, and under advances to his principal. In another and similar view, his office and duty is in the nature of a trust, to be executed for the profit or loss of his principal, conditioned on the performance by the principal, of his duty to keep the marginal security good; and is determinable at the option of either party." Morgan *v.* Jaudon, 40 How. Pr. (N. Y.) 366, 378.

Auctioneer distinguished see AUCTIONS AND AUCTIONEERS, 4 Cyc. 1039 note 2.

Brocage or brokerage defined see 5 Cyc. 1117.

Factors distinguished see *supra*, I, A, 4.

Money broker as banker see BANKS AND BANKING, 5 Cyc. 432 note 10.

Who are brokers within license or tax laws see *infra*, II, B, 1, b.

68. Regulation of loan brokers' commissions see *infra*, II, E, 1, j.

Requirement of written authorization see *infra*, II, E, 1, a, (III).

69. Wiltse *v.* State, 8 Heisk. (Tenn.) 544, holding that the occupation of a real-estate broker is subject under the constitution, to taxation as a privilege.

70. See cases cited *infra*, note 71 *et seq.* See, however, Nott *v.* Papet, 15 La. 306.

Licenses in general see LICENSES.

Offense of transacting business without a license see *infra*, II, B, 2.

Presumption as to license see *infra*, II, E, 2, d, (I).

Right of unlicensed broker to recover commissions see *infra*, II, E, 1, b.

71. Little Rock *v.* Barton, 33 Ark. 436 (city ordinance); Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611 (holding that the imposition of a license, and payment of a fee therefor as a condition precedent to conducting a brokerage business, is a lawful exercise of municipal power, whether it be for the purpose of regulation or for the production of revenue); Braun *v.* Chicago, 110 Ill. 186 (city ordinance); St. Louis *v.* McCann, 157 Mo. 301, 57 S. W. 1016 (city ordinance). And see, generally, CONSTITUTIONAL LAW.

A receipt or license from the city treasurer is not such a license as authorizes a real-estate broker to act, so as to relieve him from the penalties of the Pennsylvania act of May 27, 1841 (Pub. Laws 396), and the act of April 10, 1849 (Pub. Laws 570), and to enable him to recover commissions as such. Jadwin *v.* Hurley, 10 Pa. Super. Ct. 104.

License of brokers engaged in interstate commerce see COMMERCE, 7 Cyc. 444.

72. Braun *v.* Chicago, 110 Ill. 186, holding that in the absence of any constitutional restriction the legislature may authorize municipalities to demand and collect a license fee or tax of all persons pursuing the business of brokers within their limits, and prohibit the exercise of such business by brokers without a license.

73. See cases cited *infra*, this note *et seq.*

An auctioneer is not a broker. Wilkes *v.* Ellis, 2 H. Bl. 555.

An exchange broker, licensed as such under the Pennsylvania act of May 27, 1841, who buys notes, drafts, acceptances, and other securities in the nature thereof, with his own funds, and not to sell again, is not subject to the tax or penalty imposed by that act upon such as follow the business of a bill broker without a specific license therefor. Com. *v.* Holmes, 11 Pa. St. 468.

A ship-broker, or one who obtains on com-

term includes stock-brokers,[74] real-estate brokers,[75] and commercial or merchandise brokers.[76] Internal revenue acts have defined a broker to be one whose business

mission freight and passengers for vessels, is not a broker. Gibbons *v.* Rule, 4 Bing. 301, 5 L. J. C. P. O. S. 176, 12 Moore C. P. 539, 29 Rev. Rep. 570, 13 E. C. L. 514.

One who sells his own property is not a broker. Brooks *v.* Pollard, 36 Ala. 573; State *v.* Duncan, 16 Lea (Tenn.) 75.

A corporation does not become a broker by transacting for itself the business which its charter authorizes it to do, and its president and directors in doing and directing its business are not liable to the penalty prescribed for a failure to take out a broker's license. Henderson *v.* State, 50 Ind. 234. Thus a banking corporation licensed to discount paper, purchase bills of exchange, etc., need not take out a broker's license. Bradley *v.* State Bank, 20 Ind. 528; Smith *v.* State Bank, 18 Ind. 327.

Definition of broker see *supra*, II, A.

74. Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611 (holding that the phrase "goods, wares, and merchandise" in an ordinance defining a broker as one who, for commission or other compensation, is engaged in selling or negotiating the sale of goods, wares, and merchandise belonging to others, includes corporate stock or other securities subject to common barter, and evidenced by certificates, bonds, or other instruments); Hustis *v.* Pickands, 27 Ill. App. 270 (so holding as to a broker in mining stock); Clarke *v.* Powell, 4 B. & Ad. 846, 2 L. J. K. B. 145, 1 N. & M. 492, 24 E. C. L. 368; Scott *v.* Jackson, 19 C. B. N. S. 134, 115 E. C. L. 134; Smith *v.* Lindo, 4 C. B. N. S. 395, 93 E. C. L. 395 [*affirmed* in 5 C. B. N. S. 587, 4 Jur. N. S. 974, 27 L. J. C. P. 335, 6 Wkly. Rep. 748, 94 E. C. L. 587].

An officer of a company formed to carry on stock-broking who in the course of business bought stock for a customer and signed the bought-and-sold notes, the principals not seeing one another and no one else acting as broker in the transaction, is liable to the penalty imposed on persons acting as brokers without a license. Scott *v.* Cousins, L. R. 4 C. P. 177, 38 L. J. C. P. 156, 20 L. T. Rep. N. S. 32, 17 Wkly. Rep. 324.

A person not engaged in regular brokerage business need not take out a license. Johnson *v.* Williams, 8 Ind. App. 677, 36 N. E. 167.

One who, at public sale, disposes of tax-receivable coupons detached from state bonds, but not taken from bonds belonging to the seller, is not a stock-broker under Va. St. (Acts Gen. Assembly 1883–1884) § 65, requiring stock-brokers to take out a license, although the seller received compensation for making the sale. Com. *v.* Lucas, 84 Va. 303, 4 S. E. 695.

Evidence of brokerage.— Testimony that witness took S to an office used by defendant, that on that occasion four memoranda were made by defendant, each of the sale by S of £1,000 stock to a person whose name did not transpire, that nothing was handed over at the time, and that witness did not see any money pass, is evidence of an acting by defendant as a broker. Scott *v.* North, L. R. 2 C. P. 270, 15 L. T. Rep. N. S. 508.

75. Little Rock *v.* Barton, 33 Ark. 436; Buckley *v.* Humason, 50 Minn. 195, 52 N. W. 385, 36 Am. St. Rep. 637, 16 L. R. A. 423 (so holding, although the property in question is situated in another state); Pittsburgh *v.* Coyle, 24 Pittsb. Leg. J. (Pa.) 352 (holding that persons engaged in sale of real estate and loans on mortgages and renting houses are real-estate brokers); Blackford *v.* State, 8 Heisk. (Tenn.) 538.

A person who negotiates a lease for another is not within an ordinance which provides that "it shall not be lawful for any person to exercise within the city the business of . . . selling of or negotiating sales of real estate belonging to others . . . without a license." Hamilton *v.* Harvey, 33 Ill. App. 499, 503.

One employed to buy a piece of real estate does not thereby become a real-estate broker, so as to come within the act requiring such brokers to be licensed; and therefore a contract to pay him for his services cannot be repudiated as unlawful. Chadwick *v.* Collins, 26 Pa. St. 138.

One who, while engaged in other business, sells land for another under a special contract, may recover his commission, although he has not taken out a license, as required for real-estate agents. O'Neill *v.* Sinclair, 153 Ill. 525, 39 N. E. 124 [*affirming* 54 Ill. App. 298]; Pope *v.* Beals, 108 Mass. 561; Black *v.* Snook, 204 Pa. St. 119, 58 Atl. 648; Shepler *v.* Scott, 85 Pa. St. 329; Raeder *v.* Butler, 19 Pa. Super. Ct. 604.

Single or occasional sales.— One who makes a single (Jackson *v.* Hough, 38 W. Va. 236, 18 S. E. 575) or occasional (Yedinskey *v.* Strouse, 6 Pa. Super. Ct. 587) sale of real property is not a broker.

Residence of broker.— The fact that a man living outside of the city of Chicago was interested with a real-estate firm there in transactions in Chicago real estate, that he made frequent trips to Indiana at their instance, and made their office his headquarters while they were putting trades through, does not make him a real-estate broker, within a Chicago ordinance requiring such brokers to take out a license, where he had no desk, sign, card, or letter-head indicating that he was engaged in the real-estate business in Chicago. Spear *v.* Bull, 49 Ill. App. 348.

76. Stratford *v.* Montgomery, 110 Ala. 619, 20 So. 127 (holding that a person engaged in selling on commission in a city merchandise by sample for his several principals, having an office where his samples are exhibited, is a local commercial broker, al-

it is to negotiate purchases or sales of stocks, exchange, bullion, coined money, bank-notes, promissory notes, or other securities, for himself or for others.[77]

2. OFFENSES BY BROKERS.[78] It is competent for the legislature to define and punish offenses peculiar to brokerage,[79] such for instance as transacting business without a license.[80] Brokers, as other persons, may be guilty of other

though he makes special arrangements in advance with those by whom he is employed, and is their sole representative in his city); Harby *v.* Hot Springs, (Ark. 1889) 11 S. W. 694 (holding that one who negotiates sales of goods of which he has not the possession or control by wholesale to retail dealers for commission is a "commercial broker" within an ordinance requiring such persons to procure licenses); Stockard *v.* Morgan, 105 Tenn. 412, 58 S. W. 1061.

One confining himself to the sale of goods as an agent is a merchandise broker. Spears *v.* Loague, 6 Coldw. (Tenn.) 420.

77. Warren *v.* Shook, 91 U. S. 704, 23 L. ed. 421.

Buyers as brokers.— Commercial brokers who act wholly as buyers (other parties acting as sellers, and they, and not the brokers, receiving the purchase-money) do not make "sales" as commercial brokers, within the internal revenue act of 1866 (14 St. 134). Collector *v.* Doswell, 16 Wall. (U. S.) 156, 21 L. ed. 350. A person who buys stocks in his own name for his customers for a commission, and advances the purchase-money on the security of a percentage of such price deposited with him as security against loss, and sells the stocks for another commission, and settles the account according to the resulting balance to the credit of the customer, but who has no interest except his commissions and interest on his advances, the whole being at the risk and for the account of the customer as to profit and loss, does business as a broker within the internal revenue act of June 30, 1864, section 99 (13 St. 273). Northrup *v.* Shook, 18 Fed. Cas. No. 10,329, 10 Blatchf. 243. A person who purchases in his own name stocks, bonds, etc., for others, and advances his own money, and takes the transfers in his own name, and holds the stocks, bonds, etc., as security for the repayment of the money, and on its repayment delivers the securities according to agreement, or in default of repayment sells them to reimburse himself, and who also purchases and sells stocks, bonds, etc., for others, under certain stipulations as to risks, losses, and profits, is doing the business of a broker, within the internal revenue act of June 30, 1864 (13 St. 251). Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330.

Sellers as brokers.— Under the internal revenue act of June 30, 1864 (13 U. S. St. at L. 218), as amended by the act of March 3, 1865, providing (section 99) that all brokers shall be subject to pay certain duties on sales of specified articles, and (section 79, par. 9) that every person whose business it is as a broker to negotiate purchases or sales of stocks, exchange, promissory notes, or other securities for themselves or others shall be regarded as a broker, the sales of stocks, bonds, and securities made by brokers for themselves are subject to the same duties as those made by them for others. U. S. *v.* Cutting, 3 Wall. (U. S.) 441, 18 L. ed. 241. See also Northrup *v.* Shook, 18 Fed. Cas. No. 10,329, 10 Blatchf. 243.

Bankers doing business as brokers were subject to taxation as brokers under the internal revenue act of June 30, 1864 (13 St. 251). Warren *v.* Shook, 91 U. S. 704, 23 L. ed. 421; Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330. They were liable for the tax on all sales made by them, whether of property of their own or of others, on an ordinary brokerage contract or on a margin contract. Northrup *v.* Shook, 18 Fed. Cas. No. 10,329, 10 Blatchf. 243. See, however, U. S. *v.* Fisk, 3 Wall. (U. S.) 445, 18 L. ed. 243; Clark *v.* Gilbert, 5 Fed. Cas. No. 2,822, 5 Blatchf. 330.

78. Criminal law generally see CRIMINAL LAW.

Indictment or information generally see INDICTMENTS AND INFORMATIONS.

79. Charles *v.* Arthur, 84 N. Y. Suppl. 284, holding that N. Y. Laws (1901), p. 312, c. 128, declaring that in cities of the first and second classes any person who shall offer for sale any real property without the written authority of the owner or his attorney in fact appointed in writing, or a person who has made a written contract for the purchase of such property with the owner thereof, shall be guilty of a misdemeanor, is constitutional and a reasonable exercise of police power. See also *infra*, II, E, 1, a, (III).

Scalping tickets as offense see CARRIERS, 6 Cyc. 573 note 18.

80. Com. *v.* Manley, 2 Phila. (Pa.) 173 (holding that where a broker carries on his business without having obtained his commission, the penalty is not waived by the subsequent acceptance of the license-tax by the county treasurer); Com. *v.* Lucas, 84 Va. 303, 4 S. E. 695 (holding that the offense described in Va. Acts (1883–1884), § 65, of conducting the business of a tax-receivable coupon broker without a license, is a distinct offense from that described in sections 58 and 60 of the same act, for doing business as a stock-broker without a license).

Exclusiveness of penalty.—Unless it clearly appears that the legislature intended more, it will be held that the penalty imposed by W. Va. Code (1899), c. 32, on a real-estate agent selling property on commission without a license excludes all others. Ober *v.* Stephens, 54 W. Va. 354, 46 S. E. 195.

offenses also in the transaction of their brokerage business, such as larceny[81] or criminal conversion.[82]

C. Employment and Authority[83] — **1. Nature of Relation.** The relation existing between a broker and his customer is ordinarily a special agency.[84]

2. Appointment or Employment[85] — **a. In General.** To create the relation of broker and principal there must be a contract of employment, express or implied.[86]

81. Hentz *v.* Miller, 94 N. Y. 64; Collins *v.* Ralli, 20 Hun (N. Y.) 246.

A broker who by means of a false sold note obtains goods from his principal for delivery on the note, obtains possession of the goods by larceny within N. Y. Pen. Code, § 528. Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843 [*affirming* 48 Hun 537, 1 N. Y. Suppl. 163]; Soltau *v.* Lowenthal, 1 N. Y. Suppl. 168.

82. Boyd *v.* Barrett, 16 Phila. (Pa.) 653, holding that where stock-brokers bought scrip on the order of plaintiff, and received payments on account which they appropriated to their own use, they were guilty of a breach of trust.

Brokers as agents.— The term "agent," as used in Mich. Comp. Laws, § 11,572, providing that whenever money shall be delivered to any person as agent with written instructions as to the use to which it shall be applied, and such person shall intentionally appropriate the money in any other manner than directed, he shall be guilty of a felony, includes a broker, and justifies his conviction for misapplying money deposited with him to be used in the purchase of stock. People *v.* Karste, 132 Mich. 455, 93 N. W. 1081.

Questions for jury.—Where prosecutor sent money to defendant, with which to purchase certain stock as soon as it could be purchased at the price named, and defendant replied that the money had been placed to prosecutor's credit, whether the intention of the parties was to create the relation of debtor and creditor, or to constitute the fund a special deposit, so as to render defendant liable for its misapplication in violation of Mich. Comp. Laws, § 11,572, was a question for the jury. People *v.* Karste, 132 Mich. 455, 93 N. W. 1081.

83. Agency in general see Principal and Agent.

84. Clark *v.* Cumming, 77 Ga. 64, 4 Am. St. Rep. 72. And see cases cited *infra*, page 195 note 12 *et seq.*

Debtor and creditor.— Where a person receives from another certain notes for the purpose of negotiating their sale, which he does, charging a commission, he is a mere broker, and no relation of debtor and creditor exists between them. American Valley Co. *v.* Wyman, 92 Mo. App. 294.

Partnership.— Where a real-estate agent has a written contract with the owner of land to put upon the market, advertise, and sell the same, having for his interest a share in the profits from the sale of the land, the contract is one of agency, and not of partnership. Durkee *v.* Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300, 41 Kan. 503, 21 Pac. 1054.

Special contract.— Where, to the ordinary business of broker, some special employment and undertaking is superadded by express contract, the liability of the broker results from such contract, and not simply from his character of broker. Deady *v.* Goodenough, 5 U. C. C. P. 163.

85. Capacity of married woman to employ broker see Husband and Wife.

Exclusive agency for sale of land see *infra*, II, E, 1, m, (IX).

Implied right of municipality to employ broker to sell bonds see Municipal Corporations.

86. *Iowa.*— Stewart *v.* Pickering, 73 Iowa 652, 35 N. W. 690.

Mississippi.— Barton *v.* New England Mortg. Security Co., (1899) 25 So. 362.

New Jersey.— Illingworth *v.* De Mott, 59 N. J. Eq. 8, 45 Atl. 272.

New York.— Timpson *v.* Allen, 149 N. Y. 513, 44 N. E. 171 [*reversing* 7 Misc. 323, 27 N. Y. Suppl. 915]; Brady *v.* American Mach., etc., Co., 86 N. Y. App. Div. 267, 83 N. Y. Suppl. 663 (holding that a custom that when brokers negotiate a lease the lessor pays the commission cannot fasten on a property-owner any liability as employer of a broker, simply because he leases the property to one induced by the broker to take it, without any request, express or implied, on the part of the owner); Benedict *v.* Pell, 70 N. Y. App. Div. 40, 74 N. Y. Suppl. 1085; Jones *v.* Frost, 49 N. Y. App. Div. 176, 62 N. Y. Suppl. 1102 [*affirming* 24 Misc. 208, 53 N. Y. Suppl. 573]; Dilworth *v.* Bostwick, 1 Sweeny 581; Southack *v.* Lane, 23 Misc. 515, 52 N. Y. Suppl. 687 (holding that a broker who takes an option to purchase real estate at a stated price is not the agent of the owner for negotiating its sale).

Pennsylvania.— Earp *v.* Cummins, 54 Pa. St. 394, 93 Am. Dec. 718.

See 8 Cent. Dig. tit. "Brokers," § 5.

Signature of contract of agency.— A written proposition to employ one as agent to sell land, signed by the proposer and accepted by the agent, although not signed by him, makes a binding contract of agency, enforceable against both. Rowan *v.* Hull, (W. Va. 1904) 47 S. E. 92.

Implied appointment.—Where a broker asks and obtains from the owner of land the price at which he is willing to sell it, this of itself does not establish the relation of principal and agent between them. Castner *v.* Richardson, 18 Colo. 496, 33 Pac. 163. See also Mainwaring *v.* Crane, 22 Quebec Super. Ct.

b. Necessity of Written Authority. In the absence of statute to the contrary,[87] a contract for the employment of a broker need not be in writing.[88]

c. Identity of Principal.[89] A broker acting strictly as middleman to effect a purchase and sale of property is the common agent of both buyer and seller;[90] otherwise he is the agent of the party originally employing him.[91]

67. *Contra,* Morson *v.* Burnside, 31 Ont. 438. See also West *v.* Mills, 83 N. Y. App. Div. 629, 82 N. Y. Suppl. 473.

Evidence of agency.— In an action for deceit arising out of an exchange of property through a broker, evidence that defendant stated that his broker had made a mean trade for him warrants a finding that such broker was acting for defendant in effecting the exchange. Arnold *v.* Teel, 182 Mass. 1, 64 N. E. 413. Any evidence is ordinarily admissible which has a direct bearing on the question of agency. Bassett *v.* Rogers, 162 Mass. 47, 37 N. E. 772; Horwitz *v.* Pepper, 128 Mich. 688, 87 N. W. 1034.

Validity of contract of employment.— Where the abbreviations used in a broker's authorization to sell land were such that parties familiar with land descriptions could understand them easily, their use did not render the authorization void for uncertainty. Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127. So a contract to pay commissions for procuring customers from a certain county for real estate, and for all customers in a certain town in such county, is not invalid because there is no limit as to time. Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120. See also Albany Land Co. *v.* Rickel, 162 Ind. 222, 70 N. E. 158.

Consideration.— Where one employs another as agent to sell land for remuneration on performance, the contract is based on a sufficient consideration. Albany Land Co. *v.* Rickel, 162 Ind. 222, 70 N. E. 158; Rowan *v.* Hull, (W. Va. 1904) 47 S. E. 92.

Assignment of contract of agency.— Where the contract of a firm to act as a real-estate agent for a corporation was assigned to one member of the firm, who proceeded with the business, selling lots and rendering monthly reports in his own name, and the corporation accepted the reports and proceeds of the sales, and executed checks and other papers to the assignee in his own name, it constituted a ratification of the assignment. Albany Land Co. *v.* Rickel, 162 Ind. 222, 70 N. E. 158.

Employment as affecting right to compensation see *infra,* II, E, 1, a.

87. Kesner *v.* Miesch, 204 Ill. 320, 68 N. E. 405 [*affirming* 107 Ill. App. 468], holding under a statute providing that an agent has no authority to bind the owner of realty by a contract for the sale of the same unless lawfully authorized in writing, that a verbal promise on the part of the property-owner to carry out a contract of sale made by an agent not authorized in writing is of no effect. See also *infra,* II, E, 1, a, (III).

Conflict of laws.— A contract of employment to sell real estate is governed by the statute of frauds of the state where it was made. Goldstein *v.* Scott, 76 N. Y. App. Div. 78, 78 N. Y. Suppl. 736.

88. Rathbun *v.* McLay, 76 Conn. 308, 56 Atl. 511.

A real-estate broker may be authorized by parol to sign his principal's name to a contract for a sale or lease of land. Rottman *v.* Wasson, 5 Kan. 552; Pringle *v.* Spaulding, 53 Barb. (N. Y.) 17; Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60; Callaghan *v.* Pepper, 2 Ir. Eq. 399. *Contra,* Ballou *v.* Bergsvendsen, 9 N. D. 285, 83 N. W. 10. See also Mainwaring *v.* Crane, 22 Quebec Super. Ct. 67.

Absence of writing as affecting right to compensation see *infra,* II, E, 1, a, (III).

89. **Persons liable for commissions** see *infra,* II, E, 1, l.

90. Colvin *v.* Williams, 3 Harr. & J. (Md.) 38, 5 Am. Dec. 417.

A merchandise broker is, for the purpose of signing the memorandum of sale, the agent of both parties to the contract which he makes; but in other respects he is the agent only of the party originally employing him. Schlesinger *v.* Texas, etc., R. Co., 87 Mo. 146 [*affirming* 13 Mo. App. 471].

91. Schlesinger *v.* Texas, etc., R. Co., 87 Mo. 146 [*affirming* 13 Mo. App. 471]. See also Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435, holding that where a partner in a firm drew a note in favor of another firm of which also he was a member, and, after it was indorsed by the payees, he indorsed the name of the former firm without authority, and the note was held by a known bill broker, the broker was the agent of the payees and not of the buyer.

A merchandise broker is the agent of him who employs him originally, and only becomes the agent of the other party when the bargain between the principals is definitely settled. Woods *v.* Rocchi, 32 La. Ann. 210. So where a cotton broker, by permission of the owner, takes samples of a cargo of cotton and exhibits them to one who, relying on the samples, purchases a portion of the cargo, and the owner delivers the cotton and pays the brokerage, the broker is the agent of the owner. Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158.

Loan brokers.— Where a person makes application for a loan from a real-estate broker, the broker is the agent of the borrower and not of the lender. Henken *v.* Schwicker, 67 N. Y. App. Div. 196, 73 N. Y. Suppl. 656. So a company which is to receive a commission from a borrower for procuring a loan, and which makes out all the papers without knowing from whom the loan is to be obtained and before submitting them to the lender, is the

d. Authority to Employ Subagent or Broker. An agent to sell property cannot ordinarily, without special authority, bind the principal by the employment of a broker to effect the sale.[92]

3. Duration and Termination of Agency.[93] In the absence of a contract fixing the duration of a broker's agency,[94] either of the parties may terminate it at will[95] by giving notice,[96] subject only to the ordinary requirements of good

agent of the borrower in procuring the loan. Hamil *v.* American Freehold Land Mortg. Co., 127 Ala. 90, 28 So. 558; Land Mortg. Invest. Agency Co. of America *v.* Preston, 119 Ala. 290, 24 So. 707. The fact that a lender of money deposits in bank a fund subject to the check of a loan broker for the amount of a loan, if the lender after examination should approve the same, does not render the broker the agent of the lender for the purpose of making loans. Barksdale *v.* Security Invest. Co., 120 Ga. 388, 47 S. E. 943. So the fact that a loan agent who is in the habit of sending applications to, and obtaining loans from, an insurance company, as well as other parties, is the agent of said company for the purpose of procuring insurance, does not constitute him their agent in respect of loans obtained by him from them. Massachusetts Mut. L. Ins. Co. *v.* Boggs, 121 Ill. 119, 13 N. E. 550. And where the maker of a note payable to the order of another applied to a broker to negotiate a loan on the note, and the broker applied to one who agreed to lend money if the security was all right and requested the broker to make inquiries and report the particulars, and the broker procured the payee's indorsement on the note, the broker was not the agent of the lender in procuring the indorsement. Burlingame *v.* Foster, 128 Mass. 125.

Real-estate brokers.— A broker employed to sell real estate is the agent of the vendor. Gough *v.* Loomis, 123 Iowa 642, 99 N. W. 295; Dubois *v.* Dubois, 54 Iowa 216, 6 N. W. 261; Earp *v.* Cummins, 54 Pa. St. 394, 93 Am. Dec. 718. However, the broker may become the agent of the purchaser in paying for the land, if money be placed by the purchaser in his hands for that purpose. Small *v.* Collins, 6 Houst. (Del.) 273. A broker employed to purchase real estate is the agent of the purchaser, although he afterward acts or assumes to act for the vendor. Marsh *v.* Buchan, 46 N. J. Eq. 595, 22 Atl. 128.

92. Bonwell *v.* Howes, 15 Daly (N. Y.) 43, 2 N. Y. Suppl. 717 [*reversing* 1 N. Y. Suppl. 435] (so holding, although the customary method of selling land in the city where the transaction occurred was through brokers); Carroll *v.* Tucker, 2 Misc. (N. Y.) 397, 21 N. Y. Suppl. 952 (holding that authority given an agent "to take any steps necessary to sell" property does not empower him to employ another broker to make a sale); Insurance Co. of North America *v.* East Tennessee, etc., R. Co., 97 Tenn. 326, 37 S. W. 225. Where, however, an agent having authority to sell land, exercising his discretion as to price, examines the land and fixes the price and terms, he may employ a real-estate agent to find a purchaser, and a sale by him will be enforced, if he was required to obtain his commission in addition to the price agreed upon, although the agent may have been requested by his principal not to employ a subagent. Renwick *v.* Bancroft, 56 Iowa 527, 9 N. W. 367. And where a non-resident owner of land employs an agent, also a non-resident, to sell the same, it will be presumed that the agent has authority to appoint a subagent. Eastland *v.* Maney, (Tex. Civ. App. 1904) 81 S. W. 574. See, generally, PRINCIPAL AND AGENT.

Husband and wife.— A wife may authorize her husband to employ a broker for the sale of her property. Simes *v.* Rockwell, 156 Mass. 372, 31 N. E. 484; Esmond *v.* Kingsley, 3 N. Y. Suppl. 696. See, however, Carroll *v.* O'Shea, 19 N. Y. Suppl. 374. A wife has no implied authority to bind her husband in the disposition of his real estate. Harrell *v.* Veith, 13 N. Y. St. 738. See, generally, HUSBAND AND WIFE.

It is not a breach of the broker's bond to employ a person who is not a sworn broker. London *v.* Brandon, Holt N. P. 438, 3 E. C. L. 175, 2 Stark. 14, 3 E. C. L. 296.

Employment of subagent as affecting right to commission see *infra*, II, E, 1, c.

Ratification of employment of subagent see *infra*, II, E, 1, a, (IV).

93. Damages for revocation of agency see *infra*, II, C, 4.

94. Leslie *v.* Boyd, 124 Ind. 320, 24 N. E. 887 (holding that under a contract placing real estate in the hands of a broker for sale on commission, with the privilege of withdrawing the same at any time during one year on payment of a less commission, the right of the broker to sell continues after the expiration of the year, where the property is not so withdrawn); McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108; Rowan *v.* Hull, (W. Va. 1904) 47 S. E. 92.

Signature of contract.— A contract giving a broker a certain time within which to make sales may be valid from the time its terms are agreed on, although it is never signed. Green *v.* Cole, 103 Mo. 70, 15 S. W. 317.

95. Taylor *v.* Martin, 109 La. 137, 33 So. 112; Huffman *v.* Ellis, 64 Nebr. 623, 90 N. W. 552; Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Dec. 441.

This is especially true where the contract provides that it is to continue only so long as mutually satisfactory to both parties. Dulaney *v.* Page Belting Co., (Tenn. Ch. App. 1900) 59 S. W. 1082.

96. Freeland *v.* Hughes, 109 Ill. App. 73 (holding that a notice to a real-estate broker,

faith.[97] Thus an agency for the sale of property may be terminated by the principal at any time he may choose to do so[98] before the broker finds a buyer,[99] save under exceptional circumstances.[1] So too the agency may be terminated by the

through an agent of the landowner, of a revocation of his authority to sell, is sufficient to withdraw the land from his hands); Huffman *v.* Ellis, 64 Nebr. 623, 90 N. W. 552.

Necessity of notice.— The owner must, if he wishes to rescind the contract of agency with a broker on account of the incompetency of the agent, notify the agent to that effect. Jones *v.* Berry, 37 Mo. App. 125. See, however, White *v.* Benton, 121 Iowa 354, 96 N. W. 876.

Communication of revocation.— Authority to sell land is not revoked by a letter mailed to the brokers, but never received by them. Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157. A letter written by a principal to a broker, terminating his agency to sell property, and addressed to his place of residence, where it was delivered at his office, took effect from the date of such delivery, although by reason of the broker's absence, which was unknown to the principal, he did not personally receive it until some weeks later, he having in the meantime taken no action in the matter of the agency. Rees *v.* Pellow, 97 Fed. 167, 38 C. C. A. 94.

A stock-broker who makes a short sale for a customer on margin may after the expiration of a reasonable time close it upon notice. White *v.* Smith, 54 N. Y. 522 [*affirming* 6 Lans. 5]; Sterling *v.* Jaudon, 48 Barb. (N. Y.) 459. Stock-brokers cannot, however, revoke their general agreement to buy, hold, and sell stocks for a commission, without notice; and if they do so they are liable for damages sustained by their employers by reason of the revocation. White *v.* Smith, 6 Lans. (N. Y.) 5 [*affirmed* in 54 N. Y. 522]. See also *infra*, II, D, 9.

Notice of sale by owner see *infra*, page 194 note 3.

97. Taylor *v.* Martin, 109 La. 137, 33 So. 112; Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982; Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Rees *v.* Pellow, 97 Fed. 167, 38 C. C. A. 94.

98. *Massachusetts.*— Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982.

Missouri.— Loving *v.* Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095.

North Carolina.— Abbott *v.* Hunt, 129 N. C. 403, 40 S. E. 119.

Oregon.— Simpson *v.* Carson, 11 Oreg. 361, 8 Pac. 325.

Washington.— Knox *v.* Parker, 2 Wash. 34, 25 Pac. 909.

West Virginia.— Rowan *v.* Hull, (1904) 47 S. E. 92.

United States.— Rees *v.* Pellow, 97 Fed. 167, 38 C. C. A. 94.

See 8 Cent. Dig. tit. "Brokers," § 11.

99. Slater *v.* Holt, 10 N. Y. St. 257; Evans *v.* Gay, (Tex. Civ. App. 1903) 74 S. W. 575.

The principal cannot revoke the agency after the broker has procured a purchaser able, ready, and willing to buy. Blumenthal *v.* Goodall, 89 Cal. 251, 26 Pac. 906.

Revocation before sale.— A merchant who agrees to allow a broker, as commission for producing a sale of merchandise, all that he could sell the goods for above a certain price, may revoke the agreement at any time before the broker has consummated a contract of sale. May *v.* Schuyler, 43 N. Y. Super. Ct. 95. So the interest of a real-estate broker in commissions to be earned will not prevent a revocation of his agency at any time prior to a sale. Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153.

What constitutes revocation.— Where the owner of real estate, after employing an agent to collect the rents, make improvements, keep the property insured, etc., took the property out of the hands of the agent, and demanded and received of him the papers relating to the property, including the agreement appointing him agent, the authority of the agent was revoked. Hunn *v.* Ashton, 121 Iowa 265, 96 N. W. 745. An agency created for the sale of land is terminated by the withdrawal by the principal of the land from the market. Loving *v.* Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095; Abbott *v.* Hunt, 129 N. C. 403, 40 S. E. 119; Yingling *v.* West End Imp. Co., 5 Pa. Dist. 607.

1. Simpson *v.* Carson, 11 Oreg. 361, 8 Pac. 325 (holding by implication that a written agreement, not under seal, giving a real-estate broker "the exclusive sale of land" at a certain price, and to pay him all over that sum as commissions, may not be rescinded if a consideration or actual indebtedness is shown); McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108 (holding that where a contract authorized brokers to sell defendant's lands within a certain period, provided that defendant might sell all or any part of the land, the proviso did not authorize defendant to revoke the authority of the brokers before the time expired, where they had excited an active demand, and were rapidly selling).

Agency coupled with interest.— Where plaintiff was employed to negotiate a trade of lands for defendant, and afterward employed to sell the lands received by her in the trade, the services rendered by him in making the trade being in part the consideration for the second employment, the agency was coupled with an interest and could not be revoked at the mere pleasure of defendant. Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414. However, mere commissions to be earned by an agent in executing an agency for the sale of realty do not make the agency one coupled with an interest. Rowan *v.* Hull, (W. Va. 1904) 47 S. E. 92. See also Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34

death of the principal,[2] or by the sale[3] or the partial destruction[4] of the subject-matter.

4. Breach of Contract.[5] Where a broker is employed to sell[6] or to buy[7] lands or stocks or other commodity, and the principal refuses to accept or to part with the

S. W. 153. And a letter written by a principal to his broker, authorizing him to sell goods, and agreeing to settle his debt to the broker out of the proceeds, does not confer upon the broker an irrevocable power to collect the proceeds of sale. Higgins *v.* Grindrod, 16 Phila. (Pa.) 200.

The broker is entitled to a reasonable time under some circumstances to effect a sale. Rand *v.* Cronkrite, 64 Ill. App. 208 (holding that a broker authorized to make a sale of a large property, which necessarily involves the expenditure of a considerable amount of time and money on his part, the time within which the sale is to be made not being specifically limited, is entitled to a reasonable time, to be determined from all the circumstances of the case); Peterson *v.* Hall, 61 Minn. 268, 63 N. W. 733. See also Tinsley *v.* Durfey, 99 Ill. App. 239; Bathrick *v.* Coffin, 13 N. Y. App. Div. 101, 43 N. Y. Suppl. 313; McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. 693, 1108. But see Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982.

2. Shisler's Estate, 2 Pa. Dist. 588, there being no covenant binding the owner's heirs or representatives.

Stock transactions.— A broker who sells stock short for a customer, borrowing it for delivery, may continue the transaction after his customer's death until the appointment of an executor on whom notice can be served in order to close the transaction. Hess *v.* Rau, 95 N. Y. 359 [*affirming* 49 N. Y. Super. Ct. 324]. To the contrary effect it has been held that a stock-broker, on the death of his client, has no authority, express or implied, to carry over shares purchased for his client to the next settling day, but should close the account. *In re* Overweg, [1900] 1 Ch. 209, 69 L. J. Ch. 255, 81 L. T. Rep. N. S. 776.

3. White *v.* Benton, 121 Iowa 354, 96 N. W. 876; Teal *v.* McKnight, 110 La. 256, 34 So. 434; Oberlin College *v.* Blair, 45 W. Va. 812, 32 S. E. 203.

Notice of the sale is not necessary in order to terminate the agency. Wallace *v.* Figone, 107 Mo. App. 362, 81 S. W. 492.

Option to buy.— Whether an agency to sell real estate for the owner is terminated by an option to buy subsequently given to the agent depends upon the conduct of the parties. Lipscomb *v.* Cole, 81 Mo. App. 53. However, a contract of agency for the sale of land is revoked by notice of the exercise of an option to purchase subsequently given. Faraday Coal, etc., Co. *v.* Owens, 80 S. W. 1171, 26 Ky. L. Rep. 243.

Right of owner to sell.— In the absence of agreement to the contrary (Stringfellow *v.* Powers, 4 Tex. Civ. App. 199, 23 S. W. 313. See *infra*, II, E, 1, m, (IX), as to exclusiveness of agency), a landowner, by employing an agent to effect a sale of property, does not preclude himself from selling it himself, provided that in making the sale he acts in good faith (Cook *v.* Forst, 116 Ala. 395, 22 So. 540; Kelly *v.* Brennan, 55 N. J. Eq. 423, 37 Atl. 137; Wylie *v.* Marine Nat. Bank, 61 N. Y. 415).

4. Cox *v.* Bowling, 54 Mo. App. 289, holding that the burning of a house so changed the subject-matter of the contract for the finding of a purchaser of a house and lot as to constitute a revocation of the agency.

5. Actions for compensation see *infra*, II, E, 2.

6. *Colorado.*— Bailey *v.* Carnduff, 14 Colo. App. 169, 59 Pac. 407.

Illinois.— Metzen *v.* Wyatt, 41 Ill. App. 487.

Kansas.— Cornell *v.* Hanna, (App. 1898) 53 Pac. 790.

New York.— Sistare *v.* Best, 16 Hun 611 [*affirmed* in 88 N. Y. 527].

North Carolina.— Atkinson *v.* Pack, 114 N. C. 597, 19 S. E. 628.

Damages.— Where the principal refuses to convey to a customer found by the broker, the measure of damages in an action by the latter for a breach of contract is the amount the broker would have received as commissions if the bargain had been completed. Atkinson *v.* Pack, 114 N. C. 597, 19 S. E. 628; Roberts *v.* Barnard, 1 Cab. & E. 336. In an action for breach of contract plaintiffs are entitled to recover for only such loss of profits as proximately resulted from the breach, excluding all uncertain and conjectural profits. Emerson *v.* Pacific Coast, etc., Packing Co., 92 Minn. 523, 100 N. W. 365. The expenses incurred by a broker in advertising and selling a client's land are not an element of damages in an action to recover commissions lost by his client's refusal to convey to purchasers whom he had obtained; and exemplary damages are not recoverable by a broker for breach of a contract appointing him agent to sell lands, in the absence of special circumstances. Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775. Rate or amount of compensation see *infra*, II, E, 1, j.

Sufficiency of evidence of breach.— Where an owner employed a broker to sell land on an agreement that he might have as his compensation all the price over a certain sum, the fact that the owner afterward sold the property for that sum to a purchaser found by the broker does not show a breach of contract entitling the latter to damages, since it is not inconsistent with an effort on the owner's part to obtain the higher price asked of the purchaser by the broker. Ames *v.* Lamont, 107 Wis. 531, 83 N. W. 780.

7. Keswick *v.* Rafter, 35 N. Y. App. Div. 508, 54 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 653, 59 N. E. 1124], holding that where

property, as the case may be, or otherwise breaks the contract of employment, he is liable in damages to the broker; and the same rule applies where one who has employed a broker to obtain a loan refuses to accept it.[8] So if the principal revokes the broker's authority in breach of the contract of employment he is liable in damages.[9] If a broker violates his contract he may be held in damages.[10]

5. Authority Conferred[11] — a. General Rule. A broker is a special agent for a single object, and he cannot bind the principal beyond the limits of his authority.[12] His power is limited by and ceases with his instructions.[13]

b. Live Stock and Merchandise Brokers.[14] A broker employed to buy or to sell live stock or merchandise is confined to the terms of his instructions.[15] He

agents of a buyer were instructed to purchase tea in China and ship it to him at New York, he could not refuse it because it was sent in two lots, one after the other.

Tender of inferior goods by broker.—Where a broker employed to buy cotton, before the expiration of the time for delivery tendered marks of cotton not in accordance with the contract of employment, but on the principal's rejecting the same and before the expiration of the time for delivery tendered marks of cotton in accordance with the contract, he had not, by the first delivery, broken the contract, so as to justify the principal in refusing to accept the cotton subsequently tendered. Tetley *v.* Shand, 25 L. T. Rep. N. S. 658, 20 Wkly. Rep. 206.

8. Finck *v.* Menke, 31 Misc. (N. Y.) 748, 64 N. Y. Suppl. 38, holding, however, that one breaking a contract to pay a broker a certain sum for obtaining a loan, including expenses to be incurred in the performance thereof, is not liable for the full amount of such sum, where the expenses have not been incurred.

9. *Kansas.*— Durkee *v.* Gunn, 41 Kan. 496, 21 Pac. 637, 13 Am. St. Rep. 300, 41 Kan. 503, 21 Pac. 1054.

Missouri.— Green *v.* Cole, 103 Mo. 70, 15 S. W. 317, holding that, although a contract authorizing a broker to sell land within a certain time is revocable before the expiration of the time specified, yet if the broker has performed services thereunder before its revocation he may sue for its breach.

New York.— Bathrick *v.* Coffin, 13 N. Y. App. Div. 101, 43 N. Y. Suppl. 313.

West Virginia.— Rowan *v.* Hull, (1904) 47 S. E. 92.

England.— Toppin *v.* Healey, 11 Wkly. Rep. 466.

See 8 Cent. Dig. tit. "Brokers," § 11.

Damages.— In an action for damages for revocation of authority to sell land, nothing more than nominal damages can be recovered where the agent fails to show that he could have made a sale on the principal's terms. Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

Revocation of agency as breach of contract see also *supra*, II, C, 3; *infra*, II, E, 1, a, (VII).

10. Soudieu *v.* Faurès, 12 La. Ann. 746 (holding that where a broker violates instructions to buy first-class discount paper, he is responsible for a consequent loss); Campbell *v.* Wright, 118 N. Y. 594, 23 N. E. 914 (a case of unauthorized purchase of stocks on margin).

Assignment for creditors as breach of contract.— Where a broker employed to purchase stocks makes an assignment for the benefit of his creditors, it does not necessarily constitute a breach of his contract, but may be treated by both parties as only a temporary expedient to tide over his difficulties. *In re* Swift, 112 Fed. 315, 50 C. C. A. 264 [*affirming* 105 Fed. 493].

Breach of contract of agency for sale of land.— Where a firm of two members contracted to manage and sell lots of a corporation in a town other than that in which the partners resided, the fact that the business was carried on in the town where the lots were located by only one of the partners was not a breach of the contract. Albany Land Co. *v.* Rickel, 162 Ind. 222, 70 N. E. 158.

Demand and tender.— Where a broker employed to purchase stocks makes a general assignment or is adjudged a bankrupt, a demand and tender on the part of the customer are not necessary to enable him to assert a breach of the broker's contract. *In re* Swift, 112 Fed. 315, 50 C. C. A. 264 [*affirming* 105 Fed. 493].

11. See also *infra*, II, D.

Liability of principal for acts in excess of authority see *infra*, II, G, 2.

Unauthorized representations as defeating right to compensation see *infra*, II, E, 1, m, (X), (B).

12. Hunn *v.* Ashton, 121 Iowa 265, 96 N. W. 745 (holding that an agreement between the owner of real estate and an agent whereby the latter is appointed to collect the rents, make necessary improvements, keep the property insured, pay the taxes and the expenses for improvements that might become necessary with a view to procuring purchasers, and whereby he is to receive for compensation a specified per cent of the amount collected, does not constitute him an agent with authority to procure a purchaser or the property); Coddington *v.* Goddard, 16 Gray (Mass.) 436. See also Jones *v* Brand, 106 Ky. 410, 50 S. W. 679, 20 Ky. L. Rep. 1997.

13. Bradfield *v.* Patterson, 106 Ala. 397, 17 So. 536, holding that a broker's general authority to invest his principal's money will not authorize him also to invest his own for his principal's account.

14. See also *infra*, II, D.

15. Clark *v.* Cumming, 77 Ga. 64, 4 Am. St. Rep. 72 (holding that where definite in-

has, however, implied power to do whatever is necessary to the proper execution of the agency.[16]

c. Real-Estate Brokers.[17] A real-estate broker is ordinarily a special agent of limited authority,[18] and he is strictly confined to his instructions.[19] He has, how-

structions are given by the principal to his broker to make a specific sale at a certain price, the broker cannot continue to make sales at that price, although it has been usual for him to continue to sell at the prices last quoted by the principal); Bell *v.* Offutt, 10 Bush (Ky.) 632.

Contract in own name.— A merchandise broker has no authority to make a contract in his own name. Haas *v.* Ruston, 14 Ind. App. 8, 42 N. E. 298; Dunn *v.* Wright, 51 Barb. (N. Y.) 244; Delafield *v.* Smith, 101 Wis. 664, 78 N. W. 170, 70 Am. St. Rep. 938.

A broker may not treat himself as principal and sue his employer as for goods bargained and sold, in the absence of custom otherwise. White *v.* Benekendorff, 29 L. T. Rep. N. S. 475; Tetley *v.* Shand, 25 L. T. Rep. N. S. 658, 20 Wkly. Rep. 206.

Directing delivery of goods.— Where goods are shipped subject to the shipper's order, a broker of the shipper has no authority to direct their delivery. Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363; Watson *v.* Hoosac Tunnel Line Co., 13 Mo. App. 263.

Modification or rescission of contract of sale.— Sales agents with limited powers, having procured purchasers satisfactory to their principal, have no power to alter the terms of the contract without consent of the principal. Andrews *v.* Himrod, 37 Ill. App. 124; White *v.* Benekendorff, 29 L. T. Rep. N. S. 475. So authority of a broker to make a sale of goods for another does not include the power to rescind the sale without the knowledge or consent of the principal, in the absence of any such commercial usage. Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363; Saladin *v.* Mitchell, 45 Ill. 79. Where the terms are agreed on, the broker should reduce them to writing in the form of bought and sold notes. He cannot, without the consent of the contracting parties, vary the terms by sending the parties notes containing other terms. Northfleet Coal, etc., Co. *v.* Budd, 2 N. Y. City Ct. 97.

A broker employed to buy goods exhausts his authority by making a contract of purchase and sale, and he cannot cancel it and make a new contract with another seller. White *v.* Benekendorff, 29 L. T. Rep. N. S. 475.

Waiver and disobedience of instructions.— Where tea was ordered by a buyer in New York to be shipped from China via Suez Canal, and it was sent via San Francisco, if the deviation was ground for refusal to accept the tea, it was waived by the buyer's failure to object when notified of the deviation, and by objecting to the tea when it arrived solely on the ground that it was not up to grade. Keswick *v.* Rafter, 165 N. Y. 653, 59 N. E. 1124 [*affirming* 35 N. Y. App. Div. 508, 54 N. Y. Suppl. 850].

16. Lawrence *v.* Gallagher, 42 N. Y. Super. Ct. 309, where it was held that oral employment of a broker to buy or sell goods carries with it an implied authority to make the proper written contract for executing the agency, but not an authority to make any other writing.

17. See also *infra*, II, D.

18. Ward *v.* Lawrence, 79 Ill. 295 (holding that a real-estate broker authorized to sell a tract of land has no authority to sell it by any other description than that by which it was purchased by the owner); Raeder *v.* Butler, 19 Pa. Super. Ct. 604 (holding that the expression "placed in the hands of —— to be sold," used in a contract by which one person agrees to sell the land of another for a commission, does not confer on the agent a right to possession of the land); Kilham *v.* Wilson, 112 Fed. 565, 50 C. C. A. 454 (holding that the owner alone has the right to determine the consideration for which he will sell and the details governing the payment of it); Adams *v.* Fraser, 82 Fed. 211, 27 C. C. A. 108 (holding that a broker authorized to negotiate a sale of property has no implied authority to collect the price).

Authority to negotiate.— A contract placing property in the hands of real-estate agents for sale or exchange, the owner reserving the option as to whether it shall be sold or exchanged and expressly agreeing to give the agents all the assistance in his power in the transaction, confers upon such agents the authority to negotiate, and does not constitute them mere middlemen to bring the parties together. Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

Authority to modify land contract.—Where a contract for the sale of land is executed by the owner and left with his broker for delivery to the purchaser, the broker has no authority to alter the instrument by substituting the name of another person and changing both the consideration and the rate of interest. Ballou *v.* Bergsvendson, 9 N. D. 285, 83 N. W. 10. So a broker or agent authorized to negotiate the sale of property, who concludes a contract for the vendor which is to be performed at a future time by the delivery of the property or the title deeds to it and the simultaneous payment of the price, but who is not intrusted with the property or the conveyances thereof, has no implied authority to extend the time of payment or otherwise modify the concluded contract between the vendor and purchaser. Adams *v.* Fraser, 82 Fed. 211, 27 C. C. A. 108.

19. *District of Columbia.*— Jones *v.* Holladay, 2 App. Cas. 279, holding that authority to a real-estate agent to contract for a sale will not authorize him to make a contract for the sale of an option to purchase.

ever, implied authority to do any act or to make any declaration in regard to the property which is necessary to effectuate a purchase or sale or which is usually incidental thereto;[20] but in the absence of a special authorization,[21] a broker has no power to enter into a contract for the purchase and sale of the land so as to bind his principal.[22]

Iowa.— Balkema *v.* Searle, 116 Iowa 374, 89 N. W. 1087.

Mississippi.—Everman *v.* Herndon, 71 Miss. 823, 15 So. 135.

New York.— Breen *v.* Rives, 16 N. Y. App. Div. 632, 44 N. Y. Suppl. 672, holding that the employment of a real-estate agent with reference to a particular sale to be made to a person named does not authorize the agent afterward to sell to another person.

Virginia.— Davis *v.* Gordon, 87 Va. 559, 13 S. E. 35, holding that the fact that a proposed auction sale of lots was advertised in several newspapers by the real-estate agents, and that the bill for such advertising was paid by the owner, did not convert a special agency into a general agency, with authority in the agents, seven months later, to effect a private sale of the lots in a manner and at a price wholly different from what was arranged for the contemplated auction sale.

See 8 Cent. Dig. tit. "Brokers," § 13.

Change of owner's terms.— A real-estate broker has no authority, in procuring the purchaser, to change any of the terms imposed on him by his principal, such for instance as the price, the time of payment, or the rate of interest. Field *v.* Small, 17 Colo. 386, 30 Pac. 1034; Monson *v.* Jacques, 144 Ill. 651, 33 N. E. 757; Monson *v.* Kill, 144 Ill. 248, 33 N. E. 43 [*affirming* 44 Ill. App. 306]; Hoyt *v.* Shipherd, 70 Ill. 309; Sleeper *v.* Murphy, 120 Iowa 132, 94 N. W. 275; Halsey *v.* Monteiro, 92 Va. 581, 24 S. E. 258.

Discretion of broker.— Where the owner of land orally authorizes a broker to sell it at a certain price, payable partly in cash and partly on time, a sale with more than one third of the price payable in cash, and the residue in three and five years, with six per cent interest, secured by mortgage on the land, is within the reasonable discretion given the broker. Smith *v.* Keeler, 151 Ill. 518, 38 N. E. 250 [*affirming* 51 Ill. App. 267].

Sale for cash.— A written authority to a broker to sell land at a net price per acre does not conclusively imply that the sale is to be for cash; and the facts that the amount is large, and most of the land is held on option, go to show that the point was left open for negotiation. Bourke *v.* Van Keuren, 20 Colo. 95, 36 Pac. 882.

20. Ahern *v.* Goodspeed, 72 N. Y. 108 [*affirming* 9 Hun 263].

Terms of payment.— Where owners of part of the capital stock of a quarry authorize a broker to sell part of their stock, and the terms of payment are not named in the authorization, an agreement by him that the purchaser shall pay a certain amount down, and the balance after inspection of the property and an examination of the title and character of the company, will be assumed to coincide with the intentions of the sellers. Owl Canon Gypsum Co. *v.* Ferguson, 2 Colo. App. 219, 30 Pac. 255.

21. Keim *v.* Lindley, (N. J. Ch. 1895) 30 Atl. 1063 (holding that authority to a real-estate agent to execute a contract for the sale of land in the name of his principal may be inferred from circumstances and a course of dealing between the parties); Rosenbaum *v.* Belson, [1900] 2 Ch. 267, 69 L. J. Ch. 569, 82 L. T. Rep. N. S. 658, 48 Wkly. Rep. 522 (holding that instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the price accepted, are an authority to the agent to make a binding contract, including an authority to sign a contract for sale).

22. Hamilton *v.* Cutts, 6 Mackey (D. C.) 208; Ryon *v.* McGee, 2 Mackey (D. C.) 17 (both holding that in the absence of a special agreement the authority of a real-estate agent is only to find a purchaser and to report him to the owner, and that he has no power to conclude a sale); Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60 (holding that authority to a broker to "close the bargain" for a sale of real estate, provided he finds a purchaser who will agree to certain terms, does not authorize him to sign a contract for the sale of the property in the name of his principal); Halsey *v.* Monteiro, 92 Va. 581, 24 S. E. 258 (holding that a real-estate broker authorized to "list" and "place" property on commission has no authority to sign a contract of sale).

A broker employed to find a purchaser for land has no implied power to execute a contract for the sale thereof.

Connecticut.— McCullough *v.* Hitchcock, 71 Conn. 401, 42 Atl. 81.

Indiana.— Campbell *v.* Galloway, 148 Ind. 440, 47 N. E. 818.

Iowa.— Balkema *v.* Searle, 116 Iowa 374, 89 N. W. 1087.

New Jersey.— Dickinson *v.* Updike, (Err. & App. 1901) 49 Atl. 712; Keim *v.* Lindley, (Ch. 1895) 30 Atl. 1063.

England.— Hamer *v.* Sharp, L. R. 19 Eq. 108, 44 L. J. Ch. 53, 3 L. T. Rep. N. S. 643, 23 Wkly. Rep. 158; Chadburn *v.* Moore, 61 L. J. Ch. 674, 67 L. T. Rep. N. S. 257, 41 Wkly. Rep. 39; Wilde *v.* Watson, 1 L. R. Ir. 402.

See 8 Cent. Dig. tit. "Brokers," § 13.

A broker employed to sell land is not thereby authorized to execute a contract to convey.

California.— Armstrong *v.* Lowe, 76 Cal. 616, 18 Pac. 758.

d. Stock, Grain, Etc., Brokers.[23] Brokers in exchange or board transactions are bound to obey their clients' instructions, and they are responsible to the latter for any loss resulting from a breach of duty.[24] To charge the broker the instructions must have been communicated to him,[25] and they must not have been waived or revoked by the principal.[26] The liability of a broker depends upon the peculiar terms of his instructions,[27] the construction of which, if in writing, is

District of Columbia.— Jones *v.* Holladay, 2 App. Cas. 279; Mannix *v.* Hildreth, 2 App. Cas. 259.

New York.— Roach *v.* Coe, 1 E. D. Smith 175.

North Dakota.— Brandrup *v.* Britten, 11 N. D. 376, 92 N. W. 453.

Washington.— Carstens *v.* McReavy, 1 Wash. 359, 25 Pac. 471.

See 8 Cent. Dig. tit. "Brokers," § 13.

Contra.— Keim *v.* Lindley, (N. J. Ch. 1895) 30 Atl. 1063.

23. See also *infra*, II, D.

24. Parsons *v.* Martin, 11 Gray (Mass.) 111 (holding that a broker to whom a certificate of shares has been intrusted by the owner with written directions to sell under specified circumstances has no right to transfer the shares for any other purpose to the name of another person or to his own name); Speyer *v.* Colgate, 67 Barb. (N. Y.) 192 (holding that where an agent failed to deliver or tender certain gold sold by his principal as directed by the principal, and it thereafter fell in price, the agent is liable for loss accruing before the principal discovered the negligence, but not for that which accrued afterward, it having been the duty of the principal then to protect himself from further loss by directing a sale of the gold on hand); Bertram *v.* Godfray, 1 Knapp 381, 12 Eng. Reprint 364. See Lamert *v.* Heath, 10 Jur. 481, 15 L. J. Exch. 297, 15 M. & W. 486, 4 R. & Can. Cas. 302.

It is a broker's duty to sell when ordered to do so by the principal, and if he does not do so he is liable for the consequent loss. Cothran *v.* Ellis, 107 Ill. 413; Zimmermann *v.* Heil, 156 N. Y. 703, 51 N. E. 1094 [*affirming* 86 Hun 114, 33 N. Y. Suppl. 391]; Allen *v.* McConihe, 124 N. Y. 342, 26 N. E. 812 [*affirming* 12 N. Y. Suppl. 232]; Taylor *v.* Ketchum, 5 Roh. (N. Y.) 507, 35 How. Pr. (N. Y.) 289; Hollingshead *v.* Green, 1 Cinc. Super. Ct. 305; Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658.

Discretion as to selling.— Where, in dealings between a client and brokers who had been in the habit of purchasing stock on a margin furnished by him, their authority to sell his stock is discretionary, the client fixing no limit as to time, trusting to their judgment to sell within a reasonable time, the law will prescribe what is a reasonable time within which to make the sale. Davis *v.* Gwynne, 57 N. Y. 676. Where the broker has authority to sell at discretion, the owner cannot hold him liable for sales at a lower price than the stock was worth at other times, no fraud appearing. Wronkow *v.* Clews, 52 N. Y. Super. Ct. 176.

Refusal to sell for principal in default.— Where a speculator in stocks is in debt to his broker for advances, and is in poor credit, the broker may refuse to obey an order to sell and convert the proceeds into other stocks thought by him less safe, and even though such stocks go up afterward, the broker is not liable to his principal for refusing to obey his order. Jones *v.* Gallagher, 3 Utah 54, 1 Pac. 15.

Right to await further instructions.— Where during the Civil war plaintiff requested a broker who had funds in his hands belonging to plaintiff to invest in certain bonds, and a small amount was invested, when the bonds began to advance in price with great rapidity, and the broker did not invest the balance, but wrote to plaintiff frequently, asking instructions, receiving no reply, and the money, which was Confederate notes, remained in the broker's hands until it became worthless, he was not liable to plaintiff for the loss. Bernard *v.* Maury, 20 Gratt. (Va.) 434.

25. Birnbaum *v.* May, 58 N. Y. App. Div. 76, 68 N. Y. Suppl. 591.

26. Stone *v.* Lothrop, 109 Mass. 63, holding that where the owner of bonds ordered his broker to sell them, but he did not do so, and two or three months afterward he telegraphed to the broker: "Have you sold? Will they go lower?" the question whether the telegram was a waiver of the order to sell was for the jury. See Davis *v.* Gwynne, 4 Daly (N. Y.) 218.

27. Matthews *v.* Fuller, 123 Mass. 446; Davis *v.* Gwynne, 57 N. Y. 676 (both holding that a purchase by a broker was within his instructions); Cameron *v.* Durkheim, 55 N. Y. 425 (holding that a broker who had borrowed gold to deliver on a short sale was authorized by his instructions to make a settlement with the lender); Evans *v.* Wrenn, 93 N. Y. App. Div. 346, 88 N. Y. Suppl. 617; Lynch *v.* Simmonds, 87 N. Y. Suppl. 420 (both cases construing instructions with reference to authority to sell).

Authority to buy less than the amount ordered.— An ordinary broker's contract for the purchase of mining stock, each share of which has an independent value, is not an entire contract, and the broker may purchase a smaller quantity than that ordered. Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

Mode of sale.— Where a customer gave his broker a stop order to sell government bonds which contained no directions as to the manner of sale, and the bonds were sold between the calls at the stock exchange at private sale, and were sold as high as, and some higher than, the market price, and in the

a question for the court.[28] A broker cannot, as against his principal, cancel an original contract for the future delivery of a commodity without the substitution of another person in the place of the party released, as provided by the rules of the board of trade.[29] If a broker acts through a correspondent, the latter is the agent of the broker and not of the principal, although he takes orders directly from the principal.[30]

e. Custom and Usage.[31] In the absence of a special contract, the authority and duty of a broker depends upon the course of dealing in the particular community.[32] A customer in giving authority to a broker to negotiate a transaction in a certain market is presumed, in the absence of evidence to the contrary, to have authorized the broker to transact the business in question in accordance with the rules, customs, and usages prevailing in that exchange;[33] and this is so

manner in which government bonds are sold generally, it was held that, in the absence of evidence to impeach the fairness of the sale, the manner in which it was made was not a ground of objection. Porter *v.* Wormser, 94 N. Y. 431.

Purchase by broker himself.— An order to a broker to buy stock "on sixty days buyer's option" does not authorize the broker to buy the stock himself and hold it on his principal's account for sixty days. Pickering *v.* Demerritt, 100 Mass. 416. However, a broker may be authorized from a previous course of dealing between himself and his principal, on an approval of a purchase by the latter, to make out a contract note in his own name, without inserting that of his principal. Kemble *v.* Atkins, Holt N. P. 427, 3 E. C. L. 171, 1 Moore C. P. 6, 7 Taunt. 260, 2 E. C. L. 354, 17 Rev. Rep. 658.

Stop orders.— The meaning of a stop order to a broker is to await a certain figure, and, whenever that figure is reached, to stop the transaction. Campbell *v.* Wright, 8 N. Y. St. 471. A stop order to a broker to sell United States bonds "ex July coupons" means to sell the same reserving from the sale the July coupons. Porter *v.* Wormser, 94 N. Y. 431. A commission to sell stock "when the funds should be at eighty-five per cent, or above that price," is a particular commission under which an agent is bound to sell when the funds reach eighty-five, and he has not a general authority to act for his employer, so that he may defer selling till the funds should reach a higher price. Bertram *v.* Godfray, 1 Knapp 381, 12 Eng. Reprint 364.

To make a broker responsible it should appear that he has exceeded his orders or has not acted in conformity with them or has in some way violated the duty which he owes to the principal. The fact that a broker whom an owner of stock employs to effect a sale has the stock transferred to his own name from that of the customer, being in accordance with the usual course of business, does not justify a jury in charging the broker with the value of the stock, where the owner has not demanded it back and the broker has not refused to account for the proceeds of what he has sold. Leddy *v.* Flanigan, 3 Phila. (Pa.) 355.

28. Smith *v.* Forbes, 32 U. C. C. P. 571.

29. Higgins *v.* McCrea, 23 Fed. 782, holding that the cancellation without the previous knowledge or consent or subsequent ratification of the principal absolves the latter from all liability, and entitles him to recover back money advanced as margins to the broker.

30. Gheen *v.* Johnson, 90 Pa. St. 38.

31. See, generally, CUSTOMS AND USAGES.

Custom as to: Amount or rate of compensation see *infra*, II, E, 1, j. Commission where broker does not finally effect sale see *infra*, page 260 note 46. Rendering services gratuitously see *infra*, II, E, 1, a, (II).

Usage of: Lessor to pay commission see *supra*, page 190 note 86. Seller to pay commission see *infra*, page 218 note 55.

32. Foster *v.* Pearson, 1 C. M. & R. 849, 4 L. J. Exch. 120, 5 Tyrw. 255, holding that a bill broker is not a person known to the law with certain duties, but his employment is one which depends entirely upon the course of dealing.

33. *Illinois.*— Green *v.* Chicago Bd. of Trade, 174 Ill. 585, 51 N. E. 599, 49 L. R. A. 365.

New York.— Horton *v.* Morgan, 19 N. Y. 170, 75 Am. Dec. 311, custom among brokers to purchase stock in their own names.

Pennsylvania.— Colket *v.* Ellis, 10 Phila. 375, custom among brokers to sell stocks deposited as collateral security for call loan at the board on failure of the borrower to pay on the day on which demand is made.

United States.— Boyle *v.* Henning, 121 Fed. 376; Lehman *v.* Feld, 37 Fed. 852, custom as to substitution of contracts for future delivery of cotton.

England.— Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227]; Taylor *v.* Stray, 2 C. B. N. S. 197, 3 Jur. N. S. 964, 26 L. J. C. P. 287, 5 Wkly. Rep. 761, 89 E. C. L. 197 (rule by which broker of buyer is bound to pay for shares on principal's default); Hodgkinson *v.* Kelly, 37 L. J. Ch. 837, 16 Wkly. Rep. 1078; Harker *v.* Edwards, 57 L. J. Q. B. 147.

A custom by which a broker may close out a transaction on his principal's default (Gree-

although the client does not in fact know what they are,[34] provided that the rule or usage is one that merely regulates the mode of performing the contract of agency and does not change its intrinsic character, in which case the client is not bound unless he has knowledge of it when he employs the broker.[35] An illegal

ley *v.* Doran-Wright Co., 148 Mass. 116, 18 N. E. 878; Van Dusen-Harrington Co. *v.* Jungeblut, 75 Minn. 298, 77 N. W. 970, 74 Am. St. Rep. 463; Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510 [*reversing* 7 Quebec Q. B. 530 (*affirming* 13 Quebec Super. Ct. 104)]; Davis *v.* Howard, 24 Q. B. D. 691, 59 L. J. Q. B. 133; Lienard *v.* Dresslar, 3 F. & F. 212), or on the principal's insolvency or death (Lacey *v.* Hill, L. R. 8 Ch. 921, 42 L. J. Ch. 657, 29 L. T. Rep. N. S. 281, 21 Wkly. Rep. 857), is binding on the principal. See also *infra*, II, D, 9. A principal is insolvent within the meaning of this usage when he is unable to pay his debts in the ordinary course of business. Lacey *v.* Hill, L. R. 18 Eq. 182, 43 L. J. Ch. 551, 30 L. T. Rep. N. S. 484, 22 Wkly. Rep. 586.

A custom authorizing a broker to settle claims against defaulting clients is binding. Arnold *v.* Smith, 85 Ga. 510, 11 S. E. 851; Lehman *v.* Feld, 37 Fed. 852.

A custom by which a buyer's broker is allowed reimbursement where, on the principal's default, the seller resells at a loss and the broker pays him the difference is binding. Pollock *v.* Stables, 12 Q. B. 765, 17 L. J. Q. B. 352, 5 R. & Can. Cas. 352, 64 E. C. L. 765; Bayley *v.* Wilkins, 7 C. B. 886, 18 L. J. C. P. 273, 62 E. C. L. 886; Bayliffe *v.* Butterworth, 1 Exch. 425, 11 Jur. 1019; 17 L. J. Exch. 78, 5 R. & Can. Cas. 283.

A custom of the London stock exchange by which shares are to be transferred not later than ten days after the settling day fixed on by the parties, and by which the vendee is to pass to the seller within that time the name of a person who will take a transfer of shares, and by which the person whose name is so passed has a similar right within that time to pass the name of another person, and so on until the name of an actual purchaser is passed to the seller, is valid. Grissell *v.* Bristowe, L. R. 4 C. P. 36, 38 L. J. C. P. 10, 19 L. T. Rep. N. S. 390, 17 Wkly. Rep. 123; Sheppard *v.* Murphy, Ir. R. 2 Eq. 544, 16 Wkly. Rep. 948.

If the contract is expressly made subject to customs prevailing on the exchange the client is of course bound thereby. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80.

Rules and customs of an exchange do not apply unless it appears that the transaction in question was on change. Ayer *v.* Mead, 13 Ill. App. 625. They do not apply to subsequent transactions. Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796. See also *Ex p.* Norton, 11 Jur. 699. And see EXCHANGES, 17 Cyc. 852.

Question for jury.— The question of the existence of a particular usage is one for the jury. Foster *v.* Pearson, 1 C. M. & R. 849, 4 L. J. Exch. 120, 5 Tyrw. 255; Dent *v.* Nickalls, 29 L. T. Rep. N. S. 536, 22 Wkly. Rep. 218 [*affirmed* in 30 L. T. Rep. N. S. 644].

Sufficiency of evidence of custom.— Testimony that it was the duty of brokers, after delivery of stock, to guarantee the transaction and protect the customer from loss, and that witness had had transactions in stock running into thousands of shares, and had never known of a case where the broker did not call margins from a lender of stock borrowed to cover a short sale, is insufficient to establish a usage or custom imposing such duty on a broker. Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32]. A custom among brokers of charging clients an arbitrary sum for telegrams, usually much more than the actual cost, if it can be considered reasonable, should, in an action by the broker to collect for them, be established by very satisfactory proof. Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204.

34. Pardridge *v.* Cuttler, 68 Ill. App. 569; Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 142; Bayley *v.* Wilkins, 7 C. B. 886, 18 L. J. C. P. 273, 62 E. C. L. 886; Bayliffe *v.* Butterworth, 1 Exch. 425, 11 Jur. 1019, 17 L. J. Exch. 78, 5 R. & Can. Cas. 283.

35. Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225 (holding that a custom of the produce exchange by which brokers are personally liable on contracts for the sale of grain entered into in behalf of their principals, and are entitled to supply the grain themselves and charge it to principals who fail to meet their engagements, is not binding on a person employing such a broker in ignorance of the custom); Marye *v.* Strouse, 5 Fed. 483, 6 Sawy. 204 (holding that unless he knew of it a client is not bound by a custom among brokers to charge clients an arbitrary sum for telegrams, usually much more than the actual cost); Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* 20 Wkly. Rep. 544] (holding that a usage which gives a broker an interest at variance with his duty, as by converting him into a principal, is not binding on a client who is ignorant thereof, and that the client is not bound to inquire what the usage may be, or whether there is any particular usage affecting the market in which he proposes to deal); Harker *v.* Edwards, 57 L. J. Q. B. 147; Hamilton *v.* Young, 7 L. R. Ir. 289 (holding that a usage of the stock exchange, relied on as authorizing stock-brokers who are entitled to sell stock of a client for the realization and payment of money due to them by him, to take over to themselves, at the price of the day, stock of

custom is not binding on the principal;[36] nor is a custom which varies or contradicts the express terms of the contract of agency.[37]

the customer for which there is an inadequate demand or where a forced sale would lower the selling price, is unreasonable and incapable of being supported against a client who was not proved to be acquainted with it); Sutherland *v.* Cox, 6 Ont. 505 [*affirmed* in 15 Ont. App. 541 (*affirmed* in 24 Can. L. J. 55)] (holding that a custom by which a broker holds himself liable to account for the market value of stock when a client calls on him to do so, or then purchases stock to comply with the demand, instead of purchasing it as soon as the order is given, is not binding on the client unless he knows of it and specially submits to its conditions).

The usage of a stock exchange to disregard a statute which requires the number of bank shares to be specified in a sale is unreasonable, and knowledge of it is not to be imputed to the client merely from his instructing the broker to buy shares on the stock exchange. Perry *v.* Barnett, 15 Q. B. D. 388, 54 L. J. Q. B. 466, 52 L. T. Rep. N. S. 585. If, however, the client knows of the usage he is bound thereby. Seymour *v.* Bridge, 14 Q. B. D. 460, 54 L. J. Q. B. 347.

Presumption of knowledge.— The fact that a builder was largely engaged in buying and selling real estate, and at times through real-estate brokers, is alone insufficient to raise a presumption in an action to recover commissions, that he had knowledge of a custom existing among brokers regulating the payment of commissions. Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

36. Day *v.* Holmes, 103 Mass. 306 (holding that a custom by which an order to a broker to buy stock deliverable at any time at buyer's option in sixty days authorizes the broker to buy the stock himself at thirty days and deliver it to the client at the end of sixty days at an increased price and interest, besides the usual commission, is bad); Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756 (holding that a custom is void by which a broker who has acted for both parties in negotiating an exchange of real estate without informing either that he was employed by the other is entitled to charge a commission to each); Neilson *v.* James, 9 Q. B. D. 546, 51 L. J. Q. B. 369, 46 L. T. Rep. N. S. 791 (holding that a custom of the stock exchange to disregard a statute requiring the name of the registered proprietor of shares of stock to be expressed in bought and sold notes is void); Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796; *Ex p.* Norton, 11 Jur. 699 (both holding that a custom of a stock exchange by which a broker employed by an agent to sell his principal's stock may recognize as his employer only the agent and not the principal is invalid as applied to the broker's disposition of the proceeds of the sale); Tayler *v.* Great Indian Peninsula R. Co., 5 Jur. N. S. 1087, 28 L. J. Ch. 701, 7 Wkly Rep. 637 (holding that the practice of the stock exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law); Harker *v.* Edwards, 57 L. J. Q. B. 147; Dent *v.* Nickalls, 29 L. T. Rep. N. S. 536, 22 Wkly. Rep. 218 [*affirmed* in 30 L. T. Rep. N. S. 644] (holding that a stock jobber, until he has passed to the purchaser the name of a person who is legally capable of contracting and who has given authority for the use of his name as transferee, is not discharged, notwithstanding the rules and usages of the stock exchange to the contrary); Case *v.* McClellan, 25 L. T. Rep. N. S. 753, 20 Wkly. Rep. 113 (holding that a custom of a stock exchange by which transfer notes are signed for a consideration different from that stated in the deed of transfer is probably bad); Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706 (holding that a custom by which a broker who sells an option entitling his customer to take a lease at a specified rental is entitled to a commission where the customer takes a lease at a lower rental is invalid); Mara *v.* Cox, 6 Ont. 359 (holding that a custom of brokers that upon stock being pledged to a broker he may use it as his own, being ready to return to the pledgee, when called upon, an equal number of shares of the same stock, is invalid).

Custom allowing double commissions.— A custom allowing a broker who acts as agent for one party to collect commissions from the other also is void. Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66; Dartt *v.* Sonnesyn, 86 Minn. 55, 90 N. W. 115. See also Farnsworth *v.* Hemmer, 1 Allen (Mass.) 494, 79 Am. Dec. 756. If, however, a broker acts merely as middleman, a custom allowing him a commission from both parties is valid. Mullen *v.* Keetzleb, 7 Bush (Ky.) 253; Haviland *v.* Price, 6 Misc. (N. Y.) 372, 26 N. Y. Suppl. 757. Right to commissions from both parties in general see *infra*, II, E, 1, i.

Reasonableness of custom.— A custom may not be relied on as an authority to execute a contract of agency in a mode which the law would regard as unreasonable. Rosenstock *v.* Tormey, 32 Md. 169, 33 Am. Rep. 125.

37. Parsons *v.* Martin, 11 Gray (Mass.) 111 (custom of brokers to transfer shares of a client for a different purpose than that specified in writing); Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80 (holding that oral proof of the usage of brokers is not admissible to add to an ordinary contract for a speculative purchase of stock); Lawrence *v.* Maxwell, 53 N. Y. 19 (custom by which brokers might use by hypothecation or otherwise securities received by them as margins); Markham *v.* Jaudon, 41 N. Y. 235; Taylor *v.* Ketchum, 5 Roh. (N. Y.) 507, 35 How. Pr. (N. Y.) 289 (both cases involving a custom by which brokers who have bought stock for a client may sell the same without demand

f. Ratification and Repudiation.[38] If a broker acts contrary to his instructions, the principal may elect whether to ratify or repudiate the transaction,[39] and he is bound by the election so made.[40] Ratification may be either express ratification[41] or implied ratification.[42] Thus if a principal accepts and retains the benefits of the unauthorized transaction he cannot afterward avoid it.[43] The right to repudiate a transaction exists only for a reasonable time.[44] In order to

and notice on failure of the client to furnish margins); Allen *v.* Dykers, 3 Hill (N. Y.) 593 (custom of brokers to sell hypothecated stock and return the same in kind on payment of the debt). See also Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544 [*reversing* 20 Wkly. Rep. 544].

38. **Ratification as affecting:** Liability of principal to third person see *infra*, II, G, 2, a, (III), (F). Right of broker to compensation see *infra*, II, E, 1, a, (IV).

39. Parson *v.* Martin, 11 Gray (Mass.) 111 (holding that where a broker to whom stock is intrusted by the owner with directions to sell under specified circumstances transfers the shares for a different purpose and in the name of a person to whom he was not authorized to transfer them, the owner may treat the transfer as a sale and recover of the broker the market price of the shares on the day of the transfer, although the broker afterward tenders him another certificate of an equal number of shares and the owner fails to retransfer it to the broker, he having, however, refused to accept it); Levy *v.* Loeb, 89 N. Y. 386 [*reversing* 47 N. Y. Super. Ct. 61] (holding that where a broker agreed to purchase certain bonds for a client, and to advance the price, which he did, the client afterward paying him a sum demanded on account of the purchase, and also commissions, and before the credit for the balance of the price expired, the broker sold the bonds without the knowledge or consent of the client, the latter is entitled to repudiate the purchase and recover back the money paid).

Right of election and form of action see *infra*, II, D, 10, a.

40. Kavanaugh *v.* Ballard, 56 S. W. 159, 21 Ky. L. Rep. 1683 (holding that where the purchase of the principal's property by one of a firm of real-estate agents was ratified by the principal, and a deed executed therefor, the principal cannot claim the profit made by the purchaser); Stewart *v.* Drake, 46 N. Y. 449; Birnbaum *v.* May, 58 N. Y. App. Div. 76, 68 N. Y. Suppl. 591 (both holding the principal bound by his repudiation of an unauthorized stock transaction).

41. Sleeper *v.* Murphy, 120 Iowa 132, 94 N. W. 275; Fitzmaurice *v.* Bayley, 6 E. & B. 868, 3 Jur. N. S. 264, 26 L. J. Q. B. 114, 88 E. C. L. 868 [*reversed* on another ground in 8 E. & B. 664, 4 Jur. N. S. 506, 27 L. J. Q. B. 143, 92 E. C. L. 664 (*affirmed* in 9 H. L. Cas. 78, 6 Jur. N. S. 1215, 8 Wkly. Rep. 750, 11 Eng. Reprint 657)]; Smith *v.* Forbes, 32 U. C. C. P. 571. See Hopkins *v.* Clark, 7 N. Y. App. Div. 207, 40 N. Y. Suppl. 130, where a finding against brokers who had the burden of proving an alleged ratification was held to be justified.

42. McGeoch *v.* Hooker, 11 Ill. App. 649; Coquard *v.* Weinstein, 16 Mont. 312, 40 Pac. 696 (both being cases of acquiescence); Jackson *v.* Jacob, 3 Bing. N. Cas. 869, 5 Scott 79, 6 L. J. C. P. 315, 32 E. C. L. 399; Benham *v.* Batty, 12 L. T. Rep. N. S. 266, 13 Wkly. Rep. 636.

Account stated.— By failing within a reasonable time to object to an account rendered by the broker which shows an unauthorized transaction, the principal ratifies the act. Worn *v.* Fry, 84 Cal. 256, 24 Pac. 40. See, however, Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301, 75 N. Y. Suppl. 828 (holding that the owner of stock who, on receiving a message from his broker that the stock has been sold, immediately informs the latter that the person directing the sale was without authority to do so, does not ratify the sale by retaining without objection an account of the transaction subsequently received); Wagner *v.* Peterson, 83 Pa. St. 238 (holding that, although a principal had accepted the balance shown to be due him from his broker on an account rendered, he may bring assumpsit to recover on the common counts money retained by defendant by virtue of credits to which he was not entitled); Forget *v.* Baxter, 7 Q. B. 530 [*affirming* 13 Quebec Super. Ct. 104] (holding that payments made by a client to a broker on a current account do not constitute an acknowledgment of a particular charge relating to prior transactions).

43. Lunn *v.* Guthrie, 115 Iowa 501, 88 N. W. 1060 (holding that where property is sold by an agent on terms not authorized by the principal, but the latter receives and retains the consideration, he cannot, in the absence of fraud on the part of the agent, recover damages for his unauthorized act in selling on such terms); Mayo *v.* Knowlton, 16 Daly (N. Y.) 245, 10 N. Y. Suppl. 230 (holding that in order to rescind an unauthorized sale of stock plaintiff should have tendered the shares which he received in the exchange).

Burden of proof.— The agent is not charged with the burden of proving that the principal received and retained the consideration. Lunn *v.* Guthrie, 115 Iowa 501, 88 N. W. 1060.

44. Bassett *v.* Brown, 105 Mass. 551 (purchase of principal's land by broker); Hanks *v.* Drake, 49 Barb. (N. Y.) 186 (sale of stock by broker); Von Dusen-Harrington Co. *v.* Morton, 40 Can. L. J. 43 (sale of shares by broker upon depletion of margin).

bind the principal as by a ratification, he must have acted with full knowledge of all the material facts.[45]

D. Duties and Liability to Principal[46] — **1. General Rules.** A broker is bound to act in compliance with his principal's instructions,[47] in accordance with the customs and usages prevailing in the market where he deals;[48] and he must act as promptly as the nature of the case demands. Where for example a broker is ordered to purchase certain stocks, it is his duty to purchase promptly, report the transaction to the purchaser, receive the stock, and have the certificates ready for delivery whenever the purchaser shall pay for them.[49] The broker must account to the principal for unexpended funds received from the latter and for all profits made in transactions entered into in the principal's behalf.[50] If a broker employed to sell goods disposes of them for a bill, and draws on the buyer for the amount, he is answerable on the bill to the principal.[51] If a broker innocently buys goods for the principal which are not in existence, and the price is paid, the principal cannot recover back the money from the broker, but must proceed against the seller.[52] So a broker employed to buy stock does not necessarily guarantee its genuineness.[53] An undertaking by a broker to indemnify his princi-

What constitutes a reasonable time depends upon the circumstances of the particular case, and no arbitrary rule can be laid down. McDermid *v.* Cotton, 2 Ill. App. 297; Lunn *v.* Guthrie, 115 Iowa 501, 88 N. W. 1060; Bassett *v.* Brown, 105 Mass. 551.

45. Kerr *v.* Sharp, 83 Ill. 199; Soudieu *v.* Faurès, 12 La. Ann. 746; Day *v.* Holmes, 103 Mass. 306.

46. Breach of duty: As defeating right to compensation see *infra*, II, E, 1, d, e, f, i. As ground for arrest see Arrest, 3 Cyc. 898 *et seq.*

47. See *supra*, II, C, 5, a–d.

48. See *supra*, II, C, 5, e.

49. Tuell *v.* Paine, 39 Misc. (N. Y.) 712, 80 N. Y. Suppl. 956; Cox *v.* Sutherland, 24 Can. L. J. 55 [*affirming* 15 Ont. App. 541], holding that a broker employed to purchase shares by a speculator who expected a profit out of a rise in the value of the stock must purchase at once, and cannot rely on his ability to procure a like number of shares when required, as his interest would be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to the customer. See, however, Ingraham *v.* Taylor, 58 Conn. 503, 20 Atl. 601, 18 Am. St. Rep. 291, holding that by an agreement to purchase and carry stock for a client on a margin account a broker does not bind himself to make an immediate purchase of the stock, but only to deliver it on demand at the price of the day of the contract; and a part of the stock having been sold at a loss at the client's request and the rest delivered on his order, he cannot recover back the margins and commissions on the ground that no stock was in fact purchased until long after the orders were given.

A broker proceeds without unreasonable delay where he receives an order on Sunday and fulfils it on the following day as soon as the exchange opens. Johnston *v.* Miller, 67 Ark. 172, 53 S. W. 1052.

50. Haas *v.* Damon, 9 Iowa 589; Payne *v.* Waterson, 16 La. Ann. 239; Bate *v.* McDowell, 49 N. Y. Super. Ct. 106. See also Accounts and Accounting, 1 Cyc. 387.

Proceeds of sale of illegal bonds.— Where a broker sells bonds belonging to the principal which turn out to be invalid and uses the proceeds to purchase valid bonds for delivery to the buyer, the principal cannot recover the amount of the proceeds from the broker as money had and received to the principal's use. Maitland *v.* Martin, 86 Pa. St. 120.

Application of funds to another's account. —Where a husband having an account with brokers, being about to transfer a certain sum to a new account to be opened with them in the name of his wife, stipulated orally that notwithstanding the transfer the new account should to the extent of the sum so transferred be at all times used by the brokers to make good his account with them, the authority so conferred was not destroyed by the fact that when the transfer was made the wife gave the brokers written authority to execute orders on her account given by her husband. Boody *v.* Pratt, 64 N. J. L. 281, 45 Atl. 598.

Payment of the proceeds of a sale to the principal's agent is not payment to the principal, although the agent employed the broker, where the latter knew that his employer was merely an agent. Crossley *v.* Magniac, [1893] 1 Ch. 594, 67 L. T. Rep. N. S. 798, 3 Reports 202, 41 Wkly. Rep. 598 [*distinguishing* Bridges *v.* Garret, L. R. 5 C. P. 451, 39 L. J. C. P. 251, 22 L. T. Rep. N. S. 448, 18 Wkly. Rep. 815]; Pearson *v.* Scott, 9 Ch. D. 198, 47 L. J. Ch. 705, 38 L. T. Rep. N. S. 747, 26 Wkly. Rep. 796].

Accounting for illegal profits of broker see *infra*, II, D, 3, b.

51. Le Fevre *v.* Lloyd, 1 Marsh. 318, 5 Taunt. 749, 15 Rev. Rep. 644, 1 E. C. L. 382.

52. Risbourg *v.* Bruckner, 3 C. B. N. S. 812, 27 L. J. C. P. 90, 6 Wkly. Rep. 215, 91 E. C. L. 812.

53. Lamert *v.* Heath, 10 Jur. 481, 15 L. J. Exch. 297, 15 M. & W. 486, 4 R. & Can. Cas. 302.

pal from any loss on a resale of goods bought for him is discharged when the principal has a fair opportunity of selling to advantage and neglects it.[54] The broker is responsible to the principal for the default of a subbroker employed by him.[55] If a subbroker violates his instructions he is responsible to the broker who employed him.[56]

2. Measure of Care Required — a. General Rule. Brokers are bound to exercise reasonable care and diligence in carrying out the agency.[57] Beyond this they are not bound. If they exercise the same degree of care and diligence that a prudent man would exercise in like business they are entitled to compensation and are not liable for losses resulting to the principal.[58]

b. Sufficiency of Security or Solvency of Purchaser.[59] A broker to whom money is intrusted for investment is bound to exercise reasonable skill and care,[60] but not the greatest degree of care that an ordinarily prudent person would exercise under like circumstances.[61] So a broker for the sale or letting of property must exercise reasonable care in passing on the sufficiency of security taken for the price, if he has accepted that responsibility;[62] but ordinarily a broker is not

54. Curry *v.* Edensor, 3 T. R. 524.

55. Reid *v.* Dreaper, 6 H. & N. 813, 30 L. J. Exch. 258, 4 L. T. Rep. N. S. 650.

56. Mainwaring *v.* Brandon, 2 Moore C. P. 125, 19 Rev. Rep. 497.

57. Bronnenburg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568; Peckham *v.* Ketchum, 5 Bosw. (N. Y.) 506, 10 Abb. Pr. (N. Y.) 220 (stock-broker); Gheen *v.* Johnson, 90 Pa. St. 38 (stock-broker); Solomon *v.* Barker, 2 F. & F. 726, 11 Wkly. Rep. 375 (merchandise broker); Fletcher *v.* Marshall, 10 Jur. 528, 15 M. & W. 775, 5 R. & Can. Cas. 340 (holding that a sharebroker employed to purchase shares does not thereby undertake to procure them absolutely, but only to use due and reasonable diligence to endeavor to do so); Smith *v.* Barton, 15 L. T. Rep. N. S. 294 (real-estate broker).

Skill and care as to quality and quantity of goods.— Where a broker sells for his principal goods "to be of fair average quality in the opinion of selling broker," he is not liable to the principal for not using skill in order to form a correct opinion of the quality of the goods. Pappa *v.* Rose, L. R. 7 C. P. 32, 41 L. J. C. P. 11, 25 L. T. Rep. N. S. 468, 20 Wkly. Rep. 62 [*affirmed* in L. R. 7 C. P. 525, 41 L. J. C. P. 187, 27 L. T. Rep. N. S. 348, 20 Wkly. Rep. 784]. See also Zwilchenbart *v.* Alexander, 1 B. & S. 234, 30 L. J. Q. B. 254, 7 Jur. N. S. 1157, 4 L. T. 412, 9 Wkly. Rep. 670. And a buying broker is not liable for a mistake as to the quantity of the goods that he buys where he derives no advantage therefrom. London *v.* Brandon, Holt N. P. 438, 3 E. C. L. 175, 2 Stark. 14, 3 E. C. L. 296.

58. Guesnard *v.* Louisville, etc., R. Co., 76 Ala. 453; Barnard *v.* Coffin, 138 Mass. 37 (real-estate broker); Coe *v.* Ware, 40 Minn. 404, 42 N. W. 205 (real-estate broker).

It is ordinarily a question for the jury whether a broker has exercised due care. Harris *v.* Tumbridge, 83 N. Y. 92, 38 Am. Rep. 398, stock-broker.

59. **Fraudulent representations as to security** see *infra*, II, D, 3, a.

60. Shipherd *v.* Field, 70 Ill. 438 (holding that a loan broker is liable to a lender on real estate for loss of a loan negotiated by the broker upon a mortgage which proved insufficient security in consequence of prior encumbrances, where the broker agreed to loan the money only on first-mortgage security on real estate worth double the sum loaned, notwithstanding the property may have been in fact of double the value of all the encumbrances thereon); McFarland *v.* McClees, 1 Pa. Cas. 504, 5 Atl. 50; Murrah *v.* Brichta, (Tex. Sup. 1888) 9 S. W. 185 (where a loan broker's ignorance of the law was held to be no defense).

Release of liability.— Where a broker, through negligence, loaned on second-mortgage security money which, for compensation, he had undertaken to loan on first-mortgage security, but before the loan became due the lender, with other creditors of the borrower, signed a composition releasing him from personal liability beyond the lien of the mortgage, this released the broker from his contingent liability to the lender. Nicolai *v.* Lyons, 8 Oreg. 56.

61. Caruthers *v.* Ross, (Tex. Civ. App. 1901) 63 S. W. 911.

62. Harlow *v.* Bartlett, 170 Mass. 584, 49 N. E. 1014 (where the evidence was held to sustain a finding of negligence); Heys *v.* Tindall, 1 B. & S. 296, 30 L. J. Q. B. 362, 4 L. T. Rep. N. S. 403, 9 Wkly. Rep. 664, 101 E. C. L. 296 (holding that where an agent is employed to let a house and charges a commission on letting it, it is a question for the jury whether he undertakes to use reasonable care to ascertain that the person to whom he lets it is solvent).

Failure to record mortgage.— To an action against a broker, employed to sell a dairy, for damages sustained by plaintiff through the broker's failure to record, in accordance with his undertaking, a mortgage taken by him from a purchaser of the dairy, securing the latter's notes, which were assumed by a subsequent purchaser of the dairy from him, who afterward conveyed it, and who, as well

answerable to his principal for the solvency of one to whom he sells property on credit.[63]

3. Fraud[64] — a. In General. If in dealing with his principal a broker is guilty of fraud he is liable in damages.[65] Thus if a broker employed to invest money on good security falsely and fraudulently represents that a proposed security is ample, he is liable to the principal for the resulting damage.[66] So if a broker employed to sell property understates to the principal the best price obtainable, the principal may recover from him the difference between that obtained and that which might have been obtained.[67] And a broker employed to purchase property must inform the principal of the lowest price at which it may be bought.[68]

as the first purchaser, is insolvent, it is no defense that the dairy, when sold by the first to the second purchaser, was still unencumbered, and that plaintiff rejected an offer by the first purchaser to transfer the dairy to him in satisfaction of the account due him. Stewart *v.* Muse, 62 Ind. 385.

63. Buddecke *v.* Alexander, 20 La. Ann. 563.

64. See, generally, Fraud.

65. Fottler *v.* Moseley, 185 Mass. 563, 70 N. E. 1040 (holding that where plaintiff was induced by the fraudulent representations of a stock-broker to cancel an order to sell certain stock and to retain it until it depreciated in value, the broker was liable, although the depreciation was caused by the embezzlement of an officer of the corporation, which was not contemplated by the broker); Wright *v.* Self, 1 F. & F. 704 (holding that an agent employed by seller and purchaser may be liable to the purchaser for false representations as to value).

Burden of proof.— Where, after the confirmation of a sale of land by a broker, the owner pays to him the commission agreed on, and afterward discovers that the title to the land he has received in exchange is defective, and the representations made as to the situation and value are false, before he can recover from the broker the commissions so paid he must further show that the broker acted in bad faith, and concealed from him information possessed by the broker in regard to the title, situation, and value of the land. Lockwood *v.* Halsey, 41 Kan. 166, 21 Pac. 98.

Failure to disclose identity of purchaser.— A broker authorized to sell property to any purchaser is not ordinarily guilty of fraud in failing to disclose the identity of a prospective purchaser to the principal. Rank *v.* Garvey, 66 Nebr. 767, 92 N. W. 1025, 99 N. W. 666. If, however, he refuses or neglects to disclose the name of the buyer after deliveries have been refused, he becomes personally liable on the contract. Lincoln *v.* Levi Cotton Mills Co., 128 Fed. 865, 63 C. C. A. 333.

66. Rubens *v.* Mead, (Cal. 1898) 53 Pac. 432 (holding that the broker is liable, although the principal was in a position to have examined the security, and that it is immaterial that the broker did not share the money with, or deliver any part of it to, the borrower); Turnbull *v.* Gadsden, 2 Strobh. Eq. (S. C.) 14 (holding that a broker who undertook to invest money upon a safe bond well secured by mortgage, and who falsely represented to the lender that the mortgage security was ample, and received a remuneration from the borrower for negotiating the loan, was bound to make good the loss arising from the insufficiency of the security).

Negligence as to security see *supra*, II, D, 2, b.

67. Holmes *v.* Cathcart, 88 Minn. 213, 92 N. W. 956, 97 Am. St. Rep. 513, 60 L. R. A. 734, holding that an agent authorized to sell or exchange property on specified prices and terms is bound, on learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and that his failure so to do amounts to a fraud in law. See, however, Dickinson *v.* Updike, (N. J. Err. & App. 1901) 49 Atl. 712 (holding that if the broker did not learn of the better terms until after the transaction was closed he is not liable); Black *v.* Barr, 14 Pa. Super. Ct. 98 (holding that where a broker found a purchaser at the price named by the principal, a tenant in common, and was then referred by the principal to the other tenants in common, with whom he subsequently made terms at a higher price as to a two-eighths' interest owned by them, it was not incumbent upon him to inform his principal of the higher price).

Submission of lower offers.— It is not a breach of duty on the part of a broker to submit offers to his principal to purchase at a price less than that at which he has been authorized to sell. Bickart *v.* Hoffmann, 19 N. Y. Suppl. 472.

Reaping individual profit from transaction see *infra*, II, D, 3, b.

68. Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479, so holding, although the principal offered to pay the broker a certain sum if he would negotiate a purchase for a price which the principal stated he would be willing to pay.

Reaping individual profit from transaction see *infra*, II, D, 3, b.

b. Individual Interest of Broker.[69] Unless the principal is fully advised of the facts,[70] a broker employed to buy property cannot as a rule sell property in which he has an individual interest;[71] nor may a broker employed to sell property become the buyer thereof.[72] If a broker employed to sell property under-

69. Individual interest as affecting right to commission see *infra*, II, E, 1, d, (III).

70. See cases cited *infra*, this note *et seq.*

Burden of proving knowledge.— In an action against a broker by his principal to recover the amount retained by the former from the proceeds of the sale of land which the broker purchased for his own benefit, the burden of proving knowledge and acquiescence on the part of the principal, so as to render the transaction valid, is on defendant. Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207; Dunne *v.* English, L. R. 18 Eq. 524, 31 L. T. Rep. N. S. 75, holding also that the burden of proving a full disclosure is not discharged merely by the broker's testifying that he did so, if his evidence is contradicted by the principal and not corroborated.

71. Tewksbury *v.* Spruance, 75 Ill. 187 (so holding although the broker charges no more than the market price); Connor *v.* Black, 119 Mo. 126, 24 S. W. 184; England *v.* Burnett Real Estate, etc., Co., 79 Mo. App. 294; Taussig *v.* Hart, 58 N. Y. 425; Conkey *v.* Bond, 34 Barb. (N. Y.) 276 [*affirmed* in 36 N. Y. 427]; Kimber *v.* Barber, L. R. 8 Ch. 56, 27 L. T. Rep. N. S. 526, 21 Wkly. Rep. 65; Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29; Wilson *v.* Short, 6 Hare 366, 12 Jur. 301, 31 Eng. Ch. 366, 17 L. J. Ch. 289.

72. *Illinois.*— Cornwell *v.* Foord, 96 Ill. App. 366, holding that where an agent having charge of the management and sale of premises fails to communicate offers made for the property to his principal, and then purchases the property at a much less price than the offers not made known, and sells at a considerable advance, he will be held to account to his principal.

Massachusetts.— Smith *v.* Townsend, 109 Mass. 500.

Minnesota.— Merriam *v.* Johnson, 86 Minn. 61, 90 N. W. 116, holding that where a real-estate agent induces the owner to fix a net price on certain property on the supposition that the sale is to a third person, he cannot himself purchase the property and realize a greater profit than a reasonable commission.

New York.— Gardner *v.* Ogden, 22 N. Y. 327, 78 Am. Dec. 192 (holding that where the clerk of a broker employed to make a sale of land, who has access to the correspondence between his principal and the vendor, purchases the land himself, although the price paid is fair and there is no actual fraud, he will be compelled at the suit of the vendor to reconvey such portion of the land as remains in his hands and to account for the proceeds of what he has sold); Clark *v.* Bird, 66 N. Y. App. Div. 284, 72 N. Y. Suppl. 769.

England.— Erskine *v.* Sachs, [1901] 2 K. B. 504, 70 L. J. K. B. 978, 85 L. T. Rep. N. S. 385 (purchase by stock-broker); De Bussche *v.* Alt, 8 Ch. D. 286, 47 L. J. Ch. 381, 38 L. T. Rep. N. S. 370 (where the broker resold the property at a higher price, and he was held liable to account to the principal for the profits); Dunne *v.* English, L. R. 18 Eq. 524, 31 L. T. Rep. N. S. 75 (holding that an agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and that it is not enough merely to disclose that he has an interest, or to make statements such as might put the principal on inquiry); Bentley *v.* Craven, 18 Beav. 75, 52 Eng. Reprint 29 (holding that the principal may either repudiate the transaction altogether, or adopt and take the benefit of it); *Ex p.* Huth, 4 Deac. 294, Mont. & C. 667.

See 8 Cent. Dig. tit. "Brokers," § 24.

Assignment by purchaser to broker.— Where defendant, a real-estate agent, submitted to his non-resident principal an offer for real estate made by a person in his employ, without stating that fact, at a time when values were rapidly appreciating, and the offer was accepted, and the purchaser, finding himself unable to realize the money, conveyed to defendant, who assumed the former's liability, the conveyance will not be canceled in the absence of proof that defendant intended to purchase his principal's property in the name of another. Bookwalter *v.* Lansing, 23 Nebr. 291, 36 N. W. 549.

Interest of broker in corporation buyer.— A sale in the open market by a brokerage company of its client's stock to pay margins to a corporation, some of whose officers were officers of the selling company, is not invalid, in the absence of a showing that prejudice resulted to the client from the fact that the two corporations were thus related. Van Dusen-Harrington Co. *v.* Jungeblut, 75 Minn. 298, 77 N. W. 970, 74 Am. St. Rep. 463.

Option to buy.— The fact that a broker whom one wishing to purchase certain real estate employed to negotiate with the owner therefor has an option to purchase the land at a fixed price does not incapacitate him from acting for the purchaser, as he might abandon the option without violating any duty to the owner; nor is the broker bound in good faith to disclose to his principal that he has such option. Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479.

Partial invalidity.— Where a client directed his brokers to sell five hundred shares of stock held for his account, and they

states the price received by him and keeps the difference he must account to the principal therefor;[73] and his fraudulent conduct may subject him also to an action for breach of contract[74] or an action of tort.[75] So if a broker employed to buy property overstates the price at which it may be bought, and obtains the difference, the principal may recover the excess from him.[76] If a broker employed to purchase an estate buys it for himself, he is considered a trustee for the principal.[77] In all these cases the agency of the broker must be proved in order to invalidate the transaction and render him liable to account.[78]

c. Acting For Persons Adversely Interested.[79] A broker cannot ordinarily without notice to the principal represent persons adversely interested in the transaction in question.[80]

through another broker sold them in five separate lots of one hundred shares each, the subbroker selling one of them to himself, and the client, when the sales were reported to him, made no objection to their having been sold in one-hundred-share lots, the purchase of the one hundred shares by the subbroker will avoid the sale only as to such one hundred shares. Evans *v.* Wrenn, 93 N. Y. App. Div. 346, 88 N. Y. Suppl. 617.

73. *Colorado.*— Collins *v.* McClurg, 1 Colo. App. 348, 29 Pac. 299.

Illinois.— Helberg *v.* Nickol, 149 Ill. 249, 37 N. E. 63; Cornwell *v.* Foord, 96 Ill. App. 366.

Massachusetts.— Bassett *v.* Rogers, 165 Mass. 377, 43 N. E. 180, so holding, although the amount turned over to the principal by the broker exceeds the amount for which the principal agreed to sell.

New York.— Taylor *v.* Guest, 45 How. Pr. 276.

Washington.— Stearns *v.* Hochbrunn, 24 Wash. 206, 64 Pac. 165.

See 8 Cent. Dig. tit. "Brokers," § 24.

Necessity of demand.— A broker is, without demand, liable to his principal for a concealed excess received on a sale of land above the sum fixed for the price. Love *v.* Hoss, 62 Ind. 255.

Instructions.— In assumpsit by a principal against real-estate brokers for money had and received, an instruction that if the brokers sold the principal's farm for eleven thousand dollars, but accounted to him for only ten thousand, the principal is entitled to recover one thousand dollars is erroneous, where there is evidence that the purchaser with the principal's knowledge bought from one who had a prior option on the land, and there is no evidence that defendants ever received the one thousand dollars. Henshaw *v.* Wilson, 46 Ill. App. 364.

74. Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443.

75. Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126.

76. Healey *v.* Martin, 33 Misc. (N. Y.) 236, 68 N. Y. Suppl. 413 (holding that where an agent falsely represented to his principal that in order to purchase certain property two hundred and fifty thousand dollars and some parcels of the principal's land would be necessary, and another in collusion with the agent purchased the land for two hundred and fifty thousand dollars, and it was conveyed to the principal, who gave the consideration named by his agent, it was not necessary, in a suit by the principal to recover the land given as part consideration, that he should offer to restore what he had received before he could demand restoration); Warren *v.* Burt, 58 Fed. 101, 7 C. C. A. 105 (holding that the evidence was sufficient to implicate the broker in a scheme thus to defraud the principal); Procter *v.* Brain, 3 C. & P. 536, 14 E. C. L. 701, 7 L. J. C. P. O. S. 66, 2 M. & P. 284, 17 E. C. L. 628.

77. Lees *v.* Nuttall, 2 Myl. & K. 819, 7 Eng. Ch. 819, 39 Eng. Reprint 1157 [*affirming* 1 Russ. & M. 53, 5 Eng. Ch. 53, 39 Eng. Reprint 21, Taml. 282, 12 Eng. Ch. 282, 48 Eng. Reprint 112].

78. Webb *v.* Ward, 122 Ala. 355, 25 So. 48; Collins *v.* McClurg, 1 Colo. App. 348, 29 Pac. 299 (holding, however, that the evidence was sufficient to sustain a finding that defendants were the agents of plaintiff); Lazarus *v.* Sands, 12 Misc. (N. Y.) 575, 33 N. Y. Suppl. 855, 7 Misc. (N. Y.) 282, 27 N. Y. Suppl. 885.

After the termination of a real-estate agency, the agent has the same right as any other person to deal in the property of the principal. Oberlin College *v.* Blair, 45 W. Va. 812, 32 S. E. 203.

79. Representing adverse interest as affecting right to commission see *infra*, II, E, 1, d, (II).

80. *District of Columbia.*— Lewis *v.* Denison, 2 App. Cas. 387, holding that a real-estate agent who sells the lands for more than the price fixed by the terms of his contract, to another for whom he is also agent for the investment of money, and secretly retains the excess, is liable to a double recovery therefor by the seller and purchaser.

Maryland.— Worthington *v.* Tormey, 34 Md. 182 *semble*.

Michigan.— Hannan *v.* Prentis, 124 Mich. 417, 83 N. W. 102.

New Jersey.— Marsh *v.* Buchan, 46 N. J. Eq. 595, 22 Atl. 128, holding that a real-estate broker appointed to purchase land has no right to accept from the vendor an employment to sell the same land without disclosing to the latter his agency for the pur-

d. Fictitious Transactions. It is a fraud for a broker to make only fictitious purchases and sales and report them to the principal as genuine, and in case he does so the principal may recover back any deposits he may have made with the broker.[81]

e. Fraud of Subagent. A broker is ordinarily liable for the fraud of a subagent employed by him.[82]

chaser; and where it is of vital importance to the purchaser that the price should not be raised by a disclosure of his plans, the broker is absolutely precluded from also acting as agent for the vendor.

Virginia.— Ferguson *v.* Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234, so holding irrespective of actual fraud.

England.— Morison *v.* Thompson, L. R. 9 Q. B. 480, 43 L. J. Q. B. 215, 30 L. T. Rep. N. S. 869, 22 Wkly. Rep. 859; Phosphate Sewage Co. *v.* Hartmont, 5 Ch. D. 394, both holding that a commission received by an agent of a purchaser from the vendor or the vendor's broker without the knowledge of the principal is a bribe which the principal has a right to extract from the agent.

See 8 Cent. Dig. tit. "Brokers," § 25.

Ignorance of double agency.— A contract by an agent for a dual agency is not void *per se*, but only so when the fact that the agent represented both parties was not known to each. Red Cypress Lumber Co. *v.* Perry, 118 Ga. 870, 45 S. E. 674; Lincoln *v.* Levi Cotton Mills Co., 128 Fed. 865, 63 C. C. A. 333.

Notice to principal.— The mere signing of a contract of sale by a broker as agent for one of the purchasers does not operate as a disclosure to the vendor of his agency for the purchasers during the negotiations and when the terms were verbally agreed on. Marsh *v.* Buchan, 46 N. J. Eq. 595, 22 Atl. 128.

Evidence of double agency.— A statement by one party to an exchange of real estate that he had offered to pay the broker employed by the other party a commission does not show that the broker accepted employment by both parties, where he admits the offer but states that he did not accept it. Lebowits *v.* Colligan, 18 N. Y. App. Div. 624, 45 N. Y. Suppl. 373.

Recovery by principal of secret profits.— Although the conduct of a seller's stock-broker in undertaking to act as agent of the purchaser without informing him as to his agency for the seller and its terms is a fraud which might avoid the entire transaction at the option of the purchaser, still it will not entitle him to recover as principal from the broker profits secretly received by him. Ilingworth *v.* De Mott, 59 N. J. Eq. 8, 45 Atl. 272. See, however, cases cited *supra*, this note.

After termination of the agency for one person a broker may act for another adversely interested without breach of trust as to the former. Ritchie *v.* Judd, 137 Ill. 453, 27 N. E. 682.

A broker employed to purchase goods may act as agent for both the purchaser and the seller. Merritt *v.* Clason, 12 Johns. (N. Y.) 102, 7 Am. Dec. 286.

A broker employed to sell may act as agent of the purchaser also, unless his employment by the vendor gives him discretionary authority. Pollatschek *v.* Goodwin, 17 Misc. (N. Y.) 587, 40 N. Y. Suppl. 682. See also Selover *v.* Isle Harbor Land Co., 91 Minn. 451, 98 N. W. 344.

81. Prout *v.* Chisolm, 21 N. Y. App. Div. 54, 47 N. Y. Suppl. 376 (holding that it is wholly immaterial whether in fact the customer suffered any loss or gain by the broker's failure to execute the order); Mellott *v.* Downing, 39 Oreg. 218, 64 Pac. 393; Rothschild *v.* Brookman, 5 Bligh N. S. 165, 5 Eng. Reprint 273, 2 Dow. & Cl. 188, 6 Eng. Reprint 699 [*affirming* 7 L. J. Ch. O. S. 163, 3 Sim. 153, 30 Rev. Rep. 147, 6 Eng. Ch. 153]; Bostock *v.* Jardine, 3 H. & C. 700, 11 Jur. N. S. 586, 34 L. J. Exch. 142, 11 L. T. Rep. N. S. 577, 13 Wkly. Rep. 970; Sutherland *v.* Cox, 6 Ont. 505 [*affirmed* in 15 Ont. App. 541 (*affirmed* in 24 Can. L. J. 55)]. See also *supra*, II, D, 1.

Burden of proof.— In an action to recover money paid a broker for the purchase of stock on a margin, plaintiff claiming that no purchases had been made, and defendant that all the money had been expended in buying shares, which were sold at a loss, the burden is on defendant to show that the transactions testified to were real. Lonergan *v.* Peck, 136 Mass. 361.

Sufficiency of evidence of fictitious character of transaction see Prout *v.* Chisolm, 21 N. Y. App. Div. 54, 47 N. Y. Suppl. 376.

Transfer of shares on company books.— An actual purchase of shares for the client is shown where it appears that the broker, from the time of the purchase until a subsequent sale, always had on hand the number of shares of that particular stock ready to deliver on payment of the price, it not being necessary that the shares should have been actually transferred on the books of the company to the client or the broker. Von Duzen-Harrington Co. *v.* Morton, 40 Can. L. J. 43.

82. Barnard *v.* Coffin, 141 Mass. 37, 6 N. E. 364, 55 Am. Rep. 443 (holding that where brokers employed to sell land employ a subagent to find a customer, and he obtains from the customer a larger sum than he returns to the brokers, the latter are liable to the principal for the amount fraudulently withheld by the subagent, although they had no knowledge of his fraud); Wolff *v.* Lockwood, 70 N. Y. App. Div. 569, 75 N. Y. Suppl. 605 (where the broker's agent sent in fictitious orders in the client's name).

4. Estoppel.[83] Either the principal[84] or the broker[85] may be estopped by his representations or conduct from repudiating a given transaction between the parties.

5. Title to Property Purchased or Held by Broker — a. In General. A broker has no title to the proceeds of a bill of exchange placed in his hands with which to purchase property for a client;[86] nor has he any title to property placed with him for sale.[87]

b. Stocks. A broker who has advanced the purchase-money to a client desiring him to buy stock has the right to take the title in his own name,[88] and if a broker sells stock to a client for cash, and the client through fraud secures possession of it without payment, the title remains in the broker.[89] Ordinarily, however, the title to stock bought by a broker for a client on margin[90] or otherwise[91] vests in the client, subject, however, to the payment of advances and commissions due the broker, he being regarded as a pledgee of the stock.[92] Consequently if the broker subsequently goes into insolvency, the client may redeem the stock from the assignee or receiver.[93]

See also Elwell *v.* Chamberlain, 2 Bosw. (N. Y.) 230, 4 Bosw. (N. Y.) 320 [*affirmed* in 31 N. Y. 611].

83. See, generally, Estoppel, 16 Cyc. 671 *et seq.*

84. Christensen *v.* Wooley, 41 Mo. App. 53 (holding that where a vendor institutes a suit against his brokers to recover a part of the purchase-money retained by them as commissions, he is estopped to allege the invalidity of the sale as against them); Timpson *v.* Allen, 149 N. Y. 513, 44 N. E. 171 (holding that a broker was protected by the rule that when one of two innocent persons must suffer from the act of a third person, he shall sustain the loss who has enabled the third person to do the injury). See also Andrews *v.* Clark, 72 Md. 396, 20 Atl. 429, where it was urged that the principal was negligent in dealing with the broker's clerk so as to estop him from charging the broker with a loss occurring through the clerk's fraud. See also *infra*, page 213 note 17.

85. Matter of Pierson, 19 N. Y. App. Div. 478, 46 N. Y. Suppl. 557, holding that where a stock-broker makes entries in his books of purchases of stocks for his clients, and renders to them statements showing that he has bought and holds for them certain stocks, giving names, prices, and the standing of the account, the clients, believing and acting upon such statements, may treat them as true, and the broker is estopped to deny them. See, however, Porter *v.* Wormser, 94 N. Y. 431, holding that the fact that the heading of notices of sales sent by a broker to his principal shows the purchases to have been made by the broker does not estop the broker from showing, in an action for an accounting, that the sales were in fact made to a third person, and were therefore valid.

86. Boisblanc's Succession, 32 La. Ann. 109.

87. Bickford *v.* Searles, 9 N. Y. App. Div. 158, 41 N. Y. Suppl. 148, holding that an agreement between the owner of land and real-estate agents that the agents should sell the property, and should receive half the profits after the owner had been reimbursed for the original price and expenses, gives the agents an interest only in the profits of the land sold, and not in the land unsold.

88. Horton *v.* Morgan, 19 N. Y. 170, 75 Am. Dec. 311 [*affirming* 6 Duer 56].

89. Hays *v.* Currie, 3 Sandf. Ch. (N. Y.) 585.

90. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286]; Rothschild *v.* Allen, 90 N. Y. App. Div. 233, 86 N. Y. Suppl. 42; Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. (N. Y.) 289; Andrews *v.* Clerke, 3 Bosw. (N. Y.) 585.

91. Nourse *v.* Prime, 4 Johns. Ch. (N. Y.) 490, 13 Am. Dec. 606.

Subsequent sales by broker.— A broker who buys stocks for his principal and also on his own account, and afterward sells a part and uses the proceeds, will be presumed to have sold from his own portion, and the principal may claim that remaining. Harding *v.* Field, 1 N. Y. App. Div. 391, 37 N. Y. Suppl. 399.

92. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286]; Rothschild *v.* Allen, 90 N. Y. App. Div. 233, 86 N. Y. Suppl. 42; Andrews *v.* Clerke, 3 Bosw. (N. Y.) 585.

In Massachusetts, however, the usual relations between a broker and a customer for whom he has purchased stock on a margin are not those of pledgee and pledgor, but of parties to an executory contract for the sale and purchase of the stock, under which the broker is bound to deliver the stock purchased on demand and payment of the amount due thereon, and is entitled to claim payment on a tender of the stock after reasonable notice to the purchaser. Covell *v.* Loud, 135 Mass. 41, 46 Am. Rep. 446; *In re* Swift, 105 Fed. 493, 5 Am. Bankr. Rep. 493, 112 Fed. 315, 50 C. C. A. 264.

93. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Cham-

6. Delivery of Property Purchased by Broker. Where brokers buy stocks for a client, it is their duty to deliver the same to him on demand on payment of the sum due them thereon.[94] Their obligation is to keep at all times on hand or under their control ready for delivery to the client on his paying them the sum due them therefor either the particular shares purchased or an equal amount of other shares of the same kind.[95] They are not bound to keep the identical shares bought for the client separate from the mass of their stock, but it is sufficient if they keep on hand an equal number of the same kind,[96] and this rule applies to purchases of gold on margin.[97]

7. Pledge of Property Purchased by Broker.[98] A broker who has bought stock for another with money advanced by himself and who holds it in his own name may, so long as he has not been paid or tendered the amount of his advances, pledge it as security for his own debt to a third person without being guilty of conversion or breach of contract.[99] The receiver of a broker who has

berlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178.

Identification of stocks.— Before the stock can be redeemed, it must be identified, either by showing that particular certificates were being carried for him by the broker, or that the stock carried was sufficient for all customers. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102; Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178.

Pledge of stocks by broker.— The customer is entitled, as against the broker's assignee or receiver, to any excess in the proceeds of the stock over the amount due a pledgee of the broker. Le Marchant *v.* Moore, 79 Hun (N. Y.) 352, 29 N. Y. Suppl. 484 [*affirmed* in 150 N. Y. 209, 44 N. E. 770]; Willard *v.* White, 56 Hun (N. Y.) 581, 10 N. Y. Suppl. 170; Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178.

94. Rothschild *v.* Allen, 90 N. Y. App. Div. 233, 86 N. Y. Suppl. 42, holding that where brokers sell stock to a customer on margin, their failure to deliver the stock on demand by the customer operates as a conversion thereof; and that the fact that those to whom stock has been pledged by a broker, who had sold the stock on margin to a customer, exercised their legal right in selling the stock on suspension of business by the broker, does not relieve the broker from his obligation to deliver the stock on demand therefor by the customer. See, however, McEwen, *v.* Woods, 11 Q. B. 13, 12 Jur. 329, 17 L. J. Q. B. 206, 5 R. & Can. Cas. 335, 63 E. C. L. 13; Taylor *v.* Stray, 2 C. B. N. S. 175, 3 Jur. N. S. 540, 26 L. J. C. P. 185, 89 E. C. L. 175 [*affirmed* in 2 C. B. N. S. 197, 3 Jur. N. S. 964, 26 L. J. C. P. 287, 5 Wkly. Rep. 761, 89 E. C. L. 197].

Waiver of delivery.— Where a broker buys stock for his principal, and the principal, before receiving it, orders the broker to sell it again on the principal's account, it amounts to a waiver of any delivery or tender of the stock by the broker to the principal. Cahill *v.* Hirschman, 6 Nev. 57.

95. Taussig *v.* Hart, 58 N. Y. 425 (holding that this obligation is the same whether the relation of pledgor and pledgee exists between the parties, or whether the broker holds the stock under a special contract; and that where a stock-broker has sold the stock purchased for a customer, failing to keep enough stock on hand to meet his obligation, a subsequent acquisition by him of a sufficient amount of the stock to replace that which he held for account of his principal does not relieve him from liability); Rogers *v.* Gould, 6 Hun (N. Y.) 229; Clarkson *v.* Snider, 10 Ont. 561.

96. Price *v.* Gover, 40 Md. 102; Boylan *v.* Huguet, 8 Nev. 345; Horton *v.* Morgan, 19 N. Y. 170, 75 Am. Dec. 311; Harding *v.* Field, 1 N. Y. App. Div. 391, 37 N. Y. Suppl. 399; Nourse *v.* Prime, 4 Johns. Ch. (N. Y.) 490, 8 Am. Dec. 606.

97. Patterson *v.* Keys, 1 Cinc. Super. Ct. 94.

98. Rights of: Pledgee against principal see *infra*, II, G, 2, b, (II), (B). Principal where blank transfer of stock lodged with broker is fraudulently filled in by him and transferred see Corporations, 10 Cyc. 627 note 15.

99. Wood *v.* Hayes, 15 Gray (Mass.) 375; Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. 770; Willard *v.* White, 56 Hun (N. Y.) 581, 10 N. Y. Suppl. 170; Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178; *In re* Swift, 105 Fed. 493, holding that a broker may pledge stock purchased for his customer for his own debt without being guilty of conversion or breach of contract, until a demand has been made by the customer and refused.

Right of customer to other stocks in substitution.— Customers of a broker who has bought stocks for them, and thereafter pledged them to secure loans to himself, are not entitled to other stocks owned by the broker. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178.

Priorities.— The burden of discharging a pledge of stocks belonging to different persons, made by brokers with implied authority from their customers, from whom the brokers themselves hold the stock in pledge while carrying it on margin, is to be aver-

pledged his client's stocks has no right to redeem them for the benefit of the client at the risk of loss to the general creditors; nor is it his duty to redeem upon tender by the client of the price.[1]

8. Rights of Broker as to Collateral Security.[2] A broker may repledge collateral deposited with him to secure advances on margin transactions,[3] but he may use the collateral only so that he can at any time promptly return it to the client when the latter pays his debt.[4] Consequently a sale of the collateral is invalid.[5] The principal is not entitled, when sued by the broker for the balance of an account, to have the value of the collateral deducted, but the broker is entitled to hold it until the debt is in fact paid.[6] In order to recover on an accommodation note payable to the principal and deposited by him as collateral, the burden of proof is on the broker to show that a debt is due.[7]

9. Transactions on Margin.[8] Where a broker agrees for a commission and upon a deposit of a stipulated margin to make a short sale for a client, he is bound to carry the stock for a reasonable time so long as the margin remains intact.[9] So a broker undertaking to buy on margin has no right to sell without the client's authority while he has sufficient margin in his hands.[10] If a broker agrees to carry an account for a certain time or until a certain event without further margins, he is liable in damages for closing the transaction before that time.[11] A broker who agrees to make a short sale for a client on margin

aged among all the stocks included in the pledge, upon the brokers' becoming insolvent. Skiff *v.* Stoddard, 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L. R. A. 102. The fact that a particular customer may be able to trace the stock which belonged to him or its proceeds does not entitle him to a lien on the assets of the brokers superior to that of other customers who dealt on the same basis. Sillcocks *v.* Gallaudet, 66 Hun (N. Y.) 522, 21 N. Y. Suppl. 552.

Right to surplus proceeds as against assignee or receiver of broker see *supra*, note 93.

1. Chamberlain *v.* Greenleaf, 4 Abb. N. Cas. (N. Y.) 178.

2. See also *infra*, II, G, 2, b, (II), (B).

Right of general lien on collateral see *infra*, page 289, note 1.

3. German Sav. Bank *v.* Renshaw, 78 Md. 475, 28 Atl. 281. See, however, Duggan *v.* London, etc., Loan, etc., Co., 20 Can. Supreme Ct. 481 [*reversing* 18 Ont. App. 305].

Where a broker pledges stock with other brokers to secure advances, the latter may repledge the stock to enable them to raise the advances, but they have no right to sell it without notice to the pledgor, if he is not in default. Mara *v.* Cox, 6 Ont. 359.

A presumption that the collateral was returned may be indulged after twenty years, in an action to recover the value of bonds alleged to have been deposited by plaintiff with defendants (stock-brokers) as security for any loss resulting from the purchase of stock by defendants for plaintiff. McKay *v.* McKay, 89 Hun (N. Y.) 612, 35 N. Y. Suppl. 415.

4. German Sav. Bank *v.* Renshaw, 78 Md. 475, 28 Atl. 281.

5. Lawrence *v.* Maxwell, 6 Lans. (N. Y.) 469, 64 Barb. (N. Y.) 102 [*affirmed* in 53 N. Y. 19]; *Ex p.* Dennison, 3 Ves. Jr. 552, 30 Eng. Reprint 1152; Carnegie *v.* Federal Bank, 5 Ont. 418.

Upon default made, however, the broker is entitled to sell the stock without notice, but only for the purpose of liquidating the advance. Carnegie *v.* Federal Bank, 5 Ont. 418.

6. Eggleston *v.* Woolsey, 14 N. Y. St. 241.

7. Sweeney *v.* Rogers, 10 Daly (N. Y.) 469.

8. **Custom and usage as affecting broker's authority and duty** see *supra*, II, C, 5, e.

9. White *v.* Smith, 54 N. Y. 522 [*affirming* 6 Lans. 5] (holding that a broker cannot, unless expressly so agreed, buy in stock to cover the sale without direction or notice from his customer, so long as no demand for margin is made); Campbell *v.* Wright, 8 N. Y. St. 471 (holding that if a broker's buying is not authorized by a stop order or a default in the margin, the customer may repudiate the transaction and recover the margin deposited).

10. Denton *v.* Jackson, 106 Ill. 433 (holding that if a broker sells without the buyer's authority while he has sufficient margins in his hands, he is responsible for the loss, and the buyer may recover the full amount deposited as margins); Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. (N. Y.) 289 (holding that the unauthorized sale is a conversion, whether notice of the sale is given to the principal or not).

11. Michael *v.* Hart, [1901] 2 K. B. 867, 70 L. J. K. B. 1000, 85 L. T. Rep. N. S. 548, 50 Wkly. Rep. 154; Ellis *v.* Pond, [1898] 1 Q. B. 426, 67 L. J. Q. B. 345, 78 L. T. Rep. N. S. 125. See Harris *v.* Pryor, 18 N. Y. Suppl. 128, holding that a finding was warranted that there was no agreement to hold the stocks in question.

Consideration for agreement.— Where defendants, stock-brokers, were carrying a "short" sale of stock for plaintiff, and the

may, if the margin is not kept good, upon demand and notice, close the transaction by buying to cover the sale.[12] So a broker who makes a purchase on long account for a client on margin may sell the stock upon the client's failure to make the necessary advances on demand.[13] After a client has refused to put up margins, the broker is under no obligation to prevent loss either by making advances[14] or by closing the transaction by a purchase or a sale according to the nature of the transaction.[15] Nor is a broker who has borrowed stock to cover

stock began to rise, whereupon plaintiff wished to cover his sale and go "long" on the stock, which defendants advised him not to do, the fact that plaintiff, to his pecuniary loss, refrained from doing as he wished, was sufficient consideration for defendants' promise to carry the stock without additional margin until plaintiff could get out without loss. Rogers *v.* Wiley, 131 N. Y. 527, 30 N. E. 582 [*affirming* 14 N. Y. Suppl. 622].

Construction of agreement.— An agreement by a broker through whom "July wheat" is purchased on margin that he will carry the wheat until July 1 without further margin, and that the deal shall not be closed until so ordered by the purchaser, means that the deal shall not be closed before July 1, unless so ordered. Amsden *v.* Jacobs, 75 Hun (N. Y.) 311, 26 N. Y. Suppl. 1000.

Tender of performance by customer.— Where brokers, after demanding additional margin from their client to protect them on stock purchased for him, agree to wait till a specified time for him to comply with the demand, and sell the stock before the time specified, the client, in order to put the brokers in default, must tender performance at the specified time. Kanady *v.* Burk, 18 Mich. 278.

The deposit of a note by a customer with a broker as "temporary collateral" for the amount of the margins required does not of itself constitute a deposit of the margin, nor operate to extend the time for depositing margins until the note should mature. Gould *v.* Trask, 10 N. Y. Suppl. 619.

12. White *v.* Smith, 54 N. Y. 522 [*affirming* 6 Lans. 5]; Sterling *v.* Jaudon, 48 Barb. (N. Y.) 459, gold transaction.

To support the purchase as made on the client's account, it is essential for the broker to show that there was occasion to call upon the client to make a further deposit, and that he failed to do so after having reasonable notice prior to the purchase. Lazare *v.* Allen, 20 N. Y. App. Div. 616, 47 N. Y. Suppl. 340.

Buying in stock to repay loan of stock.— Where, by the usages of a stock exchange, a broker instructed by a client to sell stock, in case the client does not furnish the stock, is authorized to borrow the same for delivery to the person to whom it is sold, being protected against loss in the transaction by security or margins deposited by the client, he may demand additional margins when unwilling longer to stand bound to repay the borrowed stock without further protection; and unless the same is furnished within a reasonable time after notice to the client, he has the right to take such fair and reasonable steps for the purchase of stock to repay that borrowed as may be necessary to prevent loss to himself, and to charge the cost thereof to the client's account, being liable only for a failure to exercise reasonable care and skill in the matter of making such purchase. Boyle *v.* Henning, 121 Fed. 376.

13. *Massachusetts.*— Covell *v.* Loud, 135 Mass. 41, 46 Am. Rep. 446.

New York.— Schepeler *v.* Eisner, 3 Daly 11.

United States.— Lehman *v.* Feld, 37 Fed. 852. See, however, Blakemore *v.* Heyman, 23 Fed. 648, holding that in the absence of a special agreement or proof of knowledge of a custom of the cotton exchange of New York, a broker in that city who sells cotton before maturity of the contract, because of a failure on the part of his principal to advance margins, cannot recover from the principal the amount of loss sustained by reason of the sale.

England.— See Lacey *v.* Hill, L. R. 8 Ch. 921, 42 L. J. Ch. 657, 109 L. T. Rep. N. S. 281, 21 Wkly. Rep. 857, holding that brokers who have with their own money purchased stock for a principal, are, in the event of the death, bankruptcy, or insolvency of the principal, justified in immediately selling it.

Canada.— Morris *v.* Brault, 23 Quebec Super. Ct. 190.

See 8 Cent. Dig. tit. "Brokers," § 19.

14. De Mary *v.* Burtenshaw, 131 Mich. 326, 91 N. W. 647, wheat transaction.

15. Perin *v.* Parker, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336 [*affirming* 25 Ill. App. 465]; Kerr *v.* Murton, 7 Ont. L. Rep. 751. See, however, *In re* Daniels, 6 Fed. Cas. No. 3,566, 6 Biss. 405 (holding that a broker who has bought and holds stocks on margin is bound to take notice of the buyer's bankruptcy, and if he continues to hold them for an unreasonable length of time after that event, and then sells them without notice or application to the court, he must sustain the loss); *In re* Overweg, [1900] 1 Ch. 209, 69 L. J. Ch. 255, 81 L. T. Rep. N. S. 776 (holding that a carrying over or a continuation on the stock exchange is in form and in law both a sale and a repurchase, or a purchase and resale, as the case may be; and therefore if a broker, when under an obligation to close an account by selling his client's shares, prefers to carry over, he does so at his own risk, and is not entitled as against his client to treat the continuation as one transaction, but is responsible to his client as if there had been

a short sale bound to require the lender to put up margins to secure the seller against a decline of the stock so loaned.[16] To justify a broker in closing out the transaction upon depletion of the margins it is incumbent upon him first to make demand of the client for further margins;[17] and if a broker waives a default in complying with such a demand, he cannot close the transaction until a new demand is made.[18] In New York, if a broker buys on long account on margin, he cannot sell the stock without notice, even though he has demanded additional margins and the client has failed to comply therewith,[19] in the absence of a special agreement[20] or a usage[21] authorizing the sale. In other jurisdictions a contrary view is taken, and notice of sale in addition to a demand for further security is not necessary.[22] In addition to demand for additional margins and notice of an intent to sell, a broker who buys stocks on long account on margin cannot sell them out upon depletion of the margin without tender of the certificates and demand of payment of the balance due, in the absence of a waiver by the client of some one of these requisites.[23] A broker desiring to close out a transaction for short account on margin need not give notice to the client of

an immediate sale at the price named); Morris *v.* Brault, 23 Quebec Super. Ct. 190 (holding that as a broker who has received from his customer a sum of money as margin against the rise or fall of the market may close the operation as soon as the amount deposited is exhausted by the change of prices on the market, and if he continues the operations he does so at his own risk).

16. Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32].

17. Denton *v.* Jackson, 106 Ill. 433; Stenton *v.* Jerome, 54 N. Y. 480; Markham *v.* Jaudon, 41 N. Y. 235 [*reversing* 49 Barb. 462, 3 Abb. Pr. N. S. 286]; Ritter *v.* Cushman, 7 Rob. (N. Y.) 294, 35 How. Pr. (N. Y.) 284; Rogers *v.* Wiley, 14 N. Y. Suppl. 622 [*affirmed* in 131 N. Y. 527, 30 N. E. 582]. See, however, Sterling *v.* Jaudon, 48 Barb. (N. Y.) 459.

Reasonable notice to furnish further margins is necessary. Denton *v.* Jackson, 106 Ill. 433; Stewart *v.* Drake, 46 N. Y. 449 (holding two days' notice sufficient); Lazare *v.* Allen, 20 N. Y. App. Div. 616, 47 N. Y. Suppl. 340 (holding that one hour's notice is not ordinarily reasonable); Harris *v.* Pryor, 18 N. Y. Suppl. 128 (holding that a finding was justified that one day's notice was sufficient). In other words a client is entitled to a reasonable time within which to comply with the demand. Boyle *v.* Henning, 121 Fed. 376.

Sufficiency of demand.— All demands by a stock-broker upon his client for margins must be specific, definite, and certain; and no demand is specific unless it mentions a particular sum of money, or unless it states facts from which a particular amount of money may be certainly ascertained. Boyle *v.* Henning, 121 Fed. 376. A demand in the alternative which contemplates an answer is not sufficient. Esser *v.* Linderman, 71 Pa. St. 76.

Estoppel as to demand.— After refusal to put up margins to meet losses on sales for future delivery, the principal is precluded, in an action by the broker for such margins, from objecting to the demand as indefinite or excessive. Perin *v.* Parker, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336 [*affirming* 25 Ill. App. 465].

Agreement to draw for margins.— Under an agreement by a broker to draw on his principal if more margin is required, the broker has no right to close the contract without drawing, although the principal is out of the state and has made no provision to honor a draft, as the broker knows. Foote *v.* Smith, 136 Mass. 92.

18. McGinnis *v.* Smythe, 101 N. Y. 646, 4 N. E. 759; Rogers *v.* Wiley, 14 N. Y. Suppl. 622 [*affirmed* in 131 N. Y. 527, 30 N. E. 582]; Morgan *v.* Jaudon, 40 How. Pr. (N. Y.) 366. See Harris *v.* Pryor, 18 N. Y. Suppl. 128, holding that a finding was warranted that the default was not waived.

What constitutes waiver.— Where successive demands are made of a principal by the broker for margins due on a sale of grain for future delivery, the last demand, which is unreasonable, is not a waiver of the former ones, although each is greater than the last, owing to the continued advance in the grain. Perin *v.* Parker, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336 [*affirming* 25 Ill. App. 465].

19. Gruman *v.* Smith, 81 N. Y. 25. See Gillett *v.* Whiting, 120 N. Y. 402, 24 N. E. 790 [*reversing* 55 N. Y. Super. Ct. 187, 14 N. Y. St. 726], holding that where it is not the custom of brokers to sell without notice, and no call for margins is made or notice to sell given, the sale by the broker constitutes a conversion of the stock.

20. Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. (N. Y.) 289.

21. Baker *v.* Drake, 66 N. Y. 518, 23 Am. Rep. 80. See, however, Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. (N. Y.) 289.

22. Covell *v.* Loud, 135 Mass. 41, 46 Am. Rep. 446.

23. Stenton *v.* Jerome, 54 N. Y. 480; Tuell *v.* Paine, 39 Misc. (N. Y.) 712, 80 N. Y. Suppl. 956.

the time and place at which he will buy to cover the account, such notice being required only where stocks are pledged for the payment of a debt.[24]

10. Procedure[25] — a. Election and Form of Action. The form of action to be adopted by a principal against the broker depends upon the nature of the breach of duty on the part of the latter.[26] In some cases the principal has his election whether he will sue *ex contractu* or *ex delicto*.[27]

b. Damages.[28] The measure of damages in an action against a broker for selling his principal's stocks in violation of his orders is their market value at the time of sale or their highest value between the time of sale and a reasonable time after the owner has received notice of it so as to enable him to replace the stocks.[29] The measure of damages in an action by a principal against a broker

24. Sterling *v.* Jaudon, 48 Barb. (N. Y.) 459.

25. Demand as prerequisite of right of action see *supra*, page 207 note 73; page 210 note 99; *infra*, notes 43, 44.

Instructions to jury see *supra*, page 207 note 73.

Questions for jury see *supra*, page 204 notes 58, 62.

26. Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32] (holding that an indebtedness of plaintiff's brokers to him by reason of a breach of their duty to require margins from a lender of stocks borrowed to cover a short sale made by them for plaintiff could not be recovered on the common counts for money had and received); Dickinson *v.* Updike, (N. J. Err. & App. 1901) 49 Atl. 712 (holding that where defendants, who were employed by plaintiff to find a purchaser for a lot, after finding a purchaser and receiving part of the price and before the deed was delivered learned that the purchaser had sold at an advance, but did not inform plaintiff, his claim, if any, against them is for damages, for which an action at law and not a bill in equity is the appropriate remedy); Boorman *v.* Brown, 3 Q. B. 511, 43 E. C. L. 843, 11 Cl. & F. 1, 8 Eng. Reprint 1003, 2 G. & D. 793, 11 L. J. Exch. 437 (holding that an action on the case is maintainable against a broker who sells on credit in violation of instructions); Wilson *v.* Short, 6 Hare 366, 12 Jur. 301, 17 L. J. Ch. 289, 31 Eng. Ch. 366 (holding that there is a remedy in equity as well as at law in favor of a principal against his broker to recover money paid to the broker on his untrue representation that he has entered into a contract for his principal); Dufresne *v.* Hutchinson, 3 Taunt. 117 (holding that an action for breach of duty but not trover lies against a broker who is authorized to sell goods for a certain price but sells them at an inferior price). See, generally, Actions, 1 Cyc. 634 *et seq.*

Discovery.— A broker of the city of London must answer a bill of discovery in aid of an action brought against him by his employer for misconduct, although the discovery will subject him to the penalty of a bond given by him to the corporation on his admission. Green *v.* Weaver, 6 L. J. Ch. O. S. 1, 1 Sim. 404, 27 Rev. Rep. 214, 2 Eng. Ch. 404; Robinson *v.* Kitchen, 8 De G. M. & G. 88, 2 Jur. N. S. 294, 25 L. J. Ch. 441, 4 Wkly. Rep. 344, 57 Eng. Ch. 68, 44 Eng. Reprint 322.

27. Shreeve *v.* Adams, 6 Phila. (Pa.) 260, holding that an action on the case will lie for neglect of duty as a broker, the principal having his election to sue either *ex contractu* or *ex delicto*. Where, however, plaintiff claimed the right to recover from his brokers by reason of their failure to require margins of a lender of stock borrowed by them to cover a short sale for him, the breach of duty, if any, was a breach of contract, and not a tort which plaintiff could waive and sue on the common counts in assumpsit. Morris *v.* Jamieson, 205 Ill. 87, 68 N. E. 742 [*affirming* 99 Ill. App. 32]. See, generally, Election of Remedies, 15 Cyc. 251 *et seq.*

Unauthorized sales of stock.— If a broker makes an unauthorized sale of the principal's stock, the principal may either adopt the sale and charge the broker with the profits, or he may sue in trover for damages for the conversion. Taussig *v.* Hart, 49 N. Y. 301, 58 N. Y. 425; Caswell *v.* Putnam, 41 Hun (N. Y.) 521; Wagner *v.* Peterson, 83 Pa. St. 238; Carnegie *v.* Federal Bank, 5 Ont. 418.

Ratification and repudiation see *supra*, II, C, 5, *i*.

28. See, generally, Damages, 13 Cyc. 1 *et seq.*

29. Gruman *v.* Smith, 81 N. Y. 25 [*reversing* 44 N. Y. Super. Ct. 389]; Baker *v.* Drake, 53 N. Y. 211, 13 Am. Rep. 507 [*overruling* Markham *v.* Jaudon, 41 N. Y. 235]; Galigher *v.* Jones, 129 U. S. 193, 9 S. Ct. 335, 32 L. ed. 658. See also Carnegie *v.* Federal Bank, 5 Ont. 418.

Reasonable time.— Where the market price of stock had become fairly settled again within twenty-nine days after the sale, and ample opportunity was afforded within that time to the client to repurchase the stock, twenty-nine days will be deemed a reasonable time, within the rule that a client may recover as damages for an unauthorized sale of stock of a fluctuating value the difference between the price at which the stock was sold and the highest market price attained within a reasonable time thereafter. Burhorn *v.* Lockwood, 71 N. Y. App. Div. 301, 75 N. Y. Suppl. 828.

Waiver of conversion and suit in assumpsit.— Where a broker carrying stock for a principal sells it without authority, and the

who fails to act promptly in executing an order for the sale of the former's stocks at a certain price is the difference between the price named in the order and that for which the stock is finally sold.[30] If a broker fails to execute an order for the purchase of stocks, the measure of the principal's damages is the amount of money advanced, with interest,[31] where it does not appear that the broker was to carry the stocks for a rise in the price.[32] The measure of damages for the failure of a broker to buy stocks to cover a short sale is the difference between the market value at the time of the instruction to buy and the price at which the broker finally bought.[33] Where a broker who has bought stocks for a client makes an assignment for the benefit of creditors, which both parties unite in regarding merely as a temporary expedient to tide over the broker's difficulties, and subsequently the broker is adjudicated a bankrupt, the value of the stocks is determinable as of the date of the petition in bankruptcy.[34] Where a broker employed to effect an exchange of property understates an offer to his principal, which is accepted, and the broker keeps part of the property which was intended to go to the principal, the value of the part so kept is the measure of the damages which the principal is entitled to recover for the fraud.[35] Where a broker employed by a vendor of real estate secures the agreed compensation, but takes a different security for deferred payments than that specified by the principal, the measure of the principal's damages is the difference in value between the security contracted for and that taken, not exceeding the amount of the deferred payments.[36] A broker receiving money and not applying it to the purpose specified in the contract of employment within a reasonable time is chargeable with interest.[37] Money may in a proper case be valued as a commodity independently of its face value.[38] If a broker employed to sell bonds in his discretion at the

latter waives the conversion and sues in assumpsit, the measure of damages is the market value of the stock at the time of the conversion and not the highest price which it would have commanded at any time before trial. Wagner *v.* Peterson, 83 Pa. St. 238.

Agreement to carry for definite time.— Where defendant by agreement with plaintiff purchased with his own money stocks and bonds for the former on a specified commission, and agreed to hold them until a day named and then sell for plaintiff, and plaintiff deposited certain money as security against loss, and agreed to give further security if necessary, and defendant sold the stocks and bonds before such date, the measure of damages is the market value of such stocks and bonds on the last day of the period during which he had agreed to hold them. Andrews *v.* Clerke, 3 Bosw. (N. Y.) 585. In Michael *v.* Hart, [1901] 2 K. B. 867, 70 L. J. K. B. 1000, 85 L. T. Rep. N. S. 548, 50 Wkly. Rep. 154, it was held, however, that where a broker on the London stock exchange who, in breach of his agreement to keep his client's account open till the settlement at the end of the month, wrongfully closed it, the measure of damages is the highest price the stocks would have realized between the date he so wrongfully closed the account and the date to which he agreed to carry it over.

30. Allen *v.* McConihe, 124 N. Y. 342, 26 N. E. 812 [*affirming* 12 N. Y. Suppl. 232].

31. Larrabee *v.* Badger, 45 Ill. 440.

32. Gurley *v.* MacLennan, 17 App. Cas. (D. C.) 170, holding that where brokers accepted an order to purchase, and failed to execute it, but there was nothing to indicate that they were to carry the stock for a rise, the measure of damages is not the difference between the market value of the stock on the date when it was to have been purchased and the market value within such reasonable time after the principal had knowledge that the brokers had not purchased as would have enabled him to purchase.

33. Rogers *v.* Wiley, 131 N. Y. 527, 30 N. E. 582 [*affirming* 60 Hun 580, 14 N. Y. Suppl. 622].

34. *In re* Swift, 112 Fed. 315, 50 C. C. A. 264.

35. Emmons *v.* Alvord, 177 Mass. 466, 52 N. E. 126.

36. Lunn *v.* Guthrie, 115 Iowa 501, 88 N. W. 1060.

37. Larrabee *v.* Badger, 45 Ill. 440; Harrison *v.* Long, 4 Desauss. (S. C.) 110.

38. Taylor *v.* Ketchum, 5 Rob. (N. Y.) 507, 35 How. Pr. (N. Y.) 289, holding that the fact that gold coin is part of the currency of the country will not prevent a principal from recovering the value thereof as an article of merchandise in other kinds of currency which are a legal tender, in an action against his broker for selling the coin in violation of his instructions.

Confederate notes.— In an action against a real-estate broker for failing to pay over the purchase-money (Confederate treasury notes) of land sold for plaintiff, the measure of damages is the value of the currency at the time it was received by defendant, with in-

best market price refuses to disclose the time of sale or the amount realized, the evidence as to value should be strictly construed against him.[39]

c Pleading.[40] The rules of pleading applicable to civil actions in general govern the sufficiency of a complaint in an action against a real-estate broker for failure to examine the title to land purchased by him for plaintiff,[41] or for selling the property of plaintiff on terms not authorized;[42] in a suit against a broker for loaning plaintiff's money on insufficient security;[43] and in an action against a stock-broker for wrongfully selling stock purchased by him for plaintiff,[44] or for failing to execute an order for the purchase and sale of stock,[45] or for wrongfully appropriating a deposit for security;[46] and the construction of an answer in an action by a vendor against a real-estate broker for wrongfully detaining moneys collected on the sale is likewise governed.[47] Questions of pleading and proof are also governed by the general rules of pleading.[48]

terest thereon. Witsell *v.* Riggs, 14 Rich. (S. C.) 186.

39. Bate *v.* McDowell, 49 N. Y. Super. Ct. 106.

40. See, generally, PLEADING.

Right of set-off in actions between broker and principal see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

41. Sears *v.* Forbes, 122 Ind. 358, 23 N. E. 773, holding that a complaint alleging that the grantor had mortgaged the land conveyed and other lands and that the mortgage had been foreclosed and the land in question sold, without showing whether the grantor still retained title to the other lands mortgaged or their value, or that plaintiff applied for an order in the decree for foreclosure that such lands be first sold, is demurrable.

42. Lunn *v.* Guthrie, 115 Iowa 501, 88 N. W. 1060, holding that the principal, in an action against the agent for damages caused by such sale, in the absence of an allegation of fraud on the part of the agent, must plead a return of the consideration to the purchaser, or an offer so to do.

43. Bronnenburg *v.* Rinker, 2 Ind. App. 391, 28 N. E. 568, holding that the complaint need not allege that defendant agreed to be personally responsible for the loan, as the gist of the action is the negligence of defendant in making the loan as the agent of plaintiff; that it need not allege that the note evidencing the loan was unpaid, where it alleges that the loan was made to an insolvent person, and that it is utterly worthless; that where the complaint avers that the borrower of the money so deposited was and is entirely insolvent, and that the note is utterly worthless, it need not aver a demand of the money either from the maker of the note or from defendant; that where the complaint alleges that defendant falsely represented that the loan was secured by a mortgage, it need not allege that defendant knew such representation to be false, especially where it appears that the loan was made without any security; and that failure to allege that plaintiff was injured by defendant's negligence is of no consequence where it is alleged that the loan was made to an insolvent person, and that the note is utterly worthless.

44. Clark *v.* Meigs, 8 Bosw. (N. Y.) 689, 22 How. Pr. (N. Y.) 340 [*reversing* 21 How. Pr. 187], holding that a complaint against brokers which shows that they purchased stock for plaintiff to be delivered to him at his option within a specified time, but sold it meanwhile against his express instructions, need not allege a demand and tender on the part of plaintiff.

45. Ryder *v.* Sistare, 15 Daly (N. Y.) 90, 2 N. Y. Suppl. 715, holding that a complaint containing no allegation that plaintiff provided the means of payment or that defendant agreed to advance the same or that plaintiff placed the stock to be sold within defendant's reach or that he agreed to sell stocks that plaintiff did not possess or furnish for delivery, does not show a cause of action.

46. Cowen *v.* Voyer, 79 N. Y. App. Div. 638, 80 N. Y. Suppl. 29, holding a complaint to be demurrable where it does not show that defendants were not entitled to mingle the margin with their own funds, or that they were in any way in default.

47. Alexander *v.* Northwestern Christian University, 57 Ind. 466, holding that where defendant answered that plaintiff, with full knowledge that defendant was acting as the broker of the purchaser in making investments for the latter in real estate, had employed defendant at a stipulated commission to sell such real estate at a specified price, and that he had made such sale, receiving from the purchaser a sum exceeding the price of the realty, had paid over such price, less his commission, to plaintiff, and had retained the excess as the price of services rendered to the purchaser in making the investment, the answer did not admit the possession and retention by defendant of moneys received by him from the sale.

48. Kratt *v.* Hopkins, 77 N. Y. App. Div. 634, 78 N. Y. Suppl. 1012, holding that a complaint against a stock-broker alleging that he held a balance in the client's favor, and that afterward he reported to the client an alleged purchase and sale of stock on which a loss occurred greater than the entire balance, but that "no authority was ever given by this plaintiff for the purchase or sale of the aforesaid shares, and plaintiff upon notice of the purchase thereof duly and at first opportunity repudiated the same," assumes

d. Evidence.[49] Evidence of any fact which has a bearing on the issues involved is ordinarily admissible in an action by a principal against a broker for breach of duty.[50] A "bought note"[51] or a "sold note"[52] is not a contract within the rule excluding parol evidence to contradict or vary written instruments.[53]

E. Compensation — 1. Right to Compensation — a. As Affected by Contract of Employment[54] — (I) *Necessity of Contract.* To entitle a broker to compensation, he must have been employed to negotiate the transaction in connection with which his services were rendered.[55]

that the purchase and sale were in fact made, and hence no proof thereof was required.

Variance.— A complaint alleged that plaintiff employed defendants as brokers to purchase on credit certain shares of stock, and delivered to them other stock as security for their indemnity, and that they afterward rendered him an account of such purchase, and of a subsequent sale, after notice, both of which transactions were not real, but fictitious, and that a charge in such account for negotiating a loan on the stock was also fictitious, and prayed that defendants be adjudged to return to plaintiff the stock. On the trial it was proved that defendants did make the purchase according to their employment, and advanced the money therefor, and in order to hold the stock for the period contemplated by plaintiff, negotiated a loan thereon, and that defendants had sold the stock for a greater price than that for which they accounted to plaintiff. It was held that the variance was fatal to a recovery by plaintiff. Saltus *v.* Genin, 3 Bosw. (N. Y.) 250.

49. See, generally, Evidence.

Burden of proof see *supra*, page 205 note 65; page 206 note 70; page 208 note 81. See also *supra*, II, D, 8.

Presumptions see *supra*, page 209 note 91; page 211 note 3.

Weight and sufficiency of evidence see *supra*, page 204 note 62; page 206 note 70; page 207 notes 76, 78, 80; page 208 note 81; page 211 note 11; page 213 notes 17, 18.

50. Emmons *v.* Alvord, 177 Mass. 466, 59 N. E. 126 (holding that where a principal brings action against his broker for procuring a conveyance by understating an offer of exchange, and it is shown that the fraud was perpetrated by having the purchaser convey the property exchanged to a third person, who conveyed only a portion thereof to plaintiff, the purchaser may testify that he intended all the property to go to plaintiff, and that he had no idea that the person to whom he conveyed it was a *bona fide* purchaser; and the purchaser's lawyer may testify that he did not know that a portion of the property was not going to plaintiff till after the property was conveyed; and that where the action is brought against the broker and his accomplices, one of whom was the broker of his purchaser, evidence is admissible to show that one of the conspirators paid money to the purchaser's broker as a part of the scheme, without the knowledge of the purchaser); Hopkins *v.* Clark, 158 N. Y. 299, 53 N. E. 27 [*affirming* 7 N. Y. App. Div. 207, 40 N. Y. Suppl. 130] (holding that where a broker claiming general discretionary power to make purchases for a customer gives evidence of a proper exercise of that discretion in a purchase of corporate bonds, the customer may show that the bonds are behind a large amount of corporate indebtedness); Finney *v.* Gallaudet, 15 Daly (N. Y.) 66, 2 N. Y. Suppl. 707 (holding that in an action against stock-brokers, where defendants concede that a profit resulted from operations for plaintiff down to a given date, but set up that after that time other ventures were made on plaintiff's account which left him in debt to them, and it is admitted that they did not follow the usual custom of sending notices during the later transactions, evidence of the method of business between them and plaintiff during the time of the undisputed dealings, and the ordinary custom of trade as to sending notices, is admissible as bearing on the question whether the later transactions were for plaintiff).

Declarations.— In an action by a customer for a balance claimed to be due from his broker, evidence of a conversation between the broker and his confidential clerk, held during plaintiff's absence, is inadmissible in the broker's behalf, but evidence of a conversation between plaintiff and the clerk is admissible in plaintiff's favor. Finney *v.* Gallaudet, 15 Daly (N. Y.) 66, 2 N. Y. Suppl. 707 [*affirmed* in 119 N. Y. 661, 23 N. E. 1113].

51. Jackson *v.* Allan, 11 Manitoba 36.

52. Pim *v.* Wait, 32 Fed. 741.

53. **Parol evidence of custom or usage** see *supra*, II, C, 5, e.

54. See, generally, *supra*, II, C, 2.

Employment of broker as question for jury see *infra*, II, E, 2, e, (III).

Identity of principal see *supra*, II, C, 2, c.

Right to compensation: As dependent upon authority to employ broker or subagent see *supra*, II, C, 2, d. As dependent on good faith of broker in obtaining employment see *infra*, II, E, 1, d, (I).

55. *Colorado.*— Castner *v.* Richardson, 18 Colo. 496, 33 Pac. 163.

Illinois.— Day *v.* Hale, 50 Ill. App. 115.

Iowa.— See Cable *v.* Buchanan, 109 Iowa 661, 80 N. W. 1066.

Kansas.—Thomas *v.* Merrifield, 7 Kan. App. 669, 53 Pac. 891.

Michigan.— Downing *v.* Buck, (1904) 98 N. W. 388.

(II) *Express and Implied Contracts.* The contract of employment entered into by a principal and a broker may be either express[55] or implied from the circum-

Minnesota.— Crosby *v.* St. Paul Lake Ice Co., 74 Minn. 82, 76 N. W. 958.

New York.— Whiteley *v.* Terry, 83 N. Y. App. Div. 197, 82 N. Y. Suppl. 89 [*affirming* 39 Misc. 93, 78 N. Y. Suppl. 911]; McVickar *v.* Roche, 74 N. Y. App. Div. 397, 77 N. Y. Suppl. 501; Fowler *v.* Hoschke, 53 N. Y. App. Div. 327, 65 N. Y. Suppl. 638; Whitehouse *v.* Drisler, 37 N. Y. App. Div. 525, 56 N. Y. Suppl. 95; Von Hermanni *v.* Wagner, 81 Hun 431, 30 N. Y. Suppl. 991; Fish *v.* Colvin, 2 Silv. Supreme 450, 6 N. Y. Suppl. 64; Martin *v.* Bliss, 2 Silv. Supreme 155, 5 N. Y. Suppl. 686; Loeffler *v.* Friedman, 26 Misc. 750, 57 N. Y. Suppl. 281.

Oklahoma.— Johnson *v.* Whalen, 13 Okla. 320, 74 Pac. 503.

Pennsylvania.— Addison *v.* Wanamaker, 185 Pa. St. 536, 39 Atl. 1111; Reed *v.* Tomlinson, 14 Leg. Int. 116.

Texas.— Pipkin *v.* Horne, (Civ. App. 1902) 68 S. W. 1000; Ehrenworth *v.* Putnam, (Civ. App. 1900) 55 S. W. 190.

Wisconsin.— McKenzie *v.* Lego, 98 Wis. 364, 74 N. W. 249.

United States.— Block *v.* Walker, 72 Fed. 650, 19 C. C. A. 61.

England.— Tribe *v.* Taylor, 1 C. P. D. 505.

See 8 Cent. Dig. tit. "Brokers," § 38.

For evidence sufficient to show an employment see the following cases:

Illinois.— Greene *v.* Hollingshead, 40 Ill. App. 195.

Missouri.— Green *v.* Cole, 103 Mo. 70, 15 S. W. 317; Hogan *v.* Slade, 98 Mo. App. 44, 71 S. W. 1104.

New York.— Lloyd *v.* Matthews, 51 N. Y. 124; Reddin *v.* Dam, 51 N. Y. App. Div. 636, 64 N. Y. Suppl. 611.

Pennsylvania.— Keyser *v.* Reilly, 191 Pa. St. 271, 43 Atl. 317.

United States.— Plymer *v.* Hartford, etc., Transp. Co., 103 Fed. 674.

See 8 Cent. Dig. tit. "Brokers," § 118.

A broker employed to sell one thing is not entitled to a commission for selling another. Wulff *v.* Lindsay, (Ariz. 1903) 71 Pac. 963; Samuels *v.* Luckenbach, 205 Pa. St. 428, 54 Atl. 109; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775. See, however, Miller *v.* Stevens, 23 Ind. App. 265, 55 N. E. 262.

Usage.— The fact that it is the custom of the seller to pay commissions to the real-estate agent who sells his property does not impose a liability for commissions on the seller when the circumstances indicate that the agent was working in the interests of the purchaser. Downing *v.* Buck, (Mich. 1904) 98 N. W. 388.

The principal is estopped, in an action for compensation for finding a purchaser to whom he refused to convey, to deny plaintiff's employment, where before suit brought he based his refusal to convey solely on another ground. Sandefur *v.* Hines, 69 Kan. 168, 76 Pac. 444.

A promise to pay for past services voluntarily rendered by a broker is not binding unless based upon a present consideration. Myers *v.* Dean, 132 N. Y. 65, 30 N. E. 259 [*reversing* 16 Daly 251, 10 N. Y. Suppl. 532].

56. Stephens *v.* Scott, 43 Kan. 285, 23 Pac. 555; Holden *v.* Starks, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451; Brooks *v.* Leathers, 112 Mich. 463, 70 N. W. 1099; Nolan *v.* Swift, 111 Mich. 56, 69 N. W. 96; Hart *v.* Maloney, 80 N. Y. App. Div. 265, 80 N. Y. Suppl. 293. However, a letter by a real-estate agent to the owner inquiring the price of a farm, and an answer that the owner would take a certain sum net, does not authorize the agent to find a purchaser or make a sale on such terms. Johnson *v.* Whalen, 13 Okla. 320, 74 Pac. 503.

Offer and acceptance.— Evidence that plaintiff continued from time to time to make efforts to sell defendant's land after defendant offered him a commission for making the sale is sufficient to sustain a finding that he accepted the offer. Veale *v.* Green, 105 Mo. App. 182, 79 S. W. 731. Where a broker who receives a proposition to sell defendant's land does not accept it until after the expiration of the time designated in the offer for its acceptance, however, he is not entitled to a commission on making the sale. Short *v.* Willing, 1 Wkly. Notes Cas. (Pa.) 460.

Form of contract.— Where an owner of lands writes a letter to another requesting him to make a sale at a specified price, and the latter, without formally accepting the offer, effects a sale upon terms which are accepted by the vendor, the agent thereby becomes entitled to the commission. It is not necessary that such a letter should contain apt words of contract; any language from which the terms may reasonably be implied is sufficient. Fisk *v.* Henarie, 13 Oreg. 156, 9 Pac. 322.

Consideration.— The contract of employment must be based on a sufficient consideration. Murray *v.* Beard, 102 N. Y. 505, 7 N. E. 553; Wolff *v.* Denbosky, 36 Misc. (N. Y.) 643, 74 N. Y. Suppl. 465. Although an agreement signed by a real-estate owner to pay an agent a certain commission in the event that he himself should make a sale is a unilateral contract and invalid on its face, yet where the agent thereunder advertises the property and lists it, although he does nothing more, it is a sufficient partial performance to render the contract enforceable. Lapham *v.* Flint, 86 Minn. 376, 90 N. W. 780. So a contract to pay a broker a commission on any acceptable sale procured by him will support a recovery for effecting a sale, although it does not bind the broker to make any effort to sell. Brooks *v.* Leathers, 112 Mich. 463, 70 N. W. 1099. The lower price for which defendants secured real estate is sufficient consideration to support an agreement to pay plaintiffs a certain sum as commission,

stances.[57] The fact that an owner of property consents to the rendition of services by a broker which result in a sale of the property does not create an implied contract of employment and so entitle the broker to a commission, where the services were unsolicited.[58] Much less is the owner bound to pay a commission where he had no knowledge that the broker was acting as such before the sale was consummated,[59] or where he had previously refused to employ the broker.[60] Nor is a broker entitled to a commission for performing a service which it is the local custom to render gratuitously.[61]

(III) *Necessity and Sufficiency of Writing.*[62] At common law a contract employing a broker for the purchase or sale of lands need not be in writing, and he may accordingly recover compensation for services rendered under an oral contract;[63] but this rule has been changed by statute in some states.[64] If

in order to obtain the property at the price for which the owner was willing to sell it, provided he was relieved of the commission, the owner not being willing to sell unless he was so relieved. Deitch *v.* Feder, 86 N. Y. Suppl. 802.

Description of property.—In a contract with a real-estate broker for the sale of certain property the description "My property, 48 Eldridge court," is sufficiently definite to enable the broker to recover commissions, the contract being dated at Chicago, where there is a No. 48 Eldridge court, of which the principal is part owner. Weaver *v.* Snow, 60 Ill. App. 624. Moreover the contract need not describe the land specifically, if the terms of the employment can be made definite without it. Maze *v.* Gordon, 96 Cal. 61, 30 Pac. 962. A real-estate broker's right to a commission upon a sale is not defeated by a mutual mistake whereby the property is misdescribed in the contract of employment. Tyler *v.* Justice, 120 Ga. 879, 48 S. E. 328.

57. Steidl *v.* McClymonds, 90 Minn. 205, 95 N. W. 906 (holding that if a broker is encouraged by a property-owner to aid in a sale, and led to believe that he will receive compensation, the owner cannot accept the benefit of his services and deny him compensation); Kinder *v.* Pope, 106 Mo. App. 536, 80 S. W. 315. However, the fact that the owner of land at the request of a broker gave him a list of his lands with their net price per acre does not make the broker his agent so as to entitle him to commission on a sale of the land afterward made by the owner to one with whom he had begun to negotiate a sale before he listed the land with the broker. White *v.* Templeton, 79 Tex. 454, 15 S. W. 483.

For circumstances insufficient to create implied contract see the following cases:

Alabama.— Moses *v.* Beverly, 137 Ala. 473, 34 So. 825.

Connecticut.— Weinhouse *v.* Cronin, 68 Conn. 250, 36 Atl. 45.

Iowa.— Lindt *v.* Schlitz Brewing Co., 113 Iowa 200, 84 N. W. 1059.

Massachusetts.— Barton *v.* Powers, 182 Mass. 467, 65 N. E. 826.

Minnesota.— Dartt *v.* Sonnesyn, 86 Minn. 55, 90 N. W. 115.

Pennsylvania.—Samuels *v.* Luckenbach, 205 Pa. St. 428, 54 Atl. 1091 (holding that the fact that a broker had previously made a sale of property, and had been paid a commission therefor, is insufficient to entitle him to commissions on a subsequent sale made by him for the same vendor without request or employment); Jacquett's Appeal, 3 Walk. 13.

58. Viley *v.* Pettit, 96 Ky. 576, 29 S. W. 438, 16 Ky. L. Rep. 650. See, however, Kinder *v.* Pope, 106 Mo. App. 536, 80 S. W. 315.

A broker who procures a purchaser or lender without request cannot recover compensation from the vendor or borrower. Walton *v.* Clark, 54 Minn. 341, 56 N. W. 40; McLaughlin *v.* Ranger, 32 Misc. (N. Y.) 732, 66 N. Y. Suppl. 450 [*affirming* 64 N. Y. Suppl. 1110]; Campbell Printing Press, etc., Co. *v.* Yorkston, 11 Misc. (N. Y.) 340, 32 N. Y. Suppl. 263.

59. Merrill *v.* Latham, 8 Colo. App. 263, 45 Pac. 524; Tinkham *v.* Knox, 18 N. Y. Suppl. 433. See also Atwater *v.* Lockwood, 39 Conn. 45, where the owner supposed the broker was acting for the purchaser.

60. Goodspeed *v.* Robinson, 1 Hilt. (N. Y.) 423; Pierce *v.* Thomas, 4 E. D. Smith (N. Y.) 354; Dunn *v.* Price, 87 Tex. 318, 28 S. W. 681; Meston *v.* Davies, (Tex. Civ. App. 1896) 36 S. W. 805.

61. Conrey *v.* Hoover, 10 La. Ann. 437.

62. See, generally, *supra*, II, C, 2, b.

Parol promise to pay commission due from another or to pay commission by conveying land see Frauds, Statute of.

63. *Alabama.*— Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. 722.

Illinois.— Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401; Ward *v.* Lawrence, 79 Ill. 295; Fox *v.* Starr, 106 Ill. App. 273.

Indiana.— Fischer *v.* Bell, 91 Ind. 243.

Louisiana.— Houston *v.* Boagni, McGloin 164.

Michigan.— Hamilton *v.* Frothingham, 59 Mich. 253, 26 N. W. 486.

Missouri.— Gwinnup *v.* Sibert, 106 Mo. App. 709, 80 S. W. 589.

Texas.— Wilson *v.* Clark, (Civ. App. 1904) 79 S. W. 649.

See 8 Cent. Dig. tit. "Brokers," § 44.

64. *California.*—McGeary *v.* Satchwell, 129 Cal. 389, 62 Pac. 58; Shanklin *v.* Hall, 100 Cal. 26, 34 Pac. 636; Perkins *v.* Cooper, (1890) 24 Pac. 377; Myres *v.* Surryhne, 67

a statute requires a written authorization, a broker who acts under a parol contract of employment cannot recover what his services are reasonably worth as upon a promise implied by law.[65]

(IV) *RATIFICATION.*[66] One for whom a broker assumes to act without authority may, by accepting the benefits of the broker's services, ratify the act and so become liable for compensation, provided that he does so with knowledge that the broker assumed to act for him as such.[67] So one for whom a broker has been employed by a third person without authority may ratify the unauthorized

Cal. 657, 8 Pac. 523; Schuller *v.* Farquarson, (1885) 6 Pac. 86.

Indiana.— Beahler *v.* Clark, 32 Ind. App. 222, 68 N. E. 613.

Nebraska.— Blair *v.* Austin, (1904) 98 N. W. 1040.

New Jersey.— Leimbach *v.* Regner, 70 N. J. L. 608, 57 Atl. 138; Kent *v.* Phenix Art Metal Co., 69 N. J. L. 532, 55 Atl. 256.

New York.— Whiteley *v.* Terry, 83 N. Y. App. Div. 197, 82 N. Y. Suppl. 89 [*affirming* 39 Misc. 93, 78 N. Y. Suppl. 911]; Cohen *v.* Boccuzzi, 42 Misc. 544, 86 N. Y. Suppl. 187; Borgio *v.* Gange, 87 N. Y. Suppl. 538; Davis *v.* Kidansky, 86 N. Y. Suppl. 6; Charles *v.* Arthur, 84 N. Y. Suppl. 284; Peck *v.* Antes, 84 N. Y. Suppl. 252; Adler *v.* Schaumberger, 84 N. Y. Suppl. 235. See, however, New York cases cited *infra*, this note.

Canada.—See Mainwaring *v.* Crane, 22 Quebec Super. Ct. 67.

See 8 Cent. Dig. tit. "Brokers," § 44.

Constitutionality of statute.— A statute making a broker guilty of a misdemeanor if he offers real property for sale without the written authority of the owner has been held to be unconstitutional as being an arbitrary interference with private business and as imposing unusual and unnecessary restrictions thereon. Grossman *v.* Caminez, 79 N. Y. App. Div. 15, 79 N. Y. Suppl. 900 [*approved* in Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 899]. *Contra*, see New York cases cited *supra*, this note.

The statute applies to one who has been employed to sell property, although he is not engaged in the real-estate business. Dolan *v.* O'Toole, 129 Cal. 488, 62 Pac. 92; Stout *v.* Humphrey, 69 N. J. L. 436, 55 Atl. 281.

If the sale is consummated by the parties the statute does not prevent the broker from recovering a commission, although he was orally employed. Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 899. *Contra*, see New York cases cited *supra*, this note.

Modification of contract.— A contract created by letters may be changed by parol agreement as to those provisions not required to be in writing. Bradley *v.* Bower, (Nebr. 1904) 99 N. W. 490.

Sufficiency of writing.— A contract for the sale of land between the owner and a broker must be signed by the owner and broker, and contain a description of the land, and set forth the amount of the compensation. Danielson *v.* Goebel, (Nebr. 1904) 98 N. W. 819. See also Mendenhall *v.* Rose, (Cal. 1893) 33 Pac. 884. A pencil memorandum written out and signed by the owner's son, by direction of his father, "Property 76 Mangin Street; $9,006.00, no less," is not a compliance with the statute. Cohen *v.* Boccuzzi, 42 Misc. (N. Y.) 544, 86 N. Y. Suppl. 187. Where an owner by letter authorized an agent to sell certain land, and offered a specified commission, and the agent by letter notified the owner that he was attempting to sell the land, and named a prospective purchaser to whom the land was finally sold, it is a sufficient contract in writing. Bradley *v.* Bower, (Nebr. 1904) 99 N. W. 490. See also Longstreth *v.* Korb, 64 N. J. L. 112, 44 Atl. 934. A paper signed by the attorney in fact of the owner of property which recited, "They will take 86 st subject to 1st and 2nd mortgages. We to take 26th ward lots subject to taxes . . . not to exceed $6,500," and which was delivered to a real-estate broker with the intention of authorizing him to negotiate the transfer, sufficiently authorized the broker in writing to negotiate the transfer, within the statute. Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 899.

Waiver of writing.—Under N. Y. Pen. Code, § 640*d*, making it a misdemeanor to attempt to earn commissions for the sale of real estate without written authority, plaintiff, who had no written authority, cannot raise the question of waiver of the written authority, in an action to recover commissions therefor. Kronenberger *v.* Quinn, 86 N. Y. Suppl. 139.

Promise to pay for past services.— In the absence of a written contract for the sale of real estate there is an absence of right to compensation for services, and a subsequent express promise to pay is void as being without consideration. Kent *v.* Phenix Art Metal Co., 69 N. J. L. 532, 55 Atl. 256 [*distinguishing* Griffith *v.* Daly, 56 N. J. L. 466, 29 Atl. 169]; Stout *v.* Humphrey, 69 N. J. L. 436, 55 Atl. 281.

65. Jamison *v.* Hyde, 141 Cal. 109, 74 Pac. 695; McCarthey *v.* Loupe, 62 Cal. 299; Pacific Land, etc., Co. *v.* Blochman, 11 Pac. Coast L. J. 24; Goldstein *v.* Scott, 76 N. Y. App. Div. 78, 78 N. Y. Suppl. 736. See also Covey *v.* Henry, (Nebr. 1904) 98 N. W. 434.

66. See, generally, *supra*, II, C, 5, f.

67. Merrill *v.* Lathan, 8 Colo. App. 263, 45 Pac. 524; Downing *v.* Buck, (Mich. 1904) 98 N. W. 388; Dayton *v.* American Steel Barge Co., 36 Misc. (N. Y.) 223, 73 N. Y. Suppl. 316 (holding that one who continues to permit a person to act as his agent until the completion of a sale, after notifying him

employment by accepting the benefits of the broker's services,[68] if at the time he has knowledge that the broker assumed to act for him.[69] A departure of a real-estate agent from the terms of his authority becomes on ratification by the principal a part of the original contract of employment, and the compensation fixed therein controls.[70]

(v) *Modification of Contract.*[71] The terms of the contract of employment may be modified by the parties by agreement, express or implied, the same as any other contract, in which case the broker's right to compensation depends upon the new terms.[72]

(vi) *Abandonment of Contract.*[73] If a broker employed to negotiate a transaction abandons the employment he is not entitled to a commission, although the transaction is afterward consummated.[74]

(vii) *Revocation of Authority.*[75] A broker employed to buy, sell, exchange, or lease property, or to procure a loan, is not ordinarily entitled to compensation

that his services are terminated, is liable to him for commissions if he has been the means of procuring the sale); Edward H. Everett Co. *v.* Cumberland Glass Mfg. Co., 112 Wis. 544, 88 N. W. 597. See, however, George B. Loving Co. *v.* Hesperian Cattle Co., 176 Mo. 330, 75 S. W. 1095.

Acceptance of benefits.— Ames *v.* Lamont, 107 Wis. 531, 83 N. W. 780.

The intention to ratify must be plain. Fowler *v.* Hoschke, 53 N. Y. App. Div. 327, 65 N. Y. Suppl. 638.

Evidence of ratification.— In an action by a broker to recover commissions for making a sale, defendant's acquiescence in plaintiff's statement that plaintiff had secured a loan for the prospective purchasers does not justify the conclusion that defendant ratified the agency claimed by plaintiff, as no claim of agency was suggested by plaintiff's statement. Howe *v.* Miller, 65 S. W. 353, 66 S. W. 184, 23 Ky. L. Rep. 1610.

68. McKinnon *v.* Hope, 118 Ga. 462, 45 S. E. 413; Hurt *v.* Jones, 105 Mo. App. 106, 79 S. W. 486; Charles *v.* Cook, 88 N. Y. App. Div. 81, 84 N. Y. Suppl. 867; Lyle *v.* Bennett, 34 Misc. (N. Y.) 476, 70 N. Y. Suppl. 283; Markham *v.* Washburn, 18 N. Y. Suppl. 355; Graves *v.* Bains, 78 Tex. 92, 14 S. W. 256, holding that, although the coöwner of land was ignorant of the employment of a broker to sell it by the other owner, he is liable for his share of commissions if he ratified the employment by assenting to the sale. See also McCormack *v.* McCaffrey, 36 Misc. (N. Y.) 775, 74 N. Y. Suppl. 836.

69. Harris *v.* San Diego Flume Co., 87 Cal. 526, 25 Pac. 758; Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269 [*reversing* 12 Wkly. Notes Cas. 190].

70. Gelatt *v.* Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

71. **Modification or cancellation of contract concluded by principal with broker's customer** see *infra*, II, E, 1, m, (II), (D).

72. Cornell *v.* Hanna, (Kan. App. 1898) 53 Pac. 790; Deford *v.* Shepard, 6 Kan. App. 428, 49 Pac. 795; May *v.* Schuyler, 43 N. Y. Super. Ct. 95; Mayer *v.* Fuller, 17 Misc. (N. Y.) 611, 40 N. Y. Suppl. 674. See, however, Houghton *v.* Milford Pink-Granite Co., 171 Mass. 354, 50 N. E. 646; Good *v.* Smith, 44 Oreg. 578, 76 Pac. 354.

Consideration.— If a broker has produced a purchaser, able, ready, and willing to contract on the terms stipulated, a subsequent agreement without consideration not to claim his commissions until delivery of the deed is not binding on him. Moskowitz *v.* Hornberger, 15 Misc. (N. Y.) 645, 38 N. Y. Suppl. 114; McComb *v.* Von Ellert, 7 Misc. (N. Y.) 59, 27 N. Y. Suppl. 372. So where a real-estate agent agreed to reduce his commissions when the sale was made, being so induced by the *bona fide* misstatement of the agent of the vendee that unless there was a reduction in the commissions the sale would fall through, but the reduction was not the procuring cause of the sale, the executory promise of the agent was without consideration, and could not be enforced in an action for his commissions, either by the vendor or vendee. Dayton *v.* American Steel Barge Co., 36 Misc. (N. Y.) 223, 73 N. Y. Suppl. 316.

Mistake.— An agreement by land brokers that a certain lot may be withdrawn from the market, if made after they have effected a sale of it, and under the mistaken belief that the lot was a different one, will not bar them from commissions. Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157.

Modification by parol see *supra*, note 64.

73. **Duration and termination of agency in general** see *supra*, II, C, 3.

74. Everett *v.* Farrell, 11 Ind. App. 185, 38 N. E. 872. See also *infra*, II, E, 1, m, (VII), (VIII), (A). Where, however, a broker obtains a purchaser, who tells him that he thinks the broker could get the property for him cheaper and that he wants him to go and see the seller again, the mere refusal of the broker to do so does not constitute an abandonment of the employment. McCormack *v.* Henderson, 100 Mo. App. 647, 75 S. W. 171.

75. See, generally, *supra*, II, C, 3.

Damages for revocation of authority see *supra*, II, C, 4.

Revocation by expiration of time limited for effecting sale see *infra*, II, E, 1, m, (III).

for finding or trying to find a customer after the principal has withdrawn his offer, since the principal has a right to revoke the agency at any time before the broker finds a customer able, ready, and willing to consummate the transaction on the principal's terms,[76] unless the authorization is given for a valuable consideration or coupled with an interest.[77] Nor is a broker ordinarily entitled to a commission on a sale or lease made by the principal after the agency has been revoked;[78] and this may be true even though the subsequent sale or lease is made to one with whom the broker had been negotiating.[79] To avoid liability for commissions the principal must notify the broker of the revocation before performance by the latter of the contract of agency;[80] and the principal in revoking the agency must act in good faith, and not for the purpose of avoiding liability to

76. *California.*— Brown *v.* Pforr, 38 Cal. 550.

Illinois.— Young *v.* Trainor, 158 Ill. 428, 42 N. E. 139 [*affirming* 57 Ill. App. 632].

Indiana.— Wilson *v.* Dyer, 12 Ind. App. 320, 39 N. E. 163.

Kentucky.— Kavanaugh *v.* Ballard, 56 S. W. 159, 21 Ky. L. Rep. 1683.

Massachusetts.— Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982, 179 Mass. 474, 61 N. E. 37, 88 Am. St. Rep. 397, 55 L. R. A. 77.

Michigan.— West *v.* Demme, 128 Mich. 11, 87 N. W. 95.

Minnesota.— Fairchild *v.* Cunningham, 84 Minn. 521, 88 N. W. 15.

Missouri.— Kesterson *v.* Cheuvront, (App. 1902) 70 S. W. 1091; Green *v.* Wright, 36 Mo. App. 298.

Pennsylvania.— Vincent *v.* Woodland Oil Co., 165 Pa. St. 402, 30 Atl. 991.

England.— Toppin *v.* Healy, 11 Wkly. Rep. 466, where the rule was applied to loan brokers.

See 8 Cent. Dig. tit. "Brokers," § 45.

After the broker has had a reasonable time to find a purchaser the principal may revoke his authority without incurring any liability. Collier *v.* Johnson, 67 S. W. 830, 23 Ky. L. Rep. 2453.

Right to compensation for endeavoring to negotiate transaction see *infra*, II, E, 1, f.

77. Brown *v.* Pforr, 38 Cal. 550. However, a contract by which a broker is to have land laid off into lots, which he is to sell, the proceeds above a stated sum to be divided with the owner, and by which the broker is to have two years in which to make sales, does not create a power coupled with an interest, and the authority is revocable before the time specified. Green *v.* Cole, 103 Mo. 70, 15 S. W. 317.

78. Bailey *v.* Smith, 103 Ala. 641, 15 So. 900, this being especially true where the principal sells upon less favorable terms to one who had declined to purchase from the agent.

Right to commission on transaction effected by principal unaided by broker see *infra*, II, E, 1, g.

79. *Illinois.*— Uphoff *v.* Ulrich, 2 Ill. App. 399.

Iowa.— Blodgett *v.* Sioux City, etc., R. Co., 63 Iowa 606, 19 N. W. 799.

Kansas.— Gillett *v.* Corum, 5 Kan. 608.

Kentucky.— Stedman *v.* Richardson, 100 Ky. 79, 37 S. W. 259, 18 Ky. L. Rep. 567.

Maryland.— Beale *v.* Creswell, 3 Md. 196.

Massachusetts.— Cadigan *v.* Crabtree, 179 Mass. 474, 61 N. E. 37, 88 Am. St. Rep. 397, 55 L. R. A. 77.

New York.— Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441 (holding that where a broker has been allowed a reasonable time to procure a purchaser and has failed to do so, and the principal has terminated the agency in good faith and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced and that the sale was in some degree aided by his previous efforts does not give him a right to commissions); Alden *v.* Earle, 56 N. Y. Super. Ct. 366, 4 N. Y. Suppl. 548 (where the rule was applied to a lease broker).

North Carolina.— Mallonee *v.* Young, 119 N. C. 549, 26 S. E. 141.

Texas.— Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153.

United States.— Rees *v.* Pellow, 97 Fed. 167, 38 C. C. A. 94.

England.— Lumley *v.* Nicholson, 34 Wkly. Rep. 716.

See 8 Cent. Dig. tit. "Brokers," § 45.

Right to commission: On transaction negotiated through another broker see *infra*, II, E, 1, m. (VII). Where broker's customer negotiates directly with principal see *infra*, II, E, 1, m, (VIII), (A).

80. Lloyd *v.* Matthews, 51 N. Y. 124, holding that where the owner of property has placed it in the hands of two or more brokers to sell, notice to one of his change of purpose as to selling the property does not affect another not notified, nor having any knowledge of the fact; and that he is not chargeable with notice of the owner's change of purpose because of his acts in improving the property inconsistent with a design to sell, so as to revoke his agency. See also Gaty *v.* Sack, 19 Mo. App. 470.

Notice to subagent.— An owner of real estate employed a real-estate agent to find a purchaser for it. The latter, within the scope of his authority, but without the owner's knowledge, employed a broker for the same purpose. The owner revoked the authority given to the agent. The broker, without notice of the revocation, found a purchaser. It was held that he could recover

pay for services of which he takes the benefit.[81] If for example he terminates the agency after the broker has found a person ready, willing, and able to buy the property or to lend on the terms suggested by the principal, the broker is entitled to compensation.[82] This is especially true where the principal eventually sells his property to such person.[83] If the contract of agency gives the broker a certain time within which to effect a sale the principal cannot defeat his right to compensation by revoking the agency before the expiration of the time specified.[84] If before a selling broker has found a customer the principal sells the property himself or through another agent, it constitutes a revocation of the broker's authority.[85] The fact that a client's account with a stock-broker has been balanced for a few days does not of itself show a revocation of the broker's authority to make further trades in accordance with the previous course of dealing between the parties.[86]

b. As Affected by License to Do Brokerage Business.[87] It is the rule in

commissions from the owner. Lamson *v.* Sims, 48 N. Y. Super. Ct. 281.

81. *Alabama.*— Bailey *v.* Smith, 103 Ala. 641, 15 So. 900 *semble.*

Illinois.— Uphoff *v.* Ulrich, 2 Ill. App. 399 *semble.*

Maryland.— Beale *v.* Creswell, 3 Md. 196 *semble.*

Massachusetts.— Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982 *semble.*

New York.— Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441 (*semble*); Alden *v.* Earle, 56 N. Y. Super. Ct. 366, 4 N. Y. Suppl. 548 (*semble*).

Texas.— Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153 *semble.*

See 8 Cent. Dig. tit. "Brokers," § 45.

82. Collier *v.* Weyman, 114 Ga. 944, 41 S. E. 50 (where the rule was applied to loan brokers); Cadigan *v.* Crabtree, 186 Mass. 7, 70 N. E. 1033, 66 L. R. A. 982 (*semble*); Reishus-Remer Land Co. *v.* Benner, 91 Minn. 401, 98 N. W. 186. See also *infra*, II, E, 1, m, (II), (B).

83. Schuster *v.* Martin, 45 Ill. App. 481; Gleason *v.* McKay, 37 Ill. App. 464; Heaton *v.* Edwards, 90 Mich. 500, 51 N. W. 544; Stillman *v.* Mitchell, 2 Rob. (N. Y.) 523; Knox *v.* Parker, 2 Wash. 34, 25 Pac. 909.

The principal cannot break in on negotiations between the broker and his customer and revoke the broker's authority and then sell to the same customer through another agent, even though several offers made by the customer before the revocation have been rejected, the customer not having abandoned his idea of purchasing. Day *v.* Porter, 161 Ill. 235, 43 N. E. 1073 [*affirming* 60 Ill. App. 386].

Right to commission: On transaction negotiated through another broker see *infra*, II, E, 1, m, (VII). Where broker's customer negotiates directly with principal see *infra*, II, E, 1, m, (VIII), (A).

84. *California.*— Blumenthal *v.* Goodall, 89 Cal. 251, 26 Pac. 906, holding that where the principal enters into a contract authorizing a real-estate broker to sell his lands on commission within a certain time, he cannot revoke the authority and escape liability to the broker if the latter secures a purchaser before the time limited as the result of efforts commenced before the revocation. See also Maze *v.* Gordon, 96 Cal. 61, 30 Pac. 962.

Illinois.— See Schlange *v.* Lennox, 101 Ill. App. 88.

Iowa.— Attix *v.* Pelan, 5 Iowa 336.

Missouri.— Glover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695, holding that a contract with a real-estate agent to sell lots, stipulating for additional pay to the agent should he sell them all in one year, gives him one year to sell them; and although not engaging his whole time, it cannot be revoked by the principal so long as the agent is diligent in his business.

Pennsylvania.— Stamets *v.* Deniston, 193 Pa. St. 548, 44 Atl. 575, holding that an owner, having made a contract authorizing plaintiffs to sell certain lots, whereby she agreed, on their selling enough of the lots to realize to her a certain sum, to convey to them the remainder thereof, they to have a year in which to perform their part of the agreement, cannot revoke it within the year, so as to deprive plaintiffs, on obtaining customers for certain lots for that sum, of the right to a conveyance of the others, although she rescinds the power of sale so that the customers cannot compel a conveyance to them of their lots.

See 8 Cent. Dig. tit. "Brokers," § 11.

Contract for certain time.— A statement by a real-estate owner to a broker that if the latter could secure a purchaser for the land by a certain date on terms specified the land might go gives the broker nothing more than an ordinary revocable authority binding the owner to pay a commission only in case a purchaser is found before revocation, and is not an agreement that the agency shall continue until the date specified. Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

85. Johnson *v.* Wright, 124 Iowa 61, 99 N. W. 103. See also Schlange *v.* Lennox, 101 Ill. App. 88.

86. Robinson *v.* Norris, 51 How. Pr. (N. Y.) 442.

87. See, generally, *supra*, II, B, 1, a.

most jurisdictions that a broker who fails to procure a license to carry on his business as required by law cannot recover a commission for acting as broker.[88] In some states, however, a contrary view is taken,[89] many of the cases proceeding upon the ground that the license laws are enacted purely as revenue measures and have no effect on the rights of the parties *inter se*.[90]

c. As Affected by Employment of Subagent.[91] A broker employed to sell property at a certain commission may employ a subagent to sell it at a smaller commission and recover from his principal the commission stipulated.[92]

Presumption as to license see *infra*, II, E, 2, d, (I).

Validity of contract by unlicensed broker see also CONTRACTS, 9 Cyc. 478.

Who are brokers within license law see *supra*, II, B, 1, b.

88. *Illinois.*— Whitfield *v.* Huling, 50 Ill. App. 179; Eckert *v.* Collot, 46 Ill. App. 361; Hustis *v.* Pickands, 27 Ill. App. 270.

Iowa.— Richardson *v.* Brix, 94 Iowa 626, 63 N. W. 325.

Kansas.— Yount *v.* Denning, 52 Kan. 629, 35 Pac. 207.

Minnesota.— Buckley *v.* Humason, 50 Minn. 195, 52 N. W. 385, 36 Am. St. Rep. 637, 16 L. R. A. 423, also holding that the fact that the contract is to exchange the principal's property for property in another state is immaterial.

Pennsylvania.— Johnson *v.* Hulings, 103 Pa. St. 498, 49 Am. Rep. 131; Holt *v.* Green, 73 Pa. St. 198, 13 Am. Rep. 737 (holding that a commercial broker cannot recover commissions unless he has taken out a license as required by the act of congress of June 30, 1864, which provides that no person shall engage in commercial brokerage until he shall procure a license and pay a license fee); Coles *v.* Meade, 5 Pa. Super. Ct. 334; Costello *v.* Goldbeck, 9 Phila. 158. See, however, Justice *v.* Rowand, 10 Phila. 623.

Tennessee.— Stevenson *v.* Ewing, 87 Tenn. 46, 9 S. W. 230.

England.— Smith *v.* Lindo, 4 C. B. N. S. 395, 27 L. J. C. P. 196, 93 E. C. L. 395 [*affirmed* in 5 C. B. N. S. 587, 4 Jur. N. S. 974, 27 L. J. C. P. 335, 6 Wkly. Rep. 748, 94 E. C. L. 587]; Pidgeon *v.* Burslem, 3 Exch. 465, 18 L. J. Exch. 193; Cope *v.* Rowlands, 2 Gale 231, 6 L. J. Exch. 63, 2 M. & W. 149.

See 8 Cent. Dig. tit. "Brokers," § 43.

Refusal of officer to receive tax.— If a city official, pursuant to a direction of the mayor and council, refuses to receive a broker's tax imposed by ordinance, the broker's failure to pay the tax is no defense to an action for a commission. Wicks *v.* Carlisle, 12 Okla. 337, 72 Pac. 377.

Retrospective operation of license.— If a broker has no license when he effects a sale, he cannot recover a commission, although before he sues he takes out a license which by its terms relates back to a date prior to the sale. Saule *v.* Ryan, (Tenn. Ch. App. 1899) 53 S. W. 977.

Right to recover on account stated.— A stock-broker may recover on an account stated with his client, although he has not procured a license. Smith *v.* Lindo, 4 C. B. N. S. 395, 27 L. J. C. P. 196, 93 E. C. L. 395 [*affirmed* in 5 C. B. N. S. 587, 4 Jur. N. S. 974, 27 L. J. C. P. 335, 6 Wkly. Rep. 748, 94 E. C. L. 587]; Jessopp *v.* Lutwyche, 3 C. L. R. 359, 10 Exch. 614, 24 L. J. Exch. 65.

Right to reimbursement for moneys paid out for principal.— A stock-broker may recover the amount of sums paid out by him for his principal in stock transactions, although he has no license. Smith *v.* Lindo, 4 C. B. N. S. 395, 27 L. J. C. P. 196, 93 E. C. L. 395 [*affirmed* in 5 C. B. N. S. 587, 4 Jur. N. S. 974, 27 L. J. C. P. 335, 6 Wkly. Rep. 748, 94 E. C. L. 587]; Jessopp *v.* Lutwyche, 3 C. L. R. 359, 10 Exch. 614, 24 L. J. Exch. 65; Pidgeon *v.* Burslem, 3 Exch. 465, 18 L. J. Exch. 193.

Enforcement of license law in foreign state.— If a statute merely requires a broker to take out a license under a penalty to be recovered in a civil action, and does not make the failure to do so either a felony or a misdemeanor or in any way punishable criminally, the courts of a foreign state will not refuse to enforce the broker's right to compensation because he has failed to take out a license, the contract being valid by the law of the forum, and this is true, although the services were rendered in the foreign state and concerned foreign property. Angell *v.* Van Schaick, 56 Hun (N. Y.) 247, 9 N. Y. Suppl. 568.

89. Houston *v.* Boagni, McGloin (La.) 164; Tooker *v.* Duckworth, 107 Mo. App. 231, 80 S. W. 963 (so holding in the absence of any showing that both parties to the contract agreed beforehand that the statute should be violated); Prince *v.* Eighth St. Baptist Church, 20 Mo. App. 332.

90. *New Jersey.*— Ruckman *v.* Bergholz, 37 N. J. L. 437, construing a federal revenue law.

New York.— Woodward *v.* Stearns, 10 Abb. Pr. N. S. 395, construing a federal revenue law.

South Carolina.— Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215.

Texas.— Amato *v.* Dreyfus, (Civ. App. 1896) 34 S. W. 450.

West Virginia.— Ober *v.* Stephens, 54 W. Va. 354, 46 S. E. 195.

See 8 Cent. Dig. tit. "Brokers," § 43.

91. **Ratification of employment of subagent** see *supra*, II, E, 1, a, (IV).

Right of subagent to compensation see *infra*, II, E, 1, k, (II).

92. *Alabama.*— Burns *v.* Campbell, 71 Ala. 271.

d. As Affected by Fraud, Actual or Constructive[93] — (i) *In General.* If a broker procures himself to be employed by fraud, he is not entitled to a commission for services rendered.[94] So if a broker is guilty of fraud in executing the agency his right to compensation is lost.[95] Thus a broker employed to buy or sell property is not entitled to compensation where he fails to disclose to his principal the best terms upon which the transaction can be consummated.[96] The mere failure of a selling broker to disclose the name of the purchaser does not amount to fraud, and so disentitle him to a commission;[97] but if he conceals the

Illinois.— Carter *v.* Webster, 79 Ill. 435.

Iowa.— Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120.

Minnesota.— Henninger *v.* Burch, 90 Minn. 43, 95 N. W. 578.

New York.— Corning *v.* Calvert, 2 Hilt. 56.

See, however, Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790 (holding that where a subagent conceals from the principal the fact that he is acting for the agent, the latter cannot recover a commission); Jones *v.* Brand, 106 Ky. 410, 50 S. W. 679, 20 Ky. L. Rep. 1997 (holding that an agent to receive bids for property, who has no authority to consummate a sale, cannot appoint a subagent so as to bind the principal for commissions on a sale made to a purchaser found by the subagent).

93. See, generally, *supra*, II, D, 3, a.

Illegal profits as precluding commission see *infra*, II, E, 1, d, (III).

94. Murray *v.* Beard, 102 N. Y. 505, 7 N. E. 553.

95. Jeffries *v.* Robbins, 66 Kan. 427, 71 Pac. 852; Whaples *v.* Fahys, 87 N. Y. App. Div. 518, 84 N. Y. Suppl. 793 (holding that if a real-estate broker is guilty of any misrepresentation or deception which induces the principal to contract for the sale, he cannot recover commissions, even though the contract becomes binding on the vendor); De Armit *v.* Milnor, 20 Pa. Super. Ct. 369 (depressing price at auction sale); Hall *v.* Gambrill, 92 Fed. 32, 34 C. C. A. 190 [*affirming* 88 Fed. 709] (sale at grossly inadequate price).

Disclosing highest price principal will pay. — An intimation by a real-estate broker of the highest price his employer is willing to pay for land, made to the owner in good faith to obtain a reduction in the price, is not an act of disloyalty to his employer which will defeat his recovery for services. Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26.

Disclosing lowest price principal will accept.— It seems that a broker is deprived of his right to a commission if he discloses to a prospective purchaser the lowest price which the principal will accept. Harvey *v.* Lindsay, 117 Mich. 267, 75 N. W. 627, holding, however, that the evidence was insufficient to show that the broker made the disclosure.

Inducing principal to reduce price.— A broker employed to find a buyer is not necessarily guilty of fraud because he seeks to induce the principal to reduce the price. Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92. See, however, Hobart *v.* Sherburne, 66 Minn. 171, 68 N. W. 841.

Reliance on misrepresentations.— Where a vendor of land is not influenced by misrepresentations of his brokers as to the financial condition of the vendee, such misrepresentations do not constitute a ground for refusing to pay the brokers' commissions. Irwin *v.* Moubray, 5 N. Y. Suppl. 430.

Equality of means of knowledge.— It is immaterial to a real-estate agent's right to commissions for effecting the execution of a contract for the exchange of lands that he misrepresented the amount of taxes in arrear on the land to be received by his principal, where the latter had the tax-bills before him. Mason *v.* Hinds, 19 N. Y. Suppl. 996.

Fraud on third person.— Where an owner listed lands with an agent, who afterward told him of a prospective purchaser that wished to deal directly with the owner, and the owner then agreed to pay the agent a commission for the mere production of a purchaser, and the purchase was made by the person introduced and at the price at which the lands were listed, the fact that the contract between the owner and the agent was concealed from the purchaser, since he was not thereby required to pay an increased price, did not taint the contract with fraud, so as to release the owner from liability for the agent's commission. McCampbell *v.* Cavis, 10 Colo. App. 242, 50 Pac. 728.

96. *Alabama.*— Henderson *v.* Vicent, 84 Ala. 99, 4 So. 180.

California.— See Ford *v.* Brown, 120 Cal. 551, 52 Pac. 817.

Iowa.— Morey *v.* Laird, 108 Iowa 670, 77 N. W. 835.

Massachusetts.— Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479.

Michigan.— Phinney *v.* Hall, 101 Mich. 451, 59 N. W. 814.

New Jersey.— See Ballinger *v.* Wilson, (Ch. 1902) 53 Atl. 488.

New York.— Martin *v.* Bliss, 57 Hun 157, 10 N. Y. Suppl. 886.

See 8 Cent. Dig. tit. "Brokers," § 48.

97. Bertelson *v.* Hoffman, 35 Wash. 459, 77 Pac. 801. So where real-estate agents showed property of defendant to a purchaser, and afterward obtained from defendant authority to sell at a price established by him, without any fraud on their part, although they did not inform him that they had any one who would probably buy, they are entitled to their commission. Barringer *v.*

purchaser's name and puts forward a fictitious purchaser, it constitutes fraud in law, and he cannot recover.[98] Nor does the mere failure to disclose to the principal that the nominal purchaser is not the real purchaser defeat the broker's right to a commission where he acts solely in the interest of his principal and it does not appear that a disclosure would have influenced the principal's decision.[99] The rule that a broker is entitled to a commission when he produces a customer who is able, ready, and willing to enter into a contract with the principal on the latter's terms is enforced only where the broker acts in good faith.[1] The broker's right to compensation is not affected by fraudulent representations made to the principal by third persons,[2] unless they are in privity with the broker.[3] Although the principal may rescind the contract of employment if the broker is not acting in good faith, yet he must give notice of the rescission before performance by the broker in order to avoid liability for a commission.[4] A broker who has bought stock for his principal and wrongfully pledges it may nevertheless recover his commission.[5]

(II) *Representing Adverse Interest.*[6] A broker who acts for both parties to an exchange or purchase and sale or lease of property is guilty of fraud which deprives him of the right to recover compensation from either,[7] unless the prin-

Stoltz, 39 Minn. 63, 38 N. W. 808; Donohue *v.* Padden, 93 Wis. 20, 66 N. W. 804.

Waiver of right to information.—While one who has employed an agent to negotiate a sale of realty is entitled to information as to the identity of a prospective purchaser to whom he is to be introduced for the purpose of consummating a contract of sale, yet he may waive that right. Simpson *v.* Smith, 36 Misc. (N. Y.) 815, 74 N. Y. Suppl. 849.

98. Pratt *v.* Patterson, 12 Phila. (Pa.) 460.

99. Veasey *v.* Carson, 177 Mass. 117, 58 N. E. 177, 53 L. R. A. 241.

The rule is otherwise where the broker refused to tell the landowner who the real customer was for fear the owner would understand the customer's need of the property and raise the price. Wilkinson *v.* McCullough, 196 Pa. St. 205, 46 Atl. 357, 79 Am. St. Rep. 702.

Ratification.— Where, after defendant had made a contract to sell the property but before a deed was executed, he was informed that the purchaser was acting merely for a customer procured by plaintiffs, and that plaintiffs would claim their commissions, by continuing his negotiations and completing the sale to such agent defendant ratified the purchaser's agency for plaintiffs' client. Decker *v.* Widdicomb, (Mich. 1904) 100 N. W. 573.

1. Coleman *v.* Meade, 13 Bush (Ky.) 358; Bach *v.* Emerich, 35 N. Y. Super. Ct. 548 (holding that the broker cannot recover a commission where the purchaser produced by him, by arrangement with the broker, has no intention of fulfilling the contract); Pratt *v.* Patterson, 112 Pa. St. 475, 3 Atl. 858.

2. Heaton *v.* Clarke, (Iowa 1904) 98 N. W. 597.

3. Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790 (subagent); Thwing *v.* Clifford, 136 Mass. 482 (partner).

4. Gaty *v.* Sack, 19 Mo. App. 470.

5. Capron *v.* Thompson, 86 N. Y. 418.

6. See, generally, *supra*, II, D, 3, c.

7. *Arkansas.*— Tegarden *v.* Big Star Zinc Co., 71 Ark. 277, 72 S. W. 989.

Colorado.— Deutsch *v.* Baxter, 9 Colo. App. 58, 47 Pac. 405.

Georgia.— Hanesley *v.* Monroe, 103 Ga. 279, 29 S. E. 928.

Illinois.— Hafner *v.* Herron, 165 Ill. 242, 46 N. E. 211 (holding that a broker employed to sell stock forfeits his commission where, after finding a purchaser, he agrees with him and another person that the latter shall buy the stock, in order that it may be obtained at a less price, and that the real purchaser shall not be disclosed to the owner); Van Vlissingen *v.* Blum, 92 Ill. App. 145; Hampton *v.* Lackens, 72 Ill. App. 442; Boyd *v.* Dullaghan, 33 Ill. App. 266.

Indiana.— Simonds *v.* Hoover, 35 Ind. 412.

Maryland.— Worthington *v.* Tormey, 34 Md. 182. See also Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

Massachusetts.— Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Farnsworth *v.* Hemmer, 1 Allen 494, 79 Am. Dec. 756.

Missouri.— Rosenthal *v.* Drake, 82 Mo. App. 358; Chapman *v.* Currie, 51 Mo. App. 40.

Nebraska.— Strawbridge *v.* Swan, 43 Nebr. 781, 62 N. W. 199; Campbell *v.* Baxter, 41 Nebr. 729, 60 N. W. 90.

New York.— Robinson *v.* Clock, 38 N. Y. App. Div. 67, 55 N. Y. Suppl. 976; Knauss *v.* Gottfried Krueger Brewing Co., 62 Hun 46, 16 N. Y. Suppl. 357; Southack *v.* Lane, 32 Misc. 141, 65 N. Y. Suppl. 629 [*reversing* 23 Misc. 515, 52 N. Y. Suppl. 687]; Perkins *v.* Brainerd Quarry Co., 11 Misc. 328, 32 N. Y. Suppl. 230; Platt *v.* Baldwin, 2 N. Y. City Ct. 281.

Ohio.— Capener *v.* Hogan, 40 Ohio St. 203; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528, both holding that a broker acting for both parties in the sale of land cannot recover from either, even upon an express

cipals knew of the double agency and consented thereto or acquiesced therein, in which case he may recover.[8] A broker is not necessarily guilty of fraud in representing competing purchasers.[9]

(III) *INDIVIDUAL INTEREST OF BROKER.*[10] If a broker has an individual interest in the transaction he is employed to negotiate, and conceals or fails to

promise, unless his double agency was with the consent of both parties.

Pennsylvania.— Cannell *v.* Smith, 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Texas.— Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268.

Washington.— Shepard *v.* Hill, 6 Wash. 605, 34 Pac. 159.

Wisconsin.— Meyer *v.* Hanchett, 39 Wis. 419.

England.— Hurst *v.* Holding, 3 Taunt. 32, 12 Rev. Rep. 587.

See 8 Cent. Dig. tit. "Brokers," § 49.

Where a broker merely introduces the parties and they consummmate a sale themselves without his further aid and he is not compensated by the buyer, he is not precluded from recovering a commission from the seller on the ground that he was the agent of the buyer also. Flattery *v.* Cunningham, 125 Mich. 467, 84 N. W. 625. See also *infra*, II, E, 1, i.

Prejudice to principal.— The rule is the same whether or not the principal is prejudiced by the double agency and even though the transaction is advantageous to him. Hafner *v.* Herron, 165 Ill. 242, 46 N. E. 211; Worthington *v.* Tormey, 34 Md. 182 (*semble*); Cannell *v.* Smith, 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395. See, however, Davidson *v.* Manitoba, etc., Land Corp., 14 Manitoba 232.

Who may urge fraud.— If the principal, at the time of employing the broker, knew that the broker could not accept the employment without violating his duty to the adverse party, the breach of duty is no defense to an action for commissions. Hanesley *v.* Monroe, 103 Ga. 279, 29 S. E. 928; Bloomingdale *v.* Hodges, 21 Misc. (N. Y.) 6, 46 N. Y. Suppl. 859.

Advancing price to purchaser.— The fact that a broker employed to sell land advances the price to the purchaser does not make him the purchaser's agent. Goodson *v.* Embleton, 106 Mo. App. 77, 80 S. W. 22; Lawson *v.* Thompson, 10 Utah 462, 37 Pac. 732.

Facts held not to show a double employment see Macfee *v.* Horan, 45 Minn. 519, 48 N. W. 405; Rutledge, etc., Realty Co. *v.* Neely, 99 Mo. App. 384, 73 S. W. 359.

Right to commissions: From both parties see *infra*, II, E, 1, i. Where broker is mere middleman see *infra*, II, E, 1, i.

8. *Georgia.*— Hanesley *v.* Monroe, 103 Ga. 279, 29 S. E. 928.

Illinois.— Boyd *v.* Dullaghan, 33 Ill. App. 266.

Maryland.— Worthington *v.* Tormey, 34 Md. 182.

Massachusetts.—Rice *v.* Wood, 113 Mass. 133, 18 Am. Rep. 459; Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Farnsworth *v.* Hemmer, 1 Allen 494, 79 Am. Dec. 756.

Missouri.— Rosenthal *v.* Drake, 82 Mo. App. 358; Chapman *v.* Currie, 51 Mo. App. 40.

Nebraska.— Strawbridge *v.* Swan, 43 Nebr. 781, 62 N. W. 199; Campbell *v.* Baxter, 41 Nebr. 729, 60 N. W. 90.

New York.— Lansing *v.* Bliss, 86 Hun 205, 33 N. Y. Suppl. 310; Knauss *v.* Gottfried Krueger Brewing Co., 62 Hun 46, 16 N. Y. Suppl. 357; Bonwell *v.* Auld, 7 Misc. 447, 27 N. Y. Suppl. 936 [*affirmed* in 9 Misc. 65, 29 N. Y. Suppl. 15]; Bonwell *v.* Howes, 1 N. Y. Suppl. 435; Harnickel *v.* Parrot Silver, etc., Co., 15 N. Y. St. 223; Platt *v.* Baldwin, 2 N. Y. City Ct. 281.

Ohio.— Capener *v.* Hogan, 40 Ohio St. 203; Bell *v.* McConnell, 37 Ohio St. 396, 41 Am. Rep. 528.

Pennsylvania.— Cannell *v.* Smith, 142 Pa. St. 25, 21 Atl. 793, 12 L. R. A. 395.

Rhode Island.— Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458.

Wisconsin.— Meyer *v.* Hanchett, 39 Wis. 419.

See 8 Cent. Dig. tit. "Brokers," § 49.

The burden of proving knowledge on the part of the principals rests on the agent. Young *v.* Trainor, 158 Ill. 428, 42 N. E. 139; Lynch *v.* Fallon, 11 R. I. 311, 23 Am. Rep. 458, *semble*. *Contra*, Red Cypress Lumber Co. *v.* Perry, 118 Ga. 876, 45 S. E. 674. See also Hanesley *v.* Monroe, 103 Ga. 279, 29 S. E. 928.

Facts held not to show knowledge see Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479.

Waiver and ratification.— If, pending negotiations, the parties discover the double agency and nevertheless consummate the transaction, they cannot refuse to pay commissions because of the double agency. Hafner *v.* Herron, 165 Ill. 242, 46 N. E. 211; Casady *v.* Carraher, 119 Iowa 500, 93 N. W. 386. See, however, Chapman *v.* Currie, 51 Mo. App. 40, holding that the fact that one principal knew of the double agency does not make him liable for commissions.

9. Hinton *v.* Coleman, 76 Wis. 221, 45 N. W. 26, holding that it is not an act of disloyalty on the part of a broker, after obtaining an option for land at the lowest price for which the owner would sell, and afterward suspecting that his employer will not take it at that price, with his employer's knowledge to solicit other purchasers, whom he informs that his employer shall have the first right to purchase.

10. See, generally, *supra*, II, D, 3, b.

disclose it to the principal, it ordinarily constitutes a fraud which deprives him of the right to compensation for his services.[11] If for example a broker employed to sell property buys it for himself he is not ordinarily entitled to a commission.[12]

(IV) *AGREEMENT TO DIVIDE COMMISSIONS.* A secret agreement between real-estate brokers representing different principals to divide their commissions in case the transaction is completed is void as against public policy, and deprives them of their right to compensation.[13] An undisclosed agreement by an agent of a vendor or a lessor, however, to divide his commission with the purchaser or the

11. *Colorado.*— Collins *v.* McClurg, 1 Colo. App. 348, 21 Pac. 299.

Kansas.— Jeffries *v.* Robbins, 66 Kan. 427, 71 Pac. 852.

Nebraska.— Buck *v.* Hogeboom, (1902) 90 N. W. 635.

New York.— Marvin *v.* Buchanan, 62 Barb. 468.

Texas.— Ryan *v.* Kahler, (Civ. App. 1898) 46 S. W. 71.

United States.— Allen *v.* Pierpont, 22 Fed. 582, 23 Blatchf. 33, where a broker employed to place advertisements sold his own space to the principal without the latter's knowledge.

England.— Salomons *v.* Pender, 3 H. & C. 639, 11 Jur. N. S. 432, 34 L. J. Exch. 95, 12 L. T. Rep. N. S. 267, 13 Wkly. Rep. 637, holding that if an agent employed to sell land sells it to a company in which he is interested as shareholder and director, he is entitled to no commission.

Canada.— Sawyer *v.* Gray, 3 Nova Scotia 77, where a broker sold shares on his own account and not in the ordinary course of business to a customer with whom he had had previous dealings as a broker.

See 8 Cent. Dig. tit. "Brokers," § 50.

The rule does not apply to the case of a real-estate agent having lands for sale other than those of his principal, so as to prevent him from recovering from the latter his commissions, even though he concealed from the principal the fact of his interest in the other lands. Gaty *v.* Sack, 19 Mo. App. 470.

Special contract.— An agreement that a land agent shall have an interest in transactions negotiated by him does not entitle him to share in transactions in which he acted for other persons, from whom he received compensation for effecting a sale. Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868.

12. *Colorado.*— Finnerty *v.* Fritz, 5 Colo. 174.

Indiana.— Hammond *v.* Bookwalter, 12 Ind. App. 177, 39 N. E. 872.

Nebraska.— Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207.

Pennsylvania.— Powers *v.* Black, 159 Pa. St. 153, 28 Atl. 133 (holding that where brokers who are authorized to sell for a certain price, by colorable sales to an employee and actual sales of part of the premises, sell for a much larger price without their principal's knowledge, they cannot retain the commission charged on the colorable sales to the employee, nor charge commissions on the actual sales made); Mellon *v.* Holland, 1 Wkly. Notes Cas. (Pa.) 36.

Texas.— Ryan *v.* Kahler, (Civ. App. 1898) 46 S. W. 71.

See 8 Cent. Dig. tit. "Brokers," § 50.

A broker is entitled to a commission, however, where a principal placed lands in his hands for sale at a certain price, and as a proposed purchaser did not want the entire tract the broker induced his employee to purchase the remaining portion, and the principal to escape paying commissions conveyed the whole tract to the employee, who conveyed to the proposed purchaser his portion of the land, the latter assuming a proportionate amount of the purchase-money. Bogart *v.* McWilliams, (Tex. Civ. App. 1895) 31 S. W. 434. So a broker who engages for a commission to find a purchaser of land at such price as may be agreed upon between the purchaser and the vendor, and then becomes himself the purchaser in whole or in part, the vendor accepting him as such, may recover the commission; and the fact that in effecting the sale the broker has acted in fraud of his co-purchaser will not affect his right to the commission as against the vendor. Grant *v.* Hardy, 33 Wis. 668. And where a principal, after employing a broker by parol to sell land at a certain price, gave him a certain written option to purchase for himself, and the broker procured a purchaser at the price named, but the principal refused to convey to him, and the broker, exercising his option, took a conveyance to himself, and then conveyed to the purchaser, the broker was entitled to the commission specified in the parol contract of employment. Riemer *v.* Rice, 88 Wis. 16, 59 N. W. 450.

Burden of proof.— If an agent employed to sell property buys it in himself the burden of proving that the principal expressly or impliedly consented thereto rests on the agent, in an action for compensation. Jansen *v.* Williams, 36 Nebr. 869, 55 N. W. 279, 20 L. R. A. 207; Grant *v.* Hardy, 33 Wis. 668.

13. Levy *v.* Spencer, 18 Colo. 532, 33 Pac. 415, 36 Am. St. Rep. 303 (holding further that validity is not given to such an agreement by the fact that the brokers acted as mere middlemen and that the sale was effected by the principals themselves and at the valuation that each had set on his property with his broker); Norman *v.* Roseman, 59 Mo. App. 682; Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268. See also Shepard *v.* Hill, 6 Wash. 605, 34 Pac. 159. *Contra*, Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499.

If the principals know of the arrangement and acquiesce therein, the agreement for

lessee does not defeat his right to a commission for making the sale or effecting the lease.[14]

e. As Affected by Negligence. Although a broker finds a person who is willing to buy on the terms imposed by the principal, yet he is not entitled to a commission if the trade fails through his negligence.[15] So a broker who is guilty of negligence in selling or exchanging property, as a result of which the principal is injured, cannot recover compensation.[16]

f. Right to Compensation Other Than Commission[17] — (I) *In General.* A broker may be entitled to compensation other than a commission. Thus a broker employed to find a purchaser may be entitled to the reasonable[18] or agreed[19] value of services rendered under the contract of employment, although he does not effect a sale himself, and even though no sale is effected.[20]

(II) *Reimbursemeet of Advances, Expenses, or Losses.*[21] A broker who in executing his orders pays out or advances moneys on his client's account is ordinarily entitled to reimbursement.[22] If the principal fails to deliver property

division of commissions is valid. Dearing *v.* Sears, 3 N. Y. Suppl. 31.

14. Scott *v.* Lloyd, 19 Colo. 401, 35 Pac. 733; Lemon *v.* Lloyd, 46 Mo. App. 452; Chase *v.* Veal, 83 Tex. 333, 18 S. W. 597. See also Forst *v.* Farmer, 21 Misc. (N. Y.) 64, 46 N. Y. Suppl. 903. See, however, Hobart *v.* Sherburne, 66 Minn. 171, 68 N. W. 841, holding that a rental agent who agreed to divide his commission with the prospective lessee to induce the latter to take the premises, and at the request of the lessee tried to induce his principal to reduce the rental, while concealing from him his relations to the lessee, was not entitled to a commission for procuring the lessee.

15. Fisher *v.* Dynes, 62 Ind. 348.

16. Stuart *v.* Stumph, 126 Ind. 580, 26 N. E. 553 (where the brother failed to sell for the best price obtainable); Harkness *v.* Briscoe, 47 Mo. App. 196 (holding that where defendant employed plaintiff to examine the title to certain property, and if unencumbered to negotiate for the same in exchange for defendant's property, the fact that plaintiff failed to discover an encumbrance on one of the parcels, because of which it was lost by defendant, will defeat an action on defendant's note given plaintiff for his commissions, without proof of the value of the parcel lost).

17. **Damages for loss of compensation** see *supra*, II, C, 4.

Rate or amount of compensation see *infra*, II, E, 1, j.

Right of exclusive agent to compensation where sale is effected by owner see *infra*, II, E, 1, m, (IX).

18. *Delaware.*— Hawkins *v.* Chandler, 8 Houst. 434, 32 Atl. 464.

Illinois.— Biester *v.* Evans, 59 Ill. App. 181.

Nebraska.— McMurtry *v.* Madison, 18 Nebr. 291, 25 N. W. 85.

New York.— Donald *v.* Lawson, 87 N. Y. Suppl. 485.

Texas.— Alexander *v.* Wakefield, (Civ. App. 1902) 69 S. W. 77.

See, however, Rees *v.* Pellow, 97 Fed. 167, 28 C. C. A. 94; Simpson *v.* Lamb, 17 C. B. 603, 2 Jur. N. S. 91, 25 L. J. C. P. 113, 4 Wkly. Rep. 328, 84 E. C. L. 603 (holding that where the authority of an agent employed to sell on commission is revoked by the principal before the sale has been effected, the right of the agent to remuneration for what he has done in endeavoring to effect a sale depends on the terms on which he was employed); Green *v.* Mules, 30 L. J. C. P. 343.

19. Delaplaine *v.* Turnley, 44 Wis. 31.

20. Dulaney *v.* Page Belting Co., (Tenn. Ch. App. 1900) 59 S. W. 1082.

21. **Reimbursement as dependent on performance of duty to principal** see *supra*, II, D, 1-9.

Right to reimbursement for advances made in gambling transaction see, generally, GAMING.

22. *California.*— Marshall *v.* Levy, 66 Cal. 236, 5 Pac. 155.

New York.— Tompkins *v.* Tysen, 16 Barb. 456 (holding that a loan by plaintiff was not made by him as mortgagee, but as a broker, and as a temporary advance to the borrower, and could be recovered before the date on which the mortgage became due); Stewart *v.* Orvis, 47 How. Pr. 518 (where it appeared that defendant, a note broker, delivered a note to plaintiff, also a note broker, for sale, and the latter sold it to a customer, all parties believing at the time that the drawers were solvent when in fact they were then insolvent, and that when the purchaser learned such fact he returned the note and procured from plaintiff the consideration paid for it, and it was held that defendant was liable to plaintiff for the amount so paid.

Tennessee.— Dulaney *v.* Page Belting Co., (Ch. App. 1900) 59 S. W. 1082, holding that where a broker's commission is to be profits made on a sale, and the principal prevents him from making the sale and earning his commission by terminating the contract of employment after he has spent money for the interest of his principal, he can recover on a *quantum meruit* for the money expended, but that he cannot recover for money expended

which the broker has sold pursuant to the contract of employment, the broker may recover the amount in which he is obliged to answer to the buyer for the failure to complete the sale,[23] or he may go into the market and buy like property at the best price at which he can obtain it and hold the principal for any resulting loss.[24] So a broker may recover from the principal the amount of moneys advanced in purchasing stock for him;[25] and if the principal refuses to

for the purpose of consultation with the principal regarding the contract before it was entered into.

Texas.— Wilson *v.* Clark, (Civ. App. 1904) 79 S. W. 649, where a real-estate broker was allowed reimbursement for money expended in furnishing an abstract of title.

Wisconsin.— Delaplaine *v.* Turnley, 44 Wis. 31, where a real-estate broker was allowed reimbursement for moneys paid out for advertising.

England.— Read *v.* Anderson, 13 Q. B. D. 779, 49 J. P. 4, 53 L. J. Q. B. 532, 51 L. T. Rep. N. S. 55, 32 Wkly. Rep. 950 (where a turf broker was allowed reimbursement for moneys paid out in settling the bets of a defaulting principal); Broom *v.* Hall, 7 C. B. N. S. 503, 97 E. C. L. 503 (where a buying broker on his principal's default unsuccessfully defended an action by the seller for breach of contract, and he was allowed reimbursement from the principal for the costs paid in the action); Marten *v.* Gibbon, 33 L. T. Rep. N. S. 561, 24 Wkly. Rep. 87 (where a broker sold prospective dividends, calculating them at a certain rate per cent, and the dividends when declared amounted to a higher rate, and according to the usage of the stock exchange the broker paid the purchaser the difference, the broker was entitled to recover the difference from the principal, although the latter had instructed him not to pay it); Peppercorne *v.* Clench, 26 L. T. Rep. N. S. 656 (where a broker bought stocks for a principal who failed to have a valid transfer registered on the company's books, and the broker was allowed reimbursement for the amount which he paid the seller as indemnity against calls). See, however, Gray *v.* Haig, 20 Beav. 219, 52 Eng. Reprint 587, where a charge made by an agent for the sale of goods against his principal for an allowance in respect to warehousemen's salaries was disallowed, no such claim having been made in the accounts for fourteen years.

See 8 Cent. Dig. tit. "Brokers," § 57.

Duty to make separate contracts for principals.— Where a person instructs a broker to buy and sell stocks for him with the intention that he shall only receive or pay differences, and authorizes the broker to pay losses for him, the broker is entitled to recover any sums that he has paid for the principal, even though he has not entered into separate contracts in his behalf, but has appropriated to him parts of larger amounts of stocks which the broker has bought as a principal with a view to dividing them among different clients for whom he has been instructed to buy. *Ex p.* Rogers, 15 Ch. D. 207, 43 L. T. Rep. N. S. 163, 29 Wkly. Rep. 29 [*distinguishing* Robinson *v.* Mollett, L. R. 7 H. L. 802, 44 L. J. C. P. 362, 33 L. T. Rep. N. S. 544].

Unless a bargain be effected, however, a broker cannot claim his expenses in attempting to effect a bargain. Didion *v.* Duralde, 2 Rob. (La.) 163; Blanc *v.* New Orleans Imp., etc. Co., 2 Rob. (La.) 63.

Special contracts.— In a contract to pay for the services of a real-estate broker in "showing and advertising" land, the term "advertising" must be construed as meaning the publication of notice, in a newspaper or otherwise, of the fact that the land is for sale. Darst *v.* Doom, 38 Ill. App. 397. If an agent employed to sell land was to have all obtained over a certain price, the expense of getting rid of an existing lien on the land must be borne by the principal, not by the agent. Wisehart *v.* Dietz, 67 Iowa 121, 24 N. W. 752.

23. Hill *v.* Morris, 21 Mo. App. 256; Sistare *v.* Best, 88 N. Y. 527.

If forged certificates of stock are sold by a broker and the principal receives the price, the broker, on refunding the price to the purchaser, is entitled to recover therefor from the principal, but he is not entitled to a further sum which he was obliged to pay the purchaser by a resolution of the stock exchange, since the principal by placing the stock in the broker's hands did not guarantee its genuineness, and he was not bound by the resolution. Westropp *v.* Solomon, 8 C. B. 345, 13 Jur. 1104, 19 L. J. C. P. 1, 65 E. C. L. 345.

Transactions in broker's own name.— If a merchandise broker makes a contract for the sale of goods in his own name without express authority, he cannot recover damages paid by him to the purchaser on the principal's refusal to deliver the goods. Haas *v.* Ruston, 14 Ind. App. 8, 42 N. E. 298, 56 Am. St. Rep. 288; Delafield *v.* Smith, 101 Wis. 664, 78 N. W. 170, 70 Am. St. Rep. 938. The rule is otherwise as to stock-brokers. See *infra*, notes 24 *et seq.*

24. Baily *v.* Carnduff, 14 Colo. App. 169, 59 Pac. 407 (holding also that it is no defense that defendant was not bound to deliver the property except on receipt of the price, where the brokers were not themselves the purchasers); Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819; Bennett *v.* Covington, 22 Fed. 816; Biederman *v.* Stone, L. R. 2 C. P. 504, 36 L. J. C. P. 198, 16 L. T. Rep. N. S. 415, 15 Wkly. Rep. 811; Morris *v.* Brault, 24 Quebec Super. Ct. 167.

25. Seymour *v.* Bridge, 14 Q. B. D. 460, 54 L. J. Q. B. 347; Chapman *v.* Shepherd, L. R. 2 C. P. 228, 36 L. J. C. P. 113, 15 L. T. Rep.

accept the property so bought, the broker may sell it at the best price obtainable and hold the principal responsible for any resulting loss.[26] If a broker pays out

N. S. 477, 15 Wkly. Rep. 314; Sentance *v.* Hawley, 13 C. B. N. S. 458, 7 L. T. Rep. N. S. 745, 11 Wkly. Rep. 311, 106 E. C. L. 458 (where a broker employed to buy goods on credit paid for them before the expiration of the credit in order to obtain a discount, and he was allowed reimbursement); Taylor *v.* Stray, 2 C. B. N. S. 197, 26 L. J. C. P. 287, 3 Jur. N. S. 964, 5 Wkly. Rep. 761, 89 E. C. L. 197.

Authority to make advances.— Statements sent by a broker to his customer contained a printed notice reserving the right to close transactions when the margins were exhausted without giving notice. The customer sent an order to buy wheat, but inclosed no money. After the purchase the customer sent his check, and subsequently, when his margin had been exhausted, voluntarily sent another check, without inquiry as to whether the broker had sold or closed out the deal. Nothing was then heard from the customer for some three months. It was held that the customer was liable for further margins paid by the broker, since his acts constituted an implied authority to advance margins and to continue the deal. Van Dusen-Harrington Co. *v.* Jungeblut, 75 Minn. 298, 77 N. W. 970, 74 Am. St. Rep. 463.

Transactions in broker's own name.—Where a broker purchases property on 'change without disclosing the name of his principal, he becomes liable personally for the price, and on payment of the same can collect it from his principal, unless the latter shows payment to the seller or a release from the broker. Knapp *v.* Simon, 96 N. Y. 284 [*reversing* 49 N. Y. Super. Ct. 17]; Knapp *v.* Simon, 86 N. Y. 311 [*reversing* 46 N. Y. Super. Ct. 225].

Measure of recovery.— Where brokers, having been ordered by a person to buy stock for him, buy and pay for it, take the certificate in their own name, offer to transfer the certificate to him, and demand payment, and he neglects to pay, they may recover from him the price paid by them, and not merely the difference between that price and the market value of the stock on the day of their demand. Gildings *v.* Sears, 103 Mass. 311.

Tender of property and demand of price.— A broker may recover of his principal for money advanced in purchasing stock without tendering it to him (Esser *v.* Linderman, 71 Pa. St. 76), unless the broker buys it in his own name, in which case he must show a demand of payment and a transfer or an offer to transfer the stock (Merwin *v.* Hamilton, 6 Duer (N. Y.) 244).

Estoppel to claim advance.— Defendant, a share-broker, bought stock for plaintiff, also a share-broker, and sent to him an account debiting him with only the premium and not the deposit, although defendant had paid both. Afterward defendant sold the same shares for plaintiff, and sent him an account, crediting him with a sum made up of both premium and deposit. Plaintiff bought and sold these shares for his own principal, and debited and credited them at the prices charged as above to himself on the purchase and sale by defendant. It was held that defendant was not precluded from charging plaintiff with the deposit on the first transaction. Dails *v.* Lloyd, 12 Q. B. 531, 12 Jur. 827, 17 L. J. Q. B. 247, 5 R. & Can. Cas. 572, 64 E. C. L. 531.

26. Marland *v.* Stanwood, 101 Mass. 470 (holding further that an action to recover for the loss is not barred by the broker's failure to notify the principal that he will hold him responsible therefor); Gregory *v.* Wendell, 40 Mich. 432; Keswick *v.* Rafter, 35 N. Y. App. Div. 508, 54 N. Y. Suppl. 850 [*affirmed* in 165 N. Y. 653, 59 N. E. 1124]; Pollock *v.* Stables, 12 Q. B. 765, 17 L. J. Q. B. 352, 5 R. & Can. Cas. 352, 64 E. C. L. 765; Bayley *v.* Wilkins, 7 C. B. 886, 18 L. J. C. P. 273, 62 E. C. L. 886; Bayliffe *v.* Butterworth, 1 Exch. 425, 11 Jur. 1019, 17 L. J. Exch. 78, 5 R. & Can. Cas. 283 (the last three cases so holding, although the broker bought in his own name).

Elements of right to recover.— Where a broker fills an order for the purchase of stocks, and his principal makes default, and he thereupon resells at a loss, it is necessary for him, in order that he may recover the amount of the loss from his principal, to show that the stock was actually purchased by himself or by an agent under his direction at its fair market price on the day of the purchase, and that he actually paid the purchase-money therefor; that he notified the principal of the purchase and requested him to receive the stock and pay the price paid for it; that at the time of this notice he was in a condition to deliver the stock, by having the stock or other proper *indicia* of title actually in hand or in the hands of his agent; that on the failure of the principal to receive the stock he, after a reasonable time and notice to that effect to the principal, directed it to be sold; and that it was sold by his agent, either at public sale in market overt or at a sale publicly and fairly made at the stock exchange or a stock board or a board of brokers where such stocks are usually sold, at a fair market value, on the day of sale. Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125.

Notice of the resale must be given to the principal. Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125. The notice of sale is not insufficient for failing to state the place of sale, where such stock was for sale only at the New York stock board, and the principal had knowledge of the fact. And where the notice of sale was given by letter, handed to the postmaster at the broker's post-office,

money for his principal in a settlement of differences in a transaction on a stock or produce exchange, he is entitled to reimbursement therefor.[27] If the principal fails or refuses to put up margins on demand, the broker may close out the transaction by buying or selling to fulfil the principal's contracts and hold the latter for any resulting loss.[28] So the broker may close out the transaction on the principal's becoming insolvent.[29] The amount of the broker's recovery is not limited to the margins in his hands, but he may recover the full loss resulting from the operation;[30] nor is it limited to what he has actually paid in the principal's behalf, but he may recover the amount for which he is legally liable.[31] A broker is not entitled to reimbursement for losses sustained through his failing to follow the principal's instructions,[32] or for expenses incurred by him beyond the limits of his authority,[33] in the absence of ratification[34] or estoppel.[35] A principal not in default is not liable for a loss resulting from the transaction's being closed out before the settling day upon the broker's becoming a defaulter on the exchange,[36] unless he ratifies the closing of the account before the settling day.[37] The broker cannot claim reimbursement, however, where the transaction in question was fictitious, and no actual purchase or sale was effected.[38] So if a broker,

who inclosed it to the postmaster at the post-office of his customer, stating that the writer requested that he would note its delivery to the person addressed, it was binding on the customer, although not received by him by reason of his failure to call at the post-office until after the day of sale. Worthington *v.* Tormey, 34 Md. 182.

27. Bartlett *v.* Smith, 13 Fed. 263, 4 McCrary 388.

28. Perin *v.* Parker, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336; Gregory *v.* Wendell, 40 Mich. 432; Knickerbocker *v.* Gould, 25 N. Y. Wkly. Dig. 548; Bibb *v.* Allen, 149 U. S. 481, 13 S. Ct. 950, 37 L. ed. 819. See also *supra*, II, D, 9.

A broker must give his principal reasonable notice to furnish the requisite margins before he can close out the latter's account for lack of margins and hold him liable for the loss (Perin *v.* Parker, 17 Ill. App. 169; Minor *v.* Beveridge, 67 Hun (N. Y.) 1, 21 N. Y. Suppl. 691), in the absence of a stipulation waiving notice (Robinson *v.* Crawford, 31 N. Y. App. Div. 228, 52 N. Y. Suppl. 560).

Agreement to carry stocks till settling day. —Where the broker agrees for a good consideration that the stocks shall not be sold before the next settling day, he loses his right of indemnity against the principal if before that day in breach of his contract he wrongfully sells the stocks. Ellis *v.* Pond, [1898] 1 Q. B. 426, 67 L. J. Q. B. 345, 78 L. T. Rep. N. S. 125.

29. Lacey *v.* Hill, L. R. 18 Eq. 182, 43 L. J. Ch. 551, 30 L. T. Rep. N. S. 484, 22 Wkly. Rep. 586.

30. Morris *v.* Brault, 24 Quebec Super. Ct. 167.

31. Lacey *v.* Hill, L. R. 18 Eq. 182, 43 L. J. Ch. 551, 30 L. T. Rep. N. S. 484, 22 Wkly. Rep. 586.

32. Boyd *v.* Yerkes, 25 Ill. App. 527; Knowlton *v.* Fitch, 48 Barb. (N. Y.) 593.

33. Park *v.* Hogle, 124 Iowa 98, 99 N. W. 185; Carpenter *v.* Momsen, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692.

34. Sentance *v.* Hawley, 13 C. B. N. S. 458, 7 L. T. Rep. N. S. 745, 11 Wkly. Rep. 311, 106 E. C. L. 458.

35. Marland *v.* Stanwood, 101 Mass. 470.

36. Duncan *v.* Hill, L. R. 8 Exch. 242, 42 L. J. Exch. 179, 29 L. T. Rep. N. S. 268, 21 Wkly. Rep. 797. See, however, Williams *v.* Aroni, 35 La. Ann. 1115, holding that where a person contracts with a cotton broker for future delivery with special reference to the rules of the New Orleans exchange, and the contract is closed out under such rules by the broker's failure before its maturity, the latter may recover from the person so contracting the amount actually disbursed.

If no loss accrues to the principal by the closing of the transaction before the settling day, he is bound to indemnify the broker for moneys expended in the purchase of stocks for him. Lacey *v.* Hill, L. R. 18 Eq. 182, 43 L. J. Ch. 551, 30 L. T. Rep. N. S. 484, 22 Wkly. Rep. 586.

37. Hartas *v.* Ribbons, 22 Q. B. D. 254, 58 L. J. Q. B. 187, 37 Wkly. Rep. 278 [*distinguishing* Duncan *v.* Hill, L. R. 8 Exch. 242, 42 L. J. Exch. 179, 29 L. T. Rep. N. S. 268, 21 Wkly. Rep. 797].

38. Butcher *v.* Krauth, 14 Bush (Ky.) 713 (holding that when a broker is directed to buy or sell for account of his principal, his duty is to buy from, or to sell to, third persons, and he cannot recover from his principal for advances made on account of transactions where orders for purchases and sales were not executed by the making of actual contracts with third persons, but orders for purchases and sales by customers were offset against each other); Didion *v.* Duralde, 2 Rob. (La.) 163; Tuell *v.* Paine, 39 Misc. (N. Y.) 712, 80 N. Y. Suppl. 956 (holding also that where a broker, being ordered to purchase stocks, never purchases them, the customer is excused from demanding them); Forget *v.* Baxter, 13 Quebec Super. Ct. 104. See also Skelton *v.* Wood, 71 L. T. Rep. N. S. 616, 15 Reports 130, holding that a broker is not entitled to recover differences

having negotiated a time option contract for his principal, cancels it before maturity by setting off against it contracts held by him on the other side of the market, without substituting some person for the one from or to whom he may have purchased or sold originally, he cannot recover of the principal losses subsequently sustained in the operation.[39] A broker is not bound to realize on collateral deposited with him by his principal as security before suing on an account against the principal.[40]

g. Commission on Transaction Effected by Principal Unaided by Broker.[41] One employing a broker to sell property may notwithstanding negotiate a sale himself, and if he does so without the agency of the broker, and before the latter has procured a purchaser, he is not liable to the broker for a commission;[42] and the same rule applies in the case of the employment of a broker to procure a loan which the principal himself afterward procures without aid.[43] The parties may by contract avoid the effect of this rule.[44]

on stock which he purports to carry over on his principal's behalf, where there is no existing contract between the broker and any third person available for the principal at the time the differences arise. However, a broker may recover the difference in the price of stock purchased for a customer and the amount at which it was sold on the latter's refusal to accept it, although he has not actually paid the money for the stock, where his agents, who made the purchase, bought on his credit and held him liable for the price. Worthington *v.* Tormey, 34 Md. 182.

39. Kent *v.* Woodhull, 55 N. Y. Super. Ct. 311, 13 N. Y. St. 319; Higgins *v.* McCrea, 116 U. S. 671, 6 S. Ct. 557, 29 L. ed. 764.

40. De Cordova *v.* Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. Rep. 538.

41. Negotiations direct with principal see *infra*, II, E, 1, m, (VIII).

42. *Arkansas.*— Hill *v.* Jebb, 55 Ark. 574, 18 S. W. 1047, so holding, although the broker produces a purchaser after a sale by the owner.

California.— Waterman *v.* Boltinghouse, 82 Cal. 659, 23 Pac. 195; Dolan *v.* Scanlan, 57 Cal. 261.

Georgia.— Doonan *v.* Ives, 73 Ga. 295.

Illinois.— See Curtis *v.* Wagner, 98 Ill. App. 345.

Indiana.— Stewart *v.* Murray, 92 Ind. 543, 47 Am. Rep. 167.

Nebraska.— Buck *v.* Hogeboom, 2 Nebr. (Unoff.) 853, 90 N. W. 635. See, however, Tubbs *v.* Mackintosh, 31 Nebr. 238, 47 N. W. 854.

New York.— McClave *v.* Paine, 49 N. Y. 561, 10 Am. Rep. 431 [*affirming* 2 Sweeny 407, 41 How. Pr. 140]; Brown *v.* Snyder, 57 N. Y. App. Div. 413, 68 N. Y. Suppl. 224; Chilton *v.* Butler, 1 E. D. Smith 150; Scherer *v.* Colwell, 43 Misc. 390, 87 N. Y. Suppl. 490. See also Harris *v.* Rogers, 15 N. Y. St. 396.

South Carolina.— Mordecai *v.* Jacobi, 12 Rich. 547.

Texas.— Evans *v.* Gay, (Civ. App. 1903) 74 S. W. 575.

See 8 Cent. Dig. tit. "Brokers," § 47.

Although the broker finds a customer before the principal sells the property yet he is not entitled to a commission if he does not notify the owner thereof before the sale is made by the latter. Baars *v.* Hyland, 65 Minn. 150, 67 N. W. 1148.

Sale after revocation of broker's authority see *supra*, II, E, 1, a, (VII).

43. Mott *v.* Ferguson, 92 Minn. 201, 99 N. W. 804. See also Tribe *v.* Taylor, 1 C. P. D. 505.

44. Kimmell *v.* Skelly, 130 Cal. 555, 62 Pac. 1067; Reed *v.* Reed, 82 Pa. St. 420. See, however, Tracey *v.* Abney, 122 Iowa 306, 98 N. W. 121; White *v.* Benton, 121 Iowa 354, 96 N. W. 876.

Consideration of contract.— Where defendant employed brokers to sell her land, and in consideration of their services agreed to pay them a commission if the sale should be made by them or by defendant herself while the contract was in force, and the land was sold by defendant before their authority was withdrawn and after they had spent time and money in attempts to procure a purchaser, they were entitled to their commission, although the purchaser was found by defendant, the time and money spent by them in attempting to procure a purchaser being a sufficient consideration to support defendant's promise to pay the commission. Kimmell *v.* Skelly, 130 Cal. 555, 62 Pac. 1067. And where a principal contracts to pay a broker a certain sum if he sells his farm, and one half the amount if he sells it without the influence of the broker, the principal, if he sells independently of the broker, cannot, on the ground that the contract is without consideration, avoid liability for the amount agreed to be paid the broker. Hoskins *v.* Fogg, 60 N. H. 402. The introduction to an owner by a broker of one who afterward buys the property is a sufficient consideration for a promise by the owner that if the agents will abstain from further efforts he will, when the sale is effected, pay them half commissions. Gibson *v.* Gray, 17 Tex. Civ. App. 646, 43 S. W. 922.

Construction of contract.— A provision in a real-estate broker's contract for commissions for the sale of land that the owner may withdraw the land from the market or raise the price on paying to the broker two per

h. Commission on Forfeited Deposit. A real-estate broker acting for the vendor is entitled to a commission on a deposit made by the prospective purchaser and forfeited by him.[45]

i. Commission From Both Parties. If a broker merely brings together the parties to an exchange or purchase and sale of property, and his employment then terminates, and the parties themselves settle the terms of the transaction, he acts as a mere middleman, and he may accordingly recover a commission from each party if each has agreed to pay him.[46] If, however, the broker is employed as the agent of either party, so that that party relies on him to secure the best bargain possible, then the general rule forbidding a secret double employment applies, and the broker cannot recover commissions from both parties to the transaction,[47]

cent of the price stipulated therein is penal in character, and must be strictly construed. Tracy *v.* Abney, 122 Iowa 306, 98 N. W. 121. A qualification of a broker's right to commissions for the sale of property that "if sold to a party sent by Mr. Repp, of this week, then no commission to be paid; also, A. Ozias," limits the time within which a sale to such persons may be made without payment of commissions to "this week." Gaty *v.* Clark, 28 Mo. App. 332.

What constitutes a sale.— A lease by defendant for five years with the exclusive privilege to the lessee of purchasing at a fixed price at any time before the expiration of the term is a sale, within the meaning of a contract running for one year and providing that if plaintiff should effect a sale of defendant's property he should receive a certain commission, and in case a sale should be made without his aid, or the property be withdrawn from sale, one half such commission. Rucker *v.* Hall, 105 Cal. 425, 38 Pac. 962. So where an owner agreed to pay a broker a certain sum in case either should "sell" certain premises, a bargain made by the owner, unaided by the broker, to sell the land at a certain sum, and take pay in cash and another parcel of land, and a conveyance accordingly by himself and wife, was a sale within the meaning of the contract. Goward *v.* Waters, 98 Mass. 596. However, one who agrees to allow a real-estate broker commissions on sales of land made by himself is not liable for commissions upon making a conveyance absolute on its face but in fact a mortgage. Terry *v.* Wilson, 50 Minn. 570, 52 N. W. 973.

Exclusive agency see *infra*, II, E, 1, m, (IX).

45. Pierce *v.* Powell, 57 Ill. 323 (holding that the vendor is entitled to the deposit forfeited, the broker being entitled only to his commission thereon); Gilder *v.* Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398 [*reversing* 18 N. Y. Suppl. 544].

46. *California.*— Clark *v.* Allen, 125 Cal. 276, 57 Pac. 985.

Colorado.— Manders *v.* Craft, 3 Colo. App. 236, 32 Pac. 836.

Indiana.— Cox *v.* Haun, 127 Ind. 325, 26 N. E. 822.

Kentucky.— See Muller *v.* Keetzleb, 7 Bush 253.

Massachusetts.— Rupp *v.* Sampson, 16 Gray 398, 77 Am. Dec. 416.

Michigan.— Montross *v.* Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323; Ranney *v.* Donovan, 78 Mich. 318, 44 N. W. 276.

Montana.— Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714.

New York.— Gracie *v.* Stevens, 171 N. Y. 658, 63 N. E. 1117 [*affirming* 56 N. Y. App. Div. 203, 67 N. Y. Suppl. 688]; Knauss *v.* Gottfried Krueger Brewing Co., 142 N. Y. 70, 36 N. E. 867 [*reversing* 62 Hun 46, 16 N. Y. Suppl. 357]; Norton *v.* Genesee Nat. Sav., etc., Assoc., 57 N. Y. App. Div. 520, 68 N. Y. Suppl. 32; Siegel *v.* Gould, 7 Lans. 177; Southack *v.* Lane, 23 Misc. 515, 52 N. Y. Suppl. 687; Bonwell *v.* Auld, 9 Misc. 65, 29 N. Y. Suppl. 15 [*affirming* 7 Misc. 447, 27 N. Y. Suppl. 936]; Balheimer *v.* Reichardt, 55 How. Pr. 414. See also Haviland *v.* Price, 6 Misc. 372, 26 N. Y. Suppl. 757.

See 8 Cent. Dig. tit. "Brokers," §§ 52, 53.

Ignorance of double employment of middleman see *infra*, note 48.

47. *District of Columbia.*— Bates *v.* Copeland, MacArthur & M. 50.

Kentucky.— Lloyd *v.* Colston, 5 Bush 587.

Maryland.— Raisin *v.* Clark, 41 Md. 158, 20 Am. Rep. 66.

Massachusetts.— Follansbee *v.* O'Reilly, 135 Mass. 80.

Michigan.— Hale *v.* Knapp, 134 Mich. 622, 96 N. W. 1060 (holding that a real-estate agent having property of others for sale, who requests a prospective buyer to go with him to see the property, cannot charge the latter for his services and expenses in making such trip); Horwitz *v.* Pepper, 128 Mich. 688, 87 N. W. 1034; Friar *v.* Smith, 120 Mich. 411, 79 N. W. 633, 46 L. R. A. 229; Leathers *v.* Canfield, 117 Mich. 277, 75 N. W. 612, 45 L. R. A. 33; Scribner *v.* Collar, 40 Mich. 375, 29 Am. Rep. 541.

Minnesota.— Dartt *v.* Sonnesyn, 86 Minn. 55, 90 N. W. 115.

Missouri.— De Steiger *v.* Hollington, 17 Mo. App. 382.

New York.— Pugsley *v.* Murray, 4 E. D. Smith 245; Dunlop *v.* Richards, 2 E. D. Smith 181; Watkins *v.* Cousall, 1 E. D. Smith 65; Brierly *v.* Connelly, 31 Misc. 268, 64 N. Y. Suppl. 9; Norman *v.* Reuther, 25 Misc. 161, 54 N. Y. Suppl. 152. See also Levy *v.* Loeb, 85 N. Y. 365.

Pennsylvania.— Linderman *v.* McKenna, 20 Pa. Super. Ct. 409.

unless they consent to his acting for both either expressly or by implication from the circumstances of the case.[48]

j. Rate or Amount of Compensation.[49] The rate or amount of compensation to which a broker is entitled is commonly governed by contract, and in determining the question the courts resort to the rules of construction applicable to contracts in general.[50] In the absence of a special agreement as to the matter,

Wisconsin.— Meyer *v.* Hanchett, 43 Wis. 246.

See 8 Cent. Dig. tit. "Brokers," §§ 52, 53.

Subsequent payment of commission by adverse party.— The fact that after the transaction is closed to the principal's satisfaction the adverse party pays the broker an additional commission does not deprive him of the right to a commission from his principal, in the absence of a previous double employment or bad faith. Campbell *v.* Yager, 32 Nebr. 266, 49 N. W. 181; Minster *v.* Benoliel, 32 Misc. (N. Y.) 630, 66 N. Y. Suppl. 493 [*reversed* on another point in 33 Misc. 586, 67 N. Y. Suppl. 1044]; Jones *v.* Henry, 15 Misc. (N. Y.) 151, 36 N. Y. Suppl. 483. See also Harvey *v.* Mainhart, 31 Pittsb. Leg. J. (Pa.) 60.

Recovering back commission.— Where an agent, in effecting a sale of property for his principal, has taken a secret commission from the purchaser, the principal, notwithstanding that he has recovered from the agent the amount of the secret commission, is further entitled to recover back the commission which he himself has paid to the agent. Andrews *v.* Ramsay, [1903] 2 K. B. 635, 72 L. J. K. B. 865, 89 L. T. Rep. N. S. 450, 52 Wkly. Rep. 126.

Loan broker.— A broker employed by the owner of lands to procure a sale thereof to one who shall agree to take from the owner a loan and improve the property cannot, after recovering compensation from the owner of the property for effecting the sale, recover compensation from the purchaser for procuring the loan to him. Vanderpoel *v.* Kearns, 2 E. D. Smith (N. Y.) 170.

Representing adverse interest as defeating right to commission see *supra*, II, E, **1**, d, (II).

Validity of custom allowing broker to collect commissions from each party for effecting an exchange see *supra*, page 201 note 36.

48. *Indiana.*— Alexander *v.* Northwestern Christian Univ., 57 Ind. 466.

Michigan.— Scribner *v.* Collier, 40 Mich. 375, 29 Am. Rep. 541.

Missouri.— De Steiger *v.* Hollington, 17 Mo. App. 382; Collins *v.* Fowler, 8 Mo. App. 588.

New York.— Rowe *v.* Stevens, 53 N. Y. 621 [*affirming* 35 N. Y. Super. Ct. 189]; Geery *v.* Pollock, 16 N. Y. App. Div. 321, 44 N. Y. Suppl. 673; Abel *v.* Disbrow, 15 N. Y. App. Div. 536, 44 N. Y. Suppl. 573; Lansing *v.* Bliss, 86 Hun 205, 33 N. Y. Suppl. 310; Dunlop *v.* Richards, 2 E. D. Smith 181; Whiting *v.* Saunders, 22 Misc. 539, 49 N. Y. Suppl. 1016; Haviland *v.* Price, 6 Misc. 372, 26 N. Y. Suppl. 757.

North Carolina.— Lamb *v.* Baxter, 130 N. C. 67, 40 S. E. 850.

Pennsylvania.— Maxwell *v.* West, 23 Pa. Co. Ct. 302.

Wisconsin.— Meyer *v.* Hanchett, 43 Wis. 246.

See 8 Cent. Dig. tit. "Brokers," § 54.

Knowledge of double employment.— If the broker acts as a mere middleman it is immaterial that each party to the transaction was ignorant of the broker's employment by the other party. Montross *v.* Eddy, 94 Mich. 100, 53 N. W. 916, 34 Am. St. Rep. 323.

49. Damages for breach of contract see *supra*, II, C. 4.

Recovery of compensation other than commission see *supra*, II, E, 1, f.

50. For various illustrations see the following cases:

Georgia.— Emery *v.* Atlanta Real Estate Exch., 88 Ga. 321, 14 S. E. 556.

Illinois.— Kerfoot *v.* Steele, 113 Ill. 610.

Iowa.— Heaton *v.* Clark, 122 Iowa 716, 98 N. W. 597.

Michigan.— Culver *v.* Nester, 116 Mich. 191, 74 N. W. 532.

Minnesota.— Emerson *v.* Pacific Coast, etc., Packing Co., 92 Minn. 523, 100 N. W. 365.

Missouri.— Clay *v.* Lakenan, 101 Mo. App. 563, 74 S. W. 391.

New York.— Gilder *v.* Davis, 137 N. Y. 504, 33 N. E. 599, 20 L. R. A. 398 [*reversing* 18 N. Y. Suppl. 544]; Phelps *v.* Cable R. Co., 122 N. Y. 639, 25 N. E. 394; Berdell *v.* Allen, 116 N. Y. 661, 22 N. E. 1099 [*affirming* 54 N. Y. Super. Ct. 38]; Wolfsohn *v.* Haven, 95 N. Y. App. Div. 621, 88 N. Y. Suppl. 475; Hart *v.* L. D. Garrett Co., 93 N. Y. App. Div. 145, 87 N. Y. Suppl. 574; Gatling *v.* Central Spar Verein, 67 N. Y. App. Div. 50, 73 N. Y. Suppl. 496 (holding that where a principal agreed to pay a broker, for procuring a loan, a certain sum to cover all fees, lawyers' charges, advertising, etc., the broker could not, on the principal's preventing performance, recover the full sum named); Dean *v.* Woodward, 52 Hun 421, 5 N. Y. Suppl. 593 (holding that a broker employed by the year was entitled to compensation only on sales made to customers secured during the current year, and not on sales made to those secured in prior years); Robert *v.* Sire, 33 Misc. 755, 67 N. Y. Suppl. 860; Buckhout *v.* Berger, 6 Misc. 432, 27 N. Y. Suppl. 133 (holding that where defendant employed a broker to procure a person to erect a building and lease it to defendant for ten per cent of its cost for a term of years, the broker's commissions are not limited by the amount of the rentals).

the broker is entitled to a reasonable compensation,[51] and this usually depends

Pennsylvania.— Leimbach *v.* Yarnall, 17 Phila. 211.

Texas.— Jenkins *v.* Darling, (Civ. App. 1900) 56 S. W. 931; Webb *v.* Barclay, (Civ. App. 1897) 40 S. W. 1026.

Virginia.— Humphreys *v.* Hoge, (1896) 25 S. E. 106.

England.— Biggs *v.* Gordon, 8 C. B. N. S. 638, 98 E. C. L. 638.

See 8 Cent. Dig. tit. "Brokers," §§ 55, 56.

Pro rata commission.— Where an owner authorizes a sale of his property at the minimum price per acre, and agrees to give the broker a certain per cent commission, the broker is entitled to the same commission for a higher price obtained by him. Brackenridge *v.* Claridge, (Tex. Civ. App. 1897) 42 S. W. 1005. So where a real-estate broker procures a purchaser at the agreed price, and the owner sells to him for a less sum on discovering that the land does not contain the supposed number of acres, the broker is entitled to his commission at the agreed rate on the latter sum. Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689. And where the terms of sale are fixed by the vendor, in accordance with which the broker undertakes to produce a purchaser, and upon the procurement of a purchaser the vendor voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, the broker will be entitled to his commission at the rate specified in his agreement with his principal. Stewart *v.* Mather, 32 Wis. 344. See also Raeder *v.* Butler, 19 Pa. Super. Ct. 604. It has been held, however, that where a real-estate broker is entitled to a commission of one third of the excess above a certain amount realized on the sale of four houses, he is not entitled to a proportionate amount on the sale of only one house (Mayor *v.* Haaren, 57 N. Y. Super. Ct. 574, 5 N. Y. Suppl. 436); and that a contract to pay a certain commission on the sale of lots at a fixed price out of a body of land does not entitle the agent to a commission at the same rate for a large body of the land (Louisville Bldg. Assoc. *v.* Hegan, 49 S. W. 796, 20 Ky. L. Rep. 1629).

Right of broker to excess over price named by vendor.— A real-estate agent employed to sell land for a certain price is not entitled to any excess over such price that he may obtain for the land (Snow *v.* Mcfarlane, 51 Ill. App. 448; Turnley *v.* Michael, (Tex. App. 1891) 15 S. W. 912), in the absence of agreement therefor (Blakeslee *v.* Ervin, 40 Nebr. 130, 58 N. W. 850). Agreement for sale at net price see also *infra*, note 78.

Evidence of agreed amount.— Where plaintiff testified that he told defendant what the commission would be for the lease of his property, but was silent as to what the commission was, and defendant says that the first claim plaintiff made was three hundred and fifty dollars, plaintiff cannot recover a larger amount. Duncan *v.* Borden, 13 Colo. App. 481, 59 Pac. 60. The fact that a merchant had settled with another dealer, who furnished a part of the merchandise sold by a broker, on the basis of a representation made by him that the broker was to receive as his commission all that the merchandise sold for above a certain price does not conclusively establish, in an action by the broker against the merchant for such commission, that he is entitled thereto. May *v.* Schuyler, 43 N. Y. Super. Ct. 95. However, in the absence of a special agreement, evidence that the broker was willing to accept a specified sum does not show that he was not entitled to the entire amount of brokerage. Donohue *v.* Flanagan, 9 N. Y. Suppl. 273.

Evidence of value of property.— A judgment for brokerage measured on the value of the property at the time of sale on the exchange is not sustained, where there is no proof of a positive nature showing such value. McCormick *v.* McCaffrey, 32 Misc. (N. Y.) 727, 66 N. Y. Suppl. 390.

51. *Connecticut.*— Hartman *v.* Warner, 75 Conn. 197, 52 Atl. 719.

Massachusetts.— Hollis *v.* Weston, 156 Mass. 357, 31 N. E. 483.

Nebraska.— Lansing *v.* Johnson, 18 Nebr. 174, 24 N. W. 726.

New York.— Baer *v.* Koch, 2 Misc. 334, 21 N. Y. Suppl. 974.

Texas.— Harrell *v.* Zimpleman, 66 Tex. 292, 17 S. W. 478.

See 8 Cent. Dig. tit. "Brokers," §§ 55, 56.

If the amount of compensation is fixed by express contract, the broker is not entitled to a reasonable compensation independently of contract. McDermott *v.* Abney, 106 Iowa 749, 77 N. W. 505; Beatty *v.* Russell, 41 Nebr. 321, 59 N. W. 919; Evans *v.* Gay, (Tex. Civ. App. 1903) 74 S. W. 575.

Compensation for getting option.— One not employed to purchase property but simply to procure an option and whose employer does not avail himself of the services rendered to make the purchase is entitled only to reasonable compensation and not to the same compensation to which he would have been entitled had he been employed to purchase the property. Boardman *v.* Hanks, 185 Mass. 555, 70 N. E. 1012.

Compensation for negotiating lease see Schultz *v.* Goldman, (Ariz. 1901) 64 Pac. 425; Daube *v.* Nessler, 50 Ill. App. 166, holding that the value of the services of a real-estate broker for negotiating a lease cannot be measured by the value of the fee, regardless of the terms of the lease.

Compensation less than commission.— If a broker employed to effect a sale at a certain commission merely procures a customer who subsequently purchases of the owner directly, a judgment awarding the broker a less sum than the commission on a completed sale will

upon the amount allowed by custom or usage locally prevailing among the particular class of brokers in question.[52] In estimating the commission upon an exchange of real estate the actual and not the trade value of the property should be taken as the basis.[53] If several properties are sold without a separate valuation, a broker who was promised a certain percentage of the proceeds of the sale of part of the properties is entitled to that percentage of the proceeds of all.[54] A broker who agrees to take real estate as compensation is entitled to recover a commission in cash upon the principal's refusal to convey the realty.[55] In some cases the amount of compensation is governed by statute.[56]

not be set aside on appeal. Gregg *v.* Loomis, 22 Nebr. 174, 34 N. W. 355.

Excessiveness of commission.— A commission of two and one-half per cent for selling property is not excessive. Gracie *v.* Stevens, 171 N. Y. 658, 63 N. E. 1117 [*affirming* 56 N. Y. App. Div. 203, 67 N. Y. Suppl. 688].

52. *Connecticut.*— Hartman *v.* Warner, 75 Conn. 197, 52 Atl. 719; Williams *v.* Clowes, 75 Conn. 155, 52 Atl. 820.

Iowa.— See Sample *v.* Rand, 112 Iowa 616, 84 N. W. 683.

Maryland.— See Thomas *v.* Brandt, (1893) 26 Atl. 524.

Massachusetts.— Graves *v.* Dill, 159 Mass. 74, 34 N. E. 336.

Missouri.— Ashby *v.* Holmes, 68 Mo. App. 23; Green *v.* Wright, 36 Mo. App. 298.

Nebraska.— Lansing *v.* Johnson, 18 Nebr. 174, 24 N. W. 726.

New York.— Robinson *v.* Norris, 51 How. Pr. 442 (holding that one who employs stock-brokers to purchase, carry, and sell stocks on his account cannot dispute, as too high, the rates of commissions charged against him for raising money to carry his stocks in a stringent money market, where he is informed of their custom in that respect at the beginning of their dealings, and is kept informed at short intervals of the daily state of his accounts with them, and makes no objection thereto until a settlement is demanded); Hull *v.* Cardwell, 2 N. Y. City Ct. 76 (holding that since, in the absence of any express agreement, the custom is to allow percentage on the actual rental, a broker who procures a tenant for premises for six months at the rate of one thousand dollars a year is entitled to brokerage on five hundred dollars only).

Pennsylvania.— Potts *v.* Aechternacht, 93 Pa. St. 138; Inslee *v.* Jones, Brightly 76.

England.— Spain *v.* Parr, 39 L. J. Ch. 73, 21 L. T. Rep. N. S. 555, 18 Wkly. Rep. 110. See also Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771.

See 8 Cent. Dig. tit. "Brokers," §§ 55, 56.

See, however, Harrell *v.* Zimpleman, 66 Tex. 292, 17 S. W. 478 (holding that, where property is placed in the hands of a real-estate agent for sale, he is entitled to reasonable compensation for his services, regardless of custom, in the absence of a contract making the right to compensation dependent on the sale of the property by him); Hinton *v.* Coleman, 45 Wis. 165 (holding that evidence that the customary commission on sales on real estate is three per cent of the price is not sufficient evidence of the value of the services rendered in making such a sale to sustain a recovery upon a *quantum meruit* therefor).

The custom must be certain, uniform, and generally understood else it is not binding on the principal. Inslee *v.* Jones, Brightly (Pa.) 76; Pratt *v.* Bank, 12 Phila. (Pa.) 378. See also Calland *v.* Trapet, 70 Ill. App. 228; Potts *v.* Aechternacht, 93 Pa. St. 138.

Extra charges in stock transaction.— A broker carrying stock in the New York stock market for a principal at an agreed rate has no right to make extra charges in a time of panic, even though he paid a New York broker as high as one per cent a day, and the acceptance by the principal upon a sale of the stock of the balance due on the statement rendered, in which such charges were included, is no more than competent evidence of an agreement authorizing them. Wagner *v.* Peterson, 83 Pa. St. 238.

53. Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120; Porter *v.* Hellingsworth, 30 Misc. (N. Y.) 628, 62 N. Y. Suppl. 796. See also Calland *v.* Trapet, 70 Ill. App. 228.

54. Huff *v.* Hardwick, (Colo. App. 1904) 75 Pac. 593.

55. Morey *v.* Harvey, 18 Colo. 40, 31 Pac. 719.

56. Cook *v.* Phillips, 56 N. Y. 310; Broad *v.* Hoffman, 6 Barb. (N. Y.) 177; Corp *v.* Brown, 2 Sandf. (N. Y.) 293; Vanderpoel *v.* Kearns, 2 E. D. Smith (N. Y.) 170, all decided under a statute regulating the commissions chargeable by loan brokers.

Effect of statute on contract for greater compensation.— A statute which forbids any person to charge more than one half of one per cent brokerage for procuring a loan, but does not prescribe any penalty for its violation, does not render void a contract for a greater brokerage, but the broker can recover only the statutory amount. Buchanan *v.* Tilden, 18 N. Y. App. Div. 123, 45 N. Y. Suppl. 417.

Operation of statute.— 1 N. Y. Rev. St. p. 709, restricting brokers' fees for negotiating loans to one half of one per cent on the amount loaned, applies to a contract for a loan procured while the statute was in force, although not sought to be enforced until after the statute was changed. Anderson *v.* Dwyer, 61 N. Y. Suppl. 1114 [*affirmed* in 30 Misc. 793, 63 N. Y. Suppl. 201].

k. Persons Entitled to Compensation[57] — (I) *In General.* The broker who effects a sale is ordinarily the one who is entitled to the commission.[58]

(II) *Subagents.*[59] A real-estate broker and his subagent stand in practically the same relative position *inter se* with reference to the right to compensation as do the principal and the broker.[60] Ordinarily the principal is not liable to compensate a subagent employed by the broker.[61]

(III) *Agreements For Division of Commission.* A broker who has been employed to negotiate a transaction frequently calls in the aid of another broker, with whom he agrees to divide the commission. The rights and liabilities of the parties under these arrangements depend upon their particular terms, and if valid[62] they are construed and enforced the same as other contracts.[63] A broker with whom the commission for selling land is to be divided must deal fairly by the other,[64] and if he transacts business directly with the owner and finds a purchaser and collects the commission he is liable to the other for his share of it,[65] without any request on the part of the principal to deliver it to that other.[66] If the broker with whom the commission for selling land is to be divided himself

57. Right to compensation as between rival brokers see *infra*, II, E, 1, m, (VII).

58. O'Toole *v.* Dolan, 129 Cal. 471, 62 Pac. 30 (holding that where mine owners executed a written contract to sell the mine to a broker on certain conditions, and orally agreed that if he did not buy it himself but effected a sale they would pay him a certain commission, and the broker assigned the contract to another, who assigned it to a third person, who bought the mine, a finding that the broker effected the sale is not contrary to the law and facts); McCann *v.* Bailey, 60 Mo. App. 456 (holding that one real-estate agent cannot recover from another commissions for a sale of property which was in fact made by another firm of agents, and not induced by anything said or done by plaintiff, although plaintiff was the first to disclose to defendant the name of the purchaser); Yarborough *v.* Creager, (Tex. Civ. App. 1903) 77 S. W. 645 (holding that, if a broker was the procuring cause of the sale, his right to a commission does not depend upon any contract the principal may have made with other brokers relative to the sale); Arnold *v.* Garner, 11 Jur. 339, 16 L. J. Ch. 339, 2 Phil. 231, 22 Eng. Ch. 231, 41 Eng. Reprint 931 (holding that, where brokers are directed by an order of the court to take possession for the purpose of selling property, they are entitled to the ordinary remuneration, notwithstanding that they are mortgagees).

59. Authority to employ subagent in general see *supra*, II, C, 2, d.

Ratification of employment of subagent see *supra*, II, E, 1, a, (IV).

60. *Colorado.*— Leonard *v.* Roberts, 20 Colo. 88, 36 Pac. 880.

Missouri.— Hill *v.* Morris, 15 Mo. App. 322.

New York.— Whiting *v.* Saunders, 23 Misc. 332, 51 N. Y. Suppl. 211 (holding that where a real-estate broker is employed to and does effect an exchange of real property, the disclosure to him of a principal for whom his employer is acting as agent does not deprive him of his right to recover his commissions from the agent, if it is not made until after the transaction has been in fact negotiated, although prior to the actual execution of the contract for the exchange); Weinstein *v.* Golding, 17 Misc. 613, 40 N. Y. Suppl. 680.

Texas.— Eastland *v.* Maney, (Civ. App. 1904) 81 S. W. 574 (holding that where an agent employed to sell land employed a subagent, agreeing to sell at a certain price if the owners agreed to take it, the subagent took the risk of getting his commission from making a sale at that price); Blake *v.* Austin, (Civ. App. 1903) 75 S. W. 571.

Wisconsin.— Barthell *v.* Peter, 88 Wis. 316, 60 N. W. 429, 43 Am. St. Rep. 906.

See 8 Cent. Dig. tit. "Brokers," § 60.

61. Hill *v.* Morris, 15 Mo. App. 322; Carroll *v.* Tucker, 2 Misc. (N. Y.) 397, 21 N. Y. Suppl. 952; Mason *v.* Clifton, 3 F. & F. 899.

62. Wilson *v.* Gregory, 36 N. J. L. 315, 13 Am. Rep. 448, holding that where a broker procured a customer for another broker upon the understanding that the latter should charge for procuring a loan of money at a rate prohibited by statute, and that the commission should be shared between them, he could not recover a share of the commission paid by the customer.

63. See for example Whitcomb *v.* Dickinson, 169 Mass. 16, 47 N. E. 426 (holding that where a broker for the sale of land who agreed to pay other brokers a certain sum out of his own commission if they sold at a certain price but who had no interest in the land, as such brokers knew, is not liable to them for commissions on a sale at a less price); Halperin *v.* Callender, 17 Misc. (N. Y.) 362, 39 N. Y. Suppl. 1044; Dearing *v.* Sears, 3 N. Y. Suppl. 31.

64. Talbott *v.* Luckett, (Md. 1894) 30 Atl. 565.

65. Kohn *v.* Jacobs, 4 Misc. (N. Y.) 265, 23 N. Y. Suppl. 1033. See also Dearing *v.* Sears, 3 N. Y. Suppl. 31.

66. Kaufman *v.* Bloch, 5 Misc. (N. Y.) 404, 25 N. Y. Suppl. 758.

purchases the property he is entitled to no share of the commission,[67] and if the owner himself sells the property and no commission is paid the agreement for division of commissions becomes inoperative.[68] If the owner pays the commission to the broker with whom he deals without notice of the other broker's rights, he is not liable to the other for his share of the commission.[69]

I. Persons Liable For Compensation.[70] The question of who is liable for commissions due a broker depends on the circumstances of the particular case.[71] Ordinarily the person employing the broker is liable,[72] but this rule may be

67. Morgenstern *v.* Hill, 8 Misc. (N. Y.) 356, 28 N. Y. Suppl. 704.

68. McCann *v.* Sawyer, 59 Mo. App. 480.

69. Ranney *v.* Donovan, 78 Mich. 318, 44 N. W. 276.

70. **Identity of principal** see *supra*, II, C, 2, c.

71. *Iowa.*— Wilson *v.* Webster, 88 Iowa 514, 55 N. W. 571, where the purchaser was held not liable.

Kentucky.— Schamberg *v.* Auxier, 101 Ky. 292, 40 S. W. 911, 19 Ky. L. Rep. 548, holding that where a title bond is executed to several joint purchasers, each is bound for the whole commission payable to one who has assisted them in making the purchase.

Louisiana.— Miller *v.* Curtis, 23 La. Ann. 33, holding that where a prospective purchaser of land was informed by the broker that the terms of the sale included the payment of the brokerage by the purchaser, and he joined with him in the purchase another who knew nothing of the agreement to pay brokerage, he was liable to the broker for the full amount of the brokerage.

New York.— Redfield *v.* Tegg, 38 N. Y. 212 (holding that where a broker's services in effecting an exchange were rendered in pursuance of a prior employment by one of the parties, the fact that the other party joined the one in a written promise to pay the commission did not release the one from his liability); Smyth *v.* Mack, 19 N. Y. Suppl. 347 (where a nominal vendor was held not liable for the commission); Fitch *v.* Cunningham, 27 N. Y. Wkly. Dig. 198 (holding that a broker negotiating with the president of a corporation to find a buyer of certain products of the corporation, and obtaining an agreement of the president personally to pay him on his objecting to the corporation's financial standing, makes no contract with the corporation, but is entitled to recover of the president, as soon as he obtains such buyer).

Pennsylvania.— Diehl *v.* Levis, 1 Wkly. Notes Cas. 483, holding that where property in the hands of a trustee is sold by a broker under an employment by the equitable owner, the trustee, who conveys the legal title, is not liable for commissions.

Virginia.— Humphreys *v.* Hoge, (1896) 25 S. E. 106, where a person taking a "deal" from the hands of a prospective purchaser was held to assume the payment of the commission as well as of the price of the property.

England.— Gunn *v.* Showell's Brewery Co., 50 Wkly. Rep. 659, holding that where a corporation employed a broker to find property for it, and subsequently a new corporation was formed which was merely ancillary to the old, and the new company purchased the property found by the broker, it was liable for the commission.

See 8 Cent. Dig. tit. "Brokers," § 62.

72. *Connecticut.*— Williams *v.* Clowes, 75 Conn. 155, 52 Atl. 820.

Maryland.— Jones *v.* Adler, 34 Md. 440.

Michigan.— Moore *v.* Daiber, 92 Mich. 402, 52 N. W. 742.

Missouri.— Adams *v.* Dieren, 92 Mo. App. 129, holding that where a person wishing to purchase certain realty engages a broker to secure it for him, and subsequently, without the knowledge of the broker, secures the services of a third person, who makes the purchase and receives the commission, the broker cannot maintain an action against the latter to recover the commission, as his remedy is against the party employing him.

New York.— Whiting *v.* Saunders, 22 Misc. 539, 49 N. Y. Suppl. 1016; Landsberger *v.* Murray, 6 Misc. 605, 25 N. Y. Suppl. 1007.

Texas.— Taylor *v.* Cox, (Sup. 1891) 16 S. W. 1063.

See 8 Cent. Dig. tit. "Brokers," § 62.

Agents.— One who procures a real-estate broker to obtain a loan on land, without disclosing the name of the owner of the land, for whom the loan is in fact intended, is himself liable for the value of the broker's services. Bacon *v.* Rupert, 39 Minn. 512, 40 N. W. 832. So where an agent assumes without authority to employ a broker, he may be held personally liable for a commission. Brown *v.* Barse, 3 N. Y. App. Div. 257, 38 N. Y. Suppl. 400.

Executors and administrators.— A promise by a person to a broker to compensate him on a sale of land, followed by a sale made by such person as administrator, constitutes a personal contract, unconnected with the ownership of the land, upon which compensation is recoverable. Moore *v.* Daiber, 92 Mich. 402, 52 N. W. 742. An admission by defendant executor, in an action for commission for procuring a purchaser of testator's land, that he was an executor and trustee under the will, is not sufficient to show him authorized to sell the land, so as to render him officially liable. Guthmann *v.* Meuer, 31 Misc. (N. Y.) 810, 63 N. Y. Suppl. 971.

Guardians.— Where, in employing plaintiff as a real-estate broker to effect a sale of lands, defendant acted as guardian of the

changed by contract between the parties interested.[73] One who employs a broker to find a purchaser is usually liable for compensation regardless of the nature of his interest in the property,[74] and of whether or not he has any interest in it whatsoever.[75] A real-estate broker representing one party only cannot recover commissions from the other.[76]

m. Sufficiency of Services of Broker — (i) *In General.* A broker is not entitled to compensation until he has performed the undertaking assumed by him.[77] The right to compensation depends upon a performance of the stipula-

owner, and had no personal or private interest in the property, all of which was known to plaintiff, defendant cannot be charged individually for a commission. Hudson *v.* Scott, 125 Ala. 172, 28 So. 91.

Officers of corporation.— Where defendant in his negotiations with the broker did not purport to bind himself individually, but purported to bind a corporation of which he was president, no recovery can be had against him for commissions. Groeltz *v.* Armstrong, (Iowa 1904) 99 N. W. 128.

Partners.— Where a customer of stockbrokers had a speculative account with them standing in his own name but in which he and two other parties, one of them an agent of the brokers, were interested, the brokers were entitled to regard all three as partners in the transaction, and the customer was therefore individually liable for the entire balance due to the brokers on the account. Wolff *v.* Lockwood, 70 N. Y. App. Div. 569, 75 N. Y. Suppl. 605.

Liability of husband employing broker to sell wife's property see *infra*, note 75.

73. Parker *v.* Merrill, 173 Mass. 391, 53 N. E. 913; King *v.* Benson, 22 Mont. 256, 56 Pac. 280 (holding that where a broker was told by the principal that he must look to the intending purchasers for his compensation for making the sale, and nothing else was ever said about compensation, he cannot recover his commissions from the principal); Bab *v.* Hirschbein, 11 N. Y. Suppl. 776; McClave *v.* Maynard, 35 How. Pr. (N. Y.) 313; Bowles *v.* Allen, (Va. 1895) 21 S. E. 665.

Consideration of contract.—A contract by a person having no interest in the transaction to pay the commission if a sale is effected is void unless based on a sufficient consideration. Smyth *v.* Mack, 19 N. Y. Suppl. 347. There is a sufficient consideration for a promise to pay a commission, however, where a broker requested by an owner to find a purchaser at a certain price showed it to defendant, who told the broker that he (defendant) could do better by negotiating personally with the owner, and that if the broker would keep out of the way he would pay him a commission when he bought the land. Abraham *v.* Goldberg, 6 Misc. (N. Y.) 43, 25 N. Y. Suppl. 1113. See also Myers *v.* Dean, 132 N. Y. 65, 30 N. E. 259 [*reversing* 16 Daly 251, 10 N. Y. Suppl. 532].

Oral agreement to pay commission due from another see, generally, FRAUDS, STATUTE OF.

74. Jones *v.* Adler, 34 Md. 440 (holding that an employer is liable whether he holds the legal title beneficially or in trust); Taylor *v.* Cox, (Tex. Sup. 1891) 16 S. W. 1063 (holding that one who does not own the property but has an interest therein is liable).

75. *California.*— Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430, where brokers employed by a husband were ignorant that the property belonged to the wife.

Iowa.— Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098, where a husband was held liable to a broker whom he employed to sell his wife's property.

Missouri.— Enright *v.* Ford, 106 Mo. App. 705, 80 S. W. 291.

New York.— Sistare *v.* Best, 88 N. Y. 527; Whiting *v.* Saunders, 22 Misc. 539, 49 N. Y. Suppl. 1016; Dearing *v.* Sears, 3 N. Y. Suppl. 31, in both of which last two cases a husband employed a broker to sell his wife's property.

Oklahoma.— Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92.

See 8 Cent. Dig. tit. "Brokers," § 62.

Defect in principal's title as defeating right to commission see *infra*, II, E, 1, m, (x), (A), (2).

Liability of employer who acts in representative capacity see *supra*, note 72.

76. *Arkansas.*— Boysen *v.* Robertson, 70 Ark. 56, 68 S. W. 243.

Maryland.— Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

New Jersey.— Callaway *v.* Equitable Trust Co., 67 N. J. L. 44, 50 Atl. 900.

New York.— Carman *v.* Beach, 63 N. Y. 97; Haynes *v.* Fraser, 76 N. Y. App. Div. 627, 78 N. Y. Suppl. 794; Curry *v.* Terry, 34 Misc. 797, 69 N. Y. Suppl. 932; Carroll *v.* O'Shea, 18 N. Y. Suppl. 146.

Pennsylvania.— Wireman's Estate, 7 Pa. Dist. 759, 43 Wkly. Notes Cas. 334.

Canada.— Browne *v.* Gault, 19 Quebec Super. Ct. 523.

See 8 Cent. Dig. tit. "Brokers," § 62.

Representing adverse interest as defeating right to commission see *infra*, II, E, 1, d, (II).

77. *Alabama.*— Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. 722.

Colorado.— Manby *v.* Turner, 13 Colo. App. 358, 57 Pac. 862.

Massachusetts.— Caston *v.* Quimby, 178 Mass. 153, 59 N. E. 653, 52 L. R. A. 785.

New Jersey.— Demarest *v.* Spiral Riveted Tube Co., (Sup. 1904) 58 Atl. 161.

New York.— Fraser *v.* Wyckoff, 63 N. Y. 445 [*affirming* 2 Hun 545, 5 Thomps. & C. 707].

tions and conditions of the contract of agency,[78] and the broker must act strictly according to the authority conferred on him by the principal.[79] If for example a real-estate broker accepts an employment which makes his right to compensation depend upon procuring a vendor or a purchaser on specified terms, he cannot recover if he does not perform that service.[80] If on the other hand a broker

Ohio.— West *v.* Stoeckel, 6 Ohio Dec. (Reprint) 1082, 10 Am. L. Rec. 309.

See 8 Cent. Dig. tit. "Brokers," §§ 65, 70.

Unavailing efforts of the broker to perform the service imposed upon him do not entitle him to a commission. Didion *v.* Duralde, 2 Rob. (La.) 163; Blanc *v.* New Orleans Imp. Co., 2 Rob. (La.) 63; Sherburne Land Co. *v.* Eells, 92 Minn. 114, 99 N. W. 419; Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 22 Am. Rep. 441.

Partial performance.— A broker who agrees to sell slaves for a certain commission cannot charge a commission on such as remain unsold. Gourjon *v.* Cucullu, 4 La. 115.

78. *California.*— Quiggle *v.* Prouty, (1896) 45 Pac. 676.

Illinois.— Champion Iron Fence Co. *v.* Bradley, 10 Ill. App. 328.

Maryland.— Attrill *v.* Patterson, 58 Md. 226.

New Hampshire.— Lebanon *v.* Heath, 47 N. H. 353.

New York.— Gatling *v.* Menke, 34 Misc. 787, 69 N. Y. Suppl. 972; Brown *v.* Snyder, 30 Misc. 540, 63 N. Y. Suppl. 845 [*affirming* 57 N. Y. App. Div. 413, 68 N. Y. Suppl. 224].

Pennsylvania.— Kellogg *v.* Conklin, 6 Phila. 177.

England.— Toppin *v.* Healey, 11 Wkly. Rep. 466.

See 8 Cent. Dig. tit. "Brokers," § 70.

Authority to sell for net price.— Where a broker is employed to sell property for a net price, he is entitled to nothing, unless a greater sum than that price is paid by the purchaser (Babcock *v.* Merritt, 1 Colo. App. 84, 27 Pac. 882; Rees *v.* Spruance, 45 Ill. 308; Songer *v.* Wilson, 52 Ill. App. 117; Antisdel *v.* Canfield, 119 Mich. 229, 77 N. W. 944; Beatty *v.* Bussell, 41 Nebr. 321, 59 N. W. 919; Manton *v.* Cabot, 4 Hun (N. Y.) 73, 6 Thomps. & C. (N. Y.) 203; Holbrook *v.* Investment Co., 30 Oreg. 259, 47 Pac. 920; Frey *v.* Klar, (Tex. Civ. App. 1902) 69 S. W. 211; Ames *v.* Lamont, 107 Wis. 531, 83 N. W. 780. See, however, Alexander *v.* Breeden, 14 B. Mon. (Ky.) 154; Aikins *v.* Allan, 14 Manitoba 549, holding that a broker was entitled to recover on a *quantum meruit* the full amount of the usual commission on the net price), and he cannot recover of the owner where the sale is not completed (Ford *v.* Brown, 120 Cal. 551, 52 Pac. 817; Seattle Land Co. *v.* Day, 2 Wash. 451, 27 Pac. 74; Beale *v.* Bond, 84 L. T. Rep. N. S. 313).

79. Alta Invest. Co. *v.* Worden, 25 Colo. 215, 53 Pac. 1047; Hoyt *v.* Shipherd, 70 Ill. 309; Gatling *v.* Menke, 34 Misc. (N. Y.) 787, 69 N. Y. Suppl. 972; Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268.

Evidence of compliance with instructions.— Where the owner, on being informed by the broker that he has sold the land refuses to convey without objecting to the terms of sale, such conduct is some evidence that the sale conformed to the directions given the broker. Smith *v.* Keeler, 151 Ill. 518, 38 N. E. 250 [*affirming* 51 Ill. App. 267].

Immaterial excess of authority.— Where defendant commissioned real-estate brokers to find a purchaser for lands, the fact that they exceeded their authority by making a contract of sale is not material in an action to recover their commissions. Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430.

80. *Iowa.*— Park *v.* Hogle, 124 Iowa 98, 99 N. W. 185; Donley *v.* Porter, 119 Iowa 542, 93 N. W. 574; Smith *v.* Allen, 101 Iowa 608, 70 N. W. 694; Hurd *v.* Neilson, 100 Iowa 555, 69 N. W. 867.

Kentucky.— Rice *v.* Omberg, 76 S. W. 15, 25 Ky. L. Rep. 531.

Louisiana.— Lestrade *v.* Vanzani, 6 La. Ann. 399.

Maryland.— Richards *v.* Jackson, 31 Md. 250, 1 Am. Rep. 49.

Missouri.— Harwood *v.* Triplett, 34 Mo. App. 273.

Nebraska.— Huffman *v.* Ellis, 64 Nebr. 623, 90 N. W. 552; Morrill *v.* Davis, 27 Nebr. 775, 43 N. W. 1146.

New York.— Smith *v.* Nicoll, 158 N. Y. 696, 53 N. E. 1132 [*affirming* 91 Hun 173, 36 N. Y. Suppl. 347]; Briggs *v.* Rowe, 1 Abb. Dec. 189, 4 Keyes 424; Inge *v.* McCreery, 60 N. Y. App. Div. 557, 69 N. Y. Suppl. 1052; Pullich *v.* Casey, 43 N. Y. App. Div. 122, 59 N. Y. Suppl. 298; Platt *v.* Kohler, 65 Hun 557, 20 N. Y. Suppl. 547, 29 Abb. N. Cas. 366; Barnes *v.* Barker, 40 N. Y. Super. Ct. 102; Barnes *v.* Roberts, 5 Bosw. 73 (holding that a broker employed to negotiate an exchange of property on fixed terms is not entitled to a commission until he obtains a contract which is accepted by or is available to his employer); Jacobs *v.* Kolff, 2 Hilt. 133; Byrne *v.* Korn, 54 N. Y. Suppl. 1050; Burchill *v.* Rafter, 2 N. Y. City Ct. 346.

North Carolina.— Humphrey Co. *v.* Robinson, 134 N. C. 432, 46 S. E. 953.

Texas.— Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268; Howell *v.* Denton, (Civ. App. 1902) 68 S. W. 1002; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

West Virginia.— Parker *v.* National Mut. Bldg., etc., Assoc., (1904) 46 S. E. 811.

England.— Mestaer *v.* Atkins, 1 Marsh. 76, 5 Taunt. 381, 1 E. C. L. 199, holding that a broker employed to sell a ship which, when put up for sale, is bought in by the owner, is not entitled to a commission on the sale.

See 8 Cent. Dig. tit. "Brokers," §§ 65, 70.

A broker authorized to use his discretion in making a sale partly for cash and partly on

executes the agency according to his instructions he is entitled to compensation.[81] So if a broker employed to effect a sale or to find a purchaser does the one or the other according to the terms of his employment, he is entitled to his commission.[82]

(II) *Completion of Negotiations*—(A) *General Rules.* A commission ordinarily becomes payable upon completion of the transaction which the broker was employed to negotiate,[83] in the absence of a stipulation in the contract of employment to the contrary.[84] If by the contract of employment the broker is merely to find a customer who is able, ready, and willing to enter into a transaction with the principal upon the terms prescribed by him, the broker is entitled

time may, in the absence of some restriction, determine the amount of the cash payment. Taylor *v.* Cox, (Tex. Sup. 1887) 7 S. W. 69.

Terms satisfactory to principal.— If a broker agrees to find a purchaser on terms "satisfactory" to the principal, he is not entitled to a commission unless a sale is actually effected. Greene *v.* Owings, 41 S. W. 264, 19 Ky. L. Rep. 580; Weibler *v.* Cook, 77 N. Y. App. Div. 637, 78 N. Y. Suppl. 1029; Forrester *v.* Brice, 6 Misc. (N. Y.) 308, 26 N. Y. Suppl. 799. And if the contract of employment does not mention the terms upon which a sale will be made terms satisfactory to the principal are implied. Fairchild *v.* Cunningham, 84 Minn. 521, 88 N. W. 15. See also Montgomery *v.* Knickerbacker, 27 N. Y. App. Div. 117, 50 N. Y. Suppl. 128. It has been held, however, under an agreement to pay a commission for negotiating a "satisfactory lease," that the lessor cannot arbitrarily refuse to accept a lease negotiated, and thereby defeat a claim for commission. Mullally *v.* Greenwood, 127 Mo. 138, 29 S. W. 1001, 48 Am. St. Rep. 613.

Estoppel of principal.— Where defendant authorized a broker to sell certain land for one thousand eight hundred dollars cash, and the broker sold under a contract for fifty dollars cash and the balance on delivery of deed and abstract, but defendant refused to complete the sale on the ground that he only authorized a sale for one thousand eight hundred dollars net to him without deduction of commissions, he was estopped subsequently to assert that he was not bound to pay commissions because the sale made did not comply with his instructions as to payment of price. Donley *v.* Porter, 119 Iowa 542, 93 N. W. 574.

81. Harvey *v.* Hamilton, 155 Ill. 377, 40 N. E. 592 [*affirming* 54 Ill. App. 507]; Giles *v.* Swift, 170 Mass. 461, 49 N. E. 737; Scott *v.* Woolsey, 20 N. Y. App. Div. 541, 47 N. Y. Suppl. 320; Shope *v.* Campbell, 1 Silv. Supreme (N. Y.) 374, 5 N. Y. Suppl. 346; Longstreth *v.* Long, 6 Phila. (Pa.) 179 (holding that where a broker is employed under a special contract, and performs the duty for which he was engaged, he is entitled to compensation, although no actual and valid sale was effected).

82. *Colorado.*— Walsh *v.* Hastings, 20 Colo. 243, 38 Pac. 324.

Illinois.— Gilmore *v.* Bailey, 103 Ill. App. 245.

Kansas.— Stephens *v.* Scott, 43 Kan. 285, 23 Pac. 555; Dreisback *v.* Rollins, 39 Kan. 268, 18 Pac. 187.

Missouri.— Locke *v.* Griswold, 96 Mo. App. 527, 70 S. W. 400; Pollard *v.* Banks, 67 Mo. App. 187.

New Jersey.— Crowley Co. *v.* Myers, 69 N. J. L. 245, 55 Atl. 305.

New York.— Brundage *v.* McCormick, 69 Hun 65, 23 N. Y. Suppl. 262; Schultz *v.* Griffin, 8 N. Y. St. 332.

Pennsylvania.— McCaffrey *v.* Page, 20 Pa. Super. Ct. 400.

England.— Lara *v.* Hill, 15 C. B. N. S. 45, 109 E. C. L. 45.

See 8 Cent. Dig. tit. "Brokers," §§ 65, 70. See also *infra*, II, E, 1, m, (II), (A).

83. Lockwood *v.* Halsey, 41 Kan. 166, 21 Pac. 98. And see cases cited *supra*, notes 81, 82.

Stock-brokers.—Where a broker has bought stock for a customer, and either he or his agents have it in their possession so that it can be delivered to the customer upon his paying what is owing thereon, the broker is entitled to be paid the price of the stock and his commission, although it was not separated from other stock in his possession or designated as belonging to such customer. Worthington *v.* Tormey, 34 Md. 182.

84. *Iowa.*— Sanderson *v.* Tinkham Smoke-Consumer Co., 83 Iowa 446, 49 N. W. 1034.

New York.— Hart *v.* L. D. Garrett Co., 93 N. Y. App. Div. 145, 87 N. Y. Suppl. 574 (where a subagent's right to compensation was held not to attach until the broker's receipt of commissions was no longer contingent); Frye *v.* Schwarz, 87 N. Y. App. Div. 611, 82 N. Y. Suppl. 1070.

Pennsylvania.— Hillman *v.* Joseph, 9 Pa. Super. Ct. 1.

Texas.—Pryor *v.* Jolly, 91 Tex. 86, 40 S. W. 959 [*reversing* (Civ. App. 1897) 39 S. W. 1019].

England.— Alder *v.* Boyle, 4 C. B. 635, 11 Jur. 591, 16 L. J. C. P. 232, 56 E. C. L. 635.

See 8 Cent. Dig. tit. "Brokers," § 73.

See, however, Fitzpatrick *v.* Gilson, 176 Mass. 477, 57 N. E. 1000, holding that an application by a broker employed to secure a loan on certain realty on commission, stating that the title will not be deemed satisfactory if the estate is held subject to any condition, cannot be construed as a stipulation that the broker was not to be entitled to a commission unless the loan was actually made.

to compensation upon performing that service, whether or not the principal completes the transaction.[85] Thus a broker employed to find a purchaser or a vendor or to exchange lands ordinarily becomes entitled to a commission upon the execution of a contract of purchase or sale or exchange,[86] in the absence of a stipulation, express or implied, making his right to compensation depend upon the perform-

85. Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098; Peet *v.* Sherwood, 47 Minn. 347, 50 N. W. 241, 929; Rothschild *v.* Bursch, 47 Minn. 28, 49 N. W. 393; Van Orden *v.* Morris, 18 Misc. (N. Y.) 579, 32 N. Y. Suppl. 473; Moses *v.* Helmke, 18 Misc. (N. Y.) 357, 41 N. Y. Suppl. 557. And see *infra*, II, E, 1, m, (II), (B).

86. *California.*— Coward *v.* Clanton, 122 Cal. 451, 55 Pac. 147; Quitzow *v.* Perrin, 120 Cal. 255, 52 Pac. 632.

Illinois.— Lang *v.* Hall, 57 Ill. App. 134.

Maine.— Veazie *v.* Parker, 72 Me. 443.

Massachusetts.— Rice *v.* Mayo, 107 Mass. 550, holding that the word "sale" as used in an agreement to pay a broker upon sale of the estate applies to a written contract for the purchase of an estate, binding both vendor and purchaser, although a formal deed has not been executed.

Michigan.— Whitaker *v.* Engle, 111 Mich. 205, 69 N. W. 493.

Minnesota.— Francis *v.* Baker, 45 Minn. 83, 47 N. W. 452.

Missouri.— Chipley *v.* Leathe, 60 Mo. App. 15; Lemon *v.* Lloyd, 46 Mo. App. 452.

New York.— Brown *v.* Grassman, 53 N. Y. App. Div. 640, 65 N. Y. Suppl. 1126; Allen *v.* James, 7 Daly 13; Simonson *v.* Kissick, 4 Daly 143; Levy *v.* Ruff, 3 Misc. 147, 22 N. Y. Suppl. 744, 30 Abb. N. Cas. 291; Hodgkins *v.* Mead, 8 N. Y. Suppl. 854.

Pennsylvania.— Lindsay *v.* Carbon Steel Co., 195 Pa. St. 120, 45 Atl. 683; Burchfield *v.* Griffith, 10 Pa. Super. Ct. 618.

See 8 Cent. Dig. tit. "Brokers," §§ 65, 70.

Execution and delivery of contract.—Where a memorandum was made by an owner of real estate specifying the terms and conditions on which it would be sold and delivered to an intending purchaser but not signed by him, the question whether the parties intended the writing to be a contract between them was one of fact, and a mere delivery thereof was not conclusive that the parties intended it to be the final contract between them, so as to entitle a broker negotiating the sale to his commission, the customer having refused to complete the purchase. Rutherford *v.* Selover, 87 Minn. 495, 92 N. W. 413. Where, however, a contract is signed by buyer and seller which contains stipulations by each in favor of the other of nearly equal value, the broker who brought them together is the proper custodian thereof, in the absence of other arrangement; and a delivery to him by each after signing amounts to a delivery to the other so as to entitle the broker to his commission for finding a purchaser. Greene *v.* Hollingshead, 40 Ill. App. 195.

Authority to make contract.— If the contract is executed by the owner's agent, the broker must prove the agent's authority to make it. Stinde *v.* Scharff, 36 Mo. App. 15.

Evidence of contract.— The contract of sale may be established by circumstantial evidence. Chapin *v.* Bridges, 116 Mass. 105.

Alteration of contract.— If, after a contract of sale is signed by the vendor, the purchaser materially alters it and then signs it, and the vendor refuses to reëxecute it, the broker is not entitled to a commission. Bruce *v.* Hurlbutt, 54 N. Y. App. Div. 616, 66 N. Y. Suppl. 1127 [*affirming* 47 N. Y. App. 163, 62 N. Y. Suppl. 217].

Uncertainty of contract.— If the minds of the vendor and the purchaser have met on a contract to sell real estate, the broker is entitled to his commission, notwithstanding any vagueness in the terms of the agreement. Folinsbee *v.* Sawyer, 15 Misc. (N. Y.) 293, 36 N. Y. Suppl. 405 [*affirming* 8 Misc. 370, 28 N. Y. Suppl. 698]; Schultz *v.* Griffin, 8 N. Y. St. 332. See, however, Montgomery *v.* Knickerbacker, 27 N. Y. App. Div. 117, 50 N. Y. Suppl. 128.

Variance between contract and broker's instructions.— Where a broker is employed to sell land, part of the price to be paid by the purchaser's assuming a mortgage held by a certain bank, the fact that a contract procured by the broker recites that the mortgage is held by another bank is not such a variance as to release the owner from his obligation to pay the broker a commission. Schultz *v.* Griffin, 5 Misc. (N. Y.) 499, 26 N. Y. Suppl. 713.

Fraud and mistake.— A real-estate broker who produces one ready and willing to purchase, but able to do so only by perpetrating a fraud on a third person, is not entitled to a commission, although an executory contract of sale is entered into between his principal and the proposed purchaser, where the principal refuses to consummate the contract because of the proposed fraud. Zittle *v.* Schlesinger, 46 Nebr. 244, 65 N. W. 892. So where an order for goods given by a broker was accepted by the seller in the mistaken belief that the broker was purchasing for himself, the seller may, on learning the facts, impose, as a condition of filling the order, that the sale shall be approved by a third person, and the broker cannot recover a commission on the sale unless the condition is performed. White *v.* Molloy, 9 N. Y. App. Div. 101, 41 N. Y. Suppl. 162. And where a broker is instructed by his principal to ascertain the actual rentals of a property sought in exchange, and the agent procures an erroneous statement thereof, although believing it to be true, which the principal relies on,

ance of the contract or the happening of some other event.[87] In many cases, however, his right to a commission depends upon the final consummation of the transaction which he was employed to negotiate.[88] Thus a broker employed to buy, sell, or exchange property may be engaged upon such terms that he is not entitled to compensation until a contract of purchase or sale or exchange is

and he contracts to exchange the property, but rescinds the contract after learning the facts, the broker is not entitled to compensation. Marcus *v.* Bloomingdale, 63 N. Y. App. Div. 227, 71 N. Y. Suppl. 374.

Effect of non-performance of contract.— The broker is entitled to a commission where the customer found by him and the principal enter into a valid contract of purchase or sale, although one or both of the parties refused to comply with the contract, provided that the non-performance was not occasioned by the broker's fault. Jenkins *v.* Hollingsworth, 83 Ill. App. 139; Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105; Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326; Bach *v.* Emerich, 35 N. Y. Super. Ct. 548; Paulsen *v.* Dallett, 2 Daly (N. Y.) 40; Folinsbee *v.* Sawyer, 15 Misc. (N. Y.) 293, 36 N. Y. Suppl. 405 [*affirming* 8 Misc. 370, 28 N. Y. Suppl. 698]; Brown *v.* Helmuth, 2 Misc. (N. Y.) 566, 21 N. Y. Suppl. 615; Donohue *v.* Flanagan, 9 N. Y. Suppl. 273; Moore's Estate, 9 Pa. St. 675, holding that a broker is entitled to a commission when a purchaser was obtained through his agency, the agreement for sale and purchase being complete, and only prevented from consummation by litigation instituted by third persons. Effect of default: Of customer see *infra*, II, E, 1, m, (x), (B). Of principal see *infra*, II, E, 1, m, (x), (A).

87. *Iowa.*— Berry *v.* Tweed, 93 Iowa 296, 61 N. W. 858.

Kansas.— Stewart *v.* Fowler, 37 Kan. 677, 15 Pac. 918.

Minnesota.— Flower *v.* Davidson, 44 Minn. 46, 46 N. W. 308.

Nebraska.— Dorrington *v.* Powell, 52 Nebr. 440, 72 N. W. 587.

New Jersey.— S. E. Crowley Co. *v.* Myers, 69 N. J. L. 245, 55 Atl. 305.

New York.— Brown *v.* Grassman, 53 N. Y. App. Div. 640, 65 N. Y. Suppl. 1126; Hodgkins *v.* Mead, 8 N. Y. Suppl. 854.

Tennessee.— Cobb *v.* Kenner, (Ch. App. 1897) 42 S. W. 277.

England.— Clack *v.* Wood, 9 Q. B. D. 276, 47 L. T. Rep. N. S. 144, 30 Wkly. Rep. 931, where the right to a commission was made dependent upon approval of title by the principal's solicitor.

See 8 Cent. Dig. tit. "Brokers," § 73.

See, however, Smith *v.* Schiele, 93 Cal. 144, 28 Pac. 857 (holding that a contract with certain brokers "solely, to sell" the principal's land on a commission did not make the right to the commission contingent on the consummation of a sale); Alvord *v.* Cook, 174 Mass. 120, 54 N. E. 499 (holding that a broker who procures an agreement for an exchange is entitled to a commission, although the contract of employment provides that the commission is to be paid only when the exchange is carried into effect and the exchange is not effected, where the principal did not attempt to enforce the agreement for exchange).

If the right to a commission is dependent on payment of the price by the purchaser, the broker must show payment (Burnett *v.* Edling, (Tex. Civ. App. 1898) 48 S. W. 775) or tender (Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430) thereof, else he is not entitled to the commission. See, however, Frank *v.* Bonnevie, (Colo. App. 1904) 77 Pac. 363 (holding that under a contract providing for payment of a commission "at the date of the payment of the purchase-price or in instalments according to payment by said purchaser," the broker was entitled to a commission on a partial payment of the price, although the principal, a part owner, received no part of the payment); Finch *v.* Guardian Trust Co., 92 Mo. App. 263 (holding that a stipulation that the broker's commission shall be payable out of the first cash payment is not a condition precedent to the broker's right to recover his commissions, and does not mean that unless there is a cash payment there is to be no commission). So where land is sold for a price payable in instalments and the commission is to be paid as each instalment is received, if the purchaser defaults after making certain payments, and the land is sold at a judicial sale and bought in by the principal in full satisfaction of the price, the broker is entitled to a full commission. Crane *v.* Eddy, 191 Ill. 645, 61 N. E. 431, 85 Am. St. Rep. 284 [*affirming* 93 Ill. App. 569]. And where land is bought at the judicial sale for a nominal sum by a third person who, pursuant to a guaranty made to the principal, pays a much larger sum, the broker is entitled to a commission on the larger sum. Peters *v.* Anderson, (Va. 1895) 23 S. E. 754.

88. St. John *v.* Ticonderoga Pulp, etc., Co., 27 N. Y. App. Div. 14, 50 N. Y. Suppl. 242; Grasto *v.* White, 52 Hun (N. Y.) 473, 5 N. Y. Suppl. 718, 17 N. Y. Civ. Proc. 46 (holding that to entitle a broker to recover under a contract to procure a loan, it is necessary to allege that the loan was actually procured; securing an offer to loan is not sufficient); Fusco *v.* Bullowa, 17 Misc. (N. Y.) 573, 40 N. Y. Suppl. 676 (where a broker employed to lease property procured the proposed lessee to sign a paper reciting the payment of money on account of a deposit to be paid on the signing of the proposed lease, but the writing did not contain any promise to take a lease, nor specify any terms, and it was held that there was neither a lease, nor an agreement for a lease, and therefore the broker was not entitled to a commission).

entered into,[89] or the title is transferred.[90] In any event the principal and the person procured by the broker must come to an agreement on the terms of the transaction, else no commission is recoverable;[91] and the transaction must be genuine; a broker employed to sell property for instance is not entitled to a commission where the transfer effected by him is a nominal and not a real sale.[92]

89. *Georgia.*— Hyams *v.* Miller, 71 Ga. 608.
Illinois.— Kerfoot *v.* Steele, 113 Ill. 610; Jenkins *v.* Hollingsworth, 83 Ill. App. 139.
Iowa.— Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724; Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120.
Kentucky.— Stratton *v.* Samuel H. Jones Co., (1899) 50 S. W. 33, 20 Ky. L. Rep. 1787.
Louisiana.— De Santos *v.* Taney, 13 La. Ann. 151; Didion *v.* Duralde, 2 Rob. 163.
Massachusetts.— Carnes *v.* Howard, 180 Mass. 569, 63 N. E. 122.
New York.— Kronenberger *v.* Bierling, 37 Misc. 817, 76 N. Y. Suppl. 895 (holding that where a broker brought an intending purchaser to the owner's agent, and the parties came to a complete understanding as to price and terms — a deposit even being made by the purchaser — but no memorandum or receipt was signed by either of the parties, and afterward the purchaser refused to complete the contract, the broker was not entitled to a commission); Thompson *v.* Sea Isle City, 28 Misc. 494, 59 N. Y. Suppl. 596 [*reversing* 27 Misc. 834, 58 N. Y. Suppl. 203] (holding that a broker who was promised a commission to be paid on completion of the sale of certain bonds is not entitled to it, where the purchaser whom he furnished withdrew a conditional acceptance of the bonds offered); Feiner *v.* Kobre, 13 Misc. 499, 34 N. Y. Suppl. 676.
Pennsylvania.— Pierce *v.* Truitt, (1888) 12 Atl. 661; Michener *v.* Beirn, 9 Pa. Co. Ct. 637.
See 8 Cent. Dig. tit. "Brokers," § 73.

90. *Connecticut.*— Kost *v.* Reilly, 62 Conn. 57, 24 Atl. 519.
Illinois.— Kerfoot *v.* Steele, 113 Ill. 610.
Iowa.— Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.
Pennsylvania.— Brennan *v.* Perry, 7 Phila. 242; Pratt *v.* Patterson, 7 Phila. 135.
Texas.— Owen *v.* Kuhn, (Civ. App. 1903) 72 S. W. 432.
See 8 Cent. Dig. tit. "Brokers," § 73.
See, however, Beebe *v.* Roberts, 3 E. D. Smith (N. Y.) 194, holding that testimony that a deed was tendered to the principal "in pursuance of an agreement between" the broker and the principal makes a *prima facie* case of compliance with a condition in the agreement that the deed should be delivered within thirty days.

Estoppel of principal.— Where the owners of real estate agreed to sell to a purchaser procured by their broker, and the purchaser paid ten dollars of the price, the owners were estopped, when sued for commissions for making the sale, to assert that, because they subsequently refused to carry out their agreement, there was no sale, but that the broker's services consisted in securing a purchaser able and willing to purchase. Gwinnup *v.* Sibert, 106 Mo. App. 709, 80 S. W. 589.

91. *Indiana.*— Drake *v.* Biddinger, 30 Ind. App. 357, 66 N. E. 56.
Kentucky.— Murray *v.* East End Imp. Co., 60 S. W. 648, 22 Ky. L. Rep. 1477.
Maine.— Garcelon *v.* Tibbetts, 84 Me. 148, 24 Atl. 797.
New Jersey.— Runyon *v.* Wilkinson, 57 N. J. L. 420, 31 Atl. 390.
New York.— Montgomery *v.* Knickerbacker, 27 N. Y. App. Div. 117, 50 N. Y. Suppl. 128; Guthmann *v.* Meuer, 31 Misc. 810, 63 N. Y. Suppl. 971; Rohner *v.* Lenisch, 29 Misc. 315, 60 N. Y. Suppl. 543; Loeffler *v.* Friedman, 26 Misc. 750, 57 N. Y. Suppl. 281; Wall *v.* U. S. Illuminating Co., 4 N. Y. Suppl. 697.
Texas.— Kiam *v.* Turner, 21 Tex. Civ. App. 417, 52 S. W. 1043.
Wisconsin.— Hand *v.* Conger, 71 Wis. 292, 37 N. W. 235.
See 8 Cent. Dig. tit. "Brokers," § 73.
See, however, Ross *v.* Smiley, 18 Colo. App. 204, 70 Pac. 766; Beebe *v.* Ranger, 35 N. Y. Super. Ct. 452 (holding that where a broker has procured a purchaser for real estate on the terms given him by his employer, the mere fact that the interest and insurance clauses in the contract of sale had not been definitely arranged before the day on which the contract was presented for signature will not deprive the broker of his commission); Wyckoff *v.* Bliss, 12 Daly (N. Y.) 324 (holding that a broker does not lose his right to a commission merely because the principal and the customer cannot be brought to terms on a particular point, if they come to a general agreement).

Sufficiency of acceptance of offer.— Mailing a letter accepting a proposition to purchase land constitutes a sufficient acceptance thereof, so as to entitle the broker securing the purchaser to a commission, even though the sender intercepts the letter and secures its return to him before delivery to the addressee. Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217 [*modified* in 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932].

Misunderstanding of principal.— The right of a broker who has obtained a purchaser is not affected by the fact that the principal did not understand the contract of sale as written, where the broker was not guilty of fraud. Bach *v.* Emerich, 35 N. Y. Super. Ct. 548.

92. Viaux *v.* Old South Soc., 133 Mass. 1 (where, after the broker's customer had refused to buy property of historical interest, it was conveyed to him by the principal in trust to preserve it); Cosgrove *v.* Leonard Mercantile, etc., Co., 175 Mo. 100, 74 S. W.

(B) *Ability, Readiness, and Willingness of Customer to Consummate Transaction.* A broker employed to find a purchaser is not entitled to a commission where no sale is made, unless the purchaser is able, ready, and willing to take the property upon the terms specified by the principal.[93] Upon producing such a

986 (where a corporation, the principal, to facilitate a sale of its land, conveyed it to another corporation formed by its own stockholders after the broker's efforts to sell it had proved unsuccessful); Johnson *v.* Sirret, 153 N. Y. 51, 46 N. E. 1035 [*reversing* 31 N. Y. Suppl. 917].

93. *Alabama.*— Cook *v.* Forst, 116 Ala. 395, 22 So. 540.

California.—Zeimer *v.* Antisell, 75 Cal. 509, 17 Pac. 642; Masten *v.* Griffing, 33 Cal. 111.

Illinois.— Hanrahan *v.* Ulrich, 107 Ill. App. 626; Schmidt *v.* Keeler, 63 Ill. App. 487.

Iowa.— Flynn *v.* Jordal, 123 Iowa 457, 100 N. W. 326; Marple *v.* Ives, 111 Iowa 602, 82 N. W. 1017.

Kentucky.— Coleman *v.* Meade, 13 Bush 358.

Maine.— Smith *v.* Lawrence, 98 Me. 92, 56 Atl. 455.

Minnesota.— Fairchild *v.* Cunningham, 84 Minn. 521, 88 N. W. 15; Cullen *v.* Bell, 43 Minn. 226, 45 N. W. 428.

Missouri.— Harmon *v.* Enright, 107 Mo. App. 560, 81 S. W. 1180; Yoder *v.* White, 75 Mo. App. 155; Warren *v.* Cram, 71 Mo. App. 638.

Nebraska.—Stewart *v.* Smith, 50 Nebr. 631, 70 N. W. 235.

New Hampshire.— Parker *v.* Estabrook, 68 N. H. 349, 44 Atl. 484.

New York.— Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Fraser *v.* Wyckoff, 63 N. Y. 445 [*affirming* 2 Hun 545, 5 Thomps. & C. 707]; Sheinhouse *v.* Klueppel, 80 N. Y. App. Div. 445, 81 N. Y. Suppl. 116; Curtiss *v.* Mott, 90 Hun 439, 35 N. Y. Suppl. 983 (holding that a broker does not fulfil his contract to sell property at a specified price by procuring a vendee willing to purchase at such price, provided that the rentals thereof amount to a certain sum, although the vendor has incorrectly informed him that they amount to that sum); Folsom *v.* Lewis, 14 Misc. 605, 36 N. Y. Suppl. 270 (holding that a real-estate broker is not entitled to a commission, although the adult owners of the property, when employing him, misrepresented to him that leave of court for sale of the infant owners' interest had been already provided for, where the customer refuses to take title under such an order if one should be obtained); Mullenhoff *v.* Gensler, 15 N. Y. Suppl. 673.

South Dakota.— Howie *v.* Bratrud, 14 S. D. 648, 86 N. W. 747.

Texas.— Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775; O'Brien *v.* Gilliland, 4 Tex. Civ. App. 40, 23 S. W. 244.

Wisconsin.— McArthur *v.* Slauson, 53 Wis. 41, 9 N. W. 784.

See 8 Cent. Dig. tit. "Brokers," § 75 *et seq.*

Ability to make cash payment.— If the contract of sale requires the price to be paid in cash, the purchaser must have the cash in hand. Neiderlander *v.* Starr, 50 Kan. 766, 32 Pac. 359. It is not sufficient that he has property out of which the price might be realized by suit. Dent *v.* Powell, 93 Iowa 711, 61 N. W. 1043.

Ability to make final payment.—Where the proposed purchaser was at the time of the signing of the contract of sale ready to make the payment then due, the broker is not required to show that the purchaser had sufficient funds on hand at that time to make the final payment. Levy *v.* Ruff, 4 Misc. (N. Y.) 180, 23 N. Y. Suppl. 1002 [*affirming* 3 Misc. 147, 22 N. Y. Suppl. 744, 30 Abb. N. Cas. 291].

Insolvency of purchaser.— The fact that the purchaser is insolvent does not defeat the broker's right to a commission, where a cash payment is not required, and the contract of sale contemplates that the vendor is to be secured by bond and deed of trust, which the purchaser is prepared to deliver. Ross *v.* Fickling, 11 App. Cas. (D. C.) 442.

Evidence of ability.— Where the proposed purchaser admits that he had not the ability to pay the price fixed, his testimony that he was acting in behalf of a syndicate, and that he would have been prepared, when the time arrived to complete the purchase, to find the money required, does not satisfactorily show his ability to buy. Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87. A contract procured by a real-estate broker, signed by the purchaser, furnishes no evidence of his ability to perform its conditions. Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326. Evidence held to show purchaser's inability see Harmon *v.* Enright, 107 Mo. App. 560, 81 S. W. 1180; Butler *v.* Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897.

Estoppel to deny purchaser's ability.— One who employs a broker to negotiate a sale cannot, in an action for the commission, avail himself of the objection that the customer is not able to pay for the premises, if he has accepted the customer as satisfactory and has conveyed the premises to him. Travis *v.* Graham, 23 N. Y. App. Div. 214, 48 N. Y. Suppl. 736.

Evidence of readiness and willingness.— A contract of sale signed by the purchaser, although unilateral when tendered to the vendor, is *prima facie* evidence of the purchaser's readiness and willingness to buy. Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326.

A prospective purchaser is entitled to demand possession within a reasonable time, and hence the fact that he makes such a demand does not show him unwilling to effect the purchase. Beach *v.* Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867.

Purchaser acting for another.— The fact that the purchaser procured by a real-estate

person the broker becomes entitled to a commission whether or not a sale is consummated.[94] The principal cannot defeat the broker's right to compensation by refusing to enter into a contract with the customer thus procured;[95] nor is the

agent was acting in behalf of another does not affect the agent's right to commissions, if he was able, ready, and willing to buy on the principal's terms. Gelatt *v.* Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683.

Purchase by corporation or syndicate.— A broker who is promised a commission for selling street-car lines to a certain syndicate, or to a corporation organized by such syndicate, is entitled to the commission on effecting such sale to a railroad company organized by the syndicate, although such company was not duly incorporated. Smith *v.* Mayfield, 60 Ill. App. 266. Where, however, a broker furnished the names of the members of a purchasing syndicate to the owner, but the syndicate was not fully formed, and all the purchasers were not then known, and it did not appear what proportion of the price each was to pay, and the owner sold to others before the syndicate was fully formed, the broker cannot recover a commission, as he did not produce a person ready and willing to purchase. Gerding *v.* Haskin, 141 N. Y. 514, 36 N. E. 601.

Tender of performance.— The broker is not obliged to cause the party willing to purchase to tender to the seller a written agreement to that effect. Cook *v.* Kroemeke, 4 Daly (N. Y.) 268. So where a contract of sale has been repudiated by a vendor, proof of a tender of performance by the vendee is not necessary, in an action by a broker against the vendor for his commissions on the sale. Harwood *v.* Diemer, 41 Mo. App. 48.

Ability, readiness, and willingness of customer as question for jury see *infra*, page 286 note 78.

Inability of customer to complete transaction as defeating right to commission see also *infra*, page 271 note 88.

Presumption as to ability of customer see *infra*, II, E, 2, d, (I).

94. *Colorado.*— Ross *v.* Smiley, 18 Colo. App. 204, 70 Pac. 766.

District of Columbia.— Jones *v.* Holladay, 2 App. Cas. 279.

Illinois.— Faber *v.* Vaughan, 108 Ill. App. 553; Kilpatrick *v.* McLaughlin, 108 Ill. App. 463; Jeffries *v.* Loving, 106 Ill. App. 380; Phillips *v.* Dowhower, 103 Ill. App. 50.

Indiana.— Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Cassady *v.* Seeley, 69 Iowa 509, 29 N. W. 432.

Kansas.— Sandefur *v.* Hines, 69 Kan. 168, 76 Pac. 444.

Minnesota.— Hubachek *v.* Hazzard, 83 Minn. 437, 86 N. W. 426.

Missouri.— Butts *v.* Ruby, 85 Mo. App. 405; Finley *v.* Dyer, 79 Mo. App. 604; Hayden *v.* Grillo, 26 Mo. App. 289.

New York.— Duclos *v.* Cunningham, 102 N. Y. 678, 6 N. E. 790; Miller *v.* Irish, 67 Barb. 256; Smith *v.* Smith, 1 Sweeny 552.

North Dakota.— Ward *v.* McQueen, (1904) 100 N. W. 253.

Texas.— Smye *v.* Groesbeck, (Civ. App. 1902) 73 S. W. 972; Kennedy *v.* Clark, 1 Tex. App. Civ. Cas. § 843.

United States.— McGavock *v.* Woodlief, 20 How. 221, 15 L. ed. 884.

England.— Lockwood *v.* Levick, 8 C. B. N. S. 603, 7 Jur. N. S. 102, 29 L. J. C. P. 340, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603.

See 8 Cent. Dig. tit. "Brokers," § 75 *et seq.*

The broker may waive this right by agreement with the principal. Robinson *v.* Kindley, 36 Kan. 157, 12 Pac. 587.

Fault of broker.— If the failure to consummate a sale is due to the fault of the broker, he is not entitled to a commission. Smye *v.* Groesbeck, (Tex. Civ. App. 1902) 73 S. W. 972.

Injunction against sale.— An agent who under a contract produces a person able and willing to purchase real estate is entitled to his commission, although the sale is afterward enjoined. Gibson *v.* Gray, 17 Tex. Civ. App. 646, 43 S. W. 922.

95. *California.*— Merriman *v.* Wickersham, 141 Cal. 567, 75 Pac. 180; Phelps *v.* Prusch, 83 Cal. 626, 23 Pac. 1111; Neilson *v.* Lee, 60 Cal. 555; Phelan *v.* Gardner, 43 Cal. 306.

Colorado.— Millett *v.* Barth, 18 Colo. 112, 31 Pac. 769; Spalding *v.* Saltiel, 18 Colo. 86, 31 Pac. 486; Finnerty *v.* Fritz, 5 Colo. 174.

Illinois.— Wolven *v.* Shoudy, 66 Ill. App. 42; Hecht *v.* Hall, 62 Ill. App. 100; McGuire *v.* Carlson, 61 Ill. App. 295; Flood *v.* Leonard, 44 Ill. App. 113.

Indiana.— Stauffer *v.* Linenthal, 29 Ind. App. 305, 64 N. E. 643.

Iowa.— Heaton *v.* Clarke, (1904) 98 N. W. 597; Lewis *v.* Simpson, 122 Iowa 663, 98 N. W. 508; Collins *v.* Padden, 120 Iowa 381, 94 N. W. 905; Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414.

Kansas.— Neiderlander *v.* Starr, 50 Kan. 766, 32 Pac. 359, 50 Kan. 770, 33 Pac. 592.

Louisiana.— Houston *v.* Boagni, McGloin 164.

Maryland.— Schwartze *v.* Yearly, 31 Md. 270.

Missouri.— Gwinnup *v.* Sibert, 106 Mo. App. 709, 80 S. W. 589; Kesterson *v.* Cheuvront, (App. 1902) 70 S. W. 1091; Reeves *v.* Vette, 62 Mo. App. 440; Gaty *v.* Foster, 18 Mo. App. 639.

Nebraska.— Jones *v.* Stevens, 36 Nebr. 849, 55 N. W. 251.

New York.— Mooney *v.* Elder, 56 N. Y. 238; Barnard *v.* Monnot, 1 Abb. Dec. 108, 3 Keyes 203, 33 How. Pr. 440; Suydam *v.* Healy, 93 N. Y. App. Div. 396, 87 N. Y. Suppl. 669; Smith *v.* Smith, 1 Sweeny 552; Hague *v.* O'Conner, 1 Sweeny 472, 41 How.

right to a commission defeated by the fact that the principal is unable to consummate the transaction,[96] as where he has already sold the property to another.[97] These rules apply *mutatis mutandis* to brokers employed to effect exchanges[98] or leases[99] of property, and also to loan brokers.[1]

Pr. 287; Simpson *v.* Smith, 36 Misc. 815, 74 N. Y. Suppl. 849.

Oregon.—York *v.* Nash, 42 Oreg. 321, 71 Pac. 59; Fisk *v.* Henarie, 13 Oreg. 156, 9 Pac. 322.

South Dakota.—Huntemer *v.* Arent, 16 S. D. 465, 93 N. W. 653.

Texas.—McLane *v.* Goode, (Civ. App. 1902) 68 S. W. 707.

Wisconsin.—Magill *v.* Stoddard, 70 Wis. 75, 35 N. W. 346.

See 8 Cent. Dig. tit. "Brokers," § 75 *et seq.* See also *infra*, II, E, 1, m, (x), (a), (1).

The principal cannot sell to another after notice that the broker was a customer, and thus defeat the right to a commission. Phelan *v.* Gardner, 43 Cal. 306; Owl Canon Gypsum Co. *v.* Ferguson, 2 Colo. App. 219, 30 Pac. 255; Showaker *v.* Kelly, 21 Pa. Super. Ct. 390; Sullivan *v.* Hampton, (Tex. Civ. App. 1895) 32 S. W. 235.

Reservation of right to reject purchaser.—The principal may reserve the right arbitrarily to reject the proposed purchaser. Kiam *v.* Turner, 21 Tex. Civ. App. 417, 52 S. W. 1043; Calloway *v.* Stobart, 14 Manitoba 650 [*distinguishing* Wolf *v.* Tait, 4 Manitoba 59]. See, however, Hopwood *v.* Corbin, 63 Iowa 218, 18 N. W. 911, where letters from the owner of land to a real-estate broker named terms of sale, and told the broker that if he could effect sales the writer would be glad, that the right to refuse offers was reserved, but that the broker might rely on it that if he first found customers at the price named they would have the land and the broker his commission, and it was held that ambiguities should be construed against the writer, and that the broker, having found persons ready to purchase on the terms stated, was entitled to his commission, although the owner refused to sell.

Necessity of procuring binding contract with purchaser see *infra*, II, E, 1, m, (iv).

96. Hecht *v.* Hall, 62 Ill. App. 100; Jones *v.* Stevens, 36 Nebr. 849, 55 N. W. 251; Mooney *v.* Elder, 56 N. Y. 238; Clapp *v.* Hughes, 1 Phila. (Pa.) 382.

Defective title as defeating right to commission see *infra*, II, E, 1, m, (x), (a), (2).

97. Lane *v.* Albright, 49 Ind. 275 (where the principal sold the property before the expiration of the time which he had given the broker for effecting a sale); Sistare *v.* Best, 88 N. Y. 527; Gregor *v.* McKee, 18 Misc. (N. Y.) 613, 33 N. Y. Suppl. 486; Levy *v.* Rothe, 17 Misc. (N. Y.) 402, 39 N. Y. Suppl. 1057 (where the sale was made during the continuance of the broker's exclusive agency); Goldsmith *v.* Cook, 13 N. Y. Suppl. 578; Woodall *v.* Foster, 91 Tenn. 195, 18 S. W. 241 (where the principal gave the broker no notice of the sale); Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217 [*modified* in 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932].

Although the owner reserves the right to sell the property himself, the mere fact that he has given a prospective purchaser an option on the property, subject to revocation by either party at any time, does not relieve him of liability for a commission, if the broker has found a customer able, ready, and willing to buy on the owner's terms. York *v.* Nash, 42 Oreg. 321, 71 Pac. 59.

98. Hersher *v.* Wells, 103 Ill. App. 418; Kalley *v.* Baker, 132 N. Y. 1, 29 N. E. 1091, 28 Am. St. Rep. 542 [*affirming* 8 N. Y. Suppl. 851], both holding that the broker is entitled to his commission upon finding a customer who is able, ready, and willing to effect the desired exchange.

Defect in customer's title as affording principal ground for refusing to consummate exchange see *infra*, page 266 note 73.

99. Clark *v.* Dayton, 87 Minn. 454, 92 N. W. 327 (holding that to entitle a broker to a commission for finding a lessee, he must procure a customer able, ready, and willing to take the premises; it is not sufficient that the broker introduce a customer who merely contemplates leasing); Folsom *v.* Hesse, 24 Misc. (N. Y.) 713, 53 N. Y. Suppl. 783.

1. Budd *v.* Zoller, 52 Mo. 238; Phister *v.* Gove, 48 Mo. App. 455; Chambers *v.* Peters, 30 Misc. (N. Y.) 756, 63 N. Y. Suppl. 151; Van Orden *v.* Morris, 19 Misc. (N. Y.) 497, 43 N. Y. Suppl. 1108 [*affirming* 18 Misc. 579, 42 N. Y. Suppl. 473]; Middleton *v.* Thompson, 163 Pa. St. 112, 29 Atl. 796, all holding that the broker becomes entitled to his commission when he finds a person able, ready, and willing to lend on the terms proposed by the principal.

Terms satisfactory to borrower.—Where a broker was employed to borrow money to erect a factory for the principal on terms satisfactory to him, and the broker procured a person willing to furnish the money, but before the question of terms was reached the principal abandoned the negotiations, the broker was entitled to compensation; and where it did not appear that the terms on which the money would have been furnished would not have been satisfactory to the principal, a jury might properly find that the broker had substantially performed his contract, and a verdict in his favor for the whole amount promised should be sustained, although there was no proof as to the value of the services rendered. Rockwell *v.* Hurst, 13 N. Y. Suppl. 290. See, however, Crandall *v.* Phillips, 13 N. Y. App. Div. 118, 43 N. Y. Suppl. 299.

Tender of loan.—In an action by brokers

(c) *Conclusion of Contract Differing From That Which Broker Was Authorized to Negotiate* — (1) GENERAL RULE. If a broker has brought the parties together and as a result they conclude a contract, he is not deprived of his right to a commission by the fact that the contract so concluded differs in terms from the one which he was authorized to negotiate.[2] Where for example the principal

to recover commissions for negotiating a loan which the proposed borrower failed to accept and give security for as agreed, they need not prove a tender of the money, as it is the client's duty, on notice of the money being procured, to give the proposed security and take the money. Telford *v.* Brinkerhoff, 45 Ill. App. 586.

Estoppel of borrower.— Where a principal refused to accept a loan on the ground that the broker's charge for his services in obtaining it was excessive, he could not resist payment for the services because the lender incorporated a new condition in the application requiring the principal to comply with its rules and accept the loan within ten days. Hotchkiss *v.* Kuchler, 86 N. Y. App. Div. 265, 83 N. Y. Suppl. 710.

Defective title as of borrower defeating right to commission see *infra*, II, E, 1, m, (x), (A), (2).

2. *Alabama.*— See Cook *v.* Forst, 116 Ala. 395, 22 So. 540, holding that immaterial changes in the original terms do not defeat the broker's right to a commission.

Colorado.— Knowles *v.* Harvey, 10 Colo. App. 9, 52 Pac. 46.

District of Columbia.— Bryan *v.* Abert, 3 App. Cas. 180.

Illinois.— Henry *v.* Stewart, 185 Ill. 448, 57 N. E. 190 [*affirming* 85 Ill. App. 170]; Bash *v.* Hill, 62 Ill. 216 (holding that where brokers are employed to assist in making a trade with a promise of a certain compensation in case it is effected, and they assist in bringing it about, they are entitled to the sum agreed to be paid, although the principal changed his proposition with a view of dispensing with their services, they having received no notice of the change); Snyder *v.* Fearer, 87 Ill. App. 275; Lapsley *v.* Holridge, 71 Ill. App. 652; Adams *v.* Decker, 34 Ill. App. 17; Lawrence *v.* Atwood, 1 Ill. App. 217.

Indiana.— McFarland *v.* Lillard, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234.

Iowa.— Welch *v.* Young, (1899) 79 N. W. 59.

Kansas.— Marlatt *v.* Elliott, 69 Kan. 477, 77 Pac. 104.

Kentucky.— Coleman *v.* Meade, 13 Bush 358.

Missouri.— Woods *v.* Stephens, 46 Mo. 555; Henderson *v.* Mace, 64 Mo. App. 393. See, however, Reiger *v.* Bigger, 29 Mo. App. 421.

New York.— O'Toole *v.* Tucker, 17 Misc. 554, 40 N. Y. Suppl. 695 [*affirming* 16 Misc. 485, 38 N. Y. Suppl. 969]; Jones *v.* Henry, 15 Misc. 151, 36 N. Y. Suppl. 483.

Pennsylvania.— Keys *v.* Johnson, 68 Pa. St. 42.

South Dakota.— Huntemer *v.* Arent, 16 S. D. 465, 93 N. W. 653.

Texas.— Evans *v.* Gay, (Civ. App. 1903) 74 S. W. 575; Pryor *v.* Jolly, (Civ. App. 1897) 39 S. W. 1019.

See 8 Cent. Dig. tit. "Brokers," § 66.

This is especially true where the customer procured by the broker was able, ready, and willing to enter into a contract on the terms mentioned in the broker's authorization. Corbel *v.* Beard, 92 Iowa 360, 60 N. W. 636; Veatch *v.* Norman, 95 Mo. App. 500, 69 S. W. 472; Traynor *v.* Morse, 55 Nebr. 595, 75 N. W. 1103.

Intervention of rival broker.— The rule is the same, although the transaction is concluded through a second broker, if the first was the procuring cause of the transaction. Wood *v.* Wells, 103 Mich. 320, 61 N. W. 503.

Accepting property instead of cash.— A broker employed to effect a sale is entitled to a commission where the principal accepts property in lieu of cash.

California.— Clark *v.* Allen, 125 Cal. 276, 57 Pac. 985.

Indiana.— See Rabb *v.* Johnson, 28 Ind. App. 665, 63 N. E. 580.

Missouri.— Grether *v.* McCormick, 79 Mo. App. 325; Kennerly *v.* Somerville, 68 Mo. App. 222.

New Jersey.— S. E. Crowley Co. *v.* Myers, 69 N. J. L. 245, 55 Atl. 305.

Pennsylvania.— Showaker *v.* Kelly, 21 Pa. Super. Ct. 390.

Texas.— Thornton *v.* Moody, (Civ. App. 1893) 24 S. W. 331.

See 8 Cent. Dig. tit. "Brokers," § 66.

Change in subject-matter.— Where an owner employs a broker to bring about an exchange of realty, and the broker brings him and another together, he may recover his commission on an exchange, although the property received was not under discussion when the broker last appeared in the negotiations. French *v.* McKay, 181 Mass. 485, 63 N. E. 1068. Nor can the vendor escape liability for commissions to a broker employed to negotiate a sale of land, on completing himself a sale to the purchaser with whom the broker has been negotiating, by including in the sale other lands in addition to those the broker was employed to sell. Ranson *v.* Weston, 110 Mich. 240, 68 N. W. 152. See also Alexander *v.* Wakefield, (Civ. App. 1902) 69 S. W. 77, holding that in a suit on a contract providing for payment for services for promoting a sale of a street railway on the conclusion of "any trade" with the prospective vendee, it is immaterial that the trade finally consummated was not the one pending at the time the contract was made. However, a broker who has been offered a commission for sell-

consummates a sale to a purchaser found by the broker, he is liable for the commission, although the sale is made at a smaller price than that originally proposed by him to the broker,[3] unless the right to a commission is made conditional upon a sale at the price mentioned in the broker's authorization.[4] To entitle a broker

ing a described electrical plant to a person named by him is not entitled to a commission where on his failure to make a sale the principal sells a smaller and cheaper plant to the same person. Starr *v.* Royal Electric Co., 30 Can. Supreme Ct. 384.

Sale on better terms.— Where one employs a broker to sell land at a stipulated price, and the broker finds a purchaser, and the employer then refuses to sell, but soon afterward sells privately or through another agent on more advantageous terms to the same purchaser, the broker is entitled to his commission on the sale the same as if it had been made by him. Lestrade *v.* Perrera, 6 La. Ann. 398; Steidl *v.* McClymonds, 90 Minn. 205, 95 N. W. 906. See also Van Sicien *v.* Herbst, 30 N. Y. App. Div. 255, 51 N. Y. Suppl. 968. So where a principal was induced to commence negotiations for the purchase of property through a broker's agency, the fact that he raised the price from what the broker was authorized to sell cannot deprive the broker of his right to a commission on the sale made. Crone *v.* Mississippi Valley Trust Co., 85 Mo. App. 601.

The fact that a purchaser pays more than he authorized his broker to offer does not deprive the latter of his right to a commission for effecting the purchase (Carson *v.* Baker, 2 Colo. App. 248, 29 Pac. 1134), in the absence of agreement to the contrary (Lestrade *v.* Vanzini, 6 La. Ann. 399).

Loan brokers.— Where a loan for a less amount than that named by the principal was obtained by the broker, and it was accepted but subsequently declined by the principal, a service was rendered and a commission is accordingly due. Van Lien *v.* Byrnes, 1 Hilt. (N. Y.) 133; Fisher *v.* Drewett, 48 L. J. Exch. 32, 39 L. T. Rep. N. S. 253, 27 Wkly. Rep. 12. See, however, Illingsworth *v.* Slosson, 19 Ill. App. 612 (holding that if a broker undertakes to procure, for a certain compensation, a loan on certain terms, and introduces to his principal a customer who makes the loan on different terms, the broker does not earn his compensation); Faulkner *v.* Cornell, 80 N. Y. App. Div. 161, 80 N. Y. Suppl. 526.

3. *Alabama.*— Cook *v.* Forst, 116 Ala. 395, 22 So. 540.

Colorado.— Williams *v.* Bishop, 11 Colo. App. 378, 53 Pac. 239.

Connecticut.— Schlegal *v.* Allerton, 65 Conn. 260, 32 Atl. 363.

Idaho.— Spotswood *v.* Morris, (1904) 77 Pac. 216.

Illinois.— Hafner *v.* Herron, 165 Ill. 242, 46 N. E. 211 [*affirming* 60 Ill. App. 592]; Baker *v.* Murphy, 105 Ill. App. 151 (holding that where one engages a broker to sell his land so as to net seventy dollars per acre, and agrees to protect the broker in pricing the land at from seventy-one dollars to seventy-two dollars and fifty cents, and afterward connives with a prospective purchaser with a view to depriving the broker of his commission, he is liable to the broker for his services, the latter being instrumental in bringing about the sale); Loehde *v.* Halsey, 88 Ill. App. 452; McConaughy *v.* Mahannah, 28 Ill. App. 169.

Kansas.— Plant *v.* Thompson, 42 Kan. 664, 22 Pac. 726, 16 Am. St. Rep. 512 (holding that an owner cannot escape paying a commission to a broker employed to sell his land by selling for a sum less than the price given the broker, where the reduction is made of his own accord and to escape payment of the commissions, and the broker was the means of bringing the owner and the purchaser together, and the sale resulted therefrom); Ratts *v.* Shepherd, 37 Kan. 20, 14 Pac. 496.

Minnesota.— Hubachek *v.* Hazzard, 83 Minn. 437, 86 N. W. 426.

Missouri.— McCormack *v.* Henderson, 100 Mo. App. 647, 75 S. W. 171; Stinde *v.* Blesch, 42 Mo. App. 578; Wetzell *v.* Wagoner, 41 Mo. App. 509.

New York.— Martin *v.* Silliman, 53 N. Y. 615 (holding that the broker is entitled at least to a ratable portion of the agreed commission); Martin *v.* Fegan, 95 N. Y. App. Div. 154, 88 N. Y. Suppl. 472; Levy *v.* Coogan, 16 Daly 137, 9 N. Y. Suppl. 534; Chilton *v.* Butler, 1 E. D. Smith 150; Hobbs *v.* Edgar, 23 Misc. 618, 51 N. Y. Suppl. 1120 [*affirming* 22 Misc. 510, 49 N. Y. Suppl. 1138]; Gold *v.* Serrell, 6 Misc. 124, 26 N. Y. Suppl. 5. See also Steinfeld *v.* Strom, 31 Misc. 167, 63 N. Y. Suppl. 966.

Pennsylvania.— Keys *v.* Johnson, 68 Pa. St. 42.

Texas.— Byrd *v.* Frost, (Civ. App. 1894) 29 S. W. 46.

Washington.— Barnes *v.* German Sav., etc., Soc., 21 Wash. 448, 58 Pac. 569.

See 8 Cent. Dig. tit. "Brokers," § 66.

Sale by rival broker at smaller price see cases cited *infra*, note 6.

4. *District of Columbia.*— Armes *v.* Cameron, 19 D. C. 435.

Illinois.—See Buhl *v.* Noe, 51 Ill. App. 622.

Maryland.— Schwartze *v.* Yearly, 31 Md. 270.

Michigan.— Williams *v.* McGraw, 52 Mich. 480, 18 N. W. 227.

Montana.—Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714.

New York.— Briggs *v.* Rowe, 1 Abb. Dec. 189, 4 Keyes 424; Steinfeld *v.* Storm, 31 Misc. 167, 63 N. Y. Suppl. 966.

Texas.— Largent *v.* Storey, (Civ. App. 1901) 61 S. W. 977.

to a commission where the contract concluded differs from that which the broker was authorized to negotiate, however, the negotiations commenced by the broker must have continued uninterruptedly and he must have been actively instrumental throughout in causing the parties to consummate the transaction.[5] So if the principal and the customer introduced by the broker cannot agree upon the terms of a sale, and the broker or his customer drops the negotiations, or the principal withdraws his authorization, the broker is not entitled to a commission upon a sale being subsequently made by the principal, acting either independently or through another broker, to the same customer on different terms;[6] and this is especially true where the principal, at the time of concluding the transaction, had no notice of the previous negotiations between the broker and the purchaser.[7] This rule applies also to brokers employed to secure leases.[8]

(2) Conclusion of Preliminary, Conditional, or Optional Contract. To entitle a broker to a commission the customer produced by him and the principal must come to a final agreement on the terms of the transaction. Consequently the conclusion of a preliminary or tentative agreement which is not binding on the parties and which is not carried into effect does not give a right to compensation.[9] Nor is a broker entitled to a commission where he procures a contract between the parties subject to a condition not authorized by the terms of his

Wisconsin.— McArthur *v.* Slauson, 53 Wis. 41, 9 N. W. 784.

See 8 Cent. Dig. tit. "Brokers," § 66.

Agreement for net price see *supra,* page 241 note 78.

5. Woods *v.* Stephens, 46 Mo. 555; Gold *v.* Serrell, 6 Misc. (N. Y.) 124, 26 N. Y. Suppl. 5.

6. *Arizona.*— Trickey *v.* Crowe, (1903) 71 Pac. 965.

Illinois.— Watts *v.* Howard, 51 Ill. App. 243, the sale having been made at a less price.

Minnesota.— Cullen *v.* Bell, 43 Minn. 226, 45 N. W. 428.

Missouri.— Tooker *v.* Duckworth, 107 Mo. App. 231, 80 S. W. 963.

New York.— Barnard *v.* Monnot, 34 Barb. 90; Meyer *v.* Strauss, 58 N. Y. Suppl. 904.

See 8 Cent. Dig. tit. "Brokers," § 66.

Sale by rival broker.— If a broker fails to secure a purchaser who will take the property on the terms proposed by the principal, and another broker intervenes and sells the property on different terms, although to the former's customer, the former is not entitled to a commission. Carlson *v.* Nathan, 43 Ill. App. 364; Livezy *v.* Miller, 61 Md. 336; Crowninshield *v.* Foster, 169 Mass. 237, 47 N. E. 879; Chandler *v.* Sutton, 5 Daly (N. Y.) 112; De Zavala *v.* Royaliner, 84 N. Y. Suppl. 969. Thus if the rival broker sells the property at a lower price after the broker first authorized fails to sell it at the price proposed by the principal, no compensation is due to the one first authorized, although the sale be made to his customer. Armes *v.* Cameron, 19 D. C. 435; Mears *v.* Stone, 44 Ill. App. 444; Wolff *v.* Rosenberg, 67 Mo. App. 403; Freedman *v.* Havemeyer, 37 N. Y. App. Div. 518, 56 N. Y. Suppl. 97; Feldman *v.* O'Brien, 23 Misc. (N. Y.) 341, 51 N. Y. Suppl. 309; Powell *v.* Anderson, 15 Daly (N. Y.) 219, 4 N. Y. Suppl. 706; Hendricks *v.* Daniels, 19 N. Y. Suppl. 414; Powell *v.* Lamb, 1 N. Y. Suppl. 431; Land Mortg. Bank *v.* Hargis, (Tex. Civ. App. 1902) 70 S. W. 352. See, however, Cunliff *v.* Hausmann, 97 Mo. App. 467, 71 S. W. 368.

7. Cathcart *v.* Bacon, 47 Minn. 34, 49 N. W. 331; Getzler *v.* Boehm, 16 Misc. (N. Y.) 390, 38 N. Y. Suppl. 52.

8. Henkel *v.* Dunn, 97 Mo. App. 671, 71 S. W. 735; Alden *v.* Earle, 121 N. Y. 688, 24 N. E. 705 [*affirming* 56 N. Y. Super. Ct. 366, 4 N. Y. Suppl. 548]; Tyng *v.* Constable, 35 Misc. (N. Y.) 283, 71 N. Y. Suppl. 820.

9. Crombie *v.* Waldo, 137 N. Y. 129, 32 N. E. 1042 [*reversing* 60 N. Y. Super. Ct. 123, 17 N. Y. Suppl. 373] (holding that a broker who procured a contract by which the principal agreed to erect within a specified time a school building to be approved by the superintendent of school buildings, and to lease it when completed to school trustees, and by which the school trustees agreed to lease the premises when the building was finished, was not entitled to a commission as for effecting a lease of their property, where at the time the contract was made the plans for the building were not prepared and the time for its erection was insufficient); Montgomery *v.* Knickerbacker, 27 N. Y. App. Div. 117, 50 N. Y. Suppl. 128 (where the broker procured a contemplative agreement for a purchase); Ward *v.* Zborowski, 31 Misc. (N. Y.) 66, 63 N. Y. Suppl. 219 (holding that an agreement concerning a lease was a mere proposal and hence did not entitle the broker to a commission as for procuring a lease); Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268 (holding that where an executor agreed to a sale of land belonging to the estate with the express provision that if it was not ratified by his co-executor it should not be binding, and the co-executor refused to ratify it, it did not entitle the broker to a commission); Hale *v.* Kumler, 85 Fed. 161, 29 C. C. A. 67.

Contract reserving right to withdraw from transaction in case principal's title proves defective see *infra,* II, E, 1, m, (x), (A), (2).

employment.[10] So if a broker employed to effect a transaction merely secures from a customer a contract by which the latter becomes entitled to enter into the transaction at his option, the broker is not entitled to a commission.[11] Thus a broker employed to sell property is not entitled to compensation for procuring a customer who takes an option on the property,[12] as where the customer enters into a contract by the terms of which he may at his option either accept the property or forfeit the earnest money or such partial payments as he may have made up to the time of his election;[13] and the rule is the same where the contract pro-

10. Pape *v.* Romy, 16 Ind. App. 470, 44 N. E. 654, 45 N. E. 671 (holding that where the owner of a patent right agreed to pay a broker all over a certain sum for which he might sell the right, and the broker negotiated a sale subject to the condition that at the purchaser's option, to be exercised within a year, the owner should repurchase, so that the purchaser might get out his money, and the option was exercised, the broker was not entitled to compensation); Halprin *v.* Schachne, 25 Misc. (N. Y.) 797, 54 N. Y. Suppl. 1103 [*affirming* 21 Misc. 519, 47 N. Y. Suppl. 711] (holding that where a broker brings parties together, but a contract made by them is by its terms conditional upon the subsequent approval of the attorney of one of them, who fails to approve, and the contract is accordingly inoperative and is never carried out, the broker is not entitled to a commission); Hammond *v.* Crawford, 66 Fed. 425, 14 C. C. A. 109 (holding that where an owner of mines contracts with a broker to pay him a commission "if he effects a sale or deal of the mines" with a person introduced by the broker, and the agreement made with such person is made conditional on his approval of the organization of a corporation, and fails for want of such approval, the broker is not entitled to his commission).

Condition for rescission.— A mere arrangement for a sale, with no cash paid down, but on condition that if, at the end of six months, all the cash has not been paid, the vendors may rescind the contract, is not a fulfilment of an authority to sell for, among other things one million dollars in cash. Rand *v.* Cronkrite, 64 Ill. App. 208. So a broker who negotiates a contract conditioned that the purchaser may at his option rescind the sale and receive back the price with interest does not give the broker a right to the commission as for effecting a sale, the purchaser having rescinded. Pape *v.* Romy, 16 Ind. App. 470, 44 N. E. 654, 45 N. E. 671.

11. Ward *v.* Zborowski, 31 Misc. (N. Y.) 66, 63 N. Y. Suppl. 219, holding that a broker employed to procure a lease is not entitled to a commission for effecting a contract giving an option for a lease.

12. *Colorado.*— Hildenbrand *v.* Lillis, 10 Colo. App. 522, 51 Pac. 1008.

New Jersey.— Runyon *v.* Wilkinson, 57 N. J. L. 420, 31 Atl. 390.

New York.— Walsh *v.* Gay, 49 N. Y. App. Div. 50, 63 N. Y. Suppl. 543; Bennett *v.* Egan, 3 Misc. 421, 23 N. Y. Suppl. 154.

Ohio.— Wooley *v.* Schmal, 5 Ohio Cir. Ct. 76, 3 Ohio Cir. Dec. 39, holding that a broker is not entitled to recover on an agreement to pay him a commission for finding a purchaser for real estate, where the purchaser he finds is willing to take only a lease for ten years, with the privilege of purchasing in fee, the vendors being executors without power to lease the property.

Texas.— Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005].

Utah.— Tousey *v.* Etzel, 9 Utah 329, 34 Pac. 291, holding that the commission of a broker employed to find an absolute purchaser at a specified price, on terms agreeable to the seller, is not earned by procuring a person who is willing to execute a contract by which it is optional with him to make the payments specified therein.

Washington.— Lawrence *v.* Pederson, 34 Wash. 1, 74 Pac. 1011; Dwyer *v.* Raborn, 6 Wash. 213, 33 Pac. 350.

See 8 Cent. Dig. tit. "Brokers," § 67.

See, however, Rimmer *v.* Knowles, 30 L. T. Rep. N. S. 496, 22 Wkly. Rep. 574, holding that a broker employed to find a purchaser of land for £3,000 introduced a person who took a lease for one thousand years at £150 a year, with the option of purchasing for £3,000 within twenty years, he had practically found a purchaser, and was entitled to his commission.

Condition that contract shall be void on purchaser's default.— A broker employed to effect a sale does not earn a commission by procuring one who enters into a contract with the principal which provides that the contract shall be void if the first instalment of the price is not paid as provided therein. Ramsey *v.* West, 31 Mo. App. 676; Jones *v.* Eilenfeldt, 28 Wash. 687, 69 Pac. 368. It is otherwise where the contract merely gives the vendor the right to declare a forfeiture on default in payment of any instalment. See cases cited *infra*, note 16.

Estoppel of principal.— A broker employed to sell land, having effected a contract not binding on the purchaser because of a condition that it should be void and cease to bind "either party" on default in payment of the first instalment, the owner is not, by having joined in and accepted the contract, estopped from asserting that it is not such a sale as entitles the broker to his commission. Ramsey *v.* West, 31 Mo. App. 676.

13. *Colorado.*— Brown *v.* Keegan, 32 Colo. 463, 76 Pac. 1056.

District of Columbia.— Block *v.* Ryan, 4 App. Cas. 283.

vides that in case either one party or the other shall default in carrying out the contract he shall pay a stipulated sum as liquidated damages.[14] The broker is entitled to a commission, however, where the customer exercises his option by purchasing the property;[15] and if the purchaser agrees absolutely to buy the property, the fact that the price is payable in instalments, and that the vendor is given the right to declare a forfeiture on default in payment of any instalment, does not defeat the broker's right to a commission.[16]

(D) *Modification or Cancellation of Contract Concluded by Principal.* The right to a commission is not affected by the fact that the principal and the customer, after concluding a contract, subsequently enter into an agreement modifying its terms;[17] nor can a broker be deprived of his commission by any agreement of cancellation or release made by the principal and the customer,[18]

Illinois.— Lawrence *v.* Rhodes, 188 Ill. 96, 58 N. E. 910 [*reversing* 87 Ill. App. 672].

Kansas.— Aigler *v.* Carpenter Place Land Co., 51 Kan. 718, 33 Pac. 593.

Missouri.— Zeidler *v.* Walker, 41 Mo. App. 118.

New York.— Levy *v.* Kottman, 11 Misc. 372, 32 N. Y. Suppl. 241 [*reversing* 8 Misc. 504, 28 N. Y. Suppl. 1150].

See 8 Cent. Dig. tit. "Brokers," § 67.

See, however, Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430 (holding that the fact that the contract bound the purchaser to the payment of the price only by forfeiting a cash payment is immaterial, where a tender of the whole price was made); Potvin *v.* Curran, 13 Nebr. 302, 14 N. W. 400.

14. Lawrence *v.* Rhodes, 188 Ill. 96, 58 N. E. 910 [*reversing* 87 Ill. App. 672]; Kimberly *v.* Henderson, 29 Md. 512. *Contra*, Parker *v.* Estabrook, 68 N. H. 349, 44 Atl. 484. See also Leete *v.* Norton, 43 Conn. 219, where a broker arranged for an exchange of land between two owners, an agreement being made between them that if either failed to perform he should pay to the other five hundred dollars as liquidated damages, and it was held that one of them, having accepted the five hundred dollars in lieu of performance, could not object in an action by the broker to recover his commission that payment of the liquidated damages was not equivalent to performance.

15. *District of Columbia.*— Block *v.* Ryan, 4 App. Cas. 283, *semble*.

Kansas.— Aigler *v.* Carpenter Place Land Co., 51 Kan. 718, 33 Pac. 593, *semble*.

Maryland.—Kimberly *v.* Henderson, 29 Md. 512, *semble*.

New York.— Walsh *v.* Gay, 49 N. Y. App. Div. 50, 53 N. Y. Suppl. 543, *semble*.

Washington.— Lawrence *v.* Pederson, 34 Wash. 1, 74 Pac. 1011, *semble*.

Canada.— Morson *v.* Burnside, 31 Ont. 438.

See 8 Cent. Dig. tit. "Brokers," § 67.

Exercise of option.— An option to take a lease at a specified rental is not exercised by the taking of a lease for a lower rental. Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706.

16. Stewart *v.* Fowler, 53 Kan. 537, 36 Pac. 1002; Willes *v.* Smith, 77 Wis. 81, 45 N. W. 666, in both of which cases the principal (the vendor) elected to declare a forfeiture. See also Merriman *v.* Wickersham, 141 Cal. 567, 75 Pac. 180; Betz *v.* Williams, etc., Land, etc., Co., 46 Kan. 45, 26 Pac. 456, holding that the fact that default was made in the second payment and that the owner thereupon declared a forfeiture did not defeat the right to a commission, where the purchaser was solvent.

It is otherwise where the contract provides that if the first instalment of the price is not paid, the contract shall be absolutely void. See cases cited *supra*, note 12.

Default of purchaser as defeating right to compensation generally see *infra*, II, E, 1, m, (X), (B).

17. *Georgia.*— Bush *v.* Mattox, 116 Ga. 42, 42 S. E. 240; Odell *v.* Dozier, 104 Ga. 203, 30 S. E. 813.

Louisiana.— Levistones *v.* Landreaux, 6 La. Ann. 26.

New York.— Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 889. See, however, Salmon *v.* Jobbins, 10 N. Y. App. Div. 624, 41 N. Y. Suppl. 952.

South Carolina.— Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215.

South Dakota.— Mattes *v.* Engel, 15 S. D. 330, 89 N. W. 651.

Texas.— Blair *v.* Slosson, 27 Tex. Civ. App. 403, 66 S. W. 112.

Washington.— Bishop *v.* Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1029.

18. *Georgia.*— Bush *v.* Mattox, 116 Ga. 42, 42 S. E. 240.

Illinois.— Lawrence *v.* Rhodes, 87 Ill. App. 672 [*reversed* on other grounds in 188 Ill. 96, 58 N. E. 910]; Foster *v.* Wynn, 51 Ill. App. 401; Granger *v.* Griffin, 43 Ill. App. 421.

Kentucky.— Reid *v.* Thompson, 50 S. W. 248, 20 Ky. L. Rep. 1887.

Louisiana.— Levistones *v.* Landreaux, 6 La. Ann. 26.

New York.— Sullivan *v.* Frazier, 40 N. Y. App. Div. 288, 57 N. Y. Suppl. 1008.

Washington.— Bishop *v.* Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024.

Canada.— Brydges *v.* Clement, 14 Manitoba 588.

A broker is not injured by the cancellation without his consent of a contract of purchase, where he had agreed with the vendor that he should not be entitled to a commission until the purchaser completed the transaction, and the purchaser defaulted in making the first payment, as a result of which the vendor be-

unless the agreement is entered into at his request or with his consent in which case he is bound thereby.[19]

(III) *TIME WITHIN WHICH TRANSACTION MUST BE NEGOTIATED.*[20] Where the parties stipulate that an agency to sell property is limited to a definite period, it terminates at the expiration of that time, unless the broker has found a purchaser able, ready, and willing to buy the property within the time specified.[21] The owner is under no obligation to extend the time in favor of a prospective purchaser found by the broker.[22] The broker is not entitled to a commission upon a subsequent sale by the owner,[23] in the absence of fraud,[24] even though the sale is made to one with whom the broker was negotiating before the time expired.[25] There are cases, however, holding that if the negotiations between

came entitled under the contract of purchase to declare a forfeiture. Seymour *v.* St. Luke's Hospital, 28 N. Y. App. Div. 119, 50 N. Y. Suppl. 989.

19. Off *v.* J. B. Inderrieden Co., 74 Ill. App. 105; Sawyer *v.* Bowman, 91 Iowa 717, 59 N. W. 27; Shinn *v.* Boyd, (Tex. Civ. App. 1903) 77 S. W. 1027.

20. Duration of agency see also *supra,* II, E, 1, a, (VII); *infra,* II, E, 1, m, (IX).

Time for acceptance of offer of employment see *supra,* page 218 note 56.

21. Zeimer *v.* Antisell, 75 Cal. 509, 17 Pac. 642 (holding that the broker must find a customer within the time limited in the contract of employment or within such extension of time as may be granted by the principal); La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209.

Notice of finding of purchaser.— Where a broker is employed to sell land, and when the negotiation is about finished the owner limits the time within which the sale must be made and notice be sent to him, and the agent makes the sale without delay, and sends notice to the principal within the time limited, the miscarriage of the notice does not deprive the agent of his commission. Gibbons *v.* Sherwin, 28 Nebr. 146, 44 N. W. 99.

Completion of transaction.— Where the authority conferred on a broker to sell lands is limited in time, and within that time he procures a purchaser with whom his principal enters into a contract, he is entitled to his commission, although the conveyance is not made until after such time has elapsed. S. E. Crowley Co. *v.* Myers, 69 N. J. L. 245, 55 Atl. 305. See also Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 899.

22. Castner *v.* Richardson, 18 Colo. 496, 33 Pac. 163 (holding that where an owner of land merely states to a broker, not employed as his agent, the net price that he will accept within a limited time, and the broker procures an offer of such price within such time, but does not procure the execution of a binding contract, nor a purchaser ready to pay the price within the time limited, and the owner refuses to allow further time, the broker cannot recover a commission); Watson *v.* Brooks, 11 Oreg. 271, 3 Pac. 679 (holding that where a vendor agrees to give a broker a commission to effect a sale of his land within a specified time, and on the last day the broker produces one who will buy if he can have a reasonable time to investigate the title, which is refused, whereby the sale falls through, the broker cannot claim a commission).

Extension of time.— Where an owner of land employed a broker to procure, within thirty days, a purchaser of the same, and after the expiration of thirty days he wrote to the broker making inquiry as to the prospects, and directed him to sell within the next thirty days if he could get a certain sum net, the contract of employment was extended. Johnson *v.* Wright, 124 Iowa 61, 99 N. W. 103. Where, however, before the time limited for selling property expired, the broker requested an extension of time, which the principal refused, the fact that at the same time he stated that he hoped that the broker would sell the property and that he would be glad to assist him does not show an authority to sell the property after the expiration of the time limited. La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209.

23. Learned *v.* McCoy, 4 Ind. App. 238, 30 N. E. 717; Antisdel *v.* Canfield, 119 Mich. 229, 77 N. W. 944; La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209.

24. *California.*— Oullahan *v.* Baldwin, 100 Cal. 648, 35 Pac. 310 (where the principal eluded the broker and prospective purchaser); Zeimer *v.* Antisell, 75 Cal. 509, 17 Pac. 642 (holding that the fact that he first called the attention of the purchaser to the property does not entitle a broker to a commission where the sale is made by the owner after the expiration of the authority, unless the delay was caused by the negligence, fraud, or default of the owner). See also Wilson *v.* Sturgis, 71 Cal. 226, 16 Pac. 772.

Kansas.— Fultz *v.* Wimer, 34 Kan. 576, 9 Pac. 316.

Missouri.— La Force *v.* Washington University, 106 Mo. App. 517, 81 S. W. 209.

New York.— Vanderveer *v.* Suydam, 83 Hun 116, 31 N. Y. Suppl. 392, where the principal deferred action until after the time had expired.

Texas.— Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153.

See 8 Cent. Dig. tit. "Brokers," § 68.

25. *California.*— Zeimer *v.* Antisell, 75 Cal. 509, 17 Pac. 642.

Illinois.— Farrar *v.* Brodt, 35 Ill. App. 617.

the principal and the customer continue uninterruptedly after the expiration of the time allowed the broker, and a sale is made of which the broker is accordingly the procuring cause, he is entitled to a commission, although the sale is not consummated until after the expiration of the time limited.[26] These rules apply *mutatis mutandis* to loan brokers.[27]

(IV) *Duty of Broker to Procure Binding Contract.*[28] To entitle him to a commission where no sale is actually consummated, a broker employed to find a purchaser must either produce to the owner a customer who is able, ready, and willing to buy on the terms prescribed by the owner, or else take from the customer a binding contract of purchase.[29] If a broker employed to find a purchaser brings to the owner a person who is able, ready, and willing to purchase on the owner's terms, he is entitled to compensation, although he does not make or negotiate a binding contract with the purchaser.[30] Consequently the fact that

Kansas.— Fultz *v.* Wimer, 34 Kan. 576, 9 Pac. 316.

Missouri.— Page *v.* Griffin, 71 Mo. App. 524; Beauchamp *v.* Higgins, 20 Mo. App. 514.

New York.— Satterthwaite *v.* Vreeland, 48 How. Pr. 508.

Texas.— Neal *v.* Lehman, 11 Tex. Civ. App. 461, 34 S. W. 153.

See 8 Cent. Dig. tit. "Brokers," § 68.

This rule may be avoided by contract between the principal and the broker. Attix *v.* Pelan, 5 Iowa 336.

26. Griswold *v.* Pierce, 86 Ill. App. 406; Jaeger *v.* Glover, 89 Minn. 490, 95 N. W. 311; Goffe *v.* Gibson, 18 Mo. App. 1. See also Michaelis *v.* Gabren, 9 N. Y. App. Div. 495, 41 N. Y. Suppl. 563, holding that a broker is entitled to a commission upon a sale of real estate, although the matter was not concluded at the time contemplated by the parties in the first instance, if the transaction was never abandoned, and, although it was not perfected until after the expiration of two years, the broker still retained his relation to the transaction, and the delays resulted from legal proceedings taken in the meantime with a view to curing defects in the title which became known when the parties met to complete the contract in the first instance.

27. Biddison *v.* Johnson, 50 Ill. App. 173.

28. Illegality of transaction as defeating right to compensation see *infra*, II, E, 2, b, (II).

29. Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Gunn *v.* State, Bank, 99 Cal. 349, 33 Pac. 1105; Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326; Huggins *v.* Hearne, 74 Mo. App. 86; Hayden *v.* Grillo, 42 Mo. App. 1.

These requirements are waived by the principal if he refuses to proceed after notice by the broker that he has such contract or purchaser. Hayden *v.* Grillo, 42 Mo. App. 1. See, however, Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

30. *Colorado.*— Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817.

Illinois.— Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401; Ward *v.* Lawrence, 79 Ill. 295 (both holding that if a purchaser is willing to abide by a written contract for the sale of land signed by himself and also in his principal's name by a broker having only a verbal authority to make the contract, the broker is entitled to a commission, although the contract is not binding on the principal because of the want of written authority of the broker to make it); Fox *v.* Starr, 106 Ill. App. 273. See, however, Wilson *v.* Mason, 158 Ill. 304, 43 N. E. 134, 49 Am. St. Rep. 162.

Indiana.— Lockwood *v.* Rose, 125 Ind. 588, 25 N. E. 710.

New York.— Burling *v.* Gunther, 12 Daly 6; Folinsbee *v.* Sawyer, 8 Misc. 370, 28 N. Y. Suppl. 689.

Ohio.— Heintz *v.* Boehmer, 4 Ohio N. P. 226, 6 Ohio S. & C. Pl. Dec. 362, holding that the failure of the owner to incorporate into the contract with the intending purchaser found by the broker provisions which make it binding does not militate against the broker's right to recover.

South Dakota.— Mattes *v.* Engel, 15 S. D. 330, 89 N. W. 651.

Washington.— Barnes *v.* German Sav., etc., Soc., 21 Wash. 448, 58 Pac. 569.

Canada.—Brydges *v.* Clement, 14 Manitoba 588.

See 8 Cent. Dig. tit. "Brokers," § 90.

A broker employed to sell as distinguished from a broker employed to find a purchaser is not entitled to compensation until he effects a sale or procures from his customer a binding contract of sale. Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724.

Executed contract.— Where a principal in the exchange of property actually receives a good title to the property conveyed to him, he cannot defeat an action by his broker for commissions on the ground that his contract of sale was invalid. Schlesinger *v.* Jud, 61 N. Y. App. Div. 453, 70 N. Y. Suppl. 616. So one who gives a verbal order to his broker to purchase certain stock, in pursuance of which the broker purchases the stock, which is delivered to and paid for by him, cannot insist that the contract is void because no part of the stock was delivered and no money paid at the time of giving the order. Rogers *v.* Gould, 6 Hun (N. Y.) 229.

Estoppel of principal.— An offer to buy "two hundred and ninety thousand feet of land, . . . to be taken from" a parcel containing five hundred thousand feet, "said

the contract of purchase and sale is not reduced to writing does not defeat the right to a commission, where the purchaser is able, ready, and willing to carry out the oral agreement.[31] The broker is not required to prepare a contract of purchase,[32] or to advise the parties as to the terms of the contract.[33] These rules apply *mutatis mutandis* to loan brokers.[34]

(v) *Ratification of Unauthorized Acts of Broker.* A broker is entitled to his commission for effecting a transaction, although he exceeded his authority in doing so, where the principal has ratified the transaction as consummated by the broker.[35]

two hundred and ninety thousand feet to be divided as to front and back lands from the whole parcel as nearly equal as possible," where accepted by the owner of the land, entitles the broker employed to find a purchaser to his commissions, and the owner will not be heard to say that it is too indefinite. Monk *v.* Parker, 180 Mass. 246, 63 N. E. 793. So if the principal based his refusal to pay a commission, not on the ground of the incompetency of the parol contract of sale, but upon the ground that he had withdrawn the property from the market, he cannot shield himself from liability on the former ground. Mooney *v.* Elder, 56 N. Y. 238.

31. *Alabama.*— Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157.

Indiana.— McFarland *v.* Lillard, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234.

Iowa.— Bird *v.* Phillips, 115 Iowa 703, 87 N. W. 414, so holding under a statute which permits sales of real estate by oral contract.

Massachusetts.— Holden *v.* Starks, 159 Mass. 503, 34 N. E. 1069, 38 Am. St. Rep. 451.

Missouri.— Gelatt *v.* Ridge, 117 Mo. 533, 23 S. W. 882, 38 Am. St. Rep. 683; Goodson *v.* Embleton, 106 Mo. App. 77, 80 S. W. 22.

Nebraska.— Potvin *v.* Curran, 13 Nebr. 302, 14 N. W. 400.

New York.— Barnard *v.* Monnot, 1 Abb. Dec. 108, 3 Keyes 203, 33 How. Pr. 440 [*reversing* 34 Barb. 90]; Veeder *v.* Seaton, 85 N. Y. App. Div. 196, 83 N. Y. Suppl. 159; Dennis *v.* Charlick, 6 Hun 21; Heinrich *v.* Korn, 4 Daly 74; Levy *v.* Ruff, 4 Misc. 180, 23 N. Y. Suppl. 1002 [*affirming* 3 Misc. 147, 22 N. Y. Suppl. 744, 30 Abb. N. Cas. 291].

Texas.— Brackenridge *v.* Claridge, (Civ. App. 1897) 42 S. W. 1005.

See 8 Cent. Dig. tit. "Brokers," § 90.

Contra.— Wilson *v.* Mason, 158 Ill. 304, 42 N. E. 134, 49 Am. St. Rep. 162 [*affirming* 57 Ill. App. 325]; Mackenzie *v.* Champion, 12 Can. Supreme Ct. 649.

Estoppel of principal.— The owner of property who has employed a broker to sell it cannot refuse to pay the commission because no agreement in writing was entered into, at all events where the customer refused to sign because the owner insisted upon the insertion of an unusual term, and where the owner accepted the purchaser and by various acts showed that he considered that there was a valid verbal contract. McKenzie *v.* Champion, 4 Manitoba 158. So where the owner, when notified of the sale by the broker and of his offer to produce the purchaser for the purpose of reducing the contract to writing, says that it is not necessary to do so, further steps by the broker are not necessary. Gerhart *v.* Peck, 42 Mo. App. 644. See also Millett *v.* Barth, 18 Colo. 112, 31 Pac. 769, holding that, although by the terms of the contract of employment, commissions were to be paid only in the case of sale, and then only on the proceeds arising therefrom, the owner was liable where an acceptable purchaser was produced, and the failure to consummate resulted from the failure of the owner to enter into a binding contract.

32. Brackenridge *v.* Claridge, (Tex. Civ. App. 1897) 42 S. W. 1005.

33. Veazie *v.* Parker, 72 Me. 443.

34. Fitzpatrick *v.* Gilson, 176 Mass. 477, 57 N. E. 1000 (holding that a broker who found a customer willing to make a loan was entitled to a commission, although he took no binding contract from the customer and the latter subsequently refused to lend the money because of a defect in the principal's title to the security offered); Hackmann *v.* Gutweiler, 66 Mo. App. 244 (holding that a broker employed to obtain a loan must either produce a person able, ready, and willing to make the loan on the security offered, or else take a contract binding him to make the loan; but that it is not necessary thus to produce a customer or a contract where the principal refuses to accept the loan or wrongfully discharges the broker after the customer has been found); Middleton *v.* Thompson, 163 Pa. St. 112, 29 Atl. 796 (holding that it is not essential to a loan broker's right to commissions that he have a binding contract with the proposed lender).

35. Smith *v.* Schiele, 93 Cal. 144, 28 Pac. 857; Nesbit *v.* Helser, 49 Mo. 383; Gillett *v.* Whiting, 141 N. Y. 71, 35 N. E. 939, 38 Am. St. Rep. 762; Snydam *v.* Vogel, 84 N. Y. Suppl. 915; Everett Co. *v.* Cumberland Glass Mfg. Co., 112 Wis. 544, 88 N. W. 597.

Consideration for ratification.— The broker is entitled to his commission after the principal has ratified the unauthorized transaction, although no new consideration passes. Gillett *v.* Whiting, 55 N. Y. Super. Ct. 187, 14 N. Y. St. 726.

Knowledge as element of ratification.— The principal's promise to stand by the unauthorized transaction and pay the commission is not a ratification, where it was based on the broker's false representations as to the facts. Courtney *v.* Continental Land, etc., Co., 17 Mont. 394, 43 Pac. 185. So there is no ratification where the agent failed to dis-

(VI) *Broker as Procuring Cause of Transaction Negotiated*[36]— (A) *General Rules.* The fact that the transaction which the broker was authorized to negotiate is finally consummated does not of itself entitle the broker to a commission; he must have been the procuring cause of the transaction,[37] in the absence of some agreement between him and the principal to the contrary,[38] else no compensation is due. This is true, although the broker had negotiated with the person with whom the principal finally contracted; the fact that a broker finds a customer with whom the principal closes a contract without the broker's further aid does not give him a right to a commission, unless he was the procuring cause of the transaction.[39] If, however, the transaction which the

close to the principal material facts concerning the transaction. Hoffman *v.* Livingston, 46 N. Y. Super. Ct. 552.

What constitutes ratification.— Grain brokers employed by a dealer to buy and sell wheat for future delivery cannot recover commissions and advances where they write the dealer that a contract which he has for May may be changed to June delivery, to which letter the dealer makes no reply, although he is in a position to do so, and the brokers then change the contract; and the fact that the dealer receives and retains a statement sent him by the brokers, showing such change, does not show a ratification of the brokers' act in making the change. Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746 [*reversing* 41 Fed. 174]. See, however, Gillett *v.* Whiting, 55 N. Y. Super. Ct. 187, 14 N. Y. St. 726, holding that, although stock purchased by a broker for another is not of the kind ordered, an acceptance by the principal of an account presented by the broker after the stock has been sold and a promise to pay the balance indicated by the account constitute a ratification of the purchase. Where a principal directs his broker to purchase certain goods, and the broker purchases the goods individually and not on account of the principal, the receipt of a portion of the goods by the principal after he learns the facts prevents him from resisting payment therefor at the suit of the broker because there is no valid contract to purchase of the broker. Whiting *v.* William H. Crawford Co., 93 Md. 390, 49 Atl. 615.

Repudiation.— The fact that the principal had refused to make the sale negotiated by a stock-broker, on being handed a letter from the broker informing him that the broker had sold the stock in London at the price agreed on, is not sufficient to show a repudiation by the principal of the contract, which made the price payable in San Francisco, and not in London. Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

36. Procuring cause: As between rival brokers see *supra*, II, E, 1, m, (VII). As question for jury see *infra*, II, E, 2, e, (III).

37. *California.*—Zeimer *v.* Antisell, 75 Cal. 509, 17 Pac. 642.

Iowa.— Hunn *v.* Ashton, 121 Iowa 265, 96 N. W. 745.

Missouri.— Campbell *v.* Vanstone, 73 Mo. App. 84.

New York.—Colwell *v.* Tompkins, 158 N. Y. 690, 53 N. E. 1124 [*affirming* 6 N. Y. App. Div. 93, 39 N. Y. Suppl. 478]; Whiteley *v.* Terry, 83 N. Y. App. Div. 197, 82 N. Y. Suppl. 89 [*affirming* 39 Misc. 93, 78 N. Y. Suppl. 911]; Summers *v.* Carey, 69 N. Y. App. Div. 428, 74 N. Y. Suppl. 980; Bellesheim *v.* Palm, 54 N. Y. App. Div. 77, 66 N. Y. Suppl. 273; McClave *v.* Paine, 2 Sweeny 407, 41 How. Pr. 140 [*affirmed* in 49 N. Y. 561, 10 Am. Rep. 431]; Myers *v.* Dean, 9 Misc. 183, 29 N. Y. Suppl. 578.

Pennsylvania.— Earp *v.* Cummins, 54 Pa. St. 394, 93 Am. Dec. 718; Burchfield *v.* Griffith, 10 Pa. Super. Ct. 618.

England.— White *v.* Baxter, 1 Cab. & E. 199; Tribe *v.* Taylor, 1 C. P. D. 505; Curtis *v.* Nixon, 24 L. T. Rep. N. S. 706.

Canada.— Starr *v.* Royal Electric Co., 33 Nova Scotia 156.

See 8 Cent. Dig. tit. "Brokers," § 74.

38. Phillipps *v.* Roberts, 90 Ill. 492; Ware *v.* Kerwin, 24 N. Y. App. Div. 198, 48 N. Y. Suppl. 884; Goldsmith *v.* Obermeier, 3 E. D. Smith (N. Y.) 121; Terry *v.* Reynolds, 111 Wis. 122, 86 N. W. 557.

39. *California.*— Ayres *v.* Thomas, 116 Cal. 140, 47 Pac. 1013.

Colorado.— Quinby *v.* Tedford, 4 Colo. App. 210, 35 Pac. 276; Anderson *v.* Smythe, 1 Colo. App. 253, 28 Pac. 478; Babcock *v.* Merritt, 1 Colo. App. 84, 27 Pac. 882.

Illinois.— Neufeld *v.* Oren, 60 Ill. App. 350; Watts *v.* Howard, 51 Ill. App. 243; Clark *v.* Nessler, 50 Ill. App. 550.

Kentucky.— Collier *v.* Johnson, 67 S. W. 830, 23 Ky. L. Rep. 2453.

Louisiana.— Taylor *v.* Martin, 109 La. 137, 33 So. 112.

Minnesota.— Studer *v.* Byson, 92 Minn. 388, 100 N. W. 90; Francis *v.* Eddy, 49 Minn. 447, 52 N. W. 42; Cathcart *v.* Bacon, 47 Minn. 34, 69 N. W. 331; Putnam *v.* How, 39 Minn. 363, 40 N. W. 258; Armstrong *v.* Wann, 29 Minn. 126, 12 N. W. 345.

Missouri.— McCrory *v.* Kellogg, 106 Mo. App. 597, 81 S. W. 465; Crowley *v.* Somerville, 70 Mo. App. 376; Ramsey *v.* West, 31 Mo. App. 676.

Nebraska.— Frenzer *v.* Lee, 3 Nebr. (Unoff.) 69, 90 N. W. 914.

New York.— Wylie *v.* Marine Nat. Bank, 61 N. Y. 415; Phinney *v.* Chesebro, 87 N. Y. App. Div. 409, 84 N. Y. Suppl. 449; Johnson *v.* Lord, 35 N. Y. App. Div. 325, 54 N. Y. Suppl. 922; Ware *v.* Dos Passos, 4 N. Y.

broker was authorized to negotiate is consummated as the direct and proximate result of his efforts, he is entitled to a commission,[40] and this is true even though he may have had no personal intercourse with the person with whom the principal enters into the contract.[41]

(B) *Bringing Parties Together.* If a broker who has found a customer does not take a binding contract from him,[42] he must introduce the customer to the principal, else he is not entitled to compensation upon the consummation of a contract between the parties. It is not enough merely to put the customer on the track of property which the principal wishes to sell, or to put the principal on the track of a possible customer. The broker must bring the parties together.[43]

App. Div. 32, 38 N. Y. Suppl. 673; Woolley *v.* Buhler, 73 Hun 158, 25 N. Y. Suppl. 1045; Smith *v.* Seattle, etc., R. Co., 72 Hun 202, 25 N. Y. Suppl. 368; Hay *v.* Platt, 66 Hun 488, 21 N. Y. Suppl. 362; White *v.* Twitchings, 26 Hun 503; Maracella *v.* Odell, 3 Daly 123; Harris *v.* Burtnett, 2 Daly 189; Woods *v.* Burton, 21 Misc. 326, 47 N. Y. Suppl. 184; Randrup *v.* Schroeder, 21 Misc. 52, 46 N. Y. Suppl. 943; Burke *v.* Pfeffer, 68 N. Y. Suppl. 799.

Texas.— Brown *v.* Shelton, (Civ. App. 1893) 23 S. W. 483.

Canada.— Starr *v.* Royal Electric Co., 33 Nova Scotia 156.

See 8 Cent. Dig. tit. "Brokers," § 74.

40. *Colorado.*— Duncan *v.* Borden, 13 Colo. App. 481, 59 Pac. 60.

Connecticut.— Williams *v.* Clowes, 75 Conn. 155, 52 Atl. 820; Duncan *v.* Kearney, 72 Conn. 585, 45 Atl. 358; Hoadley *v.* Danbury Sav. Bank, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321.

Illinois.— Singer, etc., Stone Co. *v.* Hutchinson, 83 Ill. App. 668 [*affirmed* in 184 Ill. 169, 56 N. E. 353].

Indiana.— Clifford *v.* Meyer, 6 Ind. App. 633, 34 N. E. 23.

Iowa.— Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098; Sample *v.* Rand, 112 Iowa 616, 84 N. W. 683.

Kansas.— Marlatt *v.* Elliott, 69 Kan. 477, 77 Pac. 104.

Michigan.— Ellsmore *v.* Gamble, 62 Mich. 543, 29 N. W. 97.

Nebraska.— St. Felix *v.* Green, 34 Nebr. 800, 52 N. W. 821.

New York.— Lloyd *v.* Mathews, 51 N. Y. 124; Martin *v.* Fegan, 95 N. Y. App. Div. 154, 88 N. Y. Suppl. 472; Metcalfe *v.* Gordon, 86 N. Y. App. Div. 368, 83 N. Y. Suppl. 808; Connolly *v.* Briggs, 31 N. Y. App. Div. 626, 52 N. Y. Suppl. 553; Doran *v.* Bussard, 18 N. Y. App. Div. 36, 45 N. Y. Suppl. 387 (holding that the broker was the procuring cause of sale, although the transaction was consummated by the principal and the purchaser without the broker's further aid); Atwater *v.* Wilson, 13 Misc. 117, 34 N. Y. Suppl. 153; McKnight *v.* Thayer, 21 N. Y. Suppl. 440; Johnson *v.* Bernheimer, 19 N. Y. Suppl. 37; King *v.* Bauer, 8 N. Y. Suppl. 466. See also Whitehead *v.* Halsey, 3 Misc. 378, 22 N. Y. Suppl. 923.

Texas.— Bowser *v.* Field, (Sup. 1891) 17 S. W. 45.

England.— Mansell *v.* Clements, L. R. 9 C. P. 139.

See 8 Cent. Dig. tit. "Brokers," § 74.

41. *New Jersey.*— Derrickson *v.* Quimby, 43 N. J. L. 373.

New York.— Mason *v.* Mason, 4 E. D. Smith 636. See, however, Bertolet *v.* O'Donohue, 2 N. Y. City Ct. 193, holding that a merchandise broker who assists in a sale of supplies to the United States and is paid a commission on the service actually performed at the time cannot recover for his supposed influence with respect to future dealings.

Pennsylvania.— Earp *v.* Cummins, 54 Pa. St. 394, 93 Am. Dec. 718.

Wisconsin.— Bell *v.* Siemens, etc., Electric Co., 101 Wis. 320, 77 N. W. 152.

United States.— Norton *v.* American Ring Co., 1 Fed. 684.

See 8 Cent. Dig. tit. "Brokers," § 74. See also *infra*, II, E, 1, m, (VI), (B).

First calling attention to property.— The fact that a person with whom the broker unsuccessfully negotiated for a sale called the attention of another to the property, and that that other finally bought it, does not give the broker a right to a commission.

Illinois.— Baumgartl *v.* Hoyne, 54 Ill. App. 496.

Massachusetts.— Gleason *v.* Nelson, 162 Mass. 245, 38 N. E. 497.

Missouri.— Vandyle *v.* Walker, 49 Mo. App. 381.

New York.— Jones *v.* Frost, 24 Misc. 208, 53 N. Y. Suppl. 573.

Pennsylvania.— Johnson *v.* Seidel, 150 Pa. St. 396, 24 Atl. 587.

England.— See Antrobus *v.* Wickens, 4 F. & F. 291.

See 8 Cent. Dig. tit. "Brokers," § 74.

Contra.— Lincoln *v.* McClatchie, 36 Conn. 136; Wilkinson *v.* Alston, 44 J. P. 35, 48 L. J. Q. B. 733, 41 L. T. Rep. N. S. 394.

42. See *supra*, II, E, 1, m, (IV).

43. Lawrence *v.* Weir, 3 Colo. App. 401, 33 Pac. 646; Sievers *v.* Griffin, 13 Ill. App. 63; Baars *v.* Hyland, 65 Minn. 150, 67 N. W. 1148; Walton *v.* McMorrow, 175 N. Y. 493, 67 N. E. 1090 [*affirming* 63 N. Y. App. Div. 147, 71 N. Y. Suppl. 250]; Hamilton *v.* Gillender, 26 N. Y. App. Div. 156, 49 N. Y. Suppl. 663; Wyckoff *v.* Bissell, 24 N. Y. App. Div. 66, 48 N. Y. Suppl. 1018; Fraser *v.* Brown, 33 Misc. (N. Y.) 591, 67 N. Y. Suppl. 966; McNulty *v.* Rowe, 28 Misc. (N. Y.) 523, 59 N. Y. Suppl. 690. See, however, Kaestner

Where this is done, and a sale results, the broker becomes entitled to a commission, although he is not present during the negotiations following the introduction.[44]

v. Oldham, 102 Ill. App. 372 (holding that a broker is entitled to a commission as agreed on where he furnishes a contractor with information by which he enters into a contract for the erection of huildings); Sussdorff *v.* Schmidt, 55 N. Y. 319 (holding that, where real estate is sold through the instrumentality of a broker employed by the owner, he is entitled to his commission, although the owner himself negotiates the sale, and although the purchaser is not introduced to the owner by the broker, and the latter is not personally acquainted with the purchaser).

Necessity of personal introduction by broker.— A broker employed to procure a purchaser is entitled to his commissions, where an employee of his subagent procures a purchaser, although the broker himself did not himself introduce the purchaser to the owner. Leech *v.* Clemons, 14 Colo. App. 45, 59 Pac. 230; Mullen *v.* Bower, 26 Ind. App. 253, 59 N. E. 419.

Procuring purchaser by advertisement.— Where the owner of real property lists it with a broker, and the broker advertises the property, and a purchaser thus derives his information that the property is for sale, and afterward negotiates directly with the owner and purchases the property, the broker is entitled to his commissions. Kilbourn *v.* King, 6 D. C. 310; Tyler *v.* Parr, 52 Mo. 249; Bell *v.* Kaiser, 50 Mo. 150; Anderson *v.* Cox, 16 Nebr. 10, 20 N. W. 10; Kiernan *v.* Bloom, 91 N. Y. App. Div. 429, 86 N. Y. Suppl. 899 (so holding under a special contract); Jackson *v.* Carrick, 25 Wkly. Notes Cas. 132. *Contra*, Charlton *v.* Wood, 11 Heisk. (Tenn.) 19.

If the principal knowingly interferes with the negotiations going on between the broker and the customer and concludes the transaction himself, he cannot defeat the broker's right to a commission because the broker has not introduced the customer to him. Williams *v.* Bishop, 11 Colo. App. 378, 53 Pac 239.

The broker must notify the principal of the offer, else he is not ordinarily entitled to a commission. Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

Sufficiency of notice.— Where a broker employed to effect a sale has found a purchaser willing to buy upon the terms named and of sufficient responsibility, he is entitled to a commission, although in the telegram announcing the sale he did not name the purchaser. Duclos *v.* Cunningham, 102 N. Y. 678, 6 N. E. 790. So the fact that the broker reported to his principal that an offer of sixteen thousand dollars for the land had been made instead of fifteen thousand dollars does not affect his right to a commission, where as a result of his negotiation a sale for the smaller sum was made. Peckham *v.* Ashhurst, 18 R. I. 376, 28 Atl. 337. Notice sent by the broker by mail and by telegraph is sufficient, although the purchaser intercepts a letter of acceptance sent by himself at the same time. Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217 [*modified* in 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932].

Negligence of principal.— Where a principal agreed to pay a broker commissions on orders taken by the latter and sent to the former, and the broker was accustomed to number each order from one upward, recommencing at one at the beginning of each year, and the second year the first forty-eight orders were never received by the principal, the principal was not negligent, so as to he liable for the commissions on the orders lost, because on receiving an order numbered forty-nine he did not inform the broker that no orders for preceding numbers had been received. Steinbach *v.* Montpelier Carriage Co., 37 Fed. 760.

44. *Illinois.*— Henry *v.* Stewart, 185 Ill. 448, 57 N. E. 190 [*affirming* 85 Ill. App. 170]; Dean *v.* Archer, 103 Ill. App. 455; Pate *v.* Marsh, 65 Ill. App. 482; Hafner *v.* Herron, 60 Ill. App. 592 [*affirmed* in 165 Ill. 242, 46 N. E. 211].

Iowa.— Gibson *v.* Hunt, (1903) 94 N. W. 277.

Kansas.— Dreisback *v.* Rollins, 39 Kan. 268, 18 Pac. 187.

Maryland.— Schwartze *v.* Yearly, 31 Md. 270.

Massachusetts.— French *v.* McKay, 181 Mass. 485, 63 N. E. 1068; Desmond *v.* Stebbins, 140 Mass. 339, 5 N. E. 150. See also Loud *v.* Hall, 106 Mass. 404.

Minnesota.— Reishus-Remer Land Co. *v.* Benner, 91 Minn. 401, 98 N. W. 186. See also Haug *v.* Haugan, 51 Minn. 558, 53 N. W. 874.

New Jersey.— Vreeland *v.* Vetterlein, 33 N. J. L. 247.

New York.— Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Lloyd *v.* Matthews, 51 N. Y. 124; Goodwin *v.* Brennecke, 21 N. Y. App. Div. 138, 47 N. Y. Suppl. 266; Glentworth *v.* Luther, 21 Barb. 145; Baker *v.* Thomas, 11 Misc. 112, 31 N. Y. Suppl. 993; Myers *v.* Dean, 10 Misc. 402, 31 N. Y. Suppl. 119 (holding that a broker is entitled to commissions for procuring a lease if he brings the parties together under circumstances resulting in its execution, although he was not the first to suggest to the lessee that the lease could be procured); Van Doren *v.* Jelliffe, 1 Misc. 354, 20 N. Y. Suppl. 636 (holding that a broker who introduces the purchaser is entitled to commissions where the negotiations are suspended, but subsequently resumed, and a sale is made); Turner *v.* Putnam, 13 N. Y. Suppl. 567.

Ohio.— Roush *v.* Loeffler, 18 Ohio Cir. Ct. 806, 6 Ohio Cir. Dec. 760.

Pennsylvania.— Holmes *v.* Neafie, 151 Pa. St. 392, 24 Atl. 1096 (holding that where a

(VII) *NEGOTIATIONS THROUGH OTHER AGENTS.*[45] Where several brokers are employed to negotiate the same transaction, the one who first succeeds is entitled to the full commission.[46] Where property is placed with several brokers for sale, the owner is bound to pay the broker who in fact effects the sale;[47] and the commission belongs to the one who first procures a contract of sale, although the other first procures a conveyance.[48] If several brokers are employed to effect the same transaction in behalf of their principal, the one who is the procuring cause of the transaction is entitled to the commission.[49] Accordingly if a broker

broker brings an intending purchaser of a vessel and a shipbuilder together, and as a result a contract for the construction of a vessel is made, the mere fact that the shipbuilder is required to enter into competition with other builders before the contract is awarded to him does not deprive the broker of his right to a commission); Inslee *v.* Jones, Brightly 76; Haines *v.* Bequer, 9 Phila. 51.

England.— Green *v.* Bartlett, 14 C. B. N. S. 681, 32 L. J. C. P. 261, 8 L. T. Rep. N. S. 503, 11 Wkly. Rep. 834, 108 E. C. L. 681; *In re* Beale, 5 Morr. Bankr. Cas. 37.

See 8 Cent. Dig. tit. "Brokers," § 69. See also *supra*, II, E, 1, m, (VI), (A).

45. **Interpleader by rival brokers** see INTERPLEADER.

Right to commission where transaction is effected by another broker on different terms see *supra*, II, E, 1, m, (II), (C), (1).

46. Daniel *v.* Columbia Heights Land Co., 9 App. Cas. (D. C.) 483 (holding that upon a sale the commission should be paid to the broker selling the property, although the other broker had gone to the expense of advertising); Glenn *v.* Davidson, 37 Md. 365 (such being the usage among brokers in the locality); Glascock *v.* Vanfleet, 100 Tenn. 603, 46 S. W. 449.

Notice to principal.— To entitle him to a commission, the broker who first procures a purchaser must notify the principal of that fact before he sells to a customer procured by a rival broker; and an understanding that a broker on procuring a purchaser shall wire the owner does not constitute the telegraph company the owner's agent, so that notice to the company that a purchaser has been procured is not notice to the owner until the telegram is actually received by him. Johnson *v.* Wright, 124 Iowa 61, 99 N. W. 103.

47. Eggleston *v.* Austin, 27 Kan. 245, holding that the principal cannot exercise an option as to who shall have the commission.

However, the principal performs his duty by remaining neutral between the several brokers, and may sell to a buyer produced by any one of them without being called on to decide which one was the moving cause of the purchase. Vreeland *v.* Vetterlein, 33 N. J. L. 247.

48. Stewart *v.* Woodward, 7 Kan. App. 633, 53 Pac. 148.

49. Livezy *v.* Miller, 61 Md. 336; Cohen *v.* Hershfield, 16 Daly (N. Y.) 96, 8 N. Y. Suppl. 512, holding that a broker's right to a commission for effecting a sale is not affected by the fact that the principal, relying on the misrepresentations of the purchaser, paid a commission to a second broker who did not induce the sale. See also Bray *v.* Chandler, 18 C. B. 718, 86 E. C. L. 718; Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771.

First calling attention to property.—Which broker first called the purchaser's attention to the property is not a controlling factor, but the commission belongs to the one who is the procuring cause of the sale. Scott *v.* Lloyd, 19 Colo. 401, 35 Pac. 733 (holding that the facts that the land was in the hands of other real-estate agents, who first showed the land to the purchaser, and that by an agreement to divide the commission with him the agent effecting the sale induced the purchaser to make the purchase through him do not subject the principal to liability for commissions to the former agents, and relieve him of liability to the latter); Bowser *v.* Mick, 29 Ind. App. 49, 62 N. E. 513; Stauffer *v.* Bell, 99 Iowa 545, 68 N. W. 817; Stinde *v.* Blesch, 42 Mo. App. 578; Sampson *v.* Ottinger, 93 N. Y. App. Div. 226, 87 N. Y. Suppl. 796; Dreyer *v.* Rauch, 3 Daly (N. Y.) 434, 42 How. Pr. (N. Y.) 22 (so holding where the broker effecting the sale had no notice of the former negotiations with the other broker); Haines *v.* Barney, 33 Misc. (N. Y.) 748, 67 N. Y. Suppl. 164; Martin *v.* Rillings, 2 N. Y. City Ct. 86; Kifer *v.* Yoder, 198 Pa. St. 308, 47 Atl. 974; Glascock *v.* Vanfleet, 100 Tenn. 603, 46 S. W. 449 (where neither the principal nor the broker effecting the sale had notice of the former negotiations with the other broker); Reynolds *v.* Tompkins, 23 W. Va. 229 (holding that if one broker finds a purchaser and negotiates with him to sell the land at a certain price and on terms differing from those specified in the authority to sell, and when the sale is about to be consummated another broker meets the same person, who talks to him about the offer of the first broker, and with full knowledge of the negotiations of the first broker the second broker sells the property to such person for a less price, but on the same terms as to cash down and time in which to make deferred payments, and the owner is ignorant of the negotiations of the first broker with the purchaser, but ratifies the sale by the second broker, made on the terms proposed by the first, he is not liable to the second but to the first broker, and should pay him a reasonable compensation for procuring the sale). This rule applies also to brokers employed to effect leases. McCloskey *v.* Thompson, 26 Misc. (N. Y.) 735, 56 N. Y. Suppl. 1076.

employed to sell land produces a person whom he induces to buy, he is entitled to compensation, although the sale is formally effected by another broker.[50] This is also true where the owner at first refuses to accept the customer's offer if, without revoking the broker's agency, he subsequently accepts it,[51] and this rule applies to brokers employed to effect leases.[52] A broker who is unsuccessful in effecting a transaction in behalf of the principal is not entitled to a commission upon the success of another broker,[53] unless the principal gives him an exclusive agency[54] or promises to pay him a commission even though another broker is successful.[55] This is especially true where the unsuccessful broker's

First bringing parties together.— Where property has been listed for sale with different real-estate agents, the agent who induces the seller and the purchaser to enter into a contract is entitled to the commission, although another agent may have first brought the parties together. Higgins *v.* Miller, 109 Ky. 209, 58 S. W. 580, 22 Ky. L. Rep. 702; Baker *v.* Thomas, 12 Misc. (N. Y.) 432, 33 N. Y. Suppl. 613; De Zavala *v.* Royaliner, 84 N. Y. Suppl. 969. *Contra,* Osler *v.* Moore, 8 Brit. Col. 115.

50. *Illinois.*—Barton *v.* Rogers, 84 Ill. App. 49 (holding that a real-estate broker who brings the principal into negotiations with a customer to whom a sale is made is entitled to a commission, although another broker furnishes the customer with money to enable him to complete the sale); McGuire *v.* Carlson, 61 Ill. App. 295; Jenks *v.* Nobles, 42 Ill. App. 33.

Massachusetts.— Dowling *v.* Morrill, 165 Mass. 491, 43 N. E. 295.

Missouri.— Smith *v.* Truitt, 107 Mo. App. 1, 80 S. W. 686; McCormack *v.* Henderson, 100 Mo. App. 647, 75 S. W. 171; Hogan *v.* Slade, 98 Mo. App. 44, 71 S. W. 1104; Wright *v.* Brown, 68 Mo. App. 577; Brennan *v.* Roach, 47 Mo. App. 290.

New York.— Winans *v.* Jaques, 10 Daly 487 (holding that a real-estate broker whose action causes a sale is entitled to his commission, although another broker in fact negotiated the sale and obtained a commission); Shipman *v.* Frech, 1 N. Y. Suppl. 67.

Pennsylvania.— Gibson's Estate, 3 Pa. Dist. 147, 14 Pa. Co. Ct. 241.

See 8 Cent. Dig. tit. "Brokers," § 82 *et seq.*

Sale through joint efforts of rival brokers.— Where several brokers have each endeavored to bring about a sale which is finally consummated, and each has contributed something toward the result, that one only is entitled to a commission, in the absence of contract, whose services were the effective means, or the predominating efficient cause, of bringing about the sale. Hawkins *v.* Chandler, 8 Houst. (Del.) 434, 32 Atl. 464 (holding, however, that a broker who performs services which assist in bringing about a sale may recover compensation for his services); Whitcomb *v.* Bacon, 170 Mass. 479, 49 N. E. 742, 64 Am. St. Rep. 317. So where a purchaser is produced and the sale consummated by one of two brokers who have property for sale, and the commission paid him by the owner, the fact that the other broker has by advertising found the purchaser, and by interviews induced him to make the purchase, will not render the owner liable to him also. Daniel *v.* Columbia Heights Land Co., 9 App. Cas. (D. C.) 483. See, however, Winans *v.* Jaques, 10 Daly (N. Y.) 487.

Duty to disclose customer's name to principal.— If a broker reports an offer to his principal without identifying the person from whom it came, he cannot recover commissions in case of a subsequent sale through another broker at the same price to the same purchaser, unless the seller knew this fact, or notice was given him by the first broker before the completion of the contract and payment of commissions to the second. Tinges *v.* Moale, 25 Md. 480, 90 Am. Dec. 73.

51. Gottschalk *v.* Jennings, 1 La. Ann. 5, 45 Am. Dec. 70; Humphrey *v.* Eddy Transp. Co., 115 Mich. 420, 73 N. W. 422; Buehler *v.* Weiffenbach, 21 Misc. (N. Y.) 30, 46 N. Y. Suppl. 861; Peckham *v.* Ashhurst, 18 R. I. 376, 28 Atl. 337.

52. Cadigan *v.* Crabtree, 179 Mass. 474, 61 N. E. 37, 88 Am. St. Rep. 397, 55 L. R. A. 77.

53. *Iowa.*— Goin *v.* Hess, 102 Iowa 140, 71 N. W. 218.

Kansas.— Latshaw *v.* Moore, 53 Kan. 234, 36 Pac. 342.

Louisiana.— Walton *v.* New Orleans, etc., R. Co., 23 La. Ann. 398.

Massachusetts.— Ward *v.* Fletcher, 124 Mass. 224.

Michigan.— Douville *v.* Comstock, 110 Mich. 693, 69 N. W. 79 (also holding that where a broker employed to sell land negotiated unsuccessfully with another broker who afterward obtained authority from the principal under which he effected a sale, the fact that the purchaser after the sale promised him an interest in the profits of the lands, in consideration that he should look after them and try to effect a sale at an increased price, did not constitute him a purchaser so as to entitle the broker first employed to a commission); Thuner *v.* Kanter, 102 Mich. 59, 60 N. W. 299.

Texas.— Wilson *v.* Alexander, (1892) 18 S. W. 1057.

See 8 Cent. Dig. tit. "Brokers," § 82 *et seq.*

54. See *infra,* II, E, 1, m, (IX).

55. Long *v.* Herr, 10 Colo. 380, 15 Pac. 802; Emberson *v.* Dean, 46 How. Pr. (N. Y.) 236; Owens *v.* Wehrle, 14 Pa. Super. Ct. 536, holding that a contract with a broker for the sale of real estate, which provides that the

employment has been abandoned by him or withdrawn by the principal.[56] So if the person introduced by the broker is not able, ready, and willing to buy on the terms prescribed by the owner, the broker is not entitled to compensation upon a sale being subsequently made on those terms by the principal to the same person through another broker.[57]

(VIII) *NEGOTIATIONS DIRECT WITH PRINCIPAL*[58] — (A) *General Rules.* After a broker has found a customer and commenced negotiations, neither the principal nor the customer can break them off and defeat the broker's right to a commission by concluding the transaction without his aid.[59] Nor can a principal reject an offer made by a person found by a broker and then without the broker's intervention sell to the same person and thus defeat the broker's right to a commission.[60] A broker is entitled to a commission for effecting a sale, although he

broker shall receive his compensation if the property is sold by any person within a period of one year, is valid, in the absence of fraud, and that the broker may recover compensation, although the property is sold by another. See, however, Tinsley *v.* Scott, 69 Ill. App. 352 (holding that where, under an agreement to pay a broker a commission if he sold land or if it was sold to a customer furnished by him by any other agent for a less sum than that quoted to him, a customer was furnished who refused to pay the price and purchased other land instead, and three months afterward the same person through another agent purchased the land in question at a less price than that quoted in the agreement, the broker was not entitled to the commission); Powell *v.* Anderson, 15 Daly (N. Y.) 219, 4 N. Y. Suppl. 706.

56. Singer, etc., Stone Co. *v.* Hutchinson, 61 Ill. App. 308; Holley *v.* Townsend, 2 Hilt. (N. Y.) 34. See also Kifer *v.* Yoder, 198 Pa. St. 308, 47 Atl. 974.

Right to commissions after abandonment or revocation of agency see also *supra*, II, E, I, a, (VI), (VII).

57. *Colorado.*— Carper *v.* Sweet, 26 Colo. 547, 59 Pac. 45.

Indiana.— Platt *v.* Johr, 9 Ind. App. 58, 36 N. E. 294.

Massachusetts.— Leonard *v.* Eldridge, 184 Mass. 594, 69 N. E. 337.

Pennsylvania.— Earp *v.* Cummins, 54 Pa. St. 394, 93 Am. Dec. 718.

Texas.— Duval *v.* Moody, 24 Tex. Civ. App. 627, 60 S. W. 269; Montgomery *v.* Biering, (Civ. App. 1895) 30 S. W. 508.

See 8 Cent. Dig. tit. "Brokers," § 82 *et seq.*

This is true, although the unsuccessful broker first called the purchaser's attention to the property, or first brought the purchaser and the principal together, where he was not the procuring cause of the sale. See *supra*, note 49.

58. Transactions effected by principal: After revocation of broker's authority see supra, II, E, 1, a, (VII). On terms different from those mentioned in broker's authorization see *supra*, II, E, 1, m, (II), (C), (I).

Without broker's aid see *supra*, II, E, 1, g.

59. *Colorado.*— Howe *v.* Werner, 7 Colo. App. 530, 44 Pac. 511.

Georgia.— Gresham *v.* Connally, 114 Ga. 906, 41 S. E. 42.

Illinois.— Hutten *v.* Renner, 74 Ill. App. 124; Ellis *v.* Dunsworth, 49 Ill. App. 187.

Iowa.— Gibson *v.* Hunt, (1903) 94 N. W. 277, so holding, although the agent expressed a belief that the prospective purchaser had given up the deal, and the principal afterward carried on independent negotiations with such purchaser, where he did so to escape the payment of a commission.

New Jersey.— Hedden *v.* Shepherd, 29 N. J. L. 334, holding that a broker who brings the parties together, draws the writings, and receives the purchase-money is entitled to his commissions, although the contract of sale is directly made between the principal and his vendee.

New York.—Woolley *v.* Loew, 80 Hun 294, 30 N. Y. Suppl. 86 (holding that an owner of land who employed a broker to sell is liable for commissions, where a sale is ultimately made by the owner to a customer produced by the broker, although the sale was made after the negotiations begun by the broker had been terminated, unless the owner terminated them in good faith); Carroll *v.* Pettit, 67 Hun 418, 22 N. Y. Suppl. 250; Chilton *v.* Butler, 1 E. D. Smith 150; Esmond *v.* Kingsley, 3 N. Y. Suppl. 696; Lynch *v.* McKenna, 58 How. Pr. 42.

Pennsylvania.— Keys *v.* Johnson, 68 Pa. St. 42.

Tennessee.—Sylvester *v.* Johnson, 110 Tenn. 392, 75 S. W. 923, holding that while an agency for the sale of a certain lot is terminated by the sale of the property to one with whom the agent has commenced negotiations this does not defeat the broker's right to a commission.

Washington.— Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 73 Pac. 788.

See 8 Cent. Dig. tit. "Brokers," § 85 *et seq.*

Compare Smith *v.* Lawrence, 98 Me. 92, 56 Atl. 455, holding that on the issue whether an owner during the continuance of an option given by him to a broker on certain real estate dissuaded a probable customer of the option holder from purchasing from him, evidence that the owner and the customer had several interviews, and after termination of the option entered into a contract as to the land, does not prove dissuasion on the part of the owner.

60. Scott *v.* Patterson, 53 Ark. 49, 13 S. W. 419; Day *v.* Porter, 161 Ill. 235, 43 N. E.

takes no part in the negotiations, where the sale is effected as the result of his introducing the customer and the principal or putting them into communication; the principal cannot defeat the right to compensation by closing the transaction directly with the customer without the broker's further aid.[61] If the principal and the customer found by the broker agree upon terms, the broker's right to a commission cannot be defeated by the principal's conveying the property to a third person for the benefit of the customer;[62] and if the broker finds a customer willing to buy on the terms prescribed by the owner, the latter cannot defeat the broker's right to a commission by conveying the property to a third person who consummates the sale under the principal's direction.[63] It is not every sale to a customer procured by the broker that will entitle him to a commission, however; he must be the procuring cause of the transaction.[64] Hence if a broker fails to bring a customer to terms, and then abandons the negotiations, he is not entitled to a commission upon a sale being subsequently made by the owner to the customer;[65] and the fact that a broker found a customer to whom the

1073 [*affirming* 60 Ill. App. 386]; Somers *v.* Wescoat, 66 N. J. L. 551, 49 Atl. 462.

61. *Alabama.*— Holland *v.* Howard, 105 Ala. 538, 17 So. 35.

Illinois.— Snyder *v.* Fearer, 87 Ill. App. 275; Keeler *v.* Grace, 27 Ill. App. 427.

Iowa.— Hanna *v.* Collins, 69 Iowa 51, 28 N. W. 431.

Maryland.— Jones *v.* Adler, 34 Md. 440.

Mississippi.— Delta, etc., Land Co. *v.* Wallace, 83 Miss. 656, 36 So. 263.

Missouri.— Timberman *v.* Craddock, 70 Mo. 638; Crone *v.* Mississippi Valley Trust Co., 85 Mo. App. 601; Bass *v.* Jacobs, 63 Mo. App. 393; Jones *v.* Berry, 37 Mo. App. 125.

Nebraska.—Nicholas *v.* Jones, 23 Nebr. 813, 37 N. W. 679; Butler *v.* Kennard, 23 Nebr. 357, 36 N. W. 579; Potvin *v.* Curran, 13 Nebr. 302, 14 N. W. 400.

New York.— Lloyd *v.* Matthews, 51 N. Y. 124; Gillen *v.* Wise, 14 Daly 480, 15 N. Y. St. 367; Hanford *v.* Shapter, 4 Daly 243; Ludlow *v.* Carman, 2 Hilt. 107; O'Toole *v.* Tucker, 16 Misc. 485, 38 N. Y. Suppl. 969 [*affirmed* in 17 Misc. 554, 40 N. Y. Suppl. 695].

Pennsylvania.— Fidelity Ins., etc., Co.'s Appeal, 161 Pa. St. 177, 28 Atl. 1079; Gibson's Estate, 3 Pa. Dist. 147, 14 Pa. Co. Ct. 241.

South Dakota.— Scott *v.* Clark, 3 S. D. 486, 54 N. W. 538.

Tennessee.— Royster *v.* Mageveney, 9 Lea 148; Arrington *v.* Cary, 5 Baxt. 609.

Wisconsin.— McKenzie *v.* Lego, 98 Wis. 364, 74 N. W. 249.

See 8 Cent. Dig. tit. "Brokers," § 85 *et seq.*

Procuring customer already known to principal.— A principal who obtains knowledge from his broker that an intending purchaser procured by the broker is a person of whom he has learned from another source as being a possible purchaser owes to the broker the duty of either terminating the agency or notifying him that he intends personally to conduct future negotiations; and on his failure to do so, the broker is entitled to commissions, although the sale is completed by the principal himself. Carroll *v.* Pettit, 67 Hun (N. Y.) 418, 22 N. Y. Suppl. 250.

62. Williams *v.* Bishop, 11 Colo. App. 378, 53 Pac. 239; Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927; Steidl *v.* McClymonds, 90 Minn. 205, 95 N. W. 906; Burke *v.* Cogswell, 39 Minn. 344, 40 N. W. 251; Martin *v.* Fegan, 95 N. Y. App. Div. 154, 88 N. Y. Suppl. 472; Minster *v.* Benoliel, 32 Misc. (N. Y.) 630, 66 N. Y. Suppl. 493 [*reversed* on other grounds in 33 Misc. 586, 67 N. Y. Suppl. 1044]; Konner *v.* Anderson, 32 Misc. (N. Y.) 511, 66 N. Y. Suppl. 338; McKnight *v.* Thayer, 21 N. Y. Suppl. 440, holding that the broker's right to commissions was not affected by the fact that the owner supposed the purchaser was buying for himself, where after learning who the real purchaser was he conveyed to him when he might have avoided the contract. See, however, Goldstein *v.* Walters, 15 Daly (N. Y.) 397, 7 N. Y. Suppl. 756, 8 N. Y. Suppl. 957 (holding that a real-estate agent who fails to induce a customer to pay the price demanded by the owner, but predicts that he will ultimately pay that price, is not entitled to commissions, where the owner afterward sells the land to others for that price without knowledge that it is actually purchased for the customer); Bennett *v.* Kidder, 5 Daly (N. Y.) 512; Hamm *v.* Weber, 19 Misc. (N. Y.) 485, 43 N. Y. Suppl. 1059 (in both of which cases it was held that the facts did not show a purchase for the customer in another's name to avoid payment of commissions).

63. Fov *v.* Byrnes, 52 N. Y. Super. Ct. 150.

64. See *supra*, II, E, 1, m, (VI), (A).

65. Lipe *v.* Ludewick, 14 Ill. App. 372; Moore *v.* Cresap, 109 Iowa 749, 80 N. W. 399; Fairchild *v.* Cunningham, 84 Minn. 521, 88 N. W. 15; Bouscher *v.* Larkins, 84 Hun (N. Y.) 288, 32 N. Y. Suppl. 305; Hay *v.* Platt, 66 Hun (N. Y.) 488, 21 N. Y. Suppl. 362; Markus *v.* Kenneally, 19 Misc. (N. Y.) 517, 43 N. Y. Suppl. 1056. See also Walton *v.* McMorrow, 39 N. Y. App. Div. 667, 57 N. Y. Suppl. 691, holding that a broker cannot recover on a contract that he should have

owner sold after the employment does not entitle him to a commission where he found the customer before he was employed to sell the property and the negotiations were conducted without his aid.[66]

(B) *Ignorance of Broker's Services.* Where a broker authorized to sell land is the procuring cause of a sale made by the owner without the broker's personal intervention, he is entitled to a commission, although the owner made the sale in ignorance of the broker's having found the purchaser or having induced him to make the purchase.[67]

(IX) *EXCLUSIVE AGENCY.* A real-estate broker who is given an exclusive agency for the sale of property is entitled to a commission on any sale thereof made by the principal either independently or through the efforts of another broker within the time specified in the contract of employment, although the exclusive agent's efforts did not contribute toward the sale.[68] However, a con-

commissions for effecting an exchange of property with another, where he did nothing under the contract and does not show that he was excused from rendering services under his employment, although the trade was consummated by the owner. See, however, Diamond *v.* Wheeler, 80 N. Y. App. Div. 58, 80 N. Y. Suppl. 416.

Sale after abandonment or revocation of employment see *supra*, II, E. 1, a, (VI), (VII).

66. Cushman *v.* Gori, 1 Hilt. (N. Y.) 356.

67. *District of Columbia.*— Bryan *v.* Abert, 3 App. Cas. 180.

Illinois.— Adams *v.* Decker, 34 Ill. App. 17.

Iowa.— Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098; Kelly *v.* Stone, 94 Iowa 316, 62 N. W. 842. See, however, Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120.

Missouri.— Millan *v.* Porter, 31 Mo. App. 563; Goffe *v.* Gibson, 18 Mo. App. 1.

Nebraska.— Craig *v.* Wead, 58 Nebr. 782, 79 N. W. 718; Hambleton *v.* Fort, 58 Nebr. 282, 78 N. W. 498; Butler *v.* Kennard, 23 Nebr. 357, 36 N. W. 579.

New York.— Lloyd *v.* Matthews, 51 N. Y. 124; Bickart *v.* Hoffman, 19 N. Y. Suppl. 472. See also Metcalf *v.* Gordon, 86 N. Y. App. Div. 368, 83 N. Y. Suppl. 808. See, however, Tinkham *v.* Knox, 2 Misc. 579, 21 N. Y. Suppl. 954.

Texas.— Graves *v.* Bains, 78 Tex. 92, 14 S. W. 256.

See 8 Cent. Dig. tit. "Brokers," § 85.

Contra.— Soule *v.* Deering, 87 Me. 365, 32 Atl. 998. See also Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790, holding that, where a subagent conceals from the principal the fact that he is acting for the agent, the latter cannot recover a commission.

In any event, where a real-estate agent is instructed by the principal to send persons inquiring about property to the latter, the agent is not required to notify the principal of the fact that he has sent persons to him, in order to recover commissions on a sale to such persons. Clifford *v.* Meyer, 6 Ind. App. 633, 33 N. E. 127, 34 N. E. 23. And where a broker was employed to sell land, and a purchaser procured by him, when he called on the principal to ascertain his best terms, informed him that the broker had shown him the land, the notice was sufficient to bind the principal to pay for the services rendered. Reishus-Remer Land Co. *v.* Benner, 91 Minn. 401, 98 N. W. 186.

Evidence held sufficient to show that defendant at the time he sold his land knew that the purchaser had been sent to him by plaintiff see Henninger *v.* Burch, 90 Minn. 43, 95 N. W. 578; Lemon *v.* De Wolf, 89 Minn. 465, 95 N. W. 316.

68. *Iowa.*— Metcalf *v.* Kent, 104 Iowa 487, 73 N. W. 1037.

Massachusetts.— See Ward *v.* Fletcher, 124 Mass. 224.

Missouri.— Lipscomb *v.* Cole, 81 Mo. App. 53.

New York.— Moses *v.* Bierling, 31 N. Y. 462.

Tennessee.— Sylvester *v.* Johnson, 110 Tenn. 392, 75 S. W. 923.

See 8 Cent. Dig. tit. "Brokers," § 83.

If the principal himself sells the property, although without the broker's aid, the broker is entitled to a commission.

California.— Gregory *v.* Bonney, 135 Cal. 589, 67 Pac. 1038.

Kentucky.— Brown *v.* Lapp, 77 S. W. 194, 25 Ky. L. Rep. 1134.

Missouri.— Lipscomb *v.* Cole, 81 Mo. App. 53.

New York.— Levy *v.* Rothe, 17 Misc. 402, 39 N. Y. Suppl. 1057; Schultz *v.* Griffin, 5 Misc. 499, 26 N. Y. Suppl. 713, both holding that, where a broker is given the exclusive right to sell property within a certain time, he is entitled to his commissions if he finds a purchaser within that time who is ready and willing to accept the terms, although the owner has already sold the property.

Texas.— Harrell *v.* Zimpleman, 66 Tex. 292, 17 S. W. 478; Stringfellow *v.* Powers, 4 Tex. Civ. App. 199, 23 S. W. 313.

See 8 Cent. Dig. tit. "Brokers," § 83.

Contra.— Ingold *v.* Symonds, (Iowa 1904) 99 N. W. 713, holding that a contract giving a broker exclusive authority to find a purchaser for property but not negativing the right of the principal to sell the property himself is not violated by a sale by the principal.

tract of employment does not give the broker an exclusive agency unless it is so specified, either expressly or by implication.[69]

(x) *Effect of Failure or Refusal of Principal or Customer to Consummate Transaction*—(A) *Failure or Refusal of Principal*—(1) General Rules. If a broker finds a customer willing to enter into a transaction on the terms proposed by the principal, the principal cannot, in the absence of a special contract to the contrary,[70] defeat the broker's right to compensation by refusing to complete the transaction,[71] unless he has good grounds for the

Sale by principal after revocation of agency see *supra*, II, E, 1, a, (VII).

Time within which agency must be performed see II, E, 1, m, (III).

69. Cook *v.* Forst, 116 Ala. 395, 22 So. 540; White *v.* Benton, 121 Iowa 354, 96 N. W. 876; Kidman *v.* Howard, (S. D. 1904) 99 N. W. 1104.

70. Lyle *v.* University Land, etc., Co. (Tex. Civ. App. 1895) 30 S. W. 723, holding that where a broker is by agreement to receive commissions for procuring a purchaser only on condition that the sale is made to a certain purchaser, he cannot recover if the sale to such purchaser is not consummated owing to the fault of either of the parties.

Commission to be paid by customer.— Although the contract of employment provides that the commission shall be paid by the customer, yet the principal is liable therefor if he refuses to complete the transaction. Cavender *v.* Waddingham, 2 Mo. App. 551.

Contract for commission to be paid out of price obtained by principal.— If the contract of employment provides that the commission is to be paid out of the price received by the principal, the broker is not entitled to compensation unless the transaction was consummated (Lindley *v.* Fay, 119 Cal. 239, 51 Pac. 333; Power *v.* Kane, 5 Wis. 265. *Contra*, Stauffer *v.* Linenthal, 29 Ind. App. 305, 64 N. E. 643), in the absence of a waiver by the principal of the customer's default (Bishop *v.* Averill, 17 Wash. 209, 49 Pac. 237, 50 Pac. 1024).

Contract to negotiate transaction subject to principal's approval.— Where by the terms of employment a broker employed to sell land was to procure a contract of sale subject to the approval of the principal, the broker is not entitled to a commission upon finding a purchaser if the principal refuses to carry out the transaction. Goin *v.* Hess, 102 Iowa 140, 71 N. W. 218. Contract to procure customer on terms satisfactory to principal see *supra*, page 242 note 80. Reservation of right to reject customer see *supra*, page 248 note 95.

Contract to pay commission when property is conveyed see *supra*, II, E, 1, m, (II), (A).

Right to commission under agreement for sale at net price see *supra*, note 78.

71. See cases cited *infra*, this note. See also *supra*, II, E, 1, m, (II), (B).

Refusal of principal to complete sale see the following cases:

Illinois.— Hersher *v.* Wells, 103 Ill. App. 418. See also Tinsley *v.* Durfey, 99 Ill. App. 239.

Iowa.— Felts *v.* Butcher, 93 Iowa 414, 61 N. W. 991.

Missouri.— Carpenter *v.* Rynders, 52 Mo. 278; Harwood *v.* Diemer, 41 Mo. App. 48.

New York.— Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378, 38 Am. Rep. 441; Krahner *v.* Heilman, 16 Daly 132, 9 N. Y. Suppl. 633; Thompson *v.* Sea Isle City, 27 Misc. 834, 58 N. Y. Suppl. 203.

North Carolina.— Atkinson *v.* Pack. 114 N. C. 597, 19 S. E. 628.

Pennsylvania.— Edwards *v.* Goldsmith, 16 Pa. St. 43.

Texas.— Wilson *v.* Clark, (Civ. App. 1904) 79 S. W. 649; Orynski *v.* Menger, 15 Tex. Civ. App. 448, 39 S. W. 388.

Wisconsin.— Delafield *v.* Smith, 101 Wis. 664, 78 N. W. 170, 70 Am. St. Rep. 938; Delaplaine *v.* Turnley, 44 Wis. 31.

United States.— Kock *v.* Emmerling, 22 How. 69, 16 L. ed. 292.

England.— Inchbald *v.* Western Neilgherry Coffee, etc., Plantation Co., 17 C. B. N. S. 733, 10 Jur. N. S. 1128, 34 L. J. C. P. 15, 11 L. T. Rep. N. S. 345, 13 Wkly. Rep. 95, 112 E. C. L. 733; Lockwood *v.* Levick, 8 C. B. N. S. 603, 29 L. J. C. P. 340, 7 Jur. N. S. 102, 2 L. T. Rep. N. S. 357, 8 Wkly. Rep. 583, 98 E. C. L. 603; Prickett *v.* Badger, 1 C. B. N. S. 296, 3 Jur. N. S. 66, 26 L. J. C. P. 33, 5 Wkly. Rep. 117, 87 E. C. L. 296.

See 8 Cent. Dig. tit. "Brokers," § 94 *et seq.*

Refusal of principal to complete purchase see Beebe *v.* Roberts, 3 E. D. Smith (N. Y.) 194; Anten *v.* Jacobus, 20 Misc. (N. Y.) 669, 46 N. Y. Suppl. 681; Kiam *v.* Turner, 21 Tex. Civ. App. 417, 52 S. W. 1043.

Refusal of principal to complete exchange see Blaydes *v.* Adams, 35 Mo. App. 526; Greenwood *v.* Burton, 27 Nebr. 808, 44 N. W. 28; Brown *v.* Grassman, 53 N. Y. App. Div. 640, 65 N. Y. Suppl. 1126; West *v.* Lynch, 1 N. Y. City Ct. 225; Delaplaine *v.* Turnley, 44 Wis. 31.

Refusal of principal to complete loan see Rundle *v.* Staats, (Colo. App. 1903) 73 Pac. 1091; Vinton *v.* Baldwin, 88 Ind. 104, 45 Am. Rep. 447; Corning *v.* Calvert, 2 Hilt. (N. Y.) 56; Lord *v.* Moran, 31 Misc. (N. Y.) 750, 64 N. Y. Suppl. 37; Steinmetz *v.* Pancoast, 17 Phila. (Pa.) 185.

Effect of principal's disabling himself to consummate transaction.— The principal cannot relieve himself from liability for a commission by any voluntary act disabling him from performance. Nesbitt *v.* Helser, 49 Mo. 383; Bailey *v.* Chapman, 41 Mo. 536.

Fault of broker.— To entitle a broker to a

refusal.[72] The principal must have substantial grounds for refusing to complete the transaction in order to defeat the broker's right to a commission.[73] Thus if

commission, the transaction must not have failed of consummation through his own fault. Hersher *v.* Wells, 103 Ill. App. 418; Harwood *v.* Diemer, 41 Mo. App. 48; Thompson *v.* Sea Isle City, 27 Misc. (N. Y.) 834, 58 N. Y. Suppl. 203; Scott *v.* Gage, 16 S. D. 285, 92 N. W. 37, where the contract of sale was written by the broker and contained a mistaken description, and included land which the vendor did not own without his knowledge and consent.

Waiver of right to commission.— A broker who has procured a purchaser for real estate on the terms given by his employer waives no rights by accompanying the seller to the place where the contract of sale was to be closed, and being present at the presentation for signature of a contract containing a forfeiture clause, he having previously objected to the insertion of such a clause, and the purchaser refusing to accede thereto. Beebe *v.* Ranger, 35 N. Y. Super. Ct. 452. If a broker has become entitled to a commission under his contract of employment, a subsequent agreement by him to wait for his commission until the happening of a certain event does not bind him, where there is no consideration therefor. Fitch *v.* Cunningham, 27 N. Y. Wkly. Dig. 198.

72. Peabody *v.* Dewey, 51 Ill. App. 260 [*affirmed* in 153 Ill. 657, 39 N. E. 977, 27 L. R. A. 322] (holding that where a party agreed to pay a commission to brokers for procuring a loan, notes, mortgages, etc., to be in the usual form, and the usual form of mortgage and notes used by the brokers until a few months before the transaction contained no "gold clause," and the principal was familiar with that form, and did not know of the change to a form containing the clause, on his refusal to execute the notes and mortgages containing that clause the broker cannot recover his commission); Hayden *v.* Grillo, 35 Mo. App. 647 (holding that where brokers employed to sell land, having procured a purchaser, informed their principal of the fact, but did not inform him to whom they had bargained the property, and no contract for the sale was executed, and the principal refused to complete the sale because he supposed the brokers were themselves the purchasers and were speculating on his property, he was not liable for a commission); Finck *v.* Menke, 33 Misc. (N. Y.) 769, 67 N. Y. Suppl. 954 (holding that a broker who agrees to procure a loan is not entitled to a commission where it is not made because of the principal's refusal to furnish abstracts not mentioned in the contract of employment); Kirwan *v.* Barney, 29 Misc. (N. Y.) 614, 61 N. Y. Suppl. 122 [*affirming* 27 Misc. 181, 57 N. Y. Suppl. 812] (holding that where the customer procured by the broker is a corporation the principal may refuse to deal with one who represents himself to be an officer of the company unless he produces his authority to contract).

Waiver by principal of grounds for refusal. —Even though the principal has good grounds for refusing to consummate the transaction, yet if he does not specify them at the time of his refusal he cannot urge them when sued for a commission. Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430; Crouse *v.* Rhodes, 50 Ill. App. 120; Johnson *v.* Wright, 124 Iowa 61, 99 N. W. 103. Thus where one who has employed a broker to procure a sale for him of certain premises at a specified price refuses absolutely to complete the transaction, he cannot, at the trial of the broker's action for commissions, set up a defect in the title which if expressed at the time might have been obviated. Auten *v.* Jacobus, 21 Misc. (N. Y.) 632, 47 N. Y. Suppl. 1119 [*affirming* 20 Misc. 669, 46 N. Y. Suppl. 681].

73. *Alabama.*—Alabama Loan Co. *v.* Deans, 94 Ala. 377, 11 So. 17.

California.— Fiske *v.* Soule, 87 Cal. 313, 25 Pac. 430.

Colorado.— Cawker *v.* Apple, 15 Colo. 141, 25 Pac. 181.

Indiana.— Indiana Bermudez Asphalt Co. *v.* Robinson, 29 Ind. App. 59, 63 N. E. 797.

Missouri.— Goodson *v.* Embleton, 106 Mo. App. 77, 80 S. W. 22.

New York.— Friend *v.* Jetter, 19 Misc. 101, 43 N. Y. Suppl. 287.

England.— Case *v.* McClellan, 25 L. T. Rep. N. S. 753, 20 Wkly. Rep. 113.

See 8 Cent. Dig. tit. "Brokers," § 96.

Subsequent dissatisfaction of the principal with the terms on which the broker was authorized to sell property, or with the terms agreed on with the purchaser found by the broker, does not justify the principal in refusing to complete the transaction. Fenn *v.* Ware, 100 Ga. 563, 28 S. E. 238; Miller *v.* Barth, 35 Misc. (N. Y.) 372, 71 N. Y. Suppl. 989.

The refusal of the principal's wife to join in a deed of conveyance does not excuse him from failing to carry out the sale so as to defeat the broker's right to a commission for finding a purchaser. Hamlin *v.* Schulte, 34 Minn. 534, 27 N. W. 301; Goldberg *v.* Gelles, 33 Misc. (N. Y.) 797, 68 N. Y. Suppl. 400; Clapp *v.* Hughes, 1 Phila. (Pa.) 382.

Defect in customer's title.— Ordinarily a broker who supplies a person willing to exchange lands with his principal must show, before he can claim his commissions, that the customer is able to make the exchange. Hersher *v.* Wells, 103 Ill. App. 418; Moskowitz *v.* Hornberger, 15 Misc. (N. Y.) 645, 38 N. Y. Suppl. 114. If, however, the parties have entered into a valid contract for the exchange then, and not otherwise (Freedman *v.* Gordon, 4 Colo. App. 343, 35 Pac. 879; Rockwell *v.* Newton, 44 Conn. 333), the broker is entitled to his commission, although the cus-

the trade falls through, because the principal insists upon a change in the terms upon which he authorized the broker to negotiate, the commission is due.[74] To entitle a broker to a commission for negotiating a transaction which failed of consummation, however, the failure must be due to the refusal or default of the principal.[75]

(2) Defect in Principal's Title. A broker employed to effect a sale[76] or

tomer's title is defective, and although he has no title (Jenkins *v.* Hollingsworth, 83 Ill. App. 139; Carnes *v.* Howard, 180 Mass. 569, 63 N. E. 122; Roche *v.* Smith, 176 Mass. 595, 58 N. E. 152, 79 Am. St. Rep. 345, 51 L. R. A. 510; Knapp *v.* Wallace, 41 N Y. 477). See also Baumann *v.* Nevins, 52 N. Y. App. Div. 290, 65 N. Y. Suppl. 84 (holding the fact that the customer does not own the property offered by him is no ground for the principal's refusal to make the exchange, where the customer has a contract for the purchase of the property); Mason *v.* Hinds, 19 N. Y. Suppl. 996 (holding that the fact that the land was conveyed to the customer in fraud of his grantor's creditors is no ground for the principal's refusal to complete the exchange, where the creditors have not impeached the conveyance). *Contra*, Barber *v.* Hildebrand, 42 Nebr. 400, 60 N. W. 594; Siemssen *v.* Homan, 35 Nebr. 892, 53 N. W. 1012 (where the property was encumbered); Norman *v.* Reuther, 25 Misc. (N. Y.) 161, 54 N. Y. Suppl. 152; Moskowitz *v.* Hornberger, 20 Misc. (N. Y.) 558, 46 N. Y. Suppl. 462 [*modifying* 19 Misc. 429, 43 N. Y. Suppl. 1130]. To entitle the broker to a commission where the exchange fails of consummation because of a defect in the customer's title, the broker must have acted in good faith. Carnes *v.* Howard, *supra*; Roche *v.* Smith, *supra*. So a broker employed to carry out an exchange of lands does not earn his commission where he brings to his employer a person who assumes to contract as owner, although he is not, which fact the broker knows, and within the few days allowed for performance proves unable to perform his contract, and irresponsible. Burnham *v.* Upton, 174 Mass. 408, 54 N. E. 873. See also Norman *v.* Reuther, *supra*. The ability of one whom the broker procures to make an exchange of land with his principal does not depend upon his general financial responsibility, but upon his being the owner of the land he proposes to deed in exchange. Hersher *v.* Wells, *supra*. However, proof that a party has executed a formal contract to convey certain property in exchange for other is sufficient *prima facie* evidence of his title thereto, in an action by a broker for commissions on effecting the exchange. Moskowitz *v.* Hornberger, *supra*. But see Hersher *v.* Wells, *supra*, holding that the customer's ability is not proved by the mere production of deeds on his part, without some showing that he also had title to the properties he was willing to deed.

74. Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817 (where the reason the owner would not sell was that the commission asked by the broker, being the same provided by his contract, was more than he wished to pay, and he had concluded to hold for a higher price); Smith *v.* Fairchild, 7 Colo. 510, 4 Pac. 757 (where the reason the owner would not sell was that the property had enhanced in value); Finley *v.* Dyer, 79 Mo. App. 604 (where the sale fell through because the customer would not accept certificates of stock of a corporation owing the property in lieu of a conveyance of the property); McQuillen *v.* Carpenter, 72 N. Y. App. Div. 595, 76 N. Y. Suppl. 556; Beebe *v.* Ranger, 35 N. Y. Super. Ct. 452; Gorman *v.* Scholle, 13 Daly (N. Y.) 516; Michaelis *v.* Roffmann, 37 Misc. (N. Y.) 830, 76 N. Y. Suppl. 973 (where a purchase failed because the principal demanded a reduction in the price formerly agreed on); Halprin *v.* Schachne, 27 Misc. (N. Y.) 195, 57 N. Y. Suppl. 735 [*reversing* 25 Misc. 797, 54 N. Y .Suppl. 1103]; Hattenbach *v.* Gundersheimer, 13 N. Y. Suppl. 814. See, however, Power *v.* Kane, 5 Wis. 265.

75. Richards *v.* Jackson, 31 Md. 250, 1 Am. Rep. 49; Briggs *v.* Rowe, 1 Abb. Dec. (N. Y.) 189, 4 Keyes (N. Y.) 424; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775; Parker *v.* National Bldg., etc., Assoc., (W. Va. 1904) 46 S. E. 811.

76. *Alabama.*—Birmingham Land, etc., Co. *v.* Thompson, 86 Ala. 146, 5 So. 473. But see Blankenship *v.* Ryerson, 50 Ala. 426.

California.— Gonzales *v.* Broad, 57 Cal. 224; Middleton *v.* Findla, 25 Cal. 76.

District of Columbia.— Block *v.* Ryan, 4 App. Cas. 283.

Georgia.— Davis *v.* Morgan, 96 Ga. 518, 23 S. E. 417.

Illinois.— Goodridge *v.* Holladay, 18 Ill. App. 363.

Iowa.— Welch *v.* Young, (1899) 79 N. W. 59.

Kansas.— Remington *v.* Sellers, 8 Kan. App. 806, 57 Pac. 551.

Minnesota.— Gauthier *v.* West, 45 Minn. 192, 47 N. W. 656.

Missouri.—Kent *v.* Allen, 24 Mo. 98; Hynes *v.* Brettelle, 70 Mo. App. 344; Christensen *v.* Wooley, 41 Mo. App. 53.

New York.— Doty *v.* Miller, 43 Barb. 529.

Oklahoma.—Gorman *v.* Hargis, 6 Okla. 360, 50 Pac. 92.

Oregon.— Kyle *v.* Rippey, 20 Oreg. 446, 26 Pac. 308.

Tennessee.— Cheatham *v.* Yarbrough, 90 Tenn. 77, 15 S. W. 1076.

Texas.— Wilson *v.* Clark, (Civ. App. 1904) 79 S. W. 649; Brackenridge *v.* Claridge, (Civ. App. 1897) 42 S. W. 1005; Sullivan *v.* Hamp-

a lease[77] of property, or employed to effect a loan on the security of real

ton, (Civ. App. 1895) 32 S. W. 235. See also Smye *v.* Groesbeck, (Civ. App. 1902) 73 S. W. 972.

Canada.— Brydges *v.* Clement, 14 Manitoba 588; McKenzie *v.* Champion, 4 Manitoba 158; Wolf *v.* Tait, 4 Manitoba 59, all holding that, where the sale failed because of a defect in the principal's title, the broker was entitled to be paid a compensation for finding a purchaser, not necessarily the amount agreed on as a commission, but a compensation as on a *quantum meruit* or by way of damages, and that under the circumstances it was competent to award compensation equivalent to the amount of the commission agreed upon had the sale gone through.

See 8 Cent. Dig. tit. "Brokers," § 92.

It is especially true that the broker is entitled to a commission where the purchase fails because of a defect in the principal's title, where the contract of employment expressly requires the principal to furnish a good title (Phelps *v.* Prusch, 83 Cal. 626, 23 Pac. 1111; Attix *v.* Pelan, 5 Iowa 336; Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723) or where the owner has represented that the title is good (Davis *v.* Lawrence, 52 Kan. 383, 34 Pac. 1051; Fullerton *v.* Carpenter, 97 Mo. App. 197, 71 S. W. 98. See, however, Crockett *v.* Grayson, 98 Va. 354, 36 S. E. 477, holding that a broker is not entitled to a commission where the purchaser refuses to carry out a contract of purchase on discovering the falsity of representations of the principal concerning the amount of encumbrances on his title, if it appears that the contract of purchase would not have been entered into but for the misrepresentations, since the broker is not legally damaged. This case is contrary to all authority. It seems to proceed upon the theory that the broker was suing for fraud, whereas in fact he was suing on the contract of employment. It is unquestionably the law that the broker is entitled to his commission, if the sale fails because of a defect in the principal's title, although the principal has made no representations concerning it, and yet this case, without denying that proposition, holds that if the principal is guilty of misrepresentations, the broker cannot recover. It seems to put a distinct premium upon fraud.

The fact that the principal does not own the property which he employs the broker to sell does not defeat the broker's right to compensation on procuring a purchaser. Smith *v.* Schiele, 93 Cal. 144, 28 Pac. 857 (where, at the time the contract of brokerage was made, the principal had only an option on the land); Monk *v.* Parker, 180 Mass. 246, 63 N. E. 793. See also *supra*, II. E. 1, l.

Inability to give immediate possession.— Where a broker employed to bring about a sale of real estate brought to the owner a responsible purchaser willing to take the premises on the terms outlined by the owner, the broker was entitled to his commissions, although the sale fell through because the owner could not give immediate possession as he had agreed to do. Putter *v.* Berger, 95 N. Y. App. Div. 62, 88 N. Y. Suppl. 462.

Deficiency in quantity.— Where the sale falls through because of a deficiency in the quantity of the property, the broker is not entitled to his commission, although the principal misrepresented the dimensions of the property, there being no fraud. Hausman *v.* Herdtfelder, 81 N. Y. App. Div. 46, 80 N. Y. Suppl. 1039; Diamond *v.* Hartley, 38 N. Y. App. Div. 87, 55 N. Y. Suppl. 994, 47 N. Y. App. Div. 1, 61 N. Y. Suppl. 1022. *Contra*, Cohen *v.* Farley, 28 Misc. (N. Y.) 168, 58 N. Y. Suppl. 1102. At any rate this is true where the purchaser knew the dimensions of the lot before he agreed to purchase it. Sloman *v.* Bodwell, 24 Nebr. 790, 40 N. W. 321.

The principal is not entitled to a reasonable time within which to perfect his title. Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723.

Commission on sale of invalid bonds.— A broker employed to sell bonds has a right to presume that they are valid, and if he finds a purchaser and the sale fails because of their invalidity he is entitled to a commission. Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

Agreement to purchase when defect is cured.— Where a broker procured a purchaser ready and willing to buy the property, but the sale was not consummated by reason of a defect in the vendor's title, although the purchaser agreed to take the property as soon as the defect was cured, the broker was entitled to his commissions. Cusack *v.* Aikman, 93 N. Y. App. Div. 579, 87 N. Y. Suppl. 940.

Offer to cure defect.— The fact that the owner offered the prospective purchaser to perfect his title by suit at law is no defense to an action for commissions. Bruce *v.* Wolfe, 102 Mo. App. 384, 70 S. W. 723.

Subsequent curing of defect.— It is immaterial that the principal, after the time for performing the contract of sale has expired, procures the defect to be cured within a reasonable time, with the knowledge and consent of the agent and proposed purchaser, and the latter still refuses to take and pay for the bonds. Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

A broker may return a deposit left with him by the purchaser and still recover his commission, where the purchaser refuses to complete the transaction because of a defect in the principal's title. Phelps *v.* Prusch, 83 Cal. 626, 23 Pac. 1111.

Defect in title consisting of dower right see *supra*, note 73.

Previous sale by owner as defeating right to commission see *supra*, II, E, 1, m, (II), (B).

77. Washburn *v.* Bradley, 169 Mass. 86, 47 N. E. 512, holding that where the principal

estate,[78] is entitled to a commission, although the transaction fails of consummation because of a defect in the principal's title, provided that the broker himself is not at fault,[79] and that he does not know of the defect at the time of finding the customer.[80] Consequently if the principal pays the broker his commission before the purchaser withdraws from the transaction it cannot be recovered back.[81] The broker is not entitled to a commission under these circumstances, however, where the defect in the title is not real and substantial,[82] unless he has procured

agreed to give a broker commission for renting premises, and the broker secured a contract wherein a third person agreed to take the premises at a price satisfactory to all parties, but by reason of misrepresentations made by the principal in regard to the duration of certain subleases, he failed to become a lessee, the principal was liable for the commission.

78. *Connecticut.*—Clark *v.* Henry G. Thompson, etc., Co., 75 Conn. 161, 52 Atl. 720.

Massachusetts.— Fitzpatrick *v.* Gilson, 176 Mass. 477, 57 N. E. 1000.

Minnesota.— Peet *v.* Sherwood, 43 Minn. 447, 45 N. W. 859.

New York.— Holly *v.* Gosling, 3 E. D. Smith 262 (where the title was encumbered); Egan *v.* Kieferdorf, 16 Misc. 385, 38 N. Y. Suppl. 81 (where the principal's building encroached on adjoining property).

Pennsylvania.— Middleton *v.* Thompson, 163 Pa. St. 112, 29 Atl. 796.

England.— Green *v.* Lucas, 33 L. T. Rep. N. S. 584.

See 8 Cent. Dig. tit. "Brokers," § 92.

This is especially true where the principal agrees to furnish a good title. Finck *v.* Bauer, 40 Misc. (N. Y.) 218, 81 N. Y. Suppl. 625.

Want of authority to transfer title.— Where an executor, representing that he has authority to mortgage certain property, offers an agent a certain commission to secure a loan, and the agent produces a person able and willing to make the loan but who afterward declines to make it solely on the ground of the executor's want of authority to execute the mortgage the agent has earned his commission. Fullerton *v.* Carpenter, 97 Mo. App. 197, 71 S. W. 98.

Subsequent curing of defect.— The fact that the principal subsequently cures the defect in his title and that the customer then refuses to make the loan does not deprive the broker of his right to a commission, where the principal gave no notice that the defect was cured till six months after the customer was procured, and the customer then refused to make the loan because of changed financial conditions. Clark *v.* Henry G. Thompson, etc., Co., 75 Conn. 161, 52 Atl. 720.

79. Mittleton *v.* Fimhla, 25 Cal. 76; Remington *v.* Sellers, 8 Kan. App. 806, 57 Pac. 551; Doty *v.* Miller, 43 Barb. (N. Y.) 529.

Mere expressions of opinion by a broker to a vendee of land as to the strength of the title, not based on his personal knowledge, will not affect the broker's right to commissions on a resale of the land made by him for the vendee, but which the purchaser refused to take on account of the defective title of the vendee. Christensen *v.* Wooley, 41 Mo. App. 53.

80. *California.*— Smith *v.* Schiele, 93 Cal. 144, 28 Pac. 857. See, however, Martin *v.* Ede, 103 Cal. 157, 37 Pac. 199, holding that a broker's right to commissions for procuring a purchaser for land under an agreement therefor is not affected by the fact that he knew the principal had title to only five sixths of the land.

Illinois.— Hoyt *v.* Shipherd, 70 Ill. 309.

Massachusetts.— Tombs *v.* Alexander, 101 Mass. 255, 3 Am. Rep. 349.

Missouri.— Hynes *v.* Brettelle, 70 Mo. App. 344 (where the principal informed the broker of the defect before the negotiation, and he concealed it from the purchaser, and represented to the principal that he had fully informed the purchaser of the defect); Culp *v.* Powell, 68 Mo. App. 238 (where the broker, with knowledge of the encumbrance and despite instructions to the contrary, prepared an agreement for sale free from all encumbrances, and misread it to the principal so as to deceive him as to its contents).

New York.— Mainhart *v.* Poerschke, 32 Misc. 97, 65 N. Y. Suppl. 494, where the broker knew that the title was encumbered by a lease.

Texas.— Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929, (Civ. App. 1898) 49 S. W. 921.

See 8 Cent. Dig. tit. "Brokers," § 93.

Sufficiency of knowledge.— A broker's knowledge of the facts invalidating bonds which he is negotiating for sale carries with it knowledge of the legal effect of such facts. Berg *v.* San Antonio St. R. Co., (Tex. Civ. App. 1898) 49 S. W. 921. However, the fact that a broker, in negotiating a sale, signs a contract with the purchaser providing that the title shall be satisfactory to the purchaser's attorneys is not a recognition of a defect in the principal's title which will defeat a recovery for his commission, where the sale falls through on account of such defect. Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929.

Evidence held not to show that the broker had knowledge of a defect of title before he attempted to make a sale see McKinnon *v.* Hope, 118 Ga. 462, 45 S. E. 413.

81. Conkling *v.* Krakauer, 70 Tex. 735, 11 S. W. 117.

82. *Alabama.*— See Blankenship *v.* Ryerson, 50 Ala. 426.

a valid contract from a solvent customer.[83] The contract of employment may be so drawn as to deprive the broker of the right to a commission if the transaction falls through because of a defect in the principal's title,[84] and it has been held that, if the customer reserves the right to withdraw from the transaction in case he finds the title bad upon examination, the broker is not entitled to a commission upon the customer's refusal to make the purchase for that reason.[85]

(B) *Failure or Refusal of Customer.* If the principal and the customer found by the broker enter into a valid contract,[86] and the broker acts in good

California.— Middleton *v.* Findla, 25 Cal. 76.

District of Columbia.— Block *v.* Ryan, 4 App. Cas. 283.

Georgia.— Hanesley *v.* Bagley, 109 Ga. 346, 34 S. E. 584.

Missouri.— Kent *v.* Allen, 32 Mo. 87; Marmaduke *v.* Martin, 90 Mo. App. 629.

New York.— Gatling *v.* Central Spar Verein, 67 N. Y. App. Div. 50, 73 N. Y. Suppl. 496.

Tennessee.— Gilchrist *v.* Clarke, 86 Tenn. 583, 8 S. W. 572.

Texas.— Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005].

See 8 Cent. Dig. tit. "Brokers," § 92.

If there is an apparent defect in the paper title, and the sale failed on that account, the broker is entitled to his commission, although the title is good in fact, where the principal failed to remove the defect or to produce to the purchaser evidence that the defect did not exist in fact. Gerhart *v.* Peck, 42 Mo. App. 644.

83. Cristensen *v.* Wooley, 41 Mo. App. 53; Gilchrist *v.* Clarke, 86 Tenn. 583, 8 S. W. 572; Parker *v.* Walker, 86 Tenn. 566, 8 S. W. 391; Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005].

84. Louisville, etc., R. Co. *v.* Shepard, 126 Ala. 416, 28 So. 202, where the purchaser agreed to pay the price when a "good and sufficient warranty deed" was tendered.

Contract to pay commission on consummation of transaction.— Where the contract of employment makes the right to a commission dependent upon the consummation of the transaction which the broker is employed to negotiate, the broker cannot recover unless the transaction is finally consummated. Cremer *v.* Miller, 56 Minn. 52, 57 N. W. 318; West *v.* Stoeckel, 6 Ohio Dec. (Reprint) 1083, 10 Am. L. Rec. 308 (where a lessor having the privilege of purchasing the fee employed a broker to procure a loan with which to make the purchase, and the loan failed of consummation because the owner of the fee refused to give the lessee a deed); Seattle Land Co. *v.* Day, 2 Wash. 451, 27 Pac. 74 (holding that where a broker agrees to sell land upon the condition that the owner shall first make five hundred dollars out of the sale, the broker to have the rest of the profit as his commission, he is not entitled to a commission for merely finding a purchaser, if the sale falls through on account of a defect in the title). See, however, Fitzpatrick *v.* Gilson, 176 Mass. 477, 57 N. E. 1000 (holding that a stipulation that the principal is to pay his broker a certain commission for negotiating a loan does not make the right to a commission dependent on the making of a loan); Gauthier *v.* West, 45 Minn. 192, 47 N. W. 656 (holding that where it is agreed between the owner of real property and the brokers in whose hands he has placed it for sale that in case of a sale no commissions shall be paid until the delivery of the deed, there is an implied contract that the owner can confer upon a purchaser a perfect title to the property, and the brokers are entitled to commissions upon producing a customer able to purchase and ready and willing to do so, but for a defect in the title).

Contract to pay commissions out of proceeds of sale or loan.— If a sale of bonds fails because of their invalidity, the broker is entitled to his commission, although by his contract he was to be paid only in case the sale was effected and the price paid. Berg *v.* San Antonio St. R. Co., 17 Tex. Civ. App. 291, 42 S. W. 647, 43 S. W. 929. *Contra,* Owen *v.* Ramsey, 23 Ind. App. 285, 55 N. E. 247. So a broker's right to a commission for finding a purchaser of land is not defeated by the fact that the commission was under the contract of employment to be paid out of the proceeds of the sale, and that the sale was not consummated because of a failure of title. Cheatham *v.* Yarbrough, 90 Tenn. 77, 15 S. W. 1076. *Contra,* Bull *v.* Price, 7 Bing. 237, 9 L. J. C. P. O. S. 78, 5 M. & P. 2, 20 E. C. L. 112. It has been held, however, that a different rule applies to loan brokers, and consequently that an agreement to accept a loan on property and to pay the broker a commission to be deducted from the proceeds of the loan on the day of closing does not render the principal liable for the commission where his title to the property is rejected by the lender and the loan is refused. Hess *v.* Eggers, 38 Misc. (N. Y.) 726, 78 N. Y. Suppl. 1119 [*affirming* 37 Misc. 845, 76 N. Y. Suppl. 980]. *Contra,* Putzel *v.* Wilson, 49 Hun (N. Y.) 220, 2 N. Y. Suppl. 47.

Contract for sale at net price see *supra,* page 241 note 78.

85. Condict *v.* Cowdrey, 139 N. Y. 273, 34 N. E. 781 [*reversing* 61 N. Y. Super. Ct. 315, 19 N. Y. Suppl. 699]; Crockett *v.* Grayson, 98 Va. 354, 36 S. E. 477. *Contra,* Middleton *v.* Findla, 25 Cal. 76.

86. See *supra,* II, E, 1, m, (IV).

faith,[87] the broker is not deprived of his right to a commission by the fact that the customer fails to carry out the contract.[88] However, the principal may avoid

87. Friend *v.* Jetter, 18 Misc. (N. Y.) 368, 41 N. Y. Suppl. 560 (holding, however, that false representations of a broker concerning property of which he was negotiating a sale do not defeat his right to a commission where the purchaser signed the contract of sale after making independent inquiries as to the subject of the representations); Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217 [*modified* in 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932] (where the evidence was held not to show such a misrepresentation as to the shape of the tract by the broker, misleading the purchaser, as to warrant the latter in refusing to complete the purchase, and deprive the broker of commissions).

88. See cases cited *infra*, this note.

Failure of customer to complete contract of purchase see the following cases:

California.— Shainwald *v.* Cady, 92 Cal. 83, 28 Pac. 101.

Colorado.— Hallack *v.* Hinckley, 19 Colo. 38, 34 Pac. 479.

Connecticut.— Leete *v.* Norton, 43 Conn. 219.

Illinois.— Friestedt *v.* Dietrich, 84 Ill. App. 604; Jenkins *v.* Hollingsworth, 83 Ill. App. 139; Greene *v.* Hollingshead, 40 Ill. App. 195; McConaughy *v.* Mahannah, 28 Ill. App. 169.

Indiana.— Love *v.* Miller, 53 Ind. 294, 21 Am. Rep. 192; Micks *v.* Stevenson, 22 Ind. App. 475, 51 N. E. 492.

Massachusetts.— Pearson *v.* Mason, 120 Mass. 53.

Missouri.— Love *v.* Owens, 31 Mo. App. 501.

Nebraska.— Lunney *v.* Healey, 56 Nebr. 313, 76 N. W. 558, 44 L. R. A. 593.

New York.— Bach *v.* Emerich, 35 N. Y. Super. Ct. 548; Heinrich *v.* Korn, 4 Daly 74; Thain *v.* Philbrick, 36 Misc. 829, 74 N. Y. Suppl. 856; Rosenberg *v.* Smith, 25 Misc. 774, 55 N. Y. Suppl. 528; Geoghegan *v.* Kelly, 11 N. Y. Suppl. 704.

Pennsylvania.— Seabury *v.* Fidelity Ins., etc., Co., 205 Pa. St. 234, 54 Atl. 898; Hipple *v.* Laird, 189 Pa. St. 472, 42 Atl. 46.

See 8 Cent. Dig. tit. "Brokers," § 97.

Refusal of customer to carry out contract for exchange see Jenkins *v.* Hollingsworth, 83 Ill. App. 139; Charles *v.* Cook, 88 N. Y. App. Div. 81, 84 N. Y. Suppl. 867.

Refusal of customer to complete loan.— It has been held that a different rule applies to loan brokers, and accordingly a broker employed to procure a loan does not earn a commission merely by securing a competent person who offers to make the loan but who after acceptance by the client refuses to consummate the transaction. Ashfield *v.* Case, 93 N. Y. App. Div. 452, 87 N. Y. Suppl. 649; Crasto *v.* White, 52 Hun (N. Y.) 473, 5 N. Y. Suppl. 718.

Pecuniary responsibility of purchaser.— If the principal enters into a contract with a purchaser furnished by the broker, the commission is due, although the purchaser proves financially irresponsible. Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265; Wright *v.* Brown, 68 Mo. App. 577; Brady *v.* Foster, 72 N. Y. App. Div. 416, 75 N. Y. Suppl. 994. *Contra*, Butler *v.* Baker, 17 R. I. 582, 23 Atl. 1019, 33 Am. St. Rep. 897 (where the seller was unacquainted with the purchaser's standing, and was not informed thereof by the broker); Berg *v.* San Antonio St. R. Co., (Tex. Civ. App. 1898) 49 S. W. 921 (where a contract for the purchase of bonds was made so that the purchasers might sell the bonds to others within the time fixed for their delivery, and they failed to consummate the contract because of their inability to find other purchasers before the time for delivery). Ability of customer to carry out contract generally see *supra*, II, E, 1, m, (II), (B).

This is especially true where the failure or refusal of the customer is due to the fault of the principal. Wendle *v.* Palmer, 77 Conn. 12, 58 Atl. 12 (where the principal refused to allow the purchaser a reasonable time within which to pay a demand note given for the price); Glentworth *v.* Luther, 21 Barb. (N. Y.) 145; Condict *v.* Cowdrey, 57 N. Y. Super. Ct. 66, 5 N. Y. Suppl. 187 (in both which cases the principal had made misrepresentations concerning the land to be sold); Strong *v.* Prentice Brownstone Co., 6 Misc. (N. Y.) 57, 26 N. Y. Suppl. 85 [*affirmed* in 10 Misc. 380, 31 N. Y. Suppl. 144] (where the principal tendered to the buyer goods of a quality inferior to that specified in the contract of sale procured by the broker); Nosotti *v.* Auerbach, 79 L. T. Rep. N. S. 413 (where the principal refused to deliver possession of the land to the purchaser within a reasonable time).

A broker may by agreement waive his right to a commission in case the purchaser defaults in carrying out the contract. Seymour *v.* St. Luke's Hospital, 28 N. Y. App. Div. 119, 50 N. Y. Suppl. 989; Colwell *v.* Springfield Iron Co., 24 Fed. 631. Where, however, a purchaser obtained by a broker refuses to carry out the contract of sale entered into with the vendor, the broker does not waive his right to a commission by the fact that on such refusal he procures another customer and states that he expects no commission on the first sale. Bach *v.* Emerich, 35 N. Y. Super. Ct. 548.

Conclusion of preliminary, conditional, or optional contract by principal as founding right to commission see *supra*, II, E, 1, m, (II), (C), (2).

Modification or cancellation of contract concluded by principal as affecting right to commission see *supra*, II, E, 1, m, (II), (D).

this rule by embodying a stipulation to the contrary in the contract of employment.[89]

2. Actions For Compensation[90] — **a. In General.** If the principal fails to perform his contract with the broker, the latter may recover in assumpsit on the common money counts.[91] If a sale by an owner who has placed lands in the hands of a broker for sale works a breach of contract with the broker, an action by him should be based on the breach and not on a performance of the contract.[92] If a principal, in order to defraud the broker of his right to a commission, conveys the property to a third person for the benefit of a customer found by the broker, the broker may sue for the commission and is not compelled to bring an action for fraud.[93] If a broker releases his right to a commission in consideration of the principal's promise to give him further business, the princi-

Necessity of completion of transaction see *supra*, II, E, 1, m, (II), (A), (B).

89. Hinds *v.* Henry, 36 N. J. L. 328 (holding that a broker may, by special agreement with his principal, so contract as to make his compensation dependent upon a contingency which his efforts cannot control, even though it relates to the acts of his principal, as upon the event of the purchaser's making a certain payment at a given time); Lyle *v.* University Land, etc., Co., (Tex. Civ. App. 1895) 30 S. W. 723 (holding that where a broker is by agreement to receive a commission for procuring a purchaser only on condition that the sale should be made to a certain purchaser, he cannot recover if the sale to such purchaser is not consummated owing to the purchaser's fault); Lassen *v.* Bayliss, 125 Fed. 744, 60 C. C. A. 512.

Stipulation to pay commission when price is received by principal.— If the principal agrees to pay the broker a commission only upon receipt of the price of the property sold, then the broker is entitled to nothing until the purchaser pays the price. McPhail *v.* Buell, 87 Cal. 115, 25 Pac. 266; Ormsby *v.* Graham, 123 Iowa 202, 98 N. W. 724. However, a promise to pay a broker for selling land, a commission "on the price I may accept . . . if sold through your agency," means a commission on the price agreed to be paid for the property, and not only on the amount actually paid. Condict *v.* Cowdrey, 57 N. Y. Super. Ct. 66, 5 N. Y. Suppl. 187.

Stipulation to pay commission when sale is completed.— Where commissions are to be paid a real-estate broker, if a sale negotiated by him "goes through," the broker cannot recover such commissions where the purchaser verbally agrees to buy, and afterward, without any legal reason, refuses to do so. Parmly *v.* Head, 33 Ill. App. 134. Contract to pay commission when property is conveyed see also *supra*, II, E, 1, m, (II), (A).

Waiver of stipulation by principal.—Where a note given for brokers' services in selling the makers' land provided that it should be void if the sale should "fall through" within sixty days after the first instalment of purchase-money became due, and the vendee refused to pay such instalment within said time, claiming that she was unable to pay it, but the vendors elected to treat the sale as effectual, paid an instalment due on said note, and enforced their rights against the vendee by foreclosure, the sale did not "fall through," so as to entitle the makers to enjoin collection of the note. Webber *v.* Holmes, 174 Mass. 410, 54 N. E. 872.

Right to commission under agreement for sale at net price see *supra*, page 241 note 78.

90. Actions for revocation of authority see also *supra*, II, c, 3; II, E, 1, a, (VII).

Requiring rival brokers to interplead see INTERPLEADER.

Right of set-off see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

91. Perin *v.* Parker, 126 Ill. 201, 18 N. E. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336 (holding that advances made by a broker in the line of his employment for his principal, who has engaged him to sell on the board of trade and is acquainted with the manner of doing business there, are recoverable on the common money counts as for money advanced to the principal's use, at his request); Edwards *v.* Goldsmith, 16 Pa. St. 43 (holding that where a broker was to receive a definite commission for procuring a purchaser for land, and complied with his part of the contract, but his principal, without good reason, failed to fulfil his part of the contract, the broker may recover, in *indebitatus assumpsit*, the amount of compensation agreed upon); Prickett *v.* Badger, 1 C. B. N. S. 296, 2 Jur. N. S. 66, 26 L. J. C. P. 33, 5 Wkly. Rep. 117, 87 E. C. L. 296.

92. Metzen *v.* Wyatt, 41 Ill. App. 487; Gregg *v.* Loomis, 22 Nebr. 174, 34 N. W. 355, holding that where a real-estate broker brought an action to recover commissions for a completed sale of real estate, and the testimony showed that he had merely procured a purchaser who afterward purchased from the owner, the action was properly one to recover damages, but if this objection was not raised by either party, the court will not interpose it.

Actions for breach of contract of employment see also *supra*, **II, C, 4.**

Completion of transaction negotiated by broker as prerequisite to right to commission see *infra*, II, E, 1, m, (II), (A), (1); II, E, 1, m, (X), (A), (1); II, E, 1, m, (X), (B).

93. Martin *v.* Fegan, 95 N. Y. App. Div. 154, 88 N. Y. Suppl. 472.

pal's failure to keep his promise does not entitle the broker to recover the commission; his remedy, if any, is on the promise.[94] A bill for a discovery and accounting will lie in a proper case in favor of a broker against the principal.[95] If a broker, being the owner of an entire demand for commissions, assigns an item of it and then recovers on the residue, his recovery does not preclude the assignee from recovering on the item assigned.[96] An action to recover a commission for negotiating a contract, the commission being computable on the amount to become due the principal thereunder, may be commenced before the contract has been fully performed.[97] A demand upon the principal for payment of a commission for selling land is not ordinarily a condition precedent to the right of action therefor,[98] but a broker who has advanced margins for the purchase of stocks cannot recover the amount thereof before calling upon the client to take up the stock.[99] A broker employed to sell realty cannot enforce a stipulation in the contract of sale by which the purchaser agrees to pay the commission.[1]

b. Defenses[2] — (i) *In General.* The fact that the purchaser of a lot puts it to a use which is objectionable to the principal as the owner of remaining lots which adjoin it does not relieve the principal from the obligation to pay a commission to the broker who procured the purchaser.[3] Partial failure of consideration is no defense to an action on a note given for a commission.[4]

(ii) *Illegality of Transaction.*[5] If the transaction negotiated by a broker is illegal,[6] and he participates in the illegality[7] or has knowledge thereof,[8] he is not entitled to compensation. So if the services rendered by a broker are tainted with illegality he is not entitled to a commission.[9] The failure to comply with a stat-

94. Lindt *v.* Schlitz Brewing Co., 113 Iowa 200, 84 N. W. 1059.

95. Shepard *v.* Brown, 9 Jur. N. S. 195, 7 L. T. Rep. N. S. 499, 11 Wkly. Rep. 162.

96. Goldshear *v.* Barron, 42 Misc. (N. Y.) 198, 85 N. Y. Suppl. 395.

97. Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395, holding further, however, that the broker takes the risk of being able to prove the amount of his compensation if the trial takes place before performance.

98. Clifford *v.* Meyer, (Ind. App. 1893) 33 N. E. 127, holding that where the parties were familiar with the facts, and defendants were notified that plaintiffs would claim their commission, a demand before suit was not necessary.

99. Muller *v.* Legendre, 47 La. Ann. 1017, 17 So. 500.

1. Bab *v.* Hirschbein, 12 N. Y. Suppl. 730.

2. **Limitation of actions for commission** see LIMITATIONS OF ACTIONS.

Right to commission for negotiating gaming transaction see GAMING.

3. Kavanaugh *v.* Ballard, 56 S. W. 159, 21 Ky. L. Rep. 1683.

4. Wade *v.* Bishop, 5 Ohio S. & C. Pl. Dec. 625.

5. **Right to compensation in regard to gaming transaction** see GAMING.

6. Belding *v.* Pitkin, 2 Cai. (N. Y.) 147 (holding that if the contract negotiated is illegal, the broker cannot recover for his services, although his principal has received the money arising from it); Street *v.* Houston Ice, etc., Co., (Tex. Civ. App. 1900) 55 S. W. 516 (holding that where a statute prohibits contracts constituting conspiracies against trade, a broker may not recover for services in securing an agreement between competitors to maintain prices).

Bargains in prospective dividends are transactions which, by rule 61 of the London stock exchange, the committee will not recognize nor enforce. By rule 50 every bargain must be fulfilled by the members in accordance with the rules and usages of the exchange. By rule 16 the committee may expel any member violating any of the regulations of the exchange. It was held that rule 61 merely says that the committee will not enforce by expulsion, but leaves the contract good as between the parties. Marten *v.* Gibbon, 33 L. T. Rep. N. S. 561, 24 Wkly. Rep. 87.

Ultra vires contracts.— A bank which agrees to pay a real-estate broker a commission on the sale of land cannot set up as a defense that under the laws of the state in which the land is situated a bank is prohibited from dealing in real estate, where it has availed itself of the benefits of the sale. Church *v.* Johnson, 93 Iowa 544, 61 N. W. 916.

7. Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

8. Walsh *v.* Hastings, 20 Colo. 243, 38 Pac. 324; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225.

9. Myers *v.* Dean, 9 Misc. (N. Y.) 183, 29 N. Y. Suppl. 578, holding that a commission for obtaining a lease of property from a city, which was required to be let to the highest bidder, is not earned by a broker, where the only service rendered was in preventing attendance of competing bidders. See, however, Goldshear *v.* Barron, 42 Misc. (N. Y.) 198, 85 N. Y. Suppl. 395, holding that the

ute prohibiting a transfer of certain kinds of property except under certain conditions does not necessarily make the transaction void so as to defeat the right of the broker to a commission for negotiating it or to reimbursement for advances made in connection therewith.[10]

c. Pleading[11] — (I) *Complaint* — (A) *In General.* A complaint by a broker for a commission for effecting a sale or exchange of property must allege a contract of employment.[12] If it does this and states facts showing performance by plaintiff, as a result of which defendant and the customer secured by plaintiff consummated the transaction which he was authorized to negotiate, and alleges a refusal by defendant to pay, it is sufficient.[13] So a complaint for a commission is sufficient if it alleges a contract by which plaintiff was employed to find a purchaser,[14] and a performance on his part, and a refusal by defendant to consummate the transaction with the customer so procured.[15] A complaint for a commission by a broker employed to sell land must allege either that there was a sale to the customer introduced by him to the principal, or that the customer was able, ready, and willing to purchase on the terms proposed by the principal.[16]

fact that a broker employed to effect a sale is a director in the corporation which he procures to buy the property does not preclude him from recovering a commission where the person who practically owns the stock of the corporation consents to the transaction.

10. Pape *v.* Wright, 116 Ind. 502, 19 N. E. 459; Neilson *v.* James, 9 Q. B. D. 546, 51 L. J. Q. B. 369, 46 L. T. Rep. N. S. 791; Biederman *v.* Stone, L. R. 2 C. P. 504, 36 L. J. C. P. 198, 16 L. T. Rep. N. S. 415, 15 Wkly. Rep. 811; Chapman *v.* Shepherd, L. R. 2 C. P. 228, 36 L. J. C. P. 113, 15 L. T. Rep. N. S. 477, 15 Wkly. Rep. 314; *Ex p.* Barton, 1 De Gex 292, 10 Jur. 442, 4 R. & Can. Cas. 371.

11. See, generally, Pleading.

12. Toole *v.* Baer, 91 Ga. 113, 16 S. E. 378 (holding that where an agreement for compensation is "subject to all conditions of contract of sale," a declaration which fails to set out the contract of sale is insufficient); Fenwick *v.* Watkins, 79 S. W. 214, 25 Ky. L. Rep. 1962; Bradley *v.* Bower, (Nebr. 1904) 99 N. W. 490.

Employment of subagent.—Where the petition, in an action for compensation by a subagent against the principal, alleged that the principal and the agent were non-residents and the subagent a resident of the county in which the land was located which plaintiff claimed to have been employed to sell, the allegations were sufficient to permit proof of the authority of the agent to employ a subagent. Eastland *v.* Maney, (Tex. Civ. App. 1904) 81 S. W. 574.

13. *Alabama.*— Moses *v.* Beverly, 137 Ala. 473, 34 So. 825.

Indiana.— Adams *v.* McLaughlin, 159 Ind. 23, 64 N. E. 462; Lukin *v.* Halderson, 24 Ind. App. 645, 57 N. E. 254; Cannon *v.* Castleman, 24 Ind. App. 188, 55 N. E. 111; Miller *v.* Stevens, 23 Ind. App. 365, 55 N. E. 262; Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790.

Michigan.— Wright *v.* Beach, 82 Mich. 469, 46 N. W. 673.

Minnesota.— Lemon *v.* De Wolf, 89 Minn. 465, 95 N. W. 316.

New York.— Downey *v.* Turner, 28 N. Y. App. Div. 491, 51 N. Y. Suppl. 105.

Texas.— Yarborough *v.* Creager, (Civ. App. 1903) 77 S. W. 645; Brockenbrow *v.* Stafford, (Civ. App. 1903) 76 S. W. 576.

See 8 Cent. Dig. tit. "Brokers," § 101.

The complaint must allege either that plaintiff himself effected the sale or that it resulted from services rendered under his employment. Fenwick *v.* Watkins, 79 S. W. 314, 25 Ky. L. Rep. 1962.

14. See *supra*, note 12.

15. Beineke *v.* Wurgler, 77 Ind. 468; Ackerman *v.* Bryan, 33 Nebr. 515, 50 N. W. 435. See, however, Mulhall *v.* Bradley, etc., Co., 50 N. Y. App. Div. 179, 63 N. Y. Suppl. 782.

Identity of purchaser.— A petition to recover damages for the refusal of defendant to execute deeds to purchasers, which allege a contract of sale to various persons who were ready and able to buy the lands on the terms agreed on between plaintiff and defendant, is defective for failing to allege the names of the purchasers, the quantity of land agreed to be sold for each of them, and the prices. Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

Defect in principal's title.— A petition alleging that the sale failed because of an unsatisfied deed of trust on the property, which defendant refused to release or have canceled, is not defective in failing to allege that the deed was a lien on the property, or that defendant refused to consummate the sale. Gerhart *v.* Peck, 42 Mo. App. 644.

16. Jacobs *v.* Shenon, 3 Ida. 274, 29 Pac. 44; Booth *v.* Moody, 30 Oreg. 222, 46 Pac. 884; Sullivan *v.* Milliken, 113 Fed. 93, 51 C. C. A. 79.

If the complaint alleges that defendant refused to consummate the sale, it must also allege that the customer was able, ready, and willing to buy the property on the terms proposed by the principal. Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157; Reardon *v.* Washburn, 59 Ill. App. 161. See Newton *v.* Donnelly, 9 Ind. App. 359, 36 N. E. 769 (where the complaint was held to show that the purchaser

Where a complaint by a broker employed to find a purchaser or a lender does not allege that the transaction was consummated, it must allege that plaintiff notified defendant that a customer was found.[17] A complaint for a commission for finding a purchaser for land need not describe the land.[18] Nor need a broker's complaint allege that defendant knew of the existence of a custom on which the action is founded.[19] A complaint for a commission is not demurrable because it has no bill of particulars as a part of it where it is based on one item only.[20]

(B) *Variance Between Complaint and Proof, Findings, Verdict, or Judgment.* Plaintiff must plead the ultimate facts upon which he relies for a recovery, else he cannot prove them.[21] To entitle him to recover on a particular contract of employment he must plead it;[22] and his proof must in all material respects conform to the allegations of the complaint; evidence at substantial variance

was able, ready, and willing to consummate the transaction); Wilson *v.* Clark, (Tex. Civ. App. 1904) 79 S. W. 649 (holding that the petition may properly set forth an agreement between the owner and the purchaser settling the matter arising out of the owner's failure to sell as showing an insistence by the purchaser on his right to purchase).

17. McLaughlin *v.* Whiton, 37 Misc. (N. Y.) 838, 76 N. Y. Suppl. 1006; Penter *v.* Staight, 1 Wash. 365, 25 Pac. 469.

18. Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790. See McAllister *v.* Welker, 39 Minn. 535, 41 N. W. 107, where a description was held sufficient, although inaccurate.

19. Whitehouse *v.* Moore, 13 Abb. Pr. (N. Y.) 142.

20. Cannon *v.* Castleman, 24 Ind. App. 188, 55 N. E. 111.

21. Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775, holding that in an action by a real-estate broker to recover damages for refusal of the owner to execute deeds to purchasers, it was error to admit, over objection, evidence to prove contracts of sales of land to persons whose names and residences were not given in the petition or otherwise identified.

22. Shanklin *v.* Hall, 100 Cal. 26, 34 Pac. 636; Ayer *v.* Mead, 13 Ill. App. 625 (holding that an order by defendant to plaintiff, who was a broker: "Buy me 5,000 year wheat; if you cannot buy soon after the opening then buy October," does not sustain the allegations of the declaration, in an action by the broker, that defendant authorized plaintiff to sell the wheat, in case defendant failed to furnish margins, according to the customs of the board of trade, nor justify the admission of proof as to what were the customs of the board of trade); Armstrong *v.* O'Brien, 83 Tex. 635, 19 S. W. 268; Ames *v.* Lamont, 107 Wis. 531, 83 N. W. 780 (holding that where the complaint alleged that plaintiffs were employed to sell defendant's land; that they were to have all they could obtain for it over a certain sum, and that they offered it to one who purchased it of defendant for that sum, they could not recover for breach of an agreement that defendant would ask of any customer the price named to him by plaintiffs). See, however, Armstrong *v.* Cleveland, 32 Tex. Civ. App. 482, 74 S. W. 789, holding that, although plaintiff declares on an express contract to pay him all he should sell a tract of land for over a certain sum, he may recover on a promise of defendant to pay a certain percentage commission.

Recovery on contract substituted for that declared on.— Plaintiff cannot recover on proof of a contract which has by agreement been substituted for that declared on. Daley *v.* Russ, 86 Cal. 114, 24 Pac. 867; Kidman *v.* Garrison, 122 Iowa 215, 97 N. W. 1078; Jones *v.* Pendleton, 134 Mich. 460, 96 N. W. 574; Braly *v.* Barnett, (Tex. Civ. App. 1904) 78 S. W. 965, holding that if plaintiff declares on a written contract, and the proof shows that it had been revoked prior to the sale, which was made under a subsequent oral contract, plaintiff cannot recover, although the oral contract was "under the terms" of the written one.

Recovery on quantum meruit where express contract is declared on.— If plaintiff declares on an express contract he cannot ordinarily failing to prove it recover on a *quantum meruit*. Emery *v.* Atlanta Real Estate Exchange, 88 Ga. 321, 14 S. E. 556; McDonald *v.* Ortman, 98 Mich. 40, 56 N. W. 1055; McDonnell *v.* Stevinson, 104 Mo. App. 191, 77 S. W. 766 (holding, however, that a different rule prevails in justices' courts); Steinfeld *v.* Storm, 31 Misc. (N. Y.) 167, 63 N. Y. Suppl. 966 (holding that where plaintiff was to receive one thousand five hundred dollars for furnishing a twenty-five-thousand-dollar cash-purchaser, and furnished one who purchased at twenty thousand dollars cash, he cannot recover proportionate commissions on the lesser sum, or what his services were reasonably worth, if he does not declare on a *quantum meruit*); King *v.* Hammond, 84 N. Y. Suppl. 121 (holding that plaintiff in an action on an express contract to pay a certain commission for procuring a certain sale may not recover, failing to prove the contract, on proof of a custom to pay such a commission to persons procuring such a sale); Edwards *v.* Goldsmith, 16 Pa. St. 43; Thornton *v.* Stevenson, (Tex. Civ. App. 1895) 31 S. W. 232; Oliver *v.* Morawetz, 95 Wis. 1, 69 N. W. 977. See also Hammers *v.* Merrick, 42 Kan. 32, 21 Pac. 783; Green *v.* Mules, 30 L. J. C. P. 343.

therewith is inadmissible, and if admitted does not justify a recovery.[23] In order

See, however, Armstrong *v.* Cleveland, 32 Tex. Civ. App. 482, 74 S. W. 789; Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566, holding that where plaintiff alleged a contract for commissions and sales made thereunder, and defendant denied the contract, but admitted some of the sales and that he was indebted to plaintiff in a reasonable sum for commissions thereon, an instruction that if the jury did not find that there was a contract then they should award plaintiff reasonable commissions was proper, such issue being raised by defendant. It has been held, however, that under a complaint to recover an alleged agreed compensation for services as broker, a recovery may be had on proof of the reasonable value of the services. Veatch *v.* Norman, 95 Mo. App. 500, 69 S. W. 472; Sussdorff *v.* Schmidt, 55 N. Y. 319, holding that the variance may be disregarded unless it appears that defendant was misled.

23. Moses *v.* Beverly, 137 Ala. 473, 34 So. 825 (where the contract declared on a contemplated sale of turpentine rights in fifty thousand acres of timber and the proof showed a sale of only thirty-five thousand acres, and the variance was held fatal); Daley *v.* Russ, 86 Cal. 114, 24 Pac. 867; Norman *v.* Reuther, 25 Misc. (N. Y.) 161, 54 N. Y. Suppl. 152 (holding that in an action for compensation in procuring an exchange of property for defendant the burden is on plaintiff to show that he procured a valid contract for exchange, where he so alleges); Yarborough *v.* Creager, (Tex. Civ. App. 1903) 77 S. W. 645 (holding that where a real-estate broker suing for commissions alleges that through his efforts the land was sold, an instruction that if the jury believe plaintiff was trying to sell the land, etc., they should find for him is not warranted by the pleading). See, however, Clark *v.* Allen, 125 Cal. 276, 57 Pac. 985 (holding that an allegation that a broker employed to effect a sale found a purchaser is satisfied by evidence that a person was found with whom the principal exchanged lands); Rogers *v.* Duff, 97 Cal. 66, 31 Pac. 836 (holding that a complaint alleging that defendants were indebted to plaintiff for "commissions" on the purchase by him for them of various articles of produce justifies a finding that defendants were indebted to plaintiff "for labor performed for them at their request"); Williams *v.* Clowes, 75 Conn. 155, 52 Atl. 820 (holding, in an action to recover commission for procuring a loan, that there is no variance between an allegation that plaintiff procured a loan for defendant, and evidence that, at defendant's request and on his promise to pay a commission, plaintiff procured a loan to be made to a corporation formed by defendant; also that the common count that plaintiff performed work for defendant of the price and value of a certain sum authorizes a finding that defendant promised to pay plaintiff the reasonable value of his services); Hightower *v.* Kitchens, 118 Ga. 277, 45 S. E. 267 (holding that where suit is brought for a named sum alleged to be due under a contract for a sale on a commission of twelve and one half per cent, evidence that plaintiff was to receive eleven and one fourth per cent commission does not constitute a fatal variance, but authorizes a verdict for the latter amount); Clifford *v.* Meyer, 6 Ind. App. 633, 34 N. E. 23 (holding, in an action for brokers' commissions on a sale of land, that where the complaint alleges that the land was conveyed to two persons, and the finding is that it was conveyed to one of them, the variance is not a material one); Martin *v.* Fegan, 95 N. Y. App. Div. 154, 88 N. Y. Suppl. 472; Hoefling *v.* Hambleton, 84 Tex. 517, 19 S. W. 689.

Variance between allegation of sale by broker and proof of sale by owner or another. — In an action by a real-estate broker for commissions, under an allegation that he made the sale, evidence is admissible that the sale was brought about through his exertions or agency, although the final negotiations were conducted by the owner without his knowledge. Stinde *v.* Blesch, 42 Mo. App. 578. However, a judgment for plaintiff on a declaration for commissions in effecting a sale of real estate at defendant's request is not sustained by evidence that he entered into negotiations for a sale, and that before it was effected defendant made a new agreement to pay him a commission if a sale was effected by any one, and that a sale was thereafter made by another. Jones *v.* Pendleton, 134 Mich. 460, 96 N. W. 574. See Gregg *v.* Loomis, 22 Nebr. 174, 34 N. W. 355.

Variance between allegation of performance by broker and proof of default of principal. — Where plaintiff alleged performance of a contract by which he was to procure a loan for defendant, to be secured by a mortgage on its property, he was not entitled to prove failure to complete performance by reason of defects in defendant's title to the property. Gatling *v.* Central Spar Verein, 67 N. Y. App. Div. 50, 73 N. Y. Suppl. 496. So a broker cannot declare on a contract and seek to recover as for a performance thereof by effecting a sale, and then recover damages for defendant's breach of contract in refusing to accept a purchaser procured by plaintiff. Walker *v.* Tirrell, 101 Mass. 257, 3 Am. Rep. 352; Drury *v.* Newman, 99 Mass. 256; Cosgrove *v.* Leonard Mercantile, etc., Co., 175 Mo. 100, 74 S. W. 968.

Variance between allegation of services as broker and proof of services as middleman. — Under a complaint alleging defendant's employment of plaintiff as a broker, and that plaintiff rendered services as such in effecting a sale of property for defendant, plaintiff cannot recover for such services as those of a mere middleman. Knauss *v.* Gottfried

to take advantage of a variance between the complaint and the proof, defendant must make a timely and appropriate objection thereto.[24]

(II) *ANSWER*—(A) *In General.* The construction[25] and sufficiency of an answer in an action by a broker for a commission which presents a defense of fraud[26] or neglect of duty[27] on the part of the broker, or his failure to take out a brokerage license,[28] or the inability of the customer procured by him to consummate the transaction which he was authorized to negotiate,[29] are governed by the rules of pleading applicable in actions *ex contractu* generally. The court has no power to strike out as sham an answer consisting of a general denial of the material allegations of the complaint.[30]

(B) *Necessity of Pleading Defense.* An affirmative defense which is not pleaded cannot be proved,[31] even though defendant has interposed a general denial.[32]

Krueger Brewing Co., 62 Hun (N. Y.) 46, 16 N. Y. Suppl. 357; Southack *v.* Lane, 32 Misc. (N. Y.) 141, 65 N. Y. Suppl. 629 [*reversing* 23 Misc. 515, 52 N. Y. Suppl. 687]. See also Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Rupp *v.* Sampson, 16 Gray (Mass.) 398, 77 Am. Dec. 416.

Relevancy and materiality of evidence to issues see *infra*, II, E, 2, d, (II).

24. Clark *v.* Allen, 125 Cal. 276, 57 Pac. 985 (holding that a variance is waived where no objection is made to the introduction of the evidence); Fisher, etc., Real Estate Co. *v.* Staed Realty Co., 159 Mo. 562, 62 S. W. 443 (holding that defendant must proceed in the manner provided by statute and file his affidavit of surprise, setting forth in what respect he has been misled, or his objection will not be considered on appeal, unless there is a total failure of evidence to support the cause of action stated); Gregg *v.* Loomis, 22 Nebr. 174, 34 N. W. 355; Diamond *v.* Wheeler, 80 N. Y. App. Div. 58, 80 N. Y. Suppl. 416.

25. Peet *v.* Sherwood, 47 Minn. 347, 50 N. W. 241, 929.

26. Hanesley *v.* Monroe, 103 Ga. 279, 29 S. E. 928; Rabb *v.* Johnson, 28 Ind. App. 665, 63 N. E. 580, holding that an answer does not state a defense which admits the contract and alleges that the broker did not use his best efforts to sell the property, but fraudulently persuaded the owner to trade for property which the broker knew was of less value, but does not allege that the property was of less value than the land, or state any facts showing fraud or bad faith on the part of the broker.

27. Myers *v.* Paine, 13 N. Y. App. Div. 332, 43 N. Y. Suppl. 133 [*affirmed* in 162 N. Y. 593, 57 N. E. 1118], where the answer was held insufficient because there was no allegation that any duty was neglected by the broker or that the principal had sustained any injury.

28. Angell *v.* Van Schaick, 56 Hun (N. Y.) 247, 9 N. Y. Suppl. 568, where the answer setting up a violation of a foreign statute requiring brokers to take out a license was held insufficient to show that the complaint was founded on a criminal offense or that the broker's act was void or prohibited by the statute, averments to that effect being held mere conclusions of law such as were not admitted by demurrer.

29. Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215, holding that an allegation that the purchaser furnished by a broker had requested an extension of time on the draft drawn against the first shipment of the goods sold, because he was "not able to pay it at the time" was not equivalent to an allegation that he was insolvent, or that the broker had not furnished a purchaser who was able to pay for the goods according to the contract.

30. Wayland *v.* Tysen, 45 N. Y. 281 [*reversing* 9 Abb. Pr. N. S. 79].

31. Kelly *v.* Stone, 94 Iowa 316, 62 N. W. 842.

The defense that plaintiff acted also for the customer found by him without defendant's knowledge cannot be proved unless it is pleaded. Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714; Bonwell *v.* Auld, 9 Misc. (N. Y.) 65, 29 N. Y. Suppl. 15. See also Duryee *v.* Lester, 75 N. Y. 442 [*affirming* 43 N. Y. Super. Ct. 564]. It is not available under a general denial. Reese *v.* Garth, 36 Mo. App. 641. A denial of the agreement for the payment of a commission will not admit proof of a double employment. MacFee *v.* Horan, 40 Minn. 30, 41 N. W. 239; Smith *v.* Soosen, 24 Misc. (N. Y.) 706, 53 N. Y. Suppl. 806. This defense, however, may be proved under an answer denying all the allegations of the complaint except that plaintiff was a broker (Wolff *v.* Denboskey, 36 Misc. (N. Y.) 643, 74 N. Y. Suppl. 465), or denying merely the performance of services by him (Norman *v.* Reuther, 25 Misc. (N. Y.) 161, 54 N. Y. Suppl. 152).

32. Reishus-Remer Land Co. *v.* Benner, 91 Minn. 401, 98 N. W. 186 (holding that in an action for procuring a purchaser a defense that the services were rendered under an express contract as to compensation is inadmissible under a general denial); Rothschild *v.* Burritt, 47 Minn, 28, 49 N. W. 393 (holding that under a general denial in an action by real-estate brokers for commissions, defendant cannot show that, subsequent to the procurement of the customer and the execution by him of a written agreement to pur-

(III) *AMENDMENT OF PLEADING.* Amendments are allowed in actions by brokers for compensation as in other actions *ex contractu.*[33]

d. Evidence[34] — (I) *BURDEN OF PROOF AND PRESUMPTIONS.*[35] In an action by a broker against his principal for compensation, plaintiff bears the burden of proving that he was employed by defendant[36] or his duly authorized agent,[37] or, in the absence of a contract of employment, that defendant ratified plaintiff's acts.[38] Plaintiff bears also the burden of proving that he performed the obligations undertaken by him, either by effecting the transaction which he was authorized to negotiate[39] or by procuring a customer who is able, ready, and willing to

chase, the entire transaction was canceled by consent of all parties); Reese *v.* Garth, 36 Mo. App. 641; St. Felix *v.* Green, 34 Nebr. 800, 52 N. W. 821 (holding that in an action by a real-estate broker for commissions, where the answer is a general denial, defendant cannot prove that another person than plaintiff induced the purchaser to buy the land). See, however, Winn *v.* Gilmer, 81 Tex. 345, 16 S. W. 1058, holding that in an action by a broker for a commission for selling land under an alleged contract providing for a specified sum as commission, defendant may, under plea of general denial, show that plaintiff agreed to charge no commission unless the land was sold for more than a stated price.

33. Jamison *v.* Hyde, 141 Cal. 109, 74 Pac. 695 (holding that where the answer alleged that the contract of employment was oral and "barred and invalid by" a statute declaring that contracts for the employment of an agent to sell real estate for commissions are invalid unless in writing, subscribed by the party to be charged, and plaintiff's evidence failed to show a written contract of employment, it was not error to permit defendant to amend his answer by changing the admission of the contract of employment into a denial of the same); Stewart *v.* Van Horne, 91 Mo. App. 647 (holding that where a petition in an action for commissions alleged to be due for making the sale of a farm pursuant to a written contract declared on the contract as it would have read if no alteration had been made in the printed form, an amended petition declaring on the contract, after its production pursuant to the court's order, according to its actual contents, does not substantially change the cause of action, so as to constitute a departure); Schlesinger *v.* Jud, 61 N. Y. App. Div. 453, 70 N. Y. Suppl. 616 (holding that where the court voluntarily permits a broker suing for commissions to amend his complaint to show an assignment to him of a claim for commissions by A, it is error to refuse to allow him to amend for the purpose of showing an assignment of a portion of the claim from B, although the fact of such assignment appears in plaintiff's bill of particulars).

34. See, generally, EVIDENCE.

Inspection and production of books see *infra*, II, E, 2, e, (I).

35. **Presumption as to usage and custom** see *supra*, II, C, 5, e.

36. Hammond *v.* Mitchell, 61 Ill. App. 144; Harrison *v.* Pusteoska, 97 Iowa 166, 66 N. W. 93; Chilton *v.* Butler, 1 E. D. Smith (N. Y.) 150; Schatzberg *v.* Groswirth, 84 N. Y. Suppl. 259; Harrell *v.* Veith, 13 N. Y. St. 738.

Exclusive agency.— A real-estate broker who bases his right of action for commissions on the owner's agreement to give the broker the exclusive right of sale, and alleges a breach of such agreement and a sale effected by the owner himself, must prove the agreement. Wyckoff *v.* Taylor, 13 Daly (N. Y.) 564.

37. Funk *v.* Latta, 43 Nebr. 739, 62 N. W. 65; Harper *v.* Goodall, 10 Abb. N. Cas. (N. Y.) 161, 62 How. Pr. (N. Y.) 288 (holding that to recover for commissions a broker must prove direct employment by the principal, not the mere ordinary agency of a wife for her husband); Harrell *v.* Veith, 13 N. Y. St. 738.

Ratification of employment.— In an action by a broker against a corporation to recover a commission, he must establish his employment by one authorized to bind the corporation, or prove a subsequent ratification of his employment by the corporation. Twelfth St. Market Co. *v.* Jackson, 102 Pa. St. 269.

38. Chilton *v.* Butler, 1 E. D. Smith (N. Y.) 150.

Knowledge as element of ratification.— Before ratification of a sale of lands intrusted for sale by the owner to a broker can be inferred, it must be shown that the owner had knowledge of the particular conditions of the sale. Maze *v.* Gordon, 96 Cal. 61, 30 Pac. 962.

39. Maze *v.* Gordon, 96 Cal. 61, 30 Pac. 962 (holding that where a contract of employment limits the agency to selling certain property, plaintiff must show that the property sold was within the description of the contract); Lawrence *v.* Rhodes, 188 Ill. 96, 58 N. E. 910 [*reversing* 87 Ill. App. 672]; Harvey *v.* Cook, 24 Ill. App. 134 (holding that in a suit by a broker to recover commissions under a contract by which he agreed to procure advertising contracts to be signed by newspaper publishers, the burden is on him to show performance, and that the signatures procured were those of newspaper publishers; and that the acceptance of the contracts by defendant, without inquiring as to the genuineness of the signatures, does not relieve the plaintiff of the burden of proof); Burnett *v.* Eddling, 19 Tex. Civ. App. 711,

enter into the transaction.[40] If, however, the principal accepts the customer furnished by the broker and enters into the contract with him, it is presumed, in the absence of evidence to the contrary, that the customer was financially able to complete the transaction as agreed.[41] Plaintiff must show that his efforts were the procuring cause of the transaction entered into by defendant and plaintiff's customer.[42] In the absence of evidence to the contrary the presumption is that plaintiff was duly licensed as a broker.[43] Defendant bears the burden of proving a defense that plaintiff's authority was revoked before he found a customer,[44] and a defense of fraud.[45] Where, however, it appears that plaintiff was employed by both parties, the burden is on him to show that the double employment was with defendant's knowledge and consent.[46]

(II) *Admissibility* — (A) *In General.*[47] Generally speaking, whatever facts are logically relevant and material to a fact in issue are legally admissible,[48] and

48 S. W. 775 (holding that, where payment of the commission is made dependent on the purchaser's paying the price, plaintiff must show either that the price has been paid or that it has not been collected through defendant's fault).

Conditional contract of purchase.— Where plaintiff in an action to recover commissions for procuring a purchaser for real estate proves the execution of a contract of purchase, which defendant claims was signed conditionally, the burden of proving such defense is on defendant. Folinsbee *v.* Sawyer, 15 Misc. (N. Y.) 293, 36 N. Y. Suppl. 405.

40. Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Hammond *v.* Mitchell, 61 Ill. App. 144; Leahy *v.* Hair, 33 Ill. App. 461; Davis *v.* Gassette, 30 Ill. App. 41; Pratt *v.* Hotchkiss, 10 Ill. App. 633; Kirk *v.* Barney, 27 Misc. (N. Y.) 181, 57 N. Y. Suppl. 812.

Acceptance of principal's offer.— In an action for services by a broker who had undertaken to procure a loan for defendants from a corporation on their agreement to compensate him therefor "when notified that their application had been accepted," plaintiff cannot recover by merely showing an acceptance of the application by the corporation, without also showing that the acceptance was on the same terms as to the time of payment and rate of interest as were specified in defendants' application. Peet *v.* Sherwood, 47 Minn. 347, 50 N. W. 241, 929.

Refusal to accept principal's title.— Where a broker procured one who was willing to purchase the land of his principal but for a defect in the title, the burden is on him, in an action to recover his commissions, to show that such defect existed, no binding contract to purchase having been made, since otherwise he does not show that his customer was willing to buy. Brackenridge *v.* Claridge, 91 Tex. 527, 44 S. W. 819, 43 L. R. A. 593 [*reversing* (Civ. App. 1897) 42 S. W. 1005].

41. *Illinois.*— Springer *v.* Orr, 82 Ill. App. 558.

Indiana.— Stauffer *v.* Lilenthal, 29 Ind. App. 305, 64 N. E. 643; McFarland *v.* Lillard, 2 Ind. App. 160, 28 N. E. 229, 50 Am. St. Rep. 234.

Minnesota.— Grosse *v.* Cooley, 43 Minn. 188, 45 N. W. 15.

New Hampshire.— Parker *v.* Estabrook, 68 N. H. 349, 44 Atl. 484.

South Carolina.— Fairly *v.* Wappoo Mills, 44 S. C. 227, 22 S. E. 108, 29 L. R. A. 215.

See 8 Cent. Dig. tit. "Brokers," § 105.

If the principal does not accept the customer, the customer's ability to complete the transaction must be proved by plaintiff. Colburn *v.* Seymour, 32 Colo. 430, 76 Pac. 1058; Dent *v.* Powell, 93 Iowa 711, 61 N. W. 1043; Coleman *v.* Meade, 13 Bush (Ky.) 358. And see cases cited *supra*, note 40. *Contra*, Cook *v.* Kroemke, 4 Daly (N. Y.) 268; Gerding *v.* Haskins, 2 Misc. (N. Y.) 172, 21 N. Y. Suppl. 636 (*semble*); Hart *v.* Hoffman, 44 How. Pr. (N. Y.) 168.

42. Davis *v.* Gassethe, 30 Ill. App. 41; Chilton *v.* Butler, 1 E. D. Smith (N. Y.) 150; Schatzberg *v.* Groswirth, 84 N. Y. Suppl. 259.

43. Munson *v.* Fenno, 87 Ill. App. 655; Shepler *v.* Scott, 85 Pa. St. 329, *semble*. See, however, Eckert *v.* Collot, 46 Ill. App. 361, holding that the fact that a real-estate agent had a license at the time of the action to recover commissions does not raise a presumption that he had a license two years before, at the time of the transaction.

44. Bourke *v.* Van Keuren, 20 Colo. 95, 36 Pac. 882.

45. Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817; Stem *v.* Whitney, 66 S. W. 820, 23 Ky. L. Rep. 2179; Pollatschek *v.* Goodwin, 17 Misc. (N. Y.) 587, 40 N. Y. Suppl. 682. See also Scottish-American Mortg. Co. *v.* Davis, (Tex. Civ. App. 1902) 72 S. W. 217 [*modified* in 96 Tex. 504, 74 S. W. 17, 97 Am. St. Rep. 932].

46. Hannan *v.* Prentis, 124 Mich. 417, 83 N. W. 102; Robinson *v.* Clock, 38 N. Y. App. Div. 67, 55 N. Y. Suppl. 976.

47. Objections to evidence see *infra*, II, E, 2, e, (I).

48. *Alabama.*— Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. 722; Wilson *v.* Klein, 90 Ala. 518, 8 So. 130.

California.— Mattingly *v.* Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87.

Colorado.— Dexter *v.* Collins, 21 Colo. 455,

facts logically irrelevant or immaterial are not admissible,[49] the onus of showing the relevancy, intrinsic or in connection with other facts, of a fact offered in evidence being upon the party offering the evidence.[50]

(B) *Parol Evidence.* The competency of parol evidence of a transaction which has been reduced to writing is governed in actions by brokers for compensation by the rules that apply in civil actions in general.[51]

42 Pac. 664; Huff *v.* Hardwick, (App. 1904) 75 Pac. 593.

Connecticut.— Bradley *v.* Gorham, 77 Conn. 211, 58 Atl. 698.

Illinois.— Day *v.* Porter, 161 Ill. 235, 43 N. E. 1073 [*affirming* 60 Ill. App. 386]; Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401.

Iowa.— Gibson *v.* Hunt, (1903) 94 N. W. 277.

Michigan.— Ranney *v.* Donovan, 78 Mich. 318, 44 N. W. 276; O'Callaghan *v.* Boeing, 72 Mich. 669, 40 N. W. 843.

Minnesota.— White *v.* Collins, 90 Minn. 165, 95 N. W. 765.

New York.— Folinsbee *v.* Sawyer, 157 N. Y. 196, 51 N. E. 994 [*reversing* 8 Misc. 370, 28 N. Y. Suppl. 698]; Payne *v.* Williams, 83 N. Y. App. Div. 388, 82 N. Y. Suppl. 284 [*affirmed* in 178 N. Y. 589, 70 N. E. 1104]; Walker *v.* Johnson, 21 Misc. 16, 46 N. Y. Suppl. 864 [*reversing* 20 Misc. 725, 45 N. Y. Suppl. 1150]; Bickart *v.* Hoffmann, 19 N. Y. Suppl. 472; Condit *v.* Sill, 18 N. Y. Suppl. 97.

Tennessee.— Stevenson *v.* Ewing, 87 Tenn. 46, 9 S. W. 230.

Texas.— Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

Washington.— Howley *v.* Maddocks, 25 Wash. 297, 65 Pac. 544.

See 8 Cent. Dig. tit. "Brokers," § 106.

49. *Illinois.*— Day *v.* Porter, 161 Ill. 235, 43 N. E. 1073 [*affirming* 60 Ill. App. 386].

Iowa.— Lindt *v.* Schlitz Brewing Co., 113 Iowa 200, 84 N. W. 1059; Goin *v.* Hess, 102 Iowa 140, 71 N. W. 218.

Massachusetts.— Hall *v.* Grace, 179 Mass. 400, 60 N. E. 932.

Michigan.— West *v.* Demme, 128 Mich. 11, 87 N. W. 95; McDonald *v.* Ortman, 98 Mich. 40, 56 N. W. 1055; Gregory *v.* Wendell, 40 Mich. 432.

Missouri.— Kerr *v.* Cusenbary, 69 Mo. App. 221; Lemon *v.* Lloyd, 46 Mo. App. 452; Cavender *v.* Waddingham, 5 Mo. App. 457.

New York.— Payne *v.* Williams, 83 N. Y. App. Div. 388, 82 N. Y. Suppl. 284 [*affirmed* in 178 N. Y. 589, 70 N. E. 1104]; Allen *v.* James, 7 Daly 13; Folinsbee *v.* Sawyer, 8 Misc. 370, 28 N. Y. Suppl. 698; Mason *v.* Hinds, 19 N. Y. Suppl. 996; Crasto *v.* White, 3 N. Y. Suppl. 682.

Pennsylvania.— Potts *v.* Dunlap, 110 Pa. St. 177, 20 Atl. 413 (holding that in an action for advances made by a broker for a *bona fide* purchase of stock, evidence that other transactions in which plaintiff had purchased stocks for other persons were gambling transactions was properly rejected as irrelevant); Esser *v.* Linderman, 71 Pa. St. 76.

Texas.— Smye *v.* Groesbeck, (Civ. App. 1902) 73 S. W. 972; Alexander *v.* Wakefield, (Civ. App. 1902) 69 S. W. 77; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

Wisconsin.— Terry *v.* Reynolds, 111 Wis. 122, 86 N. W. 557.

See 8 Cent. Dig. tit. "Brokers," § 106.

50. See EVIDENCE, 16 Cyc. 1111.

51. *Alabama.*— Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157, holding that, where the correspondence by which plaintiffs were employed to sell land does not cover the question of compensation, a prior oral agreement as to the commission may be shown, but that where the contract specifies the prices and terms of sale, evidence of a prior oral agreement that the sale should be made subject to defendant's approval and that the deed should contain certain conditions is not admissible.

Minnesota.— Buxton *v.* Beal, 49 Minn. 230, 51 N. W. 918, holding, in an action for a commission for procuring a contract for lease, that defendant might show by parol that the contract was merely provisional, and did not express all the terms of the lease to be entered into by the parties, and that a lease was never consummated because the parties never came to terms.

New York.— Condict *v.* Cowdrey, 123 N. Y. 463, 25 N. E. 946 [*reversing* 57 N. Y. Super. Ct. 66, 5 N. Y. Suppl. 187] (holding that an agreement which was collateral to that sued on and which did not purport to contain the entire contract may be supplemented by parol evidence that it was a condition of the contract that the purchasers need not complete the purchase unless they were satisfied with the title); Bab *v.* Hirschbein, 12 N. Y. Suppl. 730 (holding that a contract by which a prospective purchaser agreed to pay a commission arising by reason of a sale of certain property may be supplemented by parol evidence that he agreed to pay the commission only if the title was good).

Texas.— Yarborough *v.* Creager, (Civ. App. 1903) 77 S. W. 645, holding that a broker suing for commissions may testify that he advertised the land in a certain newspaper, no effort being made to prove in this manner the terms or contents of the advertisement.

England.— Whitfield *v.* Brand, 16 L. J. Exch. 103, 16 M. & W. 282, holding that the fact that a party has agreed to sell goods on commission may be proved by oral evidence, although the terms as to its payment have been reduced to writing.

Canada.— Dunsmuir *v.* Loewenberg, 30 Can. Supreme Ct. 334, holding that parol evidence was admissible to show that written

(c) *Documentary Evidence.* Books,[52] contracts and deeds,[53] letters,[54] and other documents [55] are admitted in evidence in actions by brokers for compensation subject to the rules applicable to documentary evidence in civil actions in general.

instructions to the broker did not constitute the whole of the terms of the contract, and that there was a collateral oral agreement in respect to expenses.

See 8 Cent. Dig. tit. "Brokers," § 110.

Competency of oral evidence.— Sales and purchases of stock for private speculation on the account of a principal are "commercial matters" within Quebec Civ. Code, art. 1233, which declares that proof may be made by testimony of all facts concerning commercial matters, and that in all other matters proof must be made by writing or by the oath of the adverse party. Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510 [*reversing* 7 Quebec Q. B. 530, (*affirming* 13 Quebec Super. Ct. 104)].

Commencement of proof in writing.— The admission of defendant in his deposition that he employed plaintiffs as his stock-brokers, and that they bought and sold for him, is a sufficient commencement of proof in writing, under Quebec Civ. Code, art. 1233, which provides that proof may be made by testimony in all cases in which there is a commencement of proof in writing, and that in all other matters it must be made by writing or by the oath of the adverse party. Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510 [*reversing* 7 Quebec Q. B. 530 [*affirming* 12 Quebec Super. Ct. 104)].

52. *Illinois.*— Boyd *v.* Jennings, 46 Ill. App. 290.

Nevada.— Cahill *v.* Hirschman, 6 Nev. 57.

New York.—Rathborne *v.* Hatch, 90 N. Y. App. Div. 151, 85 N. Y. Suppl. 768.

Pennsylvania.— Esser *v.* Linderman, 71 Pa. St. 76.

Canada.— Forget *v.* Baxter, 13 Quebec Super. Ct. 104.

See 8 Cent. Dig. tit. "Brokers," § 112.

Admissibility of broker's books see also EVIDENCE, 17 Cyc. 378 note 43.

53. Rothschild *v.* Burritt, 47 Minn. 28, 49 N. W. 393 (holding that a written agreement entered into by plaintiffs' customer for the purchase of property, reciting a payment of part of the consideration to plaintiffs, is admissible as tending to prove the rendition of services in the sale of the property by plaintiffs); Gelatt *v.* Ridge, 117 Mo. 553, 23 S. W. 882, 38 Am. St. Rep. 683 (holding that a deed executed by the principal to the purchaser after the commencement of the suit is admissible to show the principal's ratification of the broker's contract of sale).

Contract of sale executed by agent without authority.— In an action by real-estate brokers for commissions, the written contract of sale executed by plaintiffs as defendant's agents is admissible to show that a sale was made, although the agents had no written authority to make it. Monroe *v.* Snow, 131 Ill. 126, 23 N. E. 401 (so holding, although it was afterward repudiated by defendant); Grosse *v.* Cooley, 43 Minn. 188, 45 N. W. 15.

Contract or deed as evidence of sale.— A deed of conveyance from the principal to the customer or an agreement for exchange executed by the customer is competent to prove the fact of sale or exchange. Hewitt *v.* Brown, 21 Minn. 163; Folinsbee *v.* Sawyer, 157 N. Y. 196, 51 N. E. 994 [*reversing* 8 Misc. 370, 28 N. Y. Suppl. 698] (*semble*); Levy *v.* Coogan, 16 Daly (N. Y.) 137, 9 N. Y. Suppl. 534. See also Cannon *v.* Castleman, 24 Ind. App. 188, 55 N. E. 111.

54. *Colorado.*— Howe *v.* Werner, 7 Colo. App. 530, 44 Pac. 511, where letters from the principal to a third person were excluded.

Michigan.— Harvey *v.* Lindsay, 117 Mich. 267, 75 N. W. 627 (where a broker's letter was held admissible as throwing light on an oral contract); McDonald *v.* Ortman, 98 Mich. 40, 56 N. W. 1055 (where correspondence relating to other deals was excluded.)

Missouri.— Veale *v.* Green, 105 Mo. App. 182, 79 S. W. 731, where correspondence between the parties leading up to a letter in which defendant offered a commission for making the sale was admitted.

Montana.— Courtney *v.* Continental Land, etc., Co., 17 Mont. 394, 43 Pac. 185, where a letter written by plaintiff to defendant after the consummation of the contract, stating that he was legally acting as agent for both defendant and the vendee, was admitted as bearing on the good faith of plaintiff.

New York.—Carroll *v.* Pettit, 67 Hun 418, 22 N. Y. Suppl. 250, holding that in an action by a broker for commissions, based on the ground that defendant surreptitiously concluded a sale procured by the broker, a letter written by the latter to the purchaser's agent is admissible to prove his efforts to make a sale; and that it is not incompetent because it incidentally corroborates his testimony as to the date of an interview between himself and defendant, at which the latter obtained the purchaser's name.

See 8 Cent. Dig. tit. "Brokers," § 112.

Evidence of non-receipt.— Testimony of one of two brokers in partnership in business that the firm never received a letter revoking their authority is competent to show that neither he nor his partner received it. Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157.

55. St. Louis, etc., R. Co. *v.* Maddox, 18 Kan. 546 (holding, in an action by a broker against a railroad company to recover his commission for procuring shipments of cattle to be made over defendant's road, that press copies of quarterly reports of shipments over the road made by an agent of the company to its general freight agent from dray tickets which were kept on file are inadmissible because hearsay); Decker *v.* Widdi-

(D) *Conversations and Declarations.* The general rules of evidence relating to the admissibility of conversations and declarations apply in actions by brokers for compensation.[56]

(E) *Evidence as to Particular Facts* — (1) EMPLOYMENT AND AUTHORITY. In an action by a broker for compensation, any competent evidence is admissible in behalf of plaintiff or defendant, as the case may be, which tends to prove or to disprove plaintiff's employment.[57]

comb, (Mich. 1904) 100 N. W. 573 (holding that a newspaper advertisement published by plaintiffs is admissible as showing what they did in performance of their duty under a contract to sell property); Davies *v.* Thomas, 87 Minn. 301, 91 N. W. 1100 (where a stipulation made in a prior suit was held to be admissible).

Memoranda made by the parties are admissible in evidence. Folinsbee *v.* Sawyer, 8 Misc. (N. Y.) 370, 28 N. Y. Suppl. 698; Bender *v.* Peyton, 4 Tex. Civ. App. 57, 23 S. W. 222.

Unstamped bought notes.— Before 23 & 24 Vict. c. 111, a note sent by a broker to his principal, containing an account of a purchase of shares in a joint-stock company, and the price paid for the same, did not require a stamp to make it admissible in evidence. Tomkins *v.* Savoy, 9 B. & C. 704, 7 L. J. K. B. O. S. 334, 4 M. & R. 538, 17 E. C. L. 315.

56. *Colorado.*— Leonard *v.* Roberts, 20 Colo. 88, 36 Pac. 880, where conversations between the broker and prospective purchasers were admitted to show that he was the moving cause of the sale.

Maine.— Veazie *v.* Parker, 72 Me. 443, holding that conversations between buyer and seller before and after the making of the contract are not admissible to affect the broker's right to compensation.

Michigan.— Huff *v.* Cole, 127 Mich. 351, 86 N. W. 835 (holding that conversations between plaintiff and the person with whom defendant afterward exchanged lands in reference to such exchange were admissible, where the statements therein were thereafter communicated to defendant); McDonald *v.* Ortman, 98 Mich. 40, 56 N. W. 1055 (where a conversation between the broker and the purchaser after the sale was held to be inadmissible).

Minnesota.— White *v.* Collins, 90 Minn. 165, 95 N. W. 765 (where a conversation in April was held to be admissible, although the contract under which the commission was alleged to have been earned was not entered into till September following, to show the relation of the parties with reference to the land); Rutherford *v.* Selover, 87 Minn. 495, 92 N. W. 413 (holding that conversations between plaintiff and the proposed purchaser in the absence of defendant are incompetent).

New York.—Woolley *v.* Lowenstein, 83 Hun 155, 31 N. Y. Suppl. 570 (holding that in an action by a broker for commissions for procuring a purchaser able and willing to perform, a statement made by the proposed purchaser at the time of accepting the offer is admissible, and that the broker is not concluded by such purchaser's testimony on the trial); Shipman *v.* Frech, 15 Daly 151, 3 N. Y. Suppl. 932 [*reversing* 1 N. Y. Suppl. 67] (holding that where another broker claiming the same commissions is substituted for the original defendant, the commissions having been paid into court by him, the declarations of the principal after the sale that plaintiff was entitled to the commissions and that he would pay him but for the claim of the other broker are not admissible); Brumfield *v.* Potter, etc., Mfg. Co., 4 Misc. 194, 23 N. Y. Suppl. 1025 [*reversing* 1 Misc. 92, 20 N. Y. Suppl. 615] (holding that, in an action for a commission for effecting a lease, conversations between third persons were competent to prove that another effected the lease); Shipman *v.* Frech, 1 N. Y. Suppl. 67 [*reversed* on another ground in 15 Daly 151, 3 N. Y. Suppl. 932] (holding that where a commission for effecting a sale of property is claimed by different brokers, a statement made by the principal to one broker in the absence of the other that he had not authorized the latter to sell with a builder's loan is inadmissible).

Wisconsin.— Richardson *v.* Babcock, 119 Wis. 141, 96 N. W. 554, where a conversation between plaintiff and defendant after the sale was held to be admissible.

See 8 Cent. Dig. tit. "Brokers," § 111.

57. *Colorado.*— Dexter *v.* Collins, 21 Colo. 455, 42 Pac. 664.

Iowa.— Borden *v.* Isherwood, 120 Iowa 677, 94 N. W. 1128; McDermott *v.* Mahoney, 119 Iowa 470, 93 N. W. 499.

Massachusetts.— Jennings *v.* Rooney, 183 Mass. 577, 67 N. E. 665.

Montana.— Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714.

New Hampshire.— Jackson *v.* Higgins, 70 N. H. 637, 49 Atl. 574.

New York.— Miller *v.* Irish, 3 Hun 352, 67 Barb. 256, 5 Thomps. & C. 707 [*affirmed* in 63 N. Y. 652]; Allen *v.* James, 7 Daly 13; Hodgkins *v.* Mead, 8 N. Y. Suppl. 854; Dayton *v.* Ryerson, 13 How. Pr. 281.

Washington.— Bertelson *v.* Hoffman, 35 Wash. 459, 77 Pac. 801; Going *v.* Cook, 1 Wash. 224, 23 Pac. 412.

Employment by agent of principal.—Where plaintiff claims to have been employed as broker by an agent of defendant, any competent evidence is admissible which tends to show that the agent had authority to employ a broker in behalf of defendant. Eichberg *v.* Ware, 92 Ga. 508, 17 S. E. 770; Hall *v.* Grace, 179 Mass. 400, 60 N. E. 932; Darling *v.* Howe, 14 N. Y. Suppl. 561.

(2) Broker as Procuring Cause of Transaction — (a) In General. In an action by a broker for compensation any competent evidence is admissible in behalf of plaintiff or defendant, as the case may be, which tends to prove or to disprove that plaintiff was the procuring cause of the transaction into which defendant and the customer entered.[58]

(b) Sale by Third Person. In an action for compensation for effecting a sale defendant may show by any competent evidence that the sale was effected not by plaintiff but by another broker.[59]

(3) Ability, Readiness, and Willingness of Customer. If a principal rejects a customer procured by his broker, any evidence is admissible in an action for compensation in behalf of plaintiff or defendant, as the case may be, which tends to prove or to disprove that the customer was able, ready, and willing to effect the purchase on the terms proposed by the principal.[60]

(4) Rules, Customs, and Usages.[61] Customs and usages relating to the brokerage business may be proved, in actions by brokers for compensation, when relevant and material to the issues.[62]

Incapacity to make contract of employment.— If, in an action by a broker employed to effect a purchase, which the principal rejected, the defense is want of mental capacity to enter into a contract of employment, evidence of the value of the property is competent only as showing that the price which defendant authorized the broker to offer was so high as to be inconsistent with good faith on the part of the broker in accepting the employment. Cavender *v.* Waddingham, 5 Mo. App. 457.

58. *Connecticut.*— See Hoadley *v.* Danbury Sav. Bank, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321.

Georgia.— Doonan *v.* Ives, 73 Ga. 295.

Michigan.— Brooks *v.* Leathers, 112 Mich. 463, 70 N. W. 1099. See, however, Burrell *v.* Gates, 112 Mich. 307, 70 N. W. 574.

Missouri.— Kerr *v.* Cusenbary, 69 Mo. App. 221.

Montana.— Childs *v.* Ptomey, 17 Mont. 502, 43 Pac. 714.

New York.— Doran *v.* Bussard, 18 N. Y. App. Div. 36, 45 N. Y. Suppl. 387.

Washington.— Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566.

England.— See Mansell *v.* Clements, L. R. 9 C. P. 139.

59. Smiley *v.* Bradley, 18 Colo. App. 191, 70 Pac. 696; McGuire *v.* Carlson, 61 Ill. App. 295 (holding that on an issue of which one of several rival brokers effected a sale so as to entitle him to a commission, it is proper to show by the purchaser his state of mind regarding the purchase after he had left the broker claiming the commission); Hunn *v.* Ashton, 121 Iowa 265, 96 N. W. 745; Sawyer *v.* Bowman, 91 Iowa 717, 59 N. W. 27; Newton *v.* Ritchie, 75 Iowa 91, 39 N. W. 209; Goldsmith *v.* Cook, 14 N. Y. Suppl. 878 [*reversing* 13 N. Y. Suppl. 578].

Such evidence must be relevant and material. Adams *v.* McLaughlin, 159 Ind. 23, 64 N. E. 462; Creager *v.* Johnson, 114 Iowa 249, 86 N. W. 275; Gregor *v.* McKee, 18 Misc. (N. Y.) 613, 43 N. Y. Suppl. 486; Bowser *v.* Field, (Tex. Sup. 1891) 17 S. W. 45. Thus in an action for commissions for procuring a purchaser for land, the fact that defendant had other agents is immaterial, it not being contended that they had been instrumental in the sale. Rounds *v.* Alee, 116 Iowa 345, 89 N. W. 1098; Goin *v.* Hess, 102 Iowa 140, 71 N. W. 218.

60. McDermott *v.* Mahoney, 119 Iowa 470, 93 N. W. 499; Walsh *v.* Gay, 49 N. Y. App. Div. 50, 63 N. Y. Suppl. 543; Kirchner *v.* Reichardt, 27 Misc. (N. Y.) 530, 58 N. Y. Suppl. 314; Middleton *v.* Thompson, 163 Pa. St. 112, 29 Atl. 796. See, however, Milligan *v.* Owen, 123 Iowa 285, 98 N. W. 792.

61. See, generally, *supra*, II, C, 5, e.

62. *Maryland.*— Rosenstock *v.* Tormey, 32 Md. 169, 3 Am. Rep. 125, holding that usage or custom of the particular business of buying and selling stocks on orders may be introduced in evidence in an action by a broker to recover from his principal the difference between the sum paid for stock and that received for it, for the purpose of showing the manner in which an order received may be performed, but not to imply an authority to execute it in a mode which the law would regard as unreasonable.

Massachusetts.— Walker *v.* Osgood, 98 Mass. 348, 93 Am. Dec. 168; Rupp *v.* Sampson, 16 Gray 398, 77 Am. Dec. 416, both holding, however, that proof of usage among brokers as to the time when a commission is to be considered as earned is inadmissible in an action on an agreement made by a seller to pay a commission to plaintiff on a contract made with a buyer in the making of which plaintiff took no part as agent of either party but acted merely as a middleman in bringing the parties together.

New York.— De Cordova *v.* Barnum, 130 N. Y. 615, 29 N. E. 1099, 27 Am. St. Rep. 538, holding, however, that evidence of the custom of brokers, when collateral security is put up as a margin and the account becomes reduced sufficiently to jeopardize it, to advertise and sell the collateral and charge the customers with the balance, is properly excluded, in an action against a principal, where the broker sells his customer's stocks

(5) VALUE OF SERVICES. If the contract of employment does not specify the compensation to be paid to the broker, any evidence is admissible in an action for compensation which tends to show the reasonable value of the services.[63]

(III) *WEIGHT AND SUFFICIENCY.*[64] The general rules governing the weight and sufficiency of evidence in civil actions apply in actions by brokers for compensation.[65] Thus plaintiff in an action for compensation must prove his cause by a preponderance of the evidence.[66] So an attempt by a party in an action for compensation to suppress testimony casts discredit upon his case.[67] The weight and sufficiency of evidence to establish particular facts are considered in other connections in this article.

e. Trial[68] — (I) *IN GENERAL.* A broker may refuse to allow the principal to inspect his books,[69] but he may be compelled by order of court to produce them for inspection in the trial.[70] An objection to the admissibility of evidence must be made when the evidence is offered else it is waived.[71] So an objection that the evidence is insufficient to support an instruction must be made at the trial.[72] The court may receive evidence after a motion has been made to dismiss the complaint for failure of proof.[73]

(II) *INSTRUCTIONS.*[74] Instructions to the jury in actions by brokers for

on the latter's express order, and not to protect himself from a shrinking margin.

Texas.— Bender *v.* Peyton, 4 Tex. Civ. App. 57, 23 S. W. 222, holding that, where a lumber broker claimed that defendants were unable and failed to fill his orders, it was proper to admit evidence to show the amount and different classes of lumber which should be carried in stock by a mill to enable it to fill the usual run of orders.

United States.— Hansen *v.* Boyd, 161 U. S. 397, 16 S. Ct. 571, 40 L. ed. 746, holding that in an action by brokers for advances made by them on account of one who employed them to sell grain futures for him, evidence having been introduced that the agreement was that the transactions should be conducted under the rules of the board of trade at Chicago, and that such rules were explained to defendant, such rules are admissible, as well as testimony by plaintiff to explain the purport of the rules and the transactions thereunder.

See 8 Cent. Dig. tit. "Brokers," § 113.

Usage as to amount of compensation.— In an action for commissions, established and customary charges for like services in the community are competent evidence to prove what is a fair and reasonable charge (Sayre *v.* Wilson, 86 Ala. 151, 5 So. 157; Glover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695; Hurt *v.* Jones, 105 Mo. App. 106, 79 S. W. 486; Ashby *v.* Holmes, 68 Mo. App. 23. See also Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771), in the absence of an express contract governing the amount of the commission (Emery *v.* Atlanta Real Estate Exch., 88 Ga. 321, 18 S. E. 556; Edwards *v.* Goldsmith, 16 Pa. St. 43; Oliver *v.* Morawetz, 95 Wis. 1, 69 N. W. 977). See also *supra*, II, E, 1, j.

63. *Colorado.*— Brand *v.* Merritt, 15 Colo. 286, 25 Pac. 175.

Iowa.— Carruthers *v.* Towne, 86 Iowa 318, 53 N. W. 240, holding, however, that the fact that at one time there had been an agreement between certain persons as to the compensation to be paid a loan broker for services in procuring a loan is not, where the agreement has been abandoned, entitled to any consideration in an action to determine the reasonable value of such services.

Missouri.— Glover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695.

New York.— Bickart *v.* Hoffmann, 19 N. Y. Suppl. 472.

Washington.— Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. 566.

See 8 Cent. Dig. tit. "Brokers," § 114.

Custom or usage as to amount of compensation see *supra*, note 62, and II, E, 1, j.

64. **Setting aside verdict as against the evidence** see *infra*, II, E, 2, f, (II).

Sufficiency of evidence: As a basis for instructions see *infra*, II, E, 2, e, (II). To go to the jury see *infra*, II, E, 2, e, (III).

65. See EVIDENCE, 17 Cyc. 753 *et seq.*

66. Lawrence *v.* Rhodes, 188 Ill. 96, 58 N. E. 910 [*reversing* 87 Ill. App. 672]; Hammond *v.* Mitchell, 61 Ill. App. 144; Schatzberg *v.* Groswirth, 84 N. Y. Suppl. 259.

67. Simes *v.* Rockwell, 156 Mass. 372, 31 N. E. 484.

68. See, generally, TRIAL.

69. London *v.* Brandon, Holt N. P. 438, 3 E. C. L. 175, 2 Stark. 14, 3 E. C. L. 296.

70. Browning *v.* Aylwin, 7 B. & C. 204, 9 D. & R. 801, 14 E. C. L. 97; Rawlings *v.* Hall, 1 C. & P. 11, 12 E. C. L. 19, so holding, although it may criminate himself. See also DISCOVERY, 14 Cyc. 301 *et seq.*

71. Ross *v.* Fickling, 11 App. Cas. (D. C.) 442; Forget *v.* Baxter, [1900] A. C. 467, 69 L. J. P. C. 101, 82 L. T. Rep. N. S. 510 [*reversing* 7 Quebec Q. B. 530 (*affirming* 13 Quebec Super. Ct. 104)], holding that the objection that notice to produce was not given so as to justify the admission of secondary evidence must be made at the trial.

72. Worthington *v.* Tormey, 34 Md. 182.

73. Dearing *v.* Sears, 3 N. Y. Suppl. 31.

74. **Harmless error in instructions** see *infra*, II, E, 2, f, (I).

compensation are governed by the same rules that apply in civil actions generally.[75]

(III) *Province of Court and of Jury.*[76] Questions of law in actions by brokers for compensation, as in other civil actions, are for the determination of the court, and it is error to submit them to the jury.[77] Issues of fact, on the other hand, are for the jury, and must be submitted to them for determination.

Instructions on questions which should be left to jury see *infra*, II, E, 2, e, (III).

Objections to instructions see *supra*, II, E, 2, e, (I).

75. See cases cited *infra*, this note.

Instructions must not assume matters in dispute. Swigart *v.* Hawley, 140 Ill. 186, 29 N. E. 883 [*reversing* 40 Ill. App. 610]; Casady *v.* Carraher, 119 Iowa 500, 93 N. W. 386; Richardson *v.* Hoyt, 60 Iowa 68, 14 N. W. 122; Benedict *v.* Pell, 70 N. Y. App. Div. 40, 74 N. Y. Suppl. 1085; Gerding *v.* Haskin, 2 Misc. (N. Y.) 172, 21 N. Y. Suppl. 636. See, however, Miller *v.* Early, 58 S. W. 789, 22 Ky. L. Rep. 825.

Instructions must be applicable to the evidence. Leech *v.* Clemons, 14 Colo. App. 45, 59 Pac. 230; Davis *v.* Morgan, 96 Ga. 518, 23 S. E. 417; Hughes *v.* McCullough, 39 Oreg. 372, 65 Pac. 85; Taylor *v.* Cox, (Tex. Sup. 1891) 16 S. W. 1063; Lawson *v.* Thompson, 10 Utah 462, 37 Pac. 732. However, an instruction may, as against plaintiff, assume that he acted as a broker where he so alleged and testified. Carpenter *v.* Fisher, 175 Mass. 9, 55 N. E. 479.

Instructions must not be inconsistent or misleading. Bowser *v.* Mick, 29 Ind. App. 49, 62 N. E. 513; Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326; Bruce *v.* Hurlbut, 81 N. Y. App. Div. 311, 81 N. Y. Suppl. 54; Baird *v.* Gleckler, 11 S. D. 233, 76 N. W. 931. See, however, Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103; McMurtry *v.* Madison, 18 Nebr. 291, 25 N. W. 85, both holding the instructions in question not open to either objection.

The instructions should cover the issues. Thus an instruction that a broker must have been the procuring cause of the sale in order to entitle him to a commission should be given on request where that point is in issue. Hinds *v.* McIntire, 89 Ill. App. 611. And where no instruction defining a broker's duty is given, it is error to refuse an instruction that the duty of the broker is to bring the buyer and seller together, and effect a purchase of the property according to the terms agreed on by the seller and the broker, and that the latter is not entitled to a commission for an unsuccessful effort to effect a sale. West *v.* Demme, 128 Mich. 11, 87 N. W. 95.

If the instructions cover the case generally, the failure to instruct concerning particular details is not error, in the absence of a request therefor. Bickart *v.* Hoffmann, 19 N. Y. Suppl. 472; Keyser *v.* Reilly, 191 Pa. St. 271, 43 Atl. 317.

If a request for an instruction is already covered by those given, it may properly be refused. Ellsmore *v.* Gamble, 62 Mich. 543, 29 N. W. 97; Stillman *v.* Mitchell, 2 Rob. (N. Y.) 523; Gerding *v.* Haskins, 2 Misc. (N. Y.) 172, 41 N. Y. Suppl. 636.

The court is not bound to use the identical language of a request to which a party is entitled; it is sufficient if the instruction given is substantially the same as that requested. Walker *v.* Rogers, 24 Md. 237. So where defendants agreed to pay commissions for sales of land to customers "procured" by plaintiffs, an instruction that defendants were liable if plaintiffs "furnished" customers is not a departure from the issues made. Boyd *v.* Watson, 101 Iowa 214, 70 N. W. 120.

If the evidence on a given fact is undisputed the court should so instruct. O'Callaghan *v.* Boeing, 72 Mich. 669, 40 N. W. 843.

Instructions are to be construed as a whole, and if so construed they are correct and sufficient defects in isolated parts are not necessarily fatal. Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103; French *v.* McKay, 181 Mass. 485, 63 N. E. 1068; Walton *v.* Chesebrough, 167 N. Y. 606, 60 N. E. 1121 [*affirming* 39 N. Y. App. Div. 665, 57 N. Y. Suppl. 687]; Bickart *v.* Hoffmann, 19 N. Y. Suppl. 472; Wilson *v.* Weber, (Tex. Civ. App. 1902) 68 S. W. 800.

It is proper to instruct as to who bears the burden of proving a particular fact in issue. Buckingham *v.* Harris, 10 Colo. 455, 15 Pac. 817; Harrison *v.* Pusteoska, 97 Iowa 166, 66 N. W. 93. See also Holmes *v.* Montauk Steamboat Co., 93 Fed. 731, 35 C. C. A. 556. It is error, however, to charge that the burden is on a party to prove a fact which his opponent does not deny. Anderson *v.* Bradford, 102 Mo. App. 433, 76 S. W. 726. And where there is a counter-claim as well as a complaint and answer, an instruction respecting the burden of proof in its terms applicable to the whole case may be refused, if it is correct with respect to the issue presented by the complaint and answer only. Grover *v.* Henderson, 120 Mo. 367, 25 S. W. 175, 41 Am. St. Rep. 695.

76. See, generally, Dismissal and Nonsuit; Trial.

77. Goodson *v.* Embleton, 106 Mo. App. 77, 80 S. W. 22, holding that it is error to leave to the jury to determine whether plaintiff complied with his contract, so as to entitle him to recover commissions. However, a judicial construction will not be placed on correspondence alone, where some of the letters refer to conversations between the parties affecting the same subject-matter the purport of which is in dispute. Beach *v.* Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867.

What constitutes a reasonable time is a question for the court. Beach *v.* Travelers' Ins. Co., 73 Conn. 118, 46 Atl. 867, time to be

Consequently if a party, whether plaintiff or defendant, adduces evidence on which the jury would be justified in finding in his favor, it is error to take the case from the jury by granting a nonsuit, dismissing his complaint or counterclaim, sustaining a demurrer to his evidence, or directing a verdict against him. He is entitled to go to the jury under these circumstances, even though his evidence be contradicted.[78] Thus it generally falls within the province of the jury to decide whether plaintiff was in fact employed as broker and authorized to perform the acts upon which he bases his right to compensation,[79] and whether he

allowed a vendor to deliver possession to the purchaser. *Contra*, Dent *v.* Powell, 80 Iowa 456, 45 N. W. 772, time to be allowed a vendor to perfect his title. See also Minor *v.* Beveridge, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804.

Mixed questions of law and fact.— In an action for commissions on a sale of land, it is proper to refuse to submit to the jury the question whether the parties entered into a contract whereby defendant employed and agreed to pay plaintiff for the sale of the land, since whether the contract was entered into is a mixed question of law and fact, and questions of law cannot be submitted to the jury. Kilpatrick *v.* McLaughlin, 108 Ill. App. 463.

78. *Colorado.*— Morey *v.* Harvey, 18 Colo. 40, 31 Pac. 719.

Illinois.— Blackall *v.* Greenbaum, 50 Ill. App. 143.

Iowa.— Groeltz *v.* Armstrong, (1904) 99 N. W. 128; Ryan *v.* Page, 123 Iowa 246, 98 N. W. 768.

Kentucky.— West *v.* Prewitt, 43 S. W. 467, 19 Ky. L. Rep. 1480.

Maryland.— Blake *v.* Stump, 73 Md. 160, 20 Atl. 788, 10 L. R. A. 103.

Massachusetts.— Wright *v.* Young, 176 Mass. 100, 57 N. E. 212; Giles *v.* Swift, 170 Mass. 461, 49 N. E. 737; Rogers *v.* Evangelical Baptist Benev., etc., Soc., 168 Mass. 592, 47 N. E. 434; Marland *v.* Stanwood, 101 Mass. 470.

Michigan.— West *v.* Demme, 128 Mich. 11, 87 N. W. 95; Marx *v.* Otto, 117 Mich. 510, 76 N. W. 7.

Minnesota.— Crevier *v.* Stephen, 40 Minn. 288, 41 N. W. 1039.

Missouri.— Finch *v.* Guardian Trust Co., 92 Mo. App. 263.

New Jersey.— Longstreth *v.* Korb, 64 N. J. L. 112, 44 Atl. 934.

New York.— Gracie *v.* Stevens, 171 N. Y. 658, 63 N. E. 1117 [*affirming* 56 N. Y. App. Div. 203, 67 N. Y. Suppl. 688]; Walton *v.* Chesebrough, 167 N. Y. 606, 60 N. E. 1121 [*affirming* 39 N. Y. App. Div. 665, 57 N. Y. Suppl. 687]; Minor *v.* Beveridge, 141 N. Y. 399, 36 N. E. 404, 38 Am. St. Rep. 804; Condit *v.* Cowdrey, 123 N. Y. 463, 25 N. E. 946 [*reversing* 57 N. Y. Super. Ct. 66, 5 N. Y. Suppl. 187]; Reddin *v.* Dam, 51 N. Y. App. Div. 636, 64 N. Y. Suppl. 611; Thornal *v.* Pitt, 36 N. Y. Super. Ct. 379; Meislahn *v.* Englehard, 1 Misc. 412, 20 N. Y. Suppl. 900; Boyd *v.* Vale, 82 N. Y. Suppl. 932; Meyer *v.* Strauss, 58 N. Y. Suppl. 904.

Pennsylvania.— Ringgold *v.* Rhodes, 132 Pa. St. 189, 18 Atl. 1118; Clendenon *v.* Pancoast, 75 Pa. St. 213; McCaffrey *v.* Page, 20 Pa. Super. Ct. 400; Raeder *v.* Butler, 19 Pa. Super. Ct. 604.

Texas.— Blair *v.* Slosson, 27 Tex. Civ. App. 403, 66 S. W. 112.

Utah.— Genter *v.* Conglomerate Min. Co., 23 Utah 165, 64 Pac. 362.

England.— Mitchell *v.* Newark, 10 Jur. 318, 15 L. J. Exch. 292, 15 M. & W. 308, 4 R. & Can. Cas. 300.

Canada.—Dunsmuir *v.* Loewenberg, 30 Can. Supreme Ct. 334.

See 8 Cent. Dig. tit. "Brokers," §§ 128, 129.

Questions of actual fraud are for the jury. Mullen *v.* Bower, 22 Ind. App. 294, 53 N. E. 790; Newhall *v.* Pierce, 115 Mass. 457; Geery *v.* Pollock, 16 N. Y. App. Div. 321, 44 N. Y. Suppl. 673; Ames *v.* McNally, 6 Misc. (N. Y.) 93, 26 N. Y. Suppl. 7; Page *v.* Voorhies, 16 N. Y. Suppl. 101; Vandevort *v.* Wheeling Steel, etc., Co., 194 Pa. St. 118, 45 Atl. 86; McCaffrey *v.* Page, 20 Pa. Super. Ct. 400.

The ability, readiness, and willingness of the broker's customer to enter into the transaction is usually a question for the jury. McDermott *v.* Mahoney, 119 Iowa 470, 93 N. W. 499; Hamill *v.* Baumhover, 110 Iowa 369, 81 N. W. 600; Finch *v.* Guardian Trust Co., 92 Mo. App. 263; Middleton *v.* Thompson, 163 Pa. St. 112, 29 Atl. 796; Smye *v.* Groesbeck, (Tex. Civ. App. 1902) 73 S. W. 972.

Whether defendant himself prevented a sale or exchange is a question for the jury. Stauffer *v.* Linenthal, 29 Ind. App. 305, 64 N. E. 643; McDermott *v.* Mahoney, 119 Iowa 470, 93 N. W. 499; Wright *v.* Young, 176 Mass. 100, 57 N. E. 212; Green *v.* Wright, 36 Mo. App. 298.

Whether plaintiff's services were rendered gratuitously is a question for the jury. Armstrong *v.* Ft. Edward, 159 N. Y. 315, 53 N. E. 1116 [*reversing* 84 Hun 261, 32 N. Y. Suppl. 433]; Darling *v.* Howe, 60 Hun (N. Y.) 578, 14 N. Y. Suppl. 561.

79. *Iowa.*— Ryan *v.* Page, 123 Iowa 246, 98 N. W. 768.

Massachusetts.—Monk *v.* Parker, 180 Mass. 246, 63 N. E. 793.

Michigan.— Codd *v.* Seitz, 94 Mich. 191, 53 N. W. 1057.

Minnesota.— Merriam *v.* Johnson, 86 Minn. 61, 90 N. W. 116.

New York.— Cody *v.* Dempsey, 86 N. Y. App. Div. 335, 83 N. Y. Suppl. 899; Palmer *v.* Durand, 62 N. Y. App. Div. 467, 70 N. Y. Suppl. 1105; Reddin *v.* Dam, 51 N. Y. App.

was in fact the procuring cause of the transaction entered into by the principal and the customer.[80]

(IV) *FINDINGS AND JUDGMENT.*[81] The sufficiency of findings in actions by brokers for compensation is governed by the rules applicable to findings in civil actions in general.[82] Where a broker effects a sale by the terms of which the price is payable in instalments, and his commissions are to be deducted from each instalment as paid, he is not entitled to a judgment for the full amount of his commissions until the purchaser has paid all the instalments.[83] If several coöwners employ a broker to sell property, their liability cannot be apportioned in an action for compensation so as to permit a recovery against one and a discharge of the others.[84] The judgment must conform to the pleadings and proof.[85]

f. Review[86]—(I) *HARMLESS ERROR.* Errors in the trial, to work a reversal on review, must have been prejudicial to the complaining party.[87]

Div. 636, 64 N. Y. Suppl. 611; Ward *v.* Van Duzer, 2 Hall 182; De Mars *v.* Boehm, 6 Misc. 38, 26 N. Y. Suppl. 67.

Pennsylvania.— Black *v.* Snook, 204 Pa. St. 119, 53 Atl. 648 (question of exclusive agency); Dixon *v.* Daub, 17 Pa. Super. Ct. 168.

Utah.— Genter *v.* Conglomerate Min. Co., 23 Utah 165, 64 Pac. 362.

United States.— Plymer *v.* Hartford, etc., Transp. Co., 103 Fed. 674.

See 8 Cent. Dig. tit. "Brokers," §§ 128, 129.

The authority of the principal's agent to employ a broker is a question for the jury. Phillips *v.* Hazen, 122 Iowa 475, 98 N. W. 305; Codd *v.* Seitz, 94 Mich. 191, 53 N. W. 1057.

Questions of ratification are questions of fact to be left to a jury under proper instructions. Genter *v.* Conglomerate Min. Co., 23 Utah 165, 64 Pac. 362.

80. *Idaho.*— Smith *v.* Anderson, 2 Ida. (Hasb.) 537, 21 Pac. 412.

Iowa.— Rounds *v.* Allee, 116 Iowa 345, 89 N. W. 1098.

Massachusetts.— Hosmer *v.* Fuller, 168 Mass. 274, 47 N. E. 94.

Missouri.— Kinder *v.* Pope, 106 Mo. App. 536, 80 S. W. 315.

New York.— Armstrong *v.* Ft. Edward, 159 N. Y. 315, 53 N. E. 1116 [*reversing* 84 Hun 261, 32 N. Y. Suppl. 433]; Smith *v.* McGovern, 65 N. Y. 574; Donovan *v.* Weed, 86 N. Y. App. Div. 630, 83 N. Y. Suppl. 682; Palmer *v.* Durand, 62 N. Y. App. Div. 467, 70 N. Y. Suppl. 1105; Holmes *v.* Eriksen, 55 N. Y. App. Div. 623, 66 N. Y. Suppl. 1090; Reddin *v.* Dam, 51 N. Y. App. Div. 636, 64 N. Y. Suppl. 611; Condict *v.* Cowdrey, 61 N. Y. Super. Ct. 315, 19 N. Y. Suppl. 699 [*reversed* on another ground in 139 N. Y. 273, 34 N. E. 781]; Smith *v.* Smith, 1 Sweeny (N. Y.) 552; Bickart *v.* Hoffman, 19 N. Y. Suppl. 472; Bonwell *v.* Howes, 1 N. Y. Suppl. 435; Shipman *v.* Frech, 1 N. Y. Suppl. 67.

Pennsylvania.— Lewis' Estate, 21 Pa. Super. Ct. 393; Burchfield *v.* Griffith, 10 Pa. Super. Ct. 618.

Washington.— Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 73 Pac. 788.

Wisconsin.— Willey *v.* Rutherford, 108 Wis. 35, 84 N. W. 14.

England.— Murray *v.* Curry, 7 C. & P. 584, 32 E. C. L. 771.

See 8 Cent. Dig. tit. "Brokers," §§ 128, 129.

81. Amount recoverable: Generally see *supra*, II, E, 1, j. As damages for breach of contract see *supra*, II, C, 4.

82. Gorham *v.* Heiman, 90 Cal. 346, 27 Pac. 289 (holding that a finding need not be made as to an immaterial fact); Diltz *v.* Spahr, 16 Ind. App. 591, 45 N. E. 1066 (where a finding was held not to support the conclusion of law); Bumfield *v.* Pottier, etc., Mfg. Co., 1 Misc. (N. Y.) 92, 20 N. Y. Suppl. 615 (holding that a finding for plaintiff on the question whether he was the procuring cause excludes the idea that any other agency cooperated to bring about the deal).

83. Gorham *v.* Heiman, 90 Cal. 346, 27 Pac. 289. See also Woodward *v.* Stearns, 10 Abb. Pr. N. S. (N. Y.) 395.

84. Mousseau *v.* La Roche, 80 Ga. 568, 5 S. E. 780.

85. Hammers *v.* Merrick, 42 Kan. 32, 21 Pac. 783.

Variance between complaint and findings, verdict, or judgment see *supra*, II, E, 2, c, (I), (B).

86. See, generally, APPEAL AND ERROR, 2 Cyc. 474 *et seq.*

87. See cases cited *infra*, this note.

Illustrations of harmless error in evidence see the following cases:

Colorado.— Wray *v.* Carpenter, 16 Colo. 271, 27 Pac. 248, 25 Am. St. Rep. 265.

Indiana.— Barnett *v.* Gluting, 3 Ind. App. 415, 29 N. E. 154, 927.

Iowa.— Hamill *v.* Baumhover, 110 Iowa 369, 81 N. W. 600.

Kansas.— Branaman *v.* Sherman, 49 Kan. 771, 31 Pac. 667.

Minnesota.—Rothschild *v.* Burritt, 47 Minn. 28, 49 N. W. 393.

See 8 Cent. Dig. tit. "Brokers," §§ 132, 133.

Illustrations of harmless error in instructions see Duncan *v.* Borden, 13 Colo. App. 481, 59 Pac. 60; Newton *v.* Ritchie, 75 Iowa 91, 39 N. W. 209; McCormack *v.* Henderson, 100 Mo. App. 647, 75 S. W. 171; Von Tobel *v.* Stetson, etc., Mill Co., 32 Wash. 683, 73 Pac. 788.

Error in favor of a party affords him no

(II) *Setting Aside Verdict as Against the Evidence.* A verdict on conflicting evidence in an action by a broker for compensation will not ordinarily be set aside on appeal or writ of error.[88] To justify the court of review in setting aside a verdict it must be palpably against the weight of the evidence.[89]

F. Lien.[90] Brokers do not usually possess the right of general lien, but they, like other agents, may be in a situation to exercise the right of particular lien.[91] A broker employed to obtain a loan of money has a lien for his fees on the fund coming into his hands.[92] Under some circumstances a broker employed to buy or to sell goods has a right of lien on them,[93] but this is ordinarily so only where

ground for complaint. Higman *v.* Hood, 3 Ind. App. 456, 29 N. E. 1141; Bruce *v.* Wolfe, 102 Mo. App. 384, 76 S. W. 723; Hendricks *v.* Daniels, 19 N. Y. Suppl. 414. See also Prewitt *v.* West, 55 S. W. 884, 22 Ky. L. Rep. 492.

Illustrations of prejudicial error see Baird *v.* Gleckler, 11 S. D. 233, 76 N. W. 931; Burnett *v.* Edling, 19 Tex. Civ. App. 711, 48 S. W. 775.

88. *Georgia.*— Mousseau *v.* Dorsett, 80 Ga. 566, 5 S. E. 780.

Iowa.— Sample *v.* Rand, 112 Iowa 616, 84 N. W. 683.

Massachusetts.— Hall *v.* Grace, 179 Mass. 480, 60 N. E. 932.

Missouri.—Holscben *v.* Fehlig, 55 Mo. App. 375.

Nebraska.— Sherwin *v.* O'Connor, 24 Nebr. 603, 39 N. W. 620.

New York.— Abraham *v.* Burstein, 178 N. Y. 586, 70 N. E. 1094 [*affirming* 82 N. Y. App. Div. 631, 81 N. Y. Suppl. 937]; Smith *v.* Cutter, 54 N. Y. App. Div. 618, 66 N. Y. Suppl. 332; Van Siclen *v.* Herbst, 30 N. Y. App. Div. 255, 51 N. Y. Suppl. 968.

Texas.— Chase *v.* Veal, 83 Tex. 333, 18 S. W. 597.

See 8 Cent. Dig. tit. "Brokers," § 116 *et seq.*

See, however, Wilkes *v.* Maxwell, 14 Manitoba 599.

The fact that a finding for the adverse party would have been sustained by the evidence does not of itself justify the appellate court in setting aside the verdict on conflicting evidence. Veale *v.* Green, 105 Mo. App. 182, 79 S. W. 731. Nor does the fact that the appellate court might have reached a different conclusion. Brand *v.* Merritt, 15 Colo. 286, 25 Pac. 175.

Conclusiveness of decision of intermediate appellate court.— In an action for commissions for services as broker, the amount to which plaintiff is entitled is a question of fact on which the judgment of the appellate court is conclusive. Smith *v.* Mayfield, 163 Ill. 447, 45 N. E. 157.

89. Summers *v.* Summers, 80 S. W. 1154, 26 Ky. L. Rep. 179; Gallagher *v.* Bell, 89 Minn. 291, 94 N. W. 867; Camp *v.* Minnesota Canning Co., 89 Minn. 252, 94 N. W. 687.

Verdicts set aside as against the evidence see Fish *v.* Colvin, 2 Silv. Supreme (N. Y.) 450, 6 N. Y. Suppl. 64; Martin *v.* Bliss, 2 Silv. Supreme (N. Y.) 155, 5 N. Y. Suppl. 686; Roos *v.* Decker, 34 Misc. (N. Y.) 168, 68 N. Y. Suppl. 790; Fraser *v.* Born, 33 Misc. (N. Y.) 591, 67 N. Y. Suppl. 966; Cuperman *v.* Stern, 88 N. Y. Suppl. 147.

90. **Lien in favor of:** Insurance brokers see INSURANCE. Ship-brokers see SHIPPING.

Pledge of property by broker a breach of duty to client see *supra*, II, D, 7.

Right of lien against third persons see *infra*, II, G, 3, b.

Rights of broker as pledgee of collateral see *supra*, II, D, 8.

91. Barry *v.* Boninger, 46 Md. 59. Thus a broker is entitled to a lien for commissions on a note and mortgage left in his possession for sale on commission. Peterson *v.* Hall, 61 Minn. 268, 63 N. W. 733. So where a broker, for a commission, negotiated exchange for a house in New York, and bought bills on Europe for them, and to raise funds for that purpose drew and sold bills upon the New York firm, some of which were accepted and others protested, he had, after the failure of the principal, a lien on any funds or securities which came into his hands for his principal, for the purpose of securing himself against outstanding liabilities arising through such bills, although he may not have paid any of them. State Bank *v.* Levy, 1 McMull. (S. C.) 431. And where a broker was employed to surrender stock and interest scrip, and to procure bonds for them, and in so doing expended time and money, it was held that if the property and interest were not the same before and after the change, but the transaction was to be considered a sale or exchange, he had the ordinary factor's lien, and that, if the property and interest were to be considered the same before and after the change, he had a lien on the ground that his labor had given it additional value, for it will be presumed from his employment that the bonds were more valuable than the stock. Chappell *v.* Cady, 10 Wis. 111.

92. Vinton *v.* Baldwin, 95 Ind. 433. So where a borrower assigns to the broker who procured the loan a certain sum to become due the borrower under a contract with a third person, the broker has an equitable lien on the fund. Goad *v.* Hart, 128 Cal. 197, 60 Pac. 761, 964. However, the fact that a lender permits securities for the loan to remain in the hands of the borrower's broker does not entitle the broker to appropriate the proceeds of the securities to the payment of a debt due to him from the borrower. James' Appeal, 89 Pa. St. 54.

93. Pultney *v.* Keymer, 3 Esp. 182, holding that if a broker advances money and gives his acceptances on the credit of goods

the goods come into his possession and remain there.[94] Ordinarily, however, no right of lien on the proceeds of goods sold exists in favor of the selling broker.[95] It has been held that, in the absence of a contract to the contrary,[96] a real-estate broker has no lien on funds or securities belonging to the principal;[97] but there are cases to the contrary.[98] At any rate any lien he may have exists only so long as he has possession of the property and his debt remains unbarred by limitations.[99] A stock-broker has, in the absence of a special agreement to the contrary, a general lien on securities of the principal which come into his hands in the course of business.[1]

G. Rights and Liabilities of Principal and Broker as to Third Persons — 1. Rights of Principal Against Third Persons — a. In General. If a member of a firm of brokers who receives money with which to purchase land passes it

lodged in his hands, the owner cannot demand them without a full indemnity; and that giving his counter aeceptances, or those of any other person, to the amount of those given by the broker and becoming payable at the same time is not a sufficient indemnity.

Transfer of lien.— The right of lien, being personal, cannot be transferred by a wrongful pledge of the goods by the broker. McCombie *v.* Davies, 7 East 5, 3 Smith K. B. 3, 8 Rev. Rep. 534.

94. Taylor *v.* Robinson, 2 Moore C. P. 730, 8 Taunt. 648, 4 E. C. L. 317.

95. Shoener *v.* Cabeen, 15 Phila. (Pa.) 65. See, however, McGillivray *v.* Simson, 2 C. & P. 320, 12 E. C. L. 595, 9 D. & R. 35, 22 E. C. L. 584, 5 L. J. K. B. O. S. 53, holding that an agreement by a broker that he will sell goods for his principal and pay over the whole proceeds without setting off a debt due him from his prineipal is not binding on the broker so as to deprive him of his legal right of lien.

96. Tinsley *v.* Durfey, 99 Ill. App. 239, holding that where the owner ot real estate executed a contraet which was recorded in the office of the recorder of deeds and by which he agreed to give his brokers the exclusive control of the sale of the land and to pay them out of the proceeds, the brokers acquired an equitable lien on the proceeds; and that where the contraet reserved to the owner the right to fix the price, and he refused to fix it and eneumbered the property with mortgages, the debt became due and the lien attached. However, the mere assumption by the grantee of the amount due from the grantor as commission to the broker who negotiated the sale ereates no lien on the land or interest in it in favor of the broker in the nature of a resulting trust or otherwise. Mayfield *v.* Turner, 180 Ill. 332, 54 N. E. 418.

97. Robinson *v.* Stewart, 97 Mich. 454, 56 N. W. 853 (holding that a broker has no lien for services on a certificate of deposit placed in his hands by his principal, to be used conditionally in purchasing land); Arthur *v.* Sylvester, 105 Pa. St. 233 (holding that a broker employed to sell real estate has no lien for fees on the title papers).

98. Richards *v.* Gaskill, 39 Kan. 428, 18 Pac. 494, holding that the broker has a lien on the specific deed delivered to him by his principal for his work thereon and for the eommission earned by him, as also for the money paid by him at the request of his principal to procure the possession of the deed, when the deed is prepared or procured by him, or delivered to him by his principal, or at the request of his principal, on aceount of his special agency or employment. See also Carpenter *v.* Momsen, 92 Wis. 449, 65 N. W. 1027, 66 N. W. 692, holding that while a broker who is not an attorney at law eannot claim a general lien on all securities in his possession for expenses incurred in managing some of such securities, he has a lien on the speeific seeurities for which the expenses were incurred.

99. Byers *v.* Danley, 27 Ark. 77.

1. *In re* London, ete., Finance Corp., [1902] 2 Ch. 416, 71 L. J. Ch. 893, 87 L. T. Rep. N. S. 49. See also Ingersoll *v.* Cunningham, 95 N. Y. App. Div. 571, 88 N. Y. Suppl. 711. See, however, Leahy *v.* Lobdell, 80 Fed. 665, 26 C. C. A. 75, holding that where securities have been purchased from one who deals in them sometimes as owner and sometimes as broker for others, although a eredit is given for a greater part of the price, and the securities remain in the vendor's hands subject to a lien for the balance, the mere fact that the vendor has in other transactions aeted as the vendee's broker in dealing in securities with others does not convert the securities purehased into the subject of a pledge for the payment of balances due from the vendee on the general account for brokerage transactions.

Rights of subbroker.— Where a subbroker employs a second subbroker to sell stock of the principal, which is done, and the first subbroker then fails in debt to the second subbroker, the latter cannot, as against the principal, retain the debt from the proceeds of the sale. Evans *v.* Waln, 71 Pa. St. 69.

General lien on collateral.— If securities are pledged to a broker to secure a particular loan or a debt, he has no lien thereon for a general balanee or for the payment of any other claim. Lane *v.* Bailey, 47 Barb. (N. Y.) 395; Wyckoff *v.* Anthony, 9 Daly (N. Y.) 417. *Contra, In re* London, etc., Finance Corp., [1902] 2 Ch. 416, 71 L. J. Ch. 893, 87 L. T. Rep. N. S. 49; Jones *v.* Peppercorne, 1 Johns. 430, 5 Jur. N. S. 140, 28 L. J. Ch. 158, 7 Wkly. Rep. 103. Rights of broker in eollateral security in general see *supra*, II, D, 8.

over to a partner, who deposits it to the credit of the firm, and the money is not invested as agreed, the whole firm are liable to the principal in assumpsit.[2]

b. Rights Against Other Party to Contract Negotiated by Broker — (i) *General Rules.* The principal is entitled to enforce a contract negotiated by his broker with a third person,[3] and this is so even though the contract be made in the broker's name[4] and the principal is undisclosed.[5] Having made a contract for his principal, the broker cannot rescind it so as to defeat the principal's right to enforce it.[6] A tender of stock by a broker in behalf of his principal for whom he has made a sale is not invalidated by the fact that the principal did not own the stock, where the broker himself owned it.[7] Notice to the broker is ordinarily imputed to the principal, and accordingly if the broker has notice of facts affecting the principal's right of action, the principal himself is bound thereby.[8]

(ii) *Validity of Contract.* To entitle a principal to enforce a contract negotiated by the broker with a third person the contract must be complete and valid.[9] Thus if the broker in negotiating it is guilty of fraud as to the other

2. Kerr *v.* Sharp, 83 Ill. 199.

3. See cases cited *infra*, note 4 *et seq.*

Privity of contract.— The existence of contracts by a broker for different principals for the sale of stock on an exchange by the rules of which a purchaser of the same amount of stock from a different party may be made a substituted purchaser from such broker does not prevent a privity of contract between such substituted purchaser and the principal of the broker. Clews *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183 [*reversing* 96 Fed. 648, 38 C. C. A. 473]. See also *infra*, notes 14, 29.

4. Saladin *v.* Mitchell, 45 Ill. 79, holding that if a broker not intrusted with the custody or possession of goods but only employed to sell them for the owner sells them in his own name without authority, the purchaser knowing that he is a broker, the owner may maintain an action in his own name for a breach of the contract.

5. Graham *v.* Duckwall, 8 Bush (Ky.) 12; Lisset *v.* Reave, 2 Atk. 394, 26 Eng. Reprint 638.

The rule of an exchange by which brokers are treated as principals in respect to contracts entered into by them cannot affect the rights of third persons so as to prevent an undisclosed principal from suing in his own name, and this is so even though the principal knew of the rule. Langton *v.* Waite, L. R. 6 Eq. 165, 37 L. J. Ch. 345, 18 L. T. Rep. N. S. 80, 16 Wkly. Rep. 508; Humphrey *v.* Lucas, 2 C. & K. 152, 61 E. C. L. 152.

6. Kelly *v.* Kauffman Milling Co., 92 Ga. 105, 18 S. E. 363, holding further that a usage to the contrary would not affect the principal, where the usage was not known to him so that his assent thereto could be reasonably inferred.

Release of security.— A principal who makes a loan is not bound by his broker's release of the security without consideration in the absence of clear proof of authority. Brown *v.* Dennis, (Tex. Civ. App. 1895) 30 S. W. 272.

7. Clews *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183 [*reversing* 96 Fed. 648, 38 C. C. A. 473].

8. Githens *v.* Murray, 92 Ga. 748, 18 S. E. 975; Cox *v.* Pearce, 112 N. Y. 637, 20 N. E. 566, 3 L. R. A. 563 (both holding that merchants employing a broker are chargeable with notice received by him that a member of a firm with whom they have dealt only through the broker has withdrawn from the firm); Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404 (holding that notice to a broker engaged in selling a check of the failure of the drawer is sufficient to charge his principal with notice, in an action by the latter against the vendee of the check to recover the consideration promised therefor). See also *infra*, II, G, 2, b, (v).

9. Frye *v.* Keller, 31 Tex. Civ. App. 165, 72 S. W. 228, holding that the minds of the parties must have met. See, however, Hawkins *v.* Maltby, L. R. 3 Ch. 188, 37 L. J. Ch. 58, 17 L. T. Rep. N. S. 397, 16 Wkly. Rep. 209.

Mutuality of obligation.— A contract of sale by a broker is not lacking in mutuality when ratified by the principal, merely because the broker exceeded his authority in making the sale on the terms agreed. Clews *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183 [*reversing* 96 Fed. 648, 38 C. C. A. 473].

Variance between bought and sold notes.— Where the validity of a contract made through a broker depends upon the bought and sold notes, a material variance between them renders the contract void. Suydam *v.* Clark, 2 Sandf. (N. Y.) 133; Peltier *v.* Collins, 3 Wend. (N. Y.) 459, 20 Am. Dec. 711; Bacon *v.* Eccles, 43 Wis. 227. *Contra*, McCaul *v.* Strauss, 1 Cab. & E. 106.

Variance between broker's entry and actual contract.— Where a contract is made by a broker, and no sale note is delivered, and the entry by him in his sale book varies from the actual contract, neither party is bound. Davis *v.* Shields, 26 Wend. (N. Y.) 341 [*reversing* 24 Wend. 322].

Misrepresentations to middleman.—Misrepresentations made by a seller to a broker who acts as middleman are in legal contemplation made to the buyer, and he may therefore avoid the purchase, and defeat an action for the price. Beetle *v.* Anderson, 98 Wis. 5, 73 N. W. 560.

party thereto, the principal is not entitled to recover thereon.[10] So if a broker who has been promised a certain commission to find a purchaser for property represents to a customer that he is to receive a less amount, for the purpose of deceiving the customer as to the value of the property, the price should be abated in the amount of the difference between the commission promised and that which he represented that he was to receive.[11] And if a vendor pays a secret commission to the purchaser's broker, the purchaser may recover the amount from the vendor.[12]

(III) *RIGHT OF SELLER OF STOCK TO INDEMNITY AGAINST CALLS*[13]— (A) *Liability of Buyer in General.* If a buyer of stock fails to have the transfer duly registered on the company's books, and in consequence the seller is subjected to calls, the buyer is bound to indemnify the seller therefor.[14]

10. Millaudon *v.* Price, 3 La. Ann. 4; Fairchild *v.* McMahon, 139 N. Y. 290, 34 N. E. 779, 36 Am. St. Rep. 701 [*affirming* 20 N. Y. Suppl. 31]; Brown *v.* Montgomery, 20 N. Y. 287, 75 Am. Dec. 404; Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8 (so holding, although the principal neither authorized nor had notice of the fraud prior to the execution and delivery of the contract); Elwell *v.* Chamberlain, 2 Bosw. (N. Y.) 230, 4 Bosw. (N. Y.) 320 [*affirmed* in 31 N. Y. 611]. See, however, Coddington *v.* Goddard, 16 Gray (Mass.) 436, holding that the principal's knowledge of an advance in the price of copper did not invalidate a purchase of copper negotiated by the broker of one who was ignorant of the advance, where the broker himself did not know of it.

Double agency.— Where a broker induced defendant to enter into the contract, believing that he was acting solely in his behalf, while in fact he was secretly acting for the interest of plaintiff, plaintiff could not hold defendant bound by the agreement. Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8. See, however, Terry *v.* Birmingham Nat. Bank, 99 Ala. 566, 13 So. 149.

Division of commissions.— A contract of sale negotiated by brokers is not fraudulent as to the purchaser because of an agreement by the seller's broker, unknown to the seller, to share his commissions with the purchaser's broker. Louisville, etc., R. Co. *v.* Diamond State Iron Co., 126 Ill. 294, 18 N. E. 735.

11. Henry *v.* Mayer, (Ariz. 1898) 53 Pac. 590.

12. Grant *v.* Gold Exploration, etc., Syndicate, [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, 82 L. T. Rep. N. S. 5, 48 Wkly. Rep. 280; Cohen *v.* Kuschke, 83 L. T. Rep. N. S. 102 (so holding, although there is no evidence that the price has been enhanced by the amount of the commission); Hovenden *v.* Millhoff, 83 L. T. Rep. N. S. 41 (holding that there is an irrebuttable presumption that the agent was influenced by the bribe).

13. Liability of broker to indemnify seller of stock against calls see *infra*, note 90.

14. Kellock *v.* Enthoven, L. R. 9 Q. B. 241, 43 L. J. Q. B. 90, 30 L. T. Rep. N. S. 68, 22 Wkly. Rep. 322; Rudge *v.* Bowman, L. R. 3 Q. B. 689, 37 L. J. Q. B. 193; Brown *v.* Black, L. R. 8 Ch. 939, 42 L. J. Ch. 814, 29 L. T. Rep. N. S. 362, 21 Wkly. Rep. 892; Hawkins *v.* Maltby, L. R. 4 Ch. 200, 38 L. J. Ch. 313, 20 L. T. Rep. N. S. 335, 17 Wkly. Rep. 557; Shepherd *v.* Gillespie, L. R. 3 Ch. 764, 38 L. J. Ch. 67, 19 L. T. Rep. N. S. 196, 16 Wkly. Rep. 1133; Paine *v.* Hutchinson, L. R. 3 Ch. 388, 37 L. J. Ch. 485, 18 L. T. Rep. N. S. 380, 16 Wkly. Rep. 553; Loring *v.* Davis, 32 Ch. D. 625, 55 L. J. Ch. 725, 54 L. T. Rep. N. S. 899, 34 Wkly. Rep. 701; Roberts *v.* Crowe, L. R. 7 C. P. 629, 41 L. J. C. P. 198, 27 L. T. Rep. N. S. 238; Holmes *v.* Symons, L. R. 13 Eq. 66, 41 L. J. Ch. 59; Castellan *v.* Hobson, L. R. 10 Eq. 47, 39 L. J. Ch. 490, 22 L. T. Rep. N. S. 575, 18 Wkly. Rep. 731 (holding that if the transfer is made to a nominal buyer, the real buyer is liable); Hodgkinson *v.* Kelly, L. R. 6 Eq. 496, 37 L. J. Ch. 837, 16 Wkly. Rep. 1078; Evans *v.* Wood, L. R. 5 Eq. 9, 37 L. J. Ch. 159, 17 L. T. Rep. N. S. 190, 16 Wkly. Rep. 67 (holding that the buyer is liable, although his failure to have the transfer registered was due to his accidental absence from home); Davis *v.* Haycock, L. R. 4 Exch. 373, 38 L. J. Exch. 155, 20 L. T. Rep. N. S. 954; Walker *v.* Bartlett, 18 C. B. 845, 2 Jur. N. S. 643, 25 L. J. C. P. 263, 14 Wkly. Rep. 681, 86 E. C. L. 845; Fenwick *v.* Buck, 24 L. T. Rep. N. S. 274, 19 Wkly. Rep. 597; Crabb *v.* Miller, 24 L. T. Rep. N. S. 219, 19 Wkly. Rep. 519 [*affirmed* in 24 L. T. Rep. N. S. 892, 19 Wkly. Rep. 882]; Joseph *v.* Holroyd, 22 Wkly. Rep. 614; Pender *v.* Fox, 20 Wkly. Rep. 966. See also Bowring *v.* Shepherd, L. R. 6 Q. B. 309, 40 L. J. Q. B. 129, 24 L. T. Rep. N. S. 721, 19 Wkly. Rep. 852. See, however, London Founders Assoc. *v.* Clarke, 20 Q. B. D. 576, 57 L. J. Q. B. 291, 59 L. T. Rep. N. S. 93, 36 Wkly. Rep. 489; Maynard *v.* Eaton, L. R. 9 Ch. 414, 43 L. J. Ch. 641, 30 L. T. Rep. N. S. 241, 22 Wkly. Rep. 457; Humble *v.* Langston, 7 M. & W. 517.

Privity of contract.— By the custom of the London stock exchange shares are to be transferred not later than the tenth day after the settling day fixed by the parties, and the vendee's contract is to "pass" (i. e. to give) to the vendor within that time the name of a person who will take a transfer of the shares; and the person whose name is so passed has a similar right within the time to pass the name of another person; and so on until the name of an actual purchaser of shares is passed to the vendor. This custom

(B) *Liability of Stock-Jobber.* The contract or liability of a jobber on the stock exchange who has purchased shares for the next approaching settling day is that on that day he will either take the shares himself and be bound himself to accept and register a transfer and to indemnify the vendor, or to give the names of one or more transferees to whom no reasonable objection exists and who will accept and pay for the shares. If he gives such a name he is not liable as principal; otherwise he is bound to take the shares himself.[15] Accordingly if the jobber fails within the time allowed by the rules and usages of the stock exchange[16] to pass to the seller or his broker the name of a *bona fide* purchaser[17] who has ordered the shares to be bought for him,[18] and who is competent to enter into a contract of purchase[19] and is acceptable to the seller,[20] and in consequence thereof the seller is subjected to calls as a shareholder, the jobber is bound to indemnify the seller.

2. Rights of Third Persons Against Principal[21] **— a. Rights Based on Contract Negotiated by Broker** — (1) *General Rule.* If the contract negotiated by a broker with a third person in behalf of a principal is within the terms of his authority,[22] the principal is bound thereby. Accordingly the other contracting party may maintain an action against the principal on the contract[23] or for a breach

is a legal one, and when the proposed name has been given and the transfer executed and paid for, privity of contract between the original seller and the ultimate purchaser is completely established, and the vendor is entitled to proceed in equity against the ultimate purchaser, and to an indemnity against calls on the shares sold, to have the contract completed by having the transfers registered. Sheppard *v.* Murphy, Ir. R. 2 Eq. 544, 16 Wkly. Rep. 948. See, however, Torrington *v.* Lowe, L. R. 4 C. P. 26, 38 L. J. C. P. 121, 19 L. T. Rep. N. S. 316, 17 Wkly. Rep. 78. See also *supra*, note 3, and *infra*, note 29.

15. Coles *v.* Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81, 19 L. T. Rep. N. S. 403, 17 Wkly. Rep. 105; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227].

16. Maxsted *v.* Morris, 21 L. T. Rep. N. S. 535.

17. Maxted *v.* Paine, L. R. 4 Exch. 81, 38 L. J. Exch. 41, 20 L. T. Rep. N. S. 34; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227].

18. Maxted *v.* Paine, L. R. 4 Exch. 81, 38 L. J. Exch. 41, 20 L. T. Rep. N. S. 34; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227]; Dent *v.* Nickalls, 29 L. T. Rep. N. S. 536, 22 Wkly. Rep. 218 [*affirmed* in 30 L. T. Rep. N. S. 644]. See, however, Shepherd *v.* Gillespie, L. R. 3 Ch. 764, 38 L. J. Ch. 67, 19 L. T. Rep. N. S. 196, 16 Wkly. Rep. 1133; Pender *v.* Fox, 20 Wkly. Rep. 966.

19. Heritage *v.* Paine, 2 Ch. D. 594, 45 L. J. Ch. 295, 34 L. T. Rep. N. S. 947; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227]; Dent *v.* Nickalls, 29 L. T. Rep. N. S. 536, 22 Wkly. Rep. 218 [*affirmed* in 30 L. T. Rep. N. S. 644]; Nickalls *v.* Eaton, 23 L. T. Rep. N. S. 689, 19 Wkly. Rep. 172.

20. Allen *v.* Graves, L. R. 5 Q. B. 478, 39 L. J. Q. B. 157, 22 L. T. Rep. N. S. 677, 18 Wkly. Rep. 919; Coles *v.* Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81, 19 L. T. Rep. N. S. 403, 17 Wkly. Rep. 105; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663 [*disapproving* Rennie *v.* Morris, L. R. 13 Eq. 203, 41 L. J. Ch. 321, 25 L. T. Rep. N. S. 862, 20 Wkly. Rep. 227]; Goldschmidt *v.* Jones, 22 L. T. Rep. N. S. 220, 18 Wkly. Rep. 513.

If the transferees are accepted by the seller, and the transfers are executed to them, and they pay the price, the liability to register the shares and indemnify the seller is shifted to the transferees, and the jobber is relieved from further liability (Coles *v.* Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81, 19 L. T. Rep. N. S. 403, 17 Wkly. Rep. 105; Grissell *v.* Bristowe, L. R. 4 C. P. 36, 38 L. J. C. P. 10, 19 L. T. Rep. N. S. 390, 17 Wkly. Rep. 123; Maxted *v.* Paine, L. R. 6 Exch. 132, 40 L. J. Exch. 57, 24 L. T. Rep. N. S. 149, 19 Wkly. Rep. 527) unless he guarantees registration by the buyer (Cruse *v.* Paine, L. R. 6 Eq. 641, 37 L. J. Ch. 711, 19 L. T. Rep. N. S. 127, 17 Wkly. Rep. 44 [*affirmed* in L. R. 4 Ch. 441, 38 L. J. Ch. 225]; Wynne *v.* Price, 3 De G. & Sm. 310, 3 Jur. 295, 5 R. & Can. Cas. 465).

21. Right of seller of stock to indemnity against calls see *supra*, II, G, 1, b, (III).

22. See *infra*, II, G, 2, a, (III).

23. Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Carroll *v.* Walton, etc., Co., 48 Fed. 123; Mortimer *v.* McCallun, 4 Jur. 172, 9 L. J. Exch. 73, 6 M. & W. 58. And see cases cited *infra*, note 32 *et seq.*

Conditional acceptance.— A vendor may, if he is doubtful of a proposed vendee's ability

thereof,[24] unless he has elected to look to the broker alone,[25] and he is entitled in a proper case to enforce specific performance.[26] So if the principal has paid money to the other party pursuant to the terms of the contract, it cannot be recovered back.[27] This right of the other party to hold the principal to the contract negotiated for him by the broker is not defeated by any custom whereby the broker is regarded as the person liable in the first instance on the contract,[28] and it exists although the principal is not disclosed by the broker when he negotiates the contract.[29]

(II) *Validity of Contract.* To entitle the other party to a transaction negotiated by a broker in behalf of a principal to rely thereon, there must be a valid contract.[30] So if the broker, in negotiating the contract, practises fraud on his principal, and the other party is privy thereto or has knowledge thereof, the principal is not bound thereby.[31]

to carry out his contract of purchase, accept the contract conditionally, and agree to sell, providing the purchaser proves able to perform its conditions. Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326.

Estoppel.— One buying through his broker, who examines, accepts, and agrees to the price to be paid for goods, is estopped, in an action for the price by the shipper, from claiming that the quality was not what he bargained for. Killough *v.* Cleveland, (Tex. Civ. App. 1896) 33 S. W. 1040.

24. Booman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158. And see cases cited *infra*, note 32 *et seq.*

Stock transactions.— Where a person buys shares on the stock exchange through his broker from a jobber, and has them carried over to a future settling day, and in the meantime his broker has been declared a defaulter on the stock exchange, a relationship of buyer and seller is established between him and the jobber; and where such a buyer on his broker's default refuses the shares at the "hammer" price and repudiates the transaction, the jobbers are entitled to sell out the shares and recover from him the whole difference between the price realized and the price at which they were carried over, and are not restricted to the difference between that price and the "hammer" price. Anderson *v.* Beard, [1900] 2 Q. B. 260, 5 Com. Cas. 261, 69 L. J. Q. B. 610, 82 L. T. Rep. N. S. 714. See also Levitt *v.* Hamblet, 5 Com. Cas. 326.

25. Henry Ames Packing, etc., Co. *v.* Tucker, 8 Mo. App. 95.

26. Paine *v.* Hutchinson, L. R. 3 Ch. 388, 37 L. J. Ch. 485, 18 L. T. Rep. N. S. 380, 16 Wkly. Rep. 553; *In re* Overend, L. R. 5 Eq. 193, 37 L. J. Ch. 161, 16 Wkly. Rep. 247: And see cases cited *infra*, note 32 *et seq.*

If the principal has good grounds for refusing specific performance of a contract of sale negotiated by a broker, his rights are not prejudiced by the broker's delivering possession to the purchaser without authority. Planer *v.* U. S. Equitable L. Assur. Soc., (N. J. Ch. 1897) 37 Atl. 668.

27. London Founders Assoc. *v.* Clarke, 20 Q. B. D. 576, 57 L. J. Q. B. 291, 59 L. T. Rep. N. S. 93, 36 Wkly. Rep. 489; Stray *v.* Russell, 1 E. & E. 888, 6 Jur. N. S. 168, 29 L. J. Q. B. 115, 1 L. T. Rep. N. S. 443, 8 Wkly. Rep. 240, 102 E. C. L. 888. See also Remfry *v.* Butler, E. B. & E. 887, 5 Jur. N. S. 1298, 7 Wkly. Rep. 682, 96 E. C. L. 887.

28. Mortimer *v.* McCalln, 4 Jur. 172, 9 L. J. Exch. 73, 6 M. & W. 58.

29. Beebee *v.* Robert, 12 Wend. (N. Y.) 413, 27 Am. Dec. 132; Campbell *v.* Hicks, 28 L. J. Exch. 70.

Privity of contract.— It has been held that where a stock-broker who is instructed by a client to carry over for him a specified number of shares for a particular account purchases in his own name from a jobber a larger number of shares, appropriating in his books the specified number to the client and the remainder to another person, no such contractual relation is established between the seller of the shares and the broker's client as will entitle the former, upon the failure of the broker, to maintain an action against the client for damages for refusing to accept the shares so appropriated to him. Beckhuson *v.* Hamblet, [1900] 2 Q. B. 18, 5 Com. Cas. 217, 69 L. J. Q. B. 431, 82 L. T. Rep. N. S. 459. See, however, Anderson *v.* Beard, [1900] 2 Q. B. 260, 5 Com. Cas. 261, 69 L. J. Q. B. 610, 82 L. T. Rep. N. S. 714; *In re* Overend, L. R. 5 Eq. 193, 37 L. J. Ch. 161, 16 Wkly. Rep. 247; McDevitt *v.* Connolly, 15 L. R. Ir. 500. See also *supra*, notes 3, 14.

Double satisfactions.— An agreement between two brokers, each acting for an undisclosed principal, does not give rise to two distinct contracts, one between the brokers and the other between the principals, but to one contract only, and separate satisfactions cannot be obtained from both broker and principal for a cause of action arising out of such contract. Orvis *v.* Wells, 73 Fed. 110, 19 C. C. A. 382.

30. Validity of contract as affected by variance: Between bought and sold notes see *supra*, note 9. Between broker's entry and actual contract see *supra*, note 9.

31. Cassard *v.* Hinman, 6 Bosw. (N. Y.) 8 (where the principal was induced by his broker to enter into a contract of sale in the belief that the broker was acting in his exclusive interest, whereas he was the secret agent of the purchaser, and it was held that an action against the principal for breach of the contract could not be maintained); Healey *v.* Martin, 33 Misc. (N. Y.) 236, 68

(III) *Authority of Broker to Negotiate Contract*—(A) *In General.* If, in negotiating a transaction in behalf of a principal, a broker acts within the terms of the authority which has been conferred on him either expressly or by implication, the principal is bound thereby and the other party may hold him to the bargain.[32] Beyond this the principal is not bound,[33] in the absence of ratification[34] or estoppel.[35]

(B) *Authority to Execute Contract of Sale.* A real-estate broker employed

N. Y. Suppl. 413 (where the principal was allowed to recover back his land from the other party to the transaction); Ferguson *v.* Gooch, 94 Va. 1, 27 S. E. 397, 40 L. R. A. 234 (holding that where the purchaser's agent without his knowledge acts also as the agent of the vendor, the transaction is not binding on the purchaser, irrespective of actual fraud). See, however, Glover *v.* Layton, 145 Ill. 92, 34 N. E. 53 (holding that the fact that the broker of a vendor procured a conveyance to be made to a third person for the benefit of the real purchaser, whom he did not disclose to the vendor, and that afterward the conveyance was made to the real purchaser, and he agreed to give the broker part of the profits arising from a resale of the land, did not constitute a fraud on the vendor); Dyas *v.* Cruise, 8 Ir. Eq. 407, 2 J. & L. 460 (holding that while a broker to let lands is bound to let them to the best advantage, yet a *bona fide* letting may not be avoided by the principal on the ground of undervalue).

Even though the other party has no knowledge of the fraud, yet the court may refuse to compel specific performance in his favor. Thus if a broker authorized to sell land at a given price, three years after, when the value has greatly advanced and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing his principal of the rise in value, it is such a fraud on the principal that a court of equity will refuse to enforce a conveyance to the purchaser. Proudfoot *v.* Wightman, 78 Ill. 553.

32. Eppens, etc., Co. *v.* Littlejohn, 27 N. Y. App. Div. 22, 50 N. Y. Suppl. 251 (where a sales broker was held to have authority to extend the time of delivery); Sherman Oil, etc., Co. *v.* Dallas Oil, etc., Co., (Tex. Civ. App. 1903) 77 S. W. 961 (holding that brokers authorized to make a contract for the sale of oil have implied authority to stipulate the quantity which the seller is bound to put into the buyer's tank cars in which the oil is to be delivered); Campbell v. Hicks, 28 L. J. Exch. 70 (where a letter from defendant's broker announcing to his principals a purchase on their account on certain terms was held to be evidence of a preceding authority to purchase, not merely on precisely the terms stated, but upon terms not unusual nor unreasonable and in substance the same).

If a contract informally made by a broker is within his authority, the fact that the other party subsequently sends a formal contract differing from the actual contract does not invalidate the latter. Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 23 L. J. C. P. 298, 112 E. C. L. 298.

33. *Iowa.*— Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964.

New York.— Nester *v.* Craig, 69 Hun 543, 23 N. Y. Suppl. 948, where the broker violated his instructions as to the terms of a sale effected by him.

Pennsylvania.— *In re* Fairmount Cab Co., 9 Pa. Co. Ct. 201 (where a sales broker was held to have no implied authority to stipulate for liquidated damages in case of the purchaser's default); Bruggeman *v.* Larzelere, 14 Wkly. Notes Cas. 108 (where a broker employed to sell a certain amount of property was held to have no authority to sell a less amount).

Texas.— Edwards *v.* Davidson, (Civ. App. 1904) 79 S. W. 48, holding that a real-estate agent authorized to accept a certain sum as earnest money is not thereby given power to accept Mexican money in that or any other sum.

Virginia.— Davis *v.* Gordon, 87 Va. 559, 13 S. E. 35, where a broker violated his instructions as to a sale effected by him.

West Virginia.— Tibbs *v.* Zirkle, (1904) 46 S. E. 701, holding that a power to sell land does not include the power to give an option, unless so expressed.

England.— Clinan *v.* Cooke, 1 Sch. & Lef. 32, 9 Rev. Rep. 3, holding that a broker authorized to make agreements for leases for lives or years cannot make an agreement in which the term of the proposed lease is not mentioned.

See 8 Cent. Dig. tit. "Brokers," § 143.

This is especially true where the other party enters into the unauthorized contract with knowledge of the agent's true authority. Fleming *v.* Burke, 122 Iowa 433, 98 N. W. 288; Gilbert *v.* Baxter, 71 Iowa 327, 32 N. W. 364.

Duty to ascertain broker's authority.— A party dealing with a special agent is ordinarily bound to ascertain the extent of his authority. Hardwick *v.* Kirwan, 91 Md. 285, 46 Atl. 987; Kramer *v.* Blair, 88 Va. 456, 13 S. E. 914; Merritt *v.* Wassenich, 49 Fed. 785, holding that one who purchases real estate from a non-resident owner through a broker is bound to ascertain, not only the terms of his authority, but also the correspondence by which such authority was obtained. Secret instructions to broker see *infra*, II, G, 2, a, (III), (G).

34. See *infra*, II, G, 2, a, (III), (F).

35. See *infra*, II, G, 2, a, (III), (G).

to find a purchaser has no inherent authority to execute a contract of sale in behalf of his principal.[36] His authority is limited to the power of finding a purchaser satisfactory to the principal, in the absence of a stipulation, express or implied, to the contrary.[37] A broker employed to sell goods, however, has inherent power to enter into a contract for their sale and delivery.[38]

(C) *Authority to Sell on Credit.* A broker employed to sell real or personal property has no authority to sell on total or partial credit.[39]

(D) *Authority to Give Warranty.* A broker employed to sell real or personal property has ordinarily no power to effect a sale with warranty.[40]

(E) *Custom and Usage.* In employing brokers to sell or to buy property, the principal gives them authority to sell or to buy according to the customs and usages prevailing among the class of brokers in question.[41] So a principal is

36. *California.*— Rutenberg *v.* Main, 47 Cal. 213.

Colorado.— See Rundle *v.* Cutting, 18 Colo. 337, 32 Pac. 944; Malone *v.* McCullough, 15 Colo. 460, 24 Pac. 1040.

Illinois.— Johnson *v.* Dodge, 17 Ill. 433, holding that specific performance of a contract for the sale of land made with a real-estate agent on parol authority will not be decreed, without full and satisfactory proof of the authority, or where it seems doubtful whether the authority was not assumed and the transaction fraudulent.

Iowa.— Gilbert *v.* Baxter, 71 Iowa 327, 32 N. W. 364.

Minnesota.— Stillman *v.* Fitzgerald, 37 Minn. 186, 33 N. W. 564.

New Jersey.— Scull *v.* Brinton, 55 N. J. Eq. 489, 37 Atl. 740; Lindley *v.* Keim, 54 N. J. Eq. 418, 34 Atl. 1073.

Texas.— See Edwards *v.* Davidson, (Civ. App. 1904) 79 S. W. 48.

Virginia.— See Kramer *v.* Blair, 88 Va. 456, 13 S. E. 914; Davis *v.* Gordon, 87 Va. 559, 13 S. E. 35.

See 8 Cent. Dig. tit. "Brokers," § 143.

Estoppel to deny broker's authority see *infra*, note 54.

Ratification of contract of sale see *infra*, notes 46, 47, 50.

37. Rutenberg *v.* Main, 47 Cal. 213; Williams *v.* Woods, 16 Md. 220, holding that where a broker has authority to make an absolute sale, not subject to the approval of the vendor, his principal, and within the scope of such authority makes such a sale, it is valid, whether the broker was influenced in making it by the approbation of the vendor's clerk or not, and whether the sale was afterward objected to by the vendor or not.

Variance between contract authorized and that made.— Where a broker to sell has power to sign a contract, if the contract signed by him varies from the instructions given by his principal, it will not be specifically enforced against the latter. Morris *v.* Ruddy, 20 N. J. Eq. 236.

38. Dunn *v.* Wright, 51 Barb. (N. Y.) 244, holding, however, that he cannot make a contract in his own name.

39. Staten *v.* Hammer, 121 Iowa 499, 96 N. W. 964; Smith *v.* McCann, 205 Pa. St. 57, 54 Atl. 498 (holding that a broker who has an exclusive right for sixty days to sell, at a fixed price, certain real estate, cannot bind his principal by a contract in which the time for completion of the purchase and the payment of the price is extended thirty days after the expiration of the sixty days); Edwards *v.* Davidson, (Tex. Civ. App. 1904) 79 S. W. 48; Wiltshire *v.* Sims, 1 Campb. 258, 10 Rev. Rep. 673.

This is especially true where he is employed to sell for cash. Rundle *v.* Cutting, 18 Colo. 337, 32 Pac. 994; Gilbert *v.* Baxter, 71 Iowa 327, 32 N. W. 364; Wanless *v.* McCandless, 38 Iowa 20.

Custom as to selling on credit see *infra*, note 41.

40. Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Dodd *v.* Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726; Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60. See also Malone *v.* McCullough, 15 Colo. 460, 24 Pac. 1040.

Warranty as to quality.— A broker having power to sell may, when not specially restricted from so doing, sell with a warranty as to the quality of the article sold, or as to its fitness for a particular use. Murray *v.* Smith, 4 Daly (N. Y.) 277. *Contra*, Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Dodd *v.* Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

Sale by sample.— Where a cotton broker, with the permission of the owner, takes samples of a cargo of cotton and exhibits them to one who, relying on the samples, purchases a portion of the cargo, the owner is responsible for a breach of warranty, if the bulk of the cotton does not correspond with the samples. Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158. So a broker having authority to sell goods without restriction as to the mode may sell by sample, and if the bulk of the articles sold turns out to be of inferior quality to the sample, the principal is liable. Andrews *v.* Kneeland, 6 Cow. (N. Y.) 354.

Custom as to giving warranty see *infra*, note 41.

Ratification of sale with warranty see *infra*, notes 46, 51.

41. Coles *v.* Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81, 19 L. T. Rep. N. S. 403, 17

bound by a contract of purchase entered into by his broker, although it omits a stipulation contained in the authorization, where the stipulation is such that it is annexed by custom to the contract.[42]

(F) *Ratification and Repudiation* — (1) NECESSITY OF RATIFICATION. If a contract negotiated by a broker is made subject to confirmation by the principal, it is not binding on the latter until he ratifies it.[43] So if a broker assumes to act for another without authority, or if a broker having a special authority acts in violation of his instructions or beyond the terms thereof, there must ordinarily be a ratification by the principal, else he is not bound thereby.[44]

(2) EFFECT OF RATIFICATION. A transaction negotiated by a broker who assumes without authority to act for another becomes binding upon the latter *ab initio* if he ratifies it.[45] So a principal is bound if he ratifies acts done by his broker in violation of his instructions or beyond the terms of his authority.[46]

(3) WHAT CONSTITUTES RATIFICATION. It constitutes a ratification of the broker's unauthorized acts, where the principal, with full knowledge of the facts,[47] does any positive act indicating an intention to abide by the transaction as negotiated by the broker.[48] Thus if the principal accepts and retains property bought for him by the broker without authority,[49] or if he conveys or tenders a conveyance of property sold for him by the broker without authority,[50] or

Wkly. Rep. 105; Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663; Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298.

A custom cannot prevail against the express terms of a contract. Thus a custom that purchasers of land need not pay cash, although the terms of sale are for cash payment, will not sustain a contract of sale made by a real-estate agent who violated an instruction to sell for "one-third cash." Wanless *v.* McCandless, 38 Iowa 20.

Custom as to confirmation by principal of purchase or sale.— If it is the custom of trade that a contract of purchase or sale must be confirmed by the principal, the contract is not binding until so confirmed. Sumner *v.* Stewart, 69 Pa. St. 321; Johnson *v.* Fairmont Mills, 116 Fed. 537.

Custom as to selling with warranty.— A merchandise broker has no implied authority from the usages of trade to bind his principal by a warranty that goods sold by him are of a merchantable quality. Boardman *v.* Spooner, 13 Allen (Mass.) 353, 90 Am. Dec. 196; Dodd *v.* Farlow, 11 Allen (Mass.) 426, 87 Am. Dec. 726.

42. Heyworth *v.* Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, 33 L. J. C. P. 298, 112 E. C. L. 298.

43. Powell *v.* Binney, 54 Nebr. 690, 74 N. W. 1073; Sumner *v.* Stewart, 69 Pa. St. 321; Johnston *v.* Fairmont Mills, 116 Fed. 537.

Waiver of confirmation.— Where plaintiff's offer, through a broker, to sell to defendant certain cotton, was accepted subject to plaintiff's confirmation, and before confirmation there were rumors of plaintiff's insolvency, whereupon defendant insisted that plaintiff should give security, such insistence was not a waiver of the requirement that he confirm the contract. Johnston *v.* Fairmont Mills, 116 Fed. 537.

Custom as to confirmation by principal see *supra*, note 41.

44. Tibbs *v.* Zirkle, (W. Va. 1904) 46 S. E. 701. See, however, *infra*, II, G, 2, a, (III), (F), (4).

45. Seymour *v.* Slide, etc., Gold Mines, 42 Fed. 633. And see cases cited *infra*, note 47 *et seq.*

46. Hoyt *v.* Tuxbury, 70 Ill. 331; Flynn *v.* Jordal, 124 Iowa 457, 100 N. W. 326 (both holding a principal bound by a contract of sale executed by his broker without authority); Brower *v.* Lewis, 19 Barb. (N. Y.) 574 (holding a principal bound by a warranty given by his broker without authority). And see cases cited *infra*, note 47 *et seq.*

Retrospective operation of ratification.— The ratification, by the owner of land, of a contract for its sale, made by a broker without authority, relates back to the making of the contract. Roby *v.* Cossitt, 78 Ill. 638; Lyons *v.* Wait, 51 N. J. Eq. 60, 26 Atl. 334.

Ratification of broker's representations see *infra*, note 75.

47. Topliff *v.* Shadwell, (Kan. Sup. 1902) 67 Pac. 545; Rowan *v.* Hyatt, 45 N. Y. 138; Edwards *v.* Davidson, (Tex. Civ. App. 1904) 79 S. W. 48, collectively holding that a principal does not ratify a contract of sale executed without authority or containing unauthorized terms where he has no knowledge of the contract or of its terms. So one is not bound as by ratification of a sale of his property by a broker if his approval was brought about by misstatements by the broker as to the terms of sale. Halsey *v.* Monteiro, 92 Va. 581, 24 S. E. 258.

48. Lyons *v.* Wait, 51 N. J. Eq. 60, 26 Atl. 334.

Acquiescence as ratification see *infra*, II, G, 2, a, (III), (F), (4).

49. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

50. Hoyt *v.* Tuxbury, 70 Ill. 331. See, however, Roby *v.* Cossitt, 78 Ill. 638.

accepts and retains the price of property so sold,[51] he is ordinarily bound by the transaction.

(4) Repudiation. If a principal repudiates a contract made for him by his broker subject to his confirmation he is not bound thereby.[52] A principal for whom personal property has been purchased on terms not authorized by him must repudiate the transaction within a reasonable time, however, else he becomes bound as by ratification.[53]

(G) *Estoppel.* A person may be estopped to deny the agency of a broker who has acted for him in negotiating a contract.[54] So if the principal holds out the broker as having a certain authority, he cannot, as against one who deals with the broker on the faith thereof, deny that such authority was in fact given; secret instructions to the contrary are of no avail.[55]

b. Rights Independent of Contract Negotiated by Broker or Collateral Thereto[56]—(I) *In General.* A principal who employs a broker to buy property is not liable to repay money borrowed of a third person by the broker to pay for it.[57] However, if a principal employs a broker to charter a boat, he is liable to the ship-owner for damages resulting to the vessel from his (the principal's) refusal to accept the cargo.[58] So the owner of a building who employs a broker to obtain tenants is liable for negligence on his (the principal's) part resulting in injuries to a prospective tenant while examining the building in company with the broker.[59] A broker employed to make sales has no implied

51. Keen *v.* Maple Shade Land, etc., Co., 63 N. J. Eq. 321, 50 Atl. 467 [*reversing* 61 N. J. Eq. 497, 48 Atl. 596]; Brower *v.* Lewis, 19 Barb. (N. Y.) 574, holding that, where a broker has no authority to sell by sample, his principals cannot affirm the sale, and get an increased price on account of the warranty implied from the exhibition of the sample, and keep it, and then say they did not authorize the warranty. See, however, Fleming *v.* Burge, (Iowa 1904) 98 N. W. 288; Clark *v.* Bird, 66 N. Y. App. Div. 284, 72 N. Y. Suppl. 769.

52. Powell *v.* Binney, 54 Nebr. 690, 74 N. W. 1073.

53. Foster *v.* Rockwell, 104 Mass. 167; Clews *v.* Jamieson, 182 U. S. 461, 21 S. Ct. 845, 45 L. ed. 1183 [*reversing* 96 Fed. 648, 38 C. C. A. 473]. See also Crabb *v.* Miller, 24 L. T. Rep. N. S. 219, 19 Wkly. Rep. 519 [*affirmed* in 24 L. T. Rep. N. S. 892, 19 Wkly. Rep. 882]. See, however, *supra*, II, G, 2, a, (III), (F), (1).

54. Warrick *v.* Smith, 137 Ill. 504, 27 N. E. 709 (holding that a purchaser who has paid money to the real-estate agent employed by his vendor to induce the agent to assist him in the transaction is estopped to deny that the agent is his agent, in a suit against him by the vendor to reform the deed, which was drawn by the agent for both parties, on the ground of mutual mistake); Seymour *v.* Slide, etc., Gold Mines, 42 Fed. 633 (holding that a purchaser who accepts the title and makes part payment according to the terms of an agreement between the vendor and the broker through whom the sale is made is estopped to deny the broker's authority to make the agreement).

55. Southern Cotton Oil Co. *v.* Shreveport Cotton Oil Co., 111 La. 387, 35 So. 610 (holding that where a broker exhibited to plaintiffs a telegram from defendants authorizing him to sell for them oil of a certain grade, plaintiffs did not have to look beyond the telegram, and defendants, having held out the broker as authorized to make the sale, are bound by his act, notwithstanding any secret instructions); Foster *v.* Rockwell, 104 Mass. 167 (holding that the fact that a broker departed from a course of dealing with a buyer as to the place of purchasing goods ordered through him is no defense to the buyer in an action for the price, where the seller had no notice of such course of dealing, and the broker was not otherwise limited as to the manner of executing the transaction). See also Nickalls *v.* Merry, L. R. 7 H. L. 530, 45 L. J. Ch. 575, 32 L. T. Rep. N. S. 623, 23 Wkly. Rep. 663; Coles *v.* Bristowe, L. R. 4 Ch. 3, 38 L. J. Ch. 81, 19 L. T. Rep. N. S. 403, 17 Wkly. Rep. 105. However, the fact that real-estate agents erected a sign on property, showing that it was for sale by them, without mentioning the owner's name, does not constitute a holding out of the agents by the owner to the public as having a general authority to bind him by a sale of the property. Davis *v.* Gordon, 87 Va. 559, 13 S. E. 35.

56. **Right of seller of stock to indemnity against calls** see *supra*, II, G, 1, b, (III).

Rights of shareholder where blank transfer of stock lodged with broker is fraudulently filled in by him and transferred see Corporations, 10 Cyc. 627 note 15.

57. Martin *v.* Peters, 4 Rob. (N. Y.) 434; Indiana Bank *v.* Bugbee, 1 Abb. Dec. (N. Y.) 86, 3 Keyes (N. Y.) 461, 3 Transcr. App. (N. Y.) 243.

58. Carroll *v.* Walton, etc., Co., 48 Fed. 123.

59. Boyd *v.* U. S. Mortgage, etc., Co., 94 N. Y. App. Div. 413, 88 N. Y. Suppl. 289.

authority to bind the principal by the submission of an incidental controversy to arbitration.[60]

(II) *Authority of Broker to Dispose of Principal's Property*— (A) *In General.* If a broker intrusted with money pays it away in the ordinary course of business for value, the principal cannot recover it from the recipient, unless the latter knew or should have known that the money was being misapplied.[61] However, a broker authorized to deliver a bill of lading only on payment of a draft attached thereto cannot bind the principal by a delivery made without such payment.[62] Nor can a broker ordinarily bind the principal by a sale of property of the latter in the broker's possession,[63] unless he has been authorized so to do.[64] So if a broker obtains possession of goods by falsely representing to the owner that he has a purchaser for them, and then sells them to another, the owner may recover them or their value from the buyer.[65]

(B) *Pledges.*[66] Since the possession of the principal's personal property by a broker gives him an apparent ownership, a transfer thereof by the broker to a *bona fide* pledgee for value without notice is ordinarily valid as against the principal.[67]

(III) *Authority of Broker to Receive Payment.* In the absence of estoppel arising against the principal,[68] or custom or usage of trade to the con-

60. Ingraham *v.* Whitmore, 75 Ill. 24.

61. Thomson *v.* Clydesdale Bank, [1893] A. C. 282, 62 L. J. P. C. 91, 67 L. T. Rep. N. S. 156, 1 Reports 255.

62. Stollenwerck *v.* Thacher, 115 Mass. 224.

63. Rodliff *v.* Dallinger, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439. See, however, Marshall *v.* Ender, 125 Ill. 370, 17 N. E. 464 [*affirming* 20 Ill. App. 312].

64. Whitehead *v.* Tuckett, 15 East 400, 13 Rev. Rep. 509.

65. Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843 [*affirming* 48 Hun 537, 1 N. Y. Suppl. 163]; Hentz *v.* Miller, 94 N. Y. 64; Collins *v.* Ralli, 20 Hun (N. Y.) 246; Soltau *v.* Loewenthal, 1 N. Y. Suppl. 168.

66. **Pledge as violation of broker's duty to principal** see *supra*, II, D, 7.

67. Dix *v.* Tully, 14 La. Ann. 456; Henry *v.* Philadelphia Warehouse Co., 81 Pa. St. 76; Laussatt *v.* Lippincott, 6 Serg. & R. (Pa.) 386, 9 Am. Dec. 440; Goodwin *v.* Robarts, 1 App. Cas. 476, 45 L. J. Exch. 748, 35 L. T. Rep. N. S. 176, 24 Wkly. Rep. 987, so holding as to negotiable securities. See also Association *v.* Miller, 1 Wkly. Notes Cas. (Pa.) 120; Mocatta *v.* Bell, 24 Beav. 585, 4 Jur. N. S. 77, 27 L. J. Ch. 237, 53 Eng. Reprint 483. *Contra*, Bragg *v.* Meyer, 4 Fed. Cas. No. 1,801, McAll. 408; Haynes *v.* Foster, 2 Cromp. & M. 237, 3 L. J. Exch. 153, 4 Tyrw. 65; *Ex p.* Gregory, 2 Mont. De G. & C. 613.

Knowledge of agency.— A broker who has reason to know that another broker of whom he buys stock sells it merely as the agent of an unnamed principal has no right to presume that such principal has authorized the agent to pledge the stock for his own debt, and cannot hold the stock by virtue of such a pledge, unauthorized or unratified by the principal. Fisher *v.* Brown, 104 Mass. 259, 6 Am. Rep. 235.

Measure of damages see Stollenwerck *v.* Thacher, 115 Mass. 224; Davis *v.* Funk, 39 Pa. St. 243, 80 Am. Dec. 519, holding that where a note left by the owner with a broker to be sold was pledged by the latter for a loan to himself, and on default of payment was sold by the pledgee for much less than its face, without notice, the owner, having tendered the advance made by the pledgee, may recover from him the difference between that sum and the face of the note.

Priorities.— As to stock deposited by plaintiff with brokers subsequently becoming insolvent as security for the advances which they might make in execution of plaintiff's orders, and which had also been pledged by them, plaintiff is entitled to a preference over other customers, whose stock was purchased on a margin, since they and plaintiff are not similarly situated. Accordingly, where one of plaintiff's certificates of stock so deposited as security by him and pledged by the brokers with other stock purchased by them on margins for other customers was sold by the pledgee, with a portion of the other stock, and the balance of the pledged stock was subsequently sold by the assignee of the brokers, to whom it had been turned over by the pledgee, plaintiff had the right to follow the proceeds of the sales, and was entitled to priority in payment over the other customers. But the mere fact that the brokers had in their possession a certificate of stock for the same number of shares in the same corporation as a certificate belonging to plaintiff, which had been sold by them and the money converted to their own use, does not make plaintiff the equitable owner of the other certificate, so as to entitle him to follow it into the hands of the pledgee. Sillcocks *v.* Gallaudet, 66 Hun (N. Y.) 522, 21 N. Y. Suppl. 552. See also Willard *v.* White, 56 Hun (N. Y.) 581, 10 N. Y. Suppl. 170.

68. Talmage *v.* Nevius, 1 Sweeny (N. Y.) 38 (where a broker negotiated a sale in the principal's office, and afterward had possession of the evidence of title to the property

trary,[69] a payment made to a broker and not received by the principal is not ordinarily binding on the latter as a payment to him,[70] unless the broker has express or implied authority to receive it, in which case the rights of the parties are the same as if the payment had been made to the principal.[71] Thus a broker employed to sell property has no inherent authority to receive the price, and consequently if the purchaser pays it to him and the principal does not receive it, it does not constitute a payment to the latter.[72] Much less is a person bound by a payment

and the evidence of the money to be paid, and his acts up to the time of payment were apparently ratified by the principal, and the purchaser was ignorant that he was only a broker); Irvine *v.* Watson, 5 Q. B. D. 102, 49 L. J. Q. B. 239, 42 L. T. Rep. N. S. 51, 28 Wkly. Rep. 353; Heald *v.* Kenworthy, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly. Rep. 176 (holding by implication that if the seller has by his conduct induced the buyer to believe that the latter's broker has already paid the seller, in consequence of which the buyer pays his broker the price, the seller cannot recover of the buyer); Townsend *v.* Inglis, Holt 278, 3 E. C. L. 116 (holding that where a principal has allowed his broker to take payment for goods sold by drawing bills on the purchaser in his own name without mention of the principal, the latter is bound by such mode of payment, on the insolvency of the agent after a particular payment made). See also Frank *v.* Levy, 10 Ohio Cir. Ct. 554, 6 Ohio Cir. Dec. 819.

The fact that the seller delivered the invoice of goods to the buyer's broker, who fraudulently made out an invoice in his own name, does not estop the seller from recovering the price from the buyer, although the latter paid it to the broker on the strength of the fraudulent invoice. Gallup *v.* Lederer, 1 Hun (N. Y.) 282; Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. (N. Y.) 671.

Payment after termination of broker's authority.— Where land is intrusted to real-estate agents to sell and collect the purchase-money, the purchaser is entitled to credit for payment to an agent of the real-estate agents, although made after he was discharged; he having been held out as authorized to receive payments due on contracts, and notice of withdrawal of his authority not having been given to the purchaser. Meeker *v.* Mannia, 162 Ill. 203, 44 N. E. 397. See, however, Rohde *v.* Marquis, (Mich. 1903) 97 N. W. 53.

The fact that the seller allows the day of payment to pass without demanding the price, and that the buyer subsequently pays it to his broker, does not estop the seller to demand the price of the buyer, where there is no invariable custom to demand prepayment (Irvine *v.* Watson, 5 Q. B. D. 102, 49 L. J. Q. B. 239, 42 L. T. Rep. N. S. 51, 28 Wkly. Rep. 353; Heald *v.* Kenworthy, 3 C. L. R. 612, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly. Rep. 176. See also Western R. Co. *v.* Roberts, 4 Phila. (Pa.) 110), or where the buyer knows that the seller is accustomed to deliver goods before actual payment therefor and has acquiesced in that course of dealing (Morey *v.* Webb, 65 Barb. (N. Y.) 22). See, however, Kymer *v.* Suwercropp, 1 Campb. 109.

69. Toledano *v.* Klingender, 6 La. 691. See also Lentilhon *v.* Vorwerck, Lalor (N. Y.) 443.

If the principal is known to the buyer, a custom permitting the broker to receive the price does not protect the buyer in paying the same to the broker. Higgins *v.* Moore, 34 N. Y. 417 [*reversing* 6 Bosw. 344].

A custom in conflict with the express terms of the contract does not protect the buyer in paying the price to the seller's broker. Campbell *v.* Hassell, 1 Stark. 233, 2 E. C. L. 94. And see Thornton *v.* Meux, M. & M. 43, 22 E. C. L. 467.

70. See cases cited *infra*, note 72.

71. Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 76 Am. St. Rep. 127 (where a purchaser who paid a deposit to the vendor's broker, who was authorized to receive it, was allowed to recover it from the vendor on his breach of the contract to convey); Kallhom *v.* Lipp, 20 Ill. App. 414; Henken *v.* Schwicker, 67 N. Y. App. Div. 196, 73 N. Y. Suppl. 656 (in both of which cases a payment by the lender of the proceeds of the loan to the borrower's broker was held binding on the borrower); Frank *v.* Levy, 10 Ohio Cir. Ct. 554, 6 Ohio Cir. Dec. 819 (where a payment to the vendor's broker was held binding on the vendor).

72. Toledano *v.* Klingender, 6 La. 691; Higgins *v.* Moore, 34 N. Y. 417 [*reversing* 6 Bosw. 344]; John Hurd Co. *v.* Consolidated Steel, etc., Co., 47 N. Y. App. Div. 467, 62 N. Y. Suppl. 439; Dunn *v.* Wright, 51 Barb. (N. Y.) 244; Harrison *v.* Ross, 44 N. Y. Super. Ct. 230; Lentilhon *v.* Vorwerck, Lalor (N. Y.) 443 (holding that where bills of exchange are sold through a broker for cash on delivery, in the absence of usage, the possession of the bills by the broker authorizes the vendee, in the absence of any communication from the sellers, to suppose either that the broker has advanced the money, or that the sellers have taken his security, and therefore the vendee will be protected in payment to the broker); Western R. Co. *v.* Roberts, 4 Phila. (Pa.) 110 (so holding where the broker does not have possession and authority to deliver the goods sold). See, however, Seabrook *v.* Hammond 5 Rich. (S. C.) 160.

This is especially true where the purchaser knows or should know that the broker is acting as such (Graham *v.* Duckwall, 8 Bush (Ky.) 12. *Contra*, Campbell *v.* Hassell, 1 Stark. 233, 2 E. C. L. 94, holding that pay-

made for his benefit where the money is paid, not to his broker, but to the broker of the payer himself.[73]

(iv) *Misrepresentations of Broker.* The principal is ordinarily responsible for representations made by the broker in the course of his employment.[74] Accordingly if a broker employed to sell property makes misrepresentations in effecting the sale, the rights and liabilities of the buyer and seller are the same as if the representations had been made by the seller himself.[75]

ment made to the broker is good, where the name of the principal is not disclosed, although the purchaser knows that the broker sold for some unknown principal. And see Favenc *v.* Bennett, 11 East 35, holding, however, that where the buyer is also indebted to the same broker for another parcel of goods, the property of a different person, and he makes a payment to the broker generally, which is larger than the amount of either demand, but less than the two together, and afterward the broker stops payment, such payments ought to be equitably apportioned as between the several owners of the goods sold, who are only respectively entitled to recover the difference from the buyer. See also Thornton *v.* Meux, M. & M. 43, 22 E. C. L. 467), or where the principal is known to the purchaser (Higgins *v.* Moore, 34 N. Y. 417 [*reversing* 6 Bosw. 344]; John Hurd Co. *v.* Consolidated Steel, etc., Co., 47 N. Y. App. Div. 467, 62 N. Y. Suppl. 439; Higgins *v.* Grindrod, 16 Phila. (Pa.) 200. See also Blackburn *v.* Scholes, 2 Campb. 341).

Sale by broker as principal.— It has been held that if the owner of goods allows his broker to sell them as a principal, the purchaser will be discharged by payment to the broker in any way which would have been sufficient had he been the real owner. Coates *v.* Lewes, 1 Campb. 444. See also Blackburn *v.* Scholes, 2 Campb. 341. It is otherwise if the principal is disclosed at the time of sale (Blackburn *v.* Scholes, *supra*), or if the owner does not know that the broker is selling as a principal (Crosby *v.* Hill, 39 Ohio St. 100 [*affirming* 8 Ohio Dec. (Reprint) 663, 9 Cinc. L. Bul. 156]).

Payment after termination of broker's authority.— A payment made by the purchaser to the vendor's broker after his authority has expired is not ordinarily a payment to the vendor. Rohde *v.* Marquis, (Mich. 1903) 97 N. W. 53. See, however, Meeker *v.* Mannia, 162 Ill. 203, 44 N. E. 397.

73. Ortmeier *v.* Ivory, 208 Ill. 577, 70 N. E. 665 [*affirming* 109 Ill. App. 361]; Gallup *v.* Lederer, 1 Hun (N. Y.) 282; Bassett *v.* Lederer, 1 Hun (N. Y.) 274, 3 Thomps. & C. (N. Y.) 671; Morey *v.* Webb, 65 Barb. (N. Y.) 22; Irvine *v.* Watson, 5 Q. B. D. 102, 49 L. J. Q. B. 239, 42 L. T. Rep. N. S. 51, 28 Wkly. Rep. 353; Kymer *v.* Suwercropp, 1 Campb. 109; Heald *v.* Kenworthy, 10 Exch. 739, 1 Jur. N. S. 70, 24 L. J. Exch. 76, 3 Wkly. Rep. 176.

Identity of principal see *supra*, II, C, 2, c.

74. Whilden *v.* Merchants', etc., Nat. Bank, 64 Ala. 1, 38 Am. Rep. 1.

Double agency.—Where a contract is signed by plaintiff, as one of the parties, and by the broker through whom it was effected for defendant, the other party, the broker cannot be considered the agent of both parties so as to relieve defendant from responsibility for his misrepresentations. Dawson *v.* Chisholm, 1 N. Y. Suppl. 171.

75. McBean *v.* Fox, 1 Ill. App. 177 (holding that a broker's power to negotiate the sale of a note implies the power to give such information as would ordinarily be called for, and that his false representations as to his principal's financial condition bind the latter); Lobdell *v.* Baker, 1 Metc. (Mass.) 193, 35 Am. Dec. 358 (holding that false representations of a broker employed to sell a note, concerning the character of the note and the parties thereto, are binding on the principal, although made contrary to the principal's express instructions); Ahern *v.* Goodspeed, 72 N. Y. 108 [*affirming* 9 Hun 263] (holding that where plaintiff, being indebted to a note broker, placed his note in his hands to be sold at a discount of twelve per cent, the proceeds to be applied on his account, and defendant purchased the note of the broker at the discount stated, on the latter's representation that it was first-class business paper, plaintiff was estopped from setting up usury); Frevall *v.* Fitch, 5 Whart. (Pa.) 325, 34 Am. Dec. 558 (holding that where defendant, the payee of a note under seal, indorsed it in blank, and put it into the hands of a broker who took it to plaintiff, and, on being asked by him as to its value, pointed to defendant's indorsement, and assured him of its sufficiency, whereupon plaintiff discounted the note, plaintiff might recover from defendant the amount paid the broker, as the note was a specialty, and the indorser for that reason was not bound). See, however, Planer *v.* U. S. Equitable L. Assur. Soc., (N. J. Ch. 1897) 37 Atl. 668.

Reliance on representations.— To make a vendor liable on account of his agent's misrepresentations in the sale, the purchaser must have relied on the misrepresentations, and not upon the fact that the agent was willing to join in the purchase. Pineville Land, etc., Co. *v.* Hollingsworth, 53 S. W. 279, 21 Ky. L. Rep. 899.

Ratification.— Where land was sold by a broker who made representations to induce defendant to purchase which were known to the broker to be false but were relied on by defendant to his injury, plaintiff by availing himself of the benefits of the transaction is bound by the representations, whether the broker was his appointed agent or not. Williamson *v.* Tyson, 105 Ala. 644, 17 So. 336.

Estoppel of purchaser.— Where an agent to sell property sells to a firm of which he is

(v) *Notice to Broker as Notice to Principal.*[76] A principal is ordinarily chargeable with knowledge acquired by his broker in the course of the employment.[77]

3. Rights of Broker Against Third Persons — a. In General. If a broker sells stock for a price payable at a future day, and a third person, for the accommodation of the principal, accepts a bill drawn by the latter in favor of the broker upon the broker's agreement to apply the price, when received, in payment of the bill, the broker cannot, as against the accepter, deduct from the price a sum due the broker from the principal on a previous transaction.[78] An exchange broker may recover on a bill bought by him, although he has not taken out a license as required by statute.[79] However, the promise of a prospective purchaser to convey part of the land to the owner's broker if he would introduce the purchaser to the owner is contrary to public policy, and cannot be enforced by the broker.[80]

b. Right of Lien. If a broker employed to buy goods pays the price, he may under some circumstances, as against third persons claiming under the buyer, be entitled to the benefit of a vendor's lien.[81] So if a person in possession of securities owned by another fraudulently deposits them with his broker to secure particular advances, the broker has a general lien thereon even as against the true owner.[82] However, a broker who holds securities given by his principal to secure a loan procured for the latter cannot, as against the lender, appropriate the proceeds of the securities to the payment of a debt due the broker from the principal.[83]

c. Rights Based on Contract Negotiated by Broker. As a rule a contract negotiated by a broker in behalf of a principal cannot found a right of action in favor of the broker against the other contracting party.[84]

a member, without the knowledge of the principal that he is interested in the purchase, the partners of the agent cannot recover damages of the principal on account of misrepresentations made by the agent, they being parties to his violation of his trust. Pineville Land, etc., Co. *v.* Hollingsworth, 53 S. W. 279, 21 Ky. L. Rep. 899.

76. See also *supra*, II, G, 1, b, (I).

77. Vercruysse *v.* Williams, 112 Fed. 206, 50 C. C. A. 486, holding that a broker employed to find a purchaser may, after the conclusion of the contract of sale, lawfully become the agent of the purchaser to pass on the title, pay the price, and receive the deed, if the purchaser has knowledge of his former relation to the vendor; and hence that knowledge acquired by the broker after the contract of sale was closed that an outstanding mortgage executed by the vendor was intended by the parties thereto to cover the land embraced in the contract of sale, but that through a mistake of the scrivener a different tract was described therein, was chargeable to the purchaser and precluded him from disputing the mortgagee's right to have the mortgage reformed so as to make it embrace the land purchased. See, however, Moorehead *v.* Gilmore, 77 Pa. St. 118, 18 Am. Rep. 435.

78. Hills *v.* Mesnard, 10 Q. B. 266, 16 L. J. Q. B. 306, 59 E. C. L. 266.

79. Lindsey *v.* Rutherford, 17 B. Mon. (Ky.) 245.

80. Smith *v.* Townsend, 109 Mass. 500.

81. Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233.

82. Jones *v.* Peppercorne, 1 Johns. 430, 5 Jur. N. S. 140, 28 L. J. Ch. 158, 7 Wkly. Rep. 103.

83. James' Appeal, 89 Pa. St. 54.

84. Gridley *v.* Bayless, 43 Ill. App. 503 (holding that where a contract for the sale of real estate provides that in case of default the defaulting party shall pay to the broker of the other party a certain sum, an action for the amount must be brought in the name of the principal); McKinney *v.* Harvie, 38 Minn. 18, 35 N. W. 668, 8 Am. St. Rep. 640 (holding that a deposit made by a purchaser on the price cannot be recovered back by his broker on the vendor's refusal to convey); Lawyer *v.* Post, 109 Fed. 512, 47 C. C. A. 491 (holding that a broker who takes an option for the purchase of property in his own name but in reality for the benefit of a customer, to whom he demands its conveyance, having himself no interest in the contract beyond a contingent commission in case a sale is made, cannot maintain a suit for specific enforcement of the contract). See also Paine *v.* Loeb, 96 Fed. 164, 37 C. C. A. 434, where brokers entered into a contract for the purchase of bonds from defendant, claiming to act for an undisclosed principal, and stipulating that they should in no manner be held liable on the contract, which, as they had reason to believe, was made by defendant under a misapprehension as to the value of the bonds, while in fact they were acting for themselves, and it was held that

4. Rights of Third Persons Against Broker[85] — **a. In General.** A broker who has accepted property from one who has no title or authority to sell, and disposed of it pursuant to his principal's instructions, is liable in damages to the true owner, although he acted in good faith and in the regular course of business.[86] One to whom a buyer has pledged bought notes may, on the buyer's rescinding the contract for fraud of the broker, recover from the broker deposits made with him by the buyer in part payment of the price.[87]

b. Rights of Other Party to Contract Negotiated by Broker — (I) *Rights Based on Contract* — (A) *Where Broker Contracts For Himself.* If a broker enters into a contract in his own behalf, his liabilities under the contract are those of a principal and ordinarily the same as if he were not a broker.[88]

(B) *Where Broker Contracts For Disclosed Principal.* If a broker, at the time of negotiating a contract, discloses his principal, the principal only, and not the broker, is liable thereon.[89]

they could not maintain an action on the contract — not as agents for an undisclosed principal, because no such principal existed, nor as principals, because, by their fraudulent misrepresentations, they had secured immunity from liability on the contract as such, and estopped themselves from claiming rights which were correlative with such liability.

Action for breach of contract. — Ordinarily a broker cannot sue the other contracting party for breach of a contract made in behalf of his principal (Fairlie *v.* Fenton, L. R. 5 Exch. 169, 39 L. J. Exch. 107, 22 L. T. Rep. N. S. 373, 28 Wkly. Rep. 700. See, however, Short *v.* Spackman, 2 B. & Ad. 962, 22 E. C. L. 402), and this is so although the principal is undisclosed (Sharman *v.* Brandt, L. R. 6 Q. B. 720, 40 L. J. Q. B. 312, 19 Wkly. Rep. 936). It has been held, however, that a real-estate broker may sue a purchaser who has refused to carry out his contract with the vendor, whereby the broker has lost his right to a commission, and this although he had agreed to look to the vendor for it. Livermore *v.* Crane, 26 Wash. 529, 67 Pac. 221, 57 L. R. A. 401. But see Cohen *v.* Hershfield, 16 Daly (N. Y.) 96, 9 N. Y. Suppl. 512, holding that where a vendee fraudulently conceals the fact that she purchased through a broker employed by the vendor, and represents that a third person was the procuring cause of the sale, whereby the vendor is induced to pay the commissions to such third person, the broker cannot sue the purchaser for lost commissions, as the vendor's liability to him is not affected by such payment to the third person.

Action for price. — An ordinary merchandise broker cannot maintain an action in his own name for the price of the goods sold by him. White *v.* Chouteau, 10 Barb. (N. Y.) 202. *Contra*, Hearshy *v.* Hichox, 12 Ark. 125, holding that a broker interested in the performance of the contract to the extent of his commission may sue for the price in his own name. If, however, the broker has guaranteed the sale (White *v.* Chouteau, *supra*) or advanced money upon the goods sold (White *v.* Chouteau, *supra*; White *v.* Chouteau, 1 E. D. Smith (N. Y.) 493), he may sue for the price in his own name.

85. **Liability of stock jobber to indemnify seller against calls** on winding up of company see *supra*, II, G, 1, b, (III), (B).

86. Bercich *v.* Marye, 9 Nev. 312; Jennie Clarkson Home for Children *v.* Union Pac. R. Co., 92 N. Y. App. Div. 618, 87 N. Y. Suppl. 1137; Jennie Clarkson Home for Children *v.* Missouri, etc., R. Co., 92 N. Y. App. Div. 617, 87 N. Y. Suppl. 1138; Jennie Clarkson Home for Children *v.* Chesapeake, etc., R. Co., 92 N. Y. App. Div. 491, 87 N. Y. Suppl. 348 [*affirming* 41 Misc. 214, 83 N. Y. Suppl. 913] (the last three cases holding that where a New York stock exchange broker, in the name of his firm, and his cashier, who personally knew the treasurer of a corporation, in good faith witnessed a forged power of attorney authorizing a transfer of bonds belonging to the corporation by such treasurer before the transfer agent of the corporation issuing the bonds, and such transfer agent acted on such power and transferred the bonds, according to a custom existing in New York city transfer offices for such transfer agents to accept the witnessing of such powers of attorney by stock exchange brokers as a sufficient guaranty of the identity of the individual executing the power, the broker was liable over to the corporation issuing the bonds on such corporation's being compelled to replace the same, as having guaranteed to it the genuineness of the power of attorney); Williams *v.* Merle, 11 Wend. (N. Y.) 80, 25 Am. Dec. 604; Fowler *v.* Hollins, L. R. 7 Q. B. 616, 41 L. J. Q. B. 277, 27 L. T. Rep. N. S. 168, 20 Wkly. Rep. 868 [*affirmed* in L. R. 7 H. L. 757, 44 L. J. Q. B. 169, 33 L. T. Rep. N. S. 73]. See, however, Cooper *v.* Illinois Cent. R. Co., 38 N. Y. App. Div. 22, 57 N. Y. Suppl. 925.

87. Wilson *v.* Short, 6 Hare 366, 12 Jur. 301, 17 L. J. Ch. 289, 31 Eng. Ch. 366.

88. Nott *v.* Papet, 15 La. 306; Wynne *v.* Price, 3 De G. & Sm. 310, 3 Jur. 295, 5 R. & Can. Cas. 465; Gurney *v.* Womersley, 4 E. & B. 133, 1 Jur. N. S. 328, 24 L. J. Q. B. 46, 82 E. C. L. 133; Wilson *v.* Short, 6 Hare 366, 12 Jur. 301, 17 L. J. Ch. 289, 31 Eng. Ch. 366. See, however, Buck *v.* Doyle, 4 Gill (Md.) 478, 45 Am. Dec. 176.

89. Bailey *v.* Galbreath, 100 Tenn. 599, 47 S. W. 84 (holding that note brokers are not

(c) *Where Broker Contracts For Undisclosed Principal.* A broker who enters into a contract without disclosing his principal assumes the principal's obligations thereunder, as against the other contracting party, and the latter may accordingly hold him responsible on the contract,[90] unless, on learning the princi-

personally liable for loss on a forged note sold by them, where they disclosed their principal); Gadd *v.* Houghton, 1 Ex. D. 357, 46 L. J. Exch. 71, 35 L. T. Rep. N. S. 222, 24 Wkly. Rep. 975 (holding that the broker of a seller is not liable for the latter's breach of contract in failing to deliver the goods); Cass *v.* Rudele, 2 Vern. Ch. 280, 23 Eng. Reprint 781; Dixon *v.* Parker, 2 Ves. 219, 28 Eng. Reprint 142. See, however, Brown *v.* Black, L. R. 8 Ch. 939, 42 L. J. Ch. 814, 29 L. T. Rep. N. S. 362, 21 Wkly. Rep. 892.

Liability of buyer's broker for price.— A broker who effects a purchase in behalf of a principal is not liable for the price. Simmons *v.* More, 100 N. Y. 140, 2 N. E. 640; Southwell *v.* Bowditch, 1 C. P. D. 374, 45 L. J. C. P. 630, 35 L. T. Rep. N. S. 196, 24 Wkly. Rep. 838, so holding in the absence of a usage to the contrary.

Liability of seller's broker to return deposit on price.— If a purchaser makes a deposit on the price with the vendor's broker, and the money is remitted to the vendor, the broker is not liable to the purchaser in an action to recover the deposit on the vendor's refusal to convey (Bogart *v.* Crosby, 80 Cal. 195, 22 Pac. 84. See also Fowler *v.* Quall, 36 Kan. 507, 13 Pac. 784, holding that a real-estate agent who received a part payment of purchase-money on a sale, conditioned that the offer be accepted by the owner on the terms and conditions specified or the money be returned, is not liable, in an action by the purchaser for the money, if the offer was accepted by the owner and the money paid to him, and if at the time of acceptance the owner and purchaser by agreement varied the terms and conditions on which the agent sold), unless by stipulation with the purchaser he makes himself personally liable for a return of the deposit in case the sale falls through (Mead *v.* Altgeld, 136 Ill. 298, 26 N. E. 388 [*affirming* 33 Ill. App. 373]). The rule is otherwise if, on the vendor's refusal to convey, he delivers the money to the broker for the purchaser. Phelps *v.* Brown, 95 Cal. 572, 30 Pac. 774. See, however, Bogart *v.* Crosby, *supra*.

Sufficiency of disclosure of principal see *infra*, II, G, 4, b, (I), (C).

90. Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602. And see cases cited *infra*, this note, and notes 92, 93.

Liability for price.— A broker who purchases property without disclosing the name of his principal becomes personally liable for the price. Knapp *v.* Simon, 86 N. Y. 311 [*reversing* 46 N. Y. Super. Ct. 225], 96 N. Y. 284, 6 N. Y. Civ. Proc. 1 [*reversing* 49 N. Y. Super. Ct. 17]; Darlington Iron Co. *v.* Foote, 16 Fed. 646.

Liability for breach of contract.— If a broker sells property for an undisclosed principal he is liable for the seller's refusal to deliver the goods (McKown *v.* Gettys, 80 S. W. 169, 25 Ky. L. Rep. 2070; Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440) or for the seller's breach of warranty (Nott *v.* Papet, 15 La. 306; Waring *v.* Mason, 18 Wend. (N. Y.) 425).

Liability to refund price.— If a broker, without disclosing a principal, sells securities which turn out to be void, he is liable to the buyer for the amount of the price which the latter has paid. Pugh *v.* Moore, 44 La. Ann. 209, 10 So. 710; Sêré *v.* Faurès, 15 La. Ann. 189; Merriam *v.* Wolcott, 3 Allen (Mass.) 258, 80 Am. Dec. 69, holding that where a broker sells a forged note without disclosing the name of his principal, the fact that he paid over the money to his principal before it was demanded by the purchaser does not relieve the broker from liability if there was no unreasonable delay in notifying him after the discovery of the forgery.

Liability to indemnify seller of stock against calls.— A broker who buys stock for an undisclosed principal is liable to the seller for assessments on the stock which were collected of him because of the buyer's failure to register the transfer on the corporation's books. Lichten *v.* Verner, 8 Pa. Dist. 218; Boulthee *v.* Gzowski, 29 Can. Supreme Ct. 54. See also *supra*, II, G, 1, b, (III).

Sufficiency of disclosure of principal.— To relieve a note broker from liability on an implied warranty of the genuineness of a note sold by him, which afterward proved to be forged, the transaction must have been such that the purchaser understood, or ought as a man of reasonable intelligence to have understood, that he was dealing with the principal. Worthington *v.* Cowles, 112 Mass. 30. The mere fact that a broker employed to sell a note stated that a certain person (his undisclosed principal) said that he would sell goods for the paper does not amount to a disclosure of his principal. Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602. So the words "rediscounts, First National Bank, Fairmont, Neb.," in a letter by a broker offering commercial paper for sale, do not notify any one purchasing the same that the broker is acting as the agent of the bank. Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516. The fact that a broker in making a purchase stated to the seller that the commodity purchased was for the "Blissville Distillery" does not show a sufficient disclosure of his principal to relieve the broker from liability, it appearing that the distillery named was not a corporation, that the seller did not know its proprietors, and that the broker directed that the charge be made to him. Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51 [*affirming* 42 N. Y. Super. Ct. 91]. How-

pal's name, he elects to proceed against him in preference to the broker.[91] If the broker contracts in his own name, it is not sufficient to relieve him of liability as principal that the other party knows that he is a broker;[92] nor is it sufficient to relieve him of liability that he discloses the fact that he is acting in behalf of another, where he does not in addition disclose the principal's name.[93]

(11) *Rights Independent of Contract or Collateral Thereto* — (A) *In General.* If a purchaser makes an overpayment of the price to the seller's broker he may recover the excess of the broker.[94] So long as the purchase stands, however, a purchaser who has paid the vendor's broker a commission as part consideration cannot recover it back because of a mutual mistake as to the dimensions of the property.[95] If the vendor's broker has agreed to divide the commissions with the purchaser, the latter is entitled to his share as against the broker.[96]

ever, a sold note reciting, "We have this day sold to you on account of James Morand & Co., Valencia," etc., shows an intention to make the foreign principals, and not the brokers, liable. Gadd *v.* Houghton, 1 Ex. D. 357, 46 L. J. Exch. 71, 35 L. T. Rep. N. S. 222, 24 Wkly. Rep. 975.

Necessity of written disclosure.— In the rice trade a custom exists that where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as principal. Bacmeister *v.* Fenton, 1 Cab. & E. 121.

91. Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51, holding, however, that the commencement of an action against the principal after a disclosure of him by the broker is not conclusive of an election to hold the principal alone liable.

Double satisfactions from undisclosed principal and broker see *supra,* note 29.

92. *Connecticut.*— Elwell *v.* Mersick, 50 Conn. 272.

Maine.— See also Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602.

Missouri.— Thompson *v.* McCullough, 31 Mo. 224, 77 Am. Dec. 644. And see Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516.

New York.— Waring *v.* Mason, 18 Wend. 425.

England.—Magee *v.* Atkinson, 6 L. J. Exch. 115, 2 M. & W. 440; Royal Exch. Assur. Co. *v.* Moore, 8 L. T. Rep. N. S. 242, 11 Wkly. Rep. 592.

See 8 Cent. Dig. tit. "Brokers," § 141.

Knowledge of brokership as relieving broker from liability on sale of forged securities see *infra,* note 93.

93. Cobb *v.* Knapp, 71 N. Y. 348, 27 Am. Rep. 51 [*affirming* 42 N. Y. Super. Ct. 91]; Hutcheson *v.* Eaton, 13 Q. B. D. 861, 51 L. T. Rep. N. S. 846.

It is the custom in many lines of trade that a broker contracting for another without disclosing his principal is personally liable, although the fact of his agency is disclosed. Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97; Imperial Bank *v.* London, etc., Docks Co., 5 Ch. D. 195, 46 L. J. Ch. 335, 36 L. T. Rep. N. S. 233; Marten *v.* Gibbon, 33 L. T. Rep. N. S. 561, 24 Wkly. Rep. 87. Such a custom is not in contravention of a contract evidenced by a sold note reciting that the goods are sold "for and on account of owner." Pike *v.* Ongley, 18 Q. B. D. 708, 56 L. J. Q. B. 373, 35 Wkly. Rep. 534. It is inconsistent, however, with a clause in a contract of sale which provides that if any dispute shall arise under the contract, it "shall be settled by the selling brokers, whose decision in writing shall be final and binding on both buyers and sellers," since if the custom were incorporated it would make the brokers judges of their own cause. Barrow *v.* Dyster, 13 Q. B. D. 635, 51 L. T. Rep. N. S. 573, 33 Wkly. Rep. 199.

Liability on sale of forged securities.— A broker who sells forged securities in behalf of an undisclosed principal is liable to the buyer even though he gives notice that he is acting for another. Morrison *v.* Currie, 4 Duer (N. Y.) 79; Soutter *v.* Stoeckle, 6 Cinc. L. Bul. 182, 6 Ohio Dec. (Reprint) 1054, 10 Am. L. Rec. 23. See Hamlin *v.* Abell, 120 Mo. 188, 25 S. W. 516. *Contra,* Buddecke *v.* Harris, 20 La. Ann. 563; Fisher *v.* Rieman, 12 Md. 497 (in both of which last two cases the buyer knew that the broker was such, but the broker did not inform the buyer that he was acting for another); Souther *v.* Stoeckle, 7 Ohio Dec. (Reprint) 511, 3 Cinc. L. Bul. 575.

94. Newall *v.* Tomlinson, L. R. 6 C. P. 405, 25 L. T. Rep. N. S. 382, holding that the fact that the broker gave credit to his undisclosed principal for the sum which he had received, the principal being largely in his debt, did not bring the case within the rule by which an agent is relieved from responsibility where he has paid over moneys received by him on account of his principal.

95. Emerson *v.* Coddington, 55 N. Y. Super. Ct. 336, 14 N. Y. St. 721.

96. Forst *v.* Farmer, 21 Misc. (N. Y.) 64, 46 N. Y. Suppl. 903, holding that neither a purchaser's failure to give notice to the vendors when the contract was made, that by agreement with the broker he was entitled to half the commissions, nor his payment of the deposit on the contract of purchase without attempting to deduct his share of the commissions, is a circumstance rendering improbable his testimony, contradicted by the broker, that the broker agreed to make such division with him.

(B) *Breach of Warranty of Authority.* A broker who assumes to negotiate a contract in behalf of a principal is liable to the other contracting party for damages resulting from a breach of the warranty of authority.[97]

(C) *Fraud.* If, in negotiating a contract in behalf of a principal, the broker is guilty of fraud as to the other contracting party, he is liable to him therefor in damages.[98]

97. McKown *v.* Gettys, 80 S. W. 169, 25 Ky. L. Rep. 2070; Simmons *v.* More, 100 N. Y. 140, 2 N. E. 640; *In re* National Palace Co., 24 Ch. D. 367, 53 L. J. Ch. 57, 50 L. T. Rep. N. S. 38, 32 Wkly. Rep. 236; Hughes *v.* Graeme, 33 L. J. Q. B. 335, 12 Wkly. Rep. 857. See, however, Bogart *v.* Crosby, 80 Cal. 195, 22 Pac. 84 (holding that the broker is not thus liable because his authorization is verbal while the statute requires it to be in writing); Hopkins *v.* Everly, 150 Pa. St. 117, 24 Atl. 624 (holding that if the vendor makes the purchaser an allowance for his failure to perform a stipulation included in the contract of sale without authority, the purchaser cannot recover of the broker); McReavy *v.* Eshelman, 4 Wash. 757, 31 Pac. 35 (holding that a broker who represents that he has "authority to sell" certain land is not liable to a customer for the consequences of their mutual mistake of law in thinking that such authority carries with it the right to make a contract of sale); Warr *v.* Jones, 24 Wkly. Rep. 695 (holding that where a person assumes without authority to act as agent for the sale of real estate, and the contract is merely verbal, the person injured by relying on his representations has no remedy in equity against him for damages on the ground of part performance).

Measure of damages.— A real-estate agent who agrees to sell realty of his principal merely undertakes to bind the interest of his principal in such realty without warranty of title, and where he acts without authority in writing from his principal, who refuses to execute the contract made by him, the measure of damages in an action by the purchaser against the agent is the excess of the market value of the principal's title, whether good or bad, over the contract price. Gestring *v.* Fisher, 46 Mo. App. 603. A principal authorized his broker to apply for shares in one company, but by mistake he applied for shares in another company, which refused to cancel the allotment and a few months afterward was ordered to be wound up. The principal having succeeded in removing his name from the list of contributories because he had never authorized his agent to apply for the shares, and the liquidator having sued the broker for a breach of his warranty of authority, it was held that the measure of damages was the full nominal value of the shares. *In re* National Coffee Palace Co., 24 Ch. D. 367, 53 L. J. Ch. 57, 50 L. T. Rep. N. S. 38, 22 Wkly. Rep. 236.

98. Kice *v.* Porter, 53 S. W. 285, 21 Ky. L. Rep. 871, 61 S. W. 266, 22 Ky. L. Rep. 1704 (holding that where a purchaser was induced to pay more than the owner asked for the property by the fraudulent representation of his broker that he would not accept less than the price paid, the purchaser is entitled, in an action for deceit, to recover of the broker the excess, which he pocketed); Todd *v.* Rourke, 27 La. Ann. 385 (holding that while a mere broker, whose office is limited to bringing buyer and seller into communication, leaving them to negotiate a sale as they please, is not responsible for a fraud practised by one of them on the other, yet a mandatory, or one who assumes to conduct and urge the negotiation, may be liable to the buyer for a deceit practised on him in the sale); Hardacre *v.* Stewart, 5 Esp. 103 (holding that if a broker has notice that what he is about to sell is not his principal's, and he yet continues to sell, he is personally liable to the buyer for the amount of the price paid to the broker). See, however, Baker *v.* Brown, 82 Cal. 64, 22 Pac. 879; Kice *v.* Porter, 53 S. W. 285, 21 Ky. L. Rep. 871 (holding that the failure of a broker to inform a purchaser that he had bought the property from one for whom the purchaser supposed he was acting as agent in making the sale does not render him liable in an action of deceit); People's Bank *v.* Bogart, 16 Hun (N. Y.) 270 [*affirmed* in 81 N. Y. 101, 37 Am. Rep. 481]; Tibbs *v.* Zirkle, (W. Va. 1904) 46 S. E. 701 (holding that an agent under power to sell is not bound by an unauthorized option given by a co-agent, and hence if he purchases the land for himself he cannot be held as trustee for the claimant under the option).

Fraud as to encumbrances.— If a broker employed to sell property which is subject to encumbrances misrepresents or conceals the fact that the property is encumbered, he is liable to the purchaser in damages. Riley *v.* Bell, 120 Iowa 618, 95 N. W. 170; Chisolm *v.* Gadsden, 1 Strobh. (S. C.) 220, 47 Am. Dec. 550; Arnot *v.* Biscoe, 1 Ves. 95, 27 Eng. Reprint 914.

Statement of source of information.— A real-estate broker is not liable to a customer for false representations respecting lands, where he states that his information is derived from his principal, and the facts respecting which the representations are made are not such as would be peculiarly within his knowledge. Griffing *v.* Diller, 21 N. Y. Suppl. 407.

Ratification of sale by purchaser.— Where a purchaser of stocks ratifies the sale, he cannot recover from the seller's broker profits made by him, although part of such profits were made by tampering with the purchaser's broker. Illingsworth *v.* De Mott, 59 N. J. Eq. 8, 45 Atl. 272.

5. Actions Between Principal or Broker and Third Persons.[99] Questions concerning the form of action, whether at law or in equity,[1] the parties,[2] pleading,[3] variance,[4] burden of proof and presumptions,[5] the admissibility of evidence,[6]

Measure of damages.— Where plaintiff purchased property from defendant, a broker, for seven thousand dollars, upon his representation that the owner would not sell it for less than that price, when the fact was that the owner had consented to sell it for six thousand five hundred dollars and the broker's commission, plaintiff can recover in an action of deceit only five hundred dollars, less a reasonable commission to defendant. Kice *v.* Porter, 53 S. W. 285, 21 Ky. L. Rep. 871, 61 S. W. 266, 22 Ky. L. Rep. 1704. In an action against an agent for fraudulent representations as to the location of real estate sold by him to plaintiff, after a disaffirmance of the contract, the measure of damages is the actual loss sustained, and not the difference between the actual value of the property conveyed and the price. Roberts *v.* Holliday, 10 S. D. 576, 74 N. W. 1034.

99. Right of set-off or counter-claim see Recoupment, Set-Off, and Counter-Claim.

1. Winston *v.* Tufts, 10 La. Ann. 23 (holding that where a person sells through a broker a note drawn and indorsed by a person whom he knows to be insolvent, but whom he causes the broker to represent to be solvent, the buyer's remedy is in an action to avoid the contract of sale); Joseph *v.* Holroyd, 22 Wkly. Rep. 614 (holding that a statute providing that "the Court of Chancery shall adjust the rights of contributories amongst themselves, and distribute any surplus that may remain among the parties thereto" does not prevent a transferrer of shares from suing a transferee in a court of law, on a contract of indemnity, for calls made upon him by the liquidator during winding up). See, generally, Actions, 1 Cyc. 634 *et seq.*

2. Harrison *v.* Pryse, Barn. 324, holding that where a principal causes stock belonging to another person to be transferred into his own name and then into the name of a broker for sale, and the stock is accordingly sold, the broker is not a necessary party to a bill by the buyer against the principal and the corporation for satisfaction. See, generally, Parties.

3. Anderson *v.* Creston Land Co., 96 Va. 257, 31 S. E. 82 (holding that a land contract entered into by the purchaser's agent cannot be avoided by the purchaser, in a suit to enforce the purchase-money notes, because the agent also represented the vendor, where that fact was not presented in the pleadings); Drakeford *v.* Piercy, 7 B. & S. 515, 14 L. T. Rep. N. S. 403 (holding, in an action for goods sold through a broker, that a plea of payment to the broker without knowledge that he was acting in behalf of a principal is bad, in the absence of an allegation that the broker had possession of the goods or that he had real or apparent authority to sell in his own name). See, generally, Pleading.

4. Erringer *v.* Miller, 3 Phila. (Pa.) 344, holding that, in an action for breach of a note broker's warranty that all the names on a note sold by him were genuine, proof that the indorsers' names are forged while the makers' names are genuine, enables plaintiff to recover in case, although the declaration alleges that both the makers' and indorsers' signatures are forgeries. See, generally, Pleading.

5. Redlon *v.* Churchill, 73 Me. 146, 40 Am. Rep. 345 (holding that where a member of a firm made his individual note payable to his own order, and indorsed thereon his own name and that of his firm, and appropriated the proceeds thereof to his own use, the fact that the note was purchased from a broker furnishes no presumption that the broker was the agent of the maker); Baxter *v.* Duren, 29 Me. 434, 50 Am. Dec. 602 (holding that any one dealing with a person whom he knows to be a broker may be presumed to know, from the nature of a broker's business, that he is acting as agent for some third person); Western R. Co. *v.* Roberts, 4 Phila. (Pa.) 110 (holding that a broker vested with a mere authority to sell, without possession and authority to deliver, will not be presumed to be also authorized to receive the purchase-money); Edwards *v.* Davidson, (Tex. Civ. App. 1904) 79 S. W. 48 (holding that a vendee suing a landowner to recover money paid his agent on an unauthorized contract of sale made by the latter has the burden of proving ratification by the landowner). See, generally, Evidence, 16 Cyc. 926 *et seq.*, 1050 *et seq.*

6. Wilkinson *v.* Churchill, 114 Mass. 184 (holding that, on a bill for specific performance of a contract to convey in which the defense is that the broker who made the sale did so without authority of defendant, evidence that the land in one year doubled in value is inadmissible); Coddington *v.* Goddard, 16 Gray (Mass.) 436 (holding that in an action to enforce a contract for the sale of copper, made through a broker, who innocently misled the seller as to the arrival of news of an advance in the price of copper in Europe, evidence is not admissible to show that sellers in general anticipated news from Europe, by the next steamer, of an advance); Bassett *v.* Lederer, 3 Thomps. & C. (N. Y.) 671 (holding that in an action for the price of goods sold through a broker, where defendant claims to have purchased the goods of the broker as principal and to have paid him for them, evidence that the broker's character for fair dealing is good is inadmissible); Waring *v.* Mason, 18 Wend. (N. Y.) 425 (holding that parol evidence of a sale by sample is admissible in an action for breach of warranty, although the broker who

instructions,[7] and questions for the jury,[8] when they arise in actions between a principal or his broker and third persons, are governed by the rules applicable in civil actions in general.

FACTORY. See MANUFACTURERS.

FACTORY PRICES. The prices at which goods may be bought at factories, as distinguished from the prices of those bought in the market, after they have passed into the hands of third parties or shopkeepers.[1] (See COST PRICE.)

FACTUM. A FACT, *q. v.*; fact, as distinguished from law.[2] In old English law, a deed; [a thing done in writing;] a conveyance or other written instrument, under seal, formerly otherwise termed *charta*, and by the civilians *literarum obligatio*.[3] In testamentary law, the execution or due execution of a will.[4]

FACTUM A JUDICE QUOD AD EJUS OFFICIUM NON SPECTAT, NON RATUM EST. A maxim meaning "An act of a judge which does not pertain to his office is of no force."[5]

FACTUM CUIQUE SUUM, NON ADVERSARIO, NOCERE DEBET. A maxim meaning "A man's actions should injure himself, not his adversary."[6]

FACTUM INFECTUM FIERI NEQUIT. A maxim meaning "What is done cannot be undone."[7]

FACTUM NEGANTIS NULLA PROBATIO. A maxim meaning "No proof is incumbent on him who denies a fact."[8]

FACTUM NON DICITUR QUOD NON PERSEVERAT. A maxim meaning "That is not said to be done which does not last."[9]

effected the sale made an entry thereof in his books without mentioning that it was a sale by sample, the entry not having been signed by the broker, and a bought and sold note not having been delivered by him to either of the parties); Jesson *v.* Texas Land, etc., Co., 3 Tex. Civ. App. 25, 21 S. W. 624 (holding that, on an issue whether a loan broker was the agent of defendant in negotiating a loan for him or the agent of plaintiff company, which made the loan, correspondence between the broker and plaintiff's manager relative to defendant's loan and a requested extension thereof, and concerning other loans made by plaintiff through the broker, is admissible in evidence). See, generally, EVIDENCE, 16 Cyc. 821 *et seq.*

The declarations of a broker who negotiates a contract for a principal are not ordinarily admissible against the other contracting party. Burlingame *v.* Foster, 128 Mass. 125. Nor may a broker's authority be enlarged by his own declarations so as to bind his principal. Stollenwerck *v.* Thacher, 115 Mass. 224.

Evidence of custom is admissible to explain the meaning of a contract. McKown *v.* Gettys, 80 S. W. 169, 25 Ky. L. Rep. 2070; Fleet *v.* Murton, L. R. 7 Q. B. 126, 41 L. Q. B. 49, 26 L. T. Rep. N. S. 181, 20 Wkly. Rep. 97 (holding also that evidence of an analogous usage in the colonial trade is properly admitted to prove the usage of the domestic trade); Field *v.* Lelean, 6 H. & N. 617, 7 Jur. N. S. 918, 30 L. J. Exch. 168, 4 L. T. Rep. N. S. 121, 9 Wkly. Rep. 387.

7. Soltau *v.* Loewenthal, 1 N. Y. Suppl. 168 [*affirmed* in 119 N. Y. 380, 23 N. E. 864, 16 Am. S. Rep. 843]. See, generally, TRIAL.

8. Jessom *v.* Texas Land, etc., Co., 3 Tex. Civ. App. 25, 21 S. W. 624 (holding that the question whether a loan broker was the agent of the borrower or of the lender is one for the jury); Catterall *v.* Hindle, L. R. 2 C. P. 368 [*reversing* 1 H. & R. 267, 12 Jur. N. S. 488, 35 L. J. C. P. 161, 14 L. T. Rep. N. S. 102, 14 Wkly. Rep. 371] (holding that it is a question for the jury whether payment to a broker in advance is a good payment as against the principal, depending on the custom of the trade). See, generally, TRIAL.

1. Whipple *v.* Levett, 29 Fed. Cas. No. 17,518, 2 Mason 89, 90.

"Wholesale factory prices" import the actual wholesale market prices at the factory. Avery *v.* Stewart, 2 Conn. 69, 82, 7 Am. Dec. 240.

2. Burrill L. Dict. [*citing* Bracton fol. 1*b*].

3. Burrill L. Dict. [*citing* 2 Blackstone Comm. 295; Coke Litt. 85*b*, 171*b*]. See also Moore *v.* Jones, 2 Str. 814, 815.

4. Burrill L. Dict.

"The factum of an instrument means, not barely the signing of it, and the formal publication or delivery, but proof in the language of the *condidit*, 'that he well knew and understood the contents thereof,' 'and did give, will, dispose, and do in all things as in the said will is contained.'" Zacharias *v.* Collis, 3 Phillim. 176, 179. See also Weatherhead *v.* Baskerville, 11 How. (U. S.) 328, 358, 13 L. ed. 717.

5. Bouvier L. Dict. [*citing* Broom Leg. Max. 93 note]. See also Marshalsea's Case, 10 Coke 68*b*, 76*a*.

6. Bouvier L. Dict. [*citing* Dig. 50, 17, 155].

7. Bouvier L. Dict. [*citing* 1 Kames Eq. 96, 259].

8. Bouvier L. Dict.

9. Bouvier L. Dict. [*citing* Sheppard Touchst. (Preston ed.) 391].

FACTUM UNIUS ALTERI NOCERI NON DEBET. A maxim meaning "The deed of one should not hurt another." [10]

FACULTAS PROBATIONUM NON EST ANGUSTANDA. A maxim meaning "The facility of proofs is not to be narrowed." [11]

FACULTIES. See COURT OF FACULTIES.

FACULTY. In American colleges, the body of instructors.[12] In ecclesiastical affairs, properly speaking, a license issued by the ordinary through his Consistorial Court, to effect certain alterations of a grave character in a parish church.[13] In Scotch law, a power founded on consent, as distinguished from a power founded on property.[14]

FAIL.[15] To leave unperformed; to omit; to neglect, as distinguished from refuse, which latter involves an act of the will, while the former may be an act of inevitable necessity;[16] although the word is sometimes used in the sense of refuse.[17] In commercial law, to become unable to pay one's notes or other obligations.[18] (See FAILURE; and, generally, BANKRUPTCY; INSOLVENCY.)

FAILS TO APPEAR. A term used as equivalent to DEFAULT,[19] *q. v.*

FAILURE.[20] When used in connection with any enterprise, in its ordinary and obvious sense, abandonment or defeat;[21] the result of action which predicates earnest effort, and not mere inaction and refusal to do.[22] Sometimes the term is used in the sense of nonperformance of a duty — that is, as the equivalent of

Applied in Goodall's Case, 5 Coke 95*a*, 96*a*.

10. Wharton L. Lex. [*citing* Coke Litt. 152].

11. Wharton L. Lex. [*citing* 4 Inst. 279].

12. Cyclopedic L. Dict.

"**Faculty of physic**" in a statute relative to a university see State University *v.* Williams, 9 Gill & J. (Md.) 365, 392, 31 Am. Dec. 72.

"**Faculty tax**" see State *v.* Gazlay, 5 Ohio 14, 22.

"**Any faculty, profession, occupation, trade, or employment**" see Charleston *v.* Lee, 1 Treadw. (S. C.) 57, 59.

13. Boyd *v.* Phillpotts, L. R. 4 A. & E. 297, 342.

14. Burrill L. Dict. [*citing* 2 Kames Eq. 265].

15. In connection with other words "fail" has often received judicial interpretation; for example as used in the following phrases: "Fail by any inevitable accident" in a mining lease (see Jervis *v.* Tomkinson, 1 H. & N. 195, 207, 26 L. J. Exch. 41, 4 Wkly. Rep. 683); "fail in the perpetration of an act" (see Com. *v.* McDonald, 5 Cush. (Mass.) 365, 366); "fails to land and take delivery thereof" (see Miedbrodt *v.* Fitzsimon, L. R. 6 P. C. 306, 316, 2 Aspin. 555, 44 L. J. P. & M. 25, 32 L. T. Rep. N. S. 579, 23 Wkly. Rep. 932); "fail to prosecute" (see Martin *v.* Fales, 18 Me. 23, 28, 36 Am. Dec. 693); "fail to sue" (see Shepard *v.* St. Louis, etc., R. Co., 3 Mo. App. 550, 553); "'fails' to establish a right which is litigated and determined after his death" (see Muenster *v.* Tremont Nat. Bank, 92 Tex. 422, 425, 49 S. W. 362).

"**Failed**" to obtain relief from assessment see Reg. *v.* Bedminster Union, 1 Q. B. D. 503, 506, 45 L. J. M. C. 117, 34 L. T. Rep. N. S. 795.

"**Failing circumstances**" see Millard's Appeal, 62 Conn. 184, 185, 25 Atl. 658; Bloodgood *v.* Beecker, 35 Conn. 469, 484; Utley *v.* Smith, 24 Conn. 290, 310, 63 Am. Dec. 163; Dodge *v.* Mastin, 17 Fed. 660, 663, 5 McCrary 404.

"**Failing conditions**" see State *v.* Burlingame, 146 Mo. 207, 214, 48 S. W. 72.

"**Failing him**" see *In re* Wilson, 8 T. L. R. 264, 265.

"**Failing the male issue**" see Murray *v.* Addenbrooke, 8 L. J. Ch. O. S. 79, 82, 4 Russ. 407, 28 Rev. Rep. 144, 4 Eng. Ch. 407, 38 Eng. Reprint 859.

"**Failing to ring up all the fares collected**" see Pittsburg, etc., Pass. R. Co. *v.* McCurdy, 114 Pa. St. 554, 557, 8 Atl. 230, 60 Am. Rep. 363.

16. Bouvier L. Dict.

17. Persons *v.* Hight, 4 Ga. 474, 497.

"**Failing to comply**" with a condition on which a devise depends may, in general, have the same operation in law as the words "refusing to comply." Taylor *v.* Mason, 9 Wheat. (U. S.) 325, 344, 6 L. ed. 101.

Fails or refuses to execute a deed of trust, implies delinquency, as well as non-action. Stallings *v.* Thomas, 55 Ark. 326, 328, 18 S. W. 184.

18. Mayer *v.* Hermann, 16 Fed. Cas. No. 9,344, 10 Blatchf. 256.

19. Covart *v.* Haskins, 39 Kan. 571, 574, 18 Pac. 522.

20. "**Failure of lineal descendants**" see Powell *v.* Brandon, 24 Miss. 343, 347.

21. White *v.* Pettijohn, 23 N. C. 52, 55.

"A failure to make the money on an execution, is a failure to execute process." Andrews *v.* Keep, 38 Ala. 315, 317.

"What is meant in a bond taken . . . by 'prosecution of the suit' — and by 'failure' therein — is beyond doubt. They mean, on the one hand, a successful prosecution unto final judgment — and on the other, a voluntary abandonment of the suit, or a final judgment against the plaintiff." White *v.* Pettijohn, 23 N. C. 52, 55.

22. O'Connor *v.* Tyrrell, 53 N. J. Eq. 15, 19, 30 Atl. 1061.

neglect.[23] As applied to a merchant or mercantile concern, an inability to pay his or their debts, from insolvency;[24] a suspension of payment or an enforced suspension of business.[25] Used in a statute relative to mechanics' liens, an unsuccessful attempt to name or designate the true owner, lessee, general assignee or person in possession of the premises against whose interest a lien is claimed.[26] (Failure: In General, see BANKRUPTCY; INSOLVENCY. Of Consideration, see CONTRACTS. Of Evidence, see PLEADING. Of Issue, see WILLS. Of Title, see VENDOR AND PURCHASER. Of Trusts, see TRUSTS. See also DELINQUENCY.)

FAIR.[27] As an adjective, in common usage, the word conveys some idea of justice or equity;[28] impartial;[29] free from suspicion of bias;[30] EQUITABLE,[31] *q. v.*; reasonable;[32] honest;[33] upright;[34] and as applied to the weather, as an adjective, free from clouds; not obscure.[35] As a noun,[36] a public mart or place of buying or selling; a greater species of market;[37] distinguished from an ordinary market

23. State *v.* Butler, 81 Minn. 103, 106, 83 N. W. 483 [*citing* State *v.* Scott County, 42 Minn. 284, 44 N. W. 64].

"Failure, neglect, or default" see Lewis *v.* Swansea, 4 T. L. R. 706, 707.

"Failure to qualify" see State *v.* Boyd, 31 Nebr. 682, 732, 48 N. W. 739, 51 N. W. 602.

24. Boyce *v.* Ewart, Rice (S. C.) 126, 140. *Compare* Terry *v.* Calnam, 13 S. C. 220, 226, where it is said: "Failure means a failure to meet its current obligations at maturity. Insolvency looks to the liability to pay; failure, to the fact of payment."

As defined by statute, the term may signify the situation of a debtor who finds himself in the impossibility of paying his debts. La. Civ. Code (1900), art. 3556, subs. 11 [*quoted* in State *v.* Lewis, 42 La. Ann. 847, 849, 8 So. 602; Seixas *v.* Citizens' Bank, 38 La. Ann. 424, 441; Kennedy *v.* New Orleans Sav. Inst., 36 La. Ann. 1, 8; Lea *v.* Bringier, 19 La. Ann. 197, 198].

25. "And the nature of the failure means the kind or distinguishing characteristic of the suspension, whether voluntary or enforced." American Credit Indemnity Co. *v.* Carrollton Furniture Mfg. Co., 95 Fed. 111, 115, 36 C. C. A. 671.

26. De Klyn *v.* Gould, 31 N. Y. Civ. Proc. 223, 224.

27. In connection with other words the word "fair" has often received judicial interpretation; as for example as used in the following phrases: "Fair aggregate value" (see Langan *v.* Francklyn, 20 N. Y. Suppl. 404, 412); "fair agreement" (see *In re* West, [1892] 2 Q. B. 102, 61 L. J. Q. B. 639, 642, 67 L. T. Rep. N. S. 57, 40 Wkly. Rep. 644); "fair compensation" (see 11 Cyc. 409 note 88); "fair and equitable" (see National Waterworks Co. *v.* Kansas City, 62 Fed. 853, 864, 10 C. C. A. 653, 27 L. R. A. 827); "fair and just" (see Matter of Roberts, 8 Daly (N. Y.) 95, 97); "fair and reasonable" (see *In re* Stuart, [1893] 2 Q. B. 201, 204, 62 L. J. Q. B. 623, 69 L. T. Rep. N. S. 334, 4 Reports 506, 41 Wkly. Rep. 614; White *v.* Feast, L. R. 7 Q. B. 353, 359, 41 L. J. M. C. 81, 84, 26 L. T. Rep. N. S. 611, 20 Wkly. Rep. 382); "fair average" (see Wright *v.* Morris, 15 Ark. 444, 449; Jones *v.* Clarke, 2 H. & N. 725, 727, 27 L. J. Exch. 165); "fair clear annual rent" (see Rex *v.* Lacy, 5 B. & C. 702, 708, 8 D. & R. 457, 5 L. J. M. C. O. S. 6, 11 E. C. L. 645); "fair compensation" (see Ratliff *v.* Davis, 38 Miss. 107, 111, 112); "fair market value" (see Walker *v.* People, 192 Ill. 106, 110, 61 N. E. 489 [*citing* Peoria Gaslight, etc., Co. *v.* Peoria Terminal R. Co., 146 Ill. 372, 34 N. E. 550, 21 L. R. A. 373]); "fair or ordinary knowledge and skill" (see Jones *v.* Angell, 95 Ind. 376, 382); "fair preponderance of evidence" (see New Haven City Bank's Appeal, 54 Conn. 269, 274, 7 Atl. 548; Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295; State *v.* Grear, 29 Minn. 221, 225, 13 N. W. 140; Hynes *v.* Metropolitan St. R. Co., 31 Misc. (N. Y.) 825, 64 N. Y. Suppl. 382; Button *v.* Metcalf, 80 Wis. 193, 194, 49 N. W. 809; Lantry *v.* Lorrie, (Tex. Civ. App. 1900) 58 S. W. 837, 838); "fair report of the trial" (see Milissich *v.* Lloyds, 13 Cox C. C. 575, 46 L. J. Q. B. 404, 407, 36 L. T. Rep. N. S. 423, 25 Wkly. Rep. 353); "fair use" (see Simms *v.* Stanton, 75 Fed. 6, 10; 9 Cyc. 939); "fair value" (see Huntington *v.* Attrill, 118 N. Y. 365, 381, 23 N. E. 544); "legal and fair" (see Wood *v.* Strother, 76 Cal. 545, 546, 18 Pac. 766, 9 Am. St. Rep. 249).

28. Wood *v.* Strother, 76 Cal. 545, 546, 18 Pac. 766, 9 Am. St. Rep. 249.

29. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295; Hirshfield *v.* Davis, 43 Tex. 155, 161.

30. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295.

31. Webster Dict [*quoted* in Hirshfield *v.* Davis, 43 Tex. 155, 161].

32. Jones *v.* Angell, 95 Ind. 376, 382; Hirshfield *v.* Davis, 43 Tex. 155, 161 [*quoting* Webster Dict.].

33. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295; Hirshfield *v.* Davis, 43 Tex. 155, 161.

34. Bryan *v.* Chicago, etc., R. Co., 63 Iowa 464, 466, 19 N. W. 295.

35. De St. Aubin *v.* Field, 27 Colo. 414, 422, 62 Pac. 199.

36. Derivation.—"'Fair' is from *feriæ*, which means holidays." Collins *v.* Cooper, 17 Cox C. C. 647, 651, 57 J. P. 248, 68 L. T. Rep. N. S. 450, 5 Reports 256.

37. Collins *v.* Cooper, 17 Cox C. C. 647, 650, 57 J. P. 248, 68 L. T. Rep. N. S. 450, 5 Reports 256.

"Every fair is a market, but every market is not a fair." Collins *v.* Cooper, 17 Cox C. C.

in former times[38] and even at the present time as existing or recurring at intervals of time.[39] (Fair: In General, see Theaters and Shows. Agricultural,[40] see Agriculture.)

FAIR ABRIDGMENT. See Copyright.

FAIR CASH VALUATION. Such a price as honest and impartial men would naturally and reasonably place upon any given piece of property, in view of its useful capabilities and the end to be accomplished by its sale and purchase.[41]

FAIR CASH VALUE. As applied to property, the highest price that a normal person, not under peculiar compulsion, will pay at a given time to get it.[42]

FAIR COMMENT. See Libel and Slander.

FAIR CRITICISM. See Libel and Slander.

FAIRLY.[43] Equitably,[44] *q. v.*; honestly.[45] (See Fair.)

647, 650, 57 J. P. 248, 68 L. T. Rep. N. S. 450, 5 Reports 256.

38. 1 Blackstone Comm. 274.

39. Collins *v.* Cooper, 17 Cox C. C. 647, 650, 57 J. P. 248, 68 L. T. Rep. N. S. 450, 5 Reports 256 [*quoting* Viner Abr.].

Place of amusement.— Although the chief idea in the word is that of buying and selling, it includes the idea of a place of amusements naturally sought by a large concourse of people attendant at a fair. Collins *v.* Cooper, 17 Cox C. C. 647, 654, 57 J. P. 248, 68 L. T. Rep. N. S. 450, 5 Reports 256, where Bruce, J., said: "In modern times the commercial importance of fairs has greatly diminished, and the amusements which accompany the holding of fairs often excite much more attention than the buying and selling. But it seems to me that this circumstance does not alter the meaning of the word fair . . . I cannot find any authority for the use of the word fair as applied to a wake, or a show, or an exhibition. A cattle fair still means a fair where cattle are sold, a fancy fair where fancy articles are sold. There are many occasions where shows and exhibitions are gathered together — for instance, at horse-race meetings, at boat races, at great football matches, and other outdoor meetings: yet I think such gatherings cannot properly be spoken of as fairs. It is said that there are such things as pleasure fairs. I am not sure that there is any such phrase in common use. But if there is it can, I think, only mean a fair at which toys, trinkets, and such like articles are sold. The fair mentioned in the old song to which the young man went to buy blue ribbon for his sweetheart may have been a pleasure fair, but it was a fair at which blue ribbon was sold, and I suppose other like commodities."

Exhibition of industrial products.— At the present time the term is very generally used to designate an exposition where the industrial products of a people are exhibited as a display of the success, workmanship, and art of the exhibitors, and to obtain such premiums as may be paid by the owners of the fair as a reward of excellence. State *v.* Long, 48 Ohio St. 509, 510, 28 N. E. 1038.

40. "Agricultural fair" defined see 2 Cyc. 72 note 59.

41. Jones *v.* Whitworth, 94 Tenn. 602, 606, 30 S. W. 736.

42. National Bank of Commerce *v.* New Bedford, 175 Mass. 257, 56 N. E. 288 [*citing* Bradley *v.* Hooker, 175 Mass. 142, 55 N. E. 848]. See also Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 337, 18 N. E. 804, 9 Am. St. Rep. 598.

43. "Fairly" is the adverb of "fair." Warnock *v.* Thomas, 48 Ala. 463, 465 [*citing* Webster Dict.; Worcester Dict.].

Distinguished from "truly."— "The word 'truly' has been substituted in the oath for 'fairly.' The words are not synonymous. They have widely different shades of meaning, and convey entirely distinct ideas. Every day's experience teaches us that language may be truly, yet most unfairly repeated. The answer of the witness may be truly written down, yet it may convey a meaning quite different from that which the witness intended to convey, and did convey to the person that heard him speak. On the other hand, language may be fairly reported, yet not in accordance with strict truth." Lawrence *v.* Finch, 17 N. J. Eq. 234, 239 [*citing* Den *v.* Thompson, 16 N. J. L. 72].

In connection with other words the word "fairly" has often received judicial interpretation; as for example as used in the following phrases: "Fairly and equitably" (see Hutton *v.* West Orange, 39 N. J. L. 453, 455); "fairly and impartially" (see Den *v.* Thompson, 16 N. J. L. 72, 74); "fairly compensate him" (see Knoxville *v.* Chicago, etc., R. Co., 83 Iowa 636, 644, 50 N. W. 61, 32 Am. St. Rep. 321); "'fairly' divided" (see Warnock *v.* Thomas, 48 Ala. 463, 465); "fairly estimated" (see Hardy *v.* Fothergill, 13 App. Cas. 351, 362, 53 J. P. 36, 58 L. J. Q. B. 44, 59 L. T. Rep. N. S. 273, 37 Wkly. Rep. 177; *In re* Mercantile Mut. Mar. Ins. Assoc., 25 Ch. D. 415, 418, 53 L. J. Ch. 593, 50 L. T. Rep. N. S. 150, 32 Wkly. Rep. 360); "fairly made" (see James *v.* Nease, (Tex. Civ. App. 1902) 69 S. W. 110, 111; Hirshfield *v.* Davis, 43 Tex. 155, 161); "fairly represented" (see Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 430, 14 N. E. 525); "fairly workable" (see Jones *v.* Shears, 7 C. & P. 346, 32 E. C. L. 649); and "ought fairly to be excused for the breach of trust" (see Perrins *v.* Bellamy, [1898] 2 Ch. 521, 527, 67 L. J. Ch. 649, 79 L. T. Rep. N. S. 109, 46 Wkly. Rep. 682).

44. Warnock *v.* Thomas, 48 Ala. 463, 465 [*citing* Webster Dict.; Worcester Dict.].

45. Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 430, 14 N. E. 525.

FAIRLY WROUGHT. In mining, a term applied to coal which can be fairly and properly gotten, according to mining usage, without extraordinary difficulty or expense.[46] (See, generally, MINES AND MINERALS.)

FAIR SALE. As the term is used in speaking of a mortgage sale, "a sale conducted with fairness as respects the rights and interests of the parties affected by it."[47] (See, generally, MORTGAGES; SALES.)

FAIR TRIAL. A trial which is such in contemplation of law, viz., that which the law secures to the party.[48] Before an impartial jury, one where the jurors are entirely indifferent between the parties.[49] (See, generally, TRIAL.)

FAIR VALUATION. As applied to property, the present market value.[50]

FAIRWAY. In navigation, water on which vessels of commerce habitually move;[51] a clear passageway by water.[52] (See, generally, COLLISION.)

FAITH.[53] Confidence; CREDIT, *q. v.*; reliance;[54] BELIEF, *q. v.*; credence; trust;[55] purpose; intent; sincerity; state of knowledge or design.[56] In Scotch law, a solemn pledge; an oath.[57] (Faith: And Credit[58] Given to Foreign Judgment, see JUDGMENTS.)

FAITHFUL. Observant of compacts, treaties, contracts, vows, or other engagements; true to one's word.[59] (See FAITHFULLY.)

FAITHFULLY. As respects temporal affairs, diligently, without unnecessary delay.[60] (See FAITHFUL.)

46. Griffiths *v.* Rigby, 1 H. & N. 237, 241, 25 L. J. Exch. 284.

47. Lalor *v.* McCarthy, 24 Minn. 417, 419.

48. St. Paul, etc., R. Co. *v.* Gardner, 19 Minn. 132, 18 Am. Rep. 334.

49. Omaha, etc., R. Co. *v.* Cook, 37 Nebr. 435, 445, 55 N. W. 943 [*citing* Curry *v.* State, 4 Nebr. 545].

50. Martin *v.* Bigelow, 36 Misc. (N. Y.) 298, 301, 73 N. Y. Suppl. 443; Duncan *v.* Landis, 106 Fed. 839, 858, 45 C. C. A. 666. See also Cumberland *v.* Bowes, 15 C. B. 348, 355, 3 C. L. R. 149, 1 Jur. N. S. 236, 24 L. J. C. P. 46, 3 Wkly. Rep. 138, 80 E. C. L. 348.

51. The Oliver, 22 Fed. 848, 849.

52. The Blue Bell, [1895] P. 242, 246, 7 Aspin. 601, 64 L. J. Adm. 71, 72 L. T. Rep. N. S. 540, 11 Reports 790.

53. "Good faith" see Mobile L. Ins. Co. *v.* Randall, 71 Ala. 220, 221; Gentry *v.* Cowan, 66 Ga. 720, 722; McLaughlin *v.* Barnum, 31 Md. 425, 454; Farmington Bank *v.* Ellis, 30 Minn. 270, 272, 15 N. W. 243; Jewett *v.* Palmer, 7 Johns. Ch. (N. Y.) 65, 67, 11 Am. Dec. 401; Dorn *v.* Dunham, 24 Tex. 366, 378; Sartain *v.* Hamilton, 12 Tex. 219, 222, 62 Am. Dec. 524; Wells *v.* Smith, 2 Utah 39, 52; Canal Bank *v.* Hudson, 111 U. S. 66, 81, 4 S. Ct. 303, 28 L. ed. 354; Swift *v.* Smith, 102 U. S. 442, 445, 26 L. ed. 193; Collins *v.* Gilbert, 94 U. S. 753, 754, 24 L. ed. 170; Dresser *v.* Missouri, etc., R. Constr. Co., 93 U. S. 92, 95, 23 L. ed. 815; Hotchkiss *v.* National Shoe, etc., Bank, 21 Wall. (U. S.) 354, 359, 22 L. ed. 645; Fowler *v.* Brantly, 14 Pet. (U. S.) 318, 321, 10 L. ed. 473; Green *v.* Biddle, 8 Wheat. (U. S.) 1, 79, 5 L. ed. 547; Jenkins *v.* Eldredge, 13 Fed. Cas. No. 7,266, 3 Story 181, 288; Brooks *v.* Hamlyn, 63 J. P. 215, 79 L. T. Rep. N. S. 734, 736.

"On the true faith of a Christian" see Miller *v.* Salomons, 21 L. J. Exch. 161, 170.

54. Thus, an act may be said to be done "on the faith" of certain representations. Black L. Dict.

55. Thus, the constitution provides that "full faith and credit" shall be given to the judgments of each state in the courts of the other states. Black L. Dict.

56. This is the meaning of the word in the phrases "good faith" and "bad faith." Black L. Dict.

57. "To make faith" is to swear, with the right hand uplifted, and that one will declare the truth. Black L. Dict. [*citing* 1 Forbes Inst. pt. 4, 235].

58. "Faith and credit" see Com. *v.* Green, 17 Mass. 515, 545; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 622, 7 S. Ct. 398, 30 L. ed. 519; Embry *v.* Palmer, 107 U. S. 3, 9, 2 S. Ct. 25, 27 L. ed. 346; Pennoyer *v.* Neff, 95 U. S. 714, 729, 24 L. ed. 565; Thompson *v.* Whitman, 18 Wall. (U. S.) 457, 465, 21 L. ed. 897; Board of Public Works *v.* Columbia College, 17 Wall. (U. S.) 521, 529, 21 L. ed. 687; Caperton *v.* Ballard, 14 Wall. (U. S.) 238, 241, 20 L. ed. 885; Green *v.* Van Buskirk, 7 Wall. (U. S.) 139, 145, 19 L. ed. 109; Christmas *v.* Russell, 5 Wall. (U. S.) 290, 293, 18 L. ed. 475; McElmoyle *v.* Cohen, 13 Pet. (U. S.) 312, 325, 10 L. ed. 177; Wiggins Ferry Co. *v.* Chicago, etc., R. Co., 11 Fed. 381, 384, 3 McCrary 609 note.

59. Century Dict.

"Faithful performance" of duty or trust see Harris *v.* Hanson, 11 Me. 241, 245; Archer *v.* Noble, 3 Me. 418, 419; American Bank *v.* Adams, 12 Pick. (Mass.) 303, 306; Fellows *v.* Gilman, 4 Wend. (N. Y.) 414, 416.

60. Den *v.* Thompson, 16 N. J. L. 72, 73.

The words "well," "truly," "firmly," and "impartially" are comprised in their legal signification in the word "faithfully." Hoboken *v.* Evans, 31 N. J. L. 342, 343.

In connection with other words the term has often received judicial interpretation; for example as used in the following phrases: "Faithfully discharge" (see Governor *v.* Wiley, 14 Ala. 172, 180; Bigelow *v.* Bridge, 8 Mass. 275); "faithfully execute" (see Al-

FAKER or FAKIR. A street-vendor.[61]

FALCIDIAN PORTION. In the law of wills, that which was the fourth which the law formerly authorized the testamentary heir to retain from the succession in case more than three-fourths of it were absorbed by the legacies.[62]

FALL. As a noun, that which falls or has fallen; something in the state of falling or of having fallen;[63] descent from a higher to a lower level.[64] And when applied to the seasons of the year, the season when the leaves fall from the trees;[65] a period of the year which begins on the first of September.[66] As a verb, to descend from a higher to a lower place or position through loss or lack of support; to come down by tumbling or loss of balance;[67] to merge; to be transmitted; to be assigned.[68]

FALL FOUL.[69] To rush on with haste, rough force, and unreasonable violence; to run against.[70]

FALLING THROUGH. A term not susceptible of a precise definition, but broad enough to comprehend the failure of a contract of sale through the refusal of the buyers to pay the price.[71] (Sec, generally, SALES.)

FALSA DEMONSTRATIONE LEGATUM NON PERIMI. A maxim meaning "A legacy is not destroyed by an incorrect description."[72]

legany County *v.* Van Campen, 3 Wend. (N. Y.) 48, 52); "faithfully, fairly, and impartially" (see Perry *v.* Thompson, 16 N. J. L. 72, 73); "faithfully perform" (see American Bank *v.* Adams, 12 Pick. (Mass.) 303, 306; Elizabeth State Bank *v.* Chetwood, 7 N. J. L. 32, 33; U. S. Bank *v.* Magill, 2 Fed. Cas. No. 929, 1 Paine 661, 664); "faithfully serve" (see Blunt *v.* Melcher, 2 Mass. 228, 232); "faithfully to discharge" (see State *v.* Chadwick, 10 Oreg. 465, 468; *In re* Cambria St., 75 Pa. St. 357, 360); "truly, faithfully, firmly, and impartially, execute and perform the duties of his said office" (see Hoboken *v.* Evans, 31 N. J. L. 342, 343); and "well and faithfully perform his duties as first teller" (see Union Bank *v.* Clossey, 10 Johns. (N. Y.) 271, 273 [*cited* in Union Bank *v.* Clossey, 11 Johns. (N. Y.) 182, 183]).

61. Century Dict.

Mills Annot. St. (1891) § 1400, defines a fakir to be "any person who shall sell or attempt to sell any article, goods, wares or merchandise of any kind upon the street or streets of any city or town, by means of any false representations, trick, device or lottery, or by means of any game of chance, for the purpose, and with intent to procure or obtain a greater or better price for such article or goods, than their actual retail price or value upon the market."

62. La. Civ. Code (1900), art. 1616.

63. Century Dict.

"A fallen building" see Breuner *v.* Liverpool, etc., Ins. Co., 51 Cal. 101, 107, 21 Am. Rep. 703.

64. Century Dict.

To "improve the falls below its dam."—"The word 'falls' [in a company's charter] though plural in form, usually means only one locality, and when the designation is of falls below a dam, it usually means the falls immediately below. Dams are usually built upon or near falls." Davis *v.* Mattawamkeag Log Driving Co., 82 Me. 346, 350, 19 Atl. 828.

65. Webster Dict. [*quoted* in Aultman *v.* Clifford, 55 Minn. 159, 161, 56 N. W. 593, 43 Am. St. Rep. 478].

66. Abel *v.* Alexander, 45 Ind. 523, 528, 15 Am. Rep. 270; State *v.* Haddock, 9 N. C. 461, 462.

To be delivered "this fall" see Weltner *v.* Riggs, 3 W. Va. 445, 450.

67. Century Dict.

"If a building shall fall, except as the result of fire" see Fireman's Fund Ins. Co. *v.* Congregation Rodeph Sholom, 80 Ill. 558; Huck *v.* Globe Ins. Co., 127 Mass. 306, 309, 34 Am. Rep. 373.

68. English L. Dict.

"Fall into the residue" see *In re* Ballance, 42 Ch. D. 62, 65, 58 L. J. Ch. 534, 61 L. T. Rep. N. S. 158, 37 Wkly. Rep. 600; *In re* Rhoades, 29 Ch. D. 142, 143, 54 L. J. Ch. 573, 53 L. T. Rep. N. S. 15, 33 Wkly. Rep. 608; *In re* Barker, 15 Ch. D. 635, 636, 29 Wkly. Rep. 281; Crawshaw *v.* Crawshaw, 14 Ch. D. 817, 820, 49 L. J. Ch. 662, 43 L. T. Rep. N. S. 309, 29 Wkly. Rep. 68; Johnson *v.* Webster, 4 De G. M. & G. 474, 483, 3 Eq. Rep. 99, 1 Jur. N. S. 145, 24 L. J. Ch. 300, 3 Wkly. Rep. 84, 53 Eng. Ch. 371, 43 Eng. Reprint 592; Humble *v.* Shore, 7 Hare 247, 248, 1 Hem. & M. 550 note, 27 Eng. Ch. 247; Lightfoot *v.* Burstall, 1 Hem. & M. 546, 549, 10 Jur. N. S. 308, 33 L. J. Ch. 188, 3 New Rep. 112, 12 Wkly. Rep. 148; *In re* Savage, 50 L. J. Ch. 131, 133.

"The land falls to him upon the death of his mother" see McCullough *v.* Gilmore, 11 Pa. St. 370, 373.

69. "The phrase is not an uncommon one." Harper *v.* Delp, 3 Ind. 225, 231.

70. "As the ship fell foul of her consort." Webster Dict. [*quoted* in Harper *v.* Delp, 3 Ind. 225, 231].

"Dr. Johnson gives the following example — In his sallies, their men might fall foul of each other." Harper *v.* Delp, 3 Ind. 225, 231.

71. Hopkinson *v.* Leeds, 9 Phila. (Pa.) 5, 9.

72. Bouvier L. Dict. [*citing* Broom Leg. Max. 645].

FALSA DEMONSTRATIO NON NOCET.[73] A maxim meaning "A false description does not render a deed or other writing inoperative."[74]

Applied in Roman Catholic Orphan Asylum *v.* Emmons, 3 Bradf. Surr. (N. Y.) 144, 149.

73. "This rule of construction is said to be derived from the civil law." State Sav. Bank *v.* Stewart, 93 Va. 447, 452, 25 S. E. 543.

"The familiar" (Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045; McFatridge *v.* Griffin, 27 Nova Scotia 421, 431); "well-known" (Rogers *v.* Rogers, 78 Ga. 688, 691, 3 S. E. 451; Le Cain *v.* Hosterman, 8 Nova Scotia 413, 419, 429 [*citing* Broom Leg. Max. 490]); "maxim of law" (Howard *v.* American Peace Soc., 49 Me. 288, 293 [*citing* Thomas *v.* Thomas, 6 T. R. 671, 3 Rev. Rep. 40]).

"The well-settled rule."— State *v.* Orange, 32 N. J. L. 49, 53.

"Founded in common sense as well as law." — Watervliet Turnpike Co. *v.* McKean, 6 Hill (N. Y.) 616, 619.

"Every application of the maxim, implies that a mistake has occurred in the use of language." Criss *v.* English, 26 Md. 553, 569.

74. State Sav. Bank *v.* Stewart, 93 Va. 447, 452, 25 S. E. 543; Barton *v.* Babcock, 28 Wis. 192, 197 [*quoting* Broom Leg. Max. 490], where it is said: "'Falsa demonstratio,' says a learned writer, 'may be defined to be an erroneous description of a person or thing in a written instrument.'"

Applied or explained in the following cases:

Connecticut.— Cloughessey *v.* Waterbury, 51 Conn. 420, 421, 50 Am. Rep. 38; Fairfield *v.* Lawson, 50 Conn. 501, 509, 47 Am. Rep. 669; Durham *v.* Averill, 45 Conn. 61, 72, 29 Am. Rep. 642; Scofield *v.* Lockwood, 35 Conn. 425, 429; Dikeman *v.* Taylor, 24 Conn. 219, 229.

Georgia.— Rogers *v.* Rogers, 78 Ga. 688, 691, 3 S. E. 451; Wood *v.* State, 48 Ga. 192, 297, 15 Am. Rep. 664.

Indiana.— Pate *v.* Bushong, 161 Ind. 533, 546, 69 N. E. 291, 100 Am. St. Rep. 287, 63 L. R. A. 593.

Iowa.— Hatcher *v.* Dunn, 102 Iowa 411, 415, 71 N. W. 343, 36 L. R. A. 689.

Kansas.— American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 553.

Maine.— Andrews *v.* Pearson, 68 Me. 19, 21; Milliken *v.* Bailey, 61 Me. 316, 322; Howard *v.* American Peace Soc., 49 Me. 288, 293; State *v.* Bartlett, 47 Me. 388, 392.

Maryland.— Criss *v.* English, 26 Md. 553, 569.

Massachusetts.— American Bible Soc. *v.* Pratt, 9 Allen 109, 113; Sargent *v.* Adams, 3 Gray 72, 78, 63 Am. Dec. 718; Minot *v.* Boston Asylum, etc., for Indigent Boys, 7 Metc. 416, 418.

Michigan.— Johnstone *v.* Scott, 11 Mich. 232, 240; Anderson *v.* Baughman, 7 Mich. 69, 74 Am. Dec. 699. See Cooper *v.* Bigly, 13 Mich. 463, 477.

Missouri.— Mitchner *v.* Holmes, 117 Mo. 185, 208, 22 S. W. 1070; Adler *v.* Kansas City, etc., R. Co., 92 Mo. 242, 249, 4 S. W. 917.

Nebraska.— Hubermann *v.* Evans, 46 Nebr. 784, 65 N. W. 1045.

New Hampshire.— Winkley *v.* Kaime, 32 N. H. 268, 275 [*citing* 1 Greenleaf Ev. § 301]; Hall *v.* Hall, 27 N. H. 275; Bellows *v.* Copp, 20 N. H. 492, 503; Booby *v.* Davis, 20 N. H. 140, 146, 51 Am. Dec. 210. See Somersworth Sav. Bank *v.* Roberts, 38 N. H. 22, 28.

New Jersey.— Dempsey *v.* Newark, 53 N. J. L. 4, 14, 20 Atl. 886, 10 L. R. A. 700; Evens *v.* Griscom, 42 N. J. L. 579, 582, 36 Am. Rep. 542; Parker *v.* Elizabeth, 39 N. J. L. 689, 692 [*citing* Curtis *v.* Brown County, 22 Wis. 167]; Newark *v.* State, 34 N. J. L. 523, 529; Freeman *v.* Headley, 33 N. J. L. 523, 541; Fuller *v.* Carr, 33 N. J. L. 157, 159; State *v.* Orange, 32 N. J. L. 49, 53; Kanouse *v.* Slockbower, 48 N. J. Eq. 42, 45, 21 Atl. 197; Conover *v.* Wardell, 22 N. J. Eq. 492, 503; Conover *v.* Wardell, 20 N. J. Eq. 266, 272; Lindsley *v.* Williams, 20 N. J. Eq. 93, 95 [*citing* Shrewsbury *v.* Boylston, 1 Pick. (Mass.) 105]. See Wills *v.* McKinney, 41 N. J. L. 120, 127.

New York.— Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 245, 14 Am. Rep. 249; Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 92, 51 N. Y. Suppl. 804; Brewster *v.* Balch, 41 N. Y. Super. Ct. 63, 69 [*citing* Burr *v.* Broadway Ins. Co., 16 N. Y. 267]; People *v.* Lord, 9 N. Y. App. Div. 458, 461, 41 N. Y. Suppl. 343 [*citing* Watervliet Turnpike Co. *v.* McKean, 6 Hill 616, 619]; Watervliet Turnpike Co. *v.* McKean, 6 Hill 616, 619. See Jackson *v.* Marsh, 6 Cow. 281, 284.

North Carolina.— Goff *v.* Pope, 83 N. C. 123, 126 [*citing* 1 Greenleaf Ev. § 301].

Ohio.— Poland *v.* Connolly, 16 Ohio St. 64, 66; Ashworth *v.* Carleton, 12 Ohio St. 381, 385. See Merrick *v.* Merrick, 37 Ohio St. 126, 41 Am. Rep. 493; Banning *v.* Banning, 12 Ohio St. 437, 452.

Oregon.— Moreland *v.* Brady, 8 Oreg. 303, 313, 34 Am. Rep. 581.

Virginia.— State Sav. Bank *v.* Stewart, 93 Va. 447, 452, 25 S. E. 543 [*citing* Hunter *v.* Hume, 88 Va. 24, 28, 13 S. E. 305; Preston *v.* Heiskell, 32 Gratt. 48, 59, 60; Wootton *v.* Redd, 12 Gratt. 196, 209; Broom Leg. Max. 629; 1 Greenleaf Ev. § 301; 2 Minor Inst. (4th ed.) 1063; 2 Taylor Ev. § 1218]; Roy *v.* Rowzie, 25 Gratt. 599, 605; Wootton *v.* Redd, 12 Gratt. 196, 209.

Wisconsin.— Jackson *v.* Rankins, 67 Wis. 285, 289, 30 N. W. 301; Jones *v.* Workman, 65 Wis. 269, 270, 27 N. W. 158; Sherwood *v.* Sherwood, 45 Wis. 357, 364, 30 Am. Rep. 757; Cork *v.* Bacon, 45 Wis. 192, 196, 30 Am. Rep. 712; Paine *v.* Benton, 32 Wis. 491, 496; Barton *v.* Babcock, 28 Wis. 192, 197; Hopkins *v.* Holt, 9 Wis. 228, 231.

United States.—Cleaveland *v.* Smith, 5 Fed. Cas. No. 2,874, 2 Story 279, 291.

England.— Doe *v.* Hubbard, 15 A. & E. 227, 244, 69 E. C. L. 227; Robinson *v.* Bristol, 11 C. B. 208, 231, 16 Jur. 889, 22 L. J. C. P. 21, 73 E. C. L. 208; Barton *v.* Dawes, 10 C. B. 261, 264, 19 L. J. C. P. 302, 70 E. C. L.

FALSA ORTHOGRAPHIA SIVE FALSA GRAMMATICA NON VITIAT CONCESSIONEM. A maxim meaning "False spelling or false grammar does not vitiate a grant."[75]

FALSE.[76] Erroneous, untrue;[77] the opposite of correct, or true;[78] and often the term, as used, does not necessarily involve turpitude of mind.[79] In the more important uses in jurisprudence,[80] and even in its popular application,[81] the word implies something more than a mere untruth; it is an untruth coupled with a lying intent,[82] or an intent to deceive or to perpetrate some treachery or fraud.[83] The true meaning of the term must, as in other instances, often be determined by the context.[84] (See FALSELY.)

261; Spooner *v.* Payne, 4 C. B. 328, 330, 16 L. J. C. P. 225, 56 E. C. L. 328; Hall *v.* Fisher, 1 Coll. 47, 53, 8 Jur. 119, 28 Eng. Ch. 47; Foster *v.* Mentor L. Assur. Co., 2 C. L. R. 1404, 3 E. & B. 48, 18 Jur. 827, 23 L. J. Q. B. 145, 150, 24 E. L. & E. 103, 77 E. C. L. 48; Hewer *v.* Cox, 3 E. & E. 428, 436, 107 E. C. L. 428; *In re* Whatman, 10 Jur. N. S. 1242, 34 L. J. P. & M. 17; Llewellyn *v.* Jersey, 12 L. J. Exch. 243, 246, 11 M. & W. 183; Doe *v.* Carpenter, 20 L. J. Q. B. 70, 71, 1 Eng. L. & Eq. 307; West *v.* Lawday, 11 H. L. Cas. 375, 385, 13 L. T. Rep. N. S. 171, 11 Eng. Reprint 1378; Slingsby *v.* Grainger, 7 H. L. Cas. 273, 282, 286, 5 Jur. N. S. 1111, 28 L. J. Ch. 616, 11 Eng. Reprint 109; Thomas *v.* Thomas, 6 T. R. 671, 676, 3 Rev. Rep. 40.

Canada.— Guardian Assur. Co. *v.* Connely, 20 Can. Supreme Ct. 208, 211; Bigaouette *v.* North Shore R. Co., 17 Can. Supreme Ct. 363, 371; Beaudet *v.* North Shore R. Co., 15 Can. Supreme Ct. 44, 53; Guardian Assur. Co. *v.* Connely, 12 Can. L. T. 152, 153; Smith *v.* Bonnisteel, 13 Grant Ch. (U. C.) 29, 33; Rowsell *v.* Hayden, 2 Grant Ch. (U. C.) 557, 563; McFatridge *v.* Griffin, 27 Nova Scotia 421, 431; Le Cain *v.* Hosterman, 8 Nova Scotia 413, 419, 429 [*citing* Broom Leg. Max. 490]; *Re* Sherlock, 28 Ont. 638, 639; McBean *v.* Kinnear, 23 Ont. 313, 317; Hickey *v.* Stover, 11 Ont. 106, 113; Brantford Electric, etc., Co. *v.* Brantford Starch Works, 3 Ont. L. Rep. 118, 119, 121; Nolan *v.* Fox, 15 U. C. C. P. 565, 574; Jamieson *v.* McCollum, 18 U. C. Q. B. 445, 448; Upper Canada Bank *v.* Boulton, 7 U. C. Q. B. 235, 242.

75. Bouvier L. Dict. [*citing* Sheppard Touchst. 55].

Applied in Shrewsbury's Case, 9 Coke 46*a*, 48*a*.

76. The word "false" is not the equivalent of the word "mistake." People *v.* Sprague, 53 Cal. 493, 494 [*cited* in People *v.* Righetti, 66 Cal. 184, 185, 4 Pac. 1063, 1185].

Distinguished from "untrue" in Anderson *v.* Fitzgerald, 4 H. L. Cas. 484, 506, 17 Jur. 995, 10 Eng. Reprint 551 [*cited* in Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 22].

"The adjectives 'false' and 'fraudulent' may express different qualities of the noun 'proof.'" Miller *v.* Tobin, 18 Fed. 609, 614, 9 Sawy. 401.

77. Walker *v.* Hawley, 56 Conn. 559, 567, 16 Atl. 674 (giving as an illustration: "As a false claim; a false conclusion; a false construction in grammar"); Gerardo *v.* Brush, 120 Mich. 405, 409, 79 N. W. 646; Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571, 577.

"To say of a man that he reasons from false premises, or draws false conclusions from correct premises, is not libelous. In such cases the word 'false' means no more than that the premises were not true, or that the conclusion was erroneous." Walker *v.* Hawley, 56 Conn. 559, 566, 16 Atl. 674.

78. Ratterman *v.* Ingalls, 48 Ohio St. 468, 484, 28 N. E. 168.

79. Gerardo *v.* Brush, 120 Mich. 405, 409, 79 N. W. 646.

80. Ratterman *v.* Ingalls, 48 Ohio St. 468, 484, 28 N. E. 168.

81. Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 24.

82. Wood *v.* State, 48 Ga. 192, 297, 15 Am. Rep. 664.

A mere pretense set up in bad faith and without color of fact see Farnsworth *v.* Halstead, 18 N. Y. Civ. Proc. 227, 228 [*citing* Hadden *v.* New York Silk Mfg. Co., 1 Daly (N. Y.) 388]; Kiefer *v.* Thomass, 6 Abh. Pr. N. S. (N. Y.) 42.

When used with reference to the testimony of a witness, it ordinarily means something more than that the testimony is untrue, and implies that it is intentionally untrue, but the word is also sometimes used in the sense of mistakenly or erroneously. State *v.* Henderson, 72 Minn. 74, 75, 74 N. W. 1014.

"Knowing it to be false" see Huntington *v.* Attrill, 118 N. Y. 365, 376, 23 N. E. 544; Torbett *v.* Eaton, 49 Hun (N. Y.) 209, 213, 1 N. Y. Suppl. 614.

"Knowingly false" see State *v.* Brown, 110 La. 591, 594, 34 So. 698.

"Untrue or fraudulent" see Clapp *v.* Massachusetts Ben. Assoc., 146 Mass. 519, 530, 16 N. E. 433.

83. State *v.* Smith, 63 Vt. 201, 211, 22 Atl. 604; Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 22 [*citing* Bouvier L. Dict.; Tomlin L. Dict], where it is said: "We do not speak of 'untrue pretences,' when we wish to designate an offence of that character; but we say 'false pretences.' So we say 'false measures,' 'false weights,' 'false swearing,' not 'untrue swearing,' as indicating perjury, or a designed misstatement." See also Hatcher *v.* Dunn, 102 Iowa 411, 416, 71 N. W. 343, 36 L. R. A. 689.

84. Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571, 577; Ratterman *v.* Ingalls, 48 Ohio St. 468, 485, 28 N. E. 168 (where the court said: "The section includes as well those who 'shall evade making a return' as those who

FALSE ACCOUNT. In the more common and ordinary meaning, an account which is morally false,—known to be untrue.[85] (See, generally, ACCOUNTS AND ACCOUNTING.)

FALSE BANK-NOTE. A forged paper in the similitude of a bank-note, or which on its face appears to be such a note.[86] (See, generally, BANKS AND BANKING; COUNTERFEITING; FORGERY.)

FALSE COIN. See COUNTERFEITING.

FALSE DIAMONDS. False stones which purport to be diamonds, or false similitude of diamonds.[87]

FALSE DOCUMENT. A document purporting to be made by a person who did not make the same, or a document purporting to be made by some person who did not in fact exist.[88]

FALSE ENTRY.[89] An entry which is either totally fictitious, or fictitious to some extent;[90] an untrue or incorrect entry,[91] in contradistinction to "correct."[92]

FALSEHOOD. In its common meaning a wilful act or declaration contrary to truth.[93] (See FALSE.)

'make a false return,' and the maxim *noscitur a sociis* is invoked. True, it is urged that the word 'evade' here is synonymous with 'omit,' and hence gives color to the opposite construction. This, we think, is wholly inadmissible, for the word, comparing the definitions of lexicographers, scarcely admits of any meaning, when applied to the act of a person, which does not involve a perverse or sinister element"); Anderson *v.* Fitzgerald, 4 H. L. Cas. 484, 512, 17 Jur. 995, 10 Eng. Reprint 551 [*quoted* in Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 26], where it is said: "When I use the word 'false' in a sense connected with fraud, what do I mean? I mean not only that which is untrue, but I mean that which is malicious, wilful, which is criminal, which is false in an odious sense, and to the man's knowledge. And therefore the construction which, after a great deal of consideration, I should put upon this part of the clause certainly is, that it refers to a wilful fraud, a wilful misstatement."

In connection with other words this word has often received judicial interpretation; as for example as used in the following phrases: "False affidavit" (see U. S. *v.* Ingraham, 49 Fed. 155, 156); "false alarm by the fire-alarm telegraph" (see Koppersmith *v.* State, 51 Ala. 6, 7); "false, forged, or counterfeited notes or bonds" (see U. S. *v.* Howell, 11 Wall. (U. S.) 432, 436, 20 L. ed. 19); "false instrument" (see State *v.* Willson, 28 Minn. 50, 53, 9 N. W. 28); "false invoice or fraudulent practice" (see U. S. *v.* Cargo of Sugar, 25 Fed. Cas. No. 14,722, 3 Sawy. 46); "false or bogus checks" (see Pierce *v.* People, 81 Ill. 98, 101); "false or unjust" weights (see Lane *v.* Rendall, [1899] 2 Q. B. 673, 676); "false packed" (see Miller *v.* Moore, 83 Ga. 684, 692, 10 S. E. 360, 6 L. R. A. 374, 20 Am. St. Rep. 329); "false representation of a material fact" (see Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571, 577); "false swearing" (see Franklin Ins. Co. *v.* Culver, 6 Ind. 137, 139; Marion *v.* Great Republic Ins. Co., 35 Mo. 148, 151; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, 292; Ratterman *v.* Ingalls, 48 Ohio St. 468, 484, 28 N. E. 168; Hamilton County Ins. Co. *v.* Cappellar, 38 Ohio St. 560, 574; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350, 359; Derry *v.* Peek, 14 App. Cas. 337, 54 J. P. 148, 58 L. J. Ch. 864, 61 L. T. Rep. N. S. 265, 1 Meg. 292, 38 Wkly. Rep. 33; Anderson *v.* Fitzgerald, 4 H. L. Cas. 483, 511, 17 Jur. 995, 10 Eng. Reprint 551; Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 22); and "false token or writing" (see People *v.* Gates, 13 Wend. (N. Y.) 311, 321).

85. Putnam *v.* Osgood, 51 N. H. 192, 207 [*citing* Bouvier L. Dict.].

86. U. S. *v.* Howell, 11 Wall. (U. S.) 432, 436, 20 L. ed. 195 [*quoted* in U. S. *v.* Owens, 37 Fed. 112, 115].

87. U. S. *v.* Howell, 11 Wall. (U. S.) 432, 436, 20 L. ed. 195.

88. Canada Cr. Code, § 421 [*quoted* in *Re* Murphy, 2 Can. Cr. Cas. 578, 579].

89. Liability of purser of vessel for making false entries see 3 Cyc. 847 note 23.

90. Newport Slipway Dry Dock, etc., Co. *v.* Paynter, 34 Ch. D. 88, 91, 56 L. J. Ch. 1021, 55 L. T. Rep. N. S. 711.

91. U. S. *v.* Graves, 53 Fed. 634, 644.

92. U. S. *v.* Potter, 56 Fed. 83, 94. See also Cochran *v.* U. S., 157 U. S. 286, 295, 15 S. Ct. 628, 39 L. ed. 704; Dorsey *v.* U. S., 101 Fed. 746, 748, 41 C. C. A. 652; U. S. *v.* Peters, 87 Fed. 984, 985; Dow *v.* U. S., 82 Fed. 904, 909, 27 C. C. A. 140; U. S. *v.* Allis, 73 Fed. 165, 170; U. S. *v.* Allen, 47 Fed. 696, 697; U. S. *v.* Grecilius, 34 Fed. 30, 31; 5 Cyc. 582.

93. Putnam *v.* Osgood, 51 N. H. 192, 207 [*citing* Bouvier L. Dict.].

FALSE IMPRISONMENT

By Edwin Ames Jaggard

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CROSS-REFERENCES

For Matters Relating to:

Abduction, see ABDUCTION.

Action Against Court Martial For Unauthorized Acts, see ARMY AND NAVY.

Bonds Executed Under Duress of Unlawful Imprisonment, see BONDS.

Kidnapping, see KIDNAPPING.

Malicious Prosecutions, see MALICIOUS PROSECUTION.

I. DEFINITION.

False imprisonment is the unlawful and total restraint of the liberty of the person. The imprisonment is false in the sense of being unlawful.[1]

II. NATURE OF RIGHT INFRINGED.

A. Primary Character. The right violated by this tort is "freedom of locomotion."[2] It belongs historically to the class of rights known as simple or primary rights (inaccurately called absolute rights), as distinguished from secondary rights, or rights not to be harmed. It is a right *in rem*; it is available against the community at large. The theory of the law is that one interferes with the freedom of locomotion of another at his peril.[3]

B. Mental Attitude of Wrong-Doer. The right invaded by false imprisonment is of such a character that the liability of the wrong-doer does not depend primarily upon his mental attitude.[4] All of the authorities declare that neither

1. Bird *v.* Jones, 7 Q. B. 742, 752, 9 Jur. 870, 15 L. J. Q. B. 82, 53 E. C. L. 742, per Pattison, J.

Other definitions.— "The gist of false imprisonment is unlawful detention." McCarthy *v.* De Armit, 99 Pa. St. 63, 71, per Trunkey, J.

"A pure, naked, unlawful detention, unaffected by any question of motive or purpose." Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717, 718, per Pugh, J.

"A wrongful interference with the personal liberty of an individual . . . without any sufficient legal cause therefor." Garnier *v.* Squires, 62 Kan. 321, 324, 62 Pac. 1005; Comer *v.* Knowles, 17 Kan. 436.

"The unlawful restraint of a person contrary to his will, either with or without process of law." Thorp *v.* Carvalho, 14 Misc. (N. Y.) 554, 558, 36 N. Y. Suppl. 1, per Bookstaver, J. To the same effect see Miller *v.* Ashcraft, 98 Ky. 314, 318, 32 S. W. 1085, 17 Ky. L. Rep. 894; Limbeck *v.* Gerry, 15 Misc. (N. Y.) 663, 665, 39 N. Y. Suppl. 95; State *v.* Lunsford, 81 N. C. 528, 530.

"Any unlawful physical restraint by one of another's liberty, whether in prison or elsewhere." Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 595, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798 [*quoting* Bishop Non-Cont. § 206], per Holt, J.

"A trespass committed by one man against the person of another by unlawfully arresting him and detaining him without any legal authority." Davis *v.* Pacific Telephone, etc., Co., 127 Cal. 312, 320, 59 Pac. 698, 57 Pac. 764 (per Cooper, C.); Snead *v.* Bonnoil, 166 N. Y. 325, 328, 59 N. E. 899 (per Gray, J.).

"Imprisonment is any restraint of the personal liberty of another; any prevention of his movements from place to place, or his free action according to his own pleasure and will. . . . It is false imprisonment when this is done without lawful authority." Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571, 600, per Baldwin, C. J.

In Illinois Cr. Code, § 95, "false imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." See Brewster *v.* People, 183 Ill. 143, 146, 55 N. E. 640; Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786.

By Tex. Pen. Code, art. 508, false imprisonment is "the willful detention of another against his consent, and where it is not expressly authorized by law." See Giroux *v.* State, 40 Tex. 97, 102; Herring *v.* State, 3 Tex. App. 108, 111.

2. Hawk *v.* Ridgway, 33 Ill. 473. "Detention and restraint of liberty." Burns *v.* Erben, 1 Rob. (N. Y.) 555, 26 How. Pr. (N. Y.) 273. "Deprivation of plaintiff's liberty." Miller *v.* Ashcraft, 98 Ky. 314, 32 S. W. 1085, 17 Ky. L. Rep. 894. "Restraint of liberty." Bonesteel *v.* Bonesteel, 28 Wis. 245, 30 Wis. 511. See also Lansing *v.* Case, 4 N. Y. Leg. Obs. 221. "Restraint upon the person." Pike *v.* Hanson, 9 N. H. 491. "Preventing a person from going in any direction he sees proper." Harkins *v.* State, 6 Tex. App. 452. "To restrain the freedom of action." Warner *v.* Riddiford, 4 C. B. N. S. 180, 93 E. C. L. 180. See also Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344; Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005.

3. Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001. At common law trespass was the remedy not case. See *infra*, IX, A.

4. *Kansas.*— Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005.

Kentucky.— Glazar *v.* Hubbard, 102 Ky. 68, 42 S. W. 1114, 19 Ky. L. Rep. 1025, 80 Am. St. Rep. 340, 39 L. R. A. 210.

Massachusetts.— Mullen *v.* Brown, 138 Mass. 114, where the object was to enforce payment of a debt.

Missouri.— Boeger *v.* Langenberg, 95 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165; Monson *v.* Rause, 86 Mo. App. 97.

New Jersey.— Booth *v.* Kurrus, 55 N. J. L. 370, 26 Atl. 1013.

New York.— Fuller *v.* Redding, 16 Misc. 634, 39 N. Y. Suppl. 109. See also Tacy *v.* Starks, 67 N. Y. App. Div. 422, 73 N. Y. Suppl. 225.

malice[5] nor ordinarily[6] want of probable cause[7] is an essential element of the right of action.[8] If the imprisonment is lawful it does not become unlawful because done with malicious intent;[9] if the conduct be unlawful, neither good faith,[10] nor provocation,[11] nor ignorance of the law[12] is a defense to the person committing the wrong, in a civil as distinguished from a criminal proceeding.[13] The normal effect of malice or absence of malice is respectively to aggregate or mitigate the damages.[14]

Ohio.— Johnson *v.* McDaniel, 5 Ohio S. & C. Pl. Dec. 717.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64.

See 23 Cent. Dig. tit. "False Imprisonment," § 16.

5. *Illinois.*— Shanley *v.* Wells, 71 Ill. 78; Markey *v.* Griffin, 109 Ill. App. 212.

Kentucky.— Reynolds *v.* Price, 56 S. W. 502, 22 Ky. L. Rep. 5.

Louisiana.— Lange *v.* Illinois Cent. R. Co., 107 La. 687, 31 So. 1003, in the sense of ill-will.

Massachusetts.— Hackett *v.* King, 6 Allen 58.

New Hampshire.— Gibbs *v.* Randlett, 58 N. H. 407.

Tennessee.— McQueen *v.* Heck, 1 Coldw. 212.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 16, 28, 43, 58.

6. As to necessity of probable cause for arrest without a warrant see *infra*, VIII, C, 2, b; VIII, C, 4, a.

7. *Arkansas.*— Chrisman *v.* Carney, 33 Ark. 316; Akin *v.* Newell, 32 Ark. 605.

Illinois.— Markey *v.* Griffin, 109 Ill. App. 212; Hight *v.* Naylor, 86 Ill. App. 508; Little *v.* Munson, 54 Ill. App. 437.

Indiana.— Boaz *v.* Tate, 43 Ind. 60.

Louisiana.— Phillips *v.* Bonham, 16 La. Ann. 387.

Missouri.—Thompson *v.* Buchholz, 107 Mo. 121, 81 S. W. 490; Boeger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

Nebraska.— Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995; Painter *v.* Ives, 4 Nebr. 122.

New York.— Hewitt *v.* Newburger, 66 Hun 230, 20 N. Y. Suppl. 913 [*reversed* on another ground in 141 N. Y. 538, 36 N. E. 593]; Sleight *v.* Ogle, 4 E. D. Smith 445.

North Carolina.— Neal *v.* Joyner, 89 N. C. 287.

Pennsylvania.— Frederick *v.* Minehart, 34 Leg. Int. 305.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64.

See 23 Cent. Dig. tit. "False Imprisonment," § 2.

8. Siegel *v.* Connor, 70 Ill. App. 116; Monson *v.* Rouse, 86 Mo. App. 97. See also Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508.

9. *Kentucky.*— Bennett *v.* Lewis, 66 S. W. 523, 23 Ky. L. Rep. 2037.

Michigan.— Johnson *v.* Maxon, 23 Mich. 129.

Missouri.— Bierwith *v.* Pieronnet, 65 Mo. App. 431.

North Carolina.— Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923.

Ohio.— Taylor *v.* Alexander, 6 Ohio 144.

Tennessee.— McQueen *v.* Heck, 1 Coldw. 212.

England.— Allen *v.* Flood, [1898] A. C. 1, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258 (per Lord Watson); Bradford *v.* Pickles, [1895] A. C. 587, 60 J. P. 3, 64 L. J. Ch. 759, 73 L. T. Rep. N. S. 353, 11 Reports 286, 44 Wkly. Rep. 190.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 16, 28, 43, 58.

10. *Georgia.*— Thorpe *v.* Wray, 68 Ga. 359.

Kansas.— Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054.

Maine.— Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673.

Nebraska.— Painter *v.* Ives, 4 Nebr. 122.

Vermont.— Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115.

England.— Sinclair *v.* Broughton, 47 L. T. Rep. N. S. 170, *bona fide* mistake.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 16, 28, 43, 58.

11. Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127. As to mitigation of damages, however, see *infra*, XIII, C.

12. Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899.

13. As to criminal proceedings see *infra*, XVII.

14. Wells *v.* Johnston, 52 La. Ann. 713, 27 So. 185; Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899; Fellows *v.* Goodman, 49 Mo. 62. See also *infra*, XIII, C. This rule as to *mens rea* has been announced and enforced so often, directly and indirectly, as to be of almost universal acceptance. Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995. Where an arrest has been made without a warrant and is sought to be justified by reasonable suspicion of guilt of violation of law, evidence of malice and want of probable cause is entirely consistent with the rule. See *infra*, VIII, C, 4.

Reasonable and real belief by a person that he was acting according to law may be an element in an action against him for causing the arrest of a trespasser. Norwood *v.* Pitt, 5 H. & N. 801, 6 Jur. N. S. 614, 29 L. J. Exch. 127, under statute defining terms of apprehension. And see Grohmann *v.* Kirschman, 168 Pa. St. 189, 32 Atl. 32; Forbes *v.* Hagman, 75 Va. 168; Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262; Howard *v.* Clarke, 20 Q. B. D. 558, 52 J. P. 310, 58 L. T. Rep. N. S. 401; Parrington *v.* Moore, 2 Exch. 223, 17 L. J. M. C. 117. But there are authorities not to be reconciled with this view (Roth *v.*

III. DISTINGUISHED FROM MALICIOUS PROSECUTION.

The distinction between false imprisonment and malicious prosecution is fundamental. They are made up of different elements, enforced by different forms of action, are governed by different rules of pleading, evidence, and damages, and are subject to different defenses.[15]

Shupp, 94 Md. 55, 50 Atl. 430; Hackett *v.* King, 6 Allen (Mass.) 58; Kessler *v.* Hoffman, 9 Pa. Dist. 365; Garvin *v.* Blocker, 2 Brev. (S. C.) 157), and the cases first above cited are to be regarded as local aberrations (Beebe *v.* De Baun, 8 Ark. 510; Gourgues *v.* Howard, 27 La. Ann. 339) or as depending on their own peculiar circumstances (Gifford *v.* Wiggins, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; Loomis *v.* Bender, 41 Hun (N. Y.) 268; Comfort *v.* Fulton, 39 Barb. (N. Y.) 56; Lamar *v.* Dana, 14 Fed. Cas. No. 8,006; Neal *v.* Minifie, 17 Fed. Cas. No. 10,070, 2 Cranch C. C. 16, justice not liable for warrant unless maliciously issued; Moore *v.* Guardner, 16 M. & W. 595, proof of express malice essential in prolonging imprisonment. See also Fellows *v.* Goodman, 49 Mo. 62, "sham" proceedings), or governed by some peculiarity of practice in a particular jurisdiction or by statutory changes in the common law.

Confusion of kindred causes of action.—The actions of false imprisonment, malicious prosecution (Page *v.* Miller, 13 Ohio Cir. Ct. 663, 6 Ohio Cir. Dec. 676. And see, generally, MALICIOUS PROSECUTION), and malicious abuse of process (Hazard *v.* Harding, 63 How. Pr. (N. Y.) 326), and similar forms of action are so intimately related in legal nature and so frequently joined, and have been so identified by changes in legal practice, that the distinctions between them have not always been clearly or consistently observed (Wilson *v.* King, 39 N. Y. Super. Ct. 384).

15. Carl *v.* Ayers, 53 N. Y. 14; Brown *v.* Chadsey, 39 Barb. (N. Y.) 253; Hobbs *v.* Ray, 18 R. I. 84, 25 Atl. 694; Herzog *v.* Graham, 9 Lea (Tenn.) 152; Whitten *v.* Bennett, 86 Fed. 405, 30 C. C. A. 140; Castro *v.* De Uriarte, 12 Fed. 250. *Compare* Platt *v.* Niles, 1 Edm. Sel. Cas. (N. Y.) 230. And see, generally, MALICIOUS PROSECUTION.

Probable cause.—In false imprisonment the onus lies on defendant to plead and prove affirmatively the existence of reasonable cause as his justification, whereas in an action for malicious prosecution plaintiff must allege and prove affirmatively its non-existence. Hicks *v.* Faulkner, 8 Q. B. D. 167, 51 L. J. Q. B. 268, 30 Wkly. Rep. 545 [*affirmed* in 46 J. P. 420, 46 L. T. Rep. N. S. 127].

It takes less to constitute false imprisonment than malicious prosecution. McCaskey *v.* Garrett, 91 Mo. App. 354.

Malice.— A cause of action in false imprisonment does not primarily and apart from justification depend upon mental attitude (see *supra*, II, B); malice or want of probable cause is of the gist of malicious prosecution. Boaz *v.* Tate, 43 Ind. 60; Colter *v.* Lower, 35 Ind. 285, 9 Am. Rep. 735.

Justification by legal authority.—False imprisonment lies only for an interference with personal liberty without legal authority (Haskins *v.* Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376; McCaskey *v.* Garrett, 91 Mo. App. 354; Brown *v.* Crowl, 5 Wend. (N. Y.) 298); but if a valid or apparently valid power to arrest is enforced without probable cause and with malice the remedy is by malicious prosecution (Colter *v.* Lower, 35 Ind. 285, 9 Am. Rep. 735; Boaz *v.* Tate, 43 Ind. 60; Wiel *v.* Israel, 42 La. Ann. 955, 8 So. 826; Morrow *v.* Wheeler, etc., Mfg. Co., 165 Mass. 349, 43 N. E. 105; Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922, holding that if an infant be arrested on a warrant, valid on its face, his infancy does not make the writ an illegal process, but that his remedy is in malicious prosecution; Dunlevey *v.* Wolferman, 106 Mo. 46, 79 S. W. 1165; Broadway, etc., Stage Co. *v.* American Soc., etc., 15 Abb. Pr. N. S. (N. Y.) 51; Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215; Lisabelle *v.* Hubert, 23 R. I. 456, 50 Atl. 837; Hobbs *v.* Ray, 18 R. I. 84, 25 Atl. 694; Herzog *v.* Graham, 9 Lea (Tenn.) 152; Murphy *v.* Marton, 58 Wis. 276, 16 N. W. 603; Whitten *v.* Bennett, 86 Fed. 405, 30 C. C. A. 140 [*affirming* 77 Fed. 271]; Castro *v.* De Uriarte, 12 Fed. 250, malicious prosecution proper where a court has no jurisdiction). See, generally, MALICIOUS PROSECUTION.

Legal advice of an attorney (Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420; Burbanks *v.* Lepovsky, 134 Mich. 384, 96 N. W. 456; Josselyn *v.* McAllister, 22 Mich. 300; Ackroyd *v.* Ackroyd, 3 Daly (N. Y.) 38; Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411), especially if given only after arrest (Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603), or the advice of a police officer (Barth *v.* Heider, 6 D. C. 312), or of a magistrate (Frederick *v.* Minehart, 34 Leg. Int. (Pa.) 305) is not a good defense in false imprisonment, in jurisdictions governed by the common law, but otherwise in Louisiana as to legal advice (Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826; Block *v.* Meyers, 33 La. Ann. 776; Mortimer *v.* Thomas, 23 La. Ann. 165); although legal advice may serve to make out a plea of *non fecit* when there was no participation (Teal *v.* Fissel, 28 Fed. 351), but not when there was (Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411), and may operate to mitigate damages (Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420; Mortimer *v.* Thomas, 23 La. Ann. 165; Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411). But

IV. ELEMENTS OF THE TORT.

A. Unlawfulness. The mere fact of voluntary detention does not constitute false imprisonment; the person complained of must have done wrong in a legal sense.[16] Questions as to illegality of conduct are usually raised by way of defense.[17]

B. Detention or Restraint — 1. SUBSTANCE. The right of freedom of locomotion is violated when one is wrongfully detained against his will or is in any way deprived of, as distinguished from obstructed[18] or subjected to inconvenience,[19] in his right[20] to come or go or stay when and where he wishes. Some conduct imposing detention or restraint is essential;[21] but any conduct resulting therein is sufficient.[22] It is the unlawful interference with the wish or desire of plaintiff which the law seeks to compensate.[23] Free egress must therefore be impossible; the restraint must be total.[24]

2. MANNER — a. In General. The conduct violating plaintiff's right must be that of the person sought to be charged[25] or conduct chargeable to him[26] showing legal or actual intent[27] to interfere with, and resulting in, the violation of freedom of locomotion of the person seeking damages. The manner in which

in malicious prosecution legal advice may be a complete defense. Lange *v.* Illinois Cent. R. Co., 107 La. 687, 31 So. 1003. See, generally, MALICIOUS PROSECUTION.

16. Baker *v.* Barton, 1 Colo. App. 183, 28 Pac. 88; Gammage *v.* Mahaffey, 110 La. 1008, 35 So. 266. In an action for false imprisonment defendants are not liable unless the arrest was unlawful, however malicious their motives may have been. Bennett *v.* Lewis, 66 S. W. 523, 23 Ky. L. Rep. 2037; Crowell *v.* Gleason, 10 Me. 325; Warren *v.* Dennett, 13 Misc. (N. Y.) 329, 34 N. Y. Suppl. 462; Hindman *v.* Hutchinson, 30 Pittsb. Leg. J. (Pa.) 422; Murphy *v.* Martin, 58 Wis. 276, 16 N. W. 603. Liability may attach when the original arrest was unlawful (Ruffner *v.* Williams, 3 W. Va. 243) or where the original arrest was justified but subsequent conduct was wrongful (Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425), and generally whenever the detention was not authorized at all by law (Low *v.* Evans, 16 Ind. 486). See also *supra*, I.

Discharge on habeas corpus because of detention for an unreasonable length of time is not conclusive that the arrest was illegal. Friesenhan *v.* Maines, (Mich. 1904) 100 N. W. 172.

17. See *infra*, VIII.

18. See *infra*, IV, B, 2.

19. Rigney *v.* Monette, 47 La. Ann. 648, 17 So. 211. Refusal of officer to go with arrested person to seek bail is not sufficient. Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215.

20. False imprisonment may consist in preventing a person from going in any direction he sees proper, without detaining him in any particular spot. Harkins *v.* State, 6 Tex. App. 452; Johnson *r.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

Thus shadowing by a detective before an examination as to robbery so as to show that, if necessary, force would be used to detain, may constitute an unjustifiable deprivation of liberty. Fotheringham *v.* Adams Express Co., 36 Fed. 252, 1 L. R. A. 474.

The use of improper means to decoy into a given jurisdiction under certain circumstances may be sufficient. Wanzer *v.* Bright, 52 Ill. 35; Ahern *v.* Collins, 39 Mo. 145.

21. Arrest is not essential (Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005; Burk *v.* Howley, 18 Pa. Co. Ct. 303; Mayer *v.* Vaughan, 11 Quebec Q. B. 340), but arrest is sufficient notwithstanding immediate release (Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875).

Merely giving in charge to a peace officer, where the officer never takes the person of defendant into custody, is not an imprisonment which will support an action. Simpson *v.* Hill, 1 Esp. 431.

Misrepresentations or threats of a criminal prosecution and payment of money, whereby plaintiff was induced to go to another place and remain in concealment for a time, is not sufficient. Payson *v.* Macomber 3 Allen (Mass.) 69.

Voluntarily remaining in custody is insufficient. Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

22. Searls *v.* Viets, 2 Thomps. & C. (N. Y.) 224.

23. See *infra*, XIII.

24. If plaintiff is free to go where he wants to he cannot sustain an action of false imprisonment; if he is prevented from going where he may have a right to go, a mere partial obstruction to his will may be the basis of some other form of action, but not of the one here under consideration. Bird *v.* Jones, 7 Q. B. 742, 9 Jur. 870, 15 L. J. Q. B. 82, 53 E. C. L. 742. See also Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663 (liberty to go); Wright *v.* Wilson, 1 Ld. Raym. 739.

25. See *infra*, V, A, 2.

26. See *infra*, V, A, 1, 3, 4.

27. Thus where the contest is for possession of personal property and there is no

the wrong is done is not material; it may be accomplished by actual force,[28] by a submission to reasonably apprehended force,[29] or by submission to legal authority.[30] Other facts or circumstances affect only the extent and not the right of recovery.[31]

b. Actual Physical Force. Unlawful detention by actual physical force is unquestionably sufficient to make out a cause of action.[32] Unnecessary violence in an otherwise justifiable arrest may give rise to it.[33] Actual physical contact with the person of plaintiff is not, however, essential. Battery often accompanies arrest; but this is incidental only.[34] Force is essential only in the sense of imposing restraint.[35]

c. Apprehension of Force. The essence of personal coercion is the effect of the alleged wrongful conduct on the will of plaintiff.[36] There is no legal wrong unless the detention was involuntary.[37] False imprisonment may be committed by words alone, or by acts alone, or by both; it is not necessary that the individual be actually confined or assaulted or even that he should be touched.[38]

intent to detain the person, false imprisonment is not made out. McClure *v.* State, 26 Tex. App. 102, 9 S. W. 353. Where by an accident an injured person with a crushed foot was removed to a house and thence to a hospital, it was held that there was no actionable imprisonment. Ollet *v.* Pittsburg, etc., R. Co., 201 Pa. St. 361, 50 Atl. 1011. On the other hand actual detention without intent to arrest but to forcibly compel return of lost money is sufficient. Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005. Ordinarily, however, the intent or motive of the person causing the detention or restraint is immaterial. See *supra*, II, B.

28. See *infra*, IV, B, 2, b.

29. Greathouse *v.* Summerfield, 25 Ill. App. 296; Ahern *v.* Collins, 39 Mo. 145; Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571. See also *infra*, IV, B, 2, c.

30. See *infra*, IV, B, 2, d.

31. See *infra*, XIII.

32. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796 (where complainant was seized, thrown down, bound, and carried away by defendants); McNay *v.* Stratton, 9 Ill. App. 215 (freedom of locomotion prevented by means of a revolver actually used so as to wound plaintiff); Hildebrand *v.* McCrum, 101 Ind. 61 (by use of weapon); Miller *v.* Ashcraft, 98 Ky. 314, 32 S. W. 1085, 17 Ky. L. Rep. 894; Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772.

33. Furr *v.* Moss, 52 N. C. 525 (in court); Harvey *v.* Mayne, Ir. R. 6 C. L. 417 (violently laying on hands).

34. No violence is necessary. Hawk *v.* Ridgway, 33 Ill. 473; Murphy *v.* Countiss, 1 Harr. (Del.) 143.

35. Floyd *v.* State, 12 Ark. 43, 44 Am. Dec. 250.

36. Carrying a drunken and disorderly passenger in a baggage-car to his destination, he not objecting or demanding to be released, is not an imprisonment. Sullivan *v.* Old Colony R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513. But a refusal by defendant to allow plaintiff to leave his room and go upstairs in his own home is an imprisonment. Warner *v.* Riddiford, 4 C. B. N. S. 180, 93 E. C. L. 180. The wrong is not made out when it appears that plaintiff was unconscious of restraint in fact imposed. Herring *v.* Boyle, 1 C. M. & R. 377, 6 C. & P. 496, 3 L. J. Exch. 344, 4 Tyrw. 801, 25 E. C. L. 543.

37. Therefore one who when charged with a crime voluntarily goes to meet the charge is in no position to seek recovery. Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

Voluntary concealment induced by misrepresentations or threats of criminal prosecution does not make out a sufficient basis for false imprisonment. Payson *v.* Macomber, 3 Allen (Mass.) 69.

Request to reënter store.— Where a salesman acting on suspicion that a person had stolen from his employer's store touches such person lightly on the shoulder and requests her to reënter the store, which she does, no false imprisonment is shown. Hershey *v.* O'Neill, 36 Fed. 168.

One who submits to arrest and imprisonment rather than pay a small license-fee illegally exacted, but which he might have recovered back without serious injury or damage, has no cause of action. Cottam *v.* Oregon City, 98 Fed. 570.

38. *Kansas.*— Comer *v.* Knowles, 17 Kan. 436; Doyle *v.* Boyle, 19 Kan. 168.

Massachusetts.— And see Bennett *v.* Sweet, 171 Mass. 600, 51 N. E. 183.

Michigan.— Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000; Brushaber *v.* Stegeman, 22 Mich. 266.

Missouri.— Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165.

New Hampshire.— Pike *v.* Hanson, 9 N. H. 491.

Texas.— Wood *v.* State, 3 Tex. App. 204; Herring *v.* State, 3 Tex. App. 108.

Wisconsin.— Bonesteel *v.* Bonesteel, 28 Wis. 245, 30 Wis. 511, holding that arrest coupled with threats of imprisonment without actual imprisonment, compelling plaintiff to promise and procure friends to vouch for him that he would not abscond, is sufficient.

United States.— Johnson *v.* Tompkins, 13 Fed. Cas. No. 7,416, Baldw. 571.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 3, 4. See also *infra*, VIII, C, 2, a.

But there must be personal coercion of some sort exercised by defendant over plaintiff in order to subject the former to liability.[39]

d. Submission to Legal Authority. Submission to legal authority to arrest may make one a prisoner.[40] That the arrested person reasonably supposed apparent authority was compulsory authority does not constitute consent to an arrest.[41] Express or implied submission to arrest, however, is inconsistent with involuntary constraint.[42]

3. Place and Time. The wrong may be committed at any place.[43] The

Compare Genner *v.* Sparks, 6 Mod. 173, 1 Salk. 79, can be no arrest without touching of person.

39. A demonstration tending to an arrest which to all appearances can only be avoided by submission operates as effectually if submitted to as force. Brushaber *v.* Stegemann, 22 Mich. 266. One is not obliged to incur the risk of personal violence and insult by resisting until actual violence is used. There need be no formal declaration of arrest. Pike *v.* Hanson, 9 N. H. 491. It is sufficient, if there was reasonable ground to apprehend that compulsory measures would be used, if plaintiff did not yield. Ahern *v.* Collins, 39 Mo. 145. Reasonable fear of personal difficulty is sufficient. Smith *v.* State, 7 Humphr. (Tenn.) 43. But merely informing a person of the business of an officer without taking him into custody or depriving him of freedom is insufficient. Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899. A charge defining false imprisonment as unlawful restraint, etc., "by words and an array of force," was held to be misleading. Marshall *v.* Heller, 55 Wis. 392, 13 N. W. 236.

40. *Delaware.*— Lawson *v.* Buziness, 3 Harr. 416, submission to arrest to avoid violence is not consent thereto.

Maine.— Strout *v.* Gootch, 8 Me. 126.

New York.— Lansing *v.* Case, 4 N. Y. Leg. Obs. 221.

North Carolina.— Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426; Mead *v.* Young, 19 N. C. 521.

England.— Russen *v.* Lucas, 1 C. & P. 153, R. & M. 26, 12 E. C. L. 98.

See 23 Cent. Dig. tit. "False Imprisonment," § 4.

41. Goodell *v.* Tower, (Vt. 1904) 58 Atl. 790; Wood *v.* Lane, 6 C. & P. 774, 25 E. C. L. 683. But where a warrant is exhibited and the person named therein accompanies the officer to the magistrate, there is not necessarily on the one hand intention to apprehend nor on the other to submit; or upon the whole an arrest. The warrant may in such a case serve merely as a summons. Arrowsmith *v.* Le Mesurier, 2 B. & P. N. R. 211. *Compare* Berry *v.* Adamson, 6 B. & C. 528, 13 E. C. L. 242, 2 C. P. 503, 12 E. C. L. 700, 9 D. & R. 558, 5 L. J. K. B. O. S. 215.

Failure to resist such authority is not necessarily legal consent thereto. Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426; Mead *v.* Young, 19 N. C. 521. As where an officer of the law exhibits a warrant of arrest to a person who thereupon peaceably accompanies the officer. Grainger *v.* Hill, 4 Bing. N. Cas. 212, 7 L. J. C. P. 85, 5 Scott 561, 33 E. C. L. 675; Bristow *v.* Haywood, 4 Campb. 213, 1 Stark. 48, 2 E. C. L. 29; Whalley *v.* Pepper, 7 C. & P. 506, 32 E. C. L. 731; Peters *v.* Stanway, 6 C. & P. 737, 25 E. C. L. 664; Chinn *v.* Morris, 2 C. & P. 361, 12 E. C. L. 617; Bridget *v.* Coyney, 1 M. & R. 211, 6 L. J. M. C. O. S. 42, 31 Rev. Rep. 316, 17 E. C. L. 661. So also where the constable says, "You must go with me," and the person voluntarily goes. Pocock *v.* Moore, R. & M. 321, 21 E. C. L. 760. It is sufficient if the officer exercises a controlling authority and has the process in his hands to enforce it. Lansing *v.* Case, 4 N. Y. Leg. Obs. 221.

The officer's present purpose and ability to arrest justifies submission. Emery *v.* Chesley, 18 N. H. 188. See also Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000; Bissett *v.* Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

42. Haskins *v.* Young, 19 N. C. 527, 31 Am. Dec. 426; Mead *v.* Young, 19 N. C. 521. One who voluntarily remains with a constable to prevent publicity of an examination cannot complain of false imprisonment. Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089. See also Searls *v.* Viets, 2 Thomps. & C. (N. Y.) 224.

43. Hawk *v.* Ridgway, 33 Ill. 473; Smith *v.* State, 7 Humphr. (Tenn.) 43. Detention in a prison or jail (Weser *v.* Welty, 18 Ind. App. 664, 47 N. E. 639; Cobbett *v.* Gray, 4 Exch. 729, 19 L. J. Exch. 137) or in any other penal institution, as in an industrial school (Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81) or a workhouse (St. Louis *v.* Karr, 85 Mo. App. 608) is sufficient, even if the purpose be not for criminal arrest. The actionable restraint may also be committed on public streets (Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Hight *v.* Naylor, 86 Ill. App. 508; Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165), in any inclosure, as within railway gates until fare is paid (Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141), in a corn-crib (McNay *v.* Stratton, 9 Ill. App. 215), or in a field (People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796); in an insane asylum (Oakes *v.* Oakes, 55 N. Y. App. Div. 576, 67 N. Y. Suppl. 427; Hindman *v.* Hutchinson, 30 Pittsb. Leg. J. (Pa.) 422), a store (Rich *v.* McInerny, 103 Ala. 345, 15 So. 653, 49 Am. St. Rep. 32; Virchatka *v.* Rothschild, 100 Ill. App. 268), a shop (Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 4 L. J. Exch. 81, 5 Tyrw. 244, 25 E. C. L. 544; Cohen *v.* Huskisson, 6 L. J. M. C. 133, M. & H. 150, 2 M. & W. 477), or a private house (Hildebrand *v.* McCrum, 101 Ind. 61;

length of time of the constraint primarily affects the extent of recovery.[44] Whenever it appears that the person complaining was actually restrained without legal authority for an appreciable time, however short, a case of false imprisonment is made out.[45] Detention for a longer time than is authorized, although the arrest was originally lawful, may be the basis of the action.[46]

V. PERSONS RESPONSIBLE.

A. Persons Causing — 1. CONNECTION AS CAUSE. The person sought to be charged for false imprisonment can be held only when it is shown that he was the legal cause of a wrongful detention,[47] and only so far as his connection as cause can be traced.[48] An alleged wrong-doer may be a legal cause in at least

Sorenson *v.* Dundas, 50 Wis. 335, 7 N. W. 259, plaintiff's own house); in any kind of a room (Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475; Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396; Warner *v.* Riddiford, 4 C. B. N. S. 180, 93 E. C. L. 180, plaintiff's own room; Williams *v.* Jones, Cas. t. Hardw. 298), or in an attorney's office (Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831). As to a hospital see Ollet *v.* Pittsburg, etc., R. Co., 201 Pa. St. 361, 50 Atl. 1011.

Locking the door of a bank at a usual and known hour may be sufficient wrongful detention. Woodword *v.* Washburn, 3 Den. (N. Y.) 369.

To touch a person suspected of theft illegally on the shoulder and to request his return to a store, which request is complied with, does not constitute an arrest. Hershey *v.* O'Neill, 36 Fed. 168.

44. See *infra*, XIII, D.

45. A few minutes (Callahan *v.* Searles, 78 Hun (N. Y.) 238, 28 N. Y. Suppl. 904; Smith *v.* State, 7 Humphr. (Tenn.) 43), a few hours (Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328; Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475; Martin *v.* Golden, 180 Mass. 549, 62 N. E. 977; Burk *v.* Howley, 179 Pa. St. 359, 36 Atl. 327, 67 Am. St. Rep. 607), or a night (Miller *v.* Ashcraft, 98 Ky. 314, 32 S. W. 1085, 17 Ky. L. Rep. 894; Pastor *v.* Regan, 9 Misc. (N. Y.) 547, 30 N. Y. Suppl. 657, trespass *ab initio*) may be sufficient.

46. Torbert *v.* Lynch, 67 Ind. 474 (where defendant was illegally compelled to work out on the streets an imposed fine); St. Louis *v.* Karr, 85 Mo. App. 608. See also Smith *v.* Peabody, 106 Mass. 262, where, however, illegality of the continued detention of a pauper was not established by proper evidence.

Removal to another county.— Liability may attach by the taking of an arrested person into another county (Potter *v.* Swindle, 77 Ga. 419, 3 S. E. 94, where plaintiff was also handcuffed and incarcerated for days; Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772, where the question of identity could as well have been investigated in the original as another county to which plaintiff was removed, unless removal was justified by circumstances of excitement and danger; Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607) or was made at plaintiff's request (Ellis *v.* Cleveland, 54 Vt. 437, to jail in a different county).

Refusal to accept bail.— Liability for unlawfully prolonged detention may attach because of attendant circumstances, like refusal to accept any reasonable bail (Manning *v.* Mitchell, 73 Ga. 660; Gibbs *v.* Randlett, 58 N. H. 407, without reference to malice; Leger *v.* Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193), but not for refusal of officer to go with prisoner to find bail (Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215).

Substitution of valid for void process.— A person who wrongfully arrested another without process or on void process cannot without liability detain him on a subsequent valid process until after he has been set at liberty. Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99.

As to detention on alias execution see Barnes *v.* Viall, 6 Fed. 661.

Plaintiff's recovery is limited to the portion of time of restraint unauthorized by law. Bauer *v.* Clay, 8 Kan. 580.

Unlawful detention after custody to enforce costs and refusal to give order for discharge after payment of costs was held actionable only on proof of express malice. Moore *v.* Guardner, 16 M. & W. 595.

47. *Georgia.*— Gordon *v.* Hogan, 114 Ga. 354, 40 S. E. 229.

Illinois.— Roth *v.* Smith, 41 Ill. 314; Pinkerton *v.* Gilbert, 22 Ill. App. 568.

Louisiana.— Rogay *v.* Juilliard, 25 La. Ann. 305.

Michigan.— Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; Hill *v.* Taylor, 50 Mich. 549, 15 N. W. 899.

Missouri.— Bœger *v.* Langenberg, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322.

New York.— Thorne *v.* Turck, 94 N. Y. 90, 46 Am. Rep. 126 [*affirming* 10 Daly 327]; Farnam *v.* Feeley, 56 N. Y. 451; Murray *v.* Friensberg, 15 N. Y. Suppl. 450.

North Carolina.— Lovick *v.* Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191.

Ohio.— Page *v.* Miller, 13 Ohio Cir. Ct. 663, 6 Ohio Cir. Dec. 676.

Pennsylvania.— Burk *v.* Howley, 179 Pa. St. 539, 36 Atl. 327, 67 Am. St. Rep. 607.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 45–61.

48. Neimitz *v.* Conrad, 22 Oreg. 164, 29 Pac. 548 (second arrest illegal); Wyatt *v.* Hill, 71 Vt. 468, 45 Atl. 1044.

one or more of three ways, viz.: (1) Where he commits the wrong singly or jointly with others;[49] (2) where he in a legal sense commands others to commit it or ratifies their conduct;[50] and (3) where he stands in such relation to the person actually doing wrong, or to the person suffering it, as to be responsible for it and its consequences.[51]

2. PERSONAL COMMISSION — a. General Rule. The liability may attach by a direct personal commission of the unlawful detention.[52]

b. Joint Tort-Feasors. All persons who directly procure, aid, abet, or assist in an unlawful imprisonment are liable as principals.[53] In order to make parties defendant joint tort-feasors there must be some participation[54] or concert of action,[55]

49. See *infra*, V, A, 2.

50. See *infra*, V, A, 3.

51. See *infra*, V, A, 4.

52. Smith *v.* State, 7 Humphr. (Tenn.) 43; Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. See also Walley *v.* McConnell, 13 Q. B. 903, 14 Jur. 193, 19 L. J. Q. B. 162, 66 E. C. L. 903; Jarmain *v.* Hooper, 6 M. & G. 827, 46 E. C. L. 827.

Any form of active participation constitutes the tort. Maddox *v.* Murphy, 27 N. Brunsw. 263.

Liability for continuous detention may be incurred by being present during a part of the time, and giving aid and counsel to the parties detaining. Ruffner *v.* Williams, 3 W. Va. 243.

Justifiably putting the law in motion, without interfering in the execution of process, is not the personal commission intended by the text. Cooper *v.* Harding, 7 Q. B. 928, 9 Jur. 777, 53 E. C. L. 928; Sowell *v.* Champion, 6 A. & E. 407, 2 N. & P. 627, W. W. & D. 667, 33 E. C. L. 226; Painter *v.* Liverpool Oil Gas Light Co., 3 A. & E. 433, 2 H. & W. 233, 5 L. J. M. C. 108, 6 N. & M. 736, 30 E. C. L. 209. See also West *v.* Smallwood, 6 Dowl. P. C. 580, 7 L. J. Exch. 144, 3 M. & W. 418.

Giving mere advice or information to the officer who makes an arrest is not sufficient. Thus a party is not liable to an action for false imprisonment who, seeing a man in custody of a constable for a supposed offense, points out another as the real criminal, and does not direct the constable to take the party into custody. Gosden *v.* Elphick, 4 Exch. 445, 13 Jur. 989, 19 L. J. Exch. 9. See also Cronshaw *v.* Chapman, 7 H. & H. 911, 31 L. J. Exch. 277, 5 L. T. Rep. N. S. 54, 10 Wkly. Rep. 323; Danby *v.* Beardsley, 43 L. T. Rep. N. S. 603.

Mere silence as to an act or approval of it is not necessarily causing it so as to impose liability as a wrong-doer. Cooper *v.* Johnson, 81 Mo. 483.

53. *Massachusetts.*— Hackett *v.* King, 6 Allen 58, "all who directly or indirectly" procure or participate.

Michigan.— Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160.

Mississippi.— Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968.

Nebraska.— Johnson *v.* Bouton, 35 Nebr. 898, 53 N. W. 995.

Ohio.— Burch *v.* Franklin, 7 Ohio S. & C. Pl. Dec. 519, 7 Ohio N. P. 155.

Texas.— Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

West Virginia.— Ruffner *v.* Williams, 3 W. Va. 243.

See 23 Cent. Dig. tit. "False Imprisonment," § 61.

Examples of joint liability are a magistrate and an officer (Moore *v.* Watts, 1 Ill. 42, imperfect affidavit; Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200, void warrant; Burlingham *v.* Wylee, 2 Root (Conn.) 152, unauthorized order for removal to another state); a mayor and an officer (Thompson *v.* Whipple, 54 Ark. 203, 15 S. W. 604), a chief of police and a policeman (Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763; Martin *v.* Golden, 180 Mass. 549, 62 N. E. 977), the magistrate who issues warrant and the prosecutor (Comfort *v.* Fulton, 13 Abb. Pr. (N. Y.) 276; Wilson *v.* Robinson, 6 How. Pr. (N. Y.) 110), the officer and the person causing the arrest (Duckworth *v.* Johnston, 7 Ala. 578; Mayberry *v.* Kelly, 1 Kan. 116), the justice, the constable, and the persons assisting the constable (Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46, arrest on void process), the complainant (grand juror), the magistrate, and the officer (Allen *v.* Gray, 11 Conn. 95, void arrest), and a stranger with a joint debtor, whom he advised, making unauthorized arrest of another joint debtor on alias execution, the first having been discharged (Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487).

All persons acting under a void warrant may be liable. Williams *v.* Jones, 6 Phila. (Pa.) 541. See also *infra*, V, A, 4, b.

54. *Alabama.*— Crumpton *v.* Newman, 12 Ala. 199, 46 Am. Dec. 251.

Kansas.— Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423.

Missouri.— Monson *v.* Rouse, 86 Mo. App. 97.

New York.— Lewis *v.* Kahn, 15 Daly 326, 5 N. Y. Suppl. 661.

Ohio.— Truesdale *v.* Combs, 33 Ohio St. 186.

Pennsylvania.— Buchanan *v.* Goettmann, 29 Pittsb. Leg. J. 302.

See 23 Cent. Dig. tit. "False Imprisonment," § 46.

Unauthorized continuance of imprisonment renders all persons liable who are parties to it or assist therein. Griffin *v.* Coleman, 4 H. & N. 265, 28 L. J. Exch. 134.

55. Carter *v.* Worcester County Com'rs, 94 Md. 621, 51 Atl. 830; Boyce *v.* Douglas, 1

even though unconscious, in the unlawful conduct.[56] All or any number of joint defendants may be responsible.[57] Damages should be assessed not with reference to conduct or motive of the most guilty or most innocent party but according to the whole injury.[58]

3. COMMAND AND RATIFICATION. One who causes an unlawful detention through another is as responsible in law to the person injured as though he personally committed the wrong.[59] It is not now, on general principles,[60] material whether the authority be conferred before or after the commission of the wrong, so far as concerns the fact that liability may attach, however strict the rules of proof as to ratification may be.[61]

4. PRINCIPAL AND AGENT, ETC. — a. In General — (I) *ACTUAL AUTHORITY.* It is now[62] well settled that liability for false imprisonment may arise from the relationship of principal and agent, master and servant, or employer and

Campb. 60. See Day *v.* Porter, 2 M. & Rob. 151.

It is not necessary to show a conspiracy in order to recover. Davis *v.* Johnson, 101 Fed. 952, 42 C. C. A. 111; Oakes *v.* Oakes, 55 N. Y. App. Div. 576, 67 N. Y. Suppl. 427. But joint action pursuant to an illegal combination makes all parties thereto joint tort-feasors. Thus false imprisonment will lie against an officer and the complainant who combine to extort money from a party accused, although the party is in the custody of the officer. Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

Mere membership of a committee does not attach responsibility for the acts of the committee in advising an arrest. Develing *v.* Sheldon, 83 Ill. 390.

A person assisting an officer in making a legal arrest does not become liable by reason of the subsequent illegal act of the officer whom he assisted. Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Stone *v.* Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727.

56. Stone *v.* Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727, arrest caused by different creditors acknowledging employment of common agent. But see Develing *v.* Sheldon, 83 Ill. 390.

57. Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Zeller *v.* Martin, 84 Wis. 4, 54 N. W. 330; Davis *v.* Johnson, 101 Fed. 952, 42 C. C. A. 111. As to extent of recovery see *infra*, XIII.

58. Eliot *v.* Allen, 1 C. B. 18, 50 E. C. L. 18; Brown *v.* Allen, 4 Esp. 158; Clark *v.* Newsam, 1 Exch. 131, 16 L. J. Exch. 296. A verdict may be found against the person causing an illegal arrest and in favor of the officer. Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859. It has been held that where the action is brought against several defendants the verdict may be found against one or more individually, jointly, or individually and jointly, according to participation of the various defendants. Bath *v.* Metcalf, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455. In Rauma *v.* Lamont, 82 Minn. 477, 85 N. W. 236, a verdict against a constable for four hundred and fifty dollars and against a private person assisting for three hundred and fifty dollars as joint tort-feasors was sustained.

59. Zimmerman *v.* Knox, 34 Kan. 245, 8 Pac. 104; Webber *v.* Kenny, 1 A. K. Marsh. (Ky.) 345; Barthe *v.* Larquié, 42 La. Ann. 131, 7 So. 80 (at whose instance and for whose benefit); McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018; Green *v.* Kennedy, 46 Barb. (N. Y.) 16 [*affirmed* in 48 N. Y. 653] (if a superintendent of police directs an imprisonment to be made, he cannot escape on the plea that the officer actually making the arrest violated his duty in obeying his order); Curry *v.* Pringle, 11 Johns. (N. Y.) 444 (at whose instance). See also Corwin *v.* Freeland, 6 How. Pr. (N. Y.) 241. And see *infra*, V, B, 4.

60. Bishop *v.* Montague, Cro. Eliz. 824. See Dempsey *v.* Chambers, 154 Mass. 330, 28 N. E. 279, 26 Am. St. Rep. 249, 13 L. R. A. 219.

61. If the arrest was for the benefit of the person sought to be charged and with his approval, it has been held sufficient. Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501; Cordner *v.* Boston, etc., R. Co., 72 N. H. 413, 57 Atl. 234. See also Callahan *v.* Searles, 78 Hun (N. Y.) 238, 28 N. Y. Suppl. 904; Eastern Counties R. Co. *v.* Broom, 6 Exch. 314, 15 Jur. 297, 20 L. J. Exch. 196, 6 R. & Can. Cas. 743. *Compare* Rowe *v.* London Pianoforte Co., 13 Cox C. C. 211, 34 L. T. Rep. N. S. 450.

Resisting a motion to vacate an attachment of the person may attach responsibility. Ackroyd *v.* Ackroyd, 3 Daly (N. Y.) 38; Moon *v.* Towers, 8 C. B. N. S. 611, 98 E. C. L. 611.

Ratification may be presumed from approval of an agent's acts. Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278.

In case of an arrest without defendant's order, he is responsible if he directs the officer arresting to detain plaintiff for a few moments. Callahan *v.* Searles, 78 Hun (N. Y.) 238, 28 N. Y. Suppl. 904.

Encouragement and promotion are sufficient. Oates *v.* Bullock, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38; Joske *v.* Irvine, (Tex. Civ. App. 1897) 43 S. W. 278.

62. False imprisonment has been held to be a direct wrong; a direct trespass, for

employee.[63] The injured person must establish: (1) That the relationship existed;[64] (2) that the employee actually caused an illegal arrest;[65] and (3) that the facts bring the case within the test for the responsibility of the employer.[66]

(II) *Test of Liability.* Some authorities incline to limit the liability of the employer to conduct strictly within the scope of authority of the employee.[67]

which liability attaches only because of direct commission including participation. Brown *v.* Chadsey, 39 Barb. (N. Y.) 253.

63. Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, 50 Am. Rep. 102; American Express Co. *v.* Patterson, 73 Ind. 430; Shea *v.* Manhattan R. Co., 7 N. Y. Suppl. 497; Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702. *A fortiori* when the master directs and approves the illegal act. Clark *v.* Starin, 47 Hun (N. Y.) 345, arrest for theft. See, generally, Master and Servant; Principal and Agent.

64. Carter *v.* Worcester County Com'rs, 94 Md. 621, 51 Atl. 830 (county commissioners not liable for arrest by road supervisors in absence of command or ratification); Travis *v.* Standard L., etc., Ins. Co., 86 Mich. 288, 49 N. W. 140; Hawkins *v.* Manston, 57 Minn. 323, 59 N. W. 309.

A state appointee to protect railroad property is not an employee of the corporation and the latter is not liable for a wrongful arrest made by him at the request of its officers. Tolchester Beach Imp. Co. *v.* Steinmeier, 72 Md. 313, 20 Atl. 188, 8 L. R. A. 846.

When a chairman directs the removal of persons creating a disturbance in a meeting the relation of master and servant is not shown but only a particular direction in a particular matter, the chairman not authorizing the officers to act on their own judgment as to who were the persons making the disturbance. Lucas *v.* Mason, L. R. 10 Exch. 251, 44 L. J. Exch. 145, 33 L. T. Rep. N. S. 13, 23 Wkly. Rep. 924. See also Wooding *v.* Oxley, 9 C. & P. 1, 38 E. C. L. 1.

Employee a special policeman.— Liability may exist, although the employer has his employee sworn in as a special policeman. Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443; Norfolk, etc., R. Co. *v.* Galliher, 89 Va. 639, 16 S. E. 935; Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798.

65. Oppenheimer *v.* Manhattan R. Co., 18 N. Y. Suppl. 411; Newman *v.* New York, etc., R. Co., 54 Hun (N. Y.) 335, 7 N. Y. Suppl. 560; Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702; Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443.

66. A common carrier is liable for the false imprisonment of a passenger, made or caused to be made by its conductor in charge of the train (Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798), or by a street-car driver or conductor (Corbett *v.* Twenty-Third St. R. Co., 42 Hun (N. Y.) 587; Rown *v.* Christopher St., etc., R. Co., 34 Hun (N. Y.) 471; Jacobs *v.* Third Ave R. Co., 33 Misc. (N. Y.) 802, 68 N. Y. Suppl. 623). The authority of a carrier to arrest or detain a passenger for failure or refusal to pay fare has been generally enforced (Standish *v.* Narragansett Steamship Co., 111 Mass. 512, 15 Am. Rep. 66; Charleston *v.* London Tramways Co., 36 Wkly. Rep. 367 [*affirmed* in 32 Sol. J. 557]), but in cases of unreasonable detention, or detention for an unreasonable time (Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141 [*affirming* 24 Hun 506]), and, in cases of the arrest or detention of a passenger who has in fact paid his fare (Corbett *v.* Twenty-Third St. R. Co., 42 Hun (N. Y.) 587; Rown *v.* Christopher St., etc., R. Co., 34 Hun (N. Y.) 471; Furlong *v.* South London Tramways Co., 1 Cab. & E. 316, 48 J. P. 329, where the fare was supposed counterfeit), the carrier is liable.

A railroad company is liable for the act of its station agent in causing an illegal arrest of an alleged trespasser upon its cars. Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831.

67. *Illinois.*— Pinkerton *v.* Gilbert, 22 Ill. App. 568.

Indiana.— Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593.

Michigan.— Park *v.* Toledo, etc., R. Co., 41 Mich. 352, 1 N. W. 1032.

New Hampshire.— Cordner *v.* Boston, etc., R. Co., 72 N. H. 413, 57 Atl. 234; Small *v.* Banfield, 66 N. H. 206, 20 Atl. 284.

England.— Charleston *v.* London Tramways Co., 36 Wkly. Rep. 367 [*affirmed* in 32 Sol. J. 557].

See 23 Cent. tit. "False Imprisonment," §§ 62, 66.

A railroad company whose station agent requested a policeman to arrest a disturber in a depot is not liable for the act of the officer in detaining the person arrested for an unreasonable time. Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443.

A servant has an implied authority to give a person into custody only when it is necessary to take such a step to protect his master's property. If a servant gives a person into custody, when no such danger exists, the master will not be liable. Abrahams *v.* Deakin, [1891] 1 Q. B. 516, 60 L. J. Q. B. 238, 55 J. P. 212, 63 L. T. Rep. N. S. 690, 39 Wkly. Rep. 183; Stevens *v.* Hinshelwood, 53 J. P. 341.

The burden is on plaintiff to prove the employer's express authority to the employee to cause the detention. Mere proof of relationship (Goff *v.* Great Northern R. Co., 3 E. & E. 672, 7 Jur. N. S. 286, 30 L. J. Q. B. 148, 3 L. T. Rep. N. S. 850, 107 E. C. L. 672), or of agency (Travis *v.* Standard L., etc., Ins. Co., 86 Mich. 288, 49 N. W.

Others are in harmony with the larger rule of liability generally laid down by recent decisions on other branches of the same general subject,[68] which hold the employer responsible for acts done by an employee in the course of his employment[69] and to a wider interpretation of implied authority.[70] In many of these cases the liability of the employer arises in large measure from his relationship to the person detained.[71]

b. Attorney and Client. An attorney is not responsible for a wrongful arrest, if he is not the legal cause, although he may have been in some way connected with it.[72] The client, apart from participation, can be held accountable for only what is done by his attorney within the line of the latter's duty.[73] Both attorney and client may because of wrongful conduct become joint tort-feasors.[74] Neither is responsible for causing a justifiable arrest.[75]

B. Liability of Persons Complaining — 1. Exoneration on Justified Complaint. The law recognizes no distinct privilege on the part of persons who procure the arrest of others; but in the interest of the administration of justice it does not treat the mere giving of information[76] or the executing or filing of a complaint[77] concerning an offense justifying arrest or punishable by imprison-

140), or a clerkship (Flora *v.* Russell, 138 Ind. 153, 37 N. E. 593; Hawkins *v.* Manston, 57 Minn. 323, 59 N. W. 309; Hershey *v.* O'Neill, 36 Fed. 168) is not sufficient.

68. See, generally, Master and Servant.

69. Illinois Cent. R. Co. *v.* King, 69 Miss. 852, 13 So. 824; McLeod *v.* New York, etc., R. Co., 72 N. Y. App. Div. 116, 76 N. Y. Suppl. 347, arrest of passenger by detective. See also Lynch *v.* Metropolitan El. R. Co., 90 N. Y. 77, 43 Am. Rep. 141.

70. Pinkerton *v.* Martin, 82 Ill. App. 589; Atchison, etc., R. Co. *v.* Henry, 55 Kan. 715, 41 Pac. 952, 29 L. R. A. 465; Missouri, etc., R. Co. *v.* Warner, 19 Tex. Civ. App. 463, 49 S. W. 254, arrest by depot master. A railroad company is liable for a false arrest and imprisonment by its depot agent of a man who used a water-closet at its depot, set apart for ladies only. Illinois Cent. R. Co. *v.* King, 69 Miss. 852, 13 So. 824.

71. Vrchotka *v.* Rothschild, 109 Ill. App. 268; Efroymsen *v.* Smith, 29 Ind. App. 451, 63 N. E. 328; Mallach *v.* Ridley, 9 N. Y. Suppl. 922. In case of conductor and passenger, the rule on this point is liberal to the latter. Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 39 Am. St. Rep. 672. The decisions grade from one extreme to the other without clear demarcation as to facts or theory or nomenclature. A conclusion can be properly reached in individual cases only by consideration of the larger questions involved. See, generally, Master and Servant; Principal and Agent; and titles of specific torts.

72. As for error of a court in granting an order of arrest. Fisher *v.* Langbein, 10 Abb. N. Cas. (N. Y.) 128, 62 How. Pr. (N. Y.) 238 [*affirmed* in 13 Abb. N. Cas. 10 (*affirmed* in 103 N. Y. 84, 8 N. E. 251)]. He is within the benefit of the rule that process valid on its face even if erroneous in fact affords protection from liability. Ward *v.* Cozzens, 3 Mich. 252.

His direction to stop a witness does not justify an arrest. Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420.

Liability may attach because of his participation if he becomes the instrument of his client in causing an arrest known to be unjustifiable (Burnap *v.* Marsh, 13 Ill. 539), or if he interposes in directing the arrest (Hunter *v.* Burtis, 10 Wend. (N. Y.) 358), but not if he merely advocates a cause (Hunter *v.* Burtis, *supra*) or advises a magistrate in good faith (Roth *v.* Shupp, 94 Md. 55, 50 Atl. 430).

73. He is not responsible for mistaken identification of the wrong person by the lawyer's clerk. Gearon *v.* Savings Bank, 50 N. Y. Super. Ct. 264, 6 N. Y. Civ. Proc. 207. It is not within the line of an attorney's duty to stop a witness by illegally arresting him. Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420; Nemitz *v.* Conrad, 22 Oreg. 164, 29 Pac. 548. See also Collett *v.* Foster, 2 H. & N. 356, 26 L. J. Exch. 412, 5 Wkly. Rep. 790.

74. Sleight *v.* Leavenworth, 5 Duer (N. Y.) 122; Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242; Brooks *v.* Hodgkinson, 4 H. & N. 712, 29 L. J. Exch. 93, 7 Wkly. Rep. 735. Both are liable for illegal issuance of an execution on which a judgment debtor is arrested. Guilleaume *v.* Rowe, 63 How. Pr. (N. Y.) 175 [*affirmed* in 94 N. Y. 268, 46 Am. Rep. 141].

75. Under process (Yearsley *v.* Heane, 3 D. & L. 265, 14 M. & W. 322) or without warrant with probable cause (Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115).

76. Waters *v.* Anthony, 20 App. Cas. (D. C.) 124; Benham *v.* Vernon, 5 Mackey (D. C.) 18; Veneman *v.* Jones, 118 Ind. 41, 20 N. E. 644, 10 Am. St. Rep. 100; Lark *v.* Bande, 4 Mo. App. 186; Whitney *v.* Hanse, 36 N. Y. App. Div. 420, 55 N. Y. Suppl. 375 (a person informing district attorney); Lewis *v.* Rose, 6 Lans. (N. Y.) 206; Brown *v.* Chadsey, 39 Barb. (N. Y.) 253 (communication of facts); Von Latham *v.* Libby, 38 Barb. (N. Y.) 339; Burns *v.* Erben, 1 Rob. (N. Y.) 555 [*affirmed* in 40 N. Y. 463].

77. Doty *v.* Hurd, 124 Mich. 671, 83 N. W. 632; Linnen *v.* Banfield, 114 Mich. 93, 72,

ment[78] as causing an unlawful detention so as to impose responsibility in false imprisonment.[79]

2. Exoneration on Lawful Arrest. A complainant is within the general rule for justification[80] by legal authority[81] and for arrest without warrant.[82]

3. Exoneration From Official Conduct. What magistrates[83] and officers of the law generally[84] may do, acting on their own judgment, responsibility, and initiation,[85] is not to be charged to the complainant,[86] in the absence of con-

N. W. 1 (affidavit for search warrant by owner of robbed house); Schultz *v.* Huebner, 108 Mich. 274, 66 N. W. 57; Peckham *v.* Tomlinson, 6 Barb. (N. Y.) 253; Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353; Brown *v.* Crowl, 5 Wend. (N. Y.) 298; Magnussen *v.* Shortt, 200 Pa. St. 257, 49 Atl. 783; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Smith *v.* Jones, 16 S. D. 337, 92 N. W. 1084. See also Lembeck *v.* Gevey, 15 Misc. (N. Y.) 663, 39 N. Y. Suppl. 95.

A fortiori there is no liability where an affidavit is made without knowledge or intention of use for basis of arrest. Roth *v.* Smith, 41 Ill. 314.

A witness who draws an information on advice of counsel on which a justice draws a warrant, and takes no other part, is not responsible. Teal *v.* Fissel, 28 Fed. 351.

78. Zimmerman *v.* Knox, 34 Kan. 245, 8 Pac. 104; Green *v.* Morse, 5 Me. 291; Thorne *v.* Turck, 94 N. Y. 90, 46 Am. Rep. 126 [*affirming* 10 Daly 327]. Complainant is not liable, although the magistrate had no jurisdiction. Brown *v.* Chapman, 6 C. B. 365, 12 Jur. 799, 17 L. J. C. P. 329, 60 E. C. L. 365; Barber *v.* Rollinson, 1 Cromp. & M. 330, 2 L. J. Exch. 101, 3 Tyrw. 267. But if the charge made does not constitute the punishable offense complained of the person causing the arrest by making an affidavit is liable. Hall *v.* Rogers, 2 Blackf. (Ind.) 429.

79. The injury in such case is loss without a wrong. See Damnum Absque Injuria, 13 Cyc. 255.

80. See *infra*, VIII, B, 1.

81. Valid warrant justifies (Krebs *v.* Thomas, 12 Ill. App. 266; Schultz *v.* Huebner, 108 Mich. 274, 66 N. W. 57; Marks *v.* Townsend, 97 N. Y. 590; Hallock *v.* Dominy, 69 N. Y. 238 [*reversing* 7 Hun 52]; Olmstead *v.* Dolan, 2 Silv. Supreme (N. Y.) 561, 6 N. Y. Suppl. 130; Williams *v.* Williams, 4 Thomps. & C. (N. Y.) 251; Waldheim *v.* Sichel, 1 Hilt. (N. Y.) 45; Reynolds *v.* Corp, 3 Cai. (N. Y.) 267), even if the evidence upon which the arrest is made is slight (Hall *v.* Munger, 5 Lans. (N. Y.) 100; Landt *v.* Hilts, 19 Barb. (N. Y.) 283; Corwin *v.* Freeland, 6 How. Pr. (N. Y.) 241) or if the evidence be incompetent (Miller *v.* Adams, 7 Lans. (N. Y.) 131 [*affirmed* in 52 N. Y. 409], in the absence of bad faith).

A legally sufficient affidavit justifies. Outlaw *v.* Davis, 27 Ill. 467; Norman *v.* Manciette, 18 Fed. Cas. No. 10,300, 1 Sawy. 484. Not all irregularities in affidavits or orders for arrest destroy the protection of legal process to such person. Ogg *v.* Murdock, 25 W. Va. 139.

Justification by other valid process or order see Rhodes *v.* King, 52 Ala. 272; Ludditington *v.* Peck, 2 Conn. 700; Wagstaff *v.* Schippel, 27 Kan. 450; Hallock *v.* Dominy, 69 N. Y. 238 [*reversing* 7 Hun 52]; Miller *v.* Adams, 7 Lans. (N. Y.) 131 [*affirmed* in 53 N. Y. 409]; Landt *v.* Hilts, 19 Barb. (N. Y.) 283; Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353; Brown *v.* Crowl, 5 Wend. (N. Y.) 298; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

82. See *supra*, VIII, C. The sufferer has his remedy, if any, in an action for a malicious prosecution or in a similar action. Morrow *v.* Wheeler, etc., Mfg. Co., 165 Mass. 349, 43 N. E. 105; Schultz *v.* Huebner, 108 Mich. 274, 66 N. W. 57.

83. The complaining witness is not responsible if the magistrate draws an instrument defective in form (Outlaw *v.* Davis, 27 Ill. 467; Langford *v.* Boston, etc., R. Co., 144 Mass. 431, 11 N. E. 697; Hewitt *v.* Newburger, 66 Hun (N. Y.) 230, 20 N. Y. Suppl. 913 [*reversed* in 141 N. Y. 538, 36 N. E. 593]); or acts erroneously and even oppressively (Taylor *v.* Moffat, 2 Blackf. (Ind.) 305; Poupard *v.* Dumas, 105 Mich. 326, 63 N. W. 301, unlawfully directing arrest without warrant; Nowak *v.* Waller, 10 N. Y. Suppl. 199; McConnell *v.* Kennedy, 29 S. C. 180, 7 S. E. 76, causing minor to execute warrant), or improperly convicts defendant (Peckham *v.* Tomlinson, 6 Barb. (N. Y.) 253). Omission of the magistrate to reduce the complaint of a prosecutor to writing before issuing the warrant does not make the prosecutor liable as a trespasser. Sleight *v.* Ogle, 4 E. D. Smith (N. Y.) 445.

84. The complaining witness is not ordinarily responsible for the improper conduct of the officer after arrest (Ocean Steamship Co. *v.* Williams, 69 Ga. 251), as for conduct of a sheriff in taking an accused person into different counties (Knight *v.* International, etc., R. Co., 61 Fed. 87, 9 C. C. A. 376), or mistreating him while in prison (Hopkins *v.* Garthwaite, 28 La. Ann. 325), or if the process be served with undue haste (Carleton *v.* Taylor, 50 Vt. 220), or for the act of the officer in holding a debtor in arrest to compel payment of illegal fees (Small *v.* Banfield, 66 N. H. 206, 20 Atl. 284). *A fortiori* this exemption extends to such a person as the prosecutor of the pleas. Hann *v.* Lloyd, 50 N. J. L. 1, 11 Atl. 346.

85. Limbeck *v.* Gerry, 15 Misc. (N. Y.) 663, 39 N. Y. Suppl. 95, arrest after officer's own inquiries.

86. *Alabama.*— Rhodes *v.* King, 52 Ala. 272.

California.— Dusy *v.* Helm, 59 Cal. 188.

trol,[87] or participation on his part,[88] or unless he failed to comply with some essential requirement of law.[89]

4. Liability For Unjustified Arrest. A complainant may, however, become responsible in damages for an arrest when he directs[90] or procures,[91] is a conspicuous actor in,[92] or in a legal sense causes[93] a detention unauthorized by

Illinois.— Outlaw *v.* Davis, 27 Ill. 467.

Michigan.— Murphy *v.* Walters, 34 Mich. 180.

Minnesota.— Gifford *v.* Wiggins, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356.

New York.— Brown *v.* Chadsey, 39 Barb. 253; Waldheim *v.* Sichel, 1 Hilt. 45; Nowak *v.* Waller, 10 N. Y. Suppl. 199; Adams *v.* Freeman, 9 Johns. 117.

Vermont.— McMullin *v.* Erwin, 69 Vt. 338, 38 Atl. 62.

United States.— Teal *v.* Fissel, 28 Fed. 351, error in issuing and executing warrant.

See 23 Cent. Dig. tit. "False Imprisonment," § 45 *et seq.*

87. Ocean Steamship Co. *v.* Williams, 69 Ga. 251. A party in a justice's court is not accountable for the issuing of process unless he directs or sanctions it. Bissell *v.* Gold, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

88. Ball *v.* Horrigan, 19 N. Y. Suppl. 913. If the complaining witness or prosecutor actually participated in the arrest he may be held liable because of personal commission. Kreger *v.* Osborn, 7 Blackf. (Ind.) 74; McCaskey *v.* Garrett, 91 Mo. App. 354. See also *supra*, V, A, 2.

Any clear participation is sufficient. Rich *v.* McInery, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Kreger *v.* Osborn, 7 Blackf. (Ind.) 74; Hallock *v.* Dominy, 7 Hun (N. Y.) 52 [*reversed* on another ground in 69 N. Y. 238]; Adams *v.* Freeman, 9 Johns. (N. Y.) 117 (after time for return of process); Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411 (void warrant); Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616. That complainant was a conspicuous actor with malicious motives has been held sufficient. Comfort *v.* Fulton, 39 Barb. (N. Y.) 56. Merely going with the officer at his request to point out the person to be arrested is enough. Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956. If he directs, aids, or assists in an illegal arrest, he becomes a joint tort-feasor. Develing *v.* Sheldon, 83 Ill. 390; Ball *v.* Horrigan, 19 N. Y. Suppl. 913; Comfort *v.* Fulton, 13 Abb. Pr. (N. Y.) 276; Wilson *v.* Robinson, 6 How. Pr. (N. Y.) 110; Lansing *v.* Case, 4 N. Y. Leg. Obs. 221. Thus handing the officer a warrant requesting the arrest of defendant at a stated place, offering to provide a vehicle, in connection with other circumstances, may make out a case. Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593 [*reversing* 66 Hun 230, 20 N. Y. Suppl. 913]. See also Hough *v.* Marchant, M. & M. 510, 22 E. C. L. 574. It is not indispensable that he be present at the time of arrest. Clifton *v.* Grayson, 2 Stew. (Ala.) 412; Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

89. Dusy *v.* Helm, 59 Cal. 189. Defects in the preliminary papers such as the complaint (Langford *v.* Boston, etc., R. Co., 144 Mass. 431, 11 N. E. 697) or the affidavit and order of arrest (Ogg *v.* Murdock, 25 W. Va. 139; Whaley *v.* Lawton, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649) do not make the complainant liable for the arrest.

90. *Georgia.*— Manning *v.* Mitchell, 73 Ga. 660, in connection with all concerned.

Kansas.— *In re* Grey, 41 Kan. 461, 21 Pac. 678; Zimmerman *v.* Knox, 34 Kan. 245, 8 Pac. 104, arrest without warrant.

Michigan.— Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859, arrest without warrant.

New Hampshire.— Gibbs *v.* Randlett, 58 N. H. 407.

New York.— Loomis *v.* Render, 41 Hun 268; Green *v.* Kennedy, 46 Barb. 16 [*affirmed* in 48 N. Y. 653]; Winn *v.* Hobson, 54 N. Y. Super. Ct. 330.

Rhode Island.— McGarraban *v.* Lavers, 15 R. I. 302, 3 Atl. 592.

Wisconsin.— Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411.

See 23 Cent. Dig. tit. "False Imprisonment," § 45 *et seq.*

91. *Alabama.*— Clifton *v.* Grayson, 2 Stew. 412.

Connecticut.— Stoddard *v.* Bird, Kirby 65.

Louisiana.— Barthe *v.* Larquié, 42 La. Ann. 131, 7 So. 80.

Massachusetts.— Emery *v.* Hapgood, 7 Gray 55, 66 Am. Dec. 459, induces.

New York.— Midford *v.* Kann, 32 N. Y. App. Div. 228, 52 N. Y. Suppl. 995; Curry *v.* Pringle, 11 Johns. 444; Lansing *v.* Case, 4 N. Y. Leg. Obs. 221, all persons instrumental.

Texas.— Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656, requests.

See 23 Cent. Dig. tit. "False Imprisonment," § 45 *et seq.*

Trespass lies for procuring by awe, fear, and influence, and contrary to his own inclinations, a sovereign, independent, absolute prince to imprison plaintiff. Rafael *v.* Verelst, 2 W. Bl. 983, 1055.

92. Comfort *v.* Fulton, 39 Barb. (N. Y.) 56; Benham *v.* Vernon, 5 Mackey (D. C.) 18, or takes an active part in.

93. *Arkansas.*— Scoggin *v.* Taylor, 13 Ark. 380, parties suing out writ of ne exeat before master in chancery.

Illinois.—Pinkerton *v.* Gilbert, 22 Ill. App. 568; Morrell *v.* Martin, 17 Ill. App. 336.

Indiana.—Taylor *v.* Moffatt, 2 Blackf. 305.

Louisiana.— Lange *v.* Illinois Cent. R. Co., 107 La. 687, 31 So. 1003; Rogay *v.* Juilliard, 25 La. Ann. 305.

Maine.— Green *v.* Morse, 5 Me. 291.

Massachusetts.— Cody *v.* Adams, 7 Gray 59.

law.[94] Mere delivery of a detained person to a police officer does not necessarily exonerate,[95] but there is no responsibility unless the officer makes the arrest because of complainant's conduct and not on his own volition.[96] In order to avoid liability the person so causing an arrest must, before he puts the law into motion, see that the process is properly procured,[97] and it is sometimes held also that such process is regular and valid on its face.[98] His liability may be that of a trespasser *ab initio*.[99]

VI. PERSONS EXEMPT.

A. Normal Liability. Normally any and every natural person,[1] including legislators,[2] and irrespective of his public or private character[3] or his personal

Michigan.— Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160.

New York.— Thorne *v.* Turck, 94 N. Y. 90, 46 Am. Rep. 126; Savage *v.* McMillan, 37 N. Y. App. Div. 103, 55 N. Y. Suppl. 1055; Winn *v.* Hobson, 54 N. Y. Super. Ct. 330; Ball *v.* Horrigan, 19 N. Y. Suppl. 913; Sullivan *v.* Newman, 17 N. Y. Suppl. 424, instrumental in legally causing.

Ohio.— Truesdell *v.* Combs, 33 Ohio St. 186.

Texas.— Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

Vermont.— Goodell *v.* Tower, (1904) 58 Atl. 790.

West Virginia.— Ogg *v.* Murdock, 25 W. Va. 139.

England.— Wheeler *v.* Whiting, 9 C. & P. 262, 38 E. C. L. 162 (as by giving in charge); Stonehouse *v.* Elliott, 1 Esp. 272, 6 T. R. 315, 3 Rev. Rep. 183; Grinham *v.* Willey, 4 H. & N. 496, 5 Jur. N. S. 444, 7 Wkly. Rep. 463, 28 L. J. Exch. 242.

See 23 Cent. Dig. tit. "False Imprisonment," § 45 *et seq.*

94. *Connecticut.*— Allen *v.* Gray, 11 Conn. 95.

Louisiana.— Escurix *v.* Daboval, 7 La. 575.

Massachusetts.— Cody *v.* Adams, 7 Gray 59 (arrest on process issued compliance with the requirement of taking oath that the cause of action is just); Winslow *v.* Hathaway, 1 Pick. 211 (execution issued after appeal taken).

Nevada.— Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832.

New York.— Grinnell *v.* Weston, 95 N. Y. App. Div. 454, 88 N. Y. Suppl. 781; Comfort *v.* Fulton, 13 Abb. Pr. 276; Blythe *v.* Tompkins, 2 Abb. Pr. 468.

West Virginia.— Ogg *v.* Murdock, 25 W. Va. 139, no action pending.

See 23 Cent. Dig. tit. "False Imprisonment," § 45 *et seq.*

95. Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

96. Rich *v.* McInery, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32.

97. A party who fraudulently or irregularly obtains process not valid on its face is not justified by it. Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922; Emery *v.* Hapgood, 7 Gray (Mass.) 55, 66 Am. Dec. 459; Cody *v.* Adams, 7 Gray (Mass.) 59.

Where an affidavit is required if it be legally insufficient the arrest is unlawful.

Alabama.— Noles *v.* State, 24 Ala. 672; Duckworth *v.* Johnston, 7 Ala. 578.

California.— Fkumoto *v.* Marsh, 130 Cal. 66, 62 Pac. 303, 509, 80 Am. St. Rep. 73.

Illinois.— Moore *v.* Watts, 1 Ill. 42.

Indiana.— Davis *v.* Bush, 4 Blackf. 330; Hall *v.* Rogers, 2 Blackf. 429, as where it fails to properly charge the offense.

Kansas.— Hauss *v.* Kohlar, 25 Kan. 640.

Michigan.— Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278, where defendant was held to bail on affidavit showing absolutely privileged communication.

Nevada.— Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832.

New York.— Vredenburgh *v.* Hendricks, 17 Barb. 179.

Ohio.— Spice *v.* Steinruck, 14 Ohio St. 213.

Vermont.— Whitcomb *v.* Cook, 39 Vt. 585, failure to file the affidavit.

In New York affidavit is not necessary to justify an officer arresting under order of a justice of the supreme court. Hall *v.* Munger, 5 Lans. 100.

98. Mere delivery of an invalid warrant to an officer for service may not attach liability, where delivery with instructions to arrest will. Lewis *v.* Rose, 6 Lans. (N. Y.) 206. If he delivers a warrant void on its face to an officer and directs arrest under it (Thorpe *v.* Wray, 68 Ga. 359; Cody *v.* Adams, 7 Gray (Mass.) 59; Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593 [*reversing* 66 Hun 230, 20 N. Y. Suppl. 913]; Hallock *v.* Dominy, 7 Hun (N. Y.) 52; Whitcomb *v.* Cook, 39 Vt. 585) he is liable, notwithstanding the approval of the prosecuting attorney (Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411).

99. Ackroyd *v.* Ackroyd, 3 Daly (N. Y.) 38.

1. Truesdale *v.* Combs, 33 Ohio St. 186. All who directly or indirectly procure or participate in an illegal act. Hackett *v.* King, 6 Allen (Mass.) 58.

2. Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377. A city alderman may be liable. Judson *v.* Reardon, 16 Minn. 431. Legislators voting for an arrest have, however, been held exempt. Canfield *v.* Gresham, 82 Tex. 10, 17 S. W. 390.

3. An administrator may commit the wrong. Stoddard *v.* Bird, Kirby (Conn.) 65. Both an official and a private person may be responsible for the same wrong. See *supra*, V, A, 2, b.

status,[4] or personal relationship,[5] is liable in an action for false imprisonment, whenever such person appears to have unlawfully detained another. A private corporation may be held liable upon the same principle as a natural person.[6]

B. Judicial Officers — 1. Within Their Jurisdiction. The general rule[7] that all judicial officers are protected by their official character from liability in tort because of public conduct, including their imposition of punishment for contempt,[8] clearly within the pale of their authority, although involving demonstrable legal error,[9] even if malicious and corrupt, is enforced in actions of false imprisonment.[10] The exemption applies to justices of the supreme court,[11] judges of courts of record generally,[12] city magistrates,[13] justices of the peace,[14] and to other judicial

4. A lunatic who in his capacity of justice of the peace causes a wrongful arrest is responsible in damages. Krom *v.* Schoonmaker, 3 Barb. (N. Y.) 647. See also Gates *v.* Miles, 3 Conn. 64, 70. And see, generally, Insane Persons.

5. Action for false imprisonment will lie on behalf of a son against his father. Fletcher *v.* People, 52 Ill. 395, for confinement in a damp and dirty cellar. See also Robalina *v.* Armstrong, 15 Barb. (N. Y.) 247. Both father and son may be responsible for concert in action (Carson *v.* Dessau, 142 N. Y. 445, 37 N. E. 493), but for participation only, not ordinarily because of relationship (Carson *v.* Dessau, 59 N. Y. Super. Ct. 79, 13 N. Y. Suppl. 232). See, generally, Parent and Child.

6. Owsley *v.* Montgomery, etc., R. Co., 37 Ala. 560; Carter *v.* Howe Mach. Co., 51 Md. 290, 34 Am. Rep. 311; Nichols *v.* Lake Shore, etc., R. Co., 4 Ohio Dec. (Reprint) 306, Clev. L. Rep. 268.

7. See, generally, Judges.

8. Punishment for contempt by a judicial officer is not generally a foundation for false imprisonment, however erroneous (Pickett *v.* Wallace, 57 Cal. 555; Rudd *v.* Darling, 64 Vt. 456, 25 Atl. 479; Tavenner *v.* Morehead, 41 W. Va. 116, 23 S. E. 673; Cooke *v.* Bangs, 31 Fed. 640) and malicious (Bell *v.* McKinney, 63 Miss. 187; Scott *v.* Fishblate, 117 N. C. 265, 23 S. E. 436, 30 L. R. A. 696) it may be so long as it relates to a matter within his jurisdiction (Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955). The common law was that judges of a court of record could punish whenever a contempt was committed; but judges of inferior courts only when committed in the face of the court itself. Reg. *v.* Lefroy, L. R. 8 Q. B. 134, 42 L. J. Q. B. 121, 28 L. T. Rep. N. S. 132, 21 Wkly. Rep. 332. The responsibility of a magistrate in arresting for contempt depends primarily on statutory provisions as to notice or hearing (Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571, where no notice or hearing was had and the justice was held liable), and on the extent to which the law makes him sole judge of the fact of contempt (Buquet *v.* Watkins, 1 La. 131, where the law did so provide and the justice was held not responsible). But see Rutherford *v.* Holmes, 66 N. Y. 368 [*affirming* 5 Hun 317]. And see Contempt, 9 Cyc. 1 *et seq.*

9. McVeigh *v.* Ripley, 77 Conn. 136, 58 Atl. 701. The protection extends to erroneous procedure (Flack *v.* Ankeny, 1 Ill. 187; Gardner *v.* Couch, (Mich. 1904) 100 N. W. 673; Stanton *v.* Schell, 3 Sandf. (N. Y.) 323; Campbell *v.* Ewalt, 7 How. Pr. (N. Y.) 399; Wright *v.* Hazen, 24 Vt. 143), to cases of second arrest (Carothers *v.* Scott, Tapp. (Ohio) 227), to errors in law (Busteed *v.* Parsons, 54 Ala. 393, 25 Am. Rep. 688; Williams *v.* Blincoe, 5 Litt. (Ky.) 171; Booth *v.* Kurrus, 55 N. J. L. 370, 26 Atl. 1013; Lange *v.* Benedict, 8 Hun (N. Y.) 362; Lange's Case, 30 Fed. Cas. No. 18,307, 13 Blatchf. 546), to an improper construction of a statute (Kenner *v.* Morrison, 12 Hun (N. Y.) 204; Stewart *v.* Hawley, 21 Wend. (N. Y.) 552, misjudgment of fact constituting violation of statute), to errors of judgment resulting in improper detention after arrest (State *v.* Wolever, 127 Ind. 306, 26 N. E. 762; Kenner *v.* Morrison, 12 Hun (N. Y.) 204; Touhey *v.* King, 9 Lea (Tenn.) 422), and to mistakes of judgment generally (Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650; Downing *v.* Herrick, 47 Me. 462; Gilbert *v.* Satterlee, 43 Misc. (N. Y.) 292, 88 N. Y. Suppl. 871; Harmon *v.* Brotherson, 1 Den. (N. Y.) 537; Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224), such as an erroneous determination that an offense has been committed and that there is probable cause against the accused (Lewis *v.* Rose, 6 Lans. (N. Y.) 206).

10. Dixon *v.* Cooper, 109 Ky. 29, 58 S. W. 437, 22 Ky. L. Rep. 539; Taylor *v.* Alexander, 6 Ohio 144; Johnston *v.* Moorman, 80 Va. 131; Cottam *v.* Oregon City, 98 Fed. 570.

11. Pickett *v.* Wallace, 57 Cal. 555.

12. Bustead *v.* Parsons, 54 Ala. 393, 25 Am. Rep. 688; Lange *v.* Benedict, 73 N. Y. 12, 18 Alb. L. J. 11, 29 Am. Rep. 80 [*affirming* 8 Hun 362]; Comstock *v.* Eagleton, 11 Okla. 487, 69 Pac. 955 (a probate judge); Lange's Case, 30 Fed. Cas. No. 18,307, 13 Blatchf. 546 (even as to a resentence without authority of law).

13. Stewart *v.* Cooley, 23 Minn. 347, 23 Am. Rep. 690; Brunner *v.* Downs, 17 N. Y. Suppl. 633; Rudd *v.* Darling, 64 Vt. 456, 25 Atl. 479. Exemption extends to mayors of cities acting judicially. State *v.* Wolever, 127 Ind. 306, 26 N. E. 762 (refusal of mayor to administer oath is judicial; so also is his decision as to sufficiency of affidavit made before a notary instead of himself); Green *v.* Talbot, 36 Iowa 499; Johnston *v.* Moorman, 80 Va. 131.

14. *California.*—Dusy *v.* Helm, 59 Cal. 188.

officers with special jurisdiction such as the mayor of a city acting under authority to take cognizance of a specified class of cases.[15]

2. In Excess of Their Jurisdiction — a. Judicial Functions. When a judicial officer has authority to deal with a matter on one basis and he deals with it on a different and erroneous basis he has acted not in absence of but in excess of his jurisdiction.[16] He is exempt from liability for the erroneous holding that the court had jurisdiction, although the ultimate ruling be that it had none.[17] Judges of a court of record,[18] and according to the better[19] but not universal[20] authority judges of courts of inferior jurisdiction acting excessively, are not liable for corrupt and malicious conduct.[21]

b. Ministerial Duties — (I) *Liability.* The judicial exemption logically ter-

Illinois.— Flack *v.* Ankeny, 1 Ill. 187.

Maine.— Downing *v.* Herrick, 47 Me. 462.

Maryland.— Roth *v.* Shupp, 94 Md. 55, 50 Atl. 430.

New Hampshire.— Burnham *v.* Stevens, 33 N. H. 247.

New York.— Gano *v.* Hall, 42 N. Y. 67 [*affirming* 5 Park. Cr. 651]; Sands *v.* Benedict, 2 Hun 479, 5 Thomps. & C. 19; Nowak *v.* Waller, 10 N. Y. Suppl. 199; Campbell *v.* Ewalt, 7 How. Pr. 399; Weaver *v.* Devendorf, 3 Den. 117.

Utah.— Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224.

Vermont.— Wright *v.* Hazen, 24 Vt. 143.

Wyoming.— Wolcott *v.* Bachman, 3 Wyo. 335, 23 Pac. 72, 673.

United States.— Allec *v.* Reece, 39 Fed. 341.

See 23 Cent. Dig. tit. "False Imprisonment," § 17.

De jure officer.— Exemption applies when defendant is shown to be a justice *de jure*, not merely *de facto*. Newman *v.* Tiernan, 37 Barb. (N. Y.) 159.

An erroneous second commitment alleged to be malicious is not actionable. Cooke *v.* Bangs, 31 Fed. 640.

15. Willis *v.* Havemeyer, 5 Duer (N. Y.) 447.

Commissioners in bankruptcy have been held to be entitled to exemption (Doswell *v.* Impey, 1 B. & C. 163, 8 E. C. L. 70 [*overruling* Miller *v.* Seare, 2 W. Bl. 1141]), and on the other hand have been denied exemption (see Groenvelt *v.* Burwell, 1 Ld. Raym. 454). See also Watson *v.* Bodell, 9 Jur. 626, 14 L. J. Exch. 281, 14 M. & W. 57.

16. As if a man be tried for one offense and be convicted for another. Rogers *v.* Jones, 3 B. & C. 409, 10 E. C. L. 190, 5 D. & R. 268, 3 L. J. K. B. O. S. 40, R. & M. 129, 21 E. C. L. 716; Reg. *v.* Brickhall, 33 L. J. M. C. 156. And see Prickett *v.* Gratrex, 8 Q. B. 1020, 10 Jur. 566, 15 L. J. M. C. 145, 2 New Sess. Cas. 429, 55 E. C. L. 1020; Davis *v.* Capper, 10 B. & C. 28, 21 E. C. L. 22; Clark *v.* Woods, 2 Exch. 395, 17 L. J. Exch. 189. The distinction is not clear in itself nor is it consistently treated. See Parker *v.* Etter, 33 Nova Scotia 52. As to the nature of distinction see Grove *v.* Van Duzen, 44 N. J. L. 654, 43 Am. Rep. 412; McCall *v.* Cohen, 16 S. C. 445, 42 Am. Rep. 641; Robertson *v.* Parker, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; Bradley *v.* Fisher, 13 Wall. (U. S.) 335, 20 L. ed. 646.

17. *California.*— Dusy *v.* Helm, 59 Cal. 188.

New Jersey.— Grove *v.* Van Duzen, 44 N. J. L. 654, 43 Am. Rep. 412.

New York.— Austin *v.* Vrooman, 128 N. Y. 229, 28 N. E. 477, 14 L. R. A. 138 (court of special sessions); Lange *v.* Benedict, 8 Hun 362.

Texas.— Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609.

Vermont.— Morrill *v.* Thurston, 46 Vt. 732.

Wisconsin.— Robertson *v.* Parker, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101; Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411; Gelzenleuchter *v.* Neyer, 64 Wis. 316, 25 N. W. 442, 54 Am. St. Rep. 616.

United States.— Bradley *v.* Fisher, 13 Wall. 335, 20 L. ed. 646; Allec *v.* Reece, 30 Fed. 344.

See 23 Cent. Dig. tit. "False Imprisonment," § 18 *et seq.*

A court has jurisdiction to determine whether or not it has jurisdiction. Reg. *v.* Bolton, 1 Q. B. 66, 4 P. & D. 679, 41 E. C. L. 439; Cave *v.* Mountain, 9 L. J. M. C. 90, 1 M. & G. 257, 1 Scott N. R. 132, 39 E. C. L. 747.

As to presumption of jurisdiction see Bode *v.* Trimmer, 82 Cal. 513, 23 Pac. 187; Fanning *v.* Bohme, 76 Cal. 149, 18 Pac. 158.

18. A judge of a court of record who imposes a sentence which while void is merely in excess of jurisdiction as distinguished from being without jurisdiction is not liable for false imprisonment. Lange *v.* Benedict, 73 N. Y. 12, 29 Am. Rep. 80 [*affirming* 8 Hun 362 (*reversing* 48 How. Pr. 465)], judge of federal circuit court.

19. *California.*— Downer *v.* Lent, 6 Cal. 94, 65 Am. Dec. 489, pilot commissioner.

New York.— Clark *v.* Holdridge, 58 Barb. 61, in measure or degree of exercise of power.

South Carolina.— McCall *v.* Cohen, 6 S. C. 445.

Texas.— Rains *v.* Simpson, 50 Tex. 496, 32 Am. Rep. 609.

United States.— Cook *v.* Bangs, 31 Fed. 640.

See 23 Cent. Dig. tit. "False Imprisonment," § 18 *et seq.*

20. Stearns *v.* Miller, 25 Vt. 20.

21. See, generally, Judges.

minates with matters the decision of which involves the exercise of discretion. If judges of courts of inferior jurisdiction who properly speaking are the only ones personally performing merely ministerial duties[22] commit or permit irregularities or illegalities in the performance of such duties,[23] whereby they lose jurisdiction of the cause,[24] they are responsible in damages to the person wrongfully detained in consequence.[25]

(II) *EXEMPTION.* But whenever the errors and omissions just mentioned involve also a judicial determination by the magistrate,[26] or do not sufficiently constitute excess of jurisdiction,[27] or where they result in process valid,[28] and

22. Downing *v.* Herrick, 47 Me. 462; Doggett *v.* Cook, 11 Cush. (Mass.) 262.

A warrant of commitment not supported by judgment of conviction is an excess of jurisdiction in performance of a ministerial rather than of a judicial act. La Roe *v.* Roeser, 8 Mich. 537.

An unauthorized indeterminable sentence by a justice of the peace makes him liable. Danforth *v.* Classon, 21 Ill. App. 572.

As to distinction between ministerial and judicial duties see Reid *v.* Hood, 2 Nott & M. (S. C.) 168, 10 Am. Dec. 582; Rains *v.* Simpson, 50 Tex. 495, 32 Am. Rep. 609; Arberry *v.* Beavers, 6 Tex. 457, 55 Am. Dec. 791; General Land Office *v.* Smith, 5 Tex. 471.

23. A justice of the peace may be liable for unjustified refusal to accept recognizance for appeal (Guenther *v.* Whiteacre, 24 Mich. 504. *Compare* Kendall *v.* Powers, 4 Metc. (Mass.) 553) or failure to fix bail within a proper time (Cargill *v.* State, 8 Tex. App. 431). A magistrate has been held liable who permits the filing of an insufficient deposition (McKelvy *v.* Marsh, 63 N. Y. App. Div. 396, 71 N. Y. Suppl. 541. *Compare* Krauskopf *v.* Tallman, 170 N. Y. 561, 62 N. E. 1096 [*affirming* 38 N. Y. App. Div. 273, 56 N. Y. Suppl. 967]) or a defective complaint (Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758. But see *contra*, Clark *v.* Spicer, 6 Kan. 440; Bocock *v.* Cochran, 32 Hun (N. Y.) 521) upon which a warrant for arrest has been issued. He is liable for a conviction improperly framed (Newman *v.* Hardwicke, 8 A. & E. 124, 2 Jur. 493, 7 L. J. M. C. 101, 3 N. & P. 368, 1 W. W. & H. 284, 35 E. C. L. 512) or a warrant of commitment not stating an offense (Wickes *v.* Clutterbuck, 2 Bing. 483, 3 L. J. C. P. O. S. 67, 10 Moore C. P. 63, 27 Rev. Rep. 692, 9 E. C. L. 670).

24. Absence of summons is fatal to jurisdiction. Mitchell *v.* Foster, 12 A. & E. 472, 9 Dowl. P. C. 527, 9 L. J. M. C. 95, 4 P. & D. 150, 40 E. C. L. 238. But *compare* Ackerley *v.* Parkinson, 3 M. & S. 411, 16 Rev. Rep. 317.

25. If a mayor (Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423; Wilcox *v.* Williamson, 61 Miss. 310) or a justice (Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102; Poulk *v.* Slocum, 3 Blackf. (Ind.) 421; Wilcox *v.* Williamson, 61 Miss. 310; Welch *v.* Scott, 27 N. C. 72. But see *contra*, Maguire *v.* Hughes, 13 La. Ann. 281; Nowak *v.* Waller, 10 N. Y. Suppl. 199; Rogers *v.* Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546) commits a defendant without a complaint, or upon a complaint unmistakably and unequivocally void, as where it shows that the statute of limitation has run (Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758), or issues a warrant on the application of an unauthorized person (Wallsworth *v.* McCullough, 10 Johns. (N. Y.) 93), or without a required oath (Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200, search warrant; Lair *v.* Abrams, 5 Blackf. (Ind.) 191) and not on view (Kossouf *v.* Knarr, 206 Pa. St. 146, 55 Atl. 854) he is held liable. But the holding has been otherwise where it appeared that the justice acted in good faith and for what he believed to be the public good. Maguire *v.* Hughes, 13 La. Ann. 281; Rogers *v.* Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546.

Where a clerk of court issued a defective warrant the party promoting the proceeding was held liable. Bryan *v.* Condon, 86 Fed. 221, 29 C. C. A. 670.

26. Mistaken judgment of a justice as to what is a sufficient complaint (Pardee *v.* Smith, 27 Mich. 33; Vennum *v.* Huston, 38 Nebr. 293, 56 N. W. 970; Bocock *v.* Cochran, 32 Hun (N. Y.) 521; Campbell *v.* Ewalt, 7 How. Pr. (N. Y.) 399; Neall *v.* Hart, 115 Pa. St. 347, 8 Atl. 628, 2 Am. St. Rep. 559; Carter *v.* Dow, 16 Wis. 298) or affidavit (Gillett *v.* Thiebold, 9 Kan. 427; Harrison *v.* Clark, 4 Hun (N. Y.) 685) is not a basis for legal liability in the absence of malice (Dyer *v.* Smith, 12 Conn. 384; Garvin *v.* Blocker, 2 Brev. (S. C.) 157; Neale *v.* Minifie, 17 Fed. Cas. No. 10,070, 2 Cranch C. C. 16) or total want of jurisdiction (Wills *v.* Whittier, 45 Me. 544).

27. A justice who gives judgment for an amount in excess of that prescribed by statute and issues execution therefor is not liable. The judgment and execution are voidable only. Butler *v.* Potter, 17 Johns. (N. Y.) 145. Failure to take an examination of the complainant and to reduce it to writing creates no liability. Nowak *v.* Waller, 10 N. Y. Suppl. 199. A magistrate who commits a prisoner for reëxamination for an unreasonable length of time is liable. Davis *v.* Capper, 10 B. & C. 28, 21 E. C. L. 22.

28. Although a justice has erred in issuing a warrant of arrest for a criminal offense no action for false imprisonment can be maintained thereon. Campbell *v.* Ewalt, 7 How. Pr. (N. Y.) 399. A judge acts in judicial capacity in issuing a warrant and he is protected thereby, although it be defective or irregular. Heard *v.* Harris, 68 Ala. 43; Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224.

not void on its face[29] he is still exempt from liability in an action of false imprisonment.

3. WITHOUT THEIR JURISDICTION. Where the imprisonment is clearly *coram non judice*,[30] judges[31] generally[32] are responsible in damages for unlawful imprisonment wholly outside their duties and powers.[33] Their honesty of purpose is no defense as to actual damage.[34]

C. Municipal Corporations. The general rule exempting municipal corporations from liability in tort for conduct in performance of governmental functions resulting in damage to individuals[35] extends to improper arrests made under the police power by constables or police officers generally.[36]

29. Good faith in the judicial officer is no defense for an arrest on a warrant void on its face. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200; Wills *v.* Whittier, 45 Me. 544; La Roe *v.* Roeser, 8 Mich. 537; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468. The remedy of the person wrongfully arrested is against the magistrate who issued the warrant. Dews *v.* Riley, 11 C. B. 434, 15 Jur. 1159, 20 L. J. C. P. 264, 2 L. M. & P. 544, 73 E. C. L. 434; Clark *v.* Woods, 2 Exch. 395, 17 L. J. Exch. 189. Where a justice's warrant is directed to the officer designated by statute and also to another person the justice is not liable. Allec *v.* Reece, 39 Fed. 341. Nor do mere defects on the face of a mittimus render him liable. Heard *v.* Harris, 68 Ala. 43.

30. The want of jurisdiction must affirmatively appear on the face of the proceedings. Miller *v.* Grice, 1 Rich. (S. C.) 147; Touhey *v.* King, 9 Lea (Tenn.) 422. A magistrate is liable in trespass who orders a person accused of a criminal offense, without being brought before him, to be committed for examination on a subsequent day. Pratt *v.* Hill, 16 Barb. (N. Y.) 303.

31. There is no judicial capacity and no consequent protection. Warner *v.* Perry, 14 Hun (N. Y.) 337. And see Comfort *v.* Fulton, 13 Abb. Pr. (N. Y.) 276; Taylor *v.* Moffatt, 2 Blackf. (Ind.) 305; Truesdell *v.* Combs, 33 Ohio St. 186.

Justices of the peace are liable.

California.— De Courcey *v.* Cox, 94 Cal. 665, 30 Pac. 95.

Connecticut.— Dyer *v.* Smith, 12 Conn. 384 (where justice's power over the proceeding has terminated); Burlingham *v.* Wylee, 2 Root 152.

Kentucky.— Commitment by one justice, when power to commit is given to two justices, is void, and the justice lays himself open to action for damages. Revill *v.* Pettit, 3 Metc. 314. See also Stephens *v.* Wilson, 115 Ky. 27, 72 S. W. 336, 24 Ky. L. Rep. 1832.

Massachusetts.— Doggett *v.* Cook, 11 Cush. 262.

Michigan.— La Roe *v.* Roeser, 8 Mich. 537.

New York.— Birdsall *v.* Fuller, 11 Hun 204.

Ohio.— Truesdell *v.* Combs, 33 Ohio St. 186.

Wisconsin.— Heller *v.* Clarke, 121 Wis. 71, 98 N. W. 952; Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105. When justices of the peace act in cases where they have no jurisdiction, their proceedings are void and they become trespassers, and as such are liable to any persons injured by their acts. Heller *v.* Clark, *supra*, per Seibecker, J. See also Brosde *v.* Sanderson, 86 Wis. 368, 57 N. W. 49.

See 23 Cent. Dig. tit. "False Imprisonment," § 18 *et seq.*

Mayors of cities as presiding officers of city councils may be liable. Thompson *v.* Whipple, 54 Ark. 203, 15 S. W. 604; State *v.* McDaniel, 78 Miss. 1, 27 So. 994, 84 Am. St. Rep. 618, 50 L. R. A. 118; Wilcox *v.* Williamson, 61 Miss. 310.

Magistrates in general are liable. Sthreshley *v.* Fisher, Hard. (Ky.) 249; Kendall *v.* Powers, 4 Metc. (Mass.) 553; Pratt *v.* Hill, 16 Barb. (N. Y.) 303; Miller *v.* Grice, 1 Rich. (S. C.) 147.

32. *Arkansas.*— Vanderpool *v.* State, 34 Ark. 174.

California.— De Courcey *v.* Cox, 94 Cal. 665, 30 Pac. 95.

Massachusetts.— Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438.

New York.— Bigelow *v.* Stearns, 19 Johns. 39, 10 Am. Dec. 189; Smith *v.* Shaw, 12 Johns. 257.

Vermont.— Goodell *v.* Tower, (1904) 58 Atl. 790.

United States.— Allec *v.* Reece, 39 Fed. 341.

England.— Watson *v.* Bodell, 9 Jur. 626, 14 L. J. Exch. 281, 14 M. & W. 57, a bankruptcy commissioner.

See 23 Cent. Dig. tit. "False Imprisonment," § 18 *et seq.*

33. As by causing an arrest of a person beyond jurisdiction (Reynolds *v.* Orvis, 7 Cow. (N. Y.) 269; Robinson *v.* Dow, 20 Fed. Cas. No. 11,950, 1 Hayw. & H. 239), or after expiration of a term of office, although in good faith (Grace *v.* Teague, 81 Me. 559, 18 Atl. 289), or committing for contempt of court after final disposition of case (Clarke *v.* May, 2 Gray (Mass.) 410, 61 Am. Dec. 470), or inflicting an unauthorized indeterminate sentence (Danforth *v.* Classen, 21 Ill. App. 572), or causing arrest under an unconstitutional statute (Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50), but not under invalid ordinance (Henke *v.* McCord, 55 Iowa 378, 7 N. W. 623).

34. De Courcey *v.* Cox, 94 Cal. 665, 30 Pac. 95; Glazar *v.* Hubbard, 102 Ky. 68, 42 S. W. 1114, 19 Ky. L. Rep. 1025, 80 Am. St. Rep. 340, 39 L. R. A. 210; Truesdell *v.* Combs, 33 Ohio St. 186.

35. See, generally, MUNICIPAL CORPORATIONS.

36. Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1; Perley *v.* Georgetown, 7 Gray

VII. PERSONS IMPRISONED.

A. Persons Non Compotes Mentis. Private persons[37] and officers of the law[38] having reason to believe that another person is so far disordered in his mind as to be dangerous to himself or to others,[39] although not guilty of a crime,[40] are justified in filing an information for his detention[41] or in imposing reasonable restraint upon him,[42] where they act conscientiously, although mistakenly, but not where they are guilty of malice or gross negligence.[43] Valid but not void judicial process is protection for the arrest of a lunatic.[44] In the absence of such justification persons participating in his wrongful detention are liable in damages.[45]

B. Persons Privileged From Arrest. At common law an action for false imprisonment does not lie for the arrest of a privileged person,[46] even where the

(Mass.) 464 (arrest for non-payment of taxes); Woodhull *v.* New York, 150 N. Y. 450, 44 N. E. 1038 [*reversing* 76 Hun 390, 28 N. Y. Suppl. 120]; Trescott *v.* Waterloo, 26 Fed. 592.

A town is not liable for the wrongful act of its constable in imprisoning a person on a verbal order of a police magistrate for non-payment of a fine imposed for the breach of a town ordinance. Odell *v.* Schroeder, 58 Ill. 353. But see Worley *v.* Columbia, 88 Mo. 106, where, however, a declaration in false imprisonment against a town was held defective.

37. Acting reasonably on a physician's advice. Emmerich *v.* Thorley, 35 N. Y. App. Div. 452, 54 N. Y. Suppl. 791.

38. Such cases are governed by the same principles which apply to cases of arrest on probable cause without process. Paetz *v.* Dain, Wils. (Ind.) 149. And see *infra*, VIII, C, 4.

39. Look *v.* Dean, 108 Mass. 116, 11 Am. Rep. 323. *Compare* Johnston *v.* Given, 14 Wkly. Notes Cas. (Pa.) 326.

Breach of the peace by an insane person would justify his arrest. Paetz *v.* Dain, Wils. (Ind.) 148.

40. Lott *v.* Sweet, 33 Mich. 308.

41. Dougherty *v.* Snyder, 97 Mo. App. 495, 71 S. W. 463; Oakes *v.* Oakes, 55 N. Y. App. Div. 576, 67 N. Y. Suppl. 427; Mulherry *v.* Fuellhart, 203 Pa. St. 573, 53 Atl. 504.

42. Colby *v.* Jackson, 12 N. H. 526. See also Brookshaw *v.* Hopkins, Lofft. 240. But the detention must be for a reasonable time only until proper legal proceedings can be had. Colby *v.* Jackson, *supra*, holding also that persons failing to return an inquisition are liable as trespassers *ab initio*.

43. Roth *v.* Smith, 41 Ill. 314; Seeger *v.* Pfeifer, 35 Ind. 13; Hurlehy *v.* Martine, 10 N. Y. Suppl. 92 (physicians held liable); Hinchman *v.* Richie, Brightly (Pa.) 143; Hindman *v.* Hutchinson, 30 Pittsb. Leg. J. (Pa.) 422. As to criminal conspiracy see Com. *v.* Sheriff, 8 Phila. (Pa.) 645; and *infra*, p. 376 note 7.

44. Dougherty *v.* Snyder, 97 Mo. App. 495, 71 S. W. 463; Washer *v.* Slater, 67 N. Y. App. Div. 385, 73 N. Y. Suppl. 425; Emmerich *v.* Thorley, 35 N. Y. App. Div. 452, 54 N. Y. Suppl. 791. For analogous cases see Page *v.* Citizens Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463; Coupal *v.* Ward, 106 Mass. 289; Schultz *v.* Huebner, 108 Mich. 274, 66 N. W. 57; Bryan *v.* Stewart, 123 N. C. 92, 31 S. E. 286.

Bona fide mistake of law in an examination of a person supposedly insane is no justification to an officer in discharge of public duty. Sinclair *v.* Broughton, 47 L. T. Rep. N. S. 170.

45. Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968. But one who hired his team to a constable and drove the latter and the alleged lunatic to an asylum without in any way aiding in the arrest or participating otherwise than by driving the team was held not liable. Williams *v.* Williams, 4 Thomps. & C. (N. Y.) 251.

46. A peer.— Tarlton *v.* Fisher, Dougl. (3d ed.) 671, per Buller, J.

Witness returning from court.— Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598 (neither the officer nor the party to the process is liable); Carle *v.* Delesdernier, 13 Me. 363, 29 Am. Dec. 508 (officer not liable); Kreiser *v.* Scofield, 10 Misc. (N. Y.) 350, 31 N. Y. Suppl. 23 (neither the party nor his attorney is liable). A statute authorizing an action in such a case "against the officer or person making the arrest" imposes no liability upon a party or his attorney, at least where they did not suggest or contemplate the arrest of the witness while protected by his privilege; and moreover an action will be treated as one at common law unless it is properly shown in the pleadings or proceedings that plaintiff counts upon the statute. Kreiser *v.* Scofield, *supra*.

Witness attending court.— Moore *v.* Chapman, 3 Hen. & M. (Va.) 260; Magnay *v.* Burt, 5 Q. B. 381, 2 Dav. & M. 652, 7 Jur. 1116, 48 E. C. L. 381, officer not liable. See also Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922.

Suitor attending in or returning from court. — Cameron *v.* Lightfoot, 2 Wm. Bl. 1190. In a *qui tam* action on a statute forbidding the arrest of a suitor attending in court or while going to or returning from court, it was held that a party who procured a capias to be issued and delivered to a constable with a general direction to arrest was not liable for arrest in violation of the statute when he did not know or have good reason to know that defendant in the capias was at the time

privilege from arrest is conferred by statute.[47] His remedy is by motion for his discharge or by habeas corpus.[48]

VIII. DEFENSES.

A. Conventional — 1. Waiver and Estoppel. A plaintiff in an action for false imprisonment may be unable to recover damages because of his own conduct by waiving his rights, or by so conducting himself as to be estopped from seeking judgment for an unlawful detention.[49] There can be no recovery of damages by any person who in any way causes[50] or consents to his own arrest[51] or who acquiesces in its irregularities.[52] The party arrested cannot complain of the con-

a suitor and so privileged from arrest. Sewell *v.* Lane, Smith (Ind.) 167.

47. **Infant.**— Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922.

Married woman.— Winchester *v.* Everett, 80 Me. 535, 15 Atl. 596, 6 Am. St. Rep. 228, 1 L. R. A. 425, the process describing her as a single woman. But see O'Boyle *v.* Brown, Wright (Ohio) 465.

Resident citizen exempt by statute, but no liability for his arrest. Wright *v.* Hazen, 24 Vt. 143, the process describing him as a non-resident.

Discharged bankrupt or insolvent.— Ewart *v.* Jones, 3 D. & L. 252, 15 L. J. Exch. 18, 14 M. & W. 774. See also Wood *v.* Kinsman, 5 Vt. 588; Yearsley *v.* Heane, 3 D. & L. 265, 14 M. & W. 322; Tarlton *v.* Fisher, Dougl. (3d ed.) 671. *Contra*, Deyo *v.* Van Valkenburgh, 5 Hill (N. Y.) 242.

Cases of liability.— Where a statute abolished imprisonment for debt, persons causing another to be arrested on execution were held liable. Bracket *v.* Eastman, 17 Wend. (N. Y.) 32. In Percival *v.* Jones, 2 Johns. Cas. (N. Y.) 49, it was held that a plaintiff who should procure an execution or a justice who should issue it without request would be liable for the arrest under it of a person having a family and who was not a freeholder. Where a statute expressly forbade the arrest of a person already under prior arrest, it was held not to be a case of personal privilege, and the party causing a second arrest and the officer making the arrest were liable for false imprisonment. Love *v.* Humphrey, 9 Wend. (N. Y.) 204.

48. Smith *v.* Jones, 76 Me. 138, 49 Am. Rep. 598; Chase *v.* Fish, 16 Me. 132.

49. As to waiver of all but compensatory damages see Holmes *v.* Blyler, 80 Iowa 365, 45 N. W. 756. Motive of plaintiff in committing the wrongful act for which he was unlawfully arrested is, however, immaterial. Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109. And provocation by plaintiff is no defense. Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127. Return of money coerced from plaintiff by his illegal arrest does not preclude him from recovering damages. Catlin *v.* Pond, 6 N. Y. St. 762.

50. Allen *v.* Gleason, 4 Day (Conn.) 376 (refusal of property-owner to turn out his property to pay tax and avoid arrest); Williams *v.* Powell, 101 Mass. 467, 2 Am. Rep. 396 (officer's own fault in not removing books attached, resulting in his being locked in attorney's office); Edmundson *v.* Frean, 2 Hill (S. C.) 410 (if a warrant, alleged to be illegal, was placed in the hands of an officer at the request of a person against whom it was issued it is no imprisonment); Ellis *v.* Cleveland, 54 Vt. 437 (wrong place of confinement at prisoner's request). See also *supra*, IV, B, 2, c.

51. As by giving bail in case of arrest on voidable process instead of moving to set aside the process (Neimitz *v.* Conrad, 22 Oreg. 164, 29 Pac. 548), by voluntarily remaining in custody, even under a mistaken view of legal conclusions (Warne *v.* Constant, 4 Johns. (N. Y.) 32. See also Moses *v.* Dubois, Dudley (S. C.) 209; Kibling *v.* Clark, 53 Vt. 379), by submitting to examination by a magistrate (Carleton *v.* Akron Sewer Pipe Co., 129 Mass. 40), by paying a penalty rather than standing trial (Twilley *v.* Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632), or by request for discharge, where the ground of complaint is that plaintiff was not taken before a court (Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899). Acceptance of discharge may operate as a waiver (Mulherry *v.* Fuellhart, 203 Pa. St. 573, 53 Atl. 504), but not invariably (Stewart *v.* Feeley, 118 Iowa 524, 92 N. W. 670). But to constitute consent to arrest there must be more than a forced appearance before the court (Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955; Buzzell *v.* Emmerton, 161 Mass. 176, 36 N. E. 796), or pleading not guilty (Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Kendall *v.* Powers, 4 Metc. (Mass.) 553; Blythe *v.* Tompkins, 2 Abh. Pr. (N. Y.) 468; Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831. But see Jones *v.* Foster, 43 N. Y. App. Div. 33, 59 N. Y. Suppl. 738), or pleading guilty (McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906), or his attorney's stipulation for postponement (Arteaga *v.* Conner, 46 N. Y. Super. Ct. 91).

52. As by appearing and failing to plead misnomer in execution (Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456), or to object to want of affidavit or warrant (Williamson *v.* Wilcox, 63 Miss. 335. And see Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899; Caffrey *v.* Drugan, 144 Mass. 294, 11 N. E. 96), or by voluntary appearance and plea (Jones *v.* Foster, 43 N. Y. App. Div. 33, 59 N. Y. Suppl. 738. And see Neimitz *v.* Con-

tinuance of a lawful detention occasioned by his own neglect[53] or his incapacity on account of drunkenness or by his own conduct generally.[54]

2. Satisfaction. That the party complaining has been paid in full[55] or that his conduct amounted to a settlement[56] is a full defense to an action for false imprisonment.

3. Statute of Limitations. The time within which an action for false imprisonment may be brought is governed by the statutes of limitation of the several states.[57] It begins to run as soon as the imprisonment ceases,[58] not from the date of imprisonment.[59] The action is barred at the expiration of the period prescribed by the statute, although the proceedings in which the arrest took place be continued within the prescribed time.[60]

B. Judicial Authority — 1. Valid Authority — a. Justification by. An action for false imprisonment does not lie for an imprisonment in due course on regular proceedings of a court having jurisdiction of the offense.[61] If the order or process be valid, the person wrongfully detained must seek his remedy in some other form of action.[62] It is the proper commandment of judicial authority which justifies; the form in which the sanctioning power of the law is manifested is not material.[63] A legally correct and sufficient order of a superior having

rad, 22 Oreg. 164, 29 Pac. 548; Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765 (failure to offer any security for appearance at appointed time).

53. Hayes *v.* Mitchell, 69 Ala. 452.

54. Pepper *v.* Mayes, 81 Ky. 673; Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376; Hays *v.* Creary, 60 Tex. 445. A person arrested cannot complain of what is done at his own request. Richardson *v.* Dybebahl, 14 S. D. 126, 84 N. W. 486, as to the magistrate before whom he is taken. If an officer gives an arrested person the alternative of paying a certain sum as a penalty or of going to jail instead of taking him to a committing magistrate the officer is liable to the extent of the custody, but if the arrested person pays the penalty prescribed rather than stand trial he cannot complain. Twilley *v.* Perkins, 77 Md. 252, 26 Atl. 286, 39 Am. St. Rep. 408, 19 L. R. A. 632. But refusal to surrender an infant (Monjo *v.* Monjo, 53 Hun (N. Y.) 145, 6 N. Y. Suppl. 132) or to answer questions (Rutherford *v.* Holmes, 66 N. Y. 368 [*affirming* 5 Hun 317]) is not an estoppel.

Failure to prosecute does not convert an arrest into a trespass *ab initio* where the prisoner consents to his discharge and the termination of the proceedings. Mulberry *v.* Fuellhart, 203 Pa. St. 573, 50 Atl. 504.

55. Stone *v.* Dickinson, 7 Allen (Mass.) 26. See Accord and Satisfaction, 1 Cyc. 305; and, generally, Release. But a release obtained by fraud is no defense. Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

56. Caffrey *v.* Drugan, 144 Mass. 294, 11 N. E. 96; Phillips *v.* Fadden, 125 Mass. 198. Although the party has been discharged on the condition of bringing no action for trespass that does not preclude an action on the case. Macfarlane *v.* Ellis, 1 F. & F. 288.

Assignment of a cause of action for false imprisonment to a third person is no defense. Chapman *v.* Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598.

57. See Huggins *v.* Toler, 1 Bush (Ky.) 192; Oakes *v.* Oakes, 55 N. Y. App. Div. 576, 67 N. Y. Suppl. 427; Vaughn *v.* Congdon, 56 Vt. 111, 48 Am. Rep. 758; and, generally, Limitations of Actions. The action must be brought within the time prescribed for that specific wrong, notwithstanding other statutes prescribing some different period within which actions may be brought against certain classes of persons for misfeasance in office. Trask *v.* Wadsworth, 78 Me. 336, 5 Atl. 182; Sibley *v.* Estabrook, 4 Gray (Mass.) 295.

58. The cause of action is complete when a prisoner is released from actual custody, as by giving bond, and limitations run from that time (Dusenbury *v.* Keiley, 8 Daly (N. Y.) 537, 58 How. Pr. 286 [*affirmed* in 85 N. Y. 383, 61 How. Pr. 408]), or where a person arrested gives certain notes payable at different times, and upon the execution of the notes is released, the statute of limitations runs from time of release, not from time of payment of the last note (Pratt *v.* Page, 18 Wis. 337).

59. Van Ingen *v.* Snyder, 24 Hun (N. Y.) 81.

60. Dusenbury *v.* Keiley, 8 Daly (N. Y.) 537, 58 How. Pr. 286. As to distinction between this action and malicious prosecution see *infra*, IX.

61. Jeffries *v.* McNamara, 49 Ind. 142; Poulk *v.* Slocum, 3 Blackf. (Ind.) 421; Finley *v.* St. Louis Refrigerator, etc., Co., 99 Mo. 559, 13 S. W. 87.

62. Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215. See, generally, Malicious Prosecution; and as to malicious abuse of process see, generally, Process.

63. *Massachusetts.*— Nichols *v.* Thomas, 4 Mass. 232.

Nebraska.— Miller *v.* Wood, 23 Nebr. 200, 36 N. W. 483.

New Jersey.— Jennings *v.* Thompson, 54 N. J. L. 55, 22 Atl. 1008.

Ohio.— Pickard *v.* Bills, Wright 344, capias ad satisfaciendum.

Vermont.— Nason *v.* Sewall, Brayt. 119.

adequate authority,[64] or a judgment authorizing imprisonment[65] or process,[66] properly sued out,[67] and issued by proper authority,[68] so long as it remains in legal force and effect[69] is a full justification.

b. Justification For Whom. Valid judicial authority existing at the time of the detention[70] is a full justification for proper conduct thereunder[71] to the officer to whom it is addressed;[72] in the absence of actionable wrong in its pro-

United States.— Barnes *v.* Viall, 6 Fed. 661; Devlin *v.* Gibbs, 7 Fed. Cas. No. 3,842, 4 Cranch C. C. 626, an execution.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

64. *Indiana.*— Johnston *v.* Vanamringe, 5 Blackf. 311, in extradition proceedings.

Massachusetts.— Hubbard *v.* Garfield, 102 Mass. 72, in tax proceedings.

New York.— Fischer *v.* Langbein, 103 N. Y. 84, 8 N. E. 251 [*affirming* 13 Abb. N. Cas. 10, 65 How. Pr. 382 (*affirming* 10 Abb. N. Cas. 128, 62 How. Pr. 238)]; Arteaga *v.* Conner, 88 N. Y. 403 [*affirming* 47 N. Y. Super. Ct. 494] (order by sheriff to jailer on failure of bail); Rutherford *v.* Holmes, 66 N. Y. 368; Miller *v.* Adams, 7 Lans. 131 [*affirmed* in 52 N. Y. 409] (commitments for contempt); Hall *v.* Munger, 5 Lans. 100 (order of arrest by justice of supreme court); Lewis *v.* Penfield, 39 How. Pr. 490. And see Nebenzahl *v.* Townsend, 10 Daly 232 (second arrest under the act of 1831, abolishing imprisonment for debt); Dresser *v.* Van Pelt, 15 How. Pr. 19 (in supplementary proceedings against a judgment debtor).

North Carolina.— Furr *v.* Moss, 52 N. C. 525, to preserve order in court.

Texas.— Giroux *v.* State, 40 Tex. 97, to preserve order at polling booth.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

65. Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922; Hallock *v.* Dominy, 69 N. Y. 238; Allison *v.* Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644 (a capias); Johnson *v.* Morton, 94 Mich. 1, 53 N. W. 816 (notwithstanding subsequent reversal for error); Fischer *v.* Langbein, 103 N. Y. 84, 8 N. E. 251 [*affirming* 13 Abb. N. Cas. 10, 65 How. Pr. 382 (*affirming* 10 Abb. N. Cas. 128, 62 How. Pr. 238)]; Simpson *v.* Hornbeck, 3 Lans. (N. Y.) 53; Vredenburgh *v.* Hendricks, 17 Barb. (N. Y.) 179.

66. *Georgia.*— Page *v.* Citizens' Banking Co., 111 Ga. 73, 36 S. E. 418, 78 Am. St. Rep. 144, 51 L. R. A. 463.

Indiana.— Davis *v.* Bush, 4 Blackf. 330 (a capias); Hawkins *v.* Johnson, 3 Blackf. 46 (a mittimus).

Massachusetts.— Coupal *v.* Ward, 106 Mass. 289.

Michigan.— Tryon *v.* Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 398, 37 L. R. A. 222; Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160.

Nebraska.— Kelsey *v.* Klabunde, 54 Nebr. 760, 74 N. W. 1099.

New Jersey.— Hann *v.* Lloyd, 50 N. J. L. 1, 11 Atl. 346, writs generally.

New York.— Love *v.* Humphrey, 9 Wend. 204, a precept.

Vermont.— Kent *v.* Miles, 68 Vt. 48, 33 Atl. 768.

West Virginia.— Tavenner *v.* Morehead, 41 W. Va. 116, 23 S. E. 673.

United States.— Carman *v.* Emerson, 71 Fed. 264, 18 C. C. A. 38, a warrant.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

Process in ne exeat proceedings see Scoggan *v.* Taylor, 13 Ark. 380; Bonesteel *v.* Bonesteel, 30 Wis. 511.

But an injunction does not attempt to secure obedience to commanded restraint by arrest and imprisonment by the officer serving it. Davis *v.* Wilson, 65 Ill. 525.

As to presumption of legality see Snow *v.* Weeks, 75 Me. 105; Love *v.* Wood, 55 Mich. 451, 21 N. W. 887; Scott *v.* Ely, 4 Wend. (N. Y.) 555.

67. Joiner *v.* Ocean Steamship Co., 86 Ga. 238, 12 So. 361; Hubbard *v.* Garfield, 102 Mass. 72; Warner *v.* Shed, 10 Johns. (N. Y.) 138; Whitten *v.* Bennett, 77 Fed. 271.

68. Leib *v.* Shelby Iron Co., 97 Ala. 626, 12 So. 67; Finley *v.* St. Louis Refrigerator, etc., Co., 99 Mo. 559, 13 S. W. 87; Stanton *v.* Schell, 3 Sandf. (N. Y.) 323.

69. Stoyel *v.* Lawrence, 23 Fed. Cas. No. 13,517, Brunn. Col. Cas. 311, 3 Day (Conn.) 1. An execution after the expiration of the time within which it was made returnable is of no more force, and an officer is liable for an arrest made under it. Stoyel *v.* Lawrence, 23 Fed. Cas. No. 13,517, Brunn. Col. Cas. 311, 3 Day (Conn.) 1. See also Adams *v.* Freeman, 9 Johns. (N. Y.) 117.

70. Strong *v.* Ives, 1 Root (Conn.) 388; Stoyel *v.* Lawrence, 23 Fed. Cas. No. 13,517, Brunn. Col. Cas. 311, 3 Day (Conn.) 1. See *supra*, note 69. Process has been held to justify, although the officer did not know of its existence (Meeds *v.* Carver, 30 N. C. 298. But see *contra*, Gordon *v.* Hogan, 114 Ga. 354, 40 S. E. 229) and did not have it in his possession (Cabell *v.* Arnold, 86 Tex. 102, 23 S. W. 645, 22 L. R. A. 87), but not when he merely supposed he had it when in fact there was none (Hall *v.* O'Malley, 49 Tex. 70).

71. See cases cited in the following notes.

72. *Arkansas.*— Trammell *v.* Russellville, 34 Ark. 105, 36 Am. Rep. 1; Floyd *v.* State, 12 Ark. 43, 44 Am. Dec. 250.

Connecticut.— Neth *v.* Crofut, 30 Conn. 580.

Georgia.— Joiner *v.* Ocean Steamship Co., 86 Ga. 238, 12 S. E. 361.

Illinois.— Ressler *v.* Peats, 86 Ill. 275; Davis *v.* Wilson, 65 Ill. 525.

Kentucky.— Clay *v.* Caperton, 1 T. B. Mon. 10, 15 Am. Dec. 77.

Maine.— Nowell *v.* Tripp, 61 Me. 426, 14 Am. Rep. 572; Chase *v.* Fish, 16 Me. 132.

curement[73] on his part,[74] even if he acts maliciously.[75] Such authority also justifies the person procuring the arrest to be made,[76] and persons assisting officers of the law in the proper execution of process[77] in his hands,[78] and magistrates issuing the process.[79]

c. Conduct Under — (I) *EXECUTION.* The immunity from liability extends to every act within a fair construction of the authority[80] which is done necessarily,[81] and without undue violence[82] in its execution,[83] upon the party named

Massachusetts.— Bergin *v.* Hayward, 102 Mass. 414; Wilmarth *v.* Burt, 7 Metc. 257; Sturbridge *v.* Winslow, 21 Pick. 83. See Coupal *v.* Ward, 106 Mass. 289.

New Hampshire.— Keniston *v.* Little, 30 N. H. 318, 64 Am. Dec. 297.

New York.— Marx *v.* Townsend, 97 N. Y. 590; Welsh *v.* Cochran, 63 N. Y. 181, 20 Am. Rep. 519; Hill *v.* Haynes, 54 N. Y. 153; Landt *v.* Hilts, 19 Barb. 283; Kreiser *v.* Schofield, 10 Misc. 350, 31 N. Y. Suppl. 23; Deyo *v.* Van Valkenburg, 5 Hill 242; Savacool *v.* Boughton, 5 Wend. 170, 21 Am. Dec. 181.

Pennsylvania.— Allison *v.* Rheam, 3 Serg. & R. 139, 8 Am. Dec. 644.

Utah.— Clinton *v.* Nelson, 2 Utah 284.

United States.— Erskine *v.* Hohnback, 14 Wall. 613, 20 L. ed. 745; Palmer *v.* Allen, 7 Cranch 550, 3 L. ed. 436; Whittan *v.* Bennett, 77 Fed. 271; Barnes *v.* Viall, 6 Fed. 661, a jailer.

England.— Belk *v.* Broadbent, 3 T. R. 183. And see Henderson *v.* Preston, 21 Q. B. D. 362, 52 J. P. 820, 57 L. J. Q. B. 607, 36 Wkly. Rep. 834 [*affirming* 59 L. T. Rep N. S. 334] (a governor of a prison protected by a warrant regular on its face); Tarlton *v.* Fisher, Dougl. (3d ed.) 471.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

When no justification.—Legal process is no justification to a person not therein authorized to arrest. American Express Co. *v.* Patterson, 73 Ind. 430 (warrant to any constable does not justify a special constable); Wells *v.* Jackson, 3 Munf. (Va.) 458 (a person not named in warrant and not a sworn officer). And only *de jure* officers are protected. Pooler *v.* Reed, 73 Me. 129.

73. Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786, officer and prosecutor and all other persons concerned in a conspiracy are not protected by writ. But see Carman *v.* Emerson, 71 Fed. 264, 18 C. C. A. 38.

74. An officer acting under process regular in form, based on a proper indictment of record, is not liable because the grand jury made a mistake in finding the indictment. Whitten *v.* Bennett, 77 Fed. 271. An officer may be protected by valid process, although the person who sued it out improperly may be responsible. Allison *v.* Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644.

75. Mullen *v.* Brown, 138 Mass. 114 (issued for a wrongful purpose); Regan *v.* Jessup, (Tex. Civ. App. 1903) 77 S. W. 972. See also Sleight *v.* Ogle, 4 E. D. Smith (N. Y.) 445. But *compare* Hackett *v.* King, 6 Allen (Mass.) 58.

76. Floyd *v.* State, 12 Ark. 43, 44 Am. Dec. 250.

77. Dehm *v.* Heiman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374 (notwithstanding subsequent misconduct of the officer); Maguire *v.* Hughes, 13 La. Ann. 281; Henry *v.* Lowell, 16 Barb. (N. Y.) 268; Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679. Evidence that some of defendants had been summoned by the constable to assist in executing the process has been held inadmissible, where the process was a warrant to arrest A, and it was executed by arresting B. Barnette *v.* Hicks, 6 Tex. 352. *Contra,* McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665, holding that persons called on to assist were protected, although the officer was arresting a person with a different name.

78. Maguire *v.* Hughes, 13 La. Ann. 281; Henry *v.* Lowell, 16 Barb. (N. Y.) 268.

79. See *supra,* VI, B.

80. Including any subsequent orders. Coffin *v.* Gardner, 1 Gray (Mass.) 159. "A person who has arrested a party without process, or on void process, wrongfully, cannot detain him on valid process, until he has restored such party to the condition he was in at time of his arrest, at least to his liberty." Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99, 102, per Smith, J.

81. An officer is liable for arresting the person of a judgment debtor when he has property openly and visibly in possession subject to levy. Blakely *v.* Weaver, 10 N. Y. St. 793.

82. An officer is not justified in forcibly breaking an outer door of plaintiff's dwelling in order to arrest him on civil process. Stedman *v.* Crane, 11 Metc. (Mass.) 295.

Bail arresting his principal is liable for false imprisonment if guilty of unnecessary violence. Pease *v.* Burt, 3 Day (Conn.) 485.

Evidence of violence of a mob committed in parts adjacent, although out of view of plaintiff in his home, if they appeared to be connected with the same purpose as actuated those about the house, was held to be admissible to show the danger and difficulty of executing a warrant by force against plaintiff in his own house, and thus to justify the amount of force used in the lawful execution of the warrant. Burdett *v.* Colman, 14 East 163, 12 Rev. Rep. 478.

83. Dehm *v.* Heinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Hann *v.* Lloyd, 50 N. J. L. 1, 11 Atl. 346. Refusal to show the warrant to an arrested person may destroy its effect as justification. Frost *v.* Thomas, 24 Wend. (N. Y.) 418. But refusal of an arresting officer to go with the person ar-

therein[84] within the jurisdiction,[85] by taking him before a magistrate therein named,[86] or by confining him in the proper place[87] and for the time[88] fixed by law.

(II) *Arrest of Wrong Person.* If the wrong person be arrested, although he was the person against whom the process was intended to be issued,[89] unless because of his own fault,[90] *prima facie* the officer making the arrest is liable, notwithstanding an innocent mistake.[91] The liability of him who started the law in motion depends primarily upon his participation in the arrest. If because of mistaken resemblance he personally directs the arrest of the wrong person he is liable for false imprisonment.[92]

(III) *Rearrest.* The unauthorized discharge,[93] or the escape,[94] or voluntary

rested to see parties to go on his bail is not illegal. Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215.

84. Hubbard *v.* Garfield, 102 Mass. 72. Arrest of a director of a corporation on an execution against the corporation is not justified. Nichols *v.* Thomas, 4 Mass. 232. But see Richmond *v.* Willis, 13 Gray (Mass.) 182. Justification has been extended to an officer who according to his precept arrests a person privileged from arrest. Chase *v.* Fish, 16 Me. 132 (a state senator); Carle *v.* Delesdernier, 13 Me. 363, 29 Am. Dec. 508; Tarlton *v.* Fisher, Dougl. (3d ed.) 671. See also *supra*, VII, B.

85. An arrest in one county under a warrant issued by a justice of the peace in another county is unjustified. Krug *v.* Ward, 77 Ill. 603; Francisco *v.* State, 24 N. J. L. 30; Green *v.* Rumsey, 2 Wend. (N. Y.) 611. Unless the party arrested has fled from the proper county both the officer and the person procuring the writ are liable. Krug *v.* Ward, *supra*, a case of a criminal warrant. Warrant is no justification for arrest in an intermediate county of a person being taken from one place to another place under legal process. Love *v.* Humphrey, 9 Wend. (N. Y.) 204.

86. Stetson *v.* Packer, 7 Cush. (Mass.) 562.

87. Commitment in a different county (Clayton *v.* Scott, 45 Vt. 386, mandate to commit in another county no defense; Green *v.* Rumsey, 2 Wend. (N. Y.) 611), or removal to a state other than the one in which the crime was committed (Burlingham *v.* Wylee, 2 Root (Conn.) 152. See also Mandeville *v.* Guernsey, 51 Barb. (N. Y.) 99) in the absence of a common-law justification, as for purposes of examining into identity (Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. *Compare* Green *v.* Rumsey, *supra*) or at prisoner's own request (Ellis *v.* Cleveland, 54 Vt. 437) or under a statute authorizing the removal (Barclay *v.* Goodale, 2 Fed. Cas. No. 972) creates liability. As to proper place of confinement of prisoners by United States marshals see Clinton *v.* Nelson, 2 Utah 284.

88. When the time of detention is fixed by statute, detention for a longer time creates responsibility for false imprisonment. Barclay *v.* Goodale, 2 Fed. Cas. No. 972. A custodian may be held responsible as a trespasser for failure to let a prisoner go when he is entitled to his discharge. Mee *v.* Cruikshank, 20 Cox C. C. 210, 66 J. P. 89, 86 L. T. Rep. N. S. 708; Withers *v.* Henley, Cro. Jac. 379. *Compare* Migotti *v.* Colvill, 4 C. P. D. 233, 14 Cox C. C. 305, 48 L. J. C. P. 695, 40 L. T. Rep. N. S. 747, 27 Wkly. Rep. 744.

89. Melvin *v.* Fisher, 8 N. H. 406; Griswold *v.* Sedgwick, 6 Cow. (N. Y.) 456; Scheer *v.* Keown, 29 Wis. 586; Carridge *v.* Lautour, 7 L. J. K. B. O. S. 33. And although the name be similar. Clark *v.* Winn, 19 Tex. Civ. App. 223, 46 S. W. 915. See also Tellefsen *v.* Fee, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481.

90. As by his misrepresentations. Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376; Hays *v.* Creary, 60 Tex. 445.

91. Ryburn *v.* Moore, 72 Tex. 85, 10 S. W. 393; Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376; Hays *v.* Creary, 60 Tex. 445; Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001. The rule is the same in case of arrest of the wrong person having the same name as the person whose arrest is authorized, and *a fortiori* this is the rule where the person arrested wrongfully is taken into another county. Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. A sheriff arresting the wrong person on description furnished by the sheriff of another county having a warrant is liable. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

92. Maliniemi *v.* Gronlund, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576. But he is not responsible for the mistake of the clerk of his attorney, who procured the writ, in identifying the person arrested (Gearon *v.* Savings Bank, 50 N. Y. Super. Ct. 264, 6 N. Y. Civ. Proc. 207), nor for error of the arresting officer in failing to arrest only "vile and improper persons" as directed by the court (Briggs *v.* Berls, 2 N. Y. City Ct. 171), nor for the error of a justice in issuing a writ against the body of the wrong person who was discharged on complainant's motion (Taylor *v.* Trask, 7 Cow. (N. Y.) 249).

Assisting a known officer, upon request, may, however, justify even if the officer mistakes the person to be arrested. McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665.

93. Letcher *v.* Crandell, 18 Tex. Civ. App. 62, 44 S. W. 197. *Compare* Gaines *v.* Newbrough, 12 Tex. Civ. App. 466, 34 S. W. 1048; Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

94. Strong *v.* Ives, 1 Root (Conn.) 388, warrant. Even if effected without the restrictions imposed on his original arrest, as where, although the original writ was civil

release by the officer[95] of the person in custody does not prevent justification upon rearrest while the legal authority is still in force. When the original authority has been legally terminated a second imprisonment is justified only[96] by subsequent valid process.[97]

2. Void Process. Written authority to detain resulting from any judicial proceeding void on its face[98] is no protection to the justice issuing it,[99] to the officer executing it,[1] to persons instrumental in procuring its issuance,[2] or to persons assisting officers in its execution[3] or participating therein.[4]

process the rearrest was on Sunday (Anonymous, 6 Mod. 231), or by breaking an outer door in fresh pursuit (Genner *v.* Sparks, 6 Mod. 173, 1 Salk. 79, Foster C. C. 320), or where the person was privileged from original arrest (*Ex p.* Lyne, 3 Stark. 132, 3 E. C. L. 624). And the same rule applies where bail arrests his principal. Anonymous, *supra* (on Sunday); *Ex p.* Lyne, 3 Stark. 132, 3 E. C. L. 624 (witness taken by bail on returning from court).

Before actual default by sureties a rearrest by the sheriff was held to be without justification. Arteaga *v.* Conner, 46 N. Y. Super. Ct. 91.

95. Langdon *v.* Chittington, 2 Root (Conn.) 133 (final process); Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115 (mesne process). After arrest on mesne process and voluntary escape rearrest is justified. See Arrest, 3 Cyc. 974. The authorities are in conflict as to whether the same rule applies to final process. See Executions, 17 Cyc. 1569, 1570. Allowance of reasonable liberty does not constitute a voluntary escape. Butler *v.* Washburn, 25 N. H. 251. See also Stevens *v.* Manson, 87 Me. 436, 32 Atl. 1002.

96. Where a prisoner arrested on a warrant has been discharged he cannot be rearrested on the same warrant. Doyle *v.* Russell, 30 Barb. (N. Y.) 300; Bagnall *v.* Ableman, 4 Wis. 163, discharge on habeas corpus.

97. An alias precept protects (Barnes *v.* Viall, 6 Fed. 661; Nason *v.* Sewall, Brayt. (Vt.) 119. But see Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487) and another capias ad satisfaciendum (Pickard *v.* Bills, Wright (Ohio) 344).

98. The rule applies to judicial proceedings before any committing magistrate (Vredenburgh *v.* Hendricks, 17 Barb. (N. Y.) 179), to proceedings to collect taxes (Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763), to equitable cases (Scoggin *v.* Taylor, 13 Ark. 380, writ of ne exeat issued by a master in chancery without legal authority), to orders generally (Kilbourn *v.* Thompson, 103 U. S. 168, 26 L. ed. 377, void order of federal house of representatives committing witness for contempt no protection to sergeant at arms executing it), and to proceedings to collect debts (Webber *v.* Kenny, 1 A. K. Marsh. (Ky.) 345; Escurix *v.* Daboval, 7 La. 575, a creditor liable for the arrest of his debtor on process illegally issued or executed; Winslow *v.* Hathaway, 1 Pick. (Mass.) 211; Vredenburgh *v.* Hendricks, 17 Barb. (N. Y.) 179; Pierson *v.* Gale, 8 Vt. 509, 30 Am. Dec. 487; Barnes *v.* Viall, 6 Fed. 661, unauthorized arrest after discharge).

Warrant negativing crime.— A warrant of arrest for obtaining goods on false pretenses which states that the relator well knew the falsity of such pretenses is bad upon its face, and the officer serving it is liable for false imprisonment. Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101.

99. A warrant void on its face and issued in good faith is no protection, although the justice had before him sufficient evidence upon which to issue a valid warrant. Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468.

1. Ministerial officers generally must see that the process executed by them is valid on its face or they will be liable for their acts thereunder. Gorton *v.* Frizzell, 20 Ill. 291 (a sheriff); Elsemore *v.* Longfellow, 76 Me. 128; Vinton *v.* Weaver, 41 Me. 430; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468; Heller *v.* Clarke, 121 Wis. 71, 98 N. W. 952. But if arrest be made by an officer having both an illegal and a valid warrant he is protected, although he declared the arrest made under the invalid one; his liability depends on the sufficiency of his authority not on his declaration. State *v.* Kirby, 24 N. C. 201.

2. *Alabama.*— Oates *v.* Bullock, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38.

Arkansas.— Scoggin *v.* Taylor, 13 Ark. 380.

Illinois.— Develing *v.* Sheldon, 83 Ill. 390.

Indiana.— Taylor *v.* Moffatt, 2 Blackf. 305.

Michigan.— Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160; Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278.

Missouri.— Fellows *v.* Goodman, 49 Mo. 62, sham proceedings.

Nebraska.— Painter *v.* Ives, 4 Nebr. 122, notwithstanding good faith.

Nevada.— Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832.

New York.— Vredenburgh *v.* Hendricks, 17 Barb. 179; Lansing *v.* Case, 4 N. Y. Leg. Obs. 221.

Texas.— Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 9, 33, 49.

3. Hiday *v.* Gilmore, 3 Blackf. (Ind.) 48; Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46; Vinton *v.* Weaver, 41 Me. 430; Williams *v.* Jones, 6 Phila. (Pa.) 541; Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956. Otherwise where the process is merely informal or erroneous. Goodwine *v.* Stephens, 63 Ind. 112.

4. All persons connected with its procurement, issuance, or execution may be held to

3. Voidable Process — a. Within Jurisdiction. An officer is protected in the service of process, issued by a court having jurisdiction and appearing upon its face to be regular and valid, even if it is fraudulently and irregularly issued[5] or if the preliminary proceedings on which it is based are insufficient or irregular,[6] or if in some cases[7] he know[8] or be advised[9] of facts which render it void, in the absence of conscious participation in its wrongful procurement.[10] A voidable judgment[11] and execution[12] have also been held sufficient to justify.[13]

the responsibility of joint tort-feasors notwithstanding such process. Hawkins *v.* Johnson, 3 Blackf. (Ind.) 46 (the person procuring, the constable serving, and the magistrate issuing a mittimus); Truesdell *v.* Combs, 33 Ohio St. 186 (the justice and the person complaining); Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411; Gelzenleuchter *v.* Niemeyer, 64 Wis. 316, 25 N. W. 442, 54 Am. St. Rep. 616.

5. *Indiana.*— Jeffries *v.* McNamara, 49 Ind. 142.

Iowa.— Chambers *v.* Oehler, 107 Iowa 155, 77 N. W. 853, however ill-founded it may have been.

Louisiana.— Went *v.* Morgan, 3 La. 311.

Massachusetts.— *In re* Blake, 106 Mass. 501; Fisher *v.* McGirr, 1 Gray 1, 61 Am. Dec. 381; Twitchell *v.* Shaw, 10 Cush. 46, 57 Am. Dec. 80; Donahue *v.* Shed, 8 Metc. 326; Wilmarth *v.* Burt, 7 Metc. 257.

Michigan.— Wheaton *v.* Beecher, 49 Mich. 348, 13 N. W. 769; Johnson *v.* Maxon, 23 Mich. 129 (an imprisonment of a debtor by virtue of a warrant not absolutely void, although issued irregularly, improvidently, and through indefensibly bad motives is not false in any sense adequate to support a charge of false imprisonment); Ortman *v.* Greenman, 4 Mich. 291.

Missouri.— Merchant *v.* Bothwell, 60 Mo. App. 341.

Nebraska.— Atwood *v.* Atwater, 43 Nebr. 147, 61 N. W. 574.

New Jersey.— Stricker *v.* Pennsylvania R. Co., 60 N. J. L. 230, 37 Atl. 776; Jennings *v.* Thompson, 54 N. J. L. 55, 22 Atl. 1008 (that the warrant showed on its face arrest for an impossible purpose (as giving evidence against himself), although in fact he was brought in for sentence, does not prevent its justification of officer); Mangold *v.* Thorpe, 33 N. J. L. 134.

New York.— Stanton *v.* Schell, 3 Sandf. 323.

North Carolina.— Bryan *v.* Stewart, 123 N. C. 92, 31 S. E. 286.

Texas.— Gaines *v.* Newbrough, 12 Tex. Civ. App. 466, 34 S. W. 1048.

Utah.— Clinton *v.* Nelson, 2 Utah 284.

Vermont.— Barrett *v.* Crane, 16 Vt. 246.

United States.— Bryan *v.* Congdon, 86 Fed. 221, 29 C. C. A. 670; Carman *v.* Emerson, 71 Fed. 264, 18 C. C. A. 38; U. S. *v.* Harris, 26 Fed. Cas. No. 15,313.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

6. *Illinois.*— Ressler *v.* Peats, 86 Ill. 275.

Indiana.— Davis *v.* Bush, 4 Blackf. 330.

Michigan.— Johnson *v.* Morton, 94 Mich. 1, 53 N. W. 816.

New York.— Hall *v.* Munger, 5 Lans. 100; Nowak *v.* Waller, 10 N. Y. Suppl. 199.

Vermont.— Barrett *v.* Crane, 16 Vt. 246.

United States.— Whitten *v.* Bennett, 77 Fed. 271, based on mistake of grand jury in finding an indictment.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

Want of evidence.— But if an arrest is made without competent evidence of guilt, both magistrate and prosecutor have been held liable. Wilson *v.* Robinson, 6 How. Pr. (N. Y.) 110; Comfort *v.* Fulton, 13 Abb. Pr. (N. Y.) 276.

Where an affidavit for an order for arrest does not state any one of the grounds required by statute to be stated, all proceedings afterward had under it are void, and such affidavit furnishes no justification for an arrest. Hauss *v.* Kohlar, 25 Kan. 640.

7. If there be error in the copy of a mittimus furnished him he is not liable unless he had reason to believe it to be erroneous. Martin *v.* Collins, 165 Mass. 256, 43 N. E. 91. On his failure to question the validity of an order of discharge and his retention of it without notice or question, he may become liable. Davis *v.* Bowe, 118 N. Y. 55, 23 N. E. 166 [*affirming* 54 N. Y. Super. Ct. 520].

8. O'Shaughnessy *v.* Baxter, 121 Mass. 515; Webber *v.* Gay, 24 Wend. (N. Y.) 485; Rainey *v.* State, 20 Tex. App. 455; Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224. He may refuse to execute process which is in fact void, although valid on its face, and no action will lie against him for such refusal. Newburg *v.* Munshower, 29 Ohio St. 617, 23 Am. Rep. 769.

9. If he be advised by counsel that an order for discharge is defective he is exonerated, even if the order would in fact have justified the release of the prisoner. Hayes *v.* Bowe, 12 Daly (N. Y.) 193.

10. He is liable where he enters into a conspiracy to procure it (Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786) or fabricates the charge himself and procures a warrant of commitment from a magistrate (State *v.* Greenwood, 1 Mill (S. C.) 420).

11. Mott *v.* Union Bank, 38 N. Y. 18 [*affirming* 8 Bosw. 591]; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574.

12. Devlin *v.* Gibbs, 7 Fed. Cas. No. 3,842, 4 Cranch C. C. 626.

13. *Alabama.*— Williams *v.* Ivey, 37 Ala. 244. See also Leib *v.* Shelby Iron Co., 97 Ala. 626, 12 So. 67.

Georgia.— Joiner *v.* Ocean Steamship Co., 86 Ga. 238, 12 S. E. 361.

Illinois.— Morrell *v.* Martin, 17 Ill. App. 336.

b. Want of Jurisdiction. Legal process, issued by courts of general or of limited jurisdiction[14] which is regular on its face justifies its proper enforcement, although void in fact for want of jurisdiction,[15] at least in the absence of notice.[16]

4. Invalid Enactments. As to liability for imprisonment for violation of an unconstitutional statute or ordinance the authorities are in conflict, while it has been held that a court can derive no jurisdiction to act in such a case,[17] and that the magistrate issuing process for arrest,[18] and *a fortiori* officers executing process or persons otherwise participating in the proceeding[19] are liable, the weight of authority is that the court has jurisdiction to determine the question of constitutionality and therefore that the person making complaint to a magistrate,[20] the magistrate issuing a warrant,[21] or an officer serving process fair on its face[22] is not liable. Nor does a municipal corporation incur liability on account of the enforcement by officers or magistrates of an unconstitutional ordinance.[23]

5. Validity of Process — a. Form. In the absence of statutory prescription as to form, a warrant good at common law justifies.[24] Where, however, a statute applies, the process must conform to its essential requirements.[25] It should be reasonably full and specific.[26] The protection from liability which is afforded

Michigan.— Johnson *v.* Morton, 94 Mich. 1, 53 N. W. 816.

New York.— Marks *v.* Townsend, 97 N. Y. 590.

United States.— Devlin *v.* Gibbs, 7 Fed. Cas. No. 3,842, 4 Cranch C. C. 626.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 8, 32, 48.

Persons assisting under voidable process are likewise protected. Goodwine *v.* Stephens, 63 Ind. 112.

14. Savacool *v.* Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Barrett *v.* Crane, 16 Vt. 246. The proceedings may be sometimes justified by reference to an original valid warrant. State *v.* Guest, 6 Ala. 778.

15. Manning *v.* Mitchell, 73 Ga. 660.

16. Davis *v.* Wilson, 65 Ill. 525; Tefft *v.* Ashbaugh, 13 Ill. 602; Tellefsen *v.* Fee, 168 Mass. 188, 46 N. E. 562, 60 Am. St. Rep. 379, 45 L. R. A. 481; Underwood *v.* Robinson, 106 Mass. 296; Chase *v.* Ingalls, 97 Mass. 524; Clarke *v.* May, 2 Gray 410, 61 Am. Dec. 470; Savacool *v.* Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; Barnett *v.* Reed, 51 Pa. St. 190, 88 Am. Dec. 574 (execution issued, although the debt be paid); Allison *v.* Rheam, 3 Serg. & R. (Pa.) 139, 8 Am. Dec. 644. Where, however, a warrant shows on its face that it was issued to apprehend an accused for an offense over which the court issuing it had no jurisdiction, the officer is bound to know its invalidity and is not protected by it in making the arrest. Wachsmuth *v.* Merchants Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278; Heller *v.* Clarke, 121 Wis. 71, 98 N. W. 952; Lueck *v.* Heisler, 87 Wis. 644, 58 N. W. 1101. The same rule applies to persons causing its issuance. Paulus *v.* Grobben, 104 Mich. 42, 62 N. W. 160; Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

17. Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50, statute.

18. Kelly *v.* Bemis, 4 Gray (Mass.) 83, 64 Am. Dec. 50, statute. See also *obiter* in Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81, statute.

19. Sumner *v.* Beeler, 50 Ind. 341, 19 Am. Rep. 718, statute.

A person complaining to the magistrate was held liable in Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81, statute.

An officer arresting without warrant was held liable in Barling *v.* West, 29 Wis. 307, 9 Am. Rep. 576.

20. Trammell *v.* Russelville, 34 Ark. 105, 36 Am. Rep. 1; Tillman *v.* Beard, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; Gifford *v.* Wiggins, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; Wheeler *v.* Gavin, 5 Ohio Cir. Ct. 246, 3 Ohio Cir. Dec. 123, all cases involving ordinances. See also Barker *v.* Stetson, 7 Gray (Mass.) 53, 66 Am. Dec. 475.

21. Trammell *v.* Russelville, 34 Ark. 105, 36 Am. Rep. 1 (ordinance); Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137 (ordinance); Wheeler *v.* Gavin, 5 Ohio Cir. Ct. 246, 3 Ohio Cir. Dec. 123 (ordinance). See also Cottam *v.* Oregon City, 98 Fed. 570 (ordinance).

22. Trammell *v.* Russelville, 33 Ark. 105, 36 Am. Rep. 1 (ordinance); Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137 (ordinance); Cottam *v.* Oregon City, 98 Fed. 570; Hofschulte *v.* Doe, 78 Fed. 436 (ordinance).

23. Trammell *v.* Russelville, 34 Ark. 1, 36 Am. Rep. 1; St. Louis *v.* Karr, 85 Mo. App. 608; Trescott *v.* Waterloo, 26 Fed. 592. See also Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205.

24. Russell *v.* Hubbard, 6 Barb. (N. Y.) 654.

25. For example, as to the day of issuance (Pearce *v.* Atwood, 13 Mass. 324), the fact and manner of indorsement (Murphy *v.* Kron, 20 Abb. N. Cas. (N. Y.) 259), the officer to whom it is directed (Russell *v.* Hubbard, 6 Barb. (N. Y.) 654. *Compare* Allec *v.* Reece, 39 Fed. 341), and the justice before whom it is returnable (Messman *v.* Ihlenfeldt, 89 Wis. 585, 62 N. W. 522).

An unsigned warrant is void. Oates *v.* Bullock, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38.

26. A search warrant without oath of the applicant, and only general in terms, affords

by process is not destroyed by any mere irregularity[27] or by informality in the process itself.[28]

b. Contents — (i) *NAME OF PERSON ARRESTED.* At common law,[29] and in some instances also by statutory or constitutional provision,[30] warrants of arrest both in civil[31] and in criminal cases[32] must specifically and correctly name or describe the person to be arrested, and if they fail so to do they afford no justification for making the arrest. If a warrant omits the christian name of defendant,[33] or if it directs the arrest of a person under a fictitious name or the arrest of persons "unknown,"[34] it affords no protection,[35] unless, as is sometimes the case,[36] a statute authorizes warrants in that form.

(ii) *CAUSE OF COMMITMENT.* A warrant must sufficiently set forth[37] the

no protection. Grumon *v.* Raymond, 1 Conn. 40, 6 Am. Dec. 200. Where if illegal allegations were expunged little but blank paper would be left the warrant affords no protection. Elsemore *v.* Longfellow, 76 Me. 128. As to the sufficiency of warrants generally see CRIMINAL LAW, 12 Cyc. 299 *et seq.*

A mere verbal authority for arrest ordinarily affords the person obeying it no protection. Odell *v.* Schroeder, 58 Ill. 353; Donovan *v.* Jones, 36 N. H. 246. But it may be otherwise under construction of particular statutes. Forrist *v.* Leavitt, 52 N. H. 481.

27. Johnston *v.* Vanamringe, 5 Blackf. (Ind.) 311; Bassett *v.* Mayhew, Quincy (Mass.) 93 note; Riddell *v.* Pakeman, 2 C. M. & R. 30, 3 Dowl. P. C. 714, 1 Gale 104, 4 L. J. Exch. 130, 5 Tyrw. 721; Briant *v.* Clutton, 5 Dowl. P. C. 66, 2 Gale 50, 5 L. J. Exch. 182, 1 M. & W. 408, 1 Tyrw. & G. 843; Kilshaw *v.* Crowther, 3 L. J. Ch. O. S. 101.

28. Goodwine *v.* Stephens, 63 Ind. 112; Franklin *v.* Amerson, 118 Ga. 860, 45 S. E. 698; Manning *v.* Mitchell, 73 Ga. 660; Hyde *v.* Malley, 121 Mass. 388; Hecker *v.* Jarret, 3 Binn. (Pa.) 404.

The addition of merely surplus words, even if erroneous, does not give a right of action to a person arrested under the process. Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19.

29. Holley *v.* Mix, 3 Wend. (N. Y.) 350, 354, 20 Am. Dec. 702; Finch *v.* Cocken, 2 C. M. & R. 196, 3 Dowl. P. C. 678, 1 Gale 130; Shadgett *v.* Clipson, 8 East 328; Kelly *v.* Lawrence, 3 H. & C. 1, 10 Jur. N. S. 636, 33 L. J. Exch. 197, 10 L. T. Rep. N. S. 195, 12 Wkly. Rep. 413; Cole *v.* Hindson, 6 T. R. 234; Huckle *v.* Money, 2 Wils. C. P. 205; 1 Chitty Cr. L. 39, 40; 1 East P. C. 310; Foster Cr. L. 312; 2 Hale P. C. 112, 114; 1 Hale P. C. 577, 580. See also cases cited in CRIMINAL LAW, 12 Cyc. 300 notes 35, 36. So too process which runs in the name of a dead person affords no protection. Webber *v.* Kenny, 1 A. K. Marsh. (Ky.) 345, a capias ad satisfaciendum.

30. Thus it is provided by the fourth amendment of the United States constitution that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." See West *v.* Cabell, 153 U. S. 78, 87, 14 S. Ct. 752, 38 L. ed. 643.

31. A warrant directing the associates of persons named to be arrested without mentioning the names of such associates is illegal and void as to them. Wells *v.* Jackson, 3 Munf. (Va.) 458. But see Briggs *v.* Berls, 2 N. Y. City Ct. 171.

32. See cases cited in CRIMINAL LAW, 12 Cyc. 300 notes 35, 36.

A misnomer in the warrant of the person to be arrested ordinarily destroys its efficacy as a justification. Cooter *v.* Bronson, 67 Barb. (N. Y.) 444 (arrest of "C. C." is not justified by warrant demanding arrest of "M. C."); Miller *v.* Foley, 28 Barb. (N. Y.) 630 (arrest of "John R." under warrant, reciting complaint against "John R.," but directing the arrest of "William" is not a justification); Scott *v.* Ely, 4 Wend. (N. Y.) 555; Ryburn *v.* Moore, 72 Tex. 85, 10 S. W. 393 (capias for arrest of "Charley" did not justify arrest of "Charles F." who insisted upon innocence); Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376; Barnette *v.* Hicks, 6 Tex. 352; Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001; West *v.* Cabell, 153 U. S. 78, 14 S. Ct. 752, 38 L. ed. 643 (warrant to arrest "James" does not justify arrest of "V. M." or "Vandy" who was never known as "James," although he was the person in mind when the warrant was issued). But it may be otherwise where the person arrested was known by the one name as well as by the other. Griswold *v.* Sedgwick, 1 Wend. (N. Y.) 126; Mead *v.* Haws, 7 Cow. (N. Y.) 332.

33. Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423. But it is sufficient to give the initial of his first name, especially where he ordinarily uses and is known by the initial, and error in the initial of his middle name or entire omission thereof does not vitiate the warrant. Cox *v.* Durham, 128 Fed. 870, 63 C. C. A. 338.

34. See CRIMINAL LAW, 12 Cyc. 301.

35. Williams *v.* Tidball, (Ariz. 1885) 8 Pac. 351; Harwood *v.* Siphers, 70 Me. 464; Gurnsey *v.* Lovell, 9 Wend. (N. Y.) 319.

36. Williams *v.* Tidball, (Ariz. 1885) 8 Pac. 351 (fictitious name); Bailey *v.* Wiggins, 5 Harr. (Del.) 462, 60 Am. Dec. 650; Allen *v.* Leonard, 28 Iowa 529; Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376; Hays *v.* Creary, 60 Tex. 445; Alford *v.* State, 8 Tex. App. 545. See also cases cited in CRIMINAL LAW, 12 Cyc. 301 note 39.

37. A warrant of arrest for larceny is void where both complaint and warrant fail to state that the article stolen had any value,

cause of commitment[38] or the nature of[39] a public offense for which an arrest is properly commanded[40] and the substance of the offense charged,[41] and show the magistrate's authority to order such arrest.[42]

(III) *COMMAND TO ARREST.* A criminal warrant is more than a mere license or permit; it must contain a command or requirement in the nature thereof to the person to whom it is directed to make the arrest.[43]

c. Return. The warrant, to justify, must be regularly returned.[44] The propriety of the return actually made is to be considered in the light of consent to it by the arrested person.[45]

C. Public Authority Without Process — 1. JUSTIFICATION IN GENERAL. When an arrest is made without warrant[46] justification can of course be made out only[47] by showing facts and circumstances[48] which constitute legal authority under common-law rules[49] or statutory enactments,[50] authorizing the arrest, in

the degree of punishment depending on the value. Frazier *v.* Turner, 76 Wis. 562, 45 N. W. 411. But *compare* Payne *v.* Barnes, 5 Barb. (N. Y.) 465.

38. See cases cited in CRIMINAL LAW, 12 Cyc. 301, 302. Where a mittimus does not show the cause of commitment and the justice issuing the same, the constable executing it as well as the person assisting the officer are liable. Hiday *v.* Gilmore, 3 Blackf. (Ind.) 48. See also Clyma *v.* Kennedy, 64 Conn. 310, 29 Atl. 539, 42 Am. St. Rep. 194.

39. Not necessarily the facts constituting the crime. Pratt *v.* Bogardus, 49 Barb. (N. Y.) 89. See also cases cited in CRIMINAL LAW, 12 Cyc. 302 note 50.

40. Hewitt *v.* Newburger, 141 N. Y. 538, 36 N. E. 593; Warner *v.* Perry, 14 Hun (N. Y.) 337; Blythe *v.* Tompkins, 2 Abb. Pr. (N. Y.) 468; Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556; Baird *v.* Householder, 32 Pa. St. 168; Williams *v.* Jones, 6 Phila. (Pa.) 541. *Compare* Smith *v.* Warden, 4 Hun (N. Y.) 787. For a sufficient charge see Gardner *v.* Bain, 5 Lans. (N. Y.) 256.

41. See CRIMINAL LAW, 12 Cyc. 301, 302. Failure to state the time and place of the alleged offense in a complaint is not fatal to the warrant when the validity of the latter is attacked in the action for false imprisonment. Miller *v.* Woods, 23 Nebr. 200, 36 N. W. 483.

42. Vinton *v.* Weaver, 41 Me. 430.

43. Abbott *v.* Booth, 51 Barb. (N. Y.) 546. See also Palmer *v.* Allen, 5 Day (Conn.) 193.

A writ containing no capias is void. Buzzell *v.* Emerton, 161 Mass. 176, 36 N. E. 796.

44. Dehm *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374; Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786; Munroe *v.* Merrill, 6 Gray (Mass.) 236, an execution. See also Stoyel *v.* Lawrence, 23 Fed. Cas. No. 13,517, Brunn. Col. Cas. 31, 3 Day (Conn.) 1. As to admissibility of return in evidence see Richmond *v.* Willis, 13 Gray (Mass.) 182.

45. Poor *v.* Taggart, 37 N. H. 544.

46. As to arrest without warrant see ARREST, 3 Cyc. 877 *et seq.*

47. In the absence of authority to arrest without warrant the person arresting another (Botts *v.* Williams, 17 B. Mon. (Ky.) 687, arrest by a private person of a fugitive from justice from another state; Moore *v.* Durgin, 68 Me. 148, arrest by member of city government; Crumeill *v.* Hill, 2 N. Y. City Ct. 236, arrest by private persons in cases of mere misdemeanor; Pesterfield *v.* Vickers, 3 Coldw. (Tenn.) 205, arrest by police officer for violation of ordinance not committed in his presence, an invalid ordinance purporting to authorize such arrest), and all persons aiding or abetting (Harris *v.* McReynolds, 10 Colo. App. 532, 51 Pac. 1016; Bright *v.* Patton, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; Pow *v.* Beckner, 3 Ind. 475) are liable in damages.

48. Mure *v.* Kaye, 4 Taunt. 34.

49. McMorris *v.* Howell, 89 N. Y. App. Div. 272, 85 N. Y. Suppl. 1018. The common-law rules have been generally reënacted in the several states with little or no restriction in terms or scope; their operation has, however, been extended in many jurisdictions so as to make the principles apply to additional cases. See the statutes of the several states.

50. *Illinois.*— Shanley *v.* Wells, 71 Ill. 78, statute authorizing arrest for vagrancy, etc., justifies only where want of visible means of support is shown.

Kentucky.— Williams *v.* Blincoe, 5 Litt. 171.

Massachusetts.— Sullivan *v.* Old Colony R. Co., 148 Mass. 119, 18 N. E. 678, 1 L. R. A. 513 (as to statute authorizing carrier to arrest and remove disorderly passenger); Krulevitz *v.* Eastern R. Co., 143 Mass. 228, 9 N. E. 613.

Michigan.— Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603 (officer not justified in arresting on suspicion, for adultery under a statute contemplating the right to punish in the injured husband or wife only); White *v.* McQueen, 96 Mich. 249, 55 N. W. 843.

New York.— Stahol *v.* Roof, 164 N. Y. 162, 58 N. E. 13, 15 N. Y. Cr. 155 (as to liability for arresting under laws forbidding fishing in private grounds); Davis *v.* American Soc., etc., 75 N. Y. 362 (statute authorizing arrest for cruelty to animals justifies only when it is shown that the person arrested was found violating the law).

North Carolina.— State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529, arrest

many instances of persons only when found committing a public offense,[51] or in others, of persons reasonably suspected thereof.[52] This justification may extend to cases where a void warrant has been issued,[53] and to clear cases of mistaken identity.[54]

2. Arrest by Private Person — a. For Breach of the Peace. A private person is justified in arresting another, with the exercise of reasonable force,[55] when the latter is guilty of a breach of peace[56] committed in the presence of the person

without warrant for violation of unconstitutional ordinance no protection.

Texas.— Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656. As to arrest of intoxicated person see Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31.

51. *Illinois.*— Shanley *v.* Wells, 71 Ill. 78 (officer arresting for vagrancy a person not in fact a vagrant is not justified by information which led him to arrest in good faith); Main *v.* McCarty, 15 Ill. 441.

Indiana.— Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875.

Kansas.— Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423, a justice and officer arresting for fighting and disturbance of the peace are both liable, when neither was present.

Kentucky.— Curran *v.* Taylor, 92 Ky. 537, 18 S. W. 232, 13 Ky. L. Rep. 750; Richardson *v.* Lawhon, 4 Ky. L. Rep. 998, officer justified in arresting if what is done in his presence is a *prima facie* public offense, although offender in fact had excuse for doing what he did.

Louisiana.— Boutte *v.* Emmer, 43 La. Ann. 980, 9 So. 921, 15 L. R. A. 63, mayor clothed with judicial authority held justified in arresting for breach of the peace committed in his presence.

New York.— Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425.

Pennsylvania.— Mulberry *v.* Fuellhart, 203 Pa. St. 573, 53 Atl. 504, arrest by officer for resisting civil process in his hands is justifiable.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31.

Various unauthorized arrests.— Neither a private person nor an officer can arrest without a warrant a person charged with a less degree of crime than a felony, unless the crime is committed in the presence of the former. Barth *v.* Heider, 6 D. C. 312; Hight *v.* Naylor, 86 Ill. App. 508. See also Sundacher *v.* Block, 39 Ill. App. 553; and Arrest, 3 Cyc. 880, 885, 886. Arrest for a misdemeanor at one place, by direction of the sheriff, who is at another place with the warrant, is illegal. McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906. Finding one who is attempting to commit a crime is not the same as finding him in its commission. Leete *v.* Hart, L. R. 3 C. P. 322, 37 L. J. C. P. 157, 18 L. T. Rep. N. S. 292, 16 Wkly. Rep. 676.

A thief found removing property stolen by him is found committing the theft. Griffith *v.* Taylor, 2 C. P. D. 194, 46 L. J. C. P. 152, 36 L. T. Rep. N. S. 5, 25 Wkly. Rep. 196.

Arrest for an act not technically criminal may be justified if the act was of an aggressive character and supposed to be criminal. Van *v.* Pacific Coast Co., 120 Fed. 699.

52. Mere misdemeanor not amounting to breach of peace does not justify. See Arrest, 3 Cyc. 880 notes 65, 66.

53. Wade *v.* Chaffee, 8 R. I. 224, 5 Am. Rep. 572, 574 note. See also Douglass *v.* Barber, 18 R. I. 459, 28 Atl. 805; Creagh *v.* Gamble, 24 L. R. Ir. 458. But *compare* Perry *v.* Johnson, 37 Conn. 32; Elwell *v.* Reynolds, 6 Kan. App. 545, 51 Pac. 578, in both of which cases the officer arresting on a void warrant was unable to justify, under the circumstances, as for an arrest without warrant.

54. *Alabama.*— Sugg *v.* Pool, 2 Stew. & P. 196.

Iowa.— Holmes *v.* Blyler, 80 Iowa 365, 45 N. W. 756.

Louisiana.— Wells *v.* Johnston, 52 La. Ann. 713, 27 So. 185.

Michigan.— Maliniemi *v.* Gronlund, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576.

Texas.— Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772; Hays *v.* Creary, 60 Tex. 445.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31.

55. The common-law plea was *molliter manus imposuit.* See McLeod *v.* Bell, 3 U. C. Q. B. 61; 3 Chitty Pl. p. 535. See also Assault and Battery, 3 Cyc. 1084.

56. Baynes *v.* Brewster, 2 Q. B. 375, 1 G. & D. 669, 6 Jur. 392, 11 L. J. M. C. 5, 42 E. C. L. 720; Cohen *v.* Huskisson, 6 L. J. M. C. 133, M. & H. 150, 2 M. & W. 477. Causing sufficient public alarm and excitement is within the rule (Webster *v.* Watts, 11 Q. B. 311, 12 Jur. 243, 17 L. J. Q. B. 73, 63 E. C. L. 311; Wheeler *v.* Whiting, 9 C. & P. 262, 38 E. C. L. 162; Howell *v.* Jackson, 6 C. & P. 723, 25 E. C. L. 657; Cohen *v.* Huskisson, 6 L. J. M. C. 133, M. & H. 150, 2 M. & W. 477; Ingle *v.* Bell, 5 L. J. M. C. 85, 1 M. & W. 516), as is also disorderly conduct by "hollering" after being told to desist (Lewis *v.* Kahn, 15 Daly (N. Y.) 326, 5 N. Y. Suppl. 661); but not a case where what is done amounts to a mere disturbance (Williams *v.* Glenister, 2 B. & C. 699, 4 D. & R. 217, 2 L. J. K. B. O. S. 143, 26 Rev. Rep. 525, 9 E. C. L. 304, riding into a church and reading a notice), or annoyance or insult (Grant *v.* Moser, 2 Dowl. P. C. N. S. 923, 7 Jur. 854, 12 L. J. C. P. 146, 5 M. & G. 123, 6 Scott N. R. 46, 44 E. C. L. 74, persistently ringing a door-bell), or making a noise or interrupting and asking questions of a speaker at a public meeting (Wooding *v.* Oxley, 9 C. & P. 1, 38 E. C. L. 13; Spilsbury *v.* Micklethwaite,

arresting,[57] or where there is reasonable ground for apprehending that the arrested person is about to commit a breach of the peace,[58] or a well founded apprehension of its continuance[59] or of its renewal.[60]

b. For Felony. To justify a private individual in making an arrest for felony, he must sufficiently plead and prove: (1) That a felony had been committed,[61] and (2) that there was reasonable ground for believing of his own knowledge that the person arrested was guilty thereof,[62] or that the felony was committed in his presence.[63]

c. Authorizing Arrest. A private person will be protected in giving another in charge of an officer without process, only within the limits of the law which would justify the arrest by such person himself;[64] but his responsibility is confined to his connection as cause of the wrong.[65]

1 Taunt. 146, 9 Rev. Rep. 717. See also Lucas *v.* Mason, L. R. 10 Exch. 251, 44 L. J. Exch. 145, 33 L. T. Rep. N. S. 13, 23 Wkly. Rep. 924), or a mere civil trespass (Rose *v.* Wilson, 1 Bing. 353, 8 Moore C. P. 362, 2 L. J. C. P. O. S. 14, 8 E. C. L. 544; Parrington *v.* Moore, 2 Exch. 223, 17 L. J. M. C. 117; Norwood *v.* Pitt, 5 H. & N. 801, 6 Jur. N. S. 614, 29 L. J. Exch. 127; Jordan *v.* Gibbon, 8 L. T. Rep. N. S. 391; Spilsbury *v.* Micklethwaite, 1 Taunt. 146, 9 Rev. Rep. 717). As to what amounts to a common-law breach of the peace see BREACH OF THE PEACE, 5 Cyc. 1024 *et seq.*; ASSAULT AND BATTERY, 3 Cyc. 1014. As to arrest by private persons without a warrant for breach of the peace see ARREST, 3 Cyc. 885.

57. That is, where he is a witness of the disturbance and does not act merely on the information of others (Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 4 L. J. M. C. 73, 5 Tyrw. 244, 25 E. C. L. 544. See also cases cited in ARREST, 3 Cyc. 885 note 91), and when he makes the arrest at the time of the commission of the offense (see cases cited in ARREST, 3 Cyc. 886 note 92).

He may stop an affray, and his liability does not depend upon the correctness of his judgment as to which is the aggressor. Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 4 L. J. M. C. 73, 5 Tyrw. 244, 25 E. C. L. 544. But it is no justification that plaintiff being engaged in an affray was taken into custody until he could be brought before a justice, without stating that defendant was an officer or acted under a warrant. Phillips *v.* Trull, 11 Johns. (N. Y.) 486. See AFFRAY, 2 Cyc. 49.

58. Sloan *v.* Schomaker, 136 Pa. St. 382, 20 Atl. 525; Grant *v.* Moser, 2 Dowl. P. C. N. S. 923, 7 Jur. 854, 12 L. J. C. P. 146, 5 M. & G. 123, 6 Scott N. R. 46, 44 E. C. L. 74.

59. Baynes *v.* Brewster, 2 Q. B. 375, 1 G. & D. 669, 6 Jur. 392, 11 L. J. M. C. 5, 42 E. C. L. 720; Price *v.* Seeley, 10 Cl. & F. 28, 8 Eng. Reprint 651; Ingle *v.* Bell, 5 L. J. M. C. 85, 1 M. & W. 516. See also ARREST, 3 Cyc. 885.

60. Timothy *v.* Simpson, 1 C. M. & R. 757, 6 C. & P. 499, 4 L. J. M. C. 73, 5 Tyrw. 224, 25 E. C. L. 544; and cases cited in ARREST, 3 Cyc. 886 note 92.

61. See ARREST, 3 Cyc. 885 note 89. But an officer may justify even if no felony has in fact been committed. 5 Inst. 52. See also *infra*, VII, C, 3; and cases cited in ARREST, 3 Cyc. 879 note 63.

62. *Iowa.*— Allen *v.* Leonard, 28 Iowa 529.

Kansas.— Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005.

New York.— Mandeville *v.* Guernsey, 51 Barb. 99; Gurnsey *v.* Lowell, 9 Wend. 319; Holley *v.* Mix, 3 Wend. 350, 20 Am. Dec. 702.

North Carolina.— Brockway *v.* Crawford, 48 N. C. 433, 67 Am. Dec. 250.

Pennsylvania.— Com. *v.* Deacon, 8 Serg. & R. 47.

Texas.— Doughty *v.* State, 33 Tex. 1.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31. See also ARREST, 3 Cyc. 885 note 89; 888 note 8.

Mistaken identity.—It is doubtful whether, in an action for false imprisonment, mere personal resemblance between plaintiff and the person who had committed the felony can afford reasonable ground of suspicion, justifying an arrest without a warrant. But at all events the plea will fail unless either defendant himself saw the felony committed, or unless the person who saw it and on whose information he acted spoke positively to the identity. Rayner *v.* German, 1 F. & F. 700.

63. It is enough if such individual saw the felony committed. Rayner *v.* German, 1 F. & F. 700.

Preponderance of evidence of guilt is sufficient and may justify shooting the accused if necessary to secure his arrest. Lander *v.* Miles, 3 Oreg. 35.

If no felony has been actually committed, reasonable suspicion and probable cause only mitigate damages. See *infra*, XIII, C; and cases cited *supra*, note 62.

64. Such as a breach of peace (Ryan *v.* Hudson, 1 N. Y. City Ct. Suppl. 12), disorderly conduct in a store (Sloan *v.* Schomaker, 136 Pa. St. 382, 20 Atl. 525), or malicious destruction of his property (Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673; Coogan *v.* McArdle, 1 N. Y. City Ct. 231), committed in his presence.

65. Murphy *v.* Walters, 34 Mich. 180; Page *v.* Miller, 13 Ohio Cir. Ct. 663, 6 Ohio Cir. Dec. 676. See also *supra*, V. If he acts without malice and makes no request and

d. Assisting Officer. A person who assists an officer in the performance of his legal duty, although without process,[66] is justified at least,[67] whenever the officer would be justified. It cannot be unlawful to take part in a lawful act.[68] But if the justification of the arrest itself fails, the officer and those who aid or abet him may also be liable.[69] The justification extends to assistance rendered the officer at his request, although that officer by subsequent conduct becomes a trespasser.[70] Justification exists only in respect of a known peace officer, authorized to arrest; persons are bound to know his authority, and if he is a trespasser for want of it persons assisting him are liable.[71]

3. Arrest by Peace Officer — a. For Felony. A peace officer is justified in arrests made without warrant in cases of felony,[72] alike whether he acts on his own knowledge or upon sufficient information derived from others,[73] if it be shown that the person arrested was reasonably suspected of guilt.[74] He may so be justified also where a felony has been actually, or is being, or is about to be,

takes no part he is not liable. Nowak *v.* Waller, 10 N. Y. Suppl. 199.

When he originates the arrest and the officer does what he would not be authorized and bound to do on his own authority the former is responsible. Derecourt *v.* Corbishley, 5 E. & B. 188, 1 Jur. N. S. 870, 24 L. J. Q. B. 313, 3 Wkly. Rep. 513, 85 E. C. L. 188. See also *supra*, V.

66. As to what constitutes assisting see Williams *v.* Williams, 4 Thomps. & C. (N. Y.) 251. As to being present see Cooper *v.* Johnson, 81 Mo. 483. See also *supra*, V.

67. The rule has been more broadly stated, viz., that the persons called upon by an officer holding a warrant to arrest, in the arrest of a party charged with crime, are protected, whether they had a warrant at the time of arrest or not. Kirbie *v.* State, 5 Tex. App. 60. But see Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

68. As assisting an officer unable to arrest (Main *v.* McCarty, 15 Ill. 441), or in arresting a person obstructing a public officer in the execution of his duty (Wooding *v.* Oxley, 9 C. & P. 1, 38 E. C. L. 13; Spilsbury *v.* Micklethwaite, 1 Taunt. 146, 9 Rev. Rep. 717). So the person assisting may justify under call of an officer to take a refractory prisoner to jail. O'Boyle *v.* Brown, Wright (Ohio) 465. The rule has been extended by construction to a case when the officer, commanding others to assist him, was actually absent in furtherance of a design of making an arrest to preserve the peace. Coyles *v.* Hurtin, 10 Johns. (N. Y.) 85.

69. Bright *v.* Patton, 5 Mackey (D. C.) 534, 60 Am. Rep. 396; Pow *v.* Beckner, 3 Ind. 475; Cooper *v.* Johnson, 81 Mo. 483. As in cases of arrest of the wrong person (Johnston *v.* Riley, 13 Ga. 97. See also Barnette *v.* Hicks, 6 Tex. 352, under a warrant. *Compare* McMahan *v.* Green, 34 Vt. 69, 80 Am. Dec. 665. And see *supra*, VII, B), or breaking an outer door of a dwelling to make an arrest on civil process (Hooker *v.* Smith, 19 Vt. 151, 47 Am. Dec. 679).

70. Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253; Dehn *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374. *A fortiori* such person is not made responsible because the officer fails to return his writ. Dehn *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374.

71. Dietrichs *v.* Schaw, 43 Ind. 175. Legal appointment, issuance of commission, and all steps necessary to clothe him with authority must be shown. Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329.

72. Malimiemi *v.* Gronlund, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576. See also *infra*, note 73 *et seq.*; and cases cited in Arrest, 3 Cyc. 878, 879. An officer, to justify because of his official privilege, must show the fact of holding office at the time of questioned conduct. Union Depot, etc., Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329; Pooler *v.* Reed, 73 Me. 129.

73. *California.*— People *v.* Pool, 27 Cal. 572.

Connecticut.— Knot *v.* Gay, 1 Root 66.

Delaware.— State *v.* List, Houst. Cr. Cas. 133.

Illinois.— Shanley *v.* Wells, 71 Ill. 78.

Maine.— Burke *v.* Bell, 36 Me. 317.

Michigan.— Drennan *v.* People, 10 Mich. 169.

New York.— Hawley *v.* Butler, 48 Barb. 101, 54 Barb. 490; Brown *v.* Chadsey, 39 Barb. 253; Wilson *v.* King, 39 N. Y. Super. Ct. 384; Slater *v.* Wood, 9 Bosw. 15, 26; Matter of Henry, 29 How. Pr. 185; Taylor *v.* Strong, 3 Wend. 384; Holley *v.* Mix, 3 Wend. 350, 20 Am. Dec. 702.

England.— Gosden *v.* Elphick, 4 Exch. 445, 13 Jur. 989, 19 L. J. Exch. 9, 8 N. Y. Leg. Obs. 204.

Canada.— Rogers *v.* Van Valkenburgh, 20 U. C. Q. B. 218; Cottrell *v.* Hueston, 7 U. C. C. P. 277.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31.

A telegram may be sufficient. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603. But see cases cited in Arrest, 3 Cyc. 887 note 6.

When no felony has been committed an officer may nevertheless be justified in arresting on the information of a private person who by causing the arrest makes himself liable. Hedges *v.* Chapman, 2 Bing. 523, 9 E. C. L. 688.

74. Filer *v.* Smith, 102 Mich. 98, 60 N. W. 297. See also *infra*, VIII, C, 4, a.

committed,[75] and where, although not in fact committed, reasonable grounds for believing that it was committed are shown.[76]

b. For Public Security. A peace officer is also justified in arresting when public security demands it, as in cases of actual[77] or reasonably apprehended breach of peace,[78] and in arresting a person resisting the proper enforcement of the law by himself[79] or by other officers.[80]

4. PROBABLE CAUSE — a. Essential to Justification. Reasonable and probable cause for belief in the guilt of the person detained[81] is essential to legal justification[82] of arrest by an officer for a public offense without a warrant[83] or by a

75. See ARREST, 3 Cyc. 878, 879.

76. *Illinois.*— Bryan *v.* Bates, 15 Ill. 87.

Indiana.— Scircle *v.* Neeves, 47 Ind. 289.

Michigan.— Malcolmson *v.* Scott, 56 Mich. 459, 23 N. W. 166; Quinn *v.* Heisel, 40 Mich. 576.

New York.— Holley *v.* Mix, 3 Wend. 350, 20 Am. Dec. 702.

North Carolina.— Neal *v.* Joyner, 89 N. C. 287.

Vermont.— *In re* Powers, 25 Vt. 261.

England.— Samuel *v.* Payne, Dougl. (3d ed.) 359; Hogg *v.* Ward, 3 H. & N. 417, 4 Jur. N. S. 885, 27 L. J. Exch. 443, 6 Wkly. Rep. 595. See also Beckwith *v.* Philby, 6 B. & C. 635, 9 D. & R. 487, 13 E. C. L. 287, 5 L. J. M. C. O. S. 132.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 30, 31; and cases cited in ARREST, 3 Cyc. 879.

77. See cases cited in ARREST, 3 Cyc. 881 note 72. *A fortiori* in case of persistent abuse of an officer and threats to kill him, he is justified. Davis *v.* Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am. Rep. 828. But he is not justified, if, having seen a breach of peace, he departs and thereafter returns and arrests without warrant. Meyer *v.* Clark, 41 N. Y. Super. Ct. 107.

78. See cases cited in ARREST, 3 Cyc. 883 note 78.

A town marshal may make an arrest before an actual breach of the peace is committed, if he has reasonable grounds to apprehend violence. Hayes *v.* Mitchell, 80 Ala. 183; Ryan *v.* Hudson, 1 N. Y. City Ct. Suppl. 12.

The justification extends only to detention as long as there is danger of renewal. Reg. *v.* Lesley, Bell C. C. 220, 8 Cox C. C. 269, 6 Jur. N. S. 202, 29 L. J. M. C. 97, 1 L. T. Rep. N. S. 452, 8 Wkly. Rep. 220.

79. Main *v.* McCarty, 15 Ill. 441; Braddy *v.* Hodges, 99 N. C. 319, 5 S. E. 17; Richardson *v.* Dybedahl, (S. D. 1904) 98 N. W. 164; Mosley *v.* State, 23 Tex. App. 409, 4 S. W. 907, arrest of person attempting a rescue. See also Smith *v.* Botens, 13 N. Y. Suppl. 222.

The sheriff of one county cannot make an arrest in another county except on fresh pursuit in case of an escape, nor can he detain in another county an arrested person whom he has taken into that county unless he is taking him through the county on a writ of habeas corpus. Page *v.* Staples, 13 R. I. 306.

80. Officers relying in good faith on the statement of another officer engaged in an encounter with persons arrested by him in good faith are protected, although that other officer was in fact the aggressor. Dilcher *v.* Raap, 73 Ill. 266. So a sergeant of volunteers is justified in arresting on strong probability for interfering with military authority. Teagarden *v.* Graham, 31 Ind. 422.

81. The officer must show reasonable proof that the person was committing wrong; not merely that he acted in good faith and had probable cause to suspect that the arrested person was violating the law. Kennedy *v.* Favor, 14 Gray (Mass.) 200. See also cases cited in ARREST, 3 Cyc. 888 note 7.

There must be: (1) An honest belief of the accuser (Forbes *v.* Hagman, 75 Va. 168; Allen *v.* Wright, 8 C. & P. 522, 34 E. C. L. 870); (2) such belief must be based on an honest conviction of the existence of the circumstances which led the accuser to that conclusion; (3) such secondly mentioned belief must be based upon reasonable grounds; and (4) the circumstances so believed and relied on by the accuser must be such as amount to reasonable ground for belief in the guilt of the accused (Hicks *v.* Faulkner, 46 J. P. 420, 46 L. T. Rep. N. S. 127 [*affirming* 8 Q. B. D. 167, 51 L. J. Q. B. 268, 30 Wkly. Rep. 545]). See also cases cited in ARREST, 3 Cyc. 887, 888. The suspicion to justify must be reasonable. Clow *v.* Wright, Brayt. (Vt.) 118. Detention by an officer on reasonable grounds to suspect one of receiving stolen goods, knowing them to be stolen, will justify. Rohan *v.* Sawin, 5 Cush. (Mass.) 281. Mere suspicion without proof is not sufficient. Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656. Nor is actual belief sufficient; there must be good reason for the belief. Gee *v.* Patterson, 63 Me. 49; Winebiddle *v.* Porterfield, 9 Pa. St. 137.

82. But the arrest may be justified, although it should turn out that the person arrested was innocent of the charge. Johnson *v.* State, 30 Ga. 426; Holley *v.* Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; Eanes *v.* State, 6 Humphr. (Tenn.) 53, 44 Am. Dec. 289.

83. Kennedy *v.* Favor, 14 Gray (Mass.) 200. As where he arrests on the request of another person, in case of felony (Hogg *v.* Ward, 3 H. & N. 417, 4 Jur. N. S. 885, 27 L. J. Exch. 443, 6 Wkly. Rep. 595), or assault (Griffin *v.* Coleman, 4 H. & N. 265, 28 L. J. Exch. 134), and on the part of a person requesting an officer to arrest (Taaffe *v.* Slevin, 11 Mo. App. 507).

private person,[84] and completes a defense[85] within the restrictions imposed by law.[86] Want of malice does not alone afford protection;[87] on the other hand malice is immaterial if probable cause and proper conduct appear.[88]

b. Sufficiency of Facts to Constitute — (i) *GENERALLY.* What is probable cause for arrest[89] depends upon all the circumstances of each case,[90] including delay which might enable the guilty person to escape,[91] the nature of the information,[92] the character of the person at whose instance the alleged wrongful arrest is

84. *Kentucky.*— Richardson *v.* Lawhon, 4 Ky. L. Rep. 998.

Massachusetts.— Rohan *v.* Sawin, 5 Cush. 281.

Michigan.— Maliniemi *v.* Gronlund, 92 Mich. 222, 52 N. W. 627, 31 Am. St. Rep. 576. And see Malcolmson *v.* Scott, 56 Mich. 459, 23 N. W. 166.

New York.— Wilson *v.* King, 39 N. Y. Super. Ct. 384.

Vermont.— Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115; Clow *v.* Wright, Brayt. 118.

England.— Hailes *v.* Marks, 7 H. & N. 56, 7 Jur. N. S. 851, 30 L. J. Exch. 389, 4 L. T. Rep. N. S. 805, 9 Wkly. Rep. 808.

See 23 Cent. Dig. tit. "False Imprisonment," § 31.

85. Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173; Billington *v.* Hoverman, 18 Ohio Cir. Ct. 637, 7 Ohio Cir. Dec. 358. As in connection with a warrant general in terms. Lewis *v.* Rose, 6 Lans. (N. Y.) 206.

86. See *supra*, note 81 *et seq.* The effect of proof of probable cause when insufficient as a complete justification is to mitigate damages. Sugg *v.* Pool, 2 Stew. & P. (Ala.) 196. See *infra*, XIII, C.

87. Shanley *v.* Wells, 71 Ill. 78; Allen *v.* Leonard, 28 Iowa 529; Macfarlane *v.* Ellis, 1 F. & F. 288. But where an officer arrests a person in pursuance of a statute, and without warrant, and restrains him in a proper place and manner, no malice can be proved against him. Kennedy *v.* Favor, 14 Gray (Mass.) 200; Grace *v.* Dempsey, 75 Wis. 313, 45 N. W. 1127.

88. See Kennedy *v.* Favor, 14 Gray (Mass.) 200; and cases cited *supra*, note 87. And good faith in the arrest of a debtor believed to be about to abscond justifies arrest. Aldrich *v.* Weeks, 62 Vt. 89, 19 Atl. 115.

89. Bostick *v.* Rutherford, 11 N. C. 83; Johnston *v.* Martin, 7 N. C. 248.

Similar handwriting is not *per se* and without other circumstances probable cause for preferring a charge of perjury against a person whose handwriting is like that of a forged instrument. Clements *v.* Ohrly, 2 C. & K. 686, 61 E. C. L. 686; McRae *v.* Oneal, 13 N. C. 166, previous suspicious conduct of arrested person. Those who honestly seek the enforcement of the law, and are supported by circumstances which will warrant a reasonable man in the belief that the party suspected may be guilty of the offense charged, should not be made unduly apprehensive that they will be held answerable in damages. Lyons *v.* Carroll, 107 La. 471, 31 So. 760.

90. **Sufficient proof of probable cause.**—For cases where the facts were held sufficient to show probable cause see the following:

Indiana.— Teagarden *v.* Graham, 31 Ind. 422.

Kansas.— Wichita, etc., R. Co. *v.* Quinn, 57 Kan. 737, 48 Pac. 132.

Michigan.— See Firestone *v.* Rice, 71 Mich. 377, 38 N. W. 885, 15 Am. St. Rep. 266.

Nebraska.— See Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

New York.— Swart *v.* Rickard, 148 N. Y. 264, 42 N. E. 665 [*reversing* 74 Hun 339, 26 N. Y. Suppl. 408]; Farnam *v.* Feeley, 56 N. Y. 451; Olmstead *v.* Dolan, 2 Silv. Supreme 561, 6 N. Y. Suppl. 130; Perry *v.* Sutley, 18 N. Y. Suppl. 633.

Pennsylvania.— Neall *v.* Hart, 115 Pa. St. 347, 8 Atl. 628, 2 Am. St. Rep. 559.

England.— Jones *v.* Howell, 29 L. J. Exch. 19, 1 L. T. Rep. N. S. 330, 8 Wkly. Rep. 151.

Canada.— Mayer *v.* Vaughan, 20 Quebec Super. Ct. 549, letter carrier, decoy letter.

See 23 Cent. Dig. tit. "False Imprisonment," § 31.

Insufficient proof of probable cause.— For cases where the facts were held insufficient to show probable cause see the following:

Illinois.— Newton *v.* Locklin, 77 Ill. 103.

Iowa.— Allen *v.* Leonard, 28 Iowa 529.

Massachusetts.— Londy *v.* Driscoll, 175 Mass. 426, 56 N. E. 598.

North Carolina.— State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.

Pennsylvania.— Grohmann *v.* Kirschman, 168 Pa. St. 189, 32 Atl. 32.

United States.— Park *v.* Taylor, 118 Fed. 34, 55 C. C. A. 56.

See 23 Cent. Dig. tit. "False Imprisonment," § 31.

Arrest of passenger by conductor.— For cases of probable cause see Southern R. Co. *v.* Gresham, 114 Ga. 183, 39 S. E. 883; Stricker *v.* Pennsylvania R. Co., 60 N. J. L. 230, 37 Atl. 776; Loggins *v.* Southern R. Co., 64 S. C. 321, 42 S. E. 163; Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262.

91. Neal *v.* Joyner, 89 N. C. 287. But mere dread that the guilty party might escape is not alone sufficient. Somerville *v.* Richards, 37 Mich. 299.

92. Wheeler *v.* McQueen, 96 Mich. 249, 55 N. W. 843; Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598; Chatfield *v.* Comerford, 4 F. & F. 1008. See also Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; and cases cited in ARREST, 3 Cyc. 887.

A conductor's telegram, complaining of disorderly conduct of a passenger whom he was unable to eject, may show probable cause.

made,[93] the condition of the person arrested,[94] and the extent of possible inquiry, as to facts and circumstances.[95]

(11) *DISCHARGE OR CONVICTION.* Voluntary dismissal of proceedings on which plaintiff was arrested,[96] or his discharge from arrest,[97] or his acquittal after trial or examination[98] is presumptive evidence of want of probable cause for his arrest, but is not invariably fatal to justification by probable cause.[99] A final conviction on the charge for which the arrest was made[1] sufficiently shows probable cause.[2]

5. JUSTIFICATION FOR WHAT CONDUCT — a. Duty of Arresting Party. The primary duty of the person arresting another without process is to release him forthwith if satisfied of his innocence[3] or to take him[4] without unnecessary violence,[5] by the

Baltimore, etc., R. Co. *v.* Cain, 81 Md. 87, 31 Atl. 801, 28 L. R. A. 688. But compare Miller *v.* Fano, 134 Cal. 103, 66 Pac. 183.

Information given by a person on whom the officer had good reason to rely may suffice. Van *v.* Pacific Coast Co., 120 Fed. 699.

Miscellaneous facts.— But an unverified rumor charging crime to an innocent person (Somerville *v.* Richards, 37 Mich. 299), a letter written by the chief of police in another city (Malcomson *v.* Scott, 56 Mich. 459, 23 N. W. 166), a claim of commission of crime in another state (Wells *v.* Johnston, 52 La. Ann. 713, 27 So. 185), or the advice of a police officer (Barth *v.* Heider, 6 D. C. 312. See also McCarthy *v.* De Armit, 99 Pa. St. 63) may not alone constitute justification. The information that will justify the making of a criminal complaint and relieve the party from liability for false imprisonment must be of such character and obtained from such sources that business men generally, of ordinary care, prudence, and discretion, would act upon it under similar circumstances. Livingston *v.* Burroughs, 33 Mich. 511. See also cases cited in ARREST, 3 Cyc. 887 note 4.

A private person cannot justify by information imparted to him by others. See cases cited in ARREST, 3 Cyc. 888 note 8.

93. The arrest on request of a person not a judicial officer is justifiable only when the emergency is urgent. Hodgson *v.* Millward, 3 Grant (Pa.) 406. The arrest of a husband, on complaint of violence, by his wife after verification (State *v.* Stouderman, 6 La. Ann. 286), or when engaged in conflict with his wife (Richardson *v.* Lawhon, 4 Ky. L. Rep. 998) is justifiable. Arrest on a statement made under military compulsion but known to be false does not justify. Huggins *v.* Toler, 1 Bush (Ky.) 192.

94. That plaintiff was intoxicated after an assault was held sufficient justification for arrest and detention three hours until regular charge could be made. Wiltse *v.* Holt, 95 Ind. 469. That plaintiff was drunk and disturbing church services is sufficient. Hutchinson *v.* Sangster, 4 Greene (Iowa) 340. But arrest for intoxication is no defense, even if the officer acts in good faith and under reasonable belief that person was intoxicated where he was in fact sober. Phillips *v.* Fadden, 125 Mass. 198.

95. Inquiry must be reasonable. Filer *v.* Smith, 102 Mich. 98, 60 N. W. 297.

96. Beebe *v.* De Baun, 8 Ark. 510.

97. Stone *v.* Dickinson, 7 Allen (Mass.) 26; Rosenkranz *v.* Hass, 1 Misc. (N. Y.) 220, 20 N. Y. Suppl. 880; McGarrahan *v.* Lavers, 15 R. I. 302, 3 Atl. 592.

98. Letzler *v.* Huntington, 24 La. Ann. 330. But not a *nolle prosequi* after disagreement of jury. Burbanks *v.* Lepovsky, 134 Mich. 384, 96 N. W. 456.

99. Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353. See also Murray *v.* Friensberg, 15 N. Y. Suppl. 450; Allen *v.* Wright, 8 C. & P. 522, 34 E. C. L. 870; Cahill *v.* Fitzgibbon, 16 L. R. Ir. 371.

1. But not conviction on another charge. Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899. And conviction from which an appeal has been taken is not sufficient evidence of probable cause to justify previous arrest by an officer without a warrant. Mason *v.* Lothrop, 7 Gray (Mass.) 354. See also Bracket *v.* Eastman, 17 Wend. (N. Y.) 32.

2. Wrexford *v.* Smith, 2 Root (Conn.) 171; Billington *v.* Hoverman, 18 Ohio Cir. Ct. 637, 7 Ohio Cir. Dec. 358. Thus where a constable made an arrest on a charge of intoxication and disorderly conduct and the magistrate committed the accused, the officer was held not liable. Minehan *v.* Thomas, 9 N. Y. Wkly. Dig. 32. Even if the magistrate made no formal record of conviction the officer is not liable. Cuniff *v.* Beecher, 84 Hun (N. Y.) 137, 32 N. Y. Suppl. 1067. But an order of a land commissioner is no justification. Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

3. Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Mayer *v.* Vaughan, 11 Quebec Q. B. 340.

4. Hayes *v.* Mitchell, 69 Ala. 452; Phillips *v.* Fadden, 125 Mass. 198; Brock *v.* Stimson, 108 Mass. 520, 11 Am. Rep. 390. Wheeler *v.* Nesbitt, 24 How. (U. S.) 544, 16 L. ed. 765. Palmer *v.* Allen, 7 Cranch (U. S.) 550, 3 L. ed. 436 [*reversing* 5 Day (Conn.) 193].

5. Pease *v.* Burt, 3 Day (Conn.) 485 (as of a principal by bail); Shanley *v.* Wells, 71 Ill. 78; Giroux *v.* State, 40 Tex. 97 (officer justified in maintaining peace at polling booth).

Threats made by a person under arrest justify an officer in putting him in irons. Cochran *v.* Toher, 14 Minn. 385. And evidence of threats was held admissible as bearing on the question of the propriety of the force used by the officer. Fulton *v.* Staats, 41 N. Y. 498. For the same point on arrest by a private

ordinary direct route,[6] to the nearest[7] committing magistrate,[8] or to deliver him to some other person[9] as the law determines.[10] Failure to perform this duty imposes liability in false imprisonment,[11] for a trespass *ab initio*.[12]

b. Prolonged Detention. Detention is justified for the length of time only reasonably required to take the detained person to the proper officer for examination[13] or admission to bail[14] or until a warrant can be obtained;[15] having due ref-

citizen see Lander *v.* Miles, 3 Oreg. 35. But *compare* Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403.

A person may be bound if there is reasonable apprehension of rescue or escape. Wright *v.* Court, 4 B. & C. 596, 6 D. & R. 623, 4 L. J. K. B. O. S. 17, 28 Rev. Rep. 418, 10 E. C. L. 718. But to justify handcuffing a prisoner arrested for felony, it is not necessary that he should be a notorious character, nor that he should be unruly and attempt to escape. Edger *v.* Burke, 96 Md. 715, 54 Atl. 986. See also cases cited in ARREST, 3 Cyc. 891 notes 33, 34.

6. Not by a circuitous one. Morris *v.* Wise, 2 F. & F. 51.

7. Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 846; Hayes *v.* Mitchell, 80 Ala. 183 (notwithstanding unwillingness of the prisoner to be tried by the proper magistrate); Potter *v.* Swindle, 77 Ga. 419, 3 S. E. 94; Papineau *v.* Bacon, 110 Mass. 319.

Where there is danger of riot taking him to another district is justifiable. Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607.

8. Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Snead *v.* Bonnoil, 49 N. Y. App. Div. 330, 63 N. Y. Suppl. 553. The officer is not justified in taking the prisoner to a certain place for identification. Hall *v.* Booth, 3 N. & M. 316, 28 E. C. L. 607.

9. Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425. But not generally. Ocean Steamship Co. *v.* Williams, 69 Ga. 251; Leger *v.* Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193.

10. Blake *v.* Burke, 42 Md. 45; Hall *v.* Booth, 3 N. & M. 316, 28 E. C. L. 607.

11. Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425, as where there is an entire failure to appear and prosecute (Brock *v.* Stimson, 108 Mass. 520, 11 Am. Rep. 390), even if the arrest be made in entire good faith (Phillips *v.* Fadden, 125 Mass. 198), but not for refusal to go with him to help get bail (Calderone *v.* Kiernan, 23 R. I. 578, 51 Atl. 215).

12. The officer making the arrest is within this liability.

Connecticut.— Dehn *v.* Hinman, 56 Conn. 320, 15 Atl. 741, 1 L. R. A. 374.

Georgia.— Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607. See also Manning *v.* Mitchell, 73 Ga. 660.

Iowa.— Stewart *v.* Fecley, 118 Iowa 524, 92 N. W. 670.

New York.— Snead *v.* Bonnoil, 49 N. Y. App. Div. 330, 63 N. Y. Suppl. 553; Paster *v.* Regan, 9 Misc. 547, 30 N. Y. Suppl. 657.

Texas.— Sheehan *v.* Holcomb, 1 Tex. App. Civ. Cas. § 462.

Vermont.— Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926; Kenerson *v.* Bacon, 41 Vt. 573.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 6, 7, 30.

13. *Georgia.*— Manning *v.* Mitchell, 73 Ga. 660; Harris *v.* Atlanta, 62 Ga. 290.

Illinois.— Hawk *v.* Ridgway, 33 Ill. 473, within a reasonable time.

Indiana.— Low *v.* Evans, 16 Ind. 486.

Maine.— Burke *v.* Bell, 36 Me. 317.

Maryland.— Brish *v.* Carter, 98 Md. 445, 57 Atl. 210.

Massachusetts.— Papineau *v.* Bacon, 110 Mass. 319; Williams *v.* Powell, 101 Mass. 467, 3 Am. Rep. 396.

Minnesota.— Judson *v.* Reardon, 16 Minn. 431, without unnecessary delay.

New Hampshire.— Colby *v.* Jackson, 12 N. H. 526.

Texas.— Newby *v.* Gunn, 74 Tex. 455, 12 S. W. 67, immediately.

England.— Allen *v.* Wright, 8 C. & P. 522, 34 E. C. L. 870; Hall *v.* Booth, 3 N. & M. 316, 28 E. C. L. 607; Harvey *v.* Mayne, Ir. R. 6 C. L. 417.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 6, 7, 30.

Over night.— Detention from sundown until ten o'clock of the next morning has been held reasonable as a matter of law. Johnson *v.* Americus, 46 Ga. 80. See also Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607; Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443. But confinement in a cell for a misdemeanor, from five thirty P. M. until morning has been held actionable in a metropolitan city. Schmeider *v.* McLane, 36 Barb. (N. Y.) 495 [*affirmed* in 4 Abb. Dec. 154, 3 Keyes 568, 3 Transcr. App. 266]. See also Green *v.* Kennedy, 46 Barb. (N. Y.) 16 [*affirmed* in 48 N. Y. 653].

Unreasonable periods.— Confinement for one day (Pratt *v.* Brown, 80 Tex. 608, 16 S. W. 443); for forty-eight hours (Burke *v.* Bell, 36 Me. 317. See also Friesenhan *v.* Maines, (Mich. 1904) 100 N. W. 172); four days (Hawley *v.* Butler, 48 Barb. (N. Y.) 101, arrest of deserter; Jones *v.* Com., 1 Rob. (Va.) 748, in connection with circumstances of aggravation); or five days (Barclay *v.* Goodale, 2 Fed. Cas. No. 972; Cochran *v.* Toher, 14 Minn. 385); several days (Green *v.* Kennedy, 46 Barb. (N. Y.) 16 [*affirmed* in 48 N. Y. 653]); and seven days (Mayberry *v.* Kelly, 1 Kan. 116) have been held to be unreasonable as a matter of law.

14. Markey *v.* Griffin, 109 Ill. App. 212, holding that plaintiff's intoxication did not necessarily deprive him of the right to have bail fixed speedily.

15. Markey *v.* Griffin, 109 Ill. App. 212; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875;

erence *inter alia* to judicial accessibility, convenience, practice, and facilities,[16] the intervention of Sunday,[17] or the mental condition of the person detained.[18] The detention may be so prolonged as to destroy the defense completed by probable cause and be actionable as malicious.[19] But a legal arrest is not tainted by a subsequent illegal detention so as to make the arresting officer a trespasser *ab initio* unless the arrest was intended as a cover to subsequent illegal conduct.[20]

D. Private Authority Without Process — 1. Personal Authority. Parents,[21] school authorities,[22] and persons acting in self-protection[23] may justify by recognized authority.[24]

2. Military Authority. Orders of the federal government,[25] within a strict construction of their terms,[26] to persons authorized,[27] justify arrests[28] within the jurisdiction[29] and without unnecessary violence.[30] In cases of arrest without

Leger *v.* Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193.

16. Such as inaccessibility of officers or immediate danger (Hayes *v.* Mitchell, 69 Ala. 452; Wiggins *v.* Norton, 83 Ga. 148, 9 S. E. 607), absence of proper judicial officer (Weser *v.* Welty, 18 Ind. App. 664, 37 N. E. 639; Brish *v.* Carter, 98 Md. 445, 57 Atl. 210; Shaw *v.* Reed, 16 Mass. 450; Kent *v.* Miles, 68 Vt 48, 33 Atl. 768) or unavoidable delay of a judicial officer (Cargill *v.* State, 8 Tex. App. 431, in taking bail). Detention in an adjoining room until the committing judicial officer had completed trial of another cause is not actionable. Hopner *v.* McGowan, 54 N. Y. Super. Ct. 98 [*affirmed* in 116 N. Y. 405, 22 N. E. 558].

17. Courts are not bound to sit on Sundays in order to try arrest cases. Tubbs *v.* Tukey, 3 Cush (Mass.) 438, 50 Am. Dec. 744; Linnen *v.* Banfield, 114 Mich. 93, 72 N. W. 1; Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598; Nason *v.* Fowler, 70 N. H. 291, 47 Atl. 263.

Detention of a drunken person from twelve o'clock Saturday night until Monday morning is justifiable. Pepper *v.* Mayes, 81 Ky. 673.

18. Detention for examination into sanity of person is sufficient legal process for justification. Mulberry *v.* Fuellhart, 203 Pa. St. 573, 53 Atl. 504. See also Brock *v.* Stimson, 108 Mass. 520, 11 Am. Rep. 390; Pastor *v.* Regan, 9 Misc. (N. Y.) 547, 30 N. Y. Suppl. 657.

19. Pinkerton *v.* Martin, 82 Ill. App. 589. Detention by the officer in a county where the crime was not committed for a justifiable time for purposes of identification is not false imprisonment (Wolf *v.* Perryman, 82 Tex 112, 17 S. W. 772), but not for inquiry into another charge (Snead *v.* Bonnoil, 49 N. Y. App. Div. 330, 63 N Y. Suppl. 553; Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291).

20. Friesenhan *v.* Maines, (Mich. 1904) 100 N. W. 172.

21 See, generally, Parent and Child.

22. Fertich *v.* Michener, 111 Ind. 472, 11 N. E. 605, 60 Am Rep. 709. *Compare* Ryan *v.* Hudson, 1 N. Y City Ct. Suppl. 72; Herring *v.* Boyle, 1 C. M. & R. 377, 6 C & P. 496, 3 L. J. Exch. 344, 4 Tyrw. 801, 25 E. C. L. 543.

23. McNay *v.* Stratton, 9 Ill. App. 215; Look *v.* Dean, 108 Mass. 116, 11 Am. Rep. 323. See also *supra*, VII, A.

24. The authority of military and maritime officers is commonly regarded as of this nature. See *infra*, VIII, D, 2, 3.

The rights and liabilities of vestrymen are essentially similar to those of private persons arresting without warrant for breach of the peace. Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403.

25. But not of the Confederate government. Whitmore *v.* Allen, 33 Tex. 355; Caperton *v.* Ballard, 4 W. Va. 420; Cole *v.* Radcliff, 4 W. Va. 332; Caperton *v.* Bowyer, 4 W. Va. 176; Caperton *v.* Nickel, 4 W. Va. 173; Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270.

As to absence of power of president to authorize arrest without judicial warrant in time of peace (see Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159), or in time of insurrection (see Jones *v.* Seward, 40 Barb. (N. Y.) 563).

26. Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159.

27. Trask *v.* Payne, 43 Barb. (N. Y.) 569.

A deputy provost marshal, directed by his superior officer to arrest and punish persons not connected with the army for retailing liquor at their usual place of business to soldiers is not protected by such order from liability to the arrested persons for damages on account of such arrest. Griffin *v.* Wilcox, 21 Ind. 370.

28. Druecker *v.* Salomon, 21 Wis. 621, 94 Am. Dec. 571, by governor under authority of the president. See also Arrests, 3 Cyc. 886.

An officer enlisting a minor and commanding him in the army is not liable, although there was no written consent of the parents. Boutwell *v.* Thompson, Brayt. (Vt.) 119.

29. Smith *v.* Shaw, 12 Johns. (N. Y.) 257; Milligan *v.* Hovey, 17 Fed. Cas. No. 9,605, 3 Biss 13. An action can be maintained against a municipal officer for seizing and taking to camp a person who has signed a paper to serve as a volunteer for three years from the date of being mustered into the service of the United States. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480.

30. McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, Deady 233.

specific order, the usual rules as to justification by probable cause and as to mitigation of damages apply.[31]

3. Maritime Authority. The right of maritime officials to arrest private persons may be derived from authority: (1) To enforce discipline aboard ship,[32] within reasonable limits;[33] (2) to capture and arrest *jure belli* or *quasi jure belli*;[34] and (3) to enforce generally process in prescribed form.[35]

4. Direction of Superior. The mere direction of a superior officer does not necessarily impose a legal duty; where it fails to do so it does not exonerate.[36]

IX. ACCRUAL OF RIGHT OF ACTION.

An action for false imprisonment is prematurely brought unless the suit in which the writ issued has terminated.[37] It may lie, however, irrespective of such a termination,[38] whereas malicious prosecution necessarily presupposes a previous judicial proceeding and its termination favorably to defendant therein.[39]

31. For example in cases of arrest for aiding the enemy (Clow *v.* Wright, Brayt. (Vt.) 118); aiding deserters (Teagarden *v.* Graham, 31 Ind. 422; Beckwith *v.* Bean, 98 U. S. 266, 25 L. ed. 124); or for the purpose of preserving order (Oglesby *v.* State, 39 Tex. 53); or for discipline (Merriman *v.* Bryant, 14 Conn. 200, person enrolled in military company). See also Carpenter *v.* Parker, 23 Iowa 450, mitigation of damages.

32. This privilege is analogous to the authority of parents to enforce domestic peace, and as to the latter see, generally, Parent and Child.

Direct command of a master may exonerate a mate. Gardner *v.* Bibbins, 9 Fed. Cas. No. 5,222, 1 Blatchf. & H. 356.

33. Lane *v.* Powell, 1 Edm. Sel. Cas. (N. Y.) 256. A naval officer may be sued in state courts for arrest under color of maritime discipline of subordinate for conduct on high seas. Wilson *v.* MacKenzie, 7 Hill (N. Y.) 95.

34. See The Lively, 15 Fed. Cas. No. 8,403, 1 Gall. 315. Under the act of congress of March 2, 1837, a commander of a squadron has power to detain a marine after his term of enlistment expires, if in the opinion of the commander public interest requires it, and is not liable for false imprisonment in so doing. Dinsman *v.* Wilkes, 12 How. (U. S.) 390, 13 L. ed. 1036.

35. As to right to arrest and proceedings for arrest in suits *in personam* in admiralty see Admiralty, 1 Cyc. notes 97, 98, 99. For form of warrant of arrest *in personam* see 2 Conkling Adm. 552; Marriott Form. 330. For form of warrant of arrest with clause for attachment of goods see 2 Conkling Adm. 554. See also Manro v. Almeida, 10 Wheat. (U. S.) 473, 6 L. ed. 369; Clark *v.* New Jersey Steam Nav. Co., 5 Fed. Cas. No. 2,859, 1 Story 531; Wilson *v.* Pierce, 30 Fed. Cas. No. 17,826, 15 Law Rep. 137. For form of warrant of arrest *in rem* and *in personam* see 2 Conkling Adm. 556.

36. *Illinois.*— Odell *v.* Schroeder, 58 Ill. 353.

Indiana.— Griffen *v.* Wilcox, 21 Ind. 370, deputy provost marshal.

Michigan.—Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635, employee of land department on order of land commissioner.

New Hampshire.— Danovan *v.* Jones, 36 N. H. 246.

New York.— Arteaga *v.* Conner, 88 N. Y. 403 [*affirming* 47 N. Y. Super. Ct. 494] (sheriff's order to jailer); Trask *v.* Payne, 43 Barb. 569 (order for arrest by marshals or deputies does not justify a deputy sheriff); Bracket *v.* Eastman, 17 Wend. 32 (invalid judge's order).

Ohio.— Leger *v.* Warren, 62 Ohio St. 500, 57 N. E. 506, 78 Am. St. Rep. 738, 51 L. R. A. 193.

Pennsylvania.— Flinn *v.* Graham, 3 Pittsb. 195.

See 23 Cent. Dig. tit. "False Imprisonment," § 77.

37. Blanchard *v.* Goss, 2 N. H. 491. As by the failure of complainant to prosecute (Fay *v.* O'Neill, 36 N. Y. 11), or abandonment of a criminal charge and discontinuance of prosecution (Warren *v.* Dennett, 17 Misc. (N. Y.) 86, 39 N. Y. Suppl. 830). As to necessity of satisfying an execution before suing for malicious arrest thereunder see Wilkins *v.* Hall, 2 McCord (S. C.) 205. Where plaintiff was arrested at the instance of defendant and bound over to keep the peace until the next court, an action before the expiration of said term of the court for false imprisonment was brought too soon. Garren *v.* Garren, 1 Wkly. Notes Cas. (Pa.) 9. But the rule stated in the text does does not apply where an order dissolving an arrest has before final judgment on the merits been affirmed on appeal, and the judgment thus rendered has become final. Wentz *v.* Bernhardt, 37 La. Ann. 636.

Where the writ is absolutely void, it need not be set aside before commencing action. *In re* Bradner, 87 N. Y. 171. See also Berger *v.* Saul, 113 Ga. 869, 39 S. E. 326, where the court had no jurisdiction. It is otherwise as to process merely irregular. Sikes *v.* Johnson, 16 Mass. 389; *In re* Bradner, *supra*.

38. McCaskey *v.* Garrett, 91 Mo. App. 354; Burns *v.* Erben, 1 Rob. (N. Y.) 555, 26 How. Pr. (N. Y.) 273. Where the subject-matter is *coram non judice* false imprisonment lies, not malicious prosecution. Castro *v.* De Uriarte, 12 Fed. 250.

39. See, generally, Malicious Prosecution. Where a party is arrested and taken

X. FORM OF ACTION AND JOINDER OF ACTIONS.

A. Form of Action. The form of action in which damages for a false imprisonment are recovered at common law and ordinarily under statutory modification is a distinctive personal trespass;[40] it is neither trespass *vi et armis* for assault and battery,[41] nor trespass *quare clausum fregit*,[42] nor trespass on the case for any form of malicious wrong.[43]

before a magistrate and there discharged, false imprisonment lies for detention until discharge; thereafter malicious prosecution. Austin *v.* Dowling, L. R. 5 C. P. 534, 39 L. J. C. P. 260, 22 L. T. Rep. N. S. 721, 18 Wkly. Rep. 1003. *Compare* Lock *v.* Ashton, 12 Q. B. 871, 13 Jur. 167, 18 L. J. Q. B. 76, 64 E. C. L. 871.

40. Woodall *v.* McMillan, 38 Ala. 622. This follows from the absolute or primary character of the right violated by conduct constituting false imprisonment. See *supra*, II, A.

As to trespass ab initio see Kenner *v.* Morrison, 12 Hun (N. Y.) 204; Meserve *v.* Folsom, 62 Vt. 504, 20 Atl. 926.

The abolition of forms of actions by various codes has produced a nominal but not substantial change. The old common-law principles survive with little change even of nomenclature.

Connecticut.— Wilcox *v.* Gladwin, 50 Conn. 77.

Georgia.— Thorpe *v.* Wray, 68 Ga. 359.

Kentucky.— Clay *v.* Sweet, 1 A. K. Marsh. 194.

Massachusetts.— Cassier *v.* Fales, 139 Mass. 461, 1 N. E. 922 ("in nature of trespass"); Spoor *v.* Spooner, 12 Metc. 281.

New Hampshire.— Osgood *v.* Blake, 21 N. H. 550.

North Carolina.— Price *v.* Graham, 48 N. C. 545; Allen *v.* Greenlee, 13 N. C. 370.

Pennsylvania.— Kramer *v.* Lott, 50 Pa. St. 495, 88 Am. Dec. 556; Baird *v.* Householder, 32 Pa. St. 168; Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708; Berry *v.* Hamill, 12 Serg. & R. 210.

Tennessee.— McQueen *v.* Heck, 1 Coldw. 212.

Vermont.— Bebee *v.* Steel, 2 Vt. 314.

See 23 Cent. Dig. tit. "False Imprisonment," § 81.

By statute in Michigan (Howell St. § 7759) an action on the case lies for false imprisonment (Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000), and also in Virginia (Parsons *v.* Harper, 16 Gratt. 64).

41. False imprisonment will often lie upon circumstances which include also an assault and battery. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796; Pease *v.* Burt, 3 Day (Conn.) 485; McNay *v.* Stratton, 9 Ill. App. 215; Rauma *v.* Lamont, 82 Minn. 477, 85 N. W. 236. The two causes of action may properly be united (Little *v.* Munson, 54 Ill. App. 437; Green *v.* Kennedy, 46 Barb. (N. Y.) 16 [*affirmed* in 48 N. Y. 653]; Allen *v.* Parkhurst, 10 Vt. 557; Burgess *v.* Freelove, 2 B. & P. 425; McCurday *v.* Driscoll, 1 Cromp. & M. 618, 2 L. J. Exch. 185, 3 Tyrw. 571, several assaults and false imprisonment laid in separate counts) or perhaps be both contained in one count (Atkinson *v.* Warne, 1 C. M. & R. 827, 6 C. & P. 687, 3 Dowl. P. C. 483, 5 Tyrw. 481, 25 E. C. L. 640). Allegations that defendants entered plaintiff's house and arrested her and another, and that they forcibly removed her therefrom and took her to jail, constitute only one cause of action. Exner *v.* Exner, 2 Abb. N. Cas. (N. Y.) 108.

42. False imprisonment being a wrong to the person as distinguished from property, trespass *quare clausum fregit* is not the proper form of action. Sawyer *v.* Ryan, 13 Metc. (Mass.) 144, where plaintiff's allegation that defendants broke and entered his dwelling and imprisoned him was held to make out a case only of trespass to land.

43. The damage being immediate, direct, and presumed by law from the mere fact of violation of a right without affirmative proof of actual harm, the form of action was not trespass on the case.

Alabama.— Holly *v.* Carson, 39 Ala. 345.

New York.— Nebenzahl *v.* Townsend, 61 How. Pr. 353; Platt *v.* Niles, 1 Edm. Sel. Cas. 230. See also Barhydt *v.* Valk, 12 Wend. 145, 27 Am. Dec. 124.

North Carolina.— Price *v.* Graham, 48 N. C. 545.

Pennsylvania.— Maher *v.* Ashmead, 30 Pa. St. 344, 72 Am. Dec. 708.

Vermont.— Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194; Bebee *v.* Steel, 2 Vt. 314.

United States.— Knight *v.* International, etc., R. Co., 61 Fed. 87, 9 C. C. A. 376; Castro *v.* De Uriarte, 12 Fed. 250; Stanton *v.* Seymour, 22 Fed. Cas. No. 13,298, 5 McLean 267.

England.— Withers *v.* Henley, Cro. Jac. 379; Macfarlane *v.* Ellis, 1 F. & F. 288. But where a wrongful arrest is made on information of another, it has been held that case not trespass lay. Morgan *v.* Hughes, 2 T. R. 225.

See 23 Cent. Dig. tit. "Malicious Prosecution," § 81.

Distinguished from other malicious wrongs. — False imprisonment is correspondingly different from malicious wrongs other than malicious prosecution. As to malicious abuse of criminal process see Wood *v.* Graves, 144 Mass. 365, 11 N. E. 567, 59 Am. Rep. 95. As to action for malicious arrest see Stanfield *v.* Phillips, 78 Pa. St. 73; Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193. An action for malicious arrest is practically obsolete in Missouri. Bierwirth *v.* Pieronnet, 65 Mo. App. 431. Primarily the distinction is because the substance of false imprisonment is unlawful de-

B. Joinder With Malicious Prosecution. The same set of facts may give rise to two distinct causes of action, the one in false imprisonment, the other in malicious prosecution, in which case the wrong-doer may be liable in separate actions[44] or to one action in which there may be two counts, one in false imprisonment and one in malicious prosecution as originally pleaded, or on amendment before the statute of limitations, bars the right to amend.[45]

XI. PLEADING.

A. Declaration or Complaint — 1. Sufficiency in General. A declaration or complaint in false imprisonment is sufficient[46] in law only when in compliance with common-law rules[47] substantially reënacted by practice statutes[48] it alleges facts[49] as distinguished from conclusions[50] concisely,[51] sufficiently setting forth the detention[52] of the party endeavoring to recover by the person sought to be

tention in fact (see *supra*, II, A; IV, A) so far as the right to recover is concerned (see *supra*, XIII); whereas malice is of the essence of the other wrongs (see *infra*, VIII, C, 4) and also because of the requirement in the latter of a previous legal proceeding terminating favorably to the person seeking damages, as in malicious arrest. Murson *v.* Austin, 2 Phila. (Pa.) 116.

44. Guest *v.* Warren, 2 C. L. R. 979, 9 Exch. 379, 18 Jur. 133, 23 L. J. Exch. 121, 2 Wkly. Rep. 159. See also Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301.

45. Berger *v.* Saul, 113 Ga. 869, 39 S. E. 326; Bradner *v.* Faulkner, 93 N. Y. 515; Nebenzahl *v.* Townsend, 61 How. Pr. (N. Y.) 353; Bryan *v.* Stewart, 123 N. C. 92, 31 S. E. 286; Nybladh *v.* Herterius, 41 Fed. 120, a case controlled by the Illinois practice. See also Wagstaff *v.* Schippel, 27 Kan. 450; and Joinder and Splitting of Actions.

As to joinder with action for slander see Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000; Miles *v.* Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412; Bible *v.* Palmer, 95 Tenn. 393, 32 S. W. 249; and Joinder and Splitting of Actions.

As to inability to compel election between false imprisonment and malicious prosecution in a complaint in which those causes of action are joined see Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81. *Compare* Thompson *v.* Stoddard, 112 Mich. 687, 71 N. W. 524.

Amendment to conform to proof.— If the petition sets forth a cause of action in malicious prosecution and the evidence shows an action of false imprisonment the pleading may be amended on trial so as to conform to the facts. Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593, 14 Pac. 229; People *v.* Judge Wayne Cir. Ct., 27 Mich. 164.

46. Held sufficient in the following cases:

Alabama.— Kelly *v.* Moore, 51 Ala. 364 (against justice of the peace); Sheppard *v.* Furniss, 19 Ala. 760 (arrest upon affidavit).

Georgia.— Howard *v.* Edwards, 89 Ga. 367, 15 S. E. 480, sufficient as to sheriff, insufficient as to person in whose favor unlawful order was made.

Kansas.— Peters *v.* Lindsborg, 40 Kan. 654, 20 Pac. 490, against a city marshal for handcuffing.

Minnesota.— Nixon *v.* Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506, without probable cause.

Mississippi.— Anderson *v.* Beck, 64 Miss. 113, 8 So. 167, against sheriff and sureties.

See 23 Cent. Dig. tit. "False Imprisonment," § 86.

Held insufficient in Going *v.* Dinwiddie, 86 Cal. 633, 25 Pac. 129 (against justice of the peace); Parker *v.* Hamilton, 6 Ky. L. Rep. 590 (against justice of the peace); Worley *v.* Columbia, 88 Mo. 106 (against a city); Force *v.* Probasco, 43 N. J. L. 539.

47. The trespass may be laid *diversis diebus ac vicibus.* Burgess *v.* Freelove, 2 B. & P. 425. See English *v.* Purser, 6 East 395.

48. Woodall *v.* McMillan, 38 Ala. 622 (including allegation of arrest without reasonable or probable cause); Shaw *v.* Jayne, 2 Code Rep. (N. Y.) 69.

49. Clare *v.* Wroten, 4 Ky. L. Rep. 363; Noyes *v.* Edgerly, 71 N. H. 500, 53 Atl. 311. A complaint alleging intent to injure, detention for an hour without reasonable cause, or authority against the will of plaintiff is not demurrable. Bonnet *v.* Wanamaker, 34 Misc. (N. Y.) 591, 70 N. Y. Suppl. 372.

50. Mere use of words like "wrongful," "unlawfully," or "maliciously" does not sufficiently plead facts. Going *v.* Dinwiddie, 86 Cal. 633, 25 Pac. 129; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875 (that plaintiff was unlawfully imprisoned); Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328 (but the objection is unavailing if raised for the first time on appeal); Reynolds *v.* Price, 56 S. W. 502, 22 Ky. L. Rep. 5; Cunningham *v.* East River Electric Light Co., 60 N. Y. Super. Ct. 282, 17 N. Y. Suppl. 372 (both holding that arrest was maliciously procured).

Want of probable cause.— Considerable liberality has been permitted in allegations of want of probable cause. Woodall *v.* McMillan, 38 Ala. 622; Akin *v.* Newell, 32 Ark. 605; Nixon *v.* Reeves, 65 Minn. 159, 67 N. W. 989, 33 L. R. A. 506.

51. Excessive detail in statements of fact may be remedied on motion to strike out. Eddy *v.* Beach, 7 Abb. Pr. (N. Y.) 17; Shaw *v.* Jayne, 4 How. Pr. (N. Y.) 119.

52. Pease *v.* Freiwald, 39 Misc. (N. Y.) 549, 80 N. Y. Suppl. 402.

charged as a legal cause,[53] against his will[54] and illegally,[55] in the absence of allegations of fact giving rise to a presumption of lawfulness of the imprisonment.[56] It has been held that if plaintiff alleges malice and want of probable cause, although unnecessary, he must prove those elements.[57]

2. Denial of Legal Authority. When a complaint in false imprisonment does not show on its face an arrest made under color of legal authority it need not anticipate a defense by denial of power to arrest nor allege that the imprisonment was malicious or without probable cause;[58] but when its own allegations involve an assertion of such power, not appearing to be void,[59] it is demurrable in the absence of allegations of fact showing a liability notwithstanding.[60]

53. Barfield *v.* Turner, 101 N. C. 357, 8 S. E. 115.

Sufficient and insufficient allegations.— For a sufficient allegation of cause in the alternative (see West *v.* Tyler, 2 Coldw. (Tenn.) 96); for an insufficient one (see Force *v.* Probasco, 43 N. J. L. 539). For a sufficient allegation of conspiracy see Exner *v.* Exner, 2 Abb. N. Cas. (N. Y.) 108. For a sufficient allegation against the proprietor of a store for the arrest of a customer see Fogarty *v.* Wanamaker, 60 N. Y. App. Div. 433, 69 N. Y. Suppl. 883; Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98, not bad for duplicity.

54. Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328 (unless properly amended); Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737 (no negation of unwillingness is necessary).

55. Warren *v.* Dennett, 17 Misc. (N. Y.) 86, 39 N. Y. Suppl. 830, unnecessary to allege conclusions.

56. Barker *v.* Anderson, 81 Mich. 508. 45 N. W. 1108. But in the absence of such allegations imprisonment is *prima facie* presumed to be unlawful. People *v.* McGrew, 77 Cal. 570, 20 Pac. 92; Burch *v.* Franklin, 7 Ohio S. & C. Pl. Dec. 519; Kirbie *v.* State, 5 Tex. App. 60.

57. Fuqua *v.* Gambill, 140 Ala. 464, 37 So. 235.

58. Johnson *v.* Von Kettler, 84 Ill. 315; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Carey *v.* Sheets, 60 Ind. 17; Gallimore *v.* Ammerman, 39 Ind. 323; Colter *v.* Lower, 35 Ind. 285, 9 Am. Rep. 735; Parsons *v.* Harper, 16 Gratt. (Va.) 64. But the presence of such allegations does not necessarily convert the complaint into one for malicious prosecution or in the nature thereof (Davis *v.* Sanders, 133 Ala. 275, 32 So. 499; Ragsdale *v.* Bowles, 16 Ala. 62; Reynolds *v.* Price, 56 S. W. 502, 22 Ky. L. Rep. 5; Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y.) 51; Brandt *v.* Craddock, 27 L. J. Exch. 314. *Compare* Austin *v.* Dowling, L. R. 5 C. P. 534, 39 L. J. C. P. 260, 22 L. T. Rep. N. S. 721, 18 Wkly. Rep. 1003), nor render it invalid (Davis *v.* Sanders, 133 Ala. 275, 32 So. 499; Rich *v.* McInerny, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Moulton *v.* Burbanks, 1 Root (Conn.) 264 (complaint not vitiated by allegation of forged warrants); Sherman *v.* Grinnell, 70 Hun (N. Y.) 354, 24 N. Y. Suppl. 59; Bonnet *v.* Wanamaker, 34 Misc. (N. Y.) 591, 70 N. Y. Suppl. 372). Where the gist of the action on fair interpretation of the whole pleading is false imprisonment, an allegation of probable cause is immaterial. Johnson *v.* Von Kettler, 84 Ill. 315. But where the complaint sets forth an arrest maliciously and without probable cause, imprisonment, and acquittal, and does not allege absence of a warrant or irregularity or illegality in a warrant it shows that malicious prosecution and not false imprisonment lies. Haskins *v.* Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376. On the other hand the allegation of absence of probable cause does not convert trespass *quare clausum fregit* into false imprisonment. Sawyer *v.* Ryan, 13 Metc. (Mass.) 144.

59. Diehl *v.* Friester, 37 Ohio St. 473, *obiter*, the court holding that the complaint was sufficient, since it showed that the judgment and order of imprisonment were void.

60. As that plaintiff was privileged or exempt (O'Boyle *v.* Brown, Wright (Ohio) 465, failure to allege exemption of female from arrest; Crandall *v.* Gavitt, 20 R. I. 366, 39 Atl. 191) or that such authority was void or groundless, for want of jurisdiction (McMichael *v.* Blasingame, 108 Ga. 298, 33 S. E. 968; Olmsted *v.* Edson, (Nebr. 1904) 98 N. W. 415; Cousins *v.* Swords, 162 N. Y. 625, 57 N. E. 1107 [*affirming* 14 N. Y. App. Div. 338, 43 N. Y. Suppl. 907]; Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525, without a warrant and without authority of law, sufficient; Pease *v.* Freiwald, 39 Misc. (N. Y.) 549, 80 N. Y. Suppl. 402 [*affirming* 38 Misc. 805, 78 N. Y. Suppl. 1130]; Barfield *v.* Turner, 101 N. C. 357, 8 S. E. 115, although in aggravation it alleged wrongful and illegal imprisonment; Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001, complaint invalid for not setting out process or authority; King *v.* Johnston, 81 Wis. 578, 51 N. W. 1011, insufficient allegation for want of showing that arrest was extrajudicial and without legal process. See also Watters *v.* De La Matter, 109 Ill. App. 334) or that judicial office (Kelly *v.* Moore, 51 Ala. 364, justice and sureties liable for arrest without reason; Parker *v.* Hamilton, 6 Ky. L. Rep. 590, failure to allege want of jurisdiction against defendant justice of the peace; Neimitz *v.* Conrad, 22 Oreg. 164, 29 Pac. 548, refusal to receive bail on lawful arrest; Taylor *v.* Goodrich, 25 Tex. Civ. App. 109, 40 S. W. 515, pleading charging judge committing for contempt for conduct "not

3. Allegation of Damage. General damages are sufficiently alleged by the usual *ad damnum* clause.[61] The causes producing special damages,[62] and matters of aggravation,[63] must be set forth with particularity to permit introduction of evidence to establish them.[64]

B. Answer — 1. General Issue. Under the plea of the general issue matter in denial of the defendant will be permitted to introduce evidence to prove

that of a court" in connection with facts alleging want of jurisdiction construed as a whole) or process (Peters *v.* Lindsborg, 40 Kan. 654, 20 Pac. 490, placing handcuffs and confinement in prison sufficient; Anderson *v.* Beck, 64 Miss. 113, 8 So. 167, allegation of unexplained detention for more than thirty days on pretended warrant on false and fraudulent charge is not demurrable; McConnell *v.* Kennedy, 29 S. C. 180, 7 S. E. 76, insufficient allegation of abuse by extorting agreement. And see Dresser *v.* Van Pelt, 15 How. Pr. (N. Y.) 19).

For allegations held to be sufficient see Sheppard *v.* Furniss, 19 Ala. 760 (detention for ten days); Burnap *v.* Marsh, 13 Ill. 535 (action against attorney); Mayberry *v.* Kelly, 1 Kan. 116.

For allegation partially sustained see Howard *v.* Edwards, 89 Ga. 367, 16 S. E. 480. See also Berrer *v.* Moorhead, 22 Nebr. 687, 36 N. W. 118, arrest under indictment and tender of recognizance.

For insufficient allegations see Cousins *v.* Swords, 14 N. Y. App. Div. 388, 43 N. Y. Suppl. 907; Barfield *v.* Turner, 101 N. C. 357, 8 S. E. 115. For defective allegation of imprisonment under false charge see Seeger *v.* Pfeifer, 35 Ind. 13. For failure to allege election and qualification of officer see Robinson *v.* Morgan, 100 Ky. 529, 38 S. W. 868, 18 Ky. L. Rep. 903. For insufficient complaint against carrier for detention for refusal to pay fare see Dierig *v.* South Covington, etc., St. R. Co., 73 S. W. 355, 24 Ky. L. Rep. 1825.

The answer may, however, cure want of or defects in allegations of the complaint. Arkansas City Bank *v.* McDowell, 7 Kan. App. 568, 52 Pac. 56.

61. Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922 (loss of time); Goodell *v.* Tower, (Vt. 1904) 58 Atl. 790 (loss of time and mental suffering). See also cases cited in Damages, 13 Cyc. 175 note 99. Under an allegation of damage consisting of disgrace, anxiety, pain of body and mind, etc., evidence that plaintiff had no bed or covering and suffered from cold and want of food is admissible. Abrahams *v.* Cooper, 81 Pa. St. 232. But there should be some allegation of damage. Pease *v.* Friewald, 39 Misc. (N. Y.) 549, 80 N. Y. Suppl. 402. See also Damages, 13 Cyc. 174 note 92. As to presumption of nominal damages at least see *infra*, XIII, A.

62. Quinn *v.* Shortall, 29 Minn. 106, 12 N. W. 153; Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001; Holtum *v.* Lotum, 6 C. & P. 726, 25 E. C. L. 658; Lowden *v.* Goodrick, 1 Peake N. P. 46. See also Damages, 13 Cyc. 176. For averments held insufficient to authorize recovery for hindrance to plaintiff's business in a particular manner see Fuller *v.* Bowker, 11 Mich. 204. For other cases relating to recovery of damages under the allegations see the following:

Delaware.— McCaffrey *v.* Thomas, 4 Pennew. 437, 56 Atl. 382, mere general allegation of expense does not entitle plaintiff to recover for expense of securing his release.

Illinois.— Miles *v.* Weston, 60 Ill. 361, damage for furnishing unfit food not recoverable unless specially alleged.

Kansas.— Atchison, etc., R. Co. *v.* Rice, 36 Kan. 593, 14 Pac. 229, damages for sickness not recoverable when not mentioned in the complaint.

New York.— Exner *v.* Exner, 2 Abb. N. Cas. 108 (allegation that the imprisonment prevented plaintiff from attending upon her sick children was held irrelevant); Strang *v.* Whitehead, 12 Wend. 64 (expense of attorney's fees in securing release must be specifically alleged).

England.— Foxall *v.* Barnett, 2 C. L. R. 273, 2 E. & B. 928, 18 Jur. 41, 23 L. J. Q. B. 7, 2 Wkly. Rep. 61, 75 E. C. L. 928 (averment of expense in procuring discharge authorizes recovery of expense of quashing an inquisition essential to total discharge); Pettit *v.* Addington, 1 Peake N. P. 62 (allegation of sickness in the common conclusion and not laid with a *per quod*, no recovery therefor permissible); Westwood *v.* Cowne, 1 Stark. 172, 2 E. C. L. 73 (under general allegation of loss of lodgers, loss of particular lodger cannot be shown).

See 23 Cent. Dig. tit. "False Imprisonment," § 86.

For sufficient allegation of attorney's fees see Parsons *v.* Harper, 16 Gratt. (Va.) 64; Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

Injury to character or business.— False imprisonment may be committed without the slightest injury to character or reputation, and such damages must be specially alleged. Comer *v.* Knowles, 17 Kan. 436. Likewise injury to credit and business are elements of special damages, not a distinct cause of action. Quinn *v.* Shortall, 29 Minn. 106, 12 N. W. 153.

63. Brushaber *v.* Stegemann, 22 Mich. 266. But see *contra*, Stanton *v.* Seymour, 22 Fed. Cas. No. 13,298, 5 McLean 267. Charge of conspiracy is matter of aggravation only (Davis *v.* Johnson, 101 Fed. 952, 42 C. C. A. 111), but is not irrelevant (Exner *v.* Exner, 2 Abb. N. Cas. (N. Y.) 108), and its presence does not affect the bar of the statute of limitations (Oakes *v.* Oakes, 167 N. Y. 625, 60 N. E. 1117).

64. Stanfield *v.* Phillips, 78 Pa. St. 73. But see Phillips *v.* Bonham, 16 La. Ann. 387.

imprisonment,[65] but not by way of confession of detention and avoidance of liability,[66] as by a claim of legal authority[67] or probable cause for arrest without warrant,[68] unless the declaration or complaint alleges arrest without reasonable or probable cause.[69]

2. SPECIAL PLEADING OF JUSTIFICATION. A pleading justifying by legal authority must set forth all facts essential to the validity of process or power of a court,[70] or all facts and reasons[71] necessary to a defense of arrest without warrant[72] or to

65. As to what amounts to general issue see Crookshank *v.* Kellogg, 8 Blackf. (Ind.) 256. As to necessity for additional traverse see Noble *v.* Halliday, 1 N. Y. 330. As to plea of general issue with notice see McMullin *v.* Erwin, 69 Vt. 338, 38 Atl. 62.

For instance of insufficient denial see Rich *v.* McInery, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32.

66. Church *v.* Pearne, 75 Conn. 350, 53 Atl. 955; Noyes *v.* Edgerly, 71 N. H. 500, 53 Atl. 311. See also Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278; Coats *v.* Darby, 2 N. Y. 517. As to effect of admissions coupled with denials see Bishop *v.* Lucy, (Tex. Civ. App. 1899) 51 S. W. 854 [*denying* rehearing in 21 Tex. Civ. App. 326, 50 S. W. 1029].

A plea of justification in an action for false imprisonment does not admit that the imprisonment was wrongful. Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

A verdict may, however, cure defect in the plea. Parker *v.* Langly, 10 Mod. 145, 209.

67. *Delaware.*— Bailey *v.* Wiggins, 5 Harr. 462, 60 Am. Dec. 650, against a magistrate.

Indiana.— Boaz *v.* Tate, 43 Ind. 60.

Maryland.— Edger *v.* Burke, 96 Md. 715, 54 Atl. 986.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

New York.— Corwin *v.* Freeland, 6 How. Pr. 241.

Utah.— Yost *v.* Tracy, 13 Utah 431, 45 Pac. 346, unsigned commitment excluded.

Vermont.— Allen *v.* Parkhurst, 10 Vt. 557.

See 23 Cent. Dig. tit. "False Imprisonment," § 89.

Defendant a constable.— But it has been held that defendant may prove, under the general issue, that he was a constable, and arrested and detained plaintiff by virtue of a legal warrant. Isaacs *v.* Camplin, 1 Bailey (S. C.) 411. See also Wilson *v.* Manhattan R. Co., 2 Misc. (N. Y.) 127, 20 N. Y. Suppl. 852; Ingram *v.* Butt, 13 Fed. Cas. No. 7,047, 4 Cranch C. C. 701.

68. Thompson *v.* Buchholz, 107 Mo. App. 121, 81 S. W. 490.

69. Russell *v.* Shuster, 8 Watts & S. (Pa.) 308.

70. Von Kettler *v.* Johnson, 57 Ill. 109 (facts showing jurisdiction and compliance with statute); Fanny *v.* Montgomery, 1 Ill. 247.

The pleading should show the process actually issued (Von Kettler *v.* Johnson, 57 Ill. 109, mere recital of order for attachment is insufficient), its commandment (Smith *v.* McGuire, 5 Litt. (Ky.) 302), its return, if the return-day be past (Caldwell *v.* Kenworthy, 31 Ind. 238; Davis *v.* Bush, 4 Blackf. (Ind.) 330; Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194, inferential allegation held sufficient), or sufficient reason for failure to return (May *v.* Sly, 5 Blackf. (Ind.) 206).

As to particular facts not necessary to detail in the pleading see Fowler *v.* Watkins, 1 N. H. 251 (completion of service of warrant); Foster *v.* Hazen, 12 Barb. (N. Y.) 547 (residence in what county); Whitney *v.* Shufelt, 1 Den. (N. Y.) 592 (jurisdiction of justice to issue warrant for arrest of non-resident); Hoose *v.* Sherrill, 16 Wend. (N. Y.) 33 (arrest of non-resident); Wright *v.* Hazen, 24 Vt. 143.

71. *Georgia.*— Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

Illinois.— Dodds *v.* Board, 43 Ill. 95.

Indiana.— Wasson *v.* Canfield, 6 Blackf. 406.

Maryland.— Edger *v.* Burke, 96 Md. 715, 54 Atl. 986.

Michigan.— White *v.* McQueen, 96 Mich. 249, 55 N. W. 843.

New York.— See Bradner *v.* Faulkner, 93 N. Y. 515.

Texas.— Boynton *v.* Tidwell, 19 Tex. 118.

Wisconsin.— Scheer *v.* Keown, 34 Wis. 349.

See 23 Cent. Dig. tit. "False Imprisonment," § 90.

For an answer held to contain a sufficient allegation of reasonable grounds see Blalock *v.* Randall, 76 Ill. 224.

72. Von Kettler *v.* Johnson, 57 Ill. 109; Mathews *v.* Biddulph, 3 M. & G. 390, 42 E. C. L. 209, arrest for felony. Such as facts showing a continuing breach of the peace or well-founded apprehension of its renewal. Price *v.* Seeley, 10 Cl. & F. 28, 8 Eng. Reprint 651. Pleading alarm and disquiet to the neighborhood is a sufficient allegation of conduct justifying arrest to stop a breach of the peace. Wheeler *v.* Whiting, 9 C. & P. 262, 38 E. C. L. 162; Howell *v.* Jackson, 6 C. & P. 723, 25 E. C. L. 657. As to irrelevant allegations of expressions of design prior to disturbance stricken out on motion see Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403. In case of arrest for assault and battery with intent to commit a felony a plea showing an assault is insufficient. Stammers *v.* Yearsley, 10 Bing. 35, 2 L. J. C. P. 256, 3 Moore & S. 410, 25 E. C. L. 26.

A private person arresting for felony must first show the commission of the offense and then the cause of suspecting the arrested party. Brown *v.* Chadsey, 39 Barb. (N. Y.) 253.

justify detention for a time *prima facie* unreasonable,[73] so as to identify the arrest justified with the arrest complained of[74] in sufficient and appropriate terms,[75] and without duplicity.[76] It must show as many distinct occasions of justification as there are charges of trespass in the counts of the declaration.[77]

3. MITIGATION OF DAMAGES. Defendant may properly plead facts in mitigation of damages in his answer,[78] even if the complaint states facts entitling plaintiff to exemplary damages.[79] But the plea of general issue has been held sufficient to admit proof of such matters.[80]

C. Replication. A replication to a plea of judicial authority to make the arrest[81] is demurrable if it fails sufficiently to allege facts destroying the validity of such authority,[82] or if it merely avers an abuse of process for which an action on the case might lie.[83] The replication may cure a defect in the answer.[84]

XII. EVIDENCE.

A. Burden of Proof. The burden rests on plaintiff to establish affirmatively

As to justification of arrest for felony by officer see Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604; Edger *v.* Burke, 96 Md. 715, 54 Atl. 986. If the arrest be pursuant to information the plea must allege that the informant stated the facts by which he knew or believed plaintiff to be guilty. Wasson *v.* Canfield, 6 Blackf. (Ind.) 406. If the informant be defendant the answer to a complaint alleging arrest with malice and without probable cause, pleading arrest by an officer for reasonable cause, is insufficient unless it denies that the arrest was made at defendant's request without justifiable belief of guilt. Rich *v.* McInery, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32. The grounds of suspicion must be detailed. Wasson *v.* Canfield, 6 Blackf. (Ind.) 406; Wade *v.* Chaffee, 8 R. I. 224, 5 Am. Rep. 572; Mure *v.* Kaye, 4 Taunt. 34. See also Haynes *v.* Mewis, 5 L. J. K. B. O. S. 47.

Other offenses than felony.— As to justification in case of arrest for other offenses than felony see Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403 (capacity of vestryman to arrest disturbers of church meeting); Smith *v.* Shirley, 3 C. B. 142, 15 L. J. C. P. 230, 54 E. C. L. 142.

73. Markey *v.* Griffin, 109 Ill. App. 212.

74. Young *v.* Warder, 94 Ind. 357 (under warrant); Scircle *v.* Neeves, 47 Ind. 289 (justice of the peace); Gallimore *v.* Ammerman, 39 Ind. 323; Weser *v.* Welty, 18 Ind. App. 664, 47 N. E. 639 (sufficient); Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194 (pleading may be sufficient, although it states shorter time than is stated in declaration).

75. Peck *v.* Rooks, 22 Ark. 221 (insufficient allegation of justification by legal authority); Ocean Steamship Co. *v.* Williams, 69 Ga. 251 (probable cause, arrest without warrant); Dodds *v.* Board, 43 Ill. 95 (detention for unreasonable time); Anderson *v.* Dunn, 6 Wheat. (U. S.) 204, 5 L. ed. 242 (sufficient allegation of judicial process). For sufficient allegation of justification of a mayor for judicial arrest see Willis *v.* Havemeyer, 5 Duer (N. Y.) 447. A plea justifying detention for the space of time complained of is sufficient. Kent *v.* Miles, 68 Vt. 48, 33 Atl. 768. General denial and plea of no malice and discharge of duty is insufficient. Moore *v.* Devoy, 37 How. Pr. (N. Y.) 18.

76. Jewett *v.* Locke, 6 Gray (Mass.) 233 (consistent justification under two warrants); Stanton *v.* Seymour, 22 Fed. Cas. No. 13,298, 5 McLean 267 (bad for duplicity).

77. McCurday *v.* Driscoll, 1 Cromp. & M. 618, 2 L. J. Exch. 185, 3 Tyrw. 571.

78. Beckett *v.* Lawrence, 7 Abb. Pr. N. S. (N. Y.) 403; Newburn *v.* Dunham, 10 Tex. Civ. App. 655, 32 S. W. 112. This is true, although the mitigation be only as to a part of the violence committed. Foland *v.* Johnson, 16 Abb. Pr. (N. Y.) 235.

79. Newburn *v.* Durham, 10 Tex. Civ. App. 655, 32 S. W. 112.

80. Richardson *v.* Huston, 10 S. D. 484, 74 N. W. 234.

81. A general reply, "*De injuria sua propria absque tali cusa*," is insufficient foundation for proof of previous arrest and discharge under the same warrant. Fowler *v.* Watkins, 1 N. H. 151. If the answer excuses an admitted irregularity in process by plaintiff's waiver in court, a replication is good which sets out that such waiver was made under duress. U. S. *v.* McNeily, 72 Fed. 972, 19 C. C. A. 318.

82. Booth *v.* Kurrus, 55 N. J. L. 370, 26 Atl. 1013. It is sufficient if it specially and sufficiently avers (Arkansas City Bank *v.* McDowell, 7 Kan. App. 568, 52 Pac. 56; Yingling *v.* Hoppe, 9 Gill (Md.) 310) a want of jurisdiction in the court to cause the arrest (Wooster *v.* Parsons, Kirby (Conn.) 110, where want of jurisdiction did not appear on face of process. *Compare* Nason *v.* Sewall, Brayt. (Vt.) 119), or to try and imprison (Willis *v.* Havemeyer, 5 Duer (N. Y. 447), a discharge (Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194), and detention without legal authority (Breck *v.* Blanchard, 22 N. H. 303, special pleading of detention in prison until money paid and other conditions submitted to is valid. See also Brown *v.* Jones, 3 D. & L. 678, 15 L. J. Exch. 210, 15 M. & W. 191).

83. Kent *v.* Miles, 65 Vt. 582, 27 Atl. 194.

84. Edger *v.* Burke, 96 Md. 715, 54 Atl. 986. See, generally, PLEADING.

and sufficiently[85] every essential[86] allegation of his complaint[87] in civil as distinguished from criminal proceedings upon a false imprisonment.[88] The onus of justification in issue primarily rests with defendant.[89] Where, however, facts showing justification appear in plaintiff's pleading or by his admissions in court;[90] or where the defense consists of justification by proof under a plea of apparently valid process or by judicial capacity, plaintiff must overcome the presumption of

85. Gordon *v.* Upham, 4 E. D. Smith (N. Y.) 9; Sparhawk *v.* Hall, 52 Vt. 624. For evidence held sufficient see Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875. For evidence held insufficient see Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425.

86. But not what is unnecessarily alleged. Atkinson *v.* Warne, 1 C. M. & R. 827, 6 C. & P. 687, 3 Dowl. P. C. 483, 5 Tyrw. 481, 25 E. C. L. 640. It is not essential to the fact of recovery that he prove damages. If he shows that his right has been violated by defendant damage is presumed. The effect of evidence as to his injury is upon the extent of recovery. See *infra*, XIII, D.

87. He must show the fact of imprisonment (Bauer *v.* Clay, 8 Kan. 580, recovery permitted, although detention for only part of time proved to be illegal); Loughman *v.* Long Island R. Co., 83 N. Y. App. Div. 629, 81 N. Y. Suppl. 1097, evidence held insufficient); Cant *v.* Parsons, 6 C. & P. 504, 25 E. C. L. 547), its unlawfulness (Chambers *v.* Oehler, 107 Iowa 155, 77 N. W. 853; Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674), where it is not presumed (Black *v.* Marsh, 31 Ind. App. 53, 67 N. E. 201. See also People *v.* McGrew, 77 Cal. 570, 20 Pac. 92; Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899), that defendant committed (Mason *v.* Barker, 1 C. & K. 100, 47 E. C. L. 100, a magistrate's signature to a warrant is *prima facie* proof of issuance by him; Harris *v.* Dignum, 29 L. J. Exch. 23, 1 L. T. Rep. N. S. 169, the fact that defendant signed the charge sheet, and appeared before the magistrate against plaintiff, is strong, although not conclusive evidence, that he authorized the arrest; Ross *v.* Lascelles, 15 L. T. Rep. N. S. 293, a charge sheet is sufficient proof of the signatures which it contains) or participated in it (Carson *v.* Dessau, 59 N. Y. Super. Ct. 79, 13 N. Y. Suppl. 232, insufficient evidence as to joint tort-feasors; Nance *v.* Haney, 1 Heisk. (Tenn.) 177, proof of mere presence at time of imprisonment without proof of counseling or procurement, aiding or abetting, insufficient; Jones *v.* Morrell, 1 C. & K. 266, 47 E. C. L. 266) or is responsible as legal cause (Miller *v.* Fano, 134 Cal. 103, 66 Pac. 183; Carter *v.* Worcester County, 94 Md. 621, 51 Atl. 830; Noad *v.* Canadian Pac. R. Co., 56 N. Y. App. Div. 33, 67 N. Y. Suppl. 265), or was instrumental in putting the law in motion (Miller *v.* Fano, *supra*, insufficient evidence of identification of arrested person by defendant); Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922; Lyons *v.* Carroll, 51 La. Ann. 1542, 26 So. 416; Brown *v.* Demont, 9 Cow. N. Y.) 262; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923, 133 N. C. 418, 45 S. E. 826; Danby *v.* Beardsley, 43 L. T. Rep. N. S. 603. See also Glynn *v.* Houstoun, 5 Jur. 195, 2 M. & G. 337, 2 Scott N. S. 548, 40 E. C. L. 630; Browne *v.* Stradling, 5 L. J. C. P. 295), or is responsible for it because of relationship or authority (National Bank of Commerce *v.* Baker, 77 Md. 462, 26 Atl. 867; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923; Eichengreen *v.* Louisville, etc., R. Co., 96 Tenn. 229, 34 S. W. 219, 54 Am. St. Rep. 833, 31 L. R. A. 702, sufficient evidence of procurement); or ratified it (Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278).

88. The latter presumes the imprisonment to be unlawful. People *v.* McGrew, 77 Cal. 570, 20 Pac. 92.

89. Mexican Cent. R. Co. *v.* Gehr, 66 Ill. App. 173. He may bear this burden by showing any of the defenses recognized by the general law, as that an employee was a policeman. Missouri, etc., R. Co. *v.* Warner, 19 Tex. Civ. App. 463, 49 S. W. 254. He and not plaintiff is ordinarily required to produce the warrant. Holroyd *v.* Doncaster, 11 Moore C. P. 441, 3 Bing. 492, 4 L. J. C. P. O. S. 178, 28 Rev. Rep. 672, 11 E. C. L. 242. But see Rich *v.* McInery, 103 Ala. 345, 15 So. 663, 49 Am. St. Rep. 32; Lowry *v.* Hately, 30 Ill. App. 297. If the defense proved be the propriety of imprisonment without warrant by a private person (Siegel *v.* Connor, 70 Ill. App. 116; Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508; Rosenkranz *v.* Hass, 1 Misc. (N. Y.) 220, 20 N. Y. Suppl. 880; Lamb *v.* Stone, 95 Wis. 254, 70 N. W. 72; U. S. *v.* McNeily, 72 Fed. 972, 19 C. C. A. 318; Hershey *v.* O'Neill, 36 Fed. 168) or by peace officers of the law (Kennedy *v.* Favor, 14 Gray (Mass.) 200) or by judicial officers outside the protection of their official status (Fisher *v.* Deans, 107 Mass. 118, a wrongful purpose, as to extort money may be shown against a justice) or by other recognized authority the burden rests on defendant to affirmatively prove the facts required by law to complete the justification (Edger *v.* Burke, 96 Md. 715, 54 Atl. 986), such as good faith (Franklin *v.* Amerson, 118 Ga. 860, 45 S. E. 698; Jackson *v.* Knowlton, 173 Mass. 94, 53 N. E. 134; Snead *v.* Bonnoil, 166 N. Y. 325, 59 N. E. 899) or reasonable ground for the arrest (Marshall *v.* Cleaver, 4 Pennew. (Del.) 450, 56 Atl. 380). See also Franklin *v.* Amerson, 118 Ga. 860, 45 S. E. 698; Stewart *v.* Feeley, 118 Iowa 524, 92 N. W. 670; Barker *v.* Anderson, 81 Mich. 508, 45 N. W. 1108; Jones *v.* Com., 1 Rob. (Va.) 748).

90. Warrant need not be offered unless its validity is questioned. Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923.

legality[91] and of exoneration of defendant from responsibility for the alleged imprisonment.[92]

B. Admissibility — 1. In General. When any evidence is admissible in an action of false imprisonment[93] its reception is governed by usual rules as to competency[94] and materiality.[95]

2. Malice and Want of Probable Cause. In an action for false imprisonment the party asking damages need not ordinarily prove want of probable cause or malice on the part of the party sought to be charged to entitle him to recover;[96] nor can he when a justification is made out by defendant.[97] But when justification is in issue, or when such justification is not made out, or the justification is qualified, malice or want of probable cause on the part of defendant[98] may be

91. Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344; Prell *v.* McDonald, 7 Kan. 426, 12 Am. Rep. 423 (officer *de facto* making the arrest is *prima facie de jure*); Love *v.* Wood, 55 Mich. 451, 21 N. W. 887; Sherman *v.* Grinnell, 159 N. Y. 50, 53 N. E. 674; Newman *v.* Tiernan, 37 Barb. (N. Y.) 159.

92. As by showing that the imprisonment was in fact illegal (Snow *v.* Weeks, 75 Me. 105; Bassett *v.* Porter, 10 Cush. (Mass.) 418; Scott *v.* Ely, 4 Wend. (N. Y.) 555) or for any other reason failed of justification, as that he was not guilty of the contempt for which he was committed (Miller *v.* Adams, 7 Lans. (N. Y.) 131 [*affirmed* in 52 N. Y. 409]) or that he was privileged from arrest (Brown *v.* Robertson, 1 Fed. Cas. No. 2,027, 1 Hayw. & H. 134), or that plaintiff had property subject to execution and constable had notice (Barhydt *v.* Valk, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124). As to inability to overcome protection by process valid on its face see Williams *v.* Ivey, 37 Ala. 244. False imprisonment is sufficiently shown, although plaintiff had the same name as a person named in an indictment for murder, for killing a negro, although he had stated that he had killed a negro where he proved that he had never been in the county. Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. A plaintiff is not bound to show notice of bail in a suit for an arrest in a bailable proceeding. Chapman *v.* Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598.

93. See *infra*, XII, B, 5.

94. See Evidence, 16 Cyc. 821. Defendant may show conversations of third party to show that the latter did not induce defendant to arrest plaintiff, to rebut plaintiff's evidence that he did. Livingston *v.* Burroughs, 33 Mich. 511. Parol evidence is admissible where order of arrest is lost. Teagarden *v.* Graham, 31 Ind. 422. The fact of imprisonment may be shown by proof of circumstances (Frost *v.* De Lury, 54 N. Y. Super. Ct. 113), not by opinions, or conclusions (Cant *v.* Parsons, 6 C. & P. 504, 25 E. C. L. 547). But defendant has been allowed to rebut malice by showing that his detective never before accused wrongly of theft. Woodward *v.* Ragland, 5 App. Cas. (D. C.) 220.

95. Testimony which is not shown to be material (Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481; Witt *v.* Haun, 1 Heisk. (Tenn.) 160), as communication between defendant and plaintiff's attorneys in another case (Marks *v.* Sullivan, 9 Utah 12, 33 Pac. 224), or that plaintiff had sufficient funds to pay a small fine and avoid confinement (Barker *v.* Anderson, 81 Mich. 508, 45 N. W. 1108), or that defendant has license to keep a boarding-house or right to retain a trunk for attempt to take which plaintiff was arrested (Isaacs *v.* Flahive, 14 Misc. (N. Y.) 249, 35 N. Y. Suppl. 716), or that defendant properly endeavored to enforce an ordinance (Fuller *v.* Redding, 13 N. Y. App. Div. 61, 43 N. Y. Suppl. 96), or that defendant kept a bawdy-house and after arrest assaulted defendant (Neal *v.* Peevey, 39 Ark. 337), or that defendant committed a similar offense at another place (Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054), or a settlement between plaintiff and defendant of a prosecution for felony (Van Voorhes *v.* Leonard, 1 Thomps. & C. (N. Y.) 148), or evidence not limited to the period involved (Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481), or which concerns collateral issues, as of defendant's innocence of a crime charged by plaintiff's letter (Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127), or recovery, on an insurance policy issued to insured by the person arrested for arson (Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420), or excessive bond for release given by parties defendant unless shown to have been concerned in fixing the penalty (Montgomery *v.* Sutton, 58 Iowa 697, 12 N. W. 719; Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481), or irrelevant circumstances (Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188; Wait *v.* Green, 5 Park. Cr. (N. Y.) 185; Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105) is not admissible.

96. Chrisman *v.* Carney, 33 Ark. 316; Aikin *v.* Newell, 32 Ark. 605; Boaz *v.* Tate, 43 Ind. 60; Hewitt *v.* Newberger, 66 Hun (N. Y.) 230, 20 N. Y. Suppl. 913; Neal *v.* Joyner, 89 N. C. 287. See also *supra*, II, B.

97. Holly *v.* Carson, 39 Ala. 345 (proceedings before grand jury); Holmes *v.* Blyler, 80 Iowa 365, 45 N. W. 756; Fuller *v.* Redding, 13 N. Y. App. Div. 61, 43 N. Y. Suppl. 96. Thus evidence is not admissible against a magistrate if he had jurisdiction. Bailey *v.* Wiggins, 1 Houst. (Del.) 299.

98. Defendant may not show conduct of prisoner as evidence of malice on his part. Josselyn *v.* McAllister, 22 Mich. 300. Defendant cannot disprove his malice by showing conduct of plaintiff of which he had no

proved and disproved[99] by facts and circumstances,[1] but not by mere conclusions or opinions.[2]

3. Character of Plaintiff. The character of the person seeking damages in false imprisonment is not ordinarily in issue so far as mere right to recover is concerned,[3] but may be made the subject of controversy and the basis of testimony where general reputation for truth and veracity is attacked;[4] where the extent of recovery of damages involves its consideration;[5] and where an attempted justification of arrest without express legal authority is sought to be proved by reasonable grounds for suspicion of plaintiff's guilt.[6]

4. Acts and Admissions. Plaintiff may prove that defendant is responsible for

knowledge or information when he made the affidavit on which the arrest was based; or facts having no bearing on the facts stated in affidavit; nor matters *ex post facto*. Josselyn *v.* McAllister, 25 Mich. 45.

99. *Alabama.*— Woodall *v.* McMillan, 38 Ala. 622; Williams *v.* Ivey, 37 Ala. 244.

Arkansas.— Beebe *v.* De Baun, 8 Ark. 510.

Georgia.— Thorpe *v.* Wray, 68 Ga. 359, plaintiff may show a second arrest under void warrant.

Iowa.— Montgomery *v.* Sutton, 58 Iowa 697, 12 N. W. 719.

Louisiana.— Block *v.* Meyers, 33 La. Ann. 776.

Maryland.— Blake *v.* Burke, 42 Md. 45, defendant may show that he was acting in discharge of official duties under direction of state's attorney in transferring prisoner confined by city commitment to county authorities.

Massachusetts.— Paget *v.* Cook, 1 Allen 522 (evidence is competent to show knowledge of facts as basis of malice in arrest on execution); Mason *v.* Lothrop, 7 Gray 354 (defendant may introduce a warrant obtained day after arrest without a warrant).

Michigan.— Brushaber *v.* Stegemann, 22 Mich. 266.

Missouri.— Vansickle *v.* Brown, 68 Mo. 627.

Nebraska.— Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693.

New York.— Fitzpatrick *v.* New York, etc., R. Co., 2 Silv. Supreme 192, 5 N. Y. Suppl. 685.

Texas.— Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162; Dunn *v.* Cole, 2 Tex. App. Civ. Cas. § 821.

See 23 Cent. Dig. tit. "False Imprisonment," § 101.

Examination as to sanity.— As to evidence held to show no bad faith in defendant causing an examination into sanity see Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Dougherty *v.* Snyder, 97 Mo. App. 495, 71 S. W. 463.

Malice is a conclusive presumption against one engaged in an attempt to subvert a government. French *v.* White, 4 W. Va. 170.

A jury may infer malice from proof of want of probable cause. Rosen *v.* Stein, 54 Hun (N. Y.) 179, 7 N. Y. Suppl. 368.

1. Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054; Girdner *v.* Taylor, 6 Heisk. (Tenn.) 244; Lamb *v.* Stone, 95 Wis. 254, 70 N. W. 72. That plaintiff paid defendant money on account of the transaction for which the arrest was made is admissible to prove motive. Mead *v.* Young, 19 N. C. 521. Defendant may show conditions surrounding the arrest without warrant, as the proximity of a large number of inmates of an almshouse disturbed by the noise. Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899.

Harsh conduct of an officer after arrest does not tend to show malice in the party who caused the arrest, where the latter was in no way privy to such conduct. Grinnell *v.* Weston, 95 N. Y. App. Div. 454, 88 N. Y. Suppl. 781.

2. King *v.* Dittrich, 28 La. Ann. 243; Judson *v.* Reardon, 16 Minn. 431; Casebeer *v.* Rice, 18 Nebr. 203, 24 N. W. 693; Grinnell *v.* Stewart, 32 Barb. (N. Y.) 544. Defendant cannot testify whether he acted in good faith in all of his actions (Bell *v.* Day, 9 Kan. App. 111, 57 Pac. 1054) or whether or not he was actuated by malicious motives (Dunn *v.* Cole, 2 Tex. App. Civ. Cas. § 821).

3. *Alabama.*— Davis *v.* Sanders, 133 Ala. 275, 32 So. 499.

Georgia.— Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420.

Kentucky.— Revill *v.* Pettit, 3 Metc. 314.

Massachusetts.— Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. 508.

Minnesota.— Cochran *v.* Toher, 14 Minn. 385.

Nebraska.— Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

West Virginia.— Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262.

See 23 Cent. Dig. tit. "False Imprisonment," § 102.

It is presumed to be good. Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772.

Cross-examination.— In an action for false imprisonment on a criminal charge, defendant cannot cross-examine as to the bad character of plaintiff, nor as to previous charges made against him. Downing *v.* Butcher, 2 M. & Rob. 374.

4. See, generally, Witnesses.

5. See Evidence, 16 Cyc. 1265 text and note 93; and *infra*, XIII, C.

6. Where such evidence has cast suspicion on plaintiff's character, evidence of good character becomes admissible. American Express Co. *v.* Patterson, 73 Ind. 430. In a defense of justification, defendant as evidence of probable cause for arrest may inquire whether plaintiff was not a man of notoriously bad character. Rodriguez *v.* Tadmire, 2 Esp. 721.

the wrong by the acts, declarations, and admissions of defendant[7] or of one coöperating with him,[8] or of his employee[9] fairly bearing upon the tortious conduct.[10] Defendant may similarly disprove his connection with the alleged wrong[11] and may prove the acts and admissions of plaintiff to show justification other than process[12] or to mitigate damages.[13]

5. RECORD AND PROCEEDINGS. The duly authenticated record of the proceeding involving the alleged imprisonment[14] is competent evidence either for plaintiff[15] or for defendant justifying by legal process.[16] The defense of justification by warrant may be proved on the trial by the warrant itself.[17] The return of a

But in defense of arrest for street-walking, evidence of specific acts on the part of plaintiff is inadmissible. Pinkerton *v.* Verberg, 78 Mich. 573, 44 N. W. 579, 18 Am. St. Rep. 473, 7 L. R. A. 507.

7. Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481; Sherman *v.* Grinnell, 70 Hun (N. Y.) 354, 24 N. Y. Suppl. 59 (defendants' signature to execution on which arrest was made, although defendants added surplus word "executors"); Fitzpatrick *v.* New York, etc., R. Co., 2 Silv. Supreme (N. Y.) 192, 5 N. Y. Suppl. 685 (that the arrest was made in a place under defendant's control); Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501 (defendant's affidavit in the supplementary proceedings under which the arrest was made); Edgell *v.* Francis, 4 Jur. 366, 9 L. J. C. P. 233, 1 M. & G. 222, 1 Scott N. R. 118, 39 E. C. L. 729. See also Brooks *v.* Blain, 39 L. J. C. P. 1. But that defendant had commenced a civil suit for money alleged to have been appropriated for which the arrest was made is not admissible. Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33.

A passenger arrested for non-payment of fare may prove the carrier's custom (Tidey *v.* Erie R. Co., 67 N. J. L. 352, 51 Atl. 1110) or rules (Dixon *v.* New England R. Co., 179 Mass. 242, 60 N. E. 581).

As to proof of defendant's system see Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

8. Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501; Powell *v.* Hodgetts, 2 C. & P. 432, 12 E. C. L. 659. And see EVIDENCE, 16 Cyc. 821.

9. Shea *v.* Manhattan R. Co., 15 Daly (N. Y.) 528, 8 N. Y. Suppl. 332.

10. Josselyn *v.* McAllister, 22 Mich. 300.

11. As by showing what the prosecuting attorney said where he claims that the latter procured the arrest (Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 481), or by showing his description of the thief given when making the complaint on which the arrest was made (Fitzpatrick *v.* New York, etc., R. Co., 2 Silv. Supreme (N. Y.) 192, 5 N. Y. Suppl. 685), or circumstances of employment of the person directly causing the arrest and refusal to authorize arrest (Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420), or that plaintiff made no claim of defendant before commencing suit (Joyce *v.* Parkhurst, 150 Mass. 243, 22 N. E. 899). If plaintiff proves what defendant said on examination before a magistrate, defendant may examine as to what the magistrate said. Richards *v.* Turner, C. & M. 414, 41 E. C. L. 228. *Compare* Butler *v.* Stockdale, 19 Pa. Super. Ct. 98.

12. Tyler *v.* Pomeroy, 8 Allen (Mass.) 480; Dougherty *v.* Snyder, 97 Mo. App. 495, 71 S. W. 463; Tobin *v.* Bell, 73 N. Y. App. Div. 41, 76 N. Y. Suppl. 425. He may prove what plaintiff, confined in an insane asylum, said and did and how she appeared in the asylum; but that money sent plaintiff, detained as a pauper, never reached her cannot be shown unless defendant is shown to have been instrumental in depriving her of it. Van Deusen *v.* Newcomer, 40 Mich. 90. The trial of a plea of justification of arrest for felony involves a trial in the same way as criminal proceedings. Therefore evidence of an accomplice is admissible. Richards *v.* Turner, C. & M. 414, 41 E. C. L. 228.

13. Johnson *v.* Von Kettler, 66 Ill. 63.

14. Forbes *v.* Hicks, 27 Nebr. 111, 42 N. W. 898 (the complaint and warrant); Regan *v.* Jessup, (Tex. Civ. App. 1903) 77 S. W. 972 (writ and testimony explanatory); Hartley *v.* Hindmarsh, L. R. 1 C. P. 553, 1 H. & R. 607, 12 Jur. N. S. 502, 35 L. J. M. C. 255, 14 Wkly. Rep. 862 (a magistrate's certificate).

15. Parsons *v.* Harper, 16 Gratt. (Va.) 64. The record of the original action is competent evidence for plaintiff. Beebe *v.* De Baun, 8 Ark. 510. A return is *prima facie* evidence of arrest under a warrant. Allen *v.* Gray, 11 Conn. 95. A commitment alone does not show that defendant was the prosecutor. The affidavit, recited by it, or an examined copy is the only admissible documentary evidence to prove that fact. Hall *v.* Acklen, 9 La. Ann. 219. A justice's mittimus is not evidence of facts recited therein. Poor *v.* Dougharty, Quincy (Mass.) 1. But recitals in a mittimus of a prior judgment are sufficient evidence of entry of the judgment, although the mittimus in fact is dated the day after. Van Vleck *v.* Thomas, 9 Ind. App. 83, 35 N. E. 913.

16. Henry *v.* Lowell, 16 Barb. (N. Y.) 268.

17. Ingram *v.* Butt, 13 Fed. Cas. No. 7,047, 4 Cranch C. C. 701. In connection with the affidavit on which it is based (Gay *v.* De Werff, 17 Ill. App. 417) or with the indorsement of a transfer from city to county authorities (Blake *v.* Burke, 42 Md. 45). It is *prima facie* evidence, subject to rebuttal. Boardman *v.* Goldsmith, 48 Vt. 403. But a certificate of damages under the warrant

warrant,[18] proceedings upon arrest generally,[19] including the verdict or judgment in the case in which the arrest was made,[20] and the discharge[21] should be received.

XIII. DAMAGES.

A. Nominal Damages. From the mere violation of the primary right of freedom of locomotion,[22] defendant's right to nominal damages at least[23] or to some compensation[24] according to the circumstances of the particular case[25] will

must contain all facts requisite to justify the arrest; it cannot be supplemented by parol evidence. Henry *v.* Tilson, 19 Vt. 447.

18. As against a justice and grand juror. Allen *v.* Gray, 11 Conn. 95. Return of a search warrant showing the finding of stolen property is evidence thereof, but plaintiff may show that the goods described did not correspond to the description in the warrant. Stone *v.* Dana, 5 Metc. (Mass.) 98.

19. As all proceedings before a justice on a warrant running to any constable and served by a special constable. American Express Co. *v.* Patterson, 73 Ind. 430. But plaintiff cannot show what the judge charged the jury on a criminal trial to show want of probable cause. Grohmann *v.* Kirschman, 168 Pa. St. 189, 32 Atl. 32. Finding of stolen property on defendant, his indictment and forfeiture of recognizance have been received. Wakely *v.* Hart, 6 Binn. (Pa.) 316. That an indictment was found is admissible only when the whole proceedings are offered. McCully *v.* Malcom, 9 Humphr. (Tenn.) 187. But evidence of the disposition of a charge by a grand jury has been excluded. Lamb *v.* Dillard, 94 Ga. 206, 21 S. E. 463; Hopner *v.* McGowan, 116 N. Y. 405, 22 N. E. 558 [*affirming* 54 N. Y. Super. Ct. 98].

20. *Arkansas.*— Beebe *v.* De Baun, 8 Ark. 510.

Indiana.— American Express Co. *v.* Patterson, 73 Ind. 430.

Massachusetts.— Piper *v.* Pearson, 2 Gray 120, 61 Am. Dec. 438; Kendall *v.* Powers, 4 Metc. 553.

Missouri.— Brant *v.* Higgins, 10 Mo. 728.

New York.— Shea *v.* Manhattan R. Co., 7 N. Y. Suppl. 497.

Pennsylvania.— Butler *v.* Stockdale, 19 Pa. Super. Ct. 98, acquittal.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64.

A police court conviction is not evidence of a breach of the peace, but is evidence of rendition only not of facts adjudged thereby. Wilson *v.* Manhattan R. Co., 2 Misc. (N. Y.) 127, 20 N. Y. Suppl. 852.

Simply binding a party over is not justification by conviction. Hartley *v.* Hindmarsh, L. R. 1 C. P. 553, 1 H. & R. 607, 12 Jur. N. S. 502, 35 L. J. M. C. 255, 14 Wkly. Rep. 862. But see McCaffrey *v.* Thomas, 4 Pennew. (Del.) 437, 56 Atl. 382; Fitzgerald *v.* Lewis, 164 Mass. 495, 41 N. E. 687.

21. American Express Co. *v.* Patterson, 73 Ind. 430 (habeas corpus); Shea *v.* Manhattan R. Co., 7 N. Y. Suppl. 497 [*affirmed* in 15 Daly 528, 8 N. Y. Suppl. 332]. See also Loughman *v.* Long Island R. Co., 83 N. Y. App. Div. 629, 81 N. Y. Suppl. 1097; Caperton *v.* Martin, 4 W. Va. 138, 6 Am. Rep. 270, pardon of rebel. As to certificate of dismissal by magistrate operating as a release see Skuse *v.* Davis, 10 A. & E. 635, 37 E. C. L. 339; Hancock *v.* Somes, 8 Cox C. C. 172, 1 E. & E. 795, 5 Jur. N. S. 983, 28 L. J. M. C. 196, 7 Wkly. Rep. 422, 102 E. C. L. 795; Costar *v.* Hetherington, 1 E. & E. 802, 102 E. C. L. 802 [*overruling* Reg. *v.* Robinson, 12 A. & E. 672, 40 E. C. L. 335].

That defendant dismissed a charge of perjury is not *per se* sufficient evidence to prove want of probable cause. Flickinger *v.* Wagner, 46 Md. 580.

22. See *supra*, II, A.

23. Lewis *v.* Clegg, 120 N. C. 292, 26 S. E. 772; Kossouf *v.* Knarr, 206 Pa. St. 146, 55 Atl. 854. As where a person convicted of an offense is transmitted to a house of correction under one valid and one illegal warrant (Doherty *v.* Munson, 127 Mass. 495), or where defendant suspected of an attempt to avoid payment of fare was merely arrested and promptly discharged by the magistrate and the intention of all parties was honest (Toomey *v.* Delaware, etc., R. Co., 2 Misc. (N. Y.) 82, 21 N. Y. Suppl. 448 [*affirmed* in 4 Misc. 392, 24 N. Y. Suppl. 108]. An instruction that if the jury believed plaintiff had been falsely imprisoned they must assess substantial and not merely nominal damages was error. Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33. As to award of considerable instead of slight damages as basis for new trial see Escurix *v.* Daboval, 13 La. 87.

24. Josselyn *v.* McAllister, 22 Mich. 300; Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740; Lovick *v.* Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191. Where one placed in jail but not taken in a cell was allowed to visit the sheriff's apartments but was restrained from leaving the jail yard he was not limited to recovery merely for time lost. Page *v.* Mitchell, 13 Mich. 63, 86 Am. Dec. 75.

25. A verdict for five hundred and fifty dollars for the arrest of a passenger by a carrier in the absence of proof of actual damage was reduced to ten dollars. Palmer *v.* Maine Cent. R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673. But where there was detention for one and one-half hours and an account was published a verdict for five hundred dollars was sustained. Alabama, etc., R. Co. *v.* Kuhn, 78 Miss. 114, 28 So. 797. A verdict for five hundred dollars

be presumed as was hereinbefore mentioned in describing the nature of the tort of false imprisonment.[26]

B. Compensatory Damages — 1. ELEMENTS GENERALLY. A successful plaintiff in false imprisonment is entitled to compensation for the natural and probable consequences of the wrong,[27] including alike[28] injury to the feelings by way of humiliation, indignity, or disgrace,[29] and injury to the person and physical suffering,[30] the interruption of his business,[31] and for loss of time during which the restraint was illegal.[32]

without evidence of damage, and detention for two days, has been sustained. Hier *v.* Hutchings, 58 Nebr. 334, 78 N. W. 638.

26. Foor *v.* Coombs, 15 Ky. L. Rep. 845 (without allegation or proof of special damage); Wood *v.* Pinkerton, 11 Ky. L. Rep. 259; Murray *v.* Friensberg, 15 N. Y. Suppl. 450. See *supra*, II, A, B.

27. Stewart *v.* Maddox, 63 Ind. 51. As to refusal of employment see Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329. As to measure of compensation for imprisonment of seamen see Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262. A person giving another into custody on a mistaken charge is liable only for the arrest, not for the act of the magistrate in remanding. Lock *v.* Ashton, 12 Q. B. 871, 13 Jur. 167, 18 L. J. Q. B. 76, 64 E. C. L. 871.

28. *Indiana.*— Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188.

Iowa.— Yount *v.* Carney, 91 Iowa 599, 60 N. W. 114.

Louisiana.— Block *v.* McGuire, 18 La. Ann. 417.

New Jersey.— Cone *v.* Central R. Co., 62 N. J. L. 99, 40 Atl. 780.

Pennsylvania.— Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672.

Texas.— Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64.

Wisconsin.— Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501.

See 23 Cent. Dig. tit. "False Imprisonment," § 111.

29. *Delaware.*—Marshall *v.* Cleaver, 4 Pennew. 450, 56 Atl. 380; Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

Indiana.— Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875.

Iowa.— Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922.

Maine.— Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

Missouri.— State *v.* Evans, 83 Mo. App. 301.

Pennsylvania.— Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98.

See 23 Cent. Dig. tit. "False Imprisonment," § 111.

30. *Indiana.*— Stewart *v.* Maddox, 63 Ind. 51.

Maine.— Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

Missouri.— Ahern *v.* Collins, 39 Mo. 145.

New Jersey.— Cone *v.* Central R. Co., 62 N. J. L. 99, 40 Atl. 780.

Pennsylvania.— Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 676.

Texas.— San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542; Coffin *v.* Varila, 8 Tex. Civ. App. 417, 27 S. W. 956.

Virginia.— Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 373; Parsons *v.* Harper, 16 Gratt. 64.

United States.— Bailey *v.* Warner, 118 Fed. 395, 55 C. C. A. 329, nervous prostration.

See 23 Cent. Dig. tit. "False Imprisonment," § 111.

31. Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193; Persons *v.* Harker, 16 Gratt. (Va.) 64. Time lost after suit if by the arrest he failed to get work he otherwise would have obtained has been held to be proximate. Thompson *v.* Ellsworth, 39 Mich. 719. That plaintiff by being detained missed an appointment for the purpose of being employed has been held to be too remote. Hoey *v.* Felton, 11 C. B. N. S. 142, 8 Jur. N. S. 764, 31 L. J. C. P. 105, 5 L. T. Rep. N. S. 354, 10 Wkly. Rep. 78, 103 E. C. L. 142.

32. Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475; Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682; Persons *v.* Harker, 16 Gratt. (Va.) 64; Jay *v.* Almy, 13 Fed. Cas. No. 7,236, 1 Woodb. & M. 262. He may recover for all time alike while in custody and while in prison. Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344; Murphy *v.* Countiss, 1 Harr. (Del.) 143. A plaintiff turned over to an officer having a legal warrant for his arrest can recover from the time of illegal detention to the time of such delivery. Cabell *v.* Arnold, (Tex. Civ. App. 1893) 22 S. W. 62. See also McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906. There can be no recovery for time while remaining in prison limits (Allen *v.* Shed, 10 Cush. (Mass.) 375) or within the county in accordance with the terms of a bail-bond (Fuller *v.* Bowker, 11 Mich. 204). Abuse of authority may, however, make the wrong-doer a trespasser *ab initio* and create a responsibility for part of the conduct which but for such abuse would have been justified. Kirby *v.* Denby, 2 Gale 31, 5 L. J. Ex. 162, 1 M. & W. 336, 1 Tyrw. & G. 688. Defendant is answerable for all ordinary acts of a policeman including more severity than the occasion required (Edgell *v.* Francis, 4 Jur. 366, 9 L. J. C. P. 233, 1 M. & G. 222, 1 Scott N. R. 118, 39 E. C. L. 729) but only for the time of illegal detention (Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831).

2. Character and Condition of Parties. The law considers, in its endeavor to compensate justly for wrong done, when the pleadings lay sufficient foundation therefor,[33] injury to character and reputation,[34] having due reference to the circumstances and condition of the party wronged[35] and of the wrong-doer.[36]

3. Attorneys' Fees and Expenses. Expenses, counsel fees, and costs necessarily incurred because of the false imprisonment may be considered in the jury's estimate, even though no bad faith, litigious conduct, or unnecessary trouble be shown.[37]

C. Mitigated Damages. It is sometimes laid down as a rule that vindictive damages may, but that actual damages may not, be mitigated by proof of the wrong-doer's good faith and absence of malice,[38] by his personal courtesy,[39] or by proof of plaintiff's own misconduct.[40] The extent of the sufferer's compensation,

33. Only when specially pleaded. Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33.

34. Hardy *v.* Stevenson, 29 La. Ann. 172; Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682, confinement in insane asylum. Bad character of plaintiff cannot be shown merely to mitigate damages (Winebiddle *v.* Porterfield, 9 Pa. St. 137; Russell *v.* Shuster, 8 Watts & S. (Pa.) 308; Ryburn *v.* Moore, 72 Tex. 85, 10 S. W. 393. *Compare* Wasson *v.* Canfield, 6 Blackf. (Ind.) 406), where plaintiff disclaims any damages for injury to his character (Smith *v.* Hyndman, 10 Cush. (Mass.) 554).

35. Thus the injured party may be entitled to have considered his physical condition (Ahern *v.* Collins, 39 Mo. 145) and his own situation in life and the manner in which he was traveling when arrested (Dougherty *v.* Gilbert, Tapp. (Ohio) 38), but not that he had a family (Bergeron *v.* Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33; Holz *v.* Rediske, 116 Wis. 353, 92 N. W. 1105. See, however, Dodge *v.* Alger, 53 N. Y. Super. Ct. 107). As to sex see Ball *v.* Horrigan, 19 N. Y. Suppl. 913, a young girl.

36. As the wealth of defendant (Van Deusen *v.* Newcomer, 40 Mich. 90; Harris *v.* Marco, 16 S. C. 575) on the question of punitive damages (Tucker *v.* Winders, 130 N. C. 147, 41 S. E. 8), or his earnings (McCaffrey *v.* Thomas, 4 Pennew. (Del.) 437, 56 Atl. 382).

37. *Delaware.*— Petit *v.* Colmery, 4 Pennew. 266, 55 Atl. 344.

Georgia.— Ocean Steamship Co. *v.* Williams, 69 Ga. 251.

Michigan.— Swart *v.* Kimball, 43 Mich. 443, 5 N. W. 635.

Mississippi.— Hewlett *v.* George, 68 Miss. 703, 9 So. 885, 13 L. R. A. 682.

Pennsylvania.— Duggan *v.* Baltimore, etc., R. Co., 159 Pa. St. 248, 28 Atl. 182, 186, 39 Am. St. Rep. 672; Mihalyik *v.* Klein, 22 Pa. Super. Ct. 193.

Tennessee.— Woodfolk *v.* Sweeper, 2 Humphr. 88.

Vermont.— Taylor *v.* Coolidge, 64 Vt. 506, 24 Atl. 656.

Virginia.— Parsons *v.* Harper, 16 Gratt. 64.

Wisconsin.—Bonesteel *v.* Bonesteel, 30 Wis. 516.

England.— Foxall *v.* Barnett, 2 C. L. R. 273, 2 E. & B. 928, 18 Jur. 41, 23 L. J. Q. B. 7, 2 Wkly. Rep. 61, 75 E. C. L. 928.

This includes expenses of habeas corpus proceedings unless they were palpably unnecessary. Williams *v.* Garrett, 12 How. Pr. (N. Y.) 456.

Evidence.— The court docket containing entries of proceedings to show damages, costs, and attorney's fees is admissible. Forbes *v.* Hicks, 27 Nebr. 111, 42 N. W. 898.

38. *Iowa.*— Holmes *v.* Blyler, 80 Iowa 365, 45 N. W. 756.

Kansas.— Comer *v.* Knowles, 17 Kan. 436.

Texas.— Pinchman *v.* Dick, 30 Tex. Civ. App. 230, 70 S. W. 333; Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

Vermont.— Tenney *v.* Harvey, 63 Vt. 520, 22 Atl. 659.

Wisconsin.— Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501.

See 23 Cent. Dig. tit. "False Imprisonment," §§ 113, 114.

Actual damages.— A person illegally arrested, although the arrest be made without malice and with probable cause, is entitled to actual damages. Wentz *v.* Bernhardt, 37 La. Ann. 636. See also Woodward *v.* Ragland, 5 App. Cas. (D. C.) 220; Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159; Roberts *v.* Hackney, 109 Ky. 265, 58 S. W. 810, 59 S. W. 328, 22 Ky. L. Rep. 975. As to conduct under void warrant see Woodall *v.* McMillan, 38 Ala. 622. As to order of president of the United States see Johnson *v.* Jones, 44 Ill. 142, 92 Am. Dec. 159. As to advice of counsel see Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922.

Circumstances inducing belief in guilt are not to be considered in the absence of a plea of justification. Yardley *v.* Hine, 17 L. T. Rep. N. S. 264.

39. Notwithstanding the excuse of due forbearance and every effort to alleviate the discomfort of the imprisonment. Kilbourn *v.* Thompson, MacArthur & M. (D. C.) 401.

40. That plaintiff had written a letter charging defendant with a crime does not lessen the extent of his right to recover. Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127. See also Prentiss *v.* Shaw, 56 Me. 427, 96 Am. Dec. 475.

Provocation may mitigate exemplary damages (Petit *v.* Colmery, 4 Pennew. (Del.) 266, 55 Atl. 344), as refusal to sign name on mileage book of passenger (Palmer *v.* Maine Cent.

however, according to many authorities, is to be determined in the light of mitigating circumstances negativing malice and showing reasonable ground for the wrong done,[41] and showing that the person sought to be charged acted in good faith on purported but insufficient legal authority,[42] or that the person seeking recovery was guilty of misconduct,[43] or that he was guilty of the offense for which he was legally arrested, where the ground of action is detention for an unreasonable time.[44] Plaintiff's general bad reputation may serve to mitigate damages.[45]

D. Aggravated Damages. Damages may be aggravated [46] by the circumstances of arrest,[47] trial,[48] or commitment,[49] or by publication of newspaper accounts.[50]

R. Co., 92 Me. 399, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L. R. A. 673).

41. Rogers *v.* Wilson, Minor (Ala.) 407, 12 Am. Dec. 61; Mitchell *v.* Malone, 77 Ga. 301; Garnier *v.* Squires, 62 Kan. 321, 62 Pac. 1005; Botts *v.* Williams, 17 B. Mon. (Ky.) 687, evidence of the declarations of plaintiff that he had committed a felony or evidence which tended to show that defendant in making the arrest was prompted by honest motives and no ill-will to plaintiff is admissible. In false imprisonment as in slander honest intent and mistake will constitute mitigation. Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165. Thus where a private person makes an arrest under circumstances which do not justify him, but would justify an officer, he should be held to pay reasonable and fair damages, according to the circumstances, mitigated by the reasonable or probable cause that induced it. Reuck *v.* McGregor, 32 N. J. L. 70. See also Colby *v.* Jackson, 12 N. H. 526; Bradner *v.* Faulkner, 93 N. Y. 515; Sawyer *v.* Jarvis, 35 N. C. 179. Statements made to the justice by the prosecutor, and by which the former was induced to issue the warrant, are admissible. Neall *v.* Hart, 115 Pa. St. 347, 8 Atl. 628, 2 Am. St. Rep. 559. That defendant was illegally arrested and detained through a mistake of law or miscalculation of time which was shared by all the parties is a fact which goes far in reduction of damages. Barnes *v.* Viall, 6 Fed. 661. In actions against an individual for giving plaintiff into custody on a charge of felony, reasonable and probable cause of suspicion is good evidence in mitigation of damages. Cowles *v.* Dunbar, 2 C. & P. 565, 12 E. C. L. 735; Chinn *v.* Morris, 2 C. & P. 361, R. & M. 424, 12 E. C. L. 617; Tulley *v.* Corrie, 10 Cox C. C. 584; Perkins *v.* Vaughan, 6 Jur. 1114, 12 L. J. C. P. 38, 4 M. & G. 988, 5 Scott N. R. 881, 43 E. C. L. 508. Inexperience of an attorney giving advice will not justify the arrest, but may be shown in mitigation of damages. Mortimer *v.* Thomas, 23 La. Ann. 165. As to how far the attorney is liable see Tenney *v.* Harvey, 63 Vt. 520, 22 Atl. 659.

42. Mitchell *v.* Malone, 77 Ga. 301. That a writ has been changed so as to make it void (Wells *v.* Jackson, 3 Munf. (Va.) 458), that the wrong person was arrested on the warrant (Wasson *v.* Canfield, 6 Blackf. (Ind.) 406; Formwalt *v.* Hylton, 66 Tex. 288, 1 S. W. 376), that the officer honestly believed that the person arrested was the one named in the warrant (Landrum *v.* Wells, 7 Tex. Civ. App. 625, 26 S. W. 1001), that the officer supposed he had a capias (Hall *v.* O'Malley, 49 Tex. 70), a decision of the supreme court shows error in a judgment quashing writ of habeas corpus (Escurix *v.* Daboval, 7 La. 575), or defective military authority (Roth *v.* Smith, 54 Ill. 431; Carpenter *v.* Parker, 23 Iowa 450; Beckwith *v.* Bean, 98 U. S. 266, 25 L. ed. 124) do not justify but may be admissible to mitigate damages. As to abatement of damages see further Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81; Baker *v.* Secor, 4 N. Y. Suppl. 303.

43. As his provocation (Weiler *v.* Pennsylvania R. Co., 29 Pittsb. Leg. J. (Pa.) 347; Thomas *v.* Powell, 7 C. & P. 807, 32 E. C. L. 883), or fraud (Linford *v.* Lake, 3 H. & N. 276, 27 L. J. Exch. 334, 6 Wkly. Rep. 515), or seditious language (McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, Deady 233).

44. Friesenhan *v.* Maines, (Mich. 1904) 100 N. W. 172.

45. Dunn *v.* Cole, 2 Tex. App. Civ. Cas. § 821.

46. As to rebuttal see Bergman *v.* Noble, 45 Hun (N. Y.) 133, 12 N. Y. Civ. Proc. 256, 19 Abb. N. Cas. 62.

47. As arresting on Saturday night (Stensrud *v.* Delamater, 56 Mich. 144, 22 N. W. 272), or the drunken condition of the officer arresting (Hall *v.* O'Malley, 49 Tex. 70), in the presence of plaintiff's family (Young *v.* Gormley, 120 Iowa 372, 94 N. W. 922). As to justifiable handcuffing see McCullough *v.* Greenfield, 133 Mich. 463, 95 N. W. 532, 62 L. R. A. 906. That a constable assaulted and then arrested plaintiff should not be considered in aggravation. Shepherd *v.* Staten, 5 Heisk. (Tenn.) 79.

48. As by filing an unsustained plea (Ocean Steamship Co. *v.* Williams, 69 Ga. 251), but otherwise as to withdrawing a plea (Warwick *v.* Foulkes, 1 D. & L. 638, 8 Jur. 85, 13 L. J. Exch. 109, 12 M. & W. 507).

49. For example, subjecting to more than ordinary inconveniences of confinement. Kindred *v.* Stitt, 51 Ill. 401. See also Fuqua *v.* Gambill, 140 Ala. 464, 37 So. 235; Miller *v.* Fano, 134 Cal. 103, 66 Pac. 183; Hall *v.* Hall, 3 Allen (Mass.) 5; Scott *v.* Flowers, 60 Nebr. 675, 84 N. W. 81; San Antonio, etc., R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. 542.

50. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603; Alabama, etc., R. Co. *v.* Kuhn, 78 Miss. 114, 28 So. 797; Scott

E. Exemplary Damages — 1. Malicious Detention. Exemplary damages in false imprisonment are allowed[51] in the reasonable[52] but not arbitrary discretion of the jury[53] only[54] when it appears that the unlawful detention was committed with actual malice,[55] or its legal equivalent,[56] although not amounting to personal ill-will.[57]

2. Supposed Right or Duty. When the arrest of plaintiff was made in the course of what the parties sought to be charged supposed to be their right and duty as public officers,[58] or as private persons,[59] without malice in fact or in law,[60] compensatory and not vindictive damages will be awarded.

F. Inadequate and Excessive Damages. The assessment of damages under proper instructions is for the jury;[61] but it is for the court to determine

v. Flowers, 60 Nebr. 675, 84 N. W. 81; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98.

51. *Illinois.*— Hawk *v.* Ridgway, 33 Ill. 473; Hight *v.* Naylor, 86 Ill. App. 508.

Michigan.— Hendricks *v.* Haskins, 114 Mich. 291, 72 N. W. 152.

New York.— Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663; Mann *v.* Barrows, 14 N. Y. St. 10.

Pennsylvania.— Grohmann *v.* Kirschman, 168 Pa. St. 189, 32 Atl. 32; Weiler *v.* Pennsylvania R. Co., 29 Pittsb. Leg. J. 347.

Vermont.— McMullan *v.* Erwin, 69 Vt. 338, 38 Atl. 62.

West Virginia.— Gillingham *v.* Ohio River R. Co., 35 W. Va. 588, 14 S. E. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798, against a carrier of passengers.

See 23 Cent. Dig. tit. "False Imprisonment," § 112.

52. Craven *v.* Bloomingdale, 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525; Hall *v.* O'Malley, 49 Tex. 70.

53. Brown *v.* Chadsey, 39 Barb. (N. Y.) 253.

54. Newman *v.* New York, etc., R. Co., 54 Hun (N. Y.) 335, 7 N. Y. Suppl. 560; Baker *v.* Secor, 6 N. Y. St. 735; Williams *v.* Garrett, 12 How. Pr. (N. Y.) 456; Richardson *v.* Huston, 10 S. D. 484, 74 N. W. 234.

55. Pearce *v.* Needham, 37 Ill. App. 90 (wanton disregard of rights of others); Grinnell *v.* Weston, 95 N. Y. App. Div. 454, 88 N. Y. Suppl. 781; Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109; Hamlin *v.* Spaulding, 27 Wis. 360 (bad faith); McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, Deady 233 (bad motive). See also Hawk *v.* Ridgway, 33 Ill. 473.

56. As a wrongful act wilfully done in a wanton and oppressive manner or done with a reckless disregard of the rights of the person seeking recovery (Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875. See also Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604; Pearce *v.* Needham, 37 Ill. App. 90; Craven *v.* Bloomingdale, 30 Misc. (N. Y.) 650, 64 N. Y. Suppl. 262 [*affirmed* in 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525]; Tucker *v.* Winders, 130 N. C. 147, 41 S. E. 8; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737; Fotheringham *v.* Adams Express Co., 36 Fed. 252, 1 L. R. A. 474), or when the conduct complained of was accompanied by circumstances of fraud, insult, or outrage (Maher *v.* Wilson, 139 Cal. 514, 73 Pac. 418; Wanzer *v.* Bright, 52 Ill. 35; Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Wiley *v.* Keokuk, 6 Kan. 94; Parker *v.* McGlin, 52 La. Ann. 1514, 27 So. 946; Ross *v.* Leggitt, 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; Kelly *v.* Durham Traction Co., 132 N. C. 368, 43 S. E. 923. *Compare* Stewart *v.* Maddox, 63 Ind. 51).

57. Gambill *v.* Schmuck, 131 Ala. 321, 31 So. 604; Craven *v.* Bloomingdale, 30 Misc. (N. Y.) 650, 64 N. Y. Suppl. 262 [*affirmed* in 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525].

58. *Delaware.*— Marshall *v.* Cleaver, 4 Pennew. 450, 56 Atl. 380.

Kentucky.— Richardson *v.* Lawhon, 4 Ky. L. Rep. 998.

South Dakota.— Richardson *v.* Huston, 10 S. D. 484, 72 N. W. 234.

Texas.— Karner *v.* Stump, 12 Tex. Civ. App. 460, 34 S. W. 656.

Utah.— Yost *v.* Tracy, 13 Utah 431, 45 Pac. 346.

Virginia.— Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

United States.— McCall *v.* McDowell, 15 Fed. Cas. No. 8,673, 1 Abb. 212, Deady 233.

See 23 Cent. Dig. tit. "False Imprisonment," § 112.

Illustrations.— As in case of imprisonment after Civil war (Milligan *v.* Hovey, 17 Fed. Cas. No. 9,605, 3 Biss. 13; Roth *v.* Smith, 54 Ill. 431), or under an unconstitutional act (Lafon *v.* Dufrocq, 9 La. Ann. 350; Gross *v.* Rice, 71 Me. 241), or a void warrant (Woodall *v.* McMillan, 38 Ala. 622).

59. Lange *v.* Illinois Cent. R. Co., 107 La. 687, 31 So. 1003; Cone *v.* Central R. Co., 62 N. J. L. 99, 40 Atl. 780 (arrest of passenger); Claiborne *v.* Chesapeake, etc., R. Co., 46 W. Va. 363, 33 S. E. 262 (liability for arrest by conductor); Ogg *v.* Murdock, 25 W. Va. 139; Bonesteel *v.* Bonesteel, 30 Wis. 511 (arrest pursuant to advice of counsel). See also Oates *v.* Bullock, 136 Ala. 537, 33 So. 835, 96 Am. St. Rep. 38.

60. Stewart *v.* Maddox, 63 Ind. 51; Newman *v.* New York, etc., R. Co., 54 Hun (N. Y.) 335, 7 N. Y. Suppl. 560; Kolzem *v.* Broadway, etc., Ave. R. Co., 1 Misc. (N. Y.) 148, 20 N. Y. Suppl. 700 (plaintiff's intent to make a test case); Pincham *v.* Dick, 30 Tex. Civ. App. 582, 70 S. W. 333.

61. Biggs *v.* Schultz, 5 N. Y. St. 56.

whether the damages assessed are inadequate[62] or excessive.[63] It will disturb the verdict on the ground of inadequacy only where the damages awarded are clearly shown to be entirely too small to compensate for the injury;[64] and on the ground of excess only when it appears that there is a plain or flagrant abuse of discretion by the jury,[65] or that the jury was actuated by passion or prejudice.[66] No sum is excessive that is not *per se* evidence of prejudice or corruption,[67] especially where there is no attempt at justification.[68]

G. Amount to Be Awarded. In fixing the amount of damages a jury is justified in exercising a liberal discretion[69] with due reference to the place of plaintiff's detention,[70] as well as duration of the detention,[71] and the oppressive or

62. Where an arrest without warrant was justifiable, yet detaining him longer than was necessary and for an unreasonable time before suing out warrant, handcuffing him, carrying him out of the county and there confining him for days under no warrant whatever, was false imprisonment, if not kidnapping, finding by the jury of twenty-five dollars damages was held insufficient compensation for the injury. Potter *v.* Swindle, 77 Ga. 419, 3 S. E. 94.

63. Johnson *v.* Von Kettler, 84 Ill. 315; Allen *v.* Jones, 7 Leg. Int. (Pa.) 110.

64. Six cents was held adequate where it appeared that plaintiff was detained only long enough to walk across the street. Henderson *v.* McReynolds, 14 N. Y. Suppl. 351. See also Wegner *v.* Risch, 114 Wis. 270, 90 N. W. 168, where a verdict for six cents was sustained. Plaintiff in an action for false imprisonment testified as to the discomforts of prison; that when arrested he was employed at thirty-five dollars a month and board; that he suffered both "bodily and in mind, and felt degraded, shamed, and humiliated at being put in jail;" that the employment that he lost was worth two hundred and fifty dollars. He did not state that he could not have gotten equally good employment after he was discharged, nor that he had not lost his employment before he was arrested. The court refused to set aside a verdict for fifty dollars as inadequate. Taylor *v.* Davis, (Tex. Sup. 1890) 13 S. W. 642.

65. Fadner *v.* Filer, 27 Ill. App. 506; Webber *v.* Kenny, 1 A. K. Marsh. (Ky.) 345; Schneider *v.* McGill, 64 S. W. 835, 23 Ky. L. Rep. 587; Allison *v.* Hobbs, 96 Me. 26, 51 Atl. 245.

Amounts held excessive.— The following amounts were held to be excessive under the particular circumstances in each case: Four hundred dollars (Robinson *v.* Clark, 53 Ill. App. 368), four hundred and seventy-five dollars (Ogg *v.* Murdock, 25 W. Va. 139), five hundred dollars (Miller *v.* Ashcraft 98 Ky. 314, 32 S. W. 1085, 17 Ky. L. Rep. 894; Moore *v.* Durgin, 68 Me. 148; Yost *v.* Tracy, 13 Utah 431, 45 Pac. 346), one thousand dollars (McCarty *v.* Fremont, 23 Cal. 196; Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420; Fair *v.* Himmel, 50 Ill. App. 215), two thousand dollars (Johnson *v.* Von Kettler, 66 Ill. 63; Brown *v.* Chadsey, 39 Barb. (N. Y.) 253), twenty-nine hundred and seventeen dollars (Woodward *v.* Glidden, 33 Minn. 108, 22 N. W. 127), three thousand dollars (Reuck *v.* McGregor, 32 N. J. L. 70), six thousand dollars (Fadner *v.* Filer, 27 Ill. App. 506), eight thousand dollars (Moore *v.* Burchfield, 1 Heisk. (Tenn.) 203), nine thousand dollars (McConnell *v.* Hampton, 12 Johns. (N. Y.) 234), twenty thousand dollars (Fotheringham *v.* Adams Express Co., 36 Fed. 252, 1 L. R. A. 474), and sixty thousand dollars (Kilbourn *v.* Thompson, MacArthur & M. (D. C.) 401).

66. Newton *v.* Locklin, 77 Ill. 103; Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109.

67. Holburn *v.* Neal, 4 Dana (Ky.) 120.

68. Reno *v.* Wilson, 49 Ill. 95.

69. Union Depot, etc., R. Co. *v.* Smith, 16 Colo. 361, 27 Pac. 329; Marsh *v.* Smith, 49 Ill. 396. What the judge would have done is not the test. Harris *v.* Louisville, etc., R. Co., 35 Fed. 116.

70. Fenelon *v.* Butts, 53 Wis. 344, 10 N. W. 501 (one thousand dollars sustained, a woman confined in a filthy cell with her infant); Clarke *v.* American Dock, etc., Co., 35 Fed. 478 (four thousand dollars sustained, elderly, respectable woman committed to jail with disorderly woman).

In shop-lifting and similar cases the following verdicts have been sustained: Five hundred dollars (Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165), eight hundred dollars (McKelvey *v.* Marsh, 63 N. Y. App. Div. 396, 71 N. Y. Suppl. 541), one thousand dollars (Cobb *v.* Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909), two thousand dollars (Efroymson *v.* Smith, 29 Ind. App. 451, 63 N. E. 328), and two thousand five hundred dollars (Siegel *v.* Connor, 70 Ill. App. 116).

71. Price *v.* Bailey, 66 Ill. 48 (detention two hours; one hundred and twenty-five dollars certainly not too much); Wheeler, etc., Mfg. Co. *v.* Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571 (detention for ten days; one thousand dollars sustained); Judson *v.* Reardon, 16 Minn. 431 (detention two and a half hours in a dark and filthy cell; eight hundred dollars sustained); Thorp *v.* Carvalho, 14 Misc. (N. Y.) 554, 36 N. Y. Suppl. 1 (detention one and a half hours; one thousand dollars sustained); Ball *v.* Horrigan, 19 N. Y. Suppl. 913 (detention of girl over night; four hundred and fifty dollars sustained); Brosde *v.* Sanderson, 86 Wis. 368, 57 N. W. 49 (detention two days; two hundred and fifty dollars sustained); Roza *v.* Smith, 65 Fed. 592 (plaintiff seized by master

humiliating treatment by defendant which may have characterized the detention for which plaintiff brings his action.[72]

XIV. JURISDICTION AND VENUE.

False imprisonment is a transitory, not a local action, and must be brought in the judicial district[73] and before a court having jurisdiction of such causes.[74]

XV. TRIAL.

A. Questions For Court or Jury — 1. In General. Ordinarily the jury determines questions of fact arising on the evidence concerning the involuntary detention itself,[75] the commission of the wrong by defendant,[76] the relationship or authority to bind defendant,[77] the elements,[78] and the extent of recovery.[79] A court takes a case from the jury[80] only when a liability on the part of defendant is conclusively shown[81] or when a legal defense is fully established.[82] Whether

of vessel and detained on board eighteen hours; five hundred dollars sustained); Cuthbert *v.* Galloway, 35 Fed. 466 (detention from Friday until Monday; three thousand five hundred dollars sustained).

72. Ryan *v.* Donnelly, 71 Ill. 100 (girl of sixteen taken out of bed at night and made to dress and taken to police station; seven hundred and seventy-five dollars sustained); Pinkerton *v.* Sydnor, 87 Ill. App. 76 (plaintiff chained to a bed; one thousand two hundred and seventy-one dollars sustained); Jacques *v.* Parks, 96 Me. 268, 52 Atl. 763 (an aggravated exposure, detention for thirteen days; one hundred dollars sustained); Monjo *v.* Monjo, 53 Hun (N. Y.) 145, 6 N. Y. Suppl. 132 (plaintiff arrested and taken through streets in a public manner, and kept in prison cell all night under very humiliating circumstances; three thousand dollars sustained); Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737 (one thousand dollars sustained); Grace *v.* Dempsey, 75 Wis. 313, 43 N. W. 1127 (five thousand dollars sustained); Sorenson *v.* Dundas, 50 Wis. 335, 7 N. W. 259 (two hundred and fifty dollars sustained); Harris *v.* Louisville, etc., R. Co., 35 Fed. 116 (five thousand dollars sustained).

73. Summers *v.* Southern R. Co., 118 Ga. 174, 45 S. E. 27; Evans *v.* Mayesville, etc., R. Co., 77 S. W. 708, 25 Ky. L. Rep. 1258; Mitchell *v.* Ripy, 6 Ky. L. Rep. 555; Ellis *v.* Baker, 62 N. Y. App. Div. 542, 71 N. Y. Suppl. 88.

74. Jeffers *v.* Brookfield, 1 N. J. L. 38; Rice *v.* Platt, 3 Den. (N. Y.) 81, as determined by the statutes of the several states.

75. Hayes *v.* Mitchell, 69 Ala. 452 (unseasonableness of hour and inaccessibility of magistrate); Cochran *v.* Toher, 14 Minn. 385; Nason *v.* Fowler, 70 N. H. 291, 47 Atl. 263; Raitz *v.* Green, 13 Ohio Cir. Ct. 455, 7 Ohio Cir. Dec. 238; Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486; Griffith *v.* Taylor, 2 C. P. D. 194, 46 L. J. C. P. 152, 36 L. T. Rep. N. S. 5, 25 Wkly. Rep. 196. See also Livingston *v.* Burroughs, 33 Mich. 511, nature of information justifying making criminal complaint. The jury should determine whether the imprisonment was against the will of plaintiff (Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250) or whether plaintiff was detained an unreasonable time (Harris *v.* Atlanta, 62 Ga. 290) and what was the intent of plaintiff in the use of language charged to constitute his misdemeanor in unlawfully intimidating a public officer in the discharge of his duty (Smith *v.* Botens, 13 N. Y. Suppl. 222).

What is an arrest is a question of law; whether there has been an arrest under particular circumstances, depending on the intent, is a question of fact for the jury. Journey *v.* Sharpe, 49 N. C. 165.

76. The jury determine, for example, whether plaintiff caused his own detention (Spoor *v.* Spooner, 12 Metc. (Mass.) 281), or requested the conduct of which he complains (Richardson *v.* Dybedahl, 14 S. D. 126, 84 N. W. 486), or whether complaining witness did in fact direct or instigate the imprisonment (Fenelon *v.* Butts, 49 Wis. 342, 5 N. W. 784), or whether there was concert in action between defendants (Carson *v.* Dessau, 142 N. Y. 445, 37 N. E. 493), or whether a hotel manager directed the arrest of a guest (Pearce *v.* Needham, 37 Ill. App. 90).

77. Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. 188 (as to consent of husband to wife's acts); National Bank of Commerce *v.* Baker, 77 Md. 462, 26 Atl. 867 (collector); Lovick *v.* Atlantic Coast Line R. Co., 129 N. C. 427, 40 S. E. 191 (scope of authority of attorney).

78. Friesenhan *v.* Maines, (Mich. 1904) 100 N. W. 172; Pincham *v.* Dick, 30 Tex. Civ. App. 230, 70 S. W. 333.

79. See *supra*, XIII, B–F.

80. Berger *v.* Saul, 113 Ga. 869, 39 S. E. 326; McLeod *v.* New York, etc., R. Co., 72 N. Y. App. Div. 116, 76 N. Y. Suppl. 347, passenger accused by detective of theft from fellow passenger.

81. Summers *v.* Southern R. Co., 118 Ga. 174, 45 S. E. 27; Alabama, etc., R. Co. *v.* Kuhn, 78 Miss. 114, 28 So. 797; Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831.

82. Cases against proprietors of stores held sufficient. Verchotka *v.* Rotchild, 100 Ill.

a warrant sufficiently describes defendant to protect the officer is a question for the court where the facts are undisputed.[83]

2. MALICE OR PROBABLE CAUSE. The question of probable cause is a mixed proposition of law and fact; whether the circumstances alleged are true or not is a question of fact for the jury; whether they amount to probable cause is a question of law for the court.[84] In clear cases, where there is no question of fact to be determined,[85] and no question whether the facts bring the case within the rule,[86] the court should direct the jury as a matter of law.[87] Except in such clear cases[88] malice[89] and probable cause[90] must be submitted to the jury under proper definition by the court.

B. Instructions. When any instruction is proper other than a direction of verdict, the language employed must substantially and clearly[91] formulate the

App. 268; Tyson *v.* Joseph H. Bauland Co., 68 N. Y. App. Div. 310, 74 N. Y. Suppl. 59; Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663; Mallach *v.* Ridley, 6 N. Y. St. 651; Butler *v.* Stockdale, 19 Pa. Super. Ct. 98. Case held insufficient. Joske *v.* Irvine, 91 Tex. 574, 44 S. W. 1059.

83. Cox *v.* Durham, 128 Fed. 870, 63 C. C. A. 338.

84. Brish *v.* Carter, 98 Md. 445, 57 Atl. 210; Brant *v.* Higgins, 10 Mo. 728; Sutton *v.* Johnstone, 1 Bro. P. C. 76, 1 T. R. 493, 1 Rev. Rep. 269, 1 Eng. Reprint 427; Gibbons *v.* Alison, 3 C. B. 181, 54 E. C. L. 181. But no definite criterion can be laid down for the exercise of its judgment. Lister *v.* Perryman, L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9. As a matter of law, ringing a door-bell and making a great noise and disturbance fails to constitute a breach of the peace or reasonable apprehension of one. Grant *v.* Moser, 2 Dowl. P. C. N. S. 923, 7 Jur. 854, 12 L. J. C. P. 146, 5 M. & G. 123, 6 Scott N. R. 46. *Compare* Lewis *v.* Kahn, 15 Daly (N. Y.) 326, 5 N. Y. Suppl. 661.

85. White *v.* McQueen, 96 Mich. 249, 55 N. W. 843. As where an officer, arresting on suspicion of adultery, has no right so to do (Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603), or where the officer arrests the wrong person having the same name as the one contained in the warrant (Filer *v.* Smith, *supra*).

86. *Illinois.*— Low *v.* Greenwood, 30 Ill. App. 184.

Maryland.— Edger *v.* Burke, 96 Md. 715, 54 Atl. 986; Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089.

Michigan.— Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

Nebraska.— Diers *v.* Mallon, 46 Nebr. 121, 64 N. W. 722, 50 Am. St. Rep. 598.

New York.— Hawley *v.* Butler, 54 Barb. (N. Y.) 490.

Reasonableness of belief that plaintiff was the guilty person is a question for the court. Lister *v.* Perryman, L. R. 4 H. L. 521, 39 L. J. Exch. 177, 23 L. T. Rep. N. S. 269, 19 Wkly. Rep. 9.

87. West *v.* Baxendale, 9 C. B. 141, 19 L. J. C. P. 149, 67 E. C. L. 141; Hailes *v.* Marks, 7 H. & N. 56, 7 Jur. N. S. 851, 30 L. J. Exch. 389, 4 L. T. Rep. N. S. 805, 9 Wkly. Rep. 808; Watson *v.* Whitmore, 8 Jur. 964, 14 L. J. Exch. 41; Busst *v.* Gibbons, 30 L. J. Exch. 75.

88. Mitchell *v.* Wall, 111 Mass. 492; Burbanks *v.* Lepovsky, 134 Mich. 384, 96 N. W. 456.

89. Whether defendant acted "wantonly" is for the jury.

Illinois.— Hawk *v.* Ridgway, 33 Ill. 473; Pearce *v.* Needham, 37 Ill. App. 90.

Michigan.— Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 781.

New York.— Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663; Rosen *v.* Stein, 54 Hun 179, 7 N. Y. Suppl. 368.

Ohio.— State *v.* Pate, 5 Ohio S. & C. Pl. Dec. 732, 7 Ohio N. P. 543.

Pennsylvania.— Kessler *v.* Hoffman, 9 Pa. Dist. 365.

See 23 Cent. Dig. tit. "False Imprisonment," § 117.

90. *Massachusetts.*— Krulevitz *v.* Eastern R. Co., 140 Mass. 573, 5 N. E. 500.

Michigan.— Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 781.

Minnesota.— Cochran *v.* Toher, 14 Minn. 385.

New York.— Grinnell *v.* Weston, 95 N. Y. App. Div. 454, 88 N. Y. Suppl. 781; Thompson *v.* Fisk, 50 N. Y. App. Div. 71, 63 N. Y. Suppl. 352; Newman *v.* New York, etc., R. Co., 54 Hun 335, 7 N. Y. Suppl. 560; Neil *v.* Thorn, 17 Hun 144; Shea *v.* Manhattan R. Co., 7 N. Y. Suppl. 497. *Compare* Voltz *v.* Blackmar, 64 N. Y. 646 [*reversing* 4 Hun 139].

England.— Baynes *v.* Brewster, 2 Q. B. 375, 1 G. & D. 669, 6 Jur. 392, 11 L. J. M. C. 5, 42 E. C. L. 720; Ingle *v.* Bell, 5 L. J. M. C. 85, 1 M. & W. 516.

See 23 Cent. Dig. tit. "False Imprisonment," § 118.

Whether defendant believed plaintiff guilty is a question for the jury. Burbanks *v.* Lepovsky, 134 Mich. 384, 96 N. W. 456. See also Venafra *v.* Johnston, 10 Bing. 301, 25 E. C. L. 145, 6 C. & P. 50, 25 E. C. L. 316, 3 L. J. C. P. 51, 3 Moore & S. 847.

91. Inaccuracies not amounting to error in law in use of terms (Warner *v.* Riddiford, 4 C. B. N. S. 180, 93 E. C. L. 180), or the use of unexplained but proper equivalents (Cooper *v.* Johnson, 81 Mo. 483) does not constitute reversible error. The rule is other-

rules of law[92] applicable to the issues,[93] and the evidence[94] subject to the construction of the charge as a whole.[95] Requests to charge not conforming to this standard should be rejected[96] or correctly modified.[97]

XVI. VERDICT.

Where each of several defendants is liable for the same wrong a verdict may properly be found against each of them and against all of them jointly.[98] And in a case where both of two defendants were liable if either was liable, but a verdict was found in favor of one and against the other, it was held that the latter had no standing to object on account of the inconsistency.[99]

wise, however, as to a misleading instruction. Filer *v.* Smith, 96 Mich. 347, 55 N. W. 999, 35 Am. St. Rep. 603.

92. For correct charge as to liability of an attorney if he directed or advised the arrest see Philadelphia F. Assoc. *v.* Fleming, 78 Ga. 733, 3 S. E. 420; Tenney *v.* Smith, 63 Vt. 520, 22 Atl. 659. For proper instruction on arrest for drunkenness (see Parham *v.* Shockler, (Tex. Civ. App. 1903) 73 S. W. 839), or arrest by a railroad company of a tramp locked in a box-car (see Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831). For correct charge as to malice and probable cause see Franklin *v.* Amerson, 118 Ga. 860, 45 S. E. 698; Murray *v.* Friensberg, 15 N. Y. Suppl. 450; Bolton *v.* Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737. For case of misdirection as to probable cause see Craven *v.* Bloomingdale, 30 Misc. (N. Y.) 650, 64 N. Y. Suppl. 262 [*affirmed* in 54 N. Y. App. Div. 266, 66 N. Y. Suppl. 525]; Gibbons *v.* Alison, 3 C. B. 181, 54 E. C. L. 181; Grant *v.* Moser, 2 Dowl. P. C. N. S. 923, 7 Jur. 854, 12 L. J. C. P. 146, 5 M. & G. 123, 6 Scott N. R. 46, 44 E. C. L. 74. Charge cutting off defense of probable cause see Bennett *v.* Eddy, 120 Mich. 300, 79 N. W. 781. For proper charge regarding character of plaintiff see Wolf *v.* Perryman, 82 Tex. 112, 17 S. W. 772. For proper charge in action against joint tort-feasors see Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875; Martin *v.* Golden, 180 Mass. 549, 62 N. E. 977. That defendant, sergeant-at-arms, had no recourse against the United States is a proper instruction. Kilbourn *v.* Thompson, MacArthur & M. (D. C.) 401. See, generally, as to improper instructions Stewart *v.* Feeley, 118 Iowa 524, 92 N. W. 670; Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

A charge as to damages must not leave jury to infer a prerogative to be governed by arbitrary discretion rather than by the facts in proof. Girdner *v.* Taylor, 6 Heisk. (Tenn.) 244. For correct charge as to special damage see Joske *v.* Irvine, (Tex. Civ. App. 1897) 43 S. W. 278. For erroneous charge as to exemplary damages see Schneider *v.* McGill, 64 S. W. 835, 23 Ky. L. Rep. 587. *Compare* Ratteree *v.* Chapman, 79 Ga. 574, 4 S. E. 684.

93. Harness *v.* Steele, 159 Ind. 286, 64 N. E. 875, instructions applicable to duty to take before magistrate.

If an immaterial instruction is given defendant cannot complain. Strozzi *v.* Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832; Stevens *v.* O'Neill, 51 N. Y. App. Div. 364, 64 N. Y. Suppl. 663; Bingham *v.* Lipman, 40 Oreg. 363, 67 Pac. 98.

As to instructions outside the issues see the following cases:

Georgia.— Southern R. Co. *v.* Gresham, 114 Ga. 183, 39 S. E. 883.

Iowa.— Stewart *v.* Feeley, 118 Iowa 524, 92 N. W. 670.

Kentucky.— Schneider *v.* McGill, 64 S. W. 835, 23 Ky. L. Rep. 587.

Maryland.— Roth *v.* Shupp, 94 Md. 55, 50 Atl. 430.

Missouri.— Thompson *v.* Buchholz, 107 Mo. App. 121, 81 S. W. 490.

Texas.— Texas, etc., R. Co. *v.* Parker, 29 Tex. Civ. App. 264, 68 S. W. 831.

94. Instructions concerning matters having no foundation in the evidence are properly refused. Thompson *v.* Buchholz, 107 Mo. App. 121, 81 S. W. 490.

95. The charge will be sustained if any error in it be corrected by subsequent portions thereof (Murray *v.* Friensberg, 15 N. Y. Suppl. 450. *Compare* Siegel *v.* Connor, 171 Ill. 572, 49 N. E. 728 [*affirming* 70 Ill. App. 116]) or by verdict (Arneson *v.* Thorstad, 72 Iowa 145, 33 N. W. 607, holding that a general and unexplained charge by a court is not reversible error when a special verdict by the jury finds facts properly determining the cause irrespective of such general language).

96. As to request failing to discriminate between joint tort-feasors see Edger *v.* Burke, 96 Md. 715, 54 Atl. 986. As to arrest by railway conductor see Dixon *v.* New England R. Co., 179 Mass. 242, 60 N. E. 581. See also Roth *v.* Shupp, 94 Md. 55, 50 Atl. 430; Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Jester *v.* Lipman, 40 Oreg. 408, 67 Pac. 102; Pincham *v.* Dick, 30 Tex. Civ. App. 230, 70 S. W. 333.

97. Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859; Bacon *v.* Bacon, 76 Miss. 458, 24 So. 968; Monson *v.* Rouse, 86 Mo. App. 97.

98. Bath *v.* Metcalf, 145 Mass. 274, 14 N. E. 133, 1 Am. St. Rep. 455.

99. Burroughs *v.* Eastman, 101 Mich. 419, 59 N. W. 817, 45 Am. St. Rep. 419, 24 L. R. A. 859.

XVII. CRIMINAL RESPONSIBILITY.

A. Nature of Offense. False imprisonment was indictable as a specific crime at common law.[1] Statutes of many states have substantially reënacted the common-law rules.[2] The gist of the offense is the actual [3] and unlawful restraint or detention of one person against his will by another.[4]

B. Sufficiency of Indictment or Information. The indictment or information should follow the statute in every essential particular.[5] But an information charging the offense under the common law may be sufficient under the statute.[6]

C. Liability and Justification. The persons liable to an indictment for false imprisonment[7] and the justification which may be shown under plea of not

1. 3 Blackstone Comm. 127; 4 Blackstone Comm. 218; Davies *v.* State, 72 Wis. 54, 38 N. W. 722; Smith *v.* State, 63 Wis. 453, 23 N. W. 879. False imprisonment of a free negro was an offense at common law. State *v.* Hill, 2 Speers (S. C.) 150.

2. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796; People *v.* Ebner, 23 Cal. 158; Ross *v.* State, 15 Fla. 55; Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786; Davies *v.* State, 72 Wis. 54, 38 N. W. 722; Smith *v.* State, 63 Wis. 453, 25 N. W. 879.

3. The mere fact that a person considers himself under arrest is not sufficient. McClure *v.* State, 26 Tex. App. 102, 9 S. W. 353.

4. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796; State *v.* Lunsford, 81 N. C. 528. Where defendant arrested plaintiff on a charge of passing upon him a counterfeit note, and took her into his house and detained her there for three-fourths of an hour, offering to release her if she would pay him for the note, he was liable to a prosecution for false imprisonment. People *v.* McArdle, 1 Wheel. Cr. (N. Y.) 101. But where three young men, in order to perpetrate a practical joke, induced a man nearly seventy years old, by promising to pay him, to ride behind one of them on a horse in the night a quarter of a mile in search of a pretended horse-thief, this fraud did not impress the transaction with the character of a criminal act. State *v.* Lunsford, 81 N. C. 528.

Violation of invalid ordinance.— Arrest by a police officer without warrant for violation of an invalid municipal ordinance makes him guilty of the offense of false imprisonment. State *v.* Hunter, 106 N. C. 796, 11 S. E. 366, 8 L. R. A. 529.

Lawful arrest, but prolonged detention.— The arrest may be legal in its inception, but made illegal by detention beyond a reasonable time before taking before a magistrate, and subject the person so arresting to a prosecution for false imprisonment. Lavina *v.* State, 63 Ga. 513.

In a prosecution for false imprisonment by a threat, a charge that the threat must have been calculated to operate on the person threatened, and inspire fear of injury, and that the jury should consider the age, sex, condition, disposition, or health of the person threatened in determining whether the threat was sufficient to intimidate and prevent him from moving beyond the bounds in which he was detained is correct. Meyer *v.* State, (Tex. Cr. App. 1899) 49 S. W. 600.

5. Ross *v.* State, 15 Fla. 55. It should allege the mode in which the detention was effected, but need not further particularize it. Maner *v.* State, 8 Tex. App. 361. It must state that it was without lawful authority; if the indictment failed to state that it was without "lawful authority" it did not allege an offense under the statute or at common law. Waterman *v.* State, 13 Fla. 683; Barber *v.* State, 13 Fla. 675. In an indictment for false imprisonment, the charge that the defendant "was unlawfully and feloniously imprisoned" implies that the act was done without sufficient legal authority, and is good without the latter allegation. U. S. *v.* Lapoint, Morr. (Iowa) 146. But a general allegation *contra formam statuti* is not sufficient. Redfield *v.* State, 24 Tex. 133.

6. Divies *v.* State, 72 Wis. 54, 38 N. W. 722, as to form. A justice of the peace indicted for false imprisonment under color of legal process is not entitled to the right of appearance and being heard before the grand jury when the indictment is found. Campbell *v.* State, 48 Ga. 353.

7. Persons committing (see *supra*, V, A, 2, a, b) and all persons participating in the unlawful arrest or detention may be found guilty. People *v.* Wheeler, 73 Cal. 252, 14 Pac. 796. It is not necessary that defendant be present at the time of arrest, if it was done under his procurement. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250. So also a person rendering aid to an officer in the safekeeping of a prisoner does so at his peril. He is bound to know whether the officer acts under legal and valid process. Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253. But the mere observation of what is going on and the fact that he did nothing to prevent the commission of the offense is not sufficient. Walker *v.* State, 25 Tex. App. 443, 8 S. W. 647.

Conspiracy.— The officer, prosecutor, and all other persons concerned may be indicted for conspiracy to procure criminal process for an improper purpose. Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786; Com. *v.* Blodgett, 12 Metc. (Mass.) 56.

guilty[8] are *mutatis mutandis* governed by substantially the same principles which determine civil responsibility.[9]

D. Evidence. On an indictment for false imprisonment, the prosecution is required to prove only the imprisonment or detention[10] set forth therein[11] and in the county named therein[12] which will be presumed to be unlawful.[13] Confinement or detention having been shown by the prosecution, it then devolves upon the accused to prove its lawfulness[14] or its justification.[15] A conviction for false imprisonment will be set aside and a new trial granted for insufficiency of evidence as in other criminal cases.[16]

FALSELY. The adverb of FALSE, *q. v.*, and otherwise used in exactly the same sense; that is, erroneously, the opposite of truly;[1] erroneously, untruly, with intent.[2]

FALSELY MAKE. To make something in the resemblance or similitude of another.[3] An expression usually adopted to describe the crime of forgery.[4] (See, generally, FORGERY.)

8. On the trial of a prosecution for false imprisonment of certain free negroes, the record of a recovery, in writs of ravishment of a ward, establishing their freedom, was held admissible to rebut the presumption of slavery arising from color, both under 7 U. S. St. at L. 397, and the general rule of evidence as to pedigree, etc. State *v.* Hill, 2 Speers (S. C.) 150.

If the justification be by warrant, defendant must show that it was legally issued and was legal on its face. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786, holding that if the officer is shown to have been a party to a conspiracy to obtain criminal process for an improper purpose the writ will afford him no protection. He must show that the warrant was regularly returned. Slomer *v.* People, *supra.*

If the justification be that he was aiding an officer in an arrest defendant must show that the arrest was made under a legal and valid process. Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253.

If the arrest was made without warrant, defendant must show by what authority the imprisonment was made. Mosley *v.* State, 23 Tex. App. 409, 4 S. W. 907 and Beville *v.* State, 16 Tex. App. 70, that the person was drunk and committing a breach of the peace in violation of an ordinance. Where a sergeant on duty in a garrison adjoining a city arrested a citizen while he was outside the garrison for using insulting language, as the sergeant was charged by the law of the United States with the good order of the fort, he was justified in going out of the fort to remove the citizen, and abate the nuisance caused by his abusive language, and was not liable in a prosecution for false imprisonment. Oglesby *v.* State, 39 Tex. 53. It has been held that a prosecutor who has reasonable ground to believe that a crime has been committed and that accused committed it would be protected in making the arrest. Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786. But see Begley *v.* Com., 60 S. W. 847, 22 Ky. L. Rep. 1546; Kirbie *v.* State, 5 Tex. App. 60, where it is held that the guilt or innocence of the person arrested is immaterial in a prosecution for false imprisonment.

Evidence insufficient as a justification may be introduced to show that there was good reason for believing that a crime had been committed in mitigation of the penalty. Staples *v.* State, 14 Tex. App. 136.

9. See *supra*, I–XI.

10. Floyd *v.* State, 12 Ark. 43, 44 Am. Dec. 250; Kirbie *v.* State, 5 Tex. App. 60.

11. Maner *v.* State, 8 Tex. App. 361. But it is not error in a prosecution for false imprisonment for the court to charge all the acts mentioned in the statute by which false imprisonment might be committed, instead of limiting the charge to the acts alleged. Meyer *v.* State, (Tex. Cr. App. 1899) 49 S. W. 600.

12. Waterman *v.* State, 13 Fla. 683; Barber *v.* State, 13 Fla. 675.

13. Kirbie *v.* State, 5 Tex. App. 60.

14. Floyd *v.* State, 12 Ark. 43, 54 Am. Dec. 250; Kirbie *v.* State, 5 Tex. App. 60.

15. Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253; Slomer *v.* People, 25 Ill. 70, 76 Am. Dec. 786.

16. Boyd *v.* State, 11 Tex. App. 80.

1. U. S. *v.* Hartman, 65 Fed. 490, 491.

2. State *v.* Brady, 100 Iowa 191, 204, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693.

"Corruptly" and "falsely" as used in an indictment see State *v.* Smith, 63 Vt. 201, 213, 22 Atl. 604.

"Falsely alter" see U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

"Wilfully, knowingly, maliciously, and falsely" see State *v.* Bixler, 62 Md. 354, 356.

3. U. S. *v.* Otey, 31 Fed. 68, 69, 12 Sawy. 416. See also People *v.* Bendit, 111 Cal. 274, 280, 43 Pac. 901, 52 Am. St. Rep. 186, 31 L. R. A. 831; Rohr *v.* State, 60 N. J. L. 576, 579, 38 Atl. 673; U. S. *v.* Hartman, 65 Fed. 490, 491.

4. U. S. *v.* Moore, 60 Fed. 738, 739 [*citing* U. S. *v.* Cameron, 3 Dak. 132, 13 N. W. 561;

FALSE OATH. See PERJURY.

FALSE OR FRAUDULENT PERSUASION. Terms equivalent to the terms inducement, promise, artifice, or deception.[5]

Com. *v.* Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703; State *v.* Willson, 28 Minn. 52, 9 N. W. 28; State *v.* Young, 46 N. H. 266, 88 Am. Dec. 212; Mann *v.* People, 15 Hun (N. Y.) 155; U. S. *v.* Staats, 8 How. (U. S.) 41, 12 L. ed. 979; U. S. *v.* Wentworth, 11 Fed. 52; U. S. *v.* Barney, 24 Fed. Cas. No. 14,524, 5 Blatchf. 294; U. S. *v.* Reese, 27 Fed. Cas. No. 16,138, 4 Sawy. 629; Barbour Cr. L. 97; N. Y. Pen. Code, § 520; Wharton Cr. L. § 653.

"Falsely making of a note" see State *v.* Wheeler, 20 Oreg. 192, 198, 25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779.

5. Graham *v.* McReynolds, 90 Tenn. 673, 677, 18 S. W. 272.

FALSE PERSONATION

EDITED BY WM. LAWRENCE CLARK*

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I. DEFINITION.

False personation is the offense of falsely representing some other person and acting in the character thus unlawfully assumed, in order to deceive others and thereby gain some profit or advantage, or in order to enjoy some right or privilege belonging to the one so personated or subject him to some expense, charge, or liability.[1]

II. NATURE AND ELEMENTS OF OFFENSE.

A. At Common Law. The bare fact of personating another, although for the purpose of fraud, can in no instance amount to more than a cheat or misdemeanor at common law, and is only punishable as such.[2]

B. By Statute — 1. IN GENERAL. Now, by statute, in England and in most of the United States false personation is made a felony or a misdemeanor, the various statutes differing widely, however, as to what constitutes the offense. Thus there are statutes making it punishable, either as a felony or as a misdemeanor, to falsely personate another and in such assumed character receive any goods, etc.,[3] to falsely personate another and authenticate a conveyance for regis-

1. Black L. Dict. [*citing* 4 Stephens Comm. 181, 290]. See also Abbott L. Dict.; Bouvier L. Dict.; Burrill L. Dict.

"To personate another person is to assume to be that person;" and upon the trial of a person accused of falsely personating another it is error to refuse to instruct the jury in substance that the mere signing of the name of another is not a personation of him, and that defendant must have assumed to be the person known by such name. People *v.* Maurin, 77 Cal. 436, 19 Pac. 832.

2. Reg. *v.* Bent, 2 C. & K. 179, 1 Den. C. C. 157, 61 E. C. L. 179; Anonymous, 2 East P. C. 1010, 1 Str. 384; Reg *v.* Hogg, 25 U. C. Q. B. 66. See Bouvier L. Dict. And see FALSE PRETENSES, *infra*, p. 384.

3. See Kirtley *v.* State, 38 Ark. 543.

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tration,[4] to falsely personate another and in such assumed character sign the assumed name to any instrument which, if genuine, would create or discharge a pecuniary obligation,[5] to falsely personate an officer or particular class of officers,[6] to falsely personate another in any legal proceeding whereby the latter's rights or interests are affected,[7] to falsely personate another, and in such assumed character to either become bail or surety for any party.[8] There are also statutes making it a felony or misdemeanor to falsely personate another and in such assumed character to marry or pretend to marry, or to sustain the married relation toward another, with or without the connivance of the latter;[9] to falsely personate a proprietor of public stocks;[10] to falsely personate a voter at any valid election;[11] to falsely personate or assume the name or character of any officer, seaman, or other person entitled or supposed to be entitled to any wages, pay, or other allowance of money or prize money,[12] or to acknowledge or procure to be acknowledged any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name or names of any other person or persons not privy or consenting to the same.[13]

2. Essential Elements — a. Personation. To constitute this offense there must be a personation and it must be false,[14] and according to most of the statutes the personation must be of some particular person and not merely of one of a

4. Martin *v.* State, 1 Tex. App. 586.

5. Thompson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 298.

6. Lansing *v.* People, 57 Ill. 241 (of police officer); People *v.* Cronin, 80 Mich. 646, 45 N. W. 479; U. S. *v.* Taylor, 108 Fed. 621 (false personation of officer, agent, or employee of the United States); U. S. *v.* Curtain, 43 Fed. 433 (under the same statute).

Personation of applicant at civil service examination see U. S. *v.* Bunting, 82 Fed. 883.

Personating detective see Detectives, 14 Cyc. 234.

7. Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379, holding that the false personation of one person by another by accepting service of process in a divorce suit against the former, in which a judgment *prima facie* regular and legal is rendered against defendant, "affects" the interests of the latter within the purview of the statute, even though the judgment is void or voidable for fraud upon the court and the person so personated.

8. People *v.* Knox, 119 Cal. 73, 51 Pac. 19. See also Renoard *v.* Noble, 2 Johns. Cas. (N. Y.) 293. By 21 Jac. 1, c. 26, it was made felony without benefit of clergy to acknowledge, or procure to be acknowledged, any bail in the name of another person not privy or consenting thereto; but it was held that the bare personating bail was not felony under this statute, unless it was filed; and therefore by 4 & 5 Wm. & Mary, c. 4, if any person shall, before any commissioner authorized to take bail, personate any other person, whereby the person so personated may be liable to the payment of money, they shall be adjudged felons. 4 Blackstone Comm. 128; Cotton's Case, Cro. Jac. 256; 1 Hawkins P. C. 178. See also Timberly's Case, 2 East P. C. 1009, 2 Sid. 90; Beasly's Case, 1 Vent. 301.

9. See Hodecker *v.* Stricker, 20 N. Y. App. Div. 245, 46 N. Y. Suppl. 808.

10. Rex *v.* Parr, 2 Leach C. C. 487. See also 2 East P. C. 1005.

11. See Reg. *v.* Hague, 4 B. & S. 715, 9 Cox C. C. 412, 10 Jur. N. S. 359, 33 L. J. M. C. 81, 9 L. T. Rep. N. S. 648, 12 Wkly. Rep. 310, 116 E. C. L. 715; Reg. *v.* Vaile, 6 Cox C. C. 470. See also Whiteley *v.* Chappell, L. R. 4 Q. B. 147, 11 Cox C. C. 307, 38 L. J. M. C. 51, 19 L. T. Rep. N. S. 355, 17 Wkly. Rep. 175. *Compare* Reg. *v.* Bent, 2 C. & K. 179, 1 Den. C. C. 157, 61 E. C. L. 179; Reg. *v.* Hogg, 25 U. C. Q. B. 66.

12. See Reg. *v.* Lake, 11 Cox C. C. 333 (under 2 Wm. IV, c. 53, § 49, making it a felony to knowingly and wilfully personate a soldier entitled to prize money); Brown's Case, 2 East P. C. 1007 (holding that the personation must be of some existing person who is entitled or who *prima facie* might be entitled to receive the wages, etc.); Rex *v.* Potts, R. & R. 262 (under 57 Geo. III, c. 127, § 4, for personating a seaman, aiders, and abetters being held guilty as principals).

A woman may be guilty as a principal if she aids and abets another in personating a seaman, although she could not commit the crime in person. Rex *v.* Potts, *supra*. See Criminal Law, 12 Cyc. 190 text, and note 64.

13. See 2 East P. C. 1009 (21 Jac. 1, c. 26, § 2).

14. Kirtley *v.* State, 38 Ark. 543 (obtaining money by falsely personating another); People *v.* Maurin, 77 Cal. 436, 19 Pac. 832 (holding that where defendant signed a certain doctor's name to a death certificate on being told that he had authorized it, but did not assume or pretend to be the doctor, a conviction could not be had under a statute punishing any person who "falsely personates another, and in such assumed character either verifies, publishes, acknowledges, or proves, in the name of another person, any written instrument with intent that the same may be recorded, delivered, and used as true"); Hodecker *v.* Stricker, 20 N. Y. App.

class of persons.[15] In some jurisdictions, however, statutes have made it an offense for a person to falsely impersonate certain classes of public officers, such as a police officer,[16] or a judge, justice of the peace, sheriff, or other judicial or ministerial officer, and to take it upon himself to act as such an officer.[17] There cannot be a "personating" of a supposititious individual who never existed,[18] but there can be a personating of one who has lived and is dead.[19]

b. Fraudulent Intent. Another essential element of the statutory offense of false personation is that such personation must be made with intent to defraud.[20]

c. Consummation of Fraudulent Intent. Under some of the statutes it is also necessary that the fraudulent intent shall be consummated;[21] but under other statutes this is not necessary.[22]

III. INDICTMENT.

The indictment or information must allege every fact and circumstance which is necessary to constitute the offense in plain and intelligible words, and with such

Div. 245, 46 N. Y. Suppl. 808 (personating another and marrying, etc.); U. S. *v.* Curtain, 43 Fed. 433 (false personation of an officer or agent of the United States). See also Coffin's Case, 6 Me. 281.

15. People *v.* Knox, 119 Cal. 73, 51 Pac. 19 (holding that a statute which provides for the punishment of "every person who falsely personates another," etc., does not apply where one falsely assumes an official character, but is only intended to cover acts done by one person while representing himself to be another and different person); Brown's Case, 2 East P. C. 1007.

16. See Lansing *v.* People, 57 Ill. 241.

17. *Maine.*— Coffin's Case, 6 Me. 281, holding that signing the name of a deputy sheriff to the return of a summons and attachment was not pretending to be a deputy sheriff and assuming to act as such.

Massachusetts.—Com. *v.* Connolly, 97 Mass. 591; Com. *v.* Wolcott, 10 Cush. 61.

Michigan.— People *v.* Cronin, 80 Mich. 646, 45 N. W. 479, holding that Howell St. Mich. § 9252, does not punish any person for falsely assuming to be a justice of the peace, sheriff, etc., but for falsely assuming to be and taking upon himself to act as such officer.

Tennessee.— State *v.* Withers, 7 Baxt. 16, holding that where a man appointed as a secret detective by the mayor served a warrant of arrest issued by a justice, but did not claim to be any other person than such detective when his authority was challenged, he was not guilty under the statute.

Texas.— Petterson *v.* State, (Cr. App. 1900) 58 S. W. 100, holding that a party falsely pretending to be a duly appointed pilot was not guilty of a violation of a statute making it an offense to falsely assume to be an executive officer of the state, since a pilot was not one of the executive officers enumerated in the constitution.

See 23 Cent. Dig. tit. "False Personation," § 1 *et seq.*

Conspiracy to defraud the United States by false personation see CONSPIRACY, 8 Cyc. 615.

18. Anonymous, 2 East P. C. 1010, 1 Str. 384 (holding that where bail was put in under feigned names, there being no such persons, it was not within the act); Rex *v.* Tannet, R. & R. 261.

19. Rex *v.* Cramp, R. & R. 242; Rex *v.* Martin, R. & R. 240. See, however, Whiteley *v.* Chappell, L. R. 4 Q. B. 147, 11 Cox C. C. 307, 38 L. J. M. C. 51, 19 L. T. Rep. N. S. 355, 17 Wkly. Rep. 175 (holding that 14 & 15 Vict. c. 105, § 3, punishing any person who shall wilfully and fraudulently "personate any person entitled to vote at" an election, does not apply to the personating of a party who is dead at the time of the personation.

20. *California.*— People *v.* Maurin, 77 Cal. 436, 19 Pac. 832.

Florida.— Goodson *v.* State, 29 Fla. 511, 10 So. 738, 30 Am. St. Rep. 135; Jones *v.* State, 22 Fla. 532.

Illinois.— Lansing *v.* People, 57 Ill. 241.

Texas.— Thompson *v.* State, (Cr. App. 1893) 24 S. W. 298, holding that where a party innocently received money intended for another person of the same name, under the belief that it was intended for himself, there could be no conviction under the statute.

United States.— False personation of officer or agent of the United States see U. S. *v.* Farnham, 127 Fed. 478; U. S. *v.* Brown, 119 Fed. 482; U. S. *v.* Taylor, 108 Fed. 621.

21. As under the act of congress of April 18, 1884, relating to personation of an officer or employee of the United States. U. S. *v.* Bradford, 53 Fed. 542; U. S. *v.* Curtain, 43 Fed. 433.

22. See Rex *v.* Parr, 2 Leach C. C. 487, holding that where a person falsely personated a proprietor of public stocks and obtained a dividend warrant in the name of the real owner, but was apprehended before he had taken any subsequent steps toward the actual payment of the money, he was nevertheless guilty of a felony under a statute punishing the personating a stock-holder and thereby endeavoring to receive a dividend. The offense of personating or inducing another to personate a voter at an election (22 Vict. c. 35, § 9) is complete when the personator tenders his voting paper, although on being asked if he is the person whose name is signed to the paper he answers "no," and the vote is accordingly rejected.

certainty as to time, place, and intent as will inform the accused of the particular crime with which he is charged, and as will enable him to plead any judgment that may be given upon it in bar of another prosecution for the same offense.[23] The indictment or information must be drawn in strict conformity with the statute upon which it is based.[24]

IV. VARIANCE.

As in the case of other offenses, in a prosecution for false personation all allegations of the indictment which are descriptive of the offense must be proved as alleged.[25]

V. EVIDENCE.

To warrant a conviction under an indictment for the offense of false personation it is essential that every element of the offense shall be proved,[26] and that it

Reg. *v.* Hague, 4 B. & S. 715, 9 Cox C. C. 412, 10 Jur. N. S. 359, 35 L. J. M. C. 81, 9 L. T. Rep. N. S. 648, 12 Wkly. Rep. 310, 116 E. C. L. 715.

23. *Arkansas.*— Kirtley *v.* State, 38 Ark. 543, holding that the act alleged to have been done must be truly described in all its essential elements, and proved as charged.

California.— People *v.* Knox, 119 Cal. 73, 51 Pac. 19, holding that the mere fact that an information is susceptible of widely different constructions renders it unsatisfactory in the eyes of the law.

New York.— McCord *v.* People, 46 N. Y. 470, holding that an indictment charging that defendant falsely represented that he had a warrant against the prosecuting witness and induced him to deliver up to him a watch and diamond ring could not be sustained, as the property might have been parted with as an inducement to the supposed officer to violate the law. See also People *v.* Stetson, 4 Barb. 151.

Tennessee.— Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379, where the indictment for falsely personating another in a legal proceeding was held to be sufficient.

Texas.— Martin *v.* State, 1 Tex. App. 586, where an indictment for falsely personating another and authenticating a conveyance for registration was held to be insufficient. See Freeman *v.* State, 20 Tex. App. 558, holding that it was not necessary to allege the whereabouts or residence of the party alleged to have been falsely personated, as his whereabouts or residence was immaterial.

Canada.— Reg. *v.* Hogg, 25 U. C. Q. B. 66, negativing identity of defendant with voter alleged to have been personated and description of voter in indictment for false personation of a voter at an election.

See 23 Cent. Dig. tit. "False Personation," § 2.

Duplicity in indictment under the act of congress of April 18, 1884, for false personation of an officer of the United States see U. S. *v.* Taylor, 108 Fed. 621.

24. *Arkansas.*— Kirtley *v.* State, 38 Ark. 543, false personation and obtaining money or property thereby.

California.— People *v.* Knox, 119 Cal. 73, 51 Pac. 19, false personation of officer.

Florida.— Goodson *v.* State, 29 Fla. 511, 10 So. 738, 30 Am. St. Rep. 135; Jones *v.* State, 22 Fla. 532.

Massachusetts.— Com. *v.* Wolcott, 10 Cush. 61, holding that an indictment against a person for falsely assuming or pretending to be a sheriff and taking upon himself to act as such must aver that he falsely assumed and pretended to be and took upon himself to act as a sheriff of the commonwealth.

Michigan.— People *v.* Cronin, 80 Mich. 646, 45 N. W. 479, holding that under a statute making it an offense for any person to falsely pretend to be a justice of the peace, sheriff, constable, or coroner, or falsely take upon himself to act or officiate in any office or place of authority, a conviction cannot be had on an information charging defendant with assuming to be a member of the metropolitan police force, without alleging that he undertook to act as such.

Tennessee.— Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379, false personation in divorce suit.

England.— Reg. *v.* Bent, 2 C. & K. 179, 1 Den. C. C. 157, 61 E. C. L. 179, false personation of voter.

For forms of indictment see Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379 (false personation of another in a legal proceeding); Rex *v.* Potts, R. & R. 262 (false personation of a seaman, and aiding and abetting therein).

Indictment for false personation of officer, agent, or employee of the United States, under the act of congress of April 18, 1884 (U. S. Comp. St. (1901) p. 2293) see U. S. *v.* Brown, 119 Fed. 482.

25. Kirtley *v.* State, 38 Ark. 543, holding that the allegation of the false personation in an indictment for obtaining money by personating another is descriptive of the offense and must be proved as alleged, and proof that two were acting in concert and one of them personated the assumed party with the assent and concurrence of the other will not sustain a charge of false personation by the latter.

26. See U. S. *v.* Curtain, 43 Fed. 433, holding that to warrant a conviction under U. S. Comp. St. (1901) p. 3679, for false personation of an officer or agent of the United States, it is necessary to prove the

shall be shown beyond a reasonable doubt that the offense was committed by defendant.[27]

FALSE PLEA. See PLEADING.

following: (1) False assumption of character of officer or agent mentioned in indictment; (2) that such assumption was false; (3) that it was made with intent to defraud; and (4) that such intent was carried out. See also U. S. *v.* Farnham, 127 Fed. 478; U. S. *v.* Brown, 119 Fed. 482; U. S. *v.* Taylor, 108 Fed. 621. In the following cases the evidence was held to be sufficient to warrant a conviction: Lansing *v.* People, 57 Ill. 241 (personation of police officer); Com. *v.* Connolly, 97 Mass. 591 (assuming and pretending to be a deputy constable and taking upon himself to act as such); Edgar *v.* State, 96 Tenn. 690, 36 S. W. 379 (false personation of another in a legal proceeding). In the following cases the evidence was held to be insufficient: People *v.* Maurin, 77 Cal. 436, 19 Pac. 832 (false personation of another and verifying a written instrument, etc.); Thompson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 298 (falsely personating another and signing the assumed name to an instrument); Freeman *v.* State, 20 Tex. App. 558; U. S. *v.* Farnham, 127 Fed. 478 (false personation of an officer or agent of the United States); U. S. *v.* Bradford, 53 Fed. 542.

On an indictment for false personation of a voter at an election it must be proved that the election was validly held. Reg. *v.* Vaile, 6 Cox C. C. 470.

27. Kirtley *v.* State, 38 Ark. 543, where two were acting in concert.

FALSE PRETENSES

[Compiled in the Biddle Memorial Library of the University of Pennsylvania]

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I. HISTORY OF THE CRIME.

The crime of cheating by certain false pretenses, such as the fraudulent assumption of a false name, the selling of the same thing to two different persons, and the use of false measures, was regarded as a crime in the Roman law analogous to the "*crimen falsi.*"[1] In England cheating was a common-law offense,[2]

1. See Stephen Hist. Cr. L. 21, 22.
2. Rex *v.* Wheatly, 2 Burr. 1125, 1 W. Bl. 273; Reg. *v.* Closs, 7 Cox C. C. 494, Dears. & B. 460, 3 Jur. N. S. 1309, 27 L. J. M. C.

but it was of such narrow compass that it was found necessary to enlarge its boundaries. This was accomplished by the statute of 33 Hen. VIII, c. 1. This statute, however, bringing within the law of cheats, as it did, merely a class of frauds perpetrated by a particular described means,[3] it was found necessary later to extend again the limits of the crime. This was done in 1757 by the statute of 30 Geo. II, c. 24. Under this statute for the first time the crime ceased to depend on the particular kind of pretense used, the statute being couched in terms broad enough to include the use of any false pretense whatever, although, as will appear later, the judges, in construing the statute, excepted certain classes of pretenses from it. It was this statute that created the crime now commonly known as obtaining goods under false pretenses. Several statutes have been enacted in England since the statute of 30 Geo. II to supply defects found therein,[4] but its general provisions, in so far as they define the crime, remain unchanged. In the United States, in those jurisdictions where the common law is in force,[5] the common-law crime of cheating prevails, and with the same limitations as in England.[6] Most of the United States have copied with minor differences the statute of 30 Geo. II, and the English cases interpreting that statute are freely cited by the American courts in interpreting their own. And in this country, as in England, other statutes have been enacted which, while not usually designated as statutes against false pretenses, are yet auxiliary to such statutes.[7]

II. CHEATS AT COMMON LAW.

A. Elements of Offense in General. The crime of cheating was not very clearly defined in the early common law, the term "cheating" being applied to the defrauding, and even to the attempt to defraud, by means of any artful device whatever.[8] Subsequently cheats were divided into two classes: First, those affecting the government, and second, those affecting individuals. In the former class of cases the use of any fraudulent device was sufficient to constitute the crime.[9] In the latter class of cases a false token was necessary.[10] In modern times cases belonging to the first of these classes, while still indictable, have ceased to be denominated cheats, and that term is now restricted to cheats by false

54, 6 Wkly. Rep. 109; Young *v.* Rex, 2 East P. C. 833, 1 Leach C. C. 505, 3 T. R. 98, 1 Rev. Rep. 660; Reg. *v.* Macarty, 2 East P. C. 823, 2 Ld. Raym. 1179, 3 Ld. Raym. 325, 6 Mod. 301; Rex *v.* Jones, 2 East P. C. 822; Treeve's Case, 2 East P. C. 821; Rex *v.* Edwards, 2 East P. C. 820; Rex *v.* Lara, 2 East P. C. 819, 2 Leach C. C. 652, 6 T. R. 565; Rex *v.* Driffield, Say. 146.

3. See *infra*, III.

4. St. 52 Geo. III, c. 64, § 1 (which included within its provisions the obtaining of choses in action); 7 & 8 Geo. IV, c. 29, § 53; 24 & 25 Vict. c. 96, § 88 (the present statute).

5. **The federal government has no jurisdiction** over the common-law offense of cheating. U. S. *v.* Wilson, 44 Fed. 751.

6. See cases cited *infra*, note 12.

7. See *infra*, IV, A.

8. Roy *v.* Parris, Sid. 431; 4 Blackstone Comm. 157.

Instances of cheats are, causing an illiterate person to execute a deed to his prejudice by reading it to him incorrectly, suppressing a will, levying a fine in another's name, etc. 1 Hawkins P. C. 187. Even a conspiracy was such a device. Rex *v.* Macarty, 2 East P. C. 823, 2 Ld. Raym. 1179, 3 Ld. Raym. 325, 6 Mod. 301. See CONSPIRACY, 8 Cyc. 630 *et seq.*

9. Rex *v.* Jones, 2 East P. C. 822 (where defendant, an apprentice not entitled to enlist as a soldier, enlisted and obtained his wages as a soldier, and the judges held that he might be convicted. This case is sometimes erroneously cited as authority for the doctrine that a person may be a false token); Treeve's Case, 2 East P. C. 821.

10. Hartman *v.* Com., 5 Pa. St. 60 (holding that it is not criminal, by the common law, to obtain a false credit by any other means than the use of a false token, or to secrete a debtor's property with a design to keep it from his creditors); State *v.* Stroll, 1 Rich. (S. C.) 244 (where it was said that a fraud or cheat, to be indictable at common law, must be effected by means of a false token that is of itself of a public character, so as to put at hazard and peril the public interest or safety in the general trade of the state, and that for such a purpose the false token must have the ostensible appearance of a public instrument calculated to deceive). And see cases cited *infra*, note 13 *et seq.*

Public tokens.— To indicate the nature of the token required, and to distinguish the common-law crime from the crime created by 33 Hen. VIII, c. 1, such tokens are called public tokens.

tokens.[11] A cheat at common law may be defined as the defrauding of any person by means of a false symbol or token, such as, when not false, is commonly accepted by the public for what it purports to represent.[12]

B. The False Token. In order to constitute the crime of cheating at common law the token used to defraud must be of such a character as, when not false, is commonly accepted by the public for what it purports to represent.[13] A measure is such a token; therefore to sell a commodity by a false measure is an indictable cheat.[14] General trade-marks having a definite meaning in the trade are also such tokens, and the use of a false trade-mark to defraud a buyer

11. See cases cited *passim*, II; III.

12. *Massachusetts.*— Com. *v.* Warren, 6 Mass. 72; Com. *v.* Hearsey, 1 Mass. 137.

New York.— People *v.* Stone, 9 Wend. 182; People *v.* Miller, 14 Johns. 371; People *v.* Babcock, 7 Johns. 201, 5 Am. Dec. 256; Allen's Case, 3 City Hall Rec. 118.

North Carolina.— State *v.* Justice, 13 N. C. 199.

Oregon.— State *v.* Renick, 33 Oreg. 584, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266.

Pennsylvania.— Hartman *v.* Com., 5 Pa. St. 60; Respublica *v.* Powell, 1 Dall. 47, 1 L. ed. 31.

South Carolina.— State *v.* Stroll, 1 Rich. 244; State *v.* Grooms, 5 Strobh. 158; State *v.* Middleton, Dudley 275, Mikell Cas. Cr. L. 57; State *v.* Delyon, 1 Bay 353. To "overreach, cheat or defraud, by any other cunning swindling act and devices," as used in the South Carolina act of 1791 (1 Faust 78), is the offense of cheating at common law. State *v.* Middleton, *supra* [*overruling* State *v.* Vaughan, 1 Bay 282]; State *v.* Wilson, Mill. 135. Under this statute selling a blind horse as and for a sound horse is not an indictable offense. State *v.* Delyon, *supra*.

England.— Rex *v.* Wheatly, 2 Burr. 1125, 1 W. Bl. 273.

Other definitions are: "Fraud . . . public in its nature, calculated to defraud numbers, to deceive the people in general." 2 East P. C. 816.

"A fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in any pecuniary interest." 2 Bishop Cr. L. (8th ed.) § 143.

Necessity that fraud be such that ordinary care cannot guard against it.— The common description of a cheat, that it is a fraud accomplished by such means as that ordinary care and prudence could not guard against the imposition (Wright *v.* People, 1 Ill. 102), is indefinite, and feeling this, the judges have invariably sought to render it more definite by accompanying illustrations, such as cheating by false weights and measures. See cases cited *passim*, II. The phrase "against which care and prudence cannot guard" was later imported into the law of false pretense from the definition of cheats, and has caused no end of trouble to the courts. See *infra*, IV, C, 5; VII, C.

Necessity that public be affected.— The description of a cheat appearing in many of the cases cited *supra*, this note, and usually adopted by text writers, that a cheat to be indictable must be "such as affects the public" (Wright *v.* People, 1 Ill. 102; Rex *v.* Wheatly, 2 Burr. 1125, 1 W. Bl. 273) is unhappy, since all acts must affect the public to be indictable; and it is no more necessary that more than one person be defrauded by a cheat than by a larceny (see cases cited *passim*, II).

It is not an indictable fraud to separate the condition from the penalty of a bond. Wright *v.* People, 1 Ill. 102.

13. See cases cited *supra*, note 12, and *infra*, this note and note 14 *et seq.*

Illustrations.— A false judgment bond is not a false token (Com. *v.* Gallagher, 2 Pa. L. J. Rep. 297, 4 Pa. L. J. 58); nor is a false surveyor's plat (State *v.* Burrows, 33 N. C. 477); nor is a private letter (Com. *v.* Woodrun, 4 Pa. L. J. Rep. 207, 7 Pa. L. J. 362; U. S. *v.* Hale, 26 Fed. Cas. No. 15,279, 4 Cranch C. C. 83). A person is not such a token as one may use to accomplish a common-law cheat. See State *v.* Renick, 33 Oreg. 584, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266. Since color was not a universal badge of slavery, selling a free negro as a slave is not the use of a false token. State *v.* Wilson, Mill. (S. C.) 135.

A thing is none the less a public token because it had no existence at common law. State *v.* Patillo, 11 N. C. 348, where a banknote was held to be a public token.

14. Rex *v.* Wheatly, 2 Burr. 1125, 1 W. Bl. 273; Rex *v.* Driffield, Say. 146.

If no false measure is used, the mere selling and delivery of goods of a less weight or fineness than they are represented to be is not a cheat. Rex *v.* Wheatly, 2 Burr. 1125, 1 W. Bl. 273; Reg. *v.* Eagleton, 3 C. L. R. 1145, 6 Cox C. C. 559; Dears. C. C. 515, 1 Jur. N. S. 940, 24 L. J. M. C. 158, 4 Wkly. Rep. 17; Rex *v.* Lewis [*cited* in Rex *v.* Bower, Cowp. 323, 324]. Thus it is not cheating for one to expose to sale and to sell wrought gold under the sterling alloy as and for gold of the true standard weight (Rex *v.* Bower, *supra*); nor for one to deliver less oats than the quantity contracted for as the due quantity (Rex *v.* Dunnage, 2 Burr. 1130).

False statements.— Where no such false token is used, the fraud is not indictable at common law, even though accompanied by a false statement to give it efficacy. Rex *v.* Wilders, 2 East P. C. 819 (indictment for selling a sack of corn, defendant affirming it to be a Winchester bushel); Pinkney's Case, 2 East P. C. 818, 1 N. Sess. Cas. 198. But see Hill *v.* State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441.

is indictable.[15] Since bank-notes pass current, the passing of a false bank-note is a cheat;[16] but the passing of a false promissory note of an individual is not, whether it purports to be the note of the person passing it or of another.[17] Since no mere words amount to a token,[18] drawing a check on a bank in which one has no funds, this being but a written promise or statement, is not a cheat at common law.[19]

C. The Property Obtained. The obtaining of such property only as is the subject of larceny will render a person indictable for a cheat.[20]

D. The Necessity For Injury. It is essential to a cheat that someone be actually defrauded.[21]

III. CHEATS UNDER THE STATUTE OF 33 HEN. VIII.

A. In General. By 33 Hen. VIII, c. 1, it was made a penal offense for any person falsely and deceitfully to obtain money or goods in another man's name by color and means of a counterfeit letter or false privy token.[22] This statute is a part of the common law of those of the United States that have adopted the common law of England;[23] but since most of the states early adopted broader statutes against frauds by false pretenses, there are few decisions on the English statute.[24]

B. The False Token. Under 33 Hen. VIII, c. 1, and similar statutes a false[25] token of some kind was still necessary to constitute cheating,[26] and a

15. Rex *v.* Edwards, 2 East P. C. 820; Rex *v.* Worrel, 2 East P. C. 820.

Marks merely indicating the quantity or weight of goods, used and affixed by the seller, were not supposed to be currently accepted for what they purported to represent, and hence were not ordinarily regarded as tokens, and accordingly the use of false marks of that nature was not cheating. Rex *v.* Wilders, 2 East P. C. 819. See, however, Respublica *v.* Powell, 1 Dall. (Pa.) 47, 1 L. ed. 31, where a baker employed by the United States army was convicted for a cheat in selling barrels of bread marked as containing eighty-eight pounds, whereas they contained only sixty-eight pounds. The court seemed to regard the marks as false tokens, "since it was the custom to take the barrels of bread at the marked weight, without weighing them again."

Imitation of painter's name.— It is cheating at common law to sell as an original a copy of a picture with the painter's name imitated on it. Reg. *v.* Closs, 7 Cox C. C. 404, Dears. & B. 460, 3 Jur. N. S. 1309, 27 L. J. M. C. 54, 6 Wkly. Rep. 109.

16. State *v.* Grooms, 5 Strobh. (S. C.) 158; State *v.* Stroll, 1 Rich. (S. C.) 244; Com. *v.* Speer, 2 Va. Cas. 65. See COUNTERFEITING, 11 Cyc. 300 *et seq.*

17. People *v.* Giggs, 98 Cal. 661, 33 Pac. 630; State *v.* Patillo, 11 N. C. 348; State *v.* Middleton, Dudley (S. C.) 275, Mikell Cas. Cr. L. 275.

18. Com. *v.* Warren, 6 Mass. 72; U. S. *v.* Carico, 25 Fed. Cas. No. 14,723, 2 Cranch C. C. 446; Nehuff's Case, 1 Salk. 151; Rex *v.* Bryan, 2 Str. 866.

19. Rex *v.* Lara, 2 East P. C. 819, 2 Leach C. C. 652, 6 T. R. 565.

20. Com. *v.* Woodrun, 4 Pa. L. J. Rep. 207, 7 Pa. L. J. 362.

21. Com. *v.* Steen, 1 Pa. Super. Ct. 624.

22. This statute was enacted to remedy the defect in the common law relating to cheating, which offense, as has been seen, did not include cheating by means of a false privy token. See *supra*, II, A, B.

New offense.— It is said in some of the cases and text-books that this statute created no new offense but only enhanced the punishment of common-law cheats. For a refutation of this position see 2 East P. C. 833.

23. Com. *v.* Warren, 6 Mass. 72; State *v.* Middleton, Dudley (S. C.) 275, Mikell Cas. Cr. L. 275.

While Pennsylvania adopted, in general, the common law of crimes, this was one of the statutes not included in the report of the commission appointed to determine which of the English statutes were in force in Pennsylvania. Com. *v.* Hutchinson, 1 Pa. L. J. Rep. 302. The first statute on this subject in Pennsylvania was the act of 1842, which was almost a transcript of the act of 52 Geo. III. Com. *v.* Smith, 1 Pa. L. J. Rep. 400, 3 Pa. L. J. 34.

24. See State *v.* Rowley, 12 Conn. 101 (holding that Conn. St. (1835) tit. 21, § 114, which embraces "all false tokens, pretences and devises [sic] whatsoever," and extends to money, goods, and every valuable thing, incorporates all the provisions of 33 Hen. VIII, 30 Geo. II, and 52 Geo. III); State *v.* Middleton, Dudley (S. C.) 275, Mikell Cas. Cr. L. 275 [*overruling* State *v.* Vaughan, 1 Bay 282] (where the South Carolina act of 1791 (1 Faust 79) against swindling by acts and devices was confined to swindling at unlawful games and to private frauds effected by false tokens).

25. Shaffer *v.* State, 82 Ind. 221 (false use of genuine writing not indictable); People *v.* Gates, 13 Wend. (N. Y.) 311.

26. See cases cited *infra*, this note, and note 27.

fraud perpetrated by mere false words alone was a civil injury only and not indictable.[27]

IV. OBTAINING PROPERTY BY FALSE PRETENSE.

A. Statutes Creating the Crime — 1. In General. The statute of 30 Geo. II, c. 24, § 1, created the crime of obtaining property by false pretenses. It provided that all persons who knowingly and designedly by false pretenses should obtain from any person money or goods with intent to cheat or defraud any person of the same should be deemed offenders against law, etc. Its provisions were extended so as to include the obtaining of choses in action as well as other property by the statute of 52 Geo. III, c. 64, § 1.[28] Most of the American statutes are modeled on these two English statutes.[29] However, the legislatures of many states have added provisions or enacted additional statutes extending the crime to many analogous frauds of various kinds.[30] In a few states, on the other hand,

Illustrations.— A false written order for the payment of money is a token (Wagoner *v.* State, 90 Ind. 504), and so is a printed business card falsely purporting to be that of a firm (Jones *v.* State, 50 Ind. 473); but a person cannot himself be a token (State *v.* Renick, (Oreg. 1899) 56 Pac. 275). A sale of four barrels of crude turpentine upon the representation that "they are all right, just as good at bottom as at top," when the chief contents are chips, constitutes the offense, under Battle Rev. N. C. c. 32, § 66, of cheating by false tokens. State *v.* Jones, 70 N. C. 75.

27. Com. *v.* Warren, 6 Mass. 72; State *v.* Delyon, 1 Bay (S. C.) 353; Rex *v.* Munez, 2 East P. C. 827, 7 Mod. 315, 2 Str. 1127; Reg. *v.* Grantham, 11 Mod. 222; Reg. *v.* Jones, 1 Salk. 379, Mikell Cas. Cr. L. 845; Rex *v.* Bryan, 2 Str. 866.

28. These two statutes were repealed by 7 & 8 Geo. IV, c. 27, making the crime a misdemeanor, and further providing that if in the trial of any person for this offense it should be proven that he obtained the property in such manner as to amount to larceny, he should not by reason thereof be acquitted of the misdemeanor. The present statute in England is 24 & 25 Vict. c. 96, § 88. This statute reënacts the provisions of 7 & 8 Geo. IV, c. 27, and adds certain provisions as to the form of the indictment and the proof necessary to convict.

Common law.— St. 30 Geo. II, c. 24, is not in force in Massachusetts as part of the common law. Com. *v.* Warren, 6 Mass. 72.

29. See cases cited *infra*, this note *et seq.*

In New York, 30 Geo. II, c. 24, was transcribed into the criminal code (1 Rev. L. 410). People *v.* Stone, 9 Wend. 182; People *v.* Johnson, 12 Johns. 292. In a revision of 1830 (2 Rev. St. 677, 702, § 30) the means by which criminal cheats and frauds can be perpetrated are described, "by color of any false token or writing or by any other false pretense," and the offense was raised to the grade of a felony. The next act was Laws (1853), 219, "to punish gross frauds and to suppress mock actions." This act makes it a felony to obtain money or property not only by that particular instrumentality but by "any other gross fraud or cheat at common law," but it does not make anything a false pretense that was not so under the act of 1830, except mock actions. Ranney *v.* People, 22 N. Y. 413; People *v.* Stone, 9 Wend. 182.

30. See the statutes of the several states.

Conversion of trust funds by a guardian is made swindling by the penal code of Texas. It was held that this was within the power of the legislature. Walls *v.* State, (Tex. Civ. App. 1903) 77 S. W. 8.

False marking of casks, etc., as to quantity or quality of the goods contained therein, is an offense in Iowa. State *v.* Burge, 7 Iowa 255.

Obtaining advances on misrepresentations of ownership of property and promises to apply the same to the payment of the debt is indictable in North Carolina. See State *v.* Torrence, 127 N. C. 550, 37 S. E. 268.

Obtaining credit.— The English Debtor's Act of 1869 provides that in certain cases it is a misdemeanor if a person in incurring any debt or liability obtains credit under false pretense or by means of any other fraud. It was held that a person entering a restaurant and ordering a meal, intending not to pay for it, is guilty under the statute. Reg. *v.* Jones, [1898] 1 Q. B. 119, 67 L. J. Q. B. 41, 77 L. T. Rep. N. S. 503, 46 Wkly. Rep. 191, Mikell Cas. Cr. L. 853. Obtaining credit as an undischarged bankrupt see Reg. *v.* Dyson, [1894] 2 Q. B. 176, 58 J. P. 528, 63 L. J. M. C. 124, 70 L. T. Rep. N. S. 877, 1 Manson 283, 10 Reports 230, 42 Wkly. Rep. 526.

Obtaining materials to be used in one building and using them in another.— In Missouri a contractor who purchases materials on credit on the representation that they are to be used in a certain building and uses them in another building without the written consent of the seller and with intent to defraud him is punishable. State *v.* Gregory, 170 Mo. 598, 71 S. W. 170.

Obtaining money by aid of a check, knowing that the drawer or maker is not entitled to draw on the drawee for the sum specified, is a crime in some states. Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep.

the legislatures have adopted statutes more restricted than the English statutes in

183; People *v.* Whiteman, 72 N. Y. App. Div. 90, 76 N. Y. Suppl. 211, Mikell Cas. Cr. L. 876, holding, however, that the evidence was insufficient to warrant a conviction.

Obtaining money by false pay-rolls.— The statute of Ohio provides against presenting for payment to the accounting officer of a municipal corporation a fraudulent pay-roll. Under this statute it is immaterial that the auditor has no authority to allow the claim as presented. State *v.* Voute, 68 Ohio St. 274, 67 N. E. 484. The board of infirmary directors is an "accounting" officer within the statute. Hauck *v.* State, 45 Ohio St. 439, 14 N. E. 92.

Obtaining money by games and tricks.— In many jurisdictions it is a crime to obtain money by means of certain games, sleight of hand, tricks with cards, etc.

California.— People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107.

Illinois.— Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; Maxwell *v.* People, 158 Ill. 248, 41 N. E. 995; Pierce *v.* People, 81 Ill. 98.

Iowa.— State *v.* Quinn, 47 Iowa 368.

Massachusetts.— See Com. *v.* Ashton, 125 Mass. 384.

Minnesota.— State *v.* Smith, 82 Minn. 342, 85 N. W. 12; State *v.* Wilson, 72 Minn. 522, 75 N. W. 715; State *v.* Gray, 29 Minn. 142, 12 N. W. 455.

South Carolina.— State *v.* Middleton, Dudley 275, Mikell Cas. Cr. L. 275.

England.— Reg. *v.* O'Connor, 15 Cox C. C. 3, 46 J. P. 214, 45 L. T. Rep. N. S. 512.

See 23 Cent. Dig. tit. "False Pretenses," §§ 20, 21.

Obtaining property by misrepresentations as to financial ability, respectability, wealth, or mercantile correspondence, is an offense in some states. These statutes are construed to include representations as to the financial ability of the firm of which accused is a member. Berkenfield *v.* People, 92 Ill. App. 400 [*affirmed* in 191 Ill. 272, 61 N. E. 96]. See also IV, C, 2, i.

Obtaining property on a contract to perform services is an offense in some states. To convict, it must be shown that defendant entered into the contract with intent to defraud the employer, and that he refused to perform the service with intent to injure or defraud the employer, and without just cause, and without refunding the money. Dorsey *v.* State, 111 Ala. 40, 20 So. 629. Mere failure to perform is not a violation of the statute. Copeland *v.* State, 97 Ala. 30, 12 So. 181. Nor is one within the statute who contracts to purchase an article and to pay a certain sum therefor, and agrees that if the price is not paid at the time stipulated labor to the value of the price will be performed. Calhoun *v.* State, 119 Ga. 312, 46 S. E. 428.

Obtaining property under false color of carrying on business is an offense in Massachusetts. See Com. *v.* Drew, 153 Mass. 588, 27 N. E. 593.

Obtaining property with intent to defraud. — A statute in Canada has even done away with the necessity of any false pretense whatever, making it a misdemeanor to obtain any property with intent to defraud. See Reg. *v.* Dessauer, 21 U. C. Q. B. 231.

Obtaining signature.— Many states extend the crime to the fraudulent obtaining of the signature of any person to any writing.

Arkansas.— See McKenzie *v.* State, 11 Ark. 594.

Maryland.— State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366, holding that the offense referred to in Code (1888), art. 27, § 82, is the obtaining of a subsisting security by false pretense and not merely the obtaining of a signature to an instrument.

Michigan.— Crane *v.* Snow, 111 Mich. 496, 69 N. W. 721.

New York.— People *v.* Chapman, 4 Park. Cr. 56, holding that an indorsement of a negotiable promissory note is a signature to a written instrument within the statute.

Ohio.— Ellars *v.* State, 25 Ohio St. 385, holding that the statute making it an offense to procure by any false pretense the signature of a person to a promissory note "as the maker thereof" makes the capacity in which the signature of a person is procured a material ingredient of the offense.

See 23 Cent. Dig. tit. "False Pretenses," § 17.

Selling land twice is made an offense in some states. To convict it must be shown that there had been a sale and conveyance of the land, and a second sale and conveyance to another party for a valuable consideration, and that the second sale was made with intent to defraud the purchasers by means of false pretenses, misrepresentations, or suppression of facts. People *v.* Garnett, 35 Cal. 470, 95 Am. Dec. 125. And see Clement *v.* Major, 8 Colo. App. 86, 44 Pac. 776. The second sale, to constitute the offense of selling land twice, is not fraudulent if made at the request of the grantee after being fully informed by the grantor of the tenor and fact of the first deed. People *v.* Garnett, *supra*. The giving of a mortgage on land by a party who has already conveyed his title to another by deed is not disposing of the land within the meaning of the statute. People *v.* Cox, 45 Cal. 342. And see Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608; Leonard *v.* Bosworth, 4 Conn. 421.

Selling merchandise containing foreign substance.— In some states it is an indictable offense to sell certain kinds of merchandise containing a foreign substance with intent to defraud the purchaser. Daniel *v.* State, 61 Ala. 4 (holding that it is not essential to the offense of false packing of cotton that the foreign substance be concealed or be inserted in packing); Hogue *v.* State, 23 Ohio Cir. Ct. 567; State *v.* Holman, 3 McCord (S. C.) 306 (holding that the statute imposing a penalty on him who wilfully puts into any bale of cotton any "stone, wood," etc., or "any matter or thing whatsoever," embraces the putting in of an undue quantity

their operation,[31] and some have abolished the crime *eo nomine* and assimilated the offense to the crime of larceny,[32] while others have included it under the broader offense of swindling.[33]

of water); Lidtke *v.* State, 27 Tex. App. 500, 11 S. W. 629 (construing Tex. Pen. Code, art. 470, which prescribes a punishment for putting into any hogshead, cask, bale, etc., containing merchandise usually sold by weight, any article of less value than that with which it is apparently filled, and also for selling or offering for sale such falsely packed bale, and article 471, which makes it an offense to conceal in a cask, bale, etc., any merchandise of inferior quality to that with which it is apparently filled, or of less value); Jones *v.* State, 22 Tex. App. 680, 3 S. W. 478 (holding that in a trial for false packing by putting sand in a bale of cotton with intent to defraud the purchaser, it is no defense that the sand was put in before ginning, and that the process of ginning removed some of it but not all, if the intent is proved).

Selling pretended title.— In some states there are statutes against selling a pretended title with intent to defraud the purchaser. Kerr *v.* State, 36 Ohio St. 614, holding that the statute is not invalid because it makes it an offense to "convey" lands where the party has no title; and also that the statute applies to instruments purporting to convey lands situated beyond the territorial limits of the state. A mortgage is not a conveyance or alienation within the meaning of the statute against selling pretended titles. Harral *v.* Leverty, 50 Conn. 46, 47 Am. Rep. 608; Leonard *v.* Bosworth, 4 Conn. 421. See also People *v.* Cox, 45 Cal. 342.

Selling property without disclosing encumbrance.— In some states it is made an offense fraudulently to sell property without disclosing an encumbrance thereon. State *v.* Johnson, 20 S. C. 387 (holding that the offense consists in selling, without regard to the number of liens, and also that a judgment lien is within the statute); State *v.* Hunkins, 90 Wis. 264, 62 N. W. 1047, 63 N. W. 167 (holding that a person is guilty who conveys land through the medium of an innocent person in whom the legal title has been placed and who executes the deed under such person's direction).

Selling or secreting property purchased.— In Missouri every person who shall contract with another for the purchase of goods to be paid for on delivery with intent to cheat and defraud the seller, and in pursuance of such intent shall sell the property after obtaining possession, or secrete the same before paying the owner, shall be punished as for feloniously stealing the property. See State *v.* Rosenberg, 162 Mo. 358, 62 S. W. 435, 982. See also Martin *v.* Chrystal, 4 La. Ann. 344.

Writing instrument to defraud.— Ohio Rev. St. § 7088, makes it an offense to write or print, either in whole or in part, any letter, telegram, or other instrument with intent to fraudulently obtain anything of value. State *v.* Hoffman, 2 Ohio S. & C. Pl. Dec. 206, 1 Ohio N. P. 290.

Questions arising under these statutes are treated in this article with analogous questions arising under the general statutes of obtaining property by false pretenses.

Analogous offenses by public officers see OFFICERS.

31. See the statutes of the several states.

In California, Pen. Code, § 1110, provides that "defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing, unless the pretense, or some note or memorandum thereof, be in writing, subscribed by or in the handwriting of the defendant, or unless the pretense be proved by the testimony of two witnesses, or that of one witness and corroborating circumstances." A promissory note is not a token within this statute (People *v.* Gibbs, 98 Cal. 661, 33 Pac. 630), but a bank-check is (People *v.* Donaldson, 70 Cal. 116, 11 Pac. 681).

In Indiana, Rev. St. (1881) § 2204, provides that whoever, with intent to defraud another, designedly, by color of any false token or writing, obtains from any person anything of value, shall be imprisoned, etc., and omits the words, "or any false pretense," contained in the act of June 10, 1852, section 27, on the same subject. It was held that the quoted words were repealed by section 2204. Wagoner *v.* State, 90 Ind. 504. This omission has been supplied by the act of 1883, section 2204.

In Oregon the statute requires, in addition to a false pretense, the use of a false token or writing. See State *v.* Lurch, 12 Oreg. 95, 6 Pac. 405. Where a married man pretended under a fictitious name to an unmarried woman that he was single, and by this means, together with his promise to marry her, obtained money from her, he was not a false token, and hence was not guilty of obtaining money by false pretenses by means of a false token, the court holding that if he was a token, he was a private token. State *v.* Renick, 33 Oreg. 584, 56 Pac. 275, 72 Am. St. Rep. 758, 44 L. R. A. 266.

32. People *v.* Jeffery, 60 Hun (N. Y.) 581, 14 N. Y. Suppl. 837; Dull *v.* Com., 25 Gratt. (Va.) 965; Anable *v.* Com., 24 Gratt. (Va.) 563; Leftwich *v.* Com., 20 Gratt. (Va.) 716; State *v.* Hurst, 11 W. Va. 54.

The same act may constitute both crimes under the statutes of some states. People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107; State *v.* Smith, 82 Minn. 342, 85 N. W. 12.

Larceny distinguished see LARCENY.

33. See Tex. Pen. Code, c. 17, art. 943 (790), where swindling is defined as the acquisition of any personal or movable property, money, or instrument of writing conveying or securing a valuable right, by means of some false or deceitful pretense or device or fraudulent representation, with intent to appropriate the same to the use of the party

2. Construction. Like all penal statutes, the statutes of false pretenses are to be strictly construed in favor of defendant.[34]

B. Elements in General and Degree — 1. In General. To constitute the crime of obtaining property by false pretense there must be: (1) A false pretense,[35] (2) by defendant or someone instigated by him;[36] (3) knowledge of defendant of its falsity;[37] (4) a reliance on the pretense by the person defrauded;[38] (5) an obtaining of the property by defendant or someone in his behalf;[39] (6) an intent in defendant to defraud;[40] and (7) an actual defrauding.[41]

so acquiring, or of destroying or impairing the rights of the party justly entitled to the same.

34. *Colorado.*— Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Georgia.— Calhoun *v.* State, 119 Ga. 312, 46 S. E. 428.

Indiana.— Shaffer *v.* State, 82 Ind. 221.

New Jersey.— State *v.* Crowley, 39 N. J. L. 264. The rule of construction announced in later cases in New Jersey is neither to restrain the interpretation of the statute within too narrow limits, nor to explain it away to the encouragement of fraud. Robinson *v.* State, 53 N. J. L. 41, 20 Atl. 753; State *v.* Tomlin, 29 N. J. L. 13; State *v.* Vanderbilt, 27 N. J. L. 328.

Vermont.— State *v.* Sumner, 10 Vt. 587, 33 Am. Dec. 219.

Ejusdem generis.— Where a statute enumerates certain kinds of false pretenses and adds "or by any other false pretenses," the "other" pretenses intended by the statute are only those of a kindred nature to those which are enumerated. State *v.* Sumner, 10 Vt. 587, 33 Am. Dec. 219. See, however, State *v.* Quinn, 47 Iowa 368; State *v.* Dixon, 101 N. C. 741, 7 S. E. 870. But this rule has no application where the pretenses enumerated are only general, as "false tokens, false writing," etc. Higler *v.* People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267. Where the words "by color of any false token or writing, or by any other false pretense," are used in a statute, the "or by any other false pretense" is a distinctive method in which the fraud may be perpetrated; not "by color of any other false pretense," but "by any other false pretense." State *v.* Chunn, 19 Mo. 233.

The word "person" in the statutory clause, "obtain from any person," includes banks (Com. *v.* Swinney, 1 Va. Cas. 146, 5 Am. Dec. 512), corporations (Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291), and counties (State *v.* White, 4 Pennew. (Del.) 4, 54 Atl. 956); and person or corporation includes a board of county commissioners (State *v.* Wilkerson, 98 N. C. 696, 3 S. E. 683).

The word "writing" or "written" as used in the statutes of false pretenses includes printing, lithographing, or other modes of representing words and letters. Jones *v.* State, 50 Ind. 473. It means some letter or instrument purporting to be the act of some person, and so framed as to have more weight and influence in effecting the fraud than the mere assertion of the party defrauded. People *v.* Gates, 13 Wend. (N. Y.) 311, 321, where the court in construing the term as used in a statute said: "Writing, as used in a statute, must mean some instrument, or at least letter — something in writing, purporting to be the act of another, or certainly of some person." See also Shaffer *v.* State, 82 Ind. 221.

For the construction of particular statutes see the following cases:

California.— People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107.

Colorado.— Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Illinois.— Maxwell *v.* People, 158 Ill. 248, 41 N. E. 995; Peirce *v.* People, 81 Ill. 98; Blemer *v.* State, 76 Ill. 265; Lucas *v.* People, 75 Ill. App. 662.

Kentucky.— Jackson *v.* Com., 86 Ky. 1, 4 S. W. 685, 9 Ky. L. Rep. 265.

Massachusetts.— Com. *v.* Drew, 153 Mass. 588, 27 N. E. 593; Com. *v.* Ashton, 125 Mass. 384.

Minnesota.— State *v.* Smith, 82 Minn. 342, 85 N. W. 12; State *v.* Wilson, 72 Minn. 522, 75 N. W. 715; State *v.* Gray, 29 Minn. 142, 12 N. W. 455.

Tennessee.— Roberts *v.* State, 2 Head 501.

Texas.— Gray *v.* State, 32 Tex. Cr. 598, 25 S. W. 627.

England.— Reg. *v.* O'Connor, 15 Cox C. C. 3, 46 J. P. 214, 45 L. T. Rep. N. S. 512.

See 23 Cent. Dig. tit. "False Pretenses," § 2.

35. Drought *v.* State, 101 Ga. 544, 28 S. E. 1013; Com. *v.* Schmunk, 22 Pa. Super. Ct. 348; Cowan *v.* State, 41 Tex. Cr. 617, 56 S. W. 751; State *v.* Smith, 2 Tyler (Vt.) 272. See also *infra*, IV, C, 1.

"False pretense" and "false representation" are synonymous. State *v.* Joaquin, 43 Iowa 131.

36. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017, holding that the state must show that defendant instigated the pretense where it was made directly by another.

37. Reg. *v.* Keighley, 7 Cox C. C. 217, Dears. & B. 145. See also *infra*, IV, G, 2.

38. People *v.* Livingstone, 47 N. Y. App. Div. 283, 62 N. Y. Suppl. 9, 14 N. Y. Cr. 422; Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. N. S. 597, 25 L. J. M. C. 101, 4 Wkly. Rep. 514. See also *infra*, IV, C, 6.

39. State *v.* Clay, 100 Mo. 571, 13 S. W. 827; Com. *v.* Schmunk, 22 Pa. Super. Ct. 348. See also *infra*, IV, D.

40. Com. *v.* Schmunk, 22 Pa. Super. Ct. 348; Reg. *v.* Gray, 17 Cox C. C. 299. See also *infra*, IV, G.

41. Berry *v.* State, 97 Ga. 202, 23 S. E. 833. See also *infra*, IV, F.

2. Necessity of False Token. To constitute the offense under the usual form of the statute, there need be no false token or writing used.[42]

3. Degree. In some jurisdictions the offense is a misdemeanor;[43] in others it is a felony;[44] in yet others its degree depends on the character or value of the property obtained and the method of obtaining.[45]

C. Requisites of Pretense — 1. Falsity. The pretense must be false.[46] If it is not false the crime is not committed, even though the accused believed it to be false at the time he made it.[47] If the representation is true when made, it is not within the statute, although it is no longer true when the property is obtained,[48] unless defendant has in the meantime either expressly or impliedly reaffirmed its truth.[49] Since the crime consists not only in making a false representation but in obtaining property thereby, it follows that, although the pretense is false when made, yet if it becomes true before the property is obtained the crime is not committed.[50]

2. Representation as to Existing Facts and Past or Future Events — a. General Rule. The pretense must be a representation as to an existing fact or past event, and not a representation as to something to take place in the future;[51]

42. Com. *v.* Stevenson, 127 Mass. 446; People *v.* Clark, 10 Mich. 310; State *v.* Vanderbilt, 27 N. J. L. 328; People *v.* Rice, 128 N. Y. 649, 29 N. E. 146 [*affirming* 13 N. Y. Suppl. 161].

43. *Ex p.* Neustadt, 82 Cal. 273, 23 Pac. 124; Fassett *v.* Smith, 23 N. Y. 252. See also St. 24 & 25 Vict. c. 96, § 88.

44. State *v.* Wilson, 116 N. C. 979, 21 S. E. 692; State *v.* Caldwell, 112 N. C. 854, 16 S. E. 1010; State *v.* Bryan, 112 N. C. 848, 16 S. E. 909; Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728. See also 2 Va. Code, §§ 3722, 3879; Wis. St. (1898) §§ 4423, 4637.

45. Bowler *v.* State, 41 Miss. 570; State *v.* Brossler, 139 Mo. 524, 41 S. W. 223. See also Mass. Rev. Laws, c. 208, §§ 26–28, c. 215, § 1; N. Y. Pen. Code, c. 4, §§ 528, 535, c. 6.

Value as fixing degree of offense see also *infra*, IV, E, 3.

46. State *v.* Hurley, 58 Kan. 669, 50 Pac. 887; Babcock *v.* People, 15 Hun (N. Y.) 347; People *v.* Thompkins, 1 Park. Cr. (N. Y.) 224; Salter *v.* State, 36 Tex. Cr. 501, 38 S. W. 212.

47. Mitchell *v.* State, 70 Ark. 30, 65 S. W. 935; Com. *v.* Pugh, 1 Lanc. Bar (Pa.) 12; State *v.* Haines, 23 S. C. 170; *In re* Wolf, 27 Fed. 606.

Swindling.—The same rule applies to swindling by false representations. Fleming *v.* State, 114 Ga. 526, 40 S. E. 705.

Estoppel.—A false representation by defendant that a mortgage which he gave was a first mortgage, being urged thus to represent by the actual first mortgagee, is not such a false pretense as to render defendant guilty of larceny under Mansfield Dig. Ark. § 1645, since the first mortgagee, by urging such false representation, waived his prior lien, and thus rendered the mortgage fraudulently obtained a first mortgage. State *v.* Asher, 50 Ark. 427, 8 S. W. 177.

48. Drought *v.* State, 101 Ga. 544, 28 S. E. 1013.

49. State *v.* Wilkinson, 98 N. C. 696, 3 S. E. 683. See, however, Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Silence as a pretense see *infra*, IV, C, 3, c.

50. *In re* Snyder, 17 Kan. 542; People *v.* Wheeler, 169 N. Y. 487, 62 N. E. 572 [*reversing* 66 N. Y. App. Div. 187, 73 N. Y. Suppl. 130], where defendant falsely represented himself to a prospective purchaser as owner of a lot and before he obtained the price he acquired title.

51. *Arkansas.*— Mitchell *v.* State, 70 Ark. 30, 65 S. W. 935.

Georgia.— Dickerson *v.* State, 113 Ga. 1035, 39 S. E. 426.

Indiana.— Keller *v.* State, 51 Ind. 111; State *v.* Magee, 11 Ind. 154.

Kansas.— State *v.* Crane, 54 Kan. 251, 38 Pac. 270.

Massachusetts.— Com. *v.* Drew, 19 Pick. 179.

Mississippi.— Smith *v.* State, 55 Miss. 513.

New Jersey.— State *v.* Barr, (Sup. 1898) 40 Atl. 772.

New York.— People *v.* Wheeler, 169 N. Y. 487, 62 N. E. 572 [*reversing* 66 N. Y. App. Div. 187, 73 N. Y. Suppl. 130]; People *v.* Laurence, 137 N. Y. 557, 33 N. E. 547 [*reversing* 66 Hun 574, 21 N. Y. Suppl. 818]; People *v.* Tompkins, 1 Park. Cr. 224; Stuyvesant's Case, 4 City Hall Rec. 156; Ring's Case, 1 City Hall Rec. 7.

North Carolina.— State *v.* Phifer, 65 N. C. 321 [*explaining* State *v.* Simpson, 10 N. C. 620].

Texas.— Hurst *v.* State, 39 Tex. Cr. 196, 45 S. W. 573; Martin *v.* State, 36 Tex. Cr. 125, 35 S. W. 976.

England.— Reg. *v.* Burrows, 11 Cox C. C. 258, 20 L. T. Rep. N. S. 499, 17 Wkly. Rep. 682; Reg. *v.* Henshaw, 9 Cox C. C. 472, 10 Jur. N. S. 595, L. & C. 444, 33 L. J. M. C. 132, 10 L. T. Rep. N. S. 428, 12 Wkly. Rep. 751; Rex *v.* Codrington, 1 C. & P. 661, 12 E. C. L. 375.

See 23 Cent. Dig. tit. "False Pretenses," § 12.

Representations held to be of present or past facts see the following cases:

California.— People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270, "I have credit with a firm."

but if the representation is of an existing fact, it is none the less within the statute because it relates to a future event.[52]

b. Simple Promise. A mere promise to do something, relating as it does to a future event, is not within the statute.[53]

Georgia.— Thomas *v.* State, 90 Ga. 437, 16 S. E. 94, holding that where the false pretense was that defendant had sold a horse, it was none the less a representation of a past event, although he did not pretend that the sale was completed by delivery.

Kentucky.— Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338, holding that the representation of defendant, who obtained the signature of another to a note for merchandise by stating that he had a contract with certain persons by which they were obligated to sell goods in retail quantities at wholesale prices to all members of a certain association of which he professed to be the president, was a representation as to an existing fact, and not a representation that the goods could be purchased in the future.

Massachusetts.— Com. *v.* Drew, 153 Mass. 588, 27 N. E. 593, holding that a representation of defendant in buying goods that he wishes them for the purpose of resale in the regular course of his business as a retail dealer therein is a statement of fact, not a promise or a mere expression of intention.

Ohio.— *In re* Fitzpatrick, 21 Ohio Cir. Ct. 519, 11 Ohio Cir. Dec. 695, "[I am] collecting money and funds to provide shoes and clothing."

England.— Reg. *v.* Gordon, 23 Q. B. D. 354, 16 Cox C. C. 622, 53 J. P. 807, 58 L. J. M. C. 117, 60 L. T. Rep. N. S. 872; Reg. *v.* Speed, 15 Cox C. C. 24, 46 J. P. 451, 46 L. T. Rep. N. S. 174, holding that the representation was one of fact and not a mere promise, where defendant stated to prosecutor that he was collecting information for a directory to be published by a certain firm, and that by paying a certain sum prosecutor would be entitled to certain advantages, it appearing that the firm was in fact getting up a directory but that defendant was not employed by it, although defendant intended to publish a directory himself.

See 23 Cent. Dig. tit. "False Pretenses," § 12.

Representations held to be of future events see Burrow *v.* State, 12 Ark. 65 (representation that prosecutor's goods were about to be attached); Miller *v.* State, 99 Ga. 207, 25 S. E. 169 (representation that a cow would give three gallons of milk per day); Martin *v.* State, 36 Tex. Cr. 125, 35 S. W. 976 (holding that giving a person from whom one has bought goods a check on a bank, accompanied with a representation that such person would have no trouble in getting his money on presenting the check to the bank, relates only to a future event); Reg. *v.* Woodman, 14 Cox C. C. 179 (where defendant obtained a loan from prosecutor on the false pretense that he then wanted it to enable him to take a certain public house).

52. State *v.* Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789; *In re* Greenough, 31 Vt. 279 (where the representation was that certain ingredients then in a simple state would when combined produce a non-explosive burning fluid); Young *v.* Rex, 2 East P. C. 833, 1 Leach C. C. 505, 3 T. R. 98, 1 Rev. Rep. 660 (where the pretense was that defendant had made a bet that a certain person would on the next day run ten miles in one hour).

53. *Alabama.*— Colly *v.* State, 55 Ala. 85.

Arkansas.— McKenzie *v.* State, 11 Ark. 594.

Georgia.— Edge *v.* State, 114 Ga. 113, 39 S. E. 888; Holton *v.* State, 109 Ga. 127, 34 S. E. 358; Garlington *v.* State, 97 Ga. 629, 25 S. E. 398; Ryan *v.* State, 45 Ga. 128.

Illinois.— Cowen *v.* People, 14 Ill. 348.

Kansas.— *In re* Eberle, 44 Kan. 472, 24 Pac. 958; *In re* Snyder, 17 Kan. 542.

Kentucky.— Glackan *v.* Com., 3 Metc. 232.

Massachusetts.— Com. *v.* Drew, 19 Pick. 179.

Missouri.— State *v.* Petty, 119 Mo. 425, 24 S. W. 1010; State *v.* Evers, 49 Mo. 542.

Nebraska.— Cook *v.* State, (1904) 98 N. W. 810.

New York.— People *v.* Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; Ranney *v.* People, 22 N. Y. 413; People *v.* Hart, 35 Misc. 182, 71 N. Y. Suppl. 492, 15 N. Y. Cr. 483; People *v.* Tompkins, 2 Edm. Sel. Cas. 191, 1 Park. Cr. 224.

North Carolina.— State *v.* Knott, 124 N. C. 814, 32 S. E. 798.

Ohio.— Dillingham *v.* State, 5 Ohio St. 280; Winnett *v.* State, 18 Ohio Cir. Ct. 515, 10 Ohio Cir. Dec. 245.

Pennsylvania.—Com. *v.* Hutchinson, 2 Pars. Eq. Cas. 309; Com. *v.* Evans, 28 Leg. Int. 310; Com. *v.* Lundberg, 18 Phila. 432.

Texas.— Allen *v.* State, 16 Tex. App. 150.

England.— Reg. *v.* Burrows, 11 Cox C. C. 258, 20 L. T. Rep. N. S. 499, 17 Wkly. Rep. 682; Rex *v.* Bradford, 1 Ld. Raym. 366; Rex *v.* Douglass, 1 Moody C. C. 462; Rex *v.* Goodhall, R. & R. 343.

Canada.— Reg. *v.* Bertles, 13 U. C. C. P. 607.

See 23 Cent. Dig. tit. "False Pretenses," § 12.

However, statutes have been enacted in some states making false promises in certain cases indictable. See *supra*, IV, A. And see Edwards *v.* State, (Fla. 1903) 33 So. 853.

Representations held to be promises see the following cases:

Florida.— Scarlett *v.* State, 25 Fla. 717, 6 So. 767, where defendant obtained property by promising to give prosecutor a check on a certain bank.

Kentucky.— Com. *v.* Warren, 94 Ky. 615, 23 S. W. 193, 15 Ky. L. Rep. 249, holding that an allegation that defendant pretended that a note he persuaded prosecutor to sign "was a renewal note of the former notes"

c. Promise Combined With Representation of Fact. While the crime is not committed by a mere false promise without a false statement of fact, a false statement of fact may become effective only by being coupled with a false promise. When this is the case the statement of fact and the promise may be considered as together constituting the false pretense and a conviction may follow, or, if the statement of fact and the promise can be separated and prosecutor relied in part on the former, the promise may be disregarded and defendant be convicted on the statement of fact.[54] The earlier cases held that if a warranty was added to

charges only a promise to use it as a renewal note.

Massachusetts.— Com. *v.* Stevenson, 127 Mass. 446, where defendant falsely represented to A that he had then and there in his possession a check for the payment of money drawn by him in favor of A, from the proceeds of which he intended to pay certain bills due from A to other persons.

North Carolina.— State *v.* Whidbee, 124 N. C. 796, 32 S. E. 318, holding that where defendant certified in writing in July, 1897, that he had received "twenty-four dollars in merchandise, the amount of my check for the quarter ending October 30, 1897, which check I hereby pledge in payment of same," and failed to apply the proceeds of the check according to his agreement, it was a mere promise to apply, and hence no false pretense.

Pennsylvania.— Com. *v.* Moore, 99 Pa. St. 570 (where defendant procured prosecutor's indorsement of a note on a representation that he would use the note to take up and cancel another note of the same amount, then about maturing, on which prosecutor was liable as indorser); Com. *v.* Garver, 16 Phila. 468 (holding that a representation that a draft is good, in the sense that it will be paid at maturity, is a mere promise).

England.— Reg. *v.* Lee, 9 Cox C. C. 304, L. & C. 309, 8 L. T. Rep. N. S. 437, 11 Wkly. Rep. 761, Mikell Cas. Cr. L. 851 (where prosecutor lent money to defendant on his false pretense that he was going to pay his rent with it); Reg. *v.* Johnston, 2 Moody C. C. 254 (holding that to obtain money on the mere promise to marry is not within the statute. *Compare* Reg. *v.* Copeland, C. & M. 516, 41 E. C. L. 282; Anonymous, Lofft 146, where it was held that an indictment lay for obtaining goods under pretense of a treaty of marriage).

Canada.— Reg. *v.* Gemmell, 26 U. C. Q. B. 312, a promise to change a bill.

See 23 Cent. Dig. tit. "False Pretenses," § 12.

Representations held to be statements of fact see State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773 (holding that a representation by defendant that his brother was soon to arrive and bring with him money for defendant, coupled with a representation that defendant would use it to pay a sum advanced by prosecutor, amounted to a pretense that he had the money, and was indictable); Reg. *v.* Gemmell, 26 U. C. Q. B. 312 (a statement that defendant could change a bill).

The addition of the words "false statement" to the words "false pretense," usually appearing, does not widen the scope of the statute so as to include false statements as to the future or promises. State *v.* Tull, 42 Mo. App. 324.

Cheating or defrauding.— Under Mo. Rev. St. (1879) § 1561, making it a crime to obtain money by means of a trick, cheat, fraud, or deception, a person is guilty who advertises to give an exhibition, rents a hall, and at appointed hours stands in the ticket office, sells tickets of admission, and collects money for them until the hour for the exhibition to begin, and then absconds. State *v.* Sarony, 95 Mo. 349, 8 S. W. 407.

54. *Arkansas.*— State *v.* Vandimark, 35 Ark. 396.

Georgia.— Holton *v.* State, 109 Ga. 127, 34 S. E. 358; Thomas *v.* State, 90 Ga. 437, 16 S. E. 94.

Illinois.— Jackson *v.* People, 18 Ill. App. 508.

Iowa.— State *v.* Tripp, 113 Iowa 698, 84 N. W. 546; State *v.* Montgomery, 56 Iowa 195, 9 N. W. 120; State *v.* Dowe, 27 Iowa 273, 1 Am. Rep. 271.

Kansas.— State *v.* Gordon, 56 Kan. 64, 42 Pac. 346; State *v.* Cowdin, 28 Kan. 269.

Kentucky.— Com. *v.* Moore, 89 Ky. 542, 12 S. W. 1066, 11 Ky. L. Rep. 971.

Maryland.— Jules *v.* State, 85 Md. 305, 36 Atl. 1027.

Michigan.— People *v.* Winslow, 39 Mich. 505.

Minnesota.— State *v.* Thaden, 43 Minn. 325, 45 N. W. 614.

Missouri.— State *v.* Vandenburg, 159 Mo. 230, 60 S. W. 79; State *v.* Vorback, 66 Mo. 168.

New Hampshire.— State *v.* King, 67 N. H. 219, 34 Atl. 461.

New York.— Watson *v.* People, 87 N. Y. 561, 41 Am. Rep. 397 [*affirming* 26 Hun 76]; People *v.* Jefferey, 82 Hun 409, 31 N. Y. Suppl. 267.

Pennsylvania.— Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353; Com. *v.* Keeper County Prison, 15 Wkly. Notes Cas. 282.

Texas.— Boscow *v.* State, 33 Tex. Cr. 390, 26 S. W. 625; Brown *v.* State, (Cr. App. 1893) 22 S. W. 22.

Vermont.— State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

England.— Reg. *v.* Thompson, 9 Cox C. C. 222, 8 Jur. N. S. 1162, L. & C. 233, 32 L. J. M. C. 57, 7 L. T. Rep. N. S. 393, 11 Wkly. Rep. 41; Reg. *v.* West, 8 Cox C. C. 12, Dears. & B. 575, 4 Jur. N. S. 514, 27 L. J. M. C. 227, 6 Wkly. Rep. 506; Reg. *v.* Fry, 7 Cox C. C. 394, Dears. & B. 449, 4 Jur. N. S. 266, 27 L. J. M. C. 68, 6 Wkly. Rep. 245;

a false pretense the offense was not committed;[55] but a warranty being in effect a promise to indemnify, its addition to the false pretense ought to have no more effect in excusing defendant than the addition of any other promise, and this view is taken by the later cases, which hold that if prosecutor relied on the pretense and not on the warranty, the case is within the statute.[56]

d. Statement of Intention. Some courts have held that a state of mind is a fact, and that therefore a false statement as to the intention of the accused is a false pretense as to an existing fact.[57] Other courts have held that a representation as to intention is not within the statute.[58]

Reg. *v.* Bates, 3 Cox C. C. 201; Rex *v.* Asterley, 7 C. & P. 191, 32 E. C. L. 567; Young *v.* Rex, 2 East P. C. 833, 1 Leach C. C. 505, 3 T. R. 98, 1 Rev. Rep. 660.

Canada.— Reg. *v.* Lee, 23 U. C. Q. B. 340.

See 23 Cent. Dig. tit. "False Pretenses," § 12.

Illustrations.— One who falsely represents himself to be a pension agent, and that he will obtain a pension for prosecutrix, and thereby obtains money from her, is liable to conviction. Pearce *v.* State, 115 Ala. 115, 22 So. 502. Where money was obtained by the prisoner from an unmarried woman on the false representation that he was a single man, and that he would furnish a house with the money, and would then marry her, the false representation of an existing fact (that he was a single man) was sufficient to support a conviction for false pretenses, although the money was obtained by that representation united with the promise to furnish a house and then marry. Reg. *v.* Jennison, 9 Cox C. C. 158, 8 Jur. N. S. 442, L. & C. 157, 31 L. J. M. C. 146, 6 L. T. Rep. N. S. 256, 10 Wkly. Rep. 488.

55. State *v.* Chunn, 19 Mo. 233; Rex *v.* Pywell, 1 Stark. 402, 2 E. C. L. 156, conspiracy to defraud and cheat by selling with a warranty of soundness a horse known to be unsound. The case of Rex *v.* Codrington, 1 C. & P. 661, 12 E. C. L. 375, is usually cited as holding that where the prisoner with false pretense in selling gives a warranty, it is not within the statute, and the remarks of Littledale, J., *arguendo*, are to that effect, but in his charge he seems to direct an acquittal on the ground that prosecutor relied on the warranty, not on the false pretense.

56. Jackson *v.* People, 18 Ill. App. 508; State *v.* Dorr, 33 Me. 498; Watson *v.* People, 87 N. Y. 561, 41 Am. Rep. 397.

57. State *v.* Nichols, Houst. Cr. Cas. (Del.) 114; State *v.* Dowe, 27 Iowa 273, 1 Am. Rep. 271 (this case at first sight seems to show something more than a statement of intention; indeed the court says it was "the act of coming to the prosecutor, proclaiming his intention" that is the false pretense. But when analyzed the pretense used in so far as it was false was nothing more than a statement of intention. The court makes the pretense the act of coming, combined with the statement of intention. But the coming was not false, nor was the representation that he had come; the only representation that was untrue was the "intention" with which he had come. The court cites in support of the decision the doctrine that a false pretense may be by acts as well as words. This is true, but the acts in such case must be equivalent to a representation of an existing or past fact, while here the act of coming singly or combined with the statement was only of a future, immediate future but none the less future, event); State *v.* Cowdin, 28 Kan. 269 [*citing* State *v.* Dowe, *supra*]; Reg. *v.* Gordon, 23 Q. B. D. 354, 16 Cox C. C. 622, 53 J. P. 807, 58 L. J. M. C. 117, 60 L. T. Rep. N. S. 872 (where Wills, J., intimated that a statement of intention is a statement of an existing fact); Reg. *v.* Jones, 6 Cox C. C. 467, 469 (where defendant, a supposed dentist, agreed to make a palate for two pounds, receiving thirteen shillings, and Coleridge, J., told the jury, "If that had been a *bonâ fide* agreement, although not performed, the defendant could not be indicted for the breach of it. But the supposition put forward on the part of the prosecution is, that the defendant never intended to make the new palate at all. That was a question for the jury to determine").

The logical application of this doctrine, seemingly not recognized by the courts that have adopted it, is to bring within the statute all promises as to future conduct, for since it is a generally recognized principle that the character of the pretense is to be tested, not by the very words used by defendant in making the representation, but by the impression his words convey, as a promise to do a thing always implies an intention to do it, the promise as such may be ignored and defendant convicted on the implied statement of intention. This very thing has been done by some courts where the representation has been as to the power of defendant to do a thing. See *infra*, IV, C, 2, h.

58. *Missouri.*— State *v.* De Lay, 93 Mo. 98, 5 S. W. 607.

New York.— People *v.* Blanchard, 90 N. Y. 314.

Ohio.— Winnett *v.* State, 18 Ohio Cir. Ct. 515, 10 Ohio Cir. Dec. 245.

Texas.— Johnson *v.* State, 41 Tex. 65.

England.— Reg. *v.* Woodman, 14 Cox C. C. 179, where defendant was indicted for obtaining thirty pounds on the pretense that he wanted a loan to enable him to take a public house, and in answer to a suggestion that here the existing fact was the intention of the prisoner to take the house, Mellor, J., asked, "How can you define a man's mind?"

Threats.—Evidence that defendant, indicted for grand larceny, threatened the owner of a

e. Statement of Expectation. A false statement of an expectation is not a false pretense within the statute.[59]

f. Statement of Desire. A false representation of a desire is not within the statute.[60]

g. Statement of Opinion. It is well settled that an expression of a false opinion or judgment is not within the statute;[61] but in the application of this doctrine — in the determination of what is a statement of opinion and what a statement of fact — there is much difference of opinion.[62]

h. Statement of Power or Ability. A false pretense of having ability, power, or authority to do an act is within the statute, and to obtain property by such means is indictable.[63]

i. Statement as to Financial Ability or Condition. Allied to misrepresentations of ability are false statements as to the financial ability or condition of the

residence by falsely representing that he owned lots in his vicinity, and that he would erect a soap factory thereon, inducing such owner thereby to buy the lots, is insufficient to sustain a conviction of obtaining money by false pretenses, within N. Y. Pen. Code, § 528, defining "larceny" as obtaining from the true owner, by aid of any false representations or pretense or false token, any property. People *v.* Wheeler, 169 N. Y. 487, 62 N. E. 572, 88 Am. St. Rep. 546, Mikell Cas. Cr. L. 864 [*reversing* 66 N. Y. App. Div. 187, 73 N. Y. Suppl. 130].

59. State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994; Dillingham *v.* State, 5 Ohio St. 280. But see State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773, where it was held that a representation by accused that his brother was soon to arrive and bring with him money for accused, coupled with a statement that accused would use it to pay a sum advanced by prosecutor, was equivalent to a statement that he had the money.

60. People *v.* Hart, 35 Misc. (N. Y.) 182, 71 N. Y. Suppl. 492, 15 N. Y. Cr. 483.

61. *Indiana.*— Shaffer *v.* State, 82 Ind. 221.

Iowa.— State *v.* Webb, 26 Iowa 262.

Maine.— State *v.* Paul, 69 Me. 215.

Mississippi.— Smith *v.* State, 55 Miss. 513.

New York.— Scott *v.* People, 62 Barb. 62.

North Carolina.— State *v.* Young, 76 N. C. 258.

See 23 Cent. Dig. tit. "False Pretenses," § 8.

62. See cases cited *infra*, this note; and see *infra*, IV, C, 2, j.

Statements held to be mere expressions of opinion see State *v.* Paul, 69 Me. 215 (that land is "worth $1,000"); People *v.* Jacobs, 35 Mich. 36 (that a lot is "nicely located"); State *v.* Daniel, 114 N. C. 823, 19 S. E. 100 (that medicine "is too strong").

Statements held to be representations of fact see the following cases:

California.— People *v.* Gibbs, 98 Cal. 661, 33 Pac. 630, that a mortgage is "a good and sufficient security."

Georgia.— Holton *v.* State, 109 Ga. 127, 34 S. E. 358, that defendant has title to land. See also Tatum *v.* State, 58 Ga. 408.

Massachusetts.— Com. *v.* Wood, 142 Mass. 459, 8 N. E. 432, that stock "is selling at $55 to $60." See also Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

New Jersey.— State *v.* Tomlin, 29 N. J. L. 13, that a person is "insolvent and unable to pay."

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160] (statements of value and quality); People *v.* Hart, 35 Misc. 182, 71 N. Y. Suppl. 492, 15 N. Y. Cr. 483 (that a certain writing is "a valid lien on land"). See also People *v.* Monroe, 64 N. Y. App. Div. 130, 71 N. Y. Suppl. 803. But see People *v.* Sully, Sheld. 17.

See 23 Cent. Dig. tit. "False Pretenses," § 8.

63. Jules *v.* State, 85 Md. 305, 36 Atl. 1027 (representation of supernatural power to cure); Com. *v.* Keeper County Prison, 15 Wkly. Notes Cas. (Pa.) 282 (representation of power to call up spirits of deceased persons); Reg. *v.* Giles, 10 Cox C. C. 44, 11 Jur. N. S. 119, L. & C. 502, 34 L. J. M. C. 50, 11 L. T. Rep. N. S. 643, 13 Wkly. Rep. 327 (representation of power to cause an errant husband to return); Reg. *v.* Lawrence, 36 L. T. Rep. N. S. 404.

Pretense of ability to secure position.— A false assertion that one has the ability to secure a position for another is a false pretense. Com. *v.* Murphy, 96 Ky. 28, 27 S. W. 859, 16 Ky. L. Rep. 224; People *v.* Winslow, 39 Mich. 505; Com. *v.* Parker, Thach. Cr. Cas. (Mass.) 24. But see Ranney *v.* People, 22 N. Y. 413.

Pretense of authority to act for another.— Falsely asserting that one is the servant or agent of another, implying as it does that he has power to act for that other, constitutes a false pretense.

Alabama.— Bobbitt *v.* State, 87 Ala. 91, 6 So. 378.

Missouri.— State *v.* Bayne, 88 Mo. 604.

New York.— People *v.* Johnson, 12 Johns. 292; Heath's Case, 1 City Hall Rec. 116; Johnson's Case, 1 City Hall Rec. 21.

North Carolina.— State *v.* Phifer, 65 N. C. 321.

Texas.— Bozier *v.* State, 5 Tex. App. 220.

England.— Reg. *v.* Archer, 3 C. L. R. 623, 6 Cox C. C. 515, Dears. C. C. 449, 1 Jur. N. S. 479; Reg. *v.* Burnsides, Bell C. C. 282, 8 Cox

accused; such representations are, unless they are merely expressions of opinion, within the statute.[64]

j. Puffing Statements. Certain latitude of statement by the owner in regard to goods he would sell has always been allowed by the courts under the name of "puffing."[65] Such statements frequently take the form of false representations as to the value or worth of the thing given in exchange for the property of the prosecutor, and where they do they are regarded as legitimate, and not within the statute.[66] Where the false representations are as to the weight of articles sold,

C. C. 370, 6 Jur. N. S. 1310, 30 L. J. M. C. 42, 3 L. T. Rep. N. S. 311, 9 Wkly. Rep. 37.

64. *California.*— People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270.

Connecticut.— State *v.* Penley, 27 Conn. 587.

Georgia.— Culver *v.* State, 86 Ga. 197, 12 S. E. 746. Ga. Code (1882), § 4587, provides that "if any person, by false representation of his own respectability, wealth, or mercantile correspondence and connections, shall obtain," etc., he shall be punished, etc. One who represents that he is perfectly solvent and responsible for his debts and is good for his obligations is within the statute. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959. The word "wealth" as used in the statute "does not import a great fortune or vast possessions . . . but its real meaning is the possession or ownership of such means or property as would reasonably entitle one to expect and receive the credit he seeks to obtain." Branham *v.* State, 96 Ga. 307, 309, 22 S. E. 957.

Indiana.— Clifford *v.* State, 56 Ind. 245; Clarke *v.* State, 32 Ind. 67; Casily *v.* State, 32 Ind. 62.

Iowa.— State *v.* Carter, 112 Iowa 15, 83 N. W. 715; State *v.* Reidel, 26 Iowa 430.

Kentucky.— Com. *v.* Schwartz, 92 Ky. 510, 18 S. W. 775, 19 S. W. 189, 13 Ky. L. Rep. 929, 36 Am. St. Rep. 609.

Missouri.— State *v.* Dennis, 80 Mo. 589.

New Hampshire.— State *v.* Call, 48 N. H. 126.

Pennsylvania.— Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353; Com. *v.* Burdick, 2 Pa. St. 163, 44 Am. Dec. 186; Com. *v.* Hutchinson, 2 Pars. Eq. Cas. 309; Com. *v.* Alsop, 1 Brewst. 328, 6 Phila. 371; Com. *v.* Keeper Philadelphia County Prison, 6 Phila. 78.

Tennessee.— Rothschild *v.* State, 13 Lea 294.

England.— Reg. *v.* Howarth, 11 Cox C. C. 588, 23 L. T. Rep. N. S. 503; Rex *v.* Crossley, 2 Lew. C. C. 164, 2 M. & Rob. 17.

See 23 Cent. Dig. tit. "False Pretenses," § 11.

Contra.— State *v.* Sumner, 10 Vt. 587, 33 Am. Dec. 218.

Necessity of written representation.— A false representation that a certificate of stock is good is not a representation as to the ability of the person making it to repay money obtained thereby, within Mass. Gen. St. c. 161, § 54, requiring such a representation to be in writing. Com. *v.* Coe, 115 Mass. 481. However, a false representation of a purchaser, made to induce merchants to sell cloth to his firm, that the firm had an order from a responsible party for the goods when manufactured, relates to the purchaser's "means or ability to pay," within N. Y. Pen. Code, § 544, requiring such a representation to be made in writing. People *v.* Rothschild, 42 Misc. (N. Y.) 123, 85 N. Y. Suppl. 1076.

Financial ability of third person see State *v.* Timmons, 58 Ind. 98; Carlisle *v.* McNamara, 48 Me. 424; Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

Representation of lack of financial ability.— In Reg. *v.* Jones, 3 C. & K. 346, 4 Cox C. C. 198, 1 Den. C. C. 551, 14 Jur. 533, 19 L. J. M. C. 162, 4 N. Sess. Cas. 353, T. & M. 270, the court applied the rule of the text to statements of lack of financial ability made in a begging letter.

65. People *v.* Morphy, 100 Cal. 84, 34 Pac. 623, holding that a prosecution for obtaining money under false pretenses cannot be maintained by reason of representations by a traveling salesman to a customer as to the importance of the house he represented, and the cheapness of its prices compared with others, where the goods sold are as represented, and are sold for a fair price. However, the rule as to puffing does not apply to representations made to a person to enter into the confidential relation of partner. Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

Puffing and cheapening.— Several judges compare the puffing by the seller to the cheapening by the buyer, and intimate a fear that to hold the former indictable would make the latter a crime. The obvious distinction is that the puffing is calculated to defraud the buyer, since he rarely knows the character of the goods he is buying as well as does the seller who owns the goods; whereas the cheapening can rarely have any effect on the seller, and therefore the goods would not be obtained by means of such depreciatory words.

66. State *v.* Patty, 97 Iowa 373, 66 N. W. 727; People *v.* King, 15 N. Y. App. Div. 84, 44 N. Y. Suppl. 287 (holding that the rule of the text applies where the property is obtained by false statements of the value of services rendered by defendant); Reg. *v.* Oates, 3 C. L. R. 661, 6 Cox C. C. 540, Dears. C. C. 459, 1 Jur. N. S. 429, 24 L. J. M. C. 123, 3 Wkly. Rep. 402; Reg. *v.* Williamson, 11 Cox C. C. 328, 21 L. T. Rep. N. S. 444; Rex *v.* Reed, 7 C. & P. 848, 32 E. C. L. 904. See, however, People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 12 N. Y. App.

whether they are indictable is still an unsettled question; if made in demanding the price, and after the articles have been delivered, and especially if some token or some artifice is used to throw the buyer off his guard, they are within the statute;[67] but if made during the course of the negotiation of sale,[68] or in selling an article for a lump sum and made for the purpose of inducing the purchaser to complete the bargain,[69] there is authority for saying that they are not within the statute. Where the representations are as to the quality of the goods sold they are not within the statute,[70] unless they amount to statements of specific facts in regard to the goods,[71] or unless they are as to the identity or species of the articles sold,[72] in which case they are within the statute.

Div. 626, 43 N. Y. Suppl. 1160]; Reg. *v.* Jessop, 7 Cox C. C. 399, Dears. & B. 442, 4 Jur. N. S. 123, 27 L. J. M. C. 70, 6 Wkly. Rep. 245, where the court refused to apply the rule to a representation that a pound note was a five-pound note.

These cases must be distinguished from those where the representation is as to quality and kind, the representation of value being inferential. See cases cited *infra*, note 70 *et seq.*

67. Jones *v.* State, 99 Ga. 46, 25 S. E. 617; Reg. *v.* Ragg, Bell C. C. 214, 8 Cox C. C. 262, 6 Jur. N. S. 178, 29 L. J. M. C. 86, 1 L. T. Rep. N. S. 337, 8 Wkly. Rep. 193; Reg. *v.* Lee, 9 Cox C. C. 460, L. & C. 418, 33 L. J. M. C. 129, 10 L. T. Rep. N. S. 348, 12 Wkly. Rep. 750; Reg. *v.* Sherwood, 7 Cox C. C. 270, Dears. & B. 251, 3 Jur. N. S. 547, 26 L. J. M. C. 81, 5 Wkly. Rep. 577 [*overruling* Rex *v.* Reed, 7 C. & P. 848, 32 E. C. L. 904]; Reg. *v.* Eagleton, 3 C. L. R. 1145, 6 Cox C. C. 559, Dears. C. C. 515, 1 Jur. N. S. 940, 24 L. J. M. C. 158, 4 Wkly. Rep. 17. And see Reg. *v.* Kerrigan, 9 Cox C. C. 441, L. & C. 383, 33 L. J. M. C. 71, 9 L. T. Rep. N. S. 843, 12 Wkly. Rep. 416. But see People *v.* Rice, 13 N. Y. Suppl. 161.

68. See Reg. *v.* Lee, 9 Cox C. C. 460, L. & C. 418, 33 L. J. M. C. 129, 10 L. T. Rep. N. S. 348, 12 Wkly. Rep. 750 (per Pollock, C. B.); Reg. *v.* Sherwood, 7 Cox C. C. 27, Dears. & B. 251, 3 Jur. N. S. 547, 26 L. J. M. C. 81, 5 Wkly. Rep. 577 (per Cockburn, C. J., and Pollock, C. B.); Reg. *v.* Reed, 7 C. & P. 848, 32 E. C. L. 904.

69. Reg. *v.* Ridgway, 3 F. & F. 838, per Bramwell, B.

70. Reg. *v.* Levine, 10 Cox C. C. 374; Reg. *v.* Lee, 8 Cox C. C. 233 (where defendant offered a chain in pledge to a pawnbroker, and required money to be advanced upon it, representing that it was gold, and it turned out to be a compound of brass, silver, and gold, but the gold was very minute in quantity); Reg. *v.* Bryan, 7 Cox C. C. 312, Dears. & B. 265, 3 Jur. N. S. 620, 26 L. J. M. C. 84, 5 Wkly. Rep. 598 (where defendant offered spoons in pledge to pawnbrokers, and falsely stated that they were of the best quality; that they were equal to Elkington's A; that the foundation was of the best material; and that they bad as much silver on them as Elkington's A).

71. *Illinois.*— Jackson *v.* People, 126 Ill. 139, 18 N. E. 286.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883 [*affirming* 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160].

Ohio.— Bartlett *v.* State, 28 Ohio St. 669.

Pennsylvania.— Com. *v.* Sebring, 1 Pa. Dist. 163.

England.— Reg. *v.* Ardley, L. R. 1 C. C. 301, 12 Cox C. C. 23, 40 L. J. M. C. 85, 24 L. T. Rep. N. S. 193, 19 Wkly. Rep. 478 (where the prisoner induced prosecutor to purchase a chain from him by fraudulently representing it was fifteen-carat gold, when in fact it was only of a quality a trifle better than six-carat); Reg. *v.* Suter, 10 Cox C. C. 577, 17 L. T. Rep. N. S. 177, 16 Wkly. Rep. 141; Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. N. S. 597, 25 L. J. M. C. 101, 4 Wkly. Rep. 514.

72. State *v.* Mills, 17 Me. 211; Reg. *v.* Foster, 2 Q. B. D. 301, 13 Cox C. C. 393, 46 L. J. M. C. 128, 36 L. T. Rep. N. S. 34; Reg. *v.* Goss, Bell C. C. 208, 8 Cox C. C. 262, 6 Jur. N. S. 178, 29 L. J. M. C. 86, 1 L. T. Rep. N. S. 337, 8 Wkly. Rep. 193 (where a seller contrived to pass off tasters of cheese as if extracted from the cheese offered for sale, whereas they were extracted from another cheese of superior quality); Reg. *v.* Abbott, 2 C. & K. 630, 2 Cox C. C. 430, 1 Den. C. C. 273, 61 E. C. L. 630; Reg. *v.* Ball, C. & M. 249, 41 E. C. L. 140; Reg. *v.* Jessop, 7 Cox C. C. 399, Dears. & B. 442, 4 Jur. N. S. 123, 27 L. J. M. C. 70, 6 Wkly. Rep. 245; Reg. *v.* Dundas, 6 Cox C. C. 380; Reg. *v.* Stevens, 1 Cox C. C. 83.

A mere misnaming of property offered in exchange, its value in no wise depending on its name, is not a false pretense. State *v.* Dyer, 41 Tex. 520. In this case defendant represented that a promissory note was a draft. The true reason for the decision would seem to be that prosecutor did not rely on the pretense.

Representations as to animals.— One who in selling or exchanging a cow falsely and with fraudulent intent represents her as having certain milk-yielding capacity (Parks *v.* State, 94 Ga. 601, 20 S. E. 430), or who falsely represents a horse to be sound (State *v.* Patty, 97 Iowa 373, 66 N. W. 727; State *v.* Stanley, 64 Me. 157; Com. *v.* Jackson, 132 Mass. 16; Watson *v.* People, 87 N. Y. 561, 41 Am. Rep. 297 [*affirming* 26 Hun 76]; State *v.* Mangum, 116 N. C. 998, 21 S. E. 189; State *v.* Burke, 108 N. C. 750, 12 S. E. 1000; State *v.* Sherrill, 95 N. C. 663. *Contra*, State *v.* Heffner, 84 N. C. 751; State *v.* Holmes, 82 N. C. 607) is within the statute.

k. Nature of Fact Represented. If the representation be of a past or existing fact, the nature of the fact is generally immaterial. Other elements of the crime appearing, one who represents himself to be another, or assumes a fictitious name,[73] or represents that he has performed services that he has not performed,[74] or submits false proofs of loss of property,[75] or a false claim for personal injuries,[76] or misreads a deed to an illiterate person,[77] or falsely pretends to own property,[78] or falsely represents that property he owns is unencumbered,[79] or makes false representations as to his business,[80] makes a sufficient pretense to render him criminally liable. However, a false representation as to an act done or omitted by prosecutor himself,[81] or of the advisability of prosecutor's doing an act,[82] has been held not to be within the statute.

3. Form — a. In General. A false pretense may be made either expressly[83] or by implication.[84] So the form of words in which the pretense is couched is immaterial; if they are intended to create and do create the impression that defendant is making a representation as to a present or past fact, the pretense is within the statute.[85]

73. *Illinois.*— Hoge *v.* First Nat. Bank, 18 Ill. App. 501.

Iowa.— State *v.* Goble, 60 Iowa 447, 15 N. W. 272.

Massachusetts.— Com. *v.* Drew, 19 Pick. 179.

Oregon.— State *v.* Renick, (1899) 56 Pac. 275.

Pennsylvania.— Com. *v.* Springs, 2 Leg. Gaz. 93.

England.— Reg. *v.* Bloomfield, C. & M. 537, 6 Jur. 224, 41 E. C. L. 293.

False pretense as to official position.— One may be guilty of obtaining money by false pretenses as to his official position, if the party defrauded relies on such statement. Jackson *v.* State, 118 Ga. 125, 44 S. E. 833.

74. Com. *v.* Barnett, 95 Ky. 302, 25 S. W. 109, 15 Ky. L. Rep. 619; People *v.* Reavey, 38 Hun (N. Y.) 418, 39 Hun (N. Y.) 364; State *v.* Dickson, 88 N. C. 643.

75. People *v.* Byrd, 1 Wheel. Cr. (N. Y.) 242, where, after a fire which destroyed defendant's factory, he included in his proofs of loss a machine which had been removed before the fire occurred, and collected its value from the insurance company.

76. Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

77. Webster *v.* People, 92 N. Y. 422, 1 N. Y. Cr. 190.

78. *Arkansas.*— Donohoe *v.* State, 59 Ark. 375, 27 S. W. 226.

Georgia.— Williams *v.* State, 105 Ga. 606, 31 S. E. 546, Mikell Cas. Cr. L. 100.

Iowa.— State *v.* Kealy, 89 Iowa 98, 56 N. W. 284.

Massachusetts.— Com. *v.* Lee, 149 Mass. 179, 21 N. E. 299; Com. *v.* Lincoln, 11 Allen 233.

Michigan.— People *v.* Oscar, 105 Mich. 704, 63 N. W. 971.

New York.— People *v.* Kendall, 25 Wend. 399, 37 Am. Dec. 240.

Statements as to financial ability or condition see *supra*, IV, C, 2, i.

79. State *v.* Butler, 47 Minn. 483, 50 N. W. 532; State *v.* Munday, 78 N. C. 460; Reg. *v.* Meakin, 11 Cox C. C. 270, 20 L. T. Rep. N. S. 544, 17 Wkly. Rep. 683.

It is an offense to effect a sale of a mortgage on realty by false representations that it is a first lien on the premises. People *v.* Sully, 5 Park. Cr. (N. Y.) 142.

80. *Kentucky.*— Taylor *v.* Com., 94 Ky. 281, 22 S. W. 217, 15 Ky. L. Rep. 49.

Massachusetts.— Com. *v.* Stevenson, 127 Mass. 446.

Michigan.— Higler *v.* People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267.

New York.— People *v.* Dalton, 2 Wheel. Cr. 161.

Wisconsin.— State *v.* Gross, 62 Wis. 41, 21 N. W. 802.

England.— Reg. *v.* Crab, 11 Cox C. C. 85, 18 L. T. Rep. N. S. 370, 16 Wkly. Rep. 732.

A representation that defendant had a partner when in fact the partner was a man of straw engaged for the purpose of gaining fraudulent credit constituted a false pretense. Com. *v.* Hershell, Thach. Cr. Cas. (Mass.) 70.

81. Com. *v.* Norton, 11 Allen (Mass.) 266, holding that a false statement to another that defendant had on a previous day paid him a bank-bill and had not received back the proper change is not within Mass. Gen. St. c. 161, § 54, punishing the obtaining of goods by false pretenses. *Contra*, Reg. *v.* Woolley, 3 C. & K. 98, 4 Cox C. C. 193, 1 Den. C. C. 559, 14 Jur. 465, 19 L. J. M. C. 165, 4 N. Sess. Cas. 341, T. & M. 279.

82. Com. *v.* Springer, 8 Pa. Co. Ct. 115, holding that a false statement that it is necessary for prosecutrix to own certain shares in a corporation in order that she may participate in a drawing of lots, although made by defendant for the purpose of inducing prosecutrix to buy the shares, is not a false pretense such as will support a conviction.

83. State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108. And see cases cited *passim*, IV.

84. See *infra*, IV, C, 3, b, c. And see cases cited *passim*, IV.

85. *Indiana.*— Maley *v.* State, 31 Ind. 192.

Iowa.— See State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773, which carries this

b. Acts. A false pretense or representation may be made by act as well as by word.[86] Passing off a worthless check or draft, or a check which accused has no reason to suppose will be honored, comes within the above rule, for it is tantamount to a representation that accused has credit with the drawee to the amount of the paper[87] And the same principle applies to the presentation of false war-

doctrine to an extent that would seem to abolish the distinction between representations of fact and statements as to future events.

Kentucky.— Com. *v.* Murphy, 96 Ky. 28, 27 S. W. 859, 16 Ky. L. Rep. 224 (holding that where defendant asked prosecutor if he would like to have a job as night watchman on a railroad, saying that he (defendant) could give it to him, the statement was equivalent to a representation that defendant was in the employ of the railroad company and that he had authority to hire prosecutor); Glackan *v.* Com., 3 Metc. 232.

Massachusetts.— Com. *v.* Hulbert, 12 Metc. 446.

Missouri.— State *v.* Dennis, 80 Mo. 589.

New York.— Lesser *v.* People, 73 N. Y. 78 [*affirming* 12 Hun 668]; Smith *v.* People, 47 N. Y. 303.

Pennsylvania.— Com. *v.* Mullen, 4 Pa. Dist. 656.

England.— Reg. *v.* Randell, 16 Cox C. C. 335, 52 J. P. 359, 57 L. T. Rep. N. S. 718; Reg. *v.* Powell, 15 Cox C. C. 568, 49 J. P. 183, 54 L. J. M. C. 26, 51 L. T. Rep. N. S. 713; Reg. *v.* Davis, 11 Cox C. C. 181, 19 L. T. Rep. N. S. 325, 17 Wkly. Rep. 127; Reg. *v.* Burrows, 11 Cox C. C. 258, 20 L. T. Rep. N. S. 499, 17 Wkly. Rep. 682; Reg. *v.* Giles, 10 Cox C. C. 44, 11 Jur. N. S. 119, L. & C. 502, 34 L. J. M. C. 50, 11 L. T. Rep. N. S. 643, 13 Wkly. Rep. 327; Reg. *v.* Smith, 6 Cox C. C. 314; Reg. *v.* Coulson, 4 Cox C. C. 227, 1 Den. C. C. 592, 14 Jur. 557, 19 L. J. M. C. 182, T. & M. 332; Rex *v.* Parker, 7 C. & P. 825, 2 Moody C. C. 1, 32 E. C. L. 893. See, however, Reg. *v.* Partridge, 6 Cox C. C. 182 (where a railway company was accustomed to advance money to persons sending goods over the road on the faith of receiving such sums back from the consignee on delivery, and defendant gave the shipping clerk a box with a card on which was written "Case to B, 10 shillings to pay" and received the ten shillings, and the box was sent to B but the address was found to be fictitious and the box to contain nothing but rubbish, and it was held that the representation on the card that there would be ten shillings to pay did not involve the assertion that the box was of value); Rex *v.* Douglas, 1 Moody C. C. 462 (where an indictment charged defendant with falsely pretending to prosecutor, whose mare and gelding had strayed, that W would tell him where they were if he would give him a sovereign down, and prosecutor gave the sovereign, but defendant refused to tell where the animals were, and it was held that the indictment should have stated that defendant pretended to know where the animals were).

Canada.— Reg. *v.* Lee, 23 U. C. Q. B. 340, holding that a threat to sue prosecutor on a note given by him to defendant and which defendant has already sold amounts to a pretense that he owns the note and is in a position to sue.

Impression intended to be conveyed and in fact conveyed as question for jury see *infra*, VIII, D, 1.

86. *Iowa.*— State *v.* Goble, 60 Iowa 447, 15 N. W. 272.

Kentucky.— Com. *v.* Murphy, 96 Ky. 28, 27 S. W. 859, 16 Ky. L. Rep. 224.

Massachusetts.— Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91; Com. *v.* Drew, 19 Pick. 179.

Minnesota.— State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108.

New York.— Fowler *v.* People, 18 How. Pr. 493.

North Carolina.— State *v.* Wilkerson, 98 N. C. 696, 3 S. E. 683.

Pennsylvania.— Com. *v.* Warner, 1 York Leg. Rec. 35.

England.— Reg. *v.* Bull, 13 Cox C. C. 608, 36 L. T. Rep. N. S. 376; Reg. *v.* Murphy, Ir. R. 10 C. L. 508, 13 Cox C. C. 298, Mikell Cas. Cr. L. 852. The case of Rex *v.* Barnard, 7 C. & P. 784, 32 E. C. L. 871, where a person obtained goods at Oxford by appearing in a commoner's cap and gown, is usually cited as authority for the principle that acts are sufficient. In that case, however, there was false pretense in words, the case stating that defendant "stated he belonged to Magdalen college."

See 23 Cent. Dig. tit. "False Pretenses," § 6.

Illustrations.— The act of selling property has been held to be a representation of ownership. Reg. *v.* Sampson, 49 J. P. 807, 52 L. T. Rep. N. S. 772. See also Reg. *v.* Hazlewood, 48 J. P. 151. Assuming to be the person mentioned in a money order is a representation that the person presenting it is the person mentioned. Rex *v.* Story, R. & R. 60. Pointing out a lot to prosecutor as the one sold him by defendant when in fact it is not is equivalent to a declaration that it is such lot. State *v.* McConkey, 49 Iowa 499. It is a false pretense to send to prosecutor an order for goods written under a letter head reciting that defendant is a dealer in grain. Taylor *v.* Com., 94 Ky. 281, 22 S. W. 217, 15 Ky. L. Rep. 49. See, however, Cowan *v.* State, 41 Tex. Cr. 617, 56 S. W. 751. Merely opening and keeping an account with a bank under an assumed name, although part of a stratagem to defraud the bank, is not a false pretense. Com. *v.* Drew, 19 Pick. (Mass.) 179.

87. *California.*— People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270; People *v.* Donaldson, 70 Cal. 116, 11 Pac. 681.

rants or orders, or valid warrants illegally obtained,[88] and to the passing of notes of a bankrupt bank,[89] or promissory notes of a third person.[90] Since promises are not within the statute,[91] if the act of defendant implies only a promise it is not indictable.[92]

c. Silence. As a general rule mere non-disclosure of facts known to the

Illinois.— Barton *v.* People, 135 Ill. 405, 25 N. E. 776, 25 Am. St. Rep. 375, 10 L. R. A. 202.

New York.— Lesser *v.* People, 73 N. Y. 78 [*affirming* 12 Hun 668]; Foote *v.* People, 17 Hun 218. *Contra*, Stuyvesant's Case, 4 City Hall Rec. 156; *In re* Allen, 3 City Hall Rec. 118.

Pennsylvania.— Com. *v.* Collins, 8 Phila. 609.

England.— Reg. *v.* Hazelton, L. R. 2 C. C. 134, 13 Cox C. C. 1, 44 L. J. M. C. 11, 31 L. T. Rep. N. S. 451, 23 Wkly. Rep. 139; Rex *v.* Jackson, 3 Campb. 370, 14 Rev. Rep. 756. See also Rex *v.* Cosnett, 20 Cox C. C. 6, 65 J. P. 472, 84 L. T. Rep. N. S. 800, 49 Wkly. Rep. 633.

See 23 Cent. Dig. tit. "False Pretenses," § 6.

Contra.— Blackwell *v.* State, 41 Tex. Cr. 104, 51 S. W. 919, 96 Am. St. Rep. 778; Brown *v.* State, 37 Tex. Cr. 104, 38 S. W. 1008; Ayers *v.* State, 37 Tex. Cr. 1, 38 S. W. 792. And see New York cases cited *supra*, this note.

However, one who presents his own check to a bank in which he has an account is not within the statute, since the act implies only a request to pay. Com. *v.* Drew, 19 Pick. (Mass.) 179. The passing of a check is not a representation that the person passing it has at the time money to the amount of its face in the bank on which it is drawn, since he may have authority from the bank to overdraw. See Reg. *v.* Hazelton, L. R. 2 C. C. 134, 13 Cox C. C. 1, 44 L. J. M. C. 11, 31 L. T. Rep. N. S. 451, 23 Wkly. Rep. 139. Where defendant, when he negotiated the check, had good reason to believe, and did honestly believe, that he was entitled to draw it, and that it would be paid in the usual course of business, he cannot be convicted. State *v.* Johnson, 77 Minn. 267, 79 N. W. 968; Williams *v.* State, 34 Tex. Cr. 606, 31 S. W. 649; Reg. *v.* Walne, 11 Cox C. C. 647, 23 L. T. Rep. N. S. 748. To sustain a conviction the false representation must have some bearing on the question whether the check will be paid, or relate to the responsibility of the drawer or payee. People *v.* Whiteman, 72 N. Y. App. Div. 90, 76 N. Y. Suppl. 211, Mikell Cas. Cr. L. 876.

A merely colorable deposit in the bank on which the check is drawn does not relieve the drawer from criminal liability. Reg. *v.* Hazelton, L. R. 2 C. C. 134, 13 Cox C. C. 1, 44 L. J. M. C. 11, 31 L. T. Rep. N. S. 451, 23 Wkly Rep. 139.

The fact that the check is post dated does not take it out of the statute. Barton *v.* People, 35 Ill. App. 573; Lesser *v.* People, 73 N. Y. 78 [*affirming* 12 Hun 668] (check of third person); Foote *v.* People, 17 Hun (N. Y.) 218; Rex *v.* Parker, 7 C. & P. 825, 2 Moody C. C. 1, 32 E. C. L. 893; Reg. *v.* Hughes, 1 F. & F. 355.

88. *Kansas.*— State *v.* McDonald, 59 Kan. 241, 52 Pac. 453.

Michigan.— People *v.* Luttermoser, 122 Mich. 562, 81 N. W. 565.

Minnesota.— State *v.* Southall, 77 Minn. 296, 79 N. W. 1007.

Pennsylvania.— Com. *v.* Sweet, 4 Pa. Dist. 136, 16 Pa. Co. Ct. 198.

England.— Rex *v.* Douglass, 1 Campb. 212, 7 C. & P. 785 note, 32 E. C. L. 871; Reg. *v.* Leonard, 2 C. & K. 514, 3 Cox C. C. 284, 1 Den. C. C. 304, 61 E. C. L. 514; *Re* Pinter, 17 Cox C. C. 497, 66 L. T. Rep. N. S. 324; Reg. *v.* Hunter, 10 Cox C. C. 642, 17 L. T. Rep. N. S. 321, 16 Wkly. Rep. 342; Mitchell's Case, 2 East P. C. 830; Rex *v.* Freeth, R. & R. 94.

Canada.— Reg. *v.* Campbell, 18 U. C. Q. B. 413.

See 23 Cent. Dig. tit. "False Pretenses," § 6.

89. Com. *v.* Stone, 4 Metc. (Mass.) 43 (so holding, although the note is of some value); Reg. *v.* Dowey, 11 Cox C. C. 115, 37 L. J. M. C. 52, 17 L. T. Rep. N. S. 481, 16 Wkly. Rep. 344 [*overruling* by implication Reg. *v.* Williams, 7 Cox C. C. 351]. But see Rex *v.* Spencer, 3 C. & P. 420, 14 E. C. L. 642; Reg. *v.* Evans, Bell C. C. 187, 8 Cox C. C. 257, 5 Jur. N. S. 1361, 29 L. J. M. C. 20, 1 L. T. Rep. N. S. 108, 8 Wkly. Rep. 48.

Proof of bankruptcy.— It is not necesssary to a conviction for obtaining by false pretense in passing a note of a bankrupt bank to show procedings in bankruptcy; evidence that the bank had stopped payment forty years previously is sufficient proof of the worthlessness of the note. Reg. *v.* Dowey, 11 Cox C. C. 115, 37 L. J. M. C. 52, 17 L. T. Rep. N. S. 481, 16 Wkly. Rep. 344.

90. Reg. *v.* Davis, 18 U. C. Q. B. 180, holding that the passing of the note amounts to a representation that it has not, to the knowledge of the person passing it, been paid either wholly or to such an extent as to make it a wholly inadequate consideration for the property obtained by it. See Com. *v.* Stone, 4 Metc. (Mass.) 43.

91. See *supra*, IV, C, 2, b.

92. Tefft *v.* Windsor, 17 Mich. 486.

A person who orders and consumes a meal at a restaurant without being possessed of the means to pay for it does not obtain goods by false pretenses within Larceny Act (1861), § 88, but does incur a debt by fraudulently obtaining credit so as to constitute an offense within Debtors Act (1869), § 13. Reg. *v.* Jones, [1898] 1 Q. B. 119, 67 L. J. Q. B. 41, 77 L. T. Rep. N. S. 503, Mikell Cas. Cr. L. 853.

defendant, even though such disclosure would deter prosecutor from parting with his property, is not a false pretense.[93]

4. To Whom Pretense Must Be Made.[94] It is not necessary that the false pretense be made directly to the person from whom the property is obtained.[95] If it is made in his presence,[96] or to an agent with power to part with the title to the property,[97] or to a third person and by him communicated to the owner,[98] or even to the public generally by an advertisement,[99] it is sufficient to bring the case within the statute.

5. Tendency to Deceive. The language of the statute "by any false pretense" is broad enough to include every misrepresentation, however absurd or irrational, or however easily detected; but in the construction of the statute the courts have in a greater or less degree narrowed its scope by excluding certain kinds of representations from its operation.[1] Some courts hold that the pretense to be indictable must be such as is calculated to impose upon a person of ordinary prudence and caution.[2] Other courts express it in the more general form that a naked lie

93. *Georgia.*— Crawford *v.* State, 117 Ga. 247, 43 S. E. 762.

Maine.— Cross *v.* Petros, 1 Me. 378, 10 Am. Dec. 78.

Massachusetts.— Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596.

Michigan.— Tefft *v.* Windsor, 17 Mich. 486.

New York.— People *v.* Baker, 96 N. Y. 340; People *v.* Moore, 37 Hun 84.

Tennessee.— Moulden *v.* State, 5 Lea 577, holding that one is not liable to indictment for obtaining money on false pretenses because of giving an order for wages to become due to him and afterward collecting them himself, concealing the fact of having given the order.

Texas.— See Blum *v.* State, 20 Tex. App. 578, 54 Am. Rep. 530.

England.— Reg. *v.* Jones, [1898] 1 Q. B. 119, 67 L. J. Q. B. 41, 77 L. T. Rep. N. S. 503, Mikell Cas. Cr. L. 853.

If, however, after learning of the falsity of a misrepresentation made by him innocently, defendant obtains property on the strength of that misrepresentation, his nondisclosure of the truth amounts to a false pretense. Crawford *v.* State, 117 Ga. 247, 43 S. E. 762.

94. See also *infra*, IV, G, 1.

95. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630; State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878; People *v.* Genet, 19 Hun (N. Y.) 91; Rex *v.* Taylor, 65 J. P. 457, 49 Wkly. Rep. 671.

96. Reg. *v.* Dent, 1 C. & K. 249, 47 E. C. L. 249.

97. Com. *v.* Call, 38 Mass. 515; Com. *v.* Mooar, Thach. Cr. Cas. (Mass.) 410; People *v.* Wakely, 62 Mich. 297, 28 N. W. 871; State *v.* Turley, 142 Mo. 403, 44 S. W. 267; Reg. *v.* Brown, 2 Cox C. C. 348.

98. *Massachusetts.*— Com. *v.* Harley, 7 Metc. 462.

New Jersey.— State *v.* Crowley, 39 N. J. L. 264.

New York.— People *v.* Court Oyer & Terminer New York County, 83 N. Y. 436.

North Dakota.— State *v.* Stewart, 9 N. D. 409, 83 N. W. 869.

Canada.— Reg. *v.* Cameron, 23 Nova Scotia 150.

See, however, Treadwell *v.* State, 99 Ga. 779, 27 S. E. 785.

99. Reg. *v.* Silverlock, [1894] 2 Q. B. 766, 18 Cox C. C. 104, 58 J. P. 788, 63 L. J. M. C. 233, 72 L. T. Rep. N. S. 298, 10 Reports 431, 43 Wkly. Rep. 14.

1. This rule of exclusion was probably adopted from the crime of cheating of which this crime was an extension and which, as has been seen, was confined to frauds against which common prudence would not guard. See People *v.* Sully, Sheld. (N. Y.) 17.

2. *Kansas.*— State *v.* Crane, 54 Kan. 251, 38 Pac. 270.

Kentucky.— Com. *v.* Grady, 13 Bush 285, 26 Am. Rep. 192; Com. *v.* Haughey, 3 Metc. 223.

New Jersey.— State *v.* Vanderbilt, 27 N. J. L. 328.

Pennsylvania.— Com. *v.* Mullen, 4 Pa. Dist. 656; Com *v.* Getler, 19 Pa. Co. Ct. 248; Com. *v.* Hickey, 2 Pars. Eq. Cas. 317, 1 Pa. L. J. Rep. 436, 3 Pa. L. J. 86; Com. *v.* Hutchinson, 2 Pars. Eq. Cas. 309; Com. *v.* McCrossin, 2 La. L. J. Rep. 6, 3 Pa. L. J. 219; Com. *v.* Schissler, 9 Phila. 587. But see Com. *v.* Henry, 22 Pa. St. 253; Com. *v.* Daniels, 2 Pars. Eq. Cas. 332; Com. *v.* Paulson, 2 Pars. Eq. Cas. 326.

Tennessee.— State *v.* De Hart, 6 Baxt. 222. But see Bowen *v.* State, 9 Baxt. 45, 40 Am. Rep. 71.

Pretense held to be such as would impose upon a person of ordinary prudence see Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338; Hall *v.* Com., 9 S. W. 409, 10 Ky. L. Rep. 468; People *v.* Henssler, 48 Mich. 49, 11 N. W. 804; McCorkle *v.* State, 1 Coldw. (Tenn.) 333; State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390.

This rule does not require that the caution and prudence to be exercised be "such suspicion and distrust as to impose upon the person, who is the subject of the imposition, such inquiry and investigation into the facts pretended as to secure him against the possibility of imposition, or that such precaution against deception should be adopted as only

is not indictable,[3] an expression which in its application seems to mean much the same thing. Other courts, while not laying down any rule as to the character of the pretense, deny that it need be such as to deceive a prudent person.[4] Other courts, while refusing to adopt the rule that the pretense must be one that common care and prudence cannot guard against, or having once adopted the rule and later discarded it, nevertheless have found it necessary to limit the general words of the statute to some extent, and hold that if the pretense is irrational or absurd,[5] or if, at the time it is made, prosecutor has and knows that he has at hand the means to detect the imposition,[6] the pretense is not within the statute, unless some device is used to prevent his using the means he has;[7] but that in all other cases it is for the jury to say whether the pretense was calculated to deceive, not a prudent person but the person to whom it was made.[8] Some

the very cautious resort to; but that there should be something in the nature of the transaction itself to show that a person of common prudence and caution could not have been imposed upon thereby." Delaney *v.* State, 7 Baxt. (Tenn.) 28, 31.

The rule does not apply to transactions between principal and agent, since they do not deal at arm's length. Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

3. Com. *v.* Drew, 19 Pick. (Mass.) 179; Com. *v.* Wilgus, 4 Pick. (Mass.) 177; Com. *v.* Henry, 22 Pa. St. 253; Com. *v.* Barker, 8 Phila. (Pa.) 613; State *v.* Wilson, 2 Mill (S. C.) 135.

4. *Alabama.*— Jenkins *v.* State, 97 Ala. 66, 12 So. 110; Woodbury *v.* State, 69 Ala. 242, 44 Am. Rep. 515.

California.— People *v.* Cummings, 123 Cal. 269, 55 Pac. 898; People *v.* Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73.

Georgia.— Ryan *v.* State, 104 Ga. 78, 30 S. E. 678.

Indiana.— Lefler *v.* State, 153 Ind. 82, 54 N. E. 439, 74 Am. St. Rep. 300, 45 L. R. A. 424 [*overruling* State *v.* Burnett, 119 Ind. 392, 21 N. E. 972; Miller *v.* State, 73 Ind. 88; State *v.* Snyder, 66 Ind. 203; Bonnell *v.* State, 64 Ind. 498; Clifford *v.* State, 56 Ind. 245; Jones *v.* State, 50 Ind. 473].

Iowa.— State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; State *v.* Davis, 56 Iowa 202, 9 N. W. 123; State *v.* McConkey, 49 Iowa 499.

Michigan.— Higler *v.* People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267; People *v.* Pray, 1 Mich. N. P. 69.

Mississippi.— Smith *v.* State, 55 Miss. 513.

Missouri.— State *v.* Williams, 12 Mo. App. 415.

New Jersey.— Oxx *v.* State, 59 N. J. L. 99, 35 Atl. 646.

New York.— People *v.* Genet, 19 Hun 91; People *v.* Cale, 20 N. Y. Suppl. 505; People *v.* Haynes, 14 Wend. 546, 28 Am. Dec. 530; People *v.* Sully, 5 Park. Cr. 142. And see People *v.* Crissie, 4 Den. 525. Some of the earlier New York cases required that the pretense be such as to deceive a person of ordinary prudence. People *v.* Higbie, 66 Barb. 131; People *v.* Stetson, 4 Barb. 151; People *v.* Williams, 4 Hill 9, 40 Am. Dec. 258; People *v.* Dalton, 2 Wheel. Cr. 161.

Ohio.— State *v.* Trisler, 49 Ohio St. 583, 31 N. E. 881; *In re* False Pretenses, 9 Ohio S. & C. Pl. Dec. 825.

Texas.— Buckalew *v.* State, 11 Tex. App. 352; Colbert *v.* State, 1 Tex. App. 314.

United States.— Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647.

5. Woodbury *v.* State, 69 Ala. 242, 44 Am. Rep. 515; State *v.* Penley, 27 Conn. 587; State *v.* Cameron, 117 Mo. 641, 23 S. W. 767; Chapman *v.* State, 2 Head (Tenn.) 36.

6. *Massachusetts.*— Com. *v.* Norton, 11 Allen 266; Com. *v.* Drew, 19 Pick. 179.

Missouri.— See State *v.* Cameron, 117 Mo. 641, 23 S. W. 767.

North Carolina.— State *v.* Young, 76 N. C. 258.

Texas.—Buckalew *v.* State, 11 Tex. App. 352.

Wisconsin.— State *v.* Green, 7 Wis. 676.

This rule does not apply where prosecutor is a municipal corporation and the pretense is made to an officer thereof. People *v.* Court Oyer & Terminer New York County, 83 N. Y. 436.

If prosecutor has not the means at hand, the mere fact that he could by inquiring protect himself does not excuse accused. Com. *v.* Lee, 149 Mass. 179, 21 N. E. 299.

7. People *v.* Skidmore, 123 Cal. 267, 55 Pac. 984; Thomas *v.* People, 113 Ill. 531; State *v.* Wilkerson, 103 N. C. 337, 9 S. E. 415.

8. *Connecticut.*— State *v.* Penley, 27 Conn. 587.

Illinois.— Cowen *v.* People, 14 Ill. 348.

Michigan.— Higler *v.* People, 44 Mich. 299, 6 N. W. 664, 38 Am. Rep. 267.

New York.— People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; Watson *v.* People, 87 N. Y. 561, 41 Am. Rep. 397; People *v.* Peckens, 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160 [*affirmed* in 153 N. Y. 576, 47 N. E. 883]; People *v.* Cole, 20 N. Y. Suppl. 505 [*affirmed* in 137 N. Y. 530, 33 N. E. 336]; People *v.* Cooke, 6 Park. Cr. 31; Skiff *v.* People, 2 Park. Cr. 139, all holding that whether the pretense was such as could deceive is a question for the jury, unless it clearly appears to be immaterial.

North Carolina.—State *v.* Dickson, 88 N. C. 643.

Tennessee.— Watson *v.* State, 16 Lea 604; Bowen *v.* State, 9 Baxt. 45, 40 Am. Rep. 71; Roberts *v.* State, 2 Head 501.

Province of court and of jury see *infra*, VIII, D, 1.

courts go further and hold that if it did in fact deceive the person to whom it was made, the pretense is sufficient.[9]

6. Effectiveness — a. Reliance on Pretense. It is not sufficient that there be a false pretense; the owner of the property must rely on it; the pretense must be an effective cause in inducing the owner to part with his property.[10] Therefore, if the owner has knowledge of the truth or does not believe the pretense,[11] or, believing it, yet parts with the property on some other inducement,[12] or investigates it and parts with the property relying entirely on the results of his

9. *Arkansas.*— Johnson *v.* State, 36 Ark. 242 [*overruling* State *v.* Vandimark, 35 Ark. 396 (*overruling* Burrow *v.* State, 12 Ark. 65)]. But see Morgan *v.* State, 42 Ark. 131, 48 Am. Rep. 55.

Colorado.— Miller *v.* People, 22 Colo. 530, 45 Pac. 408.

Georgia.— Ryan *v.* State, 104 Ga. 78, 30 S. E. 678.

Indiana.— Lefler *v.* State, 153 Ind. 82, 54 N. E. 439, 74 Am. St. Rep. 300, 45 L. R. A. 424, *semble.*

Iowa.— State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; State *v.* Montgomery, 56 Iowa 195, 9 N. W. 120.

Maine.— State *v.* Stanley, 64 Me. 157, *semble.*

Michigan.— People *v.* Bird, 126 Mich. 631, 86 N. W. 127, Mikell Cas. Cr. L. 869.

Minnesota.— State *v.* Southall, 77 Minn. 296, 79 N. W. 1007.

North Dakota.— State *v.* Stewart, 9 N. D. 409, 83 N. W. 869.

Washington.— State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

England.— Reg. *v.* Woolley, 3 C. & K. 98, 4 Cox C. C. 193, 1 Den. C. C. 559, 14 Jur. 465, 19 L. J. M. C. 165, 4 N. Sess. Cas. 341, T. & M. 279; Reg. *v.* Jessop, 7 Cox C. C. 339, Dears. & B. 442, 4 Jur. N. S. 123, 27 L. J. M. C. 70, 6 Wkly. Rep. 245. And see remarks of Denman, J., in Reg. *v.* Wickham, 10 A. & E. 34, 8 L. J. M. C. 87, 2 P. & D. 333, 37 E. C. L. 43.

10. *Colorado.*— Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599; Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

Florida.— Edwards *v.* State, (1903) 33 So. 853.

Georgia.— Jackson *v.* State, 118 Ga. 125, 44 S. E. 833; Reagan *v.* State, 112 Ga. 372, 37 S. E. 380.

Massachusetts.— Com. *v.* Davidson, 1 Cush. 33; Com. *v.* Drew, 19 Pick. 179.

Missouri.— State *v.* Cameron, 117 Mo. 641, 23 S. W. 767.

New York.— Therasson *v.* People, 82 N. Y. 238 [*reversing* 20 Hun 55]; People *v.* Livingstone, 47 N. Y. App. Div. 283, 62 N. Y. Suppl. 9, 14 N. Y. Cr. 422; People *v.* Bough, 1 N. Y. Suppl. 298; People *v.* Tompkins, 1 Park. Cr. 224; Lucre's Case, 1 City Hall Rec. 140.

Texas.— Scott *v.* State, 27 Tex. App. 264, 11 S. W. 320.

United States.—Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647.

England.— Reg. *v.* Jones, 15 Cox C. C. 475, 48 J. P. 616, 50 L. T. Rep. N. S. 726; Reg. *v.* Richardson, 1 F. & F. 488; Reg. *v.* Hazlewood, 48 J. P. 151.

See 23 Cent. Dig. tit. "False Pretenses," § 14.

11. Rainey *v.* State, 94 Ga. 599, 19 S. E. 892; Thorpe *v.* State, 40 Tex. Cr. 346, 50 S. W. 383; Buckalew *v.* State, 11 Tex. App. 352; Reg. *v.* Mills, 7 Cox C. C. 263, Dears. & B. 205, 3 Jur. N. S. 447, 26 L. J. M. C. 79, 5 Wkly. Rep. 529.

Ignorance of law.— Where the representation is as to a matter of law, some courts, adopting the exploded presumption that "every one is presumed to know the law," hold that as prosecutor under the presumption must have known the representation to be false, he could not have been induced by it to part with his property. Fambrough *v.* State, 113 Ga. 934, 39 S. E. 324; State *v.* Lawrence, 178 Mo. 350, 77 S. W. 497; People *v.* Stetson, 4 Barb. (N. Y.) 151; Com. *v.* Herman, 15 Phila. (Pa.) 386, holding that a married woman is not criminally liable for buying property on credit by false pretenses as to her ownership of property where she informs the vendor at the time of the false representation that she is a married woman, as the vendor must know as a matter of law that even if she has property it can in no way be made available to him. Other courts, properly interpreting the maxim to be that ignorance of the law excuses no one, refuse to apply it to prosecutor for the benefit of accused. Ryan *v.* State, 104 Ga. 78, 30 S. E. 678; State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108; State *v.* Stewart, 9 N. D. 409, 83 N. W. 869.

Knowledge of an agent of the prosecutor will not be imputed to the prosecutor where defendant and the agent conspire to defraud by false pretense. Reg. *v.* Clark, 2 Brit. Col. 191.

12. *Alabama.*— Woodbury *v.* State, 69 Ala. 242, 44 Am. Rep. 515.

Arkansas.— Mitchell *v.* State, 70 Ark. 30, 65 S. W. 935.

California.— People *v.* Mauritzen, 84 Cal. 37, 24 Pac. 112.

Florida.— Edwards *v.* State, (1903) 33 So. 853.

Iowa.— State *v.* Stone, 75 Iowa 215, 39 N. W. 275.

Kansas.— State *v.* Metsch, 37 Kan. 222, 15 Pac. 251.

Missouri.— State *v.* Benson, 110 Mo. 18, 19 S. W. 213; State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994.

New York.— People *v.* Baker, 96 N. Y. 340; People *v.* Tompkins, 1 Park. Cr. 224.

investigation,[13] the crime has not been committed. For the same reason an accused cannot be convicted where the pretense was made after the property was obtained.[14]

b. Other Inducements Operating. Although the pretense must be an inducing cause of the owner's parting with his property, it need not be the sole inducing cause; it is sufficient if it had a material influence in inducing the owner to part with his property, although he was also influenced in part by other causes.[15]

c. Remoteness of Pretense. It is held in many cases where the property is not obtained directly by means of the false pretense, but the effect of the pretense is merely to bring about a contract between the parties, or a condition making some further act or agreement of the parties necessary to the passage

Wisconsin.— Baker *v.* State, 120 Wis. 135, 97 N. W. 566; State *v.* Green, 7 Wis. 676.

United States.— See Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647.

England.— Rex *v.* Dale, 7 C. & P. 352, 32 E. C. L. 652; Rex *v.* Codrington, 1 C. & P. 661, 12 E. C. L. 375.

See 23 Cent. Dig. tit. "False Pretenses," § 14.

13. Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. N. S. 597, 25 L. J. M. C. 101, 4 Wkly. Rep. 514.

Although prosecutor makes some investigation of the representations made by defendant to ascertain their truth, yet if he nevertheless would not have parted with the goods but for such representations, believing them true, defendant is guilty. People *v.* Luttermoser, 122 Mich. 562, 81 N. W. 565; Reg. *v.* English, 12 Cox C. C. 171, Mikell Cas. Cr. L. 868.

14. *Connecticut.*—State *v.* Church, 43 Conn. 471.

Illinois.— Watson *v.* People, 27 Ill. App. 493.

Missouri.— State *v.* Pickett, 174 Mo. 663, 74 S. W. 844; State *v.* Willard, 109 Mo. 242, 19 S. W. 189.

New York.—Stuyvesant's Case, 4 City Hall Rec. 156; Collins' Case, 4 City Hall Rec. 143.

North Carolina.—State *v.* Moore, 111 N. C. 667, 16 S. E. 384.

England.— Reg. *v.* Brooks, 1 F. & F. 502.

See 23 Cent. Dig. tit. "False Pretenses," § 14.

15. *Alabama.*— Dorsey *v.* State, 111 Ala. 40, 20 So. 629 (holding that the rule applies to prosecutions under statutes against obtaining property through a contract of service); Woodbury *v.* State, 69 Ala. 242, 44 Am. Rep. 515.

Arkansas.— Donohoe *v.* State, 59 Ark. 375, 27 S. W. 226.

California.— People *v.* Weir, 120 Cal. 279, 52 Pac. 656; People *v.* Gibbs, 98 Cal. 661, 33 Pac. 630.

Georgia.— Braxton *v.* State, 117 Ga. 703, 45 S. E. 64; Holton *v.* State, 109 Ga. 127, 34 S. E. 358; Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Illinois.— Moore *v.* People, 190 Ill. 331, 60 N. E. 535.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; State *v.* Carter, 112 Iowa 15, 83 N. W. 715; State *v.* Nine, 105 Iowa 131, 74 N. W. 945; State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773.

Kansas.— State *v.* McDonald, 59 Kan. 241, 52 Pac. 453; State *v.* Gordon, 56 Kan. 64, 42 Pac. 346; State *v.* Cowdin, 28 Kan. 269; *In re* Snyder, 17 Kan. 542.

Louisiana.— State *v.* Tessier, 32 La. Ann. 1227.

Massachusetts.— Com. *v.* Drew, 19 Pick. 179; Com. *v.* Hershell, Thach. Cr. Cas. 70.

Michigan.— People *v.* Henssler, 48 Mich. 49, 11 N. W. 804.

Mississippi.— Smith *v.* State, 55 Miss. 513.

Missouri.— State *v.* Willard, 109 Mo. 242, 19 S. W. 189.

Nebraska.— Wax *v.* State, 43 Nebr. 18, 61 N. W. 117.

New Hampshire.— State *v.* King, 67 N. H. 219, 34 Atl. 461.

New Jersey.—State *v.* Thacher, 35 N. J. L. 445.

New York.— People *v.* Court Oyer & Terminer New York County, 83 N. Y. 436; Therasson *v.* People, 20 Hun 55; People *v.* Genet, 19 Hun 91; People *v.* Highie, 66 Barb. 131; People *v.* Herrick, 13 Wend. 87; People *v.* Haynes, 11 Wend. 557 [*reversed* in 14 Wend. 546]; People *v.* Tompkins, 2 Edm. Sel. Cas. 191. The earlier cases held the contrary. People *v.* Dalton, 2 Wheel. Cr. Cas. 161; *In re* Davis, 4 City Hall Rec. 61.

North Carolina.— State *v.* Allred, 84 N. C. 749.

Ohio.— Winnett *v.* State, 18 Ohio Cir. Ct. 515, 10 Ohio Cir. Dec. 245.

Pennsylvania.— Com. *v.* Daniels, 2 Pars. Eq. Cas. 332; Com. *v.* McCrossin, 2 Pa. L. J. Rep. 6, 3 Pa. L. J. 219.

Virginia.— Trodgon *v.* Com., 31 Gratt. 862; Fay *v.* Com., 28 Gratt. 912.

Washington.—State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

Wyoming.— Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

England.— Reg. *v.* Hewgill, 2 C. L. R. 630, Dears. C. C. 315, 18 Jur. 158, 2 Wkly. Rep. 278; Reg. *v.* Lince, 12 Cox C. C. 451, 28 L. T. Rep. N. S. 570; Reg. *v.* English, 12 Cox C. C. 171, Mikell Cas. Cr. L. 818; Reg. *v.* West, 8 Cox C. C. 12, Dears. & B. 575, 4 Jur. N. S. 514, 27 L. J. M. C. 227, 6 Wkly. Rep. 506; Reg. *v.* Fry, 7 Cox C. C. 394, Dears. & B. 449, 4 Jur. N. S. 266, 27 L. J. M. C. 68, 6 Wkly. Rep. 245.

of title to the property, that the pretense is too remote to be indictable.[16] On principle, the remoteness of the pretense is immaterial; the real question is, Was the pretense the inducing cause in the transfer of the property? If it was, it is sufficient, although other causes also may have operated. The application of this rule will serve to reconcile most of the cases that otherwise are irreconcilable.[17]

d. Continuing Pretense. The same principle governs in the so-called cases of continuing pretense; if the pretense is the inducing cause, it is immaterial that there has been a lapse of time between the pretense and the obtaining,[18] and the fiction of a continuing pretense would seem to be unnecessary.

D. The Obtaining — 1. In General. To constitute an obtaining of property defendant must in the first place acquire at least a voidable title to the property; that is the owner must intend to invest him with the title as distinguished from the mere custody or possession of the goods;[19] and when defendant is in posses-

Canada.— Reg. *v.* Corey, 22 N. Brunsw. 543.

See 23 Cent. Dig. tit. "False Pretenses," § 14.

16. *Arkansas.*— Morgan *v.* State, 42 Ark. 131, 48 Am. Rep. 55, holding that a false statement by a hotel keeper that a certain person had boarded with him, whereby he induces another person to board with him and advance money for his board, is not a criminal false pretense.

Illinois.— Watson *v.* People, 27 Ill. App. 493.

Massachusetts.— Com. *v.* Harkins, 128 Mass. 79.

Missouri.— State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017.

England.— Reg. *v.* Larner, 14 Cox C. C. 497; Reg. *v.* Gardner, 7 Cox C. C. 136, Dears. & B. 40, 2 Jur. N. S. 598, 25 L. J. M. C. 100, 4 Wkly. Rep. 526, Mikell Cas. Cr. L. 870; Reg. *v.* Bryan, 2 F. & F. 567.

Canada.— Reg. *v.* Brady, 26 U. C. Q. B. 13. The rule is modified, however, by a statute which makes it a false pretense to obtain property through the medium of a contract obtained by false pretense. Reg. *v.* Harty, 31 Nova Scotia 272.

See 23 Cent. Dig. tit. "False Pretenses," § 14.

Pretense held not to be too remote see Com. *v.* Sweet, 4 Pa. Dist. 136, 16 Pa. Co. Ct. 198; Reg. *v.* Button, [1900] 2 Q. B. 597, 19 Cox C. C. 568, 64 J. P. 600, 69 L. J. Q. B. 901, 83 L. T. Rep. N. S. 288, 48 Wkly. Rep. 703, Mikell Cas. Cr. L. 873 [*overruling* Reg. *v.* Larner, 14 Cox C. C. 497] (where defendant entered himself for a foot race under a false name, the name of an inferior runner, whereby he obtained a favorable handicap); Reg. *v.* Kendrick, 5 Q. B. 49, Dav. & M. 208, 12 L. J. M. C. 135, 48 E. C. L. 48; Reg. *v.* Abbott, 2 C. & K. 630, 2 Cox C. C. 430, 1 Den. C. C. 273, 61 E. C. L. 630; Reg. *v.* Adamson, 1 C. & K. 192, 2 Moody C. C. 286, 47 E. C. L. 192; Reg. *v.* Copeland, C. & M. 516, 41 E. C. L. 282; Reg. *v.* Willot, 12 Cox C. C. 68, 24 L. T. Rep. N. S. 758; Reg. *v.* Burgon, 7 Cox C. C. 131, Dears. & B. 11, 2 Jur. N. S. 596, 25 L. J. M. C. 105, 4 Wkly. Rep. 525; Reg. *v.* Dark, 1 Den. C. C. 276; Reg. *v.* Hope, 17 Ont. 463; Reg. *v.* Rymal, 17 Ont. 227; Reg. *v.* Huppel, 21 U. C. Q. B. 281.

17. People *v.* Martin, 102 Cal. 558, 36 Pac. 952, Mikell Cas. Cr. L. 98; Com. *v.* Lee, 149 Mass. 179, 21 N. E. 299; Com. *v.* Lincoln, 11 Allen (Mass.) 233.

18. Smith *v.* State, 55 Miss. 513; Reg. *v.* Martin, L. R. 1 C. C. 56, 10 Cox C. C. 383, 36 L. J. M. C. 20, 15 L. T. Rep. N. S. 54, 15 Wkly. Rep. 358; Reg. *v.* Powell, 15 Cox C. C. 568, 49 J. P. 183, 54 L. J. M. C. 26, 51 L. T. Rep. N. S. 713; Reg. *v.* Greathead, 14 Cox C. C. 108, 38 L. T. Rep. N. S. 691; Reg. *v.* Welman, 6 Cox C. C. 153, Dears. C. C. 188, 17 Jur. 421, 22 L. J. M. C. 118, 1 Wkly. Rep. 361; Reg. *v.* Hamilton, 1 Cox C. C. 244; Reg. *v.* Hope, 17 Ont. 463; Reg. *v.* Rymal, 17 Ont. 227. However, a charge of cheating and swindling by false representations as to financial condition, thereby obtaining credit, is not sustained where the goods sold on the faith of those representations were actually paid for, since such representations, not repeated or reaffirmed, do not apply to credit given at a subsequent period, unless the person to whom the credit was extended knew or had reason to believe that the latter credit was extended solely on the faith of the representations previously made. Broznack *v.* State, 109 Ga. 514, 35 S. E. 123 [*following* Treadwell *v.* State, 99 Ga. 779, 27 S. E. 785].

Some of the cases involving the question of remoteness of pretense (see *supra*, IV, C, 6, c) the courts have brought within the statute by applying the doctrine of a continuing pretense.

19. *Iowa.*— State *v.* Anderson, 47 Iowa 142.

Massachusetts.— Com. *v.* Devlin, 141 Mass. 423, 6 N. E. 64.

Missouri.— State *v.* Willard, 109 Mo. 242, 19 S. W. 189.

New York.— People *v.* Haynes, 11 Wend. 557; Ring's Case, 1 City Hall Rec. 7.

Tennessee.— Carter *v.* State, 7 Lea 440, Mikell Cas. Cr. L. 849.

England.— Reg. *v.* Kilham, L. R. 1 C. C. 261, 11 Cox C. C. 561, 39 L. J. M. C. 109, 22 L. T. Rep. N. S. 625, 18 Wkly. Rep. 957; Rex *v.* Cosnett, 20 Cox C. C. 6, 65 J. P. 472, 84 L. T. Rep. N. S. 800, 49 Wkly. Rep. 633; Reg. *v.* Steels, 11 Cox C. C. 5, 17 L. T. Rep. N. S. 666, 16 Wkly. Rep. 341.

See 23 Cent. Dig. tit. "False Pretenses," § 6.

sion of the property at the time, this intent alone will be sufficient;[20] but when defendant is not already in possession of the goods, he must, in addition to acquiring title, obtain actual possession of the goods, either by himself or by his agent.[21]

2. By Whom Obtained. The property need not be obtained by defendant himself; it is sufficient if it is obtained by another on his account.[22]

3. For Whom Obtained. The property need not be obtained by defendant for himself; it is sufficient if, induced by his false representations, it is delivered to another, either for the benefit of that other or for defendant's benefit.[23]

If defendant obtains a voidable title for a moment only it is sufficient. Reg. *v.* Corey, 22 N. Brunsw. 543. Thus if the false pretense induced a "sale and return," it is within the statute, since the title passes in such a sale. Com. *v.* Sebring, 1 Pa. Dist. 163. Where a contract of sale is void under the statute of frauds, however, a delivery of the goods to a carrier for conveyance to the purchaser is not such a delivery to him as will make him liable for the price, and consequently he cannot be charged on such delivery with obtaining goods by false pretenses. *Ex p.* Parker, 11 Nebr. 309, 9 N. W. 33.

Obtaining from partner.— Where property is obtained from prosecutor to be put into a business, and prosecutor thereby becomes a partner in the business, defendant is not guilty, because prosecutor does not part with the money, being jointly interested in it. Reg. *v.* Watson, 7 Cox C. C. 364, Dears. & B. 348, 4 Jur. N. S. 14, 27 L. J. M. C. 18, 6 Wkly. Rep. 67. But where by the agreement the funds do not immediately become partnership property, and the money is paid defendant as his own for an interest in the firm, and defendant only gives his personal undertaking to put a certain sum out of his own money into the business after, as occasion should require, he is guilty. Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1. *Compare* Reg. *v.* Adamson, 1 C. & K. 192, 2 Moody C. C. 286, 47 E. C. L. 192.

Obtaining loan of money.— Obtaining a loan of money is a sufficient obtaining, for since the prosecutor does not expect to receive back the identical money lent, he parts with the property therein. State *v.* Ashe, 44 Kan. 84, 24 Pac. 72; Com. *v.* Coe, 115 Mass. 481; People *v.* Oscar, 105 Mich. 704, 63 N. W. 971; Rex *v.* Crossley, 2 Lew. C. C. 164, 2 M. & Rob. 17. However, Ill. Cr. Code, § 96, defining the crime of obtaining money or property by false pretenses, was not intended to include cases where the defrauded party parts with his money as a loan; but where a loan is procured by the false representations of the borrower as to his solvency, the case falls within section 97, relating to the obtaining on credit, and the representations, to constitute an offense, must be in writing. Lucas *v.* People, 75 Ill. App. 662.

20. Com. *v.* Schwartz, 92 Ky. 510, 18 S. W. 775, 19 S. W. 189, 13 Ky. L. Rep. 929, 36 Am. St. Rep. 609; Com. *v.* Devlin, 141 Mass. 423; Com. *v.* Hutchinson, 114 Mass. 325; People *v.* Cooke, 6 Park. Cr. (N. Y.) 31. And see People *v.* Haynes, 11 Wend. (N. Y.) 557.

21. Bracey *v.* State, 64 Miss. 26, 8 So. 165; Willis *v.* People, 19 Hun (N. Y.) 84; People *v.* New York County Gen. Sess. Ct., 13 Hun (N. Y.) 395; Lucre's Case, 1 City Hall Rec. (N. Y.) 140; Com. *v.* Schmunk, 22 Pa. Super. Ct. 348 [*affirmed* in 207 Pa. St. 544, 56 Atl. 1088, 99 Am. St. Rep. 801]; Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607.

Obtaining title for another and possession for self.— Where the officer of a corporation by false and fraudulent statements induces certain persons to purchase worthless stock in the corporation, he is guilty of obtaining money under false pretenses, although the title to the money obtained passes to the corporation, and he receives none of it. Com. *v.* Langley, 169 Mass. 89, 47 N. E. 511.

Obtaining signature to instrument.—On the question whether the crime of obtaining the signature of a person to a written instrument is complete until the instrument is delivered, the cases are not uniform. In some states it is held that delivery is necessary. State *v.* McGinnis, 71 Iowa 685, 33 N. W. 238; Fenton *v.* People, 4 Hill (N. Y.) 126. In others the offense of obtaining the signature to a written instrument, when the instrument is such as takes effect or exposes the signer to liability as soon as signed, is complete as soon as the instrument is signed. Delivery of the instrument to defendant is not necessary. Com. *v.* Hutchison, 114 Mass. 325. See further *infra*, VIII, A, 3, b, (II).

Delivery to carrier.— Delivery of goods to a common carrier in one county, to be carried and delivered to the consignee in another, is a sufficient delivery to the consignee to consummate the crime of obtaining goods under false pretenses. *In re* Stephenson, 67 Kan. 556, 73 Pac. 62. See, however, *Ex p.* Parker, 11 Nebr. 309, 9 N. W. 33.

22. Sandy *v.* State, 60 Ala. 58; State *v.* Davis, 56 Kan. 54, 42 Pac. 348; People *v.* Moran, 43 N. Y. App. Div. 155, 59 N. Y. Suppl. 312 [*affirmed* in 161 N. Y. 657, 57 N. E. 1120]; State *v.* Mendenhall, 24 Wash. 12, 63 Pac. 1109. Can. Cr. Code, § 359, makes it a false pretense to procure the property to be delivered to any other person than himself. See Reg. *v.* Harty, 31 Nova Scotia 272.

23. *Indiana.*— Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885.

Iowa.— State *v.* Chingren, 105 Iowa 169, 74 N. W. 946.

Kansas.— State *v.* Balliet, 63 Kan. 707, 66 Pac. 1005.

Texas.— May *v.* State, 15 Tex. App. 430.

E. The Property Obtained — 1. In General. St. 30 Geo. II provided for the obtaining of "money, goods, wares or merchandise." Many of the American states in their statutes have transcribed this enumeration of the property, the obtaining of which shall constitute the crime. Others have added other kinds of property, such as valuable securities, credit, chattels, property, etc. Under these statutes it may be stated as a general rule that the property obtained must be such that the deprivation of it may, by possibility at least, be a cause of loss to prosecutor.[24] Under the term "property" is included promissory notes binding on the maker,[25] and drafts,[26] but not land,[27] or board and lodging,[28] or the indorsement of credit on a note,[29] or patronage.[30] The term "valuable security" embraces an order for money,[31] but to be within the statute it must be a valuable security while in the hands of prosecutor; it is not sufficient that it becomes of value after delivery to defendant.[32] The term "valuable thing" used in some of the statutes includes a promissory note,[33] whether the maker be solvent or insolvent,[34] a check representing funds in bank,[35] and the signature of a person to a note whereby he becomes a surety, although the note and the paper on which it is written is the property of defendant,[36] but not a receipt for a debt.[37] Under the term "valuable right" a chance in a raffle is not included.[38] Within the term

Washington.— State *v.* Mendenhall, 24 Wash. 12, 63 Pac. 1109.

See 23 Cent. Dig. tit. "False Pretenses," § 16. And see *supra*, note 22.

24. Robinson *v.* State, 53 N. J. L. 41, 20 Atl. 753; Rex *v.* Yates, Car. C. L. 333, 1 Moody C. C. 170.

Obtaining signature to instrument.— The same rule applies to indictments for obtaining a signature to a written instrument; the instrument must be such as might possibly injure the party signing it. *In re* Payson, 23 Kan. 757; Dord *v.* People, 9 Barb. (N. Y.) 671; People *v.* Galloway, 17 Wend. (N. Y.) 540; People *v.* Herrick, 13 Wend. (N. Y.) 87; Kennedy *v.* State, 34 Ohio St. 310. Thus a promissory note of a minor is not within the statute (Com. *v.* Lancaster, Thach. Cr. Cas. (Mass.) 428), nor is a receipt (Moore *v.* Com., 8 Pa. St. 260), nor the contract of a married woman (State *v.* Clay, 100 Mo. 571, 13 S. W. 827). But it is within the statute to induce a person by false pretense to execute a promissory note, although it is non-negotiable (State *v.* Porter, 75 Mo. 171), or to execute a deed (Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; State *v.* Tripp, 113 Iowa 698, 84 N. W. 546), or to indorse a draft (Bargie *v.* U. S., 30 Fed. Cas. No. 18,229, 2 Hayw. & H. 357). Some statutes make this a crime only when the instrument is such that the false making would be forgery. See People *v.* Mott, 34 Mich. 80; Roberts *v.* State, 2 Head (Tenn.) 501.

25. People *v.* Skidmore, 123 Cal. 267, 55 Pac. 984; People *v.* Reed, 70 Cal. 529, 11 Pac. 676; Baker *v.* State, 14 Tex. App. 332.

26. State *v.* Patty, 97 Iowa 373, 66 N. W. 727, although non-negotiable and never accepted.

27. People *v.* Cummings, 114 Cal. 437, 46 Pac. 284; State *v.* Layman, 8 Blackf. (Ind.) 330; State *v.* Burrows, 33 N. C. 477; Com. *v.* Woodrun, 4 Pa. L. J. Rep. 207, 7 Pa. L. J. 362.

28. State *v.* Black, 75 Wis. 490, 44 N. W. 635. But the obtaining of board has been especially provided for in some states. See State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994. And see Innkeepers. In State *v.* Snyder, 66 Ind. 203, and Reg. *v.* Gardner, 7 Cox C. C. 136, Dears. & B. 40, 2 Jur. N. S. 598, 25 L. J. M. C. 100, 4 Wkly. Rep. 526, the prisoner was indicted for obtaining board, but neither counsel nor the court made the objection that obtaining board is not within the statute.

29. State *v.* Moore, 15 Iowa 412.

30. Morgan *v.* State, 42 Ark. 131, 48 Am. Rep. 55.

31. Reg. *v.* Greenhalgh, 6 Cox C. C. 257, 1 Dears. C. C. 267, 2 Wkly. Rep. 171.

32. Reg. *v.* Danger, 7 Cox C. C. 303, Dears. & B. 307, 3 Jur. N. S. 1011, 26 L. J. M. C. 185, 5 Wkly. Rep. 738. See 24 & 25 Vict. c. 96, § 90.

Illustrations.— A promissory note made by prosecutor and given by him to defendant is not a valuable security, since until delivery it was only a piece of paper on which prosecutor had written his name so that it might be afterward used as valuable security. Reg. *v.* Rymal, 17 Ont. 227. *Contra*, Reg. *v.* Gordon, 23 Q. B. D. 354, 16 Cox C. C. 622, 53 J. P. 807, 58 L. J. M. C. 117, 60 L. T. Rep. N. S. 872. The statute under which this case was decided was passed because of a contrary decision in Reg. *v.* Danger, 7 Cox C. C. 303, 1 Dears. & B. 307, 3 Jur. N. S. 1011, 26 L. J. M. C. 185, 5 Wkly. Rep. 738. So a mortgage executed by prosecutor and in his hands is not a valuable security, for until signed, sealed, and delivered by him it is no security at all. Reg. *v.* Brady, 26 U. C. Q. B. 13.

33. State *v.* Vandenburg, 159 Mo. 230, 60 S. W. 79; State *v.* Porter, 75 Mo. 171.

34. Holton *v.* State, 109 Ga. 127, 34 S. E. 358.

35. Tarbox *v.* State, 38 Ohio St. 581.

36. State *v.* Thacher, 35 N. J. L. 445.

37. Moore *v.* Com., 8 Pa. St. 260.

38. Rosales *v.* State, 22 Tex. App. 673, 3 S. W. 344.

"other effects" is a promissory note.[39] The term "money" used in most of the statutes does not include bank-notes,[40] or credit,[41] or extension of time for the payment of money.[42] "Chattels" includes a letter,[43] and a railway ticket,[44] but, in analogy to larceny, is held not to include animals.[45]

2. PROPERTY NOT IN EXISTENCE. The property need not be in existence at the time the false pretense is made, to render accused indictable.[46]

3. VALUE. The value of the property obtained as fixing the degree of the crime is to be measured by the actual loss suffered by prosecutor in the transaction.[47]

F. Loss to Prosecutor. While the statutes do not in express language require that the person from whom the property is obtained should be defrauded thereby, but only that it be obtained with intent to defraud him, nevertheless it is uniformly held that the crime is not committed unless the prosecutor is in fact defrauded.[48] Hence if prosecutor gets out of the transaction just what he bargained for the offense is not committed.[49] The injury to prosecutor may result from the loss of the property parted with, or from deprivation of the benefit he expected to accrue from defendant's representation, or from the property given him by defendant in exchange for the property parted with. In neither case is it necessary to the crime to show that he has suffered actual pecuniary loss, or that he will necessarily suffer such loss;[50] but in the first case it is

39. People *v.* Stone, 9 Wend. (N. Y.) 182.

40. U. S. *v.* Wells, 28 Fed. Cas. No. 16,661, 2 Cranch C. C. 43; Rex *v.* Hill, R. & R. 142.

41. Jamison *v.* State, 37 Ark. 445, 40 Am. Rep. 103; Com. *v.* Usner, 6 Lanc. L. Rev. (Pa.) 121; Reg. *v.* Eagleton, 3 C. L. R. 1145, 6 Cox C. C. 559, Dears. C. C. 515, 1 Jur. N. S. 940, 24 L. J. M. C. 158, 4 Wkly. Rep. 17; Reg. *v.* Crosby, 1 Cox C. C. 10; Rex *v.* Wavell, 1 Moody C. C. 224.

42. Com. *v.* Chambers, 2 Chest. Co. Rep. (Pa.) 63.

43. Com. *v.* Springs, 2 Leg. Gaz. (Pa.) 93.

44. Reg. *v.* Boulton, 2 C. & K. 917, 3 Cox C. C. 576, 1 Den. C. C. 508, 13 Jur. 1034, 19 L. J. M. C. 67, 3 N. Sess. Cas. 705, T. & M. 201.

45. Reg. *v.* Robinson, Bell C. C. 34, 8 Cox C. C. 115, 5 Jur. N. S. 203, 28 L. J. M. C. 58, 7 Wkly. Rep. 203.

46. Reg. *v.* Martin, L. R. 1 C. C. 56, 10 Cox C. C. 383, 36 L. J. M. C. 20, 15 L. T. Rep. N. S. 54, 15 Wkly. Rep. 358.

47. Berry *v.* State, 97 Ga. 202, 23 S. E. 833; Faulk *v.* State, 38 Tex. Cr. 77, 41 S. W. 616; Gaskins *v.* State, (Tex. Cr. App. 1895) 38 S. W. 470 (holding that where defendant induced prosecutor to sell to him a horse by fraudulent representations, the amount paid by defendant is to be deducted from the value of the horse); Perry *v.* State, 39 Tex. Cr. 495, 46 S. W. 816. See Tuttle *v.* State, (Tex. Cr. App. 1899) 49 S. W. 82, holding that in a prosecution for swindling in an amount exceeding fifty dollars by obtaining goods on credit, if the goods were worth the selling price in the market, it is immaterial that such price was arrived at by adding a certain per cent of the original cost.

Value as fixing degree of offense see also *supra*, IV, B, 3.

48. Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188; Berry *v.* State, 97 Ga. 202, 23 S. E. 833; McGhee *v.* State, 97 Ga. 199, 22 S. E. 589 (holding that one who, in executing a mortgage to obtain credit, falsely stated that his property was unencumbered, is not liable to a prosecution for cheating and swindling, where the property was neither sold nor appropriated to the extinguishment of the senior mortgage, and the property exceeded in value the aggregate indebtedness represented by both mortgages); *In re* Cameron, 44 Kan. 64, 24 Pac. 90, 21 Am. St. Rep. 262 (holding that where defendant is entitled to the immediate possession of the property which he obtains by false pretense, he cannot be convicted).

Swindling.— By Tex. Pen. Code, § 793, it is not necessary in order to constitute the offense of swindling that any injury shall result to the person intended to be defrauded, if it is sufficiently apparent that there was a wilful design to cause injury. See May *v.* State, 15 Tex. App. 430. But see Lively *v.* State, (Tex. Cr. App. 1903) 74 S. W. 321.

To prove injury to the purchaser by the fraudulent exhibition of a false cotton sample, the difference in value between the cotton as delivered and that represented by the sample at the time and place of sale must be shown. If the purchaser shipped the cotton to Mobile, and there sold it at a small advance on the price paid by him, the prosecutor cannot be allowed, for the purpose of showing injury or damage to him, to prove that the cost of transportation to Mobile was greater than this difference in price. Cowles *v.* State, 50 Ala. 454.

Restitution of property or reimbursement of prosecutor as a defense see *infra*, VII, A.

49. State *v.* Asher, 50 Ark. 427, 8 S. W. 177; Morgan *v.* State, 42 Ark. 131, 48 Am. Rep. 55; State *v.* Matthews, 44 Kan. 596, 25 Pac. 36, 10 L. R. A. 308; People *v.* Wakely, 62 Mich. 297, 28 N. W. 871.

50. Com. *v.* Wilgus, 4 Pick. (Mass.) 177;

necessary that he at least be placed by the fraud of defendant in such a position that he may eventually suffer such loss;[51] in the second, it is sufficient if he does not receive for the property parted with the thing promised by defendant, even though he receives something else of equal value, less value, or no value at all.[52] Since actual loss is not necessary, it is of course no defense that prosecutor

State *v.* Porter, 75 Mo. 171 (where defendant obtained a non-negotiable promissory note, and it was held that, although the note was open to any defense the maker might have against it in the hands of any holder, yet if the maker had died leaving the note outstanding, it might have been impossible to prove the fraud, and the estate would suffer); West *v.* State, 63 Nebr. 257, 88 N. W. 503; People *v.* Cook, 41 Hun (N. Y.) 67 (where defendant was indicted for obtaining money by the false pretense that the maker of a note which he passed to prosecutor was a certain person, whereas in fact it was a different person of the same name, and it was held that the legal quality of defendant's act did not depend on the uncertainty of the determination of the question whether prosecutor would finally suffer any financial loss on the note); People *v.* Higbie, 66 Barb. (N. Y.) 131; People *v.* Sully, 5 Park. Cr. (N. Y.) 142.

Getting less than that bargained for.— It is not necessary to constitute the crime that prosecutor should get nothing of value for his property; it is sufficient if he does not get the value bargained for. Com. *v.* Stone, 4 Metc. (Mass.) 43.

Cheating and swindling.— Pecuniary loss is a necessary element of the offense of cheating and swindling in Georgia. Busby *v.* State, 120 Ga. 858, 48 S. E. 314.

On indictment for obtaining a signature to a draft, it is not necessary to show that prosecutor has paid the draft, for by the signature prosecutor contracted an obligation to pay to a *bona fide* holder, and hence is injured. State *v.* Rowley, 12 Conn. 101; State *v.* Jamison, 74 Iowa 613, 38 N. W. 509; People *v.* Genung, 11 Wend. (N. Y.) 18, 25 Am. Dec. 594; State *v.* Hanscom, 28 Oreg. 427, 43 Pac. 167; State *v.* Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789; Bargie *v.* U. S., 30 Fed. Cas. No. 18,229, 2 Hayw. & H. 357. So a person is defrauded by obtaining his promissory note by false pretenses, although he is insolvent, since it creates an obligation against him. Holton *v.* State, 109 Ga. 127, 34 S. E. 358; Rex *v.* Freeth, R. & R. 94.

Defrauding partners.— Defendant entered into partnership with prosecutors, and it was subsequently agreed that he should travel to obtain orders for a commission, to be paid to him, as soon as he received the orders, out of the capital funds of the partnership before dividing any profits. He falsely represented to his partners that he had obtained a certain order, and in consequence was paid his commission thereon. It was held that this was a mere matter of account between the partners, and that defendant was not guilty of obtaining money by false pretenses. Reg. *v.* Evans, 9 Cox C. C. 238, 9 Jur. N. S. 184, L. & C. 252, 32 L. J. M. C. 38, 7 L. T. Rep. N. S. 507, 11 Wkly. Rep. 125.

Giving check without funds in bank.— If a person in giving his check falsely represents that he has money in bank to meet it, it is not necessary for the prosecution to show further that he is insolvent. State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341; State *v.* Decker, 36 Kan. 717, 14 Pac. 283; Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698.

Selling land twice.— Mo. Rev. St. § 3569, which provides for the punishment of one making a deed for land which he has previously conveyed to another, if he fails in the second deed to recite or describe such former deed, "with intent to defraud," does not require that any one should have been actually defrauded by the second conveyance, an intention to defraud being sufficient. State *v.* Wilson, 66 Mo. App. 540.

51. State *v.* Moore, 15 Iowa 412 (holding that the obtaining of an indorsement of credit on a promissory note of defendant held by prosecutor is not within the statute, for the prosecutor is not defrauded thereby); Com. *v.* Harkins, 128 Mass. 79 (where it was held that defendant was not guilty of obtaining money by false pretenses on proof that he by false pretense obtained the consent of the city to the entry of judgment against it in his favor, since the judgment was conclusive evidence between the parties that the amount of it was justly due to defendant, and until reversed the city was legally bound to pay it); Com. *v.* Lancaster, Thach. Cr. Cas. (Mass.) 428 (where by means of false pretenses defendant obtained from a minor his note which, at the time of the prosecution, was not due or paid, and it was held that the offense of cheating by false pretenses was not complete); State *v.* Dowd, 95 Mo. 163, 8 S. W. 7; Moore *v.* Com., 8 Pa. St. 260, Mikell Cas. Cr. L. 846 (holding that the obtaining of a receipt for a debt by false pretense is not a crime, for a receipt so obtained is worthless).

52. Rucker *v.* State, 114 Ga. 13, 39 S. E. 902; Culver *v.* State, 86 Ga. 197, 12 S. E. 746; State *v.* Mills, 17 Me. 211; Bartlett *v.* State, 28 Ohio St. 669. But in State *v.* Palmer, 59 Kan. 318, 52 Pac. 29, it was held that defendant could not be convicted on evidence that he obtained money by misrepresentations as to the value of a note given as security to prosecutor, where other notes given at the same time were sufficient to protect the latter from any loss through defendant's fraud. In accord, State *v.* Clark, 46 Kan. 65, 26 Pac. 481. These cases may possibly be reconciled with the other cases on the ground that the thing promised by defendant was in essence

has recovered,[53] or may eventually recover,[54] for any loss he has sustained. Prosecutor is none the less defrauded because the property parted with was appropriated by defendant to the purpose for which it was delivered.[55] It is sometimes said in a general way that to obtain property by false pretense is no offense if the property obtained is intended by defendant to be applied to the payment of a debt due from prosecutor, because prosecutor is not defrauded by being made to pay a debt,[56] but this unqualified statement is not supported by the cases.[57]

G. Intent — 1. General Rules. Under the common form of the statute a specific intent to defraud is essential to the commission of the crime.[58] The

adequate security, and this adequate security he in fact received.

53. Meek *v.* State, 117 Ala. 116, 23 So. 155 (holding that in a prosecution for obtaining goods by false pretenses, it is immaterial whether defendant has paid for the goods); People *v.* Bryant, 119 Cal. 595, 51 Pac. 960; Lowe *v.* State, 111 Ga. 650, 36 S. E. 856; Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

54. State *v.* Dozier, Dudley (Ga.) 155; State *v.* McDonald, 59 Kan. 241, 52 Pac. 453 (holding that the mere fact that defendant indorsed false school warrants and thereby rendered himself liable as a guarantor for the amounts stated in them does not necessarily defeat a prosecution for obtaining money under false pretenses); State *v.* Thacher, 35 N. J. L. 445; *Re* Pinter, 17 Cox C. C. 497, 66 L. T. Rep. N. S. 324.

55. People *v.* Lennox, 106 Mich. 625, 64 N. W. 488 (where defendant obtained money from prosecutor for the establishment of a school, on a false representation that a certain person had subscribed a certain amount for the same purpose, and it was held that the fact that defendant applied the money to the establishment of the school was immaterial); Reg. *v.* Byrne, 10 Cox C. C. 369.

56. *Massachusetts.*— Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91; Com. *v.* Harkins, 128 Mass. 79; Com. *v.* McDuffy, 126 Mass. 467.

Michigan.— People *v.* Getchell, 6 Mich. 496.

New York.— People *v.* Thomas, 3 Hill 169.

Pennsylvania.— Com. *v.* Thompson, 2 Pa. L. J. Rep. 33, 3 Pa. L. J. 250.

West Virginia.— State *v.* Hurst, 11 W. Va. 54.

England.— Rex *v.* Williams, 7 C. & P. 354, 32 E. C. L. 653.

See 23 Cent. Dig. tit. "False Pretenses," § 18.

Intent.— Some of the cases put it also on the ground that there is no intent to defraud. See *infra*, IV, G, 1.

Cases distinguished.— The cases of Com. *v.* McDuffy, 126 Mass. 467, and People *v.* Getchell, 6 Mich. 496, merely decided, and properly, that evidence of such indebtedness might be received on the question of intent and left to the jury to determine on all the evidence whether there was any intent; and People *v.* Thomas, 3 Hill (N. Y.) 169, was decided on the sufficiency of the indictment. The leading case of Rex *v.* Williams, 7 C. & P. 354, 32 E. C. L. 653, does not go so far.

57. *Arkansas.*— Pruitt *v.* State, (1889) 11 S. W. 822.

New York.— People *v.* Smith, 5 Park. Cr. 490 [*distinguishing* People *v.* Thomas, 3 Hill 169].

Pennsylvania.— Com. *v.* Leisy, 1 Pa. Co. Ct. 50.

England.— Reg. *v.* Leonard, 2 C. & K. 514, 3 Cox C. C. 284, 1 Den. C. C. 304, 61 E. C. L. 514; Rex *v.* Taylor, 65 J. P. 457, 49 Wkly. Rep. 671.

Canada.— Reg. *v.* Parkinson, 41 U. C. Q. B. 545 [*disapproving* Rex *v.* Williams, 7 C. & P. 354, 32 E. C. L. 653].

See 23 Cent. Dig. tit. "False Pretenses," § 18.

In any event the rule does not apply when the debtor is the state (Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102), or where the debt is unliquidated (Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419), or where defendant is not entitled to demand payment at the time (State *v.* Walton, 114 N. C. 783, 18 S. E. 945, where the debt was owed to defendant by a county, and defendant obtained the sum by false pretenses from the county treasurer, who had no authority to pay except upon an order from the county commissioners).

If the money was parted with by prosecutor for the express purpose of applying it to the debt, there is no offense. People *v.* Thomas, 3 Hill (N. Y.) 169.

58. *Alabama.*— O'Connor *v.* State, 30 Ala. 9, where defendant was indicted for obtaining a horse by giving a note therefor and falsely representing that he had sufficient money in bank to pay the note at maturity, and it was held that if defendant intended at the time of purchase to pay the note at maturity and had grounds for a reasonable belief that he would be able to do so, he was not guilty.

California.— People *v.* Griffith, 122 Cal. 212, 54 Pac. 725; People *v.* Garnett, 35 Cal. 470, 95 Am. Dec. 125.

Florida.— Edwards *v.* State, (1903) 33 So. 853.

Georgia.— Treadwell *v.* State, 99 Ga. 779, 27 S. E. 785.

Michigan.— People *v.* Getchell, 6 Mich. 496.

Missouri.— State *v.* Benson, 110 Mo. 18, 19 S. W. 213; State *v.* Norton, 76 Mo. 180.

Nebraska.— Ketchell *v.* State, 36 Nebr. 324, 54 N. W. 564.

New Jersey.— Sharp *v.* State, 53 N. J. L. 511, 21 Atl. 1026.

New York.— People *v.* Baker, 96 N. Y. 340; People *v.* Moore, 37 Hun 84. However, intent is not an ingredient of the crime of selling articles marked "Sterling silver"

"intent to defraud" is the intent by the use of false means to induce another to part with the title to his property and confide it to defendant, when he would

which do not contain nine hundred and twenty-five one-thousandths parts of silver, in violation of Pen. Code, § 364*a*. People *v.* Webster, 17 Misc. 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340.

North Carolina.—State *v.* Oakley, 103 N. C. 408, 9 S. E. 575.

Texas.—Williams *v.* State, 34 Tex. Cr. 606, 31 S. W. 649.

United States.—Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647.

England.—Reg. *v.* Kilham, L. R. 1 C. C. 261, 11 Cox C. C. 561, 39 L. J. M. C. 109, 22 L. T. Rep. N. S. 625, 18 Wkly. Rep. 957; Reg. *v.* Gray, 17 Cox C. C. 299; Reg. *v.* Stone, 1 F. & F. 311; Rex *v.* Wakeling, R. & R. 375.

See 23 Cent. Dig. tit. "False Pretenses," § 3.

In Vermont it is doubtful if an intent is a necessary element of the offense. State *v.* Bacon, 7 Vt. 219.

Intent impossible in law.—An offense under Ariz. Pen. Code, par. 105, declaring guilty of a felony one who with intent to defraud presents a fraudulent claim, for payment to a county officer authorized to pay the same, if genuine, is not stated by an indictment charging the presentation for payment to a county treasurer of a warrant drawn by a county school superintendent in favor of another than defendant and not alleged to have been indorsed, since Ariz. Rev. St. par. 1574, makes it the treasurer's duty to pay over school moneys on such warrants "duly indorsed by the person entitled to receive the same," and it would not have been possible for defendant to defraud the county by means of such unindorsed warrant, and being impossible the possibility must be taken in law as disproving any intent to defraud. Cluff *v.* Territory, (1898) 52 Pac. 350.

Intent to deprive prosecutor of part of property obtained.—The intent need not be to deprive the prosecutor of the entire property obtained, it is sufficient if it be to deprive him of a part comprehended within the whole. Reg. *v.* Leonard, 2 C. & K. 514, 3 Cox C. C. 284, 1 Den. C. C. 304, 61 E. C. L. 514.

Obtaining to apply to debt of prosecutor.—It is held in some cases that where defendant obtains the property to apply on a debt owed by prosecutor, there is no offense, because of a lack of an intent to defraud. Pruitt *v.* State, (Ark. 1889) 11 S. W. 822; Com. *v.* McDuffy, 126 Mass. 467; Com. *v.* Thompson, 2 Pa. L. J. Rep. 33, 3 Pa. L. J. 250. In Rex *v.* Williams, 7 C. & P. 354, 32 E. C. L. 653, Mikell Cas. Cr. L. 879, prosecutor owed a debt of which the creditor could not get payment. Defendant, a servant of the creditor, went to prosecutor's wife and obtained two sacks of malt from her, saying that his master had bought them of prosecutor. Defendant knew this to be false, but took the malt to his master to enable him to pay himself the debt. It was held that if defendant did not intend to defraud prosecutor but merely to put it into his master's power to compel prosecutor to pay him a just debt, defendant ought not to be convicted of obtaining the malt by false pretenses. This case, the case on which the other cases are founded, seems to have been strangely misunderstood. The court says defendant did not intend to defraud prosecutor, but only to put it in his master's power to compel prosecutor to pay the debt. In other words, defendant did not intend to deprive prosecutor of title, but only of possession. In Reg. *v.* Hamilton, 1 Cox C. C. 244, 247, Pollock, C. B., says of this case: "The defendant believed, however erroneously, that he had some sort of right to do as he did, and this was probably the ground on which the jury acquitted him." Of course if he believed he had a right to the malt, he had no intent to defraud. In Reg. *v.* Parkinson, 41 U. C. Q. B. 545, the court disapproves Rex *v.* Williams, *supra*, and holds that to obtain by false pretenses a sum of money from A, due from him to B, with intent to pay the same to B, is obtaining by false pretenses, remarking that defendant got the money by fraud, and that could only be done with intent to defraud somebody, and if it was not to defraud the creditor, it must have been to defraud the debtor. In the case of *In re* Cameron, 44 Kan. 64, 24 Pac. 90, 21 Am. St. Rep. 262, defendant obtained by false pretenses an organ that belonged to her and which was wrongfully detained by prosecutor, and it was held, on the authority of People *v.* Thomas, 3 Hill (N. Y.) 169, and the other cases cited above, that she was not guilty. This case is clearly distinguishable. Here defendant obtained only possession by the false pretenses, title being already in her, and this fact would prevent her being guilty of obtaining the property by false pretenses, whereas in People *v.* Thomas, *supra*, the title to the money obtained was not in defendant. The true doctrine would seem to be, under the settled rule that intent is for the jury, that the mere fact that the property was obtained to apply to an indebtedness of prosecutor is no defense; but that evidence of such indebtedness and appropriation may be considered by the jury, together with all other facts and circumstances, that they may determine the question of intent. See *infra*, VIII, D, 1. It is well settled that the use the defendant makes of the property is no defense. See *supra*, IV, F; *infra*, VII, A.

Obtaining materials to be used in one building and using them in another.—In a trial under Mo. Rev. St. (1899) § 4226, providing that a contractor who purchases material on credit, then representing that it is to be used in a certain building, and thereafter uses it in another building, without the written consent of the seller of the material, and with intent to defraud him, shall be punished, etc.,

not otherwise do so.[59] The intent to defraud need not be directed against the legal owner; it is sufficient if it be directed against any one in lawful possession of the goods, or who parts with property in reliance thereon.[60] Nor need the intent be to cause ultimate loss to prosecutor, since prosecutor is defrauded by the mere obtaining of his property by a false pretense; although he may suffer an ultimate loss, an intent to cause actual loss is not necessary. Thus an intent to return the money or property obtained is no defense;[61] nor is it a defense that defendant believed that the money he obtained was a fair compensation for injuries he had received by the negligence of prosecutor;[62] and since the intent provided for by the statutes is the intent to defraud another, and not to benefit defendant, it is no defense that defendant did not intend to derive any advantage

accused's testimony that of twenty thousand laths ordered for the two houses only eleven thousand went into them, establishes an intent to do the specific thing which the statute forbids, notwithstanding his testimony that he had no intent to steal or defraud. State *v.* Gregory, 170 Mo. 598, 71 S. W. 170.

Selling land twice.— Where defendant, indicted for selling land which had already been sold, by false pretense and misrepresentations made a second sale to purchasers at their own request, and fully informed them with regard to the first sale, he is not guilty of fraud within Cal. Rev. St. § 12, since there was no intent shown on part of defendant to defraud. People *v.* Garnett, 25 Cal. 470, 95 Am. Dec. 125. One who has made a conveyance, and afterward concluded that it was invalid, and reconveyed the land to a grantee having knowledge of the prior deed and the transactions connected therewith, is not amenable to the statute, in the absence of proof of artifice or attempt to defraud, although the first deed in fact conveyed a good title. The simple making of a second deed while a former one is outstanding and in force, without reciting the same, does not, in the absence of any fraudulent intent, constitute the offense prohibited by statute. Armstrong *v.* Winfrey, 61 Mo. 354.

Selling property without disclosing encumbrance.— Under S. C. Gen. St. § 2514, making it a misdemeanor "wilfully and knowingly" to sell property on which there is a lien without giving notice of the lien, where a vendor of land has given two mortgages on it, his promise to arrange to meet such matters as he had put upon the land is sufficient notice as to the mortgages, and does not indicate an intention to suppress notice of a judgment lien, his actual knowledge of which is in controversy. State *v.* Johnson, 20 S. C. 387.

Effect of word "injure" in statute.— Most of the statutes require the intent to be to "injure or defraud." In these statutes the word "injure" implies no more nor less than the word "defraud." Carlisle *v.* State, 76 Ala. 75.

Belief in right to draw check see *supra*, page 403 note 87.

59. Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; Com. *v.* Coe, 115 Mass. 481; People *v.* Oscar, 105 Mich. 704, 63 N. W. 791.

60. *Alabama.*— Mack *v.* State, 63 Ala. 138.
Colorado.— Schayer *v.* People, 5 Colo. App. 75, 37 Pac. 43, holding that to constitute the offense defined by Gen. St. § 884, providing that any person who shall cause others to report falsely of his honesty, wealth, or mercantile character, and fraudulently get into possession of goods, shall be deemed a swindler, a specific intent to defraud a particular person is not essential.
Maryland.— Jules *v.* State, 85 Md. 305, 36 Atl. 1027, decided under Code, § 291, which provides that it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove an intent to defraud.
Massachusetts.— Com. *v.* Call, 21 Pick. 515, holding that an indictment for obtaining money by false pretenses which avers that the false pretenses were practised upon one and his money obtained with intent to defraud another is good.
Minnesota.— State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108.
Missouri.— State *v.* Scott, 48 Mo. 422.
North Carolina.— State *v.* Hargrave, 103 N. C. 328, 9 S. E. 406.
See 23 Cent. Dig. tit. "False Pretenses," § 3. See also *supra*, IV, C, 4.

61. *California.*— People *v.* Wieger, 100 Cal. 352, 34 Pac. 826.
Iowa.— State *v.* Neimeier, 66 Iowa 634, 24 N. W. 247.
Kentucky.— Com. *v.* Schwartz, 92 Ky. 510, 18 S. W. 775, 19 S. W. 189, 13 Ky. L. Rep. 929, 36 Am. St. Rep. 609.
Maine.— State *v.* Hill, 72 Me. 238.
Massachusetts.— Spaulding *v.* Knight, 116 Mass. 148; Com. *v.* Coe, 115 Mass. 481.
Michigan.— People *v.* Oscar, 105 Mich. 704, 63 N. W. 971.
Missouri.— State *v.* Wilson, 143 Mo. 334, 44 S. W. 722.
New Jersey.— State *v.* Thatcher, 35 N. J. L. 445.
England.— Reg. *v.* Naylor, L. R. 1 C. C. 4, 10 Cox C. C. 149, 11 Jur. N. S. 910, 35 L. J. M. C. 61, 13 L. T. Rep. N. S. 381, 14 Wkly. Rep. 58, Mikell Cas. Cr. L. 880; Reg. *v.* Boulton, 2 C. & K. 917, 3 Cox C. C. 576, 1 Den. C. C. 508, 13 Jur. 1034, 19 L. J. M. C. 67, 3 N. Sess. Cas. 705, T. & M. 201, 61 E. C. L. 917.
See 23 Cent. Dig. tit. "False Pretenses," § 3.

62. Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

from the obtaining of the property.[63] It is not necessary that the intent be to accomplish the particular result aimed at; if the particular result fails and another thing of value is obtained by means of the false representations, it is sufficient.[64] The intent must exist, however, when the property is obtained.[65]

2. Knowledge of Defendant of Falsity of Pretense and of Prosecutor's Reliance Thereon. Since there can be no intent to obtain the property by means of the false pretense unless defendant knows the pretense to be untrue, such knowledge on the part of defendant is essential to the commission of the crime,[66] but it is said that making a statement recklessly and without information justifying a belief in its truth is tantamount to an utterance of a statement knowing it to be false.[67] There can be no conviction under the statute against obtaining goods by false pretenses, unless defendant knows, or has reason to believe, that his representations are relied on as the ground of credit.[68]

V. ATTEMPT.[69]

The crime of attempting to obtain property by false pretenses consists in: (1) An intent to obtain by the false pretense; (2) the doing of some act, beyond mere preparation, toward obtaining the property by means of the false pretense; (3) the failure so to obtain the property.[70] If defendant with the requisite intent has

63. Musgrave *v.* State, 133 Ind. 297, 32 N. E. 885; Com. *v.* Harley, 7 Metc. (Mass.) 462; State *v.* Hofman, 2 Ohio S. & C. Pl. Dec. 200, 1 Ohio N. P. 290; May *v.* State, 15 Tex. App. 430, by statute. And see *supra*, IV, D, 3.

64. Todd *v.* State, 31 Ind. 514. See also Com. *v.* Hutchison, 114 Mass. 325.

65. People *v.* Moore, 37 Hun (N. Y.) 84; State *v.* Allred, 84 N. C. 749; Com. *v.* McCrossin, 2 Pa. L. J. Rep. 6, 3 Pa. L. J. 219; Popinaux *v.* State, 12 Tex. App. 140.

The false pretense need not originally have been made for the purpose of defrauding, however. If it is reiterated for that purpose, it is sufficient. Reg. *v.* Hamilton, 1 Cox C. C. 244.

66. *Georgia.*— Waterman *v.* State, 114 Ga. 262, 40 S. E. 262.

Massachusetts.— Com. *v.* Devlin, 141 Mass. 423, 6 N. E. 64.

New Jersey.— Sharp *v.* State, 53 N. J. L. 511, 21 Atl. 1026.

North Carolina.— State *v.* Alphin, 84 N. C. 745.

Pennsylvania.—Com. *v.* Lundberg, 18 Phila. 482.

Texas.— Maranda *v.* State, 44 Tex. 442; Hirsch *v.* State, 1 Tex. App. 393.

England.— Reg. *v.* Keighley, 7 Cox C. C. 217, Dears. & B. 145.

See 23 Cent. Dig. tit. "False Pretenses," § 13. And see *infra*, VIII, A, 3, e.

Selling articles falsely marked "sterling silver."— Guilty knowledge is not an ingredient of the offense of selling articles marked "Sterling silver" which do not contain nine hundred and twenty-five one-thousandths parts of silver, as defined by N. Y. Pen. Code, § 364*a*. People *v.* Webster, 17 Misc. (N. Y.) 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340.

Selling dirt-packed cotton.— A person is not guilty of any offense in selling dirt-packed cotton as with intent to defraud where he did not know that it was falsely packed and was not in possession of facts charging him with the duty of making an investigation. Anderson *v.* State, 30 Tex. App. 699, 18 S. W. 866.

Selling property without disclosing encumbrance.— Under S. C. Gen. St. (1882) § 2514, providing that any person who shall wilfully and knowingly sell and convey any real or personal property on which any lien or liens exist, without first giving notice of such lien or liens to the purchaser, shall be guilty, etc., one who sells property in ignorance of a lien which exists thereon is not guilty of a violation of such statute. State *v.* Johnson, 20 S. C. 387.

67. People *v.* Cummings, 123 Cal. 269, 55 Pac. 898.

68. People *v.* McAllister, 49 Mich. 12, 12 N. W. 891. Thus a merchant cannot be held criminally liable for defrauding one from whom he obtained goods on credit because of the fact that sixty days or more before the purchase he made a statement to a commercial agency to be used in giving him a rating, which statement was in some respects false, where it is not shown that he reaffirmed the statement to the seller or knew or had reason to believe that the credit was extended to him on the faith of the representations therein made. Treadwell *v.* State, 99 Ga. 779, 27 S. E. 785.

69. See Criminal Law, 12 Cyc. 176 *et seq.*

70. Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731.

What constitutes.— Attempting to pass the note of a bank that has stopped payment to defendant's knowledge is an attempt to obtain by false pretenses. Reg. *v.* Jarman, 14 Cox C. C. 111, 38 L. T. Rep. N. S. 460. On a prosecution for attempting to cash a certificate of deposit, falsely representing it to be the property of accused, evidence that accused presented the certificate at the teller's window with the payee's indorsement thereon, unaccompanied with any explanation, and

done some act toward obtaining the property, it is none the less an attempt because for some reason unknown to him he could not have completed the crime;[71] but the act done toward the accomplishment of the end in view must be adapted to secure that end.[72]

VI. PARTIES TO THE CRIME.

The general principles of criminal law relating to principal and accessary apply to the crime of obtaining property by false pretense.[73] False pretenses made by one of several in pursuance of an agreement between them are chargeable to all;[74] but when one commits the crime by means of an innocent agent, he alone is guilty.[75] The mere fact that one of several persons obtaining the property by agreement received no share of the property does not make him the less a party;[76]

evidence of a conversation between accused and the cashier immediately thereafter, in which accused insisted that he was the *bona fide* holder by purchase, shows a demand for payment. State *v.* Riddell, 33 Wash. 324, 74 Pac. 477. However, one who by false representations induces another to draw money from a bank and with it purchase a spurious gold brick cannot be prosecuted under Ill. Cr. Code, § 98, for an attempt to obtain money by a confidence game, since the money was actually obtained, although the sale was consummated in a different county from the one where the representations were made and the prosecution brought. Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731.

Distinction between preparation and attempt.—The general distinction between preparation and attempt applies in attempt to obtain property by false pretense. The criminal act, while it need not be the last proximate act to the consummation of the complete offense, must approach sufficiently near to it to stand either as the first or some subsequent step in a direct movement toward the commission of the offense after the preparations are made. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017; Reg. *v.* Button, [1900] 2 Q. B. 597, 19 Cox C. C. 568, 64 J. P. 600, 69 L. J. Q. B. 901, 83 L. T. Rep. N. S. 288, 48 Wkly. Rep. 703.

Attempt to obtain is not within Vexatious Indictments Act (22 & 23 Vict. c. 17) providing that no bill of indictment for obtaining property by false pretenses shall be found by a grand jury, unless the prosecutor presenting the indictment has been bound by recognizance to prosecute or give evidence against the person accused, or unless the person accused has committed, etc. Reg. *v.* Burton, 13 Cox C. C. 71, 32 L. T. Rep. N. S. 539.

71. People *v.* Spolasco, 33 Misc. (N. Y.) 22, 67 N. Y. Suppl. 1114, 15 N. Y. Cr. 184; Reg. *v.* Eagleton, 3 C. L. R. 1145, 6 Cox C. C. 559, Dears. C. C. 515, 1 Jur. N. S. 940, 24 L. J. M. C. 158, 4 Wkly. Rep. 17; Reg. *v.* Hensler, 11 Cox C. C. 570, 22 L. T. Rep. N. S. 691, 19 Wkly. Rep. 108, where defendant wrote a begging letter to prosecutor in which by certain false statements he attempted to obtain money, and prosecutor sent him five shillings, but stated at the trial that he knew that the pretenses were false, and it was held that defendant might be convicted of an attempt to obtain money by false pretenses, and that the attempt was complete when he placed the letter in the mail.

72. State *v.* Lawrence, 178 Mo. 350, 77 S. W. 497, holding that there can be no offense of procuring or attempting to procure by false pretenses a legal school warrant from school directors, where the directors have no power to issue such a warrant. But where defendant falsely pretended that he had killed a number of squirrels, and claimed a bounty which had been provided therefor by ordinance, he is guilty of an attempt to obtain the money by false pretense, although the ordinance was discovered to be invalid before the money was paid defendant. People *v.* Howard, 135 Cal. 266, 67 Pac. 148.

73. See CRIMINAL LAW, 12 Cyc. 183 *et seq.*

Principal in second degree.— An indictment charging A with obtaining by false pretenses, and alleging that defendant unlawfully, fraudulently, and knowingly was present aiding, abetting, and assisting A the misdemeanor aforesaid to commit, correctly charges defendant as a principal in the second degree. Reg. *v.* Connor, 14 U. C. C. P. 529.

74. *Illinois.*— Cowen *v.* People, 14 Ill. 348.

Kansas.— State *v.* McCormick, 57 Kan. 440, 46 Pac. 777, 57 Am. St. Rep. 341; State *v.* Davis, 56 Kan. 54, 42 Pac. 348.

Massachusetts.— Com. *v.* Harley, 7 Metc. 462.

Virginia.— Dull *v.* Com., 25 Gratt. 965.

England.— Reg. *v.* Kerrigan, 9 Cox C. C. 441, L. & C. 383, 33 L. J. M. C. 71, 9 L. T. Rep. N. S. 843, 12 Wkly. Rep. 416; Young *v.* Rex, 2 East P. C. 833, 1 Leach C. C. 505, 3 T. R. 98, 1 Rev. Rep. 660.

See 23 Cent. Dig. tit. "False Pretenses," § 28.

See, however, Cruthers *v.* State, 161 Ind. 139, 67 N. E. 930; State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017.

Fraudulent purchase and resale.— A party is liable under La. Acts (1840), No. 117, § 10, providing a penalty for purchasing merchandise for cash and disposing of it without paying the price, although not a principal in the purchase, if the purchase is shown to be a fraud contrived with another for their mutual benefit. Martin *v.* Chrystal, 4 La. Ann. 344.

75. Adams *v.* People, 1 N. Y. 173 [*affirming* 3 Den. 190, 45 Am. Dec. 468]; Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291.

76. State *v.* Davis, 56 Kan. 54, 42 Pac. 348.

but one does not commit the crime by merely being present when the property is received by another and taking part of the property.[77] When the crime is a misdemeanor all parties engaged are principals.[78]

VII. DEFENSES.

A. In General. On the principle that the injury is to the state, defendant cannot plead that prosecutor has condoned the crime and settled with defendant,[79] that he has offered to return the property to the prosecutor,[80] that prosecutor has regained possession of the goods,[81] that their loss has been made good to him,[82] or that prosecutor has signed a paper stating that he did not rely on the pretense.[83] The fact that defendant was entitled to a part of the money obtained by false pretenses does not excuse him;[84] nor is it a defense that prosecutor instituted the prosecution for the purpose of gaining restitution.[85]

B. Contributory Guilt. A crime being an act directed against the state, the state cannot be estopped from prosecuting it by the act of any individual, and hence the fact that the party defrauded by the false pretense was himself guilty of some fraud in the transaction is no defense to the accused.[86]

C. Contributory Negligence. The same principle should apply to the defense of negligence in the prosecutor; and when his negligence alone, unmixed with other considerations, is interposed as a defense, it is held to be immaterial.[87] Ordinarily, however, this defense arises in connection with the character of the pretense and is decided under the rules governing that branch of the subject.[88]

D. Motive of Prosecutor in Parting With Property. The motive actuating prosecutor in parting with the property is immaterial; hence, although his object in parting with it was charitable and not mercenary,[89] or although it was

77. People *v.* Cline, 44 Mich. 290, 6 N. W. 671.

78. Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647; Reg. *v.* Moland, 2 Moody C. C. 276; Reg. *v.* Campbell, 18 U. C. Q. B. 413.

Attempt to obtain property by false pretenses being a misdemeanor, all engaged are principals. Reg. *v.* Burton, 13 Cox C. C. 71, 32 L. T. Rep. N. S. 539.

79. Lowe *v.* State, 111 Ga. 650, 36 S. E. 856; Williams *v.* State, 105 Ga. 606, 31 S. E. 546; Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

80. Carlile *v.* State, 77 Ala. 71.

81. Donohoe *v.* State, 59 Ark. 375, 27 S. W. 226; State *v.* Cooper, 85 Mo. 256.

82. Clark *v.* People, 2 Lans. (N. Y.) 329.

Loss or injury to prosecutor as element of offense see *supra*, IV, F.

83. Jackson *v.* People, 126 Ill. 139, 18 N. E. 286.

84. Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419.

85. Com. *v.* Singer, 2 Del. Co. (Pa.) 182.

86. *California.*—People *v.* Howard, 135 Cal. 266, 67 Pac. 148; People *v.* Martin, 102 Cal. 558, 36 Pac. 952, Mikell Cas. Cr. L. 98, where defendant represented to prosecutor that a judgment had been obtained against him and by this false representation induced him to transfer his property to defendant to avoid paying the judgment, and it was held that prosecutor's fraud was no defense.

Colorado.— *In re* Cummins, 16 Colo. 451, 27 Pac. 887, 25 Am. St. Rep. 291, 13 L. R. A. 752.

Illinois.— Gilmore *v.* People, 87 Ill. App. 128.

Indiana.— Casily *v.* State, 32 Ind. 62.

Massachusetts.— Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; Com. *v.* Morrill, 8 Cush. 571.

Michigan.— People *v.* Watson, 75 Mich. 582, 42 N. W. 1005; People *v.* Henssler, 48 Mich. 49, 11 N. W. 804.

New Jersey.— Cunningham *v.* State, 61 N. J. L. 67, 38 Atl. 847.

See 23 Cent. Dig. tit. "False Pretenses," § 27.

Contra.— McCord *v.* People, 46 N. Y. 470; People *v.* Livingstone, 47 N. Y. App. Div. 283, 62 N. Y. Suppl. 9, 14 N. Y. Cr. 422; People *v.* Stetson, 4 Barb. (N. Y.) 151; Anonymous, 10 Ohio Dec. (Reprint) 649, 22 Cinc. L. Bul. 371; State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719, conspiring to defraud.

87. Thomas *v.* People, 113 Ill. 531. See also Elmore *v.* State, 138 Ala. 50, 35 So. 25; Crawford *v.* State, 117 Ga. 247, 43 S. E. 762. See, however, Cowan *v.* State, (Tex. Cr. App. 1900) 56 S. W. 751.

88. See *supra*, IV, C, 5.

89. *Indiana.*—State *v.* Styner, 154 Ind. 131, 56 N. E. 98; Strong *v.* State, 86 Ind. 208, 44 Am. Rep. 292.

Massachusetts.— Com. *v.* Whitcomb, 107 Mass. 486.

North Carolina.— State *v.* Matthews, 91 N. C. 635.

Wisconsin.— Baker *v.* State, 120 Wis. 135, 97 N. W. 566 [*explaining* State *v.* Crowley, 41 Wis. 271, 22 Am. Rep. 719].

England.— Reg. *v.* Jones, 3 C. & K. 346, 4

to entrap defendant into a commission of the crime,[90] it is no defense, unless the entrapment involves a knowledge on the part of prosecutor that the pretense was false.[91]

VIII. PROCEDURE.[92]

A. Indictment and Information[93] — **1. In General.** An indictment for obtaining property by false pretense or false token must allege with precision and certainty every fact necessary to be proven in order to convict the accused of the crime,[94] and the facts must be stated with such particularity as to apprise

Cox C. C. 198, 1 Den. C. C. 551, 14 Jur. 533, 19 L. J. M. C. 162, 4 N. Sess. Cas. 353, T. & M. 270; Reg. *v.* Hensler, 11 Cox C. C. 570, 22 L. T. Rep. N. S. 691, 19 Wkly. Rep. 108.

See 23 Cent. Dig. tit. "False Pretenses," § 25.

Contra.— People *v.* Clough, 17 Wend. (N. Y.) 351, 31 Am. Dec. 303.

90. Rex *v.* Ady, 7 C. & P. 140, 32 E. C. L. 540; Reg. *v.* Corey, 22 N. Brunsw. 543.

91. Thorpe *v.* State, 40 Tex. Cr. 346, 50 S. W. 383. See also Reg. *v.* Mills, 7 Cox C. C. 263, Dears. & B. 205, 3 Jur. N. S. 447, 26 L. J. M. C. 79, 5 Wkly. Rep. 529.

92. Description of offense in warrant see CRIMINAL LAW, 12 Cyc. 301 *et seq.*

Jurisdiction: As determined by locality of crime see CRIMINAL LAW, 12 Cyc. 211. Of United States courts over common-law offense of cheating see *supra*, page 387, note 5.

Venue see CRIMINAL LAW, 12 Cyc. 233.

93. See, generally, INDICTMENTS AND INFORMATIONS.

Election by state.— Under S. C. Gen. St. (1882) § 2514, providing that any person who wilfully and knowingly sells and conveys any real or personal property on which any lien or liens exist without first giving notice of such lien or liens to the purchaser is guilty, etc., the offense consists in selling, without regard to the number of liens on the property, and where an indictment charges the existence of several liens the state cannot be required to elect on which it relies. State *v.* Johnson, 20 S. C. 387.

For forms of indictment for obtaining money or property by false pretenses see People *v.* Smith, 5 Park. Cr. (N. Y.) 490; People *v.* Sully, 5 Park. Cr. (N. Y.) 142; *Ex p.* Reggel, 114 U. S. 642, 5 S. Ct. 1148, 29 L. ed. 250; Reg. *v.* Gardner, 7 Cox C. C. 136, Dears. & B. 40, 2 Jur. N. S. 598, 25 L. J. M. C. 100, 4 Wkly. Rep. 526; 11 Cox C. C. appendix xi.

Bills of particulars see INDICTMENTS AND INFORMATIONS.

Sufficiency of indictment as question for court see *infra*, page 446, note 22.

94. *Alabama.*— Tennyson *v.* State, 97 Ala. 78, 12 So. 391.

Connecticut.— State *v.* Jackson, 39 Conn. 229.

Indiana.— Cruthers *v.* State, 161 Ind. 139, 67 N. E. 930; Asher *v.* State, 88 Ind. 215.

Missouri.— State *v.* Daggs, 106 Mo. 160, 17 S. W. 306.

New Hampshire.— State *v.* Falconer, 59 N. H. 535.

New York.— People *v.* Winner, 80 Hun 130, 30 N. Y. Suppl. 54 (holding that an indictment under a statute must state all such facts and circumstances as constitute the statutory offense so as to bring the party indicted expressly within the provisions of the statute); People *v.* Chapman, 4 Park. Cr. 56. See also People *v.* Webster, 17 Misc. 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340, holding that an indictment alleging that defendant had in his possession, with intent to sell, an article of merchandise stamped "Sterling," which did not contain the required proportion of pure silver, is insufficient, in that it fails to allege that the word "Sterling" denotes that the article was "Sterling silver."

Ohio.— Ellars *v.* State, 25 Ohio St. 385.

Pennsylvania.— Com. *v.* Adley, 1 Pearson 62.

Texas.— Maranda *v.* State, 44 Tex. 442; Marshall *v.* State, 31 Tex. 471 (holding that an indictment for obtaining property should aver that the property was delivered with the consent of the owner); White *v.* State, 3 Tex. App. 605; Hirsch *v.* State, 1 Tex. App. 393.

England.— Reg. *v.* Martin, 8 A. & E. 481, 2 Jur. 515, 7 L. J. M. C. 89, 3 N. & P. 472, 1 W. W. & H. 380, 35 E. C. L. 691.

Canada.— Reg. *v.* Harty, 31 Nova Scotia 272.

See 23 Cent. Dig. tit. "False Pretenses," § 31.

Indictments held sufficient.— Alleging that defendant, by falsehood and artifice, obtained from the owner a bill of sale of property and the possession thereof, whereby the owner was defrauded and cheated, is sufficient to charge defendant with being a "common cheat and swindler." Jones *v.* State, 93 Ga. 547, 19 S. E. 250. Where an indictment is for passing a draft drawn against no funds, it is not necessary to allege that the draft was of no value. State *v.* Caldwell, 79 Iowa 473, 44 N. W. 711. An information for obtaining money under false pretenses is sufficient which alleges that defendant procured a loan by offering to pledge as security certain notes which he represented were unpaid; that the lender relied on his representations; that only part of the notes promised were delivered, and that some of them had been paid; and that defendant knew his representations to be false, and made them with intent to defraud. State *v.* Ashe, 44 Kan. 84, 24 Pac. 72. An indictment alleging that defendant, with intent to defraud, expressed certain boxes which he represented to the consignee as containing tobacco suitable for cigars; that the representations were false and fraud-

him of the accusation against him.[95] The indictment must allege the place

ulent, and known to be such by defendant; and that the consignee was thereby deceived into paying a specified sum of money for tobacco stems and rubbish, sufficiently charges the obtaining of money under false pretenses. Hafner *v.* Com., 36 S. W. 549, 18 Ky. L. Rep. 423. An indictment for obtaining property by false pretenses is sufficient which alleges that defendant, with intent to defraud, fraudulently represented to the owner of described goods that he was then, and for two years had been, employed by a third party, who told him to come to the owner's warehouse and get the goods, for which the employer would pay, and that by reason of these representations, which were false, and which defendant knew to be false, the owner was induced to deliver the goods to defendant. Com. *v.* Whitney, 3 S. W. 533, 8 Ky. L. Rep. 776. An indictment which charges that defendant obtained money from one bank by falsely representing that he had money in another bank need not allege that the latter was incorporated, since it is not the one defrauded. Brown *v.* State, (Tex. Cr. App. 1898) 43 S. W. 986.

Inconsistent averments.—An indictment for obtaining goods by false pretenses which avers that defendant purchased the goods is insufficient, a purchase being inconsistent with an obtaining by false pretenses. People *v.* Conger, 1 Wheel. Cr. (N. Y.) 448. However, an information for obtaining personalty under false pretenses by giving Confederate money in exchange therefor and representing it to be valuable which alleges that accused "did, . . . with intent to defraud, . . . buy" from the complaining witness the property described is not insufficient as precluding fraud by the use of the word "buy," since the gist of the offense was the false representation of the value of the money and not the buying of the property. Pinney *v.* State, 156 Ind. 167, 59 N. E. 383. An indictment which charges that pretenses were made to induce prosecutor to become the surety of defendant on a six-hundred-dollar note, but shows that instead of becoming a surety prosecutor became a principal and made a note for six hundred dollars payable to defendant, is bad for ambiguity and uncertainty. State *v.* Locke, 35 Ind. 419.

Duplicity.— An indictment is not bad for duplicity in that it sets out two inconsistent representations of defendant, but a conviction may be had on proof of the falsity of either. State *v.* Tripp, 113 Iowa 698, 84 N. W. 546. It is not a valid objection to an indictment that it charges two crimes, one the procuring of a signature to an instrument by false pretenses, and the other the obtaining of money by the same means. State *v.* McDonald, 59 Kan. 241, 52 Pac. 453; State *v.* Meade, 56 Kan. 690, 44 Pac. 619. Nor is an indictment bad for joining successive statutory phases of the same offense (People *v.* Luttermoser, 122 Mich. 562, 81 N. W. 565; Com. *v.* Sober, 15 Pa. Super. Ct. 520), nor because the facts stated show a case of larceny, since different offenses may spring from the same act (State *v.* Styner, 154 Ind. 131, 56 N. E. 98).

An indictment for false packing of cotton is not vitiated by the use of the term "sand-packing," this being a term generally understood in Alabama, and certain. Daniel *v.* State, 61 Ala. 4.

An indictment for fraud in the sale of wool (Ohio Rev. St. § 7069-3) must state that the wool was washed wool, describe the objectionable substance complained of contained in the wool, and aver that the fleeces were so arranged as to be calculated to defraud the purchaser. Hogue *v.* State, 23 Ohio Cir. Ct. 567.

Indictment for resale in fraud of seller.— An information under La. Acts (1896), No. 94, § 2, for buying goods on credit and selling them out of the usual course of business with intent to cheat the seller, need not set forth the name of the person to whom the goods were resold. State *v.* Artus, 110 La. 441, 34 So. 596.

Indictment for selling land twice.— An indictment under Mo. Rev. St. § 3569, providing for the punishment of one making a deed of any lands which he has previously conveyed to another without reciting the former deed, need not set forth the entire description of the land conveyed by the second deed, a description which identifies the land by its lot number being sufficient. State *v.* Wilson, 66 Mo. App. 540.

Indictment for selling without disclosing encumbrance.— If an indictment for making a deed to land without reciting an existing mortgage thereon describes the land merely as "a certain house and lot in" a certain town, county, and state, it is fatally defective (State *v.* Jones, 68 Mo. 197), and an indictment for this offense should also contain an averment of neglect to give the information concerning the encumbrance before payment of the consideration (State *v.* Bryant, 58 N. H. 79).

In an indictment for conveying land without title, it is not essential that a copy of the deed be set forth; nor is it necessary, where the instrument purports to convey land situated in another state, to aver in the indictment in terms that the deed was in the form of a proper conveyance of land under the laws of such state; it is sufficient if it be averred in the indictment that the conveyance was by deed of general warranty. Kerr *v.* State, 36 Ohio St. 614.

95. *Maryland.*— State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366, holding that an indictment must have that degree of certainty that will fully inform accused of the special character of the charge against him, that will enable the court to determine whether the facts alleged constitute a crime, and that will protect accused against further prosecution for the same offense.

Minnesota.— State *v.* Henn, 39 Minn. 464, 40 N. W. 564.

where [96] and the time when [97] the offense was committed. It is not bad merely because ungrammatically expressed if, read as a whole, the meaning is clear;[98] and if otherwise sufficient, unnecessary repetition and redundancy will not invalidate it;[99] nor will the fact that it contains some immaterial allegations render it bad.[1]

2. LANGUAGE OF STATUTE. The indictment need not charge the offense in the language of the statute. If words of similar import are used,[2] or if the indictment describes the offense with more particularity than the statute,[3] it is sufficient. It need not charge a conclusion of law, even though the conclusion is part of the statutory definition of the offense.[4] As a general rule, where the statute creating the offense sets forth with precision and certainty all the elements

Missouri.— State *v.* Barbee, 136 Mo. 440, 37 S. W. 1119, holding that under the constitutional provision that an accused shall have the right to demand the nature and cause of the accusation, an indictment for procuring payment by a bank of overdrafts to a specified amount drawn on it by defendant, by false representations as to the ownership of a note, which avers neither the date, the amount, nor the date of maturity of the note, nor that the maker was or was represented by defendant to be solvent, nor that the overdrafts were authorized by reason of defendant's representations, nor the dates, amounts, or payees of such overdrafts, is bad for uncertainty.

New York.— People *v.* Winner, 80 Hun 130, 30 N. Y. Suppl. 54.

Oregon.— State *v.* Hanscom, 28 Oreg. 427, 43 Pac. 167, holding, however, that an indictment under Hill Annot. Laws Oreg. § 1777, making it a penal offense to obtain by false pretense a signature to a writing, the false making of which would be forgery, which alleges that defendant, by falsely representing to W that he was authorized by a corporation to draw a draft on it to W's order to procure funds to be used for the corporation, obtained W's indorsement to such a draft, without an allegation that the indorsement was for defendant's accommodation, sufficiently shows defendant what he has to meet upon trial.

Pennsylvania.— Com. *v.* Galbraith, 24 Leg. Int. 117.

See 23 Cent. Dig. tit. "False Pretenses," § 31.

96. Connor *v.* State, 29 Fla. 455, 10 So. 891, 30 Am. St. Rep. 126; State *v.* Bacon, 7 Vt. 219.

By statute in some states it is not necessary to state any venue in the body of an indictment, but the county named in the margin thereof shall be taken to be the venue for all the facts stated in the body of the same. See State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666.

Venue in general see CRIMINAL LAW.

97. State *v.* Withee, 87 Me. 462, 32 Atl. 1013.

98. Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77 (holding that the words "then and there," used in connection with allegations of false representations, delivery of an instrument, and reliance on the representations by the defrauded person, need not be referred to the place where the property was located as the nearest antecedent, although the name thereof immediately precedes such words, where, on a reading of the whole paragraph, it is plain that they refer to the time and place of the representations previously specified in the paragraph); State *v.* Burke, 108 N. C. 750, 12 S. E. 1000 (holding that where an indictment charged defendant with falsely representing a certain mule to be sound and gentle, "whereas in truth and fact mule was not," etc., the omission of the word "said" before the word "mule" was not material).

99. People *v.* Carolan, 71 Cal. 195, 12 Pac. 52; State *v.* Burke, 108 N. C. 750, 12 S. E. 1000.

1. Com. *v.* Stevenson, 127 Mass. 446; Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; State *v.* Woodward, 156 Mo. 143, 56 S. W. 880.

2. *Kentucky.*— Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338.

Louisiana.— State *v.* Lewis, 41 La. Ann. 590, 6 So. 536.

Minnesota.— State *v.* Southall, 77 Minn. 296, 79 N. W. 1007.

Nebraska.— Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

New Hampshire.— State *v.* King, 67 N. H. 219, 34 Atl. 461.

Ohio.— Tarbox *v.* State, 38 Ohio St. 581.

See 23 Cent. Dig. tit. "False Pretenses," § 31.

3. Bargie *v.* U. S., 30 Fed. Cas. No. 18,229, 2 Hayw. & H. 357.

Enlarging on statute.— An indictment charging that defendant fraudulently obtained property by means of a game, device, trick, and "other implements, instruments, and means," enlarges Mass. Gen. St. c. 161, § 57, punishing the fraudulent obtaining of property by tricks, device, cards, "or other implements or instruments," and a conviction thereon cannot be sustained under the statute. Com. *v.* Parker, 117 Mass. 112.

4. Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338 (holding that an indictment under Ky. St. § 1208, providing for the punishment of any person who shall by any false pretense obtain the signature of another to a writing "the false making whereof would be forgery," need not aver that the note was one "the false making whereof would be forgery"); State *v.* Switzer, 63 Vt. 604, 22 Atl. 274, 25 Am. St. Rep. 789.

of the offense, an indictment which charges the crime in the words of the statute is sufficient.[5] Where some intended element of the crime is omitted in the statute,[6] or where by following the language of the statute the indictment would not show *prima facie* that any crime had been committed,[7] or would not sufficiently apprise accused of the charge against him,[8] more particularity of

5. *Alabama.*— Cowles *v.* State, 50 Ala. 454; O'Connor *v.* State, 30 Ala. 9.

California.— People *v.* Frigerio, 107 Cal. 151, 40 Pac. 107; People *v.* Carolan, 71 Cal. 195, 12 Pac. 52.

Illinois.— Gregg *v.* People, 98 Ill. App. 170.

Massachusetts.— Com. *v.* Ashton, 125 Mass. 384.

Minnesota.— State *v.* Evans, 88 Minn. 262, 92 N. W. 976.

New Jersey.— State *v.* Crowley, 39 N. J. L. 264.

New York.— People *v.* Higbe, 66 Barb. 131; Fenton *v.* People, 4 Hill 126.

Washington.— State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

See 23 Cent. Dig. tit. "False Pretenses," § 31.

This rule does not mean that it is sufficient to copy the statute into the indictment. Even when a form is prescribed in the statute, it will not do simply to fill up the blanks; it must be so far extended into detail as to render the particular instance of offending certain. State *v.* Crooker, 95 Mo. 389, 8 S. W. 422; Reg. *v.* Davis, 18 U. C. Q. B. 180.

6. State *v.* Smith, 8 Blackf. 489; Maranda *v.* State, 44 Tex. 442; Hirsch *v.* State, 1 Tex. App. 393; State *v.* Hurst, 11 W. Va. 54, all holding that, although the statute does not contain the word "knowingly," it is necessary to allege that defendant knew that the pretense was false, when scienter is essential to the crime. In England an indictment was held bad on demurrer for omitting to allege that defendant "knowingly" made the pretense, although the statute did not in terms require a scienter, and although another statute provided that if the offense was alleged in the words of the statute it should be held sufficient. Reg. *v.* Henderson, C. & M. 328, 2 Moody C. C. 192, 41 E. C. L. 183. But in a later case, Reg. *v.* Bowen, 13 Q. B. 790, 3 Cox C. C. 483, 13 Jur. 1045, 19 L. J. M. C. 65, 4 N. Sess. Cas. 62, the court refused to arrest judgment after verdict on the same ground.

7. State *v.* Levi, 41 Tex. 563; Reg. *v.* Martin, 8 A. & E. 481, 2 Jur. 515, 7 L. J. M. C. 89, 3 N. & P. 472, 1 W. W. & H. 380, 35 E. C. L. 691.

8. State *v.* Jackson, 39 Conn. 229.

The same rule applies to indictments following statutory forms.— If the form provided does not sufficiently apprise accused of the charge against him, it is unconstitutional, and an indictment following it is insufficient. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017; State *v.* Levy, 119 Mo. 434, 24 S. W. 1026; State *v.* Kain, 118 Mo. 5, 23 S. W. 763; State *v.* Chapel, 117 Mo. 639, 23 S. W. 760; State *v.* Fleming, 117 Mo. 377, 22 S. W. 1024 [*overruling* State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Morgan, 112 Mo. 202, 20 S. W. 456]; State *v.* Cameron, 117 Mo. 371, 22 S. W. 1024; State *v.* Benson, 110 Mo. 18, 19 S. W. 213; State *v.* Terry, 109 Mo. 601, 19 S. W. 206 [*overruling* State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Porter, 75 Mo. 171; State *v.* Connolly, 73 Mo. 235; State *v.* Fancher, 71 Mo. 460; State *v.* Williams, 12 Mo. App. 415]; State *v.* Clay, 100 Mo. 571, 13 S. W. 827; State *v.* Crooker, 95 Mo. 389, 392, 8 S. W. 422. The form considered by the court in the above cases was that contained in Mo. Rev. St. (1889) § 3826, which provides that in an indictment for obtaining property by means of any trick, false pretense, etc., "it shall be deemed and held a sufficient description of the offence to charge that the accused did on —— unlawfully and feloniously obtain or attempt to obtain (as the case may be) from A B (here insert the name of the person defrauded) his or her money or property by means and by use of a cheat, or fraud, or trick, or deception, or false and fraudulent representation or statement, or false pretense, or confidence game, or false or bogus check, or instrument, or coin or metal, as the case may be, contrary to the form of the statutes." It was held unconstitutional as it did not require a particular description of the property obtained or of the means used to obtain it. The case of State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366, is in accord with the Missouri cases cited above, on the general principle for which those cases are cited; but whereas the former decide that a statutory form which makes no provision for setting out the false pretenses is unconstitutional as not apprising accused of the nature of the charge against him, the latter decides that under Md. Code (1888), art. 27, § 288, it is unnecessary to set out the pretenses, accused being entitled on application to a statement of the false pretenses to be given in evidence. See also Jules *v.* State, 85 Md. 305, 36 Atl. 1027. Ill. Cr. Code, § 99, providing that in prosecutions for obtaining money by a confidence game "it shall be deemed and held a sufficient description of the offense to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain, (as the case may be), from A B, (here insert the name of the person defrauded or attempted to be defrauded), his money (or property, in case it be not money), by means and by use of the confidence game," does not violate Ill. Const. art 2, § 8, providing that no person shall be held to answer for a criminal offense without an indictment, or section 9, providing that in criminal cases defendant shall be informed of the nature and cause of the accusation against him, or section 2, providing that no person shall be

statement is required. Illustrations of these rules are found in other connections in this article.[9]

3. Particular Averments — a. As to the Pretense — (i) *Enumeration and Description* **— (a)** *In General.* It is not sufficient merely to aver in the indictment that accused obtained the property by a false pretense; the pleader must go further and not only set out the pretense but set it out with such particularity as to enable the court to determine whether it is such a pretense as comes within the statute and as to apprise accused of the charge against him.[10] This requirement will be dispensed with if it is averred in the indictment that the grand jury are

deprived of liberty without due process of law. Graham *v.* People, 181 Ill. 477, 485, 55 N. E. 179, 47 L. R. A. 731; Morton *v.* People, 47 Ill. 468.

9. See *infra*, VIII, A, 3, a–e.

10. *Arkansas.*— Burrow *v.* State, 12 Ark. 65.

California.— People *v.* McKenna, 81 Cal. 158, 22 Pac. 488.

Florida.— Hamilton *v.* State, 16 Fla. 288.

Indiana.— Johnson *v.* State, 75 Ind. 553, holding that an indictment for false pretenses in procuring the payment of a claim against a county is bad, where it does not accurately describe the warrant or order held by accused, or state to whom it was made payable, or the amount.

Missouri.— State *v.* Pickett, 174 Mo. 663, 74 S. W. 844; State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017; State *v.* Levy, 119 Mo. 434, 24 S. W. 1024; State *v.* Kain, 118 Mo. 5, 23 S. W. 763; State *v.* Chapel, 117 Mo. 639, 23 S. W. 760; State *v.* Fleming, 117 Mo. 377, 22 S. W. 1024 [*overruling* State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Morgan, 112 Mo. 202, 20 S. W. 456]; State *v.* Cameron, 117 Mo. 371, 22 S. W. 1024; State *v.* Benson, 110 Mo. 18, 19 S. W. 213; State *v.* Terry, 109 Mo. 601, 19 S. W. 206 [*overruling* State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Porter, 75 Mo. 171; State *v.* Connolly, 73 Mo. 235; State *v.* Fancher, 71 Mo. 460; State *v.* Williams, 12 Mo. App. 415]; State *v.* Clay, 100 Mo. 571, 13 S. W. 827; State *v.* Crooker, 95 Mo. 389, 8 S. W. 422; State *v.* Chunn, 19 Mo. 233, holding that it is not sufficient for an indictment to charge an obtaining of money "by color of a false pretense," since the word "color" mentioned in the statute applies to the words "false token" or writing and not to the following clause relating to false pretenses.

New York.— People *v.* Laurence, 66 Hun 574, 21 N. Y. Suppl. 818 (holding that an indictment for larceny committed by means of false pretenses and representations is insufficient where the pretenses and representations alleged therein are in the nature only of promises or agreements which relate wholly to future actions and events); People *v.* Gates, 13 Wend. 311; Skiff *v.* People, 2 Park. Cr. 139.

Pennsylvania.— Com. *v.* Frey, 50 Pa. St. 245; Com. *v.* Galbraith, 24 Leg. Int. 117.

Texas.— State *v.* Dyer, 41 Tex. 520 (holding that an indictment in form for falsely representing an instrument of writing, in form a promissory note, to be a draft, and thereby obtaining money for it, is not sufficient; that the indictment should disclose in what particular the instrument was defective; and that the name of the instrument, if valid, is immaterial); Mathena *v.* State, 15 Tex. App. 473.

United States.— U. S. *v.* Hess, 124 U. S. 483, 8 S. Ct. 571, 31 L. ed. 516; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

England.— Reg. *v.* Hazelton, L. R. 2 C. C. 134, 13 Cox C. C. 1, 44 L. J. M. C. 11, 31 L. T. Rep. N. S. 451, 23 Wkly. Rep. 139 (holding that passing a check is not a representation that the person passing it has at the time money in the bank on which it is drawn equal to the amount of the check, for it may be he has authority from the bank to overdraw his account, and hence the indictment should not allege this to be the representation, but should allege that the check was a valid order for the payment of the sum mentioned in the check); Reg. *v.* Henshaw, 9 Cox C. C. 472, 10 Jur. N. S. 595, L. & C. 444, 33 L. J. M. C. 132, 10 L. T. Rep. N. S. 428, 12 Wkly. Rep. 751 (holding that an indictment alleging that the prisoner pretended to A's representative that she was to give him twenty shillings for B, and that A was going to allow B sixteen shillings per week, does not sufficiently show that there was any false pretense of an existing fact); Rex *v.* Munoz, 2 East P. C. 837, 1 Leach C. C. 487, 2 T. R. 581, 1 Rev. Rep. 545; Rex *v.* Munez, 2 East P. C. 827, 7 Mod. 315, 2 Str. 1127.

Canada.— Reg. *v.* Patterson, 26 Ont. 656; Reg. *v.* Davis, 18 U. C. Q. B. 180.

See 23 Cent. Dig. tit. "False Pretenses," § 34 *et seq.*

Contra.— Jules *v.* State, 85 Md. 305, 36 Atl. 1027; State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366, by statute.

Although in some states obtaining by false pretense is larceny, the better opinion is that it is still necessary, in order to convict accused of larceny by false pretenses, to set out the pretenses used. State *v.* Henn, 39 Minn. 464, 40 N. W. 564; People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325; Marshall *v.* State, 31 Tex. 471; Warrington *v.* State, 1 Tex. App. 168. *Contra*, Anable *v.* Com., 24 Gratt. (Va.) 563; Leftwich *v.* Com., 20 Gratt. (Va.) 716.

Indictments held sufficient.— In a charge that the crime was accomplished "by the making of false statements and representa-

unable to give a more particular description of the pretense,[11] unless such description could have been given by the exercise of ordinary diligence.[12] It is not necessary to describe the false token or pretense with greater particularity than the description employed by accused at the time he used it, if as so described it appears to be within the statute;[13] and it is not necessary that the very words of the pretense be set out; it is sufficient to state the effect of the pretense correctly; hence the indictment need not allege whether the pretense was spoken or written.[14] If the pretense is described more minutely than is necessary, such description is part of the indictment and cannot be treated as surplusage.[15]

(B) *Where Pretense Is in Writing.* When the false pretense is in writing or

tions," the quoted words are synonymous with the statutory words "by false pretenses" obtaining, etc. State *v.* Grant, 86 Iowa 216, 53 N. W. 120. Where the false pretense alleged was pointing out to a purchaser valuable property as that sold him by defendant, and in fact conveying to him other property which was valueless, an averment that the property pointed out was in the city of D, and was lot one, block two, of Van's addition, was held to be a sufficient description. State *v.* McConkey, 49 Iowa 499. The fact that some of the representations alleged in an indictment are mere promises does not vitiate the indictment if it also contains allegations of other representations which do amount to false pretenses, but the false promise may be treated as surplusage or as mere inducement to the allegations which charge the false representations that in law are false pretenses. State *v.* Vorback, 66 Mo. 168. Where the acts of defendant are properly described as "false pretenses," further describing them as "inducements" and "sayings" does not render the indictment defective. State *v.* Switzer, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789. An indictment alleging that accused did falsely pretend that a paper partly in print and partly in writing, produced by her to the prosecutor and purporting to be a bank-note for the payment of five pounds to the bearer, was then a good, genuine, and available order for the payment of five pounds and was then of the value of five pounds, by means of which false pretense accused did unlawfully attempt to obtain a sewing machine, although inartificially framed, sufficiently alleges that accused falsely represented the note to be a good and genuine note of an existing bank and of the value of five pounds. Reg. *v.* Jarman, 14 Cox C. C. 111, 38 L. T. Rep. N. S. 460. See also Oxx *v.* State, 59 N. J. L. 99, 35 Atl. 646.

An indictment for cheating must set out the means employed. State *v.* Roberts, 34 Me. 320; State *v.* Johnson, 1 D. Chipm. (Vt.) 129. However, an indictment for cheating by false weights which avers that defendant kept in his warehouse "certain false weights for the weighing of grain" and used the same "by artful and deceitful contrivances" to defraud certain persons sufficiently describes the manner of cheating. People *v.* Fish, 4 Park. Cr. (N. Y.) 206.

False token.— When the indictment is for obtaining property by use of a false token, the indictment must set forth the token used. Lambert *v.* People, 9 Cow. (N. Y.) 578. But it need not set out the specific currency — e. g. whether Spanish or Mexican — to which a coin intended to be counterfeited belonged. State *v.* Boon, 49 N. C. 463.

Games and tricks.— An averment that the property was obtained "by use of the confidence game" sufficiently describes the pretense. Graham *v.* People, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; Maxwell *v.* People, 158 Ill. 248, 41 N. E. 995; Morton *v.* People, 47 Ill. 468. But an indictment for obtaining by a trick (State *v.* Pickett, 174 Mo. 663, 74 S. W. 844) or a trick game (*In re* Trick Game, 5 Ohio S. & C. Pl. Dec. 572, 7 Ohio N. P. 604) which fails to specify the kind of trick game practised is defective.

Selling note.— An indictment under Ind. Rev. St. (1881) § 2204, providing that "whoever sells, . . . any . . . promissory note, . . . knowing the signature of the maker thereof to have been obtained by any false pretence,— shall be imprisoned in the State prison," need not charge that the false pretenses were of themselves sufficient to constitute a crime under the statute. State *v.* Adams, 92 Ind. 116, 118. In an indictment for unlawfully offering to sell promissory notes the signatures to which had been procured by false pretenses, it is not necessary to allege that the notes are of any value, where a copy of them is set forth. Umbenhauer *v.* State, 4 Ohio Cir. Ct. 378, 2 Ohio Cir. Dec. 606.

Attempt.—An indictment for attempt must allege that the attempt was by false pretense, or that the cheat was of a public nature. Reg. *v.* Marsh, 3 Cox C. C. 570, 1 Den. C. C. 505, 13 Jur. 1010, 19 L. J. M. C. 12, 3 N. Sess. Cas. 699, T. & M. 192.

Necessity of describing means of obtaining property see also *supra*, note 8.

11. Com. *v.* Ashton, 125 Mass. 384; State *v.* Gray, 29 Minn. 142, 12 N. W. 455.

12. State *v.* Stowe, 132 Mo. 199, 33 S. W. 799.

13. People *v.* Nesbitt, 102 Cal. 327, 36 Pac. 654; Waterman *v.* State, 114 Ga. 262, 40 S. E. 262; State *v.* Call, 48 N. H. 126; Young *v.* Rex, 2 East P. C. 833, 1 Leach. C. C. 505, 3 T. R. 98, 1 Rev. Rep. 660.

14. Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91.

15. Cowan *v.* State, 41 Tex. Cr. 617, 56 S. W. 751.

consists wholly or in part in the use of a written instrument, the writing need not be set out *in haec verba*, it is sufficient, as in the case of a verbal pretense, to set out the purport of it,[16] unless some question turns on the form or construction of the instrument, or some legal description of it is given in the indictment, the accuracy of which it may be material for the court to determine.[17]

(c) *Where Several Pretenses Were Employed.* The indictment need not aver all the pretenses used; it is sufficient if it alleges one pretense which was an inducing cause of the imposition.[18]

(d) *Where Indictment Is For Attempt.* An indictment for an attempt to obtain property by false pretense must show the means the accused proposed to use to obtain the property.[19]

(ii) *By and To Whom Made, and Who Injured.* An indictment for obtaining property by false pretense must allege specifically that defendant made the pretense in question,[20] and state to whom the pretense was made,[21] and who

16. *Indiana.*— Wilson *v.* State, 156 Ind. 631, 59 N. E. 380, 60 N. E. 1086 (holding that under Burns Rev. St. Ind. (1894) § 1820, providing that in an indictment a description of an instrument by any name or description by which it is usually known or by the purport thereof shall be sufficient, an indictment for making, verifying, and presenting to a board of commissioners a false and fraudulent claim against a county is not defective because the claim presented is not set out); State *v.* Layman, 8 Blackf. 330 (holding that where the false pretense is that defendant represented that all the bank-bills of a certain bank, some of which he gave prosecutor in payment of property, were good, and the indictment avers that the bank was insolvent and all its bills were worthless, it is not necessary to describe the particular bills given by defendant, since it is not a question of the identity and genuineness of particular bills but of the value of the bills of a particular bank).

Iowa.— State *v.* Cadwell, 79 Iowa 473, 44 N. W. 711.

Kansas.— State *v.* Baker, 57 Kan. 541, 46 Pac. 947.

New York.— Shotwell's Case, 4 City Hall Rec. 75.

United States.— Bargie *v.* U. S., 30 Fed. Cas. No. 18,229, 2 Hayw. & H. 357.

England.—Reg. *v.* Coulson, 4 Cox C. C. 227, 1 Den. C. C. 592, 14 Jur. 557, 19 L. J. M. C. 182, T. & M. 332; Reg. *v.* Brown, 2 Cox C. C. 348.

See 23 Cent. Dig. tit. "False Pretenses," § 34 *et seq.*

17. Ferguson *v.* State, 25 Tex. App. 451, 8 S. W. 479; Hardin *v.* State, 25 Tex. App. 74, 7 S. W. 534; Dwyer *v.* State, 24 Tex. App. 132, 5 S. W. 662; White *v.* State, 3 Tex. App. 605; State *v.* Green, 7 Wis. 676. See also Moore *v.* People, 190 Ill. 331, 60 N. E. 535; Reg. *v.* Wickham, 10 A. & E. 34, 8 L. J. M. C. 87, 2 P. & D. 333, 37 E. C. L. 43. The rule is correctly stated in White *v.* State, *supra*, but in the other Texas cases cited the rule is expressed more broadly — that when the writing "enters into the offense as a part or basis thereof" it must be set out *in haec verba*; and in Dwyer *v.* State, *supra*, the court gives as the reason for setting out the writing *in haec verba* that "the indictment must set out the words used by the accused . . . whence it follows that, if in writing, the words and figures therein . . must be set out." This is incorrect in premise.

18. Moore *v.* People, 190 Ill. 331, 60 N. E. 535; Cowen *v.* People, 14 Ill. 348; People *v.* Peckens, 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160 [*affirmed* in 153 N. Y. 576, 47 N. E. 883].

Accidental circumstances which in conjunction with the false pretense influenced the delivery of the property need not be set out in the indictment. People *v.* Dalton, 2 Wheel. Cr. (N. Y.) 161; Steel's Case, 5 City Hall Rec. (N. Y.) 5. See also State *v.* Dorr, 33 Me. 498, where an indictment for obtaining a horse by a false pretense that the mare which defendant exchanged therefor was his own and unencumbered failed to allege that the mare was of any value, and it was held that this was not a sufficient ground for an arrest of judgment.

19. *In re* Schurman, 40 Kan. 533, 20 Pac. 277. However, an allegation in an indictment for an attempt to obtain money by representing to a bank that defendant was the owner of a certificate of deposit issued by the bank, that defendant pretended he was the owner of such deposit, and that by means of such false pretense he sought to obtain the value thereof is sufficient without an allegation that the certificate was in his possession. State *v.* Riddell, 33 Wash. 324, 74 Pac. 477.

20. Dwyer *v.* State, 24 Tex. App. 132, 5 S. W. 662.

While if two persons acting in concert obtained property by false pretenses, both are equally guilty, yet the indictment must allege which, if only one, made the false pretenses. Kirtley *v.* State, 38 Ark. 543. However, an allegation in an indictment against two defendants that defendants made the false pretenses is a sufficient allegation that each of them made the false representations. People *v.* Jefferey, 82 Hun (N. Y.) 409, 31 N. Y. Suppl. 267.

21. *In re* Schurman, 40 Kan. 533, 20 Pac. 277; State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017; Colbert *v.* State, 1 Tex. App. 314.

was defrauded thereby,[22] unless his name is unknown.[23] It is sufficient to allege that the pretense was made to or that the person defrauded was a corporation, either private[24] or municipal,[25] a firm,[26] or, where the pretense was by advertisement, the public generally.[27] If the false pretenses are not made to the person from whom the goods are obtained, the indictment must show the relation between them so that it may appear how the pretenses could have caused the injury.[28]

(III) *FALSITY.* The indictment must negative by special averment the truth of the pretense alleged.[29] Where, however, several pretenses are alleged, they

However, an indictment for false representations to a firm alleged to be composed of H and others named which alleges that the representations were made to H is not demurrable on the ground that it is not alleged that H was a member or employee of the firm, as it will be presumed on demurrer that the names alleged describe the same person. Woods *v.* State, 133 Ala. 162, 31 So. 984. And where the indictment states that the representations were made to a certain person, and that he was the owner of the money obtained, and the owner of the J. Co. bank, it sufficiently shows that the bank was an individual. Faulk *v.* State, 38 Tex. Cr. 77, 41 S. W. 616.

Attempt.— See Reg. *v.* Sowerby, [1894] 2 Q. B. 173, 17 Cox C. C. 767, 58 J. P. 577, 63 L. J. M. C. 136, 71 L. T. Rep. N. S. 300, 10 Reports 233, 42 Wkly. Rep. 608.

22. Dorsey *v.* State, 111 Ala. 40, 20 So. 629; State *v.* Horn, 93 Mo. 190, 6 S. W. 96; State *v.* McChesney, 90 Mo. 120, 1 S. W. 841 [*overruling* State *v.* Myers, 82 Mo. 558, 52 Am. Rep. 389] (the last two cases decided under Mo. Rev. St. § 1561); Jacobs *v.* State, 31 Nebr. 33, 47 N. W. 422.

Statutes 14 & 15 Vict. c. 100, make it unnecessary to specify the individual defrauded. Sill *v.* Reg., Dears. C. C. 132, 1 E. & B. 553, 17 Jur. 207, 22 L. J. M. C. 41, 1 Wkly. Rep. 147, 72 E. C. L. 553.

When goods are obtained from agent with authority to sell, the indictment may allege the agent as the person defrauded. Com. *v.* Blanchette, 157 Mass. 486, 32 N. E. 658. So where money belonging jointly to A, B, and C is obtained from the hand of A as the agent of B and C, the indictment properly lays it as obtained from A. Reg. *v.* Dent, 1 C. & K. 249, 47 E. C. L. 249.

Where the name of the person defrauded is not that of an individual, but such as might be applied to a corporation, partnership, or joint-stock association, it is necessary to state whether it is a corporation, partnership, or joint-stock association. State *v.* Horn, 93 Mo. 190, 6 S. W. 96 ("certain persons, firms and corporations, then and there composing a voluntary association known as the 'Brewers' Association of St. Louis and East St. Louis"); State *v.* McChesney, 90 Mo. 120, 1 S. W. 841; Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698 ("First National Bank of G").

The rule in indictments for cheating and swindling is the same; the indictment must specify the person cheated. People *v.* Fish, 4 Park. Cr. (N. Y.) 206 (indictment for defrauding by false weights); State *v.* Woodson, 5 Humphr. (Tenn.) 55 (indictment for selling goods by false weights); Burd *v.* State, 39 Tex. 509 (indictment for swindling).

23. People *v.* Fish, 4 Park. Cr. (N. Y.) 206.

24. State *v.* Hulder, 78 Minn. 524, 81 N. W. 532; State *v.* Turley, 142 Mo. 403, 44 S. W. 267, holding that an indictment for making false pretenses to a corporation need not allege that the representations were made to any person connected with the corporation. However, an indictment which charges that defendant obtained money from one bank by falsely representing that he had money in another bank is not defective in failing to allege that the latter was incorporated. Brown *v.* State, (Tex. Cr. App. 1898) 43 S. W. 986.

25. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630 (county); Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91 (holding that an indictment need not state the names of city officers through whose hands the false representations had to go for approval before reaching the city treasurer, from whom the property was obtained; nor need it allege any representations made to the treasurer); People *v.* Court Oyer & Terminer New York County, 83 N. Y. 436 (holding that an indictment for obtaining the signature of a mayor is sufficient if it alleges that the false pretenses were made to the mayor, without averring the channels by which the representations reached him).

26. State *v.* Williams, 103 Ind. 235, 2 N. E. 585 (by statute); Com. *v.* Harley, 7 Metc. (Mass.) 462; Com. *v.* Call, 21 Pick. (Mass.) 515; Stoughton *v.* State, 2 Ohio St. 562 (all holding that it is sufficient to allege that the false pretenses were made to a partnership by its firm-name).

27. Reg. *v.* Silverlock, [1894] 2 Q. B. 766, 18 Cox C. C. 104, 58 J. P. 788, 63 L. J. M. C. 233, 72 L. T. Rep. N. S. 298, 10 Reports 431, 43 Wkly. Rep. 14.

28. People *v.* Behee, 90 Mich. 356, 51 N. W. 515; Owens *v.* State, 83 Wis. 496, 53 N. W. 736; Reg. *v.* Tully, 9 C. & P. 227, 38 E. C. L. 142. However, the allegation, in an information for obtaining money for a charity under false pretenses that the person to whom the false representations were made was a member of the copartnership of which the money was fraudulently obtained is sufficient to show the agency and authority to give in charity. People *v.* Fitzgerald, 92 Mich. 328, 52 N. W. 726.

29. *Florida.*— Hamilton *v.* State, 16 Fla. 288.

need not all be negatived; as only one need be proved to convict, so only the one relied on for conviction need be negatived.[30] To allege that defendant "falsely" represented,[31] or that "by such false and fraudulent pretense" he acquired the property,[32] or that he knew that the pretenses were false,[33] is not a sufficient negative of the truth of the pretenses. So negations which are in the nature of negatives pregnant and admit an implication which destroys or renders immaterial the effect of the pretenses charged are insufficient.[34] When necessary to

Indiana.— Campbell *v.* State, 154 Ind. 309, 56 N. E. 665; Funk *v.* State, 149 Ind. 338, 49 N. E. 266; Pattee *v.* State, 109 Ind. 545, 10 N. E. 421; State *v.* Smith, 8 Blackf. 489, holding that an indictment which charged the false pretense to be that R and six other persons owed defendant three thousand dollars and which in negativing the pretense alleged that R and five other persons did not owe defendant three thousand dollars is insufficient.

Kansas.— State *v.* Crane, 54 Kan. 251, 38 Pac. 270; State *v.* Metsch, 37 Kan. 222, 15 Pac. 251.

Mississippi.— State *v.* Mortimer, 82 Miss. 443, 34 So. 214; Smith *v.* State, 55 Miss. 513.

Missouri.— State *v.* Bradley, 68 Mo. 140; State *v.* Peacock, 31 Mo 413.

New Jersey.— State *v.* Riley, 65 N. J. L. 624, 48 Atl. 536. See, however, Oxx *v.* State, 59 N. J. L. 99, 35 Atl. 646, where the indictment was sustained.

New York.— People *v.* Winner, 80 Hun 130, 30 N. Y. Suppl. 54; People *v.* Hart, 35 Misc. 182, 71 N. Y. Suppl. 492, 15 N. Y. Cr. 483; People *v.* Gates, 13 Wend. 311; People *v.* Haynes, 11 Wend. 557; People *v.* Stone, 9 Wend. 182; Conger's Case, 1 Wheel. Cr. 448, 4 City Hall Rec. 65.

Ohio.— Winnett *v.* State, 18 Ohio Cir. Ct. 515, 2 Ohio Cir. Dec. 245.

Pennsylvania.— Com. *v.* Adley, 1 Pearson 62; Com. *v.* Galbraith, 24 Leg. Int. 117. *Contra*, Com. *v.* Rosenberg, 1 Pa. Co. Ct. 273, on the ground that an indictment that charges the offense in the language of the statute is sufficient.

Tennessee.— Amos *v.* State, 10 Humphr. 117.

United States.— U. S. *v.* Post, 113 Fed. 852.

See 23 Cent. Dig. tit. "False Pretenses," § 37.

See, however, Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034, where the indictment was held to be sufficient.

In Texas an averment of the falsity of the pretense is dispensed with by statute. Arnold *v.* State, 11 Tex. App. 472.

When the pretense alleged is that accused had power to do a certain thing, the indictment must deny possession of the power, and the belief of the accused in his power and the intent to use the power. U. S. *v.* Post, 113 Fed. 852.

In negativing it is not essential to aver in express terms that the pretenses were "false." Britt *v.* State, 9 Humphr. (Tenn.) 31. It is sufficient to allege that defendant "unlawfully, knowingly and designedly pretended," then denying the pretense to be true. Rex *v.* Airey, 2 East 30, 2 East P. C. 831.

Presenting fraudulent claims.— An indictment charging defendants with making a fraudulent account against a certain city, with certifying to a fraudulent bill, with presentation of a fraudulent bill, with unlawfully making out and presenting a fraudulent bill, and with receiving payment upon a false and fraudulent bill, sufficiently charges an offense, under Ohio Rev. St. § 7075, making it an offense to make and present fraudulent claims to public officers, although there is no averment that defendants falsely pretended that the city was indebted to them, or averments showing in what respect the claim was false and fraudulent. Davis *v.* State, 20 Ohio Cir. Ct. 430, 10 Ohio Cir. Dec. 738.

30. Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; Com. *v.* Stevenson, 127 Mass. 446; Com. *v.* Morrill, 8 Cush. (Mass.) 571; Cunningham *v.* State, 61 N. J. L. 666, 40 Atl. 696; People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; Bielschofsky *v.* People, 3 Hun (N. Y.) 40 [*affirming* 5 Thomps. & C. 277]; People *v.* Higbie, 66 Barb. (N. Y.) 131; Skiff *v.* People, 2 Park. Cr. (N. Y.) 139; Brown *v.* State, (Tex. Cr. App. 1893) 22 S. W. 22. Where, however, several pretenses are charged, and the truth of some of them is not properly negatived, and a general verdict of guilty is rendered, the judgment will be reversed. Reg. *v.* Weckham, 10 A. & E. 34, 8 L. J. M. C. 87, 2 P. & D. 333, 37 E. C. L. 43.

31. *Kentucky.*— Com. *v.* Sanders, 98 Ky. 12, 32 S. W. 129, 17 Ky. L. Rep. 544.

Michigan.— People *v.* Behee, 90 Mich. 356, 51 N. W. 515.

Missouri.— State *v.* Bradley, 68 Mo. 140.

Pennsylvania.— Com. *v.* Adley, 1 Pearson 62.

England.— Reg. *v.* Kelleher, 14 Cox C. C. 48; Rex *v.* Perrott, 2 M. & S. 379, 15 Rev. Rep. 280.

See 23 Cent. Dig. tit. "False Pretenses," § 37.

32. State *v.* Levi, 41 Tex. 563.

33. People *v.* Reynolds, 71 Mich. 343, 38 N. W. 923; State *v.* Pickett, 78 N. C. 458. See, however, Com. *v.* Scroggin, 60 S. W. 528, 22 Ky. L. Rep. 1338.

34. People *v.* Griffith, 122 Cal. 212, 54 Pac. 725 (holding that an indictment for obtaining money by false representations charging that defendant represented that he was the owner of and in possession of certain land, and by reason of such ownership and possession had full authority to let the same, and

apprise defendant of the evidence he must meet, the negation of the truth of the pretense must allege affirmatively in what the falsehood consisted.[35]

that at the time defendant made such representations he was not the owner of and in possession of such land and had no authority to let the same, etc., is insufficient, as it does not deny that defendant owned the land in question, or that he was in possession thereof, but avers that he was not the owner "and" in possession); State *v.* Murphy, 68 N. J. L. 235, 52 Atl. 279; Cunningham *v.* State, 61 N. J. L. 666, 40 Atl. 696; State *v.* Trisler, 49 Ohio St. 583, 31 N. E. 881 (holding that an indictment charging defendant with falsely representing that he was the owner of several parcels of land does not sufficiently negative the truth thereof by an allegation that defendant "was not then and there the owner of all of said real estate," since defendant might have been owner of all save an insignificant parcel of the land); Redmond *v.* State, 35 Ohio St. 81 (holding that an indictment for obtaining goods by false pretenses must negative the substantial truth, and not merely the literal truth, of the representations as a means whereby accused obtained the credit); Dillingham *v.* State, 5 Ohio St. 280 (holding that an averment that defendant obtained the signature to a note for four hundred dollars by the pretense that he was engaged in an extensive spoke manufacturing business is not sufficiently negatived by an averment that he was "not engaged in an extensive spoke manufacturing business," since it only denies that the business was extensive, and a man might be good for four hundred dollars without having an extensive business).

Negations held to be sufficient see the following cases:

Indiana.— Merrill *v.* State, 156 Ind. 99, 59 N. E. 322, holding that an indictment which states that defendant sold a piano by representing that it was second-hand and that he had purchased it for two hundred and fifty dollars, which was less than it was worth, and that defendant was not in fact the owner of the piano and had never owned it, is not insufficient in failing to specifically deny that defendant purchased the piano for two hundred and fifty dollars, since the allegation that he was not and had never been the owner was a sufficient denial thereof.

Iowa.— State *v.* Tripp, 113 Iowa 698, 84 N. W. 546.

Michigan.— People *v.* Fitzgerald, 92 Mich. 328, 52 N. W. 726.

Minnesota.— State *v.* Hulder, 78 Minn. 524, 81 N. W. 532, holding that a representation that defendant had suffered a certain injury is sufficiently negatived by an averment that he "had not at any time received any injury whatever."

Ohio.— Matter of Fitzpatrick, 21 Ohio Cir. Ct. 519, 11 Ohio Cir. Dec. 695.

Pennsylvania.— Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353.

Tennessee.— Tyler *v.* State, 2 Humphr. 37, 36 Am. Dec. 293.

Vermont.— State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789, holding that where the false pretense alleged is that defendant represented that six men named had agreed to furnish him money to pay his debts, it is not necessary in negativing the representation to allege that no one of the six would furnish the money, for if all had not made the agreement the pretense was false even if one or all of them would furnish the money, since the crime does not depend on whether prosecutor would suffer loss.

See 23 Cent. Dig. tit. "False Pretenses," § 37.

35. State *v.* Trisler, 49 Ohio St. 583, 31 N. E. 881 (holding that an indictment charging defendant with falsely representing that he did not owe any one, which alleges that defendant "did owe and was indebted to divers persons to the amount of one thousand dollars," without naming the persons to whom he was indebted, is too indefinite); Wills *v.* State, 24 Tex. App. 400, 6 S. W. 316 (holding that an indictment was fatally defective which charged swindling by means of an invalid and spurious note which defendant represented to be valid and genuine, knowing the contrary, and which set out the note, apparently valid on its face, *in haec verba*, but did not allege the facts which rendered it worthless); Reg. *v.* Wickham, 10 A. & E. 34, 8 L. J. M. C. 87, 2 P. & D. 333, 37 E. C. L. 43 (where an indictment charged the false pretense as being a representation that a promissory note delivered by defendant was a good and valuable security, and negatived the representation merely by stating that the note "was not a good and valuable security for the sum of 21 pounds or for any other sum," and it was held that the negation was defective in not stating in what respect the note was not valuable).

Representations as to ownership or encumbrances.— In an indictment for obtaining property by false pretenses, where it is charged as a part of the false pretenses that certain real estate was falsely represented to be free from prior encumbrances, the prior encumbrances should be set out or described. Keller *v.* State, 51 Ind. 111; People *v.* Winner, 80 Hun (N. Y.) 130, 30 N. Y. Suppl. 54. So an indictment is bad which charges a defendant with obtaining property by falsely pretending to be the unqualified owner of certain horses exchanged therefor, when such horses were in fact encumbered by mortgage, but fails to state the parties to the mortgage, or its date or amount, or the county where recorded, or whether possession was delivered to the mortgagee and retained by him, or whether the mortgage was recorded. State *v.* Stowe, 132 Mo. 199, 33 S. W. 799. But a general averment that the pretense was false will be deemed sufficient after verdict. State *v.* Luxton, 65 N. J. L. 605, 46 Atl. 1101, 48 Atl. 535. And an indictment for obtaining money by a mortgage on a par-

(IV) *EFFECTIVENESS.* The indictment must show that the property was obtained by means of the false pretense alleged.[36] Accordingly when there appears to be no natural connection between the pretense and the delivery of the property, such additional facts as are necessary to show the relation must be alleged.[37] A defect in the indictment arising from failure to show the con-

ticular lot of cattle which defendant did not own, by means of false representations as to the ownership thereof, is not defective in failing to allege that defendant had no other cattle on which he gave the mortgage, nor that the money loaned was not secured by other cattle. Moore *v.* People, 190 Ill. 331, 60 N. E. 535.

Selling unsound animal.— An allegation that the false pretense was that defendant said a horse which he traded to prosecutor "was all right," whereas in truth it was not all right, but diseased to such an extent as to render it worthless, is not a sufficient negativing; the indictment should allege in what respects the horse was not all right. State *v.* Lambeth, 80 N. C. 393. *Contra*, Waterman *v.* State, 114 Ga. 262, 40 S. E. 262.

36. *Alabama.*— Tennyson *v.* State, 97 Ala. 78, 12 So. 391.

Florida.— Jones *v.* State, 22 Fla. 532.

Georgia.— Jackson *v.* State, 118 Ga. 125, 44 S. E. 833.

Indiana.— State *v.* Connor, 110 Ind. 469, 11 N. E. 454; Abbott *v.* State, 59 Ind. 70.

Mississippi.— State *v.* Mortimer, 82 Miss. 443, 34 So. 214.

Missouri.— State *v.* Pickett, 174 Mo. 663, 74 S. W. 844; State *v.* Saunders, 63 Mo. 482; State *v.* Evers, 49 Mo. 542.

Texas.— Cummings *v.* State, 36 Tex. Cr. 152, 36 S. W. 266; Nasets *v.* State, (Cr. App. 1895) 32 S. W. 698; Hightower *v.* State, 23 Tex. App. 451, 5 S. W. 343; Mathena *v.* State, 15 Tex. App. 473; White *v.* State, 3 Tex. App. 605.

Wisconsin.— State *v.* Green, 7 Wis. 676.

See 23 Cent. Dig. tit. "False Pretenses," § 38 *et seq.*

An allegation of a false promise as well as of a false pretense will not invalidate the indictment; it will be for the jury to say whether the prosecutor would have parted with his goods without the pretense. Com. *v.* Wallace, 114 Pa. St. 405, 6 Atl. 685, 60 Am. Rep. 353. See also State *v.* Dowe, 27 Iowa 273, 1 Am. Rep. 271.

Swindling.— Under the Texas act of 1881, prescribing "the requisites of indictments in certain cases," the indictment in a prosecution for swindling must allege that accused obtained the property by means of the false representations; an averment that the person swindled believed the false pretense and by reason thereof parted with his property is not sufficient. Ervin *v.* State, 11 Tex. App. 536. Nor is this requisite fulfilled by averring in the conclusion of the indictment that the owner was swindled out of property by means of such fraudulent representations. Epperson *v.* State, 42 Tex. 79.

37. *Alabama.*— Jenkins *v.* State, 97 Ala. 66, 12 So. 110.

Florida.— Jones *v.* State, 22 Fla. 532 (holding that an indictment against a person for falsely representing himself to one C to be K, and thereby obtaining money from C, should show the relations existing between C and K, so as to show upon what ground K had a right to demand of and receive the money from C); Pendry *v.* State, 18 Fla. 191; Ladd *v.* State, 17 Fla. 215.

Indiana.— Campbell *v.* State, 154 Ind. 309, 56 N. E. 665; State *v.* Williams, 103 Ind. 235, 2 N. E. 585; Wagoner *v.* State, 90 Ind. 504; Cooke *v.* State, 83 Ind. 402; Jones *v.* State, 50 Ind. 473; State *v.* Orvis, 13 Ind. 569; Johnson *v.* State, 11 Ind. 481.

Maine.— State *v.* Philbrick, 31 Me. 401.

Massachusetts.— Com. *v.* Dunleay, 153 Mass. 330, 26 N. E. 870; Com. *v.* Goddard, 4 Allen 312; Com. *v.* Strain, 10 Metc. 521.

Michigan.— People *v.* Brown, 71 Mich. 296, 38 N. W. 916; People *v.* McAllister, 49 Mich. 12, 12 N. W. 891; Enders *v.* People, 20 Mich. 233.

Mississippi.— Denley *v.* State, (1893) 12 So. 698.

Missouri.— State *v.* Clay, 100 Mo. 571, 13 S. W. 827; State *v.* Bonnell, 46 Mo. 395.

Nebraska.— Moline *v.* State, (1903) 93 N. W. 228; Jacobs *v.* State, 31 Nebr. 33, 47 N. W. 422.

New Jersey.— Roper *v.* State, 58 N. J. L. 420, 33 Atl. 969.

New York.— Conger's Case, 1 Wheel. Cr. 448, 4 City Hall Rec. 65.

North Carolina.— State *v.* Fitzgerald, 18 N. C. 408. See also State *v.* Dickson, 88 N. C. 643.

Ohio.— Redmond *v.* State, 35 Ohio St. 81.

Texas.— State *v.* Baggerly, 21 Tex. 757; Hurst *v.* State, 39 Tex. Cr. 196, 45 S. W. 573; Peckham *v.* State, (Cr. App. 1894) 28 S. W. 532; Lutton *v.* State, 14 Tex. App. 518.

Washington.— See State *v.* Bokien, 14 Wash. 403, 44 Pac. 889.

Wisconsin.— Owens *v.* State, 83 Wis. 496, 53 N. W. 736.

England.— See Reg. *v.* Fray, 7 Cox C. C. 394, Dears. & B. 449, 4 Jur. N. S. 266, 27 L. J. M. C. 68, 6 Wkly. Rep. 245.

See 23 Cent. Dig. tit. "False Pretenses," § 38 *et seq.*

Procuring sale by false pretenses.— It is sometimes necessary under this rule, when the goods are obtained under a contract of sale or exchange, to aver in terms that prosecutor was induced to sell or exchange and did sell or exchange the property. State *v.* Miller, 153 Ind. 229, 54 N. E. 808; State *v.* Williams, 103 Ind. 235, 2 N. E. 585; Cooke *v.* State, 83 Ind. 402; Com. *v.* Strain, 10 Metc. (Mass.) 521. But when the indictment contains other averments showing the connection between the pretense and the obtaining, this specific

nection between the false pretense and the obtaining is a material one and is not cured by verdict.[38] However, no particular form of words is necessary; an allegation that "by means of the false pretense," or "relying on the false pretense," or the like, is sufficient where it is apparent that the delivery of the property was the natural result of the pretense alleged.[39] The same general rules apply when the false pretense used is a token; the indictment must show that it was by means of the falseness of the token that accused was able to perpetrate the

averment is not essential. State *v.* Jordan, 34 La. Ann. 1219; Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; State *v.* Bokien, 14 Wash. 403, 44 Pac. 889; Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8. *Contra,* State *v.* Philbrick, 31 Me. 401. And see State *v.* Williams, *supra,* where the allegation was that for the purpose of obtaining "credit" certain false representations were made, and that by means thereof defendant did then and there obtain from prosecutor "on credit certain goods," etc., and it was held that the indictment should have shown whether the goods were obtained as a result of negotiations for a purchase, loan, or exchange. An indictment for obtaining property by false pretenses which alleges that defendant, intending to cheat and defraud A, made to him certain false representations respecting a horse, which A believed, and being deceived thereby was induced to purchase and receive of defendant the horse, and gave and delivered to defendant certain property in payment therefor, does not sufficiently set forth that A purchased the horse respecting which the false representations were made, or parted with his property by reason thereof. Com. *v.* Lannan, 1 Allen (Mass.) 590.

Indictments held to be sufficient under the rule see the following cases:

Louisiana.— State *v.* Jordan, 34 La. Ann. 1219.

Massachusetts.— Com. *v.* Blanchette, 157 Mass. 486, 32 N. E. 658; Com. *v.* Howe, 132 Mass. 250; Com. *v.* Nason, 9 Gray 125.

Michigan.— People *v.* Stockwell, 135 Mich. 341, 97 N. W. 765, holding that an information for obtaining money by falsely accusing one of being the father of an unborn child of a certain woman, alleging that a note payable to defendant or bearer was given by the person accused as a result of the false pretenses and fraud practised on him, and that it was represented to him that it would operate as a full satisfaction and settlement of all claims of the woman, and that such representation was relied on, was sufficient, although it did not directly charge that defendant was, or claimed to be, authorized to act for the woman.

New York.— People *v.* Spiegel, 143 N. Y. 107, 38 N. E. 284 [*affirming* 75 Hun 161, 26 N. Y. Suppl. 1041].

Texas.— May *v.* State, 17 Tex. App. 213.

See 23 Cent. Dig. tit. "False Pretenses," § 38 *et seq.*

Cheating and swindling.— An indictment for cheating by false pretenses which avers that defendant pledged a watch belonging to a third person as security for the performance of a certain act, falsely exaggerating its value, but which contains no allegation of any authority from the owner to pledge it, is bad on demurrer. State *v.* Estes, 46 Me. 150. An indictment for swindling which alleges that defendant, by falsely pretending to have sold certain land for a sum which would be due at some future time, induced a certain person to deliver and did acquire from such person a certain mule, with intent to appropriate the same to his use, is insufficient in failing to show whether the person mentioned was induced to part with the title and possession, and also whether he was to be paid out of the sum realized from the land, or at all. Curtis *v.* State, 31 Tex. Cr. 39, 19 S. W. 604.

38. Enders *v.* People, 20 Mich. 233; Rex *v.* Reed, 7 C. & P. 848, 32 E. C. L. 904. But see Hamilton *v.* Reg., 9 Q. B. 271, 2 Cox C. C. 11, 10 Jur. 1028, 16 L. J. M. C. 9, 58 E. C. L. 271.

39. *Iowa.*— State *v.* Neimeier, 66 Iowa 634, 24 N. W. 247.

Maryland.— Carnell *v.* State, 85 Md. 1, 36 Atl. 117.

Michigan.— People *v.* Luttermoser, 122 Mich. 562, 81 N. W. 565; People *v.* Kinney, 110 Mich. 97, 67 N. W. 1089.

Nebraska.— Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405, holding that where, in an information for obtaining money by false pretenses, it is alleged that "by reason of the false pretenses" accused obtained the money, the words of the statute being "by false pretense," the allegation is sufficient.

New York.— Skiff *v.* People, 2 Park. Cr. 139.

See 23 Cent. Dig. tit. "False Pretenses," § 38 *et seq.*

Contra.— Bryant *v.* Com., 104 Ky. 593, 47 S. W. 578, 20 Ky. L. Rep. 790 (holding that an indictment must allege that the person from whom the property was obtained would not have parted with it but for the false pretenses); Wright *v.* U. S., 30 Fed. Cas. No. 18,098, 1 Hayw. & H. 211 (holding that where the statute used the word "pretenses," an averment that "by reason of which false pretense," etc., is bad).

Averment of prosecutor's belief in pretense. — It is usual to allege that prosecutor believed the pretense to be true and was induced thereby to part with his property; but this allegation is not essential if it is otherwise shown by the indictment that the goods were obtained by the false pretense. State *v.* Williams, 103 Ind. 235, 2 N. E. 585; Com. *v.* Hulbert, 12 Metc. (Mass.) 446. If necessary to aver that prosecutor believed, an

fraud,[40] and these rules apply also to indictments for obtaining the signature of another by false pretenses,[41] or for obtaining property by a promise of service.[42]

b. As to the Obtaining — (i) *General Rule.* It must be alleged in the indictment in terms, or in words equivalent thereto, that defendant obtained the property, since the obtaining is an essential element of the crime.[43]

averment that he believed said pretenses is sufficient, without alleging that he believed them "to be true." Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034. See also State *v.* Balliet, 63 Kan. 707, 66 Pac. 1005; State *v.* Vorback, 66 Mo. 168.

Averment of reliance on pretense.— It is not necessary to allege specifically that prosecutor relied on the pretense, if the connection between the pretense and the obtaining is otherwise sufficiently shown by the indictment.

Connecticut.— State *v.* Penley, 27 Conn. 587.

Iowa.— State *v.* Carter, 112 Iowa 15, 83 N. W. 715; State *v.* McConkey, 49 Iowa 499.

Michigan.— People *v.* Jacobs, 35 Mich. 36, holding that if it is alleged that defendant obtained the property by means of the false pretense, or that prosecutor was induced by the false pretense to part with the property, it is not necessary to allege specifically that prosecutor gave credit to the representation.

Minnesota.— State *v.* Butler, 47 Minn. 483, 50 N. W. 532.

New Hampshire.— State *v.* King, 67 N. H. 219, 34 Atl. 461.

New Jersey.— Oxx *v.* State, 59 N. J. L. 99, 35 Atl. 646.

New York.— People *v.* Jefferey, 82 Hun 409, 31 N. Y. Suppl. 267. See also People *v.* Rice, 128 N. Y. 649, 29 N. E. 146 [*affirming* 13 N. Y. Suppl. 161] (holding that where an indictment for grand larceny charged defendant with stealing a certain sum of money under the following circumstances: That he was employed by the county board to make repairs and to furnish materials in the plumbing and ventilating of the court-house, and that in his bill therefor, which was fully paid, he falsely pretended that he had furnished a quantity of material in excess of what he actually furnished, "with intent to defraud and deprive the county of its money," etc., and that, "by color or aid of the false and fraudulent representations," he did steal the said sum, the words "by color or aid of" were equivalent to "by means of" and constituted a sufficient allegation that prosecutor parted with the property in reliance on the pretense); Clark *v.* People, 2 Lans. 329.

Ohio.— Norris *v.* State, 25 Ohio St. 217, 18 Am. Rep. 291.

Oregon.— State *v.* Bloodsworth, 25 Oreg. 83, 34 Pac. 1023.

West Virginia.— State *v.* Hurst, 11 W. Va. 54.

See 23 Cent. Dig. tit. "False Pretenses," § 38 *et seq.*

It is not necessary to allege specifically how the false pretense was calculated to induce prosecutor to part with his goods (Thomas *v.* People, 34 N. Y. 351), nor that the false pretense was capable of inducing him to part with them (Meek *v.* State, 117 Ala. 116, 23 So. 155).

40. Reg. *v.* Closs, 7 Cox C. C. 494, Dears. & B. 460, 3 Jur. N. S. 1309, 27 L. J. M. C. 54, 6 Wkly. Rep. 109. But it is not necessary to allege that the token was delivered in exchange for the property; an averment that defendant obtained the property by means of the false token is sufficient. State *v.* Boon, 49 N. C. 463.

41. Simmons *v.* People, 187 Ill. 327, 58 N. E. 384 [*reversing* 88 Ill. App. 334], holding that an indictment for obtaining B's signature to a deed by false pretenses that defendant was negotiating for the purchase of the land as agent of C, and that H, to whom the deed was made, was authorized to assume and agree to pay the encumbrance on the land in behalf of C, does not show that the false pretenses induced the making of the deed, it not being alleged that any obligation was assumed toward B involving an agency of defendant, or that H undertook or assumed to receive the title for C, or to pay the encumbrance in his behalf. But see Gregg *v.* People, 98 Ill. App. 170, decided under a statute which provided that an indictment should be valid which stated the offense in the language of the statute.

42. Tennyson *v.* State, 97 Ala. 78, 12 So. 391 (holding that an indictment charging that defendant, "with intent to injure or defraud, entered into a contract in writing with [prosecutor], an act or service, and obtained from said [prosecutor] twenty-seven and 90–100 dollars, and with like intent, and without just cause, and without refunding such, refused to perform such act or service," is insufficient, since it fails to charge that by the contract defendant bound himself to perform the act or service, and also because it fails to aver that by means of such promise defendant obtained either money or other personal property); Copeland *v.* State, 97 Ala. 30, 12 So. 181 (holding that an indictment alleging that defendant entered into such a contract "and" obtained certain property is fatally defective, in that it fails to allege that the property was obtained "by reason of" defendant's having entered into the contract).

43. State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366 (holding that an indictment for obtaining a bill of sale or mortgage of personal property by false pretenses must aver that the instrument was assigned or transferred to defendant by the owner or that something more passed to defendant than the mere paper on which the instrument was written); State *v.* Phelan, 159 Mo. 122, 60 S. W. 71 (holding that an indictment which alleges that the prosecut-

(II) *AVERMENT OF DELIVERY.* If the indictment avers that defendant obtained the property, it need not allege that the property was delivered to him.[44] An indictment for obtaining a signature to an instrument by false pretenses must state that the instrument was delivered to defendant, or, what is equivalent, that the signature was obtained by defendant.[45]

c. As to the Property Obtained — (I) *DESCRIPTION* — (A) *General Rule.* The property alleged to have been obtained must be described with such certainty and particularity as to enable the jury to determine whether the property proved to have been obtained is the same as that upon which the indictment was founded, and to enable defendant to make his defense intelligently.[46] However, the

ing witness, by such false pretenses, "was induced to then and there sell and deliver" the property to defendant, is had for failure to allege that such witness did sell and deliver the property); State *v.* Clay, 100 Mo. 571, 13 S. W. 827; People *v.* Court Gen. Sess. New York County, 13 Hun (N. Y.) 395.

If three persons joined in the pretense and one of them obtained the property, the indictment should aver that each of them obtained it. Jones *v.* U. S., 13 Fed. Cas. No. 7,499, 5 Cranch C. C. 647.

This allegation must be direct, not inferential. Dwyer *v.* State, 24 Tex. App. 132, 5 S. W. 662. Thus an allegation that prosecutor paid defendant a sum is not equivalent to an allegation that defendant "obtained" said sum. State *v.* Lewis, 26 Kan. 123; Kennedy *v.* State, 34 Ohio St. 310. However, an allegation that defendant "received" is equivalent to an averment that he obtained. Matter of Fitzpatrick, 21 Ohio Cir. Ct. 519, 11 Ohio Cir. Dec. 695. So an indictment for swindling which alleges, in connection with false pretenses, that defendant "did thereby then and there fraudulently induce the said C to exchange his said three hundred dollars in money for a draft," sufficiently alleges an exchange. Faulk *v.* State, 38 Tex. Cr. 77, 41 S. W. 616 [*following* Nasets *v.* State, (Tex. Cr. App. 1895) 32 S. W. 698]. And under Wash. Code, § 1243, which provides that words used in a statute to define a crime need not be strictly pursued in the information, it is not necessary to use the word "obtain," but the words "did buy" are a sufficient allegation of obtaining. State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

Acquisition.— An indictment under Tex. Pen. Code, art. 790, which defines swindling as "the acquisition of personal or movable property . . . by means of false pretense," etc., "with the intent to appropriate the same to the use of the persons so acquiring," must aver the acquisition of the property by defendant, and an averment that the property was delivered to defendant by the alleged swindled person is not sufficient. Cannon *v.* State, (Tex. App. 1890) 15 S. W. 117.

44. Tarbox *v.* State, 38 Ohio St. 581; Haines *v.* Territory, 3 Wyo. 167, 13 Pac. 8.

45. *Iowa.*— See State *v.* McGinnis, 71 Iowa 685, 33 N. W. 338; State *v.* Clark, 72 Iowa 30, 33 N. W. 340, in both of which cases, although not necessary to the decision, the court said that it was necessary to allege that the instrument was received by defendant. The necessity for an averment of delivery is also implied in State *v.* Jamison, 74 Iowa 613, 38 N. W. 509.

Michigan.— People *v.* Kinney, 110 Mich. 97, 67 N. W. 1089.

Nebraska.— Moline *v.* State, (1903) 93 N. W. 228 [*following* State *v.* McGinnis, 71 Iowa 685, 33 N. W. 338].

New York.— Fenton *v.* People, 4 Hill 126.

Vermont.— State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

See 23 Cent. Dig. tit. "False Pretenses," § 46.

It is not sufficient to allege merely that prosecutor was induced to sign and did sign the instrument. State *v.* Clark, 72 Iowa 30, 33 N. W. 340; State *v.* McGinnis, 71 Iowa 685, 33 N. W. 338. See, however, State *v.* Butler, 47 Minn. 483, 50 N. W. 532, holding that in an indictment for obtaining a signature to a deed through false pretenses, an averment that the deed was "executed" includes everything necessary to its full execution.

46. People *v.* Conger, 1 Wheel. Cr. Cas. (N. Y.) 448, 4 City Hall Rec. 65 (holding that in an indictment for obtaining goods of a merchant by false pretenses, it is insufficient to set forth a bill of the goods with the usual abbreviations as in a merchant's book of account); State *v.* Reese, 83 N. C. 637; State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390.

It is not sufficient to allege merely that defendant obtained "certain real and personal property" (State *v.* Crooker, 95 Mo. 389, 8 S. W. 422; State *v.* Rochforde, 52 Mo. 199), or "a certain lot of dry goods" (Redmond *v.* State, 35 Ohio St. 81, holding that this is true even under a provision of the code that no indictment shall be deemed invalid for any defect or imperfection which does not tend to the prejudice of the substantial rights of defendant on the merits), or "a larger amount of dry and fancy goods of the value of twenty-seven dollars" (State *v.* Appleby, 63 N. J. L. 526, 42 Atl. 847), or "goods and money of the prosecutor to the value of fifty dollars" (State *v.* Reese, 83 N. C. 637), or "board of the goods and chattels of the prosecutor" (Reg. *v.* McQuarrie, 22 U. C. Q. B. 600. See Reg. *v.* Gardner, 7 Cox C. C. 136, 1 Dears. & B. 40,

description is required to be only as particular as the nature of the case will admit,[47] and the property need not be described by its legal name.[48]

(B) *Money, Bank-Notes, Certificates of Deposit, and Writings in General.* When the property obtained consists of money, there is an irreconcilable difference of opinion among the authorities as to what particularity of description is necessary. On principle it would seem to be sufficient to describe the money as a certain amount of the lawful money of prosecutor without stating the denomination of the various pieces, their number, or whether they were notes or coin; and the best considered cases are to this effect,[49] although there are respectable authorities that require a more particular description.[50] Bank-notes are not sufficiently described as "goods,"[51] nor a certificate of deposit as "money."[52] When the thing obtained is a written instrument or the signature of a person thereto, it is not necessary in describing the instrument to set it out *in haec verba*,[53] but it

2 Jur. N. S. 598, 25 L. J. M. C. 100, 4 Wkly. Rep. 526).

Necessity of describing property obtained see also *supra*, note 8.

47. Hagerman *v.* State, 54 N. J. L. 104, 23 Atl. 357.

48. State *v.* Hurst, 11 W. Va. 54, holding that a description by its common name is sufficient.

49. *Alabama.*— Oliver *v.* State, 37 Ala. 134.

Massachusetts.— Com. *v.* Lincoln, 11 Allen 233.

New York.— People *v.* Reavey, 38 Hun 418, 39 Hun 364; People *v.* Smith, 5 Park. Cr. 490. In People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178, it was held sufficient to describe the money as the sum of four thousand, nine hundred and seventy-five dollars in money, of a kind and description to the grand jury unknown and a more particular description of which could not then be given, of the value of four thousand, nine hundred and seventy-five dollars.

North Carolina.— State *v.* Reese, 83 N. C. 637.

Virginia.— Dull *v.* Com., 25 Gratt. 965, holding that since the Virginia act of February, 1874, it is sufficient to describe the money as "United States Currency" or its equivalent "National Currency of the United States." This act was passed because of the decision in Leftwich *v.* Com., 20 Gratt. 716.

Washington.— State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

West Virginia.— State *v.* Hurst, 11 W. Va. 54, holding that a description as divers United States treasury notes and divers national bank-notes the denomination of which is to the jurors unknown, amounting in the whole to the sum of one hundred and fifty-eight dollars, and of the value of one hundred and fifty-eight dollars, is sufficient without specifying the number of notes.

England.— Reg. *v.* Brown, 2 Cox C. C. 348.

See 23 Cent. Dig. tit. "False Pretenses," § 44.

Description in alternative.— An indictment for obtaining money to the amount of thirty dollars under false pretenses, describing the same as follows: "To wit, thirty dollars in United States treasury notes, . . . of the denomination of five dollars each; thirty dollars in United States silver certificates of the denomination of ten dollars each; . . . thirty dollars, one United States gold certificate of the denomination of twenty dollars . . . and one United States silver certificate of the denomination of ten dollars; . . . thirty dollars in . . . gold coin, . . . of the denomination of ten dollars each; . . . thirty dollars in . . . silver coin, . . . of the denomination of one dollar each; . . . thirty dollars in . . . nickel coin, . . . of the denomination of five cents each," is bad for uncertainty. Cain *v.* State, 58 Ark. 43, 22 S. W. 954.

Obtaining change.— Where a person obtained a sovereign, giving fifteen shillings in change, he is properly charged with obtaining the difference. Reg. *v.* Bloomfield, C. & M. 537, 6 Jur. 224, 41 E. C. L. 293.

Value of money.— Money, being itself a measure of value, cannot be rendered more definite by an averment of value; hence, an averment that defendant obtained "sixty-five dollars in money" by false pretense is sufficiently certain without alleging the value of the money. Oliver *v.* State, 37 Ala. 134; People *v.* Millan, 106 Cal. 320, 39 Pac. 605; State *v.* Vandenburg, 159 Mo. 230, 60 S. W. 79; State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390.

50. Jamison *v.* State, 37 Ark. 445, 40 Am. Rep. 103; Treadaway *v.* State, 37 Ark. 443; Sullivan *v.* State, 44 Fla. 155, 32 So. 106 (holding that an information for obtaining property by false pretenses, describing the property as "seven dollars and fifty cents in currency of the United States of the value of seven dollars and fifty cents the money of" a person named, with no allegation that a more particular description is unknown, is bad on motion to quash or in arrest of judgment); Smith *v.* State, 33 Ind. 159 (where an indictment for obtaining under false pretenses "$25 in money, the personal goods and chattels of," etc., was held insufficient); Leftwich *v.* Com., 20 Gratt. (Va.) 716 (holding that an indictment is not sufficient if it describes the money obtained as "ninety dollars in United States currency." This rule has since been changed by statute in Virginia. See *supra*, note 49).

51. Schleisinger *v.* State, 11 Ohio St. 669.

52. Com. *v.* Howe, 132 Mass. 250.

53. State *v.* Carter, 112 Iowa 15, 83 N. W.

must be described with such certainty as to identify it when produced in evidence,[54] so that defendant may not subsequently be indicted for the same offense.[55]

(II) *Ownership.* The indictment must state correctly to whom the goods obtained belonged.[56] The ownership may properly be laid in a mortga-

715 [*distinguishing* Bonnell *v.* State, 64 Ind. 498] (holding that an indictment charging that defendant by false representations obtained the signature of M to a written instrument commonly called a "bank check," the false making of which would be punished as forgery, "for the sum of $35, and the said M did then and there draw and sign said bank check, and delivered the same to said defendant," sufficiently describes the instrument); Com. *v.* Coe, 115 Mass. 481 (holding that a description as "a check and order for the payment of money" of the value of seven thousand dollars was sufficient); People *v.* Peckens, 12 N. Y. App. Div. 626, 43 N. Y. Suppl. 1160 [*affirmed* in 153 N. Y. 576, 47 N. E. 883] (holding that when the property obtained is a deed to real estate, if the indictment sets out the purport of the deed, it is sufficient).

54. Bonnell *v.* State, 64 Ind. 498 (where the instrument was described as "the check of John King . . . upon the 'Commercial Bank of Cincinnati' for the sum of $34.51," and it was held insufficient as containing no date, and no statement as to when it was payable or by whom executed); State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366 (holding that an indictment for obtaining instruments by false pretenses does not sufficiently describe them by "certain valuable securities, to wit: The indorsement and signature of . . . [prosecutor] to two certain promissory notes for the payment of three hundred dollars each"); State *v.* Baggerly, 21 Tex. 757 (holding that an indictment for swindling charging that C "did then and there execute and deliver to [defendant], their certain promissory note in writing for a much greater sum of money than that justly due to [defendant] from" C, is defective in not giving a sufficient description of the note). See also State *v.* Blauvelt, 38 N. J. L. 306, holding that in an indictment for obtaining by false pretense an indorsement on a promissory note for one thousand five hundred dollars, the valuable thing is the indorsement, and not the one thousand five hundred dollars, and should be so stated.

55. Langford *v.* State, 45 Ala. 26; Dord *v.* People, 9 Barb. (N. Y.) 671.

56. *Florida.*— Ladd *v.* State, 17 Fla. 215.

Illinois.— Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183; Thomson *v.* People, 24 Ill. 60, 76 Am. Dec. 733.

Indiana.— State *v.* Miller, 153 Ind. 229, 54 N. E. 808; Leobold *v.* State, 33 Ind. 484; State *v.* Smith, 8 Blackf. 489.

Maryland.— State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366.

New York.— People *v.* Krummer, 4 Park. Cr. 217.

Pennsylvania.— Com. *v.* Graham, 1 Pa. Co. Ct. 282, 3 Kulp 289, holding that the omission to do so is not cured by verdict.

Texas.— Washington *v.* State, 41 Tex. 583; Mays *v.* State, 28 Tex. App. 484, 13 S. W. 787.

England.— Reg. *v.* Martin, 8 A. & E. 481, 2 Jur. 515, 7 L. J. M. C. 89, 3 N. & P. 472, 1 W. W. & H. 380, 35 E. C. L. 691; Reg. *v.* Norton, 8 C. & P. 196, 34 E. C. L. 686 (both holding that an indictment for obtaining goods by false pretenses with intent to defraud a specified person is bad, unless it states whose property the goods were, and that the defect is not aided by verdict); Sill *v.* Reg., Dears. C. C. 132, 1 E. & B. 553, 17 Jur. 207, 22 L. J. M. C. 41, 1 Wkly. Rep. 147, 72 E. C. L. 553 (holding that this requirement is not dispensed with by 14 & 15 Vict. c. 100, § 25, which provides that every objection to an indictment for any formal defect apparent on the face thereof shall be taken before the jury shall be sworn). See, however, 24 & 25 Vict. c. 96, § 88, which renders an allegation of ownership unnecessary.

See 23 Cent. Dig. tit. "False Pretenses," § 42 *et seq.*

Allegation held sufficient.— An indictment for false pretenses alleging that the prisoner obtained "from A a cheque for the sum of 8 pounds, 14 shillings, 6 pence, of the moneys of B," is a sufficient allegation that the check was the property of B, for "the money" may be stricken out. Reg. *v.* Godfrey, 7 Cox C. C. 392, Dears. & B. 426, 4 Jur. N. S. 146, 27 L. J. M. C. 151, 6 Wkly. Rep. 251.

The ownership need not be stated by a direct allegation if facts are alleged which show the ownership clearly. People *v.* Skidmore, 123 Cal. 267, 55 Pac. 984; State *v.* Balliet, 63 Kan. 707, 66 Pac. 1005; State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966.

It is not sufficient that it may be gathered by inference from the other necessary averments of intent to defraud, etc., that the ownership of the property was in some person named. Moulie *v.* State, 37 Fla. 321, 20 So. 554; Halley *v.* State, 43 Ind. 509; State *v.* Lathrop, 15 Vt. 279, holding that an allegation that defendant obtained goods of B with intent to defraud B of them is not a sufficient allegation that B owned the goods. *Contra*, State *v.* Dixon, 101 N. C. 741, 7 S. E. 870; State *v.* Boon, 49 N. C. 463, holding that it is not necessary to allege that the property obtained was the property of prosecutor, from whom it is alleged to have been obtained.

What constitutes ownership.— Although money deposited in a bank and mixed with its funds becomes its property, yet where county funds are deposited in a bank as required by law, and a specific sum is thereafter separated and appropriated by the bank for the payment of a county warrant by direction of the receiver of taxes and county treasurer, it thereby becomes, and is paid out as, the

gee,[57] or in a person in possession of the goods[58] or in a person with authority to sell them.[59]

(III) *QUANTITY OR NUMBER.* The quantity or number of chattels obtained should be stated with certainty,[60] unless the circumstances of the case do not admit of it.[61]

(IV) *VALUE.* The value of the property obtained need not be stated in the indictment,[62] unless, as in some jurisdictions, value is made an element of the offense.[63]

d. As to Loss to Prosecutor. An indictment for obtaining property by false pretenses need not allege specifically that prosecutor suffered loss by reason of the false pretense,[64] but it must set forth facts sufficient to show that he suffered a

money of such officer, so that in an indictment for obtaining by false pretenses county funds on deposit in a bank by means of a fraudulent warrant, the property in the money is properly laid in the receiver of taxes and county treasurer. State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878. Under Ky. Cr. Code, § 128, providing that if an indictment for an offense involving an injury to property describes the offense with sufficient certainty to identify the act an erroneous allegation as to the ownership of property is not material, an indictment for obtaining money by false pretenses which describes the money obtained and alleges that it was not the property of accused is sufficient, although it alleges that the money belonged to a married woman, who is shown to have had no separate estate. Hennessy *v.* Com., 88 Ky. 301, 11 S. W. 13, 10 Ky. L. Rep. 823. Where money was obtained from a servant of prosecutor by false pretenses that it was due for carriage, the fact that the master reimbursed the servant does not make the property obtained that of the master, and it is wrongly laid in the indictment as the property of the master. Rex *v.* Douglass, 1 Campb. 212, 7 C. & P. 785 note, 32 E. C. L. 871.

Obtaining by games.— In an indictment under 8 & 9 Vict. c. 109, § 17, for winning money at cards by fraud, unlawful device, and ill-practice, it is not necessary to state to whom the money belonged. Reg. *v.* Moss, 7 Cox C. C. 200, Dears. & B. 104, 2 Jur. N. S. 1196, 26 L. J. M. C. 9, 5 Wkly. Rep. 49.

Obtaining signature to instrument.— If an indictment for false pretense in obtaining a signature to an instrument, under a statute that makes it a crime to obtain the signature to an instrument the false making of which would be forgery, states facts that show that the instrument was such an instrument, it need not allege the ownership of the property represented by the instrument. State *v.* Jamison, 74 Iowa 613, 38 N. W. 509.

57. Barber *v.* People, 17 Hun (N. Y.) 366.

58. Fields *v.* State, 121 Ala. 16, 25 So. 726; Com. *v.* Springs, 2 Leg. Gaz. (Pa.) 93 (holding that the post-office department is in possession of a registered letter and ownership thereof may be laid in the department); May *v.* State, 15 Tex. App. 430 (holding that there is no variance where an indictment alleges the ownership in J of the money obtained, and the proof shows that the money was the property of C, for whom J was a clerk intrusted with the safe of C, in which the money was kept); Reg. *v.* Dent, 1 C. & K. 249, 47 E. C. L. 249. However, an indictment for obtaining money under false pretenses from the teller of a bank, the money belonging to the bank, should allege the ownership to be in the bank, instead of in the teller. Jones *v.* State, 22 Fla. 532.

The nature of the possession need not be stated. State *v.* Williams, 14 Mo. App. 591.

59. Com. *v.* Blanchette, 157 Mass. 486, 32 N. E. 658.

60. State *v.* Burrows, 33 N. C. 477 (holding that where defendant procured by means of fraudulent paper a conveyance to himself of fifty-one and one-half acres of land on payment of the price of only thirty-five and one-half acres, the indictment should allege that there was an actual excess of twenty acres, as showing the property obtained); Com. *v.* France, 2 Brewst. (Pa.) 568.

Amount of money see *supra*, VIII, A, 3, c, (I), (B).

61. Hagerman *v.* State, 54 N. J. L. 104, 23 Atl. 357 (holding that an indictment which sets out that defendant obtained certain house moldings, inside doors, corner blocks, and finishing boards for houses, contains a sufficient description of the property; it need not specify the number of each); State *v.* Hurst, 11 W. Va. 54.

62. People *v.* Jefferey, 82 Hun (N. Y.) 409, 31 N. Y. Suppl. 267; People *v.* Highie, 66 Barb. (N. Y.) 131; People *v.* Stetson, 4 Barb. (N. Y.) 151; State *v.* Gillespie, 80 N. C. 396. However, an indictment which sets out that defendant obtained, by false representations, certain property of the value of five hundred dollars, contains a sufficient statement of its value. Hagerman *v.* State, 54 N. J. L. 104, 23 Atl. 357.

Value of money see *supra*, VIII, A, 3, c, (I), (B).

63. Baker *v.* State, 31 Ohio St. 314. And see cases cited *supra*, note 45.

64. People *v.* Higbie, 66 Barb. (N. Y.) 131.

Where, in an indictment for cheating and swindling, the averment of facts set out for the purpose of showing how prosecutor was defrauded by accused fails to show that the deceitful means caused any pecuniary loss to prosecutor, the indictment is fatally defective. Busby *v.* State, 120 Ga. 858, 48 S. E. 314.

legal injury as that term is understood in the law of false pretense, else it fails to charge an offense.[65]

e. As to Knowledge, Intent, and Design. Unless the pretense averred is of such a character as to exclude the possible hypothesis of his ignorance of its falsity,[66] the indictment must allege specifically that accused knew the pretense to be false.[67] When the statute makes a certain intent an element of the offense, that intent must be averred in the indictment by a proper affirmative allega-

65. Bonnell *v.* State, 64 Ind. 498; Graves *v.* State, 31 Tex. Cr. 65, 19 S. W. 895. However, an allegation that "by means of the false pretense the prosecutor was induced to part with his property" is a sufficient allegation from which to infer injury. West *v.* State, 63 Nebr. 257, 88 N. W. 503.

Obtaining signature.— An indictment for obtaining by false pretenses the signature of a person to a deed of real estate must aver that prosecutor had some interest in the property, or that the deed contained covenants rendering him liable to an action. Dord *v.* People, 9 Barb. (N. Y.) 671. An averment that it was a "warranty deed" shows sufficiently that it may prejudice the person signing. State *v.* Butler, 47 Minn. 483, 50 N. W. 532. So in an indictment for obtaining a signature to a promissory note by false pretenses it is not necessary to allege that prosecutor was injured; it is sufficient if it appears in the indictment that the note on its face was one calculated to prejudice him. People *v.* Crissie, 4 Den. (N. Y.) 525.

66. People *v.* Lennox, 106 Mich. 625, 64 N. W. 488 (where the representation stated in the indictment was that defendant obtained a subscription from A by alleging that B had subscribed ten dollars, whereas B had subscribed only one dollar, and it was held that knowledge of falsity need not be averred); People *v.* Fitzgerald, 92 Mich. 328, 52 N. W. 726; People *v.* Behee, 90 Mich. 356, 51 N. W. 515.

67. *Indiana.*— State *v.* Smith, 8 Blackf. 489.

Michigan.— People *v.* Fitzgerald, 92 Mich. 328, 52 N. W. 726; People *v.* Behee, 90 Mich. 356, 51 N. W. 515.

Pennsylvania.— Com. *v.* Adley, 1 Pearson 62.

South Carolina.— State *v.* Wilson, 2 Mill 135.

Texas.— Maranda *v.* State, 44 Tex. 442; Hirsch *v.* State, 1 Tex. App. 393. It has been held that this is changed by the Common Sense Indictment Act of 1881, which dispenses with an averment of guilty knowledge of accused. Arnold *v.* State, 11 Tex. App. 472. But see Mathena *v.* State, 15 Tex. App. 473, where an allegation of scienter was held necessary.

Virginia.— Com. *v.* Speer, 2 Va. Cas. 65.

West Virginia.— State *v.* Hurst, 11 W. Va. 54.

England.— Reg. *v.* Bowen, 13 Q. B. 790, 3 Cox C. C. 483, 13 Jur. 1045, 19 L. J. M. C. 65, 4 N. Sess. Cas. 62, 66 E. C. L. 790; Reg. *v.* Henderson, C. & M. 328, 2 Moody C. C. 192, 41 E. C. L. 183.

See 23 Cent. Dig. tit. "False Pretenses," § 37.

See, however, People *v.* Webster, 17 Misc. (N. Y.) 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340.

The scienter is not sufficiently averred by an allegation that defendant "designedly" (State *v.* Bradley, 68 Mo. 140. *Contra*, State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789), or "unlawfully and designedly" (State *v.* Blauvelt, 38 N. J. L. 306. *Contra*, Com. *v.* Hulbert, 12 Metc. (Mass.) 446), or "falsely and fraudulently" (Reg. *v.* Henderson, C. & M. 328, 2 Moody C. C. 192, 41 E. C. L. 183), did pretend, or by an allegation of an intent to defraud (Reg. *v.* Philpotts, 1 C. & K. 112, 47 E. C. L. 112). See, however, State *v.* Snyder, 66 Ind. 203, where it was held not necessary to specifically allege that defendant knew the pretense to be false, if it is alleged that he "designedly, feloniously, and with intent to defraud" did "falsely pretend," as he could not "designedly intend to defraud" by means of the false pretense unless he knew that it was false.

Averments held sufficient.— An averment that "in truth and in fact each and every of the pretenses and representations so made by [defendant] as aforesaid was and were wholly false and fraudulent and untrue, and [defendant] then and there well knew such was the case," is a sufficient allegation of defendant's knowledge of the falsity of the pretense. People *v.* Dimick, 107 N. Y. 13, 30, 14 N. E. 178. An information for obtaining money by false pretenses, alleging certain statements of fact by defendant, and then alleging as to each of them that it was not the fact, followed by the words "all of which [she] . . . then and there well knew," sufficiently alleges defendant's knowledge of the falsity of her statements. Baker *v.* State, 120 Wis. 135, 97 N. W. 566.

Indictments held not fatally defective.— An information which charges defendant with having obtained money under false representations, but which does not directly allege his knowledge of their falsity, although demurrable, is not fatally defective. People *v.* Millan, 106 Cal. 320, 39 Pac. 605. An indictment which sets out pretenses, negativing their truth, "all of which the defendant then and there well knew," is not obnoxious, after verdict. to the objection that the scienter is not sufficiently averred. State *v.* Janson, 80 Mo. 97.

False weights.— An indictment under 1 N. Y. Rev. St. p. 611, § 33, to recover damages for using false weights, need not aver scienter on the part of defendant. Bayard *v.* Smith, 17 Wend. (N. Y.) 88.

tion.[68] Thus where the crime is a felony, the intent must be alleged to have been felonious.[69] Unless the statute makes an intent to defraud a particular person,[70] or to accomplish a particular result,[71] an element of the crime, the intent to defraud the one or to accomplish the other need not be averred.[72] Statute 30 Geo. II, c. 24, § 1, which has been the model for most of the statutes in this country, makes it an element of the crime that the goods be "designedly" obtained. Under such a statute the indictment must allege that the goods were "designedly" obtained or some word equivalent to or broad enough to include the statutory word must be used.[73]

68. *Florida.*— Jones *v.* State, 22 Fla. 532.
Iowa.— State *v.* Daniels, 90 Iowa 491, 58 N. W. 891, holding that the same rule applies to an indictment for designedly and by false pretenses obtaining the signature of a person to a written instrument.
Massachusetts.— Com. *v.* Dean, 110 Mass. 64, where an indictment was held bad that contained no allegation of intent to defraud other than a concluding statement that the jurors "say and present" that defendant, "in the manner aforesaid, designedly, by a false pretence and with intent to defraud," procured the signature.
Pennsylvania.— Com. *v.* Shissler, 9 Phila. 587.
Texas.— Marshall *v.* State, 31 Tex. 471; Stringer *v.* State, 13 Tex. App. 520 [*overruling* Tomkins *v.* State, 33 Tex. 228], so holding as to the offense of swindling.
England.— Reg. *v.* James, 12 Cox C. C. 127.
See 23 Cent. Dig. tit. "False Pretenses," § 32.
See, however, People *v.* Webster, 17 Misc. (N. Y.) 410, 40 N. Y. Suppl. 1135, 11 N. Y. Cr. 340.
Indictments held sufficient.— Under Ala. Cr. Code (1886), §§ 3811, 4383, allowing the intent in an indictment for attempting to obtain money by false pretenses to be alleged in the alternative "to injure or defraud," an indictment charging an "intent to defraud" alone is sufficient. White *v.* State, 86 Ala. 69, 4 So. 674. An indictment under La. Rev. St. § 813, providing for punishing any one who by any false pretense "shall obtain from any person, money or any property, with intent to defraud him of the same," which charges defendant with obtaining by false pretenses the property of another "with intent to defraud" is sufficient. State *v.* Lewis, 41 La. Ann. 590, 6 So. 536. An indictment for obtaining money or goods by false pretenses, if charged in the words of Tenn. St. (1842) c. 48, § 1, providing that "whoever shall feloniously obtain the personal goods or choses in action, of another, by means of any false and fraudulent pretence shall be guilty of felony," need not charge the money or goods to have been obtained with intent to steal them, though in another section of the statute it is declared that false pretenses includes all cases where the party "intended to steal the [goods]." Jim *v.* State, 8 Humphr. (Tenn.) 603.

69. People *v.* Fish, 4 Park. Cr. (N. Y.) 206; State *v.* Wilson, 116 N. C. 979, 21 S. E. 692; State *v.* Caldwell, 112 N. C. 854, 16 S. E. 1010; State *v.* Bryan, 112 N. C. 848, 16 S. E. 909; State *v.* Skidmore, 109 N. C. 795, 14 S. E. 63; State *v.* Tate, 6 Humphr. (Tenn.) 424; State *v.* Small, 31 Tex. 184. However, an indictment alleging that defendant with intent to defraud did feloniously make certain false pretenses is not insufficient as failing to allege that defendant feloniously intended to defraud. State *v.* Turley, 142 Mo. 403, 44 S. W. 267.
This allegation is unnecessary when the crime is not a felony. Robinson *v.* State, 33 Tex. 341; State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789, where it was held not necessary to use the word "feloniously" if the indictment follows the words of the statute.
Surplusage.— An averment that the false pretense was made with felonious intent, the crime being only a misdemeanor, does not invalidate the indictment. State *v.* Eason, 86 N. C. 674. *Contra*, Rex *v.* Walker, 6 C. & P. 657, 25 E. C. L. 624.

70. State *v.* Hazen, 104 Iowa 16, 73 N. W. 359; Com. *v.* Hulbert, 12 Metc. (Mass.) 446.

71. Todd *v.* State, 31 Ind. 514; Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77.

72. Headley *v.* State, 106 Ala. 109, 17 So. 714; State *v.* Blizzard, 70 Md. 385, 17 Atl. 270, 14 Am. St. Rep. 366; Hamilton *v.* Reg., 9 Q. B. 271, 2 Cox C. C. 11, 10 Jur. 1028, 16 L. J. M. C. 9, 58 E. C. L. 271; Sill *v.* Reg., Dears. C. C. 132, 1 E. & B. 553, 17 Jur. 207, 22 L. J. M. C. 41, 1 Wkly. Rep. 147, 72 E. C. L. 553.

73. *Maine.*— State *v.* Withee, 87 Me. 462, 32 Atl. 1013.
Missouri.— State *v.* Pickett, 174 Mo. 663, 74 S. W. 844; State *v.* Wilson, 143 Mo. 334, 44 S. W. 722.
Pennsylvania.— Com. *v.* Adley, 1 Pearson 62.
Texas.— State *v.* Baggerly, 21 Tex. 757, holding that an indictment for swindling which charges that C "did then and there execute and deliver to [defendant] their certain promissory note in writing for a much greater sum of money than was justly due to [defendant] from" C, is defective in omitting the word "designedly."
Vermont.— State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789, holding that an indictment for designedly obtaining the signature of another which fails to allege that the signature was obtained designedly is insufficient.
See 23 Cent. Dig. tit. "False Pretenses," § 32.

B. Pleading and Proof — 1. General Rule. Every allegation in the indictment essentially descriptive of the offense must be proved as laid.[74] An indictment for obtaining money by false pretenses is not sustained by proof of a different offense.[75] However, in some jurisdictions by statute there may be a conviction for an attempt to obtain property by false pretenses under an indictment for so obtaining the property.[76]

2. Particular Allegations and Proof Thereunder — a. As to the Pretense. A variance between the description of the pretense in an indictment for obtaining property by a false pretense and the proof thereof is fatal,[77] unless the variance be

See, however, Rex *v.* Howarth, 3 Stark. 26, 3 E. C. L. 579, holding that it is not necessary to allege that defendant did designedly pretend, etc.

Indictments held sufficient.—The word "designedly," although used in the statute, is not necessary in the indictment if words equivalent are used. State *v.* Grant, 86 Iowa 216, 53 N. W. 120 (where the indictment charged that defendants conspired "for the unlawful, malicious, and felonious purpose, and with fraudulent and malicious intent and purpose, . . . to obtain," etc.); Com. *v.* Hooper, 104 Mass. 549.

74. Com. *v.* Pierce, 130 Mass. 31 (holding that an allegation charging two persons jointly with obtaining a loan of money by false pretenses is not supported by proof of a loan to only one of the persons); Wallace *v.* State, 11 Lea (Tenn.) 542 (holding that where the indictment alleged that a note obtained was executed to S, and the evidence showed that it was to S's daughter and by her assigned to S, the variance was fatal). See also Tuttle *v.* State, (Tex. Cr. App. 1899) 49 S. W. 82. However, an allegation that prosecutor was induced to deliver goods "as upon a sale upon credit" is sufficiently proved by evidence of a sale of the goods to defendant on his promissory note, payable in four months. Com. *v.* Davidson, 1 Cush. (Mass.) 33. And see Amos *v.* State, 123 Ala. 50, 26 So. 524.

An allegation not descriptive of the offense need not be proved, but may be rejected as surplusage. Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91 (sustaining a conviction under an indictment for obtaining money from a city by making a false return of the amount due under a contract, which denies that there was anything due from the city, although a portion of the amount obtained was proved to be due); State *v.* Ridge, 125 N. C. 658, 34 S. E. 440 (holding that since N. C. Code, § 1025, provides that an indictment for obtaining goods by false pretenses need not allege the ownership of the goods, the allegation of ownership in an indictment is mere surplusage, which need not be proved). So unless the statute makes the value of the property obtained an element of the crime, it is not necessary to prove the value, although it is stated in the indictment. Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034; Com. *v.* Lee, 149 Mass. 179, 21 N. E. 299; Com. *v.* Morrill, 8 Cush. (Mass.) 571; Cunningham *v.* State, 61 N. J. L. 67, 38 Atl. 847; People *v.* Herrick, 13 Wend. (N. Y.) 87.

If an indispensable allegation is made needlessly specific, the unnecessary portion cannot be rejected but must be proved as laid. Schayer *v.* People, 5 Colo. App. 75, 37 Pac. 43.

False marking of casks, etc.— Although an indictment charges a false marking of flour with intent to defraud A, and also thereafter a sale to A, yet if the false marking with intent to defraud is proved, the sale need not be. State *v.* Burge, 7 Iowa 255.

Selling land twice.— Where the second deed conveys but a part of the property charged in the indictment to have been conveyed by both it and the first deed, it should be considered, in the determination of the effect of the variance, whether the part conveyed by both deeds formed a material inducement to the second, or whether the variance had any tendency to prejudice the substantial rights of defendant. State *v.* Wilson, 66 Mo. App. 540.

75. McQueen *v.* State, 89 Ala. 91, 8 So. 115. In some jurisdictions, however, while the crimes remain distinct, it is provided by statute that on an indictment for obtaining property by false pretenses the prisoner may be convicted of that offense, although the proof shows that he obtained the property by larceny. Reg. *v.* Henderson, C. & M. 328, 2 Moody C. C. 192, 41 E. C. L. 183; Reg. *v.* Bulmer, 9 Cox C. C. 492, 10 Jur. N. S. 684, L. & C. 476, 33 L. J. M. C. 171, 10 L. T. Rep. N. S. 580, 12 Wkly. Rep. 887. But such a statute does not authorize a verdict of guilty of larceny on an indictment for obtaining property by false pretenses, even though the evidence establishes the crime of larceny. Reg. *v.* Ewing, 21 U. C. Q. B. 523.

76. Reg. *v.* Eagleton, 3 C. L. R. 1145, 6 Cox C. C. 559, Dears. C. C. 515, 1 Jur. N. S. 940, 24 L. J. M. C. 158, 4 Wkly. Rep. 17; Reg. *v.* Goff, 9 U. C. C. P. 438.

77. *Alabama.*— Copeland *v.* State, 97 Ala. 30, 12 So. 181; O'Connor *v.* State, 30 Ala. 9.

Arkansas.— Mitchell *v.* State, 70 Ark. 30, 65 S. W. 935; Kirtley *v.* State, 38 Ark. 543.

Georgia.— Fambrough *v.* State, 113 Ga. 934, 39 S. E. 324; Garlington *v.* State, 97 Ga. 629, 25 S. E. 398; Ratteree *v.* State, 77 Ga. 774.

Illinois.— Limouze *v.* People, 58 Ill. App. 314.

Indiana.— Smith *v.* State, 33 Ind. 159; Todd *v.* State, 31 Ind. 514.

Massachusetts.— Com. *v.* Jeffries, 7 Allen 548, 83 Am. Dec. 712; Com. *v.* Davidson, 1 Cush. 33.

New Jersey.— Harris *v.* State, 58 N. J. L.

immaterial.[78] Defendant cannot be convicted on proof of pretenses not alleged in the indictment.[79] Hence if the indictment alleges a single representation made of a single inseparable fact, and the proof is of a single representation variant from that charged, the variance is fatal;[80] but where the pretense is charged as a single pretense, proof of a double and separable representation, one part of which alone might constitute this element of the offense and which corresponds with the pretense charged, is no variance;[81] nor is there a variance when several representations are alleged and only one is proved.[82] However, the allegation as to the

436, 33 Atl. 844; Sharp *v.* State, 53 N. J. L. 511, 21 Atl. 1026.

Pennsylvania.— Com. *v.* Garver, 16 Phila. 468.

Texas.— Peckham *v.* State, (Cr. App. 1894) 28 S. W. 532.

England.— Reg. *v.* Butcher, Bell C. C. 6, 8 Cox C. C. 77, 4 Jur. N. S. 1155, 28 L. J. M. C. 14, 7 Wkly. Rep. 38; Rex *v.* Plestow, 1 Campb. 494.

See 23 Cent. Dig. tit. "False Pretenses," § 53.

No variance.— Where the indictment charged that defendant said he was conducting a butcher's shop, and the evidence was that he said he must have some cattle to butcher that night, there was no variance. State *v.* Neimeier, 66 Iowa 634, 24 N. W. 247. On a trial for obtaining money by falsely pretending that a note was valid and secured by a mortgage, the fact that in the margin of the note were the words, "This note is secured by real-estate mortgage," which were not in the copy of the note set out in the indictment, was not a variance. Com. *v.* Parmenter, 121 Mass. 354. An allegation that defendant falsely represented that he had "an order" on prosecutor from W for the goods is sustained by proof that defendant had told prosecutor that W had told defendant to tell prosecutor to let defendant have the goods, since an order may be oral. State *v.* Mikle, 94 N. C. 843. And see Com. *v.* Ashton, 125 Mass. 384; State *v.* Thatcher, 35 N. J. L. 445; Moore *v.* State, 20 Tex. App. 233.

Attempt.— If an indictment for attempting to obtain money under false pretenses charges it to have been attempted by means of a paper writing purporting to be an order for money, and the instrument in evidence is not such an order, the variance is fatal. Rex *v.* Cartwright, R. & R. 79.

78. People *v.* Herrick, 13 Wend. (N. Y.) 87 (holding that in a prosecution for obtaining a signature to a note, where the indictment alleged that the pretense was that accused had three hundred dollars, and it was proved that he said he had one hundred and fifty dollars, there is no variance if one hundred and fifty dollars was sufficient to meet the note); People *v.* Sully, 5 Park. Cr. (N. Y.) 142 (holding that it is sufficient if the pretense be proved in substance and effect; the precise words need not be used, and the pretense may be proved by the conduct of the prisoner in connection with his statements); Com. *v.* Karpouski, 3 Pa. Dist. 772 [*affirmed* in 167 Pa. St. 225, 31 Atl. 572] (holding that under an indictment charging that defendant obtained goods under the false pretense that he had money in M National Bank of S, proof that he said the money was in M bank of S is not a material variance, where the evidence is that the only M bank in S was a national one; and that under an allegation of a false pretense that defendant had more than three hundred dollars in bank proof that he said he had more than enough to pay a bill of that amount past due to prosecutor is not a material variance); State *v.* Knowlton, 11 Wash. 512, 39 Pac. 966 (holding that where informant alleged that defendant represented that bars of metal were gold, in reliance on which prosecutor bought them of defendant for five thousand dollars, whereas they were of no value, and the proof showed that there was no gold in them but that they contained copper worth one hundred and twenty dollars, the variance was immaterial).

79. State *v.* Riley, 65 N. J. L. 192, 46 Atl. 700 [*affirmed* in 65 N. J. L. 624, 48 Atl. 536].

80. O'Connor *v.* State, 30 Ala. 9, where the pretense charged was that defendant said that he had in M the sum of seven thousand dollars, and the proof was that he said he had seven dollars less than seven thousand dollars in the hands of a friend in M.

81. Beasley *v.* State, 59 Ala. 20 (where the pretense charged was that defendant said he had two bales of cotton, and the proof was that he said he had two bales of cotton in a house at home and one in the field); Reg. *v.* Lince, 12 Cox C. C. 451, 28 L. T. Rep. N. S. 570.

82. *Alabama.*— Beasley *v.* State, 59 Ala. 20.

Arkansas.— Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; Johnson *v.* State, 36 Ark. 242; State *v.* Vandimark, 35 Ark. 396.

California.— People *v.* Chrones, (1904) 75 Pac. 180.

Georgia.— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959.

Indiana.— Todd *v.* State, 31 Ind. 514.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; State *v.* Chingren, 105 Iowa 169, 74 N. W. 946.

Maine.— State *v.* Dunlap, 24 Me. 77; State *v.* Mills, 17 Me. 211.

Massachusetts.—Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; Com. *v.* Ashton, 125 Mass. 384; Com. *v.* Coe, 115 Mass. 481; Com. *v.* Morrill, 8 Cush. 571; Com. *v.* Davidson, 1 Cush. 33.

New Jersey.— State *v.* Vanderbilt, 27 N. J. L. 328.

pretense which was relied upon must be proved as laid, a variance in this respect being fatal.[83]

b. As to the Property Obtained. The *allegata* and *probata* as to the property obtained must correspond;[84] but an immaterial variance will not be fatal.[85]

c. As to the Person to Whom the Pretense Was Made. The proof as to the person to whom the false pretense was made must correspond with the allegation in the indictment,[86] but, since pretenses may be indirectly made, there is no variance between an allegation that the pretenses were made to a person named and proof that they were made to another person and by him communicated to the person named.[87]

d. As to the Person Intended to Be Defrauded. Since if defendant had an

New York.— Bielschofsky *v.* People, 5 Thomps. & C. 277 [*affirming* 3 Hun 40]; People *v.* Fowler, 18 How. Pr. 493; People *v.* Haynes, 11 Wend. 557; Webster *v.* People, 1 N. Y. Cr. 190 [*affirmed* in 92 N. Y. 422].

Pennsylvania.— Com. *v.* Daniels, 2 Pars. Eq. Cas. 332; Com. *v.* Lundberg, 18 Phila. 482.

Tennessee.— Britt *v.* State, 9 Humphr. 31.

Wisconsin.— Baker *v.* State, 120 Wis. 135, 97 N. W. 566.

England.— Reg. *v.* Brown, 2 Cox C. C. 348; Rex *v.* Ady, 7 C. & P. 140, 32 E. C. L. 540; Rex *v.* Hill, R. & R. 142.

See 23 Cent. Dig. tit. "False Pretenses," § 53.

83. Carey *v.* State, 112 Ga. 226, 37 S. E. 405; Dechard *v.* State, (Tex. Cr. App. 1900) 57 S. W. 813, where defendant was indicted for obtaining property under a contract set out in the indictment, and it appeared that he obtained property under another contract. And see Reg. *v.* Bulmer, 9 Cox C. C. 492, 10 Jur. N. S. 684, L. & C. 476, 33 L. J. M. C. 171, 10 L. T. Rep. N. S. 580, 12 Wkly. Rep. 887.

84. *California.*— People *v.* Cummings, 117 Cal. 497, 49 Pac. 576; People *v.* Reed, 70 Cal. 529, 11 Pac. 676.

Massachusetts.— Com. *v.* Howe, 132 Mass. 250.

Ohio.— Baker *v.* State, 31 Ohio St. 314, holding that an allegation that defendant obtained money from a person is not sustained by proof that he procured such person to indorse a forged check, and then sold the check for money, and that such person afterward paid the amount of the check to the purchaser. See, however, *infra*, note 85.

Texas.— Rosales *v.* State, 22 Tex. App. 673, 3 S. W. 344; Marwilsky *v.* State, 9 Tex. App. 377.

Virginia.— Fay *v.* Com., 28 Gratt. 912.

See 23 Cent. Dig. tit. "False Pretenses," § 53.

Other property.— If the proof shows that defendant obtained the property alleged, proof that he also obtained other property not alleged is not a variance. Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1; People *v.* Parish, 4 Den. (N. Y.) 153; Moore *v.* State, 20 Tex. App. 233.

85. *Arkansas.*— Pruitt *v.* State, (1889) 11 S. W. 822.

Kansas.— State *v.* Palmer, 40 Kan. 474, 20 Pac. 270, where an indictment alleged that defendant obtained money by means of false pretenses, and the evidence showed that he obtained a check on a bank, and that the drawer of the check went with defendant to the bank and identified him, and that the bank then took the check from defendant, paid him the money it called for out of money deposited in the bank by the drawer, and charged the same to the drawer's account.

Missouri.— State *v.* Terry, 109 Mo. 601, 19 S. W. 206, holding that an attempt to obtain by fraud a check on which money could be obtained may be shown under an indictment charging an attempt to obtain money.

New York.— People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178, holding that an allegation that defendant obtained "money" is sufficiently proven by proof that he drew a draft on prosecutor which was accepted by prosecutor, who gave a check to a bank in payment, and that the amount of the check was credited on the books of defendant.

Ohio.— Tarbox *v.* State, 38 Ohio St. 581.

See 23 Cent. Dig. tit. "False Pretenses," § 53.

Proof of obtaining a less sum or smaller quantity of property than that alleged is not a fatal variance. State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; Com. *v.* Lee, 149 Mass. 179, 21 N. E. 299; Reg. *v.* Cameron, 23 Nova Scotia 150.

86. Broznack *v.* State, 109 Ga. 514, 35 S. E. 123, holding that an allegation that a representation was made to one member of a firm, with a view to procuring credit, is not supported by evidence that such a representation was made solely to another member of that firm.

Pretense to several persons.— If the allegation is that the false pretense was made to several persons, there is no variance in proof that it was made to one of the persons named. Reg. *v.* Kealey, 5 Cox C. C. 193, 2 Den. C. C. 69, 15 Jur. 230, 20 L. J. M. C. 57, T. & M. 405.

87. Com. *v.* Harley, 7 Metc. (Mass.) 462; Com. *v.* Call, 21 Pick. (Mass.) 515; Com. *v.* Mooar, Thach. Cr. Cas. (Mass.) 410; People *v.* Genet, 19 Hun (N. Y.) 91 (holding that an allegation that the false pretenses were made to X is proved by evidence that they were made in a written instrument which through the instrumentality of defendant was brought to X and on which X acted); Rex *v.* Taylor, 65 J. P. 457, 49 Wkly. Rep. 671; Reg. *v.* Cameron, 23 Nova Scotia 150.

intent to defraud, it is immaterial against whom the intent was directed,[88] it need not be proved that the intent was to defraud the particular person named in the indictment.[89]

e. As to the Person From Whom the Property Was Obtained. The proof must correspond to the allegations of the indictment as to the person from whom the property was obtained.[90] However, there is no variance where it is alleged that the property was obtained from a certain person and the proof shows it was delivered to defendant by the agent of such person.[91]

f. As to the Time When the Pretense Was Made. The date on which the pretense was made being immaterial, a variance as to the date is not fatal.[92]

C. Evidence[93]**— 1. Burden of Proof and Presumptions.** As in the case of all other crimes, so in this, the burden of proving every element of the crime beyond a reasonable doubt is on the state.[94] A fraudulent intent is not presumed from the fact that the pretenses were false and that defendant knew them to be so.[95] However, a presumption of an intent to cheat and defraud arising from the fact that property is obtained by means of a trick or deception, or false or fraudulent representation or pretense, is not artificial but probable and reasonable, and hence the state may create such a presumption by statute.[96]

2. Admissibility — a. In General. On a trial for obtaining property by false pretense, any evidence which tends to prove any element of the crime is admissible,[97] subject to the general rules governing the admissibility of evidence in crim-

88. See *supra*, IV, G, 1.

89. State *v.* Bourne, 86 Minn. 432, 90 N. W. 1108; State *v.* Ridge, 125 N. C. 658, 34 S. E. 440.

90. Elmore *v.* State, 138 Ala. 50, 35 So. 25, holding, however, that where defendant was charged with having obtained money by false pretenses from B, and the evidence showed that on the loan of the money defendant received from B a pawn ticket purporting to be issued by the "Capital City Loan Co.," in the absence of evidence that such company was other than a name used by B, or that it was obtained from any one other than B, there was no variance.

Ownership.— A material variance between indictment and proof as to the ownership of the goods obtained is fatal. Headley *v.* State, 106 Ala. 109, 17 So. 714 (by statute); State *v.* Myers, 82 Mo. 558, 52 Am. Rep. 389; Mathews *v.* State, 33 Tex. 102.

91. Reg. *v.* Moseley, 9 Cox C. C. 16, 7 Jur. N. S. 1108, L. & C. 92, 31 L. J. M. C. 24, 5 L. T. Rep. N. S. 328, 10 Wkly. Rep. 61; Reg. *v.* Rouse, 4 Cox C. C. 7.

92. Com. *v.* Sessions, 169 Mass. 329, 47 N. E. 1034; Com. *v.* Brown, 167 Mass. 144, 45 N. E. 1.

93. See Criminal Law, 12 Cyc. 87 *et seq.* **Competency of witness** see Witnesses.

94. *Alabama.*—O'Connor *v.* State, 30 Ala. 9.
Massachusetts.— Com. *v.* Stone, 4 Metc. 43.
Michigan.— People *v.* Getchell, 6 Mich. 496.
Mississippi.— Bowler *v.* State, 41 Miss. 570.
Texas.— Moore *v.* State, 20 Tex. App. 233.
See 23 Cent. Dig. tit. "False Pretenses," § 54.

Courts hold the state to stricter and more satisfactory proof in false pretenses than in crimes more dangerous to safety of the person or property. Morris *v.* People, 4 Colo. App. 136, 35 Pac. 188.

On a prosecution for selling land without having title thereto, the state must prove by competent evidence every material ingredient of the crime, including the want of title in defendant to the property conveyed. State *v.* Byam, 23 Oreg. 568, 32 Pac. 623.

Evidence sufficient to shift burden of proof see *infra*, page 445, note 15.

95. Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102; State *v.* Lynn, 3 Pennew. (Del.) 316, 51 Atl. 878; People *v.* Baker, 96 N. Y. 340; Brown *v.* People, 16 Hun (N. Y.) 535; Sherman *v.* People, 13 Hun (N. Y.) 575; Parmelee *v.* People, 8 Hun (N. Y.) 623; People *v.* Crissie, 4 Den. (N. Y.) 525; People *v.* Williams, 4 Hill (N. Y.) 9, 40 Am. Dec. 258; People *v.* Thomas, 3 Hill (N. Y.) 169; People *v.* Kendall, 25 Wend. (N. Y.) 399, 37 Am. Dec. 240; Skiff *v.* People, 2 Park. Cr. (N. Y.) 139 (all holding that the question of intent is one for the jury); Reg. *v.* Garrett, 2 C. L. R. 106, 6 Cox C. C. 260, Dears. C. C. 232, 17 Jur. 1060, 23 L. J. M. C. 20, 2 Wkly. Rep. 97, 22 Eng. L. & Eq. 607. See also *infra*, VIII, C, 3, b.

96. State *v.* Kingsley, 108 Mo. 135, 18 S. W. 994.

97. *Alabama.*— Amos *v.* State, 123 Ala. 50, 26 So. 524; McGee *v.* State, 117 Ala. 229, 23 So. 797; White *v.* State, 86 Ala. 69, 5 So. 674, evidence of the receipt of the property by defendant. See also Elmore *v.* State, 138 Ala. 50, 35 So. 25.
Dakota.— Territory *v.* Ely, 6 Dak. 128, 50 N. W. 623.
Georgia.— Jones *v.* State, 99 Ga. 46, 25 S. E. 617, holding that on a trial for selling a load of hay weighing six hundred and forty-four pounds upon the representation that it weighed one thousand two hundred and forty-four, it is competent to show as part of the representation that accused exhibited to the purchaser a ticket purporting to evi-

inal cases.[98] Likewise, and with the same limitation, any evidence that legitimately tends to disprove any of the elements of the crime is admissible on the part of defendant.[99]

b. As to Falsity of Pretense. Subject to the general rules of evidence, any evidence tending either by itself or in connection with other evidence in the case to prove that the pretenses made were false is admissible.[1]

dence the weight of the hay, although the indictment did not mention the ticket.

Illinois.— Jackson *v.* People, 126 Ill. 139, 18 N. E. 286.

Iowa.— State *v.* Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773 (holding that where the false pretense consisted in representing that defendant's imaginary brother was a nobleman, letters written by defendant to the imaginary brother and inclosed by defendant in return envelopes of the victim, and letters written by the supposed nobleman and addressed to the victim and delivered by defendant, are admissible to show the device used to induce prosecutor to credit the false pretense); State *v.* Brown, 25 Iowa 561.

New York.— People *v.* Bragle, 26 Hun 378, 10 Abb. N. Cas. 300.

Oregon.— State *v.* Hanscom, 28 Oreg. 427, 43 Pac. 167 (holding that evidence that a defendant charged with obtaining the signature to a draft by false pretense received the money on the draft is admissible to show a delivery to him of the draft); State *v.* Bloodsworth, 25 Oreg. 83, 34 Pac. 1023.

Texas.— Newberry *v.* State, (Cr. App. 1893) 22 S. W. 1041, holding that on a trial for swindling evidence is competent that defendant, on being threatened with prosecution, with the hope of postponing investigation into his conduct, drew a draft in settlement, for the amount he was charged with obtaining, on a bank with which he falsely alleged he carried an account.

See 23 Cent. Dig. tit. "False Pretenses," § 55.

Parol evidence.— When a false pretense is contained in a letter which is lost, the prisoner may be convicted, if parol evidence is given of the contents of the letter. Rex *v.* Chadwick, 6 C. & P. 181, 25 E. C. L. 383.

98. Baker *v.* State, 120 Wis. 135, 97 N. W. 566; Reg. *v.* Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T. Rep. N. S. 754, 24 Wkly. Rep. 279; Reg. *v.* Gallagher, 13 Cox C. C. 61, 32 L. T. Rep. N. S. 406.

Declarations.— On an indictment against a defendant for obtaining goods by falsely pretending that he was of full age, a plea of infancy in an action brought against him for the price of the goods is not admissible to prove that he was a minor, where the putting in of the plea was not brought home to him. Reg. *v.* Simmonds, 4 Cox C. C. 277.

Expert testimony.— On a prosecution for selling and conveying land without having title thereto, the fact that the land is situated in another state does not render competent the testimony of a witness as to the result of his examination of the records of title in that state, where it does not appear that he is skilled in such matters, or that the records he examined are the official records. State *v.* Byam, 23 Oreg. 568, 32 Pac. 623.

Hearsay.— On a trial for obtaining money by falsely representing that defendant was agent for a collection company which had a branch office at a certain place, testimony that the witness was informed by the police that there was no such office there is incompetent. Quick *v.* Com., 33 S. W. 77, 17 Ky. L. Rep. 938.

Irrelevant evidence is not admissible. Elmore *v.* State, 118 Ala. 661, 23 So. 669; State *v.* Cadwell, 79 Iowa 473, 44 N. W. 711; Com. *v.* Langley, 169 Mass. 89, 47 N. E. 511; Com. *v.* Coe, 115 Mass. 481; People *v.* Oscar, 105 Mich. 704, 63 N. W. 971, holding that evidence of ability to repay a loan obtained by false pretenses is inadmissible, since the offense is complete when the loan is obtained.

99. State *v.* Lurch, 12 Oreg. 95, 6 Pac. 405 (holding that on a charge of obtaining by giving a forged note, defendant may show that the signatures were written by himself under authority of the persons represented to be the makers); Bozier *v.* State, 5 Tex. App. 220 (holding that while the disposition made of the goods by defendant after he received them does not affect the question of his guilt, yet when the charge is that he obtained the goods by representing himself as the agent of X, and the agency is the issue, evidence that he gave the goods to the wife of X is material).

1. *Illinois.*— Rainforth *v.* People, 61 Ill. 365.

Kentucky.— Quick *v.* Com., 33 S. W. 77, 17 Ky. L. Rep. 938.

Massachusetts.— Com. *v.* Howe, 132 Mass. 250; Com. *v.* Davidson, 1 Cush. 33.

Minnesota.— State *v.* Hulder, 78 Minn. 524, 81 N. W. 532.

Mississippi.— Smith *v.* State, 55 Miss. 513.

New York.— Abbott *v.* People, 15 Hun 437 [*affirmed* in 75 N. Y. 602], holding that on a trial for obtaining goods by false pretenses in September, sworn schedules in bankruptcy filed by accused in the next November were admissible to show his financial condition when obtaining the goods.

Pennsylvania.— Com. *v.* Lundberg, 18 Phila. 482.

Tennessee.— Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728.

Texas.— Brown *v.* State, 37 Tex. Cr. 104, 38 S. W. 1008.

See 23 Cent. Dig. tit. "False Pretenses," § 58.

However, where the false pretense is a representation that defendant had funds in a bank, the notarial protests of defendant's

c. As to Knowledge and Intent. As a general rule, any evidence which has a legitimate tendency to prove that defendant knew his representations to be false is admissible,[2] and the same is true of any evidence which tends to prove or to disprove a guilty intent.[3] Evidence of similar false representations made by defendant to the same person for the purpose of obtaining property, or to others shortly before or after the representations for which defendant is on trial, is in most jurisdictions held admissible to prove either defendant's knowledge of their falsity or a guilty intent or both,[4] and this is so even though the transactions

drafts on the bank are not admissible to show that he had no funds there. State *v.* Reidel, 26 Iowa 430.

Evidence of the falsity of a pretense not negatived in the indictment is not admissible. State *v.* Long, 103 Ind. 481, 3 N. E. 169; Salter *v.* State, 36 Tex. Cr. 501, 38 S. W. 212. See also People *v.* Miller, 2 Park. Cr. (N. Y.) 197.

2. People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298 (holding that a judgment-roll in an action to which defendant was a party and in which his title to the property which he falsely claimed as his own was declared worthless is admissible to prove knowledge of the falsity of his claim); Jackson *v.* People, 126 Ill. 139, 18 N. E. 286 (holding that evidence of defendant's familiarity with articles similar to the one he is alleged to have misrepresented is admissible); Com. *v.* Stone, 4 Metc. (Mass.) 43 (holding that where the representation is as to the validity of certain bank-notes, evidence of the possession and negotiation of similar worthless notes is admissible); Com. *v.* Lundberg, 18 Phila. (Pa.) 482 (holding that the record of a suit between prosecutor and defendant's wife in which she claimed and recovered certain property is admissible, in a trial for obtaining money under the false pretense that defendant owned said property, to show his knowledge of the falsity).

3. *Iowa.*— State *v.* Jamison, 74 Iowa 613, 38 N. W. 509.

Massachusetts.— Com. *v.* Burton, 183 Mass. 461, 67 N. E. 419; Com. *v.* McDuffy, 126 Mass. 467; Com. *v.* Stone, 4 Metc. 43.

New Hampshire.— State *v.* Call, 48 N. H. 126.

New Jersey.— State *v.* Luxton, 65 N. J. L. 605, 48 Atl. 535.

New York.— People *v.* Sully, 5 Park. Cr. 142; Skiff *v.* People, 2 Park. Cr. 139.

North Carolina.— State *v.* Garris, 98 N. C. 733, 4 S. E. 633.

Washington.— State *v.* Riddell, 33 Wash. 324, 74 Pac. 477.

See 23 Cent. Dig. tit. "False Pretenses," § 56.

Evidence of conversion of the property by defendant may be admissible. State *v.* Lichliter, 95 Mo. 402, 8 S. W. 720; Long *v.* State, 1 Swan (Tenn.) 287.

Evidence of the financial ability of defendant may be admissible. Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599; Com. *v.* Drew, 153 Mass. 588, 27 N. E. 593; Com. *v.* Jeffries, 7 Allen (Mass.) 548, 83 Am. Dec. 712; People *v.* Cook, 41 Hun (N. Y.) 67.

Evidence that defendant offered to return the property is not admissible. Carlisle *v.* State, 77 Ala. 71.

Evidence given in trial for another crime.— A witness examined on a trial of three defendants for grand larceny may, to show a common design among them, testify to the same facts on a subsequent trial of two of defendants for obtaining money under false pretenses, from the same person, at a different time and place. State *v.* Davis, 19 Ala. 13.

4. *California.*— People *v.* Wasservogle, 77 Cal. 173, 19 Pac. 270.

Illinois.— Du Bois *v.* People, 200 Ill. 157, 65 N. E. 658, 93 Am. St. Rep. 183, holding that to show guilty knowledge of defendant of the confidence game for which he was indicted, evidence of other like transactions in which he took the part taken by his confederate in the case at bar is admissible. See, however, Jackson *v.* People, 18 Ill. App. 508, holding that where the charge is of false representation of facts within the knowledge of accused, and where from proof that they were false the inevitable inference is that they were made for a fraudulent purpose, evidence of the perpetration of other like offenses is not admissible.

Indiana.— Crum *v.* State, 148 Ind. 401, 47 N. E. 833 [*overruling* Strong *v.* State, 86 Ind. 208, 44 Am. Rep. 292]; State *v.* Long, 103 Ind. 481, 3 N. E. 169.

Iowa.— State *v.* Dexter, 115 Iowa 678, 87 N. W. 417; State *v.* Carter, 112 Iowa 15, 83 N. W. 715; State *v.* Brady, 100 Iowa 191, 69 N. W. 290, 62 Am. St. Rep. 560, 36 L. R. A. 693; State *v.* Jamison, 74 Iowa 613, 38 N. W. 509.

Maryland.— Carnell *v.* State, 85 Md. 1, 36 Atl. 117.

Massachusetts.— Com. *v.* Lubinsky, 182 Mass. 142, 64 N. E. 966; Com. *v.* Coe, 115 Mass. 481; Com. *v.* Tuckerman, 10 Gray 173; Com. *v.* Eastman, 1 Cush. 189, 48 Am. Dec. 596. The fact that such evidence also tends to show the commission of the same crime on another occasion does not render it inadmissible. Com. *v.* Blood, 141 Mass. 571, 6 N. E. 769; Com. *v.* Jackson, 132 Mass. 16. But evidence that defendant might have obtained money from other persons by similar pretenses, but did not do so, or that defendant had obtained money by similar pretenses of other persons and had repaid the same, is not admissible. Com. *v.* Howe, 132 Mass. 250.

Michigan.— People *v.* Summers, 115 Mich. 537, 73 N. W. 818; People *v.* Shelters, 99

differ in detail, if similar in general outline,[5] and notwithstanding that defend-

Mich. 333, 58 N. W. 362; People *v.* Wakely, 62 Mich. 297, 28 N. W. 871; People *v.* Henssler, 48 Mich. 49, 11 N. W. 804; People *v.* Schweitzer, 23 Mich. 301.

Minnesota.— State *v.* Southall, 77 Minn. 296, 79 N. W. 1007; State *v.* Wilson, 72 Minn. 522, 75 N. W. 715.

Missouri.— State *v.* Rosenberg, 162 Mo. 358, 62 S. W. 435, 982; State *v.* Wilson, 143 Mo. 334, 44 S. W. 722; State *v.* Turly, 142 Mo. 403, 44 S. W. 267. Confidence game see State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Sarony, 95 Mo. 349, 8 S. W. 407; State *v.* Beaucleigh, 92 Mo. 490, 4 S. W. 666; State *v.* Bayne, 88 Mo. 604; State *v.* Cooper, 85 Mo. 256; State *v.* Myers, 82 Mo. 558, 52 Am. Rep. 389.

New Hampshire.— State *v.* Call, 48 N. H. 126.

New Jersey.— Cunningham *v.* State, 61 N. J. L. 67, 40 Atl. 696 [*affirming* 61 N. J. L. 666, 38 Atl. 847], holding that *a fortiori* are such representations admissible when they are part of a general scheme to defraud.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883; People *v.* Cole, 137 N. Y. 530, 33 N. E. 336 [*affirming* 20 N. Y. Suppl. 505]; People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; People *v.* Everhardt, 104 N. Y. 591, 11 N. E. 62; Shipply *v.* People, 86 N. Y. 375, 40 Am. Rep. 551; Mayer *v.* People, 80 N. Y. 364; Weyman *v.* People, 62 N. Y. 623; Bielschofasky *v.* People, 60 N. Y. 616 [*affirming* 3 Hun 40]; People *v.* Putnam, 90 N. Y. App. Div. 125, 85 N. Y. Suppl. 1056; People *v.* Jefferey, 82 Hun 409, 31 N. Y. Suppl. 267; People *v.* Reavey, 38 Hun 418, 39 Hun 364; Copperman *v.* People, 3 Thomps. & C. 199; People *v.* Lewis, 16 N. Y. Suppl. 881. See, however, People *v.* Spielman, 20 Alb. L. J. 96, holding that dealings of defendant with other persons are not admissible to show knowledge of falsity, since such knowledge must be proved before intent is material, but may be proved to show intent.

North Carolina.— State *v.* Walton, 114 N. C. 783, 18 S. E. 945.

Ohio.— Tarbox *v.* State, 38 Ohio St. 581.

Tennessee.— Rafferty *v.* State, 91 Tenn. 655, 16 S. W. 728; Britt *v.* State, 9 Humphr. 31.

Texas.—Davison *v.* State, 12 Tex. App. 214.

Virginia.— Trogdon *v.* Com., 31 Gratt. 862, holding that evidence of similar transactions is admissible, even though statute has made false pretense larceny.

Wisconsin.— Baker *v.* State, 120 Wis. 135, 97 N. W. 566.

United States.— Wood *v.* U. S., 16 Pet. 342, 10 L. ed. 987; Wright *v.* U. S., 30 Fed. Cas. No. 18,097, 1 Hayw. & H. 201.

England.— Reg. *v.* Ollis, [1900] 2 Q. B. 758, 19 Cox C. C. 554, 64 J. P. 518, 69 L. J. Q. B. 918, 83 L. T. Rep. N. S. 251, 49 Wkly. Rep. 76; Reg. *v.* Rhodes, [1899] 1 Q. B. 77, 19 Cox C. C. 182, 62 J. P. 774, 79 L. T. Rep. N. S. 360, 47 Wkly. Rep. 121; Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. Rep. N. S. 503, 22 Wkly. Rep. 663. See, however, Reg. *v.* Holt, Bell C. C. 280, 8 Cox C. C. 411, 6 Jur. N. S. 1121, 30 L. J. M. C. 11, 3 L. T. Rep. N. S. 310, 9 Wkly. Rep. 74; Reg. *v.* Fuidge, 9 Cox C. C. 430, 10 Jur. N. S. 160, L. & C. 390, 33 L. J. M. C. 74, 9 L. T. Rep. N. S. 777, 12 Wkly. Rep. 351. When the false pretense consists in advertisements requesting answers, answers received by the postmaster and detained by him may be given in evidence in connection with other answers found in prosecutor's possession. Reg. *v.* Cooper, 1 Q. B. D. 19, 13 Cox C. C. 123, 45 L. J. M. C. 15, 33 L. T. Rep. N. S. 754, 24 Wkly. Rep. 279; Rex *v.* Roberts, 1 Campb. 399, 2 Leach C. C. 987 note (conspiracy to defraud); Reg. *v.* Stenson, 12 Cox C. C. 111, 25 L. T. Rep. N. S. 666; Reg. *v.* Roebuck, 7 Cox C. C. 126, Dears. & B. 24, 2 Jur. N. S. 597, 25 L. J. M. C. 101, 4 Wkly. Rep. 514; Rex *v.* Whitehead, 1 C. & P. 67, 12 E. C. L. 49; Hathaway's Case, 14 How. St. Tr. 639, 664.

Canada.— Reg. *v.* Hope, 17 Ont. 463 [*following* Reg. *v.* Francis, L. R. 2 C. C. 128, 12 Cox C. C. 612, 43 L. J. M. C. 97, 30 L. T. Rep. N. S. 503, 22 Wkly. Rep. 663].

See 23 Cent. Dig. tit. "False Pretenses," §§ 56, 58.

Evidence held inadmissible see the following cases:

Connecticut.— State *v.* Church, 43 Conn. 471, holding that evidence of mere gratuitous statements made by accused six months after the offense, variant from those made at the time of the offense, not in any attempt to obtain property, is not admissible to show intent.

Nebraska.— Morgan *v.* State, 56 Nebr. 696, 77 N. W. 64 (holding such evidence admissible to show knowledge but not intent); Cowan *v.* State, 22 Nebr. 519, 35 N. W. 405.

New York.— Shulman *v.* People, 21 Hun 516 [*affirmed* in 76 N. Y. 624].

Pennsylvania.— Com. *v.* Daniels, 2 Pars. Eq. Cas. 332, holding that the state cannot show that defendant at the same time procured goods from others on a similar false pretense.

Rhode Island.— State *v.* Letourneau, 24 R. I. 3, 51 Atl. 1048, 96 Am. St. Rep. 696.

Washington.— State *v.* Bokien, 14 Wash. 403, 44 Pac. 889, holding that evidence that defendant had drawn several checks to different persons which were dishonored when presented because defendant had no funds in bank, and that defendant knew that payment had been refused, is not admissible to show intent in a trial for false pretense in obtaining money by giving a check.

See 23 Cent. Dig. tit. "False Pretenses," §§ 56, 58.

For further qualifications, limitations, and exceptions see Illinois, Massachusetts, New York, and English cases cited *supra*, this note.

5. State *v.* Jackson, 112 Mo. 585, 20 S. W. 674.

ant has been acquitted on an indictment for such other representations;[6] but evidence that defendant had obtained property by such other representations is not admissible to prove intent.[7] Defendant may himself testify as to his intent.[8]

d. As to Reliance on Pretense. The general rules governing the admissibility of evidence apply to evidence offered on the issue of whether prosecutor relied on the false pretense.[9] By the weight of authority prosecutor may testify that he was induced to part with the property by the false pretenses.[10]

3. Weight and Sufficiency[11]— a. As to the Pretense and Its Falsity. The state must prove beyond a reasonable doubt that defendant made the pretense,[12] and that it was false.[13] It is not necessary that the proof should be direct; it is sufficient if the evidence establish such facts as tend legitimately to show its falsity;[14] and since defendant is usually in a position to know the truth or falsity of the representation, slight evidence of its falsity is sufficient for a conviction, in the absence of countervailing evidence of its truth.[15]

6. Reg. *v.* Ollis, [1900] 2 Q. B. 758, 19 Cox C. C. 554, 64 J. P. 518, 69 L. J. Q. B. 918, 83 L. T. Rep. N. S. 251, 49 Wkly. Rep. 76.

7. Wright *v.* U. S., 30 Fed. Cas. No. 18,098, 1 Hayw. & H. 211.

8. People *v.* Baker, 96 N. Y. 340; Babcock *v.* People, 15 Hun (N. Y.) 347.

9. Van Buren *v.* People, 7 Colo. App. 136, 42 Pac. 599; Com. *v.* Chesley, 107 Mass. 223; People *v.* Herrick, 13 Wend. (N. Y.) 87, holding that if defendant endeavors to show that prosecutor relied not on a representation of possession of a particular fund but on defendant's general responsibility, the evidence must be limited to the time when the property was obtained.

Evidence of similar transactions between the parties is admissible to show whether prosecutor was deceived or is using the law to enforce a debt. State *v.* Rivers, 58 Iowa 102, 12 N. W. 117, 43 Am. Rep. 112.

False pretenses made after delivery of the property are not admissible, as they could not have influenced prosecutor in parting with the property. State *v.* Church, 43 Conn. 471.

10. *In re* Snyder, 17 Kan. 542; Com. *v.* O'Brien, 172 Mass. 248, 52 N. E. 77; People *v.* Sully, Sheld. (N. Y.) 17; People *v.* Herrick, 13 Wend. (N. Y.) 87; People *v.* Miller, 2 Park. Cr. (N. Y.) 197 (the last three cases holding that whether prosecutor relied on the pretense is a question of fact, not opinion); People *v.* Sully, 5 Park. Cr. (N. Y.) 142; Reg. *v.* King, [1897] 1 Q. B. 214, 18 Cox C. C. 447, 61 J. P. 329, 66 L. J. Q. B. 87, 75 L. T. Rep. N. S. 392. *Contra*, Com. *v.* Daniels, 2 Pars. Eq. Cas. 332 (on the ground that this is allowing the witness to testify as to matter of opinion); Reg. *v.* Harty, 31 Nova Scotia 272 (holding that an answer of prosecutor, "I would not have given him [defendant] the credit [goods] if he had not represented himself as owner," was not a statement of fact).

11. Requirement of proof beyond a reasonable doubt see also *supra*, VIII, C, 1.

12. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017, holding that one whose life was insured and who pretended to be drowned, whereby his executor was enabled to collect the insurance, cannot be convicted under an allegation that the false pretenses as to his death were made by the executor through his procurement, unless he instigated the executor to make the pretenses; and this is not shown merely by his prior acts in obtaining the policy and pretending to drown, and his subsequent disappearance and concealment.

13. State *v.* Penny, 70 Iowa 190, 30 N. W. 561 [*explaining* State *v.* Lewis, 45 Iowa 20] (holding that under Iowa Code, § 5491, a confession that the pretense was false is not sufficient for conviction without corroborating evidence); Brown *v.* State, 29 Tex. 503 (holding that where the false pretense charged was giving a spurious bank-note, evidence of a witness who had no competent knowledge of the subject that he did not like its appearance and refused to receive it is not sufficient proof that the note was spurious); Rex *v.* Flint, R. & R. 342 (holding that on an indictment for delivering in payment for a horse certain promissory notes as and for good and available promissory notes which the prisoner knew to be not good, nor of any value, the notes purporting to be those of a county bank, evidence of a witness that he had read in the newspapers and heard from people who had bills at the bank that it had failed was not sufficient evidence of falsity of the pretense).

Where the false pretense is of supernatural power, actual proof of its falsity is not required. Bowen *v.* State, 9 Baxt. (Tenn.) 45, 40 Am. Rep. 71.

14. People *v.* Shelters, 99 Mich. 333, 58 N. W. 362; People *v.* Pinckney, 67 Hun (N. Y.) 428, 22 N. Y. Suppl. 118, 10 N. Y. Cr. 351; Reg. *v.* Smith, 6 Cox C. C. 314.

This is especially so where proof that the pretense is false necessitates proof of a negation. Bowler *v.* State, 41 Miss. 570; People *v.* Lewis, 16 N. Y. Suppl. 881.

15. People *v.* Tilton, 2 Wheel. Cr. (N. Y.) 251; Collins' Case, 4 City Hall Rec. (N. Y.) 143; Sherwood *v.* State, 42 Tex. 498; Reg. *v.* Burnsides, Bell C. C. 282, 8 Cox C. C. 370, 6 Jur. N. S. 1310, 30 L. J. M. C. 42, 3 L. T. Rep. N. S. 311, 9 Wkly. Rep. 37.

Evidence sufficient to shift burden of proof. — It is said in some of the cases cited above that slight evidence of falsity will throw

b. As to Intent. The intent must be proven specifically; it cannot be implied from proof of the making of the pretense.[16] Lack of intent is not shown by evidence that defendant intended to apply the money and in fact applied it to the object for which it was given.[17]

c. As to Reliance on the Pretense. While the state must prove that prosecutor relied on the false pretense,[18] it is not necessary that that fact should be established by the direct evidence of prosecutor himself.[19]

d. As to the Property Obtained. The fact of the obtaining of the property by defendant may be proved by circumstantial evidence.[20] In the absence of evidence raising any question of ownership, proof that property was in possession of prosecutor is sufficient proof of his ownership.[21]

D. Trial — 1. Province of Court and of Jury. Questions of law are for the court.[22] Issues of fact, on the other hand, are for the jury.[23] Thus it is for the jury to determine what impression the words used by defendant were intended to convey, and did convey,[24] whether defendant knew of the falsity of the pretense,[25] whether the representations were made with intent to defraud,[26] whether the pretense was calculated to deceive a person of ordinary prudence,[27] and whether the pretense was relied on by prosecutor so as to be the inducing cause of the transfer of the property.[28]

the burden of proof on defendant; but upon this point see State *v.* Wilbourne, 87 N. C. 529.

16. State *v.* Fields, 118 Ind. 491, 21 N. E. 252 (holding that the mere fact that in an exchange of personal property one party so far overreaches the other that an action at law would lie by the injured party for the difference in value does not necessarily show the intent essential to a conviction for false pretense); People *v.* Getchell, 6 Mich. 496; Com. *v.* Lundberg, 18 Phila. (Pa.) 482. See also *supra*, VIII, C, 1. However, the ordering of goods in the name of another is *prima facie* evidence of intent to defraud. Reg. *v.* Franklin, 4 F. & F. 94.

17. People *v.* Lennox, 106 Mich. 625, 64 N. W. 488.

18. See *supra*, IV, C, 6, a.

19. Elmore *v.* State, 138 Ala. 50, 35 So. 25; People *v.* Hong Quin Moon, 92 Cal. 41, 27 Pac. 1096; Therasson *v.* People, 82 N. Y. 238 [*reversing* 20 Hun 55]; People *v.* Suydam, 14 N. Y. Suppl. 492.

20. Roberts *v.* People, 9 Colo. 458, 13 Pac. 630.

21. Barton *v.* People, 135 Ill. 405, 25 N. E. 776, 25 Am. St. Rep. 375, 10 L. R. A. 302.

22. State *v.* Burnett, 119 Ind. 392, 21 N. E. 972; Smith *v.* People, 47 N. Y. 303, holding that the sufficiency of the indictment is a question for the court.

23. Com. *v.* Stone, 4 Metc. (Mass.) 43, holding that whether the passing of a depreciated bill is a sufficient representation that it is good is a question for the jury.

24. People *v.* Blanchard, 90 N. Y. 314; State *v.* Matthews, 121 N. C. 604, 28 S. E. 469; Reg. *v.* Cooper, 2 Q. B. D. 510, 13 Cox C. C. 617, 46 L. J. M. C. 219, 36 L. T. Rep. N. S. 671, 25 Wkly. Rep. 696; Reg. *v.* Archer, 3 C. L. R. 623, 6 Cox C. C. 515, Dears. C. C. 449, 1 Jur. N. S. 479 (where defendant represented that he wanted goods for A, and it was held for the jury to determine whether from all the circumstances this was a representation that he was employed by A to get the goods or that he intended to send them to A after getting them); Reg. *v.* Copeland, C. & M. 516, 41 E. C. L. 282; Reg. *v.* Randell, 16 Cox C. C. 335, 52 J. P. 359, 57 L. T. Rep. N. S. 718.

25. People *v.* Bird, 126 Mich. 631, 96 N. W. 127, Mikell Cas. Cr. L. 869; People *v.* Jefferey, 82 Hun (N. Y.) 409, 31 N. Y. Suppl. 267.

26. *Arkansas.*— Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

Delaware.— State *v.* Lynn, 3 Pennew. 316, 51 Atl. 878.

Georgia.— Crawford *v.* State, 117 Ga. 247, 43 S. E. 762, holding that where defendant claimed that he remained silent because he thought the person alleged to have been deceived knew the true facts, such theory of defense must be submitted to the jury, although only appearing from defendant's statement.

Missouri.— State *v.* Scott, 48 Mo. 422.

New York.— People *v.* Cole, 20 N. Y. Suppl. 505 [*affirmed* in 137 N. Y. 530, 33 N. E. 336].

See 23 Cent. Dig. tit. "False Pretenses," § 63. See also *supra*, VIII, C, 1.

27. Shaffer *v.* State, 100 Ind. 365; Wagoner *v.* State, 90 Ind. 504; Miller *v.* State, 79 Ind. 198; State *v.* Stewart, 9 N. D. 409, 83 N. W. 869. See also *supra*, IV, C, 5.

It has been held, however, that if the question arises on the pleadings, as upon a motion to quash, it is one of law. State *v.* Burnett, 119 Ind. 392, 21 N. E. 972. But see State *v.* Switser, 63 Vt. 604, 22 Atl. 724, 25 Am. St. Rep. 789.

28. *California.*— People *v.* Weir, 120 Cal. 279, 52 Pac. 656. See also People *v.* Donaldson, 70 Cal. 116, 11 Pac. 681, holding that whether the property was delivered and title vested in defendant before the false pretense was made is a question for the jury.

2. INSTRUCTIONS. The court should instruct the jury as to every essential element of the offense; therefore a failure to instruct the jury as to the necessity for intent,[29] for defendant's knowledge of the falsity of the pretense,[30] and for injury to prosecutor,[31] or a failure to instruct as to the materiality of the pretenses where more than one was used,[32] is reversible error.

3. VERDICT.[33] The verdict must contain, either in itself or by reference to the indictment, all the elements of the crime.[34]

IX. PUNISHMENT.

The crime of obtaining property by false pretenses is punished variously in different jurisdictions.[35]

Massachusetts.— Com. *v.* Coe, 115 Mass. 481.

Michigan.— People *v.* Stockwell, 135 Mich. 341, 97 N. W. 765, where in a prosecution for obtaining money under false representations that a certain person was the father of an unborn child, such person attempted to explain away a previous denial that he had had connection with the woman, and it was held that the reasonableness of his explanation was for the jury.

New York.— Thomas *v.* People, 34 N. Y. 351.

Pennsylvania.— Com. *v.* Daniels, 2 Pars. Eq. Cas. 332.

England.— Reg. *v.* Martin, L. R. 1 C. C. 56, 10 Cox C. C. 383, 36 L. J. M. C. 20, 15 L. T. Rep. N. S. 54, 15 Wkly. Rep. 358; Reg. *v.* Welman, 6 Cox C. C. 153, Dears. C. C. 188, 1 Wkly. Rep. 361; Reg. *v.* Hamilton, 1 Cox C. C. 244.

Canada.— Reg. *v.* Harty, 31 Nova Scotia 272, where the court thought the pretense too remote for the obtaining of the property, although it was a question for the jury to find whether there was a direct connection between the two.

See 23 Cent. Dig. tit. "False Pretenses," § 63.

29. Crawford *v.* State, 117 Ga. 247, 43 S. E. 762; Gregg *v.* People, 98 Ill. App. 170; State *v.* Jackson, 112 Mo. 585, 20 S. W. 674; State *v.* Myers, 82 Mo. 558, 52 Am. Rep. 389; State *v.* Norton, 76 Mo. 180; State *v.* Austin, 79 N. C. 624.

Where evidence of similar transactions has been admitted, the court must in its charge limit the purpose and object of the evidence to the question of intent. Martin *v.* State, 36 Tex. Cr. 125, 35 S. W. 976.

30. Crawford *v.* State, 117 Ga. 247, 43 S. E. 762.

31. Berry *v.* State, 97 Ga. 202, 23 S. E. 833.

32. State *v.* Nine, 105 Iowa 131, 74 N. W. 945; West *v.* State, 63 Nebr. 257, 88 N. W. 503. However, an instruction that in order to convict the jury must believe that defendant procured money on the faith of his representation that he had money in a certain bank, which representation was the one charged in the indictment, excludes the idea that they could convict if he obtained the money on any other representation. Brown *v.* State, (Tex. Cr. App. 1898) 43 S. W. 986.

33. Propriety of conviction where several pretenses are charged, the truth of some of which is not properly negatived, and a general verdict of guilty is rendered see *supra*, page 427, note 30.

34. People *v.* Cummings, 117 Cal. 497, 49 Pac. 576; State *v.* Oakley, 103 N. C. 408, 9 S. E. 575.

Verdicts held sufficient.—A verdict of guilty will not be set aside because it fixes the value of the money at a few dollars more than is established by the evidence, where the uncontradicted proofs show that the sum procured exceeded thirty-five dollars, the amount to obtain which by false pretense is made criminal by Nebr. Cr. Code, § 125. Wax *v.* State, 43 Nebr. 18, 61 N. W. 117. Under the Ohio act of Feb. 21, 1873 (70 Ohio Laws 39), making it an offense to procure, etc., the signature of a person to a promissory note, if the indictment sets out the amount of the note, it is not necessary that the value of the note be found by the verdict of the jury. The amount of the note, not its value, determines the grade of the offense. Ellars *v.* State, 25 Ohio St. 385. In a prosecution for obtaining a signature to an indorsement of a draft by false pretenses wherein the judge withdrew from the jury as immaterial the proof of the obtaining the money, a verdict, "We find the defendant guilty of obtaining money under false pretense, as charged in the indictment," was a substantial finding of the offense; and the reference to the money obtained would be, if necessary, stricken out as surplusage. Wallace *v.* State, 2 Lea (Tenn.) 29. Where the jury find in a special verdict that prosecutor supplied the prisoner with the goods, and that she believed the statement he made, which was false, it is to be inferred that she so acted because she believed the statement. Reg. *v.* Burton, 16 Cox C. C. 62, 54 L. T. Rep. N. S. 765.

A verdict cannot be amended on review in a court of appeal. Reg. *v.* Ewing, 21 U. C. Q. B. 523.

35. See the statutes of the different states. See also *Ex p.* Neustadt, 82 Cal. 273, 23 Pac. 124 (holding that a possible penalty of life imprisonment for this offense is not authorized); Wilde *v.* Com., 2 Metc. (Mass.) 408 (holding that defendant may be sentenced to pay costs as well as a fine, but that he cannot be sentenced to solitary confinement);

FALSE REPRESENTATION. See False Pretenses; Fraud.

FALSE RETURN. A return made by the sheriff or other ministerial officer to a writ in which is stated a fact contrary to the truth and injurious to one of the parties, or to some one having an interest in it.[1] (False Return: By Sheriff, see Sheriffs and Constables. Of Taxable Property, see Taxation.)

FALSE SWEARING. The act of knowingly and intentionally stating upon oath what is not true;[2] a false statement under oath by a voluntary declaration or affidavit, which is not required by law or made in the course of a judicial proceeding.[3] In its ordinary sense, swearing to what the deponent knows to be untrue; swearing corruptly; swearing which is morally, wilfully false, not merely mistaken.[4] (False Swearing: Generally, see Perjury. By Bankrupt, see Bankruptcy. By Insolvent, see Insolvency. By Insured,[5] see Fire Insurance.)

FALSE TOKEN. See False Pretenses.

FALSE TRADE DESCRIPTION. A trade description which is false in a material respect as regards goods to which it is applied.[6] (See, generally, False Pretenses; Trade-Marks and Trade-Names.)

FALSE WEIGHTS AND MEASURES. See Weights and Measures.

FALSE WRITING. See False Pretenses.

FALSI CRIMEN. See Criminal Law.

FALSIFY. To give a false appearance to anything;[7] to reverse or avoid, as a verdict, or judgment;[8] to prove a thing to be false.[9] In equity practice, to show, in accounting before a master in chancery, that a charge has been inserted which is wrong, that is, either wholly false, or in some part erroneous.[10] In criminal

State *v.* Williams, 77 Mo. 310 [*affirming* 12 Mo. App. 415] (holding that a possible sentence of life imprisonment is authorized); State *v.* Crumpler, 90 N. C. 701 (holding that the court has no power to impose any other sentence than that prescribed by statute).

In some states it is punished as larceny. People *v.* Wynn, 140 Cal. 661, 74 Pac. 144 [*affirming* 133 Cal. 72, 65 Pac. 126]; People *v.* Bryant, 119 Cal. 595, 51 Pac. 960; Dull *v.* Com., 25 Gratt. (Va.) 965.

St. 30 Geo. II, c. 24, creating the crime of obtaining property by false pretense, provided that offenders should be fined and imprisoned, or put in the pillory, or publicly whipped, or be transported for seven years, as the court should think fit.

1. Bouvier L. Dict. [*quoted* in McLain *v.* Jenkins, 170 Mo. 16, 24, 70 S. W. 152]. See also Ohio Farmers' Ins. Co. *v.* Hard, 59 Ohio St. 248, 255, 52 N. E. 635; Ratterman *v.* Ingalls, 48 Ohio St. 468, 28 N. E. 168; Lander *v.* Mercantile Nat. Bank, 118 Fed. 785, 787, 55 C. C. A. 523.

"'False return' was simply the specific name . . . for one of the numerous class of actions on the case. It was not an action *in rem* for the purpose of canceling or setting aside the return in order to pave the way for another action for damages, but was itself an action for damages founded upon the official misconduct of the sheriff." Raker *v.* Bucher, 100 Cal. 214, 219, 34 Pac. 654, 849.

"A 'false return,' within the meaning of . . . [a statute relative to taxation], must be one in which there appears, if not a design to mislead or to deceive, at least culpable negligence on the part of the taxpayer." Lander *v.* Mercantile Nat. Bank, 118 Fed. 785, 787, 55 C. C. A. 523 [*citing* Ratterman *v.* Ingalls, 48 Ohio St. 468, 28 N. E. 168].

2. Linscott *v.* Orient Ins. Co., 88 Me. 497, 499, 34 Atl. 405, 51 Am. St. Rep. 435.

3. O'Bryan *v.* State, 27 Tex. App. 339, 11 S. W. 443; Langford *v.* State, 9 Tex. App. 283, 285, where the term is distinguished from "perjury."

4. Mason *v.* Canada Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19, 25.

5. **In connection with insurance policies the** term has been construed in Franklin Ins. Co. *v.* Culver, 6 Ind. 137, 139; Marion *v.* Great Republic Ins. Co., 35 Mo. 148, 149; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 284, 49 Am. Dec. 74; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, 292.

6. St. 50 & 51 Vict. (1891) c. 28, § 4, subs. 1 [*quoted* in Kirshenboim *v.* Salmon, [1898] 2 Q. B. 19, 26, 62 J. P. 439, 67 L. J. Q. B. 601, 78 L. T. Rep. N. S. 658, 46 Wkly. Rep. 573]. See also Bischop *v.* Toler, 18 Cox C. C. 199, 59 J. P. 807, 65 L. J. M. C. 1, 73 L. T. Rep. N. S. 402, 403, 15 Reports 607, 44 Wkly. Rep. 189; Hooper *v.* Balfour, 62 L. T. Rep. N. S. 646, 648.

The use of the term "quadruple plate" in an advertisement of tea sets is an application of a false trade description, where the sets cannot properly be described in such a manner. Reg. *v.* T. Eaton Co., 31 Ont. 276.

7. Black L. Dict.

8. Burrill L. Dict. [*citing* 4 Blackstone Comm. 390; 4 Stephen Comm. 455]. See also Bouvier L. Dict. [*citing* 4 Stephen Comm. 553].

9. Bouvier L. Dict. [*citing* Coke Litt. 104*b*].

10. Burrill L. Dict. [*citing* Pulling Merc. Accounts 162; 1 Story Eq. Jur. § 525]. See also Black L. Dict. [*citing* 1 Story Eq. Jur. § 525].

"Falsifying account" see Rehill *v.* McTague, 114 Pa. St. 82, 95, 7 Atl. 224, 60 Am.

law, to forge or counterfeit; to make false; to give a false appearance to a thing.[11] (To Falsify: In General, see FORGERY. Accounts — In General, see ACCOUNTS AND ACCOUNTING; Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Of Guardian, see GUARDIAN AND WARD; Of Partner, see PARTNERSHIP; Of Trustee, see TRUSTS. Record, see RECORDS.)

FALSO RETORNO BREVIUM. A writ that lay against a sheriff, who had execution of process for a false return.[12]

FALSUS IN UNO, FALSUS IN OMNIBUS.[13] A maxim meaning "False in one thing, false in everything."[14] (See, generally, WITNESSES.)

Rep. 341; Kennedy *v.* Adickes, 37 S. C. 174, 177, 15 S. E. 922.

"Surcharge" and "falsify" see Philips *v.* Belden, 2 Edw. (N. Y.) 1, 23; Rehill *v.* McTague, 114 Pa. St. 82, 95, 7 Atl. 224, 60 Am. Rep. 341; Kennedy *v.* Adickes, 37 S. C. 174, 177, 15 S. E. 922; Pit *v.* Cholmondeley, 2 Ves. 565, 28 Eng. Reprint 360. See 1 Cyc. 459, where the terms "opening," "surcharging," and "surcharging and falsifying" are distinguished.

11. Burrill L. Dict.

12. Wharton L. Lex.

13. A maxim which has been referred to as "a familiar maxim" (Atwood *v.* Welton, 7 Conn. 66, 71); "the sound old maxim" (People *v.* Thacher, 7 Lans. (N. Y.) 274, 289); a maxim "of general acceptation" (Atkins *v.* Gladwish, 27 Nebr. 841, 847, 44 N. W. 37); "the maxim of the law . . . which does not stop at *nisi prius*" (People *v.* Evans, 40 N. Y. 1, 5, 6); "an ancient maxim of the law of evidence" (Stoffer *v.* State, 15 Ohio St. 47, 54, 55, 86 Am. Dec. 470); "an established rule of the law of evidence" (Com. *v.* Billings, 97 Mass. 405, 406); a maxim which "must still be given some force as a legal principle" (People *v.* Ledwon, 153 N. Y. 10, 22, 46 N. E. 1046); "it is not of universal application" (Seymour *v.* Fellows, 44 N. Y. Super. Ct. 124, 130).

14. Bouvier L. Dict. See also 17 Cyc. 781; 16 Cyc. 1061 note 92.

Applied or explained in the following cases:

Alabama.— Grimes *v.* State, 63 Ala. 166, 168.

Arkansas.—Marshall *v.* Green, 24 Ark. 410, 420.

California.— People *v.* Plyler, 121 Cal. 160, 163, 53 Pac. 553 [*citing* People *v.* Soto, 59 Cal. 367]; White *v.* Disher, 67 Cal. 402, 403, 7 Pac. 826; People *v.* Sprague, 53 Cal. 491, 494; People *v.* Strong, 30 Cal. 151, 156.

Connecticut.— Dubuque *v.* Coman, 64 Conn. 475, 479, 30 Atl. 777; Atwood *v.* Welton, 7 Conn. 66, 71.

Georgia.— Central R., etc., Co. *v.* Phinazee, 93 Ga. 488, 489, 21 S. E. 66.

Illinois.— Brennan *v.* People, 15 Ill. 511, 517.

Indiana.— Lemmon *v.* Moore, 94 Ind. 40, 45.

Iowa.— Callanan *v.* Shaw, 24 Iowa 441, 447.

Kansas.— Gannon *v.* Stevens, 13 Kan. 447, 461; Russell *v.* State, 11 Kan. 308, 322; Campbell *v.* State, 3 Kan. 486, 489.

Louisiana.— State *v.* Allen, 111 La. 154, 158, 35 So. 495.

Maine.— Patterson *v.* Yeaton, 47 Me. 308, 312; Parsons *v.* Huff, 41 Me. 410, 413; Lewis *v.* Hodgdon, 17 Me. 267, 273.

Massachusetts.— Com. *v.* Billings, 97 Mass. 405, 406.

Michigan.— Van Voorhis *v.* Van Voorhis, 94 Mich. 60, 77, 53 N. W. 964.

Missouri.— State *v.* Lingle, 128 Mo. 528, 540, 31 S. W. 20; State *v.* Mounce, 106 Mo. 226, 228, 17 S. W. 226; State *v.* Johnson, 91 Mo. 439, 442, 3 S. W. 868; Brown *v.* Hannibal, etc., R. Co., 66 Mo. 588, 598; State *v.* Brown, 64 Mo. 367, 375; State *v.* Elkins, 63 Mo. 159, 164; Sutton *v.* Hayden, 62 Mo. 101, 109; Iron Mountain Bank *v.* Murdock, 62 Mo. 70; State *v.* Anderson, 19 Mo. 241, 246; Hart *v.* Hopson, 52 Mo. App. 177, 192; Blitt *v.* Heinrich, 33 Mo. App. 243, 245.

Nebraska.—Nielsen *v.* Cedar County, (1904) 98 N. W. 1090, 1092; Omaha, etc., R. Co. *v.* Kravenbuhl, 48 Nebr. 553, 557, 67 N. W. 447; Stoppert *v.* Nierle, 45 Nebr. 105, 113, 63 N. W. 382; Freiberg *v.* Treitschke, 36 Nebr. 880, 889, 55 N. W. 273; Walker *v.* Haggerty, 30 Nebr. 120, 126, 46 N. W. 221; Atkins *v.* Gladwish, 27 Nebr. 841, 847, 44 N. W. 37; Kay *v.* Noll, 20 Nebr. 380, 388, 30 N. W. 269; Buffalo County *v.* Van Sickle, 16 Nebr. 363, 368, 20 N. W. 261; Gandy *v.* Pool, 14 Nebr. 98, 101, 15 N. W. 223; Dell *v.* Oppenheimer, 9 Nebr. 454, 457, 4 N. W. 51; Hoehne *v.* Breitkreitz, 5 Nebr. 110, 115.

New Hampshire.— See Titus *v.* Ash, 24 N. H. 319, 323, 331; Seavy *v.* Dearborn, 19 N. H. 351, 356.

New Jersey.— Commercial Bank *v.* Reckless, 5 N. J. Eq. 650, 653.

New York.— Hoag *v.* Wright, 174 N. Y. 36, 43, 66 N. E. 579, 63 L. R. A. 163; People *v.* Ledwon, 153 N. Y. 10, 22, 46 N. E. 1046; Moett *v.* People, 85 N. Y. 373, 377; Deering *v.* Metcalf, 74 N. Y. 501, 503; Pease *v.* Smith, 61 N. Y. 477, 483; People *v.* Evans, 40 N. Y. 1, 5, 6; Wilson *v.* Coulter, 29 N. Y. App. Div. 85, 92, 51 N. Y. Suppl. 804; Doe *v.* Doe, 23 Hun 19, 26; People *v.* Thacher, 7 Lans. 274, 289; Butler *v.* Truslow, 55 Barb. 293, 297; Brett *v.* Catlin, 47 Barb. 404, 406; Seymour *v.* Fellows, 44 N. Y. Super. Ct. 124, 130; Henry *v.* Fowler, 3 Daly 199, 201; Jennings *v.* Kosmak, 20 Misc. 300, 304, 45 N. Y. Suppl. 802; People *v.* Shea, 16 Misc. 111, 120, 38 N. Y. Suppl. 821; People *v.* Ledwon, 15 Misc. 280, 286, 36 N. Y. Suppl. 782; Morgenthau *v.* Walker, 2 Misc. 245, 246, 21 N. Y. Suppl. 936; Bogert's Estate 4 N. Y. Civ. Proc. 441, 444; People *v.* New York Hospital, 3

FAMA EST CONSTANS VIRORUM BONORUM DE RE ALIQUA OPINIO. A maxim meaning "Fame is the constant opinion of good men concerning a thing."[15]

FAMA, FIDES, ET OCULUS NON PATIUNTUR LUDUM. A maxim meaning "Fame, plighted faith, and eyesight do not endure deceit."[16]

FAMA QUÆ SUSPICIONEM INDUCIT, ORIRI DEBET APUD BONOS ET GRAVES, NON QUIDEM MALEVOLOS ET MALEDICOS, SED PROVIDAS ET FIDE DIGNAS PERSONAS, NON SEMEL SED SÆPIUS, QUIA CLAMOR MINUIT ET DEFAMATIO MANIFESTAT. A maxim meaning "Report, which induces suspicion, ought to arise from good and grave men, not indeed from malevolent and malicious men, but from cautious and credible persons, not only once, but frequently; for clamour diminishes, and defamation manifests."[17]

FAME. Report or opinion widely diffused; renown; notoriety; celebrity, favorable or unfavorable, but especially the former; reputation.[18]

FAMILIA. Among the Romans, the body of household servants;[19] the whole of the slaves in a household.[20] (See FAMILY.)

FAMILUS. A slave.[21]

FAMILY.[22] While the term may be said to have a well defined,[23] broad, and comprehensive meaning in general,[24] it is one of great flexibility and is capable of many different meanings according to the connection in which it is used;[25]

Abb. N. Cas. 229, 263; Koehucke *v.* Ross, 16 Abb. Pr. N. S. 345, 350; Bogert *v.* Hertell, 4 Hill 492, 510; Forsyth *v.* Clark, 3 Wend. 637, 643; People *v.* Douglass, 4 Cow. 26, 37, 15 Am. Dec. 332; New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. 56, 68; People *v.* Petmecky, 2 N. Y. Cr. 450, 465, 468; Beekman *v.* Beekman, 2 Dem. Surr. 635, 641; Conselyea *v.* Walker, 2 Dem. Surr. 117, 120.

North Carolina.— State *v.* Williams, 47 N. C. 257, 262, 263, 265, 266, 267, 273; State *v.* Peace, 46 N. C. 251, 256; State *v.* Jim, 12 N. C. 508, 510.

Ohio.— Mead *v.* McGraw, 19 Ohio St. 55, 65; Stoffer *v.* State, 15 Ohio St. 47, 54, 55, 86 Am. Dec. 470.

Pennsylvania.— Com. *v.* Ohio, etc., R. Co., 1 Grant 329, 349; Com. *v.* Petroff, 2 Pearson 534, 538.

Virginia.— Fant *v.* Miller, 17 Gratt. 187, 209; Taylor *v.* Bruce, Gilm. 42, 85.

Wisconsin.— Strasser *v.* Goldberg, (1904) 98 N. W. 554, 555; Little *v.* Superior Rapid Transit R. Co., 88 Wis. 402, 407, 60 N. W. 705; Louchetne *v.* Strouse, 49 Wis. 623, 634, 6 N. W. 360; Mack *v.* State, 48 Wis. 271, 286, 4 N. W. 449; Schettler *v.* Ft. Howard, 43 Wis. 48, 52; Mercer *v.* Wright, 3 Wis. 645, 647. See Schmitt *v.* Milwaukee St. R. Co., 89 Wis. 195, 198, 61 N. W. 834.

United States.— The Santissima Trinidad, 7 Wheat. 283, 339, 5 L. ed. 454; The Boston, 3 Fed. Cas. No. 1,673, 1 Sumn. 328, 356.

England.— Davidson *v.* Davidson, 1 Deane Eccl. 131, 132, 2 Jur. N. S. 547, 548, 4 Wkly. Rep. 590.

Canada.—Canada F. & M. Ins. Co. *v.* Northern Ins. Co., 2 Ont. App. 373, 377.

15. Morgan Leg. Max.

16. Bouvier L. Dict.

17. Wharton L. Lex.

18. Century Dict.

"It has a reference to the thing which gives birth to it, it goes about of itself without any apparent instrumentality. . . Hearsay refers to the receiver of that which is said, it is limited therefore to a small number of speakers or reporters. The fame serves to form or establish a character either of a person or a thing; it will be good or bad according to circumstances." Com. *v.* Murr, 42 Wkly. Notes Cas. (Pa.) 263 [*quoting* Crabb Synonyms].

19. *Ex p.* Meason, 5 Binn. (Pa.) 167, 180, where it is said: "They were called '*familiares*,' and '*famuli*' or '*famulæ*,' men or maid servants" distinguishing them from the "*servi*," who were by far the most considerable and were employed in husbandry and manufactures.

20. Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27.

Familia "anciently signified the servants belonging to one master — afterwards, together with them, the wife and children, or what we from this word call a family, of which the master was called *pater familias*, the mistress *mater familias*." Pringle *v.* McPherson, 2 Desauss. (S. C.) 524, 543.

21. Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27.

22. Derived from the Latin word *familia*. See Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27; Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268, 272; Pringle *v.* McPherson, 2 Desauss. (S. C.) 524, 543; Wilson *v.* Cochran, 31 Tex. 677, 680, 98 Am. Dec. 553; Pigg *v.* Clarke, 3 Ch. D. 672, 674, 45 L. J. Ch. 849, 24 Wkly. Rep. 1014.

23. Menefee *v.* Chesley, 98 Iowa 55, 58, 66 N. W. 1038.

24. Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27.

25. *California.*— *In re* Bennett, 134 Cal. 320, 323, 66 Pac. 370.

Connecticut.— Crosgrove *v.* Crosgrove, 69 Conn. 416, 422, 38 Atl. 219. See also St. John *v.* Dann, 66 Conn. 401, 405, 34 Atl. 110.

Illinois.— Norwegian Old Peoples' Home

thus it may mean "children," "wife and children," "blood relations," or the "members of the domestic circle," according to the connection;[26] it may be of narrow or broad meaning as the intention of the parties using the word, or as the intention of the law using it, may be made to appear;[27] but unless the context manifests a different intention, the word "family" is usually construed in its primary sense.[28] In its ordinary and primary sense the term signifies the collective body of persons living in one house, or under one head or manager,[29] or one

Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41 [*citing* Century Dict.].

Maryland.— Downes *v.* Long, 79 Md. 382, 385, 29 Atl. 827.

Massachusetts.— Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318.

Michigan.— Hosmer *v.* Welch, 107 Mich. 470, 475, 65 N. W. 280, 67 N. W. 504; Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 496, 16 N. W. 871.

Missouri.— Lister *v.* Lister, 73 Mo. App. 99, 104.

New York.— Dominick *v.* Sayre, 3 Sandf. 555, 569, 8 N. Y. Leg. Obs. 278.

Tennessee.— Rhodes *v.* Turpin, (Ch. App. 1899) 57 S. W. 351, 357.

Vermont.— White *v.* White, 30 Vt. 338, 343.

England.— Burt *v.* Hellyar, L. R. 14 Eq. 160, 164, 41 L. J. Ch. 430, 26 L. T. Rep. N. S. 833; Blackwell *v.* Bull, 1 Keene 176, 181, 5 L. J. Ch. 251, 15 Eng. Ch. 176, 48 Eng. Reprint 274; Woods *v.* Woods, 1 Myl. & C. 401, 408, 13 Eng. Ch. 401.

26. *California.*— *In re* Jessup, 81 Cal. 408, 424, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Delaware.— Hogg *v.* Lobb, 7 Houst. 399, 401, 32 Atl. 631.

Michigan.— Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 496, 16 N. W. 871.

New York.— Spencer *v.* Spencer, 11 Paige 159, 160 [*quoted* in Amsterdam First Nat. Bank *v.* Miller, 24 N. Y. App. Div. 551, 554, 49 N. Y. Suppl. 981].

West Virginia.— Whelan *v.* Reilly, 3 W. Va. 597, 610.

27. Ferbrache *v.* Grand Lodge A. O. U. W., 81 Mo. App. 268, 271 [*quoting* Lister *v.* Lister, 73 Mo. App. 99, 104].

To indicate a corps or sect.— The term has been used to denote a small select corp attached to an army chief and has even been extended to the case of Shakers. Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 496, 16 N. W. 871.

28. Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318 [*quoting* Rex *v.* Darlington, 4 T. R. 797, 800].

29. *California.*— Blythe *v.* Ayres, 96 Cal. 532, 592, 31 Pac. 915, 19 L. R. A. 40.

Connecticut.— Crosgrove *v.* Crosgrove, 69 Conn. 416, 422, 38 Atl. 219.

Delaware.— Hogg *v.* Lobb, 7 Houst. 399, 401, 32 Atl. 631.

Illinois.—Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 96, 52 N. E. 41; Rock *v.* Haas, 110 Ill. 528, 533.

Indiana.— Ferguson *v.* Smethers, 70 Ind. 519, 521, 36 Am. Rep. 186; Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436.

Iowa.— Fullerton *v.* Sherrill, 114 Iowa 511, 512, 87 N. W. 419; Neasham *v.* McNair, 103 Iowa 695, 696, 72 N. W. 773, 64 Am. St. Rep. 202, 38 L. R. A. 847; Menefee *v.* Chesley, 98 Iowa 55, 58, 66 N. W. 1038; Linton *v.* Crosby, 56 Iowa 386, 389, 9 N. W. 311, 41 Am. Rep. 107; Arnold *v.* Waltz, 53 Iowa 706, 707, 6 N. W. 40, 36 Am. Rep. 248; Tyson *v.* Reynolds, 52 Iowa 431, 3 N. W. 469.

Kansas.— Zimmerman *v.* Franke, 34 Kan. 650, 654, 9 Pac. 747.

Massachusetts.— Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318.

Mississippi.— Pearson *v.* Miller, 71 Miss. 379, 387, 14 So. 731, 42 Am. St. Rep. 470; Peeler *v.* Peeler, 68 Miss. 141, 145, 8 So. 392.

Missouri.— Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 170, 43 S. W. 633; Duncan *v.* Frank, 8 Mo. App. 286, 289.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 390, 9 N. W. 555.

New Hampshire.—Barney *v.* Leeds, 51 N. H. 253, 265.

New York.— Valentine *v.* Lloyd, 4 Abb. Pr. N. S. 371, 373.

Ohio.— Regan *v.* Zeeb, 28 Ohio St. 483, 485.

Oklahoma.— Rolator *v.* King, 13 Okla. 37, 73 Pac. 291.

Pennsylvania.— Beilstein *v.* Beilstein, 194 Pa. St. 152, 154, 45 Atl. 73, 75 Am. St. Rep. 692; Bair *v.* Robinson, 108 Pa. St. 247, 249, 56 Am. Rep. 198.

South Carolina.— Moyer *v.* Drummond, 32 S. C. 165, 167, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747.

Texas.— Wilson *v.* Cochran, 31 Tex. 677, 680, 98 Am. Dec. 553; Floyd *v.* State, (Cr. App. 1902) 68 S. W. 690, 691; Goode *v.* State, 16 Tex. App. 411, 415.

United States.— Poor *v.* Hudson Ins. Co., 2 Fed. 432, 437; *In re* Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes 233.

The same definition is given in Anderson L. Dict. [*quoted* in *In re* Bennett, 134 Cal. 320, 323, 66 Pac. 370]; Century Dict. [*quoted* in Wood *v.* Wood, 63 Conn. 324, 327, 28 Atl. 520; Danielson *v.* Wilson, 73 Ill. App. 287, 299; Matter of Shedd, 60 Hun (N. Y.) 367, 369, 14 N. Y. Suppl. 841]; Webster Dict. [*quoted* in Cheshire *v.* Burlington, 31 Conn. 326, 329; Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584, 587; Cole *v.* Bentley, 26 Ill. App. 260, 262; Emerson *v.* Leonard, 96 Iowa 311, 313, 65 N. W. 153, 59 Am. St. Rep. 372; Parsons *v.* Livingston, 11 Iowa 104, 106, 77 Am. Dec. 135; Rollings *v.* Evans, 23 S. C. 316, 318; Garaty *v.* Du Bose, 5 S. C. 493, 500];

domestic government;[30] the relations between such persons necessarily being of a permanent or domestic character, not that of persons abiding temporarily together as strangers;[31] a household;[32] those who live under the same roof with the *pater familias*, who form his fireside;[33] in its restricted use in this sense the term would include only parents and their children,[34] but the term, as commonly understood, is not so limited;[35] thus it may include grandchildren,[36] and all the persons of the same blood living together in the household;[37] so it may include sons-in-law and daughters-in-law;[38] in fact it may include all members of the household living under the authority of the head thereof, as the servants employed in the house;[39] and sometimes it may include persons who are merely lodgers or boarders.[40] No definite number of persons is necessary to constitute a

Webster Int. Dict. [*quoted* in Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957].

30. Century Dict. [*quoted* in Danielson *v.* Wilson, 73 Ill. App. 287, 299; Matter of Shedd, 60 Hun (N. Y.) 367, 369, 14 N. Y. Suppl. 841; Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957].

31. Tyson *v.* Reynolds, 52 Iowa 431, 3 N. W. 469; Duncan *v.* Frank, 8 Mo. App. 286, 289; Rolator *v.* King, 13 Okla. 37, 39, 73 Pac. 291. See also Wilson *v.* Cochran, 31 Tex. 677, 680, 98 Am. Dec. 553.

32. *California.*— *In re* Jessup, 81 Cal. 408, 424, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Connecticut.— Hoadly *v.* Wood, 71 Conn. 452, 456, 42 Atl. 263.

Delaware.— Hogg *v.* Lobb, 7 Houst. 399, 401, 32 Atl. 631.

Illinois.—Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41; Danielson *v.* Wilson, 73 Ill. App. 287, 299 [*citing* Black L. Dict.].

Indiana.— Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436.

Kansas.— Zimmerman *v.* Franke, 34 Kan. 650, 654, 9 Pac. 747 [*citing* Wilson *v.* Cochran, 31 Tex. 677, 98 Am. Dec. 553].

Pennsylvania.— McCullough *v.* Gilmore, 11 Pa. St. 370, 373.

United States.— *In re* Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes 233.

The same definition is given in Webster Dict. [*quoted* in Wood *v.* Wood, 63 Conn. 324, 328, 28 Atl. 520; Cheshire *v.* Burlington, 31 Conn. 326, 329; Race *v.* Oldridge, 90 Ill. 350, 352, 32 Am. Rep. 27; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584, 587; Cole *v.* Bentley, 26 Ill. App. 260, 262; Parsons *v.* Livingston, 11 Iowa 104, 106, 77 Am. Dec. 135]; Webster Int. Dict. [*quoted* in Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957]; Worcester Dict. [*quoted* in Barney *v.* Leeds, 51 N. H. 253, 265].

33. Dodge *v.* Boston, etc., R. Co., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318; People *v.* Sagazei, 27 Misc. (N. Y.) 727, 733, 59 N. Y. Suppl. 701; Rex *v.* Darlington, 4 T. R. 797, 800 [*quoted* in *In re* Bennett, 134 Cal. 320, 323, 66 Pac. 370; Battev *v.* Barker, 62 Kan. 517, 519, 64 Pac. 79, 56 L. R. A. 33].

34. Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436; Bouvier L. Dict. [*quoted* in Brooks *v.* Collins, 11 Bush (Ky.) 622, 626]; Webster Int. Dict. [*quoted* in Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957].

If, however, the children branch out and become heads of new establishments, they cease to be members of their father's family as the term is used in its primary sense. Rex *v.* Darlington, 4 T. R. 797, 800 [*quoted* in Battey *v.* Barker, 62 Kan. 517, 519, 64 Pac. 79, 56 L. R. A. 33; Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318]. See also Phelps *v.* Phelps, 143 Mass. 570, 574, 10 N. E. 452 [*citing* Bradlee *v.* Andrews, 137 Mass. 50].

35. Bair *v.* Robinson, 108 Pa. St. 247, 249, 56 Am. Rep. 198.

36. Rhodes *v.* Turpin, (Tenn. Ch. App. 1899) 57 S. W. 351, 357; Robinson *v.* Waddelow, 5 L. J. Ch. 350, 8 Sim. 134, 137, 8 Eng. Ch. 134.

37. Hogg *v.* Lobb, 7 Houst. (Del.) 399, 401, 32 Atl. 631; Beilstein *v.* Beilstein, 194 Pa. St. 152, 154, 45 Atl. 73, 75 Am. St. Rep. 692.

38. Lambe *v.* Eames, L. R. 6 Ch. 597, 599, 40 L. J. Ch. 447.

39. *California.*— *In re* Jessup, 81 Cal. 408, 424, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Connecticut.— St. John *v.* Dann, 66 Conn. 401, 405, 34 Atl. 110; Wood *v.* Wood, 63 Conn. 324, 327, 28 Atl. 520 [*quoting* Century Dict.]; Cheshire *v.* Burlington, 31 Conn. 326, 329.

Delaware.— Hogg *v.* Lobb, 7 Houst. 399, 401, 32 Atl. 631.

Illinois.— Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41; Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27 [*citing* Bouvier L. Dict.]; Danielson *v.* Wilson, 73 Ill. App. 287, 299 [*quoting* Bouvier L. Dict.].

Louisiana.— Galligar *v.* Payne, 34 La. Ann. 1057, 1058.

New York.— People *v.* Sagazei, 27 Misc. 727, 733, 59 N. Y. Suppl. 701.

Oklahoma.— Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957 [*quoting* Webster Int. Dict.].

Pennsylvania.— Beilstein *v.* Beilstein, 194 Pa. St. 152, 154, 45 Atl. 73, 75 Am. St. Rep. 692.

Texas.— Floyd *v.* State, (Cr. App. 1902) 68 S. W. 690, 691 [*quoting* Bouvier L. Dict.].

40. *California.*— Blythe *v.* Ayres, 96 Cal. 532, 592, 31 Pac. 915, 19 L. R. A. 40; *In re* Jessup, 81 Cal. 408, 424, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

Connecticut.— Cheshire *v.* Burlington, 31 Conn. 326, 329.

family when the term is used in its primary sense,[41] except that there must be at least two persons, for it is obvious that a collection of persons must consist of more than one person;[42] a husband and wife living together without children, servants or any one at all may constitute a family.[43] The word is frequently used in common speech without reference to any established household, but merely for the purpose of indicating the individuals related, as husband, wife, or parents and children.[44] In another sense in which the term is used it includes such persons as are descendants of a common ancestor,[45] it being said that its strict meaning as thus used in this connection is "children,"[46] and that this is the meaning that should be given it unless the context shows the term to have been used in a differ-

Delaware.— Hogg *v.* Lobb, 7 Houst. 399, 401, 32 Atl. 631.

Indiana.— Ferguson *v.* Smethers, 70 Ind. 519, 521, 36 Am. Rep. 186.

Kansas.— Zimmerman *v.* Franke, 34 Kan. 650, 654, 9 Pac. 747.

Mississippi.— Pearson *v.* Miller, 71 Miss. 379, 387, 14 So. 731, 42 Am. St. Rep. 470.

Nebraska.— Dorrington *v.* Myers, 11 Nebr. 388, 389, 9 N. W. 555.

New Hampshire.—Barney *v.* Leeds, 51 N. H. 253, 265.

New York.— People *v.* Sagazei, 27 Misc. 727, 59 N. Y. Suppl. 701; Valentine *v.* Lloyd, 4 Abb. Pr. N. S. 371, 373.

Ohio.— Regan *v.* Zeeb, 28 Ohio St. 483, 485.

Oklahoma.— Rolator *v.* King, 13 Okla. 37, 73 Pac. 291.

Pennsylvania.— Bair *v.* Robinson, 108 Pa. St. 247, 249, 56 Am. Rep. 198.

West Virginia.—Stuart *v.* Stuart, 18 W. Va. 675, 682, 684.

United States.— Jones *v.* Gray, 13 Fed. Cas. No. 7,463, 3 Woods 494.

To the same effect see Century Dict. [*quoted* in Danielson *v.* Wilson, 73 Ill. App. 287, 299; Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957]; Webster Dict. [*quoted* in Race *v.* Oldridge, 90 Ill. 250, 252, 32 Am. Rep. 27; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584, 587; Cole *v.* Bentley, 26 Ill. App. 260, 262; Parsons *v.* Livingston, 11 Iowa 104, 106, 77 Am. Dec. 135].

But see, however, Roco *v.* Green, 50 Tex. 483, 490 [*citing* Whitehead *v.* Nickelson, 48 Tex. 517], where the court said: "A mere aggregation of individuals under one common roof or within the same curtilage, although 'devoting their attention to a common object, the promotion of their mutual interests and social happiness,'— as the inmates of a boarding-house or persons employed in the capacity of servants,— does not, of itself, constitute a family."

41. Moyer *v.* Drummond, 32 S. C. 165, 167, 10 S. E. 952, 17 Am. St. Rep. 850, 7 L. R. A. 747; Poor *v.* Hudson Ins. Co., 2 Fed. 432, 437.

42. Bones *v.* State, 117 Ala. 146, 147, 23 So. 485; Lamb's Estate, 95 Cal. 397, 407, 30 Pac. 568; Rock *v.* Haas, 110 Ill. 528, 533.

That a deserted wife without children is a "family" within the meaning of an exemption law see Berry *v.* Hanks, 28 Ill. App. 51. See also Baum *v.* Turner, 76 S. W. 129, 25 Ky. L. Rep. 600.

That it may include the only child of a member of a benefit association, although his wife was divorced for her fault, the charter of the association stating its object to be the relief of the distressed, injured, sick, or disabled members of the association and their immediate families see Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 97, 52 N. E. 41.

43. Carmichael *v.* Northwestern Mut. Ben. Assoc., 51 Mich. 494, 496, 16 N. W. 171; Berry *v.* Hanks, 28 Ill. App. 51, 55 [*citing* Race *v.* Oldridge, 90 Ill. 250, 32 Am. Rep. 27]; Matter of Shedd, 60 Hun (N. Y.) 367, 369, 14 N. Y. Suppl. 841 [*quoting* Century Dict.]; People *v.* Sagazei, 27 Misc. (N. Y.) 727, 733, 59 N. Y. Suppl. 701 [*citing* Kitchell *v.* Burgwin, 21 Ill. 40; Regan *v.* Zeeb, 28 Ohio St. 483]; Cox *v.* Stafford, 14 How. Pr. (N. Y.) 519, 521; Rhodes *v.* Turpin, (Tenn. Ch. App. 1899) 57 S. W. 351, 357.

44. *California.*— *In re* Bennett, 134 Cal. 320, 323, 66 Pac. 370.

Connecticut.— Crosgrove *v.* Crosgrove, 69 Conn. 416, 422, 38 Atl. 219.

Illinois.— Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 97, 52 N. E. 41; Danielson *v.* Wilson, 73 Ill. App. 287, 299 [*quoting* Century Dict.].

New York.— Matter of Shedd, 60 Hun 367, 370, 14 N. Y. Suppl. 841.

Oklahoma.— Betts *v.* Mills, 8 Okla. 351, 356, 58 Pac. 957 [*quoting* Century Dict.].

45. *California.*— *In re* Bennett, 134 Cal. 320, 323, 66 Pac. 370 [*citing* Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 28 N. E. 243, 13 L. R. A. 318; Anderson L. Dict.].

Connecticut.— Hoadly *v.* Wood, 71 Conn. 452, 456, 42 Atl. 263.

Illinois.— Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41 [*citing* 2 Story Eq. Jur. (13th ed.) § 1065*b*].

Indiana.— Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436.

Kentucky.—Brooks *v.* Collins, 11 Bush 622, 626 [*quoting* Bouvier L. Dict.].

Massachusetts.— Dodge *v.* Boston, etc., R. Corp., 154 Mass. 299, 301, 28 N. E. 243, 13 L. R. A. 318; Marsh *v.* Supreme Council A. L. of H., 149 Mass. 512, 517, 21 N. E. 1070, 4 L. R. A. 382 [*citing* Webster Dict.; Worcester Dict.].

Mississippi.— Peeler *v.* Peeler, 68 Miss. 141, 145, 8 So. 392.

Pennsylvania.— McCullough *v.* Gilmore, 11 Pa. St. 370, 373.

United States.— *In re* Lambson, 14 Fed. Cas. No. 8,029, 2 Hughes 233.

46. Pigg *v.* Clarke, 3 Ch. D. 672, 674, 45 L. J. Ch. 849, 24 Wkly. Rep. 1014 [*quoted* in Phillips *v.* Ferguson, 85 Va. 509, 514, 8

ent sense;[47] nevertheless the term has been extended to include the issue of the ancestor's children,[48] all his descendants,[49] the whole group of persons thus related by blood,[50] and is even said to be as broad as the word "relatives," which includes relatives by affinity as well as by blood;[51] the husbands and wives of blood relatives.[52] The ordinary meaning of the term when used in wills is said to be next of kin,[53] but it may mean heir-at-law,[54] and it may have many other meanings or shades of meanings; in fact its legal import must be determined by the intention of the testator expressed in the language of the whole instrument, read in the light of relevant circumstances existing at the time of execution;[55] and different meanings may be given to the term in two distinct clauses in the same will, when used in one case in reference to real property and in the other to personal property;[56] and sometimes it may be rejected for uncertainty.[57] When the term is used in connection with real estate, it implies inheritance — that species of succession which belongs to inheritance.[58] (Family: In General, see HUSBAND AND

S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837]; Anderson *v.* Bell, 29 Grant Ch. (U. C.) 452, 454]; *In re* Terry, 19 Beav. 580, 52 Eng. Reprint 476.

47. People *v.* Feilen, 58 Cal. 218, 225, 41 Am. Rep. 258; Phillips *v.* Ferguson, 85 Va. 509, 514, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837; Gregory *v.* Smith, 9 Hare 704, 41 Eng. Ch. 708 [*quoted* in Anderson *v.* Bell, 29 Grant Ch. (U. C.) 452, 454].

48. Robinson *v.* Waddelow, 5 L. J. Ch. 350, 8 Sim. 134, 8 Eng. Ch. 134.

49. Den *v.* D'Hart, 3 N. J. L. 481, 487; Williams *v.* Williams, 20 L. J. Ch. 280, 283.

50. Goss *v.* Harris, 117 Ga. 345, 348, 43 S. E. 734; Norwegian Old Peoples' Home Soc. *v.* Wilson, 176 Ill. 94, 99, 52 N. E. 41; Supreme Council C. B. L. *v.* McGinness, 59 Ohio St. 531, 537, 53 N. E. 54; Century Dict. [*quoted* in Danielson *v.* Wilson, 73 Ill. App. 287, 299; Matter of Shedd, 60 Hun (N. Y.) 367, 370, 14 N. Y. Suppl. 841].

51. Tepper *v.* Supreme Council R. A., 61 N. J. Eq. 638, 640, 47 Atl. 460, 88 Am. St. Rep. 449.

52. Pigg *v.* Clarke, 3 Ch. D. 672, 674, 45 L. J. Ch. 849, 24 Wkly. Rep. 1014.

53. Smith *v.* Greeley, 67 N. H. 377, 379, 30 Atl. 413.

54. Elgood *v.* Cole, 21 L. T. Rep. N. S. 80, 81, 17 Wkly. Rep. 953.

55. Rugely *v.* Robinson, 10 Ala. 702, 720; Crosgrove *v.* Crosgrove, 69 Conn. 416, 422, 38 Atl. 219; Phillips *v.* Ferguson, 85 Va. 509, 514, 8 S. E. 241, 17 Am. St. Rep. 78, 1 L. R. A. 837.

As used in a will the word "family" has been construed in the following cases:

Maine.— Osgood *v.* Lovering, 33 Me. 464, 468.

Maryland.— Taylor *v.* Watson, 35 Md. 519, 527.

Massachusetts.— Bradlee *v.* Andrews, 137 Mass. 50, 55; Bates *v.* Dewson, 128 Mass. 334, 335.

New Hampshire.— Smith *v.* Greeley, 67 N. H. 377, 379, 30 Atl. 413.

Pennsylvania.— Beilstein *v.* Beilstein, 194 Pa. St. 152, 154, 45 Atl. 73, 75 Am. St. Rep. 692.

England.— *In re* Macleay, L. R. 20 Eq. 186, 44 L. J. Ch. 441, 32 L. T. Rep. N. S. 682, 23 Wkly. Rep. 718; Snow *v.* Teed, L. R. 9 Eq. 622, 624, 39 L. J. Ch. 420, 23 L. T. Rep. N. S. 303, 18 Wkly. Rep. 623; Blackwell *v.* Bull, 1 Keene 176, 181, 5 L. J. Ch. 251, 15 Eng. Ch. 176, 48 Eng. Reprint 274; Woods *v.* Woods, 1 Myl. & C. 401, 408, 13 Eng. Ch. 401; MacLeroth *v.* Bacon, 5 Ves. Jr. 159, 167, 5 Rev. Rep. 11, 31 Eng. Reprint 523.

56. Doe *v.* Smith, 5 M. & S. 126, 131. See, however, Wright *v.* Atkyns, 19 Ves. Jr. 299, 303, 34 Eng. Reprint 528.

57. Doe *v.* Joinville, 3 East 172, 176. See also Dominick *v.* Sayre, 3 Sandf. (N. Y.) 555, 569 [*citing* Harland *v.* Trigg, 1 Bro. Ch. 142, 29 Eng. Reprint 1041].

58. Lucas *v.* Goldsmid, 29 Beav. 657, 660, 7 Jur. N. S. 719, 30 L. J. Ch. 935, 4 L. T. Rep. N. S. 632, 9 Wkly. Rep. 759.

In connection with other words the word "family" has often received judicial interpretation; as for example as used in the following phrases: "According to families" (see Hooper *v.* Emery, 14 Me. 375, 379); "ambassador's family" (see 2 Cyc. 267); "and family" (see Wood *v.* Wood, 63 Conn. 324, 328, 28 Atl. 520; Chicago, etc., R. Co. *v.* Chisholm, 79 Ill. 584, 586; Phelps *v.* Phelps, 143 Mass. 570, 574, 10 N. E. 452; Hall *v.* Stephens, 65 Mo. 670, 673, 27 Am. Rep. 302; Langmaid *v.* Hurd, 64 N. H. 526, 532, 15 Atl. 136; White *v.* White, 30 Vt. 338, 343; Lambe *v.* Eames, L. R. 6 Ch. 597, 599, 40 L. J. Ch. 447; Doe *v.* Wood, 1 B. & Ald. 518, 523; *In re* Hutchinson, 8 Ch. D. 540, 542, 39 L. T. Rep. N. S. 86, 26 Wkly. Rep. 904); "and his family" (see Bangor *v.* Deer-Isle, 1 Me. 329, 332; Bowne *v.* Witt, 19 Wend. (N. Y.) 475; Beales *v.* Beales, 7 Jur. 1076, 1077, 12 L. J. Ch. 26, 13 Sim. 592, 36 Eng. Ch. 592); "any neighborhood or family" (see Noe *v.* People, 39 Ill. 96, 97; State *v.* Slater, 22 Mo. 464, 466); "any one or more of my own family" (see Grant *v.* Lyman, 6 L. J. Ch. O. S. 129, 4 Russ. 292, 28 Rev. Rep. 97, 4 Eng. Ch. 292, 38 Eng. Reprint 815); "decedent's family" (see Elsey *v.* Odd Fellows' Mut. Relief Assoc., 142 Mass. 224, 225, 7 N. E. 844); "families of parishioners" (see *In re* Sargent, 15 P. D. 168, 170); "family man" in army or navy (see 3 Cyc. 836); "family mansion" (see *In re* Spurway, 10 Ch. D. 230, 233, 48 L. J. Ch. 213, 40 L. T. Rep. N. S. 377, 27 Wkly. Rep. 302); "family for which he provides" (see Cantrell *v.* Connor, 6 Daly (N. Y.) 224,

WIFE; PARENT AND CHILD. Agreement, see FAMILY AGREEMENT. Allowance to, see EXECUTORS AND ADMINISTRATORS. Arrangement, see FAMILY AGREEMENT. As Beneficiary in Insurance Policy, see INSURANCE. Bible, see FAMILY BIBLE. Descent and Inheritance, see DESCENT AND DISTRIBUTION. Devises and Bequests to, see WILLS. Evidence of Pedigree and Relationship, see EVIDENCE. Exemption of Property, see EXEMPTIONS; HOMESTEADS. Expenses, see HUSBAND AND WIFE. Freedom, see FAMILY FREEDOM. Graveyard, see CEMETERIES. Head of, see EXEMPTIONS; HOMESTEADS. Homestead, see HOMESTEADS. Hotel, see FAMILY HOTEL. Library, see EXEMPTIONS. Meeting, see FAMILY MEETING. Name, see NAMES. Physician, see FAMILY PHYSICIAN. Picture, see EXEMPTIONS. Relation, see FAMILY RELATION. Relations, see HUSBAND AND WIFE. Service of Process by Leaving With Members of, see PROCESS. Settlement, see FAMILY AGREEMENT. Ticket, see EXCURSION TICKET. Use of, see FAMILY USE.)

FAMILY AGREEMENT, ARRANGEMENT, or SETTLEMENT. An agreement made between a father and his son or children, or between brothers, to dispose of property in a different manner from what would otherwise take place.[59] (Family Agreement, Arrangement, or Settlement: In General, see COMPROMISE AND SETTLEMENT. Between Heirs and Distributees, see DESCENT AND DISTRIBUTION. Between Heirs and Devisees and Legatees, see WILLS. Partition Agreement, see PARTITION.)

FAMILY BIBLE. A bible containing a written record of the births, deaths, and marriages of the persons composing a family.[60] (Family Bible: As Evidence of Pedigree and Relationship, see EVIDENCE.)

FAMILY EXPENSES. See HUSBAND AND WIFE.

FAMILY FREEDOM. In domestic relations, freedom from family ties.[61] (See, generally, DIVORCE.)

FAMILY GRAVEYARD. See CEMETERIES.

FAMILY HOTEL. A hotel which is not designed for the accommodation of transient guests or casual boarders, but one in which rooms and suites are taken by families or individuals for some period.[62] (See, generally, INNKEEPERS.)

FAMILY LIBRARY. See EXEMPTIONS.

FAMILY MEETING. An institution of the laws of Louisiana, being a council of the relatives (or, if there are no relatives, of the friends) of a minor, for the purpose of advising as to his affairs and the administration of his property.[63] (See, generally, GUARDIAN AND WARD; INFANTS.)

FAMILY NAME. See NAMES.

FAMILY PHYSICIAN.[64] A phrase having no technical signification but which

226); "family of" (see Smith *v.* Wildman, 37 Conn. 384, 387; Shutesbury *v.* Oxford, 16 Mass. 102, 104; Supreme Lodge K. of H. *v.* Narin, 60 Mich. 44, 53, 26 N. W. 826; *In re* Walley, 11 Nev. 260, 263; Goode *v.* State, 16 Tex. App. 411, 414); "family relations" (see 9 Cyc. 456); "family residence" (see Sonn *v.* Heilberg, 38 N. Y. App. Div. 515, 517, 56 N. Y. Suppl. 341); "having a family" (see Woodworth *v.* Comstock, 10 Allen (Mass.) 425); "hydra headed family" (see Ridenour-Baker Grocery Co. *v.* Monroe, 142 Mo. 165, 170, 43 S. W. 633); "person with a family" (see Wilson *v.* Wilson, 101 Ky. 731, 735, 42 S. W. 404, 19 Ky. L. Rep. 925); "sister's family" (see Doe *v.* Joinville, 3 East 172, 176; Barnes *v.* Patch, 8 Ves. Jr. 604, 605, 7 Rev. Rep. 127, 32 Eng. Reprint 490); "support of the family" (see Goss *v.* Harris, 117 Ga. 345, 348, 43 S. E. 734); "their respective families according to seniority" (see Lucas *v.* Goldsmid, 29 Beav. 657, 660, 30 L. J. Ch. 935, 7 Jur. N. S. 719, 4 L. T. Rep. N. S. 632, 9 Wkly. Rep. 759); "to distribute amongst certain families" (see Liley *v.* Hey, 1 Hare 580, 6 Jur. 756, 11 L. J. Ch. 415, 23 Eng. Ch. 580); "to have stated as to 'his family'" (see People *v.* Feilen, 58 Cal. 218, 225, 41 Am. Rep. 258); "used in the family" (see Fitzgerald *v.* McCarty, 55 Iowa 702, 705, 8 N. W. 646); "warranted a family to live in said house throughout the year" (see Poor *v.* Humboldt Ins. Co., 125 Mass. 274, 275, 28 Am. Rep. 228). See also, generally, WILLS.

59. Willey *v.* Hodge, 104 Wis. 81, 84, 80 N. W. 75, 76 Am. St. Rep. 852 [*citing* Baker *v.* Pyatt, 108 Ind. 61, 9 N. E. 112]. See also Bouvier L. Dict.; 8 Cyc. 504.

60. Rapalje & L. L. Dict.

61. People *v.* Smith, 200 Ill. 442, 66 N. E. 27, 93 Am. St. Rep. 206.

62. Musgrave *v.* Sherwood, 54 How. Pr. (N. Y.) 338, 357.

63. Black L. Dict. See also Lemoine *v.* Ducote, 45 La. Ann. 857, 861, 12 So. 939; *In re* Bothick, 44 La. Ann. 1037, 1041, 11 So. 712; Elliott *v.* Elliott, 31 La. Ann. 31, 34.

64. "The phrase . . . is in common use,

has been applied to the physician who usually[65] attends, and is consulted by the members of a family in the capacity of a physician.[66] (See, generally, PHYSICIANS AND SURGEONS.)

FAMILY PICTURES.[67] See EXEMPTIONS.

FAMILY RELATION. That relation sustained by the members of a family towards each other where each individual works for the benefit and comfort of the whole family and without any expectation of receiving compensation or pay outside of the general comforts of all.[68]

FAMILY SETTLEMENT. See FAMILY AGREEMENT.

FAMILY TICKET. See EXCURSION TICKET.

FAMILY USE. That use ordinarily made by and suitable for the members of a household whether as individuals or collectively.[69]

FANATICA MANIA. A form of insanity, characterized by a morbid state of religious feeling.[70] (See, generally, INSANE PERSONS.)

FANCY. Adapted to please the fancy or taste; ornamental.[71]

FANCY BREAD. A term sometimes applied to bread containing milk, butter, and sugar.[72]

FANCY WORD. See TRADE-MARKS AND TRADE-NAMES.

FARCE. A short dramatic entertainment, in which ludicrous qualities are greatly exaggerated for the purpose of exciting laughter; a short play of low comic character.[73]

FARCY. A disease of horses in the nature of scabies (itch) or many eruptions of the skin.[74]

FARE. A rate of charge for the carriage of passengers.[75] (See, generally, CARRIERS.)

FARINA. A term applied to the food preparation made from that portion of the wheat kernel which contains the largest percentage of gluten.[76]

FARM.[77] As a noun, a body of land, usually under one ownership, devoted

and has not, so far as we are aware, any technical signification." Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

65. Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421, 424.

66. Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

67. See McMicken *v.* McMicken University, 2 Am. L. Reg. N. S. 489, 490.

68. Curry *v.* Curry, (Pa. 1887) 11 Atl. 198, 199.

69. Bouvier L. Dict. See also Spring Valley Water Works *v.* San Francisco, 52 Cal. 111, 120.

70. Ekin *v.* McCracken, 11 Phila. (Pa.) 534, 540.

71. Webster Int. Dict.

As used in an order for fancy cranberries, "fancy" refers to quality, and does not mean berries of a particular variety or possessing any one unusual quality, but generally berries of excellent quality. Cape Cod Cranberry Sales Co. *v.* Whitney, 177 Mass. 385, 387, 59 N. E. 70.

Fancy goods will include firecrackers and fireworks. See Barnum *v.* Merchants' F. Ins. Co., 97 N. Y. 188, 192.

Fancy, taste, or judgment see 9 Cyc. 618.

72. Com. *v.* McArthur, 152 Mass. 522, 523, 25 N. E. 836.

In England the term is applicable to a species of bread or roll which is different from the ordinary household bread, and is made of a finer quality of flour than the latter. Aerated Bread Co. *v.* Gregg, L. R. 8 Q. B. 355, 358, 42 L. J. M. C. 117, 28 L. T. Rep. N. S. 816, 21 Wkly. Rep. 848. See also Reg. *v.* Wood, L. R. 4 Q. B. 559, 562, 10 B. & S. 534, 20 L. T. Rep. N. S. 654, 17 Wkly. Rep. 850; V. V. Bread Co. *v.* Stubbs, 18 Cox C. C. 336, 339, 60 J. P. 424, 74 L. T. Rep. N. S. 704.

73. Juvenile Delinquents Reformation Soc. *v.* Diers, 60 Barb. (N. Y.) 152, 156 [*quoting* Webster Dict.].

74. Wirth *v.* State, 63 Wis. 51, 53, 22 N. W. 860, where it is said that the disease is contagious.

75. Chase *v.* New York Cent. R. Co., 26 N. Y. 523, 526; McNeal Pipe, etc., Co. *v.* Howland, 111 N. C. 615, 624, 16 S. W. 857, 20 L. R. A. 743.

In common acceptance, when used in relation to common carriers, the term relates to the passengers, and not to freight. The word "compensation" embraces both. De Grauw *v.* Long Island Electric R. Co., 43 N. Y. App. Div. 502, 508, 60 N. Y. Suppl. 163. See also 8 Cyc. 403 note 88.

As defined by statute, the term includes all sums received or charged for the hire, fare, or conveyance of passengers upon or along any railway. St. 46 & 47 Vict. c. 34, § 8. See Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 278, 18 Am. Rep. 208 [*quoted* in Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, 594, 3 N. E. 907, 54 Am. Rep. 846 note]; 14 Cyc. 237 note 17; 6 Cyc. 570.

76. Union Nat. Bank *v.* Seeberger, 30 Fed. 429, where the term is construed under a tariff act.

77. Derivation.— The word is derived from

to agriculture, either to the raising of crops, or pasture, or both;[78] an indefinite quantity of land, some of which is cultivated,[79] whether it be large or small, isolated, or made up of many parcels;[80] for a farm may be of any size, of any shape, of any boundaries; may include less than one lot, or comprise several lots or parts of lots.[81] The term is and has been a collective one, comprehending divers things collected together, whereof one is a messuage, and the others are the lands, meadows, pastures, woods, commons, and other things lying on or appertaining thereto.[82] As a verb, as used in a lease of mineral lands, to bring

feorme, an old Saxon word signifying "provisions" (Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 448); "*farme*" or "*ferme*," called in Latin "*firma*." Sheppard Touchst. 93 [*quoted* in Black *v.* Hill, 32 Ohio St. 313, 318].

A primitive meaning of the term, in England, at least, was agricultural land let to a tenant. Lane *v.* Stanhope, 6 T. R. 345, 348 [*quoting* Johnson Dict.]. See also Respublica *v.* Carmalt, 4 Yeates (Pa.) 416, 417. And at still earlier times the word was used as the equivalent of "rent" (Black L. Dict.), which meaning was naturally derived from the original meaning of the old Saxon word *feorme*, viz., provisions, because the rent was paid in provisions produced on the land; and from the meaning "rent" it was a natural transition to have the word signify the very estate or lands rented. Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 448.

In more modern times the word has received a more extended signification, and now denotes, in this country, both in a popular and legal sense, a considerable tract of land, devoted, in part at least, to cultivation, with suitable buildings, and under the supervision of a single occupant, regardless of the nature or extent of his tenure. Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 448 [*citing* Burrill L. Dict.].

Construed in connection with an insurance policy see Johnson *v.* London Guarantee, etc., Co., 115 Mich. 86, 91, 72 N. W. 1115, 69 Am. St. Rep. 549, 40 L. R. A. 440.

Distinguished from "estate" in Den *v.* Sayre, 3 N. J. L. 598.

78. People *v.* Caldwell, 142 Ill. 434, 441, 32 N. E. 691; Worley *v.* Naylor, 6 Minn. 192, 202 [*quoting* Webster Dict.].

79. State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47 [*citing* Burrill L. Dict.]; Com. *v.* Carmalt, 2 Binn. (Pa.) 235, 238.

"The term . . . as to extent, is indefinite and ambiguous." Doolittle *v.* Blakesley, 4 Day (Conn.) 265, 271, 4 Am. Dec. 218.

80. *In re* Drake, 114 Fed. 229, 231, where it is said: "For a long time after the words began to be used in an agricultural sense, they were applied to lands held on lease, and 'demise, lease, and to farm let' are still the operative words of a lease, but they are, in modern use, applied without respect to nature of tenure. Robinson Crusoe says, 'I farmed upon my own land,' so it appears that the words have been used in their present sense for nearly 200 years."

A single farm.—"Any considerable tract, or a number of smaller tracts of land, set apart for cultivation by a single occupant, whether as a tenant or owner, and upon which he resides, even though disconnected and separated by the lands of adjoining owners, if used together, would be regarded as constituting a single farm; and, if sufficiently identified, the whole would undoubtedly pass under the word 'farm,' in a testamentary devise." Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 448 [*citing* Jackson *v.* White, 8 Johns. (N. Y.) 59; Goodtitle *v.* Paul, 2 Burr. 1089; Goodtitle *v.* Southern, 1 M. & S. 299].

81. Pepper *v.* O'Dowd, 39 Wis. 538, 547.

As synonymous with "lot" see Saunders *v.* Springsteen, 4 Wend. (N. Y.) 429, 431.

Not confined to inclosures, as used in a statute to prevent the firing of "woods, marshes and prairies." Finley *v.* Langston, 12 Mo. 120, 123.

When will not include a detached parcel of woodland see Allen *v.* Richards, 5 Pick. (Mass.) 512, 514.

82. Wrotesley *v.* Adams, 1 Plowd. 187, 195. See also Aldrich *v.* Gaskill, 10 Cush. (Mass.) 155, 158; Bell *v.* Woodward, 46 N. H. 315, 333 [*citing* Cruise Dig. tit. "Deed," c. 20, § 41; Bouvier L. Dict.]; *In re* Bright-Smith, 31 Ch. D. 314, 317, 55 L. J. Ch. 365, 54 L. T. Rep. N. S. 47, 34 Wkly. Rep. 252 [*quoting* Wharton L. Dict.]; Sheppard Touchst. 93 [*quoted* in Black *v.* Hill, 32 Ohio St. 313, 318].

Does not include the stock and tools on the farm. See Hallett *v.* Taylor, 177 Mass. 6, 8, 58 N. E. 154.

In connection with other words the word "farm" has often received judicial interpretation; as for example as used in the following phrases: "All my messuages, farms, lands, tenements" (see Doe *v.* Lucan, 9 East 448, 460. See also Hall *v.* Fisher, 1 Coll. 48, 53, 8 Jur. 119, 28 Eng. Ch. 48; Arkell *v.* Fletcher, 3 Jur. 1099, 10 Sim. 299, 116 Eng. Ch. 299; Portman *v.* Mill, 3 Jur. 356, 357, 8 L. J. Ch. 161; Stone *v.* Greening, 13 Sim. 390, 392, 36 Eng. Ch. 390; Cullum *v.* Ryder, 7 Taunt. 341, 2 E. C. L. 391; Lane *v.* Stanhope, 6 T. R. 345, 352); "all my farms" (see Lambert *v.* Paine, 3 Cranch (U. S.) 96, 97, 131, 2 L. ed. 377); "farm and lands" (see *In re* Bright-Smith, 31 Ch. D. 314, 317, 55 L. J. Ch. 365, 54 L. T. Rep. N. S. 47, 34 Wkly. Rep. 252); "farm buildings" (see O'Neil *v.* Pleasant Prairie Mut. F. Ins. Co., 71 Wis. 621, 623, 38 N. W. 345; Wiltshear *v.* Cottrell, 1 E. & B. 674, 690, 17 Jur. 758, 22 L. J. Q. B. 177, 72 E. C. L. 674); "farm" or "homestead farm" (see Locke *v.* Rowell, 47 N. H. 46, 51; 17 Cyc. 683); "farm purposes" (see *In re* Gerard, [1893] 3 Ch. 252, 259, 63 L. J. Ch. 23, 69 L. T. Rep. N. S. 393);

the minerals up to light for purposes of commerce, and make them profitable to lessor and lessee.[83] (See FARM; FARMER; FARMING; and, generally, AGRICULTURE; CROPS.)

FARM CROSSING. See RAILROADS.

FARMER.[84] A person engaged in the tillage of the soil;[85] an AGRICULTURIST, *q. v.*, a husbandman;[86] a man who cultivates a considerable tract of land.[87] (See FARM; and, generally, AGRICULTURE.)

FARMING LANDS. See HOMESTEADS; TAXATION.

FARMING NEIGHBORHOOD. A region in which there are several tracts of farming land with a proximity of location, and which can be regarded as a whole with reference to some common interests, although they are distinct in boundaries, and held in individual proprietorship.[88] As used in a statute relative to irri-

"farm servants" (see *In re* Gerard, [1893] 3 Ch. 252, 263, 63 L. J. Ch. 23, 69 L. T. Rep. N. S. 393); "farm whereon I live" (see Wheeler *v.* Randall, 6 Metc. (Mass.) 529, 533; Aldrick *v.* Gaskill, 10 Cush. (Mass.) 155, 157. See also Willard *v.* Moulton, 4 Me. 14, 16; Kimball *v.* Schoff, 40 N. H. 190, 195; Jackson *v.* Sill, 11 Johns. (N. Y.) 201, 215, 6 Am. Dec. 363); "home farm" (see Doolittle *v.* Blakesley, 4 Day (Conn.) 265, 272, 4 Am. Dec. 218; Downes *v.* Long, 79 Md. 382, 383, 29 Atl. 827; Wheeler *v.* Randall, 6 Metc. (Mass.) 529, 533); "homestead farm" (see Bell *v.* Sawyer, 32 N. H. 72, 80; Woodman *v.* Lane, 7 N. H. 241, 243; Barnard *v.* Martin, 5 N. H. 536, 537; Den *v.* Sayre, 3 N. J. L. 598, 602). See also Abbott *v.* Pike, 33 Me. 204, 206; Auburn Cong. Church *v.* Walker, 124 Mass. 69, 70; Winn *v.* Cabot, 18 Pick. (Mass.) 553, 555; Gafney *v.* Kenison, 64 N. H. 354, 356, 10 Atl. 706; Hunt *v.* Haven, 56 N. H. 87, 99; Peaslee *v.* Gee, 19 N. H. 273, 277; Evens *v.* Griscom, 42 N. J. L. 579, 593, 36 Am. Rep. 542; Saunders *v.* Springsteen, 4 Wend. (N. Y.) 429, 431; Respublica *v.* Carmalt, 4 Yeates (Pa.) 416, 417; Whitfield *v.* Langdale, 1 Ch. D. 61, 79, 45 L. J. Ch. 177, 33 L. T. Rep. N. S. 592, 24 Wkly. Rep. 313; Haines *v.* Welch, L. R. 4 C. P. 91, 92 note, 38 L. J. C. P. 118, 19 L. T. Rep. N. S. 422, 17 Wkly. Rep. 163; Goodtitle *v.* Paul, 2 Burr. 1089, 1093; Dormer *v.* Clarke, Dyer 110*a*, 110*b*; Beadle's Case, 3 Leon. 159; Newton *v.* Wilmot, 10 L. J. Ex. 476, 478, 8 M. & W. 711; Goodtitle *v.* Southern, 1 M. & S. 299, 301; Browning *v.* Beston, 1 Plowd. 131, 132; Holdfast *v.* Pardoe, 2 W. Bl. 975.

83. Anderson L. Dict. [*citing* Price *v.* Nicholas, 19 Fed. Cas. No. 11,415, 4 Hughes 616, 619].

"Farming" is the business of cultivating land, or employing it for the purposes of husbandry. Wulbern *v.* Drake, 120 Fed. 493, 495, 56 C. C. A. 643; *In re* Drake, 114 Fed. 229, 231.

"Farming" may not be called a trade see Leeds *v.* Freeport, 10 Me. 356, 359.

In connection with other words the word "farming" has often received judicial interpretation; as for example as used in the following phrases: "Farming buildings" (see Cooke *v.* Cholmondeley, 4 Drew. 326, 327, 6 Wkly. Rep. 802); "farming men" (see Reynolds *v.* Whelan, 16 L. J. Ch. 434, 435); "farming stock" (see *In re* Roose, 17 Ch. D. 696, 700, 50 L. J. Ch. 197, 43 L. T. Rep. N. S. 719, 29 Wkly. Rep. 230; Harvey *v.* Harvey, 32 Beav. 441, 444; Vaizey *v.* Reynolds, 6 L. J. Ch. O. S. 172, 5 Russ. 12, 29 Rev. Rep. 4, 5 Eng. Ch. 12, 38 Eng. Reprint 931).

84. The word has "a well recognized meaning." O'Neil *v.* Pleasant Prairie Mut. F. Ins. Co., 71 Wis. 621, 623, 38 N. W. 345.

Distinguished from "herder" in Hooker *v.* McAllister, 12 Wash. 46, 49, 40 Pac. 617.

Distinguished from "laborer" in Reg. *v.* Cleworth, 4 B. & S. 927, 933, 9 L. T. Rep. N. S. 682, 12 Wkly. Rep. 375, 116 E. C. L. 927.

Distinguished from "planter" in *In re* Drake, 114 Fed. 229, 231.

Is included under term "employer." See 15 Cyc. 1034.

Farmers' exemption from involuntary bankruptcy proceedings see 5 Cyc. 285.

Binding out children to farmers see 3 Cyc. 545 note 26.

85. Wulbern *v.* Drake, 120 Fed. 493, 495, 56 C. C. A. 643; Webster Dict. [*quoted* in *In re* Slade, 122 Cal. 434, 437, 55 Pac. 158].

86. Webster Dict. [*quoted* in *In re* Slade, 122 Cal. 434, 437, 55 Pac. 158, where it is said: "The followers of this ancient and honorable occupation may call themselves horticulturists, or viticulturists, or gardeners, but they are farmers, and their occupation is that of farming as contemplated by the statute"].

87. O'Neil *v.* Pleasant Prairie Mut. F. Ins. Co., 71 Wis. 621, 624, 38 N. W. 345, where it is said: "Whether it is necessary that he should till practically I am not quite certain; but at least a man is not called a 'farmer,' and his place is not called a 'farm,' unless he has some considerable tract of land, and cultivates it, or uses it in some one of the usually recognized ways of farming."

88. Lindsay Irr. Co. *v.* Mehrtens, 97 Cal. 676, 680, 32 Pac. 802, where it is said: "Its extent need not be characterized by fixed boundaries, nor is its existence determined by any definite number of proprietors, and while a tract of land, though large in extent, might, if held in different proprietorships, constitute a neighborhood, yet it would not if it were held in single ownership." See also Aliso Water Co. *v.* Baker, 95 Cal. 268, 269, 30 Pac. 537.

gation, a term which implies more than one farm.[89] (See FARM; and, generally, AGRICULTURE.)

FARMING ON SHARES. See LANDLORD AND TENANT.

FARMING TOOLS AND UTENSILS. A term which has no well-defined legal signification, but is susceptible to divers meanings, and is applicable to the various implements used in different branches of farming.[90] (See FARM; FARMER; and, generally, AGRICULTURE.)

FARM LET. Operative terms in leases;[91] technical words in a lease creating a term for years.[92] (See, generally, ESTATES; LANDLORD AND TENANT.)

FARM OUT. In conveyancing, to lease.[93] (See, generally, ESTATES; LANDLORD AND TENANT.)

FARM PRODUCT. A term applicable to an article which is produced by the soil, either under cultivation,[94] or by nature,[95] by labor or otherwise, and of spontaneous growth.[96] Under some circumstances the term will embrace animals.[97] And it has even been said to embrace meat,[98] manure, and cord-wood.[99] (See EMBLEMENTS; FARM; and, generally, AGRICULTURE.)

FARO. See GAMING.

FARO BANK. See GAMING.

FARVAND. In maritime language, a term meaning to travel by water.[1]

89. Lux *v.* Haggin, 69 Cal. 255, 305, 10 Pac. 674.

90. Its meaning is dependent on circumstances, and may be explained by extrinsic evidence. Rugg *v.* Hale, 40 Vt. 138, 144. See also *In re* Baldwin, 71 Cal. 74, 78, 12 Pac. 44; Voorhees *v.* Patterson, 20 Kan. 555, 556; Hall *v.* Nelson, 59 N. H. 573; Muse *v.* Darrah, 2 Ohio Dec. (Reprint) 604, 606, 4 West. L. Month. 149; Royston *v.* McCulley, (Tenn. Ch. App. 1900) 59 S. W. 725, 730, 52 L. R. A. 899; Humphrey *v.* Taylor, 45 Wis. 251, 253, 30 Am. Rep. 738.

91. Steel *v.* Frick, 56 Pa. St. 172, 174.

92. Bouvier L. Dict. [*citing* Coke Litt. 45*b*]. See also *In re* Drake, 114 Fed. 229, 231.

The terms are said to be equivalent to a contract, a writing obligatory, or parol promise, according as it is sealed or not. Magee *v.* Fisher, 8 Ala. 320, 322.

93. State *v.* Richmond, etc., R. Co., 72 N. C. 634, 637.

94. As for instance wheat (State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47 [*citing* Burrill L. Dict.]; Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 475, 18 C. C. A. 203), corn (West *v.* Moore, 8 East 339, 343), pineapple plants (Long *v.* State, 42 Fla. 509, 515, 28 So. 775), indian corn, rye, barley, cotton, fruits, vegetables, and the like (State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47).

"A mill situate on a farm is not a product of it — it is not the result of the cultivation of the soil — it is not essential to it — it is a structure enclosing machinery for the purposes of manufacture, transformation, not transmutation, and its earnings — the tolls — are not products of the owner's farm, but the products of the farms of other people, and the clause in question clearly does not therefore embrace them. A grist mill is no more a part of the farm than a cotton mill, a cotton gin, a blacksmith-shop, or other structure or machinery erected on it for the purposes of manufacture. The earnings of such things are not of the product of the farm, in the sense of the statute." State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47.

That the words "stock on the farm" as used in a devise carried the standing crops of corn growing there at the time of the testator's death see West *v.* Moore, 8 East 339, 343.

95. As hay. State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47; Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 279.

96. State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47 [*citing* Burrill L. Dict.].

"'The products of his own farm' are such as are produced by him who so owns and cultivates a farm." State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47 [*citing* Burrill L. Dict.].

97. As for instance horses, swine, sheep (State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47; Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 279), cattle (State *v.* Kennerly, 98 N. C. 657, 659, 4 S. E. 47), and neat cattle (Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 279).

98. State *v.* Spaugh, 129 N. C. 564, 568, 40 S. E. 60, holding that a *bona fide* farmer who peddles meat, produced from animals raised or fattened on his farm, is not within the purview of an act requiring the payment of a tax by persons engaged in buying and selling fresh meats. The court said: "What this law contemplates is that the meat in its essential character must be the product of the land owned or worked by the man who seeks to peddle it." But see, however, Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 279, where the court said: "The ox is the produce of the farm; beef is the produce of the slaughter-house and the shambles. It is manufactured by the professional skill of an artisan, whose business is as distinct from that of a farmer, as is that of a flax-dresser or a wool-comber."

99. Philadelphia *v.* Davis, 6 Watts & S. (Pa.) 269, 279.

1. It is compounded of "fare," a verb signifying "to travel," and "vand," meaning "by water." Gether *v.* Capper, 18 C. B. 866,

FARVANDA. Literally "navigation" or "sea," "passage by sea."[2]

FAST.[3] Moving rapidly; quick in motion; rapid; swift.[4]

FAST ESTATE. A term sometimes used in wills, meaning real property.[5]

FAST FREIGHT LINES. See CARRIERS.

FAST WRIT OF ERROR. See APPEAL AND ERROR.

FATETUR FACINUS QUI JUDICIUM FUGIT. A maxim meaning "He who flees judgment confesses his guilt."[6] (See, generally, CRIMINAL LAW.)

FATHER.[7] The male parent; a male who has begotten a child, also an adopted father, or a male ancestor more remote than a parent.[8] (Father: In General, see PARENT AND CHILD. Adoptive, see ADOPTION. Inheritance, see DESCENT AND DISTRIBUTION. Support and Maintenance, see PARENT AND CHILD; PAUPERS.)

FATHOM. When used in the measurement of land, a word which is to be understood as meaning a square fathom, but in its common usage an integral part of a unit of land measure.[9]

FATUUS PRÆSUMITUR QUI IN PROPRIO NOMINE ERRAT. A maxim meaning "A man is presumed to be simple who makes a mistake in his own name."[10]

FAUCES TERRÆ. See NAVIGABLE WATERS.

FAULT. Negligence.[11] (Fault: In General, see NEGLIGENCE. In Navigation, see COLLISION.)

FAULTS. See SALES.

FAUTORES. Favourers.[12]

FAVOR.[13] Partiality; bias; affection.[14] (Favor: Challenge for, see GRAND JURIES; JURIES. See also CHALLENGE.)

FAVORABILIA IN LEGE SUNT FISCUS, DOS, VITA, LIBERTAS. A maxim

880, 2 Jur. N. S. 789, 25 L. J. C. P. 260, 4 Wkly. Rep. 644, 86 E. C. L. 866.

2. Gether *v.* Capper, 18 C. B. 866, 870, 2 Jur. N. S. 789, 25 L. J. C. P. 260, 4 Wkly. Rep. 644, 86 E. C. L. 866.

3. "'Fast' and 'loose' are relative terms and might mean one thing in one place and quite another thing in another place." Sandwich Enterprise Co. *v.* Joliet Mfg. Co., 91 Fed. 254, 255, 33 C. C. A. 491.

Fast fish.— By the usage of the whale fishery a fish is to be considered as a fast fish which is attached by any means (such as the entanglement of the line around it, etc.) to the boat of the first striker, though the harpoon does not continue in the body of the fish. See Hogarth *v.* Jackson, 2 C. & P. 595, 12 E. C. L. 753; Fennings *v.* Grenville, 1 Taunt. 241, 243, 9 Rev. Rep. 760. "The peculiar mode of fishing has been commonly called drog-fishing." Aberdeen Arctic Co. *v.* Sutter, 6 L. T. Rep. N. S. 229, 231, 4 Macq. 355, 10 Wkly. Rep. 516.

4. "This is the meaning usually given the word." Webster Dict. [*quoted* in South Covington, etc., R. Co. *v.* Beatty, 50 S. W. 239, 20 Ky. L. Rep. 1845].

"As fast as steamer can deliver" see Hulthen *v.* Stewart & Co., [1903] A. C. 389, 394, 8 Com. Cas. 297, 72 L. J. K. B. 917.

A "very fast" train see Indianapolis, etc., R. Co. *v.* Peyton, 76 Ill. 340, 341.

"Fastest passenger train service" see Taffe *v.* Oregon R. Co., 41 Oreg. 64, 71, 67 Pac. 1015, 68 Pac. 732, 58 L. R. A. 187.

5. Brown L. Dict. See also Lewis *v.* Smith, 9 N. Y. 502, 510, 61 Am. Dec. 706; Jackson *v.* Merrill, 6 Johns. (N. Y.) 185, 191, 5 Am. Dec. 213.

6. Bouvier L. Dict. [*citing* Best Pres. § 248; 3 Inst. 14].

Applied in Foster's Case, 11 Coke 56*a*, 60*b*; Foxley's Case, 5 Coke 109*a*, 109*b*.

7. **Distinguished from "parent"** in Lantznester *v.* State, 19 Tex. App. 320, 321.

8. Lind *v.* Burke, 56 Nebr. 785, 790, 77 N. W. 444 [*citing* Century Dict.; Webster Int. Dict.].

9. Nahaolelau *v.* Kaaahu, 9 Hawaii 600, 601.

10. Bouvier L. Dict.

Applied in Van Alst *v.* Hunter, 5 Johns. Ch. (N. Y.) 148, 161.

11. Louisville, etc., R. Co. *v.* Berry, 2 Ind. App. 427, 28 N. E. 714, 716, where it is said: "Modern lexicography authorizes the use of this word in the same sense as 'negligence.' The Century Dictionary gives it the following, among other, meanings: 'An error or defect of judgment or conduct; any deviation from prudence, rectitude, or duty; any short-coming or neglect of care or performance resulting from inattention, incapacity, or perversity, a wrong tendency, course, or act.'"

12. Miller *v.* Knox, 4 Bing. N. Cas. 572, 605, 6 Scott 1, 33 E. C. L. 865.

13. **"Favorem vitæ"** see State *v.* Schieler, 4 Ida. 120, 130, 37 Pac. 272.

14. Burrill L. Dict.

"In favor of" see Myer *v.* Decroix, [1891] A. C. 520, 526; Gillam *v.* Taylor, L. R. 16 Eq. 581, 584, 42 L. J. Ch. 674, 28 L. T. Rep. N. S. 833, 21 Wkly. Rep. 823; Manchester, etc., R. Co. *v.* Denaby Colliery Co., 54 L. J. Q. B. 103, 111.

"Verdict of the party you desire to favor" see Pittsburgh, etc., R. Co. *v.* Burton, 139 Ind. 357, 369, 37 N. E. 150, 38 N. E. 594.

meaning "Things favourably considered in law are the treasury, dower, life, liberty." [15]

FAVORABILIORES REI POTIUS QUAM ACTORES HABENTUR. A maxim meaning "Defenders are held to be in a more favourable position than pursuers." [16]

FAVORABILIORES SUNT EXECUTIONES ALIIS PROCESSIBUS QUIBUSCUNQUE. A maxim meaning "Executions are preferred to all other processes whatever." [17]

FAVORABLE. CONVENIENT,[18] *q. v.*

FAVORABLY. In a favorable manner; with friendly disposition or indulgence; CONVENIENTLY, *q. v.*; ADVANTAGEOUSLY,[19] *q. v.*

FAVORES AMPLIANDI SUNT; ODIA RESTRINGENDA. A maxim meaning "Favorable inclinations are to be enlarged; animosities restrained." [20]

FEALTY. In feudal law, the obligation of fidelity which the tenant owed to his lord.[21]

FEASIBLE. Capable of being done, performed, or effected; that may be accomplished or carried out; practically possible.[22]

FEATHER.[23] A protrusion from the inside of the shell of the cylinder of a cloth-printing machine, which fits a groove in the mandrel and keeps it from slipping as the mandrel revolves.[24]

FEATHER BED. In domestic use, a single article composed of a quantity of feathers enclosed in a bedtick.[25] (See, generally, EXEMPTIONS.)

FED.[26] As applied to cattle or hogs, to be made fit for market by feeding.[27]

FEDERAL. In American law, belonging to the general government or union of the states; founded on or organized under the constitution or laws of the United States.[28] (Federal: Court[29] — Jurisdiction of, see COURTS; Removal of Causes, see REMOVAL OF CAUSES. Officer in General, see UNITED STATES; Ambassador or Consul, see AMBASSADORS AND CONSULS; Attorney-General, see, ATTORNEY-GENERAL; Commissioner, see UNITED STATES COMMISSIONERS; District Attorney, see PROSECUTING ATTORNEYS; Land Officer, see PUBLIC LANDS; Mar-

15. Wharton L. Lex. [*citing* Jenkins Cent. 94].

16. Trayner Leg. Max.

Applied in Hunt *v.* Rousmanier, 8 Wheat. (U. S.) 174, 195, 5 L. ed. 589, where it is referred to as a "maxim of the civil law."

17. Wharton L. Lex. [*citing* Coke Litt. 289].

18. Century Dict.

"Rates as favorable as 'furnished' by a certain gas company in another city" see Decatur Gas-Light Co. *v.* Decatur, 120 Ill. 67, 69, 11 N. E. 406.

19. Century Dict.

"To 'favourably consider' means, having regard to the surrounding facts, to grant an application." Montreal Gas Co. *v.* Vasey, [1900] A. C. 595, 596, 599, 69 L. J. P. C. 134, 83 L. T. Rep. N. S. 233.

20. Bouvier L. Dict. [*citing* Jenkins Cent. 186].

21. De Peyster *v.* Michael, 6 N. Y. 467, 499, 57 Am. Dec. 470, where it is said: "Escheat was the reversion of the estate on a grant in fee simple upon a failure of the heirs of the owner. Fealty was annexed to an attendant on the reversion. They were inseparable. These incidents of feudal tenure belonged to the lord of whom the lands were immediately holden; that is to say, to him of whom the owner for the time being purchased."

Distinguished from homage see Black L. Dict.

22. Century Dict.

'Laying out of the most feasible route between the two fixed bounds" see Spaulding *v.* Groton, 68 N. H. 77, 79, 44 Atl. 88.

23. **"Feathered animals"** see 2 Cyc. 421 note 15.

24. Griggs *v.* Stone, 51 N. J. L. 549, 550, 18 Atl. 1094, 7 L. R. A. 48.

25. State *v.* Parker, 47 Vt. 19.

26. **"The term . . . has a well understood meaning."** Brockway *v.* Rowley, 66 Ill. 99, 102.

27. Brockway *v.* Rowley, 66 Ill. 99, 102.

28. Black L. Dict.

The United States has been generally styled, in American political and judicial writings, a "federal government." The term has not been imposed by any specific constitutional authority, but only expresses the general sense and opinion upon the nature of the form of government. In recent years, there is observable a disposition to employ the term "national" in speaking of the government of the Union. Neither word settles anything as to the nature or powers of the government. "Federal" is somewhat more appropriate if the government is considered a union of the states; "national" is preferable if the view is adopted that the state governments and the Union are two distinct systems, each established by the people directly, one for local and the other for national purposes. Black L. Dict. [*citing* U. S. *v.* Cruikshank, 92 U. S. 542, 549, 23 L. ed. 588].

29. **When federal courts may enforce common law** see 8 Cyc. 385.

shal, see UNITED STATES MARSHALS. Question, As Ground For — Jurisdiction, see COURTS; Removal of Cause, see REMOVAL OF CAUSES.)

FEDERAL COURT. See COURTS.

FEDERAL GOVERNMENT.[30] A government distinguished from a national government by being the government of a community of independent and sovereign states, united by compact.[31] (See, generally, UNITED STATES.)

FEDERAL QUESTION. See COURTS; REMOVAL OF CAUSES.

FEE. See ESTATES. See also FEES.

FEE-BILL. See COSTS.

FEEBLE HEALTH. Words which import that the person in such health is weak, sickly, debilitated by disease or by age or decline of life.[32]

FEED.[33] To lend additional support; to strengthen *ex post facto*.[34]

FEE DAMAGES. Damages sustained by an abutting owner, occasioned by the construction and operation of an elevated railroad in one of the streets of a city,[35] which are awarded against elevated street railways.[36] (See, generally, STREET RAILROADS.)

FEEDER. A fountain, stream, or channel that supplies a main canal with water.[37]

FEED WIRE. A wire charged with a high potential current of electricity used to conduct and distribute the electricity throughout a city.[38] (See, generally, ELECTRICITY.)

FEE FARM. Lands held in fee to render for them annually the true value, or more or less.[39] (See, generally, ESTATES.)

FEE FARM RENT. A rent charge issuing out of an estate in fee; a perpetual rent reserved on a conveyance in fee simple.[40] (See, generally, ESTATES.)

FEEL. To take internal cognizance of; to be conscious of; to have an inward persuasion of;[41] to have experience of; suffer under.[42]

FEELINGS. See DAMAGES.

FEES. A charge or emolument,[43] or compensation for particular acts or services;[44] reward or compensation for services rendered or to be rendered, — a payment in money for official or professional services, whether the amount be

30. Piqua Branch State Bank *v.* Knoup, 6 Ohio St. 342, 393, dissenting opinion [*citing* 39 "Federalist"].

31. Distinguished from "state government" see 8 Cyc. 771.

32. Lund *v.* Dawes, 41 Vt. 370, 372.

33. "Feed privileges" see 17 Cyc. 686.

Feed stable construed in Morgan *v.* State, 64 Miss. 511, 513, 1 So. 749.

34. Black L. Dict. [*citing* Doe *v.* Oliver, 5 M. & R. 202, 207].

35. Dode *v.* Manhattan R. Co., 70 Hun (N. Y.) 374, 375, 24 N. Y. Suppl. 422.

36. People *v.* Barker, 165 N. Y. 305, 316, 5 N. E. 137, 151 [*citing* Messenger *v.* Manhattan R. Co., 129 N. Y. 502, 29 N. E. 955], where it is said: "Such damages are awarded for rights acquired from others for all time to come, or at least during the existence of the railroad company. The rights acquired are the easements of light, air and access of the abutting property owners in the streets occupied by the elevated railroad structure."

37. Graff *v.* Evergreen R. Co., 2 Pa. Co. Ct. 502, 504 [*citing* Webster Dict.].

38. Atlanta Consol. St. R. Co. *v.* Owings, 97 Ga. 663, 667, 25 S. E. 377, 33 L. R. A. 798.

39. De Peyster *v.* Michael, 6 N. Y. 467, 497, 57 Am. Dec. 470.

40. De Peyster *v.* Michael, 6 N. Y. 467, 497, 57 Am. Dec. 470 [*citing* 2 Blackstone Comm. 43; 3 Cruise 284]. See also Edwards *v.* Noel, 88 Mo. App. 434, 444 [*quoting* Alexander *v.* Warrance, 17 Mo. 228, 231].

41. Webster Int. Dict.

"Feels unsafe and insecure" as used in a chattel mortgage see Musser *v.* King, 40 Nebr. 892, 897, 59 N. W. 744, 42 Am. St. Rep. 700; J. I. Case Plow Works *v.* Marr, 33 Nebr. 215, 217, 49 N. W. 1119; Lichtenberger *v.* Johnson, 32 Nebr. 185, 188, 49 N. W. 336; Hull *v.* Godfrey, 31 Nebr. 204, 207, 47 N. W. 850; Newlean *v.* Olson, 22 Nebr. 717, 720, 36 N. W. 155, 3 Am. St. Rep. 286; Humpfner *v.* Osborne, 2 S. D. 310, 319, 50 N. W. 88.

"Might feel able to pay the same" see Pistel *v.* Imperial Mut. L. Ins. Co. of America, 88 Md. 552, 557, 42 Atl. 210, 43 L. R. A. 219.

42. Century Dict. See also Thillman *v.* Neal, 88 Md. 525, 532, 42 Atl. 242.

43. State *v.* Russell, 51 Nebr. 774, 778, 71 N. W. 785 [*quoting* Century Dict.].

"Fees and emoluments" of his office see U. S. *v.* Hill, 120 U. S. 169, 181, 7 S. Ct. 510, 30 L. ed. 627.

44. Seiler *v.* State, 160 Ind. 605, 619, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448 [*citing* Anderson L. Dict.; Bouvier L. Dict.]; Indianapolis *v.* Wasson, 74 Ind. 133, 141 [*citing* Bouvier L. Dict.; Richardson Dict.; Webster

optional or fixed by custom;[45] compensation paid to professional men,[46] as an attorney or physician;[47] the reward or compensation allowed by law to an officer for specific services performed by him in the discharge of his official duties;[48] frequently for services rendered in the progress of a cause,[49] to be paid by the parties, whether persons or municipalities, obtaining the benefit of the acts, or receiving the services, at whose instances they were performed.[50] Sometimes the term may mean CHARGES,[51] *q. v.*; and is often used interchangeably with the term "COSTS,"[52] *q. v.* Under a statute allowing any citizen to prosecute any suit or action in the federal courts without prepaying fees and costs, the word means the fees of the clerk in the strict sense of the word, and does not relate to disbursements.[53] The term is distinguished from "wages" or "salary" in that it refers to compensation for particular acts, whereas "wages" or "salary" refers rather to compensation for work during a definite period of time.[54] Under some statutes the fees of a witness include both the mileage and the *per diem* to which

Dict.; Wharton L. Lex.]; Cowdin *v.* Huff, 10 Ind. 83, 85 [*citing* Bouvier L. Dict.; Richardson Dict.; Webster Dict.; Wharton L. Lex.].

45. Crawford *v.* Bradford, (Fla. 1887) 2 So. 782, 783 [*citing* Abbott L. Dict.]; Callaway County *v.* Henderson, 119 Mo. 32, 39, 24 S. W. 437 [*citing* Bouvier L. Dict.]; State *v.* Russell, 51 Nebr. 774, 778, 71 N. W. 785 [*quoting* Webster Int. Dict.], giving as an illustration: "the fees of lawyers and physicians, the fees of office, clerk's fees, sheriff's fees, marriage fees, etc."

46. *In re* Stryker, 158 N. Y. 526, 528, 53 N. E. 525, 70 Am. St. Rep. 489 [*citing* Century Dict].

47. Callaway County *v.* Henderson, 119 Mo. 32, 39, 24 S. W. 437 [*quoting* Bouvier L. Dict.]; State *v.* Russell, 51 Nebr. 774, 778, 71 N. W. 785. See also Seiler *v.* State, 160 Ind. 605, 619, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448.

"Fees of the attorneys" see New Albany *v.* Smith, 16 Ind. 215, 218.

48. St. Louis *v.* Meintz, 107 Mo. 611, 615, 18 S. W. 30; State *v.* Russell, 51 Nebr. 774, 778, 71 N. W. 785 [*citing* Mobile *v.* Southerland, 45 Ala. 511, 517]; Landis *v.* Lincoln County, 31 Oreg. 424, 426, 50 Pac. 530; Williams *v.* State, 2 Sneed (Tenn.) 160, 162; Austin *v.* Johns, 62 Tex. 179, 182 [*citing* Bouvier L. Dict.; Burrill L. Dict.; Webster Unabr. Dict.]. See also Mobile *v.* Southerland, 47 Ala. 511, 517 [*citing* Bacon Abr. 463]; State *v.* Oden, 10 Ind. App. 136, 37 N. E. 731, 732; State *v.* Atherton, 19 Nev. 332, 346, 10 Pac. 901; Com. *v.* Mann, 168 Pa. St. 290, 299, 31 Atl. 1003; *Ex p.* McCully, 32 N. Brunsw. 126, 127.

49. Troup *v.* Morgan County, 109 Ala. 162, 166, 19 So. 503; Williams *v.* Flowers, 90 Ala. 136, 137, 7 So. 439, 24 Am. St. Rep. 772; Bradley *v.* State, 69 Ala. 318, 321; Tillman *v.* Wood, 58 Ala. 578, 579; Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220, 222; Musser *v.* Good, 11 Serg. & R. (Pa.) 247.

When used in reference to a levy, the word has two senses; one to denote the charges of the officer for his personal services; the other — which is the more general and popular use — all the expenses attending the levy and included in it. State *v.* Russell, 51 Nebr. 774, 778, 71 N. W. 785 [*quoting* Winfield Adjudged Words & Phrases, and *citing* Camp *v.* Bates, 13 Conn. 1, 9].

50. Landis *v.* Lincoln County, 31 Oreg. 424, 426, 50 Pac. 530 [*citing* Musser *v.* Good, 11 Serg. & R. (Pa.) 247]; Tillman *v.* Wood, 58 Ala. 578, construing a statute.

51. McPheters *v.* Morrill, 66 Me. 123, 124. See also Camp *v.* Bates, 13 Conn. 1, 5.

State harbor fees see 7 Cyc. 463.

52. State *v.* Flynn, 161 Ind. 554, 575, 69 N. E. 159 [*citing* Cowdin *v.* Huff, 10 Ind. 83; Musser *v.* Good, 11 Serg. & R. (Pa.) 247].

But when the two terms are accurately used, they are clearly distinguished. Troup *v.* Morgan County, 109 Ala. 162, 166, 19 So. 503; Bradley *v.* State, 69 Ala. 318, 321; Tillman *v.* Woods, 58 Ala. 578, 579; Camp *v.* Bates, 13 Conn. 1, 5; Howard Bldg., etc., Assoc. *v.* Philadelphia, etc., R. Co., 102 Pa. St. 220, 222 [*citing* Ramsey *v.* Alexander, 5 Serg. & R. (Pa.) 338, 344]; Musser *v.* Good, 11 Serg. & R. (Pa.) 247; Columb *v.* Webster Mfg. Co., 76 Fed. 198, 200.

"Fees are distingushed from costs in being always a compensation or recompense for services, while costs are an indemnification for money laid out and expended in a suit." Crawford *v.* Bradford, (Fla. 1887) 2 So. 782, 783 [*citing* Abbott L. Dict.].

"Costs" including attorney's fees.— "In its legal sense, the term costs denotes, not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover from his client, as remuneration for his professional services." Williams *v.* Flowers, 90 Ala. 136, 137, 7 So. 439, 24 Am. St. Rep. 772 [*citing* Tillman *v.* Woods, 58 Ala. 578; Rapalje & L. L. Dict.].

53. Columb *v.* Webster Mfg. Co., 76 Fed. 198, 200.

54. Seiler *v.* State, 160 Ind. 605, 619, 65 N. E. 922, 66 N. E. 946, 67 N. E. 448.

Distinguished from "wages" in Crawford *v.* Bradford, (Fla. 1887) 2 So. 782, 783; *In re* Stryker, 158 N. Y. 526, 528, 53 N. E. 525, 70 Am. St. Rep. 489 [*citing* Century Dict.]; Cochran *v.* A. S. Baker Co., 30 Misc. (N. Y.) 48, 50, 61 N. Y. Suppl. 724.

Not embraced within "the per diem allowance to county superintendents of schools." Jefferson County *v.* Johnson, 64 Ill. 149, 151.

he is entitled.[55] The term formerly embraced charges for weighing and gauging merchandise entered for export;[56] it included the commissions estimated by a percentage allowed by law on sums of money received or collected.[57] (Fees: Adoption of Practice of State Court by Federal Court as to, see Courts. Affirmance on Remission of Excessive, see Appeal and Error. Appealability of Orders Relating to, see Appeal and Error. As Costs, see Costs. As Element of Damages, see Damages. As Usury, see Usury. Extortion in Exacting, see Extortion. For Incorporation, see Corporations. Impairment of Obligation of Contracts or Vested Rights[58] by Statutes Regulating, see Constitutional Law. In Particular Actions or Proceedings — Admiralty, see Admiralty; Book-Account or Book Debt, see Accounts and Accounting; Bankruptcy, see Bankruptcy; Bastardy, see Bastards; Condemnation, see Eminent Domain; Divorce, see Divorce; Extradition, see Extradition; Foreclosure, see Chattel Mortgages; Mortgages; Imprisonment Under Execution Against the Person, see Executions; Pension, see Pensions; Probate, see Wills; Property Taken Under Execution, see Executions; Taking Deposition, see Depositions. Inspection, see Inspection. Liability — Of Attorney For, see Attorney and Client; Of Clerk For Wrongful Taking of, see Clerks of Courts; Of County For, see Counties. License — In General, see Licenses; Of Telegraph or Telephone Company, see Telegraphs and Telephones. Modification on Appeal, see Appeal and Error. Of Particular Persons — Arbitrator, see Arbitration and Award; Assignees, see Assignments For Benefit of Creditors; Bankruptcy; Attorney, see Attorney and Client; Clerk, see Clerks of Courts; Collector of Customs, see Customs Duties; Commissioner, see Admiralty; Judicial Sales; Constable, see Sheriffs and Constables; Consul, see Ambassadors and Consuls; Coroner, see Coroners; County Officer, see Counties; Court Commissioner, see Court Commissioners; Curator, see Absentees; Custodian, see Attachments; District or Prosecuting Attorney, see Prosecuting Attorneys; Election Officer, see Elections; Executor or Administrator, see Executors and Administrators; Guardian, see Guardian and Ward; Jailer, see Prisons; Judge, see Judges; Juror, see Juries; Justice of the Peace, see Justices of the Peace; Master or Commissioner in Chancery, see Equity; Municipal Officer, see Municipal Corporations; Poundkeeper, see Animals; Proctor, see Admiralty; Public Officer, see Officers; Recording Officer, see Records; Registers of Deeds; Referee or Auditor, see Accounts and Accounting; References; Register in Bankruptcy, see Bankruptcy; Sheriff, see Sheriffs and Constables; State Officer, see States; Stenographer, see Admiralty; Courts; Tax-Collector, see Taxation; Town Officer, see Towns; United States Officer, see United States; United States Commissioners; United States Marshals; Wharfinger,[59] see Wharves; Witness, see Witnesses. On Foreclosure, see Mortgages. On Payment of Execution, see Executions. Rules of Court as to, see Courts.)

FEE SIMPLE. See Estates.

FEE TAIL. See Estates.

FEIGNED ISSUE. See Equity.

"Lexicographers and some authorities class 'salary' and 'wages' as synonymous; . . . but not so with the terms 'salary' and 'fees,' as they appear generally to be distinguished. . . . The term 'fees' is not so inflexible as that it may not have been used in the sense of 'salary' or 'wages.'" Landis *v.* Lincoln County, 31 Oreg. 424, 427, 50 Pac. 530 [*citing* Com. *v.* Butler, 99 Pa. St. 535; Rapalje & L. L. Dict.; Webster Dict.].

"'Fees of all kinds,' embraces every kind of compensation allowed by law to a clerk of the county court unless excepted by some provision of the statute." Ellis County *v.* Thompson, 95 Tex. 22, 29, 64 S. W. 927, 66 S. W. 48.

55. Burrows *v.* Balfour, 39 Oreg. 488, 493, 65 Pac. 1062.

56. U. S. *v.* Jahn, 65 Fed. 792, 794, 13 C. C. A. 134.

57. Smith *v.* Dunn, 68 Cal. 54, 56, 8 Pac. 625.

58. When fees are vested rights see 8 Cyc. 907.

59. Wharfage fees, whether or not a taxation of commerce, see 7 Cyc. 475.

FEIGNEDLY See ACTUALLY.[60]

FELLOW SERVANTS. See MASTER AND SERVANT.

FELO DE SE. A man of the age of discretion, and *compos mentis*, who voluntarily kills himself, by stabbing, poison, or any other way.[61] One who deliberately puts an end to his own existence, or commits any unlawful, malicious act, the consequence of which is his own death.[62] (See, generally, SUICIDE.)

FELON. One who has committed felony; one convicted of felony.[63] (Felon: Arrest of, see ARREST. Bail of, see BAIL. Presence on Trial, see CRIMINAL LAW. See also, generally, CRIMINAL LAW.)

FELONIA, EX VI TERMINI SIGNIFICAT QUODLIBET CAPITALE CRIMEN FELLEO ANIMO PERPETRATUM. A maxim meaning "Felony, by force of the term, signifies any capital crime perpetrated with a malignant mind."[64]

FELONIA IMPLICATUR IN QUÂLIBET PRODITIONE. A maxim meaning "Felony is implied in every treason."[65]

FELONICE. Feloniously. Anciently an indispensable word in indictments for felony.[66] (See, generally, INDICTMENTS AND INFORMATIONS.)

FELONIOUS. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

FELONIOUSLY. See CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.

FELONY. See CRIMINAL LAW. (Felony: Compounding, see COMPOUNDING FELONY. Conspiracy to Commit, see CONSPIRACY. Presence on Trial For, see CRIMINAL LAW. Punishment For, see CRIMINAL LAW.)

FEMALE. A woman.[67] (Females: Admission to Practice Law, see ATTORNEY AND CLIENT. Citizenship, see CITIZENS. Eligibility to Office, see OFFICERS. Immunity From Arrest, see ARREST. Punishment For Crime, see CRIMINAL LAW. Rape of, see RAPE. Right—Of Naturalization, see ALIENS; Of Suffrage, see ELECTIONS. See also, generally, HUSBAND AND WIFE.)

FEME. A woman.[68]

FEME COVERT. See HUSBAND AND WIFE.

FEME SOLE. See HUSBAND AND WIFE.

FEME SOLE TRADER. See HUSBAND AND WIFE.

60. See 1 Cyc. 762 note 35.

61. Life Assoc. of America *v.* Waller, 57 Ga. 533, 536 [*citing* Hale P. C. 411]; Clift *v.* Schwabe, 3 C. B. 437, 475, 54 E. C. L. 437, 2 C. & K. 134, 61 E. C. L. 134, 17 L. J. C. P. 2 [*quoting* Hale P. C. 411, and *citing* 4 Blackstone Comm. 189].

62. Life Assoc. of America *v.* Waller, 57 Ga. 533, 536 [*quoting* 4 Blackstone Comm. 189].

63. Black L. Dict.

64. Wharton L. Lex. [*citing* Coke Litt. 391].

65. Wharton L. Lex. [*citing* 3 Inst. 15].

66. And classed by Lord Coke among those *voces artis*, (words of art) which cannot be expressed by any periphrasis or circumlocution. Burrill L. Dict. [*citing* 4 Blackstone Comm. 307; Coke Litt. 391*a*]. See also Vaux *v.* Brook, 4 Coke 40.

67. Myers *v.* State, 84 Ala. 11, 12, 4 So. 291 [*cited* in Jackson *v.* State, 137 Ala. 80, 81, 34 So. 611]; State *v.* Hemm, 82 Iowa 609, 610, 48 N. W. 971; Howell *v.* Com., 5 Ky. L. Rep. 174 [*quoted* in Couch *v.* Com., 29 S. W. 29, 16 Ky. L. Rep. 477]; Gibson *v.* State, 17 Tex. App. 574, 577 [*citing* Robertson *v.* State, 31 Tex. 36; Holland *v.* State, 14 Tex. App. 182; Battle *v.* State, 4 Tex. App. 595, 30 Am. Rep. 169; 2 Bishop Cr. Proc. (3d ed.) § 952].

"Female" is not a word of technical character, and may be substituted by the use of synonymous words, or words which plainly indicate a female, such as "her" or "she" and proper names applied to females only. Taylor *v.* Com., 20 Gratt. (Va.) 825, 827.

"Female heirs" has been construed to mean the two daughters of a certain person. Beall *v.* Harwood, 2 Harr. & J. (Md.) 167, 171, 3 Am. Dec. 532.

68. In the phrase "*baron et feme*" the word has the sense of "wife." Black L. Dict.

"In the feudal theory of the common law, the wife was subject to the husband. They were styled in the earlier law books, baron and feme, or lord and woman . . . Blackstone . . . says that the disabilities of the wife are intended for the most part for her protection and benefit, 'so great a favorite is the female sex of the law of England.'" Cummings *v.* Everett, 82 Me. 260, 262, 19 Atl. 456.

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By Chester A. Fowler
Judge of the Circuit Court of the Eighteenth Judicial Circuit, Wisconsin*

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* Author of "Counterfeiting," 11 Cyc. 300.

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CROSS-REFERENCES

For Matters Relating to:
Fences:
Around:
Common Lands, see COMMON LANDS.
Dangerous Premises, see MASTER AND SERVANT; MINES AND MINERALS; NEGLIGENCE.
Public Lands, see PUBLIC LANDS.
As Boundaries, see BOUNDARIES.
As Fixtures, see FIXTURES.
As Indicia of Possession, see ADVERSE POSSESSION.
Obstructing Easement, see EASEMENTS.
On Right of Way, see RAILROADS.
To Inclose or Restrain Animals, see ANIMALS.
Spite Fences, see ADJOINING LANDOWNERS.

I. DEFINITION.

A fence is an inclosing structure about a field or other space, or about any object, composed of wood, iron, or other material, and intended to prevent intrusion from without or straying from within.[1] It is nothing more than a line of obstacle, and may be composed of any material which will present a sufficient

1. Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 541, 6 N. W. 723; Brown *v.* Johnson, (Tex. Civ. App. 1903) 73 S. W. 49, 50; Kimball *v.* Carter, 95 Va. 77, 84, 27 S. E. 823, 38 L. R. A. 570.

A fence is an actual barrier which separates adjoining lands. Johnson *v.* Hannahan, 3 Strobh. (S. C.) 425.

A "possession fence" is an inclosure made by the lapping of fallen trees, and apparently constructed only for the purpose of indicating a claim to the ownership of the land surrounded thereby. Freedman *v.* Bonner, (Tex. Civ. App. 1897) 40 S. W. 47, 48.

A gate is a part of a fence. See Chicago, etc., R. Co. *v.* O'Brien, 34 Ill. App. 155; Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723; Estes *v.* Atlantic, etc., R. Co., 63

obstruction.[2] It may be a hedge,[3] a ditch,[4] a wall,[5] a trestle,[6] or a navigable stream or deep watercourse.[7]

II. SUFFICIENCY.

In the absence of a statute defining what constitutes a sufficient fence, the rule is that a fence which will turn ordinary stock is a good and sufficient fence;[8] it is not necessary that it turn stock which are peculiarly vicious and prone to break fences.[9] Where a division line fence is not required to be built of any particular height or size, or of any particular materials or particular style, it must be so built as to size, height, character, and kind of materials that it will be proper and suitable for all the purposes of such fence, and will be reasonably safe, and not necessarily cause injury to the adjoining owner or his property or animals.[10] Where, however, what constitutes a sufficient or lawful fence is described by statute,[11] land must be inclosed by a fence of the character thus

Me. 308; Woods *v.* Missouri, etc., R. Co., 51 Mo. App. 500; Winter *v.* Charter, 3 Y. & J. 308.

2. Allen *v.* Tobias, 77 Ill. 169.

Barbed wire is a proper material of which to construct a fence. See Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906; Siglin *v.* Coos Bay, etc., R., etc., Co., 35 Oreg. 79, 56 Pac. 1011, 76 Am. St. Rep. 463; Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520; Galveston Land, etc., Co. *v.* Levy, 10 Tex. Civ. App. 104, 30 S. W. 504. See *infra*, V, A, 2, b.

3. See Robillard *v.* Beaupre, 68 Ill. App. 103; Campbell *v.* Feyerabend, 53 Ill. App. 225; Selover *v.* Osgood, 52 Ill. App. 260; Kinney *v.* Kinney, 104 Iowa 703, 74 N. W. 688, 40 L. R. A. 626; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Usher *v.* Hiatt, 21 Kan. 548. But see Brown *v.* Johnson, (Tex. Civ. App. 1903) 73 S. W. 49.

4. See Warner *v.* Southworth, 6 Conn. 471; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Newell *v.* Hill, 2 Metc. (Mass.) 180; Ellis *v.* Arnison, 5 B. & Ald. 47, 7 E. C. L. 37, 1 B. & C. 70, 8 E. C. L. 31, 2 D. & R. 161, 1 L. J. K. B. O. S. 24, 25 Rev. Rep. 314.

5. See Allen *v.* Tobias, 77 Ill. 169; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Woodcock *v.* Calais, 68 Me. 244.

6. See Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442.

7. See Lamb *v.* Hicks, 11 Metc. (Mass.) 496; Jones *v.* Witherspoon, 52 N. C. 555, 78 Am. Dec. 263; State *v.* Lamb, 30 N. C. 229; Fripp *v.* Hasell, 1 Strobh. (S. C.) 173.

8. *Illinois.*— Scott *v.* Buck, 85 Ill. 334; Scott *v.* Wirshing, 64 Ill. 102; Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577. See also Ketchum *v.* Stolp, 15 Ill. 341; Misner *v.* Lighthall, 13 Ill. 609.

Iowa.— Frazier *v.* Nortinus, 34 Iowa 82.

Maine.— Gould *v.* Bangor, etc., R. Co., 82 Me. 122, 19 Atl. 84.

Nevada.— See Chase *v.* Chase, 15 Nev. 259.

North Carolina.— See State *v.* Lamb, 30 N. C. 229.

9. Clarendon Land Invest. Agency Co. *v.* McClelland, 86 Tex. 179, 23 S. W. 576, 1100, 22 L. R. A. 105.

10. Rowland *v.* Baird, 18 Abb. N. Cas. (N. Y.) 256.

11. See the following cases:

Georgia.— Hamilton *v.* Howard, 68 Ga. 288.

Illinois.— Scott *v.* Jackson, 93 Ill. App. 529.

Kansas.— Missouri Pac. R. Co. *v.* Baxter, 45 Kan. 520, 26 Pac. 49.

Missouri.— King *v.* Chicago, etc., R. Co., 79 Mo. 328.

Montana.— Smith *v.* Williams, 2 Mont. 195.

Sufficiency with reference to particular animals.—Statutes sometimes require that fences shall be so constructed as to turn hogs (Huber *v.* Wilkinson, 46 Iowa 458; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155), or sheep (Enders *v.* McDonald, 5 Ind. App. 297, 31 N. E. 1056).

A lawful fence means a fence as defined by statute. The word "lawful" in this connection applies merely to the quality of the fence, its height, material, etc. Russell *v.* Hannibal, etc., R. Co., 83 Mo. 507.

"Lawful" and "sufficient" fences distinguished.—"Sufficient fences," which a person must maintain around premises or fields to entitle him to recover for a trespass thereon, do not necessarily mean lawful fences, but mean fences such as farmers of practical knowledge and experience would consider as sufficient to protect the crop from injury by usually orderly cattle. Robison *v.* Fetterman, 9 Pa. Cas. 604, 14 Atl. 245.

"Lawful" and "ordinary" fences distinguished.—"Ordinary fences," in a statute relating to unruly cattle that will not be restrained by ordinary fences, does not mean lawful fences. Ordinary, in such a connection, means common. There is therefore a class of common fences to which the term "ordinary," in contradistinction to "lawful," can properly apply. Hine *v.* Wooding, 37 Conn. 123.

In Indiana a lawful fence is defined by statute to be "such as good husbandmen generally keep." See Sisk *v.* Conck, 112 Ind. 504, 14 N. E. 381, 14 Am. St. Rep. 213; Hinshaw *v.* Gilpin, 64 Ind. 116; Blizzard *v.* Walker, 32 Ind. 437; Myers *v.* Dodd, 9 Ind. 290, 68 Am. Dec. 624.

The legislature may delegate to towns the power to make their own regulations as to the sufficiency of fences. Griffin *v.* Martin, 7 Barb. (N. Y.) 297.

described,[12] or at least by an inclosure equivalent, in its capacity to turn stock, to the statutory fence.[13] The height of a lawful fence being prescribed, the average height cannot be considered in determining its sufficiency; it is immaterial that it is higher in some places if it is lower in others.[14] An immaterial variation from the statutory height will be disregarded; substantial compliance with the statute is all that is required.[15] An agreement for a partition fence which requires a "sufficient fence," without a more particular description, will be held to refer to and adopt the standard prescribed by statute.[16] Statutory requirements as to the sufficiency of partition fences may be waived by agreement.[17]

III. DUTY TO ERECT AND MAINTAIN.

A. In General. A statement of the rules as to the duty of erecting and maintaining fences generally has been made elsewhere.[18]

B. Partition Fences — 1. How Duty Arises — a. In General. A landowner's obligation to build, maintain, or contribute toward a partition fence arises by prescription, agreement, or statute, as otherwise no such duty is incumbent upon him.[19] Although a fence actually exists between adjacent lands, it will

Evidence.— In a contest respecting the lawful character of a fence, the opinion of the fence-viewers as to its sufficiency is admissible in evidence (Phillips *v.* Oystee, 32 Iowa 257); but in the absence of a statutory provision making the fence-viewers the sole judges of the sufficiency of a fence in an action brought for the recovery of damages caused by trespassing cattle, the sufficiency may be proved like any other fact. Noble *v.* Chase, 60 Iowa 261, 14 N. W. 299.

To what fences statutes apply.— A statute specifying the height of partition fences has no application to outside fences. Scott *v.* Buck, 85 Ill. 334; Scott *v.* Wirshing, 64 Ill. 102. Although not in terms so providing a statute relating in part to partition fences and elsewhere prescribing the dimensions of a lawful fence implies that a partition fence must be such a one. Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311.

12. Runyan *v.* Patterson, 87 N. C. 343; Hoskins *v.* Huling, 2 Tex. App. Civ. Cas. § 155.

Barbed wire fences.—When the statute prescribes the manner of constructing barbed wire fences, one constructed otherwise is not a lawful or sufficient fence. Hurd *v.* Lacey, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61; Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906; Cook *v.* Horstman, 2 Tex. App. Civ. Cas. § 770; Woodward *v.* Griffith, 2 Tex. App. Civ. Cas. § 360.

13. Comerford *v.* Dupuy, 17 Cal. 308. See also Durgin *v.* Kennett, 67 N. H. 329, 29 Atl. 414.

A fence of equal security with the defined lawful fence is sometimes, by the express provisions of the statute, a lawful fence. Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311; Scott *v.* Jackson, 93 Ill. App. 529; Hilliard *v.* Chicago, etc., R. Co., 37 Iowa 442; Phillips *v.* Oystee, 32 Iowa 257.

14. Hamilton *v.* Howard, 68 Ga. 288; Prather *v.* Reeve, 23 Kan. 627; Polk *v.* Lane, 4 Yerg. (Tenn.) 36.

15. Smith *v.* Williams, 2 Mont. 195. But see Prather *v.* Reeve, 23 Kan. 627.

16. Albright *v.* Bruner, 14 Ill. App. 319. See also Panther *v.* Trauman, 89 Iowa 101, 56 N. W. 289.

17. Albright *v.* Bruner, 14 Ill. App. 319. See also Avary *v.* Searcy, 50 Ala. 54; Enright *v.* San Francisco, etc., R. Co., 33 Cal. 230.

18. See Animals, 2 Cyc. 392 *et seq.*

19. *Alabama.*— Moore *v.* Levert, 24 Ala. 310.

Indiana.— Cook *v.* Morea, 33 Ind. 497; Myers *v.* Dodd, 9 Ind. 290, 68 Am. Dec. 624; Stephenson *v.* Elliott, 2 Ind. App. 233, 28 N. E. 326.

Maine.— Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Sturtevant *v.* Merrill, 33 Me. 62; Lord *v.* Wormwood, 29 Me. 282, 50 Am. Dec. 586; Little *v.* Lathrop, 5 Me. 356.

Maryland.— Richardson *v.* Milburn, 11 Md. 340.

Massachusetts.— Thayer *v.* Arnold, 4 Metc. 589; Rust *v.* Low, 6 Mass. 90.

Michigan.— Lantis *v.* Reithmiller, 95 Mich. 45, 54 N. W. 713; Aylesworth *v.* Herrington, 17 Mich. 417; Johnson *v.* Wing, 3 Mich. 163.

Missouri.— Gillespie *v.* Hendren, 98 Mo. App. 622, 73 S. W. 361; O'Riley *v.* Diss, 41 Mo. App. 184.

Nebraska.— Burr *v.* Hamer, 12 Nebr. 483, 11 N. W. 741.

New York.— Chamberlain *v.* Reed, 14 Hun 403; Hewitt *v.* Watkins, 11 Barb. 409; Holladay *v.* Marsh, 3 Wend. 142, 20 Am. Dec. 678.

Oregon.— Oliver *v.* Hutchinson, 41 Oreg. 443, 69 Pac. 139, 1024.

Pennsylvania.— Roberts *v.* Shipley, 2 Wkly. Notes Cas. 406.

South Carolina.— Walker *v.* Chichester, 2 Brev. 67.

Texas.— Nolan *v.* Mendere, 77 Tex. 565, 14 S. W. 167, 19 Am. St. Rep. 801.

Vermont.— Wilder *v.* Wilder, 38 Vt. 678; Hurd *v.* Rutland, etc., R. Co., 25 Vt. 116.

England.— Erskine *v.* Adeane, L. R. 8 Ch. 756, 42 L. J. Ch. 835, 29 L. T. Rep. N. S. 234,

become a partition fence, and the obligations and rights of the adjacent owners, under the partition fence statutes, will arise only on its being made a partition fence by agreement, or by proceeding in the manner prescribed by statute.[20]

b. By Prescription. The obligation to maintain a partition fence may arise by prescription.[21] It has also been decided that the respective owners may become bound by prescription to maintain a specific portion of such a fence.[22] From a joint maintainance, however long continued, no prescriptive obligation can arise.[23] A prescriptive obligation on the owner of land to maintain a partition fence is not destroyed by his becoming a tenant in common of the adjoining land;[24] but where adjoining lands which have once belonged to different persons, one of whom was bound to repair the fences between the two, afterward become the property of the same person, the preëxisting obligation to repair the fences is destroyed by the unity of ownership. And where the person who has so become the owner of the entirety afterward parts with one of the two closes, the obligation to repair the fences will not revive, unless express words be introduced into the deed of conveyance for that purpose.[25] A statute as to partition fences will not interfere with an obligation as to the maintenance of such a fence existing by prescription.[26]

c. By Agreement — (i) *In General.* The owners of adjacent lands may make valid agreements as to the construction and maintenance of partition fences, even when this matter is regulated by statute.[27] Where such owners make an

21 Wkly. Rep. 802; Hilton *v.* Ankesson, 27 L. T. Rep. N. S. 519.

See 23 Cent. Dig. tit. "Fences," § 7. See also ANIMALS, 2 Cyc. 397.

Pleading duty to maintain.— A count in an action to recover for repairs is fatally defective which fails to allege that it was defendant's duty to keep the fence in repair (Sharp *v.* Curtiss, 15 Conn. 526); but it is sufficient to allege that he was required by law to make and repair, without alleging the facts forming the basis of such duty (Rust *v.* Low, 6 Mass. 90).

20. *Illinois.*— McBride *v.* Lynd, 55 Ill. 411.

Kansas.— Markin *v.* Priddy, 39 Kan. 462, 18 Pac. 514.

Massachusetts.— Thayer *v.* Arnold, 4 Metc. 589.

Michigan.— Aylesworth *v.* Herrington, 17 Mich. 417.

Missouri.— Demetz *v.* Benton, 35 Mo. App. 559.

New Jersey.— Coxe *v.* Robbins, 9 N. J. L. 384.

See 23 Cent. Dig. tit. "Fences," § 7.

21. *Maine.*— Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233.

Massachusetts.— Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Thayer *v.* Arnold, 4 Metc. 589; Binney *v.* Hull, 5 Pick. 503; Rust *v.* Low, 6 Mass. 90.

New Jersey.— Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484.

New York.— Adams *v.* Van Alstyne, 25 N. Y. 232.

England.— Lawrence *v.* Jenkins, L. R. 8 Q. B. 274, 44 L. J. Q. B. 147, 28 L. T. Rep. N. S. 406, 21 Wkly. Rep. 577. See also Barber *v.* Whiteley, 11 Jur. N. S. 822, 34 L. J. Q. B. 212, 13 L. T. Rep. N. S. 319, 13 Wkly. Rep. 774; Star *v.* Rookesby, 1 Salk. 335.

See 23 Cent. Dig. tit. "Fences," § 14.

But see Wright *v.* Wright, 21 Conn. 329.

22. Harlow *v.* Stinson, 60 Me. 347; Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Heath *v.* Ricker, 2 Me. 72. See also Gibson *v.* Heyward, 67 N. H. 265, 30 Atl. 407. But see Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484 (holding that the continued maintenance for any length of time, of a division fence, must be deemed to be referable, in the absence of proof of an express agreement, to an agreement or assignment made under the statute, and no presumption will arise of a perpetual obligation to maintain that portion of the fence); Adams *v.* Van Alstyne, 25 N. Y. 232.

In New Hampshire it is provided by statute that the division of a partition fence between owners of adjoining lands may be established by usage and acquiescence. Gibson *v.* Heyward, 67 N. H. 265, 30 Atl. 407 [*distinguishing* Glidden *v.* Towle, 31 N. H. 147, decided prior to this statute]; Chase *v.* Jefts, 58 N. H. 43.

23. Webber *v.* Closson, 35 Me. 26.

24. Binney *v.* Hull, 5 Pick. (Mass.) 503.

25. Boyle *v.* Tamlyn, 6 B. & C. 329, 9 D. & R. 430, 5 L. J. K. B. O. S. 134, 30 Rev. Rep. 343, 13 E. C. L. 156.

26. Binney *v.* Hull, 5 Pick. (Mass.) 503; Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484.

27. *Illinois.*— D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11.

Indiana.— Bruner *v.* Palmer, 108 Ind. 397, 9 N. E. 354; Hinshaw *v.* Gilpin, 64 Ind. 116.

Iowa.— See Bodell *v.* Nehls, 85 Iowa 164, 52 N. W. 123; Huber *v.* Wilkinson, 46 Iowa 458 (where an agreement is for a fence that will turn sheep and swine, it must be so constructed as to accomplish that purpose); Gantz *v.* Clark, 31 Iowa 254.

Maryland.— See Willson *v.* Sands, 36 Md. 38.

Missouri.— See Mackler *v.* Cramer, 32 Mo. App. 542.

agreement relative to the duty of each in maintaining a partition fence, and one of them dies, his administrator is not bound by the contract for any future repairs.[28]

(II) *Parol Agreement.* According to the weight of authority, a parol agreement as to partition fences is binding upon the parties thereto;[29] but to be binding upon their privies such an agreement must be in writing,[30] unless recognized and acted upon by such privies, when it will bind them, although not in writing.[31]

d. By Statute — (I) *In General.* The duty to erect and maintain partition fences, and all matters connected with their erection and maintenance, are usually regulated by statute.[32] The partition fence statutes do not impose an absolute

New York.— See Parmelee *v.* Dann, 23 Barb. 461.

Rhode Island.— Thayer *v.* Smith, 7 R. I. 164.

Tennessee.— Stallcup *v.* Bradly, 3 Coldw. 406.

Wisconsin.— Brooks *v.* Allen, 1 Wis. 127.

See 23 Cent. Dig. tit. "Fences," § 15.

As to the operation of covenants for the erection and maintenance of fences see COVENANTS, 11 Cyc. 1090.

Implied agreement.— Where a party builds a fence on half the line between him and his neighbor and notifies the latter to build the other half and he does so, the former thereby securing the same result he might have obtained on application to the fence-viewers, an agreement will be implied that each shall maintain his half as a partition fence; and on the former's removing portions of his fence and thereby compelling the latter to build the whole fence in order to protect his crops, an action by the latter lies to recover the cost of such fence. Schnare *v.* Gehman, 9 Iowa 283.

Implied rights under agreement.— Where adjoining owners have entered into an agreement for the building of a line fence between them, the agreement carries with it, by implication, the right to do such things as are necessary in order to build the fence. Newberry *v.* Bunda, (Mich. 1904) 100 N. W. 277.

Existing agreements not superseded by statute.— Lamb *v.* Mulholland, 5 U. C. Q. B. O. S. 109. See also Kneale *v.* Price, 29 Mo. App. 227; Dey *v.* Prentice, 90 Hun (N. Y.) 27, 35 N. Y. Suppl. 563.

Consideration.— The mutual promises to build and maintain a partition fence constitute a sufficient consideration to support an agreement respecting it. Baynes *v.* Chastain, 68 Ind. 376.

28. Bland *v.* Umstead, 23 Pa. St. 316.

29. *Connecticut.*— Guyer *v.* Stratton, 29 Conn. 421.

Indiana.— Baynes *v.* Chastain, 68 Ind. 376.

Iowa.— See Bills *v.* Belknap, 38 Iowa 225.

New Jersey.— Irvin *v.* Ackerson, 38 N. J. L. 220.

Vermont.— Blood *v.* Spaulding, 57 Vt. 422; Scott *v.* Grover, 56 Vt. 499, 48 Am. Rep. 814; Hitchcock *v.* Tower, 55 Vt. 60; Tupper *v.* Clark, 43 Vt. 200.

Wisconsin.— Taylor *v.* Young, 61 Wis. 314, 21 N. W. 408 (*quære*); Pitzner *v.* Shinnick, 41 Wis. 676 (*quære*).

See 23 Cent. Dig. tit. "Fences," § 15.

Compare Glidden *v.* Towle, 31 N. H. 147, 163 [*approving* York *v.* Davis, 11 N. H. 241], holding that "a parol agreement is not effectual, and although it may control the parties for the time being, yet it does not prevent the fence-viewers from entertaining jurisdiction. To do that, the agreement must be in writing; and that is the only agreement which the statute recognizes. Whenever, therefore, no agreement in writing has been made, either party may apply to the fence-viewers for a division."

Contra.— Rudisill *v.* Cross, 54 Ark. 519, 16 S. W. 575, 26 Am. St. Rep. 57; Osborne *v.* Kimball, 41 Kan. 187, 21 Pac. 163; White *v.* Haperson, 43 Mich. 267, 56 N. W. 313, 38 Am. Rep. 178.

Agreement for maintenance for the season. — An oral agreement of landowners for the division and maintenance of a partition fence for the season, executed by one of them and not rescinded, is valid. Page *v.* Hodgdon, 63 N. H. 53.

30. Knox *v.* Tucker, 48 Me. 373, 77 Am. Dec. 233; Houx *v.* Seat, 26 Mo. 178, 72 Am. Dec. 202; Kneale *v.* Price, 29 Mo. App. 227; Pitzner *v.* Shinnick, 41 Wis. 676.

31. Blood *v.* Spaulding, 57 Vt. 422. See also Pitzner *v.* Shinnick, 41 Wis. 676.

32. *Alabama.*— Moore *v.* Levert, 24 Ala. 310.

California.— Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311; Gonzales *v.* Wasson, 51 Cal. 295.

Connecticut.— Wright *v.* Wright, 21 Conn. 329.

Illinois.— Boyd *v.* Lammert, 18 Ill. App. 632.

Indiana.— Rhodes *v.* Mummery, 48 Ind. 216, duty to rebuild fence destroyed by fire.

Massachusetts.— Rust *v.* Low, 6 Mass. 90.

Michigan.— Carpenter *v.* Vail, 36 Mich. 226, penalty for failure to build partition fences prescribed by statute.

New York.— Carpenter *v.* Halsey, 60 Barb. 45.

Tennessee.— Lightfoot *v.* Grove, 5 Heisk. 473.

Vermont.— Keenan *v.* Cavanaugh, 44 Vt. 268.

See 23 Cent. Dig. tit. "Fences," § 8.

Constitutionality.— "Laws compelling the building, maintaining, and keeping in repair of partition fences are enacted in the exercise of the police power, and are an ancient branch of legislation which has been uni-

requirement to build and maintain such fences; the parties may dispense with them if they so agree.[33]

(II) *Upon Whom Statutory Rights and Duties Conferred.* Partition fence statutes confer no rights or duties, except between the owners of adjoining lands and those who hold under them, and hence negligence with respect to partition fences does not concern the general public.[34] It has been held that any person occupying land and interested in the making and maintaining a partition fence, be his estate or interest in the premises what it may, is entitled to avail himself of the provisions in the statute in reference to partition fences, the remedy not being limited to the owner of the fee.[35] The grantee of one who has built a partition fence succeeds to the right of his grantor to enforce contribution from the adjoining owner.[36] Under such statutes it is generally the duty of the occupier of the land and not of the owner thereof to maintain partition fences.[37] An administrator is not personally liable in an action under a statute which provides that when one of the owners of adjoining lands neglects to build his proportion of a partition fence the person injured thereby may build it and recover therefor.[38]

(III) *To What Lands Applicable.* Sometimes statutes as to partition fences apply only to agricultural lands and do not require fences between urban lots;[39] other statutes on the subject apply only to lands that are inclosed,[40] or

formly sustained." Tomlinson *v.* Bainaka, (Ind. 1904) 70 N. E. 155, 158.

Statutes strictly construed.— The partition fence statutes, being in derogation of the common law, are strictly construed. James *v.* Tibbetts, 60 Me. 557; Lantis *v.* Reithmiller, 95 Mich. 45, 54 N. W. 713; Mackler *v.* Cramer, 48 Mo. App. 378; Butler *v.* Barlow, 2 Wis. 10.

33. *Georgia.*— See Tumlin *v.* Parrott, 82 Ga. 732, 9 S. E. 718.

Iowa.— Bills *v.* Belknap, 38 Iowa 225; Winters *v.* Jacobs, 29 Iowa 115.

Kansas.— Barker *v.* Robins, 9 Kan. 303.

Missouri.— O'Riley *v.* Diss, 41 Mo. App. 184.

Pennsylvania.— Milligan *v.* Wehinger, 68 Pa. St. 235.

Presumption of agreement not to fence.— Barker *v.* Robins, 9 Kan. 303. See also Rangler *v.* McCreight, 27 Pa. St. 95, holding that it will be presumed that they mutually agree to so occupy their respective lands that a division fence will not be needed.

34. Crandall *v.* Eldridge, 46 Hun (N. Y.) 411; Ryan *v.* Rochester, etc., R. Co., 9 How. Pr. (N. Y.) 453.

35. Bronk *v.* Becker, 17 Wend. (N. Y.) 320.

36. Gray *v.* Edrington, 29 Kan. 208; Brawner *v.* Langton, 57 Mo. 516. *Contra*, Hale *v.* Andrews, 75 Ill. 252.

37. Fay *v.* Elliott, 154 Mass. 587, 28 N. E. 1052; Carpenter *v.* Vail, 36 Mich. 226; Fenton *v.* Montgomery, 19 Mo. App. 156; Tewksbury *v.* Bucklin, 7 N. H. 518. See Baynes *v.* Chastain, 68 Ind. 376; Weymouth *v.* Gile, 72 Me. 446.

In Minnesota contribution may be demanded of either the owner or the occupant. McClay *v.* Clarke, 42 Minn. 363, 44 N. W. 255.

38. Cummings *v.* Brock, 56 Vt. 308.

39. Lightfoot *v.* Grove, 5 Heisk. (Tenn.) 473; Brooks *v.* Allen, 1 Wis. 127. See also Staub *v.* Fantz, 11 Heisk. (Tenn.) 766. *Contra*, Grief *v.* Kahn, 87 Ky. 17, 7 S. W. 159, 10 Ky. L. Rep. 87.

40. *Alabama.*— Moore *v.* Levert, 24 Ala. 310.

California.— Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311; Gonzales *v.* Wasson, 51 Cal. 295.

Illinois.— Boyd *v.* Lammert, 18 Ill. App. 632.

Iowa.— Hewit *v.* Jewell, 59 Iowa 37, 12 N. W. 738.

Maine.— James *v.* Tibbetts, 60 Me. 557.

Massachusetts.— Field *v.* Nantucket, 1 Cush. 11.

Michigan.— Lantis *v.* Reithmiller, 95 Mich. 45, 54 N. W. 713.

Minnesota.— McClay *v.* Clark, 42 Minn. 363, 44 N. W. 255; Boenig *v.* Hornberg, 24 Minn. 307.

Missouri.— Kent *v.* Lix, 47 Mo. App. 567. See also Moore *v.* White, 45 Mo. 206.

New Hampshire.— See Perkins *v.* Boody, 62 N. H. 452.

New York.— Perkins *v.* Perkins, 44 Barb. 134; Chryslar *v.* Westfall, 41 Barb. 159.

Ohio.— Kingman *v.* Williams, 50 Ohio St. 722, 36 N. E. 667.

Pennsylvania.— Whyte *v.* East Whiteland Tp., 2 Chest. Co. Rep. 219; Loeb *v.* Nissley, 2 Leg. Chron. 161, 21 Pittsb. Leg. J. 158.

Wisconsin.— Hazard *v.* Wolfram, 31 Wis. 149; Bechtel *v.* Neilson, 19 Wis. 49.

See 23 Cent. Dig. tit. "Fences," §§ 9, 10, 11.

Partial inclosure or improvement.— Only part of adjoining premises being inclosed or improved partition fences can be compelled only as to such part. Farmer *v.* Young, 86 Iowa 382, 53 N. W. 279; James *v.* Tibbetts, 60 Me. 557.

Nature of inclosing fences.— Such statutes apply where natural barriers form part of the inclosure of the one making use of the fence (Gonzales *v.* Wasson, 51 Cal. 295), and it is

occupied,[41] or improved.[42] Occupation means use such as to made it advantageous, for the purpose of such use, to fence; actual residence on the land is not required.[43] Land is under improvement when used to good purpose or turned to profitable account.[44]

(IV) *Division of Partition Fences* — (A) *In General.* Statutes as to partition fences generally provide that the portions which adjoining landowners shall construct and maintain shall be assigned to them by officials known as fence-viewers, upon application made by one of such owners when they cannot agree.[45]

(B) *Redivision.* If the land of one adjoining owner is sold in different parcels after a division of a partition fence, either by agreement or under the statute, so that new coterminous proprietors are introduced, each one extending over a part only of the line so divided, a new adjustment and division becomes necessary.[46] Where, after a fence between adjoining landowners has been divided throughout the whole length by fence-viewers, one of the owners lays a part of the land on the line in common and is thereby relieved from further contribution to maintain the fence there, the other owner will be entitled to a new division of the rest of the fence.[47]

(V) *Contribution to Cost of Partition Fences* — (A) *In General.* Such statutes also generally provide that where one adjacent owner does not construct or maintain his portion of a partition fence, the other adjacent owner may construct all of it or make all necessary repairs, and may recover from the defaulting

not necessary that the fences forming such inclosure should be "lawful" fences (Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311; Boenig *v.* Hornberg, 24 Minn. 307).

Admissibility of evidence as to land being inclosed see Moore *v.* Levert, 24 Ala. 310; Bechtel *v.* Neilson, 19 Wis. 49.

41. Maudlin *v.* Hanscombe, 12 Colo. 204, 20 Pac. 619; Rust *v.* Low, 6 Mass. 90.

42. *Michigan.*— Aylesworth *v.* Herrington, 17 Mich. 417.

Minnesota.— Boenig *v.* Hornberg, 24 Minn. 307.

New Hampshire.— Chase *v.* Jefts, 58 N. H. 280.

New York.— Chamberlain *v.* Reed, 14 Hun 403.

Pennsylvania.— Palmer *v.* Silverton, 32 Pa. St. 65.

See 23 Cent. Dig. tit. "Fences," §§ 9, 10, 11.

43. Maudlin *v.* Hanscombe, 12 Colo. 204, 20 Pac. 619.

44. Chase *v.* Jefts, 58 N. H. 280, the question whether lands are improved within the meaning of the statute is one of mixed law and fact.

Land used for pasturage is under improvement. Boenig *v.* Hornberg, 24 Minn. 307; Piper *v.* Piper, 60 N. H. 98, woodland used for pasturage.

Land occupied by buildings is improved. Wiggins *v.* Baptist Soc., 43 N. H. 260, lands open to public use on which public buildings stand are not within such statutes.

45. *Iowa.*— Bodell *v.* Nehls, 85 Iowa 164, 52 N. W. 123.

Maine.— Briggs *v.* Haynes, 68 Me. 535.

Massachusetts.— Currier *v.* Estey, 116 Mass. 577.

New Hampshire.— Fairbanks *v.* Childs, 44 N. H. 458.

New Jersey.— Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484.

New York.— Adams *v.* Van Alstyne, 25 N. Y. 232.

Wisconsin.— Butler *v.* Barlow, 2 Wis. 10.

See 23 Cent. Dig. tit. "Fences," §§ 18, 20. See also *infra*, III, B, 1, d, (VI).

Equality of division.— Under a statute requiring each owner to make equal portions of a partition fence, it is not necessary that the whole portion of each should be contiguous. Equality is best promoted by assigning to each owner a portion of the fence which is nearer to his residence and less difficult, together with a portion also of the more remote and more difficult. Prescott *v.* Mudgett, 13 Me. 423. Under some statutes each owner is not required to build one half the fence, but each must build a portion that is just and equal with reference to the cost of construction and maintenance. See Titman *v.* Smith, 61 N. J. L. 191, 38 Atl. 810; People *v.* Dewey, 1 Hun (N. Y.) 529.

Partial division.— It is not necessary to assign the whole of a fence between adjacent owners; a division of a part will be legal. Prescott *v.* Mudgett, 13 Me. 423; Alger *v.* Pool, 11 Cush. (Mass.) 450. But see Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484.

A positive disagreement is not necessary to give viewers jurisdiction; no agreement having been made they may, on application, make the division. Glidden *v.* Towle, 31 N. H. 147.

46. Wright *v.* Wright, 21 Conn. 329; Walker *v.* Wetherbee, 65 N. H. 656, 23 Atl. 621; Pitman *v.* Gale, 63 N. H. 75; Castner *v.* Riegel, 54 N. J. L. 498, 24 Atl. 484; Adams *v.* Van Alstyne, 25 N. Y. 232.

47. Jones *v.* Perry, 50 N. H. 134. See also Chamberlain *v.* Reed, 14 Hun (N. Y.) 403.

owner the value of his proper share of such construction or maintenance, the sufficiency of such fence or of the repairs to it, and the value thereof, being determined by fence-viewers.[48]

(B) *Amount of Recovery.* It has been held that where the value of a fence as appraised by viewers is recoverable, "the question which it is their duty to determine, is not what the materials are worth for any other purpose, and not, necessarily, what the materials and labor cost, but what, in the condition in which they find it, is its value as a fence. This may or may not equal the cost, depending, among other things, upon what economy was used in its construction, the suitablenesss of the materials, the character of the work, and whether, by reason of decay or other cause, it has deteriorated in value."[49] Half the value of a fence may be recovered, although it is a better or more expensive one than would have satisfied the requirements of the statute;[50] but one who builds or repairs a fence must act reasonably, and has no right to be extravagant either in materials or work.[51] In some jurisdictions, by statute, a landowner who builds such part of a fence or makes such repairs as the adjoining owner should have built or made may recover from the owner who is in default double the expense or value of his portion of the fence or repairs.[52] Such statutes being penal as well as remedial are strictly construed, and will not be extended to cases not clearly within their provisions;[53] and all proceedings prescribed by such statutes must be strictly followed.[54]

(C) *Lien For Cost of Construction or Repair.* It is sometimes provided by statute that the expenses of building or repairing a fence shall be a lien on the land of the owner who is in default.[55]

(D) *Action to Enforce*—(1) NATURE AND FORM. An action brought under a statute to recover double the expense of building or repairing the portion

48. *Connecticut.*— Mosman *v.* Sandford, 52 Conn. 23; Fox *v.* Beebe, 24 Conn. 271.

Illinois.— Hale *v.* Andrews, 75 Ill. 252.

Iowa.— Farmer *v.* Young, 36 Iowa 382, 52 N. W. 279; McKeever *v.* Jenks, 59 Iowa 300, 13 N. W. 295, contribution to the cost of a hedge fence.

Kentucky.— McMillen *v.* Wilson, 3 Dana 154.

Minnesota.— Boenig *v.* Hornberg, 24 Minn. 307.

Pennsylvania.— Stoner *v.* Hunsicker, 47 Pa. St. 514; Roberts *v.* Sarchet, 14 Pa. Co. Ct. 372.

See 23 Cent. Dig. tit. "Fences," § 29. See also *infra*, III, B, 1, d, (VI).

Failure to trim a hedge fence is not a failure to repair, within the meaning of a statute regulating contribution upon failure to repair a partition fence. Kinney *v.* Kinney, 104 Iowa 703, 74 N. W. 688, 40 L. R. A. 626.

The actual interest which the parties have in a fence is a question which cannot arise in an action for contribution to the expense of a partition fence. Moore *v.* Levert, 24 Ala. 310.

No recovery for expense of unnecessary rebuilding.— Where it appeared that after a report of fence-viewers defendant rebuilt his portion of the fence in substantial accordance therewith, and that plaintiff, dissatisfied with the style and kind adopted, of her own motion and upon her own view took it down and built a new one in its place, she was not entitled to recover the cost thereof from defendant. Trego *v.* Pierce, 119 Pa. St. 139, 12 Atl. 864.

In Indiana the statute provides for the construction or repair of partition fences by township trustees on the default of the landowner. For proceedings to compel payment therefor see Tomlinson *v.* Bainaka, (1904) 70 N. E. 155; State *v.* Kemp, 141 Ind. 125, 40 N. E. 661.

49. Robb *v.* Brachmann, 24 Ohio St. 3, 11.

50. Robb *v.* Brachmann, 24 Ohio St. 3.

51. Guyer *v.* Stratton, 29 Conn. 421.

52. *Connecticut.*— Fox *v.* Beebe, 24 Conn. 271.

Massachusetts.— Day *v.* Dolan, 174 Mass. 524, 55 N. E. 384; Fay *v.* Elliott, 154 Mass. 587, 28 N. E. 1052.

Minnesota.— McClay *v.* Clark, 42 Minn. 363, 44 N. W. 255.

New Hampshire.— Piper *v.* Piper, 60 N. H. 98; Fairbanks *v.* Childs, 44 N. H. 458.

Rhode Island.— Howland *v.* Howland, 14 R. I. 560.

Wisconsin.— Farr *v.* Spain, 67 Wis. 631, 31 N. W. 21.

53. Cobb *v.* Corbitt, 78 Me. 242, 3 Atl. 732; Abbott *v.* Wood, 22 Me. 541; Kennedy *v.* Owen, 131 Mass. 431; Voelz *v.* Breitenfield, 68 Wis. 491, 32 N. W. 757.

54. Briggs *v.* Haynes, 68 Me. 535; Eames *v.* Patterson, 8 Me. 81; Sears *v.* Charlemont, 6 Allen (Mass.) 437; Carpenter *v.* Vail, 36 Mich. 226; Franklin *v.* Wells, 6 R. I. 422.

55. See Gonzales *v.* Wasson, 51 Cal. 295 (holding that such a lien is not an exclusive remedy, but that the person in whose favor it exists may resort to an ordinary action at law); Tomlinson *v.* Bainaka, (Ind.

of a defaulting owner is legal in its nature and triable by jury.[56] An action on the case is the proper one for this purpose,[57] and assumpsit will not lie;[58] but where a custom exists,[59] or there is an agreement[60] to pay half of such expense, assumpsit will lie.

(2) PREREQUISITES TO ACTION — (a) NECESSITY OF APPLICATION TO VIEWERS. Where the statute makes fence-viewers a special tribunal for the adjudication of the rights and the settlement of controversies of adjoining landowners, respecting the erection and maintenance of partition fences, no action will lie in the courts for that purpose until fence-viewers have been applied to and acted in the premises;[61] but where the statute makes no provision for fence-viewers, an appraisal by them is not necessary to entitle one to maintain an action for the recovery of the expense of building or repairing a partition fence, and such expense may be proved by witnesses who know or can judge what it was.[62] The statutory remedy of applying to fence-viewers does not apply when the obligation to maintain a division fence rests upon a deed[63] or upon agreement.[64]

(b) NECESSITY OF DEMAND. Before bringing an action against the defaulting owner, a demand for the amount awarded by the fence-viewers must be made.[65]

(3) WHEN ACTION ACCRUES. An action founded upon the award of fence-viewers does not accrue until such award is made.[66] Under a statute providing for recovery unless the cost be paid within "one month after demand," an action commenced before the expiration of a month after demand for payment is prematurely brought.[67]

(VI) *FENCE-VIEWERS* — (A) *In General.* Partition fence statutes generally provide for fence-viewers[68] whose duties, as has been previously stated, are to assign to adjoining owners their due portions of such fences for erection or

1904) 70 N. E. 155; Gilson *v.* Munson, 114 Mich. 671, 72 N. W. 994; Farr *v.* Spain, 67 Wis. 631, 31 N. W. 21.

56. Farr *v.* Spain, 67 Wis. 631, 31 N. W. 21.

57. Sharp *v.* Curtiss, 15 Conn. 526; Sanford *v.* Haskell, 50 Me. 86; Howland *v.* Howland, 14 R. I. 560.

58. Howland *v.* Howland, 14 R. I. 560.

59. Walker *v.* Chichester, 2 Brev. (S. C.) 67.

60. Strong *v.* Slicer, 33 Vt. 466.

61. Lease *v.* Vance, 28 Iowa 501; Burr *v.* Hamer, 12 Nebr. 483, 11 N. W. 741. See also Eames *v.* Patterson, 8 Me. 81. But *compare* Walker *v.* Watrous, 8 Ala. 493, 42 Am. Dec. 646.

62. Perkins *v.* Perkins, 44 Barb. (N. Y.) 134; Bronk *v.* Becker, 17 Wend. (N. Y.) 320; Willoughby *v.* Carleton, 9 Johns. (N. Y.) 136.

63. Kennedy *v.* Owen, 134 Mass. 227. See also Dey *v.* Prentiss, 90 Hun (N. Y.) 27, 35 N. Y. Suppl. 563.

64. Rust *v.* Low, 6 Mass. 90. See also Bodel *v.* Nehls, 85 Iowa 164, 52 N. W. 123; Mackler *v.* Cramer, 32 Mo. App. 542. But see Bruner *v.* Palmer, 108 Ind. 397, 9 N. E. 354; Huber *v.* Wilkinson, 46 Iowa 458.

65. Bartlett *v.* Adams, 43 Ind. 447; Sanford *v.* Haskell, 50 Me. 86; Lamb *v.* Hicks, 11 Metc. (Mass.) 496.

Sufficiency of demand see Hollister *v.* Hollister, 35 Conn. 241; Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906.

Demand is sufficiently alleged by stating the length of the fence, its value per rod, and half its value at the time of its use to inclose, and that on a day certain plaintiff demanded said sum, which was refused. Meade *v.* Watson, 67 Cal. 591, 8 Pac. 311.

66. Snyder *v.* Bell, 32 Kan. 230, 4 Pac. 71.

67. Sanford *v.* Haskell, 50 Me. 86.

68. Bradford *v.* Hawkins, 96 Me. 484, 52 Atl. 1019 (manner of election or appointment under the Maine statute); Jaques *v.* Benton, 63 N. H. 232 (construing a statute providing for an application to viewers when the fence is situated on the line of two towns).

Selection by parties upon notice. — Where it is provided that fence-viewers are to be selected by the parties interested, upon notice, an award made by fence-viewers selected by one party without notice to the other is invalid. Thompson *v.* Bulson, 78 Ill. 277; Hall *v.* Andrews, 75 Ill. 252.

Disqualification on account of relationship. — Conant *v.* Norris, 58 Me. 451 (a brother-in-law of one of the parties disqualified); Sanborn *v.* Fellows, 22 N. H. 473 (where the uncle of one of the parties acted as a fence-viewer, the proceedings were held void); Robb *v.* Brackman, 38 Ohio St. 423 (waiver of disqualification).

Fence-viewers required to take oath. — Hartshorn *v.* Schoff, 51 N. H. 316, 58 N. H. 197; Glidden *v.* Towle, 31 N. H. 147; Gallup *v.* Mulvah, 26 N. H. 132. But *compare* Shriver *v.* Stevens, 20 Pa. St. 138.

Waiver of objections. — The fact that a board of fence-viewers is defectively constituted (Kellogg *v.* Brown, 32 Conn. 108) or that fence-viewers are not properly qualified (Glidden *v.* Towle, 31 N. H. 147) may be waived.

Presumption of authority. — It has been held that fence-viewers are quasi-public offi-

maintenance,[69] and to determine the sufficiency and value of such fences when contribution proceedings are brought by one owner against the other.[70]

(B) *Powers.* The powers of viewers are limited strictly to those given by statute, and when they exceed those limits their determinations are void.[71] They have no power to require one owner to build a part of the portion of the fence assigned to the other;[72] to apportion fences which are not for any reason subject to apportionment, and they cannot conclude the parties by determining a fence to be a partition fence when in fact it is not;[73] to make an assignment when a previous assignment has been made;[74] or when an obligation to maintain has arisen through prescription;[75] or when a written agreement has been made and recorded under a statute providing that such a partition shall be forever binding on the parties, assigns, and successive owners and occupants.[76] Under a power to assign portions of a hedge for maintainance they cannot require each party to trim his own side for the whole distance.[77] Where they have power to fix the value of a fence, they have no power to determine whether such fence has been paid for, in whole or in part, and have no control over the sum to be paid.[78] They have no authority to settle the rights of different claimants of land,[79] nor to establish boundary lines;[80] but they are sometimes authorized by

cers, and that their having acted officially is *prima facie* evidence of their appointment and qualification. Hollister *v.* Hollister, 35 Conn. 241. And where persons act as fence-viewers without objection on the part of landowners who were present or represented at the hearing, a finding that they are fence-viewers *de facto* at least is justified, although no evidence of their appointment is introduced. Day *v.* Dolan, 174 Mass. 524, 55 N. E. 384. See also Malone *v.* Faulkner, 11 U. C. Q. B. 116.

Action of a majority of fence-viewers is valid. Guyer *v.* Stratton, 29 Conn. 421 (if all have been duly notified to act); Hartshorn *v.* Schoff, 58 N. H. 197; Glidden *v.* Towle, 31 N. H. 147; Miller *v.* Sanborn, 54 Vt. 522.

Personal inspection.— A determination by fence-viewers as to the sufficiency of a fence must be made by them sitting as a board, and be based on personal inspection; but the inspection need not be made by all the members at the same time. Tubbs *v.* Ogden, 46 Iowa 134. See also Robb *v.* Brachmann, 24 Ohio St. 3.

Proceedings of fence-viewers as to matters of form should not be measured with technical nicety, but should be treated with at least the indulgence extended to proceedings before justices of the peace. Talbott *v.* Blacklege. 22 Iowa 572.

The proceedings of township trustees who act as fence-viewers are not invalidated because after meeting properly upon the land where the fence is located and determining upon their findings, they go to an attorney's office outside the township to reduce their findings to writing for recording, the findings being duly recorded in the proper township. Miles *v.* Tomlinson, 110 Iowa 322, 81 N. W. 587.

69. See *supra*, III, B, 1, d, (IV).

70. See *supra*, III, B, 1, d, (V).

71. *Illinois.*— Campbell *v.* Feyerabend, 53 Ill. App. 225.

Iowa.— Farmer *v.* Young, 86 Iowa 382, 53 N. W. 279. See also Anderson *v.* Cox, 54 Iowa 578, 6 N. W. 895.

Maine.— Longley *v.* Hilton, 34 Me. 332.

Massachusetts.— Sears *v.* Charlemont, 6 Allen 437.

New Hampshire.— Fairbanks *v.* Childs, 44 N. H. 458.

New Jersey.— Titman *v.* Smith, 61 N. J. L. 191, 38 Atl. 810.

Pennsylvania.— Painter *v.* Reese, 2 Pa. St. 126.

Rhode Island.— Howland *v.* Howland, 14 R. I. 560; Franklin *v.* Wells, 6 R. I. 422.

See 23 Cent. Dig. tit. "Fences," § 23.

72. Longley *v.* Hilton, 34 Me. 332.

73. Farmer *v.* Young, 86 Iowa 382, 53 N. W. 279; Bills *v.* Belknap, 38 Iowa 225; James *v.* Tibbetts, 60 Me. 557; American Baptist Publication Soc. *v.* Wistar, 11 Phila. (Pa.) 212; Bechtel *v.* Neilson, 19 Wis. 49.

74. Sears *v.* Charlemont, 6 Allen (Mass.) 437; Alger *v.* Poole, 11 Cush. (Mass.) 450.

75. Adams *v.* Van Alstyne, 25 N. Y. 232.

76. Glidden *v.* Towle, 31 N. H. 147; York *v.* Davis, 11 N. H. 241. *Compare* Burgin *v.* Kortright, 4 Johns. (N. Y.) 414, holding that under a statute giving them power in cases of "disputes" they have jurisdiction in cases of an agreement and a dispute under it.

77. Campbell *v.* Feyerabend, 53 Ill. App. 225.

78. Butler *v.* Barlow, 2 Wis. 10.

79. Shaw *v.* Gilfillan, 22 Vt. 565.

80. *Connecticut.*— Talcott *v.* Stillman, 28 Conn. 193.

Iowa.— See Peschong *v.* Mueller, 50 Iowa 237.

New Hampshire.— Glidden *v.* Towle, 31 N. H. 147; Gallup *v.* Mulvah, 24 N. H. 204.

Pennsylvania.— Trego *v.* Pierce, 119 Pa. St. 139, 12 Atl. 864.

Vermont.— Camp *v.* Camp, 59 Vt. 667, 10 Atl. 748; Shaw *v.* Gilfillan, 22 Vt. 565.

See 23 Cent. Dig. tit. "Fences," § 23.

statute to designate the line upon which a partition fence is to be built.[81] The powers of viewers are also limited by the complaint or application under which they proceed.[82] When selected by the parties upon notice, the scope of their powers is determined by such notice.[83]

(c) *Notice of Proceedings.* Persons whose rights will be affected by the proceedings of fence-viewers must have notice of the time and place of such proceedings,[84] and this is true, although notice is not expressly provided for by statute;[85] but a party appearing and not objecting to want of notice waives it.[86] Notice in writing not being prescribed, oral notice is sufficient;[87] but a written notice must be given when it is prescribed by the statute.[88] No period being designated, the time of notice must be "reasonable," and merely time enough to enable one to get to the meeting is not sufficient, although a short time would ordinarily suffice.[89] Such notice must be sufficiently definite to inform the party as to the time and place and the fences to be passed upon.[90] Although several matters are to be passed upon by fence-viewers, one notice is sufficient,[91] but it must embrace all the matters to be considered, or it will be insufficient as to those omitted.[92]

(d) *Decision or Order* — (1) Form and Contents — (a) In General. It is sometimes required that the decision of fence-viewers shall be reduced to writing and a copy given to each party,[93] that it shall be sworn to[94] and recorded.[95]

81. Kennedy *v.* Owen, 131 Mass. 431; Currier *v.* Esty, 116 Mass. 577; Corlis *v.* Little, 13 N. J. L. 229; Miller *v.* Barnett, 5 N. J. L. 547; State *v.* Ford, 1 N. J. L. 53.

82. Sears *v.* Charlemont, 6 Allen (Mass.) 437; Franklin *v.* Wells, 6 R. I. 422. See also Hartshorn *v.* Scharff, 51 N. H. 316.

83. Hale *v.* Andrews, 75 Ill. 252; Scott *v.* Jackson, 93 Ill. App. 529.

84. *Iowa.*— Tubbs *v.* Ogden, 46 Iowa 134; Lookhart *v.* Wessels, 46 Iowa 81. *Compare* Brown *v.* Petrie, 86 Iowa 581, 53 N. W. 321.

Maine.— Briggs *v.* Haynes, 68 Me. 535.

Massachusetts.— Day *v.* Dolan, 174 Mass. 524, 55 N. E. 384.

Michigan.— See Scofield *v.* Haire, 122 Mich. 265, 80 N. W. 1091.

Minnesota.—McClay *v.* Clark, 42 Minn. 363, 44 N. W. 255.

New Hampshire.— Davis *v.* Hazen, 61 N. H. 383; Fairbanks *v.* Childs, 44 N. H. 458.

New Jersey.— See State *v.* Ford, 1 N. J. L. 53.

Pennsylvania.— Roberts *v.* Shipley, 2 Wkly. Notes Cas. 406.

See 23 Cent. Dig. tit. "Fences," § 35.

But see Edgerton *v.* Moore, 28 Conn. 600; Fox *v.* Beebe, 24 Conn. 271.

Actual notice must be given unless it is otherwise prescribed by statute. Moore *v.* Given, 39 Ohio St. 661.

Notice to one of several owners in common is sufficient. Moore *v.* Given, 39 Ohio St. 661.

Service in accordance with statute.— Where the statute prescribes service of such notice as a summons to be served in a civil action, service in any other manner or by any one but a sheriff or constable is insufficient. Voelz *v.* Breitenfield, 68 Wis. 491, 32 N. W. 757.

A recital of notice in the return of fence-viewers is *prima facie* evidence of the giving of such notice. Achorn *v.* Andrews, (Me. 1888) 12 Atl. 793.

85. *Illinois.*— Holliday *v.* Swailes, 2 Ill. 515.

Maine.— Harris *v.* Sturdivant, 29 Me. 366.

Massachusetts.— Lamb *v.* Hicks, 11 Metc. 496; Scott *v.* Dickinson, 14 Pick. 276.

Michigan.— Gilson *v.* Munson, 114 Mich. 671, 72 N. W. 994.

Pennsylvania.— Shriver *v.* Stephens, 20 Pa. St. 138.

Rhode Island.— Franklin *v.* Wells, 6 R. I. 422.

See 23 Cent. Dig. tit. "Fences," § 35.

Contra.— Talbot *v.* Blacklege, 22 Iowa 572.

86. Talbot *v.* Blacklege, 22 Iowa 572; Shriver *v.* Stephens, 20 Pa. St. 138.

87. Gantz *v.* Clark, 31 Iowa 254; Talbot *v.* Blacklege, 22 Iowa 572.

88. Kinney *v.* Kinney, 104 Iowa 703, 74 N. W. 688, 40 L. R. A. 626; Lookhart *v.* Wessels, 46 Iowa 81.

89. Tubbs *v.* Ogden, 46 Iowa 134.

90. Bruner *v.* Palmer, 108 Ind. 397, 9 N. E. 354; Emery *v.* Maguire, 87 Me. 116, 32 Atl. 781.

91. Lamb *v.* Hicks, 11 Metc. (Mass.) 496.

92. Fairbanks *v.* Childs, 44 N. H. 458.

93. Briggs *v.* Haynes, 68 Me. 535; Hewitt *v.* Watkins, 11 Barb. (N. Y.) 409. *Compare* Talbot *v.* Blacklege, 22 Iowa 572 (holding that where each party was verbally notified and knew all the acts of the viewers, and their decision was reduced to writing on the same day and duly recorded, it was not necessary to give a written copy of the decision to the parties); Gallup *v.* Mulvah, 26 N. H. 132 (holding that, where it is provided that the decision shall be recorded, it is not essential that a copy be given to the parties, although the statute provides therefor).

94. Perkins *v.* Boody, 62 N. H. 452.

Oath may be waived. Perkins *v.* Boody, 62 N. H. 452; Hartshorn *v.* Schoff, 51 N. H. 316, 58 N. H. 197.

95. Ellis *v.* Ellis, 39 Me. 526; Glidden *v.* Towle, 31 N. H. 147. But *compare* Gantz *v.* Clarke, 31 Iowa 254, holding that, the object of a statutory provision for recording being

Technical objections to the form of an award are not favored.[96] An award is void which does not declare the fence built to be sufficient,[97] or which, under a statute requiring an assessment of the "expense" of building a fence, finds its value.[98] An award is not void for failing to specify whether the value fixed is the actual or double value, if it appears from the whole award which is meant.[99] When the dispute is as to the value of the fence and the proportion thereof which one party should pay to the other, the award should specify such sum.[1] An order is not vitiated because of mere surplusage in its contents;[2] and it has been held that omissions in an award may be supplied by oral testimony.[3]

(b) Order or Notice to Build or Repair.[4] An order or notice to build or repair a partition fence should fix the time for compliance[5] definitely.[6] A notice to repair need not specify the particulars in which the fence is deficient;[7] and it is sufficient, although it does not specify the portion of the fence to be repaired.[8] Reasonable certainty is all that is required in the description of a fence in such notice.[9]

(2) Conclusiveness. The decision of fence-viewers upon questions within their jurisdiction is conclusive,[10] unless impeached for fraud or mistake.[11] Thus the determination of the viewers as to the amount of fence to be built and maintained,[12] or as to the sufficiency of a fence already built,[13] is conclusive. And a decision against the establishment of a fence on the ground that the land is uninclosed is binding upon the parties until it is otherwise determined on a new application;[14] but a party being bound by a covenant in a deed to maintain the whole of a fence, an apportionment by viewers does not conclude the other party, who will not be estopped from asserting such obligation although he assented to the apportionment.[15] It has been decided that the award of fence-viewers is only *prima facie* evidence as to the amount of contribution to be made by one adjoining owner to another who has erected the whole fence.[16]

(3) Appealability. The right to appeal from the decision of fence-viewers is sometimes expressly provided by statute.[17] Whether a landowner was assessed by fence-viewers with the cost of a more expensive fence than the law required must be decided on appeal and not on certiorari to review their proceedings.[18] Under a statute authorizing appeals in "*qui tam* and other actions for forfeitures

to give notice, when the party is otherwise notified recording is not necessary.

96. Bruner *v.* Palmer, 108 Ind. 397, 9 N. E. 354.

97. Emery *v.* McGuire, 87 Me. 116, 32 Atl. 781. See also Briggs *v.* Haynes, 68 Me. 535.

98. Voelz *v.* Breitenfield, 68 Wis. 491, 32 N. W. 757.

99. Guyer *v.* Stratton, 29 Conn. 421.

1. Hewitt *v.* Watkins, 11 Barb. (N. Y.) 409. *Compare* Roberts *v.* Sarchet, 14 Pa. Co. Ct. 372.

2. Gallup *v.* Mulvah, 26 N. H. 132.

3. Shriver *v.* Stephens, 20 Pa. St. 138.

4. **Admissibility of parol evidence of contents.**— A written notice requiring the building of a fence having been served upon a landowner by fence-viewers, parol evidence of its contents cannot be given without notice to him to produce it. Abbott *v.* Wood, 22 Me. 541. But *compare* Willoughby *v.* Carleton, 9 Johns. (N. Y.) 136.

5. Guyer *v.* Stratton, 29 Conn. 421; Fairbanks *v.* Childs, 44 N. H. 458; Howland *v.* Howland, 14 R. I. 560.

6. James *v.* Tibbetts, 60 Me. 557.

7. Fox *v.* Beebe, 24 Conn. 271.

8. Rowe *v.* Beale, 15 Pick. (Mass.) 123.

9. Guyer *v.* Stratton, 29 Conn. 421.

10. *Connecticut.*— Wright *v.* Wright, 21 Conn. 329.

Iowa.— McKeever *v.* Jenks, 59 Iowa 300, 13 N. W. 295; Bills *v.* Belknap, 38 Iowa 225.

Michigan.— Gilson *v.* Munson, 114 Mich. 671, 72 N. W. 994.

New Hampshire.— Fairbanks *v.* Childs, 44 N. H. 458.

New York.— Clark *v.* Brown, 18 Wend. 213.

Canada.— Short *v.* Parmer, 24 U. C. Q. B. 633. See also Matter of Cameron, 25 U. C. Q. B. 533.

See 23 Cent. Dig. tit. "Fences," § 26.

11. Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906; Robb *v.* Barchmann, 24 Ohio St. 3. **Setting aside for fraud** see Robertson *v.* Bell, 36 Kan. 748, 14 Pac. 160.

12. Grey *v.* Edrington, 29 Kan. 209; People *v.* Dewey, 1 Hun (N. Y.) 529.

13. Baker *v.* Lakeman, 12 Metc. (Mass.) 195.

14. Miller *v.* Sanborn, 54 Vt. 522.

15. Dey *v.* Prentice, 90 Hun (N. Y.) 27, 35 N. Y. Suppl. 563.

16. Snyder *v.* Bell, 32 Kan. 230, 4 Pac. 71; Grey *v.* Edrington, 29 Kan. 208.

17. *In re* McDonald, 30 U. C. Q. B. 432.

18. Miles *v.* Tomlinson, 110 Iowa 322, 81 N. W. 587.

and penalties," appeal lies from the action of justices of the peace acting as fence-viewers;[19] and where a statute provides for the entry of judgment by a justice of the peace *ex parte* on a fence-viewers' award if it is not paid within a certain time, an appeal lies from such judgment as from other judgments of such courts, the proceedings being an "action" within the code and a judicial rather than a ministerial act.[20]

(E) *Fees.* The amount of the fees of fence-viewers and the persons by whom they are paid are matters regulated by statute.[21]

2. How Duty Terminated. When a statutory method of terminating the obligation as to partition fences is prescribed, the obligation continues until such method has been complied with.[22] One at whose solicitation a division fence was apportioned after the adoption of a herd law, and who with the adjoining owner acquiesced in the apportionment and erected a fence accordingly, cannot afterward of his own motion relieve himself of the obligation to keep his portion of the fence in repair.[23] One of two adjoining landowners who sets his fence in his own land and throws open to the public the land between his line and the fence is thus relieved from assisting to maintain a partition fence.[24]

3. Location of Partition Fences. Although fences on the line between adjacent owners are generally contemplated by statutes providing for partition fences,[25] yet to constitute a partition fence it is not necessary that it be located precisely on the true line;[26] but substantial compliance with the rule that a partition fence must be located on the line between adjoining landowners would seem to be necessary in the absence of an express or implied agreement to locate it elsewhere.[27] Where landowners expressly agree as to the location of a partition fence,[28] or

19. Holliday *v.* Swailes, 2 Ill. 515.

20. Lightfoot *v.* Grove, 5 Heisk. (Tenn.) 473.

21. See Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906; Roundy *v.* Smith, 68 N. H. 69, 34 Atl. 677; Chase *v.* Jefts, 58 N. H. 43; Whittier *v.* Johnson, 38 N. H. 160; Glidden *v.* Towle, 31 N. H. 147; Gallup *v.* Mulvah, 26 N. H. 132; Irish *v.* Blackmer, 56 Vt. 670. And see the statutes of the various states.

22. Hoag *v.* Switzer, 61 Ill. 294; Brown *v.* Brown, 23 Ill. App. 90.

Laying lands open or in common is a method of terminating liability sometimes provided for by statute. See Boyd *v.* Lammert, 18 Ill. App. 632; Perkins *v.* Boody, 62 N. H. 452; Jones *v.* Perry, 50 N. H. 134.

23. Barrett *v.* Dolan, 71 Iowa 94, 32 N. W. 189.

24. Smith *v.* Johnson, 76 Pa. St. 191; Rohrer *v.* Rohrer, 18 Pa. St. 367 [*distinguished* in Odenwelder *v.* Frankenfield, 153 Pa. St. 526, 26 Atl. 97]; Painter *v.* Reece, 2 Pa. St. 126.

25. Hewit *v.* Jewell, 59 Iowa 37, 12 N. W. 738.

When lands meet in the middle of a stream and no fence can be erected on the line, it must be located according to principles of reason and justice. Bissel *v.* Southworth, 1 Root (Conn.) 269. See also Lamb *v.* Hicks, 11 Metc. (Mass.) 496.

Disputed boundary line.— The fact that the boundary line between adjoining owners is in dispute is no excuse for not building a partition fence. Trego *v.* Pierce, 119 Pa. St. 139, 12 Atl. 864; Stephens *v.* Shriver, 25 Pa. St. 78. See also Robb *v.* Brachmann, 24 Ohio St. 3.

26. *California.*— Columbet *v.* Pacheco, 48 Cal. 395.

Iowa.— Card *v.* Dale, 67 Iowa 552, 25 N. W. 774; Talbot *v.* Blacklege, 22 Iowa 572.

Minnesota.— Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906.

New York.— Rowland *v.* Baird, 18 Abb. N. Cas. 256.

Ohio.— Robb *v.* Brachmann, 24 Ohio St. 3.

Pennsylvania.— Trego *v.* Pierce, 119 Pa. St. 139, 12 Atl. 864; Stephens *v.* Shriver, 25 Pa. St. 78.

Tennessee.— Clowers *v.* Sawyers, 1 Head 156.

See 23 Cent. Dig. tit. "Fences," § 13.

27. *Alabama.*— Wheeler *v.* State, 109 Ala. 56, 19 So. 993.

Connecticut.— Talcott *v.* Stillman, 28 Conn. 193.

Massachusetts.— Kennedy *v.* Owen, 131 Mass. 431.

Missouri.— Sims *v.* Field, 74 Mo. 139.

Nebraska.— Burr *v.* Hamer, 12 Nebr. 483, 11 N. W. 741.

Rhode Island.— Howland *v.* Howland, 14 R. I. 560.

Illustrations.— Fences located two or three feet (Jeffries *v.* Burgin, 57 Mo. 327), four feet (Conklin *v.* Dust, 3 Kan. App. 211, 43 Pac. 431), ten feet (Maudlin *v.* Hanscombe, 12 Colo. 204, 20 Pac. 619), and from five feet to an eighth of a mile from the line (Byers *v.* Davis, 3 Ind. App. 387, 29 N. E. 798) have been held not to be partition fences.

Objection to location waived.— Piper *v.* Piper, 60 N. H. 98.

28. Oxborough *v.* Boesser, 30 Minn. 1, 13 N. W. 906; Hoar *v.* Hennessy, 29 Mont. 253, 74 Pac. 452.

acquiesce in its location for a long period,[29] or treat a fence as being on the line,[30] the fact that it is not on the line is immaterial. Where a partition fence which was not upon the true line is rebuilt, it may be correctly located.[31] As the line between adjacent landowners is imaginary, existing only in theory,[32] and as every species of fence must take some land and cannot stand on a mathematical line,[33] a reasonable amount of land may be used for the erection of a partition fence, one half of such fence being placed on the land of each of the adjacent owners.[34] If more than half of such a fence is built upon the land of one of the adjacent owners, without his consent, he is entitled to relief.[35] The occupation by a landowner of the requisite land of his neighbor for the erection of a partition fence is not adverse but permissive.[36] The rule which permits partition fences to be placed equally on the land of each adjoining owner does not apply to fences meeting on the front of adjoining premises. Such fences are required to terminate at the division line.[37]

IV. REMOVAL, DESTRUCTION, AND OTHER ACTS RELATING TO FENCES.

A. Civil Liability — 1. IN GENERAL. A person who commits a trespass by removing or destroying a fence becomes liable to an action for damages.[38] The

29. Columbet *v.* Pacheco, 48 Cal. 395. See also Grief *v.* Kahn, 87 Ky. 17, 7 S. W. 159, 10 Ky. L. Rep. 87.

30. Garrett *v.* Sewell, 95 Ala. 456, 10 So. 226; Henry *v.* Jones, 28 Ala. 385; Robb *v.* Barchmann, 24 Ohio St. 3.

Question for jury.— Whether a fence is treated by adjacent landowners as a division fence is a question of fact for the jury. McNally *v.* O'Brien, 88 Ill. 237.

31. Scott *v.* Jackson, 93 Ill. App. 529.

32. Slaughter *v.* Cullup, 22 Tex. Civ. App. 578, 55 S. W. 182.

33. Newell *v.* Hill, 2 Metc. (Mass.) 180.

34. *Massachusetts.*—Newell *v.* Hill, 2 Metc. 180. See also Kennedy *v.* Owen, 131 Mass. 431; Holbrook *v.* McBride, 4 Gray 215.

Missouri.— Pettigrew *v.* Lancy, 48 Mo. 380.

Montana.—Hoar *v.* Hennessy, 29 Mont. 253, 74 Pac. 452.

New York.— Higgins *v.* Kingsley, 82 Hun 150, 31 N. Y. Suppl. 100. See also Warren *v.* Sabin, 1 Lans. 79; Carpenter *v.* Halsey, 60 Barb. 45; Ferris *v.* Van Buskirk, 18 Barb. 397.

Canada.— See Cook *v.* Tate, 26 Ont. 403, holding that a boundary fence should be so placed that when completed the vertical center of the board wall will coincide with the limit between the lands of the parties, each owner being bound to support it by appliances placed on his own land.

See 23 Cent. Dig. tit. "Fences," § 45.

"It must be a reasonable quantity; and that is to be determined by a just regard to the proper accomplishment of the purpose which both parties have in view, and in which they have a common interest. It is such a fence as will prevent the cattle of one party from escaping into the land of the other. In determining what is reasonable, regard would be had to the nature and character of the land to be divided. . . . Further; in considering what is reasonable, great regard should be had to the usage and practice of men of ordinary skill and judgment in the building of fences in their own lands on similar kinds of soil, and for like purposes." Newell *v.* Hill, 2 Metc. (Mass.) 180, 183 [*approved* in Hoar *v.* Hennessy, 29 Mont. 253, 74 Pac. 452], per Shaw, C. J. See also Morton *v.* Reynolds, 45 N. J. L. 326, 45 Am. Rep. 776.

Virginia or worm fences may be built half on the land of each of the adjoining owners. Pettigrew *v.* Lancy, 48 Mo. 380; Ferris *v.* Van Buskirk, 18 Barb. (N. Y.) 397. *Compare* Morton *v.* Reynolds, 45 N. J. L. 326, 46 Am. Rep. 776.

35. Higgins *v.* Kingsley, 82 Hun (N. Y.) 150, 31 N. Y. Suppl. 100; Kelly *v.* Donnelly, 19 Pa. Super. Ct. 456, right to injunction.

Right to remove excess.— If, in the erection of a partition fence, more than one half is built upon the land of one of the adjoining owners, without his consent, he may remove the excess; and if in order to effect such removal it becomes necessary to take down the whole fence he may rightfully do so. Sparhawk *v.* Twichell, 1 Allen (Mass.) 450. See also Kennedy *v.* Owen, 131 Mass. 431.

36. Higgins *v.* Kingsley, 82 Hun (N. Y.) 150, 31 N. Y. Suppl. 100; Dysart *v.* Leeds, 2 Pa. St. 488.

37. Hubbell *v.* Peck, 15 Conn. 133; Warren *v.* Sabin, 1 Lans. (N. Y.) 79.

38. *Illinois.*— Buckmaster *v.* Cool, 12 Ill. 74.

Kentucky.— Shean *v.* Withers, 12 B. Mon. 441.

Maryland.— Richardson *v.* Milburn, 11 Md. 340.

Michigan.— Graham *v.* Poor, 50 Mich. 153, 15 N. W. 61.

Wisconsin.—Dhein *v.* Beuscher, 83 Wis. 316, 53 N. W. 551.

See 23 Cent. Dig. tit. "Fences," § 52.

Compare McAninch *v.* Smith, 19 Mo. App. 240.

Illustration.— A contractor for the building of a section of a turnpike road who is authorized by the charter of the company to enter

fact that a fence was not of the kind or dimensions prescribed by statute will not defeat an action for its wilful destruction.[39] Trover lies against a person who removes a quantity of fence from the land of its owner, although such person was acting at the time under the direction of town officers and mistakenly supposed the fence to be upon the land of the town.[40] Persons who throw down or leave open fences are sometimes, by statute, made liable to a penalty recoverable in a civil action.[41]

2. Rights and Liabilities of Adjacent Owners — a. In General. If a fence separating the lands of adjoining owners is built by one of them entirely on his own land it belongs to him and he has a right to remove it.[42] A fence erected on the line between the lands of adjoining owners,[43] or recognized by them as being on the line, although not so in fact,[44] generally belongs to them as tenants in common. Either may repair it and may lawfully enter on the land of the other for that purpose,[45] but if either destroys or removes it he is liable to the other tenant.[46]

b. Statutory Provisions. In some jurisdictions there are statutes which prohibit the removal of partition fences, unless notice of intention to remove has been given by one owner adjacent to the other, at a prescribed time in advance of the

the premises of a citizen in conducting the work has a mere license, and, if he is under the necessity of taking down a fence in passing and repassing, he must keep the fence in as good condition as before he pulled it down, and a failure will render him a trespasser *ab initio* and liable accordingly. Crawford *v.* Maxwell, 3 Humphr. (Tenn.) 476.

Right to remove fence built by a trespasser. — One who builds a fence upon the land of another without his permission is a trespasser, and the owner of the land is not liable for removing the fence. Thayer *v.* Wright, 4 Den. (N. Y.) 180.

Injury to plaintiff by the act of defendant should be shown. Houx *v.* Seat, 26 Mo. 178, 72 Am. Dec. 202.

Where one joins his fence to that of another and this act is assented to or acquiesced in for a number of years, the latter may not, without notice to the former to remove his fence, disunite the fences to the injury of the former, without being guilty of a trespass. Shean *v.* Withers, 12 B. Mon. (Ky.) 441.

Injunction. — Destruction of a fence by a trespasser accompanied by threats to repeat the act as often as the fence is replaced entitles the owner to an injunction, although the trespasser is not insolvent. Lynch *v.* Egan, (Nebr. 1903) 93 N. W. 775; Pohlman *v.* Evangelical Lutheran Trinity Church, 60 Nebr. 364, 83 N. W. 201.

39. Norton *v.* Young, 6 Colo. App. 187, 40 Pac. 156; Fugate *v.* Smith, 4 Colo. App. 201, 35 Pac. 283. See also Crawford *v.* Maxwell, 3 Humphr. (Tenn.) 476.

40. Smith *v.* Colby, 67 Me. 169.

41. Osborne *v.* Warren, 44 Conn. 357; Wilson *v.* Burton, 96 Mo. App. 686, 70 S. W. 916.

42. Quillen *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Clowers *v.* Sawyers, 1 Head (Tenn.) 156. See also Bragg *v.* Rogers, 25 U. C. C. P. 156.

43. *Alabama.* — Garrett *v.* Sewell, 95 Ala. 456, 11 So. 226; Henry *v.* Jones, 28 Ala. 385.

Georgia. — See Gilreath *v.* State, 96 Ga. 303, 22 S. E. 907.

Massachusetts. — See Newell *v.* Hill, 2 Metc. 180.

Pennsylvania. — Smith *v.* Johnson, 76 Pa. St. 191; Stoner *v.* Hunsicker, 47 Pa. St. 514.

South Carolina. — Gibson *v.* Vaughn, 2 Bailey 389, 23 Am. Dec. 143.

England. — Cubitt *v.* Porter, 8 B. & C. 257, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133 [*distinguishing* Matts *v.* Hawkins, 5 Taunt. 20, 14 Rev. Rep. 695].

See 23 Cent. Dig. tit. "Fences," § 55.

Presumption as to ownership. — A line fence between the lands of adjacent owners is presumed to be the common property of both, unless the contrary is shown. Quillan *v.* Betts, 1 Pennew. (Del.) 53, 39 Atl. 595; Hoff *v.* Olson, 101 Wis. 118, 76 N. W. 1121, 70 Am. St. Rep. 903; Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432.

Division of an existing line fence for maintenance will not change the ownership of the materials of which it has been theretofore composed. Titman *v.* Smith, 61 N. J. L. 191, 38 Atl. 810.

44. Garrett *v.* Sewell, 95 Ala. 456, 11 So. 226; Henry *v.* Jones, 28 Ala. 385. See also Wells *v.* Rubenacker, 15 S. W. 1063, 12 Ky. L. Rep. 936; Clowers *v.* Sawyers, 1 Head (Tenn.) 156.

45. Garrett *v.* Sewell, 95 Ala. 456, 11 So. 226; Henry *v.* Jones, 28 Ala. 385; Walker *v.* Watrous, 8 Ala. 493, 42 Am. Dec. 646.

46. Garrett *v.* Sewall, 108 Ala. 521, 18 So. 737, 95 Ala. 456, 11 So. 226; Henry *v.* Jones, 28 Ala. 385; Drees *v.* State, 37 Ark. 122 (holding that it is not a trespass for one adjacent owner to knock off the planks added to a partition fence by the other); Smith *v.* Johnson, 76 Pa. St. 191; Stoner *v.* Hunsicker, 47 Pa. St. 514. See also Gilreath *v.* State, 96 Ga. 303, 22 S. E. 907. But *compare* Gilson *v.* Vaughn, 2 Bailey (S. C.) 389, 23 Am. Dec. 143.

Remedies of cotenant. — "Whenever one tenant in common does an unlawful act, whereby his co-tenant is injured, the law affords an appropriate remedy; he may bring

removal.[47] The fact that one adjacent owner has notified the other that he intends to remove will not justify the other in removing his part without notice; it is only where the party making the removal has given the notice that the statute affords any protection to him.[48] The effect of removing a partition fence upon notice is to remit the parties to their common-law rights and duties.[49] Statutes sometimes provide that a landowner who desires to let his land lie open shall not remove his part of a partition fence if the adjoining owner pays him for it.[50]

3. RIGHT TO REMOVE FENCES PLACED BY MISTAKE. If one of two adjoining landowners, with the knowledge of the other, erects a division or a partition fence which is by mistake placed upon the land of the latter, and the former upon discovering his mistake removes the fence, the latter cannot recover its value,[51] nor is the former liable to an action of trespass for such removal.[52] A statute giving the right to remove fences placed by mistake on the lands of other persons has been held to apply only to natural persons, and to give no right to remove fences erected by mistake on lands of the state or of the United States.[53]

4. EVIDENCE. In an action for damages for the removal of a fence without notice judgment for half the value of the fence is not supported by evidence of

trover or trespass against his co-tenant, when the thing in common is destroyed, or the conversion is equivalent to an exclusion of the right of the tenant suing. The removal of the fence from the original dividing line, on the land of the defendant, and its appropriation to his exclusive use, was tantamount to the destruction of the thing in common." Garrett *v.* Sewell, 95 Ala. 456, 458, 11 So. 226.

Removal in order to rebuild.— It is not a trespass for the owner of land to take away the fence separating it from the land of another, for the purpose of rebuilding. Ropes *v.* Flint, 182 Mass. 473, 65 N. E. 812; Burrell *v.* Burrell, 11 Mass. 294. See also Cubitt *v.* Porter, 8 B. & C. 257, 6 L. J. K. B. O. S. 306, 2 M. & R. 267, 15 E. C. L. 133.

47. *Illinois.*— McNally *v.* O'Brien, 88 Ill. 237; McCormick *v.* Tate, 20 Ill. 334; Brown *v.* Brown, 23 Ill. App. 90; Boyd *v.* Lammert, 18 Ill. App. 632.

Kentucky.— Clemmons *v.* Grow, 102 Ky. 499, 43 S. W. 728, 19 Ky. L. Rep. 1544; Grief *v.* Kahn, 87 Ky. 17, 7 S. W. 159, 10 Ky. L. Rep. 87; Gwinn *v.* Ditto, 3 Bush 547.

Missouri.— Sims *v.* Field, 74 Mo. 139; Knott *v.* Glaze, 22 Mo. App. 352.

New York.— Chamberlain *v.* Reed, 14 Hun 403; Holladay *v.* Marsh, 3 Wend. 142, 20 Am. Dec. 678.

Tennessee.— Stallcup *v.* Bradly, 3 Coldw. 406. See also Clowers *v.* Sawyers, 1 Head 156.

Wisconsin.— Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432.

See 23 Cent. Dig. tit. "Fences," § 56.

Written notice is sometimes expressly required by statute (Brown *v.* Brown, 23 Ill. App. 90; Deimel *v.* Obert, 20 Ill. App. 557; Grief *v.* Kahn, 87 Ky. 17, 7 S. W. 159, 10 Ky. L. Rep. 87), but in the absence of such provision notice by parol is sufficient (Holladay *v.* Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678).

In Texas, by statute, it is "unlawful for any person who is a joint owner of any separating or dividing fence or who is in any manner interested in any fence attached to or connected with any fence owned or controlled by any other person to remove the same" without first giving six months' notice. See Long *v.* Cude, 75 Tex. 225, 12 S. W. 827, (Civ. App. 1894) 26 S. W. 1000; St. Louis Cattle Co. *v.* Gholson, (Civ. App. 1895) 30 S. W. 269; Jamison *v.* State, 27 Tex. App. 442, 11 S. W. 483.

Fences not on the boundary line.— In Missouri a fence not built upon the boundary line between adjoining proprietors is not a division fence within the meaning of the statute, and may be removed by its owner without giving the statutory notice. Sims *v.* Field, 74 Mo. 139 [*explaining* Jeffries *v.* Burgin, 57 Mo. 327]. Under the Kentucky statute, however, it seems that even though a fence is entirely on the land of one of the adjacent owners, it cannot be removed unless the statutory notice is given, if it is treated as a partition fence. Grief *v.* Kahn, 87 Ky. 17, 7 S. W. 159, 10 Ky. L. Rep. 87.

Manner of pleading notice.— Where notice of a removal of a partition fence is alleged, the pleading should show that the notice was given in due time and to a proper person; an averment that reasonable notice was given is insufficient. McCormick *v.* Tate, 20 Ill. 334. See also Schieble *v.* Hart, 12 S. W. 628, 11 Ky. L. Rep. 607.

48. Knott *v.* Glaze, 22 Mo. App. 352.

49. Holladay *v.* Marsh, 3 Wend (N. Y.) 142, 20 Am. Dec. 678.

50. See Boyd *v.* Lammert, 18 Ill. App. 632; Haines *v.* Kent, 11 Ind. 126.

51. Matson *v.* Calhoun, 44 Mo. 368; Long *v.* Cude, 75 Tex. 225, 12 S. W. 827. See also Curtis *v.* Leasia, 78 Mich. 480, 44 N. W. 500; Hobb *v.* Clark, 53 Ark. 411, 14 S. W. 652, 9 L. R. A. 526, *quære*.

52. Curtis *v.* Leasia, 78 Mich. 480, 44 N. W. 500. See also Whitfield *v.* Bodenhammer, 61 N. C. 362.

53. Blair *v.* Worley, 2 Ill. 178.

statements of defendant that he owned only one half of it, when the otherwise uncontradicted evidence shows that it was built wholly by defendant and that plaintiff's grantor was merely permitted to connect with it.[54] Under a statute imposing a penalty against one who shall voluntarily throw down or open any fence or gate and leave the same open it is not sufficient to prove merely that defendant threw down a fence, but evidence must be introduced to show that he left it down.[55] In an action growing out of the removal of a fence, when the ownership of the land on which the fence was situated is not in issue, evidence offered to show title to the land is properly rejected.[56] A witness may testify that a fence for the removal of which an action is brought was a partition fence, although the evidence does not show that it was a statutory partition fence, if he knows the fact that it was erected by agreement between the parties who owned the land, and the statement is not objectionable as a conclusion of law.[57]

5. Damages. One who removes or destroys the fence of another is liable to respond in damages for any loss which is the natural or proximate consequence of his act;[58] and where an adjacent owner removes a partition fence without notice to[59] or the consent[60] of the other adjacent owner, when such notice or consent is required by statute, the measure of damages is the same. Where one who has given the proper notice commences the removal of a partition fence, one day prior to the time authorized by statute, he is liable for nominal damages only, unless it is shown that actual loss has been sustained.[61] Punitive damages may be awarded against one landowner for wrongfully and forcibly removing a partition fence against the protest of the adjacent owner;[62] but when one's good faith in believing his land invaded by a fence is not impugned, he should not suffer punitive damages for tearing it down.[63]

B. Criminal Liability — 1. In General. Criminal liability for acts done or omitted as to fences, being prescribed by statutory enactments containing varying provisions, whether or not a prosecution can be sustained depends upon the terms of the particular statute under which it is brought.[64] As a general rule to be criminally liable for removing or destroying a fence one must have acted unlawfully and wilfully and committed some trespass;[65] if the purpose is legiti-

54. Long *v.* Cude, (Tex. Civ. App. 1894) 26 S. W. 1000.

55. Donovan *v.* Sallee, 19 Mo. App. 593.

56. Fitts *v.* Howard, 13 Ky. L. Rep. 302.

57. Avary *v.* Searcy, 50 Ala. 54.

58. Roby *v.* Reed, 39 N. H. 461. See Damages, 13 Cyc. 22.

59. Stallcup *v.* Bradly, 3 Coldw. (Tenn.) 406.

Illustration.— The person injured by such removal is entitled to recover for the injury to his pasture by defendant's cattle straying thereon, the value of the grass consumed, and of his own cattle escaping thereby that were not recovered after proper diligence, but not the value of those alleged to have died during the following winter, as such damages would be too remote. St. Louis Cattle Co. *v.* Gholson, (Tex. Civ. App. 1895) 30 S. W. 269.

The cost of restoring the fence in addition to actual damage to crops or stock is recoverable. Deimel *v.* Obert, 20 Ill. App. 557; Richardson *v.* McDougall, 11 Wend. (N. Y.) 46.

60. Mene *v.* Horner, 7 Ky. L. Rep. 293.

61. Clemmons *v.* Grow, 102 Ky. 499, 19 Ky. L. Rep. 1544, 43 S. W. 728.

62. Fitts *v.* Howard, 13 Ky. L. Rep. 302.

63. Scheer *v.* Kriesel, 109 Wis. 125, 85 N. W. 138.

64. *Alabama.*— Shaw *v.* State, 125 Ala. 80, 28 So. 390.

Kansas.— State *v.* Sullivan, 14 Kan. 170.

Massachusetts.— Ropes *v.* Flint, 182 Mass. 473, 65 N. E. 812.

Missouri.— State *v.* Zinn, 61 Mo. App. 476.

North Carolina.— State *v.* Edmonds, 121 N. C. 679, 28 S. E. 545.

North Dakota.— Kuhnert *v.* Angel, 8 N. D. 198, 77 N. W. 1015.

Texas.— McCauley *v.* State, 43 Tex. 374; Scott *v.* State, (Cr. App. 1900) 56 S. W. 61; Martin *v.* State, (App. 1891) 16 S. W. 749; White *v.* State, 27 Tex. App. 638, 11 S. W. 643; Roberts *v.* State, 17 Tex. App. 148.

Utah.— U. S. *v.* Buford, 8 Utah 173, 30 Pac. 433.

See 23 Cent. Dig. tit. "Fences," § 64.

Necessity of showing want of owner's consent.— Brumley *v.* State, 12 Tex. App. 609.

In North Carolina it is required by statute that a sufficient fence be kept up during crop time around "cleared ground under cultivation." State *v.* Taylor, 69 N. C. 543; State *v.* Lamb, 30 N. C. 229; State *v.* Bell, 25 N. C. 506. A pasture field is not within this statute. State *v.* Perry, 64 N. C. 305.

65. State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530; State *v.* Headrick, 48 N. C. 375,

mate and no harm is done the offense is not committed.[66] The inquiry as to the possession of the fence should ordinarily be limited to the actual peaceable possession, and not extended to the right of possession.[67] One removing a fence under a *bona fide* claim of right does not commit the offense of "maliciously or wantonly," "maliciously or voluntarily," or "knowingly and wilfully" breaking down the fence of another;[68] but where one's belief in his right is due to negligence in not ascertaining the fact of ownership of the land on which a fence is located he is held guilty.[69] A conviction for unlawfully, wilfully, and knowingly fencing the land of another will not be sustained where it appears that defendant has all along made claim to that portion of the land upon which the fence was erected, and it also appears that his vendors made a similar claim.[70] Under some statutes, in order to establish criminal liability, it must be shown that the fence constituted an inclosure;[71] but a statute being merely against maliciously or negligently throwing down a fence, it is not necessary that the fence form a part of an inclosure.[72] In criminal prosecutions for injuries to or acts done in connection with fences, it is immaterial whether or not the fence is a lawful one, that is, of such dimensions as would entitle the owner to bring a civil action for a trespass by the cattle of another.[73]

2. Indictment and Information. The general rules as to the form and sufficiency of indictments and informations are applicable to prosecutions of this character,[74] and therefore an indictment or information is generally sufficient which charges the offense in the language of the statute.[75] Although the same particularity is not necessary in complaints or affidavits before inferior tribunals

67 Am. Dec. 249. See also Com. *v.* Lofi, 4 C. Pl. (Pa.) 62.

66. Hooks *v.* State, 25 Tex. App. 601, 8 S. W. 803; Woodyard *v.* State, 19 Tex. App. 516.

When cattle are unlawfully impounded one cannot be convicted who throws down a fence in order to recover them. Hill *v.* State, 104 Ala. 64, 16 So. 114; Klein *v.* State, (Tex. Cr. App. 1897) 39 S. W. 369.

67. Arbuthnot *v.* State, 38 Tex. Cr. 509, 34 S. W. 269, 43 S. W. 1024.

68. Com. *v.* Drass, 146 Pa. St. 55, 23 Atl. 233; Com. *v.* Cole, 26 Pa. St. 187; Ratcliffe *v.* Com., 5 Gratt. (Va.) 657. See also State *v.* Zinn, 26 Mo. App. 17 [*distinguished* in State *v.* Schaeffer, 56 Mo. App. 496]. *Compare* Ball *v.* State, 44 Tex. Cr. 185, 69 S. W. 512. *Contra,* Wallace *v.* Smith, 124 Ala. 87, 26 So. 932, holding that where one breaks down the fence of another the intent to break is the only criminal intent required and that belief or right to do so is immaterial.

Preventing removal under claim of ownership.— Boyd *v.* State, 28 Tex. App. 524, 13 S. W. 864.

69. Clark *v.* State, 50 Ark. 570, 9 S. W. 431.

70. Clark *v.* State, 23 Tex. App. 618, 5 S. W. 163.

71. Gundy *v.* State, 63 Ind. 528; Wilson *v.* Burton, 96 Mo. App. 686, 70 S. W. 916; State *v.* Boone, 57 Mo. App. 635; State *v.* Roberts, 101 N. C. 744, 7 S. E. 714.

In North Carolina a field not in crop at the time, if used for cultivation in the ordinary course of husbandry, is within the statute against destroying or removing a fence around "a cultivated field." State *v.* Campbell, 133 N. C. 640, 45 S. E. 344; State *v.* Allen, 35 N. C. 36. The smallness of the tract is immaterial. State *v.* Campbell, 133 N. C. 640, 45 S. E. 344. A town lot if inclosed and cultivated is within this statute. State *v.* McMinn, 81 N. C. 585.

In Texas the statute protects all inclosed lands whether crops are raised thereon or not. Dennis *v.* State, 43 Tex. Cr. 464, 66 S. W. 838. This statute applies to pasture as well as other inclosures. Jessel *v.* State, 42 Tex. Cr. 72, 57 S. W. 826; Hankins *v.* State, 39 Tex. Cr. 261, 45 S. W. 807. In this state it is an offense to open and leave open a gate leading into the inclosure of another. Jolly *v.* State, 19 Tex. App. 76.

72. Shaw *v.* State, 125 Ala. 80, 28 So. 390.

73. Hill *v.* State, 104 Ala. 64, 16 So. 114; Thomas *v.* State, 30 Ark. 433; State *v.* Council, 1 Overt. (Tenn.) 305.

74. See, generally, Indictments and Informations.

75. State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254; State *v.* Hoover, 31 Ark. 676; State *v.* Biggers, 108 N. C. 760, 12 S. E. 1024; State *v.* Bell, 25 N. C. 506; Elkins *v.* State, 40 Tex. Cr. 589, 51 S. W. 372; Gibbs *v.* State, 39 Tex. Cr. 476, 46 S. W. 645; Carney *v.* State, (Tex. Cr. App. 1897) 39 S. W. 661; Koritz *v.* State, 27 Tex. App. 53, 10 S. W. 757; Brewer *v.* State, 5 Tex. App. 248.

Allegations as to ownership see Hill *v.* State, 104 Ala. 64, 16 So. 114; State *v.* Coy, 47 Mo. App. 187; Hurlbut *v.* State, 12 Tex. App. 252.

Allegations as to want of owner's consent see Keizewetter *v.* State, 34 Tex. Cr. 513, 31 S. W. 395; Anderson *v.* State, (Tex. Cr. App. 1895) 29 S. W. 786; Warder *v.* State,

as would be required in an indictment,[76] yet the complaint must state the essential elements of the offense charged.[77] Under a statute making it an offense to destroy or injure any fence or to injure any growing crops, an indictment alleging that defendant removed a fence and injured the growing crops it inclosed charges but a single offense.[78] An action against unlawfully making or permitting a fence to remain about the lands of another must be prosecuted in the name of the state, although half the fine goes to the informer;[79] and a criminal prosecution and a civil action to recover a penalty cannot be joined where one statute imposes treble damages for the benefit of the injured party for throwing down a fence and another makes such act a misdemeanor.[80]

3. Defenses — a. In General. A trespass being a necessary element of such offenses, any fact may be shown in defense, in general, which might be shown by defendant in an action of trespass.[81] It is no defense that defendant removed the fence in order to induce a civil suit to try title,[82] or that he was acting as agent of another and by his direction.[83] One who while lawfully working a public road takes down a fence built by a landowner across such road is not guilty under the Texas statute which makes one criminally liable for removing a fence without the consent of the owner.[84] One cannot be convicted of tearing down a fence when his act is the pulling up of the posts on which no wire is strung, these not constituting a fence.[85]

b. Ownership or Possession. It has been decided that a statute against maliciously or negligently tearing down the fence of another is not violated by a person who tears down a partition fence, or one of which he is a joint owner.[86] One in actual possession of premises inclosed by a fence, or who alone or with another owns a fence, cannot be convicted of "unlawfully injuring the fence of another."[87] Generally, where the fence is removed on defendant's own land, he is not guilty of a criminal offense.[88] Where the actual possession is in the prosecutor, defendant cannot exculpate himself by showing title to the land upon which the fence was situated.[89] Where a fence is erected by one person upon the lands of another, it

29 Tex. App. 534, 16 S. W. 338; Govitt *v.* State, 25 Tex. App. 419, 8 S. W. 478.

Unnecessary allegations.— The value of the fence, or the number of rails destroyed (Dorrell *v.* State, 80 Ind. 566), or that damage was done by the removal need not be alleged (State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254); nor need express malice if not included in the statute (State *v.* Schaefer, 56 Mo. App. 496).

Omitting the words "contrary to the form of the statute," etc., will not vitiate such an indictment. State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254.

Description of land.— Gibbs *v.* State, 39 Tex. Cr. 476, 46 S. W. 645.

For form of indictment charging fence-cutting under Texas statute see Spears *v.* State, 24 Tex. App. 537, 7 S. W. 245.

76. Brazleton *v.* State, 66 Ala. 96.

77. State *v.* Grubb, 71 Mo. App. 214.

78. Ratcliffe *v.* Com., 5 Gratt. (Va.) 657.

79. Gibbs *v.* State, 39 Tex. Cr. 476, 46 S. W. 645.

80. Manville *v.* Felter, 19 Kan. 253.

81. State *v.* Boone, 57 Mo. App. 635; State *v.* Clark, 29 N. J. L. 96; State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530; Jones *v.* State, (Tex. Cr. App. 1893) 20 S. W. 926; White *v.* State, 27 Tex. Cr. 638, 11 S. W. 643.

82. State *v.* Graham, 53 N. C. 397.

83. State *v.* Campbell, 133 N. C. 640, 45 S. E. 344.

84. Gowhenouer *v.* State, 33 Tex. Cr. 538, 28 S. W. 201. See also Schott *v.* State, 7 Tex. App. 616.

85. Burch *v.* State, (Tex. Cr. App. 1902) 67 S. W. 500.

86. Boyett *v.* State, 132 Ala. 23, 31 So. 551; Drees *v.* State, 37 Ark. 122; Gilreath *v.* State, 96 Ga. 303, 22 S. E. 907.

Under the Texas statute a joint owner of a fence, that is, the owner of a fence connected with any fence owned by another person, is criminally liable for removing such fence (Jamison *v.* State, 27 Tex. App. 442, 11 S. W. 483. See also Hurlbut *v.* State, 12 Tex. App. 252), unless he gives to such other person the notice prescribed by statute of his intention to withdraw and cut loose his fence from such other person's fence (Dennis *v.* State, 43 Tex. Cr. 464, 66 S. W. 838).

87. Smith *v.* State, (Tex. Cr. App. 1904) 79 S. W. 34.

88. State *v.* Boone, 57 Mo. App. 635; State *v.* Watson, 86 N. C. 626 (division fence wholly on defendant's land); State *v.* Headrick, 48 N. C. 375, 67 Am. Dec. 249; McCoy *v.* State, (Tex. Cr. App. 1892) 20 S. W. 826; Bybee *v.* State, (Tex. Cr. App. 1892) 20 S. W. 824.

Persons occupying land with the consent of the owner are not liable for removing fences therefrom. State *v.* Williams, 44 N. C. 197.

89. Wallace *v.* State, 124 Ala. 87, 26 So. 932; State *v.* Campbell, 133 N. C. 640, 45

ordinarily becomes the property of the latter, who does not generally violate criminal fence statutes by removing it.[90] Ownership of the land, however, does not necessarily determine the ownership of the fence, which is the controlling question, and this being determined by agreement, it is immaterial on whose land the fence is located.[91]

4. Evidence. One who is prosecuted for breaking a fence may introduce a deed made to him for the property upon which the fence was located as tending to show rightful possession.[92] Although a fence is realty, its ownership, so far as is necessary to be proved, may be proved by parol.[93] On the question of ownership defendant cannot put in evidence a survey not made in conformity to statutory provisions and not shown to have been by the consent of the adjacent owner.[94] It may be shown in a prosecution for moving a division fence that in a prior civil suit between defendant and the prosecuting witness, a judgment was rendered establishing the boundary where the fence was located.[95] In a prosecution for destroying a wire fence, it is competent to prove declarations going to show motive, where the accused made such declarations, or where they were made in his presence and hearing and received either his active or tacit consent.[96] In a prosecution for breaking down a fence, when the owner cannot be had before the court, it is competent to prove his want of consent by circumstances.[97] In such a prosecution notices published in a newspaper purporting to be signed by the owners of the land prohibiting trespassing thereon are inadmissible to show want of consent of one of the owners in the absence of evidence that he published them, or authorized their publication.[98] Ownership in another than defendant is not sustained by testimony of the prosecuting witness that the fence was his and on his land, but that he knew nothing about the line between him and defendant, when defendant and others testified that the fence was on defendant's land and that they knew the line.[99] A prosecution for throwing down and leaving open a fence is not supported by evidence of throwing down and going across the adjacent premises; it must affirmatively appear that the fence was left down.[1]

5. Instructions and Questions For Court and Jury. Others having been engaged with defendant in the commission of the act constituting the offense, it is not error to charge that defendant is guilty if he wilfully committed the act either alone or in concert with others,[2] and an instruction that defendant was not guilty if he unintentionally committed the act is properly refused in the absence of evidence to support such charge.[3] The question of the sufficiency of a water-

S. E. 344; State *v.* Marsh, 91 N. C. 632; State *v.* Piper, 89 N. C. 551; State *v.* Hovis, 76 N. C. 117; Smith *v.* State, (Tex. Cr. App. 1904) 79 S. W. 34; Carter *v.* State, 18 Tex. App. 573; Behrens *v.* State, 14 Tex. App. 121; Jenkins *v.* State, 7 Tex. App. 146. See also Kalklosch *v.* State, (Tex. Cr. App. 1904) 80 S. W. 85.

Deed admissible on question of peaceable possession.— In a prosecution for breaking a fence in violation of Tex. Pen. Code (1895), art. 794, defendant may introduce in evidence a deed, conveying the land inclosed by such fence to his wife, to show that the prosecutor was not in quiet and peaceful possession at the time of the alleged commission of the offense. Pate *v.* State, (Tex. Cr. App. 1904) 81 S. W. 737.

Constructive possession will not support a prosecution. State *v.* Beacham, 125 N. C. 652, 34 S. E. 447.

90. Wheeler *v.* State, 109 Ala. 56, 19 So. 993; State *v.* McCracken, 118 N. C. 1240, 24 S. E. 530; Com. *v.* Cole, 26 Pa. St. 187; Ratcliffe *v.* Com., 5 Gratt. (Va.) 657.

91. State *v.* Buck, 74 Vt. 29, 51 Atl. 1087.

92. McCuen *v.* State, (Tex. Cr. App. 1902) 68 S. W. 180.

93. Siglin *v.* Coos Bay, etc., R., etc., Co., 35 Oreg. 79, 56 Pac. 1011, 76 Am. St. Rep. 463. See also Joy *v.* State, 41 Tex. Cr. 46, 51 S. W. 933; McCuen *v.* State, (Tex. Cr. App. 1902) 68 S. W. 180.

94. Boyett *v.* State, 132 Ala. 23, 31 So. 551.

95. Dorrell *v.* State, 83 Ind. 357.

96. Smith *v.* State, (Tex. Cr. App. 1902) 70 S. W. 84.

97. Caudle *v.* State, (Tex. Cr. App. 1903) 74 S. W. 545.

98. Caudle *v.* State, (Tex. Cr. App. 1903) 74 S. W. 545.

99. Oliver *v.* State, (Tex. Cr. App. 1896) 37 S. W. 427.

1. State *v.* Howell, 34 Mo. App. 86.

2. Hankins *v.* State, 39 Tex. Cr. 261, 45 S. W. 807.

3. Jessel *v.* State, 42 Tex. Cr. 72, 57 S. W. 826.

course to serve as a fence being material, it was held to be a question of law for the court, the jury deciding the facts.[4]

V. LIABILITY FOR INJURIES.

A. Caused by Improperly Constructed Fences — 1. To Persons. The owner of a partition fence is not liable for a personal injury caused by its fall, if he uses the care of a prudent man in maintaining it.[5] If, as between two adjoining owners, the duty of maintaining a partition fence rests exclusively upon one of them, the other owner is not liable to a third person for a personal injury caused by its fall.[6] A landowner owes no duty to persons trespassing upon his lands, in the construction of fencing not along public highways, and there can be no negligence in the construction of such fencing.[7] Where a house stands on a lot at the corner of two streets, but at some distance from both of them, a barbed wire fence running diagonally across such lot from the house to the corner of such streets is not maintained along a sidewalk, within the statute prohibiting such maintenance, and the owner of such lot is not liable to a person who leaves the sidewalk in the dark and is injured by running into such fence.[8]

2. To Live Stock — a. In General. One who builds or maintains a fence must see that it is in a reasonably safe condition and unlikely to injure live stock rightfully coming in contact with it, and for all injuries caused by a failure in this respect he is liable to respond in damages.[9]

b. By Barbed Wire Fences. The act of a landowner in erecting a barbed wire fence does not in itself render him liable to one whose live stock sustains injuries therefrom;[10] but one negligently constructing or maintaining such a fence and thereby causing injury to stock lawfully at large or on the adjacent lands is liable therefor;[11] and if there is gross negligence, or entire want of care in its construction, punitory damages are recoverable.[12] When such a fence is so negligently constructed as to constitute a trap for passing live stock, liability exists for injuries sustained by them, even though it is constructed entirely upon defendant's land and the stock are trespassing when injured.[13] One who in constructing a division fence of barbed wire leaves the wire on the ground without

4. State *v.* Lamb, 30 N. C. 229.

5. Quinn *v.* Cummings, 171 Mass. 255, 50 N. E. 624, 68 Am. St. Rep. 420, 42 L. R. A. 101.

6. Quinn *v.* Cummings, 171 Mass. 255, 50 N. E. 624, 68 Am. St. Rep. 420, 42 L. R. A. 101.

7. Worthington *v.* Wade, 82 Tex. 26, 17 S. W. 520.

8. Quigley *v.* Clough, 173 Mass. 429, 53 N. E. 884, 73 Am. St. Rep. 303, 45 L. R. A. 500.

9. Durgin *v.* Kennett, 67 N. H. 329, 29 Atl. 414; Rowland *v.* Baird, 18 Abb. N. Cas. (N. Y.) 256; Winkler *v.* Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663. See also Roney *v.* Aldrich, 44 Hun (N. Y.) 320; Firth *v.* Bowling Iron Co., 3 C. P. D. 254, 47 L. J. C. P. 358, 38 L. T. Rep. N. S. 568, 27 Wkly. Rep. 558.

Where a fence is not constructed in the manner required by statute, its construction is a trespass upon the rights of others, and those constructing it are liable for resulting injuries. Siglin *v.* Coos Bay, etc., R. Co., 35 Oreg. 79, 56 Pac. 1011, 76 Am. St. Rep. 463; Cook *v.* Horstman, 2 Tex. App. Civ. Cas. § 770; Woodward *v.* Griffith, 2 Tex. App. Civ. Cas. § 360.

10. Godden *v.* Coonan, 107 Iowa 209, 77 N. W. 852; Hoard *v.* Morris, 10 Ky. L. Rep. 771; Colvin *v.* Sutherland, 32 Mo. App. 77; Galveston Land, etc., Co. *v.* Levy, 10 Tex. Civ. App. 104, 30 S. W. 504. See Carskaddon *v.* Mills, 5 Ind. App. 22, 31 N. E. 559; Robertson *v.* Wooley, 5 Tex. Civ. App. 237, 23 S. W. 828. But *compare* Buckley *v.* Clark, 21 Misc. (N. Y.) 138, 47 N. Y. Suppl. 42, under a statute forbidding the use of barbed wire.

11. *Alabama.*— Hurd *v.* Lacy, 93 Ala. 427, 9 So. 378, 30 Am. St. Rep. 61.

California.— Loveland *v.* Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395.

Indiana.— Sisk *v.* Crump, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213.

Missouri.— Gooch *v.* Bowyer, 62 Mo. App. 206; Foster *v.* Swope, 41 Mo. App. 137.

New Hampshire.— Durgin *v.* Kennett, 67 N. H. 329, 29 Atl. 414.

New York.— Roney *v.* Aldrich, 44 Hun 320; Rowland *v.* Baird, 18 Abb. N. Cas. 256.

North Carolina.— Winkler *v.* Carolina, etc., R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663.

See 23 Cent. Dig. tit. "Fences," § 50.

12. Cook *v.* Horstman, 2 Tex. App. Civ. Cas. § 770.

13. Loveland *v.* Gardner, 79 Cal. 317, 21 Pac. 766, 4 L. R. A. 395.

protection is liable to respond in damages to the adjoining owner whose stock is injured by it.[14]

c. Contributory Negligence. One whose negligence contributed to the injury of his live stock cannot recover therefor;[15] but it is not contributory negligence for one to turn his stock loose in his own field, or in a public highway, with knowledge that a fence constructed by another partly around such field or along such highway is improperly and negligently constructed, as he cannot be deprived of the use of his own premises or the public highway by another's violation of duty.[16]

B. Caused by Failure to Erect or Maintain Fences One whose duty it is to build or maintain a fence is as a general rule liable for all injuries which may be fairly said to be the legal and natural consequence of his neglect to do so.[17] Where the injury is caused by defect in a partition fence, it must be shown that the injury resulted from a defect in that portion of the fence which it is the duty of defendant to maintain;[18] but the fact that the portion of the fence which it is the duty of the adjoining landowner to maintain is defective also does not relieve from liability.[19] One who fails to maintain his portion of a partition fence properly is without redress for injuries occasioned by his neighbor's stock breaking through such portion, as the loss is occasioned by his own negligence.[20]

VI. FENCE DISTRICT LAWS.

A. In General. As has already been stated in this work,[21] the establishment of fencing districts in accordance with the wishes of the residents of such districts, as ascertained by an election or by petition,[22] may be authorized by legisla-

14. Lowe *v.* Guard, 11 Ind. App. 472, 39 N. E. 428, 54 Am. St. Rep. 511.

15. Foster *v.* Swope, 41 Mo. App. 137. See also Bullard *v.* Mulligan, 69 Iowa 416, 29 N. W. 404. And see, generally, NEGLIGENCE.

16. Gooch *v.* Bowyer, 62 Mo. App. 206; Foster *v.* Swope, 41 Mo. App. 137; Siglin *v.* Coos Bay, etc., R. Co., 35 Oreg. 74, 56 Pac. 1011, 76 Am. St. Rep. 463; Boyd *v.* Burkett, (Tex. Civ. App. 1894) 27 S. W. 223, *quære*. *Compare* Rowland *v.* Baird, 18 Abb. N. Cas. (N. Y.) 256.

17. Cate *v.* Cate, 50 N. H. 144, 9 Am. Rep. 179; Saxton *v.* Bacon, 31 Vt. 540. See also Crawford *v.* Maxwell, 3 Humphr. (Tenn.) 476. *Compare* Walker *v.* Watrous, 8 Ala. 493, 42 Am. Dec. 646, holding that if adjoining owners enter into an agreement that each will keep up one half of a joint fence, an action of trespass cannot be maintained by one against the other for an injury caused by an insufficient fence, but the remedy is for a breach of the contract.

Liable for injuries to live stock.— Cate *v.* Cate, 50 N. H. 144, 9 Am. Rep. 179; Wilder *v.* Stanley, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; Saxton *v.* Bacon, 31 Vt. 540; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. Rep. N. S. 406, 21 Wkly. Rep. 577 (liable for death of live stock caused by eating leaves of a poisonous tree in an adjacent field to which they had escaped through a defective fence); Rooth *v.* Wilson, 1 B. & Ald. 59, 18 Rev. Rep. 431; Powell *v.* Salisbury, 2 Y. & J. 391, 31 Rev. Rep. 607. See also Anonymous, 1 Vent. 264. *Compare* Fales *v.* Cole, 153 Mass. 322, 26 N. E. 872 (holding that where a colt escaped through a defective fence and fell into a natural depression in the ground from which it was unable to rise, and struggled until it died, neglect to maintain the fence was not the proximate cause of the injury); Clark *v.* Brown, 18 Wend. (N. Y.) 213; Fennel *v.* Seguin St. R. Co., 70 Tex. 670, 8 S. W. 486.

Liable for injury to crops.— Ozburn *v.* Adams, 70 Ill. 291.

18. D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11; Saxton *v.* Bacon, 31 Vt. 540.

19. Ozburn *v.* Adams, 70 Ill. 291; Saxton *v.* Bacon, 31 Vt. 540.

20. *Connecticut.*— Studwell *v.* Ritch, 14 Conn. 292.

Illinois.— D'Arcy *v.* Miller, 86 Ill. 102, 29 Am. Rep. 11.

Indiana.— Baynes *v.* Chastain, 68 Ind. 376.

Michigan.— East *v.* Cain, 49 Mich. 473, 13 N. W. 822.

Missouri.— Field *v.* Bogie, 72 Mo. App. 185; Hopkins *v.* Ott, 57 Mo. App. 292.

New York.— Shepherd *v.* Hees, 12 Johns. 433.

Ohio.— Phelps *v.* Cousins, 29 Ohio St. 135.

Vermont.— Keenan *v.* Cavanaugh, 44 Vt. 268.

Wisconsin.— See Taylor *v.* Young, 61 Wis. 314, 21 N. W. 488.

21. See ANIMALS, 2 Cyc. 439; CONSTITUTIONAL LAW, 8 Cyc. 841.

22. Amendment of petition see Stiewel *v.* Fencing Dist. No. 6, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247.

When election unnecessary.— It has been decided in Georgia that when the lines of a militia district are changed, and territory added to such district, the added territory

tive enactment.[23] The official or officials under whose direction such elections are to be held and by whom the result is to be ascertained and declared are usually designated by statute.[24] Such statutes generally provide the qualifications of the persons who may vote or sign the petition.[25] Such an election is not void for mere irregularities;[26] but an election held on any other date than that provided by statute is necessarily void.[27]

B. Taxation. The legislature may provide for levying a tax to defray the cost of the fence erected around such a district.[28] A tax will not be defeated for mere irregularities which can be corrected,[29] or for failure to follow provisions which are directory merely.[30] But the assessment must conform to the requirements of the act, or it is altogether unauthorized.[31]

FENDER.[1] As applied to street railway cars, a guard or protection against danger to pedestrians.[2] (See, generally, STREET RAILROADS.)

becomes subject to the system of fences or stock law which prevails in that district without an election in such territory. Hackney *v.* Leake, 91 Ga. 141, 16 S. E. 966; Drummond *v.* Lowery, 88 Ga. 716, 16 S. E. 28.

23. Particular acts construed see Suddeth *v.* Ellis, (Ala. 1894) 15 So. 899 (act as to Marengo county); Burgwyn *v.* Whitfield, 81 N. C. 261 (act as to Northampton county).

Liability of adjoining county.— The legislature may provide that where a county has voted to form a fence district, an adjoining county which has not so voted shall be jointly liable with it for the building and maintenance of that portion of the district fence which forms the boundary between them. Montgomery County *v.* State, 71 Miss. 153, 15 So. 28; Leflore County *v.* State, 70 Miss. 769, 12 So. 904.

In Georgia it was decided that the erection of a fence was simply a means for the better carrying out of the law and was not a necessary condition to its going into effect. Hollman *v.* Kingery, 81 Ga. 624, 8 S. E. 535; Dover *v.* State, 80 Ga. 781, 6 S. E. 589. But this has been changed by statute. Ga. Code (1901 Suppl.), § 6154.

24. Conclusiveness of acts and findings of officials.— Harris *v.* Perryman, 103 Ga. 816, 30 S. E. 663; Meadows *v.* Taylor, 82 Ga. 738, 10 S. E. 204; Seymour *v.* Almond, 75 Ga. 112; Skrine *v.* Jackson, 73 Ga. 377; Cain *v.* Davie County Com'rs, 86 N. C. 8; Simpson *v.* Mecklenburg, 84 N. C. 158.

When application for examination of returns must be made. Dyson *v.* Pope, 71 Ga. 205.

Legal result must be stated. Steward *v.* Peyton, 77 Ga. 668.

Consolidation of returns by precinct managers.— Dyson *v.* Pope, 71 Ga. 205.

25. Dyson *v.* Pope, 71 Ga. 205; Hannah *v.* Shepherd, (Tex. Civ. App. 1894) 25 S. W. 137.

Necessary to recite that petitioners are freeholders.— Flowers *v.* Grant, 129 Ala. 275, 30 So. 94.

26. Mize *v.* Speight, 82 Ga. 397, 9 S. E. 1080; Hannah *v.* Shepherd, (Tex. Civ. App. 1894) 25 S. W. 137.

Illustration.— Where the notice of registration gave the registrar's house as the place of registration and the registrar kept his books and registered voters at his store three hundred yards distant, leaving word at the house for persons applying for registration to come to the store, this did not render the election void. Newsom *v.* Earnheart, 86 N. C. 391.

27. Reeves *v.* Gay, 92 Ga. 309, 18 S. E. 61.

28. Browning *v.* Mathews, 73 Miss. 343, 18 So. 658; Greene County Com'rs *v.* Lenoir County Com'rs, 92 N. C. 180. See, generally, TAXATION.

Tax must be uniform throughout the district. Busbee *v.* Waite County Com'rs, 93 N. C. 143.

Assessment according to benefits.— Stiewel *v.* Fencing Dist. No. 6, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247. See also Browning *v.* Mathews, 73 Miss. 343, 18 So. 658; Harper *v.* New Hanover County Com'rs, 133 N. C. 106, 45 S. E. 526.

Exemption from tax.— Under a statute providing for a tax on all real estate in the district taxable by the state or county, real estate or schools and railroads which are not taxable for general purposes are not taxable (Bradshaw *v.* Guilford County, 92 N. C. 278); and the assessment being against lands in the district according to the values as shown by the last assessment roll, railroad lands which do not appear on such roll are not assessable (Little Rock, etc., R. Co. *v.* Huggins, 64 Ark. 432, 43 S. W. 145).

Levy of tax when district composed of parts of two counties see Greene County Com'rs *v.* Lenoir County Com'rs, 92 N. C. 180; State *v.* Edgefield County Com'rs, 18 S. C. 597.

29. Simpson *v.* Mecklenburg, 84 N. C. 158.

30. Stiewel *v.* Fencing Dist. No. 6, 71 Ark. 17, 70 S. W. 308, 71 S. W. 247.

31. Bradshaw *v.* Guilford County, 92 N. C. 278.

1. "The term . . . is well defined and readily understood." Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 396, 403, 36 Atl. 696, 36 L. R. A. 653.

2. Cape May, etc., R. Co. *v.* Cape May, 59 N. J. L. 396, 402, 36 Atl. 696, 36 L. R. A. 653.

FEODAL SYSTEM. See FEUDAL SYSTEM.

FEODUM EST QUOD QUIS TENET EX QUACUNQUE CAUSA SIVE SIT TENEMENTUM SIVE REDITUS. A maxim meaning "A fee is that which any one holds from whatever cause, whether tenement or rent."[3]

FEODUM SIMPLEX EX FEODO SIMPLICI PENDERE NON POTEST. A maxim meaning "A simple fee cannot depend upon a simple fee."[4]

FEOFFMENT.[5] At common law, the mode of transferring a freehold estate in lands;[6] a conveyance of corporeal hereditaments, by delivery of the possession upon or within view of the land;[7] a deed under the seal of the grantor, whereby he grants or gives lands to the grantee;[8] the gift of any corporeal hereditament to another.[9] (Feoffment: Mode of Conveying Land, see DEEDS.)

FERÆ NATURÆ. See ANIMALS.

FERE IN OMNIBUS PŒNALIBUS JUDICIIS, ET ÆTATI ET IMPRUDENTIÆ SUCCURITUR. A maxim meaning "In almost all criminal trials, let allowance be made for youth and imprudence."[10]

FERMENTED LIQUORS. See INTOXICATING LIQUORS.

FERMER or **FERMOR.** A lessee; a FARMER, *q. v.*; one who holds a term whether of lands or an incorporeal right, such as customs or revenue.[11]

FERRIAGE. Literally speaking, the price or fare fixed by law for the transportation of the traveling public, with such goods and chattels as they may have with them, across a river, bay, or lake.[12] (See, generally, FERRIES.)

3. Black L. Dict.

4. Morgan Leg. Max.

5. "[It] is derived from the word feoffare or *infeudare*, to give one a feud; and is properly *donatio feudi*." Thatcher *v.* Omans, 3 Pick. (Mass.) 521, 532 [*citing* 2 Blackstone Comm. 310].

"The exact line of distinction between a bargain and sale and a feoffment, is not readily, in all cases, perceivable." Perry *v.* Price, 1 Mo. 553, 554.

6. Thompson *v.* Bennet, Smith (N. H.) 327, 328, where it is said: The mode "was for the seller to go with the purchaser on to the lands, and there declare (for in early times writing was very little known), in the presence of the neighboring tenants, the sale; show the boundaries; and deliver possession to the purchaser. This was called a feoffment, and, for ages, was the only mode of passing a fee-simple; and, though it serves equally well to pass other estates of freehold, yet it was held properly to signify a conveyance in fee."

"At the common law, feoffments and grants were the usual modes of transferring property." French *v.* French, 3 N. H. 234, 260.

"Feoffment, . . . conveying the whole fee, and not merely the right or estate which a party had a right to convey, was called a tortious conveyance." Orndoff *v.* Turman, 2 Leigh (Va.) 200, 233, 21 Am. Dec. 608 [*citing* Hargraves Coke Litt. 271].

7. French *v.* French, 3 N. H. 234, 260, where it is said: "No charter of feoffment was necessary; and when it was used, the lands were supposed to be transferred, not by the charter, but by the livery."

8. Perry *v.* Price, 1 Mo. 553, 554 [*citing* 2 Blackstone Comm. 309], where it is said: "The words enfeoff or grant, are sufficient words in a deed to create a feoffment."

9. Thatcher *v.* Omans, 3 Pick. (Mass.) 521, 532 [*citing* 2 Blackstone Comm. 310].

10. Morgan Leg. Max.

11. Black L. Dict.

"The term 'fermors' . . . [in the statute of Marlbridge (c. 24)], comprehended all who held by lease for life or lives, or for years by deed or without deed." Woodhouse *v.* Walker, 5 Q. B. D. 404, 406, 44 J. P. 666, 49 L. J. Q. B. 609, 42 L. T. Rep. N. S. 770, 28 Wkly. Rep. 765 [*citing* 2 Coke Inst. 300].

12. People *v.* San Francisco, etc., R. Co., 35 Cal. 606, 619.

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CROSS-REFERENCES

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Admiralty Jurisdiction, see ADMIRALTY.
Corporations in General, see CORPORATIONS.
Eminent Domain, see EMINENT DOMAIN.
Navigable Waters, see NAVIGABLE WATERS.
Obstruction of Navigation, see NAVIGABLE WATERS.
Taxation of Ferry, see TAXATION.

I. DEFINITION AND NATURE.

A ferry is a liberty to have a boat upon a river for the transportation of men, horses, and carriages with their contents, for a reasonable toll. The term is also

used to designate the place where such liberty is exercised.[1] In the latter sense a ferry is a public highway, being a continuation of the highway with which it connects,[2] and the limits of the ferry proper are the high-water mark at either terminus.[3] A distinction is also made between private ferries, which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the state and must be based upon grant, license, or prescription.[4] There is nothing in the nature of a ferry which requires that it should be operated from but one place on one shore to a single point on the opposite shore;[5] nor is there any particular limit to the distance over which it may be operated.[6] A ferry may consist of the right to transport from one shore only, or from one shore to the middle of the stream.[7]

II. ESTABLISHMENT AND MAINTENANCE.

A. Right to Establish Private Ferries. A riparian owner may, without legislative authority, establish a ferry for his own use, and may occasionally carry others and receive compensation therefor, provided it is not done as a regular business;[8] but he has no right to receive regular compensation either directly or indirectly, or to operate the ferry for the accommodation of any considerable portion of the general public.[9]

B. Right to Establish Public Ferries — 1. NECESSITY FOR LEGISLATIVE AUTHORITY. The right to establish and maintain a public ferry is a franchise which cannot be exercised without the consent of the state, and no person, although he may own the land on both sides of a stream, may establish such a ferry unless authorized to do so by the proper authority.[10]

2. REMEDIES FOR UNLAWFUL ESTABLISHMENT. If a public ferry be established

1. Black L. Dict. See also the following cases:

Arkansas.— Hunter *v.* Moore, 44 Ark. 184, 51 Am. Rep. 589.

Louisiana.— Chapelle *v.* Wells, 4 Mart. N. S. 426.

Maine.— State *v.* Wilson, 42 Me. 9.

Massachusetts.— Atty.-Gen. *v.* Boston, 123 Mass. 460.

New Jersey.— State *v.* Hudson County, 23 N. J. L. 206.

North Carolina.— Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633.

2. U. S. *v.* Fanning, Morr. (Iowa). 348; Richmond, etc., Turnpike Road Co. *v.* Rogers, 1 Duv. (Ky.) 135; New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652; Mills *v.* Learn, 2 Oreg. 215; Gant *v.* Drew, 1 Oreg. 35.

Definitions treating ferries as public highways are: "A public highway or thoroughfare across a stream of water or river by boat instead of by a bridge." Chilvers *v.* People, 11 Mich. 43, 51.

"A moving public highway upon water." Patterson *v.* Wollmann, 5 N. D. 608, 612, 67 N. W. 1040, 33 L. R. A. 536.

"A substitute for a bridge where a bridge is impracticable." People *v.* San Francisco, etc., R. Co., 35 Cal. 606, 619.

"Merely the continuance of a road across a river. It is only a substitute for a bridge." U. S. *v.* Fanning, Morr. (Iowa) 348, 351.

"A public highway, of a special description, and its termini must be in places where the public have rights, as, towns or vills, or highways leading to towns or vills." Huzzey *v.* Field, 2 C. M. & R. 432, 442.

It is not maintaining a ferry to run a boat at irregular intervals carrying passengers to a picnic ground, where the route of the boat has no connection with a highway at either terminus. People *v.* Mago, 69 Hun (N. Y.) 559, 23 N. Y. Suppl. 938.

3. State *v.* Wilson, 42 Me. 9.

4. Greer *v.* Haugabook, 47 Ga. 282; Prosser *v.* Wapello County, 18 Iowa 327. And see *infra*, II, A, B.

5. Capital City Ferry Co. *v.* Cole, etc., Transp. Co., 51 Mo. App. 228; New York *v.* New Jersey Steam-Boat Nav. Co., 106 N. Y. 28, 12 N. E. 435.

6. New York *v.* New Jersey Steam-Boat Nav. Co., 106 N. Y. 28, 12 N. E. 435.

7. State *v.* Hudson County, 23 N. J. L. 206; Power *v.* Athens, 26 Hun (N. Y.) 282.

8. Hunter *v.* Moore, 44 Ark. 184, 51 Am. Rep. 589; Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 770; Greer *v.* Haugabook, 47 Ga. 282; Prosser *v.* Wapello County, 18 Iowa 327; Alexandria, etc., Ferry Co. *v.* Wisch, 73 Mo. 655, 39 Am. Rep. 535.

9. Norris *v.* Farmers, etc., Co., 6 Cal. 590, 65 Am. Dec. 535; Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 370; McInnis *v.* Pace, 78 Miss. 550, 29 So. 835.

10. *Alabama.*— Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523.

Arkansas.— Bell *v.* Clegg, 25 Ark. 26; Murray *v.* Menefee, 20 Ark. 561.

California.— Norris *v.* Farmers, etc., Co., 6 Cal. 590, 65 Am. Dec. 535.

without authority, the state has a remedy by quo warranto,[11] and any prior grantee whose rights are infringed by action.[12] The statutes in many jurisdictions make the unauthorized establishment of a ferry a misdemeanor,[13] or provide a penalty to be recovered by persons operating authorized ferries whose rights are infringed.[14]

C. Power to Grant Franchise — 1. In General. In England the power of granting ferry franchises emanates from the crown.[15] In Canada the right is vested in the provinces, except as to ferries between a province and any British or foreign country or between two provinces, which are subjects of Dominion legislation.[16] In the United States ferries are established by legislative authority, which is exercised either directly by a special act or through some other competent authority under the provisions of a general law.[17] In the making of such general laws territorial legislatures have the same power as those of the states.[18] The power of establishing ferries is never exercised by the federal government, but lies within the scope of those undelegated powers which are reserved to the states respectively.[19]

Georgia.— Young *v.* Harrison, 6 Ga. 130.

Illinois.— School Trustees *v.* Tatman, 13 Ill. 27.

Iowa.— Prosser *v.* Wapello County, 18 Iowa 327.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

New York.— New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; Power *v.* Athens, 99 N. Y. 592, 2 N. E. 609 [*affirming* 26 Hun 282].

North Dakota.— Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

Pennsylvania.— Douglass' Appeal, 118 Pa. St. 65, 12 Atl. 834.

South Carolina.— Stark *v.* McGowen, 1 Nott & M. 397 note, 9 Am. Dec. 712.

England.— Huzzey *v.* Field, 2 C. M. & R. 432; Blissett *v.* Hart, Willes 508.

See 23 Cent. Dig. tit. "Ferries," § 15.

A grant of land from the state does not carry with it as an appurtenance the right to keep a public ferry. Harrison *v.* Young, 9 Ga. 359.

A railroad authorized by its charter to continue its line by means of boats across a body of water cannot use such boats to maintain a general public ferry. Harding *v.* The Maverick, 16 Fed. Cas. No. 9,316.

In Alabama a riparian owner may maintain a ferry and charge reasonable tolls at any point except where a public road crosses a stream. Tuscaloosa County *v.* Foster, 132 Ala. 392, 31 So. 587.

The location of a ferry cannot be changed from one highway to another without the consent of the proper authorities. Price *v.* Knott, 8 Oreg. 438.

11. Gunterman *v.* People, 138 Ill. 518, 28 N. E. 1067; New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; Stark *v.* McGowen, 1 Nott & M. (S. C.) 387, 9 Am. Dec. 712; Huzzey *v.* Field, 2 C. M. & R. 432; Blissett *v.* Hart, Willes 508. And see, generally, Quo Warranto.

A defendant charged with unlawfully usurping the franchise for a public ferry can successfully defend only by showing that he is not using the franchise or that he had a legal right to do so; the burden is upon him to show a valid title. Gunterman *v.* People, 138 Ill. 518, 28 N. E. 1067.

12. See *infra*, II, I, 1, 2.

13. *Alabama.*— Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523.

California.— Ward *v.* Severance, 7 Cal. 126; Norris *v.* Farmers, etc., Co., 6 Cal. 590, 65 Am. Dec. 535.

Kansas.— Territory *v.* Reyburn, McCahon 134.

Missouri.— Harrison *v.* State, 9 Mo. 530.

New York.— People *v.* Babcock, 11 Wend. 586.

Oregon.— Multnomah County *v.* Knott, 6 Oreg. 279.

See 23 Cent. Dig. tit. "Ferries," §§ 15, 95.

The indictment must specify the stream on which the ferry was operated. Wheat *v.* State, 6 Mo. 455.

Under the Indiana statute it is an indictable offense to run a ferry without license within two miles of an authorized ferry. See State *v.* Wise, 7 Ind. 645.

Where operating an unauthorized ferry is made punishable by indictment, the owner of a licensed ferry whose rights are infringed cannot maintain an action on the case for damages. Ward *v.* Severance, 7 Cal. 126.

14. See *infra*, II, I, 2, c.

15. Blissett *v.* Hart, Willes 508.

16. Dinner *v.* Humberstone, 26 Can. Supreme Ct. 252.

17. *California.*— Chard *v.* Harrison, 7 Cal. 113.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

South Dakota.— Evans *v.* Hughes County, 3 S. D. 580, 54 N. W. 603.

Texas.— Hudson *v.* Cuero Land, etc., Co., 47 Tex. 56, 26 Am. Rep. 289.

Virginia.— Patrick *v.* Ruffners, 2 Rob. 209, 40 Am. Dec. 740.

West Virginia.— See State *v.* Faudre, 54 W. Va. 122, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877.

See 23 Cent. Dig. tit. "Ferries," §§ 11–15.

18. Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315, holding that such laws are not "special or local laws . . . chartering or licensing ferries."

19. *Kentucky.*— Newport *v.* Taylor, 16 B. Mon. 699.

2. Power to Impose Conditions. The state in granting a ferry franchise may impose such terms and conditions upon the right to enjoy it as may be necessary to its proper regulation.[20]

3. Delegation of Power to Inferior Bodies — a. To What Bodies Delegated. In most jurisdictions the power of establishing ferries has been delegated to certain courts, boards of commissioners, municipalities, or other bodies, which are authorized under general laws to issue licenses for this purpose.[21] The delegation of this authority to an inferior body does not prevent the legislature from exercising the same right,[22] and, when a ferry is established by a direct legislative grant, no further license from the inferior body is necessary.[23] The legislature has the same right in cases where the authority of the inferior body is conferred by a state constitution,[24] unless its power in this regard is expressly denied.[25]

b. Limitation of Authority of Inferior Body. An inferior body in establishing ferries must act in strict conformity with the law by which its powers are conferred, and when its authority is limited any act done in excess of such authority is void.[26]

Missouri.— St. Louis *v.* Waterloo-Carondelet Turnpike, etc., Co., 14 Mo. App. 216.

New Jersey.— Hudson County *v.* State, 24 N. J. L. 718; State *v.* Hudson County, 23 N. J. L. 206.

New York.— People *v.* Babcock, 11 Wend. 586.

South Dakota.— Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

See 23 Cent. Dig. tit. "Ferries," §§ 11–15.

20. State *v.* Sewell, 45 Ark. 387.

In case of a grant to one who owns the land on only one side of a stream, the writ of ad quod damnum may be dispensed with and the franchise granted upon the condition that the grantee shall procure the right from the opposite landowner. Combs *v.* Hogg, 40 S. W. 453, 19 Ky. L. Rep. 356.

The rates of ferriage may be limited as a condition of the grant. State *v.* Sickmann, 65 Mo. App. 499, holding further that such a condition may be imposed by a county court to which the right of licensing ferries has been delegated.

21. **County courts.**— *Arkansas.*— Murray *v.* Menefee, 20 Ark. 561.

Kentucky.— Stahl *v.* Brown, 84 Ky. 325, 1 S. W. 540, 8 Ky. L. Rep. 279; Richmond, etc., Turnpike Road Co. *v.* Rogers, 1 Duv. 135; Coombs *v.* Sewell, 60 S. W. 933, 23 Ky. L. Rep. 169.

North Carolina.— Barrington *v.* Neuse River Ferry Co., 69 N. C. 165.

Oregon.— Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652.

Tennessee.— Levisay *v.* Delp, 9 Baxt. 415; Nashville Bridge Co. *v.* Shelby, 10 Yerg. 280.

Virginia.— Wimbish *v.* Breeden, 77 Va. 324.

Courts of county commissioners.—Collins *v.* Ewing, 51 Ala. 101; Wilson *v.* Gabler, 11 S. D. 206, 76 N. W. 924; Burrows *v.* Gonzales County, 5 Tex. Civ. App. 232, 23 S. W. 829.

Court of quarter sessions.— Day *v.* Stetson, 8 Me. 365.

Boards of county supervisors.— Finch *v.* Tehama County, 29 Cal. 453; Chard *v.* Harrison, 7 Cal. 113; Prosser *v.* Wapello County, 18 Iowa 327; Chapin *v.* Crusen, 31 Wis. 209.

Police jury.— In Louisiana the power of establishing ferries formerly vested in the county judges has been transferred to the police jury of each parish. Gillespie *v.* Freeman, 7 La. Ann. 350; Miles *v.* Craig, 3 La. Ann. 635; Hebert *v.* Maillan, 16 La. 585; Parish Treasurer *v.* Russell, 3 La. 93. In establishing ferries opposite the city of New Orleans, the city council and the police jury of the parish have concurrent jurisdiction. New Orleans Police Jury *v.* New Orleans, 3 Mart. (La.) 710.

Municipalities.— Cauble *v.* Craig, 94 Mo. App. 675, 69 S. W. 49; New York *v.* Longstreet, 64 How. Pr. (N. Y.) 30; New York *v.* New York, etc., Ferry Co., 49 How. Pr. (N. Y.) 250; Dinner *v.* Humberstone, 26 Can. Supreme Ct. 252.

22. Bush *v.* Peru Bridge Co., 3 Ind. 21; Day *v.* Stetson, 8 Me. 365; Harrison *v.* State, 9 Mo. 530; Chapin *v.* Crusen, 31 Wis. 209.

23. Roy *v.* Henderson, 132 Ala. 175, 31 So. 457; Territory *v.* Reyburn, McCahon (Kan.) 134; Multnomah County *v.* Knott, 6 Oreg. 279.

A ferryman is not subject to indictment for operating a ferry without license where his right to maintain the ferry was granted by the legislature. Harrison *v.* State, 9 Mo. 530.

24. Blake *v.* McCarthy, 56 Miss. 654; Barrington *v.* Neuse River Ferry Co., 69 N. C. 165.

25. Wis. Const. art. 4, § 31, deprives the legislature of this power in cases where the ferry is wholly within the state. See Chapin *v.* Crusen, 31 Wis. 209.

26. Lamar *v.* Marshall County Com'rs Ct., 21 Ala. 772.

A license issued for a less sum than that required by statute is void. Lombard *v.* Cheever, 8 Ill. 469.

In Oregon a ferry cannot be established by the county commissioners for one year only. It must be permanent. Cason *v.* Stone, 1 Oreg. 39.

The grant of an exclusive ferry privilege by a city which has power only to grant the privilege free from such exclusive feature is void only as to the unauthorized part. Car-

c. Procedure to Acquire Franchise — (i) *In General.* The procedure for acquiring a ferry franchise from an inferior body varies according to the statutes in the different jurisdictions. A formal application should be made,[27] stating the location of the proposed ferry,[28] and the applicant's ownership of the land or other facts essential to his right to receive the franchise.[29] A notice of the application is usually required to be given, either publicly by posting notices,[30] or personally on certain persons,[31] so that any one entitled to contest the granting of the application may have an opportunity to do so. Any one whose vested rights may be interfered with may appear and contest the granting of the application.[32] The owner of a prior established ferry is under no obligation to appear and contest the application,[33] but if he does so and the proceedings are erroneous, his remedy is by appeal and not by injunction to restrain the other ferry.[34] The record of the proceedings must show that all the requirements of the statute have been complied with.[35] The grantee of the franchise is in some cases required to give bond.[36]

(ii) *Sale or Lease to Highest Bidder.* The statutes in some cases authorize the right of establishing ferries to be disposed of at public auction by a sale or lease to the highest bidder,[37] but the highest bidder is not entitled to exercise

roll *v.* Campbell, 108 Mo. 550, 17 S. W. 884.

A county authorized to establish and maintain ferries "within the county" cannot maintain a ferry partly without the county, even in connection with the county on the opposite side of the stream. Johnston *v.* Sacramento County, 137 Cal. 204, 69 Pac. 962.

Where a county court is authorized to grant licenses only to landowners, a grant to any other person is void. Mayville *v.* Boon, 2 J. J. Marsh. (Ky.) 224.

Where the statute fixes the amount to be charged for a ferry license, the county commissioners cannot require the payment of a larger sum, and if collected, it may be recovered by the grantee of the license. La Salle County *v.* Simmons, 10 Ill. 513.

Where the statute requires the county commissioners to establish ferries whenever the public convenience requires it, they cannot divest themselves of this power by granting an exclusive franchise. Gales *v.* Anderson, 13 Ill. 413.

27. The application may be made by an attorney at law as well as by an attorney in fact. Givens *v.* Pollard, 3 A. K. Marsh. (Ky.) 320.

28. The exact point of location need not be stated if it is described with reasonable certainty. Sistersville Ferry Co. *v.* Russell, 52 W. Va. 356, 43 S. E. 107, 59 L. R. A. 513.

29. Hazleton *v.* De Priest, 143 Ind. 368, 42 N. E. 751; Zane *v.* Zane, 2 Va. Cas. 63.

30. Clark County Ct. *v.* Warner, 116 Ky. 801, 76 S. W. 828, 25 Ky. L. Rep. 857; Hazelip *v.* Lindsey, 93 Ky. 14, 18 S. W. 832, 13 Ky. L. Rep. 913; Stahl *v.* Brown, 84 Ky. 325, 1 S. W. 540, 8 Ky. L. Rep. 279; Drew *v.* Gant, 1 Oreg. 197.

The posting of notice is equivalent to the service of process on all persons interested. Clark County Ct. *v.* Warner, 116 Ky. 801, 76 S. W. 828, 25 Ky. L. Rep. 857; Combs *v.* Sewell, 60 S. W. 933, 23 Ky. L. Rep. 169.

31. See cases cited *infra*, this note.

The owner of the land through which the highway adjoining the ferry runs must be given notice of the application. *In re* Talcott, 31 Hun (N. Y.) 464; Wiswall *v.* Wandell, 3 Barb. Ch. (N. Y.) 312.

A turnpike road company, although not having a vested interest in the land over which its road passes, has such an interest as entitles it to notice of an application for the establishment of a ferry on the road. Lexington, etc., Turnpike Road Co. *v.* McMurtry, 3 B. Mon. (Ky.) 516.

Persons having established ferries within a mile of the proposed ferry are entitled to notice. See Givens *v.* Pollard, 3 A. K. Marsh. (Ky.) 320.

32. The owner of a prior established ferry at the same place may contest the application (Carter *v.* Kalfus, 6 Dana (Ky.) 43; Williamson *v.* Hayes, 25 W. Va. 609), but the owner of a ferry without exclusive privileges cannot contest an application for another ferry at a different place on the same river (Knott *v.* Jefferson St. Ferry Co., 9 Oreg. 530).

No costs should be given against one opposing the establishment of a ferry. Ackler *v.* Oldham, 1 A. K. Marsh. (Ky.) 471.

33. Lindsay *v.* Lindley, 20 Ark. 573; Murray *v.* Menefee, 20 Ark. 561.

34. Lindsay *v.* Lindley, 20 Ark. 573.

35. Givens *v.* Ferguson, 6 T. B. Mon. (Ky.) 186; Casey *v.* Jones, 2 Litt. (Ky.) 301; Lawless *v.* Reese, 4 Bibb (Ky.) 309.

Failure to show that the rates of toll have been fixed does not render the order establishing a ferry erroneous, as they are properly fixed by an independent order. Pentecost *v.* Miller, 7 T. B. Mon. (Ky.) 312; Ackler *v.* Oldham, 1 A. K. Marsh. (Ky.) 471. See also Connor *v.* Paxson, 1 Blackf. (Ind.) 189.

36. Walker *v.* Armstrong, 2 Kan. 198; Sanders *v.* Craig, 1 A. K. Marsh. (Ky.) 196. See also Garrett *v.* Ricketts, 9 Ala. 529.

37. Owens *v.* Roberts, 6 Bush (Ky.) 608; Parish Treasurer *v.* Russell, 3 La. 93; Starin

the franchise until he has complied with all the conditions imposed by the statute.[38]

d. Review of Action of Inferior Body.[39] An appeal will lie from the judgment of a county court or other inferior body in proceedings for the establishment of ferries.[40] The action of such bodies will always be reviewed where it involves any error in carrying out the provisions of the statutes;[41] but their discretion in determining whether the public convenience requires the establishment of a ferry, while it is not unlimited and may be reviewed,[42] will not be interfered with where it does not clearly appear to have been abused.[43]

4. Power to Establish Ferries on Boundary Waters. The states, and not the federal government, have the authority to establish ferries upon waters forming a boundary between the states,[44] or between a state and a foreign country.[45] The franchise of one state can confer no rights as to landing upon or ferrying from the other state,[46] but is valid as far as the jurisdiction of the state which grants the franchise extends, without any concurrent action on the part of the other state;[47] and as to ferrying from its own shore the franchise of either state may be made exclusive.[48] Where a stream separates two counties of the same state, the counties on each side have concurrent jurisdiction.[49]

D. Prescription. A ferry franchise may be acquired by prescription, in which case a grant from the state is presumed.[50]

E. Who May Acquire Franchise — 1. In General. It is not necessary that

v. Edson, 112 N. Y. 206, 19 N. E. 676; People *v.* New York, 32 Barb. (N. Y.) 102.

38. Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

Estoppel.— Irregularities or illegalities in the manner of exercising the right of a parish to sell a ferry franchise at public auction, which franchise the body had the power to confer, may be ratified or cured by estoppel. Prince *v.* Concordia Parish Police Jury, 112 La. 257, 36 So. 342.

39. Review generally see Appeal and Error.

40. Murray *v.* Mariposa County, 23 Cal. 492; Webb *v.* Hanson, 2 Cal. 133; Stahl *v.* Brown, 84 Ky. 325, 1 S. W. 540, 8 Ky. L. Rep. 279.

A supersedeas bond is not necessary under the Kentucky statute in such appeals. Ballow *v.* Pettus, 3 Bush (Ky.) 608.

41. Kennedy *v.* Covington, 8 Dana (Ky.) 50; Lawless *v.* Reese, 4 Bibb (Ky.) 309; Carothers *v.* Wheeler, 1 Oreg. 194.

42. Harvie *v.* Cammack, 6 Dana (Ky.) 242; Sistersville Ferry Co. *v.* Russell, 52 W. Va. 356, 43 S. E. 107, 59 L. R. A. 513.

43. Hudspeth *v.* Hall, 113 Ga. 4, 38 S. E. 358, 84 Am. St. Rep. 200; Harvie *v.* Cammack, 6 Dana (Ky.) 242; Carter *v.* Kalfus, 6 Dana (Ky.) 43; Lawless *v.* Reese, 4 Bibb (Ky.) 309; Blair *v.* Carmichael, 2 Yerg. (Tenn.) 306.

44. Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884; St. Louis *v.* Waterloo-Carondelet Turnpike, etc., Co., 14 Mo. App. 216; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

The state has authority to grant the franchise where the stream is a boundary between the state and an Indian reservation. Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

The power may be exercised by a county court to which authority to establish ferries has been delegated. Memphis *v.* Overton, 3 Yerg. (Tenn.) 387. *Contra*, Zane *v.* Zane, 2 Va. Cas. 63.

45. People *v.* Babcock, 11 Wend. (N. Y.) 586; Tugwell *v.* Eagle Pass Ferry Co., 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

46. Gear *v.* Bullerdick, 84 Ill. 74; Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Weld *v.* Chapman, 2 Iowa 524; Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Challiss *v.* Davis, 56 Mo. 25.

47. Columbia Delaware Bridge Co. *v.* Giesse, 38 N. J. L. 39 [*affirmed* in 38 N. J. L. 580]; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

48. Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191.

49. Jones *v.* Johnson, 2 Ala. 746.

50. *Alabama.*— Milton *v.* Haden, 35 Ala. 230; Milton *v.* Haden, 32 Ala. 30, 70 Am. Dec. 523. *Compare* Tuscaloosa County *v.* Foster, 132 Ala. 392, 31 So. 587.

Georgia.— Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 770; Harrison *v.* Young, 9 Ga. 359; Williams *v.* Turner, 7 Ga. 348.

North Carolina.— Barrington *v.* Neuse River Ferry Co., 69 N. C. 165; Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83; Pipkin *v.* Wynns, 13 N. C. 402.

South Carolina.— Stark *v.* McGowen, 1 Nott & M. 397 note, 9 Am. Dec. 712.

Texas.— Laredo *v.* Martin, 52 Tex. 548.

England.— Huzzey *v.* Field, 2 C. M. & R. 432.

See 23 Cent. Dig. tit. "Ferries," § 22.

Contra.— Sullivan *v.* Lafayette County, 58 Miss. 790 [*overruling* Leake County *v.* McFadden, 57 Miss. 618]; Bird *v.* Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 483.

a ferry franchise should be granted to a single individual. It may be granted to several persons together,[51] or to a corporation,[52] or to the trustees of a town.[53] It is not necessary, except where the law expressly requires ownership,[54] that the grantee should own the land where the ferry is located.[55]

2. PREFERRED RIGHTS OF RIPARIAN OWNERS. The statutes in many jurisdictions give a preference to the person owning the land where the ferry is to be located.[56] These statutes do not give to the owner an absolute right to have a ferry established upon his land, but only make him a preferred claimant for the right whenever the proper authorities have decided that the establishment of a ferry is necessary.[57] If the landowner fails or refuses to avail himself of his right or is adjudged not to be a proper person to exercise the franchise, it may be granted to another;[58] but in such cases it is indispensable that before making the grant

Possession for less than twenty years will not raise a presumption of a grant. Mills v. St. Clair County Com'rs, 4 Ill. 53.

51. A ferry franchise conferred upon two persons by an act of the legislature must be accepted by both or the act is inoperative. Ferrel v. Woodward, 20 Wis. 458.

Where several persons are authorized to establish a ferry, no corporation being created, they are tenants in common of the property in franchise. Haven v. Mehlgarten, 19 Ill. 91.

52. Maysville v. Boon, 2 J. J. Marsh. (Ky.) 224.

Where the language of the act shows that only natural persons were intended as grantees, the franchise cannot be granted to a corporation. Betts v. Menard, 1 Ill. 395.

53. A ferry privilege in a town bordering on a navigable stream is properly granted to the trustees of the town. Dover v. Fox, 9 B. Mon. (Ky.) 200; Maysville v. Boon, 2 J. J. Marsh. (Ky.) 224.

Where the act of incorporation of a town does not authorize it to exercise ferry rights, a franchise cannot be granted to its trustees. Betts v. Menard, 1 Ill. 395.

54. In Kentucky a franchise to operate a ferry to cross the Ohio river cannot be granted except to the owner of the property on the Kentucky shore. Churchill v. Grundy, 5 Dana 99; Henry v. Underwood, 1 Dana 245; Lytle v. Breckenridge, 3 J. J. Marsh. 663; Maysville v. Boon, 2 J. J. Marsh. 224; Jefferson Seminary v. Wagnon, 2 A. K. Marsh. 379.

55. *Illinois.*— Mills v. St. Clair County Com'rs, 4 Ill. 53.

Kentucky.— Richmond, etc., Turnpike Road Co. v. Rogers, 1 Duv. 135; Harvie v. Cammack, 6 Dana 242; Lawless v. Reese, 4 Bibb 309.

New Jersey.— Columbia Delaware Bridge Co. v. Geisse, 38 N. J. L. 39.

New York.— New York v. New York, etc., Ferry Co., 40 N. Y. Super. Ct. 232 [*affirming* 49 How. Pr. 250].

North Carolina.— Raynor v. Dowdy, 5 N. C. 279. *Compare* Pitkin v. Wynns, 13 N. C. 402.

Oregon.— Gant v. Drew, 1 Oreg. 35.

England.— Peter v. Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316.

See 23 Cent. Dig. tit. "Ferries," § 20.

56. *Alabama.*— Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. 587.

Illinois.— Mills v. St. Clair County Com'rs, 4 Ill. 53.

Iowa.— Prosser v. Wapello County, 18 Iowa 327.

Kentucky.— Ballow v. Pettus, 3 Bush 608.

Mississippi.— McCearly v. Swayze, 65 Miss. 351, 3 So. 657; Blake v. McCarthy, 56 Miss. 654.

New York.— New York v. New York, etc., Ferry Co., 40 N. Y. Super. Ct. 232 [*affirming* 49 How. Pr. 250].

Oregon.— Beckley v. Learn, 3 Oreg. 544; Knott v. Frush, 2 Oreg. 237; Mills v. Learn, 2 Oreg. 215; Gant v. Drew, 1 Oreg. 35.

Tennessee.— Sparks v. White, 7 Humphr. 86; Nashville Bridge Co. v. Shelby, 10 Yerg. 280; Allen v. Farnsworth, 5 Yerg. 189; Memphis v. Overton, 3 Yerg. 387.

Texas.— Hudson v. Cuero Land, etc., Co., 47 Tex. 65, 26 Am. Rep. 289.

See 23 Cent. Dig. tit. "Ferries," § 21.

Where the opposite banks are owned by different persons, the license may be granted to either of such owners making the application. Collins v. Ewing, 51 Ala. 101.

A franchise cannot be granted to one of several cotenants without default in the others. Pipkin v. Wynns, 13 N. C. 402.

Under the California statute a holder of lands is on the same footing as the owner. Henshaw v. Butte County, 19 Cal. 150.

A valid preëmption right unaccompanied by possession to land lying on one bank of a river does not entitle the owner to the privilege of keeping a public ferry. Cloyes v. Keatts, 18 Ark. 19.

57. Tuscaloosa County v. Foster, 132 Ala. 392, 31 So. 587; Nashville Bridge Co. v. Shelby, 10 Yerg. (Tenn.) 280; Hudson v. Cuero Land, etc., Co., 47 Tex. 65, 26 Am. Rep. 289.

58. *Iowa.*— Prosser v. Wapello County, 18 Iowa 327.

Kentucky.— Lawless v. Reese, 4 Bibb 309.

Mississippi.— Blake v. McCarthy, 56 Miss. 654.

North Carolina.— Pipkin v. Wynns, 13 N. C. 402.

Oregon.— Mills v. Learn, 2 Oreg. 215; Gant v. Drew, 1 Oreg. 35.

Tennessee.—Sparks v. White, 7 Humphr. 86.

See 23 Cent. Dig. tit. "Ferries," § 20.

the owner of the land should be given notice of the application for the establishment of the proposed ferry.[59]

F. Nature of Franchise.[60] A ferry franchise is property and is entitled to the same protection as any other property.[61] It is private property within the constitutional provisions against taking or damaging private property for public use without just compensation.[62] It is classed as real property, an incorporeal hereditament,[63] and must be conveyed in the manner provided for conveyances of realty.[64] A legislative grant of a ferry franchise, when duly accepted, is a contract between the grantee and the state which cannot be impaired by subsequent legislation,[65] unless the grant is to a public or municipal corporation, in which case it has been held that the power of the legislature to regulate such corporations includes the power to repeal the grant.[66] It is also held that there is no contractual relation growing out of a license to operate a ferry acquired under a general law.[67]

G. Construction of Franchise. In the grant of a ferry franchise no set form of words is necessary,[68] and in construing such grants, in cases of ambiguity, a construction will be given which will make the grant effective rather than one which will entirely defeat it, if such a construction is within the reasonable meaning of the terms employed;[69] but as to the privileges conferred, ferry franchises have generally been held to fall within the rule of strict construction against the grantee and in favor of the government.[70]

H. Exclusiveness of Franchise — 1. In General. At common law a ferry franchise was in its nature exclusive of contiguous competition,[71] and this is cer-

The grantee is not bound to account to the landowner in such cases for any of the profits. Sparks *v.* White, 7 Humphr. (Tenn.) 86.

59. Lawless *v.* Reese, 4 Bibb (Ky.) 309.

60. Franchises generally see FRANCHISES, *post*, p. 1451 *et seq.*

61. Lippencott *v.* Allander, 27 Iowa 460, 1 Am. Rep. 299; McRoberts *v.* Washburne, 10 Minn. 23; Cauble *v.* Craig, 94 Mo. App. 675, 69 S. W. 49; Capital City Ferry Co. *v.* Cole, etc., Transp. Co., 51 Mo. App. 228. See also Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191. See also COMMERCE, 7 Cyc. 463 note 82.

62. Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396.

63. Lewis *v.* Gainesville, 7 Ala. 85; Dundy *v.* Chambers, 23 Ill. 369; Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376; Reg. *v.* Cambrian R. Co., L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, 25 L. T. Rep. N. S. 84, 19 Wkly. Rep. 1138. *Contra*, Morse *v.* Garner, 1 Strobh. (S. C.) 514, 47 Am. Dec. 565.

A ferry franchise is real estate. It descends to heirs as such and is subject to dower and to all the incidents of real property. Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376.

64. See *infra*, II, J, 2.

65. Territory *v.* Reyburn, McCahon (Kan.) 134; Dufour *v.* Stacey, 90 Ky. 288, 14 S. W. 48, 29 Am. St. Rep. 374, 12 Ky. L. Rep. 268; McRoberts *v.* Washburne, 10 Minn. 23; Benson *v.* New York, 10 Barb. (N. Y.) 223. See also CONSTITUTIONAL LAW, IX, B, 1, c [8 Cyc. 937]. But see Chapin *v.* Crusen, 31 Wis. 209, where it was held that to give a ferry franchise the force of a contract the grant must by its terms show that such was the intention of the legislature, unless perhaps in cases where the grantee assumes obligations as to the operation of the ferry or incurs large expenses in its establishment.

Right in ferry as a vested right see CONSTITUTIONAL LAW, 8 Cyc. 903 note 6.

66. East Hartford *v.* Hartford Bridge Co., 10 How. (U. S.) 511, 541, 13 L. ed. 518, 531. But see *contra*, Benson *v.* New York, 10 Barb. (N. Y.) 223.

67. A license acquired under the general code provision and not by special grant is a mere privilege which may be revoked. The grantee has no contract with the public and no property in the right. Sullivan *v.* Lafayette County, 58 Miss. 790. See also CONSTITUTIONAL LAW, IX, B, 1, e [8 Cyc. 938].

68. Stark *v.* McGowen, 1 Nott & M. (S. C.) 397 note, 9 Am. Dec. 712.

69. Mills *v.* St. Clair County, 7 Ill. 197; Stark *v.* McGowen, 1 Nott & M. (S. C.) 397 note, 9 Am. Dec. 712; Mills *v.* St. Clair County, 8 How. (U. S.) 569, 12 L. ed. 1201; Smith *v.* Ratte, 15 Grant Ch. (U. C.) 473 [*affirming* 13 Grant Ch. 696].

70. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419; Minturn *v.* Larue, 23 How. (U. S.) 435, 16 L. ed. 574 [*affirming* 17 Fed. Cas. No. 9,646, McAll. 370]; Mills *v.* St. Clair County, 8 How. (U. S.) 569, 12 L. ed. 1201. But see New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631, where it was held that this rule of strict construction was not applicable to ferry franchises, which are never without consideration, as they impose upon the grantee the obligation of maintaining a ferry suitable for the public convenience.

71. 3 Blackstone Comm. 219; 3 Kent Comm. 459. See also Green *v.* Ivey, (Fla.

tainly true as to competing ferries sought to be established without authority of law.[72] But as to other ferries established by authority of law, the rule is that a prior franchise will not be considered as exclusive unless it is expressly so provided, and the legislature or other proper authority may establish as many other ferries at or near the same place as the necessities of the public may require.[73] In any case the grant is always taken subject to the rights of the public upon navigable waters,[74] and subject to the right of the federal government to make such improvements in these waters as may be necessary in its regulation of interstate commerce.[75]

2. Power to Make Franchise Exclusive. There is no doubt that the legislature may, subject to the restrictions above mentioned, make the grant of a ferry franchise exclusive.[76] Where the right is granted by an inferior body under the provision of a general law, it is held in some jurisdictions that the grant may be made exclusive,[77] and in others, that such bodies cannot grant exclusive franchises unless expressly authorized to do so.[78]

3. Statutory Regulations. In the absence of statute there is no particular limit within which the keeper of a public ferry is secure against the establishment of another public ferry,[79] but in most cases the special act authorizing the establishment of the ferry, or a general law, provides a limit within which other ferries may not be established.[80] These laws, however, usually make an exception of cases where the public necessities demand other ferries, or in regard to certain

1903) 33 So. 711; Shorter *v.* Smith, 9 Ga. 517; Anonymous, 2 N. C. 457.

72. McInnis *v.* Pace, 78 Miss. 550, 29 So. 835.

73. *Florida.*— Green *v.* Ivey, (1903) 33 So. 711.

Georgia.— Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 770; Shorter *v.* Smith, 9 Ga. 517.

Illinois.— Mills *v.* St. Clair County, 7 Ill. 197.

Indiana.— Bush *v.* Peru Bridge Co., 3 Ind. 21.

Iowa.— McEwen *v.* Taylor, 4 Greene 532.

Kentucky.— Brown *v.* Given, 4 J. J. Marsh. 28.

Minnesota.— Perrin *v.* Oliver, 1 Minn. 202.

New York.— Power *v.* Athens, 99 N. Y. 592, 2 N. E. 609 [*affirming* 26 Hun 282].

West Virginia.— Hostler *v.* Marlowe, 44 W. Va. 707, 30 S. E. 146.

United States.— Fanning *v.* Gregoire, 16 How. 524, 14 L. ed. 1043.

See 23 Cent. Dig. tit. "Ferries," § 38; and Constitutional Law, IX, B, 5, b, (I) [8 Cyc. 966].

74. Babcock *v.* Herbert, 3 Ala. 392, 37 Am. Dec. 695; The Globe *v.* Kurtz, 4 Greene (Iowa) 433; Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633.

75. Mississippi River Bridge Co. *v.* Lonergan, 91 Ill. 508 [*followed* in Lonergan *v.* Mississippi River Bridge Co., 5 Fed. 777, 2 McCrary 45].

76. Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 20 Am. Rep. 390; Phillips *v.* Bloomington, 1 Greene (Iowa) 498; U. S. *v.* Fanning, Morr. (Iowa) 348; New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536. See also Constitutional Law, XI, C, 1, c, (I), (A) [8 Cyc. 1039].

77. Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Costar *v.* Brush, 25 Wend. (N. Y.) 628.

78. Montjoy *v.* Pillow, 64 Miss. 705, 2 So. 108; Seal *v.* Donnelly, 60 Miss. 658; Sullivan *v.* Lafayette County, 58 Miss. 790; Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809 [*following* Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884]; Barrington *v.* Neuse River Ferry Co., 69 N. C. 165; Minturn *v.* Larue, 23 How. (U. S.) 435, 16 L. ed. 574.

79. O'Neill *v.* Caddo Parish Police Jury, 21 La. Ann. 586.

80. *Arkansas.*—Murray *v.* Menefee, 20 Ark. 561.

California.— *In re* Hanson, 2 Cal. 262.

Kentucky.— Churchill *v.* Grundy, 5 Dana 99; Cotton *v.* Houston, 4 T. B. Mon. 288.

North Dakota.— Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

South Dakota.— Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315.

West Virginia.— Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396.

See 23 Cent. Dig. tit. "Ferries," § 39; and Constitutional Law, 8 Cyc. 807 note 14.

The prohibition applies to a free ferry as well as to one where tolls are charged. *In re* Howell, 36 Ark. 466; Norris *v.* Farmers', etc., Co., 6 Cal. 590, 65 Am. Dec. 535.

The erection of a bridge is impliedly prohibited by a statute prohibiting the establishment of a ferry within a certain distance of one already established. Mason *v.* Harper's Ferry Bridge Co., 17 W. Va. 396.

A franchise granted by one county to establish a ferry across a river, forming a boundary between that and another county, precludes the latter county from granting another franchise within the prohibited distance. Jones *v.* Johnson, 2 Ala. 746.

An act prohibiting the establishing of ferries within a certain distance from a prior established ferry does not revoke a license

localities or conditions, as in the case of ferries located at or near cities or towns or rendered necessary by the establishment of public highways.[81]

I. Infringement of Franchise — 1. What Is Infringement.[82] It is not an infringement for persons to use their own boats for crossing within the limits of a ferry franchise, or to occasionally carry others where no tolls are charged;[83] but any attempt to operate a private ferry within such limits for the accommodation of any considerable portion of the general public,[84] or to collect tolls by indirect means, is an infringement of the franchise of any duly authorized ferryman whose business is interfered with.[85] The use of vessels upon navigable waters for purposes of commerce is not an infringement,[86] unless they are used with the regularity and purpose of ferry trips in competition with a lawfully established ferry.[87] The operation of an unauthorized ferry so as to injure a ferry regularly established is an infringement whether the latter's franchise is exclusive or not.[88] A railroad authorized to operate a ferry as a connecting link

to operate a ferry already established within those limits. Robinson *v.* Lamb, 129 N. C. 16, 29 N. E. 579.

The Iowa statute prohibiting the grant of a ferry on the Mississippi river within two miles of another licensed ferry refers only to licenses granted by the state of Iowa. Weld *v.* Chapman, 2 Iowa 524.

In North Carolina the act of 1897 amending acts of 1873–1874, and changing the limit from three to two miles was repealed by the act of 1901 which restored the three-mile limit. Robinson *v.* Lamb, 129 N. C. 16, 39 S. E. 579.

In Pennsylvania the limitation of three thousand feet provided by the act of April 29, 1874, within which a ferry company has exclusive privileges, is annulled by the act of April 17, 1876; the latter act being supplementary to the former and omitting reference to said limitation. Bridgewater Ferry Co. *v.* Sharon Bridge Co., 145 Pa. St. 404, 22 Atl. 1039; Braddock Ferry Co.'s Appeal, 3 Pennyp. 32.

81. Murray *v.* Menefee, 20 Ark. 561; *In re* Hanson, 2 Cal. 262.

In Kentucky the statute excepts cases where the ferry is in a town where an impassable stream intervenes. Churchill *v.* Grundy, 5 Dana 99; Cotton *v.* Houston, 4 T. B. Mon. 288.

82. Erection of a toll bridge near a licensed ferry does not infringe the vested rights of the ferryman. See Constitutional Law, 8 Cyc. 949 note 94.

83. *Arkansas.*— Hunter *v.* Moore, 44 Ark. 184, 51 Am. Rep. 589.

Iowa.— Weld *v.* Chapman, 2 Iowa 524.

Louisiana.— Chapelle *v.* Wells, 4 Mart. N. S. 426.

Missouri.— Alexandria, etc., Ferry Co. *v.* Wisch, 73 Mo. 655, 39 Am. Rep. 535.

Virginia.—Trent *v.* Cartersville Bridge Co., 11 Leigh 521.

Canada.— Ives *v.* Calvin, 3 U. C. Q. B. 464. See 23 Cent. Dig. tit. "Ferries," § 47.

84. See cases cited *infra*, this note.

Carrying a large part of the public free with an intent to lessen the value of a prior franchise is an infringement. Chiapella *v.* Brown, 14 La. Ann. 189.

Where a large number of persons combine to buy a boat and hire a common ferryman for their own convenience in crossing within the prohibited distance of an established ferry, the combination will be enjoined as an infringement. Warren *v.* Tanner, 56 S. W. 167, 21 Ky. L. Rep. 1678, 49 L. R. A. 248.

A mail carrier may ferry his mail coach in his own boat, but may not carry passengers in the coach. Weld *v.* Chapman, 2 Iowa 524.

85. Where a compensation is received when voluntarily offered (McInnis *v.* Pace, 78 Miss. 550, 29 So. 835), or the ferryman receives compensation by caring for the horses of those crossing (Chiapella *v.* Brown, 14 La. Ann. 189), or by having them trade at his store (Hudspeth *v.* Hall, 111 Ga. 510, 36 S. E. 770), or stop at his hotel (Fenner *v.* Watkins, 16 La. 204), the ferry is an infringement.

Where tolls are collected by issuing tickets alleged to represent an interest in the ferry the ferry is an infringement. Norris *v.* Farmers, etc., Co., 6 Cal. 590, 65 Am. Dec. 535; Dinner *v.* Himberstone, 26 Can. Supreme Ct. 252.

86. Broadnax *v.* Baker, 94 N. C. 675, 55 Am. Rep. 633; Conway *v.* Taylor, 1 Black (U. S.) 603, 17 L. ed. 191; Huzzey *v.* Field, 2 C. M. & R. 432.

87. Midland Terminal, etc., Co. *v.* Wilson, 28 N. J. Eq. 537; New York *v.* Longstreet, 64 How. Pr. (N. Y.) 30.

88. *Florida.*— Green *v.* Ivey, (1903) 33 So. 711.

Kentucky.— Blackwood *v.* Tanner, 112 Ky. 672, 66 S. W. 500, 23 Ky. L. Rep. 1919.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

Missouri.— Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884; Cauble *v.* Craig, 94 Mo. App. 675, 69 S. W. 49.

New York.— New York *v.* Starin, 106 N. Y. 1, 12 N. E. 631; New York *v.* New York, etc., Ferry Co., 49 How. Pr. 250.

North Dakota.— Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

Pennsylvania.— Douglass' Appeal, 118 Pa. St. 65, 12 Atl. 834.

Texas.— Tugwell *v.* Eagle Pass Ferry Co.,

in its road may use it to transport its own freight and passengers without infringing the franchise of a regular ferry at the same place,[89] but it cannot use its boat to carry on a regular ferry business.[90]

2. REMEDIES FOR INFRINGEMENT — a. Injunction[91] — (I) *GROUNDS OF EQUITY JURISDICTION.* Injunction is a proper remedy to protect a party in the enjoyment of a ferry franchise. The equity jurisdiction rests upon the ground of its necessity to avoid a multiplicity of suits and to afford adequate protection to plaintiff's property in his franchise.[92]

(II) *RIGHT TO MAINTAIN SUIT.* A suit for injunction cannot be maintained by one who has not complied with the requirements of the law authorizing him to operate his own ferry,[93] or who has so grossly neglected his duty as to make the establishment of another ferry a public necessity.[94] Nor will injunction lie where the injury complained of is not an invasion of plaintiff's franchise, but a mere trespass upon his property.[95]

(III) *PLEADING.* The bill must allege a compliance with the conditions authorizing plaintiff to operate his ferry,[96] and that he has established his ferry and is offering his services to the public,[97] and that defendant either did not have a license or that he transported passengers for pay.[98] The bill must also allege facts showing that plaintiff's remedy at law is inadequate.[99]

b. Actions For Damages — (I) *PARTIES.*[1] Where a license for operating a ferry is issued to two persons jointly they may maintain a joint action for damages for infringement.[2]

(II) *PLEADING.*[3] The complaint must allege that plaintiff was duly author-

74 Tex. 480, 9 S. W. 120, 13 S. W. 654. But see Butt *v.* Colbert, 24 Tex. 355, where injunction was denied on the ground that it was not shown that plaintiff's franchise was exclusive.

England.— Huzzey *v.* Field, 2 C. M. & R. 432.

See 23 Cent. Dig. tit. "Ferries," § 50.

But see McEwen *v.* Taylor, 4 Greene (Iowa) 532.

The fact that an unauthorized ferry is operated free does not prevent its being an infringement. Capital City Ferry Co. *v.* Cole, etc., Transp. Co., 51 Mo. App. 228.

An unauthorized bridge is an infringement. Gates *v.* McDaniel, 2 Stew. (Ala.) 211, 19 Am. Dec. 49.

89. New York *v.* New England Transfer Co., 19 Fed. Cas. No. 10,197, 14 Blatchf. 159.

Operating a ferry during the reconstruction of a bridge where only the freight and passengers of the road are carried is not an infringement. Pugh *v.* Raleigh, etc., R. Co., 61 N. C. 359.

90. Fitch *v.* New Haven, etc., R. Co., 30 Conn. 38.

Free transportation of passengers on such a ferry is an infringement if the transportation is in competition with a regular ferry. Aiken *v.* Western R. Corp., 20 N. Y. 370 [*reversing* 30 Barb. 305].

91. Injunction generally see INJUNCTIONS.

92. *Kansas.*—Walker *v.* Armstrong, 2 Kan. 198.

Minnesota.— McRoberts *v.* Washburne, 10 Minn. 23.

Mississippi.—McInnis *v.* Pace, 78 Miss. 550, 29 So. 835.

Missouri.— Carroll *v.* Campbell, 108 Mo. 550, 17 S. W. 884; Cauble *v.* Craig, 94 Mo. App. 675, 69 S. W. 49.

New York.— New York *v.* New York, etc., Ferry Co., 49 How. Pr. 250.

North Carolina.— Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83.

North Dakota.— Patterson *v.* Wollmann, 5 N. D. 608, 67 N. W. 1040, 33 L. R. A. 536.

See 23 Cent. Dig. tit. "Ferries," § 59.

93. Norris *v.* Lapsley, 5 Cal. 47.

94. Willard *v.* Forsythe, 2 Mich. N. P. 190; Ferrel *v.* Woodward, 20 Wis. 458.

95. Ross *v.* Page, 6 Ohio 166.

96. See cases cited *infra*, this note.

Where the execution of a bond is a condition precedent to the granting of a license, its execution and approval must be alleged. Willard *v.* Forsythe, 2 Mich. N. P. 190.

Where plaintiff's grant is to operate a ferry "from lands that may belong to him," it must be alleged that he owned land on which the grant could operate at the time of the grant or within the time the ferry was required to be established. Mills *v.* Brown, 3 Ill. 548.

97. Walker *v.* Armstrong, 2 Kan. 198.

In Texas the bill must allege that plaintiff's franchise is exclusive. Butt *v.* Colbert, 24 Tex. 355.

98. McEwen *v.* Taylor, 4 Greene (Iowa) 532.

99. Long *v.* Merrill, 4 N. C. 549, 7 Am. Dec. 700.

1. Parties generally see PARTIES.

2. Blackwood *v.* Tanner, 112 Ky. 672, 66 S. W. 500, 23 Ky. L. Rep. 1919, holding that the right to sue jointly is not affected by the fact that one grantee operated the ferry one week and the other the next.

3. Pleading generally see PLEADING.

ized to operate his ferry and that defendant collected tolls without lawful authority,[4] or operated the ferry other than for his personal use.[5] It is not necessary to allege ownership of the soil,[6] nor that plaintiff kept sufficient boats and ferrymen.[7] In an action by a lessee, it must be alleged that the lessor was owner of the franchise and had the right to lease it to plaintiff.[8]

(III) *Proof.* It is sufficient for plaintiff to prove possession and enjoyment of the ferry to entitle him to recover.[9]

(IV) *Defenses.* It is no defense to an action for damages that plaintiff has neglected to operate his ferry, or failed to furnish suitable accommodations.[10] Where defendant's ferry is duly authorized by a competent tribunal his grant is, until set aside by a competent authority, a good defense to an action for damages.[11]

(V) *Damages.*[12] The measure of damages for the infringement of a ferry franchise is the amount of tolls lost to the owners by diminution in the number of customers using the ferry,[13] unless defendant has used other means than fair competition in operating his ferry.[14] No recovery can be had for any time during which it is not shown that plaintiff had a license.[15]

c. Statutory Penalties.[16] The statutes in some states provide a penalty to be recovered in cases of infringement.[17] If the right infringed was one existing at common law, the remedy does not affect the common-law liability but is merely

4. Hanger *v.* Little River Junction R. Co., 52 Ark. 61, 11 S. W. 965; Hanson *v.* Webb, 3 Cal. 236.

5. Hanson *v.* Webb, 3 Cal. 236.

6. Patrick *v.* Ruffner, 2 Rob. (Va.) 209, 40 Am. Dec. 740.

7. Blissett *v.* Hart, Willes 508.

8. Owens *v.* Lockwood, 83 Ky. 266, 7 Ky. L. Rep. 193.

9. Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316.

Plaintiff is not bound to show ownership of the ferry at the time of the trial where his ownership has been settled by a former appeal. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

10. Peter *v.* Kendal, 6 B. & C. 703, 5 L. J. K. B. O. S. 282, 30 Rev. Rep. 504, 13 E. C. L. 316; New Brunswick University *v.* McCluskey, 11 N. Brunsw. 136; Hickley *v.* Gildersleeve, 10 U. C. C. P. 460.

The only persons concerned in these matters are the authorities granting the franchise and plaintiff. Capital City Ferry Co. *v.* Cole, etc., Transp. Co., 51 Mo. App. 228.

11. Conner *v.* Paxson, 1 Blackf. (Ind.) 168.

12. **Damages** generally see DAMAGES.

13. Blackwood *v.* Tanner, 111 Ky. 672, 66 S. W. 500, 23 Ky. L. Rep. 1919.

Evidence of the income derived in former years is competent to show the extent of the losses. Blackwood *v.* Tanner, 111 Ky. 672, 66 S. W. 500, 23 Ky. L. Rep. 1919; Columbia Delaware Bridge Co. *v.* Geisse, 38 N. J. L. 39.

In estimating the damages to a ferry franchise by the erection of a bridge, the ferry franchise must be considered as permanent. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

Where plaintiff's landings are not safe and convenient, his damages may be reduced by such an amount as would be necessary to put them in such condition. Mason *v.* Harper's Ferry Bridge Co., 20 W. Va. 223.

14. Stark *v.* McGowen, 1 Nott & M. (S. C.) 397 note, 9 Am. Dec. 712, where it was held that, where defendant had obstructed the road to plaintiff's ferry, the clear gains of defendant might be made the measure of damages.

15. Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809.

16. **Penalty** generally see PENALTIES.

17. *Indiana.*— Lang *v.* Scott, 1 Blackf. 405, 12 Am. Dec. 257.

Missouri.— Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809.

New York.— Almy *v.* Harris, 5 Johns. 175.

North Carolina.— Taylor *v.* Wilmington, etc., R. Co., 49 N. C. 277.

South Carolina.— Gibbes *v.* Beaufort, 20 S. C. 213.

See 23 Cent. Dig. tit. "Ferries," § 50.

In Arkansas the statutory penalty is not recoverable against one who runs a free ferry without license. Shinn *v.* Cotton, 52 Ark. 90, 12 S. W. 157.

In Louisiana the penalty must be enforced in the name of the police jury and not of the party injured. Miles *v.* Craig, 3 La. Ann. 635.

Forfeiture of boats.— In Illinois any person running an unauthorized ferry within three miles of a ferry established under the general law of that state is liable to forfeit his boat to the proprietor of the authorized ferry. Gear *v.* Bullerdick, 34 Ill. 74 (holding that a seizure can be made only after a forfeiture has been declared by judicial proceedings, and that the act applies only to ferries operated within the state and established under the general law); Lombard *v.* Cheever, 8 Ill. 469 (holding that a mere license to keep a ferry does not authorize a seizure, where it is not shown that the

cumulative;[18] but if based upon statute and not existing at common law, the remedy is exclusive and no action on the case for damages can be maintained,[19] unless the statutes expressly authorize such an action.[20]

J. Transfer of Franchise — 1. Right to Transfer.[21] In a few states the right to transfer a ferry franchise is regulated by statute.[22] In jurisdictions where the right is not so regulated the authorities are conflicting; some cases holding that the franchise may be transferred,[23] and others holding that the franchise involves a personal trust, and that the duties and obligations assumed by the grantee cannot be relieved by substitution.[24] The transfer is always permissible if made with the consent of the proper authority,[25] and in any case the right of the transferee to exercise the rights and privileges of the franchise can be questioned only by the public, and cannot be collaterally attacked.[26]

2. Mode of Transfer. Ferry franchises are real estate and can be conveyed only by deed.[27]

licensee has established his ferry and complied with the requirements of the law).

18. Taylor *v.* Wilmington, etc., R. Co., 49 N. C. 277; Gibbes *v.* Beaufort, 20 S. C. 213.

19. Lang *v.* Scott, 1 Blackf. (Ind.) 405, 12 Am. Dec. 257; Almy *v.* Harris, 5 Johns. (N. Y.) 175.

20. Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809, where it was held that the general statutes of Missouri provide for both the penalty and a civil action.

21. Sale of ferry franchise as consideration of note see Commercial Paper, 7 Cyc. 707 note 83.

Contract between ferry company and railroad company as in restraint of trade see Contracts, 9 Cyc. 535 note 2.

Conceding that a lease of a ferry granted by county commissioners is void, there is no such privity of contract between the county and an assignee of the lessee as will enable the assignee to recover from the county sums paid to it under the lease by the lessee. Evans *v.* Hughes County, 6 Dak. 102, 50 N. W. 720.

22. The Indiana statute expressly authorizes a transfer. Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376.

Under the Kentucky statute when a sale or lease is made of a ferry franchise it must be with leave of the court, and the purchaser or lessee must execute a covenant with sufficient surety in lieu of the former covenant. Hazelip *v.* Lindsey, 93 Ky. 14, 18 S. W. 832, 13 Ky. L. Rep. 913; Davis *v.* Connolly, 55 S. W. 691, 21 Ky. L. Rep. 1459. See also Paynter *v.* Miller, 80 S. W. 469, 25 Ky. L. Rep. 2222; Scott *v.* Wilson, 11 S. W. 303, 10 Ky. L. Rep. 940. It is too late to raise the question of the failure of a non-resident owner of a ferry privilege to transfer the same to a resident within a year, as required by Ky. St. (1903) § 1808, subd. 3, after he has transferred his lease to a domestic corporation, with the consent and approval of the county court. Paynter *v.* Miller, *supra*.

23. *Idaho.*— Evans *v.* Kroutinger, (1903) 72 Pac. 882.

Iowa.— Lippencott *v.* Allander, 27 Iowa 460, 1 Am. Rep. 299.

Michigan.— Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722.

Mississippi.— McCearly *v.* Swayze, 65 Miss. 351, 3 So. 657.

Missouri.— Stark *v.* Miller, 3 Mo. 470.

See 23 Cent. Dig. tit. "Ferries," §§ 42, 43.

See also Lewis *v.* Gainesville, 7 Ala. 85; Greer *v.* Haugabook, 47 Ga. 282.

The franchise may be transferred, and the transferee retain the fee in the land (Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376), except in jurisdictions where the right to establish the ferry is limited to the owners of the land (Haynes *v.* Wells, 26 Ark. 464).

A county authorized to operate and maintain a ferry may lease it to a private individual. State *v.* King County, 29 Wash. 359, 69 Pac. 1106.

In Iowa the franchise may be sold under execution. Lippencott *v.* Allander, 27 Iowa 460, 1 Am. Rep. 299.

24. Willard *v.* Forsythe, 2 Mich. N. P. 190; Ragan *v.* McCoy, 29 Mo. 356; The Maverick, 16 Fed. Cas. No. 9,316, 1 Sprague 23.

Associating a partner in the business is not a violation of a charter provision that the franchise shall not be transferred. Carroll *v.* Campbell, 110 Mo. 557, 19 S. W. 809.

The franchise cannot be sold under execution in jurisdictions where it is held to be a personal trust. Thomas *v.* Armstrong, 7 Cal. 286; Munroe *v.* Thomas, 5 Cal. 470.

25. Hackett *v.* Multnomah R. Co., 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327; Nixon *v.* Reid, 8 S. D. 507, 67 N. W. 57, 32 L. R. A. 315. See also Paynter *v.* Miller, 80 S. W. 469, 25 Ky. L. Rep. 2222.

26. Evans *v.* Kroutinger, (Ida. 1903) 72 Pac. 882; Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652. See also Johnson's Appeal, 95 Pa. St. 78.

27. Gunterman *v.* People, 138 Ill. 518, 28 N. E. 1067; Dundy *v.* Chambers, 23 Ill. 369; Higgins *v.* Hogan, 7 U. C. Q. B. 401.

Although a ferry franchise can be transferred only by deed, yet where such franchise, including the boat and all appurtenances, is sold without a conveyance, the price paid and possession taken, an equitable title passes. Mississippi River Bridge Co. *v.* Lonergan, 91 Ill. 508 [*followed* in Lonergan *v.* Mississippi River Bridge Co., 5 Fed. 777, 2 McCrary 45].

K. Termination of Franchise[28]— **1. Right to Franchise, How Lost.** The right to exercise a ferry franchise may be lost by non-user,[29] or by failure to comply with the conditions upon which it was granted,[30] or to renew the bond as required by statute,[31] or by expiration of the franchise.[32] A ferry license is not vacated, nor the franchise lost, by the death of the grantee,[33] except in jurisdictions where the franchise is held to be a personal trust imposed upon the grantee alone.[34]

2. Enforcement of Forfeiture. The state alone can insist upon the forfeiture of a ferry franchise,[35] and if for any cause the owner of the franchise subjects his right to forfeiture, the fact must be ascertained by an appropriate judicial proceeding instituted for that purpose;[36] it cannot be determined in a collateral proceeding.[37]

L. Renewal of Franchise. The statutes of some states make the former keeper of a ferry a preferred claimant for the right to a renewal when the original franchise has expired,[38] and, in jurisdictions where riparian owners are preferred claimants for the franchise in the first instance, they are entitled to the same preference as to a renewal.[39] The granting of a renewal is discretionary with the

28. Repeal of ferry license see Constitutional Law, 8 Cyc. 752 note 49.

29. Jeffersonville *v.* The John Shallcross, 35 Ind. 19; Maysville *v.* Boon, 2 J. J. Marsh. (Ky.) 224.

Failure to exercise the franchise for forty years (Smith *v.* Harkins, 38 N. C. 613, 44 Am. Dec. 83), for twenty years (Brearly *v.* Norris, 23 Ark. 514), or for eighteen years (Hartford Bridge Co. *v.* East Hartford, 16 Conn. 149) amounts to an abandonment of the right.

An unreasonable delay in putting the ferry in use will forfeit the franchise. Clarke *v.* Calloway, Ky. Dec. 46, 2 Am. Dec. 706.

Where the ferry owners kept a sufficient bridge during the time the ferry was not in operation, the franchise will not be forfeited for non-user. Com. *v.* Hulings, 129 Pa. St. 317, 18 Atl. 138.

To establish a ferry a short distance from the place designated by the grant, where the change was made with the consent of the police jury who had the right to control it, is not a non-user. Davis *v.* Concordia Police Jury, 1 La. Ann. 288.

30. School Trustees *v.* Tatman, 13 Ill. 27; Phillips *v.* Bloomington, 1 Greene (Iowa) 498.

31. Under the Alabama statute the license cannot be revoked until after ten days' notice has been given to renew the bond. Lamar *v.* Marshall County, 21 Ala. 772; Garrett *v.* Ricketts, 9 Ala. 529.

The absence of the licensee from the state is not sufficient ground for revocation, as the bond may as well be exacted from the heir, alienee, or lessee of the ferry as from the licensee. Garrett *v.* Ricketts, 9 Ala. 529.

32. Bell *v.* Clegg, 25 Ark. 26; Cauble *v.* Craig, 94 Mo. App. 675, 69 S. W. 49.

33. Lippencott *v.* Allander, 27 Iowa 460, 1 Am. Rep. 299.

34. Knott *v.* Frush, 2 Oreg. 237.

35. School Trustees *v.* Tatman, 13 Ill. 27; Douglass' Appeal, 118 Pa. St. 65, 12 Atl. 834.

36. Brown *v.* Given, 4 J. J. Marsh. (Ky.) 28.

The question of forfeiture must be tried in a proceeding in the nature of quo warranto. Territory *v.* Reyburn, 1 Kan. 551.

In Kentucky notice to the owner must first issue to show cause why his franchise should not be forfeited. Brown *v.* Given, 4 J. J. Marsh. 28; Maysville *v.* Boon, 2 J. J. Marsh, 224. The mere fact that the owner is in court on his own motion to renew his covenant is not sufficient to give the court jurisdiction. Combs *v.* Sewell, 59 S. W. 526, 22 Ky. L. Rep. 1026.

The notice must inform the owner of the nature of the complaint. Brown *v.* Givens, 1 Dana (Ky.) 259.

Forfeiture for non-user dates from the judgment of the court declaring such forfeiture. Greer *v.* Haugabook, 47 Ga. 282.

37. Maysville *v.* Boon, 2 J. J. Marsh. (Ky.) 224; Douglass' Appeal, 118 Pa. St. 65, 12 Atl. 834.

On an indictment for keeping a ferry without a license, the court cannot try the question of forfeiture of the franchise. Territory *v.* Reyburn, 1 Kan. 551.

38. In California the former keeper is entitled to have his license renewed if he has kept the ferry according to law. Finch *v.* Tehama County, 29 Cal. 453; Thomas *v.* Armstrong, 7 Cal. 286; Chard *v.* Stone, 7 Cal. 117.

The application for renewal must show that the ferry has been kept according to law. Finch *v.* Tehama County, 29 Cal. 453.

Mandamus will issue where the board of supervisors, mistaking the law, refuse the renewal of a license to a ferry owner who is entitled to it. Thomas *v.* Armstrong, 7 Cal. 286.

The Iowa statute makes the former owner a preferred claimant for a renewal, but provides that it may be granted to another, if in the discretion of the supervisors the former owner is an improper person to receive it. Lippencott *v.* Allander, 23 Iowa 536.

39. Beckley *v.* Learn, 3 Oreg. 544.

authorities having power to make the grant, and if they deem it for the public good they may refuse a renewal and discontinue the ferry.[40]

M. Right to Collect Tolls.[41] The grant of a ferry franchise implies in its very nature the taking of tolls by the grantee,[42] and the right to collect the same exists as long as the right or duty of operating the ferry continues.[43] A ferryman can collect no greater toll than is allowed by statute,[44] and in some jurisdictions is liable to prosecution and fine for charging a greater rate.[45] Where a passenger is obliged to pay a greater rate than that allowed by law, the excess, if not voluntarily paid, may be recovered.[46]

N. Right to Land and Embark. A riparian proprietor operating a private ferry from his own land has no right to land upon the property of the opposite owner without the latter's permission;[47] nor can he, for a private ferry, so use a public highway without the consent of the owner of the land through which the highway runs.[48] As to the right of landing and embarking in the case of public ferries whose termini are public highways, the decisions are conflicting. The grant of the franchise carries with it whatever rights the public then has or may afterward acquire to the use of the highway for this purpose;[49] and where the landowner retains the fee and the public has only an easement for passage, it is held in some cases that this right of way includes the right to use the highway for landing and embarking,[50] while others hold that this is not so much a public use as a use by the holder of the ferry franchise for his own gain, and that it is an additional burden upon the land for which compensation must be made to the owner.[51] A grant of the right of landing and embarking may be presumed from usage,[52] and it has been held that, where a riparian owner who would be a preferred claimant for the franchise fails to apply for it, he waives the right to object to this use of his land by the person to whom the franchise is granted.[53]

III. REGULATION AND CONTROL.[54]

A. In General. The power to regulate and control ferries rests primarily in legislatures of different states,[55] but is usually exercised through courts, commis-

40. Bell *v.* Clegg, 25 Ark. 26.

41. **Books of ferry owner** as evidence in action to recover ferriage see EVIDENCE, 17 Cyc. 378 note 42.

42. Atty.-Gen. *v.* Boston, 123 Mass. 460.

43. McCauly *v.* Givens, 1 Dana (Ky.) 261, holding that where a court of equity ordered a ferry to be leased, and the lessee remained in possession after the lease had expired, the original order remaining in force, he was bound to keep up the ferry until otherwise ordered, and had a right to the tolls after such expiration.

44. Edmonds *v.* Abeel, 20 Hun (N. Y.) 441.

Where rates of ferriage for wagons are fixed by statute, a ferryman cannot charge for the contents of a wagon, separately from the wagon, although the wagon and contents belong to different persons. Kelly *v.* Altemus, 34 Ark. 184, 36 Am. Rep. 6.

45. State *v.* Sickmann, 65 Mo. App. 499.

One state cannot punish one who acts under a ferry franchise given by another state to operate a ferry from the latter's side of the river, over that river, for charging one coming from the latter state more than is allowed by the law of the former state for ferriage over that river. State *v.* Faudre, 54 W. Va. 122, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877.

46. Edmonds *v.* Abeel, 20 Hun (N. Y.) 441.

47. Chess *v.* Manown, 3 Watts (Pa.) 219.

48. Buford *v.* Smith, 2 Tex. Civ. App. 178, 21 S. W. 168.

49. Somerville *v.* Winbish, 7 Gratt. (Va.) 205.

A ferry-boat is entitled to the space requisite for her proper manœuver in leaving as well as entering her slip. New York City *v.* New York, etc., Ferry Co., 130 Fed. 397.

50. Clark *v.* White, 5 Bush (Ky.) 353; Patrick *v.* Ruffner, 2 Rob. (Va.) 209, 40 Am. Dec. 740. See also State *v.* Wilson, 42 Me. 9.

51. Prosser *v.* Wapello County, 18 Iowa 327; Pipkin *v.* Wynns, 13 N. C. 402; Cooper *v.* Smith, 9 Serg. & R. (Pa.) 26, 11 Am. Dec. 658; Chambers *v.* Furry, 1 Yeates (Pa.) 167.

52. Clark *v.* White, 5 Bush (Ky.) 353; Bird *v.* Smith, 8 Watts (Pa.) 434, 34 Am. Dec. 483.

53. Mills *v.* Learn, 2 Oreg. 215. But see Pipkin *v.* Wynns, 13 N. C. 402.

54. **Taxation of ferries** see COMMERCE, 7 Cyc. 479.

55. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Mills *v.* St. Clair County, 7 Ill. 197; Parker *v.* Metropolitan R. Co., 109 Mass. 506.

sioners, municipal corporations, or other inferior bodies.[56] The respective rights of the state and federal governments in regard to the regulation and control of ferries upon navigable and boundary waters have been treated in a former title.[57]

B. Extent of Power to Regulate and Control. The state may, through the proper authorities, require the payment of a license-fee,[58] fix the rates of ferriage,[59] the hours during which the ferry shall be operated, and the number and frequency of trips,[60] and make such rules and regulations as may be necessary to insure that the franchise shall not be abused to the serious detriment or inconvenience of the public.[61]

56. See the following cases:

Arkansas.— Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

Illinois.— Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Rohn *v.* Beardstown, 32 Ill. App. 407.

Indiana.— Madison *v.* Abbott, 118 Ind. 337, 21 N. E. 28.

Missouri.— St. Louis *v.* Waterloo-Carondelet Turnpike, etc., Co., 14 Mo. App. 216.

New Jersey.— Hudson County *v.* State, 24 N. J. L. 718.

North Carolina.— Robinson *v.* Lamb, 126 N. C. 492, 36 S. E. 29.

Oregon.— Kadderly *v.* Multnomah County Ct., 32 Oreg. 560, 52 Pac. 515.

See 23 Cent. Dig. tit. "Ferries," § 74.

The statutes authorizing such bodies to license ferries usually confer the right of regulating the ferries when established. See *supra*, II, C, 3, a, and cases there cited.

Where a city is authorized to regulate ferries within its corporate limits and one bank only of a navigable river is within such limits, it has power to regulate ferries operated from either bank. Arkadelphia Lumber Co. *v.* Arkadelphia, 56 Ark. 370, 19 S. W. 1053.

57. See COMMERCE, IX, D, 3 [7 Cyc. 463].

58. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Madison *v.* Abbott, 118 Ind. 337, 21 N. E. 28; Chilvers *v.* People, 11 Mich. 43.

A license-fee is not a tonnage tax. Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 2 S. Ct. 257, 27 L. ed. 419.

59. Parker *v.* Metropolitan R. Co., 109 Mass. 506; Hudson County *v.* State, 24 N. J. L. 718. See also CONSTITUTIONAL LAW, IX, B, 5, b, (II) [8 Cyc. 969].

The power given to a city to regulate rates of toll implies that the rates fixed shall be reasonable. Rohn *v.* Beardstown, 32 Ill. App. 407.

In North Carolina the rates of toll are fixed by the county commissioners, and it is error for the superior court to fix such rates in the first instance on an appeal in proceedings before the county commissioners for the establishment of the ferry. Robinson *v.* Lamb, 126 N. C. 492, 36 S. E. 29.

The board of freeholders under the New Jersey "act concerning ferries" may fix the rates when one terminus is within their county, even though the other terminus is out of the state. State *v.* Hudson County, 23 N. J. L. 206.

In Kentucky the rates must be fixed at the same time the ferry is established (Lawless *v.* Reese, 4 Bibb 309), but they may be fixed by a different order from that establishing the ferry. Pentecost *v.* Miller, 7 T. B. Mon. 312; Ackler *v.* Oldham, 1 A. K. Marsh. 471.

In a special proceeding to reduce the rate of tolls the judgment of the court cannot go beyond the changes stated in the notice. Troutman *v.* Smith, 105 Ky. 231, 48 S. W. 1084, 20 Ky. L. Rep. 1134.

Interstate ferries.— The state of Ohio has the right to license ferries on the Ohio side of the Ohio river, and to fix their charges for ferriage over that river from Ohio to West Virginia. State *v.* Faudre, 54 W. Va. 122, 46 S. E. 269, 102 Am. St. Rep. 927, 63 L. R. A. 877. Tex. Rev. St. (1895) art. 1537, authorizes the commissioners' court to establish public ferries. Article 4797 classifies the persons entitled to license and operate a ferry, while article 4798 makes it unlawful for an unlicensed person to operate a ferry for compensation. Article 4799 provides that, whenever a watercourse forms a part of the boundary line of a state, if any charge shall be assessed by the adjoining state for the privilege of a ferry landing, the same charge may be assessed by the commissioners' court for a like privilege of landing in this state. It was held that articles 4797 and 4798 referred to ferries wholly in the state, and the commissioners' court had no authority under them to require license from an interstate ferry. Parsons *v.* Hunt, (Civ. App. 1904) 81 S. W. 120.

60. Madison *v.* Abbott, 118 Ind. 337, 21 N. E. 28, holding that the board of county commissioners is expressly authorized to make this regulation.

61. People *v.* New York, 32 Barb. (N. Y.) 102; Benson *v.* New York, 10 Barb. (N. Y.) 223.

Posting rates of toll.— The statutes in some states require ferrymen to keep their rates of tolls posted up at the ferry, and impose a penalty for failure to do so. State *v.* Arkadelphia Lumber Co., 70 Ark. 329, 67 S. W. 1011 (holding that the ferryman is not liable, where the rates fixed by the court have not been furnished to him by the clerk); Blanchard *v.* Hoboken Land, etc., Co., 3 Silv. Supreme (N. Y.) 22, 6 N. Y. Suppl. 279 (holding that the New York statute does not apply to a foreign corporation); Wray *v.* Pennsylvania R. Co., 4 N. Y. Suppl. 354 (holding that in an action to recover the penalty, the complaint should set forth each alleged violation as a separate cause of action).

Under the South Carolina statute failure

IV. OPERATION.

A. Duties and Liabilities in General[62] — **1. Liability as Common Carrier — a. Of Passengers** — (I) *In General.* A ferryman is a common carrier of passengers.[63] Like other common carriers the ferryman is not an insurer of the passenger's safety, but is required to exercise the highest degree of care, skill, and foresight to protect him from injury.[64] As soon as a ferryman signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery.[65]

(II) *Liability For Wrongful Expulsion.* A ferryman has no right to expel a passenger from a ferry-boat for violating a rule of the company without first informing the passenger of the existence of the rule, nor has he any right to touch the person of the passenger without first notifying him that unless he leaves the boat such extreme measures will be resorted to.[66]

(III) *Effect of Passenger's Contributory Negligence.* Where the passenger's own negligence has contributed to the injury complained of, he cannot recover against the ferryman.[67]

b. Of Goods — (I) *In General.* A ferryman is a common carrier of goods,[68] and like other common carriers is an insurer of the property committed to his care and is responsible for all injuries to it, except such as may be caused by the act of God or a public enemy.[69] The ferryman's liability as a common carrier is

to keep the rates posted forfeits the right to collect the tolls. See Frazier *v.* Drayton, 2 Nott & M. (S. C.) 471; Addison *v.* Hard, 1 Bailey (S. C.) 431.

62. **Liability of ferry company for negligence** see Corporations, 10 Cyc. 1222.

63. May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135; Brockway *v.* Lascala, 1 Edm. Sel. Cas. (N. Y.) 135. See also Carriers, 6 Cyc. 534, 596.

64. Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710; Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266.

The same degree of care is required as to passengers while on a gangway leading to the ferry-boat as while on the boat itself. Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266.

65. May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

66. Compton *v.* Van Valkenburgh, etc., Co., 34 N. J. L. 134.

67. Hoboken Ferry Co. *v.* Feiszt, 58 N. J. L. 198, 35 Atl. 299; Race *v.* Union Ferry Co., 138 N. Y. 644, 34 N. E. 280 [*reversing* 19 N. Y. Suppl. 675]; Fogassi *v.* New York Cent., etc., Co., 17 N. Y. App. Div. 286, 45 N. Y. Suppl. 175 [*affirming* 19 Misc. 108, 43 N. Y. Suppl. 268]; Fish *v.* Coopers Point, etc., Ferry Co., 4 Phila. (Pa.) 103.

It is not, as a matter of law, contributory negligence for a passenger to leave the cabin and stand on the deck between the cabin and the end of the boat (Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37), or to stand near a stairway, or go down the stairway without taking hold of the railing (Bartlett *v.* New York, etc., Transp. Co., 57 N. Y. Super. Ct. 348, 8 N. Y. Suppl. 309), or to rise from his seat before the boat is safely moored (Snelling *v.* Brooklyn, etc., Ferry Co., 13 N. Y. Suppl. 398), nor can the movements of a person in an endeavor to regain his feet be held an act of negligence on his part (Cash *v.* New York, etc., Co., 56 N. Y. App. Div. 473, 67 N. Y. Suppl. 823). See also Dougherty *v.* New York Cent., etc., R. Co., 86 N. Y. Suppl. 746.

A passenger is justified in assuming that when the guard chains are taken down or the gates opened for passengers to pass off the boat, it will remain securely fastened. Spero *v.* Long Island, etc., Co., 21 Misc. (N. Y.) 683, 47 N. Y. Suppl. 1093; St. John *v.* Macdonald, 14 Can. Supreme Ct. 1.

He may also assume that the landing place is in a safe condition and need not examine particularly to see if there is a vacant place between the bridge and the boat. Palmer *v.* New Jersey R. Co., 33 N. J. L. 90. But where a landing place is sufficiently safe for persons of ordinary prudence, and the passenger is injured by failure to exercise such prudence, he cannot recover. Race *v.* Union Ferry Co., 138 N. Y. 644, 34 N. E. 280 [*reversing* 19 N. Y. Suppl. 675]; Fogassi *v.* New York, etc., Co., 17 N. Y. App. Div. 286, 45 N. Y. Suppl. 175 [*affirming* 19 Misc. 108, 43 N. Y. Suppl. 268].

68. Griffith *v.* Cave, 22 Cal. 534, 83 Am. Dec. 82; Slimmer *v.* Merry, 23 Iowa 90; Cohen *v.* Hume, 1 McCord (S. C.) 439; Miles *v.* James, 1 McCord (S. C.) 157. See also Carriers, II, A, 4 [6 Cyc. 368].

69. *Arkansas.*— Harvey *v.* Rose, 26 Ark. 3, 7 Am. Dec. 595.

Illinois.— Fisher *v.* Clisbee, 12 Ill. 344.

Kentucky.— Hall *v.* Renfro, 3 Metc. 51.

Mississippi.— Powell *v.* Mills, 37 Miss. 691.

Missouri.— Pomeroy *v.* Donaldson, 5 Mo. 36.

South Carolina.— Cook *v.* Gourdin, 2 Nott & M. 19.

not relieved or lessened by the fact that the goods are usually accompanied by the owner.[70] His responsibility in regard to animals is the same as in the case of other property,[71] except where the loss or injury is due to the animals' own restiveness or viciousness of temper.[72]

(II) *Effect of Owner's Custody and Control.* There is a diversity of opinion as to the liability of a ferryman for property which a passenger takes with him upon a ferry-boat for transportation and does not deliver into the custody of the ferryman, but retains under his own control and management. It has been held that in such a case the owner acts, in the control of his property, solely as the agent of the ferryman, whose responsibility is that of a common carrier insuring the safety of the property.[73] On the other hand it has been held that the liability of a ferryman in such cases is more restricted.[74]

2. Liability on Statutory Bond. In some jurisdictions keepers of public ferries are required to give bonds for the faithful performance of their duties as such, on which actions may be brought by or for the benefit of persons damaged by the failure of such ferrymen to comply with the conditions of their bonds.[75]

3. Duty to Operate Ferry. The grant of a ferry franchise imposes upon the grantee the duty of operating the ferry, and his failure to do so is a sufficient ground for the forfeiture of his franchise,[76] and is a bar to his right to maintain a bill to enjoin the operation of a rival ferry.[77]

4. Duty to Transport. It is the duty of a public ferryman to transport passengers at all reasonable hours and without unnecessary delay,[78] and any person who is refused transportation or unreasonably delayed may maintain an action for the damages sustained.[79] The statutes in some states provide a penalty to be recovered in such cases by the injured party.[80]

5. Duties as to Safety of Passengers and Property — a. Sufficiency and Safety of Boats. A ferryman must provide a sufficient boat or boats to accom-

Texas.— Albright *v.* Penn, 14 Tex. 290.

See 23 Cent. Dig. tit. "Ferries," §§ 81, 86.

70. Whitmore *v.* Bowman, 4 Greene (Iowa) 148.

The presumption is that the property is in the possession of the ferryman as a common carrier and his responsibility can be lessened only by showing affirmatively that the owner retained the exclusive custody and control. Harvey *v.* Rose, 26 Ark. 3, 7 Am. Rep. 595; Powell *v.* Mills, 37 Miss. 691.

71. Wilson *v.* Hamilton, 4 Ohio St. 722.

72. Hall *v.* Renfro, 3 Metc. (Ky.) 51.

73. Fisher *v.* Clisbee, 12 Ill. 344. See also Powell *v.* Mills, 37 Miss. 691.

74. Thus he has been held to be liable for any loss or injury resulting directly from his failure to provide safe and suitable boats and appliances, or his failure to exercise proper care and skill in managing them, but the passenger who retains control of his property must use due care to protect it from injury, and if his own negligence in this regard contributes to the injury complained of he cannot recover. White *v.* Winnisimmet Co., 7 Cush. (Mass.) 155; Dudley *v.* Camden, etc., Ferry Co., 42 N. J. L. 25, 36 Am. Rep. 501, 45 N. J. L. 368, 46 Am. Rep. 781; Wyckoff *v.* Queens County Ferry Co., 52 N. Y. 32, 11 Am. Rep. 650; Roussel *v.* Aumais, 18 Quebec Super. Ct. 474. See also Yerkes *v.* Sabin, 97 Ind. 141, 49 Am. Rep. 434.

The ferryman would be liable in such cases only when the loss or injury was the direct result of his omission to use due care to avoid the same after becoming aware of the owner's negligence. Evans *v.* Rudy, 34 Ark. 383; Harvey *v.* Rose, 26 Ark. 3, 7 Am. Rep. 595.

75. Harris *v.* Plant, 31 Ala. 639; Botts *v.* Bridges, 4 Port. (Ala.) 274; Wells *v.* Steele, 31 Ark. 219; Miller *v.* Pendleton, 8 Gray (Mass.) 547. See also Walker *v.* Armstrong, 2 Kan. 198.

A bond containing conditions enlarging the liability on the bond beyond that authorized by the statute is void as to that part; any liability except what the statute provides for must be enforced against the ferryman as a common carrier. See Botts *v.* Bridges, 4 Port. (Ala.) 274.

76. See *infra*, II, K, 1.

77. See *supra*, II, I, 2, a, (II).

78. Jabine *v.* Midgett, 25 Ark. 474; Wallen *v.* McHenry, 3 Humphr. (Tenn.) 245.

A ferryman is bound to transport passengers after nightfall unless there is some further sufficient excuse for not doing so. Koretke *v.* Irwin, 100 Ala. 323, 13 So. 943, 21 L. R. A. 787; Pate *v.* Henry, 5 Stew. & P. (Ala.) 101.

79. Jabine *v.* Midgett, 25 Ark. 474.

80. Koretke *v.* Irwin, 100 Ala. 323, 13 So. 943, 21 L. R. A. 787; Pate *v.* Henry, 5 Stew. & P. (Ala.) 101. See also Carter *v.* Com., 2 Va. Cas. 354.

The penalty provided by statute does not preclude an action on the case for damages. Wallen *v.* McHenry, 3 Humphr. (Tenn.) 245.

A ferryman is not liable under the Kentucky statute for refusing to transport a

modate the usual traffic at his place of business without unreasonable delay,[81] and must keep his boats in good repair and running order,[82] and in a safe condition, free from anything likely to cause injury to passengers or their property.[83]

b. Safety of Means and Appliances. A ferryman must equip his boat with such guard rails, chains, barriers, and other appliances as are necessary to secure the safety of passengers and property in transportation.[84]

c. Safety of Landings and Approaches. A ferryman must maintain safe and suitable landing places for the ingress and egress of passengers and teams,[85] and appliances of sufficient strength to hold the boat securely to her mooring;[86] but he is not bound to guard against all possible accidents which could not reasonably have been foreseen,[87] nor is he bound to adopt new and improved methods, where

passenger from the Ohio shore. Reeves *v.* Little, 7 Bush (Ky.) 469.

81. Richards *v.* Fuqua, 28 Miss. 792, 64 Am. Dec. 121; Sanders *v.* Young, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

In Alabama a ferryman is liable to a penalty for failure to have good and sufficient boats to do his duty. Taylor *v.* Rushing, 2 Stew. 160.

In Arkansas failure to provide sufficient boats is an indictable offense. State *v.* Sewell, 45 Ark. 387.

Mere failure to provide sufficient seats for all passengers that a boat can safely carry is not of itself proof of negligence. Burton *v.* West Jersey Ferry Co., 114 U. S. 474, 5 S. Ct. 960, 29 L. ed. 215.

82. Slimmer *v.* Merry, 23 Iowa 90.

83. Wilson *v.* Shulkin, 51 N. C. 375, where it was held to be negligence to have an iron spike exposed on a ferry-boat, where animals which were being transported could be injured thereon.

It is not negligence on the part of the ferryman for his boat to be in a slippery condition during a snow-storm, where there is no defect in the construction of the boat nor any accumulation of ice or snow from previous storms. Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708, 13 L. R. A. 366.

84. *California.*— Griffith *v.* Cave, 22 Cal. 534, 83 Am. Dec. 82.

Illinois.— Fisher *v.* Clisbee, 12 Ill. 344.

Massachusetts.— Peverly *v.* Boston, 136 Mass. 366, 49 Am. Rep. 37.

Mississippi.— Powell *v.* Mills, 37 Miss. 691.

New York.— Short *v.* Knapp, 2 Abb. Pr. N. S. 241.

Ohio.— Wilson *v.* Hamilton, 4 Ohio St. 722.

Tennessee.— Sanders *v.* Young, 1 Head 219, 73 Am. Dec. 175.

See 23 Cent. Dig. tit. ' Ferries," § 82.

It is negligence not to have a division on the boat to prevent the crowding in of passengers among the horses and carriages. Hazman *v.* Hoboken Land, etc., Co., 2 Daly (N. Y.) 130.

An order of the county court pursuant to the Tennessee acts of 1842, excusing the keeper of a ferry from having hand rails on his boat, does not release him from any part of his liability at common law. Sanders *v.* Young, 1 Head (Tenn.) 219, 73 Am. Dec. 175.

But see Gillette *v.* Goodspeed, 69 Conn. 363, 37 Atl. 973, where it was held that in view of Conn. Gen. St. c. 162, p. 604, making it the duty of ferry commissioners to compel ferrymen to equip their boats with the necessary apparatus, the court would not say it was negligence in a ferryman not to have chains or barriers at the end of his boat, where the commissioners had made no such requirement.

85. *California.*— May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

Indiana.— Yerkes *v.* Sabin, 97 Ind. 141, 49 Am. Rep. 434.

Mississippi.— Richards *v.* Fuqua, 28 Miss. 792, 64 Am. Dec. 121.

New Jersey.—Palmer *v.* New Jersey R. Co., 33 N. J. L. 90.

New York.— Bartholomew *v.* Poughkeepsie, etc., Ferry Co., 4 Silv. Supreme 591, 7 N. Y. Suppl. 785.

South Carolina.—Miles *v.* James, 1 McCord 157.

England.— Willoughby *v.* Horridge, 12 C. B. 742, 17 Jur. 323, 22 L. J. C. P. 90, 74 E. C. L. 742.

Canada.— St. John *v.* Macdonald, 14 Can. Supreme Ct. 1.

See 23 Cent. Dig. tit. "Ferries," § 82.

It is negligence not to have a ferry-bridge which can be raised or lowered with the tide to the level of the boat (Hazman *v.* Hoboken Land, etc., Co., 2 Daly (N. Y.) 130); but where the ferryman uses the best appliances known and it is impossible under certain conditions to bring the bridge and boat to an exact level, he will not be responsible for an injury resulting therefrom (Duke *v.* Tenth St., etc., Ferry Co., 9 Misc. (N. Y.) 268, 29 N. Y. Suppl. 739 [*affirmed* in 145 N. Y. 640, 41 N. E. 88].

Where there is a dangerous obstruction at the landing place of a ferry, the ferryman must do everything in his power to guard against danger. Osborn *v.* Union Ferry Co., 53 Barb. (N. Y.) 629.

There should be a division on a ferry-bridge to keep back on-going passengers until the others are discharged. Hazman *v.* Hoboken Land, etc., Co., 2 Daly (N. Y.) 130.

86. Blakeley *v.* Le Duc, 19 Minn. 187; Albright *v.* Penn, 14 Tex. 290.

87. Loftus *v.* Union Ferry Co., 22 Hun (N. Y.) 33 [*affirmed* in 84 N. Y. 455, 38 Am. Rep. 533].

those already in use are reasonably safe.[88] The duty as to the safety of landings applies not only to the immediate means of getting on and off the boat, but requires the ferryman to furnish safe passageways between the ferry-houses and the streets.[89]

d. Skill Required in Operating. A ferryman must exercise the utmost care, skill, and vigilance in managing his boat and in providing against injury to passengers and property while in course of transportation.[90] Ferries are also subject to the same rules as other vessels with regard to moving cautiously or coming to anchor to avoid collisions with other vessels, in cases of fog or darkness.[91]

6. Actions to Enforce Liability[92] — a. At Common Law — (i) *For Personal Injuries* — (A) *Pleading.*[93] In order to recover against a ferryman on the ground of a breach of contract to carry the passenger safely there must be an allegation in the complaint of such contractual relation.[94] Where the authority of towns to operate ferries rests entirely upon special grants, the complaint in an action against the town must allege the existence of such a grant.[95]

(B) *Burden of Proof and Presumption of Negligence.*[96] Where a passenger rightfully on a ferry is injured in transportation, the presumption is that it was due to the negligence of the ferryman, and the burden is upon the ferry-

88. Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717, where it was held that the cost of such new and improved methods might be a sufficient excuse for not adopting them, where it did not appear that they were requisite to the reasonable safety and convenience of passengers and property.

The owners of a ferry were not guilty of negligence in the manner of providing for the landing of passengers, where the means used had been employed by such company and by other ferries for years, and never found dangerous or ineffective. Scribner *v.* Long Island R. Co., 88 N. Y. Suppl. 351.

89. Magoric *v.* Little, 25 Fed. 627, 23 Blatchf. 399.

90. Powell *v.* Mills, 37 Miss. 691; Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266; Tonkins *v.* New York Ferry Co., 47 Hun (N. Y.) 562 [*affirmed* in 113 N. Y. 653, 21 N. E. 414]; Hawks *v.* Winans, 42 N. Y. Super. Ct. 451; Brockway *v.* Lascala, 1 Edm. Sel. Cas. (N. Y.) 135; Cook *v.* Gourdin, 2 Nott & M. (S. C.) 19.

Letting down the chain securing the passageway from the ferry-boat to the bridge, by a servant of the ferry company, before the boat is properly made fast, is negligence for which the ferry company in case of injury is liable (Ferris *v.* Union Ferry Co., 36 N. Y. 312); but mere evidence that the chain had been removed, but not by the servant in charge, is not sufficient proof of negligence on the part of the company (Joy *v.* Winnisimmet Co., 114 Mass. 63).

It is negligence to order teams to pass off before the bridge is properly adjusted to the level of the boat. Hazman *v.* Hoboken Land, etc., Co., 50 N. Y. 53.

Proof of the striking of a ferry-boat against the slip with unusual violence, and that there was no exceptional weather or tide to make the landing difficult, is sufficient evidence of negligence to warrant a recovery by a passenger who is thrown and injured (Cash *v.* New York Cent., etc., Co., 56 N. Y. App. Div. 473, 67 N. Y. Suppl. 823; Snelling *v.* Brooklyn, etc., Ferry Co., 13 N. Y. Suppl. 398); but the mere fact that a passenger was thrown by the striking of the boat is not sufficient without other evidence to establish the negligent operation of the ferry (Aiken *v.* Southern Pac. Co., 104 La. 157, 29 So. 1).

Where a company operating a ferry-boat moors its boat and keeps open the gate, it thereby invites a passenger to embark, and gives assurance that it is safe to do so. Dougherty *v.* New York Cent., etc., R. Co., 86 N. Y. Suppl. 746.

91. Hoffman *v.* Brooklyn Union Ferry Co., 68 N. Y. 385, where, however, the court said that a ferry-boat might be justified in leaving her dock upon her regular trips, and moving cautiously in her usual course, when it would be improper for vessels in other service to do so.

Lights for ferry-boats see Collision, 7 Cyc. 333.

Speed for ferry-boats in fog see Collision, 7 Cyc. 344 note 34.

92. See Carriers, III, F, 4 [6 Cyc. 626].

A ferry-boat is a "vessel" within the jurisdiction of admiralty. See Admiralty, 1 Cyc. 823 note 15.

93. Pleading generally see Pleading.

Amendment.— In an action for injuries received by a passenger at the landing of a ferry, it was error to permit an amendment alleging, for the first time, insufficient lighting as an act of negligence. Scribner *v.* Long Island R. Co., 88 N. Y. Suppl. 351.

94. Grafton *v.* Brooklyn Union Ferry Co., 19 N. Y. Suppl. 966, 22 N. Y. Civ. Proc. 402, holding that no recovery can be had on this ground where the complaint alleges a tort and claims damages only.

95. Hoggard *v.* Monroe, 51 La. Ann. 683, 25 So. 349, 44 L. R. A. 477.

96. Matters relating to negligence generally see Negligence.

man to prove the contrary.[97] The rule, however, is subject to qualification, and has been held not to apply in cases where the injury is of such a character that it might reasonably have happened without any negligence on the part of the ferryman,[98] or is caused by something not connected with the machinery of transportation,[99] or where the cause of the injury is equally well known to both parties.[1] It is not incumbent upon plaintiff to prove the exercise by him of ordinary care to avoid the injury.[2]

(II) *For Loss of or Injury to Property*[3] — (A) *Nature of Action.* Where property is lost or damaged by the negligence of a ferryman, the owner must sue the ferryman either on his contract as a carrier or in tort.[4]

(B) *Pleading.*[5] The complaint must specify the articles lost or damaged so as to inform defendant of the extent of the action.[6]

(C) *Proof.* In an action of contract against a ferryman for loss of or injury to property, it is sufficient for plaintiff to show the receipt of the property by the ferryman and the loss or injury; the burden is upon defendant to show that his failure to perform his agreement was due to a cause which would relieve him from liability.[7]

(D) *Evidence.*[8] Evidence is not admissible of any losses or injuries other than those alleged in the complaint,[9] nor of a custom or usage among ferrymen which would make the safety of a passenger or his property to depend upon his own conduct and not upon the care and vigilance of the ferryman.[10]

(E) *Damages.*[11] The recovery should be for whatever damage was the natural and proximate consequence of the injury complained of.[12]

b. On Statutory Bond[13] — (I) *Nature of Remedy.* The remedy given on the bond of a public ferryman[14] is in the nature of a common-law action on the case for damages caused by the ferryman's negligence. It is a cumulative remedy and not exclusive of the common-law right of action.[15]

(II) *Pleading.* The complaint must allege facts showing clearly a breach of the conditions of the bond.[16]

B. Liability of Private Ferryman. One who keeps a private ferry for his own use is not a common carrier,[17] but the owner of a private ferry may so use it, as where he undertakes for hire to convey all persons indifferently, with their carriages and goods, as to subject himself to the liability of a common carrier.[18]

97. Louisville, etc., Ferry Co. *v.* Nolan, 135 Ind. 60, 34 N. E. 710. See also Bartnik *v.* Erie R. Co., 36 N. Y. App. Div. 246, 55 N. Y. Suppl. 266, holding that the same presumption arises where the injury is caused by a defect in the machinery of transportation and happens to a passenger while he is on the gangway leading to the boat.

98. Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717.

99. Hayman *v.* Pennsylvania R. Co., 118 Pa. St. 508, 11 Atl. 815.

1. Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.) 312, 87 Am. Dec. 717; Fearn *v.* West Jersey Ferry Co., 143 Pa. St. 122, 22 Atl. 708, 13 L. R. A. 366; Hayman *v.* Pennsylvania R. Co., 118 Pa. St. 508, 11 Atl. 815.

2. May *v.* Hanson, 5 Cal. 360, 63 Am. Dec. 135.

3. See Carriers, II, R [6 Cyc. 510].

4. Smith *v.* Seward, 3 Pa. St. 342.

5. Pleading generally see Pleading.

6. Whitmore *v.* Bowman, 4 Greene (Iowa) 148.

7. Lewis *v.* Smith, 107 Mass. 334.

8. Evidence generally see Evidence.

9. Whitmore *v.* Bowman, 4 Greene (Iowa) 148.

10. Miller *v.* Pendleton, 8 Gray (Mass.) 547, holding that evidence is inadmissible of a custom at other ferries on the same river to put up guard chains at the request of passengers and not otherwise.

11. Damages generally see Damages.

12. Evans *v.* Rudy, 34 Ark. 383, where it was held proper to include the actual value of the property lost, together with the actual expenses and compensation for loss of time caused by detention on account of the accident.

13. Bond generally see Bonds.

14. See *supra*, IV, A, 2.

15. Wells *v.* Steele, 31 Ark. 219; Miller *v.* Pendleton, 8 Gray (Mass.) 547.

16. Judge Wilcox County Ct. *v.* Pharr, 4 Stew. & P. (Ala.) 332.

The bond is not an official bond within the provisions of the Alabama code allowing the person aggrieved to sue in his own name, but the complaint may be amended making it suit of the probate judge for the use of the person injured. Harris *v.* Plant, 31 Ala. 639.

17. Self *v.* Dunn, 42 Ga. 528, 5 Am. Rep. 544; Roussel *v.* Aumais, 18 Quebec Super. Ct. 474.

18. Hall *v.* Renfro, 3 Metc. (Ky.) 51.

C. Liability of Unlicensed Ferryman. One who without authority operates a public ferry and holds himself out as a public ferryman is liable as such, and cannot take advantage of his own wrong to avoid the responsibilities of his calling.[19]

D. Liability of Lessee. Where the owner of a ferry leases it to another who has the control and management of it, the lessee and not the owner is liable for any loss or injury caused by the defective condition of the ferry, or negligence in its management.[20]

E. Liability of Municipal Corporations, Counties, Etc. Municipal corporations or other public bodies charged with like duties are not liable to civil actions for damages for losses or injuries sustained in the operation of ferries by them, unless made so by statute.[21]

FERRULE. A metallic ring or sleeve on the handle of a tool or the end of a stick to keep the wood from splitting;[1] a ring of metal put around a column, cane, or other thing to strengthen it or prevent its splitting.[2]

FERRY-BOATS. See FERRIES.

FERTILIZER. A term which includes all substances, chemicals, and compounds commonly known as commercial fertilizers, and all manures, except animal excrement, cotton seed, and unmixed cotton seed products, whether natural or artificial products.[3] (See, generally, AGRICULTURE; INSPECTION.)

FESTINATIO JUSTITIÆ EST NOVERCA INFORTUNII. A maxim meaning "Hasty justice is the step-mother of misfortune."[4]

FETTERS. See CRIMINAL LAW.

FEUD. A fee.[5] (See, generally, ESTATES.)

FEUDA AD INSTAR PATRIMONIORUM SUNT REDACTA. A maxim meaning "Lands held feu are reduced to the character of a patrimony or succession."[6]

FEUDA ANTIQUA. In feudal law, a term used to designate an interest in land to which the possessor succeeds as heir to his ancestor.[7]

FEUDAL ACTION. See REAL ACTIONS.

FEUDAL SYSTEM. The system of feuds.[8] (See, generally, ESTATES.)

FEUDA NOVA. In feudal law, a term used to designate an interest in land

It is a question for the jury whether the owner of a private ferry so used it as to subject himself to the liability of a common carrier. Littlejohn *v.* Jones, 2 McMull. (S. C.) 365, 39 Am. Dec. 132.

To avoid responsibility under the Georgia statute, the landowner must prevent his ferry from being used as a public ferry by a tenant of the land, or at least show that he did all in his power to prevent it. Printup *v.* Patton, 91 Ga. 422, 18 S. E. 311.

19. Polk *v.* Coffin, 9 Cal. 56.

20. *Alabama.*— Taylor *v.* Rushing, 2 Stew. 160; Ladd *v.* Chotard, Minor 366.

Illinois.— Claypool *v.* McAllister, 20 Ill. 504.

North Carolina.— Biggs *v.* Ferrell, 34 N. C. 1.

Texas.— Hale *v.* Dutant, 39 Tex. 667; Henry *v.* Voltz, 1 Tex. App. Civ. Cas. § 775.

Vermont.— Felton *v.* Deall, 22 Vt. 170, 54 Am. Dec. 61.

See 23 Cent. Dig. tit. "Ferries," § 83.

One employed to operate a ferry on shares, although in exclusive control, is a servant for hire and not a lessee, and the owner is liable. Taylor *v.* Rushing, 2 Stew. (Ala.) 160.

21. Chick *v.* Newberry County, 27 S. C. 419, 3 S. E. 787, holding that a ferry is not included in the term "highway," as used in the act of 1874, which provides for the recovering from a county of damages caused by defects in a highway, causeway, or bridge.

A county is not liable under the Georgia statute for defects in the construction or repair or for negligence in the management of ferries, where no toll is charged. Arline *v.* Laurens County, 77 Ga. 249, 2 S. E. 833.

1. Knight Mechanical Dict. [*quoted* in Evans *v.* Newark Rivet Works, 126 Fed. 492, 493, 61 C. C. A. 474].

2. Imperial Dict. [*quoted* in Evans *v.* Newark Rivet Works, 126 Fed. 492, 493, 61 C. C. A. 474, construing the term as used in a patent].

3. Miss. Code (1892), § 2065.

4. Black L. Dict.

5. Black L. Dict. See also 16 Cyc. 601.

6. Trayner Leg. Max.

7. Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 349 [*citing* Sandford Herit. Suc. 30].

8. Black L. Dict., where it is said to have been "a political and social system which prevailed throughout Europe during the eleventh, twelfth and thirteenth centuries."

which was acquired by the possessor in any other way than by succession as heir to his ancestor.[9]

FEUDUM ANTIQUUM. A feud which descended to a vassal from an ancestor; one which had been in the family for generations.[10] (See, generally, ESTATES.)

FEW. A relative term and of great elasticity of meaning.[11]

FIANZA. A Spanish word of generic meaning, sufficiently broad to designate general obligation, as well as restricted liability under a single instrument.[12] (See, generally, CONTRACTS.)

FIAT JUS, RUAT JUSTITIA. A maxim meaning "Let law prevail, though justice fail."[13]

FIAT JUSTITIA, RUAT CŒLUM. A maxim meaning "Let justice be done, though the heaven should fall."[14]

FIAT PROUT FIERI CONSUERIT, NIL TEMERE NOVANDUM. A maxim meaning "Let it be done as formerly, let no innovation be made rashly."[15]

FICTIO CEDIT VERITATI, FICTIO JURIS NON EST UBI VERITAS. A maxim meaning "Fiction yields to truth. Where there is truth, fiction of law exists not."[16]

FICTIO EST CONTRA VERITATEM, SED PRO VERITATE HABETUR. A maxim meaning "Fiction is against the truth, but it is to be esteemed truth."[17]

FICTIO JURIS NON EST UBI VERITAS. A maxim meaning "Where truth is, fiction of law does not exist."[18]

FICTIO LEGIS INIQUÈ OPERATUR ALICUI DAMNUM VEL INJURIAM. A maxim meaning "A legal fiction does not properly work loss or injury."[19]

FICTIO LEGIS NEMINEM LÆDIT. A maxim meaning "A fiction of law injures no one."[20]

FICTION. A false averment on the part of the plaintiff which the defendant is not allowed to traverse, the object being to give the court jurisdiction.[21] (See, generally, PLEADING.)

FICTION OF LAW. A legal assumption that a thing is true which is either not true, or which is as probably false as true;[22] an allegation in legal proceedings, that does not accord with the actual facts of the case; and which may be contradicted for every purpose, except to defeat the beneficial end for which the fiction is invented and allowed.[23] (See, generally, PLEADING.)

9. Priest *v.* Cummings, 20 Wend. (N. Y.) 338, 349 [*citing* Sandford Herit. Suc. 30], distinguishing *feuda antiqua* from *feuda nova.*

10. English L. Dict. See also Gardner *v.* Collins, 2 Pet. (U. S.) 58, 92, 7 L. ed. 347.

11. Anderson *v.* Williams, 44 Wkly. Notes Cas. (Pa.) 418, 420.

As used in proposed evidence of the number of people traveling by a certain street railroad see Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 418, 61 N. E. 936.

"A few copies" see Myers *v.* Gross, 59 Ill. 436, 438.

"A few gross" see Allen *v.* Kirwan, 159 Pa. St. 612, 617, 28 Atl. 495.

"A few rods" see Butts *v.* Stowe, 53 Vt. 600, 603.

"A few stones" see Wheelock *v.* Noonan, 108 N. Y. 179, 184, 15 N. E. 67, 2 Am. St. Rep. 405.

12. Martinez *v.* Runkle, 57 N. J. L. 111, 125, 30 Atl. 593.

13. Wharton L. Lex.

14. Bouvier L. Dict. [*citing* Branch Princ. 161].

Applied or explained in: Bush *v.* Canfield, 2 Conn. 485, 492; Lamont *v.* Cheshure, 6 Lans. (N. Y.) 234, 238; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 50 Vt. 500, 595 (where it is said: "The *justitia* of that maxim means, legal justice — justice evolved and made operative by the administration of the law"); Laughton *v.* Sodor, L. R. 4 P. C. 495, 505, 42 L. J. P. C. 11, 28 L. T. Rep. N. S. 377, 9 Moore P. C. N. S. 318, 21 Wkly. Rep. 204, 17 Eng. Reprint 534.

15. Bouvier L. Dict. [*citing* Jenkins Cent. 116; Branch Princ.].

16. Wharton L. Lex.

17. Bouvier L. Dict.

18. Bouvier L. Dict.

19. Wharton L. Lex.

20. Bouvier L. Dict. [*citing* 3 Blackstone Comm. 43; 2 Rolle 502]. See also Low *v.* Little, 17 Johns. (N. Y.) 346, 348, dissenting opinion.

21. Snider *v.* Newell, 132 N. C. 614, 625, 44 S. E. 354 [*citing* Best Ev. 419; Black L. Dict.; Maine Anc. L. 25], per Clark, C. J.

Distinguished from presumption of law see Black L. Dict.

22. Hibberd *v.* Smith, 67 Cal. 547, 561, 4 Pac. 473, 8 Pac. 46, 56 Am. Rep. 726 [*citing* Johnson *v.* Smith, 2 Burr. 950, 962; Broom Leg. Max.].

23. New Hampshire Stafford Bank *v.* Cornell, 2 N. H. 324, 327.

FICTITIOUS. Feigned, imaginary, not real, counterfeit, false, not genuine.[24] (Fictitious: Action, see FICTITIOUS ACTION. Claim[25] as Affecting Jurisdiction, see APPEAL AND ERROR. Plaintiff,[26] see ABATEMENT AND REVIVAL.)

FICTITIOUS ACTION or SUIT. A mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit.[27] (Fictitious Action: In General, see ACTIONS. Ground For Voluntary Dismissal, see DISMISSAL AND NONSUIT. Jurisdiction Affected by, see APPEAL AND ERROR; COURTS.)

FIDE COMMISSARY. A term sometimes used as a euphonious substitute for CESTUI QUE TRUST,[28] *q. v.*

FIDEI COMMISSUM. A disposition, *causa mortis*, by which the heir, or legatee, is requested to give, or return, a certain thing to another person.[29] (See, generally, TRUSTS.)

24. Stein *v.* Howard, 65 Cal. 616, 617, 4 Pac. 662 [*citing* Webster Dict.].

Fictitious.— Bail or security (see 9 Cyc. 14); indebtedness (see 10 Cyc. 1170) or fraudulent demand (see 11 Cyc. 776); payee (see 8 Cyc. 122 note 77; 7 Cyc. 811 note 51, 785, 647 note 22, 564 note 9, 556 note 58, 542 note 21); person (see 10 Cyc. 714; 7 Cyc. 564 note 9, 569; Bank of England *v.* Vagliano, [1891] A. C. 107, 55 J. P. 676, 60 L. J. Q. B. 145, 64 L. T. Rep. N. S. 353, 39 Wkly. Rep. 657 [*cited* in Clutton *v.* Attenborough, [1897] A. C. 90, 93, 66 L. J. Q. B. 221, 75 L. T. Rep. N. S. 556, 45 Wkly. Rep. 276]); sale (see 9 Cyc. 555 note 78); signatures (see 11 Cyc. 304); stamp (47 & 48 Vict. c. 76, § 7; 61 & 62 Vict. c. 46, § 1, subs. 1); stock (see 10 Cyc. 444); trustee (see 10 Cyc. 698).

25. **Fictitious claim** see 4 Cyc. 178 note 21.

Fictitious or invalid claim see 4 Cyc. 201 note 12.

26. **Fictitious plaintiff** see Black L. Dict. [*citing* 4 Blackstone Comm. 134].

27. Smith *v.* Junction R. Co., 29 Ind. 546, 551. See also Hotchkiss *v.* Jones, 4 Ind. 260; Brewington *v.* Lowe, 1 Ind. 21, 48 Am. Dec. 349. See also 3 Cyc. 441 note 49.

Fictitious nature of suit see 9 Cyc. 42 note 21.

Fictitious or unnecessary controversies and questions see 11 Cyc. 664.

Fictitious proceedings see 2 Cyc. 533.

Fictitious suits see 8 Cyc. 799.

Fictitious or vexatious suits see 14 Cyc. 432.

28. "Which is an awkward, barbarous phrase." Brown *v.* Brown, 83 Hun (N. Y.) 160, 164, 31 N. Y. Suppl. 650 [*quoting* Perry Trusts, § 245, and *citing* Story Eq. Jur. § 321].

29. Meunier's Succession, 52 La. Ann. 79, 88, 26 So. 776, 48 L. R. A. 77 [*citing* Domat, lib. 4, tit. 2, § 2] (where it is said: "By 'another person' is meant a person or institution so named or indicated as to individualize him, or her, or it"); Ducloslange *v.* Ross, 3 La. Ann. 432, 433.

FIDELITY INSURANCE

By Joseph Walker Magrath*

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CROSS-REFERENCE

For Matters Relating to:

Insurance in General, see Insurance, and cross-references thereunder.

I. DEFINITION.

Fidelity insurance is a contract whereby the insurer, for a valuable consideration, agrees, subject to certain conditions, to indemnify the insured against loss consequent upon the dishonesty or default of a designated employee.[1]

II. FORM, NATURE, AND VALIDITY OF CONTRACT.

The contract is sometimes in a form very similar to that of a policy of insurance,[2] while in other instances it is in the form of a bond of indemnity.[3] It is sometimes issued upon the application of the employer[4] and sometimes upon the application of the employee.[5] But whatever the form of the contract, it is well established that guaranteeing the fidelity of employees is a form of insurance,[6]

1. See Vance Ins. § 247.

2. See Tarboro Bank *v.* Maryland Fidelity, etc., Co., 126 N. C. 320, 35 S. E. 588, 83 Am. St. Rep. 682; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253.

3. See Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193.

4. See Phenix Ins. Co. *v.* Guarantee Co. of North America, 115 Fed. 964, 53 C. C. A. 360.

5. See Imperial Bldg., etc., Co. *v.* U. S. Fidelity, etc., Co., 23 Ohio Cir. Ct. 243; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977.

6. *Illinois.*— People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

Kentucky.— Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356.

Maryland.— Union Cent. L. Ins. Co. *v.*

* Joint author of "Death," 13 Cyc. 290; "Evidence," 16 Cyc. 821, etc.

although it also partakes somewhat of the nature of a suretyship.[7] A contract guaranteeing the honesty of employees is not void as being against public policy.[8] Where a bond given by an insurer of the fidelity of an employee makes it essential to its validity that the signature of the employee shall be subscribed thereto, but it is never so signed by the employee, the bond is invalid.[9]

III. CONSTRUCTION OF CONTRACT.

A contract to indemnify an employer against the dishonesty or default of employees is subject to the same rules of construction as apply to other insurance contracts.[10] Thus if, looking at all its provisions, the bond or policy is fairly and reasonably susceptible of two constructions, one favorable to the insured and the other to the insurer, the former construction, if consistent with the objects for which the bond or policy was given, must be adopted.[11] But in construing a policy the manifest intent of the conditions must be respected,[12] and the rule above stated cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties and embodying requirements, compliance with which is made a condition to liability thereon.[13]

U. S. Fidelity, etc., Co., 99 Md. 423, 58 Atl. 437.

Minnesota.— New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586.

Washington.— Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989.

Canada.— London West *v.* London Guarantee, etc., Co., 26 Ont. 520.

Incorporation of company.— A company proposing to transact the business of "guaranteeing the fidelity of persons holding public or private places of trust" cannot be incorporated under a general corporation law which excludes from its operation corporations formed for the purpose of insurance. People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

7. See New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586.

8. New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586, where it was contended that the effect of such a contract was to make it a matter of indifference to a company dealing with the general public whether it employed honest or dishonest agents to deal with its patrons.

9. This is true even though there is nothing in the bond to indicate that the insured, and not the insurer, is to procure the employee to sign the bond, and notwithstanding subsequent renewals of the bond, they being made subject to all the conditions contained in the original bond. Union Cent. L. Ins. Co. *v.* U. S. Fidelity, etc., Co., 99 Md. 423, 58 Atl. 437; Adelberg *v.* U. S. Fidelity, etc., Co., 45 Misc. (N. Y.) 376, 90 N. Y. Suppl. 465.

10. Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989. See also People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124.

11. City Trust, etc., Co. *v.* Lee, 204 Ill. 69, 68 N. E. 485 [*affirming* 107 Ill. App. 253]; Champion Ice Mfg. Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356; Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 69 Pac. 989; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542, and in effect *overruling* 68 Fed. 459 (*affirmed* in 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818])]; American Surety Co. *v.* Pauly, 170 U. S. 160, 18 S. Ct. 563, 42 L. ed. 987; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644]; American Bonding Co. *v.* Spokane Bldg., etc., Soc., 130 Fed. 737, 65 C. C. A. 121; Carstairs *v.* American Bonding, etc., Co., 116 Fed. 449, 54 C. C. A. 85.

Construction upholding contract.— Defendant contracted to indemnify plaintiff against any loss arising from the fraud or dishonesty of a certain factor at a certain town in his management of plaintiff's money intrusted to him with which to buy cotton. The factor was one of a firm and had exclusive control of the business at the town named. Plaintiff had no separate contract with the individual factor, but had a written contract with the firm to buy cotton at such town, and such contract was shown to defendant at the time of executing the contract of indemnity, and was referred to therein as the contract between plaintiff and the factor. It was held that plaintiff could recover on the indemnity contract, although its business with the factor was in the name of the firm of which he was a member. Clifton Mfg. Co. *v.* U. S. Fidelity, etc., Co., 60 S. C. 128, 38 S. E. 790.

12. Union Cent. L. Ins. Co. *v.* U. S. Fidelity, etc., Co., 99 Md. 423, 58 Atl. 437; New York Fidelity, etc., Co. *v.* Consolidated Nat. Bank, 71 Fed. 116, 17 C. C. A. 641 [*reversing* 67 Fed. 874].

13. Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S.

IV. LIABILITY OF INSURER.

A. Losses Covered by Policy. In order to create a liability on the part of the insurer, the loss must be one which is covered by the terms of the policy, fairly construed.[14] A policy, bond, or contract of the character under discussion usually by its terms covers only losses due to "fraud or dishonesty" on the part of the employee,[15] and in such case the liability of the insurer is restricted to claims based upon the larceny, embezzlement, or at least the dishonesty of the employee,[16] and a loss resulting from the employee's carelessness or inattention to business or other acts or omissions not fraudulent or dishonest imposes no liability on the insurer.[17] The better opinion appears to be that where the policy insures against loss through the "fraud and dishonesty amounting to embezzlement or larceny" of the employee, the words "fraud or dishonesty" are to be taken in their ordinary sense, and it is not necessary that the acts of the employee should have been such as to subject him to an indictment and conviction for larceny or embezzlement.[18] And in order that liability may attach on a bond conditioned to insure an employer against larceny or embezzlement by an employee, it is not necessary for the employer to introduce such proof as would convict the employee of the crime of larceny or embezzlement as defined by the laws of the state.[19] Where a policy guarantees not only the honesty but also the diligence and faithfulness of the employee, any loss due to his negligence or irregularities must fall on the insurer.[20]

B. Time Covered by Policy. The contract usually covers only losses from acts of the employee committed while it is in force,[21] and does not render the

402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542, and in effect *overruling* 68 Fed. 459 (*affirmed* in 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818])]; Carstairs *v.* American Bonding, etc., Co., 116 Fed. 449, 54 C. C. A. 85.

14. See Milwaukee Theatre Co. *v.* Fidelity, etc., Co., 92 Wis. 412, 66 N. W. 360, holding that an arrangement between a corporation and its treasurer by which he is to pay interest on the moneys in his hands makes him, as to such moneys, merely a debtor of the corporation, and his failure to pay them over to his successor on demand is therefore not an embezzlement thereof such as will create a liability upon a bond to reimburse to the corporation any loss resulting from embezzlement or larceny by such treasurer.

"Fraud and dishonesty amounting to embezzlement."— Where the cashier of a bank removed a bundle of notes from the bank premises to his residence for the purpose of signing them, but it appeared that he brought them all back, and subsequently, in his office in the bank, he put a number of five-dollar notes in the bundle instead of ten-dollar notes, and thus defrauded the bank, it was held that in intrusting the notes to the cashier to be signed there was no negligence on the part of the bank involving a violation of the terms of a contract of fidelity insurance, and that the loss was one caused by "fraud and dishonesty amounting to embezzlement" on the part of the cashier and came within the guaranty given by the policy. London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25.

15. See Monongahela Coal Co. *v.* Fidelity, etc., Co., 94 Fed. 732, 36 C. C. A. 444.

16. Clifton Mfg. Co. *v.* U. S. Fidelity, etc., Co., 60 S. C. 128, 38 S. E. 790; Monongahela Coal Co. *v.* Fidelity, etc., Co. of America, 94 Fed. 732, 36 C. C. A. 444.

An indebtedness from the employee to the employer is not of itself sufficient to authorize a recovery by the employer. Monongahela Coal Co. *v.* Fidelity, etc., Co., 94 Fed. 732, 36 C. C. A. 444.

17. Monongahela Coal Co. *v.* Fidelity, etc., Co., 94 Fed. 732, 36 C. C. A. 444.

18. City Trust, etc., Co. *v.* Lee, 204 Ill. 69, 68 N. E. 485 [*affirming* 107 Ill. App. 263]; London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25. *Contra,* Reed *v.* Fidelity, etc., Co., 189 Pa. St. 596, 42 Atl. 294.

19. Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356.

20. *Re* Citizens' Ins. Co., 16 Can. L. J. 334; European Ins. Soc. *v.* Toronto Bank, 7 Rev. Lég. 57 (irregularity of agent in allowing persons to overdraw their account); Colonial Bank *v.* European Ins., etc., Soc., 1 W. W. & A'Beck. (Vict.) (Law) 15 [*distinguishing* Ionides *v.* Universal Mar. Ins. Co., 14 C. B. N. S. 259, 10 Jur. N. S. 18, 32 L. J. C. P. 170, 8 L. T. Rep. N. S. 705, 11 Wkly. Rep. 858, 108 E. C. L. 259].

21. Supreme Council C. K. of A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96, holding that where obligations of a beneficial association, which should have been paid by the treasurer during his former term,

insurer liable for losses resulting from acts committed before the contract was entered into.[22]

C. Time of Discovery as Affecting Liability. The bond or policy sometimes contains a provision limiting the liability of the insurer to losses discovered during the time of its continuance,[23] or within a fixed period after its discontinuance,[24] or the death, dismissal, or retirement of the employee,[25] and in

were carried forward by him into his new term, and paid out of current receipts, as such obligations were not discharged when assessments were made sufficient to meet them, but continued obligations until paid, their payment out of funds of the association did not amount to embezzlement or larceny committed during the new term, and the surety was not liable for the misappropriation. See also New York Fidelity, etc., Co. *v.* Consolidated Nat. Bank, 71 Fed. 116, 17 C. C. A. 641.

When contract in force.— Where a bond recited that it was made July 1, 1891, and stated that it was for a term ending July 1, 1892, and an indorsement on its back stated those days to be the dates of the bond and of its expiration, and the premium received covered one year, but the bond was dated July 10, 1891, it was held that the bond was properly construed as in effect from July 1, 1891, without regard to evidence as to when it was accepted. Supreme Council C. K. of A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

Effect of renewal.— A fidelity bond given to reimburse a bank for loss occasioned by the fraud or dishonesty of its bookkeeper recited that the insurer would make good to the employer, to the extent of seven thousand dollars, all pecuniary loss occasioned by the dishonesty of the employee occurring during the continuance of the bond or any renewal thereof. The liability of the bond was limited to default occurring during one year. A renewal bond guaranteeing the fidelity of the employee for the following year was given. It recited that it was a renewal bond, subject to the conditions of the original bond. It was held that the renewal bond was a new contract only so far as it extended the indemnity of the original bond to another year, but there was in effect one bond, with one penalty. Nashville First Nat. Bank *v.* U. S. Fidelity, etc., Co., 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765.

To what period deficit attributable.— The plaintiffs made, on Jan. 1, 1879, their claim under the policy, which only extended to losses occurring within the period of twelve months prior to such claim being made. It appeared that at the end of 1877, the default was six hundred and seventy-four dollars, which was increased during the first two months of 1878, to one thousand two hundred and sixty-one dollars and fifty-seven cents, but in the next four months the deficiency was reduced by payments to two hundred and ninety-two dollars and eighty-five cents, after which it again increased until, at the end of 1878, it amounted to eight hundred and forty-four dollars and twenty-two cents. It was held that, in the absence of any specific appropriation, the payments must be appropriated to the earliest items of the default, thereby paying off the whole of the default due at the end of 1877, so that the whole amount of eight hundred and twenty-four dollars and twenty-two cents, due at the end of 1878, must be deemed to have accrued due within that year. Board of Education *v.* Citizens' Ins., etc., Co., 30 U. C. C. P. 132.

Conclusiveness of entries, receipts, and reports.— On the reappointment of the treasurer of a beneficial association for a new term, a surety company gave to the association its bond to make good "such pecuniary loss, if any, as may be sustained by the employer by reason of fraud or dishonesty of the employed in connection with the duties referred to, amounting to embezzlement or larceny, which was committed and discovered during the continuance of said term, or any renewal thereof," it was held that entries, receipts, and reports made by the treasurer during the life of the bond, in the ordinary course of his duty as treasurer, charging himself with certain items, were not conclusive against the surety as to the time when such items were received, there being no circumstances creating an estoppel *in pais*. Supreme Council C. K. of A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

22. Dorsey *v.* Fidelity, etc., Co., 98 Ga. 456, 25 S. E. 521.

23. American Surety Co. *v.* Pauly, 170 U. S. 160, 18 S. Ct. 563, 42 L. ed. 987; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644]; Commercial Mut. Bldg. Soc. *v.* London Guarantee, etc., Co., 7 Montreal Q. B. 307; Fanning *v.* London Guarantee, etc., Co., 10 Vict. L. Rep. 8.

24. American Surety Co. *v.* Pauly, 170 U. S. 160, 18 S. Ct. 563, 42 L. ed. 987; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

25. American Surety Co. *v.* Pauly, 170 U. S. 160, 18 S. Ct. 563, 42 L. ed. 987; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644]; Commercial Mut., etc., Soc. *v.* London Guaranty, etc., Co., 7 Montreal Q. B. 307.

What constitutes retirement.— Where, by the terms of the bond, the insurer agreed to make good and reimburse any loss to the insured, a bank, caused by any act of fraud or dishonesty on the part of an officer, not only with regard to his duties as such officer, but

such case there is no liability unless the fraud, dishonesty, or negligence causing the loss not only occurred, but was discovered within the time limited.[26] The same is true where the liability is limited to acts or defaults committed within a certain time prior to their discovery.[27]

D. Change in Employee's Position or Duties. Where a new contract made by an employer with an employee increases the responsibilities of the employee, such new contract discharges a fidelity company from liability on its bond,[28] unless the obligation in terms covers the acts of the employee in any position or duties to which he may be assigned in the employer's service, as well as in regard to his position and duties at the time the obligation is entered into.[29]

E. Release From Liability. The act of the employer in intrusting money or property to the employee after discovering his dishonesty will usually release the insurer from liability for subsequent acts of the employee.[30] The fact that the employee has made over to the employer money or property which has been or might have been applied to make good the loss caused by the employee's act or default does not, at least where the whole loss has not been made good, amount to such a settlement or condonation as will relieve the insurer of liability,[31] nor does such relief result from the fact that the employer has recovered a part of the money taken by the employee,[32] or that the amount lost might be recovered by the employer from other sources.[33] A claim on a policy of fidelity insurance

in connection with the duties to which, in the employer's service, he might be subsequently appointed, and the liability was limited to losses occurring during the continuance of the bond and discovered during such continuance or within six months thereafter, and within six months from the death, dismissal, or retirement of the employee from the service of the employer, it was held that where the bank suspended and the bank examiner entered upon an investigation of its affairs, the officer did not retire from the service of the bank, within the meaning of the bond, but remained in the service of the employer during at least the investigation of the bank's affairs and the custody of its assets by the national bank examiner, which lasted until the appointment and qualification of a receiver, and hence that notice given within six months from the latter date was sufficient. American Surety Co. *v.* Pauly, 170 U. S. 160, 18 S. Ct. 563, 42 L. ed. 987; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

26. See cases cited *supra*, notes 23, 24, 25.

27. New York Fidelity, etc., Co. *v.* Consolidated Nat. Bank, 71 Fed. 116, 17 C. C. A. 641 [*reversing* 67 Fed. 874], so holding, although the default of the employee would have been discovered within the prescribed time after its commission, had not such discovery been prevented by the employee's falsifying the books.

28. Sun L. Ins. Co. *v.* U. S. Fidelity, etc., Co., 130 N. C. 129, 40 S. E. 975, holding further that it was error to instruct that the insurer had waived any difference between its liability under the two contracts by certain correspondence, where there was no evidence tending to show that the insurer ever had notice of the execution of the later contract.

29. Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821 (additional office conferred or duties imposed without notice to insurer covered); Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356.

30. Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989, where the bond so provided. See also Phillips *v.* Foxall, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293, 27 L. T. Rep. N. S. 231, 20 Wkly. Rep. 900.

Failure to suspend employee.— Under 12 & 13 Vict. c. 91, the power of dismissing rate collectors is vested in the lord lieutenant, but by regulations of the privy council, made under the act, the collector general is empowered to suspend any collector who in his opinion has been guilty of neglect of duty. In Byrne *v.* Muzia, 8 L. R. Ir. 396, it was held that the omission of the collector general to suspend the collector, after knowledge of fraud and dishonesty on his part during his service and employment, was not a defense to an action on the guaranty: (1) Because the doctrine of Phillips *v.* Foxall, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293, 27 L. T. Rep. N. S. 231, 20 Wkly. Rep. 900, was inapplicable to a guaranty for the fidelity of an officer appointed and removable by the lord lieutenant; (2) because the omission to exercise a power of suspension as distinguished from a power of dismissal did not terminate the liability of the sureties.

31. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 92 N. W. 686; Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989.

32. London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25, where there is a balance of loss remaining exceeding the amount of the policy.

33. Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep.

is not affected by communications of the employer with the employee after his appropriation of the employer's funds and flight where such communications did not have any injurious effect as regarded the insurer.[34]

V. DUTIES OF INSURED.

A. Supervision of Employee. It has been held that in order to warrant a recovery of a policy guaranteeing the fidelity of an employee, the employer must perform all the duties with respect to supervision of the employee and the like which are imposed upon him by the contract or the proposal or application upon which it is based, and which is made a part thereof.[35]

B. Notice of Fraud, Dishonesty, Etc. The bond or policy frequently imposes upon the insured the duty of informing the insurer of any acts of the employee which are fraudulent or dishonest or may involve a loss,[36] as soon as, or

356, holding that the fact, although conceded, that a bank was liable for a loss resulting to an employer through the fraudulent act of his employee in raising the amount of checks drawn on the bank, would not release such employee's surety on a fiduciary bond from liability to the employer.

34. London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25.

35. Young *v.* Pacific Surety Co., 137 Cal. 596, 70 Pac. 660; Rice *v.* Maryland Fidelity, etc., Co., 103 Fed. 427, 43 C. C. A. 270; Board of Education *v.* Citizens' Ins., etc., Co., 30 U. C. C. P. 132. But see *infra*, VI.

Where the employer is a corporation, a stipulation "that the employer shall observe, or cause to be observed, due and customary supervision over the employee for the prevention of default, and if the employer shall at any time during the currency of this bond condone any act or default upon the part of the employé which would give the employer the right to claim hereunder, and shall continue the employé in his service without written notice to the company, the company shall not be responsible hereunder for any default of the employé which may occur subsequent to such act or default so condoned" in reason imports that the things forbidden to be done or agreed to be done are to be either done or left undone by the corporation in its corporate capacity, speaking and acting through the representative agents empowered by the charter to do or not to do the things pointed out, and such a stipulation is not fairly subject to the construction that it was the intention that the neglect or omission of a minority in number of the board of directors, or the neglect or omission of subordinate officers or agents of the corporation, should be treated as the neglect or omission of the corporation. Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 362, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331].

What constitutes compliance with conditions.— An application to a surety company for a bond to secure the faithful performance of his duties by the cashier of the applicant, a corporation, contained the following question and answer: "It is suggested: (1) That all moneys and checks received be deposited intact in bank, and all disbursements be made either by check or from a petty cash fund drawn from the bank as required; and (2) that all checks received be indorsed 'For deposit,' to prevent any loss or conversion. To what extent will these practices be followed?" Answer: "Fully." It was held that the employer complied with such warranty by adopting a regulation requiring all checks to be deposited, indorsed as therein specified, and by exercising reasonable supervision over its cashier to see that the practice was pursued; and that the answer to such question could not be construed as an absolute warranty by the employer that its cashier would adopt all checks, properly indorsed, and to relieve the surety from liability for the failure to make such deposits, contrary to the employer's regulations, and without its knowledge, where it exercised reasonable diligence in the premises. Brooklyn Phenix Ins. Co. *v.* Guarantee Co. of North America, 115 Fed. 964, 53 C. C. A. 360.

36. Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542] (speculation or gambling of employee); American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

Time to which condition relates.— Where defendants, by their agreement, contracted to guarantee plaintiff against loss sustained by any act of fraud, dishonesty, etc., of an employee, provided that plaintiff should, "within ten days after the discovery by him of any fraud or dishonesty of the 'said persons employed,' and of any matter in respect of which any claim may be intended to be made, give notice in writing, at the office of the society, as far as the case will admit, of all the particulars thereof; and after any such discovery, the guaranty herein contained shall, as to loss by any act of fraud or dishonesty, subsequent thereto, be at an end," it was held that the proviso required notice to be given of such fraud or dishonesty only as would form the foundation of a claim under the guaranty and did not impose upon plaintiff an obligation to give notice if he discovered that fraud or dishonesty had occurred

as soon as practicable after, the facts come to the knowledge of the employer,[37] and failure of the employee to comply with such a condition will defeat a recovery.[38]

C. Notice of Loss. It is very usually stipulated in policies or bonds of the nature under discussion, as a condition precedent to a recovery thereon, that the insured shall, upon the discovery of any default or loss, immediately give the insurer notice,[39] in writing.[40] Such a stipulation has, however, been construed to require, not that notice should be given to the insurer instantly on the discovery of a default or loss, but merely that such notice should be given within a reasonable time thereafter, having in view all the circumstances of the case.[41]

on the part of the person employed, before the guaranty was entered into or the employment under himself commenced. Byrne *v.* Muzio, 8 L. R. Ir. 396.

37. American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

A provision requiring notice to the insurer "as soon as practicable" after the occurrence of an act on the part of the employee which may involve a loss shall have come to the knowledge of the insured makes it the duty of the insured to transmit information of such acts on the part of the employee, not as soon as possible, but with reasonable promptness, and it is for the jury to say whether the notice was given within a reasonable time. American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

Whether positive knowledge necessary.— Under a condition of the contract requiring the insured to give written notice to the insurer of any act of the employee which may involve a loss for which the insurer is responsible as soon as practicable after the occurrence of such act "shall have come to the knowledge" of the insured, it is not sufficient to defeat the insured's right of action that it be shown that he may have had suspicions of dishonest conduct of the employee. American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644]. But a provision of the contract requiring the insured to notify the insurer immediately upon "becoming aware" of the employee being engaged in speculation or gambling means that such notice shall be given when the insurer is "informed of," "apprised of," or "put on guard in respect to" such conduct on the part of employee, and the phrase "becoming aware" cannot be considered as meaning "having knowledge," nor can it be considered equivalent to "becoming satisfied." Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542, and *overruling* 68 Fed. 459 (*affirmed* in 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818])].

Knowledge of co-employee.—Where the contract contained no stipulation making it in the least degree incumbent upon the insured, a bank, to exercise any diligence or care in inquiring into or supervising the conduct of the particular employee, or of any of his co-employees in its service, and imposed upon it no duty of vouching for the fidelity or efficiency of the latter, or of requiring them to watch or report upon his actions and doings, information or knowledge on the part of the bank's cashier, he being only such a co-employee, as to the matters concerning which the company had stipulated for notice, would not, relatively to it, be, under these circumstances, imputable to the bank itself. Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821.

38. See *supra*, notes 36, 37.

39. Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331].

40. Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331].

41. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 92 N. W. 686 (holding that a delay of six or eight days in notifying a surety company of an employee's defalcation, where no prejudice resulted, was not, as a matter of law, a violation of a condition of the bond requiring immediate notice); Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331] (where a notice given within from ten to seventeen days after the first discovery of a default was held sufficient); London Guarantee, etc., Co. *v.* Hochelaga Bank, 3 Quebec Q. B. 25 (where notice of the loss given to the local agent of the guaranty company the day after it was discovered by the employer was held to be in proper time).

Where notice too late.— Where the employer, although aware of a defalcation on the twenty-fifth, did not give notice thereof to the guarantor until the twenty-seventh, after the employee had fled the country, the bond was forfeited. Molsons Bank *v.* Guarantee Co. of North America, 4 Montreal Super. Ct. 376. Where the guarantors were not notified until a week after the employer had full notice of the employee's defalcation and he had left the country, it was held that there could be no recovery under the policy. Harbour Com'rs *v.* Guarantee Co. of North America, 22 Can. Sup. Ct. 542.

Question for jury.— An employee's surety bond provided that the employer should give the company immediate notice of the discov-

Such notice may be waived by the insurer, or a waiver may result from the acts of the insurer's authorized agent.[42]

D Proof of Loss. It is usually required that the insured shall file with the insurer his claim with full particulars thereof, immediately or as soon as practicable after giving notice of a default or loss.[43]

E. Criminal Prosecution of Employee. A criminal prosecution of the employee by the employer, if required by the insurer, may, by the terms of the contract, be made a condition precedent to a recovery against the insurer.[44]

VI. REPRESENTATIONS INDUCING CONTRACT OR RENEWALS.

As a general rule before a contract of fidelity insurance is entered into or renewed, the applicant is required to make certain statements or answer certain questions as to the character of the employee, the state of his accounts, and the like,[45] and if such statements or answers are untrue the contract is thereby avoided,[46] especially where it is expressly provided by the contract that such repre-

ery of any loss or default, and should file his claim, with full particulars, immediately thereafter, and that the bond should be void if immediate notice was not given. The employer discovered defalcations on August 20, but did not notify the company until October 3. He, however, immediately endeavored to secure a bookkeeper to ascertain the exact amount of the defalcations. One was obtained about September 1, and finished his examination October 2, notice being sent the day following. It was held to be a question for the jury whether the notice was given within the required time. Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989.

42. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 92 N. W. 686, holding that where a surety company sent an inspector to ascertain the nature and extent of the delinquencies of an employee it had bonded, and such inspector insisted on the examination of the employee's books by an expert accountant, the surety company was charged with notice of what was going on, and likely to be ascertained, at least so far as to constitute waiver of notice of defalcations subsequently discovered, until the examination had been completed, although the contract required immediate notice.

43. See Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989; Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331], where an instruction that a proof of claim sent by a receiver of the insured on July 2, 1897, was made "as soon as practicable" after the giving of notice of the default, which notice was given on Feb. 18, 1897, was held proper where the investigation to ascertain the various defaults of the employee continued after the giving of the preliminary notice of default, and the evidence in the record failed to give any support to the contention that the proof of claim was unreasonably delayed and was not made as soon as practicable after the full particulars thereof were ascertained.

44. London Guarantie Co. *v.* Fearnley, 5 App. Cas. 911, 45 J. P. 4, 43 L. T. Rep. N. S. 390, 28 Wkly. Rep. 893.

45. See Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331].

46. Imperial Bldg., etc., Co. *v.* U. S. Fidelity, etc., Co., 23 Ohio Cir. Ct. 243; Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331]. See also Ottawa Agricultural Ins. Co. *v.* Canada Guarantee Co., 30 U. C. C. P. 360.

Statement as to knowledge.— Statements made by the insured that its secretary was not in arrears or was not to the knowledge of the employer or its officers in arrears or a defaulter or in debt to it, etc., did not constitute a warranty that the secretary was not indebted to it at the time as a fact, but only that he was not so indebted, etc., to the knowledge of the association or its officers. American Bonding Co. *v.* Spokane Bldg., etc., Soc., 130 Fed. 737, 65 C. C. A. 121.

Facts as to which no representation made. — Where a bond for the fidelity of the treasurer of a beneficial association recited that the association had delivered to the company certain statements relative to the duties and accounts of the treasurer, which it was agreed should form the basis of the contract expressed in the bond, it was held that if such statements involved no misrepresentation or concealment the contract could not be affected by loose parol statements or concealment of facts about which no inquiry was made, or conduct on which no reliance was placed, or by conversations, as to laws of the association, with its vice-president, at the time of application for the bond, it not appearing that he had authority to make any representations on the subject, or by the fact that at the time of such application the treasurer was in default to the association, there being no representation to the contrary in the statements delivered, and nothing to show that at that time the fact was known to any officer of the association. Supreme Council C. K.

sentations or answers are a part or the basis thereof.[47] Where the insured is a corporation, statements and answers made by an officer, who in making the same represents and is properly acting for the corporation, are binding upon it.[48] Statements in the application as to the conduct of the employer's business, the checks to be used to detect error or fraud on the part of the employee, the amount with which he would be intrusted, and the like, have been considered mere promissory representations of intention rather than warranties.[49]

of A. *v.* New York Fidelity, etc., Co., 63 Fed. 48, 11 C. C. A. 96.

The Tennessee statute, which provides that no representation or warranty made in negotiations for a contract or policy of insurance, or in any application therefor, shall be deemed material or defeat the policy unless the misrepresentation is made with actual intent to deceive, or unless it increases the risk of the loss, applies to fidelity bonds given to an employer to indemnify him for losses occasioned by the fraud of an employee. Nashville First Nat. Bank *v.* U. S. Fidelity, etc., Co., 110 Tenn. 10, 75 S. W. 1076, 100 Am. St. Rep. 765, holding further that the question whether statements of a bank cashier made to a fidelity company during the negotiations for the issuance of a bond insuring the fidelity of an employee of the bank were true was for the jury.

Ont. Ins. Act (1892), § 33, subs. 2, provides that no contract of insurance made or renewed after the commencement of the act shall contain any condition that the contract shall be avoided by reason of any statement in the application therefor, or inducing the entering into of the contract by the corporation, unless such condition is limited to cases in which such statement is material to the contract, and no contract within the intent of such section of such act shall be avoided by reason of the inaccuracy of any such statement unless it be material to the contract. Accordingly a condition of such character which is not limited to cases in which the statement inducing the contract is material to the contract is illegal and cannot be relied upon to defeat a claim under the contract. London West *v.* London Guarantee, etc., Co., 26 Ont. 520.

47. Young *v.* Pacific Surety Co., 137 Cal. 596, 70 Pac. 660; Model Mill Co. *v.* Maryland Fidelity, etc., Co., 1 Tenn. Ch. App. 365; Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331]; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542, and in effect *overruling* 68 Fed. 459 (*affirmed* in 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818])].

Unintentional misrepresentation.— An employee's surety bond provided for its renewal from year to year. At the time of its issuance the employer agreed to make monthly examinations of the employee's accounts, and did so, as agreed. The bond expired July 1, and afterward, on July 20, the employer, having examined the books, made a renewal certificate reciting that they were correct, and all moneys accounted for, and an extension of the policy was granted. The books were apparently correct, but as a matter of fact defalcations had occurred which an expert might have detected. It was held that under the circumstances the certificate was a representation of a fact and not a warranty of its truth. Remington *v.* Maryland Fidelity, etc., Co., 27 Wash. 429, 67 Pac. 989. But *compare* Model Mill Co. *v.* Maryland Fidelity, etc., Co., 1 Tenn. Ch. App. 365, holding that recovery could not be had on a bond insuring against loss by the dishonesty of an employee where answers to questions on material matters were untrue, although they were not known to the applicant to be untrue and there was no bad faith on the part of the applicant.

48. Maryland Fidelity, etc., Co. *v.* Courtney, 186 U. S. 342, 22 S. Ct. 833, 46 L. ed. 1193 [*affirming* 103 Fed. 599, 43 C. C. A. 331, and *distinguishing* American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977]; Guarantee Co. of North America *v.* Mechanics' Sav. Bank, etc., Co., 183 U. S. 402, 22 S. Ct. 124, 46 L. ed. 253 [*reversing* 100 Fed. 559, 40 C. C. A. 542, and in effect *overruling* 68 Fed. 459 (*affirmed* in 80 Fed. 766, 26 C. C. A. 146 [*reversed* on other grounds in 173 U. S. 582, 19 S. Ct. 551, 43 L. ed. 818])]; Carstairs *v.* American Bonding, etc., Co., 116 Fed. 449, 54 C. C. A. 85.

Personal statements of an officer of the insured corporation, not authorized by or purporting to emanate from the corporation, do not bind the latter. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 92 N. W. 686; American Surety Co. *v.* Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977 [*affirming* 72 Fed. 470, 18 C. C. A. 644].

49. Champion Ice Mfg., etc., Co. *v.* American Bonding, etc., Co., 115 Ky. 863, 75 S. W. 197, 25 Ky. L. Rep. 239, 103 Am. St. Rep. 356 (holding that statements by an employer in an application for a fiduciary bond for one of his employees that such employee's position would be merely that of bookkeeper, and that the largest amount of cash likely to be in his custody would be but a few dollars, did not amount to warranting, under Ky. St. (1899) § 639, providing that all statements or descriptions in an application for an insurance policy shall be deemed representations, and not warranties); Brooklyn Phenix Ins. Co. *v.* Guarantee Co. of North America, 115 Fed. 964, 53 C. C. A. 360; Benham *v.* Guarantee, etc., L. Assur. Co., 7 Exch. 744, 16 Jur. 691, 21 L. J. Exch. 317 (statement

VII. PLEADING.

In an action on a contract of fidelity and guaranty insurance, plaintiff must state his cause of action and defendant its defenses according to the usual rules of pleading.[50] A failure of the complaint to fully set out the contract is cured where it is set out in full in the answer.[51] Defendant must aver and prove breaches of the stipulations of plaintiff contained in his application where such breaches are relied on.[52]

VIII. EVIDENCE.

It is incumbent upon plaintiff to prove his case as laid,[53] and any legitimate evidence tending to this end should be admitted.[54] On an issue whether the president of a building and loan association had made false representations to a surety company as to the business integrity of an employee, a question whether, at the time of such statement, he knew that the employee had failed to make his

that accounts of employee would be examined by finance committee every fortnight). But *compare* Towle *v.* National Guardian Ins. Soc., 7 Jur. N. S. 1109, 30 L. J. Ch. 900, 5 L. T. Rep. N. S. 193, 10 Wkly. Rep. 49 [*reversing* 7 Jur. N. S. 618], holding that the policy was avoided by a misrepresentation as to the amount to be received weekly by the employee. And see *supra*, V, A.

50. See, generally, PLEADING.

Defective amendment.— Where defendant filed an amendment to its plea, which amendment alleged that the employee had, within the knowledge of plaintiff, been guilty of a specified default, such amendment not being legally complete without further alleging that plaintiff had failed to duly notify defendant of the default in question, was properly stricken on demurrer. Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821.

51. Tarboro Bank *v.* Fidelity, etc., Co., 126 N. C. 320, 35 N. E. 588, 83 Am. St. Rep. 682.

52. Tarboro Bank *v.* Fidelity, etc., Co., 126 N. C. 320, 35 N. E. 588, 83 Am. St. Rep. 682.

Necessity of pleading fraud.— In an action upon a guaranty for the fidelity of an employee, a plea of defendants that the contract was entered into by them on the faith of a certain statement and representation made by plaintiff and the person employed that there had been no balance outstanding from the latter, nor any irregularity in his accounts, and that such representation was untrue was held had on demurrer, for not alleging, either that the statement was fraudulent or circumstances from which fraud could be inferred as matter of law. Byrne *v.* Muzio, 3 L. R. Ir. 396.

53. Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821.

54. Clifton Mfg. Co. *v.* U. S. Fidelity, etc., Co., 60 S. C. 128, 38 S. E. 790, holding that where defendant contracted to indemnify plaintiff against any loss arising from the fraud or dishonesty of plaintiff's agent in his management of plaintiff's money intrusted to him to buy cotton, and by the written contract with plaintiff the agent agreed that such money should be kept separate from any other funds, and that on demand he would return any unexpended moneys of plaintiff, any evidence tending to show a criminal intent on the part of the agent in the use and disposition of the money was competent, since plaintiff could recover on the guaranty only on showing fraud or dishonesty.

Previous fraudulent or dishonest acts of employee.— In an action on a bond insuring the fidelity of a bank cashier, evidence of acts of fraud and dishonesty by the cashier, occurring before the date of the bond, and for which no claim was made against the surety company, but which were similar to the acts on which the claim was based, was admissible to show that the acts on which the claim was based were intentional, and not merely negligent or due to oversight. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644 [*affirmed* in 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977].

Account-books.— In an action on a bond insuring the fidelity of a bank cashier, for the purpose of showing the dealings with the bank of the president, who was charged with having misappropriated the bank's money with the cashier's aid, the president's ledger account was put in evidence, together with the testimony of the bookkeeper who made the entries, and who swore that they were correctly made from the original deposit slips and checks furnished to him by the teller, who had died before the trial; that it had been the teller's duty to verify all deposit slips and to pay the checks; and that all such slips and checks, when reaching the bookkeeper's hands, bore marks indicating that they had been verified or paid by the teller. It was held that the account was competent and sufficiently proven. American Surety Co. *v.* Pauly, 72 Fed. 470, 18 C. C. A. 644 [*affirmed* in 170 U. S. 133, 18 S. Ct. 552, 42 L. ed. 977], holding further that the "teller's book" of the bank, which had been kept by a person who died before the trial, and which was offered in evidence to show that on certain days no money was received for

semiannual report was properly excluded, where there was no evidence that it was the employee's duty to make such report.[55]

IX. SUBROGATION TO RIGHTS OF EMPLOYER.

A corporation which has insured an employer against loss by reason of the want of integrity or fidelity, or by reason of the misconduct of one of his employees, stands in the shoes of the employer and has a right to be subrogated to all the rights of the employer in the prosecution of dishonest employees, and also has a right to all the remedies that the defrauded employer would have.[56]

FIDES EST OBLIGATIO CONSCIENTIÆ ALICUJUS AD INTENTIONEM ALTERIUS. A maxim meaning "A trust is an obligation of conscience of one to the will of another."[1]

FIDES SERVANDA. A maxim meaning "Good faith must be observed."[2]

FIDES SERVANDA EST; SIMPLICITAS JURIS GENTIUM PRÆVALEAT. A maxim meaning "Good faith is to be preserved; the simplicity of the law of nations should prevail."[3]

FIDUCIARY. As a noun, a person holding the character of a trustee, or a character analogous to that of a trustee.[4] As an adjective, the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.[5] (See, generally, TRUSTS.)

FIEF. A term used in the Norman law to designate real estate.[6]

FIELD.[7] Cleared land for cultivation or other purposes, whether inclosed or not;[8] a cultivated tract of land;[9] a wide extent of land, suitable for tillage or pasture.[10] In the method of gambling by selling pools on horse races, the term is sometimes used to designate the number of horses in the race which are not selected by the persons selecting particular horses as winners.[11]

certificates of deposit, was competent, in connection with evidence of the course of business by which, if received, such money would be entered in the book, although not conclusive.

55. Perpetual Bldg., etc., Assoc. *v.* U. S. Fidelity, etc., Co., 118 Iowa 729, 92 N. W. 686.

56. London Guaranty, etc., Co. *v.* Geddes, 22 Fed. 639. Where a contract guaranteeing the fidelity of an employee is executed at his request, his obligation to indemnify the insurer is coextensive with the obligation of the latter to indemnify the employer, and any provisions in the contract between the insurer and the employer as to proof of liability which are binding on the insurer in favor of the employer are equally binding on the employee in favor of the insurer. New York Fidelity, etc., Co. *v.* Eickhoff, 63 Minn. 170, 65 N. W. 351, 56 Am. St. Rep. 464, 30 L. R. A. 586, holding, however, that a stipulation between the insurer and the employee that the voucher or other evidence of payment by the insurer to the employer should be conclusive evidence against the employee as to the fact and extent of his liability to the insurer was void as against public policy in so far as it made such voucher or other evidence of payment conclusive evidence.

1. Wharton L. Lex.

2. Bouvier L. Dict.

Applied in McCoy *v.* Artcher, 3 Barb. (N. Y.) 323, 330.

3. Bouvier L. Dict. [*citing* Story Bills, § 15].

Applied in Pillans *v.* Van Mierop, 3 Burr. 1663, 1672.

4. Black L. Dict.

5. Black L. Dict.

Fiduciary capacity see 9 Cyc. 24, 127; 5 Cyc. 399; 3 Cyc. 908, 947.

Fiduciary interest see 8 Cyc. 69 note 13.

Fiduciary obligation see 7 Cyc. 264 note 43.

Fiduciary relation see 10 Cyc. 614; 9 Cyc. 410, 470; 8 Cyc. 52, 264, note 43, 502 note 5, 565 note 1; 7 Cyc. 951; 6 Cyc. 335; 1 Cyc. 55.

6. Dowdel *v.* Hamm, 2 Watts (Pa.) 61, 65.

7. "In his field" on the Lord's day as used in an indictment see Com. *v.* Josselyn, 97 Mass. 411, 412.

Field driver see 2 Cyc. note 7.

"Re-enlisted in the field" see Sargent *v.* Ludlow, 42 Vt. 726, 729.

Stock injured in the "field" see 2 Cyc. 431 note 22.

8. Com. *v.* Wilson, 9 Leigh (Va.) 648, 649.

May include a garden see Com. *v.* Josselyn, 97 Mass. 411, 412.

"Fields and fenced lands" see Hearst *v.* Pujol, 44 Cal. 230, 234.

9. State *v.* McMinn, 81 N. C. 585, 587 [*citing* Worcester Dict.], where the term is distinguished from "lot."

10. Southern Kansas R. Co. *v.* Isaacs, 20 Tex. Civ. App. 466, 467, 49 S. W. 690.

11. James *v.* State, 63 Md. 242, 248.

FIELD-NOTES.[12] See Boundaries.

FIERI FACIAS.[13] Literally, "That you cause to be made."[14] The process to enforce the collection of a claim which has gone to a judgment which has become final and executory.[15] (See, generally, Executions. See also Fi. Fa.)

FIERI FACIAS DE BONIS PROPRIIS. A writ for the seizure of the goods of an executor, where devastavit has prevented satisfaction of a judgment from goods of the testator.[16] (See, generally, Executors and Administrators.)

FIERI FACIAS DE BONIS TESTATORIS. The writ issued on an ordinary judgment against an executor when sued for a debt due by his testator.[17] (See, generally, Executors and Administrators.)

FIERI NON DEBET, SED FACTUM VALET. A maxim meaning "It ought not to be done, but done it is valid."[18]

FI. FA. An abbreviation of Fieri Facias,[19] *q. v.*

FIFTEENTH AMENDMENT. See Constitutional Law.

FIFTY TRIP TICKET. See Excursion Ticket.

FIGHT. To strike or contend for victory, in battle or in single combat; to attempt to defeat, subdue, or destroy an enemy, either by blows or weapons.[20] (See Combat. See also, generally, Assault and Battery; Homicide; Prize-Fighting.)

FIGURES.[21] The numerical characters by which numbers are expressed or written.[22] (Figures: Alteration of, see Alterations of Instruments. In Award, see Arbitration and Award. In Bill or Note, see Commercial Paper. In

12. Field-notes named in a decree of partition see 5 Cyc. 891 note 93.

13. Distinguished from "attachment" execution (see Dobbin *v.* Allegheny, 7 Fed. Cas. No. 3,941); "mandamus" (see Loague *v.* Brownsville Taxing Dist., 36 Fed. 149, 150); "supersedeas" (see Lum *v.* Reed, 53 Miss. 71, 72).

Equivalent to "execution" see 17 Cyc. 923 note 20. See also Hammett *v.* Smith, 5 Ala. 156, 157.

14. English L. Dict.

15. American Nat. Bank *v.* Childs, 49 La. Ann. 1359, 1366, 22 So. 384, where the writ is distinguished from a writ of attachment and a writ of sequestration.

"The office of the fieri facias is to create the lien and then to enforce the lien created by itself, but not to enforce liens created in any other way." Baltimore, etc., R. Co. *v.* Wilson, 2 W. Va. 528, 552.

16. English L. Dict.

17. Cyclopedic L. Dict.

18. Bouvier L. Dict.

Applied or explained in Nichols *v.* Ketcham, 19 Johns. (N. Y.) 84, 92; Denniston *v.* Cook, 12 Johns. (N. Y.) 376, 378; Yates *v.* Foot, 12 Johns. (N. Y.) 1, 10; Stoddart *v.* Smith, 5 Binn. (Pa.) 355, 368; Tey's Case, 5 Coke 37*b*, 38*b*; Mills *v.* Keyes, Fitzg. 290, 294; Chancy *v.* Needham, 2 Str. 1081; Fisher *v.* Emerton, 1 Str. 526; Billing's Case, T. Raym. 58; Magrath *v.* Todd, 26 U. C. Q. B. 87, 91; Cull *v.* Wakefield, 6 U. C. Q. B. O. S. 178, 180.

19. Cyclopedic L. Dict.

A fieri facias is included in the generic word "process," as used in Civ. Code, § 667, subs. 1, reading, "Every process in an action or proceeding shall be directed to the sheriff of the county," etc. Epperson *v.* Graves, 3 Ky. L. Rep. 527, 528.

20. Webster Dict. [*quoted* in Sullivan *v.* State, 67 Miss. 346, 351, 7 So. 275].

21. As part of the English language see 15 Cyc. 1049 note 7.

"By mark" as a sufficient signature see 7 Cyc. note 32.

Figures and signs to represent the year see 15 Cyc. note 7.

22. Wharton L. Lex. See also *Ex p.* Stephens, 3 Ch. D. 659, 660, 46 L. J. Ch. 46, 24 Wkly. Rep. 963.

An order drawn for 37,89, without any mark ($) expressing dollars, is not void, as being unintelligible. Northrop *v.* Sanborn, 22 Vt. 433, 436, 54 Am. Dec. 83.

For illustrations of the use of figures see Perdue *v.* Fraley, 92 Ga. 780, 781, 19 S. E. 40; Gilpatrick *v.* Foster, 12 Ill. 355, 357; Jaqua *v.* Witham, etc., Co., 106 Ind. 545, 546, 7 N. E. 314; Diamond Plate Glass Co. *v.* Tennell, 22 Ind. App. 132, 52 N. E. 168, 169; Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432, 433; Hunt *v.* Smith, 9 Kan. 137, 152; Com. *v.* Traylor, 45 S. W. 356, 450, 20 Ky. L. Rep. 97; Johnson *v.* Robertson, 31 Md. 476, 489; Com. *v.* Hagarman, 10 Allen (Mass.) 401, 402; Goltermann *v.* Schiermeyer, 111 Mo. 404, 413, 19 S. W. 484, 20 S. W. 161; Stout *v.* Hopping, 6 N. J. L. 125, 126; Brown *v.* Butchers', etc., Bank, 6 Hill (N. Y.) 443, 41 Am. Dec. 755; Dieter *v.* Fallon, 12 N. Y. Suppl. 33; Gulf, etc., R. Co. *v.* Fink, 4 Tex. Civ. App. 269, 270, 23 S. W. 330; Isaacs *v.* Wiley, 12 Vt. 674, 678; State *v.* Hodgeden, 3 Vt. 481, 485; Middlebury College *v.* Cheney, 1 Vt. 336, 350; State *v.* Schwartz, 64 Wis. 432, 434, 25 N. W. 417; Burrow-Giles Lithographic Co. *v.* Sarony, 111 U. S. 53, 55, 4 S. Ct. 279, 28 L. ed. 349; Bolles *v.* Outing Co., 77 Fed. 966, 969, 23 C. C. A. 594; Snow *v.* Mast, 65 Fed. 995.

Indictment or Information, see INDICTMENTS AND INFORMATIONS. In Pleading, see PLEADING. In Tax Proceeding, see TAXATION. In Verdict, see TRIAL. See also ABBREVIATIONS; ENGLISH.)

FILAMENT. A substance like a thread; a long, thread-like process;[23] fiber.[24]

FILE.[25] A word of well-defined meaning,[26] which may, however, be used in several senses.[27] As a noun, it signifies a thread, string, or wire upon which writs and other exhibits in courts and offices are fastened or filed for the more safe keeping and ready turning to the same;[28] a paper placed with the officer, and assigned by the law to his official custody;[29] a record of the court;[30] papers put together and tied in bundles;[31] and, more loosely, the official custody of the court or the place in the offices of a court where the records and papers are kept.[32] As a verb, it means to string, to fasten, as papers, on a line or wire for preservation; to arrange or insert in a bundle, as papers, indorsing the title on each paper;[33] to leave a paper with an officer for action or preservation;[34] to deposit with the proper custodian for keeping;[35] to place in the official custody of the clerk;[36] to put upon the files or among the records of a court;[37] to place papers upon a file; or, more generally, to deposit papers in official custody;[38] to receive papers officially for orderly, systematic safe keeping;[39] to note on a paper the fact and date of its reception in court;[40] to indorse on a paper the date of its reception, and retain it in the office, subject to inspection by whomsoever it may concern;[41] to indorse a paper, as received into custody, and give it

23. Worcester Dict. [*quoted* in Luckemeyer *v.* Magone, 38 Fed. 30, 34].

24. Webster Int. Dict.

25. "The word file is derived from the Latin word '*filum*,' which signifies a thread; and its present application is drawn from the ancient practice of placing papers upon a thread, or wire, 'for the more safe keeping and ready turning to the same.'" Phillips *v.* Beene, 38 Ala. 248, 251. To the same effect see Demers *v.* Cloud County, 5 Kan. App. 271, 47 Pac. 567, 569.

26. Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626.

27. Chapin *v.* Kingsbury, 138 Mass. 194, 196.

28. Wilkinson *v.* Elliott, 43 Kan. 590, 595, 23 Pac. 614, 19 Am. St. Rep. 158 [*citing* Bouvier L. Dict.; Wharton L. Lex.]; Gorham *v.* Summers, 25 Minn. 81, 86 [*citing* Bouvier L. Dict.; Wharton L. Lex.]; Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796 [*citing* Anderson L. Dict.; Century Dict.; Webster Int. Dict.]; Dawson *v.* Cross, 88 Mo. App. 292, 299 [*citing* Jones *v.* Parker, 73 Me. 248; Gorham *v.* Summers, 25 Minn. 81].

29. Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94. See also Holman *v.* Chevaillier, 14 Tex. 337, 339 [*citing* Burrill L. Dict.; 1 Littleton 112].

30. Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94.

31. Fanning *v.* Fly, 2 Coldw. (Tenn.) 486, 488.

"In modern practice, the file is the manner adopted for preserving papers. The mode is immaterial. Such papers as are not for transcription into records are folded similarly, indorsed with a note or index of their contents, and tied up in a bundle — a file." Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796 [*quoting* Anderson L. Dict.].

32. Black L. Dict.

33. Webster Dict. [*quoted* in Bishop *v.* Cook, 13 Barb. (N. Y.) 326, 329].

34. Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796 [*citing* Anderson L. Dict.]; Medland *v.* Linton, 60 Nebr. 249, 255, 82 N. W. 866 [*citing* Anderson L. Dict.].

35. *In re* Dewar, 10 Mont. 426, 437, 25 Pac. 1026 [*citing* Howell *v.* Slauson, 83 Cal. 539, 23 Pac. 692; Smith *v.* Biscailuz, 83 Cal. 344, 21 Pac. 15, 23 Pac. 314; Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501; Lamson *v.* Falls, 6 Ind. 309; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494; Harrison *v.* Clifton, 75 Iowa 736, 38 N. W. 406; Bishop *v.* Cook, 13 Barb. (N. Y.) 326; Holman *v.* Chevaillier, 14 Tex. 337; Bouvier L. Dict.].

36. Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796; Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 621, 22 C. C. A. 425 [*citing* Burrill L. Dict.; Webster Int. Dict.].

37. Webster Dict. [*quoted* in Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626].

38. Abbott L. Dict. [*quoted* in State *v.* Lewis, 49 La. Ann. 1207, 1211, 22 So. 327; *In re* Conant, 43 Oreg. 530, 535, 73 Pac. 1018].

39. Abbott L. Dict. [*quoted* in State *v.* Lewis, 49 La. Ann. 1207, 1211, 22 So. 327; *In re* Conant, 43 Oreg. 530, 535, 73 Pac. 1018].

40. Webster Dict. [*quoted* in Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626].

41. Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796; Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 621, 22 C. C. A. 425 [*citing* Burrill L. Dict.; Webster Int. Dict.].

its place among other papers — to file away;[42] to present or exhibit officially, or for trial, as, to file a bill in chancery;[43] to bring before a court or legislative body by presenting proper papers in a regular way, as to file a petition or bill;[44] and sometimes used as the equivalent of "to deposit."[45] (See FILING.)

FILED.[46] Delivered to the proper officer and by him received to be kept on file.[47] The derivation and meaning of the word, as defined in the dictionaries,

42. Medland *v.* Linton, 60 Nebr. 249, 255, 82 N. W. 866 [*citing* Anderson L. Dict.].

43. Webster Dict. [*quoted* in Bishop *v.* Cook, 13 Barb. (N. Y.) 326, 329].

44. Webster Dict. [*quoted* in Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626].

45. Harrison *v.* Clifton, 75 Iowa 736, 740, 38 N. W. 406.

Distinguished from "deposit" in U. S. *v.* Van Duzee, 185 U. S. 278, 281, 22 S. Ct. 648, 46 L. ed. 909. See also 13 Cyc. 821 note 2.

46. The term "filed," in connection with other words, has often received judicial interpretation; as for example as used in the following phrases: "Filed and recorded" (see Pfirmann *v.* Henkel, 1 Ill. App. 145, 149); "filed for record" (see Bowen *v.* Fassett, 37 Ark. 507, 510; Cook *v.* Halsell, 65 Tex. 1, 5); "filed in open court" (see McKenzie *v.* State, 24 Ark. 636, 638); "filed in the office" (see Gates *v.* State, 128 N. Y. 221, 228, 28 N. E. 373); "filed the same for record" (see Smith *v.* Headley, 33 Minn. 384, 385, 23 N. W. 550); "filed it as of that day" (see Marlet *v.* Hinman, 77 Wis. 136, 140, 45 N. W. 953, 20 Am. St. Rep. 102); "received and filed" (see Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626).

"The terms 'entered' and 'filed' frequently occur in the statute, but they are never used as synonymous terms." State *v.* Lamm, 9 S. D. 418, 420, 69 N. W. 592 [*citing* Locke *v.* Hubbard, 9 S. D. 364, 69 N. W. 588].

47. *California.*— Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501, 506 [*quoted* in Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 620, 621, 22 C. C. A. 425]. See also Edwards *v.* Grand, 121 Cal. 254, 256, 53 Pac. 796.

Florida.— Franklin County *v.* State, 24 Fla. 55, 62, 3 So. 471, 12 Am. St. Rep. 183.

Georgia.— Floyd *v.* Chess-Carley Co., 76 Ga. 752, 754.

Indiana.— Oats *v.* State, 153 Ind. 436, 438, 55 N. E. 226; State *v.* Chicago, etc., R. Co., 145 Ind. 229, 237, 43 N. E. 226; Powers *v.* State, 87 Ind. 144, 148; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Indian Territory.— McClellan *v.* Tootle, 3 Indian Terr. 325, 329, 58 S. W. 555; Noyes *v.* Guy, 2 Indian Terr. 205, 213, 48 S. W. 1056.

Kansas.— State *v.* Heth, 60 Kan. 560, 563, 57 Pac. 108; Wilkinson *v.* Elliott, 43 Kan. 590, 595, 23 Pac. 614, 19 Am. St. Rep. 158.

Louisiana.— State *v.* Lewis, 49 La. Ann. 1207, 1210, 22 So. 327.

Massachusetts.— Reed *v.* Acton, 120 Mass. 130, 131.

Michigan.— Beebe *v.* Morrell, 76 Mich. 114, 120, 42 N. W. 1119, 15 Am. St. Rep. 288.

Minnesota.— Appleton Mill Co. *v.* Warder, 42 Minn. 117, 119, 43 N. W. 791; Smith *v.* Headley, 33 Minn. 384, 388, 23 N. W. 550; Gorham *v.* Summers, 25 Minn. 81, 87.

Missouri.— State *v.* Hockaday, 98 Mo. 590, 593, 12 S. W. 246; Dawson *v.* Cross, 88 Mo. App. 292, 299.

Nebraska.— Medland *v.* Linton, 60 Nebr. 249, 256, 82 N. W. 866.

New York.— Manhattan Co. *v.* Laimbeer, 108 N. Y. 578, 581, 15 N. E. 712, 21 Abb. N. Cas. 27; People *v.* Peck, 67 Hun 560, 570, 22 N. Y. Suppl. 576.

Oregon.— Hilts *v.* Hilts, 43 Oreg. 162, 165, 72 Pac. 697.

South Carolina.— Sternberger *v.* McSween, 14 S. C. 35, 43.

South Dakota.— Starkweather *v.* Bell, 12 S. D. 146, 152, 80 N. W. 183; Stone *v.* Crow, 2 S. D. 525, 528, 51 N. W. 335.

Tennessee.— Fanning *v.* Fly, 2 Coldw. 486, 488.

Texas.— Dallas *v.* Beeman, 18 Tex. Civ. App. 335, 339, 45 S. W. 626. See also Beal *v.* Alexander, 6 Tex. 531, 541.

Utah.— Wescott *v.* Eccles, 3 Utah 258, 264, 2 Pac. 525.

Wisconsin.— Bergeron *v.* Hobbs, 96 Wis. 641, 654, 71 N. W. 1056, 65 Am. St. Rep. 85.

United States.— *In re* Von Borcke, 94 Fed. 352.

See also Bouvier L. Dict. [*quoted* in Peterson *v.* Taylor, 15 Ga. 483, 484, 60 Am. Dec. 705; Hastay *v.* Bonness, 84 Minn. 120, 125, 86 N. W. 896; *In re* Conant, 43 Oreg. 530, 534, 73 Pac. 1018; Townsend *v.* Sparks, 50 S. C. 380, 384, 27 S. E. 801; Archer *v.* Long, 46 S. C. 292, 294, 24 S. E. 83].

"A bill in chancery is said to be filed, when it is delivered to the clerk, and he states the day when it was brought into his office, numbers it, and receives it into his custody." Phillips *v.* Beene, 38 Ala. 248, 251 [*citing* 1 Daniell Ch. Pl. & Pr. 454]. In the English chancery practice a bill is not deemed filed until it receives the proper indorsement of the clerk. Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 621, 22 C. C. A. 425 [*citing* Pinders *v.* Yager, 29 Iowa 468; Amy *v.* Shelby County, 1 Fed. Cas. No. 345, 1 Flipp. 104; Daniell Ch. Pr. & Pl. (6th Am. ed.) 399; Foster Fed. Pr. (2d ed.) 598].

As applied to telegrams, the word might be construed to mean only such messages as the company chose to accept and file for transmission. In its strict sense, it would not include even messages received and sent at once before filing. Trenton, etc., Turnpike Co. *v.* American, etc., Commercial News Co., 43 N. J. L. 381, 385.

Place of delivery to clerk.— In order to

carries with it the idea of permanent preservation; becoming part of the permanent records of the public office where it is filed,[48] and includes the idea that the paper is to remain in its proper order on the file in the office.[49] (See FILING.)

FILIATION. See BASTARDS.

FILING.[50] Delivery of a paper to the proper officer to be kept on file;[51] placing and leaving a paper among the files;[52] placing a paper in the proper official custody;[53] presenting a paper at the proper office and leaving it there, deposited with the papers in such office;[54] placing a paper in the proper official's custody by the party charged with this duty, and the making of the proper indorsement by the officer;[55] receiving a paper into custody, and giving it a

be filed with the clerk, a paper must be delivered to him in his office, where the law requires him to keep his books and files, and to receive and file papers. Matter of Norton, 25 Misc. (N. Y.) 48, 49, 53 N. Y. Suppl. 924 [*citing* Hathaway *v.* Howell, 54 N. Y. 97].

48. Medland *v.* Linton, 60 Nebr. 249, 256, 82 N. W. 866 [*citing* Pfirmann *v.* Henkel, 1 Ill. App. 145; Gorham *v.* Summers, 25 Minn. 81; People *v.* Peck, 67 Hun (N. Y.) 560, 22 N. Y. Suppl. 576; Century Dict.; Rapalje & L. L. Dict.]; People *v.* Peck, 67 Hun (N. Y.) 560, 570, 22 N. Y. Suppl. 576 [*citing* Century Dict.; Rapalje & L. L. Dict.].

"Filed" has a broader signification than the mere indorsement to that effect. Fulkerson *v.* Houts, 55 Mo. 301, 302 [*quoted* in Pope *v.* Thomson, 66 Mo. 661, 662; Johnson *v.* Hodges, 65 Mo. 589, 590].

49. Bergeron *v.* Hobbs, 96 Wis. 641, 643, 71 N. W. 1056, 65 Am. St. Rep. 85 [*citing* Bouvier L. Dict.].

50. "Filing" distinguished from "docketing" in 14 Cyc. 823 note 18.

"Filing" distinguished from "entering of record."— These expressions are not synonymous. They are nowhere so used, but always convey distinct ideas. "Filing" originally signified placing papers in order on a thread or wire for safe-keeping. In this country and at this day it means, agreeably to our practice, depositing them in due order in the proper office. Entering of record uniformly implies writing. Naylor *v.* Moody, 2 Blackf. (Ind.) 247, 248. See also State *v.* Lamm, 9 S. D. 418, 419, 69 N. W. 592 [*citing* Anderson L. Dict.], where it is said: "There is, however, a marked distinction between entering a paper of record and filing the same."

"Filing" distinguished from "service" in Boyd *v.* Burrel, 60 Cal. 280, 282.

"Filing" within the meaning of the fee bill giving the clerk of the federal courts certain fees for filing and entering every declaration, etc., see Amy *v.* Shelby County, 1 Fed. Cas. No. 345, 1 Flipp. 104.

51. Noyes *v.* Guy, 2 Indian Terr. 205, 213, 48 S. W. 1056; Beebe *v.* Morrell, 76 Mich. 114, 42 N. W. 1119, 15 Am. St. Rep. 288; Bouvier L. Dict. [*quoted* in McClellan *v.* Tootle, 3 Indian Terr. 325, 329, 58 S. W. 555].

52. Pfirmann *v.* Henkel, 1 Ill. App. 145, 152 [*quoted* in Meridian Nat. Bank *v.* Hoyt, etc., Co., 74 Miss. 221, 226, 21 So. 12, 60 Am. St. Rep. 504, 36 L. R. A. 796].

53. Naylor *v.* Moody, 2 Blackf. (Ind.) 247, 248; Demers *v.* Cloud County, 5 Kan. App. 271, 47 Pac. 567, 569.

The modern method of filing papers is to place them in the official custody of the proper officer to be kept as a permanent record, and the making of an indorsement thereon by the officer of the time they were received (Wilkinson *v.* Elliott, 43 Kan. 590, 595, 23 Pac. 614, 19 Am. St. Rep. 158), but "though the ancient mode of filing papers has gone into disuse, the phraseology of the ancient practice is retained in the common expressions 'to file,' 'to put on file,' 'to take off the files,' &c., from 'filum,' the thread, string, or wire used in ancient practice for connecting the papers together" (Holman *v.* Chevaillier, 14 Tex. 337, 339).

In matters of practice, the word "filing" is very commonly used to express the duty of bringing to the proper office, as the case may be, writs, pleadings, affidavits and other such matters for safe custody, or enrolment. The duty of filing in this sense may be properly considered as included under the word "returning." Hunter *v.* Caldwell, 10 Q. B. 69, 81, 12 Jur. 285, 59 E. C. L. 69.

54. Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501, 506 [*quoted* in Mutual L. Ins. Co. *v.* Phinney, 76 Fed. 617, 620, 621, 22 C. C. A. 425].

55. Medland *v.* Linton, 60 Nebr. 249, 255, 256, 82 N. W. 866; Stone *v.* Crow, 2 S. D. 525, 528, 51 N. W. 335 [*citing* Fulkerson *v.* Houts, 55 Mo. 301; Bouvier L. Dict.]. See also Jones *v.* Bowman, 10 Wyo. 47, 53, 65 Pac. 1002.

Distinguished from the indorsement.—It has been said that the word "filing" is generally used to describe the indorsement on a paper of the day when it is left at a public office (Lent *v.* New York, etc., R. Co., 130 N. Y. 504, 509, 29 N. E. 988. See also Jones *v.* Wells, 3 Tex. App. Civ. Cas. § 94); but the filing is the actual delivery of the paper to the clerk without regard to any action that he may take thereon (Grubbs *v.* Cones, 57 Mo. 83, 84 [*quoted* in State *v.* Hockaday, 98 Mo. 590, 593, 12 S. W. 246]), and does not consist of the marking put on it by the clerk, but in placing it as a permanent record in the office or case where it belongs (Bettison *v.* Budd, 21 Ark. 578, 580 [*citing* State *v.* Gowen, 12 Ark. 62; Keath *v.* Berkley, 7 Ark. 469; Thompson *v.* Foster, 6 Ark. 208]). Indeed the indorsement of the fact of filing is only evidence that such filing has been made

place among other papers;[56] the act of either party bringing the paper and depositing it with the officer for keeping, or the act of the officer in folding, endorsing and putting up the paper.[57] (Filing: For Purpose of Record, see Assignments For Benefit of Creditors; Chattel Mortgages; Deeds; Judgments; Liens; Mechanics' Liens; Mortgages; Records; Sales.)

FILIUS CONSTAT ESSE IN FAMILIA PATRIS ET NON MATRIS. A maxim meaning "A son appears to be in the family of the father and not of the mother."[58]

FILIUS IN UTERO MATRIS EST PARS VISCERUM MATRIS. A maxim meaning "A son in the mother's womb is part of the mother's vitals."[59]

FILIUS NULLIUS. See Bastards.

FILL. To so occupy that no space remains;[60] to hold, as an office;[61] to pay; to promise to pay.[62] (To Fill: Blanks, see Alteration of Instruments; Bonds; Commercial Paper; Deeds; Forgery.)

FILL A PRESCRIPTION. To furnish, prepare, and combine the requisite drugs in due proportion as prescribed.[63] (See, generally, Physicians and Surgeons.)

FILLED. A technical term used by manufacturers, and relates to the process of manufacture.[64]

(Jacksonville St. R. Co. *v.* Walton, 42 Fla. 54, 61, 28 So. 59; Oats *v.* State, 153 Ind. 436, 438, 55 N. E. 226 [*citing* Powers *v.* State, 87 Ind. 144; Gorham *v.* Summers, 25 Minn. 81]; State *v.* Heth, 60 Kan. 560, 563, 57 Pac. 108; *In re* Dewar, 10 Mont. 426, 437, 25 Pac. 1026; Bishop *v.* Cook, 13 Barb. (N. Y.) 326, 329; King *v.* Penn, 43 Ohio St. 57, 61, 1 N. E. 84; Nimmons *v.* Westfall, 33 Ohio St. 213, 223; Haines *v.* Lindsey, 4 Ohio 88, 89, 19 Am. Dec. 586; Starkweather *v.* Bell, 12 S. D. 146, 152, 80 N. W. 183); and but one evidence thereof (Franklin County *v.* State, 24 Fla. 55, 62, 3 So. 471, 12 Am. St. Rep. 183 [*citing* Willingham *v.* State, 21 Fla. 761]). See also Nimmons *v.* Westfall, 33 Ohio St. 213, 221 [*citing* Haines *v.* Lindsey, 4 Ohio 88, 19 Am. Dec. 586]. See also 3 Cyc. 131 note 6.

56. State *v.* Lamm, 9 S. D. 418, 420, 69 N. W. 592 [*quoting* Anderson L. Dict., and *citing* Bouvier L. Dict.; Webster Dict.].

57. Abbott L. Dict. [*quoted* in State *v.* Lewis, 49 La. Ann. 1207, 1211, 22 So. 327; *In re* Conant, 43 Oreg. 530, 535, 73 Pac. 1018].

"The origin of the term indicates very clearly, that the filing of a paper can only be effected by bringing it to the notice of the officer, who anciently put it upon the 'string' or 'wire.' Accordingly, we find that filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing the paper, and the making of the appropriate endorsement by the officer." Phillips *v.* Beene, 38 Ala. 248, 251 [*citing* Holman *v.* Chevaillier, 14 Tex. 337; Bouvier L. Dict.; Burrill L. Dict.; Marriott L. Dict.; Tomlin L. Dict.] See also City St. Imp. Co. *v.* Babcock, (Cal. 1902) 68 Pac. 584, 585 [*citing* Tregambo *v.* Comanche Mill, etc., Co., 57 Cal. 501]; Demers *v.* Cloud County, 5 Kan. App. 271, 47 Pac. 567, 569.

The word "filing," in connection with other words, has often received judicial interpretation; as for example as used in the following phrases: "Filing a claim" (see Erwin *v.* McGuire, 44 Ala. 499, 504; Phillips *v.* Beene, 38 Ala. 248, 251; Justice *v.* Gallert, 131 N. C. 393, 395, 42 S. E. 850); "filing an administrator's bond" (see Cullen *v.* Miller, 9 N. Y. Leg. Obs. 62, 64); "filing an affidavit" (see Adams *v.* Goodwin, 99 Ga. 138, 25 S. E. 24); "filing certificates" (see Medland *v.* Linton, 60 Nebr. 249, 255, 82 N. W. 866); filing "in the office of the clerk" (see Matter of Norton, 25 Misc. (N. Y.) 48, 49, 53 N. Y. Suppl. 924); "filing of articles of consolidation" (see State *v.* Chicago, etc., R. Co., 145 Ind. 229, 237, 43 N. E. 226); "filing telegraph despatches" (see Trenton, etc., Turnpike Co. *v.* American, etc., Commercial News Co., 43 N. J. L. 381, 385); "filing the resolution" (see *Ex p.* Thorne, L. R. 8 Ch. 722, 726).

58. Trayner Leg. Max. [*citing* Fraser Par. & Ch. 99].

59. Wharton L. Lex.

60. English L. Dict.

When it may mean an embankment see Anderson *v.* Birmingham Mineral R. Co., 109 Ala. 128, 129, 19 So. 519.

The term "filling" has a well settled meaning among civil engineers and contractors in that line of business. It means to be filled with clay, sand, clean earth, or any solid, imperishable material. Levy *v.* Chicago, 113 Ill. 650, 653. The term has acquired an elastic quality, and in business directions is often used loosely. U. S. *v.* Pinney, etc., Co., 105 Fed. 934, 936, 45 C. C. A. 138.

61. English L. Dict.

"Fill up such vacancy," etc., see Johnston *v.* Wilson, 2 N. H. 202, 204, 9 Am. Dec. 50.

62. Bangor Bridge Co. *v.* McMahon, 10 Me. 478, 480, thus construed in a subscription for shares whereby the subscriber agreed to pay and "fill" the number of shares of stock against his name.

63. Ray *v.* Burbank, 61 Ga. 505, 512, 34 Am. Rep. 103.

64. U. S. *v.* Pinney, etc., Co., 105 Fed. 934, 935, 45 C. C. A. 138.

The term is also employed to a certain extent by the commission merchant or by the importer who is naturally familiar with the

FILLY. A young mare or filly; a wanton girl; a young horse; especially a young mare; a female colt; a lively, roistering, or wanton girl.[65]

FILTER. To purify or defecate.[66]

FILTH. Anything that soils or defiles; foul, offensive matter.[67]

FILTRATION. The act or process of filtering; the mechanical separation of a liquid from the dissolved particles floating in it.[68]

FILUM. An imaginary thread or line passing through the middle of a stream or road.[69] (See, generally, BOUNDARIES.)

FINAL.[70] In its ordinary signification, last;[71] that which absolutely ends or concludes a matter;[72] precluding further controversy on the question passed upon;[73] that which terminates or ends a matter or proceeding;[74] not absolutely, however.[75]

method of manufacture by which the goods which he sells are presented to the public. U. S. *v.* Finney, etc., Co., 105 Fed. 934, 935, 45 C. C. A. 138.

"Filled cheese" includes all substances made of milk or skimmed milk with the admixture of butter, animal oils or fats, vegetable or any other oils, or compounds foreign to such milk, and made in imitation or semblance of cheese. 29 U. S. St. at L. 253 [U. S. Comp. St. (1901) p. 2236].

"Filled cotton goods," in England, was formerly "synonymous with 'weighted goods,' and meant that the interstices of the fabric were loaded or weighted with foreign substances. . . . The interstices of cotton cloth are also necessarily filled in order to finish or prepare the goods for the purposes for which they are designed, and, when thus filled, the completed goods contain no element of deception." U. S. *v.* Pinney, etc., Co., 105 Fed. 934, 935, 45 C. C. A. 138.

65. Webster Dict. [*quoted* in Lunsford *v.* State, 1 Tex. App. 448, 450, 28 Am. Rep. 414].

66. Pendleton *v.* Saunders, 19 Oreg. 9, 22, 24 Pac. 506, as by causing liquor to pass through a porous substance which retains the feculent matter.

67. Century Dict.

Authority to compel the occupiers of premises to remove all "dust, ashes, rubbish, filth, manure, dung, and soil" from the premises is confined to things in the nature of manure, and does not give authority for a by-law to compel removal of snow. Reg. *v.* Wood, 5 E. & B. 49, 55, 3 Wkly. Rep. 419, 85 E. C. L. 49.

68. Pendleton *v.* Saunders, 19 Oreg. 9, 22, 24 Pac. 506.

69. As in the phrases *"filum aquæ," "filum viæ;"* or along the edge or border, as in *"filum forestæ."* Black L. Dict.

The term has been illustrated by the expression "up to the extreme *filum* of the Plaintiff's property." Woodyer *v.* Hadden, 5 Taunt. 125, 134, 14 Rev. Rep. 706, 1 E. C. L. 74.

Filum aquæ is defined to be "the middle of a river" (Ingraham *v.* Wilkinson, 4 Pick. (Mass.) 268, 273, 16 Am. Dec. 342. See Adams *v.* Pease, 2 Conn. 481, 483; *In re* Ipswich, 24 Pick. (Mass.) 343, 344; Claremont *v.* Carlton, 2 N. H. 369, 371, 9 Am. Dec. 88; Arnold *v.* Mundy, 6 N. J. L. 1, 67, 10 Am. Dec. 356; Child *v.* Starr, 4 Hill (N. Y.) 369, 382; Canal Com'rs *v.* People, 5 Wend. (N. Y.) 423, 430; People *v.* Platt, 17 Johns (N. Y.) 195, 210, 8 Am. Dec. 382; Williams *v.* Buchanan, 23 N. C. 535, 539, 35 Am. Dec. 760; Tyler *v.* Wilkinson, 24 Fed. Cas. No. 14,312, 4 Mason 397, 400), or "the thread of a stream" (Knight *v.* Wilder, 2 Cush. (Mass.) 199, 207, 48 Am. Dec. 660).

Filum viæ is defined to be the thread or middle line of a road. Black L. Dict.

Filum forestæ is the border of the forest. Black L. Dict.

70. "The word 'final' has a well understood and accepted meaning." Pittsburgh, etc., R. Co. *v.* Gillespie, 158 Ind. 454, 458, 63 N. E. 845.

71. Johnson *v.* New York, 1 N. Y. Suppl. 254, 255.

72. Rondeau *v.* Beaumette, 4 Minn. 224, 228 [*citing* Burrill L. Dict.].

"Final and conclusive" see Carter *v.* Sonoma County Super. Ct. 138 Cal. 150, 70 Pac. 1067; Lambert *v.* Bates, 137 Cal. 676, 70 Pac. 777; Tyler *v.* Connolly, 65 Cal. 28, 31, 2 Pac. 414; Vigo County *v.* Davis, 136 Ind. 503, 508, 36 N. E. 141, 22 L. R. A. 515; Hammond *v.* Ridgely, 5 Harr. & J. (Md.) 245, 268, 9 Am. Dec. 522; Ackerman *v.* Taylor, 9 N. J. L. 65, 69; *In re* New York, 49 N. Y. 150, 154; People *v.* Kingston, 53 N. Y. App. Div. 58, 60, 65 N. Y. Suppl. 590; People *v.* Canal Board, 7 Lans. (N. Y.) 220, 223; Mussina *v.* Hertzog, 5 Binn. (Pa.) 387, 389; Barker *v.* Edger, [1898] A. C. 748, 753, 67 L. J. C. P. 115, 79 L. T. Rep. N. S. 151; Reg. *v.* Bridge, 24 Q. B. D. 609, 611, 17 Cox C. C. 66, 54 J. P. 629, 59 L. J. M. C. 49, 62 L. T. Rep. N. S. 297, 38 Wkly. Rep. 464; Death *v.* Harrison, L. R. 6 Exch. 15, 19, 40 L. J. Exch. 26, 23 L. T. Rep. N. S. 495.

73. Pittsburgh, etc., R. Co. *v.* Gillespie, 158 Ind. 454, 63 N. E. 845 [*quoting* Century Dict., and *citing In re* New York, 49 N. Y. 150].

74. Rondeau *v.* Beaumette, 4 Minn. 224, 228.

75. Rondeau *v.* Beaumette, 4 Minn. 224, 228 [*citing* Burrill L. Dict.].

"Final, unless appealed against" see Reg. *v.* Hunt, 6 E. & B. 408, 413, 88 E. C. L. 408.

"Final, without exception or appeal" see Williams *v.* Danziger, 91 Pa. St. 232, 233 [*citing* McCahan *v.* Reamey, 33 Pa. St. 535].

"When expressly made final" see Sharon *v.* Hill, 26 Fed. 337, 390, 11 Sawy. 291.

Sometimes it may mean CONCLUSIVE,[76] *q. v.* As applied to a judgment or judicial award, it has a technical, fixed, and appropriate meaning; it denotes the essential character, not the mere consequences, of the order; it is used in contradiction to "interlocutory."[77] (Final: Account — Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Of Guardian, see GUARDIAN AND WARD; Of Receiver, see RECEIVERS; Of Trustee, see TRUSTS. Award,[78] see ARBITRATION AND AWARD. Costs, see COSTS. Destination,[79] see MARINE INSURANCE. Hearing[80] of Cause, see EQUITY. Judgment or Decree[81] — In General, see EQUITY; JUDGMENTS; As Affecting Right of Review see APPEAL AND ERROR; JUSTICES OF THE PEACE; On Certiorari, see CERTIORARI; To Bar Subsequent Action, see JUDGMENTS. Passage,[82] see STATUTES. Port,[83] see MARINE INSURANCE. Process, see EXECUTIONS. Sailing,[84] see SHIPPING. Settlement[85] — Of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; Of Guardian, see GUARDIAN AND WARD; Of Receiver, see RECEIVERS; Of Trustee, see TRUSTS. See also EVENT.)

FINALLY. At the end or conclusion; ultimately; at last; lastly.[86] (See FINAL.)

76. Pittsburgh, etc., R. Co. *v.* Gillespie, 158 Ind. 454, 63 N. E. 845.

77. State *v.* Wood, 23 N. J. L. 560, 561.

"Final decision" see McGehee *v.* Mathis, 21 Ark. 40, 55; Moore *v.* Mayfield, 47 Ill. 167, 169; Ashton *v.* Thompson, 28 Minn. 330, 334, 9 N. W. 876; Anderson *v.* Cortlandt School Dist. No. 15, 89 N. Y. App. Div. 231, 234, 85 N. Y. Suppl. 943; Mannix *v.* Hamilton County, 43 Ohio St. 210, 211, 1 N. E. 322; Reg. *v.* Napton, 2 Jur. N. S. 1138, 1139, 25 L. J. Q. B. 296, 4 Wkly. Rep. 561.

"Final determination" see Dean *v.* Marschall, 90 Hun (N. Y.) 335, 339, 35 N. Y. Suppl. 724; Swarthout *v.* Curtis, 4 N. Y. 415, 416.

"Final disposition" see Colcord *v.* Fletcher, 50 Me. 398, 401 [*citing* Lincoln *v.* Whittenton Mills, 12 Metc. (Mass.) 31; Waite *v.* Barry, 12 Wend. (N. Y.) 377]; *Ex p.* Russell, 13 Wall. (U. S.) 664, 667, 20 L. ed. 632; *In re* Brightman, 4 Fed. Cas. No. 1,878, 14 Blatchf. 130).

"Final order affecting a substantial right" see Collins *v.* Case, 25 Wis. 651, 653; Ballston Spa Bank *v.* Milwaukee Mar. Bank, 18 Wis. 490, 491 [*citing* Livingston *v.* Swift, 23 How. Pr. (N. Y.) 1; *In re* Fleming, 16 Wis. 70].

In connection with other words the word "final" has often received judicial interpretation; as for example as used in the following phrases: "Final adjustment" (see Lexington, etc., R. Co. *v.* Ford Plate Glass Co., 84 Ind. 516, 520; Copper *v.* Metzger, 74 Ind. 544, 551); "final appeal" (see Lofft 184); "final balance" (see Capehart *v.* Logan, 20 Minn. 442, 445); "final consummation" (see *In re* King, 3 Fed. 839, 840); "final distribution" (see Rogers *v.* Gillett, 56 Iowa 266, 268, 9 N. W. 204); "final division" (see *In re* Wilkins, 18 Ch. D. 634, 637, 50 L. J. Ch. 774, 45 L. T. Rep. N. S. 244, 29 Wkly. Rep. 911); "final estimate" (see U. S. *v.* Venable Constr. Co., 124 Fed. 267, 272); "final sentence" (see U. S. *v.* The Peggy, 1 Cranch (U. S.) 103, 109, 2 L. ed. 49).

78. "Final award" see 9 Vict. c. 4, § 44.

79. "Final destination" see Beddall *v.* British, etc., Mar. Ins. Co., 21 N. Y. Suppl. 709, 711.

80. "Final hearing" see Bryant *v.* Rich, 106 Mass. 180, 192, 8 Am. Rep. 311; Beery *v.* Irick, 22 Gratt. (Va.) 484, 489, 12 Am. Rep. 539; Vannevar *v.* Bryant, 21 Wall. (U. S.) 41, 43, 22 L. ed. 476; Home L. Ins. Co. *v.* Dunn, 19 Wall. (U. S.) 214, 219, 22 L. ed. 68; Osborn *v.* Osborn, 5 Fed. 389, 390, 2 McCrary 455; Akerly *v.* Vilas, 1 Fed. Cas. No. 119, 1 Abb. 284, 288, 2 Biss. 110; 1 Cyc. 910 note 14.

81. "Final judgment" or "final decree" see Kelley *v.* Stanberry, 13 Ohio 408, 421; Crawford *v.* Haller, 111 U. S. 796, 797, 4 S. Ct. 697, 28 L. ed. 602; Holmes *v.* Jennison, 14 Pet. (U. S.) 540, 562, 614, 10 L. ed. 579, 618; Weston *v.* Charleston, 2 Pet. (U. S.) 449, 470, 7 L. ed. 481; Hayford *v.* Griffith, 11 Fed. Cas. No. 6,263, 3 Blatchf. 34.

82. "Final passage" see State *v.* Buckley, 54 Ala. 599, 613.

83. "Final port" see U. S. *v.* Barker, 24 Fed. Cas. No. 14,516, 5 Mason 404, 406; Moore *v.* Taylor, 1 A. & E. 25, 29, 28 E. C. L. 37 [*citing* Inglis *v.* Vaux, 3 Campb. 437].

84. "Final sailing" see Roelandts *v.* Harrison, 2 C. L. R. 995, 9 Exch. 444, 449, 23 L. J. Exch. 169, 25 Eng. L. & Eq. 470; Price *v.* Livingstone, 9 Q. B. D. 679, 681, 682, 5 Aspin. 13, 53 L. J. Q. B. 118, 47 L. T. Rep. N. S. 629 [*citing* Hudson *v.* Bilton, 6 E. & B. 565, 2 Jur. N. S. 784, 26 L. J. Q. B. 27, 88 E. C. L. 565]; Sailing Ship Garston Co. *v.* Hickie, 15 Q. B. D. 580, 586, 5 Aspin. 499, 53 L. T. Rep. N. S. 795.

85. "Final settlement" see Pomeroy *v.* Mills, 37 N. J. Eq. 578, 580 [*citing* Stevenson *v.* Phillips, 21 N. J. L. 70]; Sims *v.* Waters, 65 Ala. 442, 445; Dickerson *v.* Robinson, 6 N. J. L. 195, 206, 10 Am. Dec. 396; Richards' Case, 6 Serg. & R. (Pa.) 462, 465.

86. Century Dict.

"Finally determined" see Rex *v.* Plowright, 3 Mod. 94, 95.

"Finally recover" see Fisk *v.* Gray, 100 Mass. 191, 193.

FINANCIAL MEMBER. As applied to a fraternal order, a member who pays his dues and assessments regularly.[87]

FINANCIER. A term sometimes applied to an officer of a lodge who performs the duties usually appertaining to a secretary.[88]

FIND.[89] In its primary meaning, to come to; to meet; and hence to reach; to attain to; to arrive at;[90] to discover.[91] It may mean to supply, to furnish.[92] In law, to ascertain by judicial inquiry;[93] to determine a controversy in favor of one of the parties,[94] as to "find for the plaintiff."[95] (See DETERMINE; DETERMINED; ESTABLISH.)

FINDER OF PROPERTY. See FINDING LOST GOODS.

FINDING. The decision of a judge, arbitrator, jury, or referee;[96] a term universally used by the profession and by the courts as meaning the decision of a trial court upon the facts.[97] (Finding:[98] As Part of Record, see APPEAL AND ERROR. By Arbitrator, see ARBITRATION AND AWARD. By Commissioner, see EMINENT DOMAIN. By Court, see TRIAL. By Intermediate Appellate Court, see APPEAL AND ERROR. By Interstate Commerce Commission, see COMMERCE. By Jury, see TRIAL. By Master or Commissioner, see EQUITY. By Referee—In General, see REFERENCES; In Action of Book Debt, see ACCOUNTS AND ACCOUNTING. On Question of Boundary, see BOUNDARIES. Conformity of Judgment, see JUDGMENTS. Harmless Error in, see APPEAL AND ERROR. In Action—For Accounting, see ACCOUNTS AND ACCOUNTING; In Aid of Execution, see EXECUTIONS. In Bastardy Proceeding, see BASTARDS. Irregularities or Defects as Ground For New Trial, see NEW TRIAL. On Inquisition of Lunacy, see INSANE PERSONS. Review in Appellate Court, see APPEAL AND ERROR. Special, see TRIAL.)

"**Finally recovered**" see George *v.* Pangborn, 6 Allen (Mass.) 243.

"**Finally settled**" see McGrew's Appeal, 14 Serg. & R. (Pa.) 396, 397; Carpenter's Appeal, 11 Wkly. Notes Cas. (Pa.) 162.

87. Meyer *v.* American Star Order, 2 N. Y. Suppl. 492.

88. Backdahl *v.* Grand Lodge A. O. U. W., 46 Minn. 61, 64, 48 N. W. 454.

89. "'To find,' . . . 'coincides in origin with venio,' but in sense with *invenio*. And the literal signification of '*invenio*' is to come upon, to get at." Webster Dict. [*quoted* in Carter *v.* Youngs, 42 N. Y. Super. Ct. 169, 172].

"**Found,**" the past participle of "find," has been construed in Tower *v.* Tower, 18 Pick. (Mass.) 262, 263; Spear *v.* Bicknell, 5 Mass. 125, 131; State *v.* Bellows, 62 Ohio St. 307, 309, 56 N. E. 1028; Smith *v.* Hickman, 14 Pa. Super. Ct. 46, 51; Doe *v.* Franks, 2 C. & K. 678, 679, 61 E. C. L. 678; Jowett *v.* Spencer, 1 Exch. 647, 648, 17 L. J. Exch. 367.

90. Webster Dict. [*quoted* in Carter *v.* Youngs, 42 N. Y. Super. Ct. 169, 172].

91. Smith *v.* Hickman, 14 Pa. Super. Ct. 46, 51.

92. Smith *v.* Hickman, 14 Pa. Super. Ct. 46, 51. See also Abbott *v.* Bates, 45 L. J. C. P. 117, 120, 33 L. T. Rep. N. S. 491, 24 Wkly. Rep. 101.

"**Find a buyer**" see Flynn *v.* Van Kleek, 91 Iowa 78, 80, 58 N. W. 1091; McCormick *v.* Stephany, 61 N. J. Eq. 208, 209, 48 Atl. 25.

"**Find help**" see Ladd *v.* Patten, 66 Me. 97, 98.

"**Find the expense money**" see Rich *v.* Braxton, 158 U. S. 375, 387, 15 S. Ct. 1006, 39 L. ed. 1022.

"**Finding or producing a purchaser**" see Baars *v.* Hyland, 65 Minn. 150, 152, 67 N. W. 1148.

"**Finding of the money inclosed**" see Keron *v.* Cashman, (N. J. Ch. 1896) 33 Atl. 1055, 1056.

93. State *v.* Bulkeley, 61 Conn. 287, 369, 23 Atl. 186, 14 L. R. A. 657.

"**Find and establish the boundary line between the adjoining lands of different proprietors**" see Weeks *v.* Trask, 81 Me. 127, 131, 16 Atl. 413, 2 L. R. A. 532.

"**Find they do the work**" in a contract for the purchase of smoke consumers see Garden City Wire, etc., Co. *v.* Kause, 67 Ill. App. 108, 110.

94. Black L. Dict.

95. Young *v.* Porter, 5 Yerg. (Tenn.) 98, 99.

96. Anderson L. Dict.

97. And is never used to designate the decision of the supreme court upon appeal. Williams *v.* Giblin, 86 Wis. 648, 57 N. W. 1111.

A finding by the court takes the place of a verdict by the jury.—Findings are said to be general and special. In other words, the court finds a general verdict on all the issues for the plaintiff or defendant, or it finds a special verdict. Rhodes *v.* U. S. National Bank, 66 Fed. 512, 514, 13 C. C. A. 612, 34 L. R. A. 742.

98. **Findings** see 12 Cyc. 53 note 2; 11 Cyc. 410, 413 note 15, 488 note 34, 977; 8 Cyc. 331 note 23; 7 Cyc. 491 note 25; 5 Cyc. 275, 855, 972; 3 Cyc. 172, 357, 428; 2 Cyc. 616, 679 note 33.

FINDING LOST GOODS

EDITED BY SAMUEL B. ADAMS*

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Lost Instrument, see LOST INSTRUMENTS.
Reward For Finding, see REWARDS.
Sale of Lost Goods, see SALES.
Stranded and Lost Logs, see LOGGING.
Wrecks and Vessels and Goods Derelict, see SHIPPING.

I. TITLE TO PROPERTY FOUND.

A. Chattels Unattached to Realty — 1. FINDER'S TITLE AGAINST ALL BUT OWNER — a. In General. By the general rule of the common law one who finds and appropriates a lost[1] chattel not buried in or attached to the soil[2] acquires the title thereto and the right to possession thereof against all the world except the true owner.[3] This rule of the common law has been frequently and

1. What is lost property see *infra*, I, C, 1.
2. See *infra*, I, B.
Effect of place of finding on title of finder see *infra*, I, A, 1, c.

3. *Alabama.*— Brandon *v.* Planters', etc., Bank, 1 Stew. 320, 18 Am. Dec. 48.
Delaware.— Clark *v.* Maloney, 3 Harr. 68.

* Sometime Associate Justice of the Supreme Court of Georgia.

variously modified by the terms and provisions of local statutes of many states and these statutes have been considered as wise and equitable.[4]

b. As Affected by Fact That Finder Is an Employee. A servant (other than a slave) or employee who finds a lost chattel while engaged in work for his master is entitled thereto as against the master if the latter is not the owner.[5]

c. As Affected by Ownership of Property In or Upon Which Chattel Was Found. As a general rule the title and the right to possession of the finder is not affected by the ownership of the property in or upon which the thing lost[6] is found.[7] Thus, if a lost article is found on the surface of the ground,[8] on the floor of a shop,[9] in the public parlor of a hotel,[10] or near a table at an open-air

Indiana.— Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172.

Massachusetts.— Ellery *v.* Cunningham, 1 Metc. 112.

Michigan.— Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888; Cummings *v.* Stone, 13 Mich. 70.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

New York.— See Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13; McLaughlin *v.* Waite, 5 Wend. 404, 21 Am. Dec. 232.

Oregon.— Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526.

Pennsylvania.— Hamaker *v.* Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664; Tatum *v.* Sharpless, 6 Phila. 18.

Rhode Island.— Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528.

Virginia.— Tancil *v.* Seaton, 28 Gratt. 601, 26 Am. Rep. 380.

England.—Armory *v.* Delamirie, 1 Str. 505, 1 Smith Lead. Cas. (Hare & Wallace ed.) 407, 1 Gray Cas. Prop. 368.

See 23 Cent. Dig. tit. "Finding Lost Goods," § 9.

Goods waived or scattered by a thief in his flight belonged at common law to the king, for there was supposed to be a default in the party robbed in not making fresh pursuit of the thief and reclaiming the goods before the public officer seized them. 2 Kent Comm. 358 [*citing* Foxley's case, 5 Coke 109, Cro. Eliz. 693].

4. See the statutes of the different states. And see 2 Kent Comm. 356 note c, 360. See also Coverlee *v.* Warner, 19 Ohio 29 (relating to rafts found adrift); Sovern *v.* Yoran, 16 Oreg. 269, 20 Pac. 100, 8 Am. St. Rep. 293

Operation of statute.— A state statute providing that property found must be appraised and the appraisal left with the town-clerk for a year before the owner's title can be divested does not apply to property found in waters not wholly within the state, unless it be shown that the property was found within that part of the waters within the state. Cummings *v.* Stone, 13 Mich. 70.

5. Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172; Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526; Hamaker *v.* Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664 (where the finder was a domestic servant in a hotel and her title was held good as against the proprietor); Tatum *v.* Sharpless, 6 Phila. (Pa.) 18 (where a railroad conductor who found money in a car in the course of his employment was held entitled to the money as against the receiver of the railroad with whom he had left it while the loss and the finding were being advertised). See also Ellery *v.* Cunningham, 1 Metc. (Mass.) 112. But see Mathews *v.* Harsell, 1 E. D. Smith (N. Y.) 393, 394, where the court said: "I am by no means prepared to hold that a house servant who finds lost jewels, money or chattels in the house of his or her employer, acquires any title even to retain the possession, against the will of the employer. It will tend much more to promote honesty and justice, to require servants in such cases to deliver the property so found to the employer for the benefit of the true owner."

Slaves see Brandon *v.* Planters', etc., Bank, 1 Stew. (Ala.) 320; Peay *v.* McEwen, 8 Rich. (S. C.) 31, both holding that property found by a slave belongs to his master.

6. What is lost property within the rule see *infra*, I, C, 1.

7. *Indiana.*— Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

Oregon.—See Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526.

Pennsylvania.— Hamaker *v.* Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664. See Tatum *v.* Sharpless, 6 Phila. 18.

Rhode Island.— Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528.

England.—Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 375 [*distinguished* in South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. Rep. N. S. 761, 44 Wkly. Rep. 653].

8. Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526, where money was found while removing loose dirt and *débris*. See Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13.

Property buried in or attached to soil see *infra*, I, B.

Treasure-trove see *infra*, I, C, 2.

9. Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 375.

10. Hamaker *v.* Blanchard, 90 Pa. St. 377, 35 Am. Rep. 664.

place of amusement,[11] or in the car of a railroad,[12] it becomes, except as against the loser, the property of the finder who appropriates it, without any reference to the ownership of the property in or upon which the article was found or from which it was taken.[13] So too if the lost thing be found within a chattel transferred by sale, the finder takes title to the thing found unaffected by the property rights of the vendee of the chattel,[14] for unless the vendee of the chattel had knowledge, when he made his purchase, of the thing contained therein,[15] or had reason to believe that anything more than the chattel was sold to him,[16] no title to the thing found passed to him by the sale. This rule that the title of the finder is unaffected by the fact that the thing was found in or upon the property of another has been limited in some cases, however.[17]

d. As Affected by the Nature of the Property Found. The rule that the finder of the lost chattel has title against all the world except the true owner does not under some decisions include choses in action.[18]

2. Titles of Finders Inter Se. It is a necessary consequence of the general rule as to the title of the finder of a lost chattel[19] that the first finder who appropriates the chattel found and then loses it has a superior title to that of a subsequent finder, against whom the first finder's rights can be enforced.[20] If a lost chattel is discovered by two or more persons under circumstances which fairly show that it was found by all, the finders take a qualified title in common.[21]

11. Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

12. Tatum *v.* Sharpless, 6 Phila. (Pa.) 18.

13. See cases cited *supra*, note 8 *et seq.*

14. Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172 (where one found money inside of an envelope bought by her employer as waste paper); Durfee *v.* Jones, 11 R. I. 588, 23 Am. Rep. 528 (where a person bought a safe and left it with another, who found money in it).

15. Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

16. Merry *v.* Green, 10 L. J. M. C. 154, 7 M. & W. 623.

17. Ferguson *v.* Ray, 44 Oreg. 557, 77 Pac. 600, 102 Am. St. Rep. 648 [*following* South Staffordshire Water Co. *v.* Sharman, *infra*]; Forster *v.* Juniata Bridge Co., 16 Pa. St. 393, 55 Am. Dec. 506 (holding that the owner of land on which property is stranded cannot appropriate it, although he may cast it back into the stream after notice to the owner to remove it and the owner's neglect or refusal to do so); South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44, 46, 65 L. J. Q. B. 460, 74 L. T. Rep. N. S. 761, 44 Wkly. Rep. 653 (where defendant, a laborer, found while cleaning out a pool on plaintiff's property two gold rings which were held by the court to belong to the landowner, and the court said: "The principle upon which this case must be decided, and the distinction which must be drawn between this case and that of Bridges *v.* Hawkesworth [21 L. J. Q. B. 75, 15 Jur. 1079] is to be found in a passage in Pollock and Wright's Essay on Possession in the Common Law, p. 41: 'The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorized interference.'"

18. See McLaughlin *v.* Waite, 5 Wend. (N. Y.) 404, 21 Am. Dec. 232 [*affirming* 9 Cow. 670], where a person found a certificate which entitled the holder to one half the prize that might be drawn by a certain lottery ticket.

It does, however, include bank-notes. Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 604, 26 Am. Rep. 380 (where the court said: "The reasoning of the distinguished chancellor (Walworth) in the case last named [McLaughlin *v.* Waite, 5 Wend. (N. Y.) 404, 21 Am. Dec. 232] is somewhat subtle and not very satisfactory: but if his conclusion is sound that negotiable notes, bankers' checks and lottery tickets, payable to the holder, are not within the operation of the rule, still it by no means follows that current bank notes, convertible at par into money, are not subject to the rule. The finder of money, we apprehend, would acquire by the finding the same title to it that the chimney sweeper's boy in the leading case acquired to the jewel which he found, and which he was permitted to recover in an action against a wrongdoer"); Bridges *v.* Hawkesworth, 15 Jur. 1079, 21 L. J. Q. B. 75.

Promissory notes, foreign bills, etc., see Lost Instruments.

19. See *supra*, I, A, 1, a.

20. Lawrence *v.* Buck, 62 Me. 275. See also Clark *v.* Maloney, 3 Harr. (Del.) 68; Cumming *v.* Cumming, 3 Ga. 460.

21. Cummings *v.* Stone, 13 Mich. 70 (where plaintiff's tug, while towing a raft belonging

3. Finder's Title Against Owner or His Representative. The finder is only the apparent general owner of the thing found, under an uncertain or contingent title which may be defeated by the discovery of the true owner;[22] the owner and loser's title is unaffected by the mere fact that his chattel has been lost.[23] Before a perfect title accrues to the finder, it is necessary that the true owner should have completely relinquished and abandoned his title, although this inchoate title is sufficient to maintain trover thereon against everyone except the true owner.[24] If the true owner dies before his title and right to the lost chattel be discovered, his personal representative has same right over the lost chattel as he has over other property of the decedent's estate.[25]

B. Property Buried in or Attached to Soil. If a chattel is buried or imbedded in the soil and does not belong to that class of chattels which when so found should be considered treasure-trove,[26] title is in the owner of the soil, unless in some instances at least the depositor owner be known.[27] Such a chattel

to defendant, slackened speed, and on starting again the towline caught and drew up an anchor and chain, which were secured and put on the raft by defendant, and it was held that the finding was joint); Keron *v.* Cashman, (N. J. Ch. 1896) 33 Atl. 1055 (where one of several boys picked up a stocking in which something was tied, and after he had swung it about in play for a time, a second one of the boys snatched it, or, it having been thrown by the finder, the second boy picked it up, and began striking the other boys with it, and so it passed from one to another, and finally while the second boy was swinging it, it broke open, and money was found therein, all then examining it together, and it was held that the finding was joint).

22. Brandon *v.* Planters', etc., Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 48; Coverlee *v.* Warner, 19 Ohio 29, holding that under Swan Ohio St. c. 874, §§ 12–16, providing that any person finding a raft adrift may take it up, and if the owner does not call for it within thirty days and the raft exceeds five dollars in value it shall be delivered to a constable, who shall advertise and sell it, the finder of a raft has no right therein as against the owner if he appears within thirty days, and if the owner takes the raft into his possession by force the finder cannot replevy it.

23. *Alabama.*— Brandon *v.* Planters', etc., Bank, 1 Stew. 320, 18 Am. Dec. 48.

Maine.— Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

New York.— New York, etc., R. Co. *v.* Haws, 56 N. Y. 175.

Pennsylvania.— Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

United States.— Gardner *v.* Ninety-Nine Gold Coins, 111 Fed. 552; Lears *v.* One Cask Oil, 14 Fed. Cas. No. 8,161*a*.

24. Eastman *v.* Harris, 4 La. Ann. 193; 2 Kent Comm. 356. And see *infra*, IV, A. See, generally, Abandonment, 1 Cyc. 3; Trover and Conversion.

If the chattel found had no owner, the finder would take, by rule of the Roman law, absolute title by occupation. *Quod enim ante nullius est id naturali ratione occupanti conceditur.* Inst. 2, 1, 12 [*quoted* in Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600]. See Bonum Vacans, 5 Cyc. 858.

25. Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600; Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502, where a chattel sold at auction by an administrator contained money and other valuables secreted therein by decedent, of which neither party to the sale had knowledge, and it was decided that the purchaser of the chattel held the discovered money and valuables for the administrator.

Where money was taken from a body found floating in the sea and paid into the registry of an admiralty court and an award for salvage services made, the public administrator of the county in which the admiralty court was located, who had been granted letters on the estate, was held entitled to the possession of the remainder of the fund left after paying salvage, in preference to the salvors, who claimed as finders of lost goods whose owner was unknown, and in preference to the United States claiming as successor to the prerogative rights of the king of England. Gardner *v.* Ninety-Nine Gold Coins, 111 Fed. 552.

Prerogative of United States in surplus proceeds of derelict property found at sea after awarding to salvors a proper compensation see Peabody *v.* Proceeds of Twenty-Eight Bags of Cotton, 19 Fed. Cas. No. 10,869. See also Shipping.

26. See *infra*, I, C, 2.

Gold rings found by a laborer while cleaning out a pool on his employer's land belong to the landowner. South Staffordshire Water Co. *v.* Sharman, [1896] 2 Q. B. 44, 65 L. J. Q. B. 460, 74 L. T. Rep. N. S. 761, 44 Wkly. Rep. 653. But see Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 103 Am. St. Rep. 627, 65 L. R. A. 526, where money found in loose earth or *débris* by a person employed to remove the same was held to belong to the finder at least as against the person occupying the land. See *supra*, I, A, 1, c.

27. Ferguson *v.* Ray, 44 Oreg. 557, 77 Pac. 600, 102 Am. St. Rep. 648 (where plaintiff, while in possession of defendant's premises under a lease, discovered rich specimens of gold-bearing quartz lying on top

becomes a part of the soil and passes by gift, sale, or descent of the real property as a part thereof.[28]

C Property Found But Not Lost — 1. In General. It is clear that the finder does not take title to every article found out of the possession of its true owner. That the finder should have his qualified title, the chattel found must have been lost, and a thing is not lost unless possession of it has been parted with casually and involuntarily,[29] so that the mind has no impress of and can have no recourse to the event.[30] A thing voluntarily laid down and forgotten is not lost within the meaning of the rule giving the finder title to lost property, and the owner of a shop,[31] bank,[32] or other place[33] where the thing has been left is the proper custodian rather than the person who has happened to have discovered it and rather than all other persons except the owner.

2 Treasure-Trove. Treasure-trove is usually defined as any gold or silver in coin, plate, or bullion found concealed in the earth,[34] or in a house or other private place,[35] but not lying on the ground,[36] the owner of the discovered treasure being

of the ground, and investigated and dug up a large quantity of such quartz found lying in the soil unconnected with any natural deposit, and it was held that the quartz belonged to the owner of the soil, not to the finder); Elwes *v.* Brigg Gas Co., 33 Ch. D. 562, 55 L. J. Ch. 734, 55 L. T. Rep. N. S. 831, 35 Wkly. Rep. 192 (where a prehistoric boat was found by the lessees of the land imbedded in the soil six feet below the surface, and it was held that the owner of the fee was entitled to the boat). See Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13.

An aerolite belongs to the owner of the fee of the land upon which it falls, and not to one who discovered it the day after its fall and dug it up out of the ground. Goddard *v.* Winchell, 86 Iowa 71, 52 N. W. 1124, 41 Am. St. Rep. 481, 17 L. R. A. 788. Therefore a pedestrian upon a highway who first discovers it cannot claim title to it, the highway being a mere easement for travel. Maas *v.* Amama Soc., 16 Alb. L. J. 76.

28. See Burdick *v.* Chesebrough, 94 N. Y. App. Div. 532, 88 N. Y. Suppl. 13.

29. Ferguson *v.* Ray, 44 Oreg. 557, 77 Pac. 600, 102 Am. St. Rep. 648; Lawrence *v.* State, 1 Humphr. (Tenn.) 228, 34 Am. Dec. 644. See also Sovern *v.* Yoran, 16 Oreg. 269, 20 Pac. 100, 8 Am. St. Rep. 293, holding under a statute providing that "if any person shall find any money" he shall give notice, etc., and "if the owner of such lost money appear," etc., money found hid in the earth where it had been intentionally deposited for safe-keeping is not lost money.

30. Ferguson *v.* Ray, 44 Oreg. 557, 564, 77 Pac. 600, 102 Am. St. Rep. 648.

Losing is distinguished from abandonment in that the one is involuntary, and the other is by intent or design. Ferguson *v.* Ray, 44 Oreg. 557, 564, 77 Pac. 600, 102 Am. St. Rep. 648. See Abandonment, 1 Cyc. 3.

31. McAvoy *v.* Medina, 11 Allen (Mass.) 548, 87 Am. Dec. 733; State *v.* McCann, 19 Mo. 249; Lawrence *v.* State, 1 Humphr. (Tenn.) 228, 34 Am. Dec. 644.

32. Kincaid *v.* Eaton, 98 Mass. 139, 93 Am. Dec. 142, where the chattel was laid down by the owner on a desk provided for the use of such persons as should have business at the bank.

33. Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740. And see cases cited *supra*, notes 29, 30.

A pocket-book found under or near a table at a place of amusement has been held to have been lost and not intentionally laid down there and forgotten. Hoagland *v.* Forest Park Highlands Amusement Co., 70 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

Money found between the outer casing and the lining of a safe was held to be lost property. Durfee *v.* Jones, 11 R. I. 588, 591, 23 Am. Rep. 528.

34. See Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600; Danielson *v.* Roberts, 44 Oreg. 108, 114, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526; Sovern *v.* Yoran, 16 Oreg. 269, 276, 20 Pac. 100, 8 Am. St. Rep. 293 [both *quoting* Jacob L. Dict.]; Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 683, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294 [*quoting* Chitty Prerog. 150]; Atty.-Gen. *v.* British Museum, 19 T. L. R. 555, 559 [*quoting* Chitty Prerog. 152].

35. Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 683, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294 [*quoting* Chitty Prerog. 150]; Atty.-Gen. *v.* British Museum, 19 T. L. R. 555, 559 [*quoting* Chitty Prerog. 152]. See Huthmacher *v.* Harris, 38 Pa. St. 491, 499, 80 Am. Dec. 502, where it was said: "And it is not necessary that the hiding should be in the ground, for we are told in 3 Inst. 132, that it is not 'material whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or otherwise.'"

Property found concealed in a chattel transferred by sale has been said to be treasure-trove. Huthmacher *v.* Harris, 38 Pa. St. 491, 80 Am. Dec. 502.

36. Jacobs L. Dict. [*quoted* in Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600; Sovern *v.* Yoran, 16 Oreg. 269, 276, 20 Pac. 100, 8 Am. St. Rep. 293].

unknown.[37] It seems to be generally considered that the treasure must be either gold or silver coin or bullion;[38] but articles manufactured of gold and silver have been conceded and held to be treasure-trove,[39] and it has been said that at the present time treasure-trove may "be taken to include paper representatives of gold and silver, especially when they are found hidden with both of these precious metals."[40] By the early common law the finder of treasure-trove took title thereto against all the world, except the true owner,[41] but by St. 4 Edw. I the title to treasure-trove was vested in the crown, subject to the claim of the true owner.[42] This seems to have been the general rule of law of nearly all nations[43] and remains the law of England at the present time.[44] It has been said that in this country the law relating to treasure-trove has generally been merged into the law relating to lost property found.[45]

II. DUTIES OF FINDER TO OWNER.

A. Return of Property. The finder of a lost chattel should restore it to its owner, and generally in the manner provided by the statute.[46] Whether the finder is bound to submit the thing found to the personal inspection of one who

37. See cases cited *supra*, note 34 *et seq.*

38. See Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600; Ferguson *v.* Ray, 44 Oreg. 557, 77 Pac. 600, 102 Am. St. Rep. 648. And see cases cited *supra*, note 34 *et seq.*

Gold-bearing quartz rock found buried in the loose surface earth is neither gold nor bullion, "and there is clearly nothing else that will give it the stamp of treasure trove." Ferguson *v.* Ray, 44 Oreg. 557, 564, 77 Pac. 600, 102 Am. St. Rep. 648, in which case the proportion of gold to other substances in the rock was estimated from one quarter to three quarters.

39. Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294; Atty.-Gen. *v.* British Museum, 19 T. L. R. 555.

40. Huthmacher *v.* Harris, 38 Pa. St. 491, 499, 80 Am. Dec. 502.

La. Civ. Code, art. 3423, defines a treasure as "a thing hidden or buried in the earth, on which no one can prove his property, and which is discovered by chance." See also Cachard French Civ. Code, art. 716.

41. 1 Blackstone Comm. 296; 2 Kent Comm. 358.

42. See McLaughlin *v.* Waite, 5 Wend. (N. Y.) 404, 21 Am. Dec. 232; Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294; 1 Blackstone Comm. 296; 2 Kent Comm. 357.

Paramount title of true owner.— The rule of the common law, in regard to treasure-trove as laid down by Bracton, lib. 3, cap. 3, and as quoted in Viner Abr. is "that he to whom the property is, shall have treasure trove, and if he dies before it be found, his executors shall have it, for nothing accrues to the King unless when no one knows who hid that treasure." Huthmacher *v.* Harris, 38 Pa. St. 491, 499, 80 Am. Dec. 502. See also Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600.

43. 2 Kent Comm. 358 [*citing* Grotius De Jure Belli et Pacis, bk. 2, c. 8, § 7]. By the law of emperor Hadrian, which was adopted by Justinian, the finder of treasure-trove took title, except as against the true owner, if the thing found was on his own land, but if it was found by chance on the land of another, half of the treasure went to the proprietor of the soil and the other half to the finder. See Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600 [*citing* McKenzie Rom. L. 170]; 2 Kent Comm. 358 [*citing* Justinian Inst. 2, 1, 39]. This rule was adopted by the civil codes of France (see Cachard French Civ. Code, art. 716; Livermore *v.* White, 74 Me. 452, 43 Am. Rep. 600) and Louisiana (Civ. Code, art. 3423).

44. Atty.-Gen. *v.* Moore, [1893] 1 Ch. 676, 62 L. J. Ch. 607, 68 L. T. Rep. N. S. 574, 3 Reports 213, 41 Wkly. Rep. 294; Atty.-Gen. *v.* British Museum, 19 T. L. R. 555.

The prerogative of treasure-trove does not pass in a royal grant under the general word "franchise." Atty.-Gen. *v.* British Museum, [1903] 2 Ch. 598, 72 L. J. Ch. 743, 88 L. T. Rep. N. S. 858, 51 Wkly. Rep. 582.

45. Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627, 65 L. R. A. 526. See Brandon *v.* Planters', etc., Bank, 1 Stew. (Ala.) 320, 18 Am. Dec. 43.

46. See the statutes of the different states.

If the finder knows the owner it is not always necessary to follow the statute. Jones *v.* Smyth, 18 N. H. 119, holding that he need not advertise or appraise the goods as prescribed by statute. Indeed it is held that if circumstances charge the finder with notice that the property belongs to a particular person, the finder should make inquiry as to ownership before taking action under the statute to ascertain the owner. Sovern *v.* Yoran, 15 Oreg. 644, 15 Pac. 395.

If the finder pursues the statutory method and fails to ascertain the owner, and then makes distribution according to the statute under the belief that the statute applies, he is not liable for conversion. Sovern *v.* Yoran, 16 Oreg. 269, 20 Pac. 100, 8 Am. St. Rep. 293.

claims as owner as a safe and proper expedient in searching out the true owner is a question for the jury.[47]

B. Care and Custody of Property. At common law the finder is not liable for mere negligence in the care and keeping of the chattel he has found,[48] but if he uses the property in a way which injures it he is liable to the owner for the injury.[49]

III. FINDER'S RIGHT TO COMPENSATION.[50]

In the absence of an offer of reward, the finder has no right to a reward for the finding of the lost chattel.[51] The finder is, however, entitled to be reimbursed for his necessary expenditures for the preservation of the property,[52] and perhaps for his time and trouble,[53] but he has no lien therefor,[54] and he cannot pay himself for his expense and trouble by using the property for that purpose.[55]

IV. ACTION BY OWNER OR FINDER.

A. Right and Form of.[56] The finder may protect his rights by an action against any one who infringes them.[57] At common law he may maintain trover against any one who deprives him of his possession, except of course the true owner.[58] The true owner may enforce his rights against the finder by

Larceny.— While due diligence should be exercised to seek out the owner, yet a want of promptness on the part of the finder in the performance of this duty does not furnish just cause for charging felonious intent in keeping the property. Peters *v.* Bourneau, 22 Ill. App. 177. See, generally, LARCENY.

47. Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

48. Mulgrave *v.* Ogden, Cro. Eliz. 219, 1 Gray Cas. Prop. 360. See Murgoo *v.* Cogswell, 1 E. D. Smith (N. Y.) 359.

Only gross negligence in the finder's care of money can make him liable. See Dougherty *v.* Posegate, 3 Iowa 88.

A bailee of the finder is not liable to his bailor if the chattel be stolen without the bailee's gross negligence. Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380.

49. Murgoo *v.* Cogswell, 1 E. D. Smith (N. Y.) 359. See Mulgrave *v.* Ogden, 1 Cro. Eliz. 219, 1 Gray Cas. Prop. 360.

Finder's care of lost animals see ANIMALS, 2 Cyc. 361.

50. Reward see REWARDS.

51. *Iowa.*— Dougherty *v.* Posegate, 3 Iowa 88.

Massachusetts.—Wentworth *v.* Day, 3 Metc. 352, 37 Am. Dec. 145, *semble.*

New York.— Amory *v.* Flyn, 10 Johns. 102, 6 Am. Dec. 316.

Oregon.— Watts *v.* Ward, 1 Oreg. 86, 62 Am. Dec. 299.

Pennsylvania.— Hendler *v.* Perkins, 4 Pa. Super. Ct. 344.

United States.— Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533.

The finder of a public document, paper, or record, or one into whose hands such an instrument comes by finding or otherwise, gains no such property in the same as to authorize him to estimate what the value of the document may be to him, to whom it may belong, or who may have an interest therein, and to withhold the same from the rightful owner or lawful custodian until the sum estimated or demanded for the picking up and keeping shall be paid. De la O *v.* Acoma, 1 N. M. 226.

The Roman law denied to the finder of lost property a reward for finding it. 2 Kent Comm. 356 [*citing* Dig. 47, 2, 44, §§ 4–10].

52. *Kentucky.*—Reeder *v.* Anderson, 4 Dana 193.

Massachusetts.— Chase *v.* Corcoran, 106 Mass. 286.

New York.— Amory *v.* Flyn, 10 Johns. 102, 6 Am. Dec. 316.

United States.— Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533, *semble.*

England.— Nicholson *v.* Chapman, 2 H. Bl. 254, *semble.*

See, however, Hendler *v.* Perkins, 4 Pa. Super. Ct. 344.

53. Reeder *v.* Anderson, 4 Dana (Ky.) 193; Nicholson *v.* Chapman, 2 H. Bl. 254, 3 Rev. Rep. 374.

54. Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888; Nicholson *v.* Chapman, 2 H. Bl. 254, 3 Rev. Rep. 374; 2 Kent Comm. 356.

A finder told by the owner to care for the chattel until he calls and pays the sum demanded for rescuing it from a flood is entitled to a lien for such payment. Hendler *v.* Perkins, 4 Pa. Super. Ct. 344.

55. Watts *v.* Ward, 1 Oreg. 86, 62 Am. Dec. 299.

56. See, generally, ACTIONS, 1 Cyc. 634 *et seq.*

Election of remedies see *infra*, IV, C. And see, generally, ELECTION OF REMEDIES, 15 Cyc. 251 *et seq.*

57. Tancil *v.* Seaton, 28 Gratt. (Va.) 601, 26 Am. Rep. 380, holding that the finder may recover from the bailee to whom he intrusted the chattel.

58. Clark *v.* Maloney, 3 Harr. (Del.) 68; Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am.

trover[59] or replevin.[60] His right of action for property for the return of which he has offered a reward is not defeated by neglect to tender the reward.[61]

B. Evidence.[62] The general rules of evidence apply in actions for or against finders of lost goods.[63]

C. Variance.[64] There is no fatal variance between a complaint for money had and received and evidence that defendant found coupons and had them redeemed, for plaintiff had the right to waive the tort and sue in contract.[65]

D. Measure of Recovery.[66] If the finder is successful in an action for conversion of the thing found, defendant is liable for its value[67] and the interest thereon, running usually from the time of the conversion.[68]

FINE AND RECOVERY. See ESTATES.

FINE ARTS. According to the universal acceptation of the term, music, painting, sculpture, etc.[1]

St. Rep. 740; Mathews *v.* Harsell, 1 E. D. Smith (N. Y.) 393; Armory *v.* Delamirie, 1 Str. 505.

First finder may maintain trover against a subsequent finder. Clark *v.* Maloney, 3 Harr. (Del.) 68.

59. Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

60. Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533.

61. Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888.

62. See, generally, EVIDENCE, 16 Cyc. 821 *et seq.*

63. Chase *v.* Corcoran, 106 Mass. 286 (holding that where in an action by the finder for his expenses in preserving the property he testifies without objection that the chattel when found was worth a certain sum, evidence of what, when he found the chattel, he considered it worth is immaterial); Wood *v.* Pierson, 45 Mich. 313, 7 N. W. 888 (holding that in an action against the finder for conversion by refusing to give the chattel up, the fact that after suit was begun the finder learned that it really belonged to claimant has no tendency to show that he had fair and reasonable evidence thereof before suit).

Sufficiency of evidence.— In an action against the finder by one claiming as the true owner, evidence from which a legitimate and reasonable inference may be drawn that the property belongs to plaintiff is sufficient to support a verdict in his favor. Rittenhause *v.* Knoop, 9 Ind. App. 126, 36 N. E. 384; Warren *v.* Ulrich, 130 Pa. St. 413, 18 Atl. 618. See also McFadden *v.* Goettert, 131 Cal. 333, 63 Pac. 477; Lears *v.* One Cask Oil, 15 Fed. Cas. No. 8,161*a*, holding that evidence that libellant's whaling vessel was recently wrecked in the vicinity where a cask of oil was picked up at sea, that similar casks of oil were picked up and delivered to libellant, and that the currents were such as to drift casks in that direction from the wreck is sufficient *prima facie* proof of ownership as against the finder, who concealed the cask.

64. See, generally, PLEADING.

65. Rittenhouse *v.* Knoop, 9 Ind. App. 126, 36 N. E. 384.

66. See DAMAGES, 13 Cyc. 1 *et seq.*

67. Ellery *v.* Cunningham, 1 Metc. (Mass.) 112; Mathews *v.* Harsell, 1 E. D. Smith (N. Y.) 393.

Measure of value of concealed jewel.— In the leading case of Armory *v.* Delamirie, 1 Str. 505, it was held that the jury should presume against a goldsmith to whom a jewel had been intrusted by plaintiff and who had extracted the stones therefrom that the stones were of the finest water and find the value accordingly unless he should produce the jewel and show it to be not of the finest water.

68. Mathews *v.* Harsell, 1 E. D. Smith (N. Y.) 393.

If the finder makes defendant his factor to sell the chattels found, interest begins to run only from the day when the finder demands an account from defendant, he being in no default before that day. Ellery *v.* Cunningham, 1 Metc. (Mass.) 112. See, generally, FACTORS AND BROKERS.

1. Vredenburg *v.* Behan, 33 La. Ann. 627, 637.

"Works of the fine arts" which may be copyrighted see Rosenbach *v.* Dreyfuss, 2 Fed. 217, 219.

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I. DEFINITION.

A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of crime or misdemeanor.[1]

1. Bouvier L. Dict. [*quoted* in People *v.* Nedrow, 122 Ill. 363, 366, 13 N. E. 533; Hudson *v.* Granger, 23 Misc. (N. Y.) 401, 403, 52 N. Y. Suppl. 9; Southern Express Co. *v.* Com., 92 Va. 59, 63, 22 S. E. 809, 41 L. R. A. 436].

Other definitions are: "A pecuniary punishment for an offense or a contempt committed against the King." State *v.* McConnell, 70 N. H. 158, 46 Atl. 458; Coke Litt. 126*b* [*quoted* in State *v.* Ostwalt, 118 N. C. 1208, 1213, 24 S. E. 660, 32 L. R. A. 396; State *v.* Burton, 113 N. C. 655, 662, 18 S. E. 657]. See also Jacob L. Dict.

"A pecuniary punishment imposed by the judgment of a court upon a person convicted of crime." State *v.* Steen, 14 Tex. 396, 398.

"Pecuniary punishments of offences, which are inflicted by sentence of a court in the exercise of criminal jurisdiction." Hanscomb *v.* Russell, 11 Gray (Mass.) 373, 374.

"A sum of money exacted of a person guilty of a misdemeanor or a crime, the amount of which may be fixed by law or left in the discretion of the court." Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136, 140.

"A sum of money ordered to be paid by an offender as a punishment for an offence." Rapalje and L. L. Dict. [*quoted* in State *v.* Burton, 113 N. C. 655, 662, 18 S. E. 657].

"A sum of money paid at the end, to make an end of a transaction, suit, or prosecution; mulct; penalty." Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 15 [*citing* Webster Dict.; Richardson Dict.].

"A pecuniary punishment for an offense inflicted by sentence of a court having authority to impose it." Wilcox *v.* Knoxville Borough, 12 Pa. Co. Ct. 641, 646 [*citing* Anderson L. Dict.].

"The sentence pronounced by the Court for a violation of the criminal law of the State." Board of Education *v.* Henderson, 126 N. C. 689, 691, 36 S. E. 158.

"Amends, or pecuniary mulct for an offence committed." State *v.* Robertson, 15 Rich. (S. C.) 17, 20.

"Fine" is derived from "*finis*," and is so called because its payment puts an end to the offense for which it is imposed. State *v.* Steen, 14 Tex. 396, 398. See also Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 15; Coke Litt. 126*b*.

Distinguished from "penalty."— In its broadest sense "penalty" includes fines, as well as all other kinds of punishment (Gosselink *v.* Campbell, 4 Iowa 296; The Strathairly, 124 U. S. 558, 31 L. ed. 580; U. S. *v.* Mann, 26 Fed. Cas. 15,718, 1 Gall. 177; Reg. *v.* Gavin, 1 Can. Cr. Cas. 59. But see Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136); but in its narrower sense a penalty is the amount recovered for a violation of the statute law of the state or the ordinance of a town, which violation may or may not be a crime (Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136; Hudson *v.* Granger, 23 Misc. (N. Y.) 401, 52 N. Y. Suppl. 9; Fuller *v.* Redding, 16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109; Board of Education *v.* Henderson, 126 N. C. 689, 36 S. E. 158; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; Reg. *v.* Brown, [1895] 1 Q. B. 119. See also Atty.-Gen. *v.* Bradlaugh, 14 Q. B. D. 667, 54 L. J. Q. B. 205, 52 L. T. Rep. N. S. 589, 33 Wkly. Rep. 673); while a fine is a pecuniary punishment inflicted by the sentence of a court of criminal jurisdiction on a person convicted of crime (Indianapolis *v.* Fairchild, 1 Ind. 315; State *v.* Missouri Pac. R. Co., 64 Nebr. 679, 90 N. W. 877; Lancaster *v.* Richardson, 4 Lans. (N. Y.) 136; Hudson *v.* Granger, 23 Misc. (N. Y.) 401, 52 N. Y. Suppl. 9; Fuller *v.* Redding,

II. ORIGIN AND SOURCE.

Fines constitute in whole or in part the punishment for many offenses at common law,[2] as well as for many offenses created by statute.[3] Subject to constitutional restrictions,[4] the imposition and regulation of fines belong to the legislature.[5]

III. RECOVERY AND IMPOSITION.

A. Proceedings to Recover. Since the word "fine" in its strict technical sense is to be regarded as a punishment for a criminal offense,[6] a criminal prosecution is the usual mode of recovery.[7] But the mode in which fines and penal-

16 Misc. (N. Y.) 634, 39 N. Y. Suppl. 109; Board of Education *v.* Henderson, 126 N. C. 689, 36 S. E. 158; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436. See also Slayton *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; State *v.* Burton, 113 N. C. 655, 18 S. E. 657; U. S. *v.* Mann, 26 Fed. Cas. No. 15,718, 1 Gall. 177). The terms "fine" and "penalty" are, however, often used as synonymous (People *v.* Nedrow, 122 Ill. 363, 13 N. E. 533; State *v.* Horgan, 55 Minn. 183, 56 N. W. 688. See also Lord *v.* State, 37 Me. 177); and the term "fine" has been held broad enough to include "penalties" recoverable in a civil action (People *v.* Nedrow, 122 Ill. 363, 13 N. E. 533; Atchison, etc., R. Co. *v.* State, 22 Kan. 1, 15, where the court said: "In all cases where money is imposed merely as punishment for the violation of some law, we think the imposition of such money should be called a fine;" Hanscomb *v.* Russell, 11 Gray (Mass.) 373; Territory *v.* Baca, 2 N. M. 183). See also, generally, PENALTIES.

Distinguished from forfeiture.— "A fine is a pecuniary penalty," while "a forfeiture is a penalty by which one loses his rights and interests in his property." Gosselink *v.* Campbell, 4 Iowa 296, 300. See also Johnson *v.* Daw, 53 Mo. App. 372. But the terms are often used indiscriminately (see Gosselink *v.* Campbell, 4 Iowa 296; Hanscomb *v.* Russell, 11 Gray (Mass.) 373; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436); and it has been held that the word "forfeit," or "forfeiture," when used in a criminal statute to denote a punishment for crime, is equivalent to "fine" (*Ex p.* Alexander, 39 Mo. App. 108, holding that a provision that a person convicted shall "forfeit and pay a sum not exceeding one thousand dollars," authorizes the imposition of a fine, and imprisonment on non-payment thereof; State *v.* McConnell, 70 N. H. 158, 159, 46 Atl. 458, where the court said: "A pecuniary punishment called a forfeiture, is equivalent to the same pecuniary punishment called a fine;" *Ex p.* Marx, 86 Va. 40, 9 S. E. 475. See also Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429; State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532; State *v.* Sellner, 17 Mo. App. 39). See also FORFEITURES, *post*, p. 1356.

Personal liabilities imposed on public officers for the non-performance of official duties are not fines. Porter *v.* Thomson, 22 Iowa 391.

Money paid on a forfeited recognizance is not a fine and is not a substitute for a fine, although the alleged crime was one which might have required the imposition of a fine if defendant had appeared and had been convicted; and consequently no part of such money belongs to the informer who would have been entitled to a share of the fine. U. S. *v.* Fanjul, 25 Fed. Cas. No. 15,069, 1 Lowell 117. See also *In re* Brittingham, 5 Fed. 191.

2. Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436. See also CRIMINAL LAW, 12 Cyc. 957 note 36 *et seq.*

3. Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

4. See CRIMINAL LAW, 12 Cyc. 958 note 41.

Statutes imposing excessive fines see CRIMINAL LAW, 12 Cyc. 965.

5. *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952; Thomas *v.* Rowe, (Va. 1895) 22 S. E. 157; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 523, 6 S. Ct. 110, 29 L. ed. 463 (where it is said: "The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government"); Canada Atty.-Gen. *v.* Ontario Atty.-Gen., 23 Can. Sup. Ct. 458 [*following* Hodge *v.* Reg., 9 App. Cas. 117, 53 L. J. P. C. 1, 50 L. T. Rep. N. S. 301]. See also CRIMINAL LAW, 12 Cyc. 958 note 42 *et seq.*

Delegation of power to municipal corporations see MUNICIPAL CORPORATIONS.

6. See *supra*, I.

7. *Louisiana.*— State *v.* Williams, 7 Rob. 252.

Minnesota.— State *v.* Horgan, 55 Minn. 183, 56 N. W. 688.

Nebraska.— State *v.* Missouri Pac. R. Co., 64 Nebr. 679, 90 N. W. 877, holding that under a constitutional provision giving the supreme court original jurisdiction of "civil cases in which the state shall be a party," such court has no original jurisdiction of a proceeding to enforce the liability of a person, under a statute which provides that a person violating its provisions shall "upon conviction thereof be fined."

New Hampshire.— State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51, holding that a complainant, under a statute imposing a fine, cannot recover in an action of debt that portion of the fine to which, by the terms of the statute, he may be entitled.

New York.— Hudson *v.* Granger, 23 Misc. 401, 52 N. Y. Suppl. 9, holding that a viola-

ties are to be recovered is a matter of legislative discretion;[8] and many statutes creating offenses provide that the fine imposed for a violation of their provisions may be recovered in a civil action,[9] as well as by indictment.[10] Where a statute creating a new offense and imposing a fine also prescribes the mode of its enforcement, the mode so prescribed will be held to be exclusive.[11]

tion of a city ordinance made punishable by a maximum fine or in the alternative by certain imprisonment is properly prosecuted as a crime.

North Carolina.— See State *v.* Ostwalt, 118 N. C. 1208, 24 S. E. 660, 32 L. R. A. 396; State *v.* Burton, 113 N. C. 655, 18 S. E. 657.

United States.— See U. S. *v.* Morin, 26 Fed. Cas. No. 15,810, 4 Biss. 93.

See also, generally, INDICTMENTS AND INFORMATIONS.

Implication arising from statutory use of word.— In State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51 [*followed* by State *v.* Horgan, 55 Minn. 183, 56 N. W. 688; State *v.* Missouri Pac. R. Co., 64 Nebr. 679, 90 N. W. 877], the rule is laid down that in the absence of any special provision as to the mode of procedure, the use of the word "fine" determines the form of the remedy.

Statute providing for fine and imprisonment.— A statute providing that on conviction the party guilty of violating the statute shall be fined or imprisoned or both contemplates a criminal proceeding only. Pardee *v.* Smith, 27 Mich. 33; U. S. *v.* Claflin, 97 U. S. 546, 553 note, 24 L. ed. 1082, 1085; U. S. *v.* Morin, 26 Fed. Cas. No. 15,810, 4 Biss. 93, holding that where a violation of the internal revenue law is punishable by fine or imprisonment or both, the district attorney has no authority to waive the imprisonment and sue in debt for the fine. See also People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331.

8. State *v.* Missouri Pac. R. Co., 64 Nebr. 679, 90 N. W. 877; *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 6 S. Ct. 110, 29 L. ed. 463.

9. State *v.* Ford, 70 Mo. 469 (holding that a statute providing for the recovery of fines in certain cases by a "civil action" to the use of the county before a justice does not authorize a proceeding before a justice founded on an affidavit charging a criminal offense, on which a warrant is issued for the arrest of defendant); *Ex p.* Marx, 86 Va. 40, 9 S. E. 475 (holding that under Va. Code, §§ 3799, 2939, the fine prescribed for violating the Sabbath is recoverable before a justice by a civil warrant). See also Wiley *v.* Yale, 1 Metc. (Mass.) 553; Fowler *v.* U. S., 1 Wash. Terr. 3. And see DEBT, ACTION OF, 13 Cyc. 411; and, generally, PENALTIES.

In Kentucky under statutes providing that a public offense for which the only punishment is a fine may be prosecuted by penal action in the name of the commonwealth, it has been held that a fine may be recovered in a civil action unless the statute creating the offense provides that the proceeding must be by indictment. Com. *v.* Louisville, etc., R. Co., 80 Ky. 291, 44 Am. Rep. 475; Harp *v.* Com., 61 S. W. 467, 22 Ky. L. Rep. 1792; Com. *v.* Louisville, etc., R. Co., 37 S. W. 589, 18 Ky. L. Rep. 610.

Fines for violation of municipal ordinances. — *Illinois.*— Caldwell *v.* Wright, 25 Ill. App. 74.

Missouri.— De Soto *v.* Brown, 44 Mo. App. 148.

Ohio.— Markle *v.* Akron, 14 Ohio 586.

Tennessee.— State *v.* Mason, 3 Lea 649.

Wisconsin.— Oshkosh *v.* Schwartz, 55 Wis. 483, 13 N. W. 552; Platteville *v.* Bell, 43 Wis. 488.

See also, generally, MUNICIPAL CORPORATIONS.

Preponderance of evidence sufficient for recovery.— Under a statute providing that the fine imposed for a violation of its provision may be enforced by criminal prosecution or sued for and recovered before a justice, a suit for the fine is not a criminal prosecution but is a civil action in which a recovery is justified by the preponderance of evidence. Proctor *v.* People, 24 Ill. App. 599.

Previous conviction of offender as prerequisite.— Under a municipal ordinance providing for the imposition of a fine, where a person is convicted of a violation of the ordinance, the fine "to be collected as similar debts are now by law collected," it has been held that the fine cannot be collected by a suit before a justice until after the person charged has been convicted of violating the ordinance. Wilcox *v.* Knoxville Borough, 12 Pa. Co. Ct. 641.

Conclusion of declaration "against the form of the statute."— In an action or information to recover a fine under a statute, it has been held that the declaration must conclude "against the form of the statute," or by words of equivalent import. U. S. *v.* Babson, 24 Fed. Cas. No. 14,489, 1 Ware 462. See also, generally, PENALTIES.

10. Com. *v.* Louisville, etc., R. Co., 37 S. W. 589, 18 Ky. L. Rep. 610; *In re* Hersom, 39 Me. 476; State *v.* Carr, 6 Oreg. 133 (holding that an indictment is an action at law within the meaning of a statute which makes gambling a misdemeanor, punishable by fine and imprisonment until such fine is paid, and provides that all fines and forfeitures under the act shall be recovered by "an action at law," to be brought in the name of the state); State *v.* Slocum, 9 R. I. 373. See also, generally, INDICTMENTS AND INFORMATIONS.

Fines incurred under the laws of the United States may, under U. S. Rev. St. (1878) § 3214 [U. S. Comp. St. (1901) p. 2084], be recovered by indictment. U. S. *v.* Craft, 43 Fed. 374; U. S. *v.* Moore, 11 Fed. 248; U. S. *v.* Bougher, 24 Fed. Cas. No. 14,627, 6 McLean 277.

11. People *v.* Craycroft, 2 Cal. 243, 56 Am. Dec. 331; Com. *v.* Louisville, etc., R. Co., 37

B. Imposition — 1. IN GENERAL. The court or jury in assessing the fine on conviction of an offense must conform to the statute prescribing the punishment for the offense, and as a general rule any departure therefrom makes the sentence illegal.[12]

2. AMOUNT OF FINE. At common law, when an offense was punishable by fine, the amount thereof was usually left to the discretion of the court within constitutional boundaries.[13] The amount of fines is now, however, generally a matter of statutory regulation;[14] and as a general rule a sentence to have full force and effect must conform to the statute.[15]

3. JOINT OFFENDERS. Although several persons may be jointly indicted and jointly tried, they must be severally fined.[16]

S. W. 589, 18 Ky. L. Rep. 610 (holding that under Ky. St. § 793, providing that the fine imposed on railway companies for failure to give the statutory signals at grade crossings is to be "recovered by indictment," such fine can only be recovered by indictment, although section 1139 provides that a fine may be recovered by civil proceedings or by indictment); State *v.* Helfrid, 2 Nott & M. (S. C.) 233, 10 Am. Dec. 591. See Israel *v.* Jacksonville, 2 Ill. 290. And see ACTIONS, 1 Cyc. 706; DEBT, ACTION OF, 13 Cyc. 411; and, generally, PENALTIES.

A statute providing for the recovery of a fine by "bill, plaint or information" will not sustain an indictment. State *v.* Corwin, 4 Mo. 609; Journey *v.* State, 1 Mo. 428; State *v.* Mathews, 2 Brev. (S. C.) 82. But see State *v.* Helfrid, 2 Nott & M. (S. C.) 233, 10 Am. Dec. 591, holding that the word "bill" includes a bill of indictment.

Statute designating prosecutor.— Where a statute provides that a designated officer shall prosecute all fines which may inure to a city, a prosecution by an officer other than the one designated in the statute cannot be sustained. Com. *v.* Smith, 111 Mass. 407; Com. *v.* Fahey, 5 Cush. (Mass.) 408.

In Missouri, by statute, whenever a fine may be inflicted it may be recovered by indictment or information notwithstanding the law imposing the fine may specify another remedy. Mo. Rev. St. (1889) § 3971; State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130; State *v.* Mackin, 51 Mo. App. 129.

12. *Arkansas.*— Graham *v.* State, 1 Ark. 171.

California.— *Ex p.* Gilmore, 71 Cal. 624, 12 Pac. 800.

Texas.— Sager *v.* State, 11 Tex. App. 110; Fowler *v.* State, 9 Tex. App. 149.

Wisconsin.— Haney *v.* State, 5 Wis. 529.

United States.— *Ex p.* Davis, 112 Fed. 139; U. S. *v.* Vickery, 28 Fed. Cas. No. 16,619, 1 Harr. & J. 427.

See 23 Cent. Dig. tit. "Fines," § 1. See also CRIMINAL LAW, 12 Cyc. 782, 783; 958 note 45 *et seq.*

Directing to whom fine shall be paid see CRIMINAL LAW, 12 Cyc. 329 notes 89, 90, 780.

Presence of accused at time of sentence see CRIMINAL LAW, 12 Cyc. 776 note 57 *et seq.*

13. 4 Blackstone Comm. 378; 1 Chitty Cr. L. 810.

Nominal fine imposed.— In People *v.* Cochran, 2 Johns. Cas. (N. Y.) 73, it was held that where a prisoner was convicted of a misdemeanor on his own confession in open court, and no circumstances attending the offense, either by way of aggravation or extenuation, were shown, the court had no criterion by which to regulate its discretion in fixing the punishment, and hence a nominal fine only would be imposed.

Province of court and jury distinguished.— According to the common-law practice, the jury finds whether or not the prisoner be guilty, and if they find him guilty the court must assess the fine. Hawkins *v.* State, 3 Stew. & P. (Ala.) 63; State *v.* Bangor, 41 Me. 533; U. S. *v.* Mundel, 27 Fed. Cas. No. 15,834, 1 Hughes 415, 6 Call (Va.) 245. See also 1 Chitty Cr. L. 809. But the rule making it the province of the court to assess the fine has been variously modified by statute in the different jurisdictions. Melton *v.* State, 45 Ala. 56; Hawkins *v.* State, 3 Stew. & P. (Ala.) 63; Cook *v.* U. S., 1 Greene (Iowa) 56; Herron *v.* Com., 79 Ky. 38; Canada *v.* Com., 9 Dana (Ky.) 304; Madden *v.* State, (Tenn. Sup. 1901) 67 S. W. 74; State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; France *v.* State, 6 Baxt. (Tenn.) 478; March *v.* State, 35 Tex. 115; Com. *v.* Frye, 1 Va. Cas. 19. See also CRIMINAL LAW, 12 Cyc. 593.

Excessive fines see CRIMINAL LAW, 12 Cyc. 965 *et seq.*

14. *Arkansas.*— Graham *v.* State, 1 Ark. 171.

California.— *Ex p.* Bernert, 62 Cal. 524.

Connecticut.— Taff *v.* State, 39 Conn. 82.

Missouri.— State *v.* McQuaig, 22 Mo. 319; Barada *v.* State, 13 Mo. 94.

Nevada.— State *v.* Lawry, 4 Nev. 161.

Ohio.— Kubach *v.* State, 25 Ohio Cir. Ct. 488; Derby *v.* State, 24 Ohio Cir. Ct. 304.

South Carolina.— Greenville *v.* Kemmis, 58 S. C. 427, 36 S. E. 727, 50 L. R. A. 725; State *v.* Sheppard, 54 S. C. 178, 32 S. E. 146.

Wisconsin.— Taylor *v.* State, 35 Wis. 298.

Excessive fines see CRIMINAL LAW, 12 Cyc. 965 *et seq.*

15. Graham *v.* State, 1 Ark. 171; Taff *v.* State, 39 Conn. 82; State *v.* Lawery, 4 Nev. 161; Taylor *v.* State, 35 Wis. 298. See also CRIMINAL LAW, 12 Cyc. 782, 783; 958 note 49.

16. *Illinois.*— Miller *v.* People, 47 Ill. App. 472.

Missouri.— State *v.* Berry, 21 Mo. 504; State *v.* Gay, 10 Mo. 440.

IV. PAYMENT AND SATISFACTION.

A. Payment or Giving Security — 1. In General. As a general rule payment of a fine by a prisoner will operate as his discharge after an order of court has been obtained for that purpose.[17]

2. Medium of Payment — a. In General. In the absence of language to the contrary, it will be presumed that the court in imposing a fine contemplated payment of the fine in the ordinary currency of the country.[18] The rule has been laid down, moreover, that in the absence of statute an officer has no authority to receive anything other than money in payment of a fine.[19] Under statute in some jurisdictions it has been held that fines may be paid in county warrants,[20] in coupons from state bonds,[21] or by the giving of some other security.[22]

b. Confession of Judgment. As a substitute for the cash payment of a fine and imprisonment therefor, provision is made by statute in some jurisdictions for a confession of judgment by defendant for his fine and costs, with good and sufficient sureties.[23] Indeed the practice of allowing a party committed for fine and

New York.— March *v.* People, 7 Barb. 391.
South Carolina.— State *v.* Smith, 1 Nott & M. 13.
Virginia.— Com. *v.* Hamor, 8 Gratt. 698.
West Virginia.— Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655.
United States.— U. S. *v.* Babson, 24 Fed. Cas. No. 14,489, 1 Ware 462.
England.— Beecher's Case, 8 Coke 58*a*.
See also CRIMINAL LAW, 12 Cyc. 774.

17. State *v.* Smith, 1 Nott & M. (S. C.) 13, holding that an order of discharge by the court is essential.

Necessity of paying costs in addition to fine see *In re* Landreth, 55 Kan. 147, 40 Pac. 285.

Time of payment of fine see Broomhead *v.* Chisolm, 47 Ga. 390; Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131; State *v.* Wooley, 44 Vt. 363.

Payment of fine as affecting right of appeal see CRIMINAL LAW, 12 Cyc. 807, 808.

18. State *v.* Robertson, 15 Rich. (S. C.) 17, holding that a fine was not payable in bills of the bank of the state of South Carolina.

Payment in specific kind of money.— In State *v.* Robertson, 15 Rich. (S. C.) 17, 20, it was said: "It would be competent for him [the magistrate] to require as part of the sentence, that the penalty be paid in gold."

19. Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131; Robinson *v.* State, 34 Tex. Cr. 131, 29 S. W. 788.

This rule has been applied to payment of fines by check (Robinson *v.* State, 34 Tex. Cr. 131, 29 S. W. 788); mortgage (Hubbard *v.* State, 71 Ark. 467, 75 S. W. 853; Schlief *v.* State, 38 Ark. 522; Floyd *v.* State, 32 Ark. 200; Manitowoc County *v.* Sullivan, 51 Wis. 115, 8 N. W. 12), promissory note of defendant (Good *v.* Allen, 15 Ill. App. 663; Clark *v.* State, 3 Tex. App. 338; Manitowoc County *v.* Sullivan, 51 Wis. 115, 8 N. W. 12. *Compare* Caldwell *v.* Wright, 25 Ill. App. 74), or third person (Kingsbury *v.* Ellis, 4 Cush. (Mass.) 578).

Legality of payment of fine by note or promise of third person see CONTRACTS, 9 Cyc. 503 note 33.

Statutory provision for payment of fine by promissory note.— State *v.* Van Vleet, 23 Iowa 168; Bates *v.* Butler, 46 Me. 387. See also COUNTIES, 11 Cyc. 438 note 19.

Effect of release of prisoner on promise of third person.— Where a sheriff releases a prisoner and takes the promise of another to pay the fine imposed upon him, he cannot afterward hold defendant or arrest him for not paying the fine. By taking the promise of a third person the sheriff becomes liable for the amount of fine and must look to the person on whose promise he acted. Williams *v.* Mize, 72 Ga. 129.

20. Russell *v.* Rowland, 47 Ark. 203, 1 S. W. 74 (holding that a fine may be paid in the warrants of a county, although the case in which the fine was imposed was tried in another county to which it had been removed); McKibben *v.* State, 31 Ark. 46.

21. Clarke *v.* Tyler, 30 Gratt. (Va.) 134; *In re* Shaner, 39 Fed. 869; *In re* Mitchell, 39 Fed. 386.

22. Hubbard *v.* State, 71 Ark. 467, 75 S. W. 853; State *v.* Piggues, 58 Ark. 132, 23 S. W. 792; Chatfield *v.* Frye, 19 Wend. (N. Y.) 545. See also Hamilton *v.* State, 9 Baxt. (Tenn.) 355.

Replevy of judgment imposing fine.— Howard *v.* Fuller, 100 Ky. 148, 37 S. W. 585, 18 Ky. L. Rep. 611; Nall *v.* Springfield, 9 Bush (Ky.) 673; Com. *v.* Merrigan, 8 Bush (Ky.) 131.

Statutory right to surrender land in discharge of body see Walsh *v.* Ringer, 2 Ohio 327, 15 Am. Dec. 555.

23. Bowen *v.* State, 98 Ala. 83, 12 So. 808; Nelson *v.* State, 46 Ala. 186; McLeod *v.* State, 35 Ala. 395; Halfacre *v.* State, (Tenn. Sup. 1904) 79 S. W. 132; Boyken *v.* State, 3 Yerg. (Tenn.) 426.

Tennessee statute mandatory.— Halfacre *v.* State, (Tenn. Sup. 1904) 79 S. W. 132.

Offer of good and sufficient sureties required.— Bowen *v.* State, 98 Ala. 83, 12 So. 808.

costs to confess judgment with sureties in satisfaction of the original judgment has been adopted in North Carolina apart from statutory authority.[24]

3. Interest on Fines. A fine imposed by the judgment of the court upon a person convicted of crime does not bear interest under a statute allowing interest on judgments.[25]

4. To Whom Payment Is to Be Made. In order to discharge defendant from further liability for a fine, payment must be made to an official authorized by law to receive payment.[26]

B. Enforcement of Payment — 1. By Execution — a. Against Property. After a fine has been imposed by the sentence of the court, it is regarded as in the nature of a debt of record due the state,[27] and it may be enforced by execution against defendant's property both at common law[28] and under statutes

Attorney as surety.— Tenn. Acts (1903), p. 89, c. 48, making it unlawful for an attorney to sign a bond or enter into any recognizance as surety for an appearance in a criminal case, and punishing by fine a violation of its provision, has no application to securing a confessed judgment for a fine and costs pursuant to Shannon Code, § 7214. Halfacre *v.* State, (Sup. 1904) 79 S. W. 132.

Tender of security to court.— By the express provisions of Shannon Code, § 7214, a tender of security for a confessed judgment for a fine and costs may be made to the court, and therefore tender need not be made to the clerk. Halfacre *v.* State, (Tenn. Sup. 1904) 79 S. W. 132.

Tender of more than one surety required.— Halfacre *v.* State, (Tenn. Sup. 1904) 79 S. W. 132.

Where several persons are indicted jointly, and sever in their trials, and are found guilty, and each is fined, and they come in and confess judgment jointly as securities for each other, such judgment must show what each defendant is liable for. Boyken *v.* State, 3 Yerg. (Tenn.) 426. Where two persons were jointly indicted, tried, and convicted, and, with a common surety, confessed judgment for their fines, it was held that separate judgments should be entered against each and the surety, as neither was liable for the other's fine. McLeod *v.* State, 35 Ala. 395.

No particular form of judgment necessary. — Lambert *v.* People, 43 Ill. App. 223.

Estoppel to question amount of fine.— If a defendant who is sentenced to pay a fine procures his discharge or prevents his imprisonment by reason of a confession of judgment, for the amount of the fine and costs by himself and his surety, he is estopped from questioning the amount of the fine and costs. Lambert *v.* State, 43 Ill. App. 223.

Contract for service for repayment of surety.— Sometimes, by statute, a person upon whom a fine has been imposed is authorized to procure security for the payment of his fine and the costs incidental to his conviction, by contracting with his surety to render personal services until his fine and costs are paid (*Ex p.* Davis, 95 Ala. 9, 11 So. 308. See also Convicts, 9 Cyc. 878 note 93 *et seq.*); and he may be subjected to a criminal prosecution for a violation of the contract, without a good and sufficient excuse (Giles *v.* State, 88 Ala. 230, 7 So. 271. See also Convicts, 9 Cyc. 879 note 98 *et seq*).

24. State *v.* Cooley, 80 N. C. 398 [*following* State *v.* Love, 23 N. C. 264]. See also State *v.* Simpson, 46 N. C. 80. *Compare* Lambert *v.* State, 43 Ill. App. 223, 226, where it is said: "This method of procuring a discharge from imprisonment, or of preventing the defendant who may be convicted of a misdemeanor, punishable by fine only, from being imprisoned, is purely statutory, and unknown to the common law."

A judgment confessed by a third person to satisfy a fine and costs imposed on one convicted of an offense has been held to be regular and proper, but an execution upon such a judgment can only issue against the person who has confessed the judgment and not against him jointly with the person against whom the fine and costs were awarded; and hence an execution issuing against them jointly is void, and a sale under it conveys no title to the purchaser. Flemming *v.* Dayton, 30 N. C. 453.

25. People *v.* Sutter St. R. Co., 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137; State *v.* Steen, 14 Tex. 396.

Where under statute a fine draws interest, a tender of an amount insufficient to pay both fine and interest is bad. State *v.* Wooley, 44 Vt. 363.

26. Smith *v.* Dana, 63 Vt. 537, 22 Atl. 629; Manitowoc County *v.* Sullivan, 51 Wis. 115, 8 N. W. 12. See also Good *v.* Allen, 15 Ill. App. 663; State *v.* Wooley, 44 Vt. 363.

Sentence directing to whom fine shall be paid see Criminal Law, 12 Cyc. 780.

27. Gill *v.* State, 39 W. Va. 479, 480, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655 (where the court said: "When the prosecution for a public offence has ended in a judgment imposing a fine, it is no longer an unascertained penalty or liability, but has become fixed in amount and has become a debt, and that of the highest character — a debt of record payable instanter — and the lawful process of execution may go upon it at common law and under our statute"); Rex *v.* Woolf, 2 B. & Ald. 609, 1 Chitt. 401, 18 E. C. L. 223.

28. McMeekin *v.* State, 48 Ga. 335; McNamara *v.* Earley, 2 Pa. Co. Ct. 491; Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St.

in many jurisdictions.[29] The execution may issue whether the sentence be for a fine alone, or a fine coupled with a definite term of imprisonment;[30] and it has been held that it may issue, although defendant's body has already been taken in execution for the fine.[31] Executions in these cases are as a general rule governed by the principles applicable to executions in civil cases.[32]

b. Against the Person — (i) *CAPIAS PRO FINE.* At common law, where a judgment for a fine is rendered in the absence of defendant, a special writ of capias pro fine issues against him, the exigency of which is that his body be

Rep. 928, 26 L. R. A. 655; Rex *v.* Woolf, 2 B. & Ald. 609, 1 Chitt. 401, 18 E. C. L. 223 [*following* Rex *v.* Wade, Jones 185, Skin. 12], where levari facias was used. See also Rex *v.* Speed, 1 Ld. Raym. 583, 1 Salk. 379.

In New York it seems that a fine imposed in a criminal case can be enforced only by imprisonment and that an execution cannot issue against the property of defendant. Colon *v.* Lisk, 13 N. Y. App. Div. 195, 43 N. Y. Suppl. 364; People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372. See also Harrington *v.* New York, 40 Misc. 165, 81 N. Y. Suppl. 667; Hudson *v.* Granger, 23 Misc. 401, 52 N. Y. Suppl. 9. But see Kane *v.* People, 8 Wend. 203; People *v.* Van Eps, 4 Wend. 387.

29. *Arkansas.*— Cheaney *v.* State, 36 Ark. 74; Hall *v.* Doyle, 35 Ark. 445.

California.— People *v.* Brown, 113 Cal. 35, 45 Pac. 181; Grady *v.* Superior Ct., 64 Cal. 155, 30 Pac. 613.

Kentucky.— Farris *v.* Dozier, 82 S. W. 615, 26 Ky. L. Rep. 892.

Minnesota.— *In re* Shaw, 31 Minn. 44, 16 N. W. 461.

Ohio.— Huddleson *v.* Ruffin, 6 Ohio St. 604.

Pennsylvania.— McNamara *v.* Earley, 2 Pa. Co. Ct. 491.

Tennessee.— Beasley *v.* State, 2 Yerg. 481.

Texas.— *Ex p.* Dickerson, 30 Tex. App. 448, 17 S. W. 1076.

Utah.— Roberts *v.* Howells, 22 Utah 389, 62 Pac. 892.

West Virginia.— Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655; State *v.* Burkeholder, 30 W. Va. 593, 5 S. E. 439.

United States.— Clark *v.* Allen, 114 Fed. 374; *In re* Teuscher, 23 Fed. Cas. No. 13,846.

See 23 Cent. Dig. tit. "Fines," § 7.

But see State *v.* Robinson, 17 N. H. 263.

Capias pro fine operating as execution against property.— Under statute in Kentucky it has been held that a capias pro fine is made to operate as an execution against the property of defendant, and if so used it must be returned as an ordinary execution against property. Com. *v.* Merrigan, 8 Bush 131.

Fieri facias and not levari facias is, under the Pennsylvania practice, the proper writ to issue for the enforcement of a fine. McNamara *v.* Earley, 2 Pa. Co. Ct. 491.

Execution against lands.— In West Virginia, under statute, execution may issue against the land as well as the goods and chattels of defendant. Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 45 Am. St. Rep. 928, 26 L. R. A. 655; State *v.* Burkeholder, 30 W. Va. 595, 5 S. E. 439.

Collection of fine for violation of ordinance, by fieri facias.— Huddleson *v.* Ruffin, 6 Ohio St. 604.

Execution on property of infant.— Beasley *v.* State, 2 Yerg. (Tenn.) 481.

Execution on the separate estate of a married woman.— Gill *v.* State, 39 W. Va. 479, 20 S. E. 568, 75 Am. St. Rep. 928, 26 L. R. A. 655.

Failure of judgment to order issuance of execution immaterial.— *Ex p.* Dickerson, 30 Tex. App. 448, 17 S. E. 1076.

Liability of marshal for failure to apply to district attorney for execution see Washington County Levy Ct. *v.* Ringgold, 5 Pet. (U. S.) 451, 8 L. ed. 188 [*affirming* 15 Fed. Cas. No. 8,305, 2 Cranch C. C. 659].

Right to claim homestead against execution for fine see, generally, HOMESTEAD.

30. People *v.* Brown, 113 Cal. 35, 37, 45 Pac. 181 (holding that under Pen. Code, § 1214, which provides that "if the judgment is for a fine alone, execution may be issued thereon as on a judgment in a civil action," execution may issue, if there is a fine without the alternative of imprisonment to enforce the fine, whether it be a judgment of fine coupled with a judgment of imprisonment, or one simply of fine without a judgment of imprisonment); Roberts *v.* Howells, 22 Utah 389, 62 Pac. 892; Rex *v.* Woolf, 2 B. & Ald. 609, 1 Chitt. 401, 18 E. C. L. 223.

31. Rex *v.* Woolf, 2 B. & Ald. 609, 1 Chitt. 401, 18 E. C. L. 223; Rex *v.* Webb, 2 Show. 166. *Compare* State *v.* Johnston, 2 N. C. 293; O'Conner *v.* State, 40 Tex. 27.

32. See cases cited *infra*, this note. And see EXECUTIONS, 17 Cyc. 878.

The execution must follow the judgment imposing the fine, and a judgment in favor of the state will not support an execution in the name of an informer. Dupont *v.* Downing, 6 Iowa 172. See also EXECUTIONS, 17 Cyc. 1010.

Levy as satisfaction.— Where property seized on execution for the payment of a fine is thereafter restored to the owner, the judgment is not satisfied. Warrensburg *v.* Simpson, 22 Mo. App. 695.

Necessity of cash sale under statute see Hall *v.* Doyle, 35 Ark. 445.

Replevin by person fined to contest title of purchaser at execution sale.— Heagle *v.* Wheeland, 64 Ill. 423.

Court without power to order disposition of property seized in execution.— Rex *v.* Carlile, 1 D. & R. 474, 16 E. C. L. 50.

taken and committed to jail until the fine is paid,[33] and provision is made by statute in many states for the use of this writ in the enforcement of the payment of fines.[34] The right to issue a capias pro fine is not affected by statutes abolishing the writ of capias ad satisfaciendum.[35] Although a judgment imposing a fine may expressly award a capias pro fine for its collection,[36] the writ may issue in the absence of an order in the judgment for its issuance,[37] unless the judgment imposing the fine expressly provides some other mode for its enforcement.[38]

(II) *CAPIAS AD SATISFACIENDUM.*[39] A capias ad satisfaciendum in the form appropriate to civil cases was not issuable at common law for enforcing the payment of fines,[40] although a different rule obtains under statute in some jurisdictions.[41]

2. BY IMPRISONMENT — a. Power to Imprison — (I) *IN GENERAL.* Under the common-law practice, wherever a court has power to impose a fine it has power

33. *New Jersey.*— Dodge *v.* State, 24 N. J. L. 455.

New York.— Kane *v.* People, 8 Wend. 203.

North Carolina.— State *v.* Johnston, 2 N. C. 293.

Texas.— State *v.* Boren, 21 Tex. 591.

Virginia.— Com. *v.* Webster, 8 Gratt. 702. See also Pifer *v.* Com., 14 Gratt. 710.

United States.— *Ex p.* Watkins, 7 Pet. 568, 8 L. ed. 786.

England.— Duke's Case, 1 Salk. 400; Reg. *v.* Templeman, 1 Salk. 55. See 1 Chitty Cr. L. 721, 811.

See 23 Cent. Dig. tit. "Fines," § 11.

Judgment for costs.— In Com. *v.* Webster, 8 Gratt. (Va.) 702, it was held that where there is a judgment in favor of the commonwealth for a fine and the costs of the prosecution, a capias pro fine may issue for the fine and costs, but where the judgment is for costs without a fine, the writ is not a proper process to enforce the judgment.

Process unnecessary when defendant present in court.— It is to be presumed that a party was present in court when a judgment in a criminal prosecution was rendered against him and that an order of committal was made for his failure to pay his fine, and no process to arrest is necessary in such cases. Edwards *v.* State, 22 Ark. 303. See also Steele *v.* Com., 3 Dana (Ky.) 84.

Proceedings for committal of defendant present in court see *infra*, IV, B, 2, a.

Capias pro fine distinguished from capias ad satisfaciendum see Leavison *v.* Rosenthal, 5 Ky. L. Rep. 132; Wilkerson *v.* Allen, 23 Gratt. (Va.) 10; Com. *v.* Webster, 8 Gratt. (Va.) 702.

34. *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; Long *v.* Wood, 78 Ky. 392; Faris *v.* Com., 3 B. Mon. (Ky.) 79; Steele *v.* Com., 3 Dana (Ky.) 84; Farris *v.* Dozier, 82 S. W. 615, 26 Ky. L. Rep. 892; Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838 (holding that under Va. Code, § 726, the court or the judge thereof in vacation may direct the clerk to issue a capias pro fine either before or after a return of the writ of fieri facias); Com. *v.* Webster, 8 Gratt. (Va.) 702.

Issuance of capias pro fine upon judgment in penal action.— Harp *v.* Com., 61 S. W. 467, 22 Ky. L. Rep. 1792.

Place of confinement.— In Long *v.* Wood, 78 Ky. 392, it was held that a party arrested under a capias pro fine in a county other than that from which it was issued should be taken by the officer to the jail of the county whence it issued.

Form and contents of capias see *Ex p.* Peacock, 25 Fla. 478, 6 So. 473.

Suspension of capias by issuance of fieri facias.— Although a fieri facias issues on a judgment for a fine assessed for gaming and is levied, and the right to issue a capias pro fine is thereby suspended, yet if the property levied on be rescued by defendant, the suspension ceases and the capias may be issued. Faris *v.* Com., 3 B. Mon. (Ky.) 79.

Replevy of capias pro fine.— Under a statute in Kentucky it has been held that a judgment for a fine is merged in a bond replevying a capias pro fine which issued thereon, and if an execution issued on the replevin bond be returned "no property" a second capias cannot be issued. Com. *v.* Merrigan, 8 Bush 131.

35. Cagle *v.* State, 6 Humphr. (Tenn.) 391; Com. *v.* Webster, 8 Gratt. (Va.) 702. See also Dodge *v.* State, 24 N. J. L. 455.

36. Com. *v.* Webster, 8 Gratt. (Va.) 702.

37. Long *v.* Wood, 78 Ky. 392; Farris *v.* Dozier, 82 S. W. 615, 26 Ky. L. Rep. 892; Com. *v.* Webster, 8 Gratt. (Va.) 702. See also *In re* Beall, 26 Ohio St. 195.

38. *In re* Teuscher, 23 Fed. Cas. No. 13,846.

39. See, generally, EXECUTIONS, 17 Cyc. 1490.

40. Wilkerson *v.* Allan, 23 Gratt. (Va.) 10; Com. *v.* Webster, 8 Gratt. (Va.) 702; *Ex p.* Watkins, 7 Pet. (U. S.) 568, 8 L. ed. 786.

41. Atty.-Gen. *v.* Baker, 9 Rich. Eq. (S. C.) 521; *Ex p.* Watkins, 7 Pet. (U. S.) 568, 8 L. ed. 786, construing the Maryland law as adopted in the District of Columbia. See also Bayard *v.* State, 2 Ohio Dec. (Reprint) 15, 1 West. L. Month. 89.

Application of rules governing the writ in civil cases see Bayard *v.* State, 2 Ohio Dec. (Reprint) 15, 1 West. L. Month. 89; *Ex p.* Watkins, 7 Pet. (U. S.) 568, 8 L. ed. 786; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,650, 4 Cranch C. C. 271.

to compel the payment thereof by imprisonment of the party fined,[42] and where the punishment for the offense is a fine and defendant is present in court at the time of sentence, it is a part of the sentence that he stand committed until the fine is paid.[43] In many jurisdictions moreover provision is made by statute for enforcing the payment of fines by imprisonment of the party fined.[44] Under statutes in some jurisdictions, where the party is convicted of an offense and

42. *Georgia.*— Shiver *v.* State, 23 Ga. 230; Brock *v.* State, 22 Ga. 98.

Illinois.— *In re* Bollig, 31 Ill. 88; Brown *v.* People, 19 Ill. 613.

Michigan.— See Brownbridge *v.* People, 38 Mich. 751.

Minnesota.— State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

United States.— Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13; U. S. *v.* Robbins, 27 Fed. Cas. No. 16,171, holding that the federal courts, in cases of crimes punishable by fine or by fine and imprisonment, have an inherent power, derived from the common law, to order the person convicted to be confined in jail until the fine is paid.

England.— Beecher's Case, 8 Coke 58. See also Coke Litt. 126*b*.

Statutory crimes.—Where a statute authorizes or prescribes the infliction of a fine as a punishment for an offense, it is lawful for the court inflicting the fine to direct that the party stand committed until the fine is paid, although there be no specific affirmative grant of power in the statute to make such direction. Fischer *v.* Hayes, 6 Fed. 63, 19 Blatchf. 13.

In Ohio, where all offenses are statutory and punishments are regulated by statute, it is held that a court has no authority to commit for non-payment of a fine in the absence of a specific statute authorizing the commitment. Brown *v.* State, 11 Ohio 276; Bonsal *v.* State, 11 Ohio 72; Lougee *v.* State, 11 Ohio 68. See also U. S. *v.* Robbins, 27 Fed. Cas. No. 16,171.

Imprisonment for non-payment of costs in criminal cases see COSTS, 11 Cyc. 291.

Working out fines see *infra,* IV, B, 3,

Fines imposed by municipal corporations see, generally, MUNICIPAL CORPORATIONS.

43. *Florida.*— *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; *Ex p.* Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200.

Georgia.— Brock *v.* State, 22 Ga. 98.

Massachusetts.— Harris *v.* Com., 23 Pick. 280, holding that where the accused is sentenced to pay a fine the sentence should be "to pay the fine or stand committed until the sentence be performed."

New Jersey.— Dodge *v.* State, 24 N. J. L. 455.

New York.— Kane *v.* People, 8 Wend. 203.

Ohio.— See Lougee *v.* State, 11 Ohio 68.

Tennessee.— Hill *v.* State, 2 Yerg. 247.

United States.— *Ex p.* Watkins, 7 Pet. 568, 8 L. ed. 786; U. S. *v.* Roberts, 27 Fed. Cas. No. 16,173, 2 N. Y. Leg. Obs. 99.

England.— Groenvelt's Case, 1 Ld. Raym. 213; Rex *v.* Hord, Say. 176. See also Rex *v.* Wilkes, 4 Burr. 2527, 19 How. St. Tr. 1075; Chapman's Case, Cro. Car. 340; Rex *v.* Waddington, 1 East 167; Gordon's Case, 22 How. St. Tr. 175, 235.

A failure to order the commitment of a person on whom a fine was imposed has been held ground for quashing the conviction. Rex *v.* Hord, Say. 176. But see Dodge *v.* State, 24 N. J. L. 455.

A sentence awarding process according to the practice of the court is good, although it be not added that defendant stand committed until the fine be paid. Kane *v.* People, 8 Wend. (N. Y.) 203.

44. *California.*— People *v.* Brown, 113 Cal. 35, 45 Pac. 181; *Ex p.* Soto, 88 Cal. 624, 26 Pac. 530; *Ex p.* Casey, 85 Cal. 36, 24 Pac. 599; *Ex p.* Neustadt, 82 Cal. 273, 23 Pac. 124; *In re* Fil Ki, 80 Cal. 201, 22 Pac. 146; *Ex p.* Ellis, 54 Cal. 204; *Ex p.* Kelly, 28 Cal. 414; People *v.* Markham, 7 Cal. 208.

Florida.— *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; *Ex p.* Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200.

Illinois.— Berkenfield *v.* People, 191 Ill. 272, 61 N. E. 96.

Indiana.— Smith *v.* State, 23 Ind. 132; McCool *v.* State, 23 Ind. 127.

Iowa.— State *v.* Boynton, 75 Iowa 753, 38 N. W. 505; State *v.* Jordan, 39 Iowa 387.

Kansas.— State *v.* Baxter, 41 Kan. 516, 21 Pac. 650.

Kentucky.— Hopkinsville *v.* Boyd, 101 Ky. 664, 42 S. W. 350, 19 Ky. L. Rep. 876; Faris *v.* Com., 3 B. Mon. 79; Farris *v.* Dozier, 82 S. W. 615, 26 Ky. L. Rep. 892.

Minnesota.— State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

Missouri.— *Ex p.* Alexander, 39 Mo. App. 108.

Montana.— Petelin *v.* Kennedy, 29 Mont. 466, 75 Pac. 82.

Nevada.— State *v.* Second Judicial Dist. Ct., 16 Nev. 76.

New Jersey.— Dodge *v.* State, 24 N. J. L. 455.

New Mexico.— *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952.

New York.— See Matter of Hoffman, 1 N. Y. Cr. 484.

Ohio.— *In re* McAdams, 21 Ohio Cir. Ct. 450.

Oregon.— *Ex p.* McGee, 33 Oreg. 165, 54 Pac. 1091.

Utah.— Roberts *v.* Howells, 22 Utah 389, 62 Pac. 892.

Wyoming.— Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

See 23 Cent. Dig. tit. "Fines," § 12.

Constitutionality of statutes see CONSTITUTIONAL LAW, 8 Cyc. 881; EXECUTIONS, 14 Cyc. 1494.

Statute imposing fine also providing means of enforcement.— Where a statute imposing

sentenced to pay a fine, it is within the discretion of the court to order his imprisonment until the fine be paid.[45] A direction in a sentence imposing a fine that defendant stand committed until the fine is paid is no part of the penalty for the offense, but is merely a means of compelling obedience to the judgment of the court.[46]

(II) *Where Both Fine and Imprisonment Are Imposed.* As a general rule, where the punishment for an offense is both fine and imprisonment, the court may order defendant, for a failure to pay the fine, to be imprisoned, and that such imprisonment begin after the expiration of the term fixed as a punishment for the crime.[47]

a fine prescribes a particular method for its enforcement by docketing the fine and issuing execution thereon, the court has no authority to sentence one convicted for violating the statute to imprisonment for non-payment of the fine imposed. People *v.* Stock, 26 N. Y. App. Div. 564, 50 N. Y. Suppl. 483 [*affirmed* in 157 N. Y. 681, 51 N. E. 1092]; People *v.* Hazard, 23 Misc. (N. Y.) 477, 52 N. Y. Suppl. 670. See also People *v.* Kinney, 24 N. Y. App. Div. 309, 48 N. Y. Suppl. 749.

Time of commitment.— It has been held that, while a justice should immediately commit a defendant to jail on his failure to pay a fine imposed, yet if he extends indulgence to him by giving him time in which to pay a mittimus subsequently issued is not void. McLaughlin *v.* Etchison, 127 Ind. 474, 27 N. E. 152, 22 Am. St. Rep. 658. See also *In re* Shaw, 31 Minn. 44, 16 N. W. 461.

Suspension of execution of sentence.— It has been held that a court has no power to suspend execution of a sentence except as incident to a writ of error or some other legal ground, and having sentenced a defendant to pay a fine and to stand committed until it was paid, not exceeding six months, the term of imprisonment on failure to pay the fine commenced at once; and that if the court without legal cause suspended execution of the sentence until further order, and no further order was made until after the expiration of the six months, defendant could not thereafter be committed, although the fine remains unpaid. *In re* Webb, 89 Wis. 354, 62 N. W. 177, 46 Am. St. Rep. 846, 27 L. R. A. 356. See also CRIMINAL LAW, 12 Cyc. 772.

General statute authorizing commitment.— Where there is a general statute authorizing the commitment of a defendant for the non-payment of a fine and costs, a defendant may be committed, although the statute under which he is convicted contains no provision for such commitment. People *v.* Markham, 7 Cal. 208; Hanks *v.* Workman, 69 Iowa 600, 29 N. W. 628; *In re* McCort, 52 Kan. 18, 34 Pac. 456.

In Arkansas it has been held that a fine imposed as a part of the punishment for a felony cannot be enforced by imprisonment. Cheaney *v.* State, 36 Ark. 74.

Alternative or conditional sentences, such as a sentence to pay a fine, and in default thereof to be imprisoned for a definite time, leaving the prisoner to decide which alternative he will take, are generally held not to be allowable (*Ex p.* Martini, 23 Fla. 343, 2 So. 689; Turner *v.* Smith, 90 Mich. 309, 51 N. W. 282; People *v.* Carroll, 44 Mich. 371, 6 N. W. 871; Donnoly *v.* People, 38 Mich. 756; Brownbridge *v.* People, 38 Mich. 751; Roop *v.* State, 58 N. J. L. 487, 34 Atl. 885; Matter of Hoffman, 1 N. Y. Cr. 484; *In re* Deaton, 105 N. C. 59, 11 S. E. 244 [*following* State *v.* Perkins, 82 N. C. 681]. See also *In re* Bray, 12 N. Y. Suppl. 366. *Compare* Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959; Broomhead *v.* Chisolm, 47 Ga. 390), unless authorized by statute (Wilde *v.* Com., 2 Metc. (Mass.) 408. See also State *v.* Markham, 15 La. Ann. 498; Brownbridge *v.* People, *supra*).

Definiteness of sentence see CRIMINAL LAW, 12 Cyc. 779.

45. *Ex p.* Soto, 88 Cal. 624, 26 Pac. 530; *Ex p.* Tuichner, 69 Iowa 393, 28 N. W. 655; Hill *v.* State, 2 Yerg. (Tenn.) 247; *Re* Jackson, 96 U. S. 727, 24 L. ed. 877; *In re* Teuscher, 23 Fed. Cas. No. 13,846.

46. *Arkansas.*— *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34.

California.— *Ex p.* Kelly, 28 Cal. 414; People *v.* Markham, 7 Cal. 208.

Florida.— *Ex p.* Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200.

Georgia.— Brock *v.* State, 22 Ga. 98.

Illinois.— Berkenfield *v.* People, 190 Ill. 272, 61 N. E. 96; *In re* Bollig, 31 Ill. 88.

Kansas.— State *v.* Baxter, 41 Kan. 516, 21 Pac. 650.

Minnesota.— State *v.* Peterson, 38 Minn. 143, 36 N. W. 443.

Missouri.— State *v.* Schierhoff, 103 Mo. 47, 15 S. W. 151.

New Jersey.— Dodge *v.* State, 24 N. J. L. 455.

North Carolina.— State *v.* Crook, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260.

Ohio.— Inwood *v.* State, 42 Ohio St. 186, holding that an act punishing persons disturbing religious worship and authorizing a fine only on a summary conviction and imprisonment for its enforcement is not in violation of Const. art. 1, §§ 5, 10, on the ground that no provision is made for trial by the jury.

Oregon.— *Ex p.* McGee, 33 Oreg. 165, 54 Pac. 1091.

Texas.— Luckey *v.* State, 14 Tex. 400.

47. *Illinois.*— Berkenfield *v.* People, 191 Ill. 272, 61 N. E. 96 [*affirming* 92 Ill. App. 400].

Indiana.— See *Ex p.* Tongate, 31 Ind. 370.

Iowa.— State *v.* Myers, 44 Iowa 580.

Louisiana.— See State *v.* Hyland, 36 La.

(III) *Necessity of First Proceeding Against Property.* Apart from express statutory requirement,[48] it is not a condition precedent to the power to imprison that an effort should first have been made to satisfy the fine out of the property of defendant.[49]

b. Place of Confinement. As a general rule, where the sentence is to pay a fine and in default of payment to be imprisoned, the imprisonment should be in the common jail of the city or county.[50] But the rule has been laid down in New York that where a prisoner is sentenced to both fine and imprisonment in the state prison, it is proper to direct a continuance of imprisonment in the state prison, in default of payment of the fine.[51]

c. Duration of Imprisonment — (I) *In General.* In the absence of a statute limiting the duration of the imprisonment to enforce the payment of a fine, it seems that the convict may be imprisoned for an unlimited time in default of payment of the fine.[52] But statutes authorizing imprisonment for non-payment of a fine usually impose limitations upon the term of imprisonment.[53] As a gen-

Ann. 709; State *v.* Ryder, 36 La. Ann. 294.

New York.— People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372 [*affirming* on this point 17 Misc. 712, 41 N. Y. Suppl. 531]; People *v.* Sutton, 2 Silv. Sup. 575, 6 N. Y. Suppl. 95.

Wyoming.— Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

England.— Groenvelt's Case, 1 Ld. Raym. 213.

But see People *v.* Brown, 113 Cal. 35, 45 Pac. 181; Lowrey *v.* Hogue, 85 Cal. 600, 24 Pac. 995; People *v.* Hamberg, 84 Cal. 468, 24 Pac. 298; *Ex p.* Rosenheim, 83 Cal. 388, 23 Pac. 372 [*overruling* People *v.* Righetti, 66 Cal. 184, 4 Pac. 1063, 1185]; *Ex p.* Neustadt, 82 Cal. 273, 23 Pac. 124; *In re* Collins, (1890) 23 Pac. 374; Roberts *v.* Howells, 22 Utah 389, 62 Pac. 892.

48. Sheldon *v.* Hill, 33 Mich. 171; People *v.* Rochester, 8 N. Y. St. 291.

49. *Illinois.*— *In re* Bollig, 31 Ill. 88.

Iowa.— Elsner *v.* Shrigley, 80 Iowa 30, 45 N. W. 393.

South Carolina.— Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521.

Virginia.— Shiflett *v.* Com., 90 Va. 386, 18 S. E. 838.

Canada.— Arnott *v.* Bradly, 23 U. C. C. P. 1.

50. State *v.* Framness, 43 Minn. 490, 45 N. W. 1098. See *Ex p.* Halsted, 89 Cal. 471, 26 Pac. 961; *In re* Montijo, (Cal. 1891) 26 Pac. 961; Saner *v.* People, 17 Colo. App. 307, 69 Pac. 76; People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372; Merkee *v.* Rochester, 13 Hun (N. Y.) 157. And see Criminal Law, 12 Cyc. 956 note 57.

51. People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372 [*reversing* 17 Misc. 712, 41 N. Y. Suppl. 531], holding that N. Y. Code Cr. Proc. § 488, which provides that where the judgment is imprisonment in the county jail or fine and imprisonment until it is paid "the judgment must be executed by the sheriff of the county" in which conviction was had, applies only to cases where fine or fine and imprisonment in the county jail is the only penalty imposed. *Compare* Cheaney *v.* State, 36 Ark. 74; *Ex p.* Wadleigh, 82 Cal. 518, 23 Pac. 190; *Ex p.* Middleton, (Cal. 1889) 20 Pac. 684; *Ex p.* Arras, 78 Cal. 304, 20 Pac. 683.

52. Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959; Brock *v.* State, 22 Ga. 98. *Compare* Brownbridge *v.* People, 38 Mich. 751.

53. *California.*— People *v.* Brown, 113 Cal. 35, 45 Pac. 181; *Ex p.* Soto, 88 Cal. 624, 26 Pac. 530; *Ex p.* Casey, 85 Cal. 36, 24 Pac. 599; *Ex p.* Kelly, 28 Cal. 414; People *v.* Markham, 7 Cal. 208.

Iowa.— Elsner *v.* Shrigley, 80 Iowa 30, 45 N. W. 392; State *v.* Boynton, 75 Iowa 753, 38 N. W. 505; *Ex p.* Tuichner, 69 Iowa 393, 28 N. W. 655; State *v.* Myers, 44 Iowa 580; State *v.* Jordan, 39 Iowa 387.

Louisiana.— State *v.* Prince, 42 La. Ann. 817, 8 So. 591; State *v.* Markham, 15 La. Ann. 498; State *v.* Butman, 15 La. Ann. 166.

Missouri.— St. Louis *v.* Karr, 85 Mo. App. 608.

Montana.— Petelin *v.* Kennedy, 29 Mont. 466, 75 Pac. 82.

New Mexico.— *In re* Roe Chung, 9 N. M. 130, 49 Pac. 952.

New York.— *In re* Sweatman, 1 Cow. 144. See also Matter of Hoffman, 1 N. Y. Cr. 484.

Oregon.— *Ex p.* McGee, 33 Oreg. 165, 54 Pac. 1091.

Pennsylvania.— See Mertz's Case, 8 Watts & S. 374.

Utah.— Roberts *v.* Howells, 22 Utah 389, 62 Pac. 892.

Virginia.— Com. *v.* Webster, 8 Gratt. 702.

Wyoming.— Fisher *v.* McDaniel, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

Reduction of imprisonment by partial payment.— In Iowa it is held that one committed for non-payment of a fine must remain in custody for the whole of the term fixed in the sentence, unless the whole fine be sooner paid (Galles *v.* Wilcox, 68 Iowa 664, 27 N. W. 816); but in California, where the imprisonment operates as a satisfaction of the fine at a certain rate per day, the prisoner may at any time pay the sum remaining unsatisfied and claim his discharge (*Ex p.* Riley, 142 Cal. 124, 75 Pac. 665; *Ex p.* Casey, 85 Cal. 36, 24 Pac. 599; *Ex p.* Chin Yan, 60 Cal. 78; *Ex p.* Kelly, 28 Cal. 414. *Compare Ex p.* Harrison, 63 Cal. 299).

eral rule, however, the term of imprisonment for the non-payment of a fine is not limited by statutes prescribing a maximum period as punishment for the offense in controversy.[54]

(II) *FIXING DURATION IN SENTENCE.* At common law the commitment is until the fine be paid,[55] and it is not competent to sentence to imprisonment for a term fixed and absolute as a penal consequence for non-payment of a fine.[56] Where the duration of the imprisonment is fixed by statute, the rule in some jurisdictions is that a commitment until the fine be paid, without specifying the duration of the imprisonment, is not void, as the statute fixes a limit beyond which the imprisonment cannot extend regardless of the language of the judgment;[57] but in other jurisdictions the court must conform to the statute, and a commitment until the fine be paid will not justify the detention of the prisoner.[58] A commitment for a definite period which exceeds the statutory limit is illegal.[59]

d. Discharge From Imprisonment — (I) *IN GENERAL.* In the absence of statute a person imprisoned for non-payment of a fine cannot demand his discharge

Improper release by jailer.— Where one sentenced to pay a fine and to be imprisoned until such fine is paid in the proportion of one day for every dollar of the fine is released by the sheriff without authority, the time of his absence cannot be considered as spent in jail in satisfaction of the judgment. *Ex p.* Vance, 90 Cal. 208, 27 Pac. 209, 13 L. R. A. 574.

54. State *v.* Peterson, 38 Minn. 143, 36 N. W. 443 [*distinguishing* Mims *v.* State, 26 Minn. 494, 5 N. W. 369]; People *v.* Sage, 13 N. Y. App. Div. 135, 43 N. Y. Suppl. 372 [*affirming* on this point 17 Misc. 712, 41 N. Y. Suppl. 531]; People *v.* Sutton, 2 Silv. Sup. (N. Y.) 575, 6 N. Y. Suppl. 95; *Ex p.* McGee, 33 Oreg. 165, 54 Pac. 1091, holding that a sentence of a municipal court to imprisonment for one hundred days for non-payment of a fine or violation of an ordinance is not illegal as being in conflict with a provision in the city charter, giving power to punish violations of ordinances by fine or imprisonment not exceeding ninety days. But see Brownbridge *v.* People, 38 Mich. 751; Howard *v.* People, 3 Mich. 207.

In California the rule of the text was applied in the earlier cases (*Ex p.* Casey, 85 Cal. 36, 24 Pac. 599; *Ex p.* Kelly, 28 Cal. 414), but it is now provided by statute (Pen. Code, § 1205) that imprisonment for non-payment of the fine must not "extend in any case beyond the term for which defendant might be sentenced to imprisonment for the offense for which he has been convicted" (*Ex p.* Erdmann, 88 Cal. 579, 26 Pac. 372).

55. Brock *v.* State, 22 Ga. 98. See also *supra*, IV, 2, a, (I), text and note 2. *Compare* Brownbridge *v.* People, 38 Mich. 751.

56. Brownbridge *v.* People, 38 Mich. 751; Groenvelt's Case, 1 Ld. Raym. 213. See also *supra*, IV, 2, a, (I), text and note 3.

Power of court to fix definite limit to imprisonment.— The court may, however, fix a limit beyond which the imprisonment shall not extend, although the fine be not paid. Brock *v.* State, 22 Ga. 98.

A commitment by a justice of the peace, under a statute authorizing him to commit until a fine be paid, but prescribing no particular length of imprisonment, must strictly conform to the statute giving him his authority, and a commitment to jail "for the term of one year, unless the said sum shall be sooner paid," is unwarranted. *Ex p.* Marx, 86 Va. 40, 9 S. E. 475.

57. *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34; Elsner *v.* Shrigley, 80 Iowa 30, 45 N. W. 393 [*distinguishing Ex p.* Tuicher, 69 Iowa 393, 28 N. W. 655]; Jackson *v.* Boyd, 53 Iowa 536, 5 N. W. 734; State *v.* Myers, 44 Iowa 580; Fisher *v.* McDaniels, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

Indefinite imprisonment.— A sentence to pay a fine, accompanied by an order of commitment until the fine is paid, is not in violation of a constitutional provision against indefinite imprisonment. *Ex p.* Peacock, 25 Fla. 478, 6 So. 473; *Ex p.* Bryant, 24 Fla. 278, 4 So. 854, 12 Am. St. Rep. 200.

58. *Ex p.* Sing Oh Tong, 84 Cal. 165, 24 Pac. 181; *Ex p.* Harrison, 63 Cal. 299; State *v.* Prince, 42 La. Ann. 817, 7 So. 591; State *v.* Markham, 15 La. Ann. 498; State *v.* Butman, 15 La. Ann. 166; Gurney *v.* Tufts, 37 Me. 130, 58 Am. Dec. 777, holding that a statute which authorizes a magistrate to commit for thirty days in default of the payment of a fine does not authorize the commitment of a defendant "until he perform said sentence, or be otherwise discharged by due course of law." See also Howard *v.* People, 3 Mich. 207.

A substantial compliance with the terms of the statute is sufficient. *Ex p.* Ellis, 54 Cal. 204. See also *Ex p.* Sing Oh Tong, 84 Cal. 165, 24 Pac. 181.

Stipulation for termination of imprisonment on payment is unnecessary. *Ex p.* Riley, 142 Cal. 124, 75 Pac. 777; *Ex p.* Ellis, 54 Cal. 204; Flanagan *v.* Plainfield, 44 N. J. L. 118. See also *In re* Moore, 14 Ohio Cir. Ct. 237, 7 Ohio Cir. Dec. 575. *Compare* Brownbridge *v.* People, 38 Mich. 751; *Ex p.* Mullaney, 10 Ohio S. & C. Pl. Dec. 419, 8 Ohio N. P. 49.

59. Kanouse *v.* Lexington, 12 Ill. App. 318; State *v.* Jordan, 39 Iowa 387; *In re* Sweatman, 1 Cow. (N. Y.) 114.

upon proof that he is unable to pay.[60] Since a fine is not a debt but a punishment for crime,[61] a person in execution for the non-payment of a fine imposed in a criminal proceeding is not entitled to the benefit of general acts passed for the relief of insolvent debtors,[62] unless such acts expressly include persons imprisoned for non-payment of fines.[63] Statutes in many jurisdictions, however, make special provision for the discharge of one imprisoned for non-payment of a fine, upon his making affidavit that he is unable to pay the fine, and after undergoing a limited term of imprisonment or otherwise complying with the law.[64]

(II) *Improper Discharge or Escape.* If a prisoner, after being fined and ordered into custody, escapes before his term of imprisonment expires, with or without the consent of the officer into whose custody he has been placed, he is not thereby legally set at liberty and may be retaken and imprisoned.[65]

e. Effect as Discharging Fine. Undergoing imprisonment for non-payment of a fine does not in most jurisdictions operate as a satisfaction of the fine, but the liability of defendant remains and may be enforced against his property.[66]

60. Luckey *v.* State, 14 Tex. 400.

61. State *v.* Manuel, 20 N. C. 144; Rex *v.* Norris, 4 Burr. 2142.

62. Perth Amboy *v.* Brophy, 43 N. J. L. 589; State *v.* Manuel, 20 N. C. 144; Com. *v.* Chapman, 1 Va. Cas. 138; Rex *v.* Norris, 4 Burr. 2142. See also 1 Chitty Cr. L. 811.

Discharge of poor debtors see EXECUTIONS, 14 Cyc. 1541 *et seq.*

63. *Arkansas.*— Edwards *v.* State, 22 Ark. 303.

New York.— *In re* Sweatman, 1 Cow. 144.

South Carolina.— Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521.

Tennessee.— Rogers *v.* State, 5 Yerg. 368; Hill *v.* State, 2 Yerg. 247.

Virginia.— Com. *v.* Webster, 8 Gratt. 702.

Prison bounds.— The South Carolina act of 1788, providing that "all prisoners in execution on any civil process" shall be entitled to the benefit of prison bounds, has been construed to include a prisoner in custody under a capias ad satisfaciendum for a fine and the costs of prosecution. Atty.-Gen. *v.* Baker, 9 Rich. Eq. 521. *Compare* State *v.* Gee, 1 Bay 163, holding that a person committed for the non-payment of a fine is not entitled to the privilege of prison bounds.

64. *District of Columbia.*— *Ex p.* Norvell, 20 D. C. 348.

Florida.— *Ex p.* Pells, 28 Fla. 67, 9 So. 833.

Illinois.— *Ex p.* Bolling, 31 Ill. 88; Rankin *v.* Beaird, 1 Ill. 163.

Iowa.— Hanks *v.* Workman, 69 Iowa 600, 29 N. W. 628; *In re* Jordan, 39 Iowa 394; State *v.* Peck, 37 Iowa 342; *In re* Curley, 34 Iowa 184; State *v.* Van Vleet, 23 Iowa 168.

Kansas.— *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

Maine.— Bates *v.* Butler, 46 Me. 387.

Massachusetts.— Gannon *v.* Adams, 8 Gray 395.

New Hampshire.— *In re* Siskin, 63 N. H. 389.

North Carolina.— State *v.* Williams, 97 N. C. 414, 2 S. E. 370; State *v.* Davis, 82 N. C. 610; State *v.* McClure, 61 N. C. 491. See also State *v.* Manuel, 20 N. C. 144.

Ohio.— *Ex p.* Scott, 19 Ohio St. 581; *In re* McAdams, 21 Ohio Cir. Ct. 450, 11 Ohio Cir. Dec. 780; *In re* Moore, 14 Ohio Cir. Ct. 237, 7 Ohio Cir. Dec. 575; *Ex p.* Mullaney, 10 Ohio S. & C. Pl. Dec. 419, 8 Ohio N. P. 49.

Pennsylvania.— Com. *v.* Long, 5 Binn. 489; Johnson's Petition, 2 Pa. Dist. 700, 13 Pa. Co. Ct. 170; Com. *v.* Carey, 2 Pa. Co. Ct. 293; Feehan's Case, Brightly 462; Com. *v.* Heiffer, 2 Woodw. 311.

Texas.— *Ex p.* Biela, (Cr. App. 1904) 81 S. W. 739; *Ex p.* Rodriquez, (Cr. App. 1903) 73 S. W. 1050; *Ex p.* Reeves, 41 Tex. Cr. 266, 53 S. W. 1022; *Ex p.* Hall, 34 Tex. Cr. 617, 31 S. W. 640; *Ex p.* Taylor, 34 Tex. Cr. 273, 30 S. W. 230; *Ex p.* Richmond, 34 Tex. Cr. 112, 29 S. W. 471; *Ex p.* Hunt, 28 Tex. App. 361, 13 S. W. 145; Childers *v.* State, 25 Tex. App. 658, 8 S. W. 928; *Ex p.* Bogle, 20 Tex. App. 127; *Ex p.* Godfrey, 11 Tex. App. 34.

65. *Kansas.*— *In re* Landreth, 55 Kan. 147, 40 Pac. 285; *In re* Bradley, 55 Kan. 147, 40 Pac. 285.

North Carolina.— State *v.* Cooley, 80 N. C. 398; State *v.* McClure, 61 N. C. 491; State *v.* Simpson, 46 N. C. 80. See also Hawkins *v.* Hall, 38 N. C. 280.

Pennsylvania.— Schwamble *v.* Sheriff, 22 Pa. St. 18.

Texas.— Luckey *v.* State, 14 Tex. 400.

Virginia.— Wilkerson *v.* Allan, 23 Gratt. 10.

Compare Flora *v.* Sachs, 64 Ind. 155; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,650, 4 Cranch C. C. 271.

66. *Arkansas.*— Hall *v.* Doyle, 35 Ark. 445.

Georgia.— Hathcock *v.* State, 88 Ga. 91, 13 S. E. 959 [*following* Brock *v.* State, 22 Ga. 98]; McMeekin *v.* State, 43 Ga. 335.

Indiana.— Flora *v.* Sachs, 64 Ind. 155.

Iowa.— State *v.* Anwerda, 40 Iowa 151; State *v.* Jordan, 39 Iowa 387; State *v.* Peck, 37 Iowa 342.

Kansas.— *In re* Boyd, 34 Kan. 570, 9 Pac. 240.

Missouri.— Warrensburg *v.* Simpson, 22 Mo. App. 695.

Pennsylvania.— Brown *v.* Com., 114 Pa. St. 335, 6 Atl. 152; Com. *v.* Long, 5 Binn. 489; Stehl *v.* Com., 4 Pa. Cas. 172, 7 Atl. 169.

Compare Ex p. Harrison, 63 Cal. 299; *Ex p.* Chin Yan, 60 Cal. 78; *Ex p.* Kelly, 28 Cal.

3. Working Out Fines. In the absence of statute the court has no authority to sentence one on whom a fine has been imposed to hard labor in default of the payment of the fine.[67] Statutes,[68] however, in many jurisdictions provide with

414; Petelin *v.* Kennedy, 29 Mont. 466, 75 Pac. 82.

67. *In re* Fil Ki, 80 Cal. 201, 22 Pac. 146; *Ex p.* Kelly, 65 Cal. 154, 3 Pac. 673; State *v.* Hyland, 36 La. Ann. 709; State *v.* Ryder, 36 La. Ann. 294. See Kanouse *v.* Lexington, 12 Ill. App. 318. And see Criminal Law, 12 Cyc. 959 note 58.

68. *Alabama.*— Burke *v.* State, 71 Ala. 377; Bradley *v.* State, 69 Ala. 318; Williams *v.* State, 55 Ala. 166; Burch *v.* State, 55 Ala. 136; Nelson *v.* State, 46 Ala. 186.

Arkansas.— *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34; State *v.* Barnes, 37 Ark. 448.

Florida.— *Ex p.* Pells, 28 Fla. 67, 9 So. 833.

Illinois.— Kanouse *v.* Lexington, 12 Ill. App. 318.

Iowa.— State *v.* Anwerda, 40 Iowa 151; State *v.* Jordan, 39 Iowa 387.

Kansas.— *In re* McCort, 52 Kan. 18, 34 Pac. 456.

Missouri.— *In re* Lorkowski, 94 Mo. App. 623, 68 S. W. 610. See also St. Louis *v.* Karr, 85 Mo. App. 608.

North Carolina.— Myers *v.* Stafford, 114 N. C. 234, 19 S. E. 764.

Tennessee.— Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786.

Texas.— *Ex p.* Biela, (Cr. App. 1904) 81 S. W. 739; *Ex p.* Rodriquez, (Cr. App. 1903) 73 S. W. 1050; *Ex p.* Reeves, 41 Tex. Cr. 266, 53 S. W. 1022; *Ex p.* Jones, 38 Tex. Cr. 142, 41 S. W. 626; *Ex p.* Hall, 34 Tex. Cr. 617, 31 S W. 640; *Ex p.* Taylor, 34 Tex. Cr. 273, 30 S. W. 230; *Ex p.* Richmond, 34 Tex. Cr. 112, 29 S. W. 471; *Ex p.* Hunt, 28 Tex. App. 361, 13 S. W. 145; Childers *v.* State, 25 Tex. App. 658, 8 S. W. 928; *Ex p.* Dampier, 24 Tex. App. 561, 7 S. W. 330; *Ex p.* Godfrey, 11 Tex. App. 34.

See also Convicts, 9 Cyc. 879.

Effect of part payment of fine.— In Bowen *v.* State, 98 Ala. 83, 12 So. 808, it was held that on conviction of a misdemeanor the court should allow a confession of judgment for such part of the fine as defendant is able to make with proper security, and impose a sentence for hard labor for such part as is not paid or confessed.

Retrospective effect of statute reducing per diem.— It has been held that a law reducing a *per diem* allowed a county convict as a credit on his fine when working the same out by manual labor can have no application to a judgment which was rendered and in process of execution prior to the passage of the law. *Ex p.* Hunt, 28 Tex. App. 361, 13 S. W. 145.

Specifying number of days of labor in sentence.— While a sentence to hard labor to pay a fine and costs should specify the amount of the fine and costs or number of days of labor, the sentence is not invalidated by reason of the failure to do so. Walton *v.* State, 62 Ala. 197; Walker *v.* State, 58 Ala. 393.

Failure to impose hard labor.— If a defendant be ordered to be imprisoned until a fine is satisfied at a certain rate per day, where the statute provides that a prisoner shall work out his fine by labor in the workhouse or on the public streets, the failure to require defendant to work out the fine does not render the sentence void. Berkenfield *v.* People, 191 Ill. 272, 61 N. E. 96 [*affirming* 92 Ill. App. 400].

Work done while awaiting trial.— A rule or regulation made by the prison authorities whereby it is provided that a convict held in custody under sentence of a court to work out fines or costs shall receive credit for labor voluntarily performed by him before conviction and while in prison awaiting trial is unauthorized and void. Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786.

Working out several fines.— Under statute in Arkansas providing that, where a prisoner is delivered to a contractor for the discharge of his fine, he shall be kept at work "for such time as will discharge all fines and costs for which he may be committed," and allowing a certain rate of compensation per day, a person who has been convicted and fined for twenty offenses is not entitled to a discharge when the largest fine is paid, on the theory that the periods of his detention for the several offenses run concurrently, as would be the case if the imprisonment were imposed as a punishment unless the judgment otherwise specified, but the prisoner must work until all the fines are paid. *Ex p.* Brady, 70 Ark. 376, 68 S. W. 34.

Effect of inability to work.— Under statute in Tennessee, it has been held that a prisoner may be discharged by a county judge before he has worked out his fine, but that no person shall be so discharged except on the certificate of a physician that such person is physically unable to labor. Vanvabry *v.* Staton, 88 Tenn. 334, 12 S. W. 786. By statute in Texas a convict who from age, disease, or other disability, physical or mental, is unable to do manual labor, shall not be required to work, but shall remain in jail until his term of imprisonment is ended or until the fine and costs charged against him are discharged at the rate of one dollar for each day of such confinement in jail. *Ex p.* Anderson, 34 Tex. Cr. 14, 28 S. W. 807. See also *Ex p.* Littlefield, 39 Tex. Cr. 119, 44 S. W. 1094.

Contractor's bond see *Ex p.* Ransom, 38 Tex. Cr. 141, 41 S. W. 637; *Ex p.* Price, 37 Tex. Cr. 275, 39 S. W. 369; *Ex p.* Price, 11 Tex. App. 538. And see Convicts, 9 Cyc. 880.

Constitutionality of statutes sustained.— Com. *v.* Sherley, 12 S. W. 771, 11 Ky. L. Rep. 641 (act of April 10, 1878, providing that where a fine imposed in a misdemeanor case is unpaid, defendant may be required by a verdict to be put at hard labor for a certain time); Monroe *v.* Meuer, 35 La. Ann. 1192 (a

modifications in some instances that one convicted of a misdemeanor and sentenced to pay a fine may be compelled to pay the fine either by being hired out or put to work on the public improvements; the statutes usually providing further that defendant shall be entitled to a credit on the fine at a certain rate per day.

4. Application by Court of Funds Belonging to Prisoner. It has been held that where money is deposited in lieu of bail for a prisoner,[69] or is found on the person of the prisoner when arrested for intoxication and searched by the police,[70] it may be applied in payment of any fine imposed on the prisoner, and that although the judgment is in the alternative and would be satisfied by either payment or by imprisonment, the prisoner has no right to elect to be imprisoned instead of thus paying the fine.[71]

5. Lien of Judgment Imposing Fine. Provision is sometimes made by statute giving a judgment imposing a fine operation as a lien on defendant's property.[72]

C. Recovery Back of Fines Paid — 1. In General. A fine illegally imposed may be recovered back where it was paid involuntarily or under duress, for example, where it was paid to avoid or obtain release from imprisonment;[73] but there can be no recovery where the fine, although illegally imposed, was volun-

city ordinance and charter authorizing a sentence to work on the streets at a specified rate in default of payment of a fine); State *v.* Manuel, 20 N. C. 144 (act of 1831, providing for a collection of fines imposed on free negroes by hiring them out, with certain regulations).

69. Wills *v.* Neilan, 88 Iowa 548, 55 N. W. 527; People *v.* Laidlaw, 102 N. Y. 588, 7 N. E. 910, a deposit made by a third person for the prisoner.

70. McCann *v.* Barr, 6 Pa. Dist. 721, 19 Pa. Co. Ct. 669 (holding that where an ordinance prescribes a fine as punishment for intoxication, and in default thereof confinement in the city jail, the mayor, after sentencing a prisoner to pay the fine, may retain the amount thereof from money found on his person when searched by the police); McCann *v.* Barr, 16 Lanc. L. Rev. (Pa.) 183, 13 York Leg. Rec. 63.

71. Wills *v.* Neilan, 88 Iowa 548, 55 N. W. 527; McCann *v.* Barr, 6 Pa. Dist. 721, 19 Pa. Co. Ct. 669; McCann *v.* Barr, 16 Lanc. L. Rev. (Pa.) 183, 13 York Leg. Rec. 63.

72. People *v.* Brown, 113 Cal. 35, 45 Pac. 181 (holding that Cal. Pen. Code, § 1206, providing that a judgment imposing a fine shall be a lien in like manner as a judgment for money in a civil action, applies whether the judgment be one of fine and imprisonment or whether it be simply a judgment for a fine without a judgment for imprisonment); Tate *v.* People, 25 Colo. 335, 53 Pac. 1050.

Statutory lien of judgment imposing fine for maintenance of liquor nuisance see Jasper County *v.* Sparham, 125 Iowa 464, 101 N. W. 134; State *v.* McCulloch, 77 Iowa 450, 42 N. W. 367; Polk County *v.* Hierb, 37 Iowa 361.

73. Durr *v.* Howard, 6 Ark. 461 (holding that a sentence by a court without jurisdiction (for assault and battery without indictment or information) that defendant pay a fine and be imprisoned until it is paid, confers no authority on the officer of the court; and if defendant pays the fine he may maintain an action against the officer for its recovery); Develin *v.* U. S., 12 Ct. Cl. 266. See also Merkee *v.* Rochester, 13 Hun (N. Y.) 157; Harrington *v.* New York, 40 Misc. (N. Y.) 165, 81 N. Y. Suppl. 667; Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

Indebitatus assumpsit for money had and received, it has been held, is a proper form of action against the government or a county for the recovery back of a fine illegally collected. Develin *v.* U. S., 12 Ct. Cl. 266. See also Stromburg *v.* Earick, 6 B. Mon. (Ky.) 578; Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

Jurisdiction of action to recover fine from city see Harrington *v.* New York, 40 Misc. (N. Y.) 165, 81 N. Y. Suppl. 667.

Payment under duress a question for the jury.— Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

Estoppel to set up duress and want of jurisdiction.— If a person sentenced by a military commission to pay a fine for defrauding the government and to be imprisoned until the fine is paid secures his release by paying the fine, and afterward concedes that there was justly due from him to the government a larger sum than he had paid, and consents that the money so paid be paid into the treasury as a credit upon his accounts, and accepts as compensation for his services or as a gratuity a portion of the balance justly due from him, he cannot recover the money either upon the ground that the fine was imposed by the commission acting without jurisdiction, or that it was paid under duress. Carver *v.* U. S., 111 U. S. 609, 4 S. Ct. 561, 28 L. ed 540 [*affirming* 16 Ct. Cl. 361].

Liability of county or government for fine improperly collected.— In Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840, it was held that whatever may be the defects in the proceedings where the fine was collected, the county is not answerable for the money so collected, unless it is shown to have been paid into the county treasury. So in Carver *v.* U. S., 16 Ct. Cl. 361 [*affirmed* in 111 U. S. 609, 4 S. Ct. 561, 28 L. ed. 540, it was held that no action can be maintained against the

tarily paid under a mistake of law,[74] as for instance, where the payment was induced, not because of threatened imprisonment but to avoid further inconvenience and trouble.[75] The mere fact, however, that the judgment imposing a fine is void as being in excess of the jurisdiction of the court does not, it has been held, constitute a sufficient ground for recovering back money paid without objection or protest.[76]

2. RESTITUTION AFTER VACATION OF JUDGMENT. Restitution of a fine after the reversal of a judgment imposing it is not a matter of right,[77] but it is for the court to determine whether the payment was voluntarily[78] or involuntarily made,[79] and therefore whether defendant is entitled to a restitution.

V. DISPOSITION OF PROCEEDS.

A. In General. By the common law all fines belong to the crown,[80] or in this country to the state as succeeding to the prerogative of the crown.[81] Constitutional or statutory provisions very generally prescribe the application and disposition to be made of fines,[82] as for instance, that they shall be paid over to

United States for the recovery of a fine illegally imposed by a military commission while it remains in the hands of the military officers.

Remission of fines see, generally, PARDON.

74. *Iowa.*—Bailey *v.* Paullina, 69 Iowa 463, 29 N. W. 418, holding that one who is arrested for the violation of a void ordinance pleads not guilty, but makes no objection to the ordinance, is found guilty and is fined, and pays the fine, while under arrest, without protest, believing that the judgment against him therefor is valid, does not pay under duress, and cannot recover back the money so paid.

New York.— Harrington *v.* New York, 40 Misc. 165, 81 N. Y. Suppl. 667.

Pennsylvania.— Com. *v.* Gipner, 118 Pa. St. 379, 12 Atl. 306.

South Carolina.— McKee *v.* Anderson, Rice 24.

United States.— See Carver *v.* U. S., 111 U. S. 609, 4 S. Ct. 561, 28 L. ed. 540 [*affirming* 16 Ct. Cl. 361].

See 23 Cent. Dig. tit. "Fines," § 22.

75. Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840.

76. Harrington *v.* New York, 40 Misc. (N. Y.) 165, 81 N. Y. Suppl. 667; Houtz *v.* Uinta County, 11 Wyo. 152, 70 Pac. 840. See also McKee *v.* Anderson, Rice (S. C.) 24. *Compare* Stromburg *v.* Earick, 6 B. Mon. (Ky.) 578, holding that a justice of the peace cannot impose fines where he has no jurisdiction, and retain the money, but he is liable to the party paying the fine as for money had and received.

Recovery against magistrate in individual capacity.— Under a statute prescribing both fine and imprisonment for a violation of its provisions, it has been held that a sentence by a justice of a fine only is erroneous but not void as being without jurisdiction, and where the person sentenced has paid the fine he cannot maintain an action against the justice in his individual capacity for its recovery. Bragdon *v.* Somerby, 55 Me. 92.

77. Hazleton *v.* Birdie, 10 Kulp (Pa.) 98; Leffingwell *v.* Wilkes-Barre, 4 Kulp (Pa.) 494. See also APPEAL AND ERROR, 3 Cyc. 463.

78. Com. *v.* Gipner, 118 Pa. St. 379, 12 Atl. 306, holding that where a defendant convicted before a magistrate and sentenced under a statute has voluntarily paid the fine and costs, the court of common pleas has no power on certiorari to reverse the judgment and order restitution. See also Hazleton *v.* Birdie, 10 Kulp (Pa.) 98.

79. People *v.* Wayne County, 41 Mich. 223, 49 N. W. 921, holding that where a judgment imposing a fine is reversed after defendant has paid the fine in order to avoid imprisonment, mandamus will lie to the board of auditors to refund the fine.

80. 1 Chitty Cr. L. 809; 3 Salk. 32; Groenvelt's Case, 1 Ld. Raym. 213.

Power of crown to grant right to fines to third person see Groenvelt's Case, 1 Ld. Raym. 213.

81. Sessions *v.* Boykin, 78 Ala. 328; Klyman *v.* Com., (Ky. 1895) 30 S. W. 658 (laying down the rule that in every case, unless otherwise clearly provided, fines imposed for the violation of a statute of the state belong, when recovered, to the state); Com. *v.* Louisville, etc., R. Co., 30 S. W. 607, 17 Ky. L. Rep. 111. See also Taunton *v.* Sproat, 2 Gray (Mass.) 428.

82. See cases cited *infra*, this and succeeding notes 83–88.

Legislative provision for payment to board of commissioners of fisheries.—People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

Provision of congress for part of fines to be paid over to levy court.— Washington County Levy Ct. *v.* Ringgold, 5 Pet. (U. S.) 451, 8 L. ed. 188.

Provision for payment of fine or part thereof to person injured.— *Connecticut.*— William Rogers Mfg. Co. *v.* Rogers, 38 Conn. 121.

Nebraska.— Everson *v.* State, 66 Nebr. 154, 92 N. W. 137; Hier *v.* Hutchings, 58 Nebr. 334, 78 N. W. 638; Clearwater Bank *v.* Kurkonski, 45 Nebr. 1, 63 N. W. 133; Wayne

the state,[83] county,[84] town, or city,[85] or to some charitable institution,[86] or that they be devoted to the support of the public schools or to some other educational purpose,[87] or to the payment of costs in criminal proceedings when the person

County *v.* Bressler, 32 Nebr. 818, 49 N. W. 782; Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455.

North Carolina.— Morris *v.* Whitehead, 65 N. C. 637; *In re* Rhodes, 65 N. C. 518.

Ohio.— Hancock County Com'rs *v.* Findley Bank, 32 Ohio St. 194.

United States.— U. S. *v.* Murphy, 16 Pet. 203, 10 L. ed. 937. See also CONTEMPT, 9 Cyc. 54.

Sentence directing to whom fine shall be paid see CRIMINAL LAW, 12 Cyc. 329 notes 89, 90, 780.

83. Louisville *v.* Com., 9 Dana (Ky.) 70; Taunton *v.* Sproat, 2 Gray (Mass.) 428; State *v.* Bosworth, 74 Vt. 315, 52 Atl. 423; State *v.* St. Johnsbury, 59 Vt. 332, 10 Atl. 531.

84. *California.*— Los Angeles County *v.* Los Angeles, 65 Cal. 476, 4 Pac. 453.

Illinois.— Edgar County *v.* Mayo, 8 Ill. 82.

New Hampshire.— Hillsborough County *v.* Manchester, 49 N. H. 57.

New York.— People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187 [*affirming* 26 N. Y. Suppl. 167].

Ohio.— Cleveland *v.* Jewett, 39 Ohio St. 271.

Texas.— Hempstead *v.* Waller County, 1 Tex. App. Civ. Cas. § 799.

Virginia.— Tyler *v.* Taylor, 29 Gratt. 765.

Change of venue.— Where there is a change of venue in a criminal case, the fine recovered belongs to the county in which the prosecution originated, and not to the county in which the trial is had. Russell *v.* Rowland, 47 Ark. 203, 1 S. W. 74; Washington County *v.* State, 43 Ark. 267; Rock Island County *v.* Mercer County, 24 Ill. 35; Findley *v.* Erwin, 6 N. C. 244.

85. *Arkansas.*—State *v.* Ft. Smith, 56 Ark. 137, 19 S. W. 427; Hackett City *v.* State, 56 Ark. 133, 19 S. W. 426.

California.— People *v.* Sacramento, 6 Cal. 422.

Kentucky.— Greenville *v.* Townes, 93 Ky. 597, 20 S. W. 912, 14 Ky. L. Rep. 582; Barbour *v.* Louisville, 83 Ky. 95; Harrodsburg *v.* Harrodsburg Educational Dist., 7 S. W. 312, 8 Ky. L. Rep. 605.

Massachusetts.— Taunton *v.* Sproat, 2 Gray 428.

New Hampshire.— Batchelder *v.* Rockingham County, 66 N. H. 374, 23 Atl. 429; Hillsborough County *v.* Manchester, 49 N. H. 57.

New York.— Green Island *v.* Williams, 79 N. Y. App. Div. 260, 79 N. Y. Suppl. 791; People *v.* Ontario County, 4 Den. 260.

Ohio.— Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571.

Virginia.— Tyler *v.* Taylor, 29 Gratt. 765.

Canada.— St. Stephen *v.* Charlotte County, 24 Can. Sup. Ct. 329 [*reversing* 32 N. Brunsw. 292].

86. See cases cited *infra*, this note.

Payment to home for friendless women.— Indianapolis *v.* Indianapolis Home, etc., 50 Ind. 215.

Provision for payment to society for prevention of cruelty to children.— Yonkers Soc., etc., *v.* Yonkers, 44 Hun (N. Y.) 338.

Provision for payment to home for care of inebriates.— Inebriates' Home *v.* Reis, 95 Cal. 142, 30 Pac. 205.

Provision for payment to society for prevention of cruelty to animals.— American Soc., etc., *v.* Gloversville, 78 Hun (N. Y.) 40, 29 N. Y. Suppl. 257; American Soc., etc., *v.* Cohoes, 4 N. Y. St. 808; American Soc., etc. *v.* Doyle, 65 How. Pr. (N. Y.) 459. See also ANIMALS, 2 Cyc. 352.

87. *Dakota.*— Yankton County *v.* Faulk, 1 Dak. 348, 46 N. W. 583.

Illinois.— Sierer *v.* Martin, 63 Ill. 290; Edgar County *v.* Mayo, 8 Ill. 82.

Indiana.— State *v.* Pennsylvania Co., 133 Ind. 700, 32 N. E. 822; State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Burgh *v.* State, 108 Ind. 132, 9 N. E. 75; Swift *v.* State, 63 Ind. 81; Indianapolis *v.* Fairchild, 1 Ind. 315.

Iowa.— Mackie *v.* Iowa Cent. R. Co., 54 Iowa 540, 6 N. W. 723; Woodward *v.* Greeg, 3 Greene 287.

Kansas.— Atchison, etc., R. Co. *v.* State, 22 Kan. 1.

Kentucky.— Harrodsburg *v.* Harrodsburg Educational Dist., 7 S. W. 312, 8 Ky. L. Rep. 605.

Louisiana.— Parish Bd. of Directors *v.* Hebert, 112 La. 467, 36 So. 497.

Mississippi.— State *v.* Stone, 69 Miss. 375, 11 So. 4.

Missouri.— *In re* Staed, 116 Mo. 537, 22 S. W. 859; State *v.* Wabash, etc., R. Co., 89 Mo. 562, 1 S. W. 130; Barnett *v.* Atlantic, etc., R. Co., 68 Mo. 56, 30 Am. Rep. 773.

Nebraska.— Everson *v.* State, 66 Nebr. 154, 92 N. W. 137; State *v.* Heins, 14 Nebr. 477, 16 N. W. 767.

Nevada.— *Ex p.* McMahon, 26 Nev. 243, 66 Pac. 294; State *v.* Swift, 11 Nev. 128.

North Carolina.— Buncombe County *v.* Asheville, 128 N. C. 249, 38 S. E. 874; Board of Education *v.* Henderson, 126 N. C. 689, 36 S. E. 158; Sutton *v.* Phillips, 116 N. C. 502, 21 S. E. 968; Wake *v.* Raleigh, 88 N. C. 120.

Virginia.— Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; Pitman *v.* Com., 2 Rob. 800.

Wisconsin.— State *v.* De Lano, 80 Wis. 259, 49 N. W. 808; State *v.* Miles, 52 Wis. 488, 49 N. W. 808; State *v.* Miles, 52 Wis. 488, Dutton *v.* Fowler, 27 Wis. 427; Lynch *v.* The Economy, 27 Wis. 69; State *v.* Casey, 5 Wis. 318.

See 23 Cent. Dig. tit. "Fines," § 24.

Constitutional provision for application of fines to public libraries.— People *v.* Bay City 36 Mich. 186; People *v.* Detroit, 18 Mich.

convicted is insolvent.[88] In the absence of constitutional restrictions[89] the legislature may make such disposition of fines as it may deem advisable,[90] and may change the disposition thereof at will.[91] Where a disposition of the proceeds unauthorized by law has been made, the right thereto may be enforced in an appropriate action.[92]

B. Informer's Share.[93] The practice of paying a moiety of fines to informers was in frequent use in England from very early times;[94] and in this country congress or the legislature in fixing fines has in many cases provided, with a view to stimulating prosecutions, that an informer should be entitled to a part of the fine.[95] Under the various state constitutions making provision for

445; Wayne County *v.* Detroit, 17 Mich. 390; People *v.* Wayne County, 8 Mich. 392.

88. Hawkins *v.* State, 124 Ala. 102, 27 So. 215; Brown *v.* Parris, 93 Ala. 314, 9 So. 603; Sessions *v.* Boykin, 78 Ala. 328; Palmer *v.* Fitts, 51 Ala. 489; Brunson *v.* Massenberg, 115 Ga. 195, 41 S. E. 699; Overstreet *v.* Rawlings, 106 Ga. 793, 32 S. E. 855; Freeman *v.* Hardeman, 67 Ga. 559; *In re* Speer, 54 Ga. 41. See also COSTS, 11 Cyc. 279 note 27.

89. See Indianapolis *v.* Indianapolis Home, etc., 50 Ind. 215; Graham *v.* Kibble, 9 Nebr. 182, 2 N. W. 455; People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

Unconstitutionality of provision for disposition of fine invalidating statute in part only see State *v.* Newell, 140 Mo. 282, 41 S. W. 751; State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317.

90. State *v.* Swift, 11 Nev. 128; Lloyd *v.* Dollisin, 23 Ohio Cir. Ct. 571. See Palmer *v.* Fitts, 51 Ala. 489. And see cases cited *supra*, notes 82–88.

91. Sessions *v.* Boykin, 78 Ala. 328; Holliday *v.* People, 10 Ill. 214; Rankin *v.* Beaird, 1 Ill. 163; Colee *v.* Madison County, 1 Ill. 154, 12 Am. Dec. 161; Watson Seminary *v.* Pike County Ct., 149 Mo. 57, 50 S. W. 880, 45 L. R. A. 675; Cushman *v.* Hale, 68 Vt. 444, 35 Atl. 382. See also Buffalo *v.* Neal, 86 Hun (N. Y.) 76, 33 N. Y. Suppl. 346.

Constitutionality of retroactive statute.— A statute changing the disposition of fines collected may be given a retroactive effect without being unconstitutional, as depriving the county previously entitled to the fines of private property without due process of law. People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

92. Los Angeles County *v.* Los Angeles, 65 Cal. 476, 4 Pac. 453; Green Island *v.* Williams, 79 N. Y. App. Div. 260, 79 N. Y. Suppl. 791; Yonkers Soc., etc. *v.* Yonkers, 44 Hun (N. Y.) 338; American Soc., etc. *v.* Cohoes, 4 N. Y. St. 808; Cleveland *v.* Jewett, 39 Ohio St. 271; State *v.* St. Johnsbury, 59 Vt. 332, 10 Atl. 531.

Limitation of actions see Harrodsburg *v.* Harrodsburg Educational Dist., 7 S. W. 312, 9 Ky. L. Rep. 605; Hillsborough County *v.* Manchester, 49 N. H. 57; Buncombe County *v.* Asheville, 128 N. C. 249, 38 S. E. 874.

93. **Informer defined.**— An informer is one who gives the first information to the government of a violation of law which induces the prosecution and contributes to the conviction of the offender or to the recovery of a fine, penalty, or forfeiture. U. S. *v.* Simons, 7 Fed. 709 [*citing* City Bank *v.* Bangs, 2 Edw. (N. Y.) 95; *In re* Fifty Thousand Cigars, 9 Fed. Cas. No. 4,782, 1 Lowell 22; *In re* One Hundred Barrels Whiskey, 18 Fed. Cas. No. 10,526, 2 Ben. 14; Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464; U. S. *v.* George, 25 Fed. Cas. No. 15,198, 6 Blatchf. 406; U. S. *v.* Isla de Cuba, 26 Fed. Cas. No. 15,448, 2 Cliff. 458; Lancaster *v.* Walsh, 1 H. & H. 258, 4 M. & M. 16].

94. Bacon Abr. tit. "Action Qui Tam;" 3 Blackstone Comm. 160; State *v.* De Lano, 80 Wis. 259, 49 N. W. 808.

95. *Delaware.*— Law, etc., Soc. *v.* Wilmington, 4 Pennew. 366, 55 Atl. 1.

Illinois.— See Illinois Cent. R. Co. *v.* Herr, 54 Ill. 356.

New Hampshire.— Pierce *v.* Hillsborough County, 54 N. H. 433.

South Carolina.— State *v.* Baldwin, 2 Bailey 541.

Vermont.— Wing *v.* Smilie, 63 Vt. 532, 22 Atl. 74; Cain *v.* Valiquette, 56 Vt. 78.

Virginia.— See Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436.

Wisconsin.— State *v.* De Lano, 80 Wis. 259, 49 N. W. 808.

United States.— Washington Levy Ct. *v.* Ringgold, 5 Pet. 451, 8 L. ed. 188; U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

See 23 Cent. Dig. tit. "Fines," § 25.

Informer must give first information.— In U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176, it was held that a party claiming an informer's share must be the first informer. See also U. S. *v.* George, 25 Fed. Cas. 15,198, 6 Blatchf. 406. So in U. S. *v.* Simons, 7 Fed. 709, it was held that the fact that a person has procured testimony, be it ever so valuable, does not entitle such person to an informer's share where the crime has been disclosed by others and proceedings have been commenced in consequence of such information. In U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176, it was held that if several causes exist by either of which a fine, penalty, or forfeiture is incurred, information of any one of them properly given to the proper officer will entitle the person giving the information to the informer's share if he is the first informer.

Necessity of personal knowledge on part of informer.— Under a statute in Maryland

the application of the proceeds of fines to educational or other purposes, acts of

it has been held that that person is the informer, within the meaning of the statute, who first gives notice to the police authorities that a violation of the law has taken place, and in consequence of whose communication arrests are made, followed by conviction and payment of the fine, and that it is not necessary that he should be a witness in the case or have such personal knowledge of the crime as to make him a competent witness. Sanner *v.* State, 85 Md. 523, 37 Atl. 165.

Character of information.—It has been held that the information furnished by an informer must be substantially true and capable of proof. U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176. So it has been held that it is not sufficient to state a general suspicion of rumor, although such statement may lead to inquiries disclosing facts sufficient to incur liability. U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

Information leading to other information.—Where A informed against B for smuggling and B confessed and implicated C for receiving the property smuggled, and C was arrested and acting upon the advice of a third party also confessed and implicated D as his principal in the transaction, and D was convicted and fined, A was held to be entitled to an informer's share of the fine imposed. U. S. *v.* Simons, 7 Fed. 709.

Form of communication.—U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

From what time claim of informer dates.—In U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176, it was held that the claim of an informer can only date from the time when he actually gave the information and not from the time when he ascertained the facts.

How informer's share estimated.—In U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176, it was held that the share of an informer must be taken from the net and not from the gross proceeds. See also Routt *v.* Feemster, 7 J. J. Marsh. (Ky.) 131.

Officer as informer.—It seems that any person receiving pay from the government whose duty it is to disclose any information he may receive is "an officer of the United States," within the meaning of the act of 1874, and therefore cannot be an informer. U. S. *v.* Simons, 7 Fed. 709 [*citing* U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176; U. S. *v.* One Hundred Barrels Distilled Spirits, 27 Fed. Cas. No. 15,946, 1 Lowell 244; U. S. *v.* Thirty-Four Barrels Whiskey, 28 Fed. Cas. No. 16,462]. *Compare In re* One Hundred Barrels Whiskey, 18 Fed. Cas. No. 10,526, 2 Ben. 11. Under Maryland Code Pub. Gen. Laws, art. 38, § 2, providing that all fines and penalties, when recovered, shall be paid to the county or city where the same may be imposed, unless directed to be paid otherwise by the law imposing them, but if there be an informer he shall have half, unless otherwise provided, it has been held that the state had no interest in, and could not maintain, an action against a sheriff to recover fines which he collected and claimed as informer's fees. Sanner *v.* State, 83 Md. 648, 35 Atl. 158.

To whom information must be given.—To entitle a person to an informer's share under 14 U. S. St. at L. 145, the information must be given by him to some government official who has the power and duty to act thereupon. U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

Action of debt for recovery of share.—A complainant, under a statute imposing a fine, cannot recover in an action of debt that portion of the fine to which, by the terms of the statute, he may be entitled, in the absence of a special provision to that effect, since in the absence of any special provision as to the mode of procedure, the use of the word "fine" in a statute determines that its recovery must be by indictment or information. State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51.

Form of judgment imposing fine.—In a criminal prosecution, under a statute which gives one half of the fine to the prosecutor or person injured, it has been held that the judgment should on conviction be rendered in favor of the state, for the use of the county, for the whole amount of the fine, to be collected as other fines on conviction of misdemeanors, and that there is no authority for a severance of the judgment. Bass *v.* State, 63 Ala. 108. See also Rawlings *v.* State, 2 Md. 201, holding that where an act awards one half of a fine to the county, and one half to the informer, and the whole is adjudged to the state, the judgment will not be reversed at the instance of the person convicted.

Execution in favor of informer.—Where judgment imposing a fine in a prosecution by information is entered in favor of the state it has been held that an execution thereon in favor of the informer is invalid. Dupont *v.* Downing, 6 Iowa 172. To the same effect see Bass *v.* State, 63 Ala. 108.

Form of judgment in qui tam actions see Illinois Cent. R. Co. *v.* Herr, 54 Ill. 356; Illinois Cent. R. Co. *v.* Tait, 50 Ill. 48.

Statute giving law and order society share of fine.—Law, etc., Soc. *v.* Wilmington, 4 Pennew. (Del.) 366, 55 Atl. 1.

Court held without jurisdiction to grant certificate as to value of informer's services after decree imposing fine.—*Ex p.* Gans, 17 Fed. 471, 5 McCrary 393.

Effect of remission by governor on share paid over to informer.—It has been held that after a fine has been paid over to the informer his right thereto is absolute, and a subsequent remission by the governor will not give the person fined a right of action to recover back from the informer the amount of the fine paid to him. Rucker *v.* Bosworth, 7 J. J. Marsh. (Ky.) 645. See also, generally, PARDON.

the legislature giving shares of fines collected to the informers have been upheld in most instances.[96]

FINES MANDATORUM DOMINI REGIS PER RESCRIPTA SUA (SCIL. BREVIA) DILIGENTUR SUNT OBSERVANDI. A maxim meaning "The limits of the king's mandates in his rescripts (i. e., writs) are to be diligently observed."[1]

FINING. In the manufacture of glass, the process of melting in which the purified particles sink and find their level.[2]

FINIS FINEM LITIBUS IMPONIT. A maxim meaning "A fine puts an end to litigation."[3]

FINISH. To COMPLETE,[4] *q. v.*

FINISHED. DONE,[5] *q. v.* As applied to furniture a term which means that an article has been varnished, stained, oiled, polished, or the like.[6]

FINIS REI ATTENDENDUS EST. A maxim meaning "The end of a thing is to be attended to."[7]

FINIS TALIS CONCORDIA FINALIS DICITUR EO QUOD FINEM IMPONIT NEGOTIO, ADEO QUOD NEUTRA PARS LITIGANTIUM, AB EO DE CÆTERO POTEST RECEDERE. A maxim meaning "A final concord is that by which an end is put to the business, from which end neither litigant can recede."[8]

FINIS UNIUS DIEI EST PRINCIPIUM ALTERIUS. A maxim meaning "The end of one day is the beginning of another."[9]

FIRE. To cause to explode.[10]

FIREARMS. See WEAPONS.

FIRE-BOTE. A sufficient allowance of wood to burn in a house.[11] (See BOTE; ESTOVERS; and, generally, COMMON LANDS.)

FIRE-BRICK. A brick made of material which will not fuse readily in a kiln or furnace.[12]

Effect of repeal of statute imposing fine or penalty on rights of informer see CONSTITUTIONAL LAW, 8 Cyc. 911.

Share in fines illegally imposed.— In U. S. *v.* George, 25 Fed. Cas. No. 15,198, 6 Blatchf. 406, it was held that customs officers and informers are entitled to share only in fines, penalties, and forfeitures which are created by some law of the United States.

Delay in bringing claim to notice of court held immaterial.— U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

Conviction a prerequisite to right to claim share.— Sanner *v.* State, 85 Md. 523, 37 Atl. 165.

Informer as party to proceeding for recovery of fine see U. S. *v.* Funkhouser, 25 Fed. Cas. No. 15,177, 4 Biss. 176.

Share of prosecuting officer.— Ashlock *v.* Com., 7 B. Mon. (Ky.) 44; Rout *v.* Feemster, 7 J. J. Marsh. (Ky.) 131; Batchelder *v.* Rockingham County, 66 N. H. 374, 23 Atl. 429; Wing *v.* Smilie, 63 Vt. 532, 22 Atl. 74; Cain *v.* Valiquette, 56 Vt. 78.

Payment to society for prevention of cruelty to children as prosecutor.— Yonkers Soc., etc. *v.* Yonkers, 44 Hun (N. Y.) 338.

96. State *v.* Indiana, etc., R. Co., 133 Ind. 69, 32 N. E. 817, 18 L. R. A. 502; Southern Express Co. *v.* Com., 92 Va. 59, 22 S. E. 809, 41 L. R. A. 436; State *v.* De Lano, 80 Wis. 259, 49 N. W. 808; Dutton *v.* Fowler, 27 Wis. 427; Lynch *v.* The Economy, 27 Wis. 69; State *v.* Casey, 5 Wis. 318. *Compare* Atchison, etc., R. Co. *v.* State, 22 Kan. 1; *Ex p.* McMahon, 26 Nev. 243, 66 Pac. 294.

1. Peloubet Leg. Max.

Applied in Blumfield's Case, 5 Coke 86*a*, 87*a*.

2. Benjamin *v.* Chambers, etc., Glass Co., 59 Fed. 151, 155, 8 C. C. A. 61.

3. Peloubet Leg. Max.

Applied in State *v.* Lee, 65 Conn. 265, 271, 30 Atl. 1110, 48 Am. St. Rep. 202, 27 L. R. A. 498; Fermor's Case, 3 Coke 77*a*, 78*b*.

4. See 8 Cyc. 407. See also Robbins *v.* Blodgett, 121 Mass. 584, 586 ("finished" with respect to a house); *In re* Bartol, 182 Pa. St. 407, 410, 38 Atl. 527 ("finished" with respect to a railroad); Hardcastle *v.* Jones, 3 B. & S. 153, 161, 9 Jur. N. S. 19, 33 L. J. M. C. 49, 7 L. T. Rep. N. S. 322, 11 Wkly. Rep. 36, 113 E. C. L. 153 ("finishing" used with respect to goods).

5. See 14 Cyc. 868.

6. *In re* Herrman, 56 Fed. 477, 479, 5 C. C. A. 582, where it is said that in the furniture trade the word has a particular trade meaning.

7. Bouvier L. Dict. [*citing* Inst. 78].

8. Morgan Leg. Max. [*citing* Coke Litt. 121].

9. Wharton L. Lex.

10. Webster Int. Dict.

"Firing a large sized Colt's revolving pistol," etc., as used in an indictment see Shepherd *v.* State, 54 Ind. 25, 28.

11. See 8 Cyc. 349 note 45. See also Jackson *v.* Brownson, 7 Johns. (N. Y.) 227, 236, 5 Am. Dec. 258.

12. Century Dict.

Fire-brick construed under a customs tariff act see Wing *v.* U. S., 119 Fed. 479.

FIRE-DEPARTMENT. See MUNICIPAL CORPORATIONS.

FIRE DISTRICT. See MUNICIPAL CORPORATIONS.

FIRE-ENGINE. An engine, the primary purpose of which is to extinguish fires.[13]

FIRE-ESCAPE. A contrivance or apparatus on a building to enable the occupants to escape without injury in case of fire.[14] (Fire-Escape: Erection by Order of Health Department, see HEALTH. Liability of — Innkeeper, see INNKEEPERS; Master, see MASTER AND SERVANT; Owner of Building, see NEGLIGENCE.)

13. Des Moines Water Co.'s Appeal, 48 Iowa 324, 329.

14. English L. Dict.

FIRE INSURANCE

By Emlin McClain
Associate Justice of Supreme Court of Iowa*

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* Author of "Carriers," 6 Cyc. 352; "A Treatise on the Law of Crimes," etc., etc.

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CROSS-REFERENCES

For Matters Relating to:
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Contract Generally, see CONTRACTS.
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Motive For:
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Other Kinds, see INSURANCE, and the Cross-References Thereunder.
Insurance Money:
As Community Property, see HUSBAND AND WIFE.
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For Matters Relating to — (*continued*)
Insurance Transaction in Fraud of Creditors, see FRAUDULENT CONVEYANCES.
Interest in or Under Policy:
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Policemen's Relief Society, see MUNICIPAL CORPORATIONS.
Policy Passing to Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY.
Surety Company, see PRINCIPAL AND SURETY.
Taxation of Policy, see TAXATION.

I. DEFINITION.

Fire insurance is a contract[1] by which the insurer, for a consideration, agrees to indemnify the insured against loss of or damage to property by fire.[2]

II. NATURE OF CONTRACT; INSURABLE INTEREST.

A. Personal Contract. A contract of fire insurance is in its nature personal, being presumed to rest to some extent on the trust and confidence of the insurer in the insured that the property will not be destroyed by the insured for the purpose of realizing on the contract.[3]

B. Contract of Indemnity. Fire insurance is a contract of indemnity only.[4]

C. Insurable Interest — 1. NECESSARY TO VALIDITY. The definition of the contract as one of indemnity requires that the insured shall have some interest in the property which will be injuriously affected or imperiled by destruction of or injury to the property by fire. If the person procuring or holding the contract of insurance has no such interest the contract is invalid,[5] the objection to such contract being that it is a mere wager on an event in the happening of

1. See, generally, INSURANCE. See also CONTRACTS.

2. Warren *v.* Davenport F. Ins. Co., 31 Iowa 464, 7 Am. Rep. 160. And see People *v.* Rose, 174 Ill. 310, 51 N. E. 246, 44 L. R. A. 124; Com. *v.* Wetherbee, 105 Mass. 149.

3. Therefore insurance on property is not incident to the title to the property, and in the event of change of title does not inure by virtue of the original contract to the benefit of one who acquires such title.
Illinois.— Lindley *v.* Orr, 83 Ill. App. 70.
Maine.— Lane *v.* Maine Mut. F. Ins. Co., 12 Me. 44, 28 Am. Dec. 150.
Massachusetts.— Wilson *v.* Hill, 3 Metc. 66.
Michigan.— Disbrow *v.* Jones, Harr. 48.
New York.— Ætna F. Ins. Co. *v.* Tyler, 16 Wend. 385, 30 Am. Dec. 90.
Ohio.— Hubbard *v.* Austin, 8 Ohio S. & C. Pl. Dec. 111, 6 Ohio N. P. 249.
Tennessee.— Quarles *v.* Clayton, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170.
Vermont.— Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.
United States.— Carpenter *v.* Providence Washington Ins. Co., 16 Pet. 495, 10 L. ed. 1044.
See 28 Cent. Dig. tit. "Insurance," § 172.
Assignment of contract or policy see *infra*, VIII.

4. *Illinois.*— Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.
Iowa.— Chickasaw County Farmers' Mut. F. Ins. Co. *v.* Weller, 98 Iowa 731, 68 N. W. 443.
Kentucky.— New York Home Ins. Co. *v.* Gaddis, 3 Ky. L. Rep. 159.
Louisiana.— Marchesseau *v.* Merchants' Ins. Co., 1 Rob. 438.
Maryland.— Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.
New York.—Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. 339.
Pennsylvania.— Commonwealth Ins. Co. *v.* Sennett, 37 Pa. St. 205, 78 Am. Dec. 418.
Tennessee.— State Ins. Co. *v.* Hughes, 10 Lea 461.
United States.— Hedger *v.* Union Ins. Co., 17 Fed. 498; Spare *v.* Home Mut. Ins. Co., 15 Fed. 707, 8 Sawy. 618.
England.— Darrell *v.* Tibbitts, 5 Q. B. D. 560, 44 J. P. 695, 50 L. J. Q. B. 33, 42 L. T. Rep. N. S. 797, 29 Wkly. Rep. 66; Rayner *v.* Preston, 18 Ch. D. 1, 50 L. J. Ch. 472, 44 L. T. Rep. N. S. 787, 29 Wkly. Rep. 546; Dalby *v.* India, etc., L. Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365; Chapman *v.* Pole, 22 L. T. Rep. N. S. 306.
See 28 Cent. Dig. tit. "Insurance," § 172.

5. *District of Columbia.*— Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. 66.
Indiana.— Bersch *v.* Sinnissippi Ins. Co., 28 Ind. 64.
Iowa.— Baldwin *v.* State Ins. Co., 60 Iowa 497, 15 N. W. 300.

which the insured has no interest.[6] To render the contract valid, the insured should have an interest in the property at the time of making the contract as well as at the time of loss;[7] but the parties may by contract provide for insurance when the interest attaches, and if during the existence of the risk and at the time of the loss the insured has an interest, he may recover, although when the contract was made his interest had not yet attached;[8] nevertheless if at the time of the loss there is no interest there can be no recovery under the contract.[9]

2. What Constitutes Insurable Interest — a. Rules Stated. Any title or interest in the property, legal or equitable, will support a contract of insurance on such property.[10] Indeed, any interest in or relation to the property, such as that its loss may cause a pecuniary injury to the insured, is sufficient to sustain a contract of insurance.[11] So one who is in the possession and use of property

Louisiana.— Macarty *v.* Commercial Ins. Co., 17 La. 365; Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

Michigan.— Balow *v.* Teutonia Farmers' Mut. F. Ins. Co., 77 Mich. 540, 43 N. W. 924.

New York.—Fowler *v.* New York Indemnity Ins. Co., 26 N. Y. 422; Freeman *v.* Fulton F. Ins. Co., 38 Barb. 247.

Pennsylvania.— Farmers' Mut. Ins. Co. *v.* New Holland Turnpike Co., 122 Pa. St. 37, 15 Atl. 563; Sweeny *v.* Franklin F. Ins. Co., 20 Pa. St. 337; Central Ins. Co. *v.* Gayman, 7 Leg. Gaz. 234.

United States.— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478.

Canada.— Ottawa Agricultural Ins. Co. *v.* Sheridan, 5 Can. Supreme Ct. 157; Hunt *v.* Home Ins. Co., 3 Rev. Leg. 455; Crockford *v.* London, etc., F. Ins. Co., 10 N. Brunsw. 152; Howard *v.* Lancashire Ins. Co., 17 Nova Scotia 172 [*affirmed* in 11 Can. Supreme Ct. 92, 6 Can. L. T. 26].

See 28 Cent. Dig. tit. "Insurance," § 136 *et seq.*

6. *Georgia.*—Macon Exch. Bank *v.* Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372.

Massachusetts.—Amory *v.* Gilman, 2 Mass. 1.

New York.— National Filtering Oil Co. *v.* Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473; Freeman *v.* Fulton F. Ins. Co., 38 Barb. 247, 14 Abb. Pr. 398.

Wisconsin.— Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503.

United States.— Spare *v.* Home Mut. Ins. Co., 15 Fed. 707, 8 Sawy. 618.

See 28 Cent. Dig. tit. "Insurance," § 136 *et seq.*

In North Carolina it was held in Shepherd *v.* Sawyer, 6 N. C. 26, 5 Am. Dec. 517, that a wagering contract is illegal only when prohibited by statute or against public policy, and therefore that, in the absence of statute, a contract of insurance with reference to property in which the insured has no interest is not necessarily invalid. But this is perhaps the only case in which a purely wagering contract as to loss of property has been sustained in this country. As will appear in discussing insurable interest in the article Marine Insurance, it is competent for the parties to contract with reference to the contingency or loss having already occurred, but only where the contract is for the benefit of one having some interest in the property. And see *infra*, II, D, 1.

7. White *v.* Merchants' Ins. Co., 93 Mo. App. 282.

A subsequently acquired interest will not support the contract of an insured who had no interest when the policy was taken. Howard *v.* Lancashire Ins. Co., 11 Can. Sup. Ct. 92; Milligan *v.* Equitable Ins. Co., 16 U. C. Q. B. 314.

8. London Sun Ins. Office *v.* Merz, 64 N. J. L. 301, 45 Atl. 785, 52 L. R. A. 330; Henshaw *v.* Mutual Safety Ins. Co., 11 Fed. Cas. No. 6,387, 2 Blatchf. 99. Thus insurance may be effected on a future interest, provided such interest subsists at the time of the loss. Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446. And see *infra*, II, D, 2, b.

9. Hanover F. Ins. Co. *v.* Orr, 56 Ill. App. 621; Ætna Ins. Co. *v.* Kittles, 81 Ind. 96; Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446; Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339.

10. *Alabama.*— North Alabama Home Protection *v.* Caldwell, 85 Ala. 607, 5 So. 338.

Illinois.— Danvers Mut. F. Ins. Co. *v.* Schertz, 95 Ill. App. 656.

Massachusetts.— Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143; Locke *v.* North American Ins. Co., 13 Mass. 61; Oliver *v.* Greene, 3 Mass. 133, 3 Am. Dec. 96.

North Carolina.— Gerringer *v.* North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773.

Pennsylvania.— Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8.

Vermont.— Swift *v.* Vermont Mut. F. Ins. Co., 18 Vt. 305.

Wisconsin.— Horsch *v.* Dwelling-House Ins. Co., 77 Wis. 4, 45 N. W. 945, 8 L. R. A. 806.

United States.— Columbian Ins. Co. *v.* Lawrence, 2 Pet. 25, 7 L. ed. 335.

Canada.— Whyte *v.* Home Ins. Co., 14 L. C. Jur. 301.

See 28 Cent. Dig. tit. "Insurance," § 139 *et seq.*

Insurance by life-tenant see Estates, 16 Cyc. 632.

11. New York Home Ins. Co. *v.* Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; Agricultural Ins. Co. *v.* Clancey, 9 Ill. App. 137; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287; Farmers', etc., Ins. Co. *v.* Mickel, (Nebr. 1904) 100 N. W. 130; Spare *v.* Home

under a claim thereto has an insurable interest, although he may be without either legal or equitable title.[12]

b. Particular Persons Having Such Interest — (i) *In General.* Applying the rules just stated[13] as to what constitutes an insurable interest it has been held that the following persons among others[14] have an insurable interest in property: Any bailee;[15] a carrier of goods;[16] a consignee of goods with power of sale;[17]

Mut. Ins. Co., 15 Fed. 707, 8 Sawy. 618; Davies *v.* Home Ins. Co., 3 Grant Err. & App. (U. C.) 269; O'Connor *v.* Imperial Ins. Co., 14 L. C. Jur. 219.

The term "interest" as used in regard to the right to insure does not necessarily imply any property in the subject of the insurance (Sturm *v.* Atlantic Mut. Ins. Co., 38 N. Y. Super. Ct. 281 [*affirmed* in 63 N. Y. 77]; Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 7 L. ed. 90); and a contingent interest is sufficient (Fenn *v.* New Orleans Mut. Ins. Co., 53 Ga. 578; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219).

The fact that the loss of the property will cause pecuniary damage to the insured gives him an insurable interest, although he has no direct interest in the property itself. Hayes *v.* Milford Mut. F. Ins. Co., 170 Mass. 492, 49 N. E. 754; Parks *v.* Connecticut F. Ins. Co., 26 Mo. App. 511; U. S. *v.* American Tobacco Co., 166 U. S. 468, 17 S. Ct. 619, 41 L. ed. 1081. If there be a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; McColdin *v.* Greenwich Ins. Co., 10 N. Y. St. 390.

The fact that the property is already covered by insurance will not render a subsequent contract of insurance thereon invalid as not supported by an interest. Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433. *Contra*, Amory *v.* Gilman, 2 Mass. 1.

The fact that the right of the insured to the property is disputed or in litigation will not render insurance thereon in his favor invalid. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Monroe County Mut. Ins. Co. *v.* Robinson, 5 Wkly. Notes Cas. (Pa.) 389.

12. *Kansas.*— Kansas Ins. Co. *v.* Berry, 8 Kan. 159.

Maryland.— Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469.

Massachusetts.— Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358.

Missouri.— Travis *v.* Continental Ins. Co., 32 Mo. App. 198.

New York.— Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; Redfield *v.* Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424.

See 28 Cent. Dig. tit. "Insurance," § 139 *et seq.*

13. See *supra*, II, C, 2, a.

14. See *infra*, II, C, 2, b, (II)-(IV).

15. Any bailee may insure the property in his custody. Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569; Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; South Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101, 6 Moore P. C. N. S. 341, 22 L. T. Rep. N. S. 843, 16 Eng. Reprint 755. See Bailments, 5 Cyc. 176.

A husband has an insurable interest in personal property settled on his wife for her separate use but which he uses with her. Goulstone *v.* Royal Ins. Co., 1 F. & F. 276.

16. A common carrier has an insurable interest in the goods received for transportation.

Maryland.— American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Fire Ins. Assoc. of England *v.* Merchants', etc., Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162.

Minnesota.— Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132.

New York.— Savage *v.* Corn Exch., etc., Ins. Co., 36 N. Y. 655 [*affirming* 4 Bosw. 1]; Chase *v.* Washington Mut. Ins. Co., 12 Barb. 595.

Pennsylvania.— Shaw *v.* Wyoming Ins. Co., 1 Wkly. Notes Cas. 559.

United States.—California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730; Munich Assur. Co. *v.* Dodwell, 128 Fed. 410, 63 C. C. A. 152 [*affirming* 123 Fed. 841].

England.— Crowley *v.* Cohen, 3 B. & Ad. 478, 1 L. J. K. B. 158, 23 E. C. L. 214; London, etc., R. Co. *v.* Glyn, 1 E. & E. 652, 5 Jur. N. S. 1004, 28 L. J. Q. B. 188, 7 Wkly. Rep. 238, 102 E. C. L. 652.

See 28 Cent. Dig. tit. "Insurance," § 145.

The fact that the carrier has relieved himself from liability for loss by fire does not relieve him from liability for such loss due to negligence, and therefore he has an insurable interest, notwithstanding the limitation in the contract. California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730.

17. Consignee.— One who holds goods as consignee with power of sale has an insurable interest. Ætna Ins. Co. *v.* Jackson, 16 B. Mon. (Ky.) 242; Pouverin *v.* Louisiana State M. & F. Ins. Co., 4 Rob. (La.) 234; Hough *v.* People's F. Ins. Co., 36 Md. 398; Shaw *v.* Ætna Ins. Co., 49 Mo. 578, 8 Am. Rep. 150.

A consignee who is under obligation to carry insurance on the goods for his consignor has an insurable interest in his own right. De Forest *v.* Fulton F. Ins. Co., 1 Hall (N. Y.) 94; California Ins. Co. *v.*

a factor;[18] a pledgee;[19] a warehouseman;[20] an assignee for the benefit of creditors;[21] an executor or administrator;[22] an attachment creditor,[23] but not a general creditor[24] or a general judgment creditor;[25] a grantee in a fraudulent conveyance;[26] a landlord;[27] a tenant;[28] the mortgagee of personal property,[29] as well as the mortgagee of real property;[30] the mortgagor of real

Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730.

18. **Factor.**— Bell *v.* Firemens' Ins. Co., 5 Rob. (La.) 446; De Forest *v.* Fulton F. Ins. Co., 1 Hall (N. Y.) 94; Russell *v.* Union Ins. Co., 21 Fed. Cas. No. 12,146, 4 Dall. 421, 1 Wash. 409.

19. **Pledgee.**— Wilson *v.* Citizen's Ins. Co., 19 L. C. Jur. 175.

20. **Warehousman.**— *Missouri.*— Dawson *v.* Waldheim, 80 Mo. App. 52.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Texas.— Southern Cold Storage, etc., Co. *v.* Dechman, (Civ. App. 1903) 73 S. W. 545.

United States.— Baxter *v.* Hartford F. Ins. Co., 12 Fed. 481, 11 Biss. 306.

England.— Waters *v.* Monarch F., etc., Assur. Co., 5 E. & B. 870, 2 Jur. N. S. 375, 25 L. J. Q. B. 102, 4 Wkly. Rep. 245, 85 E. C. L. 870; Todd *v.* Liverpool, etc., Ins. Co., 20 U. C. C. P. 523.

See 28 Cent. Dig. tit. "Insurance," § 144.

21. **An assignee for the benefit of creditors** may insure the assignor's property, and his insurable interest attaches even before he has filed his bond and qualified as such assignee. Phœnix Ins. Co. *v.* Adams, 8 Ky. L. Rep. 532; Sibley *v.* Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473.

22. **An executor or administrator** of an estate has an insurable interest in the property coming into his possession. Security Ins. Co. *v.* Kuhn, 108 Ill. App. 1 [*affirmed* in 207 Ill. 166, 69 N. E. 822]; Herkimer *v.* Rice, 27 N. Y. 163; Phelps *v.* Gebhard F. Ins. Co., 9 Bosw. (N. Y.) 404; Globe Ins. Co. *v.* Boyle, 1 Cinc. Super. Ct. 444; Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

23. **An attaching creditor** has an insurable interest in the property covered by his attachment. Donnell *v.* Donnell, 86 Me. 518, 30 Atl. 67; McLaughlin *v.* Park City Bank, 22 Utah 473, 63 Pac. 589, 54 L. R. A. 343.

24. **A mere general creditor,** without any specific lien upon property of his debtor, has no insurable interest in such property, for a contract of fire insurance does not cover liability on a debt or guaranty. Bishop *v.* Clay F. & M. Ins. Co., 49 Conn. 167; Foster *v.* Van Reed, 5 Hun (N. Y.) 321. But it is said that one who has furnished a dealer with goods which have been incorporated into his stock, relying for payment on the success of the business, has an insurable interest in the stock. Roos *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 409.

25. **General judgment creditor.**— A general judgment which may be enforced against any real property of the debtor, in the absence of a levy under such judgment on any specific property, does not give the judgment creditor such an interest in the real property of the debtor as to support insurance on such property. Grevemeyer *v.* Southern Mut. F. Ins. Co., 62 Pa. St. 340, 1 Am. Rep. 420. This seems to be doubted in Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Spare *v.* Home Mut. Ins. Co., 15 Fed. 707, 8 Sawy. 618.

It seems that one who has a right to have his claim paid by the sale of specific real estate of a deceased debtor has an insurable interest in the real property left by such debtor which is subject to be taken for the payment of the claim. Creed *v.* Sun F. Ins. Co., 101 Ala. 522, 14 So. 323, 46 Am. St. Rep. 134, 23 L. R. A. 177; Herkimer *v.* Rice, 27 N. Y. 163.

26. **The grantee in a conveyance** which is voidable at the suit of a creditor nevertheless has an insurable interest in the property. Home Ins. Co. *v.* Allen, 93 Ky. 270, 19 S. W. 743, 14 Ky. L. Rep. 161; German Ins. Co. *v.* Hyman, 34 Nebr. 704, 52 N. W. 401; Steinmeyer *v.* Steinmeyer, 64 S. C. 413, 42 S. E. 184. But it is said that the grantee in a conveyance actually and not constructively fraudulent as to creditors has no insurable interest. Home Ins. Co. *v.* Allen, 13 Ky. L. Rep. 95.

27. **A landlord** has an insurable interest in the premises and in personal property of the tenant on which he has a lien. Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

28. **A tenant** has an insurable interest in the premises, whether he be a tenant for a fixed term or at will. Schaeffer *v.* Anchor Mut. F. Ins. Co., 113 Iowa 652, 85 N. W. 985; Georgia Home Ins. Co. *v.* Jones, 49 Miss. 80; Simpson *v.* Scottish Union Ins. Co., 1 Hen. & M. 618, 9 Jur. N. S. 711, 32 L. J. Ch. 329, 8 L. T. Rep. N. S. 112, 1 New Rep. 537, 11 Wkly. Rep. 459; St. Amand *v.* Cie. d'Assurance de Québec, 9 Quebec 162, 14 Rev. Lég. 27; Shaw *v.* Phœnix Ins. Co., 20 U. C. C. P. 170.

29. **Mortgagee of personalty.**— Ogden *v.* Montreal Ins. Co., 3 U. C. C. P. 497.

30. **Mortgagee of realty.**— Kellar *v.* Merchants' Ins. Co., 7 La. Ann. 29; Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446; Allen *v.* Harford County Mut. F. Ins. Co., 2 Md. 111; Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817; Weed *v.* Hamburg-Bremen F. Ins. Co., 61 Hun (N. Y.) 110, 15 N. Y. Suppl. 429; Mix *v.* Andes Ins. Co., 9 Hun (N. Y.) 397; Kernochan *v.* New York Bowery F. Ins. Co., 5 Duer (N. Y.) 1; Weed *v.* Philadelphia Fire Assoc., 17 N. Y. Suppl. 206; Montreal Assur. Co. *v.* McGillivray, 2 L. C. Jur. 221, 8 L. C. Rep. 401, 4 R. J. R. Q. 406.

Even after transfer of his mortgage in con-

property;[31] one having a lien on property to secure his debt,[32] as for example the holder of a mechanic's lien;[33] one who owns or has a right or interest in a building whether such building is situated on his own land or on the land of another;[34]

nection with the indorsement of the note secured thereby, the mortgagee continues to have such interest in the preservation of the property as security by way of protection against his liability as indorser that his insurable interest continues. New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Williams *v.* Roger Williams Ins. Co., 107 Mass. 377, 9 Am. Rep. 41; Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

The purchaser of the mortgage of course acquires thereby an insurable interest in the premises. Excelsior F. Ins. Co. *v.* Royal Ins. Co., 7 Lans. (N. Y.) 138 [*affirmed* in 55 N. Y. 343, 14 Am. Rep. 271].

The mortgagee has a separate insurable interest in the premises, distinct from that of the mortgagor. McDowell *v.* Morath, 64 Mo. App. 290; Traders' Ins. Co. *v.* Roberts, 9 Wend. (N. Y.) 404; McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448.

Right of the mortgagee to recover under a policy taken by the mortgagor in his own name, but for the benefit of the mortgagee, or assigned by the consent of the company to the mortgagee see *infra*, XIX, A, 6.

31. A mortgagor has an insurable interest in the mortgaged premises (Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 25 Am. Rep. 386; Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 3 Am. Rep. 149; Walsh *v.* Philadelphia Fire Assoc., 127 Mass. 383; Curry *v.* Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547; Strong *v.* Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; French *v.* Rogers, 16 N. H. 177; Smith *v.* Royal Ins. Co., 27 U. C. Q. B. 54; Richards *v.* The Liverpool, etc., F., etc., Ins. Co., 25 U. C. Q. B. 400); and this interest is not terminated even after foreclosure, so long as the mortgagor has a right to redeem (Essex Sav. Bank *v.* Meriden F. Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; Stephens *v.* Illinois Mut. F. Ins. Co., 43 Ill. 327; Strong *v.* Manufacturers' Ins. Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478; Mechler *v.* Phœnix Ins. Co., 38 Wis. 665). See also *infra*, II, C, 2, b, (III).

After foreclosure and expiration of the period of redemption the mortgagor's insurable interest is terminated. Pope *v.* Glenn Falls Ins. Co., 136 Ala. 670, 34 So. 29.

32. One having a lien on property to secure a debt due him has an insurable interest in such property.

Louisiana.— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

Nebraska.— Rochester Loan, etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

New York.— Allen *v.* Franklin F. Ins. Co., 9 How. Pr. 501.

Texas.— Sun Mut. Ins. Co. *v.* Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180.

United States.— International Trust Co. *v.* Norwich Union F. Ins. Soc., 71 Fed. 81, 17 C. C. A. 608; Nussbaum *v.* Northern Ins. Co., 37 Fed. 524, 1 L. R. A. 704; Brugger *v.* State Invest. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304.

See 28 Cent. Dig. tit. "Insurance," § 143.

Even though the lien may be voidable, the creditor nevertheless has an insurable interest. Parks *v.* Hartford F. Ins. Co., 100 Mo. 373, 12 S. W. 1058.

The sureties on a distiller's bond who become liable for the government tax on whisky manufactured by such distiller have an insurable interest in such whisky. Germania F. Ins. Co. *v.* Thompson, 95 U. S. 547, 24 L. ed. 487.

33. One who has a mechanic's lien on real property has an insurable interest therein, for his lien is specific. Stout *v.* City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287; Protection Ins. Co. *v.* Hall, 15 B. Mon. (Ky.) 411; Franklin F. Ins. Co. *v.* Coates, 14 Md. 285; Royal Ins. Co. *v.* Stinson, 103 U. S. 25, 26 L. ed. 473.

34. Owner of building.— *Colorado.*— American Cent. Ins. Co. *v.* Donlon, 16 Colo. App. 416, 66 Pac. 249.

Georgia.— Creech *v.* Richards, 76 Ga. 36.

Illinois.—Clemson *v.* Trammell, 34 Ill. App. 414.

Kentucky.— Fireman's Fund Ins. Co. *v.* Gatewood, 10 Ky. L. Rep. 117.

Louisiana.—Allen *v.* Sun Mut. Ins. Co., 36 La. Ann. 767.

New York.— Niblo *v.* North American F. Ins. Co., 1 Sandf. 551.

Canada.— Stevenson *v.* London, etc., Ins. Co., 26 U. C. Q. B. 148.

See 28 Cent. Dig. tit. "Insurance," § 139 *et seq.*

Owner and contractor.— The owner of land has an insurable interest in buildings which are being constructed upon his land by a contractor who is to furnish all the labor and material and be paid after the completion of the work. Greenwich Ins. Co. *v.* Louisville, etc., R. Co., 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 23 Ky. L. Rep. 2014, 99 Am. St. Rep. 313, 56 L. R. A. 477; Foley *v.* Manufacturers', etc., F. Ins. Co., 152 N. Y. 131, 46 N. E. 318, 43 L. R. A. 664; Foley *v.* Farragut F. Ins. Co., 71 Hun (N. Y.) 369, 24 N. Y. Suppl. 1131. Likewise the contractor has an insurable interest in the building thus being constructed. Planters', etc., Ins. Co. *v.* Thurston, 93 Ala. 255, 9 So. 268; Commercial F. Ins. Co. *v.* Capital City Ins. Co., 81 Ala. 320, 8 So. 222, 60 Am. Rep. 162; Ulmer *v.* Phœnix F. Ins. Co., 61 S. C. 459, 39 S. E. 712; Cushing *v.* Williamsburg City F. Ins. Co., 4 Wash. 538, 30 Pac. 736. See also BUILDERS AND ARCHITECTS, 6 Cyc. 53.

Where the landlord becomes entitled to buildings put upon his land by a tenant after the expiration of the term, he has an insur-

a receiver;[35] a residuary devisee or legatee;[36] a reversioner;[37] the surety for the payment of a debt for which property is also held as security;[38] a trustee,[39] or a *cestui que trust*;[40] the vendee of personalty;[41] the vendee under a contract of purchase of realty;[42] the vendor of personalty who retains a lien to secure payment of purchase-money;[43] the vendor of realty having a lien thereon for

able interest therein. New York *v.* Exchange F. Ins. Co., 3 Abb. Dec. (N. Y.) 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103; New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537; New York *v.* Exchange F. Ins. Co., 9 Bosw. (N. Y.) 424; Western Ins. Co. *v.* Carson, 9 Ohio Dec. (Reprint) 848, 17 Cinc. L. Bul. 357.

35. A receiver has such legal interest in the preservation of the property coming under his control as receiver as will support a policy of insurance on the property taken by him. *In re* Hamilton, 102 Fed. 683.

36. A residuary devisee has an insurable interest in the decedent's estate. *In re* Lee, 4 Luz. Leg. Reg. (Pa.) 44.

37. Reversioner.— One who has a reversion in property has an insurable interest therein. New York *v.* Exchange F. Ins. Co., 3 Abb. Dec. (N. Y.) 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103.

38. Surety.— Caley *v.* Hoopes, 86 Pa. St. 493, holding that one who is surety for the payment of a debt for which property is also held as security has an interest in the preservation of the property which may be applied to the extinguishment of such indebtedness, for the destruction of the property will increase the liability of the surety to be called on to pay the debt.

39. Trustee.— The trustee holding the legal title to property and having such property in his possession for the purpose of caring for it and distributing the proceeds, either of the use or sale, to beneficiaries, has an insurable interest. Wiley *v.* Morris, 39 N. J. Eq. 97; Cross *v.* National F. Ins. Co., 132 N. Y. 133, 30 N. E. 390; Bicknell *v.* Lancaster City, etc., F. Ins. Co., 58 N. Y. 677; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. (N. Y.) 33; Colburn *v.* Lansing, 46 Barb. (N. Y.) 37; People *v.* Liverpool, etc., Ins. Co., 2 Thomps. & C. (N. Y.) 268; Graham *v.* Firemen's Ins. Co., 2 Disn. (Ohio) 255.

It is immaterial whether the trustee has finally accepted the trust, if at the time of the insurance he is in fact the trustee. Babson *v.* Thomaston Mut. F. Ins. Co., 2 Fed. Cas. No. 704. And it is also immaterial whether the trustee could have asserted his title under the trust, if he is in the actual possession of the property under his claim as trustee. Rhode Island Underwriters' Assoc. *v.* Monarch, 98 Ky. 305, 32 S. W. 959, 17 Ky. L. Rep. 876.

40. The beneficiary of the trust has such interest that he may insure the property in his own name. Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Dick *v.* Franklin F. Ins. Co., 81 Mo. 103 [*affirming* 10 Mo. App. 376]; Harvey *v.* Cherry, 76 N. Y. 436; Pettigrew *v.* Grand River Farmers' Mut. Assur. Co., 28 U. C. C. P. 70; Butler *v.* Standard F. Ins. Co., 4 Ont. App. 391.

41. Purchaser of personalty.— A vendee has an insurable interest, although he has not yet fully paid the purchase-price nor acquired the title. Reed *v.* Williamsburg City F. Ins. Co., 74 Me. 537; Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Guiterman *v.* German-American Ins. Co., 111 Mich. 626, 70 N. W. 135; Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23.

42. Vendee of realty.— *California.*— Davis *v.* Phœnix Ins. Co., 111 Cal. 409, 43 Pac. 1115.

Georgia.— Southern Ins., etc., Co. *v.* Lewis, 42 Ga. 587.

Illinois.— Phœnix Ins. Co. *v.* Mitchell, 67 Ill. 43.

Iowa.— Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

Maine.— Gilman *v.* Dwelling-House Ins. Co., 81 Me. 488, 17 Atl. 544.

Massachusetts.— Rider *v.* Ocean Ins. Co., 20 Pick. 259.

New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

New York.— Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Brooks *v.* Erie F. Ins. Co., 76 N. Y. App. Div. 275, 78 N. Y. Suppl. 748; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247; Tyler *v.* Ætna F. Ins. Co., 12 Wend. 507; McGivney *v.* Phœnix F. Ins. Co., 1 Wend. 85.

North Carolina.— Clapp *v.* Farmers' Mut. F. Ins. Assoc., 126 N. C. 388, 35 S. E. 617.

Oklahoma.— Dunn *v.* Yakish, 10 Okla. 388, 61 Pac. 926.

Pennsylvania.— Annville Mut. F. Ins. Co. *v.* Wagner, 1 Pa. Cas. 66, 7 Atl. 103.

Rhode Island.— Tuckerman *v.* Home Ins. Co., 9 R. I. 414.

Washington.— Quinn *v.* Parke, etc., Machinery Co., 5 Wash. 276, 31 Pac. 866.

West Virginia.— McCutcheon *v.* Ingraham, 32 W. Va. 378, 9 S. E. 260.

United States.— Dupuy *v.* Delaware Ins. Co., 63 Fed. 680.

Canada.— Howard *v.* Lancashire Ins. Co., 11 Can. Sup. Ct. 92; Humphrey *v.* London, etc., Ins. Co., 2 Nova Scotia Dec. 39.

See 28 Cent. Dig. tit. "Insurance," § 150.

Although only a portion of the purchase-price has been paid and he is not yet entitled to a conveyance, he has an insurable interest in the premises. See cases cited *supra*, this note.

Even though the contract of purchase be not in writing, the vendee has an insurable interest. Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Keck *v.* Porter, 9 Kulp (Pa.) 428.

43. Vendor of personalty.—The vendor who retains a lien or contract right to secure pay-

unpaid purchase-money;[44] a mere bargainee or one entitled to acquire goods not yet set apart;[45] the owner of stock in a corporation;[46] any agent who has the care and management of his principal's property, and may become liable therefor on account of his own negligence or otherwise.[47]

(II) *Husband and Wife; Curtesy; Dower; Entirety; Homestead Interest.* Under statutes giving a married woman the right to acquire and hold real estate free from any control of her husband thereover or any liability thereof on account of his debts,[48] the husband of such married woman has no insurable interest in her real property thus acquired and held;[49] nor does it constitute an insurable interest on the part of the husband that a conveyance by the wife of her separate estate in property acquired from the husband can only be

ment of any unpaid balance of the purchase-money has an insurable interest in the property. Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229; Tallman *v.* Atlantic F. & M. Ins. Co., 4 Abb. Dec. (N. Y.) 345, 3 Keyes 87, 33 How. Pr. 400; North British, etc., Ins. Co. *v.* McLellan, 21 Can. Sup. Ct. 288.

44. Vendor of realty.— *Alabama.*— Continental F. Ins. Co. *v.* Brooks, 131 Ala. 614, 30 So. 876.

Louisiana.— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 39 Am. Dec. 542.

New York.— Wood *v.* North Western Ins. Co., 46 N. Y. 421.

Pennsylvania.— Parcell *v.* Grosser, 109 Pa. St. 617, 1 Atl. 909; State Mut. F. Ins. Co. *v.* Updegraff, 21 Pa. St. 513; Perry County Ins. Co. *v.* Stewart, 19 Pa. St. 45; Norcross *v.* Franklin F. Ins. Co., 17 Pa. St. 429, 55 Am. Dec. 571.

South Carolina.—Jacobs *v.* Mutual Ins. Co., 52 S. C. 110, 29 S. E. 533.

Texas.— Merchants' Ins. Co. *v.* Nowlin, (Civ. App. 1900) 56 S. W. 198.

Virginia.— Wheeling F. & M. Ins. Co. *v.* Morrison, 11 Leigh 354, 36 Am. Dec. 385.

Canada.— Ottawa Agricultural Ins. Co. *v.* Sheridan, 5 Can. Sup. Ct. 157; Gill *v.* Canada F. & M. Ins. Co., 1 Ont. 341; Mann *v.* Western Assur. Co., 19 U. C. Q. B. 314.

See 28 Cent. Dig. tit. "Insurance," § 150.

This rule applies even though the portion remaining unpaid is a part of the entire purchase-price. See cases cited *supra*, this note.

45. Bargainee.— *Maine.*—Cumberland Bone Co. *v.* Andes Ins. Co., 64 Me. 466.

Massachusetts.— Bohn Mfg. Co. *v.* Sawyer, 169 Mass. 477, 48 N. E. 620.

South Carolina.— Graham *v.* American F. Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707.

Wisconsin.— Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395, 80 N. W. 471.

England.— Martineau *v.* Kitching, L. R. 7 Q. B. 436, 41 L. J. Q. B. 227, 26 L. T. Rep. N. S. 836, 20 Wkly. Rep. 769.

Canada.— Box *v.* Provincial Ins. Co., 18 Grant Ch. (U. C.) 280; Parsons *v.* Queen Ins. Co., 29 U. C. C. P. 188; Mathewson *v.* Royal Ins. Co., 16 L. C. Jur. 45.

But where no title, or possibility of title, has passed, there is no insurable interest. Heald *v.* Builders' Mut. F. Ins. Co., 111 Mass. 38; North British, etc., Ins. Co. *v.* Moffatt, L. R. 7 C. P. 25, 41 L. J. C. P. 1, 25 L. T. Rep. N. S. 662, 20 Wkly. Rep. 114; Clarke *v* Scottish Imperial Ins. Co., 18 N. Brunsw. 240 [*affirmed* in 4 Can. Sup. Ct. 192].

46. The owner of stock in a corporation has an insurable interest in the corporate property, although he has no individual ownership thereof, nor of any specific interest therein, the reason being that his individual interest in the corporation will be affected by destruction of its property.

Illinois.— Crawford *v.* Aachen, etc., F. Ins. Co., 100 Ill. App. 454 [*affirmed* in 199 Ill. 367, 65 N. E. 134]; Glover *v.* Wells, 40 Ill. App. 350.

Iowa.— Warren *v.* Davenport F. Ins. Co., 31 Iowa 464, 7 Am. Rep. 160.

New York.— Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7, 25 N. E. 1058, 21 Am. St. Rep. 716, 10 L. R. A. 684.

Ohio.— Philips *v.* Knox County Mut. Ins. Co., 20 Ohio 174.

Pennsylvania.— Sweeny *v.* Franklin F. Ins. Co., 20 Pa. St. 337.

United States.— Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778; Seaman *v.* Enterprise F. & M. Ins. Co., 18 Fed. 250, 5 McCrary 558.

See 28 Cent. Dig. tit. "Insurance," § 151.

47. Agent.— Page *v.* Western M. & F. Ins. Co., 19 La. 49; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169; Kline *v.* Queen Ins. Co., 7 Hun (N. Y.) 267; Roberts *v.* Firemen's Ins. Co., 165 Pa. St. 55, 30 Atl. 450, 44 Am. St. Rep. 642.

48. See, generally, HUSBAND AND WIFE.

49. *Arkansas.*— Planters' Mut. Ins. Co. *v.* Loyd, 71 Ark. 292, 75 S. W. 725.

Indiana.—Traders' Ins. Co. v. Newman, 120 Ind. 554, 22 N. E. 428.

Indian Territory.— German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

Louisiana.— Breard *v.* Mechanics', etc., Ins. Co., 29 La. Ann. 764.

Michigan.— Watertown Agricultural Ins. Co. *v.* Montague, 38 Mich. 548, 31 Am. Rep. 326.

West Virginia.— Tyree *v.* Virginia F. & M. Ins. Co., 55 W. Va. 63, 46 S. E. 706, 66 L. R. A. 657.

See 28 Cent. Dig. tit. "Insurance," § 153.

But if the property has been conveyed by the husband to the wife, but not to her sole and separate use, as required by statutory provision, the husband still has an insurable

made by his joining in the deed.[50] But if the statutes do not authorize the separate and independent ownership by the wife of real property in her own right,[51] and her husband is entitled to the possession of such property, as tenant by curtesy initiate during her life, he has an insurable interest.[52] Likewise a widow has an insurable interest in land in which she has a dower estate.[53] An estate by entirety is an insurable interest.[54] Under the provisions of homestead statutes[55] by which either husband or wife has an interest in the property of the other which cannot be cut off save by his joining in a conveyance or otherwise, either has an insurable interest in the homestead owned by the other.[56]

(III) *Judgment Debtor and Purchaser at Judicial Sale.* Until title under a judicial sale has absolutely and finally vested in the purchaser and all the rights of the judgment debtor to redeem or have the sale set aside have been lost, such judgment debtor, being the former owner of the property, still has an insurable interest therein.[57] The purchaser, however, at judicial sale has an insurable interest in the property from the time that he acquires a conditional or potential right to such property under his purchase.[58]

(IV) *Partner.* One partner has such an interest in the partnership property as to be entitled to insure the same in his own name,[59] and of course a partnership may insure the property owned by it, or in which it has an interest.[60]

e. Estoppel[61] to Deny Interest. Where the company has, with knowledge of the nature of the interest of the insured, recognized such interest as sufficient to support a policy, it cannot question the sufficiency of such interest.[62]

interest therein. Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

50. Clark *v.* Dwelling-House Ins. Co., 81 Me. 373, 17 Atl. 303.

51. See, generally, Husband and Wife.

52. Franklin M. & F. Ins. Co. *v.* Drake, 2 B. Mon. (Ky.) 47; Doyle *v.* American F. Ins. Co., 181 Mass. 139, 63 N. E. 394; Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792; Harris *v.* York Mut. Ins. Co., 50 Pa. St. 341; Uhler *v.* Farmers' American F. Ins. Co., 4 Leg. Gaz. (Pa.) 354. See also Caldwell *v.* Stadacona F., etc., Ins. Co., 11 Can. Sup. Ct. 212, holding that a husband who is tenant by curtesy initiate has an insurable interest in his wife's real estate.

The surviving husband having possession of the community property, with right of disposition for the payment of his own debts, has an insurable interest therein. Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441.

53. Zebring's Estate, 4 Pa. Super. Ct. 243; Lingley *v.* Queen Ins. Co., 12 N. Brunsw. 280.

The wife having a dower interest and having removed encumbrances on the property has an insurable interest to the extent of the encumbrance thus removed. Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64.

54. Clawson *v.* Citizens' Mut. F. Ins. Co., 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538.

55. See, generally, Homesteads.

56. *Georgia.*— German-American Ins. Co. *v.* Davidson, 67 Ga. 11.

Illinois.— Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

Iowa.— Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Merrett *v.* Farmers' Ins. Co., 42 Iowa 11.

Ohio.— Webster *v.* Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 53 Am. St. Rep. 658, 30 L. R. A. 719.

Texas.— Continental Fire Assoc. *v.* Wingfield, 32 Tex. Civ. App. 194, 73 S. W. 847.

See 28 Cent. Dig. tit. "Insurance," § 153.

57. Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29; Slobodesky *v.* Phenix Ins. Co., 53 Nebr. 816, 74 N. W. 270; Cone *v.* Niagara F. Ins. Co., 60 N. Y. 619 [*affirming* 3 Thomps. & C. 33]; Franklin F. Ins. Co. *v.* Findlay, 6 Whart. (Pa.) 483, 37 Am. Dec. 430.

So long as the debtor has any remaining interest in having the property sold applied to the extinguishment of his indebtedness, he has an insurable interest in such property. Hanover F. Ins. Co. *v.* Bohn, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. Rep. 719; Waring *v.* Loder, 53 N. Y. 581.

58. McLaren *v.* Hartford F. Ins. Co., 5 N. Y. 151; Ætna Ins. Co. *v.* Miers, 5 Sneed (Tenn.) 139.

59. *Louisiana.*— Millaudon *v.* Atlantic Ins. Co., 8 La. 557.

Massachusetts.— Converse *v.* Citizens' Mut. Ins. Co., 10 Cush. 37.

New York.— Voisin *v.* Commercial Mut. Ins. Co., 62 Hun 4, 16 N. Y. Suppl. 410.

North Carolina.— Grabbs *v.* Farmers' Mut. F. Ins. Assoc., 125 N. C. 389, 34 S. E. 503.

Texas.— Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 130, 31 S. W. 1100, 32 S. W. 344.

See 28 Cent. Dig. tit. "Insurance," § 152.

60. Georgia Home Ins. Co. *v.* Hall, 94 Ga. 630, 21 S. E. 828; Phœnix Ins. Co. *v.* Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729; Columbian Ins. Co. *v.* Lawrence, 2 Pet. (U. S.) 25, 7 L. ed. 335.

61. Estoppel generally see Estoppel.

62. *Illinois.*— New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221.

3. Extinguishment or Change of Interest. As there must be an insurable interest at the time of loss as well as at the time of the making of the contract,[63] a total extinguishment of the interest of the insured in the property after the making of the contract and prior to a loss will prevent recovery under the contract for the loss.[64] But if the insured still has an insurable interest in the property at the time of loss, he may recover, although his interest is not the same as at the time of contract, unless the change has been such as to avoid the policy by some stipulation in the policy itself, providing for a forfeiture.[65]

4. Assignment[66] to Person Without Interest. A fire-insurance policy may be assigned as collateral security by the consent of the company, and it will be immaterial that the assignee has no interest in the property.[67]

D. Subject-Matter — 1. Property Not in Existence. The contract of fire insurance as usually made relates to property assumed to be in existence at the time when, by the terms of the contract, the risk attaches, and if at that time, although without the knowledge of either party, the property is not in existence, there is no valid insurance.[68] But the parties may, by antedating the contract, cover a loss which has already occurred, provided the fact of the loss is not known to the insured.[69] If, however, the loss is known to the insured, but not to

Indiana.— Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118.

Iowa.— Schaeffer *v.* Anchor Mut. F. Ins. Co., 113 Iowa 652, 85 N. W. 985.

Missouri.— Franklin *v.* National Ins. Co., 43 Mo. 491.

New York.— New York *v.* Brooklyn F. Ins. Co., 41 Barb. 231.

Pennsylvania.—Light *v.* Countrymen's Mut. F. Ins. Co., 169 Pa. St. 310, 32 Atl. 439, 47 Am. St. Rep. 904; Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. Rep. 703.

Wisconsin.— Appleton Iron Co. *v.* British America Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

See 28 Cent. Dig. tit. "Insurance," § 163.

63. See *supra*, II, C, 1.

64. *Connecticut.*— Birdsey *v.* City F. Ins. Co., 26 Conn. 165.

Louisiana.— Pike *v.* Merchants' Mut. Ins. Co., 26 La. Ann. 505; Leavitt *v.* Western M. & F. Ins. Co., 7 Rob. 351; Bell *v.* Firemen's Ins. Co., 3 Rob. 423; Macarty *v.* Commercial Ins. Co., 17 La. 365.

New York.— McLaren *v.* Hartford F. Ins. Co., 5 N. Y. 151 [*affirming* 1 Edm. Sel. Cas. 210].

Ohio.— Ohio Farmers' Ins. Co. *v.* Waters, 65 Ohio St. 157, 61 N. E. 711; Mt. Vernon Mfg. Co. *v.* Summit County Mut. F. Ins. Co., 10 Ohio St. 347.

United States.— Seaman *v.* Enterprise F. & M. Ins. Co., 21 Fed. 778; Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478; Hidden *v.* Slater Mut. F. Ins. Co., 12 Fed. Cas. No. 6,463, 2 Cliff. 266.

See 28 Cent. Dig. tit. "Insurance," § 168 *et seq.*

An assignment in bankruptcy terminates the insurable interest of the bankrupt. *In re* Carow, 5 Fed. Cas. No. 2,426, 41 How. Pr. (N. Y.) 112; Marks *v.* Hamilton, 7 Exch. 323, 16 Jur. 152, 21 L. J. Exch. 109. But it has been said that an insolvent retains an insurable interest in goods concealed from his creditors. Goulstone *v.* Royal Ins. Co., 1 F. & F. 276, per Pollock, C. B.

If by sale under execution or other similar proceedings the right of the insured is totally divested the insurance ceases. Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299; White *v.* Merchants' Ins. Co., 93 Mo. App. 282; Birmingham *v.* Empire Ins. Co., 42 Barb. (N. Y.) 457; Wall *v.* Commercial Ins. Co., 7 Ohio Dec. (Reprint) 323, 2 Cinc. L. Bul. 113; Wilson *v.* Trumbull Mut. F. Ins. Co., 19 Pa. St. 372. And see *supra*, II, C, 2, b, (III).

65. Bell *v.* Fireman's Ins. Co., 5 Rob. (La.) 446; Jackson *v.* Massachusetts Mut. F. Ins. Co., 23 Pick. (Mass.) 418, 34 Am. Dec. 69; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. (Mass.) 249; Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299; Blackwell *v.* Miami Valley Ins. Co., 7 Ohio Dec. (Reprint) 159, 19 Cinc. L. Bul. 87.

66. Assignment of policy generally see *infra*, VIII.

67. Merrill *v.* Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268; Baughman *v.* Camden Mfg. Co., 65 N. J. Eq. 546, 56 Atl. 376; Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922. But *compare* Traders' Ins. Co. *v.* Pacaud, 51 Ill. App. 252.

Where the transfer of the property and the assignment of the policy by consent of the company unite an interest in the property and in the policy in the same person, there may be a recovery by such assignee in case of loss. Wolfe *v.* Security F. Ins. Co., 39 N. Y. 49.

68. See cases cited *infra*, note 69 *et seq.*

It is usually stipulated that the policy does not cover a loss which has already occurred or a risk which has been materially increased by facts not within the knowledge of the company. Mark *v.* Ætna Ins. Co., 29 Ind. 390.

69. Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Hughes *v.* Mercantile Mut. Ins.

the company, the contract is invalid.[70] An agent has no authority to bind his company for insurance of property which to his knowledge has already been destroyed.[71]

2. NATURE OF PROPERTY WHICH MAY BE COVERED — a. Property Which May Be Damaged by Fire. As the insurance is against loss or damage by fire, property such as land, which is not subject to such loss, cannot be insured.[72]

b. Future Interests. Insurance may be effected on a future interest, but the interest must subsist at the time of the loss to give rise to a claim for indemnity.[73]

c. Separate Interests. There may be distinct insurable interests in the same property, and the separate interest of the insured may be covered by a policy.[74]

d. Profits. Any reasonable expectation of profit or advantage to be derived from the thing insured is proper subject of insurance.[75]

e. Prohibited Property. Even though the agent of the company is prohibited from insuring property of a specified character, nevertheless a policy on such property, duly issued, will be binding on the company.[76]

III. THE MAKING OF THE CONTRACT; EXECUTORY CONTRACTS TO INSURE.

A. Parties.[77] There is no peculiarity of the contract of fire insurance differentiating it from other contracts as to the capacity of the parties.[78] Any corporation, association, or individual capable of owning property and contracting with reference thereto may contract for insurance thereon,[79] provided of course such person has an insurable interest, as already explained.[80]

B. Authority of Agent to Contract For Company — 1. SOLICITING AGENTS. An agent of a fire-insurance company, authorized merely to receive and forward applications and collect premiums, is not a general agent to contract for insurance, and cannot make a contract which will be binding on the company.[81]

Co., 44 How. Pr. (N. Y.) 351; Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. No. 7,920, 1 Wash. 93.

70. Wales *v.* New York Bowery F. Ins. Co., 37 Minn. 106, 33 N. W. 322.

If before the completion of the contract the insured has reason to know that a loss has occurred, his application should be countermanded. Watson *v.* Delafield, 1 Johns. (N. Y.) 150, 2 Cai. 224 [*affirmed* in 2 Johns. 526]; Byrnes *v.* Alexander, 1 Brev. (S. C.) 213.

Concealment of material facts by the insured will avoid the policy. See *infra*, XII, A, 2, b.

71. Clark *v.* Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; Mead *v.* Phenix Ins. Co., 158 Mass. 124, 32 N. E. 945; Bentley *v.* Columbia Ins. Co., 17 N. Y. 421.

72. Mutual Assur. Soc. *v.* Holt, 29 Gratt. (Va.) 612.

73. Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542. See *supra*, II, C, 1.

74. Roots *v.* Cincinnati Ins. Co., 1 Disn. (Ohio) 138, 12 Ohio Dec. (Reprint) 535.

75. French *v.* Hope Ins. Co., 16 Pick. (Mass.) 397; Niblo *v.* North American F. Ins. Co. 1 Sandf. (N. Y.) 551; International Mar. Ins. Co. *v.* Winsmore, 124 Pa. St. 61, 16 Atl. 516.

While the use and occupancy of property may be covered by insurance, those terms do not include profits of the business, but only the business use of which the property is capable. Tanenbaum *v.* Simon, 40 Misc. (N. Y.) 174, 81 N. Y. Suppl. 655.

76. Ætna Ins. Co. *v.* Maguire, 51 Ill. 432; Citizens' Mut. F. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217. And see *infra*, III, B, 2.

The charter of the company limiting the subjects of insurance will be liberally construed to sustain the policy. Langworthy *v.* C. C. Washburn Flouring Mills Co., 77 Minn. 256, 79 N. W. 974; Swift *v.* Vermont Mut. F. Ins. Co., 18 Vt. 305.

77. Who may be the beneficiary under a contract of insurance see *infra*, XIX.

78. Parties to contracts generally see CONTRACTS, 9 Cyc. 213.

79. Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229.

80. Insurable interest see *supra*, II, C.

81. The power to bind the company by contract will not be implied from the power to take applications and collect premiums.

Illinois.— Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64.

Iowa.—Armstrong *v.* State Ins. Co., 61 Iowa 212, 16 N. W. 94.

Kentucky.— Phœnix Ins. Co. *v.* Wilkes, 10 Ky. L. Rep. 283.

Minnesota.— Morse *v.* St. Paul F. & M. Ins. Co., 21 Minn. 407.

Missouri.— Embree *v.* German Ins. Co., 62 Mo. App. 132.

Pennsylvania.— Patterson *v.* Benjamin Franklin Ins. Co., 81* Pa. St. 454; New York Union Mut. Ins. Co. *v.* Johnson, 23 Pa. St. 72.

2. General or Recording Agents. An agent may, however, have authority to make binding contracts of insurance, and a contract made by such agent will be valid, although in violation of private instructions or restrictions.[82] Such an agent is a general agent, and the company is bound by his acts, in the absence of knowledge of limitation of his authority on the part of the person who contracts for insurance.[83] However, an agent may have authority to take one kind of risk without having authority to contract for other kinds of risks, if such limitation of authority is known to the insured.[84]

C. Contracts to Procure Insurance. Where one, whether as insurance agent, broker, or person having an interest in the property, enters into a valid undertaking, whether express or implied, to have property insured, and fails to do so, he is liable in damages for breach of his contract to the person for whose benefit such contract existed.[85] But the contract relied on in such a case must be

Virginia.— Haden *v.* Farmers', etc., Fire Assoc., 80 Va. 683; Haskin *v.* Agricultural F. Ins. Co., 78 Va. 700.

Wisconsin.— Fleming *v.* Hartford F. Ins. Co., 42 Wis. 616.

See 28 Cent. Dig. tit. "Insurance," § 180. See also Insurance.

82. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

Illinois.— Hartford F. Ins. Co. *v.* Farrish, 73 Ill. 166.

Indiana.— German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

Kentucky.— Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881; Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237.

Michigan.— Miller *v.* Scottish Union, etc., Ins. Co., 101 Mich. 49, 59 N. W. 439, 45 Am. St. Rep. 389.

Mississippi.— Rivara *v.* Queen's Ins. Co., 62 Miss. 720.

Missouri.— Brownfield *v.* Phœnix Ins. Co., 26 Mo. App. 390.

Wisconsin.— Johnson *v.* Scottish Union, etc., Ins. Co., 93 Wis. 223, 67 N. W. 416.

United States.— May *v.* Western Assur. Co., 27 Fed. 260.

See 28 Cent. Dig. tit. "Insurance," § 180 *et seq.*

Recital in a policy of limitations on the agent's authority to bind the company will be construed as referring to his authority to represent the company as a party to the contract, and not as limitations on his authority to make a contract of insurance. German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41; Montgomery *v.* Lebanon Town Mut. F. Ins. Co., 80 Mo. App. 500; Zell *v.* Herman Farmers' Mut. Ins. Co., 75 Wis. 521, 44 N. W. 828.

83. *Alabama.*— Queen Ins. Co., *v.* Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51.

Illinois.— Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Manufacturers', etc., Mut. Ins. Co. *v.* Gent, 13 Ill. App. 308.

Indiana.— German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41.

Kentucky.— Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881.

New York.— Belt *v.* American Cent. Ins. Co., 29 N. Y. App. Div. 546, 53 N. Y. Suppl. 316; McGuire *v.* Hartford F. Ins. Co., 7 N. Y. App. Div. 575, 40 N. Y. Suppl. 300.

See 28 Cent. Dig. tit. "Insurance," § 181.

Extent of authority.— An agent having authority to make a contract for insurance may fill up a blank policy evidencing such contract even after the loss has occurred. Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423.

Revocation of the authority of a general agent will not be effectual as to one with whom he subsequently contracts for his principal, if the usual evidence of his right to represent the principal is left with him, such as policies signed in blank, duly filled out by him. Marshall *v.* Reading F. Ins. Co., 78 Hun (N. Y.) 83, 29 N. Y. Suppl. 334.

84. Smith *v.* State Ins. Co., 58 Iowa 487, 12 N. W. 542; Reynolds *v.* Continental Ins. Co., 36 Mich. 131.

85. *Minnesota.*— Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901.

Missouri.— Kaw Brick Co. *v.* Hogsett, 73 Mo. App. 432.

New York.— Tanenbaum *v.* Greenwald, 67 N. Y. App. Div. 473, 73 N. Y. Suppl. 873.

South Dakota.— Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266.

Wisconsin.— McAlpine *v.* St. Clara Female Academy, 101 Wis. 468, 78 N. W. 173.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.* See also Insurance.

A contract to obtain a good policy of insurance implies the procuring of insurance from a company able and willing to pay in case of loss. Landusky *v.* Beirne, 80 N. Y. App. Div. 272, 80 N. Y. Suppl. 238 [*affirmed* in 178 N. Y. 551, 70 N. E. 1101].

A standard policy of insurance containing the usual conditions is a compliance with a parol agreement by an insurance agent on payment of premium to write a policy. Young *v.* St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. 681.

Personal contract with agent to renew.— Where the contract is with the agent of a company carrying a policy on the property that it will be renewed in the same or some

one mutually binding and supported by a consideration, or the arrangement must be of such a nature as to operate by way of estoppel.[86] The measure of damages for breach of the contract to procure insurance is the amount which might have been recovered under such insurance if procured as agreed,[87] and nominal damages may be recovered, even though no actual loss is shown.[88]

D. Executory Contracts to Insure — 1. Power of Company to Make. The right to make contracts of insurance like any other right of contracting exists as at common law, unless prohibited by statute.[89] Provisions in the statutes or in the charter and by-laws of the company as to the method of executing a policy[90] of insurance, as that it shall be in writing, signed by the officers, shall bear the seal of the company, or shall be countersigned by the agent, do not prevent the making of a valid executory parol contract of insurance which may be enforced against the company.[91]

2. Authority of Agent to Make. An agent duly authorized to bind his company by contracts for insurance may make valid contracts by parol or by a binding slip or memorandum,[92] and a general authority to solicit insurance, receive

other company, the contract is a personal one with the agent and does not bind the company. Sargent *v.* National F. Ins. Co., 86 N. Y. 626; Brown *v.* Dutchess County Mut. Ins. Co., 64 N. Y. App. Div. 9, 71 N. Y. Suppl. 670; Deadman *v.* Royal Ins. Co., 12 Ky. L. Rep. 389. Renewals generally see *infra*, VII.

86. Prescott *v.* Jones, 69 N. H. 305, 41 Atl. 352.

87. Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901.

Value of property.— One who agrees to have property insured and fails to do so is liable in damages for the value of the property, as it is to be understood that he was to insure the property for its value. Ela *v.* French, 11 N. H. 356.

Where insurer becomes insolvent.— Failure to effect insurance in an agreed company which becomes insolvent renders the person failing to effect such insurance as agreed liable for the dividend which the company would have paid on the loss. Chicago Bldg. Soc. *v.* Crowell, 65 Ill. 453.

88. Tanenbaum *v.* Simon, 40 Misc. (N. Y.) 174, 81 N. Y. Suppl. 655.

89. Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371 [*distinguishing* Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 372, and *approving* Henning *v.* U. S. Insurance Co., 11 Fed. Cas. No. 6,366, 2 Dill. 26]. See also cases cited *infra*, note 90.

If by statute the contract is required to be in writing, equity will not relieve a party acting on a parol contract, unless his act was in pursuance of the contract, on the faith of it, and induced by it. Simonton *v.* Liverpool, etc., Ins. Co., 51 Ga. 76.

90. **A specific charter requirement that all insurance "contracts" shall be in writing** may render oral contracts of insurance invalid. Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 332 [*distinguished* in Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371]; Hazlett *v.* Allegheny Ins. Co., 1 Walk. (Pa.) 336, 1 Wkly. Notes Cas. 24. But *compare* cases cited *supra*, note 89.

91. *Indiana.*— New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536.

Iowa.— Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276.

Kentucky.— Security F. Ins. Co. *v.* Kentucky M. & F. Ins. Co., 7 Bush 81, 3 Am. Rep. 301.

Maine.— Walker *v.* Metropolitan Ins. Co., 56 Me. 371.

Massachusetts.— Goodhue *v.* Hartford F. Ins. Co., 175 Mass. 187, 55 N. E. 1039; Sanborn *v.* Firemen's Ins. Co., 16 Gray 448, 77 Am. Dec. 419.

Mississippi.— Franklin F. Ins. Co. *v.* Taylor, 52 Miss. 441.

Missouri.— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371 [*distinguishing* Henning *v.* U. S. Insurance Co., 47 Mo. 425, 4 Am. Rep. 332].

New York.—First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305; Post *v.* Ætna Ins. Co., 43 Barb. 351; Cooke *v.* Ætna Ins. Co., 7 Daly 555.

Wisconsin.— Zell *v.* Herman Farmers' Mut. Ins. Co., 75 Wis. 521, 44 N. W. 828.

United States.— Franklin F. Ins. Co. *v.* Colt, 20 Wall. 560, 22 L. ed. 423; Constant *v.* Allegheny Ins. Co., 6 Fed. Cas. No. 3,136, 3 Wall. Jr. 313; Henning *v.* U. S. Ins. Co., 11 Fed. Cas. No. 6,366, 2 Dill. 26.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

92. *California.*— Harron *v.* London F. Ins. Co., 88 Cal. 16, 25 Pac. 982.

Illinois.— Hartford F. Ins. Co. *v.* Wilcox, 57 Ill. 180; Philadelphia Fire Assoc. *v.* Smith, 59 Ill. App. 655.

Massachusetts.— Brown *v.* Franklin Mut. F. Ins. Co., 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534; Baker *v.* Westchester F. Ins. Co., 162 Mass. 358, 38 N. E. 1124, opinion by Knowlton, J.

Missouri.— Edwards *v.* Sun Ins. Co., 101 Mo. App. 45, 73 S. W. 886.

New York.— Fish *v.* Cottenet, 44 N. Y. 538, 4 Am. Rep. 715; Schlesinger *v.* Columbian F. Ins. Co., 37 N. Y. App. Div. 531, 56 N. Y. Suppl. 37; Cooke *v.* Ætna Ins. Co., 7 Daly 555.

West Virginia.— Croft *v.* Hanover F. Ins.

premiums, and issue and deliver policies is sufficient to cover an executory contract to insure.[93]

3. Method of Making — a. Oral Agreement.[94] There may be an oral agreement for insurance which will be binding on the company before the issuance of a policy.[95]

b. Binding Slip or Receipt. It is usual, however, to issue to the person contracting for insurance some sort of a receipt or memorandum, which is sometimes called a binding slip, evidencing the making of the contract, although not specifying its terms and conditions. Such binding slip or memorandum is evidence of a present contract of insurance between the parties,[96] and the insurance takes effect

Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

Wisconsin.— Stehlick *v.* Milwaukee Mechanics' Ins. Co., 87 Wis. 322, 58 N. W. 379.

United States.— Humphrey *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,875, 15 Blatchf. 504.

See 28 Cent. Dig. tit. "Insurance," § 190.

Presumption of authority.— It is said that the authority of an officer or agent to make an executory contract will not be presumed, in the absence of allegation and proof. Greenwich Ins. Co. *v.* Waterman, 54 Fed. 839, 4 C. C. A. 600; Farmers' Co-operative Ins. Assoc. *v.* Nolan, 26 Ind. App. 514, 60 N. E. 163; Patterson *v.* Benjamin Franklin Ins. Co., 81* Pa. St. 454; Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458. *Contra*, Stickley *v.* Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838.

Ratification.— If no binding contract is made up to the time of loss, the agent has no authority to ratify an attempted contract after the loss. Blake *v.* Hamburg Bremen F. Ins. Co., 67 Tex. 160, 2 S. W. 368, 60 Am. Rep. 15.

The company may expressly limit the authority of the agent to bind it by an executory agreement. Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527; Henry *v.* Agricultural Mut. Assur. Assoc., 11 Grant Ch. (U. C.) 125; Walker *v.* Provincial Ins. Co., 5 Can. L. J. 162.

Where the company had not given the agent authority to make a contract of insurance, but the agent forwarded an application for approval after loss had actually occurred, but before knowledge of the loss which the company accepted, it was held that there was no invalid insurance. Fireman's Fund Ins. Co. *v.* Rogers, 108 Ga. 191, 33 S. E. 954.

93. *Massachusetts.*— Putnam *v.* Home Ins. Co., 123 Mass. 324, 25 Am. Rep. 93.

Missouri.— Edwards *v.* Sun Ins. Co., 101 Mo. App. 45, 73 S. W. 886.

New York.— Angell *v.* Hartford F. Ins. Co., 59 N. Y. 171, 17 Am. Rep. 322; Ellis *v.* Albany City F. Ins. Co., 50 N. Y. 402, 10 Am. Rep. 495; Hotchkiss *v.* Germania F. Ins. Co., 5 Hun 90.

West Virginia.— Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

United States.— Baubie *v.* Ætna Ins. Co., 2 Fed. Cas. No. 1,111, 2 Dill. 156; Weeks *v.* Lycoming F. Ins. Co., 29 Fed. Cas. No. 17,353.

See 28 Cent. Dig. tit. "Insurance," § 190.

A local agent, having no power to issue policies, may nevertheless have authority to make an executory contract of insurance. Greenwich Ins. Co. *v.* Waterman, 54 Fed. 839, 4 C. C. A. 600.

94. Oral contracts of insurance see *infra*, III, F.

95. *Illinois.*—Insurance Co. of North America *v.* Bird, 175 Ill. 42, 51 N. E. 686.

Kansas.— Phœnix Ins. Co. *v.* Ireland, 9 Kan. App. 644, 58 Pac. 1024.

Kentucky.— Fidelity, etc., Co. *v.* Ballard, 105 Ky. 253, 48 S. W. 1074, 20 Ky. L. Rep. 1169.

Massachusetts.— Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358.

New York.— Clarkson *v.* Western Assur. Co., 92 Hun 527, 37 N. Y. Suppl. 53; First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. 69.

Oregon.— Hardwick *v.* State Ins. Co., 20 Oreg. 547, 26 Pac. 840.

United States.— Daniels *v.* Citizens' Ins. Co., 5 Fed. 425, 10 Biss. 116.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*; and cases cited *infra*, notes 96 *et seq.*

A company authorized to insure can ordinarily make an oral contract to insure. Firemen's Ins. Co. *v.* Kuessner, 164 Ill. 275, 45 N. E. 540; Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358; Van Loan *v.* Farmers' Mut. F. Ins. Assoc., 90 N. Y. 280. See also cases cited *supra*, notes 89, 90, 91.

96. Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Dec. 125; J. C. Smith, etc., Co. *v.* Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. 458; Belt *v.* American Cent. Ins. Co., 163 N. Y. 555, 57 N. E. 1104 [*affirming* 29 N. Y. App. Div. 546, 53 N. Y. Suppl. 316]; Underwood *v.* Greenwich Ins. Co., 66 N. Y. App. Div. 531, 73 N. Y. Suppl. 251]; State F. & M. Ins. Co. *v.* Porter, 3 Grant (Pa.) 123. See also Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

In Canada there are many cases with reference to binding receipts or as they are designated "interim receipts" in which it is held that such a receipt constitutes a binding contract of insurance subject to the conditions of such a policy as the company would have issued. Citizens' Ins. Co. *v.* Parsons, 7 App. Cas. 96, 51 L. J. P. C. 11, 45 L. T. Rep. N. S. 721; Barnes *v.* Dominion Grange Mut. F. Ins. Assoc., 22 Ont. App. 68 [*affirmed* in 25 Can. Sup. Ct. 154]; Barnes

and is in force from the time the binding receipt or memorandum is delivered to the person contracting for the insurance.[97]

4. Validity. A valid executory contract must, however, be made out, specific, either by express terms or by implication, as to the subject-matter, period, rate, and amount of insurance.[98] If there is no specific agreement as to the period of the insurance,[99] or as to the company in which the insurance is to be taken,[1] the contract will not be enforceable. There must be a consideration for the executory agreement to insure,[2] but an agreement, even implied, to pay the usual premium, will be sufficient to constitute a consideration.[3]

v. Dominion Grange Mut. F. Ins. Assoc., 25 Ont. 100; Cockburn *v.* British America Assur. Co., 19 Ont. 245; Compton *v.* Mercantile Ins. Co., 27 Grant Ch. (U. C.) 334; Canada F. & M. Ins. Co. *v.* Western Ins. Co., 26 Grant Ch. (U. C.) 264; Hawke *v.* Niagara Dist. Mut. F. Ins. Co., 23 Grant Ch. (U. C.) 139; Staunton *v.* Western Assur. Co., 21 Grant Ch. (U. C.) 578 [*affirmed* in 23 Grant Ch. 81]; Patterson *v.* Royal Ins. Co., 14 Grant Ch. (U. C.) 169; Johnson *v.* Provincial Ins. Co., 27 U. C. C. P. 464; Kelly *v.* Isolated Risk, etc., F. Ins. Co., 26 U. C. C. P. 299; Johnson *v.* Provincial Ins. Co., 26 U. C. C. P. 113; Goodfellow *v.* Times, etc., Assur. Co., 17 U. C. Q. B. 411; Perry *v.* Newcastle Dist. Mut. F. Ins. Co., 8 U. C. Q. B. 363; Turgeon *v.* Citizens Ins. Co., 9 Quebec 78; Citizens Ins. Co. *v.* Lefrançois, 2 Quebec 550; Lafleur *v.* Citizens Ins. Co., 22 L. C. Jur. 247, 1 Montreal Leg. N. 518; Tough *v.* Provincial Ins. Co., 20 L. C. Jur. 168 [*reversing* 17 L. C. Jur. 305]; Goodwin *v.* Lancashire F., etc., Ins. Co., 18 L. C. Jur. 1 [*reversing* 16 L. C. Jur. 298].

Temporary insurance.— Where the binding slip is for temporary insurance, pending the consideration of the application by the company, it ceases to be effectual after the insured is notified of the rejection of the application. Underwood *v.* Greenwich Ins. Co., 161 N. Y. 413, 55 N. E. 936. Since an oral contract of insurance may be binding, an entry of insurance made in the binding book of the agent, to be temporarily in force until the risk is inspected and the company determines whether or not to accept it, is sufficient to show a contract of insurance. Putnam *v.* Home Ins. Co., 123 Mass. 324, 25 Am. Rep. 93. And *compare* Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

97. Insurance Co. of North America *v.* Thornton, 130 Ala. 222, 30 So. 614, 89 Am. St. Rep. 30, 55 L. R. A. 547; Hartford F. Ins. Co. *v.* King, 106 Ala. 519, 17 So. 707; Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

98. *Alabama.*— Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

Missouri.— Worth *v.* German Ins. Co., 64 Mo. App. 583.

New York.— Tyler *v.* New Amsterdam F. Ins. Co., 4 Rob. 151; White *v.* Hudson River Ins. Co., 7 How. Pr. 341.

Wisconsin.— Mattoon Mfg. Co. *v.* Oshkosh Mut. F. Ins. Co., 69 Wis. 564, 35 N. W. 12.

United States.— Kimball *v.* Lion Ins. Co., 17 Fed. 625; Weeks *v.* Lycoming F. Ins. Co., 29 Fed. Cas. No. 17,353.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

Where there was no agreement to keep the property insured pending the writing and delivery of the policy, loss of the property prior to the delivery of the policy is not covered by the insurance, although the policy was filled out and countersigned by the agent at the time of the fire. Consumers' Match Co. *v.* German Ins. Co., 70 N. J. L. 226, 57 Atl. 440.

But it will be sufficient if the intention of the parties to the contract in these particulars can be gathered from the circumstances of the case. Concordia F. Ins. Co. *v.* Heffron, 84 Ill. App. 610; Weeks *v.* Lycoming F. Ins. Co., 29 Fed. Cas. No. 17,353.

There may be sufficient mutuality to render the contract binding, although the goods to be covered are left to be determined by subsequent specification. Ames-Brooks Co. *v.* Ætna Ins. Co., 83 Minn. 346, 86 N. W. 344.

99. Insurance Co. of North America *v.* Thornton, 130 Ala. 222, 30 So. 614, 89 Am. St. Rep. 30, 55 L. R. A. 547; Clark *v.* Brand, 62 Ga. 23; Cleveland Oil, etc., Mfg. Co. *v.* Norwich Union F. Ins. Co., 34 Oreg. 228, 55 Pac. 435.

1. Hartford F. Ins. Co. *v.* Trimble, 78 S. W. 462, 25 Ky. L. Rep. 1497; Johnson *v.* Connecticut F. Ins. Co., 2 S. W. 151, 8 Ky. L. Rep. 460; Deadman *v.* Royal Ins. Co., 12 Ky. L. Rep. 389; Sargent *v.* National F. Ins. Co., 86 N. Y. 626; Connecticut F. Ins. Co. *v.* Bennett, 1 Ohio S. & C. Pl. Dec. 60, 1 Ohio N. P. 71; Krumm *v.* Jefferson F. Ins. Co., 8 Ohio Dec. (Reprint) 103, 5 Cinc. L. Bul. 646; German Ins. Co. *v.* Downman, 115 Fed. 481, 53 C. C. A. 213.

2. *Illinois.*— Dinning *v.* Phœnix Ins. Co., 68 Ill. 414.

Indiana.— American Horse Ins. Co. *v.* Patterson, 28 Ind. 17.

Nebraska.— Farmers', etc., Ins. Co. *v.* Graham, 50 Nebr. 818, 70 N. W. 386.

New Jersey.— J. C. Smith, etc., Co. *v.* Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. 458.

Wisconsin.—Chamberlain *v.* Prudential Ins. Co. of America, 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

3. Worth *v.* German Ins. Co., 64 Mo. App. 583; J. C. Smith, etc., Co. *v.* Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. 458; Campbell *v.* American F. Ins. Co., 73 Wis. 100, 40 N. W. 661; Fitton *v.* Fire Ins. Assoc., 20 Fed. 766.

5. Terms and Conditions of the Contemplated Policy. The preliminary agreement not being an executed contract of insurance but contemplating the issuance of a policy which shall contain in full the terms and conditions of the contract, in order to determine what are the terms and conditions contemplated in the preliminary agreement, it is necessary to ascertain the terms and conditions of such a policy as the company were bound to issue in pursuance of such agreement.[4] But it will be presumed that the policy contracted for was such policy as the company was in the habit of issuing to those contracting for insurance.[5]

6. Enforcement — a. In Equity. A court of equity will grant relief for breach of a valid contract to issue a policy of insurance by compelling the delivery of the policy, and this relief may be granted after a loss.[6] But even in an equitable action to compel the issuance of a policy, the court may and can properly, on proof of a loss for which recovery could be had under the policy if it had been issued, enter a money judgment for the recovery of the loss.[7]

b. By Action at Law. The insured is not required, however, to seek relief in equity. He may sue at law for breach of the contract to insure, and recover as damages the amount which could have been recovered had a policy been issued in accordance with the terms of the executory agreement.[8]

4. See Green *v.* Liverpool, etc., Ins. Co., 91 Iowa 615, 60 N. W. 189; Michigan Pipe Co. *v.* North British, etc., Ins. Co., 97 Mich. 493, 56 N. W. 849; Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311; Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

The rights of one whose property is destroyed by fire after an oral contract to insure it, but before a policy therefor is issued, are subject to the provisions of the standard policy prescribed by law, and he can recover only by compliance with the conditions required by such policy, including that as to furnishing proofs of loss within a specified time. Hicks *v.* British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

An oral agreement for additional insurance retains all conditions of the policy which is added to, except as changed by the verbal contract; and this is true, whether the original policy is valid or not. Green *v.* Liverpool, etc., Ins. Co., 91 Iowa 615, 60 N. W. 189.

Pleading and proof.— The petition in an action for a loss under an oral contract for insurance must allege the terms and conditions of the policy intended to be issued, and allege in general the terms and specify the performance of the conditions. Trask *v.* German Ins. Co., 58 Mo. App. 431. Thus it is necessary for plaintiff to show compliance with the terms of such a policy as to notice and proof of loss. Hicks *v.* British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424.

5. Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311.

A binding slip issued by an insurance company designed to provide temporary insurance pending delay in issuing the policy, not specifying the risk insured against, containing none of the usual conditions of policies and expressed to be binding until a policy is delivered, constitutes a contract of insurance subject to the conditions contained in the ordinary policies in use by the company. Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719. See *supra*, III, D, 3, b.

Where a policy is issued and received by the insured, in pursuance of an oral contract to insure, it will be presumed that the terms of the oral contract were the same as those in the written policy. Green *v.* Liverpool, etc., Ins. Co., 91 Iowa 615, 60 N. W. 189.

6. Gerrish *v.* German Ins. Co., 55 N. H. 355; Clarkson *v.* Western Assur. Co., 92 Hun (N. Y.) 527, 37 N. Y. Suppl. 53; Chase *v.* Washington Mut. Ins. Co., 12 Barb. (N. Y.) 595; Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. (N. Y.) 408; Haden *v.* Farmers', etc., F. Assoc., 80 Va. 683; Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636; Tayloe *v.* Merchants F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187; Fitton *v.* Fire Ins. Assoc., 20 Fed. 766. But the contract to issue a policy must be made out by clear proof. Neville *v.* Merchants', etc., Mut. Ins. Co., 19 Ohio 452; Suydam *v.* Columbus Ins. Co., 18 Ohio 459.

Specific performance generally see Specific Performance.

7. *Missouri.*— Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371.

New Hampshire.— Gerrish *v.* German Ins. Co., 55 N. H. 355.

New York.— Whitaker *v.* Farmers' Union Ins. Co., 29 Barb. 312; Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. 448; Carpenter *v.* Mutual Safety Ins. Co., 4 Sandf. Ch. 408.

Virginia.— Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. 362, 31 Am. Rep. 732.

United States.— Franklin F. Ins. Co. *v.* Colt, 20 Wall. 560, 22 L. ed. 423; Commercial Mut. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. 318, 15 L. ed. 636; Tayloe *v.* Merchants F. Ins. Co., 9 How. 390, 13 L. ed. 187.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

8. *Alabama.*— Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

7. TERMINATION BY ISSUANCE OF POLICY. When a policy is issued and accepted in pursuance of a parol agreement for insurance, the liability under the executory contract is terminated, and such contract is merged in the policy.[9] But the liability of the company under the executory contract is not merged in a policy which does not conform to the terms of the preliminary agreement and is not accepted as a substitute therefor.[10] And if, although there is an attempt to issue a policy, such policy does not become valid as a contract of insurance by reason of lack of assent thereto of the company or the assured, then the oral contract of insurance continues in force.[11]

E. Mutuality — 1. IN GENERAL. As in any other contract,[12] there must be mutuality of obligation in order to render the contract of insurance effectual as against either party.[13] If there is any lack of agreement of the parties

Kansas.— Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

New York.— Hicks *v.* British America Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424; Angell *v.* Hartford F. Ins. Co., 59 N. Y. 171, 17 Am. Rep. 322; Guggenheimer *v.* Greenwich F. Ins. Co., 9 N. Y. St. 316; Rockwell *v.* Hartford F. Ins. Co., 4 Abb. Pr. 179.

Wisconsin.— Campbell *v.* American F. Ins. Co., 73 Wis. 100, 40 N. W. 661.

United States.— Humphrey *v.* Hartford F. Ins. Co., 12 Fed. Cas. Nos. 6,874, 6,875, 15 Blatchf. 35, 504.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

A policy of insurance not executed will not support an action, but an action may nevertheless be predicated upon a valid agreement to insure and to issue a policy. Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73.

9. Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237; Kleis *v.* Niagara F. Ins. Co., 117 Mich. 469, 76 N. W. 155; Watertown Agricultural Ins. Co. *v.* Fritz, 61 N. J. L. 211, 39 Atl. 910.

Premiums.— In an action by the company to recover the premium the insured cannot object that no policy has been delivered to him unless the company has delayed beyond a reasonable time to tender such policy. Thompson *v.* Adams, 23 Q. B. D. 361. And the mere demand of the premium without insisting upon it or tendering a valid policy does not terminate the oral insurance. Kelly *v.* Commonwealth Ins. Co., 10 Bosw. (N. Y.) 82. An interim receipt does not in itself prove payment of the premium. Canadian F. Ins. Co. *v.* Keroack, 2 Montreal Leg. N. 272.

10. *Kentucky.*— Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881.

Michigan.— Lawrence *v.* Griswold, 30 Mich. 410.

Minnesota.— Salisbury *v.* Hekla F. Ins. Co., 32 Minn. 458, 21 N. W. 552.

Nebraska.— Nebraska, etc., Ins. Co. *v.* Seivers, 27 Nebr. 541, 43 N. W. 351.

New York.— Bunten *v.* Orient Mut. Ins. Co., 8 Bosw. 448.

Ohio.— Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

United States.— Kerr *v.* Milwaukee Mechanics' Ins. Co., 117 Fed. 442, 54 C. C. A. 616; Humphry *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,875, 15 Blatchf. 504.

Canada.— Liverpool, etc., Ins. Co. *v.* Wyld, 1 Can. Sup. Ct. 604 [*affirming* 23 Grant Ch. (U. C.) 442].

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

11. *Kentucky.*— Franklin F. Ins. Co. *v.* Hewitt, 3 B. Mon. 231.

Massachusetts.— Bennett *v.* City Ins. Co., 115 Mass. 241.

Missouri.— Lungstrass *v.* German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100.

New Jersey.— Millville Mut. M. & F. Ins. Co. *v.* Collerd, 38 N. J. L. 480.

New York.— Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Kelly *v.* Commonwealth Ins. Co., 10 Bosw. 82; Guggenheimer *v.* Greenwich F. Ins. Co., 9 N. Y. St. 316.

United States.— Snell *v.* Atlantic F. & M. Ins. Co., 98 U. S. 85, 25 L. ed. 52.

See 28 Cent. Dig. tit. "Insurance," § 188 *et seq.*

12. Mutuality generally see CONTRACTS, 9 Cyc. 213.

13. *Florida.*— New Orleans Ins. Assoc. *v.* Boniel, 20 Fla. 815.

Georgia.— Crutchfield *v.* Dailey, 98 Ga. 462, 25 S. E. 526.

Illinois.— Manchester F. Assur. Co. *v.* Benson, 66 Ill. App. 615.

Massachusetts.— Wilson *v.* New Hampshire F. Ins. Co., 140 Mass. 210, 5 N. E. 818.

Michigan.—Zimmermann *v.* Dwelling-House Ins. Co., 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698; Faughner *v.* Manufacturers' Mut. F. Ins. Co., 86 Mich. 536, 49 N. W. 643.

Pennsylvania.— Schaffer *v.* Mutual F. Ins. Co., 89 Pa. St. 296.

South Dakota.— Brink *v.* Merchants', etc., United Mut. Ins. Assoc., 17 S. D. 235, 95 N. W. 929.

West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Wisconsin.— Sheldon *v.* Hekla F. Ins. Co., 65 Wis. 436, 27 N. W. 315.

Canada.— Doherty *v.* Millers, etc., Ins. Co., 4 Ont. L. Rep. 303.

See 28 Cent. Dig. tit. "Insurance," § 178.

If the insured in a mutual company is discharged in bankruptcy, so that he is released from liability on his premium note, the mutuality of the contract of insurance is thereby

as to any essential feature of the contract, the contract cannot be enforced as binding on either party.[14]

2. Application. Generally speaking, there can be no contract of insurance until the application for insurance has been made in some form or manner by the insured;[15] but no formal application is essential to the validity of the contract if it is in fact made and acted upon.[16]

3. Acceptance — a. Essential. Likewise there must be some acceptance of a proposition for insurance by the company; and of course such acceptance must have become effectual to bind the company before the loss, in order that there be a valid insurance covering such loss.[17] But the acceptance may be effectual as a contract to insure, although the policy has not yet been written.[18]

b. Effect of Delay. Acceptance of the application in some form being essential to the validity of the contract, mere delay in acceptance of an application made[19] or failure to notify the insured of the rejection of his application will not constitute an acceptance.[20]

destroyed, and the company is no longer bound. Reynolds *v.* Mutual F. Ins. Co., 34 Md. 280, 6 Am. Rep. 337.

14. Massasoit Steam Mills Co. *v.* Western Assur. Co., 125 Mass. 110; Goddard *v.* Monitor Mut. F. Ins. Co., 108 Mass. 56, 11 Am. Rep. 307; Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153; Eames *v.* Home Ins. Co., 94 U. S. 621, 24 L. ed. 298; Hamblet *v.* City Ins. Co., 36 Fed. 118.

15. If, by reason of a lack of such application on the part of the person who afterward claims to be insured, there was never in fact any meeting of the minds, so as to effect a contract of insurance binding on the insured, then there is no contract binding on the company. Thayer *v.* Middlesex Mut. F. Ins. Co., 10 Pick. (Mass.) 326; Diver *v.* London, etc., F. Ins. Co., 9 N. Y. St. 482; Sandford *v.* Trust F. Ins. Co., 11 Paige (N. Y.) 547.

If what purports to be a signed application, containing answers to questions, is not in fact signed by the insured, but by another not acting with authority, the acceptance will not bind the company. Carrigan *v.* Massachusetts Ben. Assoc., 26 Fed. 230.

16. *Illinois.*— People's Ins. Co. *v.* Paddon, 8 Ill. App. 447.

Kentucky.— Continental Ins. Co. *v.* Haynes, 10 Ky. L. Rep. 276.

Maine.— Clark *v.* Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276.

Missouri.— Moore *v.* Atlantic Mut. Ins. Co., 56 Mo. 343.

Ohio.— Connecticut F. Ins. Co. *v.* Bennett, 1 Ohio S. & C. Pl. Dec. 60, 1 Ohio N. P. 71.

Pennsylvania.— City Ins. Co. *v.* Bricker, 91 Pa. St. 488; Baldwin *v.* Pennsylvania F. Ins. Co., 20 Pa. Super. Ct. 238.

West Virginia.— Cleavenger *v.* Franklin F. Ins. Co., 47 W. Va. 595, 35 S. E. 998.

See 28 Cent. Dig. tit. "Insurance," § 198.

17. *Illinois.*— Ætna Ins. Co. *v.* Maguire, 51 Ill. 342; Manchester F. Assur. Co. *v.* Benson, 66 Ill. App. 615.

Kansas.— Picket *v.* German F. Ins. Co., 39 Kan. 697, 18 Pac. 903.

New York.— Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Mead *v.* Westchester F. Ins. Co., 3 Hun 608.

Ohio.— Krumm *v.* Jefferson F. Ins. Co., 8 Ohio Dec. (Reprint) 103, 5 Cinc. L. Bul. 646.

Wisconsin.— John R. Davis Lumber Co. *v.* Scottish Union, etc., Ins. Co., 94 Wis. 472, 69 N. W. 156.

United States.— Schultz *v.* Phenix Ins. Co., 77 Fed. 375.

See 28 Cent. Dig. tit. "Insurance," § 196.

18. Home Ins. Co. *v.* Adler, 77 Ala. 242; Firemen's Ins. Co. *v.* Knessner, 164 Ill. 275, 45 N. E. 540; Herring *v.* American Ins. Co., 123 Iowa 523, 99 N. W. 130. And see *infra*, IV, E.

19. *Illinois.*— Winneshiek Ins. Co. *v.* Holzgrafe, 53 Ill. 516, 5 Am. Rep. 64.

Iowa.— Atkinson *v.* Hawkeye Ins. Co., 71 Iowa 340, 32 N. W. 371; Walker *v.* Farmers' Ins. Co., 51 Iowa 679, 2 N. W. 583.

Maryland.— Harp *v.* Grangers' Mut. F. Ins. Co., 49 Md. 307.

New York.— Van Tassel *v.* Greenwich Ins. Co., 72 Hun 141, 25 N. Y. Suppl. 301.

Pennsylvania.— New York Union Mut. Ins. Co. *v.* Johnson, 23 Pa. St. 72.

South Dakota.— Brink *v.* Merchants', etc., United Mut. Ins. Assoc., 17 S. D. 235, 95 N. W. 929.

See 28 Cent. Dig. tit. "Insurance," § 196.

The fact that the agent receiving the application to be submitted to the company and the accompanying premium does not return them within a reasonable time to the insured will not in itself give rise to a contract on the part of the company. Easley *v.* New Zealand Ins. Co., 5 Ida. 593, 51 Pac. 418; Armstrong *v.* State Ins. Co., 61 Iowa 212, 16 N. W. 94; Trask *v.* German Ins. Co., 53 Mo. App. 625.

20. Winchell *v.* Iowa State Ins. Co., 103 Iowa 189, 72 N. W. 503; Otterbein *v.* Iowa State Ins. Co., 57 Iowa 274, 10 N. W. 667; More *v.* New York Bowery F. Ins. Co., 130 N. Y. 537, 29 N. E. 757; Ætna Ins. Co. *v.* Webster, 6 Wall. (U. S.) 129, 18 L. ed. 888.

The question is in reality whether it is the mutual understanding of the parties that the insurance shall not become binding until acceptance, or, on the other hand, that it shall become binding unless it is rejected. If the company has simply reserved the right

c. Power of Agent to Accept. An agent having only authority to receive and transmit applications does not bind the company by the acceptance of an application.[21] And an insurance agent acting without the knowledge or consent of either party cannot make a valid contract of insurance.[22]

F. Form; Oral or Written.[23] In the absence of any statutory provision, or provision in the charter of the corporation, limiting the method in which the company may bind itself by contract, an oral or parol contract of insurance is valid.[24]

to reject applications, unreasonable delay in formally accepting, or failure to notify the insured within a reasonable time of the rejection, will amount to an acceptance, rendering the company liable. Commercial Union Assur. Co. *v.* State, 113 Ind. 331, 15 N. E. 518; Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881; Agricultural Ins. Co. *v.* Yates, 10 Ky. L. Rep. 984; Continental Ins. Co. *v.* Haynes, 10 Ky. L. Rep. 276; Palm *v.* Medina County Mut. Ins. Co., 20 Ohio 529; Somerset County Mut. F. Ins. Co. *v.* May, 2 Wkly. Notes Cas. (Pa.) 43.

21. Strickland *v.* Council Bluffs Ins. Co., 66 Iowa 466, 23 N. W. 926; Stockton *v.* Firemen's Ins. Co., 33 La. Ann. 577, 39 Am. Rep. 277; Potter *v.* Phenix Ins. Co., 63 Fed. 382.

But authority to reject raises a presumption of authority to accept. Trask *v.* German Ins. Co., 53 Mo. App. 625.

22. London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

But acceptance by the company, of an application made by an agent without authority to bind the company, will constitute a valid contract. Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117.

23. Parol executory contracts to insure see *supra*, III, D, 1, 3.

24. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 31 Ala. 711.

Arkansas.— King *v.* Cox, 63 Ark. 204, 37 S. W. 877.

Illinois.— Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150 [*affirming* 55 Ill. App. 497]; Hartford F. Ins. Co. *v.* Farrish, 73 Ill. 166; Philadelphia County F. Ins. Co. *v.* Sinsabaugh, 101 Ill. App. 55; Philadelphia Fire Assoc. *v.* Smith, 59 Ill. App. 655; People's Ins. Co. *v.* Paddon, 8 Ill. App. 447.

Indiana.— New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536.

Iowa.— Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386.

Kansas.— Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347.

Kentucky.— Commercial Union Assur. Co. *v.* Urbansky, 113 Ky. 624, 68 S. W. 653, 24 Ky. L. Rep. 462; Deadman *v.* Royal Ins. Co., 12 Ky. L. Rep. 389.

Massachusetts.— Brown *v.* Franklin Mut. F. Ins. Co., 165 Mass. 565, 43 N. E. 512, 52 Am. St. Rep. 534.

Michigan.— Gay *v.* Farmers' Mut. Ins. Co., 51 Mich. 245, 16 N. W. 392; Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143.

Missouri.— Worth *v.* German Ins. Co., 64 Mo. App. 583; Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252.

New York.— Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216; First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305; Reynolds *v.* Westchester F. Ins. Co., 8 N. Y. App. Div. 193, 40 N. Y. Suppl. 336; Van Loan *v.* Farmers' Mut. F. Ins. Assoc., 24 Hun 132; Kelly *v.* Commonwealth Ins. Co., 10 Bosw. 82.

Ohio.— Newark Mach. Co. *v.* Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

Pennsylvania.— Smith *v.* Odlin, 4 Yeates 468.

South Carolina.— Stickley *v.* Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838.

Wisconsin.—Strohn *v.* Hartford F. Ins. Co., 33 Wis. 648; Northwestern Iron Co. *v.* Ætna Ins. Co., 23 Wis. 160, 99 Am. Dec. 145.

United States.— Potter *v.* Phenix Ins. Co., 63 Fed. 382; Relief F. Ins. Co. *v.* Shaw, 94 U. S. 574, 24 L. ed. 291.

See 28 Cent. Dig. tit. "Insurance," § 204 *et seq.*

A contract of insurance does not necessarily imply a policy, nor indeed a written instrument at all. It may be orally made. Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311.

Extent and limits of rule.— Even though the corporation by its charter is authorized to contract for insurance and issue policies, it may nevertheless contract in parol. Continental Ins. Co. *v.* Roller, 101 Ill. App. 77. The few cases in which it has been said that under the general law of insurance the contract must be in writing can be explained by reference to the statutory provisions defining the method of entering into such a contract. Clark *v.* Brand, 62 Ga. 23; Simonton *v.* Liverpool, etc., Ins. Co., 51 Ga. 76; Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio 148.

Mutual fire-insurance companies may consummate contracts of insurance within this rule without the issuance of a policy. Alliance Co-operative Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. 108; Loomis *v.* Jefferson County Patrons' Fire Relief Assoc., 92 N. Y. App. Div. 601, 81 N. Y. Suppl. 5.

In Louisiana it is said that a contract of insurance must always be made in writing, and its terms sufficiently expressed therein. Bell *v.* Firemen's Ins. Co., 5 Rob. 446. And likewise that a contract of reinsurance must be in writing. Egan *v.* Fireman's Ins. Co., 27 La. Ann. 368.

In Canada it is held that a contract to insure must be in writing. Jones *v.* Provincial Ins. Co., 16 U. C. Q. B. 477; Montreal Assur. Co. *v.* McGillivray, 9 L. C. Rep. 488, 13 Moore P. C. 87, 15 Eng. Reprint 33.

Statute of frauds.— An oral contract for

IV. THE POLICY.

A. Its Nature. An insurance policy is a contract, and not a piece of property, and the written instrument is the evidence of a contract between the parties;[25] but when duly executed and delivered, the insured is entitled to the possession of the instrument, and may maintain his right to such possession by appropriate action.[26]

B. Form — 1. In General. The rules applicable to written contracts determine the sufficiency of a policy of insurance,[27] in the absence of statutory provision on the subject.[28]

2. Statutory Forms. By statute in several states[29] a standard form of policy[30] is prescribed, which must be employed in entering into the contract, and no provisions not found in the prescribed form will be enforced.[31] In other states[32] certain conditions are specified, but the authorities of the state are given power to approve such forms as they may deem proper.

C. Execution — 1. By Company; Countersigned by Agent. It is usual for companies to execute blank policies in due form, and place them in the hands of agents, to be filled out and delivered; and under such method of doing business it is usual to stipulate in the policy, as thus executed in blank, that it shall not be valid until countersigned by the agent who issues it. Under such a stipulation a policy not thus countersigned is not valid.[33] But the countersigning may be waived, and the policy nevertheless valid, if the actual execution of the policy under proper authority is otherwise shown.[34]

insurance is not invalid under the statute of frauds. Sanborn *v.* Fireman's Ins. Co., 16 Gray (Mass.) 448, 77 Am. Dec. 419; Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252, 5 N. W. 303. See also Frauds, Statute of.

25. Hearing's Succession, 26 La. Ann. 326.

26. Phœnix Ins. Co. *v.* Van Allen, 29 Ill. App. 149; Ellicott *v.* U. S. Insurance Co., 8 Gill & J. (Md.) 166; Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268; Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423.

Election of remedies.— The insured may proceed by action to recover possession of the policy, or sue on the policy to recover for the loss suffered thereunder. Franklin F. Ins. Co. *v.* Colt, 20 Wall. (U. S.) 560, 22 L. ed. 423.

In an action of trover for a policy of insurance, the amount that could have been recovered on the policy is the measure of damage. Allemania Ins. Co. *v.* McHugh, 1 Lack. Leg. Rec. (Pa.) 411.

27. *Massachusetts.*— Lee *v.* Massachusetts F. & M. Ins. Co., 6 Mass. 208.

Missouri.— Bushnell *v.* Farmers' Mut. Ins. Co., 91 Mo. App. 523; Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311; Imboden *v.* Detroit F. & M. Ins. Co., 31 Mo. App. 321.

New York.— Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490.

Wisconsin.—Strohn *v.* Hartford F. Ins. Co., 37 Wis. 625, 19 Am. Rep. 777.

England.— *Re* Norwich Equitable F. Assur. Soc., 57 L. T. Rep. N. S. 241.

See 28 Cent. Dig. tit. "Insurance," § 211.

A by-law of a mutual insurance company providing that a policy may at the request of the insured be indorsed payable to the mortgagee as his interest may appear, is not obligatory, and hence a failure to do so does not relieve the insurer from liability. Loomis *v.* Jefferson County Patrons' Fire Relief Assoc., 92 N. Y. App. Div. 601, 87 N. Y. Suppl. 5.

28. See *infra*, IV, B, 2.

29. As in Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Wisconsin, etc.

30. The New York standard form is not only prescribed in some of the other states, but is used by many companies in states where it is not specifically prescribed, and is given in full in the note. Form of the policy is set out in full in Wis. St. (1898) §§ 1941, 1943–1964.

31. In Massachusetts the standard form may be to some extent added to or modified by attaching a slip to the policy. Quinn *v.* Philadelphia Fire Assoc., 180 Mass. 560, 62 N. E. 980. But a policy not conforming to the statutory requirements will be binding on the company. Hewins *v.* London Assur. Corp., 184 Mass. 177, 68 N. E. 62.

32. As in Iowa, North Dakota, Canada, etc.

33. Peoria M. & F. Ins. Co. *v.* Walser, 22 Ind. 73; Lynn *v.* Burgoyne, 13 B. Mon. (Ky.) 400; Badger *v.* American Popular L. Ins. Co., 103 Mass. 244, 4 Am. Rep. 547.

34. *In re* Pelican Ins. Co., 47 La. Ann. 935, 17 So. 427; Grady *v.* American Cent. Ins. Co., 60 Mo. 116; Kantrener *v.* Penn Mut. L. Ins. Co., 5 Mo. App. 581; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Camden Consol. Oil Co. *v.* Ohio Ins. Co., 4 Fed. Cas. No. 2,337*b*.

See 28 Cent. Dig. tit. "Insurance," § 212.

The policy is issued as the contract of the company, and not of the agent; and proof of the agent's signature or authority is not re-

2. SEALING. In the absence of some requirement in the charter of the company that it shall contract only under seal,[35] it is not essential or usual that the policy be a sealed instrument.[36]

3. INCORPORATING OR ATTACHING OTHER DOCUMENTS OR PAPERS — a. Application or Collateral Stipulation. Stipulations in collateral instruments may be made parts of the policy, by express reference;[37] but such collateral instruments not expressly incorporated into the policy by reference or otherwise, such as an application on which the policy is issued, are not to be taken into account in construing the terms of the policy.[38] In several states[39] it is specifically provided by statute that any application or other collateral instrument, although expressly referred to in the policy, and by terms made a part thereof, shall not be binding as against assured, unless actually incorporated into the policy, or a copy is indorsed thereon or attached thereto.[40]

b. Constitution, By-Laws, or Rules of Insurer. Provisions in the articles or

quired unless the execution of the instrument is properly put in issue. Firemen's Ins. Co. *v.* Barnsch, 161 Ill. 629, 44 N. E. 285.

The policy must be executed by someone having authority to bind the company. Planters', etc., Mut. F. Assoc. *v.* De Loach, 113 Ga. 802, 39 S. E. 466.

35. But if the charter requires that the policies issued by the company shall be under seal, the company cannot, in an action on the policy, as for instance in a suit for recovery of a premium, introduce an unsealed instrument in evidence. Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

36. Brown *v.* Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325; Mitchell *v.* Union Ins. Co., 45 Me. 104, 71 Am. Dec. 529; National Banking, etc., Co. *v.* Knaup, 55 Mo. 154.

37. *Colorado.*— Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587.

Indiana.— Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352.

Louisiana.— Goldman *v.* North British Mercantile Ins. Co., 48 La. Ann. 223, 19 So. 132.

Massachusetts.— Mullaney *v.* National F. & M. Ins. Co., 118 Mass. 393.

New York.— Wall *v.* Howard Ins. Co., 14 Barb. 383; Roberts *v.* Chenango County Mut. Ins. Co., 3 Hill 501.

Texas.—Allred *v.* Hartford F. Ins. Co., (Civ. App. 1896) 37 S. W. 95.

United States.— Equitable Safety Ins. Co. *v.* Hearne, 20 Wall. 494, 22 L. ed. 398 [*affirming* 11 Fed. Cas. No. 6,300, 4 Cliff. 192].

See 28 Cent. Dig. tit. "Insurance," § 214 *et seq.*

38. Vilas *v.* New York Cent. Ins. Co., 72 N. Y. 590, 28 Am. Rep. 186; Weed *v.* Schenectady Ins. Co., 7 Lans. (N. Y.) 452; Philadelphia Fire Assoc. *v.* Bynum, (Tex. Civ. App. 1898) 44 S. W. 579; East Texas F. Ins. Co. *v.* Brin, 3 Tex. App. Civ. Cas. § 333; Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441.

An application made after the issuance of the policy, and not in pursuance of any previous agreement to make such application, is no part of the contract of insurance. Michigan F. & M. Ins. Co. *v.* Wich, 8 Colo. App. 409, 46 Pac. 687.

39. See the statutes of the several states.

40. See cases cited *infra*, this note.

In Iowa a copy of a premium note executed in connection with the policy must thus be attached. Summers *v.* Des Moines Ins. Co., 116 Iowa 593, 88 N. W. 326; Lewis *v.* Burlington Ins. Co., 80 Iowa 259, 45 N. W. 749. A copy of the application which contains only a portion of its provisions is not sufficient under the statute. Corson *v.* Iowa Mut. F. Assoc., 115 Iowa 485, 88 N. W. 1086; Corson *v.* Anchor Mut. F. Ins. Co., 113 Iowa 641, 85 N. W. 806. The statute is applicable to other kinds of insurance also. McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188; Cook *v.* Federal L. Assoc., 74 Iowa 746, 35 N. W. 500.

In Massachusetts the fact that the policy purports to refer to an application which is not in fact attached will not render the policy void, if no written application was ever made, or if such application was defective and is attached so far as it in fact existed. Blake *v.* Exchange Mut. Ins. Co., 12 Gray 265.

In New York see Landers *v.* Watertown F. Ins. Co., 19 Hun 174; Delonguemare *v.* Tradesmens' Ins. Co., 2 Hall 629.

In Pennsylvania under the act of May 11, 1881, see Imperial F. Ins. Co. *v.* Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. Rep. 686; Susquehanna Mut. F. Ins. Co. *v.* Hallock, 10 Pa. Cas. 386, 14 Atl. 167; Hill *v.* Kittauning Ins. Co., 5 Lanc. L. Rev. 197. This statute applies only where the application is in writing (Lenox *v.* Greenwich Ins. Co., 165 Pa. St. 575, 30 Atl. 940), and does not prevent the introduction of the application in evidence to show fraud on the company in procuring insurance on an application not signed by the applicant (Carrigan *v.* Massachusetts Ben. Assoc., 18 Phila. 528). This statute is applicable to other forms of insurance. Mutual Live Stock Ins. Co. *v.* Dutton, 6 Del. Co. 148. See also Hebb *v.* Kittanning Ins. Co., 138 Pa. St. 174, 20 Atl. 837; Standard L., etc., Ins. Co. *v.* Carroll, 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194.

In Wisconsin see Johnson *v.* Scottish Union, etc., Ins. Co., 93 Wis. 223, 67 N. W. 416; Stanhilber *v.* Mutual Mill Ins. Co., 76 Wis. 285, 45 N. W. 221; Dunbar *v.* Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386.

by-laws of a mutual company may be incorporated into the contract by reference.[41] It is usual, however, to incorporate specific provisions of the articles and by-laws relative to the particular contract of insurance, into the express contract, or print them on the back thereof.[42]

D. Delivery — 1. In General. In the absence of any other evidence to show assent of the company to the making of a contract of insurance, delivery of the policy must be shown.[43] But where a policy has been duly executed in compliance with an application on the part of the insured, so that the minds of the parties have fully met as to the terms and conditions of the contract, a manual delivery of the policy to the insured is not essential to render it binding on the company.[44]

41. The articles of incorporation and the by-laws of a mutual association enter into and become part of the contract with each member of the company. Farmers' Mut. Hail Ins. Assoc. *v.* Slattery, 115 Iowa 410, 88 N. W. 949; Farmers' Mut. Ins. Co. *v.* Kinney, 64 Nebr. 808, 90 N. W. 926; Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327. And the member is bound by subsequent by-laws, if they are reasonable. Farmers' Mut. Ins. Co. *v.* Kinney, 64 Nebr. 808, 90 N. W. 926.

42. Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319; Hygum *v.* Ætna Ins. Co., 11 Iowa 21; Douville *v.* Farmers' Mut. F. Ins. Co., 113 Mich. 158, 71 N. W. 517.

In some states it is required by statute that provisions of the articles and by-laws of a mutual company affecting the contract be thus incorporated or attached. Capitol Ins. Co. *v.* Pleasanton Bank, 48 Kan. 397, 29 Pac. 578; Capitol Ins. Co. *v.* Blue Mound Bank, 48 Kan. 393, 29 Pac. 576; Fabyan *v.* Union Mut. F. Ins. Co., 33 N. H. 203; Susquehanna Mut. F. Ins. Co. *v.* Oberholtzer, 172 Pa. St. 223, 32 Atl. 1105, 1108; Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51; Shoun *v.* Armstrong, (Tenn. Ch. App. 1900) 59 S. W. 790.

43. *Arkansas.*— Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461.

Georgia.— Jones *v.* Methvin, 97 Ga. 449, 25 S. E. 318.

Iowa.— Brown *v.* American Cent. Ins. Co., 70 Iowa 390, 30 N. W. 647.

Kentucky.— Blue Grass Ins. Co. *v.* Cobb, 72 S. W. 1099, 24 Ky. L. Rep. 2132.

Massachusetts.— Myers *v.* Liverpool, etc., Ins. Co., 121 Mass. 338.

New Jersey.— Millville Mut. M. & F. Ins. Co. *v.* Collerd, 38 N. J. L. 480.

New York.— Ikeller *v.* Hartford F. Ins. Co., 24 Misc. 136, 53 N. Y. Suppl. 323.

North Carolina.— Folb *v.* Phœnix Ins. Co., 109 N. C. 568, 13 S. E. 798.

Pennsylvania.— Pennsburg Mfg. Co. *v.* Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91.

Texas.— Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978.

United States.— German Ins. Co. Downman, 115 Fed. 481, 53 C. C. A. 213; Wilson *v.* Queen Ins. Co., 5 Fed. 674.

See 28 Cent. Dig. tit. "Insurance," § 219 *et seq.*

Deposit in the mail, duly addressed and postage prepaid, constitutes delivery. Triple Link Mut. Indemnity Assoc. *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34; Hartford Steam-Boiler Inspection, etc., Co. *v.* Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859. But it is said that no legal presumption arises from such fact that delivery has been made. Springfield F. & M. Ins. Co. *v.* Jenkins, 9 Ky. L. Rep. 932.

44. *Alabama.*— Phœnix Assur. Co. *v.* McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. Rep. 154.

Illinois.— Milwaukee Mechanics' Ins. Co. *v.* Graham, 181 Ill. 158, 54 N. E. 914.

Kansas.— Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347.

Kentucky.— Western Assur. Co. *v.* Meuth, 10 Ky. L. Rep. 718; Springfield F. & M. Ins. Co. *v.* Jenkins, 9 Ky. L. Rep. 932.

Maine.— Bragdon *v.* Appleton Mut. F. Ins. Co., 42 Me. 259; Loring *v.* Proctor, 26 Me. 18.

Mississippi.—Equitable F. Ins. Co. *v.* Alexander, (Miss. 1892) 12 So. 25.

New Hampshire.— Stebbins *v.* Lancashire Ins. Co., 60 N. H. 65.

Ohio.— Manchester F. Ins. Co. *v.* Plato, 23 Ohio Cir. Ct. 35.

Pennsylvania.— Pennsburg Mfg. Co. *v.* Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91.

See 28 Cent. Dig. tit. "Insurance," § 219 *et seq.*

Delivery by an agent whose authority is unrevoked will be binding on the company, although the insured has been notified of an intention to revoke the authority of the agent. Lightbody *v.* North American Ins. Co., 23 Wend. (N. Y.) 18.

If the agent retains the policy for his own personal security, for reimbursement of premium advanced for the insured, the contract is binding on the company. Fireman's Fund Ins. Co. *v.* Pekor, 106 Ga. 1, 31 S. E. 779.

If the policy has been put into the hands of the company's agent, to be delivered to the insured, and nothing remains but to make such delivery, without any further action on the part of the insured being necessary, except the mere formal act of receiving the policy, then their agent is presumed to hold the policy for the insured, and the contract is complete and binding.

Massachusetts.— Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1.

2. After Loss. If the contract has become binding by the issuance of the policy and the placing it in the hands of an agent for delivery, then the fact that such delivery is not actually made to the insured until after loss has occurred will not defeat recovery by the insured.[45]

E. Acceptance. In general it is essential, as in case of other written contracts, that the instrument, to be binding on the parties, must not only have been executed by the one party, but also accepted by the other.[46] But by acceptance without objection the insured becomes bound by the terms of the policy.[47] The assent of the insured, such as to make a binding contract, may, however, be shown without proof of actual acceptance.[48]

V. Premiums and Assessments.

A. Premiums — 1. Necessity of Payment — a. In General. The consideration for the carrying of the risk of the policy by the insurer is the premium paid by the insured, and the payment of such consideration, unless waived by the insurer, or unless a different agreement is made in relation thereto by the parties, is a condition necessary to the operation of the policy.[49] Provisions to this

Michigan.— Dibble *v.* Northern Assur. Co., 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470; Home Ins. Co. *v.* Curtis, 32 Mich. 402.

Nebraska.— Phœnix Ins. Co. *v.* Meier, 28 Nebr. 124, 44 N. W. 97.

New Hampshire.— Morrison *v.* Insurance Co. of North America, 64 N. H. 137, 7 Atl. 378.

New Jersey.— Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268.

Ohio.— Newark Mach. Co. *v.* Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

United States.— Franklin F. Ins. Co. *v.* Colt, 20 Wall. 560, 22 L. ed. 423.

See 28 Cent. Dig. tit. "Insurance," § 220.

Retention of policy by agent at request of insured and delivery to insured after loss has been considered to be a delivery at the time of insurance. Young *v.* St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. 681.

Redelivery to the agent after delivery to the insured does not invalidate the original delivery of the policy to the insured. Cassville Roller Mills Co. *v.* Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

45. Howard Ins. Co. *v.* Owens, 13 Ky. L. Rep. 237; Michigan Pipe Co. *v.* Michigan F. & M. Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277; Keim *v.* Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291; Brownfield *v.* Phœnix Ins. Co., 35 Mo. App. 54; Commercial Ins. Co. *v.* Hallock, 27 N. J. L. 645, 72 Am. Dec. 379. See also Young *v.* St. Paul, etc., Ins. Co., 68 S. C. 387, 47 S. E. 681.

46. *Alabama.*— Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

Illinois.— National Mut. Church Ins. Co. *v.* Bentley M. E. Church, 105 Ill. App. 143; Hartford F. Ins. Co. *v.* McKenzie, 70 Ill. App. 615.

Iowa.— Stephens *v.* Capital Ins. Co., 87 Iowa 283, 54 N. W. 139.

Missouri.— Wallingford *v.* Home Mut. F. & M. Ins. Co., 30 Mo. 46.

New Hampshire.— Stebbins *v.* Lancashire Ins. Co., 60 N. H. 65.

Pennsylvania.—Pennsburg Mfg. Co. *v.* Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91.

United States.— Kerr *v.* Milwaukee Mechanics' Ins. Co., 117 Fed. 442, 54 C. C. A. 616.

See 28 Cent. Dig. tit. "Insurance," § 222.

47. *District of Columbia.*—Wilson *v.* Hartford F. Ins. Co., 17 App. Cas. 14.

Kansas.— Pierce *v.* Home Ins. Co., 45 Kan. 576, 26 Pac. 5.

Massachusetts.— Commonwealth Mut. F. Ins. Co. *v.* Wm. Knabe, etc., Mfg. Co., 171 Mass. 265, 50 N. E. 516; Draper *v.* Charter Oak F. Ins. Co., 2 Allen 569.

Michigan.— Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

Missouri.—American Ins. Co. *v.* Neiberger, 74 Mo. 167; Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666; Overton *v.* American Cent. Ins. Co., 79 Mo. App. 1.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 579, 69 Pac. 936.

See 28 Cent. Dig. tit. "Insurance," § 222.

Limitation of rule.— Where, however, the insured has simply received and retained possession of the policy, in order to determine subsequently whether he will accept it or not, it is not a binding contract. Nutting *v.* Minnesota F. Ins. Co., 98 Wis. 26, 73 N. W. 432.

48. Blanchard *v.* Waite, 28 Me. 51, 48 Am. Dec. 474. See also cases cited *supra*, note 20 *et seq.*, as to the delivery of the policy.

49. *Delaware.*— Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 325, 54 Atl. 952.

Illinois.— Milwaukee Mechanics' Ins. Co. *v.* Graham, 80 Ill. App. 549.

Iowa.— Union Bldg. Assoc. *v.* Rockford Ins. Co., 83 Iowa 647, 49 N. W. 1032, 32 Am. St. Rep. 323, 14 L. R. A. 248.

Louisiana.— Berthoud *v.* Atlantic M. & F. Ins. Co., 13 La. 539.

Maryland.—Bradley *v.* Potomac F. Ins. Co., 32 Md. 108, 3 Am. Rep. 121.

Massachusetts.— Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11

effect in the policy, being mere restatements of the law, have been considered by the courts as valid.[50]

b. Extension of Credit — (I) *In General.* But while this is the general inference when nothing is said as to payment of the premium, the presumption may be rebutted by showing that there was an agreement, either implied from past dealings between the insurer or its agent and the insured,[51] or made at the time of the issuance of the policy, that payment of the premium would not be a prerequisite, or that credit was to be given.[52] When no time is fixed by the company within which the proposition to insure must be accepted and the premium paid, the law fixes a reasonable time.[53]

(II) *Authority of Agent.* An agent who has power to countersign and deliver policies and who is responsible to the company for the premiums and their collection on all policies issued by him binds the company by an agreement to extend credit to the insured.[54]

c. Waiver of Prepayment. A condition that the payment of the premium is

L. R. A. 598; Mulrey *v.* Shawmut Mut. F. Ins. Co., 4 Allen 116, 81 Am. Dec. 689; Real Estate Mut. F. Ins. Co. *v.* Roessle, 1 Gray 336.

Michigan.— New York Lumber, etc., Co. *v.* People's F. Ins. Co., 96 Mich. 20, 55 N. W. 434.

Missouri.— Bidwell *v.* St. Louis Floating Dock, etc., Co., 40 Mo. 42; Wallingford *v.* Home Mut. F. & M. Ins. Co., 30 Mo. 46.

New Jersey.— Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333.

New York.— Tyler *v.* New Amsterdam F. Ins. Co., 4 Rob. 151.

Oregon.— Hardwick *v.* State Ins. Co., 20 Oreg. 547, 26 Pac. 840.

England.— Tarleton *v.* Staniforth, 3 Anst. 707, 1 B. & P. 471, 5 T. R. 695, 4 Rev. Rep. 845; Salvin *v.* James, 6 East 571, 2 Smith K. B. 646, 8 Rev. Rep. 540; Sears *v.* Agricultural Ins. Co., 32 U. C. C. P. 585. But see Kelly *v.* London, etc., F. Ins. Co., 1 Cab. & E. 47, where it was said that in the absence of a provision that a policy was not to attach until the premium was paid, no such agreement would be implied.

See 28 Cent. Dig. tit. "Insurance," § 231.

50. Watrous *v.* Mississippi Valley Ins. Co., 35 Iowa 582; Diver *v.* London, etc., F. Ins. Co., 9 N. Y. St. 482.

51. *Illinois.*— Firemen's Ins. Co. *v.* Kuessner, 164 Ill. 275, 45 N. E. 540; Continental Ins. Co. *v.* Roller, 101 Ill. App. 77.

Indiana.— Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

Iowa.— Davenport *v.* Peoria M. & F. Ins. Co., 17 Iowa 276.

Missouri.— Lungstress *v.* German Ins. Co., 48 Mo. 201, 8 Am. Rep. 100; Worth *v.* German Ins. Co., 64 Mo. App. 583; Trundle *v.* Providence-Washington Ins. Co., 54 Mo. App. 188.

New York.— Train *v.* Holland Purchase Ins. Co., 62 N. Y. 598.

Ohio.— Newark Mach. Co. *v.* Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

See 28 Cent. Dig tit. "Insurance," § 239.

52. New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153; Squier *v.* Hanover F. Ins. Co., 18 N. Y. App. Div. 575, 46 N. Y. Suppl. 30. See also Germania F. Ins. Co. *v.* Muller, 110 Ill. App. 190. Under such circumstances the premium may be paid even after a loss has occurred. Van Loan *v.* Farmer's Mut. F. Ins. Assoc., 24 Hun (N. Y.) 132. See also cases cited *infra*, note 62 *et seq.*

If the insurer chooses to extend credit to an assured for the premium, it is under no obligation to him to demand payment at any particular time, unless it elects to cancel the policy. Citizen's F. Ins. Co. *v.* Swartz, 21 Misc. (N. Y.) 671, 47 N. Y. Suppl. 1107.

Relation back.— Where after an oral contract of insurance the premium is accepted and the policy delivered, it relates back to the making of the oral contract, and the insured need not at the time of paying the premium and receiving the policy voluntarily inform the insurers of the destruction of the property. Worth *v.* German Ins. Co., 64 Mo. App. 583.

53. Carson *v.* German Ins. Co., 62 Iowa 433, 17 N. W. 650; Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527.

54. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Illinois.— Home Ins. Co. *v.* Field, 53 Ill. App. 119. See also Germania F. Ins. Co. *v.* Muller, 110 Ill. App. 190.

Iowa.— Dubuque First Nat. Bank *v.* Getz, 96 Iowa 139, 64 N. W. 799.

Ohio.— Hughs *v.* Farmer's Ins. Co., 4 Ohio Dec. (Reprint) 412, 2 Clev. L. Rep. 125.

West Virginia.— Croft *v.* Hanover F. Ins. Co., 40 W. Va. 508, 21 S. E. 854, 52 Am. St. Rep. 902.

United States.— Franklin F. Ins. Co. *v.* Colt, 20 Wall. 560, 22 L. ed. 423; Taylor *v.* Germania Ins. Co., 23 Fed. Cas. No. 13,793, 2 Dill. 282.

See 28 Cent. Dig. tit. "Insurance," § 239.

But when the provisions of the policy are that it shall not take effect until payment of the premium, there is sometimes a contrary holding, the court regarding the insured chargeable with the provision of the policy despite the agent's agreement for

to be regarded as a condition precedent also may be waived by the insurer, in part,[55] or wholly.[56] If the insured be prevented by the insurer from performing such a condition the insurer cannot assert such a failure.[57] An unconditional delivery of the policy by the agent to the insured amounts to a waiver of the condition of payment in advance of the inception of the risk.[58]

2. WHAT IS PAYMENT — a. In General. A valid payment may be made in other ways than in cash if there has been an assent thereto by the insurer or its agent.[59] Thus payment may be made by check [60] or by note.[61]

credit. Buffun *v.* Fayette Mut. F. Ins. Co., 3 Allen (Mass.) 360; Marland *v.* Royal Ins. Co., 71 Pa. St. 393.

55. Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407.

56. *Illinois.*— Germania F. Ins. Co. *v.* Muller, 110 Ill. App. 190; German Ins. Co. *v.* Orr, 56 Ill. App. 637.

Missouri.— Worth *v.* German Ins. Co., 64 Mo. App. 583.

New York.— Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521; Goit *v.* National Protection Ins. Co., 25 Barb. 189; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468; Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. 69; Kelly *v.* Commonwealth Ins. Co., 10 Bosw. 82.

England.— Kelly *v.* London, etc., F. Ins. Co., 1 Cab. & E. 47.

Canada.— Roberts *v.* Security Co., [1897] 1 Q. B. 111, 66 L. J. Q. B. 119, 75 L. T. Rep. N. S. 531, 45 Wkly. Rep. 214; Peppit *v.* North British, etc., Ins. Co., 13 Nova Scotia 219.

See 28 Cent. Dig. tit. "Insurance," § 256; and *infra*, VI, E, 1, b.

Recital of consideration being paid.— In Mooney *v.* Home Ins. Co., 72 Mo. App. 92, it was held that the acknowledgment in a policy of a cash payment of the premium did not estop the insured from showing that such payment has been made in fact by a note which had not been met. *Contra*, Roberts *v.* Security Co., [1897] 1 Q. B. 111, 66 L. J. Q. B. 119, 75 L. T. Rep. N. S. 531, 45 Wkly. Rep. 214, where such a recital was held a waiver of the condition, although the policy remained in the possession of the insurer, the insured being always ready to pay the premium. To the same effect see Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Gaysville Mfg. Co. *v.* Phœnix Mut. F. Ins. Co., 67 N. H. 457, 36 Atl. 367. The condition was held waived in Massé *v.* Hochelaga Mut. Ins. Co., 22 L. C. Jur. 124, 1 Montreal Leg. N. 338. The civil code of California enacts the last-mentioned rule. See Palmer *v.* Continental Ins. Co., 132 Cal. 68, 64 Pac. 97, (1900) 61 Pac. 784. And see *infra*, VI, E, 1, b, (IV).

If no premium has been agreed upon, but the insurer has assumed the risk, the insured must pay at a reasonable rate for the protection received. J. C. Smith, etc., Co. *v.* Prussian Nat. Ins. Co., 68 N. J. L. 674, 54 Atl. 458. *Contra*, Rölker *v.* Great Western Ins. Co., 2 Sweeny (N. Y.) 275.

Who may pay.— One to whom by its terms a fire-insurance policy taken out by another is made payable has the right to pay the renewal premium for the one to whom it was issued, on the latter's failure to make such payment. Mechler *v.* Phœnix Ins. Co., 38 Wis. 665.

Consideration.— The agreement of an agent of an insurance company to issue a policy is sufficient consideration for a note given for the premium. American Ins. Co. *v.* McWhorter, 78 Ind. 136.

57. Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333.

58. Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Watertown Agricultural Ins. Co. *v.* Montague, 38 Mich. 548, 31 Am. Rep. 326; State Ins. Co. *v.* Hale, 1 Nebr. (Unoff.) 191, 95 N. W. 473; Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055. *Contra*, Union Bldg. Assoc. *v.* Rockford Ins. Co., 83 Iowa 647, 49 N. W. 1032, 32 Am. St. Rep. 323, 14 L. R. A. 248. And see *infra*, VI, E, 1, b, (III).

59. See cases cited *infra*, this and succeeding notes.

Bond to pay premium see BONDS, 5 Cyc. 849 note 80.

In property.— Payment may be accepted in property unless the transaction is vitiated by fraud. Folb *v.* Firemen's Ins. Co., 133 N. C. 179, 45 S. E. 547.

Set-off.— A set-off held by the insured against the insurer and due prior to the loss will operate as a payment. Union Ins. Co. *v.* Greenleaf, 64 Me. 123; Walker *v.* Metropolitan Ins. Co., 56 Me. 371. The maker may test the legality of the transfer of a note as against the transferee in order to avail himself of a set-off against the insurer. Litchfield *v.* Dyer, 46 Me. 31; Marsh *v.* Northwestern Nat. Ins. Co., 16 Fed. Cas. No. 9,118, 3 Biss. 351.

60. **By check.**— Acceptance of the check of the insured by the company's agent amounts to payment. Tayloe *v.* Merchants F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187, holding that the mere putting a letter in the mail containing a check, the same being done pursuant to agreement, was a sufficient payment. And see Malletee *v.* British-American Assur. Co., 91 Md. 471, 46 Atl. 1005.

But a check unaccepted by the insurer, and for the payment of which the insured has not a large enough cash balance in bank, is not a sufficient payment. Walls *v.* Home Ins. Co., 114 Ky. 611, 71 S. W. 650, 24 Ky. L. Rep. 1452, 102 Am. St. Rep. 298.

61. **By note.**— The note of the insured accepted by the company's agent constitutes payment. Farmers', etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312; Tooker *v.* Security Trust Co., 165 N. Y. 608, 58 N. E.

b. Payment by Insurer's Agent. As the payment of the premium in cash may be waived by an agent authorized to deliver policies and receive payment, an agreement between the insured and the agent that the latter will be responsible to the company for the amount and hold the insured as his personal debtor amounts to such a payment that the insured's rights under the policy immediately vest.[62] This is true *a fortiori* if the company has actually accepted the agent's credit, for it is a waiver of the requirement of cash payment by the insured.[63] If the agent is the personal debtor of the insured and agrees to pay the debt by payment of the premium, this has been held to constitute such payment that the insured is protected in the absence of fraud.[64]

1093; Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 4 Am. L. Rec. 228; Hughes *v.* Farmers' Ins. Co., 4 Ohio Dec. (Reprint) 412, 2 Clev. L. Rep. 125. It is not essential that the note should have been actually executed in order that the risk should attach, if there was an agreement that it should be made. Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Commercial Mut. M. Ins. Co. *v.* Union Mut. Ins. Co., 19 How. (U. S.) 318, 15 L. ed. 636. When the insurer's agent executed a note in the insured's name of which the latter had no knowledge, an acceptance by him of a policy without reading which recited that he had given his note was held a ratification. Monitor Mut. F. Ins. Co. *v.* Buffum, 115 Mass. 343. In Merchants', etc., Ins. Co. *v.* Maguire, 1 Mo. App. 223, the insured was held estopped to deny the right of the agent to increase the amount of his note when he authorized the agent to increase the amount of his insurance. If the statute under which the insurance company exists requires a payment in cash, payment by note is insufficient. State *v.* Moore, 48 Nebr. 870, 67 N. W. 876. If the policy provides that the note is accepted as payment only until maturity, and that if not paid at that time the policy shall be suspended until the note be paid, the insured cannot recover for a loss arising after the maturity of the note and while it remains unpaid. Continental Ins. Co. *v.* Dorman, 125 Ind. 189, 25 N. E. 213; McGugan *v.* Manufacturers, etc., Mut. F. Ins. Co., 29 U. C. C. P. 494. If the note be accepted as absolute payment, however, the non-payment of the same at maturity will not invalidate the insurance. Anchor Mar. Ins. Co. *v.* Corbett, 9 Can. Sup. Ct. 73; Compagnie d'Assurance de Cultivateurs *v.* Grammon, 24 L. C. Jur. 82.

Such is the customary method in mutual companies. Belleville Mut. Ins. Co. *v.* Van Winkle, 12 N. J. Eq. 333. See also *infra*, V, B, 1.

62. Fireman's Fund Ins. Co. *v.* Pekor, 106 Ga. 1, 31 S. E. 779; Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457; Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Lungstrass *v.* German Ins. Co., 57 Mo. 107; Jones *v.* Ætna Ins. Co., 13 Fed. Cas. No. 7,453. *Contra*, Dunham *v.* Morse, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473.

When the agent actually advances the premium and takes the note of the insured in repayment the company cannot dispute its liability. Home Ins. Co. *v.* Curtis, 32 Mich. 402.

Rights of agent against insured.— The agent advancing premiums is entitled to recover all sums so advanced as money paid out and expended (Cobb *v.* Keith, 110 Ala. 614, 18 So. 325; Waters *v.* Wandless, (Tex. Civ. App. 1896) 35 S. W. 184), or on the principle of subrogation (Gillett *v.* Insurance Co. of North America, 39 Ill. App. 284); and he has a lien on the policy therefor, whenever it comes into his hands unless he has abandoned the same (Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614). He is not the proper party to a suit to compel the insured to pay premiums due on the policy. Ross *v.* Rubin, 25 Misc. (N. Y.) 479, 54 N. Y. Suppl. 1036; Lounsbury *v.* Duckrow, 22 Misc. (N. Y.) 434, 50 N. Y. Suppl. 927. Such a debt is one subject to garnishment. Peterson *v.* Herber, 75 Minn. 133, 77 N. W. 418.

63. White *v.* Connecticut F. Ins. Co., 120 Mass. 330; Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195; Bank *v.* Farmville Ins., etc., Co., 2 Fed. Cas. No. 838, 1 Hughes 290. But it was held in Van Wert *v.* St. Paul F. & M. Ins. Co., 90 Hun (N. Y.) 465, 36 N. Y. Suppl. 54, that a transaction between a fire-insurance company and its agent without the knowledge, consent, or ratification of the insured, whereby the agent is charged with the premium due on the policy, is not a payment of the premium that will inure to the benefit of the insured. As to the right of the insurer to appropriate sums sent to it by an agent and apply the same to the agent's personal indebtedness, when the same were sent to it without a specific designation of what payment was intended to be made thereby, the sums representing premiums received on renewals, see Kirkpatrick *v.* South Australian Ins. Co., 11 App. Cas. 177.

64. Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118; Huggins Cracker, etc., Co. *v.* People's Ins. Co., 41 Mo. App. 530; Phœnix Ins. Co. *v.* Meier, 28 Nebr. 124, 44 N. W. 97; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 31 Am. Rep. 732. See also Herring *v.* American Ins. Co., 123 Iowa 533, 99 N. W. 130.

But the insured is not justified in paying a private debt of the agent in lieu of the premium upon the agent's assurance that he has advanced the premium. Clingerman *v.* Pheasant, 18 Pa. Co. Ct. 203.

c. Payment to Insurer's Agent. Payment to the agent of the insurer authorized to receive the same is equivalent to payment to the insurer,[65] and the policy has its inception from the instant such payment is made.[66] And it is no defense to the company that the agent has not remitted at all, or that remittance has not been made until after the loss.[67] Although the policy provides that payment shall be at the home office, it is sufficient if made to a qualified agent;[68] but such a payment is not sufficient if the insurer expressly notifies the insured that no agent is qualified to receive it.[69] It must of course appear that the person acting as the recipient of the money was actually the agent of the insurer and authorized to collect for it.[70] If the insurer has intrusted the policy to its agent for delivery to the insured, and the latter in reliance thereon has paid the premium to such agent, the insurer cannot be heard to say that such agent has not authority to collect.[71] The effect of a stipulation contained in a policy that

The taking of clothing by an agent of a fire-insurance company in part payment of the premium of a policy was held a fraud on the company in Folb *v.* Firemen's Ins. Co., 133 N. C. 179, 45 S. E. 547. *Compare* also Sebring *v.* Hazard, 128 Mich. 330, 87 N. W. 257.

The acceptance by the agent of the responsibility of a third person is sufficient, if the premium be not required to be paid in cash. Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422.

65. *Delaware.*— Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 325, 54 Atl. 952.

Illinois.— Sun Mut. Ins. Co. *v.* Saginaw Barrel Co., 114 Ill. 99, 29 N. E. 477.

Kentucky.— Blackerby *v.* Continental Ins. Co., 83 Ky. 574; Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232.

Maryland.—American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

New Hampshire.— Estes *v.* Home Manufacturers', etc., Mut. Ins. Co., 67 N. H. 462, 33 Atl. 515.

New York.— Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842; Andes F. Ins. Co. *v.* Loehr, 6 Daly 105.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Carter, 8 Pa. Cas. 191, 11 Atl. 102.

Virginia.— Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

United States.—Ide *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 7,001, 2 Biss. 333.

See 28 Cent. Dig. tit. "Insurance," § 396 *et seq.*

66. Hallock *v.* Commercial Ins. Co., 26 N. J. L. 268.

67. Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527; Perkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645; Palm *v.* Medina County Mut. F. Ins. Co., 20 Ohio 529; Riley *v.* Commonwealth Mut. F. Ins. Co., 110 Pa. St. 144, 1 Atl. 528; Gardner *v.* Home, etc., Assur. Co., 2 Nova Scotia Dec. 204.

The insured is not chargeable with any default of the agent in conforming to the rules of the insurer. East *v.* Prudential Ins. Co., 11 N. Y. App. Div. 190, 42 N. Y. Suppl. 584.

68. Pulaski Mut. F. Ins. Co. *v.* Dawson, 87 Ill. App. 514; Perkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645.

But the insured, paying a premium note payable at the home office, to an agent not in the possession of the same, assumes the burden of showing authority on the part of the agent to receive the money. Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

69. Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

70. In the following cases such person was held not so authorized. Wilber *v.* Williamsburgh City F. Ins. Co., 122 N. Y. 439, 25 N. E. 926; Lounsbury *v.* Duckrow, 22 Misc. (N. Y.) 434, 50 N. Y. Suppl. 927; Pottsville Mut. F. Ins. Co. *v.* Minnequa Springs Imp. Co., 100 Pa. St. 137.

Effect of appointment of receiver.— In Rice *v.* Barnard, 127 Mass. 241, the authority of the agent to receive the payment of premiums was held not to be revoked by an interlocutory decree against the company appointing a receiver with power to continue its business and enjoining the company's officers and agents from receiving and disposing of the company's property.

If the payment has been made to one who was known by plaintiff not to be authorized to accept payment for the insurer, such payment by the insured and not received by the company and accepted by it as a payment is of no avail. More *v.* New York Bowery F. Ins. Co., 130 N. Y. 537, 29 N. E. 757.

It is immaterial that the money was paid to one not authorized to receive it, provided that it ultimately reached the insurer, the channel being wholly immaterial. Weisman *v.* Commercial F. Ins. Co., 3 Pennew. (Del.) 224, 50 Atl. 93.

71. It is estopped because it has intrusted the agent with the *indicia* of the right to receive payment. Of two innocent parties that one must stand the loss which has made it possible for the loss to occur.

Illinois.— Lycoming F. Ins. Co. *v.* Ward, 90 Ill. 545; Gosch *v.* State Mut. F. Ins. Assoc., 44 Ill. App. 263.

Louisiana.— Michael *v.* Nashville Mut. Ins. Co., 10 La. Ann. 737.

New Hampshire.— Gaysville Mfg. Co. *v.* Phœnix Mut. F. Ins. Co., 67 N. H. 457, 36 Atl. 367.

New Jersey.— Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

New York.— Greenwich Ins. Co. *v.* Union Dredging Co., 14 Daly 237, 8 N. Y. St. 352.

every insurance agent or other person forwarding applications or receiving premiums is the agent of the applicant is regarded differently in different jurisdictions.[72]

3. Return of Premiums Paid — a. Unearned Premiums. Inasmuch as the consideration for the payment of the premium is the carrying of a risk by the insurer, if the risk did not attach, and in consequence the risk was never actually carried by the insurer, there has been a failure of consideration and the insured is entitled to a return of his consideration paid, namely, the premium.[73] If, however, the risk has once attached, even for a moment, although the policy may be afterward forfeited, the insured is not entitled to a return of the premium he has paid.[74]

b. When Policy Becomes Void. Fraud and misrepresentation in obtaining insurance are a good defense to an action brought by an insured for a return of the premium.[75] If the insured has elected to treat a policy as void for breach of

Pennsylvania.— Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8; Pennsylvania Ins. Co. *v.* Carter, 8 Pa. Cas. 191, 11 Atl. 102.

United States.— Cahill *v.* Andes Ins. Co., 4 Fed. Cas. No. 2,289, 5 Biss. 211.

See 28 Cent. Dig. tit. "Insurance," § 396 *et seq.*

Mere authority to deliver policies does not carry with it the authority to receive payment upon a note given for the premium. Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366.

72. See cases cited *infra*, this note.

That payment to the agent protected the insured despite such a stipulation of the policy see Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584; Greenwich Ins. Co. *v.* Union Dredging Co., 14 Daly (N. Y.) 237, 8 N. Y. St. 352; Kelly *v.* London, etc., F. Ins. Co., 1 Cab. & E. 47. In Ohio the same result is reached by statute, for a construction of which see Central Ohio Ins. Co. *v.* Lake Erie Provision Co., 13 Ohio Cir. Ct. 661, 7 Ohio Cir. Dec. 562. That the agent of the company was not appointed as such in writing as the policy required before payment could be made to him was held immaterial in Arthurholt *v.* Susquehanna Mut. F. Ins. Co., 159 Pa. St. 1, 28 Atl. 197, 39 Am. St. Rep. 659, when it appeared that he was in fact the agent. *Compare* Pennsylvania Ins. Co. *v.* Carter, 8 Pa. Cas. 191, 11 Atl. 102.

Upholding this stipulation and considering the applicant's agent as a representative of the insured and not of the insurer see Mulrey *v.* Shawmut Mut. F. Ins. Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; Peoria Sugar Refinery *v.* Susquehanna Mut. F. Ins. Co., 20 Fed. 480, where the payment to the agent was not a payment to the insurer. The same thing was held in Citizens' F. Ins. Co. *v.* Swarts, 21 Misc. (N. Y.) 671, 47 N. Y. Suppl. 1107, when the broker had no *indicia* of authority for collecting the premium.

73. *Iowa.*— Waller *v.* Northern Assur. Co., 64 Iowa 101, 19 N. W. 865.

Kentucky.— Archer *v.* National Ins. Co., 2 Bush 226; Lynn *v.* Burgoyne, 13 B. Mon. 400.

Massachusetts.— Toppan *v.* Atkinson, 2 Mass. 365.

New York.—Waddington *v.* United Ins. Co., 17 Johns. 23; Elbers *v.* United Ins. Co., 16 Johns. 128; Steinback *v.* Rhinelander, 3 Johns. Cas. 269.

Tennessee.—Jones *v.* Insurance Co. of North America, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706.

Wisconsin.— De Wolf *v.* Washington, 119 Wis. 554, 97 N. W. 220.

United States.— Clark *v.* Manufacturers Ins. Co., 8 How. 235, 12 L. ed. 1061.

See 28 Cent. Dig. tit. "Insurance," § 457 *et seq.*

The surplus of an assessment made by a solvent mutual insurance company is to be divided among its members. Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. (Pa.) 351. See also Sullivan *v.* Massachusetts Mut. F. Ins. Co., 2 Mass. 318.

74. *Dakota.*— St. Paul F. & M. Ins. Co. *v.* Coleman, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87.

Indiana.—Continental L. Ins. Co. *v.* Houser, 89 Ind. 258.

Kentucky.— Phœnix Ins. Co. *v.* Stevenson, 78 Ky. 150.

New York.— Hendricks *v.* Commercial Ins. Co., 8 Johns. 1; Howland *v.* Commercial Ins. Co., Anth. N. P. 42.

Ohio.— Hicks *v.* Merchants', etc., Ins. Co., 1 Ohio Dec. (Reprint) 374, 8 West. L. J. 416.

Canada.— Hawke *v.* Niagara Dist. Mut. F. Ins. Co., 23 Grant Ch. (U. C.) 139.

See 28 Cent. Dig. tit. "Insurance," § 457 *et seq.*

Right to surrender.— It must be borne in mind that statutes in some states and provisions in many policies reserve to the insured the right to terminate the insurance and recover the unearned premiums. See *infra*, X, B. See also Colby *v.* Cedar Rapids Ins. Co., (Iowa 1884) 19 N. W. 891; Farmers' Mut. Ins. Co. *v.* Phœnix Ins. Co., 65 Nebr. 14, 90 N. W. 1000, 95 N. W. 3; Farmers' Mut. Ins. Co. *v.* Home F. Ins. Co., 54 Nebr. 740, 74 N. W. 1101. When a policyholder exercises such an option the short rate is to be determined without regard to the reason of the termination, which in this case was the insolvency of the company. Insurance Commissioner *v.* People's F. Ins. Co., 68 N. H. 51, 44 Atl. 82.

75. If the insured by deception and false pretenses induced the insurer to take a risk

condition providing for a forfeiture, the insured has no claim on the insurer for any unearned premium.[76] On the other hand, if the insurer or its agent has induced the insured to take out the policy by false representations, the insured can at any time rescind the contract and recover back his premiums.[77] If the insured has reserved the right to rescind the contract should the policy on due consideration prove unsatisfactory, his right to recover the premiums paid above the short rates, or to recover a note in its entirety given for the premium, rests upon the contract so made.[78] If the risk attached only in part to the subject-matter of the insurance, and the contract is severable, there may be a return of the premium as to that part as to which the consideration has failed.[79]

c. Nature of Action to Recover. An action to recover premiums is not an action on the policy, but a distinct and separate proceeding, supportable on principles of quasi-contract,[80] and thus is not barred by a provision in the policy that all actions thereon must be brought within a specified time.[81]

d. To Whom Returnable. Where a premium was properly returnable payment should be made to the insured or to his authorized agent.[82]

which, had the truth been discovered, he would have refused, no recovery of premiums is permitted. Friesmuth *v.* Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587; Hoyt *v.* Gilman, 8 Mass. 336; Himely *v.* South Carolina Ins. Co., 1 Mill (S. C.) 154, 12 Am. Dec. 623; Schwartz *v.* U. S. Insurance Co., 21 Fed. Cas. No. 12,505, 3 Wash. 170. It was, however, held in Mulvey *v.* Gore Dist. Mut. F. Assur. Co., 25 U. C. Q. B. 424, that where plaintiff untruly represented the building as furnished with a brick chimney, the policy never attached and he might therefore recover back his premium.

Where there is no actual fraud, the insured is entitled to a return of the premium in case the policy becomes void by a failure of the warranty. Delavigne *v.* United Ins. Co., 1 Johns. Cas. (N. Y.) 310.

76. Jackson *v.* Millspaugh, 103 Ala. 175, 15 So. 576; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

Sale of property.— If the policy gives the insured the right on certain conditions to recover premiums paid, in case the property insured be sold, it is only on such conditions that a return may be enforced. Colby *v.* Cedar Rapids Ins. Co., 66 Iowa 577, 24 N. W. 54, (Iowa 1884) 19 N. W. 891; Edwards *v.* Franklin F. Ins. Co., 3 Wkly. Notes Cas. (Pa.) 241. But where a policy provided that it should terminate on the commencement of mortgage foreclosure proceedings, on the commencement of such proceedings, the insured was held entitled to the return of a ratable proportion of the premium. Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Payment after avoidance.— A party to whom a policy of insurance has been issued is entitled to recover, under the money counts of a declaration, the amount of the assessments with interest, which have been paid and received without the knowledge that the policy had been avoided. Hazard *v.* Franklin Mut. F. Ins. Co., 7 R. I. 429.

Payment after destruction of property.— One who pays insurance premiums knowing that the insured property has been destroyed cannot recover them. But, if at the time of payment he has no information as to the destruction of the property or, if having such information, he communicates it fully to the agent of the company, he may then recover back the amount so paid. Reese *v.* Delaware Mut. Ins. Co., 3 Leg. & Ins. Rep. (Pa.) 83.

77. Clark *v.* Manufacturers Ins. Co., 8 How. (U. S.) 235, 12 L. ed. 1061.

78. Jacoway *v.* German Ins. Co., 49 Ark. 320, 5 S. W. 339.

But where insurance was effected on condition that if it had already been effected abroad a certain proportion of the premium was to be returned, it was not a matter entitling the insured to a return of the premium, that insurance had been made abroad after the date of the insurance here. New York Ins. Co. *v.* Thomas, 3 Johns. Cas. (N. Y.) 1.

Upon the right of the insured, under statute or right reserved in policy, to surrender his policy and to receive the unearned premium thereon after paying the "short rates" see *infra*, X, B, 4, b.

79. Finney *v.* Warren Ins. Co., 1 Metc. (Mass.) 16, 35 Am. Dec. 343; Waters *v.* Allen, 5 Hill (N. Y.) 421; Howland *v.* Commercial Ins. Co., Anth. N. P. (N. Y.) 42; Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Where the insured has paid the premium to the agent of the company, and before the agent has paid over the same, or assumed any liability on account of it, the company becomes insolvent, and such party notifies the agent that he claims the money and does not rely on the policy issued to him, which is worthless, he may recover back the premium in a suit against the agent, even though he does not surrender the policy until after the suit is brought. Smith *v.* Binder, 75 Ill. 492.

80. Hemmenway *v.* Bradford, 14 Mass. 121.

81. Waller *v.* Imperial F. Ins. Co., 64 Iowa 101, 19 N. W. 865; McCallum *v.* National Credit Ins. Co., 84 Minn. 134, 86 N. W. 892.

82. Vanderslice *v.* Royal Ins. Co., 13 Pa. Super. Ct. 455.

4. Who Liable For — a. Person For Whose Benefit Policy Is Procured. Even though a person's name does not appear in the application for insurance, he is liable for the premiums if in fact he was the principal, although the policy was procured by another.[83]

b. Assignee or Mortgagee. A mere covenant in a policy that the assignee thereof shall be liable for the premium does not render the assignee so liable to the insurer when an assignment is made;[84] although, as between the assignor and the assignee, such a provision may be effectual.[85] Where a trust deed or mortgage provides for the maintenance of insurance on the policy described in it, a clause in the policy that the beneficiary on demand shall pay the same amounts to a contract on the part of the beneficiary to pay the premium if the mortgagee fails to do so;[86] but a mere transfer of a policy by way of collateral security throws upon the mortgagee, in the absence of any express provision, no obligation to pay the premiums.[87]

B. Assessments — 1. Premium Notes — a. Use and Nature. Companies doing business under the mutual plan provide for the payment of sums as a consideration for carrying the risk either by means of annual or stated dues or by assessments levied *per capita* on its entire membership when losses occur,[88] or by means of assessments as funds are needed to pay the insurer's liabilities, levied on notes[89]

If the insured has intrusted his policies to a broker, assigning them in blank, the insurer is protected if it pays to the broker on the faith of the assignment without notice of his fraud. Vanderslice *v.* Royal Ins. Co., 13 Pa. Super. Ct. 455.

A mortgagee assignee of a policy as collateral security is entitled to the premium in case he has not realized on foreclosure, enough to satisfy the debt. Rafsnyder's Appeal, 88 Pa. St. 436.

83. Commonwealth Ins. Co. *v.* Smith, 3 Whart. (Pa.) 520. See Sun Mut. Ins. Co. *v.* Davis, 1 Rob. (N. Y.) 602, where the person held liable was a prospective partner, the insurance being on goods belonging jointly to himself and the party named in the policy as beneficiary. But *compare* Northern Assur. Co. *v.* Goelet, 31 Misc. (N. Y.) 361, 65 N. Y. Suppl. 403.

The broker is a mere go-between and is not liable for a premium of insurance not paid to him unless he acts under a *del credere* commission. Touro *v.* Cassin, 1 Nott & M. (S. C.) 173, 9 Am. Dec. 680.

The acceptance of a policy agreeing to pay assessments in addition to a cash premium is equivalent to a promise to pay the same. Whipple *v.* United F. Ins. Co., 20 R. I. 260, 38 Atl. 498.

84. Washington Ins. Co. *v.* Grant, 2 Pa. L. J. Rep. 308, 4 Pa. L. J. 88, holding that the assignee's liability for premiums arises only when he enters into a contract with the insurer, and that it arises from the new agreement. It was said in Storms *v.* Canada Farmers' Mut. Ins. Co., 22 U. C. C. P. 75, that the non-payment of a cash premium note given by the original assured cannot, after assignment assented to by the insurer, be set up to defeat the claim of the assignee, he not having been aware even of the existence of the note.

85. Sherman *v.* Fair, 2 Speers (S. C.) 647.

86. Boston Safe Deposit, etc., Co. *v.* Thomas, 59 Kan. 470, 53 Pac. 472; St. Paul F. & M. Ins. Co. *v.* Upton, 2 N. D. 229, 50 N. W. 702.

Particularly is this true if the mortgagee expressly requests the insurer not to cancel, promising himself to pay if the mortgagor does not, and the insurer, in reliance on such promise, fails to cancel. This is an independent agreement and not a mere collateral contract to pay the debt of another. Colby *v.* Thompson, 16 Colo. App. 271, 64 Pac. 1053.

87. Van Duersen *v.* Scanlan, 8 Ohio Dec. (Reprint) 362, 7 Cinc. L. Bul. 188.

88. See, generally, Mutual Benefit Insurance.

89. Stock notes.— Some mutual companies are permitted by their charters and by-laws to receive from their members notes payable in a different manner called "stock-notes" or "absolute funds." Such notes are assessable for losses accruing otherwise than during the maker's membership in the company. Long Pond Mut. F. Ins. Co. *v.* Houghton, 6 Gray (Mass.) 77; Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48. See also *infra*, V, B, 5. They are not merely subject to ratable assessment but may be deemed matured, unless otherwise provided, at the pleasure of the company. Dana *v.* Munro, 38 Barb. (N. Y.) 528. A company organized, however, solely on the assessment plan is not permitted to receive stock notes. Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 514. Although if nothing appears in either charter or statute limiting the mode and manner in which the company may do business, the issuance of policies upon either the stock note (Continental Fire Assoc. *v.* Masonic Temple Co., 26 Tex. Civ. App. 139, 62 S. W. 930), or cash premium plan (Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771), is not *ultra vires*. But see Bradford *v.* Mutual F. Ins. Co., 112 Iowa 495, 84 N. W. 693, where a mutual company was held incapable of receiving premiums. If a mutual company be permitted to issue policies in return for stock notes, it is not precluded thereby

given by each member upon entering into the mutual relationship, as an evidence of indebtedness. The amount of such notes is the maximum that any member can be called upon to pay,[90] and assessments are to be levied only proportionally thereon upon all the members of the company at the time of the loss.[91] In the absence of statutory requirement no particular form is necessary to constitute a valid note for this purpose.[92] Such a note payable to the insurance company or "the treasurer for the time being" is a good note for the company.[93] While the note is given as the consideration for the policy and in such a sense is a part of a single transaction, yet in an action on the note it has been held that the policy is not admissible in evidence to vary the terms of or to insert additional provisions into the note, unless the policy be expressly referred to or made a part of the note.[94] A premium note is transferable like any other note, there being no implied agreement on the part of the insurer to retain it until due.[95]

b. Defenses in Suits on Premium Notes — (1) *In General.*[96] That a loss due defendant on a policy has not been paid is a defense to the note.[97] The insolvency of a mutual company is a defense against further assessments on a premium note,[98] but not against sums past due;[99] nor is it if the note given was not one merely subjecting the maker to assessments but rendering him absolutely liable.[1] In making an assessment upon premium notes, amounts paid in by way of cash premiums are to be allowed for.[2]

from issuing policies upon its fundamental mutual assessment plan. Toll *v.* Whitney, 18 How. Pr. (N. Y.) 161. A premium note given as such cannot be treated as a stock note by the company, although it be authorized to issue policies upon the latter plan. Bell *v.* Shibley, 33 Barb. (N. Y.) 610. See *infra*, V, B, 5.

90. Bangs *v.* Bailey, 37 Barb. (N. Y.) 630; Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771. See also *infra*, V, B, 4.

91. See cases cited *supra*, note 89.

92. Corey *v.* Sherman, (Iowa 1894) 60 N. W. 232. And *compare* Hyatt *v.* Whipple, 37 Barb. (N. Y.) 595.

93. Gaytes *v.* Hibbard, 10 Fed. Cas. No. 5,287, 5 Biss. 99.

A treasurer of a mutual insurance company may take a note or chattel mortgage securing it to himself for a debt due the company, but it is preferable to make it to the company itself. Brodie *v.* Ruttan, 16 U. C. Q. B. 207.

94. American Ins. Co. *v.* Gallahan, 75 Ind. 168; Mitchell *v.* American Ins. Co., 51 Ind. 396. See also New England Mut. F. Ins. Co. *v.* Butler, 34 Me. 451; Matten *v.* Lichtenwalner, 6 Pa. Super. Ct. 575. But in People's Mut. F. Ins. Co. *v.* Clark, 12 Gray (Mass.) 165, where there was also a second count to the declaration inserted upon the theory of an assumpsit, there being also a count upon the note, the court admitted the policy in evidence. In Lovet *v.* Johnson, 2 Root (Conn.) 114, the note being expressed to be for the premium on an insurance policy, the court took notice of a stipulation of the policy for a reduction of the premium.

Declarations of the agent of the company at the time the note was made were held admissible, upon the theory that the note was received, although absolute upon its face, in connection with the provisions of the charter and by-laws of the company. Mutual Ben. L. Ins. Co. *v.* Jarvis, 22 Conn. 133.

95. Furniss *v.* Gilchrist, 1 Sandf. (N. Y.) 53. Further upon the question of transferability see Gore Dist. Mut. Ins. Co. *v.* Simons, 13 U. C. Q. B. 555, where it was held that a note given to a mutual insurance company in respect of a policy was negotiable.

Defenses available against the transferee see Lester *v.* Webb, 5 Allen (Mass.) 569. See also COMMERCIAL PAPER.

The form of the note may render it non-negotiable, although still transferable as a chose in action; but the fact that a note bears on its face the number of the policy for which it was given does not make it non-negotiable. Union Ins. Co. *v.* Greenleaf, 64 Me. 123.

What constitutes a bona fide purchaser of a premium note see Perry *v.* Archard, 1 Indian Terr. 487, 42 S. W. 421.

96. Defenses in actions on commercial paper generally see COMMERCIAL PAPER, 8 Cyc. 25 *et seq.*

97. Columbian Ins. Co. *v.* Bean, 113 Mass. 541; Osgood *v.* De Groot, 36 N. Y. 348. But not if it be a partial loss only for this is not a liquidated claim. Union Mut. Mar. Ins. Co. *v.* Howes, 124 Mass. 470.

Such a defense, being a set-off, must arise out of the same transaction. Patrons Mut. F. Ins. Co. *v.* Coble, 20 Pa. Super. Ct. 533. See also Phœnix Ins. Co. *v.* Fiquet, 7 Johns. (N. Y.) 383.

The surety on a premium note cannot set up as a defense that the company has terminated the policy, when sued for an unpaid premium. Irwin *v.* National Ins. Co., 2 Disn. (Ohio) 68.

98. Home Ins. Co. *v.* Daubenspeck, 115 Ind. 306, 17 N. E. 601.

99. Tellon *v.* Columbus City Bank, 9 Ind. 119.

1. Union Ins. Co. *v.* Greenleaf, 64 Me. 123; Howard *v.* Hinckley, etc., Iron Co., 64 Me. 93; Carey *v.* Nagle, 5 Fed. Cas. No. 2,403, 2 Abb. 156, 2 Biss. 244.

2. Sands *v.* Graves, 58 N. Y. 94.

(II) *ILLEGALITY.* The validity of the charter of the company cannot be inquired into in an action on the premium note;[3] but if a company is doing business contrary to the provisions of the charter, a note given in furtherance of such illegal business cannot be enforced.[4] If an insurance company fails to comply with the statutes of a state requiring certain acts as a condition of its doing business within that state, this may be set up as a defense in an action on a premium note.[5]

(III) *FAILURE OF CONSIDERATION.* That the note was given without a consideration is fatal to the same in whole or in part.[6]

(IV) *CONTRACT NOT EMBODIED IN POLICY.* If an insured gives his note with the agreement that a certain kind of policy is to be issued, a defense that certain provisions were omitted therefrom is valid when he is sued on the note;[7]

3. Huntley *v.* Beecher, 30 Barb. (N. Y.) 580; Freeland *v.* Pennsylvania Cent. Ins. Co., 94 Pa. St. 504. *Compare* Montgomery *v.* Harker, 9 N. D. 527, 84 N. W. 369.

4. Rochester Ins. Co. *v.* Martin, 13 Minn. 59; Tillinghast *v.* Craig, 17 Ohio Cir. Ct. 531, 9 Ohio Cir. Dec. 459; Hock-age Mut. Ins. Co. *v.* Becker, 1 Wkly. Notes Cas. (Pa.) 100.

Estoppel.— A member may be estopped to set up such a defense by participation in the act and the acceptance of benefits therefrom.

Illinois.— Thompson Lumber Co. *v.* Mutual F. Ins. Co., 66 Ill. App. 254.

New York.— Hill *v.* Reed, 16 Barb. 280.

Ohio.— Trumbull County Mut. F. Ins. Co. *v.* Horner, 17 Ohio 407.

Pennsylvania.— Frederici *v.* Pennsylvania Mut. F. Ins. Co., 1 Mona. 493; Interstate Mut. F. Ins. Co. *v.* Brownback, 1 Pa. Super. Ct. 183; Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. 9; Lycoming F. Ins. Co. *v.* Lauffer, 4 Leg. Gaz. 153.

Wisconsin.— Gilman *v.* Druse, 111 Wis. 400, 87 N. W. 557.

— See 28 Cent. Dig. tit. "Insurance," § 442.

5. Black *v.* Enterprise Ins. Co., 33 Ind. 223; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376; Jones *v.* Smith, 3 Gray (Mass.) 500; Williams *v.* Cheney, 3 Gray (Mass.) 215; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526. *Contra*, American Ins. Co. *v.* Smith, 73 Mo. 368; Burmood *v.* Farmers' Union Ins. Co., 42 Nebr. 598, 60 N. W. 905.

Presumption of compliance.— Compliance with the law regulating insurance companies is presumed. Cassady *v.* American Ins. Co., 72 Ind. 95.

6. *Arkansas.*—Robinson *v.* German Ins. Co., 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251.

Maine.—Maine Mut. Mar. Ins. Co. *v.* Stockwell, 67 Me. 382.

Massachusetts.— Merchants' Ins. Co. *v.* Clapp, 11 Pick. 56; Homer *v.* Dorr, 10 Mass. 26; Cleveland *v.* Fettyplace, 3 Mass. 392; Taylor *v.* Lowell, 3 Mass. 331, 3 Am. Dec. 141. But *compare* New England Mut. F. Ins. Co. *v.* Belknap, 9 Cush. 140.

Minnesota.— Bankers' Acc. Ins. Co. *v.* Rogers, 73 Minn. 12, 75 N. W. 747.

New York.— Nelson *v.* Wellington, 5 Bosw. 178. But *compare* Collier *v.* Bedell, 39 Hun 238; Tannenbaum *v.* Bloomingdale, 27 Misc. 532, 58 N. Y. Suppl. 235.

See 28 Cent. Dig. tit. "Insurance," § 442 *et seq.*

Such a case is presented if the policy never attached to the risk, there being no fraud on the part of the insured. Bersch *v.* Sinnissippi Ins. Co., 28 Ind. 64; Mound City Mut. F. & M. Ins. Co. *v.* Curran, 42 Mo. 374; Columbia Ins. Co. *v.* Mullin, 4 Leg. Op. (Pa.) 572. See *supra*, V, A, 3, a.

If other consideration has passed, beyond the mere execution of the invalid policy, then the fact of the policy's invalidity does not show a failure of consideration. Howard *v.* Palmer, 64 Me. 86.

The destruction of the property insured is not, however, a failure of consideration in an action on the premium note and will not relieve the member from assessments to the full amount of his note to pay the losses of other members. Swanscot Mach. Co. *v.* Partridge, 25 N. H. 369; New Hampshire Mut. F. Ins. Co. *v.* Rand, 24 N. H. 428; Bangs *v.* Skidmore, 21 N. Y. 136 [*affirming* 24 Barb. 29]; Thropp *v.* Susquehanna Mut. F. Ins. Co., 125 Pa. St. 427, 17 Atl. 473, 11 Am. St. Rep. 909.

When the property insured is alienated and the member thus severs his relation with the company and the company ceases to carry any risk, there is no consideration for the payment of losses occurring thereafter and the maker is not liable therefore in an action on the note. Indiana Mut. F. Ins. Co. *v.* Conner, 5 Ind. 170; Indiana Mut. F. Ins. Co. *v.* Coquillard, 2 Ind. 645; York County Mut. F. Ins. Co. *v.* Turner, 53 Me. 225; Huntley *v.* Beecher, 30 Barb. (N. Y.) 580; Miner *v.* Judson, 5 Thomps. & C. 46, 2 Hun (N. Y.) 441; Wilson *v.* Trumbull Mut. F. Ins. Co., 19 Pa. St. 372; Niagara Dist. Mut. F. Ins. Co. *v.* Gordon, 29 U. C. C. P. 611. See also *infra*, V, B, 5, a, (II). The insured may be estopped to set up this defense when others have insured upon faith of his liability for assessment. Beeber *v.* Thomas, 4 Pa. Co. Ct. 192.

7. *Alabama.*— Carmelich *v.* Mims, 88 Ala. 335, 6 So. 913.

Georgia.— Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48.

Louisiana.— Eureka Ins. Co. *v.* Tobin, 25 La. Ann. 121.

Washington.— Ward *v.* Tucker, 7 Wash. 399, 35 Pac. 126, 1086.

Canada.— Canadienne Cie d'Assur. la Vie. *v.* Perrault, 5 Montreal Super. Ct. 62.

but if the insured has failed to assert the variance and has had the benefit of the policy as it stood, he will be estopped to set up the defense in an action on the note.[8]

(v) *Fraud.* Actual fraud on the part of an insurance company[9] or its agent whereby the insured was induced to take out the insurance is a defense in an action brought against him on the premium note by the company,[10] or by its transferee with notice.[11] If the insured signed the notes without reading the policy, he is barred from asserting that the agent gave a different policy than that agreed upon;[12] but illiteracy of the insured is an excuse for reliance upon the agent's statements as to the nature of the policy.[13] A representation at the time of issuing the policy that a company is solvent when in fact it is unable to pay its losses is fraudulent and a defense to the maker of a premium note.[14] Oral statements by the agent as to what future assessments will be, in contradiction to the provisions of the policy, do not amount to a fraud.[15] If the insured wishes to assert the fraud he must do so seasonably, however, and cannot set up the same by way of defense to the notes after a long lapse of time, inasmuch as his proper remedy was by way of a rescission in equity, before he obtained the benefit of the insurance;[16]

See 28 Cent. Dig. tit. "Insurance," § 442 *et seq.*

The burden is on the insured to prove that the policies are not what were agreed upon or what they purported to be. Ward *v.* Tucker, 7 Wash. 399, 35 Pac. 126, 1086.

8. Susquehanna Mut. F. Ins. Co. *v.* Swank, 102 Pa. St. 17.

9. Leinweber *v.* Forest City Ins. Co., 32 Ill. App. 190.

10. Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488; Rockford Ins. Co. *v.* Hildreth, 45 Ill. App. 428; Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19; Heller *v.* Crawford, 37 Ind. 279; Boland *v.* Whitman, 33 Ind. 64; Keller *v.* Equitable F. Ins. Co., 28 Ind. 170.

The intent to deceive is immaterial if the insured was actually deceived. Rockford Ins. Co. *v.* Hildreth, 45 Ill. App. 428. But *compare* Fogg *v.* Pew, 10 Gray (Mass.) 409, 71 Am. Dec. 662.

Materiality.— The fraud must have been material to justify a defense. Dunn *v.* Abrams, 97 Ga. 762, 25 S. E. 766.

Question for court.— What amounts to fraud is a question for the court. Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19.

11. Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488.

12. *Georgia.*— Shedden *v.* Heard, 110 Ga. 461, 35 S. E. 707.

Kansas.— Walker *v.* State Ins. Co., 46 Kan. 312, 26 Pac. 718.

Maine.— Maine Mut. Mar. Ins. Co. *v.* Hodgkins, 66 Me. 109.

Missouri.— Palmer *v.* Continental Ins. Co., 31 Mo. App. 467.

Pennsylvania.— Sparks *v.* Flaccus Glass Co., 16 Pa. Super. Ct. 119.

See 28 Cent. Dig. tit. "Insurance," § 443.

13. Keller *v.* Equitable F. Ins. Co., 28 Ind. 170.

14. Graff *v.* Simmons, 58 Ill. 440; Brown *v.* Donnell, 49 Me. 421, 77 Am. Dec. 266.

15. Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196; Farmers Mut. F. Ins. Co. *v.* Chase, 56 N. H. 341; Mansfield *v.* Cincinnati Ice Co., 11 Ohio Dec. (Reprint) 617, 28 Cinc. L. Bul. 113; Jacobs *v.* Susquehanna Mut. F. Ins. Co., 42 Leg. Int. (Pa.) 227.

16. Graff *v.* Simmons, 58 Ill. 440; Sherman *v.* Frasier, 112 Iowa 236, 83 N. W. 886; Dwinnell *v.* Felt, 90 Minn. 9, 95 N. W. 579; American Ins. Co. *v.* Kuhlman, 6 Mo. App. 522.

But the member is not thereby estopped to deny a liability to assessment for losses on policies issued by the company to non-members of whom he had no knowledge. Corey *v.* Sherman, (Iowa 1894) 60 N. W. 232.

Duty to restore.— He must also do all in his power to restore the insurer to *statu quo*. Devendorf *v.* Beardsley, 23 Barb. (N. Y.) 656.

The mere opinion of the agent as to the effect of the policy is not a fraud. Corey *v.* Sherman, 96 Iowa 114, 64 N. W. 828, 32 L. R. A. 490; American Ins. Co. *v.* Sorter, 4 Ohio Dec. (Reprint) 226, 1 Clev. L. Rep. 133; Garber *v.* Bresee, 96 Va. 644, 32 S. E. 39; Farmers' Mut. F. Ins. Co. *v.* Marshall, 29 Vt. 23.

To whom made.— The fraudulent representations need not have been made directly to the insured if the insurer made them intending that they should be repeated or generally acted upon. Sunbury F. Ins. Co. *v.* Humble, 100 Pa. St. 495.

Authority to make.— Following a line of English decisions in agency, contrary to what is the prevalent American rule, it was held, in Pennsylvania Cent. Ins. Co. *v.* Kniley, 2 Pearson (Pa.) 229, that the agent must have had authority from the company to make the representations complained of as fraudulent. And *compare* Hackney *v.* Alleghany Mut. Ins. Co., 4 Pa. St. 185. When the policy contains a stipulation that "every . . . person, forwarding applications or receiving premiums, is the agent of the applicant, and not of the company" the Massachusetts courts have given effect thereto and have declared that the fraudulent representations of such a person are no defense to the insured. Shawmut Mut. F. Ins. Co. *v.* Stevens, 9 Allen (Mass.) 332. Also

but fraud, being an equitable defense, is not available when the rights of innocent parties have intervened.[17]

(VI) *OFFICIAL DELINQUENCY.* Inasmuch as the officials of a mutual concern are to a certain extent agents of the various members in the performance of their official duties, their delinquency or derelictions are in general no ground of defense in a suit on a premium note.[18] So mere delay in levying or collecting an assessment is not generally regarded as a good defense to a premium note.[19] However, the fact that an assessment is excessive and illegal embraces more than a defense of delinquency and is available.[20]

(VII) *SUSPENSION OF POLICY.* An insurance company may recover premiums earned prior to any default on the part of a policy-holder in paying instalments, despite a provision of the policy that it shall lapse during delinquency.[21] If there be a provision that on failure to pay an instalment the entire note falls due, the fact that the policy also provides for a suspension during the period of default does not defeat the first provision.[22] The entire amount of the note may be enforced despite the suspension,[23] except that, when the policy provides that it

see Mulrey *v.* Shawmut Ins. Co., 4 Allen (Mass.) 116, 81 Am. Dec. 689; Abbott *v.* Shawmut Ins. Co., 3 Allen (Mass.) 213.

Pleading.— Defendant in his answer must aver the fraud definitely and positively. Sterling *v.* Mercantile Mut. Ins. Co., 32 Pa. St. 75, 72 Am. Dec. 773; Northwestern Mut. Hail Ins. Co. *v.* Fleming, 12 S. D. 618, 80 N. W. 147. See Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

17. People's Mut. F. Ins. Co. *v.* Bergstresser, 1 Pa. Dist. 771, 11 Pa. Co. Ct. 646; Sparks *v.* Vitale, 44 Wkly. Notes Cas. (Pa.) 150. In these cases the fact that policies had been issued subsequently to those in question and hence in partial reliance thereon was a bar to relief.

18. Davis *v.* Sharp, 2 Ohio Dec. (Reprint) 197, 2 West. L. Month. 40; Lycoming F. Ins. Co. *v.* Newcomb, 4 Leg. Gaz. (Pa.) 409. Thus a violation of a statute prohibiting such a company from employing solicitors is no defense. Randall *v.* Phelps County Mut. Hail Ins. Assoc., 2 Nebr. (Unoff.) 530, 89 N. W. 398. Nor is a champertous contract for the collection of the assessments. Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622. Nor is the fact that the officers were improperly receiving compensation. Thropp *v.* Susquehanna Mut. F. Ins. Co., 125 Pa. St. 427, 17 Atl. 473, 11 Am. St. Rep. 909. Nor that they received excessive compensation. Koehler *v.* Beeber, 122 Pa. St. 291, 16 Atl. 354. Nor that the company's funds have been mismanaged or wasted. West Branch Ins. Co. *v.* Smith, 1 Leg. Rec. (Pa.) 93. Nor that the company has waived one of its own rules respecting an additional requirement of suretyship upon defendant's policy. Randall *v.* Phelps County Mut. Hail Ins. Assoc., 2 Nebr. (Unoff.) 530, 89 N. W. 398.

19. Thus the negligence of the company in this respect, the delay being not unreasonable, was considered no defense in Marblehead Mut. F. Ins. Co. *v.* Underwood, 3 Gray (Mass.) 210; Dettra *v.* Murray, 5 Pa. Dist. 201.

A delay occasioned by a mistake was held no defense in People's Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297.

An unreasonable delay was considered no defense in Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York Leg. Rec. (Pa.) 121.

Negligence in failing to collect prior assessments was no defense in Davis *v.* Sharp, 2 Ohio Dec. (Reprint) 197, 2 West. L. Month. 40. But in Baltimore County Mut. F. Ins. Co. *v.* Jean, 96 Md. 252, 53 Atl. 950, 94 Am. St. Rep. 570, delay in assessing, whereby various members who would also have been liable for a proportionate share ceased to be members, was a defense. This seems to be predicated on the assumption that such persons were released from such liability by termination of their membership. Such is not the prevailing doctrine.

20. Pencille *v.* State Farmers' Mut. Hail Ins. Co., 74 Minn. 67, 76 N. W. 1026, 73 Am. St. Rep. 326; Sparks *v.* Vitale, 44 Wkly. Notes Cas. (Pa.) 150.

Whether or not the diversion of the note to a use not originally contemplated is a defense thereto see People *v.* Rensselaer Ins. Co., 38 Barb. (N. Y.) 323; Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601.

21. Limerick *v.* Gorham, 37 Kan. 739, 15 Pac. 909; Park *v.* Hilton, 54 S. W. 949, 21 Ky. L. Rep. 1319.

There is no failure of consideration under such a provision. Cauffield *v.* Continental Ins. Co., 47 Mich. 447, 11 N. W. 264; Minnesota Farmers' Mut. F. Ins. Assoc. *v.* Olson, 43 Minn. 21, 44 N. W. 672; German American Ins. Co. *v.* Divilbiss, 67 Mo. App. 500. But *compare* American Ins. Co. *v.* Stoy, 41 Mich. 385, 1 N. W. 877.

A provision that a policy shall stand suspended for failure to pay premiums by a certain day is valid. Joliffe *v.* Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35.

22. American Ins. Co. *v.* Klink, 65 Mo. 78.

The company may waive the default and sue on the note. McEvoy *v.* Nebraska, etc., Ins. Co., 46 Nebr. 782, 65 N. W. 888; Susquehanna Mut. F. Ins. Co. *v.* Leavy, 136 Pa. St. 499, 20 Atl. 502, 505; Columbia Ins. Co. *v.* Buckley, 83 Pa. St. 293, 24 Am. Rep. 172.

23. St. Paul F. & M. Ins. Co. *v.* Coleman, 6 Dak. 458, 43 N. W. 693, 6 L. R. A. 87; McEvoy *v.* Nebraska, etc., Ins. Co., 46 Nebr.

shall be null and void during default, for such a period the insured is not liable for premiums.[24]

(VIII) *CANCELLATION, SURRENDER, AND FORFEITURE.* The fact that the failure to pay a premium renders a policy void does not affect the consideration for which the note was given;[25] but a forfeiture which will relieve a company from liability on the policy will ordinarily relieve the insured from future liability on his premium notes;[26] not, however, for premiums past due.[27] The insured remains liable for future premiums despite an unexecuted agreement to cancel a policy and surrender the note.[28] The insured cannot set up as a defense his own defaults or misrepresentations when the insurer has elected to waive the same.[29]

(IX) *STATUTE OF LIMITATIONS.*[30] Inasmuch as the premium note does not become due until the assessment has been made,[31] the statute of limitations does not begin to run upon the customary premium note until an assessment is levied.[32]

782, 65 N. W. 888; Phenix Ins. Co. *v.* Rollins, 44 Nebr. 745, 63 N. W. 46; Equitable Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092; Joliffe *v.* Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35. *Contra,* Yost *v.* American Ins. Co., 39 Mich. 531.

24. Matthews *v.* American Ins. Co., 40 Ohio St. 135.

A conditional annulment of a policy for non-payment of assessments is within the powers of a mutual company. Coles *v.* Iowa State Mut. Ins. Co., 18 Iowa 425.

25. Kempshall *v.* Vedder, 79 Ill. App. 368. See also *infra,* XIII, J.

26. Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126; Virginia Mut. Assur. Soc. *v.* Holt, 29 Gratt. (Va.) 612. *Contra,* Korn *v.* Virginia Mut. Assur. Soc., 6 Cranch (U. S.) 192, 3 L. ed. 195.

27. Iowa State Ins. Co. *v.* Prossee, 11 Iowa 115; Marblehead Mut. F. Ins. Co. *v.* Underwood, 3 Gray (Mass.) 210; National Ins. Co. *v.* Irwin, 1 Disn. (Ohio) 430, 12 Ohio Dec. (Reprint) 714.

28. Columbia Ins. Co. *v.* Stone, 3 Allen (Mass.) 385; Alliance Mut. Ins. Co. *v.* Swift, 10 Cush. (Mass.) 433; American Ins. Co. *v.* Woodruff, 34 Mich. 6.

A termination or surrender of the policy actually completed, while relieving the maker of the note from future liability to the company (Home Ins. Co. *v.* Burnett, 26 Mo. App. 175), does not relieve him as against an assignee of the note when the surrender has taken place after the assignment (Clark *v.* Brown, 12 Gray (Mass.) 355).

A notice that the insured desired to withdraw given to the agent through whom the insurance was effected, he not being the agent of the company for that purpose, does not constitute a surrender and hence is no defense. Buckley *v.* Columbia Ins. Co., 83 Pa. St. 298.

29. St. Paul F. & M. Ins. Co. *v.* Neidecken, 6 Dak. 494, 43 N. W. 696; Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19; Huntley *v.* Perry, 38 Barb. (N. Y.) 569; Susquehanna Mut. F. Ins. Co. *v.* Leavy, 136 Pa. St. 499, 20 Atl. 502, 505; Dettra *v.* Sax, 3 Lack. Jur. (Pa.) 198.

30. See, generally, LIMITATIONS OF ACTIONS.

31. The insured in a mutual company generally contracts to pay in instalments upon his obligation "at such time as the directors of said company may order and levy assessments" or similarly. See cases cited *infra,* note 32 *et seq.*

32. *Massachusetts.*— Bigelow *v.* Libby, 117 Mass. 359.

Minnesota.— Langworthy *v.* Garding, 74 Minn. 325, 77 N. W. 207.

New York.— Sands *v.* Lilienthal, 46 N. Y. 541.

Pennsylvania.— Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229; Smith *v.* Bell, 107 Pa. St. 352; Solly *v.* Moore, 1 Pa. Dist. 688, 11 Pa. Co. Ct. 333.

Rhode Island.— *In re* Slater Mut. F. Ins. Co., 10 R. I. 42.

See 28 Cent. Dig. tit. "Insurance," § 445.

That the company was dilatory in levying an assessment does not start the statute of limitations against a cause of action on a premium note. Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229.

That the losses for which the assessments were made are barred by the statute of limitations is no defense to an action to recover assessments. Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York Leg. Rec. (Pa.) 121. See Mills *v.* Whitmore, 22 Ohio Cir. Ct. 467, 12 Ohio Cir. Dec. 338, for effect of a local statute peculiar in its terms.

When the note provides that the whole sum thereof is to become due and payable upon default in an assessment, the statute runs from the date of the first default, upon the sum of the whole note. Lycoming F. Ins. Co. *v.* Batcheller, 62 Vt. 148, 19 Atl. 982.

Notice.— As notice of the levy of an assessment is generally held a condition precedent to maintaining an action on the note, the giving of such notice is necessary to start the running of the statute. Howland *v.* Cuykendall, 40 Barb. (N. Y.) 320; Shuman *v.* Juniata Farmers' Mut. F. Ins. Co., 206 Pa. St. 417, 55 Atl. 1069. Under a statute in Sands *v.* Annesley, 56 Barb. (N. Y.) 598, a personal demand was held also necessary to start the running of the statute.

The statute begins to run against an action to recover money paid for insurance on property in which the insured had no insurable interest as soon as the premiums are paid, or at latest, when the company refuses

2. Who Liable For. Upon a complete assignment the assignee becomes liable for assessments and the assignor is discharged,[33] and his liability does not revive on a reassignment to him as security for a debt.[34]

3. By Whom Levied. The assessment is to be levied by the person or body charged with that duty by the by-laws or fundamental law of the company.[35] This is usually the board of directors.[36] As this is a discretionary power it cannot be delegated,[37] although a complete ratification of the act of a functionary named to levy an assessment would amount to the exercise of that discretionary power and hence be valid.[38] But other persons than the directors may be called on by the laws of the company to determine the necessity for an assessment.[39]

4. Amount. The face of the premium note is the maximum amount assessable.[40] But, except in the case of stock notes or absolute funds, which are collectable at the pleasure of the assessing body without assessment,[41] the note is to be paid only when needed to pay the obligations of the company,[42] and when an assessment has been validly laid by the assessing power.[43] And each note of every member without regard to the amount he has already paid or the length of time he has been a member[44] must be assessed ratably[45] in the proportion which the amount of his note bears to the aggregate amount of all the deposit notes.[46] In

to pay a loss, and it is immaterial that the party did not know his legal rights thereto. New Holland Turnpike Co. *v.* Farmers' Ins. Co., 144 Pa. St. 541, 22 Atl. 923.

33. Cumings *v.* Hildreth, 117 Mass. 309; Bowditch Mut. F. Ins. Co. *v.* Buffum, 2 Gray (Mass.) 550; Cleveland *v.* Clap, 5 Mass. 201; Shirley *v.* Mutual Assur. Soc., 2 Rob. (Va.) 705.

This is particularly true if the assignee has expressly agreed to become liable for all assessments thereafter levied. New Hampshire Mut. F. Ins. Co. *v.* Hunt, 30 N. H. 219.

But the assignee is not responsible for any prior assessments unpaid by the assignor, when the company has consented to a transfer of the policy; and a failure by the assignee to pay such unpaid assessments will not result in a forfeiture of a policy that prescribes such a penalty. Brannin *v.* Mercer County Mut. F. Ins. Co., 28 N. J. L. 92.

34. Miner *v.* Judson, 2 Lans. (N. Y.) 300.

35. Farmers' Ins. Co. *v.* Borders, 26 Ind. App. 491, 60 N. E. 174.

36. Ross *v.* Hawkeye Ins. Co., 93 Iowa 222, 61 N. W. 852, 34 L. R. A. 466; Hallman *v.* Gilbertsville Live Stock Ins. Co., 13 Montg. Co. Rep. (Pa.) 59; Lycoming F. Ins. Co. *v.* Lauffer, 4 Leg. Gaz. (Pa.) 153.

All assessments must be levied by a majority vote of the board of directors. Monmouth Mut. F. Ins. Co. *v.* Lowell, 59 Me. 504.

An assessment made by an illegally elected board of directors is void. People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440.

An assessment notice showing that the assessment had been made by the "company" is valid, as this term is synonymous with "board of directors." Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387.

37. Farmers' Mut. F. Ins. Co. *v.* Chase, 56 N. H. 341.

38. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 10 Allen (Mass.) 110; Johnson *v.* Farmers' Mut. F. Ins. Co., 110 Mich. 488, 68 N. W. 299, 64 Am. St. Rep. 360; Farmers' Mut. F. Ins. Co. *v.* Chase, 56 N. H. 341.

39. The person thus named is the proper party to act, although he may seek advice of the directors. Phelps County Farmers' Mut. Ins. Co. *v.* Johnston, 66 Nebr. 590, 92 N. W. 576.

40. Davis *v.* Parcher, etc., Co., 82 Wis. 488, 52 N. W. 771.

41. See *supra*, V, B, 1, a. See also Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619; Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen (Mass.) 27; Nashua F. Ins. Co. *v.* Moore, 55 N. H. 48.

42. See *infra*, V, B, 5.

43. Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Howland *v.* Cuykendall, 40 Barb. (N. Y.) 320; Hill *v.* Reed, 16 Barb. (N. Y.) 280; Gaytes *v.* Hibbard, 10 Fed. Cas. No. 5,287, 5 Biss. 99.

44. Com. *v.* Mechanics' Mut. F. Ins. Co., 112 Mass. 192; Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Herkimer County Mut. Ins. Co. *v.* Fuller, 14 Barb. (N. Y.) 373. *Contra*, Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771.

45. *Iowa.*— American Ins. Co. *v.* Schmidt, 19 Iowa 502.

Massachusetts.— Citizens' Mut. F. Ins. Co. *v.* Sortwell, 10 Allen 110; Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen 27; Marblehead Mut. F. Ins. Co. *v.* Underwood, 3 Gray 210.

Minnesota.— Taylor *v.* North Star Mut. Ins. Co., 46 Minn. 198, 48 N. W. 772.

Mississippi.— Planters' Ins. Co. *v.* Comfort, 50 Miss. 662.

Pennsylvania.— Buckley *v.* Columbia Ins. Co., 83 Pa. St. 298.

See 28 Cent. Dig. tit. "Insurance," § 430 *et seq.*

46. Western Manufacturers' Mut. Ins. Co. *v.* Hutchinson Cooperage Co., 92 Ill. App. 1; Bangs *v.* Gray, 12 N. Y. 477 [*reversing* 15 Barb. 264]; Bangs *v.* Bailey, 37 Barb. (N. Y.) 630; Herkimer County Mut. Ins. Co. *v.* Fuller, 14 Barb. (N. Y.) 373; Davis *v.* Oshkosh Upholstery Co., 82 Wis. 488, 52 N. W. 771.

determining the amount of assessments to be levied, the directors are not required to assume that all notes will be promptly met, but may consider the possibility of being unable to collect in full and determine the percentage of the assessment accordingly.[47] If a particular mode of assessment be provided in the charter or by-laws this must be followed, although the directors may consider another more equitable,[48] unless such method in view of subsequent legislation has become illegal.[49] The assessments need not be after each loss or necessarily in exact amount to the particular loss sustained, an approximation, so long as it is equitable and ratable, being valid.[50]

5. For What Purposes Levied — a. For Losses — (i) *In General.* In theory a mutual company levies assessments only to meet losses as they accrue. In practice, as this would lead to an interminable number of assessments and many of extremely small per cent upon the face of the note, more often a levy and assessment is made at rarer intervals and at such times provision is made for a number of past losses as well as reasonably for anticipated future losses. In some instances such levies are upheld if made within the reasonable discretion of

An assessment made on the face of a premium note, although payments have been made thereon, is proportional when made in the same manner on all notes of the same class. Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61.

Just assessment.— An assessment by a mutual insurance company on all the members on the basis of the "schedule premium," which was found by multiplying the amount of insurance by the percentage or rate of the risk, is just and equitable. Susquehanna Mut. F. Ins. Co. *v.* Leavy, 136 Pa. St. 499, 20 Atl. 502, 505.

Void assessment.— A formal assesment on a premium note given to a mutual insurance company to the entire amount of the note, without any inquiry or determination as to the amount of losses and of premium notes liable to be assessed therefor, is void, and the omission cannot be supplied by proof, upon the trial of an action upon the note, that such assessment would have been proper. Sands *v.* Graves, 58 N. Y. 94.

Where the business of an insurance company had been carried on, partly on the mutual and partly on the stock plan, and moneys had been received for premiums under the latter plan, which moneys were appropriated to the payment of losses, thus relieving early members on the mutual system from assessments on their notes, and leaving others to be assessed for subsequent losses, it was held that there was no remedy for this inequality, and that the subsequent losses must be borne by those whose notes were in force at the time they occurred. Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

47. Vandalia Mut. County F. Ins. Co. *v.* Peasley, 84 Ill. App. 138; Jones *v.* Sisson, 6 Gray (Mass.) 288; Bangs *v.* Gray, 12 N. Y. 477 [*reversing* 15 Barb. 264]; Buckley *v.* Columbia Ins. Co., 92 Pa. St. 501. In Commonwealth Mut. F. Ins. Co. *v.* Wood, 171 Mass. 484, 51 N. E. 19, a member was considered barred from questioning the amount of an assessment, because of a statute providing that a decree of the supreme court confirming an assessment should be final on all parties liable to an assessment. See also Hamilton Mut. Ins. Co. *v.* Parker, 11 Allen (Mass.) 574.

48. Slater Mut. F. Ins. Co. *v.* Barstow, 8 R. I. 343.

49. New Boston F. Ins. Co. *v.* Saunders, 67 N. H. 249, 34 Atl. 670.

If the company relies on a change in its by-laws as affecting the method of assessment and amount of levy, it must clearly show that the change has been made so as to bind the member assessed. Sparks *v.* McCreery, 61 N. Y. App. Div. 402, 70 N. Y. Suppl. 610.

An assessment of "——— per cent" is a nullity, since the recovery on premium notes can be only for the amount actually assessed. St. Lawrence Mut. Ins. Co. *v.* Paige, 1 Hilt. (N. Y.) 430.

50. Peoples' Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297; Marblehead Mut. F. Ins. Co. *v.* Underwood, 3 Gray (Mass.) 210; Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90; Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. (Pa.) 351. See *In re* People's Mut. Equitable F. Ins. Co., 9 Allen (Mass.) 319, for an arithmetical method permitted.

A company cannot by contract limit the number of assessments that will be required, for all its losses must be paid, and hence a greater number of assessments than those agreed upon may be necessary. Morgan *v.* Hog Raisers' Mut. Ins. Co., 62 Nebr. 446, 87 N. W. 145.

Improper amount.— An error in the amount of an assessment, as stated in the notice arising from miscalculation, will not prevent a recovery of the amount actually due. Thropp *v.* Susquehanna Mut. F. Ins. Co., 125 Pa. St. 427, 17 Atl. 473, 11 Am. St. Rep. 909. And although assessments are levied greater in amount than stipulated for in the policy, if the company at the trial be confined to a recovery of the amount stipulated, a verdict in its behalf should be sustained. Quaker City Mut. F. Ins. Co. *v.* Notter, 15 Pa. Super. Ct. 596.

the directors.[51] In others, most of such cases arising from a construction of a fundamental statute or by-law, it is asserted that the power to levy an assessment is limited by the amount of losses, sustained and unpaid at the time of making the assessment.[52] And in case the amount in excess of past losses is unreasonable, no special circumstances being shown to justify the excess, the assessment would everywhere be held invalid.[53]

(II) *DURING LIFE OF POLICY* A member of a mutual insurance company cannot be assessed for losses sustained before he became a member of the company.[54] Nor is a member liable to assessment for losses occurring after he has ceased to be a member.[55] The rule is the same if the policy has been declared forfeited.[56] The company in short must show that the loss accrued during the life of the policy of the member assessed.[57] But during the existence of his policy

51. Ionia, etc., Farmers' Mut. F. Ins. Co. *v.* Ionia Cir. Judge, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481; Kelly *v.* Troy F. Ins. Co., 3 Wis. 254.

It is not necessary that an assessment be made after each and every loss, but levies may be made at reasonable intervals. New England Mut. F. Ins. Co. *v.* Belknap, 9 Cush. (Mass.) 140. And *compare* American Ins. Co. *v.* Schmidt, 19 Iowa 502.

52. Vandalia Mut. County F. Ins. Co. *v.* Peasley, 84 Ill. App. 138; Palmyra Ins. Co. *v.* Knight, 59 Ill. App. 274 [*affirmed* in 162 Ill. 470, 44 N. E. 834]; Sinnissippi Ins. Co. *v.* Farris, 26 Ind. 342; Sinnissippi Ins. Co. *v.* Wheeler, 26 Ind. 336; Sinnissippi Ins. Co. *v.* Taft, 26 Ind. 240; Rosenberger *v.* Washington Mut. F. Ins. Co., 87 Pa. St. 207; Orr *v.* Beaver, etc., Mut. F. Ins. Co., 26 U. C. C. P. 141.

53. York County Mut. F. Ins. Co. *v.* Bowden, 57 Me 286; Traders' Mut. F. Ins. Co. *v.* Stone, 9 Allen (Mass.) 483; People's Equitable Mut. F. Ins. Co. *v.* Babbitt, 7 Allen (Mass.) 235.

54. *Maryland.*— Baltimore County Mut. F. Ins. Co. *v.* Jean, 96 Md. 252, 53 Atl. 950, 94 Am. St. Rep. 570.

Massachusetts.— Long Pond Mut. F. Ins. Co. *v.* Houghton, 6 Gray 77.

Michigan.—Detroit Manufacturers' Mut. F. Ins. Co. *v.* Merrill, 101 Mich. 393, 59 N. W. 661.

Minnesota.— Swing *v.* H. C. Akeley Lumber Co., 62 Minn. 169, 64 N. W. 97.

Mississippi.— Planters' Ins. Co. *v.* Comfort, 50 Miss. 662.

New York.— Sands *v.* Lilienthal, 46 N. Y. 541.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Leavy, 136 Pa. St. 499, 20 Atl. 502, 505; Susquehanna Mut. F. Ins. Co. *v.* Stauffer, 125 Pa. St. 416, 17 Atl. 471; Koehler *v.* Beeber, 122 Pa. St. 291, 16 Atl. 354; Peoples' F. Ins. Co. *v.* Hartshorne, 90 Pa. St. 465; Mutual Valley F. Ins. Co. *v.* Rausch, 1 Leg. Rec. 250.

Canada.— Green *v.* Beaver, etc., Mut. F. Ins. Co., 34 U. C. Q. B. 78; Beaver, etc., Mut. F. Ins. Co. *v.* Spires, 30 U. C. C. P. 304.

See 28 Cent. Dig. tit. "Insurance," § 418.

But under a Wisconsin statute the contrary was held. Gilman *v.* Druse, 111 Wis. 400, 87 N. W. 557.

If an assessment otherwise valid is also levied on those who were not members when the loss accrued it remains valid in part, although void as to such members. Long Pond Mut. F. Ins. Co. *v.* Houghton, 6 Gray (Mass.) 77.

55. *Maine.*— York County Mut. F. Ins. Co. *v.* Turner, 53 Me. 225.

Maryland.— Baltimore County Mut. F. Ins. Co. *v.* Jean, 96 Md. 252, 53 Atl. 950, 94 Am. St. Rep. 570.

Michigan.— Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913.

New Jersey.— Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

Pennsylvania.—Akers *v.* Hite, 94 Pa. St. 394, 39 Am. Rep. 792.

See 28 Cent. Dig. tit. "Insurance," § 421.

But note a practical difficulty in determining just when membership ceases under the provisions of a policy and the custom of business in People's Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297.

56. *Maryland.*— Stockley *v.* Benedict, 92 Md. 325, 48 Atl. 59.

Massachusetts.— Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen 27.

New York.— Tuckerman *v.* Bigler, 46 Barb. 375.

Ohio.— Mansfield *v.* Franklin Furniture Co., 12 Ohio Cir. Ct. 222, 4 Ohio Cir. Dec. 473.

Pennsylvania.— Columbia Ins. Co. *v.* Buckley, 83 Pa. St. 293, 24 Am. Rep. 172.

See 28 Cent. Dig. tit. "Insurance," § 421.

57. *Indiana.*— Hashagan *v.* Manlove, 42 Ind. 330.

Mississippi.— Planters' Ins. Co. *v.* Comfort, 50 Miss. 662.

New Hampshire.— Great Falls Mut. F. Ins. Co. *v.* Harvey, 45 N. H. 292; Atlantic Mut. F. Ins. Co. *v.* Young, 38 N. H. 451, 75 Am. Dec. 200.

New Jersey.—Stewart *v.* Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436.

New York.— Sparks *v.* McCreery, 61 N. Y. App. Div. 402, 70 N. Y. Suppl. 610.

Pennsylvania.—Columbia F. Ins. Co. *v.* Bolton, 2 Pearson 222.

South Carolina.— South Carolina Mut. Ins. Co. *v.* Price, 67 S. C. 207, 45 S. E. 173.

Virginia.— Greenhow *v.* Buck, 5 Munf. 263.

West Virginia.— Swing *v.* Parkersburg Ve-

the insured is liable for his proportion of every loss arising.[58] And this even though the subject-matter of the insurance be alienated or destroyed unless an actual surrender of the policy is made,[59] and all prior assessments paid.[60] After the cancellation of his policy, a member of a mutual company, while not liable for losses arising subsequently to the date he ceases to be a member, is still assessable for losses arising prior to that time, to the amount of his deposit note.[61] The rule is the same in case the membership has come to an end by the termination of the policy by other means than by cancellation.[62]

b. For Expenses and Other Purposes. In addition to the assessments for the purpose just mentioned, a mutual insurance company may levy an assessment for certain other purposes;[63] for example to provide a reasonable sum for the running expenses of the company;[64] to pay back sums voluntarily paid under a previous assessment which has been adjudged to be illegal, together with interest

neer, etc., Co., 45 W. Va. 288, 31 S. E. 926; Swing *v.* Bentley, etc., Furniture Co., 45 W. Va. 283, 31 S. E. 925.

See 28 Cent. Dig. tit. "Insurance," § 418 *et seq.*

58. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 10 Allen (Mass.) 110; Morgan *v.* Hog Raisers' Mut. Ins. Co., 62 Nebr. 446, 87 N. W. 145; New Hampshire Mut. F. Ins. Co. *v.* Rand, 24 N. H. 428; Stockley *v.* Schwerdfeger, 19 Pa. Super. Ct. 289.

59. Boot, etc., Manufacturers Mut. F. Ins. Co. *v.* Melrose Orthodox Cong. Soc., 117 Mass. 199; Cumings *v.* Sawyer, 117 Mass. 30; Stockley *v.* Riebenack, 12 Pa. Super. Ct. 169.

Each member is liable until the policy is canceled or completely surrendered. Com. *v.* Massachusetts Mut. F. Ins. Co., 112 Mass. 116; Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328; Huntley *v.* Beecher, 30 Barb. (N. Y.) 580; Stockley *v.* Riebenack, 12 Pa. Super. Ct. 169.

60. Indiana Mut. F. Ins. Co. *v.* Conner, 5 Ind. 170; Indiana Mut. F. Ins. Co. *v.* Coquillard, 2 Ind. 645; Hyatt *v.* Wait, 37 Barb. (N. Y.) 29.

61. Mallen *v.* Langworthy, 70 Ill. App. 376; Farwell *v.* Parker, 59 Ill. App. 43; Peake *v.* Yule, 123 Mich. 675, 82 N. W. 514; Sands *v.* Hill, 42 Barb. (N. Y.) 651; Sparks *v.* Flaccus Glass Co., 16 Pa. Super. Ct. 119; Stockley *v.* Hartley, 12 Pa. Super. Ct. 628; Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York Leg. Rec. (Pa.) 121. *Contra*, Campbell *v.* Adams, 38 Barb. (N. Y.) 132.

Particularly is this true as to losses unadjusted at the time of cancellation. Susquehanna Mut. F. Ins. Co. *v.* Mardorf, 152 Pa. St. 22, 25 Atl. 234.

62. Hamilton Mut. Ins. Co. *v.* Parker, 11 Allen (Mass.) 574; Detroit Manufacturers' Mut. F. Ins. Co. *v.* Merrill, 101 Mich. 393, 59 N. W. 661; Ionia, etc., Farmers' Mut. F. Ins. Co. *v.* Otto, 96 Mich. 558, 56 N. W. 88, 97 Mich. 522, 56 N. W. 755; Tolford *v.* Church, 66 Mich. 431, 33 N. W. 913; St. Louis Mut. F. & M. Ins. Co. *v.* Boeckler, 19 Mo. 135; Billmeyer *v.* People's F. Ins. Co., 1 Walk. (Pa.) 530.

On the death of a member no liability attaches to the heirs. Pickneyville Mut. F. Ins. Co. *v.* Kimmel, 59 Ill. App. 532.

A complete bona fide settlement, however, by which the insured on paying his supposed share of all supposed outstanding losses was permitted to withdraw, has been held to release him from all liability, although deficiencies or mistake be afterward discovered. Union Mut. F. Ins. Co. *v.* Spaulding, 61 Mich. 77, 27 N. W. 860; Langworthy *v.* Saxony Mills, 72 Mo. App. 363; Hyde *v.* Lynde, 4 N. Y. 387; Patrons of Industry F. Ins. Co. *v.* Harwood, 64 N. Y. App. Div. 248, 72 N. Y. Suppl. 8.

63. See cases cited *infra*, note 64 *et seq.*

Payment in advance.— Where a member of a mutual insurance company has obligated himself to pay such annual assessments as shall be made, not to exceed a specified sum each year, and in anticipation of an annual assessment pays to the treasurer the amount of an annual assessment in advance, and such assessment is not in fact made, the sum so paid stands to his credit, and he has a right to apply the same on an assessment for a succeeding year. Montgomery *v.* Harker, 9 N. D. 527, 84 N. W. 369.

64. American Guaranty Fund Mut. Ins. Co. *v.* Mattson, 100 Mo. App. 316, 73 S. W. 365; Hyatt *v.* Esmond, 37 Barb. (N. Y.) 601; Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90; Schofield *v.* Hayes, 17 Pa. Super. Ct. 110; Stockley *v.* Riebenack, 12 Pa. Super. Ct. 169. But in Sinnissippi Ins. Co. *v.* Taft, 26 Ind. 240, this right was denied. And in Gilman *v.* Druse, 111 Wis. 400, 87 N. W. 557, under a special statute a levy covering unpaid general expenses, the statute providing for a deficiency assessment for losses, was held a "fraud."

A legal necessity for the levy is of course necessary. Pacific Mut. Ins. Co. *v.* Guse, 49 Mo. 329, 8 Am. Rep. 132. But the directors are the judges of the practical necessity. St. Lawrence Mut. Ins. Co. *v.* Paige, 1 Hilt. (N. Y.) 430.

If the losses are payable first from a certain fund, the exhaustion of this fund is a condition precedent to the levying of an assessment. Ohio Mut. Ins. Co. *v.* Marietta Woolen Factory, 1 Ohio Dec. (Reprint) 577, 10 West. L. J. 466.

The fact that no suit has been brought for losses during the time for which the assessments were made is inadmissible. Buckley *v.* Columbia Ins. Co., 83 Pa. St. 298.

thereon;[65] to pay back sums advanced or borrowed by the directors as a means of paying losses;[66] to provide a fund from which to repay unearned premiums in event of cancellation;[67] to refill the capital stock diminished by repeated losses;[68] or to cover losses occasioned by bad investments.[69] If a certain assessment levied to pay the losses accrued to date thereof is insufficient, a second assessment may be levied to pay the deficiency, and the fact that it is a second assessment is no defense thereto.[70] The rule is the same when the prior assessment was void, provided that those who have paid the same are credited therewith upon the new levy.[71]

6. Formalities of Assessment — a. The Levy. All provisions of the by-laws as to the time or manner of levying assessments must be followed in order that the same may be valid;[72] but in the absence of a showing of some defect the

65. *In re* People's Mut. Equitable F. Ins. Co., 9 Allen (Mass.) 319. An assessment by a mutual insurance company, made in place of a previous illegal assessment which has not been enforced by the directors, is valid. People's Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297. But this cannot be done by an insolvent company. Com. *v.* Mechanics' Mut. F. Ins. Co., 112 Mass. 192.

66. Baltimore County Mut. F. Ins. Co. *v.* Jean, 96 Md. 252, 53 Atl. 950, 94 Am. St. Rep. 570; Jones *v.* Sisson, 6 Gray (Mass.) 288; Eichman *v.* Hersker, 170 Pa. St. 402, 33 Atl. 229; New Hanover Mut. F. Ins. Co. *v.* Scholl, 12 Montg. Co. Rep. (Pa.) 78.

67. Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen (Mass.) 27. But a member of a mutual fire-insurance company who contracts to pay only for losses and expenses cannot be assessed to repay unearned premiums. Warner *v.* Delbridge, etc., Co., 110 Mich. 590, 68 N. W. 283, 64 Am. St. Rep. 367, 34 L. R. A. 701.

68. Gardner *v.* Hope Ins. Co., 9 R. I. 194, 11 Am. Rep. 238.

69. People's Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297.

70. *Michigan.*— Peake *v.* Yule, 123 Mich. 675, 82 N. W. 514; Ionia, etc., Farmers' Mut. F. Ins. Co. *v.* Otto, 96 Mich. 558, 56 N. W. 88, 97 Mich. 522, 56 N. W. 755.

New Jersey.— Doane *v.* Milville Mut. M. & F. Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625.

New York.— Rockland, etc., Town F. Ins. Co. *v.* Bussey, 48 N. Y. App. Div. 359, 63 N. Y. Suppl. 86. *Contra,* under prior statute. See Sands *v.* Lillienthal, 46 N. Y. 541; Pratt *v.* Dwelling-House Mut. F. Ins. Co., 7 N. Y. App. Div. 544, 40 N. Y. Suppl. 179; Cooper *v.* Shaver, 41 Barb. 151; Campbell *v.* Adams, 38 Barb. 132. But *compare* Bangs *v.* Gray, 12 N. Y. 447 [*reversing* 15 Barb. 264].

Ohio.— Davis *v.* Sharp, 2 Ohio Dec. (Reprint) 197, 2 West. L. Month. 40.

Pennsylvania.— Snyder *v.* Groff, 8 Pa. Dist. 291.

See 28 Cent. Dig. tit. "Insurance," § 414 *et seq.*

Contra.—Farmers' Mut. F. Ins. Co. *v.* Chase, 56 N. H. 341. And *compare* Estabrooks *v.* Fidelity Mut. F. Ins. Co., 74 Vt. 202, 52 Atl. 420.

But if the members who did not pay have been released from liability the second assessment is invalid. Herkimer County Mut. Ins. Co. *v.* Fuller, 14 Barb. (N. Y.) 373.

71. Ionia, etc., Farmers' Mut. F. Ins. Co. *v.* Ionia Cir. Judge, 100 Mich. 606, 59 N. W. 250, 32 L. R. A. 481.

72. Com. *v.* Dorchester Mut. F. Ins. Co., 112 Mass. 142; Baker *v.* Citizens' Mut. F. Ins. Co., 51 Mich. 243, 16 N. W. 391; Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327.

An injunction is proper to restrain an attempt to collect an illegal assessment. Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9.

Burden of proof ordinarily is on the company to show that the assessment has been legally laid in accordance with its charter and by-laws. Rand *v.* Continental Mut. F. Ins. Co., 58 Ill. App. 665; Augusta Mut. F. Ins. Co. *v.* French, 39 Me. 522; Washington County Mut. Ins. Co. *v.* Chamberlain, 16 Gray (Mass.) 165; Atlantic Mut. F. Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279; Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90. When, however, the certificate of the secretary or other officer as to the regularity of the assessment is accepted as *prima facie* proof of the facts recited therein, the burden is correspondingly thrown upon the insured to show the irregularity of the assessment proceedings. Davis *v.* Sharp, 2 Ohio Dec. (Reprint) 197, 2 West. L. Month. 40; Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90; People's F. Ins. Co. *v.* Hartshorne, 90 Pa. St. 465; Lehigh Valley F. Ins. Co. *v.* Dryfoos, 6 Pa. Cas. 219, 9 Atl. 262; People's Mut. F. Ins. Co. *v.* Bergstresser, 1 Pa. Dist. 771, 11 Pa. Co. Ct. 646; Billmeyer *v.* People's F. Ins. Co., 1 Walk. (Pa.) 530.

Technical requirements of declaration or answer under statutory procedure see People's Equitable Mut. F. Ins. Co. *v.* Arthur, 7 Gray (Mass.) 267; Genesee Mut. Ins. Co. *v.* Moynihen, 5 How. Pr. (N. Y.) 321.

Requirements of an affidavit of defense under the Pennsylvania practice under such a rule see Hoffman *v.* Whelan, 160 Pa. St. 94, 28 Atl. 498; People's Mut. F. Ins. Co. *v.* Groff, 154 Pa. St. 200, 26 Atl. 63; Fidelity Mut. F. Ins. Co. *v.* Vitale, 10 Pa. Super. Ct. 157; People's Mut. F. Ins. Co. *v.* Bergstresser, 1 Pa. Dist. 771, 11 Pa. Co. Ct. 646; West Branch Ins. Co. *v.* Smith, 1 Leg. Rec.

presumption of regularity in all mere formalities obtains.[73] It is necessary that the company should show affirmatively the necessity of a levy and that the same has been done pursuant to its act of incorporation and by-laws.[74] To this end it is necessary that the statement of the condition of the assets of the company upon which the levy is based should be sufficient to enable a member to judge of the necessity for the assessment he is called on to pay.[75] Thus while lumped items are improper,[76] a setting out of all the details is superfluous.[77] It is not necessary that the resolution levying the assessment should specify the names of each member assessed or the precise sums required to be paid by each member; if the percentage is fixed, the court regards the levy as sufficiently certain, for that is certain which can be made certain;[78] but members liable to an assessment cannot be omitted therefrom, for this violates the rule requiring a proportionate

93; Lycoming F. Ins. Co. *v.* Brierly, 10 Wkly. Notes Cas. 45; Susquehanna Mut. F. Ins. Co. *v.* Sprenkle, 13 York Leg. Rec. 121.

73. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 10 Allen (Mass.) 110; Bay State Mut. F. Ins. Co. *v.* Sawyer, 12 Cush. (Mass.) 64; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252; Fidelity Mut. F. Ins. Co. *v.* Vitale, 10 Pa. Super. Ct. 157; Sparks *v.* Vitale, 44 Wkly. Notes Cas. (Pa.) 150; Lycoming Ins. Co. *v.* Wright, 60 Vt. 515, 12 Atl. 103.

If no mode be provided in the by-laws it is not requisite that the object of the meeting be stated in a notice of the meeting sent out to the directors. Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen (Mass.) 27.

"Mere irregularities" in the proceedings will not avail as a defense. Richards *v.* Hale, 24 Ohio Cir. Ct. 468.

74. Warner *v.* Beem, 36 Iowa 385; Atlantic Mut. F. Ins. Co. *v.* Fitzpatrick, 2 Gray (Mass.) 279; Sparks *v.* McCrecry, 61 N. Y. App. Div. 402, 70 N. Y. Suppl. 610; Kelly *v.* Troy F. Ins. Co., 3 Wis. 254.

The company must prove that by the terms of the policy defendant is a member liable to assessment (Manitoba Farmers' Mut. Hail Ins. Co. *v.* Fisher, 14 Manitoba 157), but all purely formal requirements are presumed to have been complied with (Richards *v.* Hale, 24 Ohio Cir. Ct. 468). While the company must prove the actual issuance of the policy to defendant if it be denied (New England Mut. F. Ins. Co. *v.* Belknap, 9 Cush. (Mass.) 140; Moore *v.* Everitt, 20 Pa. Super. Ct. 13), a recital of the same and reference thereto in the premium note presents *prima facie* proof (Way *v.* Billings, 2 Mich. 397).

In order to justify an assessment upon an alleged missing premium note, proof of its having existed at some time, unpaid and uncanceled, must be furnished independently of the records of the company. *In re* Slater Mut. F. Ins. Co., 10 R. I. 42.

75. Lycoming Ins. Co. *v.* Bixby, 15 Wkly. Notes Cas. (Pa.) 109.

A copy of the assessment itself need not be filed in an action on the note (Hope Mut. F. Ins. Co. *v.* Koeller, 47 Mo. 129; Hope Mut. F. Ins. Co. *v.* Beckmann, 47 Mo. 93; Pennsylvania Cent. Ins. Co. *v.* Kniley, 2 Pearson (Pa.) 229); but on trial the assessment must be shown by the records of the company (Western Massachusetts Mut. F. Ins. Co. *v.* Siegel, 84 Ill. App. 528). Although a verbatim copy of the director's resolution need not be attached yet a statement of claim must be made a part of the declaration (Sparks *v.* Flaccus Glass Co., 16 Pa. Super. Ct. 119).

76. Seidler *v.* Beebe, (Pa. 1886) 5 Atl. 612; Barker *v.* Beeber, 112 Pa. St. 216, 5 Atl. 1.

77. American Guaranty Fund Mut. Ins. Co. *v.* Mattson, 100 Mo. App. 316, 73 S. W. 365.

Setting out the particular loss for payment of which each assessment is made is not necessary. Merchants', etc., Ins. Co. *v.* Linchey, 3 Mo. App. 588.

The books of the company are available to prove the necessity of levy and if they show such necessity a *prima facie* case is made. Citizens' Mut. F. Ins. Co. *v.* Sortwell, 10 Allen (Mass.) 110; People's Mut. Ins. Co. *v.* Allen, 10 Gray (Mass.) 297; Marblehead Mut. F. Ins. Co. *v.* Underwood, 3 Gray (Mass.) 210.

Vote of directors authorizing assessment.— A *prima facie* case is made in a suit on premium notes for assessments levied by showing the vote of the directors authorizing the assessments. American Guaranty Fund Mut. Ins. Co. *v.* Mattson, 100 Mo. App. 316, 73 S. W. 365; Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622.

Secretary's certificate.— By charter or act of incorporation the secretary's certificate of an assessment is often made *prima facie* evidence of the legal necessity for the same. Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387; People's F. Ins. Co. *v.* Hartshorne, 90 Pa. St. 465; Buckley *v.* Columbia Ins. Co., 83 Pa. St. 298; West Branch Ins. Co. *v.* Macklin, 66 Pa. St. 34. It is the necessity existing at the time of the levy that is thus presumptively shown. People's Mut. F. Ins. Co. *v.* Groff, 154 Pa. St. 200, 26 Atl. 63.

Statutes frequently provide what a statement of assessment shall show. Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen (Mass.) 27; Dwinnell *v.* Kramer, 87 Minn. 392, 92 N. W. 227.

78. Sands *v.* Sanders, 28 N. Y. 416; Lycoming F. Ins. Co. *v.* Rought, 97 Pa. St. 415; Lycoming F. Ins. Co. *v.* Sensenig, 16 Phila. (Pa.) 601.

levy, and an assessment which knowingly does so is invalid.[79] Every assessment levied by a company should include all losses arising down to the time of the levy,[80] but it need not include contested or litigated claims until they are established by a court of competent jurisdiction.[81]

b. The Notice. No notice to the members of the directors' intention to levy an assessment is required.[82] But notice of the levy of the assessment must be given fully and legally to each member before he can be held personally upon his note.[83] A demand is, however, unnecessary unless stipulated for or reasonably implied.[84] When no mode is prescribed by the by-laws the notice may be either written or verbal.[85] In the absence of specific requirement mailing a notice to the last known address of the member is sufficient;[86] but if a particular sort of notice be required by the by-laws nothing else will suffice.[87] A demand for the payment of an assessment is a sufficient notice of the levying of the assessment.[88]

c. Default, Penalties, Interest, Etc. If the policy and note provide that, in case of a default in the payment of an assessment, the entire amount of the note shall become due and payable, plaintiff upon showing such default may have judgment for the balance unpaid upon the note, although in general an execution can only issue for future assessments and costs as they accrue.[89] But it appears

79. *Massachusetts.*— Marblehead Mut. F. Ins. Co. *v.* Hayward, 3 Gray 208.

Minnesota.— Swing *v.* H. C. Akely Lumber Co., 62 Minn. 169, 64 N. W. 97.

Mississippi.— Planters' Ins. Co. *v.* Comfort, 50 Miss. 662.

New York.— Herkimer County Mut. Ins. Co. *v.* Fuller, 14 Barb. 373.

Pennsylvania.— New Hanover Mut. F. Ins. Co. *v.* Scholl, 12 Montg. Co. Rep. 78.

See 28 Cent. Dig. tit. "Insurance," § 428.

Extent of rule.— This is true, although there is a purpose to assess persons so omitted at a later date. Marblehead Mut. F. Ins. Co. *v.* Hayward, 3 Gray (Mass.) 208. But if the difference is very minute it may be overlooked. Fayette Mut. F. Ins. Co. *v.* Fuller, 8 Allen (Mass.) 27.

A release by the company of its claims against its insolvent policy-holders on compromise is no defense in an action against another policy-holder for his delinquent assessments. Susquehanna Mut. F. Ins. Co. *v.* Gackenbach, 115 Pa. St. 492, 9 Atl. 90; Crawford *v.* Susquehanna Mut. F. Ins. Co., 9 Pa. Cas. 502, 12 Atl. 844.

80. Columbia F. Ins. Co. *v.* Bolton, 2 Pearson (Pa.) 222. And *compare* Shaughnessy *v.* Rensselaer Ins. Co., 21 Barb. (N. Y.) 605.

81. Decker *v.* Righter, 9 Kan. App. 431, 58 Pac. 1009.

82. Dwinnell *v.* Felt, (Minn. 1903) 95 N. W. 579.

83. Thornton *v.* Western Reserve Farmers' Ins. Co., 31 Pa. St. 529; Sparks *v.* Industrial Brick Co., 12 Pa. Super. Ct. 404; Susquehanna Mut. F. Ins. Co. *v.* Staats, 4 Pennyp. (Pa.) 313. *Compare* Boone County Home Mut. Ins. Co. *v.* Anthony, 68 Mo. App. 424.

In a suit brought therefor it is not necessary for the company to specifically aver a notice of an assessment, it being sufficient to aver the refusal of defendant to pay the same. Missouri State Mut. F. & M. Ins. Co. *v.* Spore, 23 Mo. 26.

84. Mitchell *v.* American Ins. Co., 51 Ind. 396; Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252.

A New York statute requires a personal demand before an action can be maintained. Sands *v.* Lilienthal, 46 N. Y. 541; Sands *v.* Annesley, 56 Barb. 598.

A company whose charter allows an action on notice merely is not affected by subsequent legislation requiring a demand. York County Mut. F. Ins. Co. *v.* Knight, 48 Me. 75.

85. Williams *v.* German Mut. F. Ins. Co., 68 Ill. 387.

86. Commonwealth Mut. F. Ins. Co. *v.* Wood, 171 Mass. 484, 51 N. E. 19; Jones *v.* Sisson, 6 Gray (Mass.) 288; Stevens *v.* Hein, 37 N. Y. App. Div. 542, 55 N. Y. Suppl. 491.

87. York County Mut. F. Ins. Co. *v.* Knight, 48 Me. 75; Northampton Mut. Live Stock Ins. Co. *v.* Stewart, 39 N. J. L. 486; Sands *v.* Boutwell, 26 N. Y. 233; Sands *v.* Shoemaker, 4 Abb. Dec. (N. Y.) 149; Buckley *v.* Columbia Ins. Co., 83 Pa. St. 298. See also Frey *v.* Wellington County Mut. F. Ins. Co., 4 Ont. App. 293, 43 U. C. Q. B. 102.

For technical requirements as to the giving of notice see Atlantic Mut. F. Ins. Co. *v.* Sanders, 36 N. H. 252; Shuman *v.* Juniata Farmers' Mut. F. Ins. Co., 206 Pa. St. 417, 55 Atl. 1069.

88. Stevens *v.* Hein, 37 N. Y. App. Div. 542, 55 N. Y. Suppl. 491.

89. *Illinois.*— Rand *v.* Mutual F. Ins. Co., 58 Ill. App. 528.

Indiana.— German Mut. F. Ins. Co. *v.* Franck, 22 Ind. 364.

Kentucky.— Blackerby *v.* Continental Ins. Co., 83 Ky. 574.

Massachusetts.— Jones *v.* Sisson, 6 Gray 288.

Missouri.— St. Louis Mut. F. & M. Ins. Co. *v.* Boeckler, 19 Mo. 135.

Nebraska.— Farmers' Union Ins. Co. *v.* Wilder, 35 Nebr. 572, 53 N. W. 587.

South Carolina.— Continental Ins. Co. *v.*

generally speaking that a provision that a certain sum of money shall be due and payable or that a large rate of interest shall be chargeable upon the failure of the member to pay his assessments is a penalty and therefore will not be enforced.[90] On general principles of the law of damages interest[91] should be recoverable for failure to pay an assessment properly levied from the date on which payment thereof became due.[92]

7. Classes of Members; Liability. A mutual insurance company has ordinarily no right to divide its risks and capital into classes and restrict the liability upon stock notes to the class in which they are placed. The insured has the right to call upon the whole capital of the company and require an assessment upon all the stock notes.[93] If, however, the charter permits a separation of risks into classes the obligations and rights of the members in the different classes may be kept separate and a member be liable only for losses arising in his division, as well as able only to enforce payment of a loss he may sustain against the members of his class,[94] provided that the loss may be fully paid by assessments within that class, for the notes of the members of a different class must be assessed if such means be insufficient.[95]

8. Insurer's Lien. The charter of a company, or the statutes under which a charter is granted, frequently give the company a lien on the property insured for unpaid premiums. The right is also frequently reserved by the policy. This lien so reserved is good as against the insured so long as he retains title;[96] but is

Hoffman, 25 S. C. 327; Continental Ins. Co. *v.* Boykin, 25 S. C. 323.

What law governs.— The remedy is to be determined by the law of the place of delivery and execution of the policy and not by that of the state where the company is located. Thornton *v.* Western Reserve Farmers' Ins. Co., 31 Pa. St. 529.

Amount for which an execution may issue when judgment has been entered for the face of the note under the New York statute see Taylor *v.* Port Jefferson Milling Co., 84 Hun (N. Y.) 610, 32 N. Y. Suppl. 307.

Exemptions of members of a mutual company from execution for losses see Montgomery County Farmers' Mut. Ins. Co. *v.* Milner, 90 Iowa 685, 57 N. W. 612.

90. Rix *v.* Mutual Ins. Co., 20 N. H. 198; Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591; National Mut. F. Ins. Co. *v.* Yeomans, 8 R. I. 25, 86 Am. Dec. 610. *Contra*, People's Mut. F. Ins. Co. *v.* Groff, 154 Pa. St. 200, 26 Atl. 63.

91. See Damages, 15 Cyc. 83 *et seq.*

92. Hyatt *v.* Wait, 37 Barb. (N. Y.) 29. But see Bangs *v.* Bailey, 37 Barb. (N. Y.) 630.

93. People's Equitable Mut. F. Ins. Co. *v.* Arthur, 7 Gray (Mass.) 267; Jackson *v.* Roberts, 31 N. Y. 304; Lehigh Valley F. Ins. Co. *v.* Schimpf, 13 Phila. (Pa.) 515; Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9; Fitzpatrick *v.* Troy Ins. Co., 9 Fed. Cas. No. 4,844, 5 Biss. 48.

94. *Maine.*— Atlantic Mut. F. Ins. Co. *v.* Moody, 74 Me. 385.

New Jersey.— Doane *v.* Millville Ins. Co., 45 N. J. Eq. 274, 17 Atl. 625.

New York.— Sands *v.* Boutwell, 26 N. Y. 233.

Ohio.— Ohio Mut. Ins. Co. *v.* Marietta Woolen Factory, 3 Ohio St. 348.

Wisconsin.— Allen *v.* Winne, 15 Wis. 113; Kelly *v.* Troy F. Ins. Co., 3 Wis. 254.

Contra.— Merchants', etc., Ins. Co. *v.* Linchey, 3 Mo. App. 588.

Members may be estopped, however, to assert such a privilege. Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. (Pa.) 351.

95. Sands *v.* Sanders, 28 N. Y. 416; White *v.* Ross, 4 Abb. Dec. (N. Y.) 589, 15 Abb. Pr. 66; White *v.* Havens, 4 Abb. Dec. (N. Y.) 582, 20 How. Pr. 177; Susquehanna Mut. F. Ins. Co. *v.* Leavy, 136 Pa. St. 499, 20 Atl. 502, 505; Hays *v.* Lycoming F. Ins. Co., 98 Pa. St. 184; Schimpf *v.* Lehigh Valley Mut. Ins. Co., 86 Pa. St. 373; Hummel's Appeal, 78 Pa. St. 320; Rhinehart *v.* Alleghany County Mut. Ins. Co., 1 Pa. St. 359; Crawford *v.* Susquehanna Mut. F. Ins. Co., 9 Pa. Cas. 502, 12 Atl. 844; Lycoming F. Ins. Co. *v.* Ruch, 1 Leg. Chron. (Pa.) 235. *Contra*, George *v.* Lawrence, 1 Pearson (Pa.) 159. And *compare* Beaver, etc., Mut. F. Ins. Co. *v.* Trimble, 23 U. C. C. P. 252.

Where one class is a "hazardous department" and a premium note is in that department, it has been held that the maker is first liable to contribute for losses in that department; but if the losses do not exhaust such note what is left is applicable to the payment of losses in the other departments during the running of the policy. Sands *v.* Sanders, 28 N. Y. 416, 26 N. Y. 239, 25 How. Pr. 82.

96. Lycoming F. Ins. Co. *v.* Ruch, 1 Leg. Chron. (Pa.) 235; Lycoming F. Ins. Co. *v.* Newcomb, 1 Leg. Chron. (Pa.) 9; Shirley *v.* Mutual Assur. Soc., 2 Rob. (Va.) 705; *Ex p.* Hill, 2 Ch. Chamb. (U. C.) 348. See Farmers' Mut. F. Ins. Assoc. *v.* Bunch, 46 S. C. 550, 24 S. E. 503, where a lien was held invalid there being no statutory authority for it.

lost by a sale of the property to a *bona fide* purchaser,[97] and a mortgagee is deemed a "purchaser."[98] Such a lien is not general upon any property of the insured, but only upon the particular property insured against which it is reserved.[99] The lien may be filed even after the expiration of the policy.[1] The foreclosure of such lien is an equitable action in its nature.[2]

VI. VALIDITY OF CONTRACT OR POLICY IN GENERAL.

A. Effect of Want of Assent. A policy issued by an insurance agent acting without knowledge or consent of either party is of course not valid.[3]

B. Effect of Fraud or Mistake.[4] Fraud or mistake as to the substantial terms or subject-matter of the contract will render it void.[5] But to avoid the contract on the ground of fraudulent inducement or representation, it must appear that the representation or inducement was material to the contract.[6]

C. Effect of Illegality — 1. In General. If the policy is void as being in violation of statutory provisions, there can be no recovery thereon.[7] The fact, however, that the company is empowered by its charter to make contracts in the jurisdiction in which it is created will not render a policy of insurance on goods not within such jurisdiction invalid.[8]

2. Against Public Policy. If the policy is void by reason of being against public policy there can be no recovery thereon.[9] But the mere fact that the

97. McCulloch *v.* Indiana Mut. F. Ins. Co., 8 Blackf. (Ind.) 50; Kentucky Farmers' Mut. Ins. Co. *v.* Mathers, 7 Bush (Ky.) 23, 3 Am. Rep. 286.

Contra, under statute. See Mutual Assur. Soc. *v.* Stone, 3 Leigh (Va.) 218; Mutual Assur. Soc. *v.* Byrd, 1 Va. Cas. 170; Montgomery *v.* Gore Dist. Mut. Ins. Co., 10 Grant Ch. (U. C.) 501. But see Mutual Assur. Soc. *v.* Faxon, 6 Wheat. (U. S.) 606, 5 L. ed. 342; Mutual Assur. Soc. *v.* Watts, 1 Wheat. (U. S.) 279, 4 L. ed. 91, two decisions of the supreme court of the United States upon the same policy.

98. Shaw *v.* Shaw, 2 Ohio Dec. (Reprint) 609, 4 West. L. Month. 158.

99. Halfpenny *v.* People's F. Ins. Co., 85 Pa. St. 48; People's F. Ins. Co. *v.* Coppell, 8 Leg. Gaz. (Pa.) 118; People's F. Ins. Co. *v.* Levi, 1 Leg. Rec. (Pa.) 220.

1. Peoples' F. Ins. Co. *v.* Hartshorne, 84 Pa. St. 453.

Before an execution can issue thereon all the formalities of a fundamental statute must be complied with. Barker *v.* Beeber, 112 Pa. St. 216, 5 Atl. 1; Seidler *v.* Beebe, (Pa. 1886) 5 Atl. 612; Hageman *v.* People's Ins. Co., 1 Walk. (Pa.) 509; Lycoming Ins. Co. *v.* Lewis, 13 Lanc. Bar (Pa.) 87; Lycoming F. Ins. Co. *v.* Bixby, 15 Phila. (Pa.) 647.

An entry of such a lien does not amount to a judgment by confession. Lycoming F. Ins. Co. *v.* Morrell, 15 Phila. (Pa.) 649.

Estoppel.—A company is not estopped from asserting its lien on the policy by a defense that the policy was void. Susquehanna Mut. F. Ins. Co.'s Appeal, 105 Pa. St. 615.

Personalty.—The lien was held not applicable to personalty in People's F. Ins. Co. *v.* Levi, 1 Leg. Rec. (Pa.) 220. But the mere fact that personalty was also insured does not defeat the lien of the policy. Peoples' F. Ins. Co. *v.* Hartshorne, 84 Pa. St. 453.

2. South Carolina Mut. Ins. Co. *v.* Price, 56 S. C. 407, 34 S. E. 696.

3. London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544. *Compare* Peterson *v.* Hartford F. Ins. Co., 111 Ill. App. 466. And see *supra*, III, D, 2.

4. Misrepresentations or fraud avoiding the policy see *infra*, XII.

5. Tebbetts *v.* Hamilton Mut. Ins. Co., 3 Allen (Mass.) 569; Underwriters' Fire Assoc. *v.* Henry, (Tex. Civ. App. 1904) 79 S. W. 1072; Alsop *v.* Commercial Ins. Co., 1 Fed. Cas. No. 262, 1 Sumn. 451.

6. Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19; American Steam-Boiler Co. *v.* Wilder, 39 Minn. 350, 40 N. W. 252, 1 L. R. A. 671; Atlantic Mut. F. Ins. Co. *v.* Goodall, 29 N. H. 182; Camden Consol. Oil Co. *v.* Ohio Ins. Co., 4 Fed. Cas. No. 2,337*b*. And see *infra*, XII, A, 1-3.

7. Weed *v.* Cuming, 12 Pa. Super. Ct. 412; Luthe *v.* Farmers' Mut. F. Ins. Co., 55 Wis. 543, 13 N. W. 490.

Failure to comply with the statutory requirement that the member shall be notified of annual meetings on the part of a mutual company does not affect the validity of the policy. Dwinnell *v.* Felt, 90 Minn. 9, 95 N. W. 579.

If the contract is valid when made, but performance is rendered illegal by subsequent statute, both parties are discharged from its obligations. The insured loses his indemnity and the insurer loses his premium. Gray *v.* Sims, 10 Fed. Cas. No. 5,729, 3 Wash. 276.

8. Toronto Bank *v.* St. Lawrence F. Ins. Co., 19 Quebec Super. Ct. 434.

9. Spare *v.* Home Mut. Ins. Co., 15 Fed. 707, 8 Sawy. 618. Insurance against the acts of a foreign government is not invalid. Nigel

insured attempts to protect himself by a policy against loss that may be due to his own fault will not render the contract invalid as against public policy.[10]

3. Property Used in Unlawful Business. If the subject-matter of the insurance is property employed in an unlawful business the policy will be void.[11]

D. Partial Invalidity. Where the contract is invalid as to a part of the risk, it may be enforced as to that part as to which it is not invalid, if the two parts can be separated.[12] Agreements or stipulations in a policy which are forbidden by law will be disregarded, and the contract sustained.[13]

Gold Min. Co. *v.* Hoade, [1901] 2 K. B. 849, 6 Com. Cas. 268, 70 L. J. K. B. 1006, 85 L. T. Rep. N. S. 482, 50 Wkly. Rep. 106.

10. American Casualty Ins. Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132.

Thus a carrier of goods or passengers may protect himself by policy against a risk due even to his own negligence. See *supra*, II, C, 2, b, (I); and Carriers, 6 Cyc. 352.

11. See cases cited *infra*, this note.

House of ill fame.— Insurance on the furniture in a house of ill fame is not valid. Bruneau *v.* Laliherté, 19 Quebec Super. Ct. 425. But where the policy was on a house described as "occupied as a sporting house," it was held that the description did not necessarily indicate an unlawful use and the policy was valid. White *v.* Toronto Western Assur. Co., 52 Minn. 352, 54 N. W. 195.

Business without license.— A merchant required to pay a license-tax for conducting his business cannot take a valid policy on his stock of goods without having paid a license; the statute providing that all contracts made with any person violating the statute in reference to the business carried on in disregard thereof shall be void. Springfield F. & M. Ins. Co. *v.* Fowler, (Miss. 1902) 31 So. 810; American F. Ins. Co. *v.* Vicksburg First Nat. Bank, 73 Miss. 469, 18 So. 931; Sun Mut. Ins. Co. *v.* Searles, 73 Miss. 62, 18 So. 544; Pollard *v.* Phœnix Ins. Co., 63 Miss. 244, 56 Am. Rep. 805.

Insurance on store fixtures is not void, although they are used by the insured in carrying on a drug business without being registered, as required by statute. Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261.

Intoxicating liquors kept for illegal sale.— In Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 423, 38 Am. Rep. 687, it is said: "We think that a contract directly insuring liquors intended for illegal sale in violation of the law of this state is invalid. Such contracts are made in order to afford the assured protection in his illegal acts. Shaw, Ch. J., says: 'Where the direct purpose of a contract is to effect, advance, or encourage acts in violation of law, it is void. But if the contract sought to be enforced is collateral and independent, though in some measure connected with acts done in violation of law, the contract is not void.' Boardman *v.* Merrimack Mut. F. Ins. Co., 8 Cush. (Mass.) 583." In harmony with this case are three Massachusetts cases holding that a policy on intoxicating liquors "kept for illegal sale" is invalid. Lawrence *v.* National F. Ins. Co., 127 Mass. 557 note; Johnson *v.* Union M. & F. Ins. Co., 127 Mass. 555; Kelly *v.* Home Ins. Co., 97 Mass. 288. But in Michigan, under a similar state of facts, it has been held that spirituous liquors "illegally kept for sale" may be insured against loss by fire. Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124. And the Michigan rule has been adopted in Iowa and Kansas. Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845; Insurance Co. of North America *v.* Evans, 64 Kan. 770, 68 Pac. 623. See 40 L. R. A. 845 note.

Lottery tickets.— A contract of insurance on foreign lottery tickets is not invalid, although the statute prohibits the insurance of tickets in any lottery. Mount *v.* Waite, 7 Johns. (N. Y.) 434.

A policy to protect illicit trade in another country is valid. Gardiner *v.* Smith, 1 Johns. Cas. (N. Y.) 141.

12. *Delaware.*— Thurber *v.* Royal Ins. Co., 1 Marv. 251, 40 Atl. 1111.

Kentucky.— Continental Ins. Co. *v.* Gardner, 62 S. W. 886, 23 Ky. L. Rep. 335.

Michigan.— Agricultural Ins. Co. *v.* Montague, 38 Mich. 548, 31 Am. Rep. 326.

New York.— Fitzgerald *v.* Atlanta Home Ins. Co., 61 N. Y. App. Div. 350, 70 N. Y. Suppl. 552.

Tennessee.— Light *v.* Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851.

United States.— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478.

See 28 Cent. Dig. tit. "Insurance," § 252.

Severance of a contract relating to different classes or items of property which is rendered invalid by breach of condition or otherwise as to one class or item see *infra*, XI, L; XII, D.

Where the policy is for a larger amount than the company is allowed to place on the property, the policy is void only as to the excess. Boulware *v.* Farmers', etc., Co-Operative Ins. Co., 77 Mo. App. 639.

13. Sachs *v.* London, etc., F. Ins. Co., 67 S. W. 23, 23 Ky. L. Rep. 2397; Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313, 64 Am. Dec. 375; Knorr *v.* Bates, 12 Misc. (N. Y.) 395, 33 N. Y. Suppl. 691, 24 N. Y. Civ. Proc. 377; Thompson *v.* Liverpool, etc., Ins. Co., 23 Fed. Cas. No. 13,966, 2 Hask. 363.

Although a married woman may not be able to bind herself personally by a note for insurance, a policy issued on such a note is not void. McQuitty *v.* Continental L. Ins. Co., 15 R. I. 573, 10 Atl. 635.

E. Estoppel,[14] Waiver, or Ratification — 1. On Part of Insurer — a. As to Informality in Execution of Contract. As against any defects or informalities in the execution of the formal contract, an estoppel of the party who could otherwise complain will result from his act in subsequently treating the contract as valid after knowledge of the defect or informality.[15] But a contract forbidden by law cannot be made binding by estoppel.[16]

b. As to Prepayment of Premium — (i) *By Officer or Agent.* One clothed with apparent general authority to deliver policies may waive the requirement as to prepayment.[17] A mutual company whose articles or by-laws forbid the delivery of a policy without prepayment of the premium will, however, not be estopped by the act of an officer in issuing a policy without compliance with such condition.[18]

(ii) *By Custom or Course of Dealing.*[19] Authority to waive prepayment, even as against express stipulations of the policy, may be inferred from a custom of dealing on the part of the company's agent known to and acquiesced in by it.[20]

If the company contracts for insurance extending beyond the term when it may act under its charter, the policy will be valid for the unexpired term of the charter. Huntley *v.* Merrill, 32 Barb. (N. Y.) 626; Huntley *v.* Beecher, 30 Barb. (N. Y.) 580.

14. Estoppel generally see Estoppel.

15. Insurance Co. of North America *v.* McDowell, 50 Ill. 120, 99 Am. Dec. 497; Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90; Star Union Lumber Co. *v.* Finney, 35 Nebr. 214, 52 N. W. 1113; Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Block *v.* Columbian Ins. Co., 42 N. Y. 393.

Knowledge of the defect or informality is essential. Pratt *v.* Dwelling-House Mut. F. Ins. Co., 53 Hun (N. Y.) 101, 6 N. Y. Suppl. 78; Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458.

The acceptance of a premium on a policy which might have been repudiated for defective execution will render it binding. Powell *v.* Factors', etc., Ins. Co., 28 La. Ann. 19; Camden Consol. Oil Co. *v.* Ohio Ins. Co., 4 Fed. Cas. No. 2,337*b*.

Consent to assignment.— A void policy of insurance is not rendered valid by the approval of an assignment of the interest of the insured therein. Eastman *v.* Carrol County Mut. F. Ins. Co., 45 Me. 307, May, J., delivering the opinion of the court.

In an action on a contract made by a foreign insurance company, it is not necessary to prove that the company had authority under the state law to transact business. The company is estopped by its act to deny its authority, or defend against its contract on that ground. Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

16. Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327; Weed *v.* Cumming, 198 Pa. St. 442, 48 Atl. 409.

17. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Colorado.— Standard Acc. Ins. Co. *v.* Friedenthal, 1 Colo. App. 5, 27 Pac. 88.

Indiana.— Terry *v.* New York Provident Fund Soc., 13 Ind. App. 1, 41 N. E. 18, 55 Am. St. Rep. 217.

Missouri.— Brownfield *v.* Phœnix Ins. Co., 35 Mo. App. 54.

New York.— Boehen *v.* Williamsburgh City Ins. Co., 35 N. Y. 131, 90 Am. Dec. 787.

Ohio.— Newark Mach. Co. *v.* Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612.

Pennsylvania.—Elkins *v.* Susquehanna Mut. F. Ins. Co., 113 Pa. St. 386, 6 Atl. 224; Pottsville Mut. F. Ins. Co. *v.* Minnequa Springs Imp. Co., 100 Pa. St. 137.

United States.— Ball, etc., Wagon Co. *v.* Aurora F. & M. Ins. Co., 20 Fed. 232; Jones *v.* Ætna Ins. Co., 12 Fed. Cas. No. 7,453, 7 Reporter 644.

See 28 Cent. Dig. tit. "Insurance," § 256. See also *supra*, V, A, 1, c.

Even the stipulation in a policy that no agent shall have authority to waive its conditions does not prevent a general agent having authority to issue policies from binding the company without such prepayment. Young *v.* Hartford F. Ins. Co., 45 Iowa 377, 24 Am. Rep. 784; Bowman *v.* Agricultural Ins. Co., 2 Thomps. & C. (N. Y.) 261 [*affirmed* in 59 N. Y. 521]. *Contra*, Wilkins *v.* State Ins. Co., 43 Minn. 177, 45 N. W. 1.

A soliciting agent has no such authority. Hambleton *v.* Home Ins. Co., 11 Fed. Cas. No. 5,972, 6 Biss. 91.

18. Baxter *v.* Chelsea Mut. F. Ins. Co., 1 Allen (Mass.) 294, 79 Am. Dec. 730; Brewer *v.* Chelsea Mut. F. Ins. Co., 14 Gray (Mass.) 203.

19. Custom and usage generally see Customs and Usages.

20. Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529; Susquehanna Mut. F. Ins. Co. *v.* Elkins, 124 Pa. St. 484, 17 Atl. 24, 10 Am. St. Rep. 608; Universal F. Ins. Co. *v.* Block, 109 Pa. St. 535, 1 Atl. 523; Potter *v.* Phenix Ins. Co., 63 Fed. 382; Peoria Sugar Refinery *v.* Susquehanna Mut. F. Ins. Co., 20 Fed. 480.

Thus it is competent to show a course of dealing between the company and its agents,

(III) *By Delivery of Policy.* It is usually made a condition precedent to the taking effect of the policy that the premium be paid; but this condition may be waived by delivering the policy without insisting upon such requirement.[21]

(IV) *By Acknowledgment of Receipt in Policy.* Where the policy duly executed and delivered recites that the premium has been paid, the company will be estopped from questioning its validity on the ground that the premium was not paid.[22]

c. Authority of Officer or Agent to Estop.[23] An officer or agent having authority to act for the company in contracting insurance may in general bind the company by a waiver amounting to an estoppel.[24] But in the case of mutual companies in which all the members are policy-holders estoppel by acts of officers or agents is not so conclusive.[25] However a mutual company represented by duly

by which the personal liability of the agent for the premiums on policies issued by him is substituted for the obligation of the insured to pay the premium. Lebanon Mut. Ins. Co. *v.* Hoover, 113 Pa. St. 591, 8 Atl. 163, 57 Am. Rep. 511; Elkins *v.* Susquehanna Mut. F. Ins. Co., 113 Pa. St. 386, 6 Atl. 224.

To the contrary it has been said that parol evidence is not admissible to show a general custom among insurance companies and brokers to consider payment to the broker as a payment to the company when the policy provides that there shall be no waiver except as expressed in writing. Peoria Sugar Refinery *v.* Susquehanna Mut. F. Ins. Co., 20 Fed. 480.

21. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Illinois.— Gosch *v.* State Mut. F. Ins. Assoc., 44 Ill. App. 263; Daft *v.* Drew, 40 Ill. App. 266.

Indiana.— Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; Ohio Farmers' Ins. Co. *v.* Stowman, 16 Ind. App. 205, 44 N. E. 558, 940.

Louisiana.— Latoix *v.* Germania Ins. Co., 27 La. Ann. 113; Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Nebraska.—Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407.

New York.— Bodine *v.* Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Wood *v.* Poughkeepsie Mut. Ins. Co., 32 N. Y. 619; Sheldon *v.* Atlantic F. & M. Ins. Co., 26 N. Y. 460, 84 Am. Dec. 213; Washoe Tool Mfg. Co. *v.* Hibernia F. Ins. Co., 7 Hun 74; Goit *v.* National Protection Ins. Co., 25 Barb. 189; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468; Greenwich Ins. Co. *v.* Union Dredging Co., 8 N. Y. St. 353.

Pennsylvania.—Elkins *v.* Susquehanna Mut. F. Ins. Co., 113 Pa. St. 386, 6 Atl. 224.

Tennessee.— Equitable Ins. Co. *v.* McCrea, 8 Lea 541.

Texas.— East Texas F. Ins. Co. *v.* Mims, 1 Tex. App. Civ. Cas. § 1323.

United States.— Ball, etc., Wagon Co. *v.* Aurora F. & M. Ins. Co., 20 Fed. 232; Frankle *v.* Pennsylvania F. Ins. Co., 9 Fed. Cas. No. 5,052*a*.

See 28 Cent. Dig. tit. "Insurance," § 260.

Especially is this true where the premium is retained and appropriated by the company, with knowledge that the policy has been delivered without prepayment. Schoneman *v.* Western Horse, etc., Ins. Co., 16 Nebr. 404, 20 N. W. 284.

Merely placing the policy in the hands of an agent to deliver when the premium is paid does not in itself constitute a waiver. Home Ins. Co. *v.* Field, 42 Ill. App. 392; Marland *v.* Royal Ins. Co., 71 Pa. St. 393.

Nor will a contemporaneous agreement between the agent and insured, in violation of the terms of the contract that prepayment will not be required, amount to a waiver. Flint *v.* Ohio Ins. Co., 8 Ohio 501; Dircks *v.* German Ins. Co., 34 Mo. App. 31.

22. Such an acknowledgment cannot be contradicted, in the absence of fraud, for the purpose of avoiding the policy. Illinois Cent. Ins. Co. *v.* Wolf, 37 Ill. 354, 87 Am. Dec. 251; Mayo *v.* Pew, 101 Mass. 555; Basch *v.* Humboldt Mut. F. & M. Ins. Co., 35 N. J. L. 429; *In re* Pennsylvania Ins. Co., 22 Fed. 109.

Such acknowledgment is prima facie evidence at least of the receipt of the premium, and sufficient, in the absence of evidence to the contrary, to bind the company. Henschel *v.* Oregon F. & M. Ins. Co., 4 Wash. 476, 30 Pac. 735, 31 Pac. 332, 765; Whiting *v.* Mississippi Valley Manufacturers' Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672. And see *supra*, V, A, 1, c, text and note 56.

But a recital that the policy is issued "in consideration of" the premium named is not an acknowledgment of the receipt of the premium. Dircks *v.* German Ins. Co., 34 Mo. App. 31.

23. **General authority of agents to waive** the written conditions in the policy see INSURANCE.

24. Esch *v.* Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241; Hoge *v.* Dwelling-House Ins. Co., 138 Pa. St. 66, 20 Atl. 939; Smith *v.* Sugar Valley Mut. F. Ins. Co., 5 Pa. Dist. 336; Beal *v.* Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719.

25. The business being done by the association as a body, any action outside the scope of business fixed by the statutes or articles will not work an estoppel. Saratoga County Industry F. Ins. Co. *v.* Plum, 84 N. Y. App. Div. 96, 82 N. Y. Suppl. 550; Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327.

selected officers may be bound by their acts in waiving defects and ratifying invalid policies of insurance.[26]

2. On Part of Insured. The doctrine of estoppel is applicable to the insured as well as to the insurer.[27]

VII. Renewals.

A. Nature and Effect — 1. New Contract. A valid renewal gives rise to a new contract of insurance which requires the assent of both parties, and a new consideration.[28] Like any other contract[29] it is to be established by a preponderance of the evidence.[30]

2. Embodying Terms of Former Policy. Although the renewal constitutes a new contract, nevertheless its terms are to be determined by reference to the

26. Garner *v.* Mutual F. Ins. Co., (Iowa 1901) 86 N. W. 289; Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356; Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117.

27. One who accepts a policy of insurance without dissent will be presumed to have knowledge of its contents and to have assented thereto, and will be estopped to deny that its provisions are binding upon him.

Illinois.— Thompson Lumber Co. *v.* Mutual F. Ins. Co., 66 Ill. App. 254; Phenix Ins. Co. *v.* Still, 43 Ill. App. 233; Manufacturers', etc., Mut. Ins. Co. *v.* Gent, 13 Ill. App. 308.

Iowa.— Moore *v.* State Ins. Co., 72 Iowa 414, 34 N. W. 183.

Kentucky.— Western Assur. Co. *v.* Meuth, 10 Ky. L. Rep. 718.

Louisiana.— Reeve *v.* Phœnix Ins. Co., 23 La. Ann. 219.

Massachusetts.— Monitor Mut. F. Ins. Co. *v.* Buffum, 115 Mass. 343.

Michigan.— Wierengo *v.* American F. Ins. Co., 98 Mich. 621, 57 N. W. 833.

New York.— Belt *v.* American Cent. Ins. Co., 74 Hun 448, 26 N. Y. Suppl. 692 [*reversed* in 148 N. Y. 624, 43 N. E. 64].

North Carolina.— Cuthbertson *v.* North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258.

Pennsylvania.— Stone *v.* Lorentz, 6 Pa. Dist. 17, 19 Pa. Co. Ct. 51.

Texas.— Georgia Home Ins. Co. *v.* Smithville, (Civ. App. 1899) 49 S. W. 412; Guinn *v.* Phœnix Ins. Co., (Civ. App. 1893) 31 S. W. 566.

See 28 Cent. Dig. tit. "Insurance," § 262.

Effect of acceptance see *supra*, IV, E.

Fraud.— Of course it is open to the insured to show that he was fraudulently misled as to the contents of the policy. Wyman *v.* Gillett, 54 Minn. 536, 56 N. W. 167.

Delay in making objection.— The retention of a policy for a considerable period without objection makes the showing of estoppel stronger. Plympton *v.* Dunn, 148 Mass. 523, 20 N. E. 180; Susquehanna Mu F. Ins. Co. *v.* Oberholtzer, 172 Pa. St. 223, 32 Atl. 1105, 1108; Schofield *v.* Leach, 15 Pa. Super. Ct. 354; Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22.

Alteration of policy.— Where the policy appears to have had a slip attached thereto, it will be presumed that such slip was attached at the time of delivery. Hartford F. Ins. Co. *v.* Davis, 59 Mo. App. 405.

28. *Illinois.*—Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115.

Kentucky.— Johnson *v.* Connecticut F. Ins. Co., 84 Ky. 470, 2 S. W. 151, 8 Ky. L. Rep. 460.

Maryland.— Mallette *v.* British-American Assur. Co., 91 Md. 471, 46 Atl. 1005.

Michigan.— Aurora F. & M. Ins. Co. *v.* Kranich, 36 Mich. 289; Brady *v.* Northwestern Ins. Co., 11 Mich. 425.

New York.— O'Reilly *v.* London Assur. Corp., 101 N. Y. 575, 5 N. E. 568 [*affirmed* in 1 Silv. Supreme 216, 5 N. Y. Suppl. 360]; Abel *v.* Phœnix Ins. Co., 47 N. Y. App. Div. 81, 62 N. Y. Suppl. 218.

North Dakota.— McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641.

Utah.— Idaho Forwarding Co. *v.* Fireman's Fund Ins. Co., 8 Utah 41, 29 Pac. 826, 17 L. R. A. 586.

West Virginia.— Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

Canada.— Doherty *v.* Millers, etc., Ins. Co., 4 Ont. L. Rep. 303.

See 28 Cent. Dig. tit. "Insurance," § 276.

29. See Contracts, 9 Cyc. 213, 259 note 95, 272 note 66, 480 note 25.

Seal.— Even though the policy is a sealed instrument, the renewal need not be under seal. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Fraud of the insured in procuring a renewal, with knowledge that the property has been destroyed, concealing the fact from the company, will defeat recovery under the renewal. Nippolt *v.* Firemen's Ins. Co., 57 Minn. 275, 59 N. W. 191.

Estoppel.— The renewal contract may become effectual by estoppel. Phœnix Ins. Co. *v.* Hale, 67 Ark. 433, 55 S. W. 486.

30. McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641.

Parol.— The renewal, as well as the original contract may be made out by parol evidence. Roberts *v.* Germania F. Ins. Co., 71 Ga. 478; Commonwealth *v.* Mechanics' Mut. F. Ins. Co., 120 Mass. 495; Post *v.* Ætna Ins. Co., 43 Barb. (N. Y.) 351; Cohen *v.* Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24. Parol contracts see *supra*, III, D, 3, a; III, F.

Custom.— An alleged custom of companies to renew insurance policies without special request will not in itself be sufficient evidence to establish a renewal, unless it is of such nature as to be binding on the insured,

terms and conditions in the original policy, which will be deemed to be continued in force, except as altered or modified in the contract of renewal.[31]

B. Power of Agent. An agent having authority to make contracts of insurance by issuance of policies or otherwise is presumed to have authority to renew policies already in force.[32]

C. Agreements to Renew. An agreement to renew insurance in force will be presumed to have reference to the terms and conditions of such existing insurance.[33] But a mere indefinite executory agreement on the part of the agent for renewal of insurance will not bind the company.[34]

as well as on the company. Nippolt *v.* Firemen's Ins. Co., 57 Minn. 275, 59 N. W. 191.

31. *Illinois.*—Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115; New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200.

Maryland.— Mallette *v.* British-American Assur. Co., 91 Md. 471, 46 Atl. 1005.

Michigan.— Aurora F. & M. Ins. Co. *v.* Kranich, 36 Mich. 289; Brady *v.* Northwestern Ins. Co., 11 Mich. 425.

Missouri.— Honnick *v.* Phœnix Ins. Co., 22 Mo. 82.

New York.— Abel *v.* Phœnix Ins. Co., 47 N. Y. App. Div. 81, 62 N. Y. Suppl. 218; Cochran Cotton Seed Oil Co. *v.* Phœnix Ins. Co., 7 Misc. 695, 28 N. Y. Suppl. 45.

Wisconsin.— Scott *v.* Home Ins. Co., 53 Wis. 238, 10 N. W. 387.

Canada.— Agricultural Sav., etc., Co. *v.* Liverpool, etc., Ins. Co., 3 Ont. L. Rep. 127.

See 28 Cent. Dig. tit. "Insurance," § 276 *et seq.*

If a new policy is delivered to the insured in connection with the renewal, he will be presumed to have assented to the terms of such policy, although they may differ from the terms of the former policy. Thomson *v.* Southern Mut. Ins. Co., 90 Ga. 78, 15 S. E. 652.

The application for the former policy will be considered as containing the representations on which the new contract is founded. American F. Ins. Co. *v.* Nugent, 7 Ky. L. Rep. 598.

Change of title, interest, or hazard.— Any change in the title to the property or the interest of the insured therein, or any increase of hazard not made known to the company and which would have avoided the former policy under the terms thereof, will also avoid the renewal. Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; Garrison *v.* Farmers' Mut. F. Ins. Co., 56 N. J. L. 235, 28 Atl. 8; Cole *v.* Germania F. Ins. Co., 99 N. Y. 36, 1 N. E. 38; Brueck *v.* Phœnix Ins. Co., 21 Hun (N. Y.) 542; Phelps *v.* Gebhard F. Ins. Co., 9 Bosw. (N. Y.) 404; Wolff *v.* Oswego, etc., Ins. Co., 6 N. Y. St. 548. But so far as the company is aware of change in condition, the renewal contract becomes applicable to such changed condition. Lancey *v.* Phœnix F. Ins. Co., 56 Me. 562; Martin *v.* Jersey City Ins. Co., 44 N. J. L. 273; Driggs *v.* Albany Ins. Co., 10 Barb. (N. Y.) 440; Eddy St. Iron Foundry *v.* Farmers' Mut. F. Ins. Co., 5 R. I. 426; Akin *v.* Liverpool, etc., Ins. Co., 1 Fed. Cas. No. 121.

A consent to vacancy given by a local agent during the life of a policy cannot be considered as operative without renewal under a renewal policy. Hartford Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115.

The original policy may be reformed so as to embody the changed terms or conditions with reference to which the renewal was made. Palmer *v.* Hartford Ins. Co., 54 Conn. 488, 9 Atl. 248; Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607 [*affirming* 13 Hun 496].

32. *Kansas.*— Western Home Ins. Co. *v.* Hogue, 41 Kan. 524, 21 Pac. 641.

New York.— Leeds *v.* Mechanics' Ins. Co., 8 N. Y. 351; Carroll *v.* Charter Oak Ins. Co., 40 Barb. 292 [*affirmed* in 1 Abb. Dec. 316].

Pennsylvania.—Franklin F. Ins. Co. *v.* Massey, 33 Pa. St. 221; McCullough *v.* Hartford F. Ins. Co., 2 Pa. Super. Ct. 233.

Wisconsin.— Zell *v.* Herman Farmers' Mut. Ins. Co., 75 Wis. 521, 44 N. W. 828.

United States.— International Trust Co. *v.* Norwich Union F. Ins. Soc., 71 Fed. 81, 17 C. C. A. 608; Baubie *v.* Ætna Ins. Co., 2 Fed. Cas. No. 1,111, 2 Dill. 156; Taylor *v.* Germania Ins. Co., 23 Fed. Cas. No. 13,793, 2 Dill. 282.

See 28 Cent. Dig. tit. "Insurance," § 277.

Conversely an agent having no authority to make a contract of insurance has not in general authority to agree to a renewal thereof. Stewart *v.* Helvetia Swiss F. Ins. Co., 102 Cal. 218, 36 Pac. 410; Shank *v.* Glens Falls Ins. Co., 4 N. Y. App. Div. 516, 40 N. Y. Suppl. 14; Wood *v.* Prussian Nat. Ins. Co., 99 Wis. 497, 75 N. W. 173; Hambleton *v.* Home Ins. Co., 11 Fed. Cas. No. 5,972, 6 Biss. 91.

33. *Alabama.*— Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34.

California.— Gold *v.* Sun Ins. Co., 73 Cal. 216, 14 Pac. 786.

Iowa.— Sater *v.* Henry County Farmers' Ins. Co., 92 Iowa 579, 61 N. W. 209.

Minnesota.— Wiebeler *v.* Milwaukee Mechanics' Mut. Ins. Co., 30 Minn. 464, 16 N. W. 363.

Wisconsin.— King *v.* Hekla F. Ins. Co., 58 Wis. 508, 17 N. W. 297.

See 28 Cent. Dig. tit. "Insurance," § 278 *et seq.*

34. Montrose *v.* Roger Williams Ins. Co., 49 Mich. 477, 13 N. W. 823; McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A.

D. Renewal Receipts. The renewal receipt is more than a mere receipt for money; it is evidence of a contract.[35] But it is an extension of the original policy, and not a substitute therefor.[36]

E. Payment of Premium. Prepayment of the premium on renewal is essential under the same conditions as are applicable to the prepayment of the premium for original insurance.[37]

VIII. ASSIGNMENT[38] OR TRANSFER OF POLICY.

A. As Giving Assignee Right to Proceeds — 1. ASSIGNABILITY. An insurance policy, while not assignable at law,[39] because at law a chose in action may not be assigned, is assignable in equity, and all the interest of the assignor thereby vests in the assignee and can be asserted by him against the assignor.[40] An assignment of the proceeds of the insurance as distinct from an assignment of the policy is valid, and will transfer to the assignee the right to such proceeds;[41]

641; Friend *v.* Brown, 6 Ohio Dec. (Reprint) 809, 8 Am. L. Rec. 308.

35. Baum *v.* Parkhurst, 26 Ill. App. 128.

36. New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

Renewal of the contract takes effect by delivery of the receipt. Baum *v.* Parkhurst, 26 Ill. App. 128; Brown *v.* German-American Ins. Co., 10 N. Y. St. 412.

37. *Georgia.*— Croghan *v.* New York Underwriters' Agency, 53 Ga. 109.

Iowa.— Zigler *v.* Phœnix Ins. Co., 82 Iowa 569, 48 N. W. 987.

Maryland.— American Casualty Co.'s Case, 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

New York.—Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 28 N. Y. 153 [*affirming* 23 How. Pr. 448].

Wisconsin.— Taylor *v.* Phœnix Ins. Co., 47 Wis. 365, 2 N. W. 559, 3 N. W. 584.

United States.— Taylor *v.* Germania Ins. Co., 23 Fed. Cas. No. 13,793, 2 Dill. 282.

See 28 Cent. Dig. tit. "Insurance," § 284.

Prepayment may be waived by an agent extending credit or otherwise as in the case of issuance of an original policy. Baker *v.* Westchester F. Ins. Co., 162 Mass. 358, 38 N. E. 1124; Lum *v.* U. S. Fire Ins. Co., 104 Mich. 397, 62 N. W. 562; Planters' Ins. Co. *v.* Ray, 52 Miss. 325; Bodine *v.* Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; First Baptist Church *v.* Brooklyn F. Ins. Co., 19 N. Y. 305.

A custom to extend credit on renewal must be shown to constitute a waiver. Baldwin *v.* Phœnix Ins. Co., 107 Ky. 356, 54 S. W. 13, 21 Ky. L. Rep. 1090, 92 Am. St. Rep. 362; McCabe *v.* Ætna Ins. Co., 9 N. D. 19, 81 N. W. 426, 47 L. R. A. 641; New York Fidelity, etc., Co. *v.* Willey, 80 Fed. 497, 25 C. C. A. 593.

Waiver of payment see *supra*, VI, E, 1, b.

38. Assignments generally see ASSIGNMENTS.

39. Wyman *v.* Prosser, 36 Barb. (N. Y.) 368; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. (N. Y.) 247; Rousset *v.* Insurance Co. of North America, 1 Binn. (Pa.) 429.

40. Gourdon *v.* Insurance Co. of North America, 3 Yeates (Pa.) 327; Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614; McPhillips *v.* London Mut. F. Ins. Co., 23 Ont. App. 524. See also ASSIGNMENTS, 4 Cyc. 20 *et seq.*

It is immaterial that there was no fund in the hands of the insurer when the assignment took place. The equitable right of the assignee attaches when the fund comes into existence. Frels *v.* Little Black Farmer's Ins. Co., 120 Wis. 590, 98 N. W. 522.

41. *Alabama.*— Perry *v.* Merchants' Ins. Co., 25 Ala. 355.

Georgia.— Kern *v.* Grier, 94 Ga. 498, 19 S. E. 819.

Illinois.— Glover *v.* Lee, 140 Ill. 102, 29 N. E. 680; Greenwich Ins. Co. *v.* Columbia Mfg. Co., 73 Ill. App. 560.

Maryland.— Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Johnston *v.* Phœnix Ins. Co., 39 Md. 233.

Massachusetts.— Boardman *v.* Holmes, 124 Mass. 438; Wakefield *v.* Martin, 3 Mass. 558.

Missouri.— Archer *v.* Merchants', etc., Ins. Co., 43 Mo. 434.

New York.— Greene *v.* Republic F. Ins. Co., 84 N. Y. 572; De Wolf *v.* Capital City Ins. Co., 16 Hun 116; Cromwell *v.* Brooklyn F. Ins. Co., 39 Barb. 227; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247; Brichta *v.* New York Lafayette Ins. Co., 2 Hall 372.

United States.— *In re* Wittenberg Veneer, etc., Co., 108 Fed. 593; Aultman *v.* McConnell, 34 Fed. 724.

See 28 Cent. Dig. tit. "Insurance," § 468 *et seq.*

Nature of such assignment.— Such assignment is of course subject to all equities and defenses existing in favor of the company against the insured. Matthews *v.* General Mut. Ins. Co., 9 La. Ann. 590; Ames *v.* Richardson, 29 Minn. 330, 13 N. W. 137. Like any other assignment it may be void on account of misrepresentation or fraud. Frank *v.* Tolman, 75 Ill. 648; Derrick *v.* Lamar Ins. Co., 74 Ill. 404. And if void for any reason, the insured may recover, regardless of the assignment. Lett *v.* Guardian F. Ins. Co., 125 N. Y. 82, 25 N. E. 1088 [*affirming* 52 Hun 570, 5 N. Y. Suppl. 526]; Commonwealth Ins. Co. *v.* Trask, 8 Phila. (Pa.) 32. It seems that an equitable assignment of the

and no notice thereof need be given to the insurer to complete this right.[42] Even if there is a provision in the policy against assignment before or after loss, without consent of the company, such provision will not render invalid an assignment made after loss without consent, for such an assignment relates to the cause of action and not to the policy.[43] The provision against assignment can only be taken advantage of by the company.[44]

2. WHAT CONSTITUTES SUCH ASSIGNMENT. The intention of the parties that an assignment should take place is determinative, and no particular form is necessary in order to transfer an equitable interest in the proceeds to the assignee.[45] It is

proceeds of the insurance may be made before loss (Russ *v.* Waldo Mut. Ins. Co., 52 Me. 187; Frink *v.* Hampden Ins. Co., 45 Barb. (N. Y.) 384, 1 Abb. Pr. N. S. 343, 31 How. Pr. 30; Commonwealth Ins. Co. *v.* Trask, 8 Phila. (Pa.) 32), but not if the policy prohibits assignment as collateral security (Lynde *v.* Newark F. Ins. Co., 139 Mass. 57, 29 N. E. 222). After the payment of the debt the complete right to the proceeds is in the insured. Griswold *v.* American Cent. Ins. Co., 1 Mo. App. 97 [*affirmed* in 70 Mo. 654].

Assignment of part interest.— As a chose in action cannot be split, an assignment of a part of the insured's interest is ineffectual. Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497; Baughman *v.* Camden Mfg. Co., 65 N. J. Eq. 546, 56 Atl. 376. But when two specific properties or two specific interests therein are insured by the same policy, on a conveyance of the separate properties or interests, the policy may be separately assigned. Manchester F. Assur. Co. *v.* Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231; Bullman *v.* North British, etc., Ins. Co., 159 Mass. 118, 34 N. E. 169. See also *infra*, XI, L; XII, D.

42. Richardson *v.* White, 167 Mass. 58, 44 N. E. 1072; Stevens *v.* Queen Ins. Co., 32 N. Brunsw. 387.

43. *Iowa.*— Mershon *v.* National Ins. Co., 34 Iowa 87; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451.

Michigan.— Roger Williams Ins. Co. *v.* Carrington, 43 Mich. 252, 5 N. W. 303.

New Jersey.— Combs *v.* Shrewsbury Mut. F. Ins. Co., 32 N. J. Eq. 512.

New York.— Cromwell *v.* Brooklyn F. Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402, 40 Barb. 292; Courtney *v.* New York City Ins. Co., 28 Barb. 116; Goit *v.* National Protection Ins. Co., 25 Barb. 189; Mellen *v.* Hamilton F. Ins. Co., 5 Duer 101 [*affirmed* in 17 N. Y. 609]; Rogers *v.* Traders' Ins. Co., 6 Paige 583.

Pennsylvania.— West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

Tennessee.— Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 598.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584; Nease *v.* Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233.

Wisconsin.— Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

United States.— Spare *v.* Home Mut. Ins. Co., 17 Fed. 568, 9 Sawy. 142.

See 28 Cent. Dig. tit. "Insurance," § 474.

44. Embry *v.* Harris, 107 Ky. 61, 52 S. W. 958, 21 Ky. L. Rep. 714; Commonwealth Ins. Co. *v.* Trask, 8 Phila. (Pa.) 32.

45. White *v.* Robbins, 21 Minn. 370; Kitts *v.* Massasoit Ins. Co., 56 Barb. (N. Y.) 177; McDonald *v.* Daskam, 116 Fed. 276, 53 C. C. A. 554. In Ross *v.* Wells, 5 Pa. Co. Ct. 430, the owner of a policy delivered it to a creditor saying that he wished to make an assignment thereof and that he wished the creditor to take it and collect it. The court considered this a completed and valid assignment. *Compare* Frankenthal *v.* Guardian Assur. Co., 76 Mo. App. 15.

A letter directing the agent of an insurance company to retain out of the proceeds of a fire policy the amount of an account due by the writer to a certain creditor was held not to amount to an assignment when the letter was not acted upon and the policy remained in the hands of the writer. *In re* Foster, Ir. R. 7 Eq. 294.

A verbal assignment is sufficient (O'Brien *v.* Prescott Ins. Co., 11 N. Y. Suppl. 125 [*reversed* on other grounds in 134 N. Y. 28, 31 N. E. 265]; Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422), unless a statute requires a writing (St. Paul F. & M. Ins. Co. *v.* Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483; Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580). And it was held in Cannon *v.* Farmers' Mut. F. Ins. Assoc., 58 N. J. Eq. 102, 43 Atl. 281, that an assignment not in writing would carry the equitable title to a policy, although the by-laws of the insurer contemplated a written assignment.

An actual delivery of the policy is not necessary (Weaver *v.* Weaver, 80 Ill. App. 370; Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614), but a delivery thereof with intent to assign completes the assignment (Matter of Babcock, 12 N. Y. St. 841).

An indorsement upon a policy assigning "the interest of the insured as owner of the property covered by the within policy" is sufficient. Rines *v.* German Ins. Co., 78 Minn. 46, 80 N. W. 839.

An unexecuted purpose or agreement to assign will not take effect as an assignment. Meadows *v.* Meadows, 13 Ky. L. Rep. 495.

But a covenant to insure contained in a mortgage operates as an equitable assignment of insurance when effected. Griet *v.* Citizens Ins. Co., 5 Ont. App. 596.

Estoppel of insured.— An insurance com-

not necessary that there should be an assignment of the property insured, for an assignment by way of collateral only is sufficient to give the assignee the equitable title to the proceeds of the policy.[46]

B. As Creating Privity With Assignee — 1. Necessity of Consent. Most policies contain a provision that they are not assignable without the consent of the insurer, and they frequently provide the mode in which such consent shall be manifested. Such provisions are valid and accomplish the purpose intended,[47] so that the assignee acquires no privity with the insurer unless such consent be obtained.[48]

2. Consent — a. In General. Consent is usually given by an express agreement made at the time of the assignment, but by the form of the contract itself consent may virtually have been given in advance.[49] When there is such a pro-

pany is not liable for the cancellation values of policies paid to a person fraudulently representing himself to be their owner, if they were by the insured signed in blank and delivered to such person as his agent for another purpose. The owner of the policies is estopped from asserting title as he has conferred the *indicia* of title upon the agent, and of two innocent parties the one that has made it possible for the other to suffer must himself stand the loss. Vanderslice *v.* Royal Ins. Co., 7 Pa. Dist. 51, 14 Montg. Co. Rep. 96.

Statute of Elizabeth.— A trader insured his stock in trade and other effects. These were destroyed by fire. He assigned the policies to trustees in trust to pay and divide the moneys received thereunder among all his creditors ratably and to pay the balance, if any, to himself. The court held the assignment not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under £50. Green *v.* Brand, 1 Cab. & E. 410.

46. Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 337; Griswold *v.* American Cent. Ins. Co., 70 Mo. 654.

But the rule is otherwise as to creating a contractual privity between the insurer and the assignee. The latter must have an insurable interest under such circumstances. Hoyt *v.* Hartford F. Ins. Co., 26 Hun (N. Y.) 416.

A clause in a bill of lading providing that in case of loss or damage the carrier should have the benefit of the insurance on the goods and should not be answerable over to the insurer operates as an assignment of such insurance to the carrier. Dundee Chemical Works *v.* New York Mut. Ins. Co., 12 Misc. (N. Y.) 353, 33 N. Y. Suppl. 628. See also *infra*, VIII, C, 1.

Insurance upon property does not necessarily pass with a sale of the property even as between the vendor and vendee, and even a covenant in a contract of sale or mortgage that the holder shall procure insurance does not inure to the benefit of the other party without an express stipulation. Lees *v.* Whiteley, L. R. 2 Eq. 143, 35 L. J. Ch. 412, 14 L. T. Rep. N. S. 472, 14 Wkly. Rep. 534. And see *supra*, II, A. But see Gates *v.* Smith, 4 Edw. (N. Y.) 702 (where the policy passed on a partition sale after confirmation but before conveyance); Farmer's Bank *v.* Mutual Assur. Soc., 4 Leigh (Va.) 69 (where a mortgage of the insured buildings was held to operate as an assignment of the policy).

A transfer of personal property covered by a policy of insurance, with a covenant to insure for the benefit of the transferee, does not vest the latter with any interest in the existing insurance. Lees *v.* Whiteley, L. R. 2 Eq. 143, 35 L. J. Ch. 412, 14 L. T. Rep. N. S. 472, 14 Wkly. Rep. 534.

47. Waterhouse *v.* Gloucester F. Ins. Co., 69 Me. 409.

48. New England L. & T. Co. *v.* Kenneally, 38 Nebr. 895, 57 N. W. 759; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. (N. Y.) 247; Sadlers Co. *v.* Badcock, 2 Atk. 554, 26 Eng. Reprint 733; Lynch *v.* Dalzell, 4 Bro. P. C. 431, 2 Eng. Reprint 292; London Invest. Co. *v.* Montefiore, 9 L. T. Rep. N. S. 688; Corse *v.* British American Ins. Co., 1 Rev. Crit. 243.

This follows from the well established principle that a policy does not run with the subject-matter of the insurance into whosesoever hands it may come, but is rather a contract to personally indemnify the party insured.

California.— Bergson *v.* Builders' Ins. Co., 38 Cal. 541.

Missouri.— Doggett *v.* Blanke, 70 Mo. App. 499.

New Hampshire.— Lahiff *v.* Ashuelot Ins. Co., 60 N. H. 75.

Ohio.— Gilbert *v.* Port, 28 Ohio St. 276.

Pennsylvania.— Olyphant Lumber Co. *v.* People's Mut. Live-Stock Ins. Co., 4 Pa. Super. Ct. 100.

England.— Poole *v.* Adams, 33 L. J. Ch. 639, 10 L. T. Rep. N. S. 287, 12 Wkly. Rep. 683.

See 28 Cent. Dig. tit. "Insurance," § 474 *et seq.*; and *supra*, II, A.

Although the ownership is acquired by descent the rule still holds true. Mildmay *v.* Folgham, 3 Ves. Jr. 471, 30 Eng. Reprint 1111.

49. Meadows *v.* Meadows, 13 Ky. L. Rep. 495; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583 (where the language of the policy was for the benefit of "whom it may concern, at the time of loss"); Hagan *v.* Scottish Union, etc., Ins. Co., 98 Fed. 129 (where the words so construed were, "For

vision and the insurer without valid reason refuses to consent to an assignment of the policy, the assignee acquires the same right as though consent had been given.[50] But if there is nothing in the policy giving consent in advance, a consent must actually be given at or subsequent to the time of the assignment to invest the assignee with rights against the insurer.[51]

b. Mode of Giving. If a certain method for obtaining consent to an assignment of the policy is prescribed in the policy itself, no other mode will suffice.[52] And a forfeiture takes place if it be provided that such will be the effect of an assignment without the insurer's consent.[53] But if the company waives such a requirement and assents to the assignment the right of the assignee is perfected.[54] As an insurance contract can be created by parol, so an assignment creating privity with the insurer can be made in the same fashion,[55] unless required to be in writing by the policy, in which event the terms of the policy must be followed,[56] unless this requirement be waived.[57] If the consent to

account of whom it may concern"). Similarly as to the effect of the use of the word "assigns" in a policy see Bergson *v.* Builders' Ins. Co., 38 Cal. 541.

The Iowa statute provides that all instruments assignable in equity shall be assignable despite a stipulation therein to the contrary. Mershon *v.* National Ins. Co., 34 Iowa 87.

50. Farmers' Mut. Ins. Assoc. *v.* Price, 112 Ga. 264, 37 S. E. 427; Manchester F. Assur. Co. *v.* Glenn, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225; National F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289; Hughson *v.* Hardy, 62 Minn. 209, 64 N. W. 389.

Cost of procuring other insurance.— Under such circumstances the insurer is liable for the cost of procuring other insurance if the assignee prefers to obtain it. Marshall *v.* Franklin F. Ins. Co., 176 Pa. St. 628, 35 Atl. 204, 34 L. R. A. 159.

Notice to company.— When the policy is assignable upon notice to the company, such notice must be given in the mode prescribed. Toronto Bank *v.* St. Lawrence F. Ins. Co., 19 Quebec Super. Ct. 434. But when it is payable to "whom it may concern, at the time of loss," a printed clause in the policy requiring notice to the insurer is inoperative. Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583. And conversely if the policy be assignable only on consent the giving of notice thereof is ineffectual. Girard F. & M. Ins. Co. *v.* Hebard, 95 Pa. St. 45; Corse *v.* British American Ins. Co., 1 Rev. Crit. 243.

51. Carroll *v.* Boston Mar. Ins. Co., 8 Mass. 515. See also Griswold *v.* American Cent. Ins. Co., 70 Mo. 654, where the evidence was weighed and held sufficient to show consent to an assignment of the policy.

Inuring to benefit of coöwner.— The consent of the insurer to the transfer of a fire policy to a purchaser of the property inures to the benefit of a coöwner, although his name be not expressly mentioned. Palatine Ins. Co. *v.* Boyd, (Tex. Civ. App. 1899) 50 S. W. 643.

52. *Georgia.*— Farmers' Mut. Ins. Assoc. *v.* Price, 112 Ga. 264, 37 S. E. 427.

Indiana.— American Ins. Co. *v.* Gallagher, 50 Ind. 209.

Iowa.— Simeral *v.* Dubuque Mut. F. Ins. Co., 18 Iowa 319.

Kentucky.— Mays *v.* Continental Ins. Co., 7 Ky. L. Rep. 524.

New York.— Smith *v.* Saratoga County Mut. F. Ins. Co., 1 Hill 497, 3 Hill 508.

See 28 Cent. Dig. tit. "Insurance," § 476.

53. New *v.* German Ins. Co., 5 Ind. App. 82, 31 N. E. 475. See *infra*, XIV.

54. German-American Ins. Co. *v.* Sanders, 17 Ind. App. 134, 46 N. E. 535; Manchester F. Assur. Co. *v.* Glenn, 13 Ind. App. 365, 41 N. E. 847, 55 Am. St. Rep. 225; Moffitt *v.* Phenix Ins. Co., 11 Ind. App. 233, 38 N. E. 835; Wyman *v.* Imperial Ins. Co., 16 Can. Sup. Ct. 715.

Until all the steps required have been taken, the assignment remains incomplete and vests no right in the assignee. Fogg *v.* Middlesex Mut. F. Ins. Co., 10 Cush. (Mass.) 337; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Cranberry Mut. F. Ins. Co. *v.* Hawk, (N. J. Ch. 1888) 14 Atl. 745; Davis *v.* Farmers' Mut. F. Ins. Co., 134 N. C. 60, 45 S. E. 955; Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

55. Moffitt *v.* Phenix Ins. Co., 11 Ind. App. 233, 38 N. E. 835; Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

56. Minturn *v.* Manufacturers' Ins. Co., 10 Gray (Mass.) 501; Pennsylvania Ins. Co. *v.* Bowman, 44 Pa. St. 89.

57. Moffitt *v.* Phenix Ins. Co., 11 Ind. App. 233, 38 N. E. 835.

Consideration.— An agreement by a company to consent to an assignment of the policy must rest upon a consideration, or otherwise it is void and cannot be specifically enforced. Equitable Ins. Co. *v.* Cooper, 60 Ill. 509. But an agreement by the assignee to pay the premium due is a sufficient consideration. Hughson *v.* Hardy, 62 Minn. 209, 64 N. W. 389. The time for which premium was paid for a policy not having expired when consent to transfer thereof was given, there was a sufficient consideration for the company's consent to the transfer, although it might have insisted on a forfeiture of the policy for previous transfer of the property. North British, etc., Ins. Co. *v.* Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715.

the assignment of the policy has been obtained by fraud or sharp practice the insurer is not bound thereby.[58]

c. By Whom Given. Consent to an assignment may be given by the president of the company, acting as its agent,[59] and a formal vote of the directors is not necessary.[60] It may be given by the secretary,[61] or by an agent for such purpose lawfully authorized.[62]

3. Effect of Consent. When the assignment has been completed and the consent of the insurer obtained a new and independent contract has arisen[63] by which the assignee acquires all the rights of the assignor.[64] If the assignor has prior to the assignment forfeited all his rights under the policy, there is nothing that the assignee can acquire.[65] Inasmuch as the assignee is simply substituted for the assignor and stands in his shoes, he therefore takes subject to every set-off,[66] prior equity, and defense existing in favor of the insured against the assignor,[67]

58. Lynde *v.* Newark F. Ins. Co., 139 Mass. 57, 29 N. E. 222; Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416. And see *supra*, V, B, 1, b, (v).

Mistake as to nature of assignment.— The policy making no restriction as to the kind of assignment that might be made, and, although the company gave its assent presuming that the assignment was absolute as the deed purported, it was decided in the case of Merrill *v.* Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. 439, that the fact that the assignment was actually for collateral did not render the consent void. To the same effect see London Imperial Ins. Co. *v.* Wolf, 21 Ohio Cir. Ct. 202, 11 Ohio Cir. Dec. 815. But when the transferee's interest is actually that of an owner, but the company assented supposing that he was a mortgagee, the contrary result is reached, because the company obtains no right of subrogation to any securities as it would were the transferee a mortgagee. Wall *v.* Commercial Ins. Co., 7 Ohio Dec. (Reprint) 323, 2 Cinc. L. Bul. 113.

59. Davis *v.* Farmers' Mut. F. Ins. Co., 134 N. C. 60, 45 S. E. 955; Pennsylvania Ins. Co. *v.* Bowman, 44 Pa. St. 89.

60. Durar *v.* Hudson County Mut. Ins. Co., 24 N. J. L. 171.

61. Durar *v.* Hudson County Mut. Ins. Co., 24 N. J. L. 171; Conover *v.* Albany Mut. Ins. Co., 3 Den. (N. Y.) 254 [*affirmed* in 1 N. Y. 290].

62. German Ins. Co. *v.* Rounds, 35 Nebr. 752, 53 N. W. 660; Farmers' Mut. Ins. Co. *v.* Taylor, 73 Pa. St. 342; Fire Ins. Assoc. *v.* Miller, 2 Tex. App. Civ. Cas. § 332; Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

An agent authorized to issue policies originally has such authority. German Ins. Co. *v.* Penrod, 35 Nebr. 273, 53 N. W. 74.

Who may not give consent.— An agent authorized to receive applications and make them temporarily binding pending the consideration of the risk and to receive renewals has not implied authority to consent to an assignment. Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Dec. (N. Y.) 315, 3 Keyes 280, 5 Abb. Pr. N. S. 80, 37 How. Pr. 365. Nor has a mere broker to procure insurance. Richmond *v.* Phœnix Assur. Co., 88 Me. 105, 33 Atl. 786. Nor has a mere soliciting agent. Strickland *v.* Council Bluffs Ins. Co., 66 Iowa 466, 23 N. W. 926.

63. *Indiana.*— New *v.* German Ins. Co., 5 Ind. App. 82, 31 N. E. 475.

Kentucky.— Home Ins. Co. *v.* Allen, 13 Ky. L. Rep. 95.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

New York.— Pratt *v.* New York Cent. Ins. Co., 55 N. Y. 505, 14 Am. Rep. 304 [*affirming* 64 Barb. 589].

United States.— Virginia-Carolina Chemical Co. *v.* Sundry Ins. Cos., 108 Fed. 451.

See 28 Cent. Dig. tit. "Insurance," § 488 *et seq.*

64. Cleveland *v.* Clap, 5 Mass. 201.

Garnishment by subsequent creditor.— The lien created by the transfer of an insurance policy with the assent of the insurer as security for a debt, "as its interest may appear," is prior to that acquired by the garnishment of a subsequent creditor. Glover *v.* Lee, 140 Ill. 102, 29 N. E. 680.

65. McCluskey *v.* Providence Washington Ins. Co., 126 Mass. 306; Edes *v.* Hamilton Mut. Ins. Co., 3 Allen (Mass.) 362; Wilson *v.* Montgomery County Mut. F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122.

66. Johnston *v.* Phœnix Ins. Co., 39 Md. 233; Cleveland *v.* Clap, 5 Mass. 201.

67. *California.*— Bergson *v.* Builders' Ins. Co., 38 Cal. 541.

Iowa.— Mershon *v.* National Ins. Co., 34 Iowa 87.

Louisiana.— Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596.

Massachusetts.— Com. *v.* National Ins. Co., 113 Mass. 514.

Pennsylvania.— State Mut. F. Ins. Co. *v.* Roberts, 31 Pa. St. 438; Rousset *v.* Insurance Co. of North America, 1 Binn. 429; Gourdon *v.* Insurance Co. of North America, 3 Yeates 327.

Texas.— Swenson *v.* Sun Fire Office, 68 Tex. 461, 5 S. W. 60, decided under Texas statute.

Vermont.— Reed *v.* Windsor County Mut. F. Ins. Co., 54 Vt. 413.

United States.— McDonald *v.* Daskam, 116 Fed. 276, 53 C. C. A. 554.

See 28 Cent. Dig. tit. "Insurance," § 488 *et seq.*

Extent and limits of rule.— *A fortiori* is

even though he is unaware of the same. When the assignment has been completed and consent of the insurer given thereto, the assignee under the new arrangement has acquired the right to sue in his own name.[68]

4. SUBSEQUENT ACTS OF ASSIGNOR AS AFFECTING ASSIGNEE. Where the policy is simply by the consent of the company made payable to another as his interest may appear, the policy continues to be a contract with the original insured, and any action on the part of the original insured which would defeat his right of recovery under the policy will likewise defeat the recovery by the assignee,[69] but if by virtue of contract or statute the assignment by consent of the company becomes a new contract with the assignee, then no subsequent act of the assignor (the original insured) will defeat the assignee's rights.[70]

C. As Effecting a Forfeiture of Policy — 1. STIPULATIONS AGAINST ASSIGNMENTS. A customary clause in fire-insurance policies is one providing that in case of an assignment without the consent of the company the policy shall stand

this true when the assignee knows of a pre-existing equity. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Nichols *v.* Baxter, 5 R. I. 491; Smith *v.* Carmack, (Tenn. Ch. App. 1901) 64 S. W. 372. The insurer cannot, however, set up in defense of an action on the policy by an assignee that the assignment was in fraud of the assignor's creditors, where no final judgment is shown to have been obtained against the assignor. Horst *v.* London F. Ins. Co., 73 Tex. 67, 11 S. W. 148. The assignee takes free from any outstanding equity in favor of any third party of which he has no notice, when he has assumed the place of a *bona fide* holder by the completion of the new contract. *In re* Hamilton, 102 Fed. 683. See also Spring *v.* South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. ed. 614.

68. *Iowa.*— Mershon *v.* National Ins. Co., 34 Iowa 87.

Massachusetts.— Merrill *v.* Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

New Jersey.— Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

North Carolina.— Southern Fertilizer Co. *v.* Reams, 105 N. C. 283, 11 S. E. 467.

Pennsylvania.— Marshall *v.* Franklin F. Ins. Co., 176 Pa. St. 628, 35 Atl. 204, 34 L. R. A. 159.

See 28 Cent. Dig. tit. "Insurance," § 488 *et seq.*

But *compare* Frankenthal *v.* Guardian Assur. Co., 76 Mo. App. 15. And see Merchants' Ins. Co. *v.* Union Ins. Co., 162 Ill. 173 [*affirming* 58 Ill. App. 611].

Where a purchaser from the insured mortgages back the premises and with the consent of the company reassigns the policy as collateral, the original insured can sue when loss occurs in his own name. Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. (Mass.) 393.

69. *Indiana.*— Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549, 54 N. E. 772. See also American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159.

Michigan.— Ranspach *v.* Teutonia F. Ins. Co., 109 Mich. 699, 67 N. W. 967.

New Jersey.— Kase *v.* Hartford F. Ins. Co., 58 N. J. L. 34, 32 Atl. 1057.

Ohio.— Western Ins. Co. *v.* Carson, 9 Ohio Dec. (Reprint) 848, 17 Cinc. L. Bul. 357.

Pennsylvania.— Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422.

Wisconsin.— Keith *v.* Royal Ins. Co., 117 Wis. 531, 94 N. W. 295; Pupke *v.* Resolute F. Ins. Co., 17 Wis. 378, 84 Am. Dec. 754.

United States.— Delaware Ins. Co. *v.* Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

Canada.— Migner *v.* St. Lawrence F. Ins. Co., 10 Quebec Q. B. 122.

See 28 Cent. Dig. tit. "Insurance," § 488 *et seq.*

Parol agreements between the insurer and the company see Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Connecticut F. Ins. Co. *v.* Hilbrant, (Tex. Civ. App. 1903) 73 S. W. 558.

70. *Colorado.*— Scottish Union, etc., Ins. Co. *v.* Field, 18 Colo. App. 68, 70 Pac. 149.

Illinois.— New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221.

Maine.— Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221.

Massachusetts.— Whiting *v.* Burkhardt, 178 Mass. 535, 60 N. E. 1, 86 Am. St. Rep. 503, 52 L. R. A. 788; Felton *v.* Brooks, 4 Cush. 203.

Michigan.— Hall *v.* Niagara F. Ins. Co., 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135.

New York.— Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. 442; Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. 570.

Rhode Island.— Smith *v.* Union Ins. Co., 25 R. I. 260, 55 Atl. 715.

Texas.— Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22 [*overruling* Delaware Ins. Co. *v.* Security Co., (Civ. App. 1900) 54 S. W. 916].

Canada.— Anderson *v.* Saugeen Mut. F. Ins. Co., 18 Ont. 355.

See 28 Cent. Dig. tit. "Insurance," § 488 *et esq.* See also *infra*, XIII, A, 7.

But the assignee is protected as against future acts only of the assignor. If the pol-

forfeited.[71] Such a provision is uniformly upheld by the courts, but is required in order that the policy may be so forfeited.[72]

2. WHAT CONSTITUTES SUCH ASSIGNMENT. It is not every transfer of an interest under a policy that falls within the prohibition. The term has a somewhat limited meaning. The assignment contemplated is one whereby the assignor parts with all his rights under the policy and which when completed creates a privity between the assignee and the insured.[73] A specific agreement in the policy that an assignment by way of pledge or collateral security will work a forfeiture will,

icy was invalid in its inception by reason of fraud or misrepresentation, it is not validated by consent to a consignment. Stanstead, etc., Mut. F. Ins. Co. *v.* Gooley, 9 Quebec Q. B. 324; Omnium Securities Co. *v.* Canada F., etc., Ins. Co., 1 Ont. 494.

71. Dey *v.* Poughkeepsie Mut. Ins. Co., 23 Barb. (N. Y.) 623; Pennsylvania R. Co. *v.* Manheim Ins. Co., 56 Fed. 301.

72. Waterhouse *v.* Gloucester F. Ins. Co., 69 Me. 409; Manley *v.* Insurance Co. of North America, 1 Lans. (N. Y.) 20; Smith *v.* Saratoga County Mut. F. Ins. Co., 1 Hill (N. Y.) 497; Stolle *v.* Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593. See also *infra*, XIII.

The policy becomes ipso facto void upon the violation of such provision. Buchanan *v.* Westchester County Mut. Ins. Co., 61 N. Y. 611.

When there is such a provision, it is immaterial whether or not the breach was wilful. Watertown F. Ins. Co. *v.* Cherry, 84 Va. 72, 3 S. E. 876. So it is immaterial whether or not the insurer has been injured thereby. Dundee Chemical Works *v.* New York Mut. Ins. Co., 12 Misc. (N. Y.) 353, 33 N. Y. Suppl. 628.

73. Thus a mere mortgage of the subject-matter of the insurance with a delivery of the policy to the mortgagee is not an assignment that will work a forfeiture. Brown *v.* Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325; Sun Fire Office *v.* Fraser, 5 Kan. App. 63, 47 Pac. 327; Whiting *v.* Burkhardt, 178 Mass. 535, 60 N. E. 1, 86 Am. St. Rep. 503, 52 L. R. A. 788; Key *v.* Continental Ins. Co., 101 Mo. App. 344, 74 S. W. 162; Breeyear *v.* Rockingham Farmers' Mut. F. Ins. Co., 71 N. H. 445, 52 Atl. 860; Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Hodges *v.* Tennessee M. & F. Ins. Co., 8 N. Y. 416; Cromwell *v.* Brooklyn F. Ins. Co., 39 Barb. (N. Y.) 227; Commonwealth Ins. Co. *v.* Phœnix Ins. Co., 71 Pa. St. 31; True *v.* Manhattan F. Ins. Co., 26 Fed. 83. For this is equivalent only to a power of attorney coupled with an interest. Grosvenor *v.* Atlantic F. Ins. Co., 5 Duer (N. Y.) 517 [*affirmed* in 17 N. Y. 391]. But see *contra*, Ferree *v.* Oxford F., etc., Ins. Annuity, etc., Co., 67 Pa. St. 373, 5 Am. Rep. 436.

A mere assignment of the amount secured by the policy is not within the prohibition. Philips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. (Mass.) 350.

An assignment for the benefit of creditors is not within the prohibition. People *v.* Beigler, Lalor (N. Y.) 133.

An indorsement making the loss payable to a third party is not within the prohibition. Franklin Sav. Inst. *v.* Central Mut. F. Ins. Co., 119 Mass. 240; Froehly *v.* North St. Louis Mut. F. Ins. Co., 32 Mo. App. 302; Griswold *v.* American Cent. Ins. Co., 1 Mo. App. 97 [*affirmed* in 70 Mo. 654]; Williamson *v.* Michigan F. & M. Ins. Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906.

The deposit of the policy merely by way of pledge is not within the prohibition. Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Mahr *v.* Bartlett, 53 Hun (N. Y.) 388, 7 N. Y. Suppl. 143, 23 Abb. N. Cas. 436. And such a trustee must hold the money received on a payment of a policy till the maturity of the debt. Fergus *v.* Wilmarth, 117 Ill. 542, 7 N. E. 508. See also Buckley *v.* Garrett, 60 Pa. St. 333, 100 Am. Dec. 564.

The giving of a chattel mortgage is not a violation of a condition against assigning a policy. Prows *v.* Ohio Valley Ins. Co., 2 Cinc. Super. Ct. 14. But see Olyphant Lumber Co. *v.* Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100.

Bankruptcy.— In Fayette County Mut. F. Ins. Co. *v.* Neel, 6 Wkly. Notes Cas. (Pa.) 233, it was held that an assignment in bankruptcy was not such an assignment as would avoid the policy under the foregoing provision. The same was held in Appleton Iron Co. *v.* British American Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100, where there had been no actual assignment or delivery of the policy to the trustee, although the bankrupt's petition stated that the policy was so assigned. But in Starkweather *v.* Cleveland Ins. Co., 22 Fed. Cas. No. 13,309, such an assignment was held to have the effect of forfeiting the policy.

Bills of lading.— A clause in a bill of lading subrogating the carrier to the rights of the shipper as to insurance in case of loss, although the insured accept the bill of lading as a contract, does not avoid a policy providing against assignments and stipulating forfeiture as the penalty thereof. Jackson Co. *v.* Boylston Mut. Ins. Co., 139 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728. However, where there is an express warranty in a policy that the interest of the insured has not been and will not be assigned to any common carrier, an agreement in a bill of lading that the carrier is to have the benefit of all insurance, will forfeit the policy. Dundee Chemical Works *v.* New York Mut. Ins. Co., 12 Misc. (N. Y.) 353, 33 N. Y. Suppl. 628; Insurance Co. of North America *v.* Easton, 73 Tex. 167, 11 S. W. 180, 3 L. R. A. 424; Pennsylvania

however, have the stipulated effect.[74] An assignment of the claim of the insured after the loss has been sustained does not fall within this provision against assignment, as such an assignment is not an attempt to create a new contractual relation with the insurer, but is merely the sale or transfer of a chose in action, which is always permitted in equity.[75] If the assignment be of the sort prohibited but is contingent upon obtaining the consent of the insurer, it does not avoid the policy.[76]

IX. REINSURANCE.

A. Nature of the Contract — 1. Classes of Reinsurance. The term "reinsurance" is used in two different senses: (1) It may mean a contract between two insurance companies, by which the one assumes the risks of the other and becomes substituted to its contracts, so that on the assent of the original insured the liability of the original insurer ceases, and the liability of the so-called reinsurer is substituted;[77] (2) but, as usually used, it designates a new contract, by which a company secures partial or entire indemnity for losses which it may suffer under risks which it continues to carry.[78]

2. Indemnity; Insurable Interest. The contract of reinsurance by which a company contracts for its own protection against liability which may accrue to it on risks which it continues to carry is a contract of indemnity.[79] The original insurer has an insurable interest in the property covered by its risks, and therefore the contract is not open to the objection of being a wager contract.[80] And such insurable interest will be sufficient to support reinsurance for the whole or any portion of the risk carried.[81]

3. Validity and Effect. The terms of the contract of reinsurance must be found in the agreement between the reinsuring and the reinsured companies, and not in the original policy of insurance.[82] The usual incidents affecting the

R. Co. *v.* Manheim Ins. Co., 56 Fed. 301. See Carriers.

A release by one of the members of the firm insured of his interest in the policy and property to his copartners is not embraced within the prohibition of such a clause. Texas Banking, etc., Co. *v.* Cohen, 47 Tex. 406, 26 Am. Rep. 298.

74. Lynde *v.* Newark F. Ins. Co., 139 Mass. 57, 29 N. E. 222; Lazarus *v.* Commonwealth Ins. Co., 5 Pick. (Mass.) 76.

75. Mershon *v.* National Ins. Co., 34 Iowa 87; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287; Walters *v.* Washington Ins. Co., 1 Iowa 404, 63 Am. Dec. 451; Merchants' Ins. Co. *v.* Scott, 1 Tex. Unrep. Cas. 534.

76. Smith *v.* Monmouth Mut. F. Ins. Co., 50 Me. 96.

And a consent afterward obtained to an assignment made contrary to the provisions of the policy, provided the insurer is not prejudiced, operates as a waiver of the breach of the right to forfeit. Gould *v.* Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717.

77. This form of reinsurance is usually made for the purpose of enabling the company carrying insurance to retire from business by securing a release from its obligations. It may also be resorted to for the purpose of securing release from a certain class of obligations, or even certain specified risks. See Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481, 495.

78. In this usual sense, it indicates a new and independent contract of insurance between two companies, and not an arrangement by which the reinsuring company is to become directly obligated to the original insured. See Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481, 495.

79. Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137 [*affirmed* in 2 N. Y. 235]; Philadelphia Trust, etc., Co. *v.* Fame Ins. Co., 9 Phila. (Pa.) 292.

80. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Rob. (N. Y.) 316; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant (Pa.) 71.

81. London Assur. Corp. *v.* Thompson, 170 N. Y. 94, 62 N. E. 1066; Commonwealth Ins. Co. *v.* Globe Mut. Ins. Co., 35 Pa. St. 475; Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565, 11 S. Ct. 909, 35 L. ed. 517; Lower Rhine, etc., Ins. Assoc. *v.* Sedgwick, [1898] 1 Q. B. 739, 8 Aspin. 380, 67 L. J. Q. B. 330, 78 L. T. Rep. N. S. 496, 46 Wkly. Rep. 380. But to the extent to which the reinsured company attempts to reinsure risks which it does not carry the contract of reinsurance is invalid; and if it is entire and inseparable the whole contract will be void. Sun Ins. Office *v.* Merz, 63 N. J. L. 365, 43 Atl. 693.

82. Faneuil Hall Ins. Co. *v.* Liverpool, etc., Ins. Co., 153 Mass. 63, 26 N. E. 244, 10 L. R. A. 423; Manufacturers' F. & M. Ins. Co. *v.* Western Assur. Co., 145 Mass. 419, 14 N. E. 632; Jackson *v.* St. Paul F. & M. Ins. Co., 99 N. Y. 124, 1 N. E. 539; St. Nicholas

validity of a contract of insurance apply with equal force to a contract of reinsurance.[83]

4. Construction and Operation. Any ambiguity in the contract of reinsurance will be resolved in favor of the validity of the contract.[84] The contract may be construed in accordance with a well recognized custom as to a matter as to which the contract is silent;[85] but custom will not control the plain letter of the contract.[86]

B. Power to Make the Contract — 1. In General. Under a general power to make contracts of insurance, the company is authorized to enter into contracts by which it becomes substituted for another company as insurer;[87] and no doubt

Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 83 N. Y. 604; Alker *v.* Rhoads, 73 N. Y. App. Div. 158, 76 N. Y. Suppl. 808; Imperial F. Ins. Co. *v.* Home Ins. Co., 68 Fed. 698, 15 C. C. A. 609.

The original insurer may waive conditions in the original policy without thereby releasing the insuring company from its liability on the policy of reinsurance. Fire Ins. Assoc. *v.* Canada F. & M. Ins. Co., 2 Ont. 481.

83. See cases cited *infra*, this note.

Validity of contract of insurance generally see *supra*, VI.

Lack of mutuality or certainty in the reinsuring contract will invalidate the contract. Manchester F. Assur. Co. *v.* State Ins. Co., 91 Ill. App. 609; Henshaw *v.* State Ins. Co., 36 Misc. (N. Y.) 405, 73 N. Y. Suppl. 1. Mutuality generally see *supra*, VI, A.

Contract may be in parol in the absence of any statute requiring it to be in writing. Union Mut. Ins. Co. *v.* Commercial Mut. Mar. Ins. Co., 24 Fed. Cas. No. 14,372, 2 Curt. 524. Oral contract generally see *supra*, III, F.

Variance in the description of the property between the original contract of insurance and the contract of reinsurance may be obviated by construction, there being enough to identify the property. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Rob. (N. Y.) 316. Description of property insured generally see *infra*, XI, I.

Fraud or concealment.— Fraudulent concealment on the part of the reinsured company as to the nature of the risk assumed by the reinsurer will avoid the contract. Chalaron *v.* Insurance Co. of North America, 48 La. Ann. 1582, 21 So. 267, 26 L. R. A. 742; New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359; Canadian F. Mar. Ins. Co. *v.* Northern Ins. Co., 2 Ont. App. 373. Effect of fraud generally see *supra*, VI, B; and *infra*, XII, A, 2.

Antedating.— A loss which has already occurred will not be covered by the contract of reinsurance, if it is made with reference to the custom that reinsurance shall take effect only from the time it is granted, even though the fact of loss was not known to the other party. Union Ins. Co. *v.* American F. Ins. Co., 107 Cal. 327, 40 Pac. 431, 48 Am. St. Rep. 140, 28 L. R. A. 692. Where a company assumed "trade, contingent liabilities and good-will" of another company, agreeing to pay its losses "to accrue" from it, and the company going out of business agreed to discharge its "outstanding obligations," it was held that the latter company was liable for losses through fire which had already occurred. Olsen *v.* California Ins. Co., 11 Tex. Civ. App. 371, 32 S. W. 446. And see Giffard *v.* Queen Ins, Co., 12 N. Brunsw. 432.

Premiums.— The obligation to pay the full premium stipulated in the policy of reinsurance cannot be affected by proof of usage or custom among all companies in the same locality, by which the reinsuring company obtains a percentage from the gross amount stipulated, nor by proof of a parol agreement making such custom a part of the written contract. St. Nicholas Ins. Co. *v.* Mercantile Mut. Ins. Co., 5 Bosw. (N. Y.) 238. The company which takes over the business of another, in consideration of payments to be made, and thereby renders the company thus reinsured unable to carry out its contracts, cannot relieve itself from liability to the policy-holders by avoiding its contract, on the ground of the other company's failure to pay subsequent instalments of the consideration, as required. Ruohs *v.* Traders' F. Ins. Co., 111 Tenn. 405, 78 S. W. 85, 102 Am. St. Rep. 790. Premiums generally see *supra*, V.

Renewal.— The extension of a policy of reinsurance creates a new contract, reviving the original contract of reinsurance, even though it may have been forfeited by failure to comply with its terms. St. Nicholas Ins. Co. *v.* Merchants' Mut. F. & M. Ins. Co., 11 Hun (N. Y.) 108. Renewal generally see *supra*, VII.

84. London Assur. Corp. *v.* Thompson, 170 N. Y. 94, 62 N. E. 1066; Ocean Ins Co. *v.* Sun Mut. Ins. Co., 18 Fed. Cas. No. 10,407, 8 Ben. 272 [*reversed* on other grounds in 107 U. S. 485, 1 S. Ct. 582, 27 L. ed. 337].

But where a written contract for reinsurance specifically provided for reinsurance of policies on risks within the state, it was held that the contract should be so limited, although the schedules describing the risks embraced risks outside of the state. London, etc., F. Ins. Co. *v.* Lycoming F. Ins. Co., 105 Pa. St. 424.

85. Louisiana Mut. Ins. Co. *v.* New Orleans Ins. Co., 13 La. Ann. 246.

Custom generally see Customs and Usages.

86. Milwaukee Mechanics' Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71, 60 Pac. 518.

87. Jameson *v.* Hartford F. Ins. Co., 14 N. Y. App. Div. 380, 44 N. Y. Suppl. 15;

it may without express authority, unless the power is denied in its charter, make contracts of reinsurance. Perhaps an agent having authority to issue policies of insurance may bind his company by a policy of reinsurance, but he cannot act as agent for both parties; and if he attempts to reinsure the risks of one company as agent in another company for which he also acts as agent the contract will be invalid.[88]

2. By Statute. There was an English statute prohibiting insurers from making contracts of reinsurance unless in case of insolvency, bankruptcy, or death of the insurer;[89] but this statutory provision is not found in general in state statutes on the subject of insurance.[90]

C. Relation of Original Policy-Holder to Reinsuring Company. Under a contract of reinsurance, the original policy-holder has no claim against the reinsuring company, for the reinsurer contracts with the reinsured company only.[91] But in some states it seems to be held without due consideration that an action may be maintained by the original insured against the reinsuring company, perhaps on the theory of avoiding circuity of actions.[92] Where the second company has undertaken to reinsure the policy-holders in the first, and such a substitution of liability has been assented to by the policy-holders, they may of course sue the reinsuring company as on an original contract of insurance.[93]

New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359.

88. *Indiana.*— United L., etc., Ins. Co. *v.* Insurance Co. of North America, 42 Ind. 588.

Kentucky.— London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Louisiana.— Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

Missouri.— Mercantile Mut. Ins. Co. *v.* Hope Ins. Co., 8 Mo. App. 408.

New York.— Empire State Ins. Co. *v.* American Cent. Ins. Co., 138 N. Y. 446, 34 N. E. 200 [*affirming* 64 Hun 485, 19 N. Y. Suppl. 504]; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 14 N. Y. 85 [*reversing* 20 Barb. 468]; Casserly *v.* Manners, 9 Hun 695.

See 28 Cent. Dig. tit. "Insurance," § 1808; and, generally, Insurance.

89. St. 19 Geo. II, c. 34, § 4.

90. In Iowa a company failing to comply with the statute as to the amount of capital required before doing business may nevertheless make a valid contract to indemnify itself against loss by reinsurance of risks already assumed. Davenport F. Ins. Co. *v.* Moore, 50 Iowa 619.

In Maryland it is said that the English statute, although in force in that state, relates exclusively to marine insurance. Consolidated Real Estate, etc., Co. *v.* Cashow, 41 Md. 59.

In Massachusetts it is held that the English statute has no force in that state. Merry *v.* Prince, 2 Mass. 176.

In New Jersey it is said that the general statutes authorize policies of reinsurance on an insurable interest. Sun Ins. Office *v.* Merz, 63 N. J. L. 365, 43 Atl. 693.

In New York the law authorizes reinsurance by a company for its own benefit, but not for the benefit of individual policy-holders. Casserly *v.* Manners, 48 How. Pr. 219.

In Pennsylvania the statutes authorize "insurance companies to reinsure themselves." Fame Ins. Co.'s Appeal, 83 Pa. St. 396.

91. Therefore the original policy-holder has no claim or lien on the fund realized by his insurer out of the reinsurance, although the original insurer has become bankrupt. Consolidated Real Estate, etc., Co. *v.* Cashow, 41 Md. 59; Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104. *Compare* Goodrich's Appeal, 109 Pa. St. 523, 2 Atl. 209.

There is no privity between the original policy-holder and the reassuring company. Consolidated Real-Estate, etc., Co. *v.* Cashow, 41 Md. 59; Strong *v.* Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104; Hoffman *v.* North British, etc., Ins. Co., 35 Misc. (N. Y.) 40, 70 N. Y. Suppl. 106; Thompson *v.* Colonial Assur. Co., 33 Misc. (N. Y.) 37, 68 N. Y. Suppl. 143 [*affirmed* in 60 N. Y. App. Div. 325, 70 N. Y. Suppl. 85]; Herckenrath *v.* American Mut. Ins. Co., 3 Barb. Ch. (N. Y.) 63; Goodrich's Appeal, 109 Pa. St. 523, 2 Atl. 209; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant (Pa.) 71.

92. These cases, however, do not involve the question as to the distribution of the funds of the company whose risks have thus been reinsured. Barnes *v.* Hekla F. Ins. Co., 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; Shoaf *v.* Palatine Ins. Co., 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804; Johannes *v.* Phenix Ins. Co., 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 248.

93. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660; Excelsior F. Ins. Co. *v.* Liverpool Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271.

By arrangement between the two companies they may become jointly liable to the policy-holders of the first. Whitney *v.* American Ins. Co., 127 Cal. 464, 59 Pac. 897.

In a contract to pay losses under policies issued by another company as promptly as

D. Liability of Reinsurer — 1. MEASURE OF RECOVERY. The reinsured company may recover from the reinsurer not simply the amount which it in fact paid under the risk reinsured, but what it is bound under its policy to pay by reason of the loss.[94] And the liability of the reinsuring company may include also costs and expenses of defending a suit by the reinsured company, for the purpose of determining its liability, if the reinsurer has notice of the action.[95] The liability of the reinsuring company is in general for all loss suffered by the reinsured company on account of the risks reinsured, up to the amount of reinsurance.[96] But it is frequently stipulated in policies of reinsurance that the liability of the reinsuring company shall be for a *pro-rata* proportion only of the risks; and under such a stipulation the reinsurer is bound only for such proportion of the amount for which the reinsured company is liable.[97]

2. DEFENSES. The reinsured may make the same defenses as against the

losses under its own policies, the contracting company does not enter into a contract of reinsurance, but becomes directly liable to the original insured. Whitney *v.* American Ins. Co., (Cal. 1899) 56 Pac. 50.

94. *Illinois.*— Illinois Mut. F. Ins. Co. *v.* Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620.

Indiana.— Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443.

Maryland.— Consolidated Real-Estate, etc., Co. *v.* Cashow, 41 Md. 59.

Missouri.— Ganut *v.* American Cent. Ins. Co., 68 Mo. 503.

New Hampshire.— Hunt *v.* New Hampshire F. Underwriters' Assoc., 68 N. H. 305, 38 Atl. 145, 73 Am. St. Rep. 602, 38 L. R. A. 514.

New York.— New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137 [*affirmed* in 2 N. Y. 235]; Blackstone *v.* Allemania F. Ins. Co., 4 Daly 299.

Ohio.— Commercial Mut. Ins. Co. *v.* Detroit F. & M. Ins. Co., 38 Ohio St. 11, 43 Am. Rep. 413.

Pennsylvania.— Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant 71; Philadelphia Trust, etc., Co. *v.* Fame Ins. Co., 9 Phila. 292.

See 28 Cent. Dig. tit. "Insurance," § 1817.

95. New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458.

But expenses of the action cannot be included in the loss as against the reinsuring company, where it has had no such notice. Pennsylvania Ins. Co. *v.* Telfair, 27 Misc. (N. Y.) 247, 57 N. Y. Suppl. 780.

96. Chalaron *v.* Insurance Co. of North America, 48 La. Ann. 1582, 21 So. 267, 36 L. R. A. 742; Fame Ins. Co.'s Appeal, 83 Pa. St. 396. Where the liability of an unincorporated association under a contract of insurance was limited to a specific sum to be paid out of a fund, it was held that by continuing to issue policies after the fund was exhausted the reinsuring association became bound to provide such fund as contemplated in the contract of reinsurance. Burke *v.* Rhoads, 81 N. Y. Suppl. 1045.

If the reinsurance is of one half the risk, and not pro rata, and the liability of the reinsured company is reduced to less than half of the original risk insured, then the reinsuring company is relieved from further liability. Home Ins. Co. *v.* Continental Ins. Co., 62 N. Y. App. Div. 63, 70 N. Y. Suppl. 824.

97. Blackstone *v.* Alemannia F. Ins. Co., 56 N. Y. 104; Alker *v.* Rhoades, 73 N. Y. App. Div. 158, 76 N. Y. Suppl. 808; Norwood *v.* Resolute F. Ins. Co., 36 N. Y. Super. Ct. 552, 47 How. Pr. 43; Royal Ins Co. *v.* Vanderbilt Ins. Co., 102 Tenn. 264, 52 S. W. 168.

Operation and effect of such stipulation.— A stipulation in the policy that the loss if any is payable at the time, and *pro rata* with the insured, relates to the amount for which the reinsured company is liable, and not to the amount which it is actually compelled to pay; and insolvency of the reinsured company will not diminish the liability of the reinsurer. Blackstone *v.* Allemania F. Ins. Co., 4 Daly (N. Y.) 299; Cashau *v.* Northwestern Nat. Ins. Co., 5 Fed. Cas. No. 2,499, 5 Biss. 476; *In re* Republic Ins. Co., 20 Fed. Cas. No. 11,705. Such a stipulation merely gives the reinsuring company the benefit of any defense the first insurer may have. *Ex p.* Norwood, 18 Fed. Cas. No. 10,364, 3 Biss. 504. Under such a stipulation the liability of the reinsuring company accrues at the same time with the liability of the reinsured. Blackstone *v.* Allemania F. Ins. Co., 4 Daly (N. Y.) 299. Mere custom or construction will not be allowed to reduce an absolute liability provided for in the contract of reinsurance to *pro-rata* liability. Mutual Safety Ins. Co. *v.* Hone, 2 N. Y. 235. But the usual stipulation that a loss shall be "payable *pro rata* at the same time and in the same manner" as to the insured under the original policy has been held to reduce the liability of the reinsuring company to its *pro-rata* share of the amount actually paid by the original insurer. Illinois Mut. F. Ins. Co. *v.* Andes Ins. Co., 67 Ill. 362, 16 Am. Rep. 620. Under such a stipulation of reinsurance, the reinsurer is liable for the *pro-rata* share of adjustment expenses as well as its share of the loss. State Ins. Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 174 N. Y. 541, 66 N. E. 1110; State Ins. Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 70 N. Y. App. Div. 69, 74 N. Y. Suppl. 1038.

liability for the loss reinsured, as the original insurer may make against the original insured.[98] And the companies may agree that one of them may make a defense for both, the costs to be pro-rated.[99]

E. Proofs and Adjustment of Loss. Where the reinsuring company assumes the entire risk and liability of the company reinsured, proofs of loss by the original insured may be made to the reinsuring company.[1] If the contract is one of reinsurance proper, without special conditions as to proofs of loss other than as usually found in insurance policies, the reinsured must make proofs of loss to the reinsurer.[2] There are usually provisions in the policy of reinsurance as to the proofs to be furnished.[3] Failure of the reinsurer to object to the form or substance of copies of proofs of loss furnished by the company is a waiver of the objection that they were not furnished in time.[4]

X. CANCELLATION, SURRENDER, RESCISSION, AND REFORMATION.

A. Cancellation — 1. Right to Cancel — a. In General. In the absence of statute[5] or of a right reserved in the contract,[6] the insurer cannot cancel the policy without the consent of the insured.[7] For it has no right to abandon or change the contracts it has made.[8]

98. Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443; Delaware Ins. Co. *v.* Quaker City Ins. Co., 3 Grant (Pa.) 71; New York State Mar. Ins. Co. *v.* Protection Ins. Co., 18 Fed. Cas. No. 10,216, 1 Story 458, an action on a policy of marine reinsurance.

But knowledge of the agent acting for the reinsuring company of any objection which might be urged by way of defense will be imputed to the company, and defeat its right to interpose such objection to the validity of the insurance. Virginia F. & M. Ins. Co. *v.* Cummings, (Tex. Sup. 1904) 78 S. W. 716.

Counter-claim.— The reinsuring company cannot buy up claims against the reinsured company and use them by way of offset as against its liability to such company on the policy of reinsurance. *In re* Cleveland Ins. Co., 22 Fed. 200.

99. See cases cited *infra*, this note.

Compromise.— If the company thus undertaking the defense afterward compromises without the consent of the other, there can be no recovery by it for the proportion which should have been paid by the other, in the event of judgment being rendered. Commercial Union Assur. Co. *v.* American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712. But where such an arrangement makes the original insurer simply the agent of the reinsurer for the purpose of making defense, the original insurer may compromise its liability, as it might have done had no agency been created. Consolidated Real Estate, etc., Co. *v.* Cashow, 41 Md. 59; Gantt *v.* American Cent. Ins. Co., 68 Mo. 503.

1. Whitney *v.* American Ins. Co., 127 Cal. 464, 59 Pac. 897.

2. Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Rob. (N. Y.) 316.

Generally it is sufficient if the reinsured transmits the notice and proofs given to it by the original insurer. New York Bowery F. Ins. Co. *v.* New York F. Ins. Co., 17 Wend. (N. Y.) 359.

3. See cases cited *infra*, this note.

Operation and effect of such provisions.— If the condition is that the contract of reinsurance is subject to the same risks, valuations, conditions, and mode of settlements as are or may be adopted or assumed by the company reinsured, then preliminary proofs to the reinsurer are dispensed with. Consolidated Real Estate, etc., Co. *v.* Cashow, 41 Md. 59. And a requirement that the reinsured give notice and render an account of the loss and so on means that there be a notice and schedule served within a reasonable time under the circumstances. Cashau *v.* Northwestern Nat. Ins. Co., 5 Fed. Cas. No. 2,499, 5 Biss. 476.

4. *Ex p.* Norwood, 18 Fed. Cas. No. 10,364, 3 Biss. 504.

5. Statutes in some of the states give the right to the insurer or to the insured to withdraw from the contract on certain conditions. See statutory provisions in Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Wisconsin, and Wyoming.

6. See *infra*, XI, A, 1, b.

If the contract is intended to bind each party only so long as it chooses, the insurer may cancel it at will, on notice to the insured. Manchester F. Assur. Co. *v.* State Ins. Co., 91 Ill. App. 609; Sun Fire Office *v.* Hart, 14 App. Cas. 98, 53 J. P. 548, 58 L. J. P. C. 69, 60 L. T. Rep. N. S. 337, 37 Wkly. Rep. 561.

7. Rothschild *v.* American Cent. Ins. Co., 74 Mo. 41, 41 Am. Rep. 303 [*affirming* 5 Mo. App. 596]; Duel *v.* Getman, 6 N. Y. St. 397; Philadelphia Linen Co. *v.* Manhattan F. Ins. Co., 8 Pa. Dist. 261.

Custom of other companies permitting cancellation is not available to establish such a custom on the part of plaintiff (American Ins. Co. *v.* Neiberger, 74 Mo. 167), at least not without showing facts to which a custom is applicable (Pollard *v.* Fidelity F. Ins. Co., 1 S. D. 570, 47 N. W. 1060).

8. People's Mut. Ins. Fund *v.* Bricken, 92 Ky. 297, 17 S. W. 625, 13 Ky. L. Rep. 586.

b. By Reservation in Policy. But where the right is reserved to cancel the policy, and the cancellation is made pursuant thereto and in the manner prescribed, the insurer is released from liability.[9] Such a reservation in a contract of insurance is valid,[10] and is not contrary to public policy;[11] but it must be exercised and completed before a loss occurs,[12] and a cancellation made after a loss, although without knowledge of the loss, is void.[13] The motive for such cancellation is wholly immaterial.[14]

c. By Mutual Agreement. Even though no right to terminate the contract is reserved, the parties may by mutual agreement cancel the policy.[15]

2. Manner of Effecting — a. In General. If the policy prescribes a certain method for exercising the reserved right of cancellation by the company, this method must be followed,[16] unless the insured waives the requirement.[17] So

9. Albany City F. Ins. Co. *v.* Keating, 46 Ill. 394; Allemania Ins. Co. *v.* McHugh, 1 Lack. Leg. Rec. (Pa.) 411 (where it was also stated that the insured has no power to coerce the insurer in the exercise of its discretion to cancel); Sea Ins. Co. *v.* Johnston, 105 Fed. 286, 44 C. C. A. 477.

10. National Ins. Co. *v.* Irwin, 1 Disn. (Ohio) 68, 12 Ohio Dec. (Reprint) 714.

But it gives the insurer no authority merely to reduce the amount of the insurance. Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

11. Boland *v.* Whitman, 33 Ind. 64. Defendant, after having policies issued by plaintiff's agent giving him a right to cancel, changed to another company and was offered a lower rate to change back. Unlike the former policies the new one contained a clause in fine print limiting the right to cancel. The agent did not call his attention to the clause, but rather gave him to infer the opposite. It was held that the clause limiting the right to cancel was not binding on defendant. Hartford Steam Boiler Inspection, etc., Co. *v.* Cartier, 89 Mich. 41, 50 N. W. 747.

A by-law of a mutual fire-insurance company giving the secretary power to cancel a policy for non-payment of assessments is valid. Douville *v.* Farmers' Mut. F. Ins. Co., 113 Mich. 158, 71 N. W. 517.

When a "binding slip" is issued, referring to a policy, the terms of the policy as to cancellation become a part thereof. Karelsen *v.* Sun Fire Office, 122 N. Y. 545, 25 N. E. 921 [*affirming* 1 N. Y. Suppl. 387]; Van Tassel *v.* Greenwich Ins. Co., 72 Hun (N. Y.) 141, 25 N. Y. Suppl. 301.

12. Ætna Ins. Co. *v.* Rosenberg, 62 Ark. 507, 36 S. W. 908; Southern Ins. Co. *v.* Williams, 62 Ark. 382, 35 S. W. 1101; Clark *v.* Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276; Ritchey *v.* Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341.

The insurer may not cancel if there be an imminent danger of the destruction of the insured property. It may, however, consider a change in circumstances, such an increase in risk, as to justify a cancellation when immediate destruction is not impending. Home Ins. Co. *v.* Heck, 65 Ill. 111.

13. Hollingsworth *v.* Germania F. Ins. Co., 45 Ga. 294, 12 Am. Rep. 579; Crawford *v.* Aachen, etc., F. Ins. Co., 100 Ill. App. 454 [*affirmed* in 199 Ill. 367, 65 N. E. 134]; Partridge *v.* Milwaukee Mechanics' Ins. Co., 162 N. Y. 597, 57 N. E. 1119 [*affirming* 13 N. Y. App. Div. 519, 43 N. Y. Suppl. 632]; Worcester First Nat. F. Ins. Co. *v.* Isett, 11 Wkly. Notes Cas. (Pa.) 558.

14. International L. Ins., etc., Co. *v.* Franklin F. Ins., etc., Co., 66 N. Y. 119.

15. Boland *v.* Whitman, 33 Ind. 64.

16. *California.*— Quong Tue Sing *v.* Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

Minnesota.— Bradshaw *v.* Philadelphia County F. Ins. Co., 89 Minn. 334, 94 N. W. 866.

Missouri.— Landis *v.* Home Mut. F. & M. Ins. Co., 56 Mo. 591.

New York.— Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

Pennsylvania.— Philadelphia Linen Co. *v.* Manhattan F. Ins. Co., 8 Pa. Dist. 261.

Wisconsin.— Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059.

See 28 Cent. Dig. tit. "Insurance," § 498 *et seq.*

17. *Illinois.*— Larsen *v.* Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31 [*affirming* 108 Ill. App. 420].

Michigan.— Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337.

Minnesota.— Bradshaw *v.* Philadelphia County F. Ins. Co., 89 Minn. 334, 94 N. W. 866.

New York.— Springer *v.* Anglo-Nevada Assur. Corp., 11 N. Y. Suppl. 533.

Pennsylvania.—Baldwin *v.* Pennsylvania F. Ins. Co., 206 Pa. St. 248, 55 Atl. 970; Arnfeld *v.* Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. 580.

United States.— Sea Ins. Co. *v.* Johnston, 105 Fed. 286, 44 C. C. A. 477.

See 28 Cent. Dig. tit. "Insurance," § 498 *et seq.*

A waiver made under a mistake is not effectual as a waiver. Quong Tue Sing *v.* Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

Any ratification of an attempted but defective cancellation is ineffectual unless made with knowledge of the material facts. Larsen *v.* Thuringia American Ins. Co., 208 Ill. 166,

where the insured acquiesces in the cancellation a method of cancellation other than that prescribed in the policy may be operative.[18]

b. Return of Premiums. If the policy gives the insurer the right at any time to cancel and return the unearned premium "upon surrender of the policy," or the right to cancel "upon notice," the return of the premium or tender thereof is not a condition precedent.[19] If, however, the return of the unearned premium is a condition for exercising the right of cancellation, a failnre to return or tender the premium renders the attempted cancellation nugatory;[20] but even here the premiums need not be returned if the insured has temporarily,[21] or absolutely, waived the requirement,[22] and whether or not there has been a waiver is a question of fact.[23] In case the premium has not been actually paid, no tender of unearned premium is necessary,[24] nor is it when the premium has

70 N. E. 31; Aachen, etc., F. Ins. Co. *v.* Crawford, 199 Ill. 367, 65 N. E. 134 [*affirming* 100 Ill. App. 454].

18. Hopkins *v.* Phœnix Ins. Co., 78 Iowa 344, 43 N. W. 197; Van Tassel *v.* Greenwich Ins. Co., 72 Hun (N. Y.) 141, 25 N. Y. Suppl. 301.

19. *Illinois.*— Newark F. Ins. Co. *v.* Sammons, 11 Ill. App. 230.

New York.— Backus *v.* Exchange F. Ins. Co., 26 N. Y. App. Div. 91, 49 N. Y. Suppl. 677; Walthear *v.* Pennsylvania F. Ins. Co., 2 N. Y. App. Div. 328, 37 N. Y. Suppl. 857.

Ohio.— Phœnix Mut. F. Ins. Co. *v.* Brecheisen, 50 Ohio St. 542, 35 N. E. 53.

Pennsylvania.—Arnfeld *v.* Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. 580.

United States.— Schwarzschild, etc., Co. *v.* Phœnix Ins. Co., 124 Fed. 52, 59 C. C. A. 572 [*affirming* 115 Fed. 653].

See 28 Cent. Dig. tit. "Insurance," § 509 *et seq.*

20. *Arkansas.*—Ætna Ins. Co. *v.* Rosenberg, 62 Ark. 507, 36 S. W. 908; Southern Ins. Co. *v.* Williams, 62 Ark. 382, 35 S. W. 1101.

California.— Quong Tue Sing *v.* Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

Georgia.— Hollingsworth *v.* Germania F. Ins. Co., 45 Ga. 294, 12 Am. Rep. 579.

Illinois.— Peoria M. & F. Ins. Co. *v.* Botto, 47 Ill. 516; Peterson *v.* Hartford F. Ins. Co., 87 Ill. App. 567.

Kansas.— Manlove *v.* Commercial Mut. F. Ins. Co., 47 Kan. 309, 27 Pac. 979.

Massachusetts.— White *v.* Connecticut F. Ins. Co., 120 Mass. 330.

Michigan.— Home Ins. Co. *v.* Curtis, 32 Mich. 402.

Missouri.— Chrisman, etc., Banking Co. *v.* Hartford F. Ins. Co., 75 Mo. App. 310.

New York.— Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Van Valkenburgh *v.* Lenox F. Ins. Co., 51 N. Y. 465; Hathorn *v.* Germania Ins. Co., 55 Barb. 28; Tisdell *v.* New Hampshire F. Ins. Co., 11 Misc. 20, 32 N. Y. Suppl. 166.

Pennsylvania.— Philadelphia Linen Co. *v.* Manhattan F. Ins. Co., 8 Pa. Dist. 261; Home Ins. Co. *v.* Tighe, 11 Wkly. Notes Cas. 15.

Texas.— Phœnix Assurance Co. *v.* Munger Improved Cotton Mach. Mfg. Co., 92 Tex. 297, 49 S. W. 222; Hartford F. Ins. Co. *v.* Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Continental Ins. Co. *v.* Busby, 3 Tex. App. Civ. Cas. § 101; Planters' Ins. Co. *v.* Walker Lodge, No. 19, I. O. O. F., 1 Tex. App. Civ. Cas. § 758.

United States.— Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74; Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

Canada.— Grant *v.* Reliance Mut. F. Ins. Co., 44 U. C. Q. B. 229.

See 28 Cent. Dig. tit. "Insurance," § 509 *et seq.*

The statement that a premium is "at the call" of the insured is not sufficient. Van Valkenburgh *v.* Lenox F. Ins. Co., 51 N. Y. 465. This is true under the New York standard policy. Tisdell *v.* New Hampshire F. Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. But it has been denied under policies requiring the surrender of the policy by the insured as a condition precedent to the repayment of the unearned premium. Walthear *v.* Pennsylvania F. Ins. Co., 2 N. Y. App. Div. 328, 37 N. Y. Suppl. 857.

Under the New York standard policy return or tender of the unearned premium is necessary, and a mere notice that it will be returned is insufficient. Tisdell *v.* New Hampshire F. Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765.

When an agent has issued a policy to himself, and the insurer on that ground desires to cancel the policy, tender of the premium is a prerequisite. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

21. Bingham *v.* Insurance Co. of North America, 74 Wis. 498, 43 N. W. 494.

22. Ætna Ins. Co. *v.* Weissinger, 91 Ind. 297; Hopkins *v.* Phœnix Ins. Co., 78 Iowa 344, 43 N. W. 197; Kirby *v.* Phœnix Ins. Co., 13 Lea (Tenn.) 340.

23. Kirby *v.* Phœnix Ins. Co., 13 Lea (Tenn.) 340.

24. As when the only payment is credit extended to the broker (Stone *v.* Franklin F. Ins. Co., 105 N. Y. 543, 12 N. E. 45); or when the premium note is unpaid (Little *v.* Eureka F. & M. Ins. Co., 38 Ohio St. 110; Mueller *v.* South Side F. Ins. Co., 87 Pa. St. 399); but the note if not returned must be credited with the unearned premium (Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint)

been paid after the proper steps for cancellation have been taken.[25] Payment to the agent of the insured is sufficient,[26] but the insurer takes the risk in paying to an agent as to whether the agency is still subsisting.[27] If one policy is surrendered to be replaced by the issuance of a new policy, the cancellation is not completed until the new policy is executed.[28]

c. Mistake or Fraud. A cancellation procured or perfected through fraud or mistake does not bar the insured from asserting rights under his policy.[29]

d. Waiver of Defects. Even though the cancellation has not been properly accomplished the insured may with full knowledge[30] waive the defective cancellation and become bound thereby.[31]

e. Notice — (i) *Insured Entitled to.* The insured is entitled to notice of the fact that his policy is canceled, and cancellation is not effectual until the notice has been given.[32]

285, 4 Am. L. Rec. 228); and a crediting of the unearned premium on a debt owed insurer by insured is not sufficient (Lattan *v.* Royal Ins. Co., 45 N. J. L. 453).

25. Mississippi Valley Manufacturers Mut. Ins. Co. *v.* Bermond, 45 Ill. App. 22.

Retaining premiums at the "short rate."— The insurer canceling a policy for non-payment of premiums is entitled to recover or retain premiums at the "short rate" while the risk was being carried. Hibernia Ins. Co. *v.* Blanks, 35 La. Ann. 1175.

26. Ackerson *v.* Svea Assur. Co., 75 Minn. 135, 77 N. W. 419.

27. Vanderslice *v.* Royal Ins. Co., 9 Pa. Super. Ct. 233, 43 Wkly. Notes Cas. 381. See cases cited *infra*, note 47 *et seq.* A cancellation was found by the court under peculiar circumstances in Jackson *v.* Philadelphia Fire Assoc., 13 N. Y. St. 257; John R. Davis Lumber Co. *v.* Hartford Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

28. Hickey *v.* Hartford F. Ins. Co., 15 N. Y. App. Div. 224, 44 N. Y. Suppl. 191, 92 Hun 102, 36 N. Y. Suppl. 329; Miller *v.* Fireman's Ins. Co., 54 W. Va. 344, 46 S. E. 181; White *v.* New York Ins. Co., 93 Fed. 161; Poor *v.* Hudson Ins. Co., 2 Fed. 432.

29. Niagara F. Ins. Co. *v.* Raden, 87 Ala. 311, 5 So. 876, 13 Am. St. Rep. 36; Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; Holden *v.* Putnam F. Ins. Co., 46 N. Y. 1, 7 Am. Rep. 287. For a case of alleged mistake see Birnstein *v.* Stuyvesant Ins. Co., 83 N. Y. App. Div. 436, 82 N. Y. Suppl. 140 [*reversing* 39 Misc. 808, 81 N. Y. Suppl. 306]. And *compare* Peterson *v.* Hartford F. Ins. Co., 111 Ill. App. 466; Cassville Roller Mill Co. *v.* Ætna F. Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

30. Quong Tue Sing *v.* Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144; Aachen, etc., F. Ins. Co. *v.* Crawford, 199 Ill. 367, 65 N. E. 134.

31. *Illinois.*— Larsen *v.* Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31. But see Peterson *v.* Hartford F. Ins. Co., 111 Ill. App. 466, holding that the facts did not show ratification of an invalid cancellation.

Indiana.— Ætna Ins. Co. *v.* Weissinger, 91 Ind. 297.

Iowa.— Hopkins *v.* Phœnix Ins. Co., 78 Iowa 344, 43 N. W. 197.

Minnesota.— Bradshaw *v.* Philadelphia County F. Ins. Co., 89 Minn. 334, 94 N. W. 866.

Missouri.— See Cassville Roller Mill Co. *v.* Ætna F. Ins. Co., 105 Mo. App. 146, 79 S. W. 720, holding that the facts did not show a ratification of an invalid cancellation.

New York.— Van Tassel *v.* Greenwich Ins. Co., 72 Hun 141, 25 N. Y. Suppl. 301; Springer *v.* Anglo-Nevada Assur. Corp., 11 N. Y. Suppl. 533.

See 28 Cent. Dig. tit. "Insurance," § 511.

32. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Georgia.— Hollingsworth *v.* Germania F. Ins. Co., 45 Ga. 294, 12 Am. Rep. 579.

Illinois.— Watertown F. Ins. Co. *v.* Rust, 141 Ill. 85, 30 N. E. 772; Peoria M. & F. Ins. Co. *v.* Botto, 47 Ill. 516; Fowler Cycle Works *v.* Western Ins. Co., 111 Ill. App. 631.

Iowa.— Supple *v.* Iowa State Ins. Co., 58 Iowa 29, 11 N. W. 716.

Massachusetts.— White *v.* Connecticut F. Ins. Co., 120 Mass. 330.

Michigan.— Dove *v.* Royal Ins. Co., 98 Mich. 122, 57 N. W. 30; Home Ins. Co. *v.* Curtis, 32 Mich. 402.

Missouri.— Cassville Roller Mill Co. *v.* Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

Nebraska.— German Ins. Co. *v.* Rounds, 35 Nebr. 752, 53 N. W. 660.

New York.— Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202; Van Valkenburgh *v.* Lenox F. Ins. Co., 51 N. Y. 465; Partridge *v.* Milwaukee Mechanics' Ins. Co., 13 N. Y. App. Div. 519, 43 N. Y. Suppl. 632 [*affirmed* in 162 N. Y. 597, 57 N. E. 1119]; McLean *v.* Republic F. Ins. Co., 3 Lans. 421; Hathorn *v.* Germania Ins. Co., 55 Barb. 28; Tisdell *v.* New Hampshire F. Ins. Co., 11 Misc. 20, 32 N. Y. Suppl. 166.

Pennsylvania.—Mauk *v.* Commercial Union Assur. Co., 7 Pa. Super. Ct. 633; Worcester First Nat. F. Ins. Co. *v.* Isett, 11 Wkly. Notes Cas. 558.

Texas — Planters' Ins. Co. *v.* Walker Lodge No. 19, I. O. O. F., 1 Tex. App. Civ. Cas. § 758; Continental Ins. Co. *v.* Busby, 3 Tex. App. Civ. Cas. § 101.

(11) *Sufficiency.* The notice must conform to that specified in the policy,[33] although the insured may waive the requirement of time,[34] and if no notice is prescribed therein a reasonable notice must be given.[35] The notice must be actual and a mere entry on the books of the company[36] or a mere instruction to an agent to cancel is not sufficient.[37] A notice sent by mail but not received,[38] a notice sent but not received until after the loss,[39] or a notice so blurred as to be illegible[40] is not sufficient. The notice should state, not merely an executory intent to cancel,[41] or a threat to cancel if some condition be not complied with,[42] but should convey a knowledge of a present completed cancellation.[43]

United States.— Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

Canada.— Grant *v.* Reliance Mut. F. Ins. Co., 44 U. C. Q. B. 229; Johnson *v.* Provincial Ins. Co., 27 U. C. C. P. 464.

See 28 Cent. Dig. tit. "Insurance," § 501.

And this is true even though the insured is in default. Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

33. *Kansas.*— Manlove *v.* Commercial Mut. F. Ins. Co., 47 Kan. 309, 27 Pac. 979.

Kentucky.— Continental Ins. Co. *v.* Daniel, 78 S. W. 866, 25 Ky. L. Rep. 1501.

New York.— Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055.

Pennsylvania.— Philadelphia Linen Co. *v.* Manhattan F. Ins. Co., 8 Pa. Dist. 261.

Wisconsin.— Wicks *v.* Scottish Union, etc., Ins. Co., 107 Wis. 606, 83 N. W. 781; Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059.

See 28 Cent. Dig. tit. "Insurance," § 502.

When a certain number of days of notice is provided for in the policy, the insurance is not canceled, in the absence of a waiver by the insured, until the expiration of the last hour of the final day. Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810; Wicks *v.* Scottish Union, etc., Ins. Co., 107 Wis. 606, 83 N. W. 781. Notice given the prescribed number of days prior to the loss is sufficient, although the notice was not served that number of days before the date fixed for cancellation in the notice. Philadelphia Linen Co. *v.* Manhattan F. Ins. Co., 8 Pa. Dist. 261; Emmott *v.* Slater Mut. F. Ins. Co., 7 R. I. 562.

34. Larsen *v.* Thuringia American Ins. Co., 208 Ill. 166, 70 N. E. 31; Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337; Arnfeld *v.* Guardian Assur. Co., 172 Pa. St. 605, 34 Atl. 580; Sea Ins. Co. *v.* Johnston, 105 Fed. 286, 44 C. C. A. 477.

35. Hibernia Ins. Co. *v.* Blanks, 35 La. Ann. 1175; Lipman *v.* Niagara F. Ins. Co., 48 Hun (N. Y.) 503, 1 N. Y. Suppl. 384; McLean *v.* Republic F. Ins. Co., 3 Lans. (N. Y.) 421; Karelson *v.* Sun Fire Office, 1 N. Y. Suppl. 387.

The purpose of the notice is to give the insured an opportunity to reinsure himself, and it has been held that such opportunity is had if the notice be given during business hours. Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719.

36. King *v.* Enterprise Ins. Co., 45 Ind. 43.

37. Ætna Ins. Co. *v.* Maguire, 51 Ill. 342; London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

38. Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233; American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373; Mullen *v.* Dorchester Mut. F. Ins. Co., 121 Mass. 171; Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055.

39. Partridge *v.* Milwaukee Mechanics' Ins. Co., 162 N. Y. 597, 57 N. E. 1119 (the letter had been received, but not opened); Worcester First Nat. F. Ins. Co. *v.* Isett, 11 Wkly. Notes Cas. (Pa.) 558.

40. State Ins. Co. *v.* Hale, 1 Nebr. (Unoff.) 191, 95 N. W. 473.

But the notice was considered sufficient when the insurer had directed the agent to terminate the risk, and this direction had been communicated to the insured, although the agent did not state that the policy was canceled, but agreed to continue it for a few days contrary to directions. Springfield F. & M. Ins. Co. *v.* McKinnon, 59 Tex. 507.

41. Newark F. Ins. Co. *v.* Sammons, 110 Ill. 166; Chrisman, etc., Banking Co. *v.* Hartford F. Ins. Co., 75 Mo. App. 310; O'Connell *v.* Fidelity, etc., Co., 87 N. Y. App. Div. 306, 84 N. Y. Suppl. 315; John R. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

42. *Maryland.*— American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

Massachusetts.— Lyman *v.* State Mut. F. Ins. Co., 14 Allen 329.

Missouri.— Gardner *v.* Standard Ins. Co., 58 Mo. App. 611.

Montana.— Savage *v.* Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591.

New York.— Van Tassel *v.* Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365 [*affirming* 72 Hun 141, 25 N. Y. Suppl. 301]; Van Valkenburgh *v.* Lennox F. Ins. Co., 51 N. Y. 465.

Pennsylvania.— Worcester First Nat. F. Ins. Co. *v.* Isett, 11 Wkly. Notes Cas. 558.

United States.— Runkle *v.* Citizens' Ins. Co., 6 Fed. 143; Grace *v.* American Cent. Ins. Co., 10 Fed. Cas. No. 5,649.

See 28 Cent. Dig. tit. "Insurance," § 501.

But the contrary has been held in Bergson *v.* Builders' Ins. Co., 38 Cal. 541; Fabyan *v.* Union Mut. F. Ins. Co., 33 N. H. 203.

43. Van Valkenburgh *v.* Lennox F. Ins. Co., 51 N. Y. 465; Grace *v.* American Cent. Ins. Co., 10 Fed. Cas. No. 5,649. Hence a statement calling attention to the cancellation provision of a policy is not enough. Savage

(III) *To Whom Given*—(A) *In General.* The notice should be given to the party to the contract,[44] that is, to the one liable for the payment of the premium.[45] But if the policy is payable to a mortgagee, notice to him is necessary to cut off his rights.[46]

(B) *To Agent*—(1) Of Insured. If the person to whom notice of the cancellation is given is the agent of the insured and authorized to receive such notice, this is notice to the insured,[47] and a general agent of the insured upon whom has been devolved the duty of attending to matters of insurance is such an authorized agent,[48] but a broker employed by the insured to procure insurance is not.[49]

(2) Of Insurer. The agent of the company who has written the policy is not a proper person to whom such notice can be given,[50] even though he retains the insured's policy with limited authority.[51] A frequent provision in policies is that the agent procuring the policy is the agent of the insured and not of the insurer;

v. Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591. Nor is a notice stating that the company is about to dissolve, accompanied by the levy of an assessment to pay its debts, such a notice as is contemplated. Manlove *v.* Commercial Mut. F. Ins. Co., 47 Kan. 309, 27 Pac. 979; Seamans *v.* Millers' Mut. Ins. Co., 90 Wis. 490, 63 N. W. 1059.

A policy of insurance was canceled when the agent advised the insured to that effect, and that the amount covering the unearned premium would be remitted to him upon receipt of the policy, especially as the amount of the unearned premium was not sufficient to keep the policy alive until the date of the fire. Hamburg-Bremen F. Ins. Co. *v.* Browning, 102 Va. 890, 48 S. E. 2.

44. Taylor *v.* Glenns Falls Ins. Co., 44 Fla. 273, 32 So. 887.

45. Peterson *v.* Hartford F. Ins. Co., 87 Ill. App. 567; Chadbourne *v.* German-American Ins. Co., 31 Fed. 533.

But notice to the mortgagee who is designated as the payee is sufficient in Pennsylvania (Mueller *v.* South Side F. Ins. Co., 87 Pa. St. 399), and in Missouri (Burris *v.* Phœnix Ins. Co., 65 Mo. App. 157).

Notice to a mere trustee holding the policy as collateral is not required. Edwards *v.* Sun Ins. Co., 101 Mo. App. 45, 73 S. W. 886.

46. Lattan *v.* Royal Ins. Co., 45 N. J. L. 453.

Although, as between the mortgagor and subsequent insurers, the latter cannot allege the invalidity of the cancellation because of a want of notice to the mortgagee. Shawnee F. Ins. Co. *v.* Bayha, 8 Kan. App. 169, 55 Pac. 474.

47. Von Wien *v.* Scottish Union, etc., Ins. Co., 54 N. Y. Super. Ct. 276; Royal Ins. Co. *v.* Wight, 55 Fed. 455, 5 C. C. A. 200.

48. *Michigan.*— Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337.

Missouri.— Edwards *v.* Home Ins. Co., 100 Mo. App. 695, 73 S. W. 881.

New York.— Stone *v.* Franklin Ins. Co., 105 N. Y. 543, 12 N. E. 45.

Wisconsin.— Schauer *v.* Queen Ins. Co., 88 Wis. 561, 60 N. W. 994.

United States.— Royal Ins. Co. *v.* Wight, 55 Fed. 455, 5 C. C. A. 200.

See 28 Cent. Dig. tit. "Insurance," § 503.

After termination of agency.— Notice of cancellation served on the insured's agent after the agency between the parties had ceased is ineffectual. Davis Lumber Co. *v.* Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131.

49. *Alabama.*— Insurance Companies *v.* Raden, 87 Ala. 311, 5 So. 876, 13 Am. St. Rep. 36.

California.— Quong Tue Sing *v.* Anglo-Nevada Assur. Corp., 86 Cal. 566, 25 Pac. 58, 10 L. R. A. 144.

Colorado.— British-America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147.

Kansas.— Merchants' Ins. Co. *v.* Shults, 8 Kan. App. 798, 57 Pac. 306.

Michigan.— Snedicor *v.* Citizens' Ins. Co., 106 Mich. 83, 64 N. W. 35.

Minnesota.— Broadwater *v.* Lion F. Ins. Co., 34 Minn. 465, 26 N. W. 455.

Missouri.— Edwards *v.* Sun Ins. Co., 101 Mo. App. 45, 73 S. W. 886; Gardner *v.* Standard Ins. Co., 58 Mo. App. 611; McCartney *v.* State Ins. Co., 45 Mo. App. 373; Rothschild *v.* American Cent. Ins. Co., 5 Mo. App. 596 [*affirmed* in 74 Mo. 41, 41 Am. Rep. 303].

New York.— Hermann *v.* Niagara F. Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197; Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055; Hodge *v.* Security Ins. Co., 33 Hun 583; Von Wein *v.* Scottish Union, etc., Ins. Co., 52 N. Y. Super. Ct. 490.

Pennsylvania.— Scott *v.* Sun Fire Office, 133 Pa. St. 332, 19 Atl. 360.

Texas.— East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 13 S. W. 572.

Wisconsin.— Body *v.* Hartford F. Ins. Co., 63 Wis. 157, 23 N. W. 132.

United States.— White *v.* New York Ins. Co., 93 Fed. 161.

See 28 Cent. Dig. tit. "Insurance," § 503.

50. Snedicor *v.* Citizens' Ins. Co., 106 Mich. 83, 64 N. W. 35; Worcester First Nat. F. Ins. Co. *v.* Isett, 11 Wkly. Notes Cas. (Pa.) 558.

51. British America Assur. Co. *v.* Cooper, 26 Colo. 452, 58 Pac. 592.

such a provision does not, in the majority of jurisdictions, make him an agent to whom notice of cancellation can be given.[52] But if the agent is in fact the agent both of the insurer and the insured, notice of cancellation may be given to him.[53]

3. WHO MAY CANCEL. There is no presumption that a mere soliciting agent has a right to cancel a policy,[54] and in fact he has not such power without express authorization;[55] and, although he possesses such authority, he cannot delegate his power, but only the doing of mere ministerial acts.[56] Where, however, an agent has authority either express or implied to request the cancellation of the policy, the cancellation by the company upon his request is valid.[57]

4. PROOF OF CANCELLATION. The burden of proving that there has been a can-

52. *Alabama.*—Insurance Companies *v.* Raden, 87 Ala. 311, 5 So. 876, 13 Am. St. Rep. 36.

Indiana.— Indiana Ins. Co. *v.* Hartwell, 100 Ind. 566.

Michigan.— Dove *v.* Royal Ins. Co., 98 Mich. 122, 57 N. W. 30.

New York.— Hermann *v.* Niagara F. Ins. Co., 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197.

Virginia.— Mutual Assur. Soc. *v.* Scottish Union, etc., Ins. Co., 84 Va. 116, 4 S. E. 178, 10 Am. St. Rep. 819.

Wisconsin.— Wicks *v.* Scottish Union, etc., Ins. Co., 107 Wis. 606, 83 N. W. 781.

United States.— Grace *v.* American Cent. Ins. Co., 109 U. S. 278, 3 S. Ct. 207, 27 L. ed. 932; Kehler *v.* New Orleans Ins. Co., 23 Fed. 709; Adams *v.* Manufacturers', etc., F. Ins. Co., 17 Fed. 630.

See 28 Cent. Dig. tit. "Insurance," § 503.

Some courts put this on the ground that such a provision is contrary to fact and to public policy, while others assert that it is evidently intended to refer only to the proceedings involved in the issuance of the policy. See cases cited *supra*, this note.

Agent of insurer and not of insured.— In a set of cases consolidated under the title of Parker, etc., Mfg. Co. *v.* Exchange F. Ins. Co., 166 Mass. 484, 44 N. E. 614, the court held that an examination of the facts showed that the insurance broker was the agent of the insured and not of the insurer. See also Newark F. Ins. Co. *v.* Sammons, 11 Ill. App. 230, upholding the validity of such a provision in the policy. And *compare* Karelsen *v.* Sun Fire Office, 122 N. Y. 545, 25 N. E. 921; Lipman *v.* Niagara F. Ins. Co., 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719, and note thereto.

53. Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502. But *compare* Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

Where the insured surrendered her policy to defendant's agent, understanding that it might be canceled, and to enable the agent to reinsure in case of cancellation, it was held that such agent did not become plaintiff's agent, and notice to him of cancellation was insufficient. Mallory *v.* Ohio Farmers' Ins. Co., 90 Mich. 112, 51 N. W. 188.

The insured and his privies are the only persons who can raise the question of the sufficiency of the notice. Shawnee F. Ins. Co. *v.* Bayha, 8 Kan. App. 169, 55 Pac. 474; Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337.

54. Phenix Ins. Co. *v.* Radford, (Nebr. 1903) 93 N. W. 1000.

55. *Alabama.*—Insurance Companies *v.* Raden, 87 Ala. 311, 5 So. 876, 13 Am. St. Rep. 36; Insurance Co. of North America *v.* Forcheimer, 86 Ala. 541, 5 So. 870.

Kentucky.— Commercial Union Assur. Co. *v.* Urbansky, 113 Ky. 624, 68 S. W. 653, 24 Ky. L. Rep. 462.

Maine.— Clark *v.* Insurance Co. of North America, 89 Me. 26, 35 Atl. 1008, 35 L. R. A. 276.

Michigan.— Buick *v.* Mechanics' Ins. Co., 103 Mich. 75, 61 N. W. 337.

United States.— Adams *v.* Manufacturers', etc., F. Ins. Co., 17 Fed. 630.

See 28 Cent. Dig. tit. "Insurance," § 498 *et seq.*

56. Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

On general principles of agency, a mere statement by such soliciting agent that he has the power to cancel does not protect the insured against liability under the contract as to premiums. Phenix Ins. Co. *v.* Radford, (Nebr. 1903) 93 N. W. 1000.

Where an act incorporating an insurance company provides that all policies and other instruments made and signed by the president or any other officer of the company shall be binding, a contract to cancel a policy must be signed by the president or other officer in order to be effectual against the company. Dawes *v.* North River Ins. Co., 7 Cow. (N. Y.) 462; Beatty *v.* Marine Ins. Co., 2 Johns. (N. Y.) 109, 3 Am. Dec. 401; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

57. Fowler Cycle Works *v.* Western Ins. Co., 111 Ill. App. 631.

Possession of an insurance policy by an insurance broker ordinarily confers upon him implied authority to procure its cancellation, but this implication is rebutted where at the time of a request for cancellation by the broker the insurance company is informed that he has ceased to be the agent of the policy-holder. And where an insurance broker has possession of a policy belonging to another, but is the agent of such other only for the purpose of obtaining certain additional insurance and having the form of certain policies changed, he has no implied authority, notwithstanding such possession, to cause a cancellation thereof. Fowler Cycle Works *v.* Western Ins. Co., 111 Ill. App. 631.

cellation rests on the party asserting the same.[58] The general rules governing the admissibility[59] and the weight and sufficiency[60] of evidence apply in proving the cancellation of the policy.

B. Surrender — 1. Right to Surrender. If no right is reserved by the terms of the contract and if there is no statutory requirement[61] giving the insured the right to withdraw, he cannot surrender his policy without the consent of the insurer.[62] But a provision is frequently found in policies allowing the insured to withdraw at his election.[63] Even if the right be not expressly reserved, the insured and the insurer may agree to a surrender.[64]

2. Who Entitled to Surrender. The right reserved in a policy passes to an assignee thereof.[65] A general or authorized agent may surrender for the

58. Mohr, etc., Distilling Co. *v.* Ohio Ins. Co., 13 Fed. 74.

59. See, generally, Evidence. See also Mallory *v.* Ohio Farmers' Ins. Co., 90 Mich. 112, 51 N. W. 188; Brownfield *v.* Phœnix Ins. Co., 35 Mo. App. 54; Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85; Bedell *v.* Commercial Mut. Ins. Co., 3 Bosw. (N. Y.) 147; Duel *v.* Getman, 6 N. Y. St. 397.

60. See, generally, Evidence.

Evidence sufficient to show cancellation see the following cases:

Michigan.— Hillock *v.* Traders Ins. Co., 54 Mich. 531, 20 N. W. 571.

Missouri.— McCartney *v.* State Ins. Co., 33 Mo. App. 652.

New Jersey.— Lattan *v.* Royal Ins. Co., 45 N. J. L. 453.

New York.— Ikeller *v.* Hartford F. Ins. Co., 24 Misc. 136, 53 N. Y. Suppl. 323; Beiermeister *v.* City of London F. Ins. Co., 15 N. Y. Suppl. 433.

Pennsylvania.— Baldwin *v.* Pennsylvania F. Ins. Co., 206 Pa. St. 248, 55 Atl. 970; Columbia Ins. Co. *v.* Masonheimer, 76 Pa. St. 138.

West Virginia.— Miller *v.* Firemen's Ins. Co., 54 W. Va. 344, 46 S. E. 181.

United States.— Sea Ins. Co. *v.* Johnston, 105 Fed. 286, 44 C. C. A. 477.

See 28 Cent. Dig. tit. "Insurance," § 507.

Evidence insufficient to show cancellation see Tucker *v.* Dairy Mut. Ins. Co., 116 Iowa 37, 89 N. W. 37; Hopkins *v.* Phœnix Ins. Co., 78 Iowa 344, 43 N. W. 197; Bradshaw *v.* Philadelphia County F. Ins. Co., 89 Minn. 334, 94 N. W. 866; Winne *v.* Niagara F. Ins. Co., 91 N. Y. 185; Schwarzchild, etc., Co. *v.* Phœnix Ins. Co., 124 Fed. 52, 59 C. C. A. 572.

The return of a premium note and acceptance thereof by the insured amounts to a cancellation. Mansfield *v.* Franklin Furniture Co., 12 Ohio Cir. Ct. 222, 4 Ohio Cir. Dec. 473; Lampasas Hotel, etc., Co. *v.* Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. 1081.

61. See statutory provisions in Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, Wisconsin, and Wyoming. See State Ins. Co. *v.* Farmers' Mut. Ins. Co., 65 Nebr. 34, 90 N. W. 997; Com. *v.* Susquehanna Mut. F. Ins. Co., 14 Pa. Co. Ct. 438. And see also Phœnix Mut. F. Ins. Co. *v.* Brecheisen, 50 Ohio St. 542, 35 N. E. 53, where it was declared that statutes have no application to cases in which the policy is canceled by action of the company.

62. Joshua Hendy Mach. Works *v.* American Steam-Boiler Ins. Co., 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33. It was held, however, at an early day that a member of a mutual company may surrender his policy at any time after alienating the building insured and recover his proportion of the funds of the association at the time of the surrender. Sullivan *v.* Massachusetts Mut. F. Ins. Co., 2 Mass. 318.

Surrender by bailee.— In Stillwell *v.* Staples, 19 N. Y. 401, it was held that where the owner of goods insured by a bailee for services as "held in trust," etc., fails to ratify such insurance as principal, the bailee is at liberty to surrender the policy at any time.

63. *In re* Independent Ins. Co., 13 Fed. Cas. No. 7,015, Holmes 103.

64. Skillern *v.* Continental Ins. Co., (Tenn. Ch. App. 1897) 42 S. W. 180. In Crown Point Iron Co. *v.* Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147, the court determined that a surrender had been effected and distinguished a surrender from a mere inquiry for terms thereof.

After the execution of the premium note and the acceptance of the policy to take place in futuro, it was returned to the company by its agent for correction. The insured then instructed the company to cancel the policy and return his note. The company refused and forwarded the corrected policy, which the insured immediately returned and which was then held by the company. In an action on the premium note, the maker was held not liable. German Ins. Co. *v.* Davis, (Ark. 1889) 12 S. W. 155.

A surrender, although made by mistake, was held final on the insured in Birnstein *v.* Stuyvesant Ins. Co., 39 Misc. (N. Y.) 808, 81 N. Y. Suppl. 306.

Evidence sufficient to justify a finding of a completed surrender see Van Tassel *v.* Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365; Von Wien *v.* Scottish Union, etc., Ins. Co., 118 N. Y. 94, 23 N. E. 123; Jones *v.* Alliance Mut. F. Ins. Co., 174 Pa. St. 438, 34 Atl. 198; Walters *v.* St. Joseph F. & M. Ins. Co., 39 Wis. 489.

65. Fogerty *v.* Philadelphia Trust, etc., Co., 75 Pa. St. 125.

insured,[66] and the insured who has left his policy in the hands of an agent may be estopped to deny that agent's authority to surrender the same.[67] But a mortgagee in possession of the policy has no such authority.[68]

3. Mode of Surrender. No notice of an intention to surrender is necessary.[69] The surrender itself must be made in accordance with any requirements of the policy,[70] or with the statute prescribing the mode.[71] If the surrender has been made to the agent[72] of the insurer the negligence of the agent in failing to notify his principal does not affect the insured.[73]

4. Effect of Surrender — a. In General. On a completed[74] surrender of the policy the contract is terminated.[75]

b. Return of Premiums. On a request for cancellation and return of premiums, the insured's right thereto becomes absolute,[76] provided the policy is surrendered,[77] although the surrender may be complete without the return of the

66. Colby *v.* Cedar Rapids Ins. Co., 66 Iowa 577, 24 N. W. 54; Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85; Head *v.* Providence Ins. Co., 2 Cranch (U. S.) 127, 2 L. ed. 229.

67. Kooistra *v.* Rockford Ins. Co., 122 Mich. 626, 81 N. W. 568.

68. Matter of Moore, 6 Daly (N. Y.) 541; Marrin *v.* Stadacona Ins. Co., 4 Ont. App. 330.

69. Insurance Commissioner *v.* People's F. Ins. Co., 68 N. H. 51, 44 Atl. 82. *Contra*, under statute. See Colby *v.* Cedar Rapids Ins. Co., 66 Iowa 577, 24 N. W. 54.

70. Burmood *v.* Farmers' Union Ins. Co., 42 Nebr. 598, 60 N. W. 905; Backenstoe *v.* O'Neil, 18 Pa. Super. Ct. 55. Unless such mode be waived by the insurer. Farmers' Mut. Ins. Co. *v.* Wenger, 90 Pa. St. 220.

Surrender by bailee.— Where the value of goods, the property of the bailee and covered by the same policy as those of the bailor, exceeded the whole amount insured and the bailee presented no claim for the loss of the bailor's goods, the court found that this was equivalent to an election by the bailee to cancel so much of the policy as covered the goods held by him in trust. Stillwell *v.* Staples, 19 N. Y. 401.

Surrender under conditional agreement.— An insurance company claiming that a policy has been surrendered by an express but conditional agreement must show a fulfilment of the condition and cannot rely partly on such agreement and partly on the right of cancellation fixed in the policy. Queen Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49.

The surrender is not complete until the request reaches the insurer, and in the interim the insured is both protected by the policy from loss (Crown Point Iron Co. *v.* Ætna F. Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147; Skillings *v.* Royal Ins. Co., 4 Ont. L. Rep. 123), and is liable for premiums on the risk carried (Farmers' Mut. Ins. Co. *v.* Phœnix Ins. Co., 65 Nebr. 14, 90 N. W. 1000, 95 N. W. 3).

71. Phœnix Mut. F. Ins. Co. *v.* Brecheisen, 50 Ohio St. 542, 35 N. E. 53.

72. Train *v.* Holland Purchase Ins. Co., 68 N. Y. 208.

73. Crown Point Iron Co. *v.* Ætna Ins. Co., 53 Hun (N. Y.) 220, 6 N. Y. Suppl. 602 [*affirmed* in 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147].

Whether agent procuring policy is agent of insured or of insurer see *supra*, X, A, 2, e, (III).

Whether soliciting agent is authorized to cancel see *supra*, X, A, 3.

74. A surrender may be completed even though the company has not actually canceled the policy. Crown Point Iron Co. *v.* Ætna Ins. Co., 53 Hun (N. Y.) 220, 6 N. Y. Suppl. 602 [*affirmed* in 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147].

Where one policy has been fraudulently substituted for another and such other has been fraudulently surrendered, such surrender is not ratified by bringing a suit on the other policy for a loss subsequently occurring. Peterson *v.* Hartford F. Ins. Co., 111 Ill. App. 466.

75. Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502.

An agent without express authority cannot revive the policy. Hartford F. Ins. Co. *v.* Reynolds, 36 Mich. 502. See also Crown Point Iron Co. *v.* Ætna Ins. Co., 127 N. Y. 608, 28 N. E. 653, 14 L. R. A. 147 [*affirming* 53 Hun 220, 6 N. Y. Suppl. 602].

Upon surrender, a member of a mutual insurance company ceases to be liable for expenses and losses thereafter accruing. Patrons of Industry F. Ins. Co. *v.* Harwood, 64 N. Y. App. Div. 248, 72 N. Y. Suppl. 8.

76. State Ins. Co. *v.* Farmers' Mut. Ins. Co., 65 Nebr. 34, 90 N. W. 997.

But the company is entitled to such time as is necessary to determine the amount of the applicant's liabilities, if any, to the company. State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

A provision in a policy that if it should become void the unearned portion of the premium should be returned on surrender of the policy was held not to prevent the company in a suit upon the policy from resisting recovery, on the ground that the policy was forfeited, and at the same time retaining the premium. Senor *v.* Western Millers' Mut. F. Ins. Co., 181 Mo. 104, 79 S. W. 687.

77. El Paso Reduction Co. *v.* Hartford F. Ins. Co., 121 Fed. 937; Schwarzchild, etc., Co. *v.* Phœnix Ins. Co., 115 Fed. 653.

premiums.[78] Upon a withdrawal and surrender of a policy containing a provision allowing the insured to withdraw at his election the insured is entitled to a return of his premium, less the cost of insurance at the so-called "short rates" during the period that the risk has been carried.[79] The insurer in addition to the "short rates" may retain from the premiums paid its reasonable expenses incurred in writing the policy.[80]

C. Rescission. Prior to the loss the insurer can rescind a contract procured through mistake or fraud,[81] but after a loss has occurred its remedy is at law.[82] Providing he comes in within a reasonable time,[83] the insured may have his contract rescinded for fraud or mistake.[84]

D. Reformation[85]**— 1. For Accident, Fraud, or Mistake —a. In General.** A court of equity on a proper case shown will reform a written contract of insurance on the ground of accident,[86] fraud,[87] or mistake.[88] To justify reformation

78. Van Wert *v.* St. Paul F. & M. Ins. Co., 8 N. Y. App. Div. 107, 40 N. Y. Suppl. 463.

Policy-holders in a mutual company who have paid the entire premium in cash are entitled to a return of unearned premiums or of the cash surrender value of their policies as well as policy-holders who had paid in premium notes. Sullivan *v.* Massachusetts Mut. F. Ins. Co., 2 Mass. 318; Carr *v.* Union Mut. F. Ins. Co., 33 Mo. App. 291.

If the policy has been forfeited by the act of the insured premiums cannot be recovered. Colby *v.* Cedar Rapids Ins. Co., 66 Iowa 577, 24 N. W. 54; Farmers' Mut. Ins. Co. *v.* Home F. Ins. Co., 54 Nebr. 740, 74 N. W. 1101. See also *supra*, V, A, 3, a.

Liability of a mortgagee who has surrendered a policy payable to him, in case of loss, over to the mortgagor for premiums see Parker *v.* Smith Charities, 127 Mass. 499.

79. *In re* Independence Ins. Co., 13 Fed. Cas. No. 7,015, where the meaning of such a stipulation was held to be that the insured on surrendering his policy would allow the insurer to retain such premium as would have been payable according to the short-time rates if he had originally insured for the time during which he had actually been insured.

80. State Ins. Co. *v.* Farmers' Mut. Ins. Co., 65 Nebr. 34, 90 N. W. 997.

What are reasonable expenses is a question of fact (Burlington Ins. Co. *v.* McLeod, 34 Kan. 189, 8 Pac. 124), and includes the commission paid by the insurer to its agent (State Ins. Co. *v.* Horner, 14 Colo. 391, 23 Pac. 788. *Contra*, McKenna *v.* Firemen's Ins. Co., 30 Misc. (N. Y.) 727, 63 N. Y. Suppl. 164).

81. Globe Mut. L. Ins. Co. *v.* Reals, 48 How. Pr. (N. Y.) 502.

82. Imperial F. Ins. Co. *v.* Gunning, 81 Ill. 236.

83. Susquehanna Mut. F. Ins. Co. *v.* Oberholtzer, 172 Pa. St. 223, 32 Atl. 1105, 1108.

What is a reasonable time is a question for the jury. Norton *v.* Gleason, 61 Vt. 474, 18 Atl. 45.

84. Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25; Edmonds' Appeal, 59 Pa. St. 220, but he must unquestionably establish the mistake.

The mistake or discrepancy must be material. Edwards *v.* Farmers' Ins. Co., 74 Ill. 84.

Liability for matured premiums.—One seeking to rescind a contract of fire insurance is liable for any part of the premium that may have matured prior to such rescission. American Ins. Co. *v.* Garrett, 71 Iowa 243, 32 N. W. 356. In Fishbeck *v.* Phenix Ins. Co., 54 Cal. 422, the insurer was held not entitled to retain any premiums when it sought to avoid the policy on the ground of deception.

85. Reformation of instruments generally see Reformation of Instruments.

86. Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442.

87. *Illinois.*— Northfield Farmers' Tp. Mut. F. Ins. Co. *v.* Sweet, 46 Ill. App. 598.

Louisiana.— Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 446, 39 Am. Dec. 542.

Massachusetts.— German American Ins. Co. *v.* Davis, 131 Mass. 316.

Nebraska.— Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483.

New York.— Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Bartholomew *v.* Mercantile Mar. Ins. Co., 34 Hun 263.

Pennsylvania.— Weissenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442.

West Virginia.—Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

United States.— Western Assur. Co. *v.* Ward, 75 Fed. 338, 21 C. C. A. 378.

See 28 Cent. Dig. tit. "Insurance," § 266 *et seq.*

88. *Florida.*— Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887.

Illinois.— German F. Ins. Co. *v.* Gueck, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199; Northfield Farmers' Tp. Mut. F. Ins. Co. *v.* Sweet, 46 Ill. App. 598.

Iowa.— Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530, (1886) 68 N. W. 710; Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185; Barnes *v.* Hekla F. Ins. Co., 75 Iowa 11, 39 N. W. 122, 9 Am. St. Rep. 450; Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539.

Kansas.—Hartford F. Ins. Co. *v.* McCarthy, 69 Kan. 555, 77 Pac. 90.

Louisiana.— Davega *v.* Crescent Mut. Ins.

on the ground of mistake, the mistake must have been mutual,[89] or there must have been mistake on one side and fraud on the other.[90] In case the minds of

Co., 7 La. Ann. 228; Bell *v.* Western M. & F. Ins. Co., 5 Rob. 423, 446, 39 Am. Dec. 542.

Maryland.— Maryland Home F. Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764; Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212.

Massachusetts.— German American Ins. Co. *v.* Davis, 131 Mass. 316.

Mississippi.— Phœnix F. Ins. Co. *v.* Hoffheimer, 46 Miss. 645.

Missouri.— Clem *v.* German Ins. Co., 29 Mo. App. 666.

Nebraska.— Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; Home F. Ins. Co. *v.* Wood, 50 Nebr. 381, 69 N. W. 941.

New Jersey.— Sun Ins. Co. *v.* Greenville Bldg., etc., Assoc., 58 N. J. L. 367, 33 Atl. 962; Miller *v.* Hillsborough Mut. F. Assur. Assoc., 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278.

New York.— Trenton Potteries Co. *v.* Title Guarantee, etc., Co., 176 N. Y. 65, 68 N. E. 132; Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283 [*affirming* 6 Hun 353]; Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263; Bartholomew *v.* Mercantile Mar. Ins. Co., 34 Hun 263; Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. 72 [*affirmed* in 55 N. Y. 657]; New York Ice Co. *v.* North Western Ins. Co., 12 Abb. Pr. 414; Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige 278, 19 Am. Dec. 431; Strong *v.* North American F. Ins. Co., 1 Alb. L. J. 162.

Ohio.— Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Harris *v.* Columbiana County Mut. Ins. Co., 18 Ohio 116, 51 Am. Dec. 448; Mitchell *v.* Ætna Ins. Co., 6 Ohio S. & C. Pl. Dec. 420, 4 Ohio N. P. 386.

Pennsylvania.— Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41; Weisenberger *v.* Harmony F. & M. Ins. Co., 56 Pa. St. 442; Spring Garden Ins. Co. *v.* Scott, 27 Leg. Int. 76.

South Dakota.— Epiphany Roman Catholic Church *v.* German Ins. Co., 16 S. D. 17, 91 N. W. 332.

Texas.— Home Ins., etc., Co. *v.* Lewis, 48 Tex. 622.

West Virginia.—Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

Wisconsin.— Blake Opera House Co. *v.* Home Ins. Co., 73 Wis. 667, 41 N. W. 968; Knox *v.* Lycoming F. Ins. Co., 50 Wis. 671, 7 N. W. 776.

United States.— Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408; Western Assur. Co. *v.* Ward, 75 Fed. 338, 21 C. C. A. 378; Abraham *v.* North German Ins. Co., 40 Fed. 717, 37 Fed. 731, 3 L. R. A. 188; Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 724; Williams *v.* North German Ins. Co., 24 Fed. 625; Fink *v.* Queen Ins. Co., 24 Fed. 318; Brugger *v.* State Invest. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398]; North American Ins. Co. *v.* Whipple, 18 Fed. Cas. No. 10,315, 2 Biss. 418; Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277.

See 28 Cent. Dig. tit. "Insurance," § 266 *et seq.*

89. *Iowa.*— Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530.

Maryland.— Maryland Home F. Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764.

Nebraska.— Home F. Ins. Co. *v.* Wood, 50 Nebr. 381, 69 N. W. 941.

New York.— Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 46 How. Pr. 498, 14 Am. Rep. 249; Dougherty *v.* Lyon F. Ins. Co., 95 N. Y. App. Div. 618, 88 N. Y. Suppl. 1096 [*affirming* 41 Misc. 285, 84 N. Y. Suppl. 10]; Mead *v.* Westchester F. Ins. Co., 3 Hun 608; McHugh *v.* Imperial F. Ins. Co., 48 How. Pr. 230.

Ohio.— Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Elstner *v.* Cincinnati Equitable Ins. Co., 1 Disn. 411, 12 Ohio Dec. (Reprint) 703.

Wisconsin.— Knox *v.* Lycoming F. Ins. Co., 50 Wis. 671, 7 N. W. 776.

See 28 Cent. Dig. tit. "Insurance," § 266 *et seq.*; and cases cited *supra*, note 88.

90. Phœnix F. Ins. Co. *v.* Hoffheimer, 46 Miss. 645; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192. A policy in a mutual company recited that the insurer should be liable according to the terms of the constitution, by-laws, and conditions. Annexed to the policy were a number of by-laws called "Conditions of Insurance." The assignee of the policy was allowed to have reformation so that it should be subject only to such by-laws so annexed, and not to other by-laws not specifically attached. The *rationale* of the case seems to be a misleading of the insured by a partial setting out of the conditions. Miller *v.* Hillsborough Mut. F. Assur. Assoc., 44 N. J. Eq. 224, 10 Atl. 106, 14 Atl. 278.

Mistakes corrected.— A policy may be corrected for mistake as to its term and duration (Mercantile Ins. Co. *v.* Jaynes, 87 Ill. 199; Knox *v.* Lycoming F. Ins. Co., 50 Wis. 671, 7 N. W. 776; North American Ins. Co. *v.* Whipple, 18 Fed. Cas. No. 10,315, 2 Biss. 418); or for mistake in the name of the party insured (Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; German Ins. Co. *v.* Gueck, 31 Ill. App. 151 [*affirmed* in 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835]; Carey *v.* Home Ins. Co., 97 Iowa 619, 66 N. W. 920; Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Sun Ins. Co. *v.* Greenville Bldg., etc., Assoc., 58 N. J. L. 367, 33 Atl. 962; Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Mitchell *v.* Ætna Ins. Co., 6 Ohio S. & C. Pl. Dec. 420, 4 Ohio N. P. 386; Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909; Fink *v.* Queen Ins. Co., 24 Fed. 318; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183), except in the case of misrepresentation (Diffenbaugh

the parties have never met because of the mistake and there has been no agreement upon the subject-matter of the contract, no reformation can be had, for the courts will not make contracts; and this is the usual case presented when the mistake is only on one side.[91] It is not an absolute bar to relief that the mutual mistake may have been one of law,[92] although many cases in other fields than insurance state a contrary rule,[93] and although the most frequent ground for reformation is for a mutual mistake of fact.[94]

b. Proof of Fraud or Mistake. Parol evidence is admissible to prove the fraud or mistake,[95] but the courts exercise their power with extreme caution,[96] and require the clearest proof before granting relief.[97]

c. Negligence of Plaintiff. To justify the reformation of a policy for mistake plaintiff must not have been guilty of negligence causing the mistake,[98] and fur-

v. Union F. Ins. Co., 150 Pa. St. 270, 24 Atl. 745, 30 Am. St. Rep. 805; Schmid *v.* Virginia F. & M. Ins. Co., (Tenn. Ch. App. 1896) 37 S. W. 1013; Snow *v.* National Cotton Oil Co., (Tex. Civ. App. 1896) 34 S. W. 177), A policy may be corrected for misdescription in the premises or interest insured (Kansas Farmers' F. Ins. Co. *v.* Swaindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; Harris *v.* Columbiana County Mut. Ins. Co., 18 Ohio 116, 51 Am. Dec. 448), for mistake caused by the inclusion of terms that should have been omitted (Barnes *v.* Hekla F. Ins. Co., 75 Iowa 11, 39 N. W. 122, 9 Am. St. Rep. 450; Elstner *v.* Cincinnati Equitable Ins. Co., 1 Disn. (Ohio) 411, 12 Ohio Dec. (Reprint) 703), or for mistake caused by failure to include terms agreed upon (Davega *v.* Crescent Mut. Ins. Co., 7 La. Ann. 228; Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. (N. Y.) 72 [*affirmed* in 55 N. Y. 657]; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192).

91. *Indiana.*— Cox *v.* Ætna Ins. Co., 29 Ind. 586.

Kentucky.— Hartford F. Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64.

Missouri.— Clem *v.* German Ins. Co., 29 Mo. App. 666.

New York.— Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249, 46 How. Pr. 498; Cary Mfg. Co. *v.* Merchants' Ins. Co., 42 N. Y. App. Div. 201, 59 N. Y. Suppl. 7; London Assur. Corp. *v.* Thompson, 22 N. Y. App. Div. 64, 47 N. Y. Suppl. 830; Mead *v.* Westchester F. Ins. Co., 3 Hun 608.

Tennessee.— Schmid *v.* Virginia F. & M. Ins. Co., (Ch. App. 1896) 37 S. W. 1013.

Texas.— German Ins. Co. *v.* Daniels, (Civ. App. 1895) 33 S. W. 549.

United States.— Severance *v.* Continental Ins. Co., 21 Fed. Cas. No. 12,680, 5 Biss. 156.

See 28 Cent. Dig. tit. "Insurance," § 266 *et seq.*

If the mistake is a mere error of description and the insurer was aware what the premises were and the nature of the risk, reformation is proper. Kansas Farmers' F. Ins. Co. *v.* Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; Epiphany Roman Catholic Church *v.* German Ins. Co., 16 S. D. 17, 91 N. W. 332; Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909. See also Phenix Ins. Co. *v.* Gebhart, 32 Nebr. 144, 49 N. W. 333.

The pleadings must allege that both parties intended to make a different contract than that consummated. Phenix Ins. Co. *v.* Rogers, 11 Ind. App. 72, 38 N. E. 865.

92. Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539 (where the agent mistakenly told the insured that the term "mortgagee" legally described his interest under a mechanic's lien); Maher *v.* Hibernia Ins. Co., 67 N. Y. 283 (where the term "grocery" was used to describe a building composed of a dwelling and grocery combined, the agent considering that the term used was a sufficient legal designation); Sias *v.* Roger Williams Ins. Co., 8 Fed. 183 (where the mistake of law arose through the error of the insurer's agent who was a lawyer). See also Oliver *v.* Mutual Commercial Mar. Ins. Co., 18 Fed. Cas. No. 10,498, 2 Curt. 277.

93. Hunt *v.* Rousmanier, 1 Pet. (U. S.) 1, 7 L. ed. 27.

94. See Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41. And see cases cited *supra*, note 88 *et seq.*

95. Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; Brugger *v.* State Invest. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304.

96. Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398].

97. Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530; Home F. Ins. Co. *v.* Wood, 50 Nebr. 381, 69 N. W. 941; Shopf *v.* Patrons' Mut. F. Ins. Co., 197 Pa. St. 219, 47 Atl. 201; Blake Opera House Co. *v.* Home Ins. Co., 73 Wis. 667, 41 N. W. 968. And see Boyce *v.* Hamburg-Bremen F. Ins. Co., 24 Pa. Super. Ct. 589. And EVIDENCE, 17 Cyc. 775.

98. Cary Mfg. Co. *v.* Merchants' Ins. Co., 42 N. Y. App. Div. 201, 59 N. Y. Suppl. 7.

Mere failure to read the policy is not such negligence as will defeat plaintiff asking for reformation. Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; Fitchner *v.* Fidelity

thermore he must have acted promptly upon discovery of the mistake for which he seeks to reform the policy.[99]

d. Negligence of Agent. In case the mistake is due to the negligence of the agent of the insurer or to the insurer itself, a satisfactory ground of reformation is presented by the insured,[1] unless the insurer relied upon the mistaken statement as a warranty and the change would affect the nature of the risk.[2]

e. Reformation After Loss. Reformation may be granted even after the loss has occurred.[3]

2. Necessity of Reformation — a. In General. As to whether an action can be maintained at law on the policy without having first had a reformation the practice differs.[4] The insured is not barred from prosecuting his action for reformation because of an action at law brought upon the policy prior to discovery

Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530; Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185; Barnes *v.* Hekla F. Ins. Co., 75 Iowa 11, 39 N. W. 122, 9 Am. St. Rep. 450; Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101. But a delay of three years before bringing suit, plaintiff not having read the policy, was held to bar relief in Okes *v.* Fire Ins. Co., 12 Pa. Co. Ct. 341.

99. McHoney *v.* German Ins. Co., 52 Mo. App. 94; Steinberg *v.* Phœnix Ins. Co., 49 Mo. App. 255. In Wagner *v.* Westchester F. Ins. Co., (Tex. Civ. App. 1898) 48 S. W. 49, the court held plaintiff barred because he had not discovered the mistake for eight months, until after the property was burned. On the other hand it was held in Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530, that even though plaintiff had failed to read the policy at the time it was executed, the subsequent failure of plaintiff to read the same and discover the mistake until after the property was burned, two months after the delivery of the policy, was not laches such as to bar relief. And in general a plaintiff is not guilty of laches simply because of lapse of time, when he has been ignorant of the error. Bidwell *v.* Astor Mut. Ins. Co., 16 N. Y. 263.

1. *Iowa.*— Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185; Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. St. Rep. 539.

Maryland.— Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212.

Missouri.— Harris *v.* Columbiana County Mut. Ins. Co., 18 Ohio 116, 51 Am. Dec. 448.

West Virginia.— Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

Wisconsin.— Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804.

United States.— Brugger *v.* State Invest. Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304.

See 28 Cent. Dig. tit. "Insurance," § 265 *et seq.*

2. Cox *v.* Ætna Ins. Co., 29 Ind. 586; Sykora *v.* Forest City Mut. Ins. Co., 7 Ohio Dec. (Reprint) 372, 2 Cinc. L. Bul. 223.

3. Le Gendre *v.* Scottish Union, etc., Ins. Co., 95 N. Y. App. Div. 562, 88 N. Y. Suppl. 1012; Van Tuyl *v.* Westchester F. Ins. Co., 67 Barb. (N. Y.) 72 [*affirmed* in 55 N. Y. 657]; Home Ins., etc., Co. *v.* Lewis, 48 Tex. 622; Brugger *v.* State Invest Ins. Co., 4 Fed. Cas. No. 2,051, 5 Sawy. 304.

Where an action has been brought on the policy within the time limited therein, a bill for reformation is not barred, although brought after such time, as such bill is not a suit on the policy within the meaning of the limitation. Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 724.

4. It seems to be largely a question of practice in the particular jurisdiction. See cases cited *infra*, this note.

Some courts hold that there is a variance between plea and proof and require the reformation before the action at law on the policy can be maintained. Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; Collins *v.* St. Paul F. & M. Ins. Co., 44 Minn. 440, 46 N. W. 906; Sun Ins. Co. *v.* Greenville Bldg., etc., Assoc., 58 N. J. L. 367, 33 Atl. 962; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, asserting the doctrine that a judgment for the amount due may be sustained in an action seeking reformation and a money judgment thereon, without in terms adjudicating a reformation.

Other courts assert that there is no need of first obtaining reformation, when there is a mere misdescription, but the insurer actually was aware of the real risk carried (Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652; American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524), where the insurer is estopped (Carey *v.* Home Ins. Co., 97 Iowa 619, 66 N. W. 920), or where the insurer has waived a condition (Kansas Farmers' F. Ins. Co. *v.* Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356; Hobkirk *v.* Phœnix Ins. Co., 102 Wis. 13, 78 N. W. 160; Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804). In Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909, a reformation was held unnecessary to permit one not a party to a policy to sue thereon, the theory of undisclosed principal being adopted. In Burke *v.* Niagara F. Ins. Co., 12 N. Y. Suppl. 254 [*affirmed* in 128 N. Y. 668, 29 N. E. 148], when property was insured in the name of the decedent after his death and was subse-

of the mistake.[5] But he cannot maintain the action for a reformation if the preceding action at law amounted to an election to assert the policy as it then stood as representing the real contract.[6]

b. After Modification by Agreement. A mistake may be corrected by mutual agreement[7] of the parties. The transaction then amounts to a reissue of the policy upon the terms intended,[8] and a reformation by the court is not necessary to maintain an action.[9]

3. Incidental Relief. A money judgment may be granted as an incident to and in the same action as that in which reformation is decreed.[10]

XI. Construction and Operation of the Contract.

A. In General — 1. Rules Applicable to Other Contracts. Policies of insurance are written contracts between the parties, and are to be construed by the same rules which are applicable in the construction of other written instruments.[11]

quently assigned to a mortgagee by the executors, no reformation was held necessary to enable a second assignee to maintain suit thereon.

5. Abraham *v.* North German F. Ins. Co., 37 Fed. 731, 3 L. R. A. 188. And see also Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887.

6. Thomas *v.* United Firemen's Ins. Co., 108 Ill. App. 278; Steinbach *v.* Relief F. Ins. Co., 12 Hun (N. Y.) 640.

7. Washington F. Ins. Co. *v.* Davison, 30 Md. 91; Solms *v.* Rutgers F. Ins. Co., 4 Abb. Dec. (N. Y.) 279, 3 Keyes 416, 2 Transcr. App. 227, 5 Abb. Pr. N. S. 201 [*reversing* 8 Bosw. 578].

A correction made by the agent of the insurer is not binding on the insurer unless the agent is given authority therefor, as it is in effect the making of a new contract. Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251; S. S. White Dental Mfg. Co. *v.* Delaware Ins. Co., 105 Fed. 642 [*reversed* in 109 Fed. 334, 48 C. C. A. 382]. And *compare* Laclede Fire-Brick Mfg. Co. *v.* Hartford Steam-Boiler Inspection, etc., Co., 60 Fed. 351, 9 C. C. A. 1. Even the written indorsement of the secretary was held ineffectual in Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101, when the same was made merely at the request of the insured. But a ratification of such an act by the board of directors was held to bind the insurer in Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

A modification of the contract by one party alone does not affect the rights or liabilities of the other party thereto. Even in mutual benefit associations, the modification of the by-laws, although the insured has agreed that they may be amended and be a part of the contract, must not alter a vested right. Farmers' Mut. Hail Ins. Assoc. *v.* Slattery, 115 Iowa 410, 88 N. W. 949.

Acquiescence in a proposed modification must be shown. McLean *v.* American Mut. F. Ins. Co., 122 Iowa 355, 98 N. W. 146.

Consideration.— A modification need rest on no further consideration than the mutual agreement of the parties. Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

Parol modification.— In the absence of a statutory prohibition, inasmuch as a contract of insurance may be created by parol, it may be modified in the same manner, and the fact that the contract is a written one does not prevent its change or enlargement by a subsequent parol agreement. Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143. But this rule is sometimes changed by statute (Simonton *v.* Liverpool, etc., Ins. Co., 51 Ga. 76), or by the by-laws or charter (Halliday *v.* Eureka F. & M. Ins. Co., 7 Ohio Dec. (Reprint) 193, 1 Cinc. L. Bul. 286).

8. Field *v.* Citizens Ins. Co., 11 Mo. 50; Walker *v.* Phœnix Ins. Co., 89 Hun (N. Y.) 333, 35 N. Y. Suppl. 374; Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

9. Fireman's Fund Ins. Co. *v.* Dunn, 22 Ind. App. 332, 53 N. E. 251.

10. Maryland Home F. Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764; Maher *v.* Hibernia Ins. Co., 67 N. Y. 283.

11. *Alabama.*— Mobile Mar. Dock, etc., Ins. Co. *v.* McMillan, 27 Ala. 77.

California.— Wells *v.* Pacific Ins. Co., 44 Cal. 397.

Colorado.— Goodrich *v.* Treat, 3 Colo. 408.

Louisiana.— Wallace *v.* Insurance Co., 4 La. 289.

Ohio.— Miller *v.* Western Farmers' Mut. Ins. Co., 1 Handy 208, 12 Ohio Dec. (Reprint) 105.

Pennsylvania.— Lycoming F. Ins. Co. *v.* Buck, 1 Luz. Leg. Reg. 351.

Vermont.— Farmers' Mut. F. Ins. Co. *v.* Marshall, 29 Vt. 23.

United States.— Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460; Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576.

See 28 Cent. Dig. tit. "Insurance," § 202.

The terms cannot be restricted or enlarged in the absence of litigation and proof of fraud or mistake. Ætna Ins. Co. *v.* Johnson, 11 Bush (Ky.) 587, 21 Am. Rep. 223.

Plain and ordinary sense.— The contract is to be construed according to the plain and ordinary meaning of the language implied. Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42; Stone *v.* Granite State F. Ins. Co., 69 N. H. 438, 45 Atl. 235; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86

2. INTENTION TO BE TAKEN INTO ACCOUNT. Policies should be construed so as to give effect to the evident intention of the parties.[12]

3. LIBERAL CONSTRUCTION IN FAVOR OF INSURED. The policy of insurance, being an instrument prepared by the insurer, should in case of doubt under the general rules be construed strictly against the insurer, who prepares it, and liberally in favor of the insured.[13] This is the rule, even though the intent of the company

Am. Dec. 362; Nelson *v.* Traders' Ins. Co., 86 N. Y. App. Div. 66, 83 N. Y. Suppl. 220; Delaware Ins. Co. *v.* Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

All the terms should be given effect if meaning can be given to them consistent with the general design and object of the instrument. Goss *v.* Citizens' Ins. Co., 18 La. Ann. 97; Stettiner *v.* Granite Ins. Co., 5 Duer (N. Y.) 594.

General words may be aptly restrained according to the subject-matter or person to whom they relate (Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503), or by particular words following (Joel *v.* Harvey, 5 Wkly. Rep. 488).

The provisions of a standard form prescribed by statute are to be construed according to their plain meaning. Hewins *v.* London Assur. Corp., 184 Mass. 177, 68 N. E. 62; Nelson *v.* Traders' Ins. Co., 86 N. Y. App. Div. 66, 83 N. Y. Suppl. 220.

Unintelligible provision.— Where there was a recital in the policy that it was to be "subject to the three fourths value clause," and there was nothing in the policy to indicate the intention with which such clause was inserted, it was held that it could not be given any meaning. Parks *v.* Hartford F. Ins. Co., 100 Mo. 373, 12 S. W. 1058.

12. *Indiana.*— Employers' Liability Assur. Corp. *v.* Light, etc., Co., 28 Ind. App. 437, 63 N. E. 54.

Louisiana.— Bradley *v.* Nashville Ins. Co., 3 La. Ann. 708, 48 Am. Dec. 465.

New York.— Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

Ohio.— Travelers' Ins. Co. *v.* Myers, 62 Ohio St. 529, 57 N. E. 458, 49 L. R. A. 760.

Pennsylvania.— Snyder *v.* Groff, 8 Pa. Dist. 291.

South Carolina.— Cross *v.* Shutliffe, 2 Bay 220, 1 Am. Dec. 645.

United States.— Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576; Mauger *v.* Holyoke Mut. F. Ins. Co., 16 Fed. Cas. No. 9,305, Holmes 287.

See 28 Cent. Dig. tit. "Insurance," § 292 *et seq.*

A reasonable interpretation should be placed upon the policy. Fireman's Ins. Co. *v.* Cecil, 12 Ky. L. Rep. 48, 259. In case of doubt or ambiguity, such fair and reasonable construction should be given as that the contract shall not be avoided for trivial or immaterial matter. Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520; Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396; American Credit Indemnity Co. *v.* Wood, 73 Fed. 81, 19 C. C. A. 264.

Construed most favorably to the insured see *infra*, XII, A, 3.

Intent limited to terms.— The intention of the parties, however, must be sought in the instrument itself. Bell *v.* Firemen's Ins. Co., 5 Rob. (La.) 446; Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Mississippi Mut. Ins. Co. *v.* Ingram, 34 Miss. 215.

13. National F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289; Boyd *v.* Mississippi Home Ins. Co., 75 Miss. 47, 21 So. 708; Connecticut F. Ins. Co. *v.* Jeary, 60 Nebr. 338, 83 N. W. 78, 51 L. R. A. 698; Merrick *v.* Germania F. Ins. Co., 54 Pa. St. 277.

This rule of construction is stated in a variety of ways. For instance that policies of insurance being regarded as commercial instruments (Hearn *v.* New England Mut. Mar. Ins. Co., 11 Fed. Cas. No. 6,301, 3 Cliff. 318) are to be liberally construed for the purpose of sustaining them; and technical objections are not to be favored (Phœnix Ins. Co. *v.* Barnd, 16 Nebr. 89, 20 N. W. 105; Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360). The policy is to be interpreted most strongly against the company (Continental Ins. Co. *v.* Daniel, 78 S. W. 866, 25 Ky. L. Rep. 1501; Keck *v.* Porter, 9 Kulp (Pa.) 428), and most favorably to the insured (Mobile Mar. Dock, etc., Co. *v.* McMillan, 27 Ala. 77; Wells *v.* Pacific Ins. Co., 44 Cal. 397; Travelers' Ins. Co. *v.* Dunlap, 59 Ill. App. 515; Fireman's Fund Ins. Co. *v.* Western Refrigerating Co., 55 Ill. App. 329; Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868; Ætna Ins. Co. *v.* Jackson, 16 B. Mon. (Ky.) 242; Ethington *v.* Dwelling House Ins. Co., 55 Mo. App. 129; Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76; White *v.* Hudson River Ins. Co., 15 How. Pr. (N. Y.) 288; Teutonia F. Ins. Co. *v.* Mund, 102 Pa. St. 89; Hendel *v.* Reverting Fund Assur. Assoc., 2 Pa. Dist. 116; Brink *v.* Merchants', etc., Ins. Co., 49 Vt. 442; Bryan *v.* Peabody Ins. Co., 8 W. Va. 605; American Credit Indemnity Co. *v.* Wood, 73 Fed. 81, 19 C. C. A. 264; Phenix Ins. Co. *v.* Wilcox, etc., Guano Co., 65 Fed. 724, 13 C. C. A. 88; Teutonia Ins. Co. *v.* Boylston Mut. Ins. Co., 20 Fed. 148; Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576).

If there is any doubt or uncertainty under the terms of the policy as to the intent of the parties, it is to be resolved in favor of the insured. Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]; Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810; Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; American Steamship Co. *v.* Indemnity Mut. Mar. Assur. Co., 108 Fed. 421 [*affirmed* in 118 Fed. 1014, 56 C. C. A.

was otherwise.[14] The object of the contract being to afford indemnity, it will be so construed, in case of doubt, as to support rather than defeat the indemnity provided for.[15] But if the terms of the policy are clear and unambiguous, they are to be taken in the plain and ordinary sense, and no construction is necessary.[16]

4. Conditions and Exceptions. Conditions and exceptions are to be strictly construed against the company, and liberally construed in favor of the insured.[17] Stipulations and conditions in the policy are to be so construed if possible as to avoid forfeiture [18] and afford indemnity.[19]

5. General and Specific Provisions. The general terms of the policy give way to the specific provisions contained therein.[20]

56]; Commercial Travelers' Mut. Acc. Assoc. *v.* Fulton, 79 Fed. 423, 24 C. C. A. 654.

If the policy is susceptible of two constructions, that construction is to be adopted which is favorable to the insured. Forest City Ins. Co. *v.* Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161 [*affirming* 77 Ill. App. 413]; Imperial Shale Brick Co. *v.* Jewett, 169 N. Y. 143, 62 N. E. 167; Fenton *v.* Fidelity, etc., Co., 36 Oreg. 283, 56 Pac. 1096, 48 L. R. A. 770; Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460.

14. Cunningham *v.* Union Casualty, etc., Co., 82 Mo. App. 607; Wallace *v.* German-American Ins. Co., 41 Fed. 742.

15. Illinois Mut. Ins. Co. *v.* Hoffman, 31 Ill. App. 295 [*affirmed* in 132 Ill. 522, 24 N. E. 413]; Niagara F. Ins. Co. *v.* Heeman, 81 Ill. App. 678; Phœnix Ins. Co. *v.* Barnd, 16 Nebr. 89, 20 N. W. 105; Cleavenger *v.* Franklin F. Ins. Co., 47 W. Va. 595, 35 N. E. 998; Miller *v.* Citizens' F., etc., Ins. Co., 12 W. Va. 116, 29 Am. Rep. 452.

Warranties in the policy relied on to defeat recovery are to be construed strongly against the company. See *infra*, XII, A, 3, e.

16. Kiesel *v.* Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515; Ripley *v.* Hartford Pass. Assur. Co., 20 Fed. Cas. No. 11,854 [*affirmed* in 16 Wall. 336, 21 L. ed. 469].

17. *Alabama.*— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665; Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399.

Connecticut.— Boon *v.* Aetna Ins. Co., 40 Conn. 575.

Illinois.— Phenix Ins. Co. *v.* Lewis, 63 Ill. App. 228.

Indiana.— Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Kentucky.— Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Fireman's Ins. Co. *v.* Cecil, 12 Ky. L. Rep. 259; Owen *v.* Howard Ins. Co., 9 Ky. L. Rep. 147.

Massachusetts.— Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. 393.

Minnesota.— Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn. 85, 18 Am. Rep. 385.

Missouri.— McCollum *v.* Niagara F. Ins. Co., 61 Mo. App. 352.

New Jersey.— State Ins. Co. *v.* Maackens, 38 N. J. L. 564.

New York.— Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; McLaughlin *v.* Washington County Mut. Ins. Co., 23 Wend. 525.

Pennsylvania.— Western Ins. Co. *v.* Cropper, 32 Pa. St. 351, 75 Am. Dec. 561.

United States.— Kansas City First Nat. Bank *v.* Hartford F. Ins. Co., 95 U. S. 673, 24 L. ed. 563; Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63; Lowenstein *v.* New York Fidelity, etc., Co., 88 Fed. 474; Stout *v.* Commercial Union Assur. Co., 12 Fed. 554, 11 Biss. 309; Sayles *v.* Northwestern Ins. Co., 21 Fed. Cas. No. 12,422, 2 Curt. 610.

See 28 Cent. Dig. tit. "Insurance," § 296 *et seq.*

This rule is subject to another, that words ought to be made subservient to the intent, not the intent subservient to the words. Palmer *v.* Warren Ins. Co., 18 Fed. Cas. No. 10,698, 1 Story 360.

The burden is on the insured to show that the case is not within the exception. Sohier *v.* Norwich F. Ins. Co., 11 Allen (Mass.) 336.

Conditions which affect the validity of the contract prior to the loss, including all statements and representations preceding the contract, should receive a fair construction, according to the intent of the parties; but those conditions which relate to matters after the loss, defining the mode of adjustment and recovery, must receive a more liberal construction in favor of the insured. McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475.

Language importing the intention that an act be done or omitted materially affecting the risk is to be treated as involving an obligation to do or omit the act, unless the insured has reserved the right to change his intention. Bilbrough *v.* Metropolis Ins. Co., 5 Duer (N. Y.) 587.

18. Clay *v.* Phœnix Ins. Co., 97 Ga. 44, 25 S. E. 417; Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843; Henton *v.* Farmers', etc., Ins. Co., 1 Nebr. (Unoff.) 425, 95 N. W. 670; Phœnix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532; Halpin *v.* Insurance Co. of North America, 10 N. Y. St. 345.

19. Woodmen's Acc. Assoc. *v.* Byers, 62 Nebr. 673, 87 N. W. 546, 89 Am. St. Rep. 777, 5 L. R. A. 291; Home Mut. Ins. Co. *v.* Tomkies, 96 Tex. 187, 71 S. W. 812, 814.

Provisions for forfeiture should not be extended beyond the mischief intended to be met. Henton *v.* Farmers', etc., Ins. Co., 1 Nebr. (Unoff.) 425, 95 N. W. 670.

20. German Ins. Co. *v.* Churchill, 26 Ill. App. 206; Mitchell Furniture Co. *v.* Imperial

6. Conflict Between Written and Printed Provisions. The rule well recognized in the construction of contracts, that in case of conflict between written and printed portions of the instrument the writing will be presumed to represent the intent of the parties as against the printed portions, is applicable to policies of insurance.[21] Thus if the printed portion excludes certain articles from the risk, or prohibits their being kept, and the written portion extends the policy to cover property of such character as to necessarily include prohibited articles, the written portion will invalidate the exclusion or prohibition found in the printed portion.[22] The same construction is applied where the printed stipulations as to ownership of the property are inconsistent with the description of the property in the written clause.[23]

B. Stipulations on Margin or Back of Policy, or Attached by Slip. Conditions written or printed on the margin or the back of the policy are to be construed as portions of it if by the terms of the policy they are made part thereof.[24] Provisions or conditions may be incorporated into the policy by

F. Ins. Co., 17 Mo. App. 627; New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537.

21. *Alabama.*— Mobile Mar. Dock, etc., Co. *v.* McMillan, 27 Ala. 77.

Louisiana.— Wallace *v.* Insurance Co., 4 La. 289; Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. 51, 17 Am. Dec. 175; Brooke *v.* Louisiana State Ins. Co., 4 Mart. 640.

Michigan.— Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236, 51 N. W. 367.

Minnesota.— Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

New York.— Benedict *v.* Ocean Ins. Co., 31 N. Y. 389 [*affirming* 1 Daly 8]; Clinton *v.* Hope Ins. Co., 51 Barb. 647; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. 385; Hayward *v.* Northwestern Ins. Co., 19 Abb. Pr. 116.

Vermont.— Mascott *v.* Granite State F. Ins. Co., 68 Vt. 253, 35 Atl. 75.

United States.— Hagan *v.* Scottish Union, etc., Ins. Co., 98 Fed. 129; Stout *v.* Commercial Union Assur. Co., 12 Fed. 554, 11 Biss. 309.

See 28 Cent. Dig. tit. "Insurance," § 301.

If both the written and printed clauses can be given effect, then they will be construed together. Goss *v.* Citizens' Ins. Co., 18 La. Ann. 97; Hayward *v.* Liverpool, etc., L., etc., Ins. Co., 2 Abb. Dec. (N. Y.) 349; Kratzenstein *v.* Western Assur. Co., 53 N. Y. Super. Ct. 505 [*reversed* in 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799]; Seton *v.* Delaware Ins. Co., 21 Fed. Cas. No. 12,675, 2 Wash. 175.

Limitation of rule.— The rule that the written portion of the contract controls the printed portion is subject to the rule that words of exception are to be construed most strongly against the party for whose benefit they are intended. Canton Ins. Office *v.* Woodside, 90 Fed. 301, 33 C. C. A. 63.

22. Liverpool, etc., Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810; Bryant *v.* Poughkeepsie Mut. F. Ins. Co., 21 Barb. (N. Y.) 154.

Articles used in particular business.— If the written portion of the policy covers property to be used in conducting a particular business, articles usually used in conducting such business are included within the risk, although they are excluded by the printed portion of the policy. Haley *v.* Dorchester Mut. F. Ins. Co., 12 Gray (Mass.) 545; Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 37 Atl. 255. Thus, although the printed stipulation prohibits the keeping of benzine, yet, if the written provision covers a stock of goods such as is usually kept for sale in country stores (Tubb *v.* Liverpool, etc., Ins. Co., 106 Ala. 651, 17 So. 615; Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789; Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; Lancaster F. Ins. Co. *v.* Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778), or covers a paint factory in which benzine is necessarily used (Russell *v.* Manufacturers, etc., F. Ins. Co., 50 Minn. 409, 52 N. W. 906; Archer *v.* Merchants' etc., Ins. Co., 43 Mo. 434), the written portion of the policy will control. So a prohibition in the printed portion of the policy of the keeping of gunpowder will be superseded by a written provision in the policy making it cover such a stock of goods as usually includes gunpowder. Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492; Liverpool, etc., Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810. And it is similarly held as to fireworks. Plinsky *v.* Germania F. & M. Ins. Co., 32 Fed. 47. But if the printed provisions can reasonably be applied so as to exclude articles which would otherwise be included by the written description, the exception in the provision will be given effect. Com. *v.* Hide, etc., Ins. Co., 112 Mass. 136, 17 Am. Rep. 72; Vandervolgen *v.* Manchester F. Assur. Co., 123 Mich. 291, 82 N. W. 46; Johnston *v.* Niagara F. Ins. Co., 118 N. C. 643, 24 S. E. 424.

23. Sullivan *v.* Spring Garden Ins. Co., 34 N. Y. App. Div. 128, 54 N. Y. Suppl. 629; West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081; Hagan *v.* Scottish Union, etc., Ins. Co., 186 U. S. 423, 22 S. Ct. 862, 46 L. ed. 1229.

24. *Louisiana.*— Rafel *v.* Nashville M. & F. Ins. Co., 7 La. Ann. 244.

New Jersey.— Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

written or printed slips attached thereto, and will control the printed provisions of the policy.[25]

C. Construing Policy With Application or Other Accompanying Documents. The written application is usually considered a part of the contract, and the policy is to be construed in connection with it.[26] Especially is this so where the proposals and conditions are attached to the policy and delivered with it, even though the policy does not contain any express reference to such papers.[27]

D. Construing Policy With Statutes, Charter, or By-Laws. A contract of insurance is presumed to have been made with reference to existing statutes or

New York.— Burt *v.* Brewers', etc., Ins. Co., 9 Hun 383; Jube *v.* Brooklyn F. Ins. Co., 28 Barb. 412; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75.

Pennsylvania.— Kensington Nat. Bank *v.* Yerkes, 86 Pa. St. 227 [*affirming* 1 Wkly. Notes Cas. 508]; Desilver *v.* State Mut. Ins. Co., 38 Pa. St. 130; Philadelphia Fire Assoc. *v.* Williamson, 26 Pa. St. 196.

United States.— Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,374.

See 28 Cent. Dig. tit. "Insurance," § 305.

Indorsements.— A written indorsement on the back of a policy modifying its terms will control the printed provisions of the policy. Howes *v.* Union Ins. Co., 16 La. Ann. 235; Moore *v.* Perpetual Ins. Co., 16 Mo. 98; Hugg *v.* Augusta Ins., etc., Co., 12 Fed. Cas. No. 6,838, Taney 159. But otherwise if the indorsement is in no way referred to or incorporated into the policy. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257. An indorsement on the back of the policy of the name and place of business of the company is no part of the policy. Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416.

Stipulations in small type, printed on the back of the policy, should not be deemed a part of it to bind the insured, unless it appears that they were brought to his attention or that he was in some way chargeable with knowledge thereof. Sun Mut. Ins. Co. *v.* Crist, 39 S. W. 837, 19 Ky. L. Rep. 305; Bassell *v.* American F. Ins. Co., 2 Fed. Cas. No. 1,094, 2 Hughes 531.

Under a statute requiring the conditions to be stated in the body of the policy, a mere general reference in the body to terms and conditions "hereto annexed, which are hereby made a part of the policy," is not sufficient to incorporate conditions printed on the back. Mullaney *v.* National F. & M. Ins. Co., 118 Mass. 393. But by reference in the body of the policy, schedules or details of regulations printed upon a subsequent page of the instrument, or on its back, may be made parts of the instrument. Eastern R. Co. *v.* Relief F. Ins. Co., 98 Mass. 420.

25. Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159; Couch *v.* Home Protective F. Ins. Co., 32 Tex. Civ. App. 44, 73 S. W. 1077; St. Paul F. & M. Ins. Co. *v.* Kidd, 55 Fed. 238, 5 C. C. A. 88.

26. *Michigan.*—Cronin *v.* Philadelphia Fire Assoc., 123 Mich. 277, 82 N. W. 45.

New Jersey.— Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

New York.—Steward *v.* Phœnix F. Ins. Co., 5 Hun 261; Clinton *v.* Hope Ins. Co., 51 Barb. 647; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75.

North Carolina.— Bobbitt *v.* Liverpool, etc., Ins. Co., 66 N. C. 70, 8 Am. Rep. 494.

Oregon.— Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466.

Pennsylvania.— Norris *v.* Insurance Co. of North America, 3 Yeates 84, 2 Am. Dec. 360.

Tennessee.— Kimbro *v.* Continental Ins. Co., 101 Tenn. 245, 47 S. W. 413.

Texas.— Couch *v.* Home Protective F. Ins. Co., 32 Tex. Civ. App. 44, 73 S. W. 1077; City Drug Store *v.* Scottish Union, etc., Ins. Co., (Civ. App. 1898) 44 S. W. 21.

Virginia.— Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. 585.

See 28 Cent. Dig. tit. "Insurance," § 308.

If the application is referred to in the policy and made part of it, the language of the application will control that used in the policy. Wood *v.* Worsley, 2 H. Bl. 574, 6 T. R. 710, 3 Rev. Rep. 323. And see Oldman *v.* Bewicke, 2 H. Bl. 577 note; Routledge *v.* Burrell, 1 H. Bl. 254; Vezina *v.* Canada F. & M. Ins. Co., 9 Quebec 65.

Insured is entitled to rely on the presumption that the policy corresponds to the application; and his failure to read the policy will not deprive him of the benefit of this presumption. McElroy *v.* British American Assur. Co., 94 Fed. 990, 36 C. C. A. 615.

For the purpose of correcting the policy to conform to the intention of the parties the terms of the application may be taken into account. Phenix Ins. Co. *v.* Lorenz, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495; Lippincott *v.* Insurance Co., 3 La. 546, 23 Am. Dec. 467; Delaware Ins. Co. *v.* Hogan, 7 Fed. Cas. No. 3,765, 2 Wash. 4.

But an application not made by the insured is not binding upon him, although attached to the policy. Susquehanna Mut. F. Ins. Co. *v.* Hallock, 10 Pa. Cas. 386, 14 Atl. 167; Le Bell *v.* Norwich Union F. Ins. Soc., 34 N. Brunsw. 515.

27. Murdock *v.* Chenango County Mut. Ins. Co., 2 N. Y. 210; Duncan *v.* Sun F. Ins. Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

Insurance certificate subject to conditions in open policy.— Where complainants accepted an insurance certificate to insure their crops against fire, subject to all the terms and conditions of a certain open policy in defendant's possession, made a part of the certificate, plaintiffs were bound by the conditions of such open policy, although they had no knowledge thereof. Conner *v.* Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127.

ordinances affecting the contract.[28] The charter or by-laws of the company are to be considered a part of the contract of which the insured will be presumed to have due notice.[29]

E. Evidence to Aid Construction — 1. PAROL.[30] In the absence of ambiguity in the terms of the policy, parol evidence is not admissible to show the understanding of the parties.[31] But if the intent is not clear from the language used, then surrounding circumstances may be shown and considered for the purpose of arriving at the intent.[32]

2. CUSTOM AND USAGE.[33] Known usage of trade may be taken into account in construing the language of the policy;[34] but it is not competent by proof of usage

28. Ritchey *v.* Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341; Montgomery *v.* Whitbeck, 12 N. D. 385, 96 N. W. 327; Flatley *v.* Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828. See also Hartford F. Ins. Co. *v.* Redding, (Fla. 1904) 37 So. 62.

Thus it was held that the ordinance of a city with reference to the alteration and repair of buildings damaged by fire within the fire limit to the extent of fifty per cent of their value was to be taken into account in the construction of a policy covering such building. Larkin *v.* Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286.

29. *Indiana.*— American Ins. Co. *v.* Henley, 60 Ind. 515.

Michigan.— Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Dougl. 124, 43 Am. Dec. 457.

New Jersey.— Miller *v.* Hillsborough Fire Assoc., 42 N. J. Eq. 459, 7 Atl. 895.

New York.— Hyatt *v.* Wait, 37 Barb. 29.

Ohio.— Manufacturers' Fire Assoc. *v.* Lynchburg Drug Mills, 8 Ohio Cir. Ct. 112, 4 Ohio Cir. Dec. 350.

See 28 Cent. Dig. tit. "Insurance," § 312.

But provisions in the charter or by-laws having relation only to the method of conducting the business of the company will not be binding on the insured. Lattomus *v.* Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 254; American Ins. Co. *v.* Stoy, 41 Mich. 385, 1 N. W. 877; Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31, opinion by Lowrie, J.

Subsequent change of by-laws.— Where the by-laws existing at the time the contract was made are expressly referred to in the policy and made part thereof, subsequent changes in such by-laws will not affect the contract (Becker *v.* Farmers' Mut. F. Ins. Co., 48 Mich. 610, 12 N. W. 874; Annan *v.* Hill Union Brewery Co., 59 N. J. Eq. 414, 46 Atl. 563; Northampton County F. Ins. Co. *v.* Connor, 17 Pa. St. 136) unless the insured has agreed to be bound by such subsequent changes (Borgards *v.* Farmers' Mut. Ins. Co., 79 Mich. 440, 44 N. W. 856).

30. Parol evidence generally see EVIDENCE, 17 Cyc. 567 *et seq.*

31. *Georgia.*— Home Ins. Co. *v.* Harrington, 95 Ga. 759, 22 S. E. 666.

Kentucky.— Mudd *v.* German Ins. Co., 56 S. W. 977, 22 Ky. L. Rep. 308.

Louisiana.— Gomila *v.* Hibernia Ins. Co., 40 La. Ann. 553, 4 So. 490.

Maine.— Levy *v.* Merrill, 4 Me. 180.

New York.—Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 23 How. Pr. 448.

Pennsylvania.— Miller *v.* Inter-State Casualty Co., 6 Lack. Leg. N. 62.

United States.— Sias *v.* Roger Williams Ins. Co., 8 Fed. 187.

England.— Hare *v.* Barstow, 8 Jur. 928.

See 28 Cent. Dig. tit. "Insurance," § 313.

The policy being in writing, all prior or contemporaneous proposals or conversation not inserted therein, or embodied by reference, are to be excluded in construing the unambiguous language of the policy. Moore *v.* State Ins. Co., 72 Iowa 414, 34 N. W. 183; Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542.

32. *Minnesota.*— Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584.

Missouri.— Pietri *v.* Seguenot, 96 Mo. App. 258, 69 S. W. 1055.

New York.— New York *v.* Exchange F. Ins. Co., 3 Abb. Dec. 261, 3 Keyes 436, 3 Transcr. App. 206, 34 How. Pr. 103; Fabbri *v.* Mercantile Mut. Ins. Co., 64 Barb. 85; Savage *v.* Howard Ins. Co., 44 How. Pr. 40.

Ohio.— Royal Ins. Co. *v.* Walrath, 17 Ohio Cir. Ct. 509, 9 Ohio Cir. Dec. 699.

Pennsylvania.— McKeesport Mach. Co. *v.* Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. 16; Stacey *v.* Franklin F. Ins. Co., 2 Watts & S. 506.

United States.— Clark *v.* Manufacturers' Ins. Co., 8 How. 235, 12 L. ed. 1061 [*reversing* 5 Fed. Cas. No. 2,829, 2 Woodb. & M. 472]; Poor *v.* Hudson Ins. Co., 2 Fed. 432.

See 28 Cent. Dig. tit. "Insurance," § 313.

Where parol evidence is resorted to for ascertaining the intent of the parties, the construction of the contract in this respect is for the jury. Thompson *v.* Thorne, 83 Mo. App. 241; Hordern *v.* Commercial Union Ins. Co., 56 L. J. P. C. 78, 56 L. T. Rep. N. S. 240.

33. Custom and usage generally see CUSTOMS AND USAGES.

34. *Alabama.*— Fulton Ins. Co. *v.* Milner, 23 Ala. 420.

Louisiana.— Rafel *v.* Nashville M. & F. Ins. Co., 7 La. Ann. 244.

Maine.— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

Maryland.— Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Massachusetts.— Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

New York.— Standard Oil Co. *v.* Triumph Ins. Co., 64 N. Y. 85; Fabbri *v.* Phœnix Ins. Co., 55 N. Y. 129; Wall *v.* Howard Ins. Co.,

to vary the plain terms of the policy itself.[35] Local customs or usages in a particular city cannot be resorted to in the construction of a policy made elsewhere.[36]

3. Construction by Parties. The practical construction put upon the contract by the parties thereto will be binding upon them.[37]

4. Construction by Prior Decisions. Terms used in a policy which have by prior decisions of the court been given a definite meaning will be presumed to have been used in view of such established construction.[38]

F. Construction of Executory Agreements to Insure. Where a binding contract of insurance is made in parol or by the execution of a binding receipt of some kind contemplating the future issuance of a policy,[39] the terms and conditions of the contract are presumed to be those of the usual policy issued by the company, which the insured is bound to assume the company will issue in carrying out its contract;[40] and therefore evidence is admissible to show the form of the usual contract or the form of a previous policy on the same property, there being no indication on the part of the company of any intention to change the terms and conditions of the policy.[41]

G. Place of the Contract, and of Performance. Regardless of the place

14 Barb. 383; New York Belting, etc., Co. *v.* Washington F. Ins. Co., 10 Bosw. 428; Hone *v.* Mutual Safety Ins. Co., 1 Sandf. 137 [*affirmed* in 2 N. Y. 235]; Rankin *v.* American Ins. Co., 1 Hall 682; Coit *v.* Commercial Ins. Co., 7 Johns. 385, 5 Am. Dec. 282.

United States.— Red Wing Mills *v.* Mercantile Mut. Ins. Co., 19 Fed. 115; Winthrop *v.* Union Ins. Co., 30 Fed. Cas. No. 17,901, 2 Wash. 7.

See 28 Cent. Dig. tit. "Insurance," § 314.

35. Hartshorn *v.* Shoe, etc., Dealers' Ins. Co., 15 Gray (Mass.) 240; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385; Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 456, 17 L. ed. 505; Phenix Ins. Co. *v.* Wilcox, etc., Guano Co., 65 Fed. 724, 13 C. C. A. 88.

Usages among merchants should be sparingly resorted to in construction, as they are often founded in mere mistake. Donnell *v.* Columbian Ins. Co., 7 Fed. Cas. No. 3,987, 2 Sumn. 366.

36. *Maine.*— Cobb *v.* Lime Rock F. & M. Ins. Co., 58 Me. 326.

Maryland.— Mason *v.* Franklin F. Ins. Co., 12 Gill & J. 468.

Mississippi.— Natchez Ins. Co. *v.* Stanton, 2 Sm. & M. 340, 41 Am. Dec. 592.

New York.— Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26.

United States.— Insurance Co. of North America *v.* Hibernia Ins. Co., 140 U. S. 565, 11 S. Ct. 909, 35 L. ed. 517.

See 28 Cent. Dig. tit. "Insurance," § 314.

A local usage will not affect the meaning of the terms of the policy, unless both parties knew of such usage and contracted with reference to it. Cook *v.* Loew, 34 Misc. (N. Y.) 276, 69 N. Y. Suppl. 614.

If the policy refers to the usages of a particular city, it will be construed in accordance with those usages only. Union Bank *v.* Union Ins. Co., Dudley (S. C.) 171.

37. People *v.* Commercial Alliance L. Ins. Co., 21 N. Y. App. Div. 533, 48 N. Y. Suppl. 389; Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159.

But a mere statement in an application as to what the understanding of the insured is will not control the legal construction of the terms of the policy. Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 7 S. Ct. 685, 30 L. ed. 740.

38. Davis *v.* Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393; Bargett *v.* Orient Mut. Ins. Co., 3 Bosw. (N. Y.) 385; New York Fidelity, etc., Co. *v.* Lowenstein, 97 Fed. 17, 38 C. C. A. 29, 46 L. R. A. 450 [*affirming* 88 Fed. 474].

39. See *supra*, III, D.

40. See *supra*, III, D, 5.

41. *Alabama.*— Home Ins. Co. *v.* Adler, 71 Ala. 516.

Illinois.— Home Ins. Co. *v.* Favorite, 46 Ill. 263.

Minnesota.— Salisbury *v.* Hekla F. Ins. Co., 32 Minn. 458, 21 N. W. 552.

Missouri.— Duff *v.* Philadelphia F. Assoc., 56 Mo. App. 355.

New York.— De Grove *v.* Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305.

Ohio.— Newark Mach. Co. *v.* Kenton Ins. Co., 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768.

Oregon.— Cleveland Oil, etc., Mfg. Co. *v.* Norwich Union F. Ins. Soc., 34 Oreg. 228, 55 Pac. 435.

Pennsylvania.— Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256, 94 Am. Dec. 65; State F. & M. Ins. Co. *v.* Porter, 3 Grant 123.

Wisconsin.— Ætna Ins. Co. *v.* Northwestern Iron Co., 21 Wis. 458.

See 28 Cent. Dig. tit. "Insurance," § 300.

This rule is applicable whether the suit is brought in equity for specific performance, or directly at law on the agreement for insurance, for damages for breach in failure to issue the policy as agreed. Sproul *v.* Western Assur. Co., 33 Oreg. 98, 54 Pac. 180.

A memorandum of a contract for additional insurance indorsed on a policy previously issued is to be construed as contemplating so far as applicable the terms and conditions of the previous policy. London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650.

of business of the company, the policy is to be construed as to its operation and validity in accordance with the laws of the place where the policy is delivered and accepted.[42] And if the policy provides that it shall not be valid until it is countersigned by its agent, the place where it is thus countersigned and delivered is deemed the place of contract.[43] Nevertheless the contract is to be construed in general with reference to the laws of the state or country where it is made.[44] The place where the property is situated is not controlling; and a company may in its own state make a valid contract as to the insurance of property in another state, without complying with the laws of the latter state, the state where the contract is made, and not the state where the property is situated, being deemed the place of contract.[45] The enforcement of the obligations of the

42. *Massachusetts.*— King Brick Mfg. Co. *v.* Phœnix Ins. Co., 164 Mass. 291, 41 N. E. 277.

New Hampshire.—Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

Pennsylvania.— Watt *v.* Gideon, 8 Pa. Dist. 395, 22 Pa. Co. Ct. 499.

Wisconsin.— Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17.

United States.—Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 124 Fed. 25, 59 C. C. A. 545; Gibson *v.* Connecticut F. Ins. Co., 77 Fed. 561.

Canada.— McLachlan *v.* Ætna Ins. Co., 9 N. Brunsw. 173.

See 28 Cent. Dig. tit. "Insurance," § 293.

In North Carolina the statute provides that all policies of insurance, applications for which are taken within the state, are to be construed in accordance with the laws of the state. Horton *v.* Home Ins. Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717.

43. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Antes *v.* State Ins. Co., 61 Nebr. 55, 84 N. W. 412; Galloway *v.* Standard F. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

Reference to laws of state.— Even though the contract specifies that it is to be construed according to the laws of the state in which the company has its home office for the transaction of business, nevertheless, if finally executed and delivered in another state, the courts of the latter state will not feel bound to look to the laws of the state thus referred to for the purpose of determining questions with reference to its construction and operation. Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 626, 20 L. R. A. 761; Pietri *v.* Seguenot, 96 Mo. 258, 69 S. W. 1055; Summers *v.* Fidelity Mut. Aid Assoc., 84 Mo. App. 605.

Reference to the laws of foreign countries. — By the terms of a policy entered into between parties residing in different jurisdictions, the terms of the contract as to its enforcement may be made dependent on the laws of a jurisdiction expressly specified. Spurrier *v.* La Cloche, [1902] A. C. 446, 71 L. J. P. C. 101, 86 L. T. Rep. N. S. 631, 51 Wkly. Rep. 1. But in the absence of any evidence as to the foreign law, it will be presumed to be the same as the law of the jurisdiction. Huth *v.* New York Mut. Ins. Co., 8 Bosw. (N. Y.) 538; McLachlan *v.* Ætna Ins. Co., 9 N. Brunsw. 173.

44. Thus if an application is sent from one state or country to a company doing business in another, and the application is there accepted, and a policy issued in accordance with such application, the law of the state or country in which the company thus transacts the business will control as to the validity of the contract. State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712; Marden *v.* Hotel Owners' Ins. Co., 85 Iowa 584, 52 N. W. 509, 39 Am. St. Rep. 316; Shiff *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 629; Galloway *v.* Standard F. Ins. Co., 45 W. Va. 237, 31 S. E. 969; Seamans *v.* Knapp-Stout, etc., Co., 89 Wis. 171, 61 N. W. 757, 46 Am. St. Rep. 825, 27 L. R. A. 362; Lamb *v.* Bowser, 14 Fed. Cas. No. 8,008, 7 Biss. 315. And this is true, although the policy, instead of being sent directly to the insured from the office of the company, is sent to an agent of the company, to be delivered to the insured. Commonwealth Mut. F. Ins. Co. *v.* William Knabe, etc., Mfg. Co., 171 Mass. 265, 50 N. E. 516; Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258; Huntley *v.* Merrill, 32 Barb. (N. Y.) 626; Desmazes *v.* Mutual Ben. L. Ins. Co., 7 Fed. Cas. No. 3,821; Wright *v.* Sun Mut. Ins. Co., 30 Fed. Cas. No. 18,095 [*reversed* on other grounds in 23 How. 412, 16 L. ed. 529].

But if some modification of terms is required by the company, the contract is not completed until the policy is delivered to and accepted by the insured, and the place of such delivery and acceptance then becomes the place of contract. Born *v.* Home Ins. Co., 120 Iowa 299, 94 N. W. 849.

A resident of one state may become a member of a mutual company doing business in another state, and be bound by the laws of the state where the company is organized and transacts business. Warner *v.* Delbridge, etc., Co., 110 Mich. 590, 68 N. W. 283, 64 Am. St. Rep. 367, 34 L. R. A. 701; Baker *v.* Spaulding, 71 Vt. 169, 42 Atl. 982.

45. *Arkansas.*— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

contract will be governed by the laws of the state where the contract is to be performed;[46] and the remedy will be administered by the law of the state in which suit is brought.[47]

H. Description of Parties — 1. The Insured. The name of the insured,[48] as a party to the contract, usually appears from the written instrument; but if the designation is imperfect or ambiguous extrinsic evidence may be resorted to, and the contract will be held to apply to the person thus ascertained.[49] In general one who is not the insured cannot have the benefit of the insurance, unless it is stipulated in the policy or is otherwise made to appear that the contract was made for his benefit.[50]

2. Beneficiary. The insurance may be for beneficiaries not specifically named, if otherwise sufficiently described.[51]

Massachusetts.— Commonwealth Mut. F. Ins. Co. *v.* Fairbanks Canning Co., 173 Mass. 161, 53 N. E. 373.

Missouri.— Lumberman's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; Merchants', etc., Ins. Co. *v.* Linchey, 3 Mo. App. 588.

New Jersey.— Northampton Mut. Live Stock Ins. Co. *v.* Tuttle, 40 N. J. L. 476; Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266; Western Massachusetts Mut. F. Ins. Co. *v.* Hilton, 42 N. Y. App. Div. 52, 58 N. Y. Suppl. 996.

Ohio.— In re Andress, 6 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 253.

Vermont.—Baker *v.* Spaulding, 71 Vt. 169, 42 Atl. 982.

Wisconsin.—Seamans *v.* Knapp-Stout, etc., Co., 89 Wis. 171, 61 N. W. 757, 46 Am. St. Rep. 825, 27 L. R. A. 362.

See 28 Cent. Dig. tit. "Insurance," § 293.

A foreign company, having made a contract of insurance in Massachusetts, it was held that such contract would be interpreted by the laws of Massachusetts, although the foreign company had not complied with the statute requiring it to have a general agent within the state. Thwing *v.* Great Western Ins. Co., 111 Mass. 93.

If a policy is not valid in the state where it is executed, it will not be enforced by the courts of another state. Ford *v.* Buckeye State Ins. Co., 6 Bush (Ky.) 133, 99 Am. Dec. 663.

By statute in New Hampshire a company organized in that state must use the standard policy there provided for, but may in other states use a different form of contract. Davis *v.* Ætna Mut. F. Ins. Co., 67 N. H. 218, 34 Atl. 464.

46. Burgess *v.* Alliance Ins. Co., 10 Allen (Mass.) 221; Griswold *v.* Union Mut. Ins. Co., 11 Fed. Cas. No. 5,840, 3 Blatchf. 231.

47. Thompson *v.* Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889. But the place of performance is determined by the location of the property. Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

48. The term "the insured" refers to the person applying for the insurance and entering into the contract therefor, and not to another person to whom the loss may be made payable (Sanford *v.* Mechanics' Mut. F. Ins. Co., 12 Cush. (Mass.) 541); but if the one to whom the loss is made payable is really the contracting party, he is the insured, although the property may belong to another in whose name the policy is ostensibly taken (Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; Sias *v.* Roger Williams Ins. Co., 8 Fed. 187).

49. Clinton *v.* Hope Ins. Co., 45 N. Y. 454. Where the policy was issued to "L. Simon" and in a suit thereon it appeared that a woman claiming as plaintiff was intended by that name, it was held that her recovery would not be defeated by the fact that in the body of the instrument the insured was frequently referred to by the personal pronoun "his." Simon *v.* Home Ins. Co., 58 Mich. 278, 25 N. W. 190. The fact that a corporation is described in a policy slightly different from its legal corporate name will not defeat its recovery under a policy by such corporation. Toledo Linseed Oil Co. *v.* Universal F. Ins. Co., 17 Phila. (Pa.) 304.

50. Farmers' Mut. Ins. Co. *v.* New Holland Turnpike Co., 122 Pa. St. 37, 15 Atl. 563; Johnson *v.* Scottish Union, etc., Ins. Co., 93 Wis. 223, 67 N. W. 416.

51. Thus a policy insuring the estate of "A B, deceased" is valid. Magoun *v.* Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370.

On the other hand it has been held that a recital in the policy designating the "estate of Daniel Ross" as the beneficiary was without legal significance, but might be sustained by parol evidence showing the person intended. Clinton *v.* Hope Ins. Co., 51 Barb. (N. Y.) 647.

A policy for the benefit of the heirs and representatives of a deceased person is valid in favor of the trustee of the property held for their benefit. Savage *v.* Howard Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741.

A policy issued to "S. M. G., agent," sufficiently indicates that the intent is to insure for the benefit of persons not named. Platho *v.* Merchants', etc., Ins. Co., 38 Mo. 248.

A policy taken by a person named as receiver may be sued on by his successor in the receivership. Steel *v.* Phenix Ins. Co., 51 Fed. 715, 2 C. C. A. 463.

Parol evidence.— Where the policy was

I. Description of Subject-Matter — 1. In General. The language of the policy being chosen by the insurer, it should be construed, if practicable, so as to cover the subject-matter intended to be covered.[52] A portion of the description which is false may be disregarded, if enough remains to identify the property; the rule being to support the contract of indemnity when possible.[53] The description in the application may be referred to for the purpose of defining the subject-matter to which the policy relates.[54] Merely clerical errors or mistakes may be corrected even after loss.[55]

2. Location. The location of the property is usually an essential element in the description, and the policy will not be extended to property not within the terms of the description in this respect.[56] The location of personal property is

written in the name of the owner "with a contractor's insurance for 30 days," parol evidence was held to be admissible to show the intention that the insurance was to be for the benefit of the contractor for thirty days, and after that for the benefit of the owner. German F. Ins. Co. *v.* Thompson, 43 Kan. 567, 23 Pac. 608.

52. Ætna Ins. Co. *v.* Jackson, 16 B. Mon. (Ky.) 242; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

The insurer may be presumed to know the meaning of the terms used in designating the subject-matter as acquired by universal or established usage. Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

53. *California.*—Hatch *v.* New Zealand Ins. Co., 67 Cal. 122, 7 Pac. 411.

Illinois.— Zeigler *v.* Clinton Mut. County F. Ins. Co., 84 Ill. App. 442.

Kansas.— American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

Massachusetts.— Heath *v.* Franklin Ins. Co., 1 Cush. 257.

Minnesota.— Schreiber *v.* German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708.

New York.— Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249.

See 28 Cent. Dig. tit. "Insurance," § 338 *et seq.* And see *supra*, XI, A.

But parol evidence is not admissible to change the plain and essential language of the description. Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 801, 5 L. R. A. 638; Fowler *v.* Ætna F. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460.

54. Menk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; Workman *v.* Insurance Co., 2 La. 507, 22 Am. Dec. 141; Coleman *v.* Retail Lumbermen's Ins. Assoc., 77 Minn. 31, 79 N. W. 588; Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50.

The description may limit the insurance to a condition of the property, as a threshing machine "while not in use." Minneapolis Threshing Mach. Co. *v.* Firemen's Ins. Co., 57 Minn. 35, 58 N. W. 819, 47 Am. St. Rep. 572, 23 L. R. A. 576.

55. Woodruff *v.* Columbus Ins. Co., 5 La. Ann. 697; Marsh Oil Co. *v.* Ætna Ins. Co., 79 Mo. App. 21; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169; Shanahan *v.* Agricultural Ins. Co., 6 Pa. Super. Ct. 65.

Authority of agent.— The general agent of the company, having authority to issue policies, has also authority to correct the description of the property insured in order to conform it to the intent of the parties. Warner *v.* Peoria M. & F. Ins. Co., 14 Wis. 318. And such an agent may make the correction even after loss, so that action at law may be maintained on the policy as thus corrected. McLaughlin *v.* American F. Ins. Co., (Iowa 1904) 101 N. W. 765; Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210.

56. *Illinois.*— Liebenstein *v.* Ætna Ins. Co., 45 Ill. 303; Phœnix Ins. Co. *v.* Stewart, 53 Ill. App. 273.

Maine.— Robinson *v.* Pennsylvania Ins. Co., 87 Me. 399, 32 Atl. 996.

Maryland.— Mason *v.* Franklin F. Ins. Co., 12 Gill & J. 468.

Massachusetts.— Mead *v.* Phenix Ins. Co., 158 Mass. 124, 32 N. E. 945; Sampson *v.* Security Ins. Co., 133 Mass. 49; Hews *v.* Atlas Ins. Co., 126 Mass. 389; Heath *v.* Franklin Ins. Co., 1 Cush. 257.

Michigan.— Benton *v.* Farmers' Mut. F. Ins. Co., 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237; North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638.

New York.— Hood *v.* Manhattan F. Ins. Co., 11 N. Y. 532; Liddle *v.* Market F. Ins. Co., 4 Bosw. 179.

Pennsylvania.— Lycoming County Ins. Co. *v.* Updegraff, 40 Pa. St. 311; Line Lexington Ins. Co. *v.* Eastburn, 3 Walk. 88.

United States.— Eddy St. Iron Foundry *v.* Hampden Stock, etc., F. Ins. Co., 8 Fed. Cas. No. 4,277, 1 Cliff. 300; Severance *v.* Continental Ins. Co., 21 Fed. Cas. No. 12,680, 5 Biss. 156.

See 28 Cent. Dig. tit. "Insurance," § 351.

But even as to matter of description, some liberality is exercised in applying the description to the property, so as to carry out the evident intention of the parties, as is illustrated by the following cases.

Massachusetts.— Westfield Cigar Co. *v.* Insurance Co. of North America, 165 Mass. 541, 43 N. E. 504.

Minnesota.— Bergstrom *v.* Farmers' Mut. Ins. Co., 51 Minn. 29, 52 N. W. 980; Soli *v.* Farmers' Mut. Ins. Co., 51 Minn. 24, 52 N. W. 979.

Mississippi.— Boyd *v.* Mississippi Home Ins. Co., 75 Miss. 47, 21 So. 708.

Nebraska.— Omaha F. Ins. Co. *v.* Dufek,

as material a part of its description as the location of buildings; and if the personal property is described as kept or contained in a certain building, its loss will not be covered if destroyed elsewhere.[57] And a removal of the property to another building or location takes it out of the description of the policy.[58]

3. Buildings and Additions. In general the description of a building covers only the single and complete structure, and not separate structures used in connection with it,[59] nor walls or fixtures not constituting a part of the permanent structure.[60] So too it is well settled that the term "buildings and additions"

44 Nebr. 241, 62 N. W. 465; Phenix Ins. Co. *v.* Gebhart, 32 Nebr. 144, 49 N. W. 333.

New York.— Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. 33; Webb *v.* National F. Ins. Co., 2 Sandf. 497.

Canada.— Citizens' Ins, etc., Co. *v.* Lajoie, 4 Montreal Q. B. 362; Cie. d'Assurance Mutuelle *v.* Villeneuve, 2 Montreal Q. B. 89; Rolland *v.* Citizens Ins. Co., 21 L. C. Jur. 262; Rolland *v.* North British, etc., Ins. Co., 14 L. C. Jur. 69.

See 28 Cent. Dig. tit. "Insurance," § 351.

57. Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249; Edwards *v.* Fireman's Ins. Co., 43 Misc. (N. Y.) 354, 87 N. Y. Suppl. 507. Thus the description of the property as on the premises of a certain company was held not to apply to the same property on premises subsequently acquired. Providence, etc., R. Co. *v.* Yonkers F. Ins. Co., 10 R. I. 74; Brandt *v.* Berlin Farmers' Mut. Feuer, etc., Co., 108 Wis. 231, 84 N. W. 180. But it was held that a description of the property as in the "frame stable and carriage house building belonging with" the dwelling of the insured, and on the same lot, covered such property in a frame building afterward erected on the same lot for the same use. Robinson *v.* Pennsylvania F. Ins. Co., 90 Me. 385, 38 Atl. 320. Words of description of the place in which the property is kept, which designated a factory or some such general place of business, may cover goods not in the main building. Liebenstein *v.* Baltic F. Ins. Co., 45 Ill. 301; Blake *v.* Exchange Mut. Ins. Co., 12 Gray (Mass.) 265; Pettit *v.* State Ins. Co., 41 Minn. 299, 43 N. W. 378.

58. Harris *v.* Royal Canadian Ins. Co., 53 Iowa 236, 5 N. W. 124; English *v.* Franklin F. Ins. Co., 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377; Lyons *v.* Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364; Gorman *v.* Hand-in-Hand Ins. Co., Ir. R. 11 C. L. 224.

Extent and limits of rule.— If the property is described as covered by insurance while in a certain building or location "and not elsewhere," the insurance will cover only a loss of the property while in that location. L'Anse *v.* Philadelphia Fire Assoc., 119 Mich. 427, 78 N. W. 465, 75 Am. St. Rep. 410, 43 L. R. A. 838. So if the policy covers machinery while in operation or use in a specified locality, loss of the machinery will not be covered if it occurs while the machinery is stored or in a shop for repairs. Slinkard *v.* Manchester F. Assur. Co., 122 Cal. 595, 55 Pac. 417; Mawhinney *v.* Southern Ins. Co., 98 Cal. 184, 34 Pac. 945, 20 L. R. A. 87. But a removal of the goods described as in a building from one part of the building to another will not affect the insurance. Fair *v.* Manhattan Ins. Co., 112 Mass. 320.

Live stock described as "in barn or in field" will cover animals at large. Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792. However, live stock, vehicles, and the like may be so described that any animals or vehicles within the general description of the policy in a specific barn referred to will be covered by the policy. Springfield F. Ins. Co. *v.* Crozier, 12 Ky. L. Rep. 143; Bradbury *v.* Western Assur. Co., 80 Me. 396, 15 Atl. 34, 6 Am. St. Rep. 219.

Although removal of goods is allowed by the policy, and they are covered in different locations as described, they will not be covered while in transit. Goodhue *v.* Hartford F. Ins. Co., 184 Mass. 41, 67 N. E. 645.

Description of location of personal property as a continuing warranty, breach of which will avoid the contract, see *infra*, XIII, E, 1.

59. *Louisiana.*—Workman *v.* Insurance Co., 2 La. 507, 22 Am. Dec. 141.

Massachusetts.— Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Mead *v.* Phenix Ins. Co., 158 Mass. 124, 32 N. E. 945; White *v.* Springfield Mut. F. Assur. Co., 8 Gray 566.

Michigan.— Hannan *v.* Westchester F. Ins. Co., 81 Mich. 561, 45 N. W. 1122; Hannan *v.* Williamsburgh City F. Ins. Co., 81 Mich. 556, 45 N. W. 1120, 9 L. R. A. 127.

Minnesota.— Broadwater *v.* Lion F. Ins. Co., 34 Minn. 465, 26 N. W. 455.

New Jersey.— A. A. Griffing Iron Co. *v.* Liverpool, etc., Ins. Co., 68 N. J. L. 368, 54 Atl. 409.

New York.— Nelson *v.* Traders' Ins. Co., 86 N. Y. App. Div. 66, 83 N. Y. Suppl. 220; Saunders *v.* Agricultural Ins. Co. of Watertown, 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683; Rickerson *v.* German-American Ins. Co., 85 Hun 266, 32 N. Y. Suppl. 1026.

Pennsylvania.— Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

See 28 Cent. Dig. tit. "Insurance," § 340.

60. Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202; Monteleone *v.* Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784; Hale *v.* Springfield F. & M. Ins. Co., 46 Mo. App. 508; Northrup *v.* Piza, 167 N. Y. 578, 60 N. E. 1117.

But a policy on the "main building" of an asylum was held to cover connected engine

does not cover structures not structurally connected with, and dependent upon, the main building.[61]

4. FIXTURES. The insurance on a building, in the absence of an express exception, covers those things which have by annexation become a part of the realty,[62] but not those things which remain personalty, although they are within the building.[63] But the term "store fixtures" is used to cover fittings, fixtures, furniture, etc., which are peculiarly adapted for use in course of trade, whether they are a part of the realty or not.[64]

5. MANUFACTORIES AND MANUFACTURES. Within the term "manufactory," as used in a policy covering also articles or materials used in the business, all machinery, stock, and material thus used is included.[65]

6. TOOLS AND MACHINERY. Under the head of tools and machinery are included the appliances used in a manufacturing business, whether attached to the building or not.[66]

room, kitchen, and laundry. Ætna Ins. Co. *v.* Atty.-Gen., 18 Can. Sup. Ct. 707.

61. *Kentucky.*— Franklin F. Ins. Co. *v.* Hellerick, 49 S. W. 1066, 20 Ky. L. Rep. 1703.

Massachusetts.— Forbes *v.* American Ins. Co., 164 Mass. 402, 41 N. E. 656.

Minnesota.— Boak Fish Co. *v.* Manchester F. Assur. Co., 84 Minn. 419, 87 N. W. 932; Cargill *v.* Millers', etc., Mut. Ins. Co., 32 Minn. 90, 22 N. W. 6.

Mississippi.— Phenix Ins. Co. *v.* Martin, (1894) 16 So. 417.

New Hampshire.— Marsh *v.* Concord Mut. F. Ins. Co., 71 N. H. 253, 51 Atl. 898; Marsh *v.* New Hampshire F. Ins. Co., 70 N. H. 590, 49 Atl. 88.

New Jersey.— Garrison *v.* Farmers' Mut. F. Ins. Co., 56 N. J. L. 235, 28 Atl. 8.

New York.— Maisel *v.* Philadelphia Fire Assoc., 59 N. Y. App. Div. 461, 69 N. Y. Suppl. 181.

Pennsylvania.— Carpenter *v.* Allemannia F. Ins. Co., 156 Pa. St. 37, 26 Atl. 781.

Wisconsin.— Gross *v.* Milwaukee Mechanics' Ins. Co., 92 Wis. 656, 66 N. W. 712; Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 36 N. W. 594.

United States.— Arlington Mfg. Co. *v.* Norwich Union F. Ins. Co., 107 Fed. 662, 46 C. C. A. 542.

See 28 Cent. Dig. tit. "Insurance," § 341.

But a subsequent addition to a school building was held to be covered by a prior policy on the main building. Meigs *v.* London Assur. Co., 126 Fed. 781.

62. Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355; Niagara F. Ins. Co. *v.* Heenan, 181 Ill. 575, 54 N. E. 1052; West *v.* Farmers' Mut. Ins. Co., 117 Iowa 147, 90 N. W. 523; Phœnix Ins. Co. *v.* Luce, 11 Ohio Cir. Ct. 476, 5 Ohio Cir. Dec. 210.

63. Planters', etc., Ins. Co. *v.* Thurston, 93 Ala. 255, 9 So. 268.

A policy covering fixtures of a saloon does not include chairs. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

A policy on a "grist mill" was held to cover both fixed and movable machinery. Shannon *v.* Gore Dist. Mut. F. Ins. Co., 2 Ont. App. 396.

An exception of decoration to walls and ceilings does not cover the painting of the outside of the building. Sherlock *v.* German-American Ins. Co., 162 N. Y. 656, 57 N. E. 1124.

64. *California.*— Clark *v.* Svea F. Ins. Co., 102 Cal. 252, 36 Pac. 587.

Massachusetts.— Whitemarsh *v.* Conway F. Ins. Co., 16 Gray 359, 77 Am. Dec. 414.

New York.— Banyer *v.* Albany Ins. Co., 85 N. Y. App. Div. 122, 83 N. Y. Suppl. 65.

Washington.— Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

United States.— Thurston *v.* Union Ins. Co., 17 Fed. 127.

See 28 Cent. Dig. tit. "Insurance," § 342.

65. *Illinois.*— Phœnix Ins. Co. *v.* Favorite, 49 Ill. 259; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553.

Kentucky.— Ætna Ins. Co. *v.* Jackson, 16 B. Mon. 242.

Maryland.— Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440; Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382.

Massachusetts.— Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

Michigan.— Cronin *v.* Philadelphia Fire Assoc., 112 Mich. 106, 70 N. W. 448.

Missouri.— American Spelter Co. *v.* Providence Washington Ins. Co., 64 Mo. App. 438.

New York.— Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 44 N. Y. Suppl. 832; Moadinger *v.* Mechanics' F. Ins. Co., 2 Hall 490.

Oregon.— Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

United States.— Spratley *v.* Hartford Ins. Co., 22 Fed. Cas. No. 13,256, 1 Dill. 392.

See 28 Cent. Dig. tit. "Insurance," § 345.

Compare Franklin F. Ins. Co. *v.* Brock, 57 Pa. St. 74, defining the term "manufactory" as used in a fire-insurance policy.

For example material may be included which is not in its nature hazardous (Citizens' Ins. Co. *v.* McLaughlin, 53 Pa. St. 485), but not extrahazardous articles, excluded by the other terms of the policy which are not necessarily or usually used in the business (McFarland *v.* Peabody Ins. Co., 6 W. Va. 425).

66. *Alabama.*— James River Ins. Co. *v.* Merritt, 47 Ala. 387.

Illinois.— Phœnix Ins. Co. *v.* Stewart, 53 Ill. App. 273.

7. Stock and Merchandise. The term "stock" as used in connection with a mercantile business includes articles usually kept for sale in connection with that business,[67] but not articles kept for use, and not for sale.[68]

8. Household Goods and Furniture. The term "household furniture" includes all articles necessary and convenient for housekeeping, such as kitchen furniture, carpets, bedding, and the like.[69]

Massachusetts.— Houghton *v.* Watertown F. Ins. Co., 131 Mass. 300; Lovewell *v.* Westchester F. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671; Seavey *v.* Central Mut. F. Ins. Co., 111 Mass. 540.

Missouri.—Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107.

New York.— Bigler *v.* New York Cent. Ins. Co., 20 Barb. 635.

See 28 Cent. Dig. tit. "Insurance," § 344.

"A threshing outfit" will include a self-feeder. Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266.

Patterns are tools. Ætna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934; Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 51 N. W. 1149; Lovewell *v.* Westchester F. Ins. Co., 124 Mass. 418, 26 Am. Rep. 671.

Rolling-stock.— An insurance on the property of a railroad company includes cars and other rolling-stock, whether in use on its own road or elsewhere.

Illinois.— Phenix Ins. Co. *v.* Belt R. Co., 82 Ill. App. 265.

Massachusetts.— Fitchburg R. Co. *v.* Charlestown Mut. F. Ins. Co., 7 Gray 64.

New York.— Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. 33 [*affirmed* in 41 N. Y. 619].

Texas.— Philadelphia Underwriters *v.* Ft. Worth, etc., R. Co., 31 Tex. Civ. App. 104, 71 S. W. 419.

United States.— Liverpool, etc., Ins. Co. *v.* McNiell, 89 Fed. 131, 32 C. C. A. 173.

67. *Arkansas.*— Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789.

Iowa.— Davis *v.* Anchor Mut. F. Ins. Co., 96 Iowa 70, 64 N. W. 687.

Louisiana.— Rafel *v.* Nashville M. & F. Ins. Co., 7 La. Ann. 244.

Maryland.— Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468.

Massachusetts.— Crosby *v.* Franklin Ins. Co., 5 Gray 504.

Michigan.— Hall *v.* Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524.

New York.— Cook *v.* Loew, 34 Misc. 276, 69 N. Y. Suppl. 614.

North Carolina.— Wilson Drug Co. *v.* Phœnix Assur. Co., 110 N. C. 350, 14 S. E. 790.

Ohio.— Clary *v.* Protection Ins. Co., Wright 228.

Pennsylvania.— West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350.

See 28 Cent. Dig. tit. "Insurance," § 346.

Even extrahazardous articles kept for sale as a part of the usual stock of the business are covered by a policy, although there is special prohibition of the keeping of such articles. Steinbach *v.* La Fayette F. Ins. Co., 54 N. Y. 90; Jones *v.* Fireman's Fund Ins. Co., 51 N. Y. 318; Pindar *v.* Kings County F. Ins. Co., 36 N. Y. 648, 93 Am. Dec. 544. And see *supra*, XI, A, 6.

68. Kent *v.* Liverpool, etc., Ins. Co., 26 Ind. 294, 89 Am. Dec. 463; Burgess *v.* Alliance Ins. Co., 10 Allen (Mass.) 221. But *compare* Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399, holding that under a policy insuring a stock of merchandise consisting of family groceries, lamps, scales, and other merchandise, scales used as store fixtures and not kept for sale were included.

Where a policy was issued to a painter who kept nothing for sale except his own productions, including his paints, oils, brushes, and other merchandise, it was held that this last term covered articles of necessity and convenience. Hartwell *v.* California Ins. Co., 84 Me. 524, 24 Atl. 954.

69. Patrons' Mut. Aid Soc. *v.* Hall, 19 Ind. App. 118, 49 N. E. 279; Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Clarke *v.* Firemen's Ins. Co., 18 La. 431; Summers *v.* Home Ins. Co., 53 Mo. App. 521.

"Household furniture, useful and ornamental" covers a valuable vase. Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473. "Household furniture, useful and ornamental and family stores," includes books and games, writing materials, child's swing, etc. Huston *v.* State Ins. Co., 100 Iowa 402, 69 N. W. 674.

Dental books.— A policy on the furniture, chairs, instruments, etc., in a dental office was held not to include dental books. American F. Ins. Co. *v.* Bell, (Tex. Civ. App. 1903) 75 S. W. 319.

Silver forks and spoons intended for general use are not within the exception of "plate," which is classed with money, bullion, etc. Hanover F. Ins. Co. *v.* Mannasson, 29 Mich. 316.

Wearing apparel.— A policy on wearing apparel does not cover the apparel of a housekeeper. Dwelling House Ins. Co. *v.* Freeman, 10 Ky. L. Rep. 496. Where the policy specified "$800 on household and kitchen furniture, . . . and $—— — on family wearing apparel," it was held that wearing apparel not being put in under separate valuation was included in the eight-hundred-dollar item. German F. Ins. Co. *v.* Seibert, 24 Ind. App. 279, 56 N. E. 686.

But a policy on the furniture of a hotel does not include furniture stored. Continental Ins. Co. *v.* Pruitt, 65 Tex. 125.

9. Crops, Grain, Etc. Insurance on crops includes those growing in the field as well as those harvested.[70]

10. Subsequent Additions to Stock, Furniture, Etc. A policy covering by general terms stock, furniture, fixtures, etc., will include subsequent additions thereto,[71] unless the description is specific, and it is indicated by such description or otherwise that only the property on hand at the time of insurance was intended to be covered.[72]

11. Interest of Insured. The description in the policy usually relates to the property[73] and not to the interest of the insured therein; and if the policy is not invalid by reason of some misdescription or breach of warranty, the insured recovers for a loss of the property, if he had an insurable interest therein at the time of the loss,[74] and unless it is so stipulated the policy will not cover interests other than those of insured.[75] But the policy may be made payable to a third

70. Montgomery County Mut. F. Ins. Co. *v.* De Haven, 2 Pa. Cas. 371, 5 Atl. 65.

"Grain" covers millet hay (Norris *v.* Farmers' Mut. F. Ins. Co., 65 Mo. App. 632); but not baled broom corn from which the seed has been threshed (Reavis *v.* Farmers' Mut. F. Ins. Co., 78 Mo. App. 14).

"Grain in stack" includes stacked grain on a separate tract of land. Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503. Such term covers unthreshed flax raised for seed and not for fiber. Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 7 N. W. 596, 39 Am. Rep. 174.

71. *Alabama.*— Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

Illinois.— Northern Pac. Express Co. *v.* Traders' Ins. Co., 183 Ill. 356, 55 N. E. 702; Phenix Ins. Co. *v.* Belt R. Co., 182 Ill. 33, 54 N. E. 1046; American Cent. Ins. Co. *v.* Rothchild, 82 Ill. 166; Peoria M. & F. Ins. Co. *v.* Anapow, 51 Ill. 283.

Iowa.— Mills *v.* Farmers' Ins. Co., 37 Iowa 400.

Louisiana.— Walton *v.* Louisiana State M. & F. Ins. Co., 2 Rob. 562.

New Hampshire.— Cummings *v.* Cheshire County M. F. Ins. Co., 55 N. H. 457.

New York.— Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337; Whitwell *v.* Putnam F. Ins. Co., 6 Lans. 166; Hooper *v.* Hudson River F. Ins. Co., 15 Barb. 413; New York Gaslight Co. *v.* Mechanics' F. Ins. Co., 2 Hall 108.

Pennsylvania.— Sharpless *v.* Hartford F. Ins. Co., 140 Pa. St. 437, 21 Atl. 451.

Vermont.— Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

See 28 Cent. Dig. tit. "Insurance," § 342 *et seq.*

72. Nappanee Furniture Co. *v.* Vernon Ins. Co., 10 Ind. App. 319, 37 N. E. 1064; Moriarty *v.* U. S. Fire Ins. Co., 19 Tex. Civ. App. 669, 49 S. W. 132; Phœnix Ins. Co. *v.* Dunn, (Tex. Civ. App. 1897) 41 S. W. 109; Mauger *v.* Holyoke Mut. F. Ins. Co., 16 Fed. Cas. No. 9,305, Holmes 287.

73. The policy may be so drawn as to cover not merely the value of the property destroyed, but also earnings and profits (Hayes *v.* Milford Mut. F. Ins. Co., 170 Mass. 492, 49 N. E. 754; Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810; Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918), or the value of the use and occupancy of the property which is lost by its destruction (Tanenbaum *v.* Simon, 40 Misc. (N. Y.) 174, 81 N. Y. Suppl. 655 [*affirmed* in 84 N. Y. App. Div. 642, 82 N. Y. Suppl. 1116]), or liability which falls upon the insured by reason of the loss of the property (Home Ins. Co. *v.* Peoria, etc., R. Co., 178 Ill. 64, 52 N. E. 862; National Filtering Oil Co. *v.* Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473 [*affirming* 34 Hun 556]; Hedger *v.* Union Ins. Co., 17 Fed. 498; Germania F. Ins. Co. *v.* Thompson, 95 U. S. 547, 24 L. ed. 487).

74. Teague *v.* Germania F. Ins. Co., 71 Ala. 473; Bell *v.* Western M. & F. Ins. Co., 5 Rob. (La.) 423, 39 Am. Dec. 542; Fire Ins. Assoc. of England *v.* Merchants', etc., Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

75. *Illinois.*— Hebner *v.* Palatine Ins. Co., 157 Ill. 144, 41 N. E. 627.

Massachusetts.— Monadnock R. Co. *v.* Manufacturers Ins. Co., 113 Mass. 77; Getchell *v.* Ætna Ins. Co., 14 Allen 325.

New Jersey.— Milliken *v.* Woodward, 64 N. J. L. 444, 45 Atl. 796.

New York.— Mead *v.* Mercantile Mut. Ins. Co., 67 Barb. 519; Pitney *v.* Glens Falls Ins. Co., 61 Barb. 335; Wyman *v.* Prosser, 36 Barb. 368.

Pennsylvania.—Smith *v.* Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546.

United States.— Hedger *v.* Union Ins. Co., 17 Fed. 498; Cohn *v.* Virginia F. & M. Ins. Co., 6 Fed. Cas. No. 2,970, 3 Hughes 272.

See 28 Cent. Dig. tit. "Insurance," § 347.

One person may, however, be the sole owner within the terms of the policy, although another has some interest in the property. Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460 [*affirming* 51 Ill. App. 252]; Millaudon *v.* Atlantic Ins. Co., 8 La. 557.

A mortgagee may insure the mortgaged property. Kernochan *v.* New York Bowery F. Ins. Co., 17 N. Y. 428. And see *supra*, II, C, 2, b, (I).

A vendee may insure as owner. Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am.

person as his interest may appear, the interest thus protected being usually that of one who, as creditor holding a lien or otherwise, has become entitled to the proceeds of the insurance,[76] or to "whom it may concern,"[77] the person entitled to the proceeds of the insurance being thus left to be ascertained by facts shown to exist at the time of the loss.[78]

12. Property Held in Trust, or Otherwise, For Another. It is usual[79] for persons engaged in the business of keeping property for others, on account of which they may be liable,[80] to insure such property under policies covering goods held by them "in trust"; but this term does not imply a technical trust, but only possession of property of others, for which the insured may be called on to account.[81] Such insurance is, however, on the goods, and not on the interest of the insured therein; and he may recover the entire value, accounting to the real owner who sees fit to avail himself of the benefit of the insurance for any excess beyond the interest or liability of the insured,[82] although the insurance may

Rep. 96; Rumsey *v.* Phœnix Ins. Co., 1 Fed. 396, 17 Blatchf. 527. And see *supra*, II, C, 2, b, (I).

76. Dakin *v.* Liverpool, etc., Ins. Co., 77 N. Y. 600 [*affirming* 13 Hun 122]; Donaldson *v.* Sun Mut. Ins. Co., 95 Tenn. 280, 32 S. W. 251. And see *supra*, II, C, 2, b, (I).

77. Marine policies made payable "to whom it may concern" see Marine Insurance.

78. Cincinnati Ins. Co. *v.* Rieman, 1 Disn. (Ohio) 396, 12 Ohio Dec. (Reprint) 692; Steele *v.* Franklin Ins. Co., 17 Pa. St. 290.

79. The ordinary policy describing the insured as owner does not cover property thus held in trust, in the absence of some specific provision therefor. Corkery *v.* Security F. Ins. Co., 99 Iowa 382, 68 N. W. 792; Fuller *v.* Phœnix Ins. Co., 61 Iowa 350, 16 N. W. 273; Rafel *v.* Nashville M. & F. Co., 7 La. Ann. 244; Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468; Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20.

80. See cases cited *infra*, note 81 *et seq.* And see *supra*, II, C, 2, b, (I).

Carriers.— Railroad companies and other carriers may thus insure the goods in their possession. Fire Ins. Assoc. *v.* Merchants', etc., Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Com. *v.* Hide, etc., Ins. Co., 112 Mass. 136, 17 Am. Rep. 72; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390.

Cotton pressers.— Those engaged in the business of pressing cotton usually insure the cotton while in their possession, as held in trust. Hope Oil Mill, etc., Co. *v.* Phœnix Assur. Co., 74 Miss. 320, 21 So. 132; Southern Cold Storage, etc., Co. *v.* Dechman, (Tex. Civ. App. 1903) 73 S. W. 545; Germania Ins. Co. *v.* Anderson, 15 Tex. Civ. App. 551, 40 S. W. 200; Missouri, etc., R. Co. *v.* Union Ins. Co., (Tex. Civ. App. 1896) 39 S. W. 975; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730; Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868.

81. *Illinois.*— Home Ins. Co. *v.* Favorite, 46 Ill. 263.

Louisiana.— Millaudon *v.* Atlantic Ins. Co., 8 La. 557.

Maryland.— Hough *v.* People's F. Ins. Co., 36 Md. 398.

Michigan.— Michigan Pipe Co. *v.* Michigan F. & M. Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

New York.— Stillwell *v.* Staples, 19 N. Y. 401 [*affirming* 6 Duer 63].

North Carolina.— Lockhart *v.* Cooper, 87 N. C. 149, 42 Am. Rep. 514.

Pennsylvania.— Roberts *v.* Firemen's Ins. Co., 165 Pa. St. 55, 30 Atl. 450, 44 Am. St. Rep. 642; Siter *v.* Morrs, 13 Pa. St. 218.

Texas.— Southern Cold Storage, etc., Co. *v.* Dechman, (Civ. App. 1903) 73 S. W. 545.

See 28 Cent. Dig. tit. "Insurance," § 350.

Floating policies.— Such policies are termed "floating policies," and cover property belonging to other persons coming into the possession of the insured in trust after the issuance of the policy. Smith *v.* Carmack, (Tenn. Ch. App. 1901) 64 S. W. 372.

Such policies frequently exclude liability for loss of goods which are covered by specific policies. Macon F. Ins. Co. *v.* Powell, 116 Ga. 703, 43 S. E. 73; United Underwriters' Ins. Co. *v.* Powell, 94 Ga. 359, 21 S. E. 565; Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 44 N. E. 746 [*reversing* 55 Ill. App. 329].

82. *Louisiana.*— Lambeth *v.* Western M. & F. Ins. Co., 11 Rob. 82.

Massachusetts.— Johnson *v.* Campbell, 120 Mass. 449.

New York.— Savage *v.* Corn Exch. F., etc., Ins. Co., 4 Bosw. 1; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490.

Pennsylvania.— Pittsburgh Storage Co. *v.* Scottish Union, etc., Ins. Co., 168 Pa. St. 522, 32 Atl. 58.

West Virginia.— Lucas *v.* Liverpool, etc., Ins. Co., 23 W. Va. 258, 48 Am. Rep. 383.

United States.— Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868; Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 41 Fed. 271; Robbins *v.* Fireman's Fund Ins. Co., 20 Fed. Cas. No. 11,881, 16 Blatchf. 122.

See 28 Cent. Dig. tit. "Insurance," § 350.

Further, as to recovery under such a policy by the insured for the benefit of the owner, see *infra*, XIX, A, 7.

be so taken as to cover only the liability of the insured and preclude any recovery by him for the benefit of the owner.[83]

13. Partnership Property. A partner who insures the partnership property[84] in his own name, without any stipulation or understanding that the insurance is for the benefit of the firm or his copartner, is presumed to have insured only his own interest in the property.[85]

14. Mortgaged Property. The mortgagor and the mortgagee each has an insurable interest, and may insure the property in his own name,[86] and the policy will be construed as insurance of the property for the benefit of the insured, whether he be mortgagor or mortgagee, unless it is otherwise stipulated.[87]

15. Evidence to Aid Description. Parol evidence[88] is not usually admissible for the purpose of extending the policy to cover property not included in the description;[89] but it may be received for the purpose of applying the description to property intended to be described.[90] And where general terms, such as "the contents of a building,"[91] or "property held in trust,"[92] or the kind of goods usually kept in the particular stock described,[93] are used parol evidence may be received to identify the property. Proof of custom or usage[94] cannot be received to show that it was intended that a policy made in the name of a particular person should protect the interests of another person.[95]

J. Description of Amount of Insurance — 1. Open or Valued Policies. Fire policies[96] are generally written so that the liability of the company is

83. Parks *v.* General Interest Assur. Co., 5 Pick. (Mass.) 34; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 55 Minn. 236, 56 N. W. 815, 22 L. R. A. 390.

84. See *supra*, II, C, 2, b, (IV).

85. *Maine.*— Bailey *v.* Hope Ins. Co., 56 Me. 474.

Maryland.— Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; Baltimore F. Ins. Co. *v.* McGowan, 16 Md. 47.

Massachusetts.— Clement *v.* British America Assur. Co., 141 Mass. 298, 5 N. E. 847.

Michigan.— Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202.

New York.— Germania F. Ins. Co. *v.* Home Ins. Co., 144 N. Y. 195, 39 N. E. 77, 43 Am. St. Rep. 749, 26 L. R. A. 591; Burgher *v.* Columbian Ins. Co., 17 Barb. 274.

Vermont.— Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

See 28 Cent. Dig. tit. "Insurance," § 348.

86. See *supra*, II, C, 2, b, (I).

87. *Illinois.*— Honore *v.* Lamar F. Ins. Co., 51 Ill. 409.

Louisiana.— Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238.

Massachusetts.— Williams *v.* Roger Williams Ins. Co., 107 Mass. 377, 9 Am. Rep. 41.

New York.— Weed *v.* Hamburg-Bremen F. Ins. Co., 61 Hun 110, 15 N. Y. Suppl. 429; Creighton *v.* Homestead F. Ins. Co., 17 Hun 78; Ulster County Sav. Inst. *v.* Decker, 11 Hun 515; Smith *v.* Exchange F. Ins. Co., 40 N. Y. Super. Ct. 492; Weed *v.* Philadelphia F. Assoc., 17 N. Y. Suppl. 206 [*affirmed* in 137 N. Y. 567, 33 N. E. 339]; Traders' Ins. Co. *v.* Robert, 9 Wend. 404.

Washington.— Washington Nat. Bank *v.* Smith, 15 Wash. 160, 45 Pac. 736.

See 28 Cent. Dig. tit. "Insurance," § 349.

88. Parol evidence generally see Evidence, 17 Cyc. 567 *et seq.*

89. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594; Fuller *v.* Phœnix Ins. Co., 61 Iowa 350, 16 N. W. 273; Holmes *v.* Charlestown Mut. F. Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428; North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638.

90. *Iowa.*— Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652.

Massachusetts.— Westfield Cigar Co. *v.* Teutonic Ins. Co., 169 Mass. 382, 47 N. E. 1026.

New York.— Lee *v.* Adsit, 37 N. Y. 78; Burr *v.* Broadway Ins. Co., 16 N. Y. 267.

Ohio.— Harris *v.* Ætna Ins. Co., 1 Cinc. Super. Ct. 361.

Pennsylvania.— Stacey *v.* Franklin F. Ins. Co., 2 Watts & S. 506; Spring Garden Ins. Co. *v.* Scott, 27 Leg. Int. 76.

See 28 Cent. Dig. tit. "Insurance," § 354.

91. Wheeler *v.* Traders' Ins. Co., (N. H. 1885) 1 Atl. 293; Graybill *v.* Penn. Tp. Mut. F. Ins. Assoc., 170 Pa. St. 75, 32 Atl. 632, 50 Am. St. Rep. 747, 29 L. R. A. 55; Eakin *v.* Home Ins. Co., 1 Tex. App. Civ. Cas. § 1234.

92. Bramstein *v.* Crescent Mut. Ins. Co., 24 La. Ann. 589; Lowell Mfg. Co. *v.* Safeguard F. Ins. Co., 88 N. Y. 591; Lee *v.* Adsit, 37 N. Y. 78; Richardson *v.* Home Ins. Co., 47 N. Y. Super. Ct. 138.

93. Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281; Mascott *v.* Granite State F. Ins. Co., 68 Vt. 253, 35 Atl. 75.

94. Custom or usage generally see Customs and Usages.

95. Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80.

96. Policies of marine insurance, on the contrary, usually fix the amount to be paid in the event of loss, leaving no occasion for inquiry as to the value of the property at the

dependent upon the amount of the loss, to be determined after the loss has occurred, and the valuation of the property in the application or policy does not fix the liability of the company, even in case of total loss.[97] Such policies are called "open policies."[98] However, by an open policy is also sometimes meant, in the United States, one in which an aggregate amount is expressed in the body of the policy, and the specific amounts and subjects are to be indorsed from time to time.[99] On the other hand, by special provision in the policy, the loss may be valued so that the liability is fixed;[1] as in the case of a policy in which the amount payable in case of loss is fixed by the terms of the policy itself,[2] in which the value of the subject-matter insured is agreed upon by the parties,[3] or in which both the property insured and the loss are valued, and which bind the insurer to pay the whole sum insured, in case of total loss.[4] In such cases the policies are

time of loss, in the absence of fraud. See MARINE INSURANCE. See also Haven *v.* Gray, 12 Mass. 71.

97. Wallace *v.* Insurance Co., 4 La. 289; Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 367; Williams *v.* Continental Ins. Co., 24 Fed. 767; Luce *v.* Springfield F. & M. Ins. Co., 15 Fed. Cas. No. 8,589, 1 Flipp. 281. And see *infra*, XVI, A, 1 *et seq.*

98. Riggs *v.* Home Mut. F. Protection Assoc., 61 S. C. 448, 39 S. E. 614; Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

Other definitions of an "open policy" are: "[A policy] in which the sum to be paid as indemnity in case of loss is not fixed in the contract, but is left open to be proved by the claimant, or to be determined by the parties, and this determination is called an adjustment of the loss." Fire Ins. Assoc. *v.* Miller, 2 Tex. App. Civ. Cas. § 332 [*citing* May Ins. 27]. "A policy on which the value is to be proved by the assured." Bouvier L. Dict. [*quoted* in London Assur. Corp. *v.* Paterson, 106 Ga. 538, 549, 32 S. E. 650].

As defined by statute, an open policy is one in which the value of the thing insured is not agreed upon, but is left to be ascertained in case of loss. Cal. Civ. Code (1899), § 2595; Ga. Civ. Code (1895), § 2129; N. D. Rev. Code (1899), § 4496; S. D. Civ. Code (1903), § 1486.

A policy issued to indemnify a contractor against loss he may sustain by reason of the building which he has contracted to build in case of its destruction, to a sum not exceeding a designated sum, is an open policy. It does not mean that as soon as the house is destroyed by fire the insured shall be entitled to recover the sum designated, but means that he is to recover the amount if that is the damage done to him by the fire. Ulmer *v.* Phœnix F. Ins. Co., 61 S. C. 459, 462, 39 S. E. 712.

Failure to fill in the blank or to make any indorsement as to value will render an instrument an open policy and not a valued policy of insurance. Snowden *v.* Guion, 101 N. Y. 458, 467, 5 N. E. 322.

99. Bouvier L. Dict. [*quoted* in London Assur. Corp. *v.* Paterson, 106 Ga. 538, 549, 32 S. E. 650]. In London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650, where the company agreed to carry three fifths of a fifty-thousand-dollar risk, and offered to take, and afterward by indorsement on the policy assumed, a liability not exceeding fifty thousand dollars on the excess, the policy was construed as not limiting the liability to three fifths on the additional fifty thousand, the subsequent dealings of the parties showing that full liability as to the second risk was assumed.

In an open policy of insurance, for which an aggregate amount is expressed, there are as many contracts for insurance as there are indorsements on the policy of separate shipments of goods. State *v.* Williams, 46 La. Ann. 922, 929, 15 So. 290 [*citing* Douville *v.* Sun Mut. Ins. Co., 12 La. Ann. 259].

1. Cushman *v.* Northwestern Ins. Co., 34 Me. 487, where a policy which after insuring one thousand seven hundred dollars upon a mill and fixed machinery and one hundred and fifty dollars on movable machinery therein proceeded in written words as follows: "Said insured being the lessee of said mill for one year from November 1st, 1850, and having paid the rent therefor of $2171.01, which interest, diminishing day by day, in proportion to the whole rent for the year, is hereby insured" was considered to be a valued policy, although in a printed part of the instrument there was a provision that the "loss or damage should be estimated according to the true and actual cash value at the time such loss or damage shall happen."

Where the bona fides of the transaction is not assailed, and neither fraud nor mistake is charged, the valuation is conclusive on the parties as to the amount which the assured is entitled to receive upon the happening of the condition of the policy. That is the rule which is settled upon authority, and to that extent it qualifies the principle underlying the contract as one of indemnity. Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810. See also Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126; Kane *v.* Commercial Ins. Co., 8 Johns. (N. Y.) 229.

2. Riggs *v.* Home Mut. F. Protection Assoc., 61 S. C. 448, 39 S. E. 614.

3. Cox *v.* Charleston F. & M. Ins. Co., 3 Rich. (S. C.) 331, 45 Am. Dec. 771 [*citing* Phillmore Ins. 325].

4. Wood F. Ins. § 41 [*quoted* in Farmers' Ins. Co. *v.* Butler, 38 Ohio St. 128, 134].

called "valued policies."[5] A policy of insurance must be regarded as an open one, unless it appears to have been the intention of the parties to the policy, upon a fair and reasonable construction of its terms, to value the loss, and thereby fix by contract the amount of recovery.[6]

2. Pro Rata Liability. Where an aggregate amount of insurance is on separately valued items *pro rata*, the risk as to each item is to be determined by pro-rating the insurance according to the value of the different items.[7] The usual provision for pro-rating relates, however, to other insurance; and in general, in the absence of other insurance, the company is liable to the full amount of the sum specified in the policy, for the loss of any portion of the property covered.[8]

The value of the thing insured is fixed by the contract of the parties, and requires no proof; and, this constituting the only difference between an open and a valued policy, the value being agreed on, it is binding on both parties, and cannot be opened unless the value fixed is so exorbitant as to make it a fraudulent or gambling policy. Natchez Ins. Co. *v.* Buckner, 4 How. (Miss.) 63.

A valued policy determines beforehand the amount for which the insurer is liable in case of loss, and such amount is inserted in the policy as a fit sum to be paid if loss occurs. It does more than merely value the property insured; it values the loss. To do this the policy must amount to a contract either to pay, in case of loss, a stipulated sum, or that the property shall be estimated at the stipulated sum in case of loss. Luce *v.* Springfield F. & M. Ins. Co., 15 Fed. Cas. No. 8,589, 1 Flipp. 281. See also Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 367.

5. Nichols *v.* Fayette Mut. F. Ins. Co., 1 Allen (Mass.) 63; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. (Mass.) 350; Holmes *v.* Charlestown Mut. F. Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428; Fuller *v.* Boston Mut. F. Ins. Co., 4 Metc. (Mass.) 106; Borden *v.* Hingham Mut. F. Ins. Co., 18 Pick. (Mass.) 523, 29 Am. Dec. 614; and cases cited *supra*, note 97 *et seq.*

As defined by statute a valued policy is one which expresses on its face an agreement that the thing insured shall be valued at a specified sum. Cal. Civ. Code (1899), § 2596; N. D. Rev. Code (1899), § 4496; S. D. Civ. Code (1903), § 1486.

This form of policy may be said to be one in which the insurer himself, at the time of making the policy, assesses the damages in case of total loss, unless fraud, inducing an overvaluation on the part of assured, is established. Wood F. Ins. § 41 [*quoted* in Farmers' Ins. Co. *v.* Butler, 38 Ohio St. 128, 134].

The term "valued policy" applies to cases only where a valuation is fixed upon the underwritten property by way of liquidated damages, and for the purpose of avoiding a subsequent valuation of the property in case of loss. Universal Mut. F. Ins. Co. *v.* Weiss, 106 Pa. St. 20 [*citing* Bouvier L. Dict.]. Insurance upon property "valued at six thousand dollars each, making in all thirty thousand dollars, of which fifteen thousand dollars are insured in the Western Marine and Fire Insurance Company: this policy covers the other fifteen thousand dollars," has been held to be clearly a valued policy. Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 31, 29 Am. Dec. 433.

Every policy on profits is necessarily a valued policy. Mumford *v.* Hallett, 1 Johns. (N. Y.) 433.

The premium may be included in the valuation of the property insured without special notice to that effect. Mayo *v.* Maine F. & M. Ins. Co., 12 Mass. 259.

6. Farmers' Ins. Co. *v.* Butler, 38 Ohio St. 128. See also Williams *v.* Continental Ins. Co., 24 Fed. 767.

Under a policy which limits the liability of the company to a certain proportion of the value of the property at the time of the insurance, specifying, however, the valuation placed upon the property and the amount of the insurance, which does not exceed the proportion of the valuation thus placed upon the property, such valuation is conclusive; and it is not open to the company afterward to show that the valuation was excessive, for the purpose of reducing the amount of its liability; but such a stipulation relates to the value of the property at the time of the insurance, and not to the value at the time of loss; and the policy is therefore not in a proper sense a valued policy, but, like other policies of fire insurance, is an open policy, the liability of the company being determined by the value of the property at the time of loss. Funk *v.* Iowa Business Men's Mut. F. Assoc., 103 Iowa 660, 72 N. W. 774; Reavis *v.* Farmers' Mut. F. Ins. Co., 78 Mo. App. 14; Ramsey *v.* Philadelphia Underwriters Assoc., 71 Mo. App. 380; Laurent *v.* Chatham F. Ins. Co., 1 Hall (N. Y.) 45; Farmers' Ins. Co. *v.* Butler, 38 Ohio St. 128. *Compare* Massachusetts cases cited *supra*, note 5.

7. Citizens' Ins. Co. *v.* Ayers, 88 Tenn. 728, 13 S. W. 1090.

But where the insurance was on several buildings, separately valued, and the hay and grain therein, it was held that the value of the hay and grain in one of the buildings destroyed, not exceeding the amount of insurance, might be recovered, and that no pro-rating was contemplated. Rix *v.* Mutual Ins. Co., 20 N. H. 198.

8. Hoffman *v.* Manufacturers' Mut. F. Ins. Co., 38 Fed. 487. See *infra*, XVI, B, 3; XVII, C.

K. Commencement, Duration, and Termination of Risk — 1. Commencement. As a general rule,[9] the risk commences with the date of the policy.[10] But where the insurance is effected by a preliminary contract in accordance with which a policy is to be issued,[11] the risk takes effect from the date of such preliminary contract.[12]

2. Duration and Termination — a. In General. The duration of the insurance depends in general upon the terms of the policy; but if the policy fails to state any terms of duration, it is deemed to be in force for a reasonable time.[13]

b. Termination on Condition Subsequent. The contract may be so framed that the risk will continue only during the existence or continuance of a certain specified condition of the property; and when that condition ceases to exist the policy will no longer be binding.[14]

9. Delivery.— If, by stipulation, the policy is to go into effect only on delivery, the liability of the company does not attach until such delivery. Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

10. Day *v.* Hawkeye Ins. Co., 72 Iowa 597, 34 N. W. 435; Wales *v.* New York Bowery F. Ins. Co., 37 Minn. 106, 33 N. W. 322; Hart *v.* Delaware Ins. Co., 11 Fed. Cas. No. 6,150, 2 Wash. 346.

11. See *supra*, III, D.

12. *Iowa.*— Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Rep. 125.

New York.— Kelly *v.* Pennsylvania Ins. Co., 10 Bosw. 82; Lightbody *v.* North American Ins. Co., 23 Wend. 18.

Ohio.— Krumm *v.* Jefferson F. Ins. Co., 40 Ohio St. 225; Palm *v.* Medina County Mut. F. Ins. Co., 20 Ohio 529; Bennett *v.* Connecticut F. Ins. Co., 11 Ohio Dec. (Reprint) 429, 27 Cinc. L. Bul. 15.

Oregon.— Hardwick *v.* State Ins. Co., 20 Oreg. 547, 26 Pac. 840.

United States.— Potter *v.* Phenix Ins. Co., 63 Fed. 382.

See 28 Cent. Dig. tit. "Insurance," § 362.

It may be stipulated in the preliminary contract that the insurance shall take effect from the approval of the application, and the company will become liable for a loss occurring between the date of such approval and the issuance of a policy. St. Paul F. & M. Ins. Co. *v.* Kelley, 2 Nebr. (Unoff.) 720, 89 N. W. 997 [*citing* New York Union Mut. Ins. Co. *v.* Johnson, 23 Pa. St. 72].

Power of agent to bind company by preliminary agreement.— An agent without authority to contract binding insurance cannot by stating to the insured that the risk will attach at once bind the company. O'Brien *v.* New Zealand Ins. Co., 108 Cal. 227, 41 Pac. 298; Stockton *v.* Firemen's Ins. Co., 33 La. Ann. 577, 39 Am. Rep. 277; Allen *v.* St. Lawrence County Farmers' Ins. Co., 88 Hun (N. Y.) 461, 34 N. Y. Suppl. 872. But agents having authority to insure, and not simply to take applications for insurance, may make such a stipulation, and the company will be bound thereby. Collins *v.* Phœnix Ins. Co., 14 Hun (N. Y.) 534; Walker *v.* Lion F. Ins. Co., 175 Pa. St. 345, 34 Atl. 736; Mathers *v.* Union Mut. Acc. Assoc., 78 Wis. 588, 47 N. W. 1130, 11 L. R. A. 83. *Compare* Alliance Co-operative Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. 108. And see *supra*, III, D, 2.

Retrospective contract.— While a contract mutually entered into, covering a loss which may already have occurred, is valid if insured has not concealed any knowledge as to the occurrence of the loss (Security F. Ins. Co. *v.* Kentucky M. & F. Ins. Co., 7 Bush (Ky.) 81, 3 Am. Rep. 301; Bennett *v.* Connecticut F. Ins. Co., 11 Ohio Dec. (Reprint) 429, 27 Cinc. L. Bul. 15); yet in general it is not presumed that a loss occurring prior to the actual completion of the contract is covered thereby (Fuchs *v.* Germantown Farmers' Mut. Ins. Co., 60 Wis. 286, 18 N. W. 846). See *supra*, II, D, 1; *infra*, XII, A, 2, b.

13. Schroeder *v.* Trade Ins. Co., 109 Ill. 157.

Both dates inclusive.— Where by its terms the policy runs from one day named to another day named "both inclusive" it does not expire until midnight of the last day. Herald Co. *v.* Northern Assur. Co., 4 Montreal Super. Ct. 254.

Mistake.— If the agent has by mistake issued a policy for a longer period than that intended, and the insured has accepted it as a valid policy for the time specified, the company is bound. Latimore *v.* Dwelling House Ins. Co., 153 Pa. St. 324, 25 Atl. 757; Noel *v.* Pymatuning Mut. F. Ins. Co., 130 Pa. St. 523, 18 Atl. 1054. But where by mistake the date of the expiration named in the policy is the same as the date on which by the terms of the policy it is to go into effect, the fact of mistake may be shown by parol evidence, and the policy will be valid for the term intended. Phœnix Ins. Co. *v.* Boulden, 96 Ala. 609, 11 So. 774; Liberty Hall Assoc. *v.* Housatonic Mut. F. Ins. Co., 7 Gray (Mass.) 261.

14. Langworthy *v.* Oswego, etc., Ins. Co., 85 N. Y. 632; Hamilton *v.* Lycoming Ins. Co., 5 Pa. St. 339; Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91. See *infra*, XV, C. Where it was stipulated that the policy should continue until a new policy was issued, and the insured surrendered the old policy and accepted a new policy, it was held that the risk under the new policy attached as against the company, although it had not yet formally accepted the return of the old policy. Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

L. Contract Entire or Divisible — 1. In General. Policies are frequently written which, while specifying one gross premium, cover several items of property, the total amount of the insurance being apportioned to the several items by specifying the amount of insurance on each item;[15] and the courts are hopelessly divided[16] as to whether in such case the policy is to be regarded as an indivisible contract, so that a breach of stipulation or warranty as to one of the items of property covered will avoid the policy in its entirety, or whether, on the other hand, the policy is to be regarded as in effect so many separate contracts, so that the invalidity as to one item of property will not defeat recovery for loss on other items as to which there is no breach.[17] The fact that the contract is executed as a whole, and the consideration is a gross premium, has led many courts to adopt the conclusion that such a contract is indivisible;[18] but the weight of authority on the general proposition is perhaps in favor of the rule that the contract is divisible, and may be valid as to some of the items of property covered, although void as to the others.[19] The conflict in the authorities extends to policies covering

Condition as to falling of building.— Under a stipulation that the falling of the building insured shall terminate the risk, damage to the building by storm or otherwise, which does not result in its complete fall and destruction as a building, does not terminate the risk. Fireman's Fund Ins. Co. *v.* Congregation Rodeph Sholom, 80 Ill. 558; London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140.

Temporary insurance.— By stipulation in the policy or a collateral contract, the company may render itself liable for temporary insurance until other insurance is perfected. Milwaukee Mechanics' Ins. Co. *v.* Graham, 181 Ill. 158, 54 N. E. 914; Barr *v.* Insurance Co. of North America, 61 Ind. 488; Thomson *v.* Connecticut Mut. L. Ins. Co., 4 Pa. Dist. 382.

15. The effect of the apportionment of risk among several separate and distinct items of property is to limit the amount of the risk as to each of such items. Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697; Phœnix Ins. Co. *v.* Pfeifer, (Tex. Civ. App. 1897) 39 S. W. 1001.

16. Many of the cases apparently conflicting could be reconciled on the theory that the question is one of construction, depending on the intent of the parties, the reasonable intendment being that where the risk is common to the different items of property, as for instance where the policy covers a building and contents, or separate items of personal property in the same building, the policy should be construed as indivisible, while it should be allowed to be divisible where the risk of loss as to one building or item of property is wholly distinct from that as to the other. Taylor *v.* Anchor Mut. F. Ins. Co., 116 Iowa 625, 88 N. W. 807, 93 Am. St. Rep. 261 [*modifying* Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555]. And see as lending some support to the same explanation Geiss *v.* Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324; Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Loomis *v.* Rockfort Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834.

For monographic notes on this subject see 74 Am. Dec. 498 *et seq.*, 19 L. R. A. 211.

17. See cases cited *infra*, notes 18–24.

18. *Iowa.*— Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555. But see Taylor *v.* Anchor Mut. F. Ins. Co., 116 Iowa 625, 88 N. W. 807, 93 Am. St. Rep. 261.

Maine.— Day *v.* Charter Oak F. & M. Ins. Co., 51 Me. 91; Lovejoy *v.* Augusta Mut. F. Ins. Co., 45 Me. 472.

Massachusetts.— Brown *v.* People's Mut. Ins. Co., 11 Cush. 280; Friesmuth *v.* Agawam Mut. F. Ins. Co., 10 Cush. 587.

New Jersey.— State *v.* Parker, 35 N. J. L. 575.

Ohio.— Germania F. Ins. Co. *v.* Schild, 60 Ohio St. 136, 68 N. E. 706, 100 Am. St. Rep. 663.

Pennsylvania.— Gottsman *v.* Pennsylvania Ins. Co., 56 Pa. St. 210, 94 Am. Dec. 55.

Tennessee.— Teutonia Ins. Co. *v.* Bussell, (Ch. App. 1897) 48 S. W. 703.

Wisconsin.— Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448; Schumitsch *v.* American Ins. Co., 48 Wis. 26, 3 N. W. 595; Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159.

See 28 Cent. Dig. tit. "Insurance," § 384 *et seq.*

Waiver.— The company may waive the indivisibility of the policy. Manchester F. Assur. Co. *v.* Glenn, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225.

19. *Illinois.*— German Ins. Co. *v.* Miller, 39 Ill. App. 633; Insurance Co. of North America *v.* Hofing, 29 Ill. App. 180.

Indiana.— Phœnix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

Kansas.— Continental Ins. Co. *v.* Ward, 50 Kan. 346, 31 Pac. 1079.

Missouri.— Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719 [*following* Koontz *v.* Hannibal Sav., etc., Co., 42 Mo. 126, 97 Am. Dec. 325; Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247]; Holloway *v.* Dwelling House Ins. Co., 121 Mo. 87, 25 S. W. 850 [*reversing*

separate buildings, some cases holding such contracts inseverable,[20] while others hold them to be severable.[21] This difference in the authorities extends also to policies covering distinct items of personal property,[22] some cases being to the

48 Mo. App. 1, and *following* Trabue *v.* Dwelling House Ins. Co., *supra*]; Stephens *v.* German Ins. Co., 61 Mo. App. 194; Jenkins *v.* German Ins. Co., 58 Mo. App. 210; Crook *v.* Phœnix Ins. Co., 38 Mo. App. 582. *Contra*, American Ins. Co. *v.* Barnett, 73 Mo. 364, 39 Am. Rep. 517; Shoup *v.* Dwelling House F. Ins. Co., 51 Mo. App. 286. But in Trabue *v.* Dwelling House Ins. Co., *supra*, Gantt, P. J., said: "Our conclusion is that so much of Judge Norton's opinion as referred to the entirety of the policy in the Barnett case, was *obiter* and did not overrule the Koontz and Loehner cases."

Montana.— Wright *v.* London F. Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211.

Nebraska.— Home F. Ins. Co. *v.* Bernstein, 55 Nebr. 260, 75 N. W. 839; Johansen *v.* Home F. Ins. Co., 54 Nebr. 548, 74 N. W. 866.

New York.— Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Schuster *v.* Dutchess County Mut. Ins. Co., 102 N. Y. 260, 6 N. E. 406; Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184 [*affirming* 10 Hun 428]; Mott *v.* Citizens' Ins. Co., 69 Hun 501, 23 N. Y. Suppl. 400; Smith *v.* Home Ins. Co., 47 Hun 30; Burrill *v.* Chenango Mut. Ins. Co., 1 Edm. Sel. Cas. 233; Trench *v.* Chenango County Mut. Ins. Co., 7 Hill 122. But *compare* Chase *v.* Hamilton Ins. Co., 20 N. Y. 52; Smith *v.* Empire Ins. Co., 25 Barb. 497; Diver *v.* London, etc., F. Ins. Co., 9 N. Y. St. 482.

Oklahoma.— Miller *v.* Delaware Ins. Co., 14 Okla. 81, 75 Pac. 1121, 65 L. R. A. 173.

Texas.— Bills *v.* Hibernia Ins. Co., 87 Tex. 547, 29 S. W. 1063, 47 Am. St. Rep. 121, 29 L. R. A. 706 [*distinguished* in Home Ins. Co. *v.* Smith, (Civ. App. 1895) 32 S. W. 240]; German Ins. Co. *v.* Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173; North British, etc., Ins. Co. *v.* Freeman, (Civ. App. 1896) 33 S. W. 1091; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550, 30 S. W. 833.

West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

See 28 Cent. Dig. tit. "Insurance," § 384 *et seq.*

20. McQueeny *v.* Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; Thomas *v.* Commercial Union Assur. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323; Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583; Hartshorne *v.* Watertown Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. 615; Philadelphia F. Assoc. *v.* Williamson, 26 Pa. St. 196; Kelly *v.* Humboldt F. Ins. Co., 4 Pa. Cas. 99, 6 Atl. 740.

21. *Illinois.*—Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115.

Indiana.— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498; Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

Kentucky.— Speagle *v.* Dwelling House Ins. Co., 97 Ky. 646, 31 S. W. 282, 17 Ky. L. Rep. 610.

Maryland.— Bowman *v.* Franklin F. Ins. Co., 40 Md. 620.

New York.— Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644 [*reversing* 45 N. Y. Super. Ct. 394]; Burrill *v.* Chenango Mut. Ins. Co., 1 Edm. Sel. Cas. 233; Trench *v.* Chenango County Mut. Ins. Co., 7 Hill 122.

Wisconsin.— Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834. But *compare* Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448.

See 28 Cent. Dig. tit. "Insurance," § 385.

22. Not severable.—*Arkansas.*—Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959.

Indiana.— Geiss *v.* Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324.

Maryland.— Associated Firemen's Ins. Co. *v.* Assum, 5 Md. 165.

Pennsylvania.— Newlin *v.* Insurance Co. of North America, 20 Pa. St. 312, 1 Phila. 273.

Wisconsin.— Burr *v.* German Ins. Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905 [*followed* in Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267], where the property was all personalty and stored in the same warehouse, and although the risk was distributed to different items the premium paid was a gross sum, and the policy provided that it should cease to be binding if the property insured should be levied upon or taken into possession or custody under legal process. But *compare* Cooper *v.* Pennsylvania Ins. Co., 96 Wis. 362, 71 N. W. 606.

See 28 Cent. Dig. tit. "Insurance," § 386.

Severable.— *Alabama.*— Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

Colorado.— Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513.

Illinois.— Dwelling House Ins. Co. *v.* Butterly, 33 Ill. App. 626 [*affirmed* in 133 Ill. 534, 24 N. E. 873].

Mississippi.— Mitchell *v.* Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86, 48 Am. St. Rep. 535.

Nebraska.— German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459.

New York.— Tompkins *v.* Hartford F. Ins. Co., 22 N. Y. App. Div. 380, 49 N. Y. Suppl. 184; Adler *v.* Germania F. Ins. Co., 17 Misc. 347, 39 N. Y. Suppl. 1070; American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. 114, 20 N. Y. Suppl. 646.

Texas.— Sun Mut. Ins. Co. *v.* Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180; German Ins. Co. *v.* Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173; North British, etc., Ins. Co. *v.* Freeman, (Civ. App. 1896) 33 S. W. 1091.

See 28 Cent. Dig. tit. "Insurance," § 386.

effect that such contracts are indivisible and others to the effect that they are divisible. With respect to policies on buildings and contents the same lack of harmony in the decisions exists.[23]

2. SEPARATE PARTIES OR ESTATES. It is even held that if there is a good defense as against one of two parties jointly interested in the policy, such defense will be available as against the other.[24] And it is also said that where several

23. Not severable.—*Alabama.*—Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

Connecticut.— Essex Sav. Bank *v.* Meriden F. Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759.

Georgia.— Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70.

Iowa.— Kahler *v.* Iowa State Ins. Co., 106 Iowa 380, 76 N. W. 734.

Louisiana.— Germier *v.* Springfield F. & M. Ins. Co., 109 La. 341, 33 So. 361.

Maine.— Barnes *v.* Union Mut. F. Ins. Co., 51 Me. 110, 81 Am. Dec. 562; Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494; Lovejoy *v.* Augusta Mut. F. Ins. Co., 45 Me. 472.

Maryland.— Bowman *v.* Franklin F. Ins. Co., 40 Md. 620.

Massachusetts.— Bullman *v.* North British, etc., Ins. Co., 159 Mass. 118, 34 N. E. 169.

Michigan.— Ætna Ins. Co. *v.* Resh, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228.

Pennsylvania.— Gottsman *v.* Com. Ins. Co., 56 Pa. St. 210, 94 Am. Dec. 55; Todd *v.* Missouri State Ins. Co., 11 Phila. 355.

Vermont.— McGowan *v.* People's Mut. F. Ins. Co., 54 Vt. 211, 41 Am. Rep. 843.

Wisconsin.— Worachek *v.* New Denmark Mut. Home F. Ins. Co., 102 Wis. 88, 78 N. W. 411; Stevens *v.* Queen Ins. Co., 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905; Schumitsch *v.* American Ins. Co., 48 Wis. 26, 3 N. W. 595; Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159. But *compare* Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448, holding that a policy covering a dwelling-house and contents to a certain amount, and barns, granary, and contents, and certain stock on the same farm, is severable.

Canada.— Gore Dist. Mut. F. Ins. Co. *v.* Samo, 2 Can. Sup. Ct. 411; Cashman *v.* London, etc., F. Ins. Co., 10 N. Brunsw. 246.

See 28 Cent. Dig. tit. "Insurance," § 387.

Severable.— *Delaware.*— Thurber *v.* Royal Ins. Co., 1 Marv. 251, 40 Atl. 1111.

Illinois.— Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Insurance Co. of North America *v.* Hofing, 29 Ill. App. 180. But see Illinois Mut. F. Ins. Co. *v.* Fix, 53 Ill. 151, 5 Am. Rep. 38, holding that a policy on a house and fixtures which divides the amount of the insurance for the two classes of property and provides that other insurance shall avoid the policy is not severable.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 53 Kan. 623, 36 Pac. 983; Continental Ins. Co. *v.* Ward, 50 Kan. 346, 31 Pac. 1079; German Ins. Co. *v.* York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313.

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521; Thompson *v.* Farmers' Mut. Ins. Co., 10 Ky. L. Rep. 282. But *compare* Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352, holding that where a policy of fire insurance insures a house for a sum stated, and the furniture therein for another sum, the whole being covered by one contract, it is an entire contract of insurance.

Missouri.— Hollaway *v.* Dwelling House Ins. Co., 121 Mo. 87, 25 S. W. 850; Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719; Koontz *v.* Hannibal Sav., etc., Co., 42 Mo. 126, 97 Am. Dec. 325; Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247; Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Stephens *v.* German Ins. Co., 61 Mo. App. 194; Crook *v.* Phœnix Ins. Co., 38 Mo. App. 582. *Contra,* Shoup *v.* Dwelling-House F. Ins. Co., 51 Mo. App. 286; Holloway *v.* Dwelling-House Ins. Co., 48 Mo. App. 1.

Nebraska.— Phenix Ins. Co. *v.* Grimes, 33 Nebr. 340, 50 N. W. 168; German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

New York.— Schuster *v.* Dutchess County Mut. Ins. Co., 102 N. Y. 260, 6 N. E. 406; King *v.* Tioga County Patron's F. Relief Assoc., 35 N. Y. App. Div. 58, 54 N. Y. Suppl. 1057; Mott *v.* Citizens' Ins. Co., 69 Hun 501, 23 N. Y. Suppl. 400; Smith *v.* Home Ins. Co., 47 Hun 30; Woodward *v.* Republic F. Ins. Co., 32 Hun 365; Holmes *v.* Drew, 16 Hun 491; Merrill *v.* Agricultural Ins. Co., 10 Hun 428; Halpin *v.* Insurance Co. of North America, 10 N. Y. St. 345. But see Smith *v.* Empire Ins. Co., 25 Barb. 497.

Ohio.— Coleman *v.* New Orleans Ins. Co., 49 Ohio St. 310, 31 N. E. 279, 34 Am. St. Rep. 565, 16 L. R. A. 174; Phillips *v.* Ohio Farmer's Ins. Co., 13 Ohio Cir. Ct. 679, 6 Ohio Cir. Dec. 266.

Texas.— Sullivan *v.* Hartford F. Ins. Co., 89 Tex. 665, 36 S. W. 73; Bills *v.* Hibernia Ins. Co., 87 Tex. 547, 29 S. W. 1063, 47 Am. St. Rep. 121, 29 L. R. A. 706; Georgia Home Ins. Co. *v.* Brady, (Civ. App. 1897) 41 S. W. 513; Georgia Home Ins. Co. *v.* McKinley, (Civ. App. 1896) 37 S. W. 606; Springfield F. & M. Ins. Co. *v.* Green, (Civ. App. 1896) 36 S. W. 143; Roberts *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Sullivan *v.* Hartford F. Ins. Co., (Civ. App. 1896) 34 S. W. 999; Home Ins. Co. *v.* Smith, (Civ. App. 1895) 32 S. W. 240.

See 28 Cent. Dig. tit. "Insurance," § 387.

24. Paradise *v.* Sun Mut. Ins. Co., 6 La. Ann. 596.

estates are separately insured by the same policy, the contract is severable,[25] and that a policy of insurance assigned to a mortgagee may be regarded as severable, so as to be valid as to him, although invalid as to the mortgagor.[26]

XII. MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY AVOIDING POLICY.

A. In General — 1. Misrepresentations — a. Effect in General. The effect of a misrepresentation[27] in connection with fire insurance is generally to avoid the policy;[28] but if a representation in a policy partly fails, but is true and is complied with so far as essential to the risk insured against, the policy remains in force.[29]

b. Materiality. But a misrepresentation as distinct from a warranty[30] must be with reference to a matter material to the risk or the rate of premium, and if it is as to a matter which would not have affected the making of the contract, had it been truly represented, then the validity of the contract is not affected by such misrepresentation.[31] It is the materiality of the misrepresentation as to the making of the contract, and not its materiality as shown by a subsequent loss, which is to be considered in determining the validity of the contract.[32] Representations may be made material by the stipulations of the policy so that the question

But on the other hand it is said that where two parties have joint insurance on property in which each has a separate interest, the fact that the policy is void as to one, because he is found not to have an insurable interest, will not avoid it as to the other. Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478.

25. Clark *v.* New England Mut. F. Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Rep. 44.

26. Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. (N. Y.) 254.

27. A "misrepresentation" in connection with fire insurance is a false representation by the insured of a material fact tending to induce the company to enter into the contract, or to do so at a lower rate of premium than would have been charged but for such misrepresentation. Commonwealth Ins. Co. *v.* Monninger, 18 Ind. 352; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Livingston *v.* Maryland Ins. Co., 7 Cranch (U. S.) 506, 3 L. ed. 421; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. (U. S.) 494, 22 L. ed. 398].

28. *California.*— Parrish *v.* Rosebud Min., etc., Co., 140 Cal. 635, 74 Pac. 312.

Illinois.— Kingston Mut. County F., etc., Ins. Co. *v.* Olmstead, 68 Ill. App. 111.

Kentucky.— Germania L. Ins. Co. *v.* Rudwig, 3 Ky. L. Rep. 712.

New York.— Wall *v.* Howard Ins. Co., 14 Barb. 383.

Ohio.— Howell *v.* Cincinnati Ins. Co., 7 Ohio 276.

United States.— Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

See 28 Cent. Dig. tit. "Insurance," § 538.

29. Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342.

30. See *infra*, XII, A, 3.

31. *District of Columbia.*—Mallery *v.* Frye, 21 App. Cas. 105.

Georgia.— Mobile F. Dept. Ins. Co. *v.* Coleman, 58 Ga. 251.

Indiana.— Commonwealth Ins. Co. *v.* Monninger, 18 Ind. 352.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Ætna Ins. Co. *v.* Grube, 6 Minn. 82.

Missouri.— Schroeder *v.* Stock, etc., Ins. Co., 46 Mo. 174; Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342; Ritchey *v.* Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341.

New Hampshire.— Boardman *v.* New Hampshire Mut. F. Ins. Co., 20 N. H. 551.

New Jersey.— Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

New York.— Farmers' Ins., etc., Co. *v.* Snyder, 16 Wend. 481, 30 Am. Dec. 118; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 22 Am. Dec. 567.

Vermont.— Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142.

United States.— Maryland Ins. Co. *v.* Ruden, 6 Cranch 338, 3 L. ed. 242; Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. ed. 222; Hodgson *v.* Alexandria Mar. Ins. Co., 5 Cranch 100, 3 L. ed. 48; Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 115 Fed. 77, 52 C. C. A. 671, 124 Fed. 25, 59 C. C. A. 545; Clason *v.* Smith, 5 Fed. Cas. No. 2,868, 3 Wash. 156.

See 28 Cent. Dig. tit. "Insurance," § 548.

Question for jury.— The question whether a misrepresentation is material is a question of fact. Davis *v.* Ætna Mut. F. Ins. Co., 67 N. H. 335, 39 Atl. 902; Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

32. Miller *v.* Western Farmers' Mut. Ins.

of materiality will not be open to inquiry,[33] but they thereby become in effect warranties, and are governed by the general rules relating to warranties.[34]

c. Falsity. A representation relied upon as avoiding the policy must not only be false in fact but false to the knowledge of the insured making it, that is, it must be knowingly and intentionally false,[35] and false in a substantial and material respect.[36] Thus if the application for a policy of fire-insurance is not made by the insured or some agent authorized to act for him misstatements therein will not avoid the policy if they are not made warranties;[37] if, however, the representation is made by an agent acting under the authority of the insured, for the purpose of securing insurance, it will be binding upon the insured.[38] So too it seems to be well settled that unintentional misstatements or omissions will not defeat the policy;[39] however, if the representations are as to a material fact and they were relied on by the company in entering into the contract, the policy is invalid.[40]

Co., 1 Handy 208, 12 Ohio Dec. (Reprint) 105; Hazard *v.* New England Mar. Ins. Co., 8 Pet. (U. S.) 557, 8 L. ed. 1043.

33. Cerys *v.* State Ins. Co., 71 Minn. 338, 73 N. W. 849; Ætna Ins. Co. *v.* Grube, 6 Minn. 82; Graham *v.* Fireman's Ins. Co., 87 N. Y. 69, 41 Am. Rep. 348 [*affirming* 9 Daly 341]; Wilson *v.* Conway F. Ins. Co., 4 R. I. 141; Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 115 Fed. 77, 52 C. C. A. 671, 124 Fed. 25, 59 C. C. A. 545.

34. See *infra*, XII, A, 3.

35. Rankin *v.* Amazon Ins. Co., 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; American Cent. Ins. Co. *v.* Nunn, (Tex. Civ. App. 1904) 79 S. W. 88; Clark *v.* Manufacturers' Ins. Co., 8 How. (U. S.) 235, 12 L. ed. 1061 [*reversing* 5 Fed. Cas. No. 2,829, 2 Woodb. & M. 472]; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439.

36. *Connecticut.*— Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

Massachusetts.— Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Minnesota.— Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

Ohio.—Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

United States.— Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 115 Fed. 77, 52 C. C. A. 671, 124 Fed. 25, 59 C. C. A. 545; New York Fidelity, etc., Co. *v.* Alpert, 67 Fed. 460, 14 C. C. A. 474; Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395.

See 28 Cent. Dig. tit. "Insurance," § 543 *et seq.*

37. *Illinois.*— Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 26 Am. Rep. 386.

Maine.— Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

New York.— Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. 527; Landers *v.* Watertown F. Ins. Co., 6 N. Y. St. 168.

Tennessee.— So held where the insured signed the application without reading it. Continental F. Ins. Co. *v.* Whitaker, (Sup. 1904) 79 S. W. 119.

Texas.— Liverpool, etc., Ins. Co. *v.* Stern, (Civ. App. 1895) 29 S. W. 678.

See 28 Cent. Dig. tit. "Insurance," § 543 *et seq.*

38. *California.*— Parrish *v.* Rosebud Min., etc., Co., (1903) 71 Pac. 694.

Illinois.—Fame Ins. Co. *v.* Mann, 4 Ill. App. 485.

New York.— Armour *v.* Transatlantic F. Ins. Co., 90 N. Y. 450.

Pennsylvania.— Lennox *v.* Greenwich Ins. Co., 2 Pa. Super. Ct. 431.

United States.— Hamblet *v.* City Ins. Co., 36 Fed. 118; Carpenter *v.* American Ins. Co., 5 Fed. Cas. No. 2,428, 1 Story 57; Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

See 28 Cent. Dig. tit. "Insurance," § 543.

If on the other hand the person acting for the insured has no authority to represent him, then representations so made will not affect the validity of the policy. Harmony F., etc., Ins. Co. *v.* Hazlehurst, 30 Md. 380; Denny *v.* Conway Stock, etc., F. Ins. Co., 13 Gray (Mass.) 492; Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 63 N. W. 650; Thomas *v.* Lebanon Town Mut. F. Ins. Co., 78 Mo. App. 268.

39. *Illinois.*— Tarpey *v.* Security Trust Co., 80 Ill. App. 378.

Kentucky.— Dwelling House Ins. Co. *v.* Freeman, 10 Ky. L. Rep. 496.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

Missouri.—Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Pennsylvania.—Imperial F. Ins. Co. *v.* Murray, 73 Pa. St. 13.

Texas.— Phœnix Ins. Co. *v.* Swann, (Civ. App. 1897) 41 S. W. 519.

Virginia.— Continental Ins. Co. *v.* Kasey, 25 Gratt. 268, 18 Am. Rep. 681.

Wisconsin.— Mechler *v.* Phœnix Ins. Co., 38 Wis. 665; Wright *v.* Hartford F. Ins. Co., 36 Wis. 522.

United States.— Fisher *v.* Crescent Ins. Co., 33 Fed. 544.

See 28 Cent. Dig. tit. "Insurance," § 543 *et seq.*

40. Dennison *v.* Thomaston Mut. Ins. Co., 20 Me. 125, 37 Am. Dec. 42; Bryant *v.* Ocean Ins. Co., 22 Pick. (Mass.) 200; Stetson *v.* Massachusetts Mut. F. Ins. Co., 4 Mass. 330, 3

Incorrect statements given as a matter of opinion or belief will not, it has been frequently held, invalidate the policy.[41]

2. Fraud and False Swearing[42] **— a. In General.** Any fraud of the insured in procuring the policy[43] renders it voidable at the election of the company.[44] But the false swearing must be knowingly and wilfully done.[45]

b. Concealment[46] — (I) *Effect in General.* The insured may by failing to disclose facts material to the risk to be assumed under the policy, and which he has reason to believe are not within the knowledge of the company, be guilty of such fraud as to defeat the contract.[47]

(II) *Materiality.* The concealment must be of a material fact, that is, one which, indicating a greater risk than the company would otherwise have reason to suppose it was assuming, would probably have deterred the company from entering into the contract.[48]

Am. Dec. 217; Melvin *v.* Insurance Co. of North America, 2 Luz. Leg. Reg. (Pa.) 219; Carpenter *v.* American Ins. Co., 5 Fed. Cas. No. 2,428, 1 Story 57.

41. *Maine.*— Dennison *v.* Thomaston Mut. Ins. Co., 20 Me. 125, 37 Am. Dec. 42.

North Carolina.— Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417.

Ohio.— Hunter *v.* International Fraternal Alliance, 7 Ohio S. & C. Pl. Dec. 239, 5 Ohio N. P. 35.

Pennsylvania.— Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31.

United States.— Clason *v.* Smith, 5 Fed. Cas. No. 2,868, 3 Wash. 156.

See 28 Cent. Dig. tit. "Insurance," § 543 *et seq.*

42. Fraud or false swearing in proof of loss see *infra*, XVII, C, 2.

43. False swearing after the fire and on trial of an action on the policy which was held not as a matter of law to preclude a recovery on the ground of fraud or false swearing but merely to affect the credibility of the witness see Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342.

44. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Tarpy *v.* Security Trust Co., 80 Ill. App. 378; Moore *v.* Virginia F. & M. Ins. Co., 28 Gratt. (Va.) 508, 26 Am. Rep. 373.

It may be provided in the policy that fraud or false swearing shall render it void. Sun Mut. Ins. Co. *v.* Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180; F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69. False swearing under a stipulation rendering the policy void on that account means some verified false assertion likely to or which does deceive. Maher *v.* Hibernia Ins. Co., 67 N. Y. 283 [*affirming* 6 Hun 353].

45. Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101; Beyer *v.* St. Paul F. & M. Ins. Co., 112 Wis. 138, 88 N. W. 57; Mason *v.* Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19.

46. Concealment defined.— "Concealment" is the designed and intentional suppression of any fact material to the risk which the insured honestly and in good faith ought to communicate. Orient Ins. Co. *v.* Peiser, 91 Ill. App. 278; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192. For instance if the subject-matter of the contract has already been destroyed or is in imminent peril that fact should be communicated. Henshaw *v.* State Ins. Co., 36 Misc. (N. Y.) 405, 73 N. Y. Suppl. 1; Buff *v.* Turner, 2 Marsh. 47, 6 Taunt. 338, 16 Rev. Rep. 626, 1 E. C. L. 643. The actual intention to defraud, however, is immaterial if the fact concealed is one which the insured should in good faith have made known to the company. Bebee *v.* Hartford County Mut. F. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553; Fame Ins. Co. *v.* Thomas, 10 Ill. App. 545; Miller *v.* Western Farmers' Mut. Ins. Co., 1 Handy (Ohio) 208, 12 Ohio Dec. (Reprint) 105; Stoney *v.* Union Ins. Co., Harp. (S. C.) 235; Weigle *v.* Cascade F. & M. Ins. Co., 12 Wash. 449, 41 Pac. 53. See also 8 Cyc. 544.

47. *Kentucky.*— Home Ins. Co. *v.* Allen, 19 S. W. 743, 14 Ky. L. Rep. 161.

Louisiana.— Walden *v.* Louisiana Ins. Co., 12 La. 134, 32 Am. Dec. 116.

Massachusetts.— Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

New York.—Clarkson *v.* Western Assur. Co., 33 N. Y. App. Div. 23, 53 N. Y. Suppl. 508; Dickenson *v.* Commercial Ins. Co., Anth. N. P. 126.

Ohio.— Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324.

Pennsylvania.— Murgatroyd *v.* Crawford, 3 Dall. 491, 3 L. ed. 692.

South Carolina.— Ingraham *v.* South Carolina Ins. Co., 2 Treadw. 707.

United States.— Clark *v.* Manufacturers' Ins. Co., 8 How. 235, 12 L. ed. 1061 [*affirming* 5 Fed. Cas. No. 2,829, 2 Woodb. & M. 472]; McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. ed. 98; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; Kohne *v.* Insurance Co. of North America, 14 Fed. Cas. Nos. 7,920, 7,922, 1 Wash. 93, 158; Vale *v.* Phœnix Ins. Co., 28 Fed. Cas. No. 16,811, 1 Wash. 283.

Canada.— McFaul *v.* Montreal Inland Ins. Co., 2 U. C. Q. B. 59; Barsalou *v.* Royal Ins. Co., 15 L. C. Rep. 1; Minogue *v.* Quebec F. Assur. Co., 1 Montreal Super. Ct. 478; Aitkin *v.* National Ins. Co., 1 Montreal Leg. N. 531.

See 28 Cent. Dig. tit. "Insurance," § 550.

48. *Indiana.* — Insurance Co. of North America *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181.

(III) *Facts Within Knowledge of Insurer.* If the fact is within the knowledge of the company or might reasonably be assumed to be within its knowledge, the assured is under no obligation to communicate it.[49] By the great weight of authority[50] the issuance of the policy with knowledge that representations or warranties made by the insured are false will be a waiver of any right to avoid the policy on that ground.[51]

(IV) *Facts Not Within Knowledge of Insured.* If the fact is not one within the knowledge of the insured, he is under no obligation to communicate it;[52] but if the insured fails to state a fact which by the terms of the policy renders it void, the failure to state will vitiate the policy, although the proviso is not known to the insured.[53]

(V) *Failure to Make or Follow Up Inquiry.* It does not constitute a concealment, however, that the insured in the application fails to give information as to matters with reference to which no questions are asked, it being presumed that the company requires answers as to matters which it deems material.[54]

Kansas.— Home Ins. Co. *v.* Feyerabend, 7 Kan. App. 231, 52 Pac. 899.

Kentucky.— Lancashire Ins. Co. *v.* Monroe, 101 Ky. 12, 39 S. W. 434, 19 Ky. L. Rep. 204; Mechanics', etc., Ins. Co. *v.* Floyd, 49 S. W. 543, 20 Ky. L. Rep. 1538.

Louisiana.— Lyon *v.* Commercial Ins. Co., 2 Rob. 266.

Maryland.— Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159.

Massachusetts.— Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547.

Missouri.— Boggs *v.* America Ins. Co., 30 Mo. 63; Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247.

New York.— Gates *v.* Madison County Mut. Ins. Co., 2 N. Y. 43; Parker *v.* Otsego County Farmers' Co-operative F. Ins. Co., 47 N. Y. App. Div. 204, 62 N. Y. Suppl. 199.

Ohio.—Lexington F., etc., Ins. Co. *v.* Paver, 16 Ohio 324.

Pennsylvania.— Pine *v.* Vanuxem, 3 Yeates 30.

Vermont.— Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 37 Atl. 255.

West Virginia.— Wolpert *v.* Northern Assur. Co., 44 W. Va. 734, 29 S. E. 1024.

United States.— Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. ed. 222; Hardman *v.* Firemen's Ins. Co., 20 Fed. 594, opinion of Billings, J.

Canada.— Laidlaw *v.* Liverpool, etc., Ins. Co., 13 Grant Ch. (U. C.) 377; Rowe *v.* London, etc., F. Ins. Co., 12 Grant Ch. (U. C.) 311; McDonell *v.* Beacon F., etc., Assur. Co., 7 U. C. C. P. 308; Parsons *v.* Citizens' Ins. Co., 43 U. C. Q. B. 261; Dear *v.* Western Assur. Co., 41 U. C. Q. B. 553; Toronto Bank *v.* St. Lawrence F. Ins. Co., 19 Quebec Super. Ct. 434.

See 28 Cent. Dig. tit. "Insurance," § 565.

As to matters to which there is an express or implied warranty the insured is not bound to make disclosures. New York Firemen Ins. Co. *v.* De Wolf, 2 Cow. (N. Y.) 56; De Wolf *v.* New York Firemen Ins. Co., 20 Johns. (N. Y.) 214.

That an application on the same property had been previously rejected by the company does not show fraud in making subsequent application for insurance. Body *v.* Hartford F. Ins. Co., 63 Wis. 157, 23 N. W. 132.

Unless the insured has reasonable ground to believe that the fact would be deemed material, a failure to state it will not constitute a concealment. Tuck *v.* Hartford F. Ins. Co., 56 N. H. 326; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410.

49. Waterbury *v.* Dakota F. & M. Ins. Co., 6 Dak. 468, 43 N. W. 697; Hey *v.* Guarantors' Liability Indemnity Co., 181 Pa. St. 220, 37 Atl. 402, 59 Am. St. Rep. 644; Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31; Phœnix Ins. Co. *v.* Padgitt, (Tex. Civ. App. 1897) 42 S. W. 800; Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 21 L. ed. 827 [*affirming* 9 Fed. Cas. No. 4,902, 8 Blatchf. 170].

50. But it is said in a few cases that breach of warranty will avoid the policy even though the falsity of the warranty is known to the company. Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425; Mayes *v.* Hartford F. Ins. Co., 3 Ky. L. Rep. 687; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. (N. Y.) 75; Nassauer *v.* Susquehanna Mut. F. Ins. Co., 109 Pa. St. 507.

51. See *infra*, XIV, E, 3.

52. Neptune Ins. Co. *v.* Robinson, 11 Gill & J. (Md.) 256; Slobodisky *v.* Phœnix Ins. Co., 53 Nebr. 816, 74 N. W. 270; Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77; Clement *v.* Phœnix Ins. Co., 5 Fed. Cas. No. 2,881, 6 Blatchf. 481.

53. Skinner *v.* Norman, 18 N. Y. App. Div. 609, 46 N. Y. Suppl. 65.

54. *Kentucky.*— German-American Ins. Co. *v.* Norris, 100 Ky. 29, 37 S. W. 267, 18 Ky. L. Rep. 537, 66 Am. St. Rep. 324.

Massachusetts.— Washington Mills Emery Mfg. Co. *v.* Weymouth, etc., Mut. F. Ins. Co., 135 Mass. 503; Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. 348; Green *v.* Merchants' Ins. Co., 10 Pick. 402.

Missouri.— Boggs *v.* America Ins. Co., 30 Mo. 63.

New York.— Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86 [*affirming* 6 Daly 522]; Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345.

Nor will a total failure to answer a question asked constitute a concealment, for the company is thereby advised that the insured gives no information upon that subject, and if it deems the information material it should insist upon an answer to the question before issuing its policy.[55]

3. Breach of Warranty — a. Nature and Elements of Warranty. The parties may by their affirmative contract declare that a representation shall be deemed material and thus eliminate the question of materiality and good faith so that such representation shall become a warranty; in that case a misrepresentation constitutes a breach of warranty rendering the contract void. Thus it is usual to specifically provide in the policy that the application, survey, or other statement by the insured, on the faith of which the policy is issued, shall be deemed a part of the policy and any statements made by the insured therein shall be deemed warranties, and thus the statements of the application are given as full effect as though they were made in the policy itself;[56] but unless thus incorporated into the policy by specific reference, the statements of the application or other statements preliminary or collateral to the making of the contract are not warranties, and their falsity will affect its validity only as misrepresentations.[57] Statements contained in the policy itself may be made warranties by an

North Carolina. — Whitehurst *v.* Fayetteville Mut. Ins. Co., 51 N. C. 352.

Oregon.—Koshland *v.* Hartford F. Ins. Co., 31 Oreg. 402, 49 Pac. 866.

Pennsylvania. — Satterthwaite *v.* Mutual Ben. Ins. Assoc., 14 Pa. St. 393.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Wisconsin.— Johnson *v.* Scottish Union, etc., Ins. Co., 93 Wis. 223, 67 N. W. 416.

United States.— Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82.

Canada. — Laidlaw *v.* Liverpool, etc., Ins. Co., 13 Grant Ch. (U. C.) 377.

See 28 Cent. Dig. tit. "Insurance," § 553.

If, however, the insured undertakes to state fully all the circumstances which affect the risk, he is bound to tell the whole truth, and concealment of any material fact will render the policy void. Smith *v.* Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546; Stoney *v.* Union Ins. Co., 3 McCord (S. C.) 387, 15 Am. Dec. 634; Dunham *v.* Citizens' Ins. Co., 34 Wash. 205, 75 Pac. 804.

55. Liberty Hall Assoc. *v.* Housatonic Mut. F. Ins. Co., 7 Gray (Mass.) 261; Armenia Ins. Co. *v.* Paul, 91 Pa. St. 520, 36 Am. Rep. 676.

56. *California.*— Rankin *v.* Amazon Ins. Co., (1890) 25 Pac. 260; Roberts *v.* Ætna Ins. Co., 58 Cal. 83.

Colorado.— Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587; Travelers' Ins. Co. *v.* Lampkin, 5 Colo. App. 177, 38 Pac. 335.

Connecticut.— Treadway *v.* Hamilton Mut. Ins. Co., 29 Conn. 68; Sheldon *v.* Hartford F. Ins. Co., 22 Conn. 235, 58 Am. Dec. 420.

Indiana.— Cox *v.* Ætna Ins. Co., 29 Ind. 586.

Massachusetts.— Abbott *v.* Shawmut Mut. F. Ins. Co., 3 Allen 213; Tebbetts *v.* Hamilton Mut. Ins. Co., 1 Allen 305, 79 Am. Dec. 740.

New York.— Ballston Spa First Nat. Bank *v.* Insurance Co. of North America, 50 N. Y. 45; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; King *v.* Tioga County Patrons' F. Relief Assoc., 35 N. Y. App. Div. 58, 54 N. Y. Suppl. 1057; Pierce *v.* Empire Ins. Co., 62 Barb. 636; Shoemaker *v.* Glens Falls Ins. Co., 60 Barb. 84; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468; Kennedy *v.* St. Lawrence County Mut. Ins. Co., 10 Barb. 285.

Oregon.— Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466.

Pennsylvania.— Lennox *v.* Greenwich Ins. Co., 2 Pa. Super. Ct. 431, 9 Pa. Super. Ct. 171, 43 Wkly. Notes Cas. 398.

See 28 Cent. Dig. tit. "Insurance," § 558.

57. *Indiana.*— Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352.

Kentucky.— Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634.

Massachusetts.— Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray 139; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

New York.— Farmers' Ins., etc., Co. *v.* Snyder, 16 Wend. 481, 30 Am. Dec. 118.

Pennsylvania.— Lebanon Mut. Ins. Co. *v.* Losch, 109 Pa. St. 100.

Texas.— Goddard *v.* East Texas F. Ins. Co., 67 Tex. 69, 1 S. W. 906, 60 Am. Rep. 1; Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. 867; Queen Ins. Co. *v.* May, (Civ. App. 1896) 35 S. W. 829.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

United States.—Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

See 28 Cent. Dig. tit. "Insurance," § 558 *et seq.*

Ky. St. (1903) § 639, provides that all statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties, nor shall any misrepresentations unless material or fraudulent prevent recovery on the policy. Manchester Assur. Co. *v.* Dowell, 80 S. W. 207, 25 Ky. L. Rep. 2240.

Effect of misrepresentations see *supra*, XII, A, 1.

affirmative declaration to that effect,[58] and even without such formal declaration representations contained in the policy itself may be deemed warranties,[59] whether referred to as constituting covenants and agreement[60] or conditions.[61]

b. Effect of Breach. A warranty must be literally complied with and an unimportant breach will avoid the policy.[62] The falsity of a statement or representation which is directly or impliedly affirmed in the policy itself or by reference to some preliminary or collateral statement renders the policy void from the beginning,[63] or, if the statement is promissory, from the time of the breach.[64] But the

A mere description in the application is not a warranty. Jefferson Ins. Co. *v.* Cotheal, 7 Wend. (N. Y.) 72, 22 Am. Dec. 567.

An agreement in the application that the policy shall be void if the interrogatories propounded to the applicant are not correctly answered has been held to render the statements therein made warranties, so that incorrect answers would avoid the policy. Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466.

If a new policy is issued as a substitute for an existing policy it is deemed to have been made on the same application as the policy for which it is a substitute. McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38; Clark *v.* Manufacturers' Ins. Co., 5 Fed. Cas. No. 2,829, 2 Woodb. & M. 472 [*reversed* in 8 How. 235, 12 L. ed. 1061].

If the application is in writing, verbal representations made to the agent are not to be treated as warranties. Dolliver *v.* St. Joseph F. & M. Ins. Co., 131 Mass. 39.

The use of the word "warrant" in the application itself will not render the statements in the application warranties in the proper sense of the term. Indiana Farmers' Live Stock Ins. Co. *v.* Byrkett, 9 Ind. App. 443, 36 N. E. 779.

The acceptance of a policy containing a stipulation as to ownership does not constitute a representation on the part of the insured that the ownership is as stated in the policy. Manchester F. Assur. Co. *v.* Abrams, 89 Fed. 932, 32 C. C. A. 426.

By statute, it is sometimes provided that the statements in the application, or other preliminary, or collateral instruments shall not be made warranties by reference thereto in the policy unless a copy of the application or other instrument thus referred to is incorporated into the policy, or indorsed thereon, or attached thereto. MacKinnon *v.* Mutual F. Ins. Co., 89 Iowa 170, 56 N. W. 423; Ellis *v.* Council Bluffs Ins. Co., 64 Iowa 507, 20 N. W. 782; Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1; Taylor *v.* Ætna Ins. Co., 120 Mass. 254; Kollitz *v.* Equitable Mut. F. Ins. Co., 92 Minn. 234, 99 N. W. 892.

In Canada the conditions and warranties are regulated by statute. Ballagh *v.* Royal Mut. F. Ins. Co., 5 Ont. App. 87; Butler *v.* Standard F. Ins. Co., 4 Ont. App. 391; Parsons *v.* Citizens' Ins. Co., 4 Ont. App. 96; Findley *v.* Fire Ins. Co. of North America, 25 Ont. 515; Sly *v.* Ottawa Agricultural Ins. Co., 29 U. C. C. P. 28; McIntyre *v.* Montreal Nat. Ins. Co., 44 U. C. Q. B. 501.

58. Germier *v.* Springfield F. & M. Ins. Co., 109 La. 341, 33 So. 361; Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122; Phœnix Assur. Co. of London *v.* Munger Improved Cotton Mach. Mfg. Co., 92 Tex. 297, 49 S. W. 222.

59. *Maine.*— Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219.

Mississippi.— Planters' Ins. Co. *v.* Myers, 55 Miss. 479, 30 Am. Rep. 521.

Missouri.— Ramer *v.* American Cent. Ins. Co., 70 Mo. App. 47.

New York.— Wall *v.* East River Mut. Ins. Co., 7 N. Y. 370 [*overruling* Wall *v.* Howard Ins. Co., 14 Barb. 383]; O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122; Evans *v.* Columbia F. Ins. Co., 40 Misc. 316, 81 N. Y. Suppl. 933.

United States.—Higgie *v.* American Lloyds, 14 Fed. 143, 11 Biss. 395; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

See 28 Cent. Dig. tit. "Insurance," § 558 *et seq.*

Within Cal. Civ. Code, §§ 2607, 2608, a provision in the policy that the insurer shall not be liable for loss caused directly or indirectly by order of any civil authority is not a warranty. Connor *v.* Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127.

60. Ætna Ins. Co. *v.* Norman, 12 Ind. App. 652, 40 N. E. 1116; Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 367; Phœnix Assur. Co. of London *v.* Munger Improved Cotton Mach. Mfg. Co., 92 Tex. 297, 49 S. W. 222 [*affirming* (Civ. App. 1898) 49 S. W. 271].

61. *Illinois.*—Farmers' F. Ins. Co. *v.* Bates, 65 Ill. App. 37.

Louisiana.— Cornell *v.* Hope Ins. Co., 3 Mart. N. S. 223.

New Jersey.— Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110.

New York.— Evans *v.* Columbia F. Ins. Co., 40 Misc. 316, 81 N. Y. Suppl. 933.

United States.— Hearn *v.* Equitable Safety Ins. Co., 12 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398].

See 28 Cent. Dig. tit. "Insurance," § 558 *et seq.*

62. Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342.

63. Phœnix Ins. Co. *v.* Benton, 87 Ind. 132; Whitney *v.* Ocean Ins. Co., 14 La. 485, 33 Am. Dec. 595; Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

64. Cogswell *v.* Chubb, 157 N. Y. 709, 53 N. E. 1124 [*affirming* 1 N. Y. App. Div. 93, 36 N. Y. Suppl. 1076]; Farmers' Ins., etc.,

policy is nevertheless not absolutely void but voidable in such sense that it will be valid if the company waives the breach of warranty or condition.[65] Notwithstanding the broad statement, however, supported by many cases,[66] that falsity of any statement contained in the policy or incorporated therein, by reference, will render the policy void irrespective of its materiality or the good faith with which it is made, nevertheless there may be statements in the policy or in the application referred to in the policy, such for instance as descriptions of the property, which are so clearly matters of surplusage and not pertinent or material to the contract that they will be disregarded, and their falsity will not affect the validity of the contract.[67]

c. Materiality — "Representation" and "Warranty" Distinguished. Warranties differ from representations, then, in that falsity of a representation will defeat the contract only where it is material, as representations are merely inducements to the making of the contract,[68] while in case of a warranty the statement is made material by the very language of the contract, so that a misrepresentation of a matter warranted is a breach of the contract itself.[69] Therefore the falsity of a statement which is made a warranty will avoid the contract without regard to whether it can be considered as material in any way to the risk or the loss.[70]

Co. *v.* Snyder, 16 Wend. (N. Y.) 481, 30 Am. Dec. 118; Murgatroyd *v.* Crawford, 2 Yeates (Pa.) 420.

65. Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399. See *infra*, XIV, A, 4.

66. See cases cited *supra*, note 62 *et seq.*, and *infra*, note 67 *et seq.*

67. Cases of this kind are to be explained, not on the theory that the parties cannot by express stipulations make any representations material without regard to the extent to which they may affect the risk, but on the theory that, considering the purpose with which the contract is made, it could not have been the intention of the parties that exact accuracy in such statements was relied on.

Indian Territory.— Liverpool, etc., Ins. Co. *v.* Kearney, 2 Indian Terr. 67, 46 S. W. 414.

Kansas.— Phœnix Assur. Co. *v.* Hinds, 67 Kan. 595, 73 Pac. 893.

Kentucky.— Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634.

Nebraska.— Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125.

New York.— Farmers' Ins., etc., Co. *v.* Snyder, 16 Wend. 481, 30 Am. Dec. 118 [*affirming* 13 Wend. 92]; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 22 Am. Dec. 567.

Ohio.— Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

United States.— Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 115 Fed. 77, 52 C. C. A. 67, 124 Fed. 25, 59 C. C. A. 545; Fisher *v.* Crescent Ins. Co., 33 Fed. 549.

England.— Dobson *v.* Sotheby, M. & M. 90, 31 Rev. Rep. 718, 22 E. C. L. 481.

See 28 Cent. Dig. tit. "Insurance," § 568.

See also cases cited *infra*, note 15.

68. See *supra*, XII, A, 1.

69. *Connecticut.*— Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

Louisiana.—Germier *v.* Springfield F. & M. Ins. Co., 109 La. 341, 33 So. 361.

Maine.— Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219.

Minnesota.— Ætna Ins. Co. *v.* Grube, 6 Minn. 82.

Missouri.— Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342; Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209.

New Jersey.— Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

United States.— American Credit Indemnity Co. *v.* Carrollton Furniture Mfg. Co., 95 Fed. 111, 36 C. C. A. 671; Hearn *v.* Equitable Safety Ins. Co., 11 Fed. Cas. No. 6,300, 4 Cliff. 192 [*affirmed* in 20 Wall. 494, 22 L. ed. 398].

See 28 Cent. Dig. tit. "Insurance," § 560.

70. *California.*— Bayley *v.* Employers' Liability Assur. Corp., (1899) 56 Pac. 638.

Illinois.— Thomas *v.* Fame Ins. Co., 108 Ill. 91 [*affirming* 10 Ill. App. 545].

Indiana.— Cox *v.* Ætna Ins. Co., 29 Ind. 586.

Louisiana.—Germier *v.* Springfield F. & M. Ins. Co., 109 La. Ann. 341, 33 So. 361; Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. 51, 17 Am. Dec. 175.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200.

Minnesota.— Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 429, 52 N. W. 910, 17 L. R. A. 575.

Missouri.— Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247; Maddox *v.* Dwelling House Ins. Co., 56 Mo. App. 343.

New York.— O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122; Wall *v.* Howard Ins. Co., 14 Barb. 383; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75; Duncan *v.* Sun F. Ins. Co., 6 Wend. 488, 22 Am. Dec. 539; Callaghan *v.* Atlantic Ins. Co., 1 Edw. 64.

Pennsylvania.— State Mut. F. Ins. Co. *v.* Arthur, 30 Pa. St. 315.

Virginia.— Virginia F. & M. Ins. Co. *v.* Morgan, 90 Va. 290, 18 S. E. 191.

d. Knowledge of Falsity. The fact that a statement which is made a warranty is made in good faith or through mistake will not prevent the falsity thereof from constituting a breach of warranty and avoiding the policy.[71] Nevertheless statements which are made warranties may by their very terms so clearly appear to be merely statements as to the knowledge or belief of the insured that falsity therein will avoid the policy only where it is intentional, and as to a material matter.[72]

e. Construction of Warranty.[73] As the effect of a breach of warranty is to invalidate the contract and operate as a forfeiture of the insurance, a warranty will be construed strictly as against the company, and liberally as against the insured.[74]

B. As to Specific Matters — 1. Description, Location, and Use of Property — a. Description. The description of the property insured as to character and construction is a warranty that the property is as described, and if it be untrue

United States.— Clark *v.* Manufacturers' Ins. Co., 8 How. 235, 12 L. ed. 1061 [*reversing* 5 Fed. Cas. No. 2,829, 2 Woodb. & M. 472]; Bulkley *v.* Protection Ins. Co., 4 Fed. Cas. No. 2,118, 2 Paine 82.

England.— Newcastle F. Ins. Co. *v.* Macmorran, 3 Dow. 255, 3 Eng. Reprint 1057.

See 28 Cent. Dig. tit. "Insurance," § 565.

By statute in some of the states breach of warranty will not defeat recovery unless the warranty is as to a matter material to the risk.

Georgia.— Mobile Fire Dept. Ins. Co. *v.* Miller, 58 Ga. 420.

Kentucky.— Warren Deposit Bank *v.* Maryland Fidelity, etc., Co., 116 Ky. 38, 74 S. W. 1111, 25 Ky. L. Rep. 289; Germania Ins. Co. *v.* Rudwig, 80 Ky. 223; Farmers', etc., Ins. Co. *v.* Curry, 13 Bush 312, 26 Am. Rep. 194.

Maine.— Philadelphia Fidelity Mut. L. Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197.

Massachusetts.—Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525; Barre Boot Co. *v.* Milford Mut. F. Ins. Co., 7 Allen 42.

Missouri.— Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

North Dakota.— Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

Ohio.— North American Acc. Ins. Co. *v.* Sickles, 23 Ohio Cir. Ct. 594.

Tennessee.— Continental F. Ins. Co. *v.* Whitaker, (Sup. 1904) 79 S. W. 119; Nashville First Nat. Bank *v.* U. S. Fidelity, etc., Co., 110 Tenn. 10, 75 S. W. 1076, 100 Am. St Rep. 765.

71. *Georgia.*— Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595.

New Hampshire.— Davis *v.* Ætna Mut. F. Ins. Co., 67 N. H. 335, 39 Atl. 902.

New York.— Le Roy *v.* Market F. Ins. Co., 45 N. Y. 80.

Ohio.— Byers *v.* Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623.

Pennsylvania.—Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41; Cooper *v.* Farmers' Mut. F. Ins. Co., 50 Pa. St. 299, 88 Am. Dec. 544 [*distinguished* in Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464].

United States.— Fisher *v.* Crescent Ins. Co., 33 Fed. 544.

Canada.— Greet *v.* Citizens' Ins. Co., 27 Grant Ch. (U. C.) 121.

See 28 Cent. Dig. tit. "Insurance," § 558 *et seq.*

It is otherwise as to representations which are not made warranties. See *supra*, XII, A, 1, c.

72. *Indiana.*— Phenix Ins. Co. *v.* Wilson, 132 Ind. 449, 25 N. E. 592.

Iowa.— Wilkins *v.* Germania F. Ins. Co., 57 Iowa 529, 10 N. W. 916.

Maine.— Garcelon *v.* Hampden F. Ins. Co., 50 Me. 580.

Minnesota.— Ætna Ins. Co. *v.* Grube, 6 Minn. 82.

Mississippi.— Planters' Ins. Co. *v.* Myers, 55 Miss. 479, 30 Am. Rep. 521.

United States.— Mulville *v.* Adams, 19 Fed. 887.

See 28 Cent. Dig. tit. "Insurance," § 558 *et seq.*

An unqualified assertion of a material fact which proves to be false will avoid the policy, although the company must have known the impossibility of any knowledge as to the fact on the part of the insured. Callaghan *v.* Atlantic Ins. Co., 1 Edw. (N. Y.) 64.

73. **General rule of construction** see *supra*, XI, A, 3.

74. *Illinois.*— Schroeder *v.* Trade Ins. Co., 109 Ill. 157.

Indiana.— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498.

Maryland.— U. S. Fire & M. Ins. Co. *v.* Kimberly, 34 Md. 224, 6 Am. Rep. 325.

New York.— Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182; Mowry *v.* World Mut. L. Ins. Co., 7 Daly 321.

Pennsylvania.— Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520.

Rhode Island.— Wilson *v.* Conway F. Ins. Co., 4 R. I. 141.

United States.— Kansas City First Nat. Bank *v.* Hartford F. Ins. Co., 95 U. S. 673, 24 L. ed. 563; Stout *v.* Commercial Union Assur. Co., 12 Fed. 554, 11 Biss. 309; Sayles *v.* Northwestern Ins. Co., 21 Fed. Cas. No. 12,422, 2 Curt. 610.

England.— Mayall *v.* Mitford, 1 N. & P. 732, 6 A. & E. 670, W. W. & D. 310, 33 E. C. L. 355.

See 28 Cent. Dig. tit. "Insurance," § 564.

in substance the policy is void.[75] However, complete accuracy in detail is not required or essential, provided that the description is substantially correct and that the risk is not really greater than as represented.[76] An omission to mention a material part of the description is a fatal concealment,[77] but not so if the part omitted in no wise increases the hazard.[78] The age of a building is a material part of its description, and if false will effect a forfeiture of the policy,[79] unless such a statement be entirely immaterial, because of the nature, preservation, and value of the premises.[80] A practically complete reconstruction is equivalent to a rebuilding and the date thereof may be used to fix the age of the structure.[81]

b. Location. While a statement as to the location of the subject-matter of the risk, both with reference to its own situation,[82] and with reference to its position relatively to adjacent structures,[83] is an essential feature of the risk when

75. Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316; Jackson *v.* St. Paul F. & M. Ins. Co., 33 Hun (N. Y.) 60; Evans *v.* Columbia F. Ins. Co., 40 Misc. (N. Y.) 316, 81 N. Y. Suppl. 933; Delonguemare *v.* Tradesmens' Ins. Co., 2 Hall (N. Y.) 689; Fowler *v.* Ætna F. Ins. Co., 6 Cow. (N. Y.) 673, 16 Am. Dec. 460; Mulvey *v.* Gore Mut. F. Assur. Co., 25 U. C. Q. B. 424; Davis *v.* Scottish Provincial Ins. Co., 16 U. C. C. P. 176. Thus the description of a stone house with a wooden kitchen as a stone dwelling-house is untrue and vitiates the policy. Chase *v.* Hamilton Ins. Co., 20 N. Y. 52. The description must be incorporated into the policy in terms or by reference or it cannot amount to a warranty. Delonguemare *v.* Tradesmens' Ins. Co., *supra*. And the statements in the survey may be regarded as representations despite a reference to them in the policy. Snyder *v.* Farmers' Ins. Co., 13 Wend. (N. Y.) 92. See also *supra*, XI, I.

76. *Indiana.*— Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868.

Iowa.— Wilkins *v.* Germania F. Ins. Co., 57 Iowa 529, 10 N. W. 916.

Massachusetts.— Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Medina *v.* Builders' Mut. F. Ins. Co., 120 Mass. 225.

New York.— Bilbrough *v.* Metropolis Ins. Co., 5 Duer 587; Snyder *v.* Farmers' Ins., etc., Co., 13 Wend. 92.

Rhode Island.— Massell *v.* Protective Mut. F. Ins. Co., 19 R. I. 565, 35 Atl. 209; Lindsey *v.* Union Mut. F. Ins. Co., 3 R. I. 157.

South Dakota.— McNamara *v.* Dakota F. & M. Ins. Co., 1 S. D. 342, 47 N. W. 288.

Texas.— Hartford F. Ins. Co. *v.* Moore, 13 Tex. Civ. App. 644, 36 S. W. 146.

United States.— Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145.

See 28 Cent. Dig. tit. "Insurance," § 589.

A description is not inaccurate if it can be made definite and complete by reference to extrinsic matters referred to therein or by a construction of the entire writing. Woods *v.* Atlantic Mut. Ins. Co., 50 Mo. 112; McCulloch *v.* Norwood, 58 N. Y. 562; Yonkers, etc., F. Ins. Co. *v.* Hoffman F. Ins. Co., 6 Rob. (N. Y.) 316.

Usage is competent to explain terms used in describing property, provided such usage was known to the insured. Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497; Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26; Fowler *v.* Ætna F. Ins. Co., 7 Wend. (N. Y.) 270. See Meyer *v.* Queen Ins. Co., 41 La. Ann. 1000, 6 So. 899, for an instance of construction of the language employed.

77. Day *v.* Conway Ins. Co., 52 Me. 60. See *supra*, XII, A, 2, b.

Knowledge or mistake of the agent is imputable to the insurer, so that a misdescription of character or situation is not fatal necessarily if the building described was familiar to the insurer. Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624; Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31; Hartford F. Ins. Co. *v.* Moore, 13 Tex. Civ. App. 644, 36 S. W. 146.

78. Benedict *v.* Ocean Ins. Co., 31 N. Y. 389 [*affirming* 1 Daly 8].

79. Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898.

80. Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444.

81. Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497; Manufacturers', etc., Mut. Ins. Co. *v.* Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105 [*affirming* 68 Ill. App. 268]; Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. 867.

The age of the materials cannot be considered in determining the age of the building. Phenix Ins. Co. *v.* Pickel, 3 Ind. App. 332, 29 N. E. 432.

82. Maddox *v.* Dwelling House Ins. Co., 56 Mo. App. 343; Eddy St. Iron Foundry *v.* Farmers' Mut. F. Ins. Co., 5 R. I. 426; Eddy St. Iron Foundry *v.* Hampden Stock, etc., F. Ins. Co., 8 Fed. Cas. No. 4,277, 1 Cliff. 300.

A statement in the application that insurance is desired upon household goods while they are in a building does not involve a representation that the insured owns the building, or that the goods are then in it. Omaha F. Ins. Co. *v.* Crighton, 50 Nebr. 314, 69 N. W. 766.

83. *Colorado.*— Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

Maine.—Day *v.* Conway Ins. Co., 52 Me. 60.

Massachusetts.— Bostwick *v.* Bass, 99 Mass. 469; Tebbetts *v.* Hamilton Mut. Ins. Co., 1 Allen 305, 79 Am. Dec. 740.

required and made a part of the policy, so that a misrepresentation therein, although unintentional, may invalidate the policy; yet immaterial variations, omissions, or errors in no way affecting the hazard will not affect the rights of the insured.[84]

c. Use. While the insured must correctly state the use[85] and nature of the occupancy[86] of the premises insured, when he undertakes to describe the prop-

New York.— Mamlok *v.* Franklin, 65 N. Y. 556; Chaffee *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 376; Wilson *v.* Herkimer County Mut. Ins. Co., 6 N. Y. 53; Gates *v.* Madison County Mut. Ins. Co., 2 N. Y. 43; Huntley *v.* Perry, 38 Barb. 569; Kennedy *v.* St. Lawrence County Mut. Ins. Co., 10 Barb. 285; Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. 191; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75; Trench *v.* Chenango County Mut. Ins. Co., 7 Hill 122; Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill 188, 40 Am. Dec. 345.

Pennsylvania.— Pottsville Mut. F. Ins. Co. *v.* Horan, 89 Pa. St. 438.

Canada.— O'Neill *v.* Ottawa Agricultural Ins. Co., 30 U. C. C. P. 151.

See 28 Cent. Dig. tit. "Insurance," § 590.

Rule applied.— A condition in a policy of insurance requiring that the insured shall truly state the situation of the building in reference to other buildings within a certain distance relates only to an insurance on the building, and not to an insurance on the goods contained in it. Burrill *v.* Chenango Mut. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 233. There is no misrepresentation in stating that a building is "isolated" if it be detached, although "isolated" has a technical meaning of separated by one hundred feet according to the policy, if this meaning be unknown to the insured. Pacaud *v.* Queen Ins. Co., 21 L. C. Jur. 111. A statement that a building is "within fifty feet" was held in Allen *v.* Charlestown Mut. F. Ins. Co., 5 Gray (Mass.) 384, to sufficiently specify a building two feet away. The mention of the nearest buildings in an application not requiring all buildings adjacent to be set out is not a warranty that there are no other buildings contiguous. Gates *v.* Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624.

84. *Maine.*— Dennison *v.* Thomaston Mut. Ins. Co., 20 Me. 125, 37 Am. Dec. 42.

Massachusetts.— Hall *v.* People's Mut. F. Ins. Co., 6 Gray 185.

Minnesota.— Everett *v.* Continental Ins. Co., 21 Minn. 76.

Missouri.— Dougherty *v.* German-American Ins. Co., 67 Mo. App. 526.

New York.— Baldwin *v.* Citizens' Ins. Co., 60 Hun 389, 15 N. Y. Suppl. 587.

Pennsylvania.— Meadowcraft *v.* Standard F. Ins. Co., 61 Pa. St. 91.

Wisconsin.— Prieger *v.* Exchange Mut. Ins. Co., 6 Wis. 89.

Canada.— Wilson *v.* Standard F. Ins. Co., 29 U. C. C. P. 308; Naughter *v.* Ottawa Agricultural Ins. Co., 43 U. C. C. P. 121; Benson *v.* Ottawa Agricultural Ins. Co., 42 U.C. Q. B. 282; Cie. d'Assurance Mutuelle, etc. *v.* Villeneuve, 29 L. C. Jur. 163; Goodwin *v.* Lancashire F., etc., Ins. Co., 18 L. C. Jur. 1 [*reversing* 16 L. C. Jur. 298]; Wilson *v.* State F. Ins. Co., 7 L. C. Jur. 223; Casey *v.* Goldsmid, 4 L. C. Rep. 107, 3 R. J. R. Q. 144.

See 28 Cent. Dig. tit. "Insurance," § 589 *et seq.*

Illustrations.— A failure to disclose the existence of a structure of rough timber, forty-five feet by twelve, and fifty feet distant, used as a shelter, and not materially increasing the risk, did not affect the policy. Richmondville Union Seminary *v.* Hamilton Mut. Ins. Co., 14 Gray (Mass.) 459. A hogpen and a henhouse three to six feet high were held not to constitute a building necessary to be described. White *v.* Springfield Mut. F. Assur. Co., 8 Gray (Mass.) 566. An omission to state the existence of a small office seventy-five feet distant was held not to affect the policy in Burleigh *v.* Gebhard F. Ins. Co., 90 N. Y. 220. And even an immaterial omission has been held fatal when the application is specifically made a part of the policy and warranted as a full exposition of the facts so far as known. Hardy *v.* Union Mut. F. Ins. Co., 4 Allen (Mass.) 217. But under a policy containing the same provisions an innocent misstatement of ninety feet instead of seventy-two as the distance of the nearest house did not vitiate the policy in Noone *v.* Transatlantic Ins. Co., 88 Cal. 152, 26 Pac. 103. A failure to state an intention to erect a building, preparations for which are begun, is not a concealment affecting the policy. Gates *v.* Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360. There must be so much that is true in the description that, casting out what is false, there is still enough left to clearly point out the place where the property is. Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249 [*affirming* 35 N. Y. Super. Ct. 394].

85. *Louisiana.*—Prudhomme *v.* Salamander F. Ins. Co., 27 La. Ann. 695.

Massachusetts.— Goddard *v.* Monitor Mut. F. Ins. Co., 108 Mass. 56, 11 Am. Rep. 307.

New Jersey.— Greenwich Ins. Co. *v.* Dougherty, 64 N. J. L. 716, 42 Atl. 485.

Pennsylvania.— Lennox *v.* Greenwich Ins. Co., 2 Pa. Super. Ct. 431, 39 Wkly. Notes Cas. 188.

United States.— Camden Consol. Oil Co. *v.* Ohio Ins. Co., 4 Fed. Cas. No. 2,337*b*.

See 28 Cent. Dig. tit. "Insurance," § 593.

86. Merwin *v.* Star F. Ins. Co., 7 Hun (N. Y.) 659 [*affirmed* in 72 N. Y. 603]; Sarsfield *v.* Metropolitan Ins. Co., 61 Barb.

erty, or when he is called upon so to do,[87] save in immaterial matters,[88] he is not required to state the uses to which the building may be put if no inquiry is made in the absence of misrepresentation or fraud.[89] A statement of the use of the building may be descriptive only of its accustomed use and not equivalent to a warranty *in præsenti*.[90] Thus the description of a building as a dwelling is not a warranty that it is occupied.[91] But ordinarily a statement of use or occupancy must be true in the present, particularly if the present tense is used.[92] A description of a building as used for a certain trade carries with it a sufficient statement of its use for all purposes essential and customary in that trade.[93]

2. VALUE. Where an insured in order to obtain excessive insurance or other-

(N. Y.) 479, 42 How. Pr. (N. Y.) 97; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. (N. Y.) 75; Pottsville Mut. F. Ins. Co. *v.* Fromm, 100 Pa. St. 347; Mullin *v.* Vermont Mut. F. Ins. Co., 54 Vt. 223. It is not a misdescription to call a building formerly a factory but now used as a dwelling-house by the latter name. Mitchell *v.* Niagara F. Ins. Co., 91 Hun (N. Y.) 287, 36 N. Y. Suppl. 204. The description of a boarding-house as a dwelling is not so inaccurate as to affect the policy. Planters' Ins. Co. *v.* Sorrels, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780. But a hotel cannot be properly so described. Thomas *v.* Commercial Union Assur. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323.

87. *Illinois.*— Howard F. & M. Ins. Co. *v.* Cornick, 24 Ill. 455.

Maryland.— Turnbull *v.* Home F. Ins. Co., 83 Md. 312, 34 Atl. 875.

Massachusetts.— Abbott *v.* Shawmut Mut. F. Ins. Co., 3 Allen 213.

Missouri.— Loehner *v.* Home Mut. Ins. Co., 19 Mo. 628.

New York.— Alexander *v.* Germania F. Ins. Co., 2 Hun 655, 5 Thomps. & C. 208 [*reversed* in 66 N. Y. 464, 23 Am. Rep. 76].

Texas.—Sun Ins. Co. *v.* Texarkana Foundry, etc., Works, 3 Tex. App. Civ. Cas. § 320.

Virginia.— Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

See 28 Cent. Dig. tit. "Insurance," § 593.

But although such a statement is called a warranty it will not be treated as such where it was evidently not so intended. Mills, etc., Nat. Bank *v.* Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324.

88. *Illinois.*— Howard F. & M. Ins. Co. *v.* Cornick, 24 Ill. 455.

Iowa.— Carter *v.* Humboldt F. Ins. Co., 17 Iowa 456.

Massachusetts.—Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525; Haley *v.* Dorchester Mut. F. Ins. Co., 12 Gray 545.

New York.— Whitney *v.* Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116; Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60.

Texas.— Liverpool, etc., Ins. Co. *v.* Nations, 24 Tex. Civ. App. 562, 59 S. W. 817; Philadelphia Fire Assoc. *v.* Colgin, (Civ. App. 1896) 33 S. W. 1004.

See 28 Cent. Dig. tit. "Insurance," § 593.

The test of materiality is whether the disclosure of the facts would have influenced the taking of the risk or the rate of premium. Hardman *v.* Firemen's Ins. Co., 20 Fed. 594.

89. Lyon *v.* Commercial Ins. Co., 2 Rob. (La.) 266; Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86.

The insured need not inform the insurer that the premises are used for purposes of prostitution. Phenix Ins. Co. *v.* Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307; National F. Ins. Co. *v.* U. S. Building, etc., Assoc., 54 S. W. 714, 21 Ky. L. Rep. 1207; Hall *v.* People's Mut. F. Ins. Co., 6 Gray (Mass.) 185.

90. Niagara F. Ins. Co. *v.* Johnson, 4 Kan. App. 16, 45 Pac. 789; Dolliver *v.* St. Joseph F. & M. Ins. Co., 131 Mass. 39; Pabst Brewing Co. *v.* Union Ins. Co., 63 Mo. App. 663.

91. Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Slobodisky *v.* Phenix Ins. Co., 53 Nebr. 816, 74 N. W. 270; Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133; Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; Hill *v.* Hibernia Ins. Co., 10 Hun (N. Y.) 26; Alexander *v.* Germania Ins. Co., 2 Hun (N. Y.) 655, 5 Thomps. & C. 208; Lennox *v.* Greenwich Ins. Co., 2 Pa. Super. Ct. 431, 39 Wkly. Notes Cas. 188. *Contra*, Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

To state that a building is "occupied as a dwelling" is to warrant that there is occupancy *in præsenti*. Aiple *v.* Boston Ins. Co., 92 Minn. 337, 100 N. W. 8.

92. *District of Columbia.*— Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. 66.

Indiana.— Baker *v.* German F. Ins. Co., 124 Ind. 490, 24 N. E. 1041.

Iowa.— Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539.

New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

New York.— Hobby *v.* Dana, 17 Barb. 111.

See 28 Cent. Dig. tit. "Insurance," § 593 *et seq.*

"Occupied as a dwelling" will be construed to be words of warranty in the absence of knowledge by the insurer that the building was vacant. Aiple *v.* Boston Ins. Co., 92 Minn. 337, 100 N. W. 8.

93. Collins *v.* Charlestown Mut. F. Ins. Co., 10 Gray (Mass.) 155; Martin *v.* State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397; Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Wall *v.* Howard Ins.

wise, intentionally and falsely grossly or materially exaggerates the value of his property at the time he takes out the policy, he is not entitled to recover thereon in case of loss;[94] but inasmuch as value is inherently a matter largely of opinion and estimate, overvaluation is not conclusive of fraud, but only evidence thereof.[95] If it can be shown that the insured was honest in his estimate of value, even though he placed the same much higher than it really was, the misstatement will not affect his right to recover;[96] and this has been held to be true, although

Co., 14 Barb. (N. Y.) 383; Chaplin *v.* Provincial Ins. Co., 23 U. C. C. P. 278.

94. *Illinois.*— Lycoming F. Ins. Co. *v.* Rubin, 79 Ill. 402; Hartford F. Ins. Co. *v.* Magee, 47 Ill. App. 367.

Kentucky.— Protection Ins. Co. *v.* Hall, 15 B. Mon. 411; Continental Ins. Co. *v.* Ware, 3 Ky. L. Rep. 621.

New Hampshire.— Hersey *v.* Merrimack County Mut. F. Ins. Co., 27 N. H. 149.

New York.— Sturm *v.* Great Western Ins. Co., 40 How. Pr. 423.

Tennessee.— Catron *v.* Tennessee Ins. Co., 6 Humphr. 176.

Texas.— Home Ins. Co. *v.* Eakin, 2 Tex. App. Civ. Cas. § 665.

Vermont.— Boutelle *v.* Westchester F. Ins. Co., 51 Vt. 4, 31 Am. Rep. 666.

United States.— Whittle *v.* Farmville Ins. Co., 29 Fed. Cas. No. 17,603, 3 Hughes 421.

England.— Britton *v.* Royal Ins. Co., 4 F. & F. 905, 15 L. T. Rep. N. S. 872.

Canada.— Chaplin *v.* Provincial Ins. Co., 23 U. C. C. P. 278. See also Moore *v.* Citizens F. Ins. Co., 14 Ont. App. 582; Sly *v.* Ottawa Agricultural Ins. Co., 29 U. C. C. P. 557, 29 U. C. C. P. 28; Rice *v.* Provincial Ins. Co., 7 U. C. C. P. 548; Park *v.* Phœnix Ins. Co., 19 U. C. Q. B. 110; Dickson *v.* Equitable F. Assur. Co., 18 U. C. Q. B. 246; Seghetti *v.* Queen Ins. Co., 10 L. C. Jur. 243; Thomas *v.* Times, etc., F. Assur. Co., 3 L. C. Jur. 162.

See 28 Cent. Dig. tit. "Insurance," § 597.

Such representations should, however, be made a part of the policy. If oral they are not admissible. Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

Overvaluation, in the absence of a stipulation that the policy should be void in such event, has been said not to be material to the risk in the case of an open policy (Aurora F. Ins. Co. *v.* Johnson, 46 Ind. 315; Cox *v.* Ætna Ins. Co., 29 Ind. 586; Indiana Farmers' Live Stock Ins. Co. *v.* Bogeman, 9 Ind. App. 399, 36 N. E. 927), and a representation as to value regarded necessarily as a mere expression of opinion (Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498). So also under a statute (Rosser *v.* Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. 286), and *compare* under a Missouri statute (Williams *v.* Bankers' etc., Town Mut. F. Ins. Co., 73 Mo. App. 607). If the overvaluation appears in an application made out at the request of the insurer after the policy is issued there is no forfeiture. Liverpool, etc., Ins. Co. *v.* Stern, (Tex. Civ. App. 1895) 29 S. W. 678.

In Ohio, by statute, in the absence of actual fraud no misrepresentation as to value will affect the policy when the agent has not personally examined the premises. Queen Ins. Co. *v.* Leslie, 47 Ohio St. 409, 24 N. E. 1072, 9 L. R. A. 45.

Overvaluation in proofs of loss see *infra*, XVIII, C, 3.

Undervaluation will not affect the policy. Hawke *v.* Niagara Dist. Mut. F. Ins. Co., 23 Grant Ch. (U. C.) 139.

95. Akin *v.* Mississippi M. & F. Ins. Co., 4 Mart. N. S. (La.) 661; Brooke *v.* Louisiana State Ins. Co., 4 Mart. N. S. (La.) 640; Ocean Ins. Co. *v.* Fields, 18 Fed. Cas. No. 10,406, 2 Story 59.

If the policy calls for a statement of the price paid, the question requires a statement of the actual price and not the price mentioned in the deed. Stensgaard *v.* St. Paul Real Estate Title Ins. Co., 50 Minn. 420, 52 N. W. 910, 17 L. R. A. 575.

It is not fraud to state that the building cost thirteen thousand dollars, although its present value be but six thousand dollars. Meyers *v.* Lebanon Mut. Ins. Co., 156 Pa. St. 420, 27 Atl. 39.

96. *Illinois.*— Merchants', etc., Ins. Co. *v.* Schroeder, 18 Ill. App. 216.

Indiana.— Citizens' F. & M. Ins. Co. *v.* Short, 62 Ind. 316.

Iowa.— Behrens *v.* Germania F. Ins. Co., 64 Iowa 19, 19 N. W. 838.

Kentucky.— Protection Ins. Co. *v.* Hall, 15 B. Mon. 411; Teutonia Ins. Co. *v.* Howell, 54 S. W. 852, 21 Ky. L. Rep. 1245; German Ins. Co. *v.* Read, 13 S. W. 1080, 14 S. W. 595, 12 Ky. L. Rep. 371; Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 7 L. R. A. 81; Dwelling-House Ins. Co. *v.* Freeman, 12 Ky. L. Rep. 894; Agricultural Ins. Co. *v.* Yates, 10 Ky. L. Rep. 984; Continental Ins. Co. *v.* Ware, 3 Ky. L. Rep. 621.

Massachusetts.— Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350.

Michigan.— Schmidt *v.* City, etc., F. Ins. Co., 55 Mich. 432, 21 N. W. 875.

Mississippi.— Planters' Ins. Co. *v.* Myers, 55 Miss. 479, 30 Am. Rep. 521.

Missouri.— Hubbard *v.* North British, etc., Ins. Co., 57 Mo. App. 1.

Nebraska.— Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125.

New York.— Huth *v.* New York Mut. Ins. Co., 8 Bosw. 538.

Oregon.— Baker *v.* State Ins. Co., 31 Oreg. 41, 48 Pac. 699, 65 Am. St. Rep. 807.

Pennsylvania.— Miller *v.* Germania F. Ins. Co., 13 Phila. 551.

the statement of value be made specifically a warranty.[97] An overvaluation of the land on which the insured property stands is wholly immaterial, as the land is not the subject-matter of the insurance.[98] Where the value of the property is far more than the total of insurance an overvaluation is immaterial.[99]

3. Title or Interest of Insured — a. Disclosure of Nature Thereof. The extent and nature of the title of the insured is an important element in determining the character of the risk. As a consequence, even in the absence of any provision of the policy, a material misrepresentation with reference thereto on the faith of which the policy is issued should have the effect of invalidating the insurance.[1] And likewise a concealment amounting to fraud should have the

Texas.— Eakin *v.* Home Ins. Co., 1 Tex. App. Civ. Cas. § 368. But *compare* Home Ins. Co. *v.* Eakin, 2 Tex. App. Civ. Cas. § 666.

Virginia.— Morotock Ins. Co. *v.* Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850; Lynchburg F. Ins. Co. *v.* West, 76 Va. 575, 44 Am. Rep. 177.

Wisconsin.— Beyer *v.* St. Paul F. & M. Ins. Co., 112 Wis. 138, 88 N. W. 57.

United States.— Kansas City First Nat. Bank *v.* Hartford F. Ins. Co., 95 U. S. 673, 24 L. ed. 563; Miller *v.* Alliance Ins. Co., 7 Fed. 649, 19 Blatchf. 308; Field *v.* Insurance Co. of North America, 9 Fed. Cas. No. 4,767, 6 Biss. 121.

England.— Citizens Ins. Co. *v.* Parsons, 7 App. Cas. 96, 51 L. J. P. C. 11, 45 L. T. Rep. N. S. 721.

Canada.— Cope *v.* Scottish Union Co., 5 Brit. Col. 329; McGibbon *v.* Imperial F. Ins. Co., 14 Nova Scotia 6, 1 Can. L. T. 192; Laidlaw *v.* Liverpool, etc., Ins. Co., 13 Grant Ch. (U. C.) 377; Parsons *v.* Citizens' Ins. Co., 43 U. C. Q. B. 261; Redford *v.* Clinton Mut. F. Ins. Co., 38 U. C. Q. B. 538; Newton *v.* Gore Dist. Mut. F. Ins. Co., 33 U. C. Q. B. 92; Pacaud *v.* Queen Ins. Co., 21 L. C. Jur. 111.

See 28 Cent. Dig. tit. "Insurance," § 597.

A Canadian court has indeed asserted that it requires about a double overvaluation to prove fraud. Northern Assur. Co. *v.* Prevost, 25 L. C. Jur. 211. And see Larocque *v.* Royal Ins. Co., 23 L. C. Jur. 217.

A statement in excess of the present value of a stock of goods may be explained by showing that it was the insured's intention to purchase immediately goods to bring the total value up to the amount stated. Myers *v.* Council Bluffs Ins. Co., 72 Iowa 176, 33 N. W. 453; Lee *v.* Howard F. Ins. Co., 11 Cush. (Mass.) 324.

If the insured states the value as being merely his opinion there is no breach of condition, although the value be placed too high. Kerr *v.* Hastings Mut. F. Ins. Co., 41 U. C. Q. B. 217.

Effect of a local statute rendering the policy void even in the absence of fraud see Thurber *v.* Royal Ins. Co., 1 Marv. (Del.) 251, 40 Atl. 1111.

97. Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Bennett *v.* Agricultural Ins. Co., 50 Conn. 420; Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498; Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Shelden *v.* Michigan Millers' Mut. F. Ins. Co., 124 Mich. 303, 82 N. W. 1068. *Contra*, Mercer County School Dist. No. 4 *v.* State Ins. Co., 61 Mo. App. 597; Lama *v.* Boston Dwelling-House Ins. Co., 51 Mo. App. 447.

A failure to put a fair and reasonable value has been under these circumstances regarded as rendering the policy void. Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587.

98. Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; Dacey *v.* Agricultural Ins. Co., 21 Hun (N. Y.) 83.

99. Phœnix Ins. Co. *v.* McKernan, 104 Ky. 224, 46 S. W. 10, 698, 20 Ky. L. Rep. 337.

So if the insurer is to be responsible in case of loss only for a certain proportion of the value as it exists at the time of loss, any statement of present value becomes immaterial. Bonham *v.* Iowa Cent. Ins. Co., 25 Iowa 328.

1. *Alabama.*— Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

New York.— Niblo *v.* North American F. Ins. Co., 1 Sandf. 551.

Ohio.— Philips *v.* Knox County Mut. Ins. Co., 20 Ohio 174.

Tennessee.— Catron *v.* Tennessee Ins. Co., 6 Humphr. 176.

Vermont.— Mullin *v.* Vermont Mut. F. Ins. Co., 54 Vt. 223.

See 28 Cent. Dig. tit. "Insurance," § 601 *et seq.*

The policy is void ab initio upon the delivery of the policy. Waller *v.* Northern Assur. Co., 64 Iowa 101, 19 N. W. 865; Matthie *v.* Globe F. Ins. Co., 68 N. Y. App. Div. 239, 74 N. Y. Suppl. 177.

Fraud.— Such misrepresentation by many courts is required to have been fraudulent (Bellatty *v.* Thomaston M. & F. Ins. Co., 61 Me. 414; Emery *v.* Piscataqua F. & M. Ins. Co., 52 Me. 322), except in the case of mutual companies, where it has been said that because of the lien for premiums frequently reserved on the property insured the insurer is entitled to have a complete disclosure and representation of all material matters concerning the title (Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Pinkham *v.* Morang, 40 Me. 587).

False swearing by insured in obtaining insurance, as to the extent of his interest in the property, will not avoid the policy where it was done under a mistake of fact, and

same effect;[2] but the courts early held that there was no obligation on the insurer to specify the nature of his title when it was not asked about, provided he had an insurable interest and acted *bona fide*.[3] However, as the courts have generally been inclined to treat such representations rather liberally for the benefit of the insured,[4] the insurer has sought to strengthen its own position by inserting in the policy various phrases descriptive of the quantity or quality of ownership, each successively of somewhat stricter signification.[5] Such phrases have, as a general rule, been regarded as valid,[6] but nevertheless they have received uniformly a

without intending to defraud. Phœnix Assur. Co. *v.* Hinds, 67 Kan. 595, 73 Pac. 893; Hartford F. Ins. Co. *v.* Haas, 8 Ky. L. Rep. 610. See *supra*, XII, A, 2.

2. *Illinois.*— Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Hebner *v.* Palatine Ins. Co., 55 Ill. App. 275.

Kentucky.— Addison *v.* Kentucky, etc., Ins. Co., 7 B. Mon. 470.

Missouri.— Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299.

Ohio.— Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

Pennsylvania.— Monroe County Mut. Ins. Co. *v.* Robinson, 5 Wkly. Notes Cas. 389.

Tennessee.— Ætna Ins. Co. *v.* Miers, 5 Sneed 139.

Virginia.— Southern Mut. Ins. Co. *v.* Kloeber, 31 Gratt. 739.

Wisconsin.— Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159.

See 28 Cent. Dig. tit. "Insurance," § 601 *et seq.*

3. *Dakota.*— St. Paul F. & M. Ins. Co. *v.* Neidecken, 6 Dak. 494, 43 N. W. 696.

Illinois.— Farmers' Mut. F., etc., Ins. Co. *v.* Lecroy, 91 Ill. App. 41.

Kansas.— German Ins. Co. *v.* Davis, 6 Kan. App. 268, 51 Pac. 60.

Kentucky.— Hartford F. Ins. Co. *v.* Haas, 8 Ky. L. Rep. 610.

Maine.—Gilman *v.* Dwelling-House Ins. Co., 81 Me. 488, 17 Atl. 544.

Massachusetts.— Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598; Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547; Bixby *v.* Franklin Ins. Co., 8 Pick. 86; Bartlet *v.* Walter, 13 Mass. 267, 7 Am. Dec. 143; Locke *v.* North American Ins. Co., 13 Mass. 61.

Minnesota.— Caplis *v.* American F. Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535.

Missouri.— Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299.

New Jersey.— Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541.

New York.— Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184.

Pennsylvania.—Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331.

United States.— Russel *v.* Union Ins. Co., 21 Fed. Cas. No. 12,146, 1 Wash. 409, 4 Dall. (Pa.) 421, 1 L. ed. 892.

See 28 Cent. Dig. tit. "Insurance," § 601.

A mere statement that the company would not be liable "for loss for property owned by any other party unless such be stated in the policy" does not require a disclosure of such interest but even implies an excuse therefrom. Norwich F. Ins. Co. *v.* Boomer, 52 Ill. 442, 4 Am. Rep. 618.

The nature of the estate need not be stated with technical accuracy, if it is described as ordinarily intelligent persons would have spoken. Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Davis *v.* Quincy Mut. F. Ins. Co., 10 Allen (Mass.) 113; Wyman *v.* People's Equity Ins. Co., 1 Allen (Mass.) 301, 79 Am. Dec. 737; Nichols *v.* Fayette Mut. F. Ins. Co., 1 Allen (Mass.) 63; Weed *v.* Hamburg-Bremen F. Ins. Co., 61 Hun (N. Y.) 110, 15 N. Y. Suppl. 429. Thus a policy on "the Estate of O" sufficiently includes goods which "O" prior to his death conveyed to a trustee for the benefit of his creditors. Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231 [*affirming* 61 Hun 110, 15 N. Y. Suppl. 429]. See also cases cited *infra*, notes 12, 53 *et seq.*

4. Southern Ins., etc., Co. *v.* Lewis, 42 Ga. 587.

5. The current and standard form now recites that the policy is to be void if the "interest of the insured be not truly stated herein or be other than unconditional and sole ownership." Former phrases in use are that the insured is the "owner," "the sole owner," or "unconditional owner" of the property, that he has "a perfect legal and equitable title," or that his title is "unconditional, free, and unencumbered;" or that the insured is the "owner in fee simple."

6. *Illinois.*— Hebner *v.* Palatine Ins. Co., 55 Ill. App. 275.

Kentucky.— Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64.

Missouri.— Grigsby *v.* German Ins. Co., 40 Mo. App. 276; Mt. Leonard Milling Co. *v.* Liverpool, etc., Ins. Co., 25 Mo. App. 259.

New York.— Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451 [*affirming* 1 Thomps. & C. 339].

Texas.— Philadelphia Fire Assoc. *v.* Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153.

West Virginia.— Tyree *v.* Virginia F. & M. Ins. Co., 55 W. Va. 63, 46 S. E. 706, 66 L. R. A. 657.

United States.— Waller *v.* Northern Assur. Co., 10 Fed. 232, 2 McCrary 637.

Canada.— Sherboneau *v.* Beaver Mut. F. Ins. Assoc., 30 U. C. Q. B. 472.

See 28 Cent. Dig. tit. "Insurance," § 601 *et seq.*

The Michigan supreme court has refused to

strict and technical construction by the courts.[7] Under such provisions misrepresentations may avoid the policy, although not made with any knowledge of their falsity or an intent to deceive.[8] And the insurer's failure to inquire into the title is likewise immaterial.[9]

b. What Amounts to a Breach — (i) *Ownership of an Insurable Interest.* When the only stipulation of the policy is that the insured must be the "owner" of the property,[10] or that the property be "his,"[11] the courts have not regarded this statement as importing a warranty that the insured is seized unconditionally in fee to the exclusion of all persons, but, if in common parlance, the property might be spoken of as "his" and he has an insurable interest not over-

regard such stipulations as amounting to a warranty *in præsenti*, but say such provisions are to be construed only with reference to the future. Hall *v.* Niagara F. Ins. Co., 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135; Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340.

But the better view is to regard them as relating to ownership when the policy is issued. Rosenstock *v.* Mississippi Home Ins. Co., 82 Miss. 674, 35 So. 309; Collins *v.* London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924.

In case of a conflict between such clauses in the printed part of the policy and provisions specially inserted, the former must yield to those specifically thus embodied. Dresser *v.* United Firemen's Ins. Co., 45 Hun (N. Y.) 298; Grandin *v.* Rochester German Ins. Co., 107 Pa. St. 26.

The provisions are applicable alike to personalty and realty (Girard F. & M. Ins. Co. *v.* Hebard, 95 Pa. St. 45), except when the term "fee" or "fee simple" is used, such a term not being applicable to anything but real estate (German Ins. Co. *v.* Miller, 39 Ill. App. 633; Butler *v.* Standard F. Ins. Co., 4 Ont. App. 391).

The burden is on the insurer to establish the defense that, at the time the policy was taken out, the insured was not the owner of the property, notwithstanding it is incumbent on the insured, in order to make out a *prima facie* case, to show that the property belonged to him at the time it was burned. Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595. And see *infra*, XXI, G, 1, c.

7. *Dakota.*— St. Paul F. & M. Ins. Co. *v.* Neidecken, 6 Dak. 494, 43 N. W. 696.

Georgia.— Southern Ins., etc., Co. *v.* Lewis, 42 Ga. 587.

New York.— Niblo *v.* North American F. Ins. Co., 1 Sandf. 551.

Vermont.— Swift *v.* Vermont Mut. F. Ins. Co., 18 Vt. 305.

Virginia.— Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. 389, 26 Am. Rep. 364.

See 28 Cent. Dig. tit. "Insurance," § 601.

8. Wilbur *v.* Bowditch Mut. F. Ins. Co., 10 Cush. (Mass.) 446; Holloway *v.* Dwelling-House Ins. Co., 48 Mo. App. 1; Cie. d'Assurance Mutuelle *v.* Le May, 12 Quebec Super. Ct. 232.

Statutes are found, however, making such intention or an increase of risk essential to a forfeiture. See Doyle *v.* American F. Ins. Co., 181 Mass. 139, 63 N. E. 394; McCarty *v.* Imperial Ins. Co., 126 N. C. 820, 36 S. E. 284.

9. Orient Ins. Co. *v.* Williamson, 98 Ga. 464, 25 S. E. 560. But see Miotke *v.* Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463.

So it is immaterial that the insured did not know of the stipulation or thought it non-essential. Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64.

10. Southern Ins., etc., Co. *v.* Lewis, 42 Ga. 587; Manchester F. Assur. Co. *v.* Abrams, 89 Fed. 932, 32 C. C. A. 426; Hopkins *v.* Provincial Ins. Co., 18 U. C. C. P. 74. See also *supra*, II, C, 2.

The words "absolute fee-simple title" mean that the insured does not have a limited interest in the property, but that he claims and holds under a deed of conveyance or other evidence of title purporting to invest him with an estate in fee simple. New Haven Security Ins. Co. *v.* Kuhn, 207 Ill. 166, 69 N. E. 822.

When the condition was to apply if the insured possessed an estate less than "fee simple," it was held to refer to an estate less in quantity or duration and not to one less in quality or nature. Swift *v.* Vermont Mut. F. Ins. Co., 18 Vt. 305.

When the policy was conditioned to be void if the insured's interest be other than the entire and unconditional ownership, it was held that the reference was descriptive, not of the legal title, but only of what interest the insured possessed, and if that be insurable, although less than a fee, and did not rest upon a condition and were not held jointly or in common, the condition was not broken. Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. (Va.) 389, 26 Am. Rep. 364.

11. Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Niblo *v.* North American F. Ins. Co., 1 Sandf. (N. Y.) 551.

An equitable title is sufficient. Farmers' Mut. F. Ins. Co. *v.* Fogelman, 35 Mich. 481.

A provision that "false representations" shall avoid the policy applies to statements as to title. J. B. Ehrsam Mach. Co. *v.* Phenix Ins. Co., 43 Nebr. 554, 61 N. W. 722.

A stipulation for avoidance if the insurer "shall cause the property to be described otherwise than it is" applies only to a description physically and not as to the character of the title or interest. Franklin F. Ins. Co. *v.* Coates, 14 Md. 285.

insured, the policy is not forfeitable because his interest is not entire.[12] But under a policy providing that the title of the insured must not be other than unconditional and sole ownership, the fact that the insured has an insurable interest exceeding in value the amount of the policy will not prevent a forfeiture.[13]

(II) *Ownership of Equitable Title.* If the insured possesses the equitable title to the premises, the fact that the naked legal title is outstanding, which he has a right to compel to be transferred, will not amount to a breach of a condition that he is the owner, that his interest is absolute, or that his title is not other than sole and unconditional ownership.[14] But possession of land under a verbal gift will not satisfy such a condition, because equity will not aid a volunteer to perfect a conveyance.[15] The absence of a deed when the insured is the real owner, although the record title rests in another, will not affect his right to recover.[16] Thus possession under claim of right and color of title for a longer period than the statute of limitations constitutes the occupant the owner in fee of the premises.[17]

(III) *Business Carried on in Name of Another.* Actual ownership satisfying the condition is not interfered with by the fact that the insured has carried on his business in the name of another for purposes of strengthening his credit or otherwise.[18]

12. *Connecticut.*— Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.
Illinois.— Andes Ins. Co. *v.* Fish, 71 Ill. 620.
Iowa.— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.
Massachusetts.— Allen *v.* Charlestown Mut. F. Ins. Co., 5 Gray 384; Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547.
Michigan.— Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 86 N. W. 994; Knop *v.* Hartford Nat. F. Ins. Co., 101 Mich. 359, 59 N. W. 653.
Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.
Nebraska.— Farmers', etc., Ins. Co. *v.* Mickel, (1904) 100 N. W. 130.
New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.
New York.— McCulloch *v.* Norwood, 58 N. Y. 562; Bicknell *v.* Lancaster City, etc., F. Ins. Co., 1 Thomps. & C. 215 [*affirmed* in 58 N. Y. 677]; Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. 275; Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. 527; Irving *v.* Excelsior F. Ins. Co., 1 Bosw. 507.
Texas.— East Texas F. Ins. Co. *v.* Dyches, 56 Tex. 565.
Wisconsin.— Pavey *v.* American Ins. Co., 56 Wis. 221, 13 N. W. 925.
Canada.— Stillman *v.* Agricultural Ins. Co., 16 Ont. 145.
See 28 Cent. Dig. tit. "Insurance," § 601 *et seq.*

13. Gettelman *v.* Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627.

14. *District of Columbia.*— Mallery *v.* Frye, 21 App. Cas. 105.
Iowa.— McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.
Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.
Mississippi.— Phenix Ins. Co. *v.* Bowdre, 67 Miss. 620, 7 So. 596, 19 Am. Rep. 326.
Missouri.— Lingenfelter *v.* Phœnix Ins. Co., 19 Mo. App. 252.
New Jersey.— Martin *v.* State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397.
New York.— Brown *v.* German-American Ins. Co., 10 N. Y. St. 412; Ætna F. Ins. Co. *v.* Tyler, 16 Wend. 385, 30 Am. Dec. 90 [*affirming* 12 Wend. 507].
Pennsylvania.— Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520.
Texas.— Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.
United States.— American Basket Co. *v.* Farmville Ins. Co., 1 Fed. Cas. No. 290, 3 Hughes 251. *Contra*, Murphrey *v.* Old Dominion Ins. Co., 17 Fed. Cas. No. 9,945.
See 28 Cent. Dig. tit. "Insurance," § 607.

15. Wineland *v.* New Haven Security Ins. Co., 53 Md. 276.

16. *Alabama.*— Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355.
Iowa.— Mattocks *v.* Des Moines Ins. Co., 74 Iowa 233, 37 N. W. 174.
Michigan.— Diehlman *v.* Dwelling-House Ins. Co., 78 Mich. 141, 43 N. W. 1045, where the deed held by the insured at the time of the fire contained a total misdescription.
Washington.— Dooly *v.* Hanover F. Ins. Co., 16 Wash. 155, 47 Pac. 507, 58 Am. St. Rep. 26.
Wisconsin.— Davis *v.* Pioneer Furniture Co., 102 Wis. 394, 78 N. W. 596.
See 28 Cent. Dig. tit. "Insurance," § 607.

17. Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101.
An outstanding legal title in the mortgagor barred by the statute of limitations does not invalidate the insured's title. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553; Phœnix Ins. Co. *v.* Whiteleather, 34 Ill. App. 60.

18. Orient Ins. Co. *v.* McKnight, 96 Ill. App. 525 [*affirmed* in 197 Ill. 190, 64 N. E. 339]; Erb *v.* Fidelity Ins. Co., 99 Iowa 727,

(iv) *Vendee in Contract For Sale.* Inasmuch as the vendee under a written contract of sale has the right to compel a conveyance by equitable proceedings for a specific performance, a policy taken out by him is not invalidated, although his interest be not disclosed in full, by a provision that the policy is void if the property be not "his,"[19] or if his interest is "other than sole and unconditional ownership." The retention of a lien by the vendor for the purchase-money is not inconsistent with such ownership.[20] But if he actively misrepresents the nature of his interest he cannot recover on the policy, although he has a valid enforceable contract for the purchase of the property.[21] The rule is the same as to personalty if possession has been taken and no lien has been reserved by the vendor.[22] And if the title has actually passed to the vendee the fact that a lien has been retained for the purchase-price or that a chattel mortgage has been given by the vendee to secure the vendor does not make the vendee's interest other than "sole and unconditional."[23] But if the title by the terms of the contract is to remain in the vendor until the conditions are complied with, the interest of the vendee is not insurable as being "sole and unconditional."[24] So if the

69 N. W. 261; Phœnix Ins. Co. *v.* McKernan, 104 Ky. 224, 46 S. W. 10, 698, 20 Ky. L. Rep. 337; Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494.

Valid insurance may be taken out in such name, however. Clark *v.* German Mut. F. Ins. Co., 7 Mo. App. 77; American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235; Merchants' Ins. Co. *v.* Bonnet, (Tex. Civ. App. 1898) 48 S. W. 1110, (1897) 42 S. W. 316; Delaware Ins. Co. *v.* Bonnet, 20 Tex. Civ. App. 107, 48 S. W. 1104. *Contra*, Porter *v.* Ætna Ins. Co., 19 Fed. Cas. No. 11,286, 2 Flipp. 100. And see Abbott *v.* Shawmut Mut. F. Ins. Co., 3 Allen (Mass.) 213.

19. *Iowa.*— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.

Michigan.— Knop *v.* Hartford Nat. F. Ins. Co., 101 Mich. 359, 59 N. W. 653.

New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

New York.— McCulloch *v.* Norwood, 58 N. Y. 562; Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. 275; Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. 527.

Texas.— East Texas F. Ins. Co. *v.* Dyches, 56 Tex. 565.

See 28 Cent. Dig. tit. "Insurance," § 618.

But see Reynolds *v.* State Mut. Ins. Co., 2 Grant (Pa.) 326.

In the case of mutual companies the rule seems to be different. Merrill *v.* Farmers', etc., Mut. F. Ins. Co., 48 Me. 285; Brown *v.* Williams, 28 Me. 252; Falis *v.* Conway Mut. F. Ins. Co., 7 Allen (Mass.) 46; Lowell *v.* Middlesex Mut. F. Ins. Co., 8 Cush. (Mass.) 127; Smith *v.* Bowditch Mut. F. Ins. Co., 6 Cush. (Mass.) 448; Marshall *v.* Columbian Mut. F. Ins. Co., 27 N. H. 157.

20. *Alabama.*— Boulden *v.* Phœnix Ins. Co., 112 Ala. 422, 20 So. 587. But see Liberty Ins. Co. *v.* Boulden, 96 Ala. 508, 11 So. 771; Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500, where it appeared that nothing had been paid on the purchase-price.

Michigan.— Dupreau *v.* Hibernia Ins. Co., 76 Mich. 615, 43 N. W. 585, 5 L. R. A. 671.

New Jersey.— Martin *v.* Jersey City Ins. Co., 44 N. J. L. 273.

New York.— Pelton *v.* Westchester F. Ins. Co., 77 N. Y. 605 [*affirming* 13 Hun 23]; Tyler *v.* Ætna F. Ins. Co., 12 Wend. 507.

Oregon.— Baker *v.* State Ins. Co., 31 Oreg. 41, 48 Pac. 699, 65 Am. St. Rep. 807.

Pennsylvania.— Carey *v.* Allemania F. Ins. Co., 171 Pa. St. 204, 33 Atl. 185; Elliott *v.* Ashland Mut. F. Ins. Co., 117 Pa. St. 548, 12 Atl. 676, 2 Am. St. Rep. 703; Imperial F. Ins. Co. *v.* Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. Rep. 686; Chandler *v.* New York Commerce F. Ins. Co., 88 Pa. St. 223; Millville Mut. F. Ins. Co. *v.* Wilgus, 88 Pa. St. 107.

Texas.— Queen Ins. Co. *v.* May, (Civ. App. 1896) 35 S. W. 829.

Wisconsin.— Matthews *v.* Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675; Johannes *v.* Standard Fire Office, 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159. But see Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159.

United States.— Phenix Ins. Co. *v.* Kerr, 129 Fed. 723, 64 C. C. A. 251; Lewis *v.* New England F. Ins. Co., 29 Fed. 496.

Canada.— Brogan *v.* Manufacturers', etc., Mut. F. Ins. Co., 29 U. C. C. P. 414.

See 28 Cent. Dig. tit. "Insurance," § 618.

21. Wooliver *v.* Boylston Ins. Co., 104 Mich. 132, 62 N. W. 149; Roberts *v.* State Ins. Co., 26 Mo. App. 92.

22. Bonham *v.* Iowa Cent. Ins. Co., 25 Iowa 328; Stowell *v.* Clark, 47 N. Y. App. Div. 626, 62 N. Y. Suppl. 155; Carey *v.* Liverpool, etc., Ins. Co., 92 Wis. 538, 66 N. W. 693; Franklin F. Ins. Co. *v.* Vaughan, 92 U. S. 516, 23 L. ed. 740; Pennsylvania F. Ins. Co. *v.* Hughes, 108 Fed. 497, 47 C. C. A. 459.

The entire contract must be examined to see whether there has in fact been a misrepresentation. McCulloch *v.* Norwood, 58 N. Y. 562; Lorillard F. Ins. Co. *v.* McCulloch, 21 Ohio St. 176, 8 Am. Rep. 52.

23. Kells *v.* Northwestern Live-Stock Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541; Manhattan Ins. Co. *v.* Barker, 7 Heisk. (Tenn.) 503.

24. Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas.

only condition to be performed is payment of the purchase-price, the deed being in escrow, the vendee is the "sole and unconditional owner."[25] It is immaterial that the contract provides for a forfeiture for non-payment of an instalment,[26] at least in the absence of any breach which the vendor can take advantage of.[27] Even though the contract be parol, there is no misdescription if the vendee has entered into possession and has made such valuable improvements that under the doctrine of part performance the contract is taken out of the statute of frauds.[28] But if the contract is not enforceable because of the statute of frauds the policy is invalid.[29] A person in possession of realty holding a "bond for deed" is likewise possessed of "sole and unconditional ownership."[30]

(v) *Vendor in Executory Contract.* Correlatively, if the vendor of realty is under an obligation to convey title upon the payment by the vendee of the purchase-price, his interest is to be regarded in equity as a mere lien and his rights those of a trustee. Consequently his interest is not equivalent to unconditional and sole ownership,[31] at least if possession has been taken by the vendee.[32] However, if the sale is upon condition that the title remains unaffected in the vendor until the performance of the condition, his interest is regarded as unconditional and sole.[33] The giving of an option, under which the holder thereof has not bound himself to purchase, does not affect the owner's interest or title.[34] And in the case of personalty when possession has not passed, the vendor's interest remains unaffected by virtue of a contract for sale whereby the title is to remain in the vendor until the purchase-price is paid.[35]

(vi) *Mortgages, Defeasible Conveyances, and Other Liens* — (a) *In General.* Where a mortgage is regarded merely as giving the mortgagee a lien by way of security and not as operating to transfer an estate, the existence of a mortgage or other lien upon property has been quite uniformly held not to amount, prior to foreclosure, to a breach of a condition in the mortgagor's policy that the insured's interest shall be entire, sole, and unconditional ownership, the stipulation being considered not to refer to a mere encumbrance.[36] And the same

(D. C.) 245, 40 L. R. A. 358; Westchester F. Ins. Co. *v.* Weaver, 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478; McWilliams *v.* Cascade F. & M. Ins. Co., 7 Wash. 48, 34 Pac. 140.

25. Davis *v.* Pioneer Furniture Co., 102 Wis. 394, 78 N. W. 596.

26. Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497; Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 24 Ky. L. Rep. 958. But see to the contrary Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159.

27. Baker *v.* State Ins. Co., 31 Oreg. 41, 48 Pac. 699, 65 Am. St. Rep. 807. Nor if, payment not having been made, the vendor has a right to declare a forfeiture if he has not chosen to do so. Pelton *v.* Westchester F. Ins. Co., 13 Hun (N. Y.) 23 [*affirmed* in 77 N. Y. 605]; Franklin F. Ins. Co. *v.* Crockett, 7 Lea (Tenn.) 725.

28. Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Home Ins. Co. *v.* Patterson, 12 Ky. L. Rep. 941; Milwaukee Mechanics' Ins. Co. *v.* Rhea, 123 Fed. 9, 60 C. C. A. 103.

29. Philadelphia F. Assoc. *v.* Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153. In Mott *v.* Citizens' Ins. Co., 69 Hun (N. Y.) 501, 23 N. Y. Suppl. 400, this rule was applied, although it would seem that there was a sufficient part performance to take the case out of the statute.

30. Loventhal *v.* Home Ins. Co., 112 Ala. 108, 20 So. 419, 57 Am. St. Rep. 17, 33 L. R. A. 258; Franklin F. Ins. Co. *v.* Crockett, 7 Lea (Tenn.) 725; Williams *v.* Buffalo German Ins. Co., 17 Fed. 63. *Contra*, Harness *v.* National F. Ins. Co., 62 Mo. App. 245.

31. See *infra*, note 32. *Contra*, Davis *v.* Quincy Mut. F. Ins. Co., 10 Allen (Mass.) 113.

32. Hamilton *v.* Dwelling House Ins. Co., 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527; Rosenstock *v.* Mississippi Home Ins. Co., 82 Miss. 674, 35 So. 309; Barnard *v.* National F. Ins. Co., 27 Mo. App. 26; Ambrose *v.* First Nat. F. Ins. Co., 19 Pa. Super. Ct. 117; Rathmell *v.* Aurora F. Ins. Co., 38 Wkly. Notes Cas. (Pa.) 356.

33. Vogel *v.* People's Mut. F. Ins. Co., 9 Gray (Mass.) 23; Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

34. Phenix Ins. Co. *v.* Kerr, 129 Fed. 723, 64 C. C. A. 251.

35. Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261; Burson *v.* Philadelphia Fire Assoc., 136 Pa. St. 267, 20 Atl. 401, 20 Am. St. Rep. 919.

36. *Kentucky.*— Fireman's Fund Ins. Co. *v.* Meschendorf, 14 Ky. L. Rep. 757. But see Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238; Home Ins. Co. *v.* Allen, 13 Ky. L. Rep. 95.

Maryland.— Clay F. & M. Ins. Co. *v.* Beck, 43 Md. 358.

New Jersey.— Carson *v.* Jersey City Ins.

rule has been generally adopted, even where the common-law theory of a mortgage prevails,[37] notably in the case of a mortgage on personal property.[38] A trust deed, being in effect a mortgage, stands on the same footing and does not interfere with the grantor's unconditional ownership.[39] Similarly a deed absolute but intended as a security does not vitiate a policy, for the grantor can compel a reconveyance of the bare legal title.[40] Likewise a bill of sale intended as security, the vendor retaining possession of the property, does not render the policy invalid.[41] But if in any case a reconveyance is not enforceable in equity by the grantor such insured misrepresents his interest by calling the property his.[42] The existence of a mere lien of other character, such as a vendor's lien[43] or judgment,[44] does not amount to a breach of such condition.[45] Nor does the levy of an attachment.[46] Nor does a pending litigation concerning the title lessen the interest of the insured so as to make him other than the sole and unconditional owner.[47]

(B) *After Foreclosure or Judicial Sale.* After foreclosure has progressed to a sale, the mortgagor's interest, being limited to a right of redemption, cannot be properly designated as sole and unconditional ownership.[48] So the purchaser of

Co., 43 N. J. L. 300, 39 Am. Rep. 584; Hare *v.* Headley, 54 N. J. Eq. 545, 35 Atl. 445.

New York.— Woodward *v.* Republic F. Ins. Co., 32 Hun 365.

Ohio.— United Firemen's Ins. Co. *v.* Kukral, 7 Ohio Cir. Ct. 356.

Wisconsin.— Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014.

United States.— Ellis *v.* Insurance Co. of North America, 32 Fed. 646; Friezen *v.* Allemania F. Ins. Co., 30 Fed. 352.

Canada.— Temple *v.* Western Assur. Co., 35 N. Brunsw. 171.

See 28 Cent. Dig. tit. "Insurance," § 613.

But if the insured warrants that he has not omitted to state any information material to the risk, this being in addition to the provision respecting unconditional ownership, a mortgage outstanding avoids his policy. Westchester F. Ins. Co. *v.* Weaver, 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478.

37. Dolliver *v.* St. Joseph F. & M. Ins. Co., 128 Mass. 315, 35 Am. Rep. 378; Buffum *v.* Bowditch Mut. F. Ins. Co., 10 Cush. (Mass.) 540; Union Assur. Soc. of England *v.* Nalls, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923. *Contra*, Ordway *v.* Chace, 57 N. J. Eq. 478, 42 Atl. 149.

38. Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas. (D. C.) 245, 40 L. R. A. 358; Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Rep. 125; Lancashire Ins. Co. *v.* Monroe, 101 Ky. 12, 39 S. W. 434, 19 Ky. L. Rep. 204; American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. (N. Y.) 114, 20 N. Y. Suppl. 646. But see Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513. And *compare* Born *v.* Home Ins. Co., 110 Iowa 379, 94 N. W. 849.

39. McCarty *v.* Imperial Ins. Co., 126 N. C. 820, 36 S. E. 284; Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. (Va.) 389, 26 Am. Rep. 364; Wolpert *v.* Northern Assur. Co., 44 W. Va. 734, 29 S. E. 1024.

40. Hawley *v.* Liverpool, etc., Ins. Co., 102 Cal. 651, 36 Pac. 926; Orient Ins. Co. *v.* Williamson, 98 Ga. 464, 25 S. E. 560; De Armand *v.* Home Ins. Co., 28 Fed. 603. And the grantee has not the "sole and unconditional title." Farmers', etc., Ins. Co. *v.* Hahn, 1 Nebr. (Unoff.) 510, 513, 96 N. W. 255. But see *contra*, White *v.* Agricultural Mut. Assur. Co., 22 U. C. C. P. 98.

41. Kronk *v.* Birmingham F. Ins. Co., 91 Pa. St. 300.

An assignment of a contract to purchase land, made by way of security for present and future advances, does not vitiate the policy. Chandler *v.* Commerce F. Ins. Co., 88 Pa. St. 223.

But if the debt is past due, it has been held that when the vendee has taken possession the latter's interest has become the sole and unencumbered title. Carey *v.* Liverpool, etc., Ins. Co., 92 Wis. 538, 66 N. W. 693.

42. Treadway *v.* Hamilton Mut. Ins. Co., 29 Conn. 68. Thus the grantee in a deed of gift is the owner, although the deed is void as against the grantor's creditors. Weed *v.* London, etc., F. Ins. Co., 116 N. Y. 106, 22 N. E. 229; Steinmeyer *v.* Steinmeyer, 64 S. C. 413, 42 S. E. 184, 92 Am. St. Rep. 809.

43. Southern Ins. Co. *v.* Estes, 106 Tenn. 472, 62 S. W. 149, 82 Am. St. Rep. 892, 52 L. R. A. 915; Underwriters' Fire Assoc. *v.* Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603; Liverpool, etc., Ins. Co. *v.* Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248.

44. McClelland *v.* Greenwich Ins. Co., 107 La. 124, 31 So. 691.

45. Alamo F. Ins. Co. *v.* Brooks, (Tex. Civ. App. 1895) 32 S. W. 714; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126.

46. Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700.

47. Lang *v.* Hawkeye Ins. Co., 74 Iowa 673, 39 N. W. 86; Kenton Ins. Co. *v.* Wigginton, 10 Ky. L. Rep. 587, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 7 L. R. A. 81; Hill *v.* Lafayette Ins. Co., 2 Mich. 476.

48. Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 209, 56 S. W. 44, 77 Am. St. Rep. 136; Breedlove *v.* Norwich Union F. Ins. Soc., 124 Cal. 164, 56 Pac. 770, (1899) 54 Pac. 93;

the mortgaged premises at a foreclosure sale, even though the right of redemption has not expired, has been held to be the "absolute owner,"[49] and the "unconditional and sole" owner;[50] but not until there has been a final adjudication by the court.[51] The same is true of a purchaser at any judicial sale.[52]

(VII) *PROPERTY HELD IN TRUST.* A trustee cannot properly describe property as "his only" when he is a mere trustee thereof.[53] But he is so far the owner that if the property is merely described as "his" there is no misrepresentation,[54] in the absence of more explicit inquiry.[55] His right, however, cannot properly be described as sole and unconditional.[56] When a policy requires that property held in trust must be insured as such, every interest is thereby included in which the insured has only a qualified interest, while the true ownership is in a third person.[57]

(VIII) *PART OWNERSHIP.* A person possessed of an undivided interest in property is not properly described as the sole and unconditional owner;[58] nor is he the owner in fee.[59]

(IX) *PARTNERSHIP PROPERTY.* The title of an individual member of a firm

Reaper City Ins. Co. *v.* Brennan, 58 Ill. 158, 11 Am. Rep. 54; Geib *v.* Enterprise Co., 10 Fed. Cas. No. 5,297, 1 Dill. 449 note.

He still has an insurable interest therein in the absence of any misrepresentation. Essex Sav. Bank *v.* Meriden F. Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759.

Even after a foreclosure sale, the mortgagor may properly describe the property as "his." Breedlove *v.* Norwich Union F. Ins. Soc., (Cal. 1899) 54 Pac. 93.

When the period of redemption has expired, of course the mortgagor has no interest to insure. Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 209, 56 S. W. 44, 77 Am. St. Rep. 136.

49. Gaylord *v.* Lamar F. Ins. Co., 40 Mo. 13, 93 Am. Dec. 289.

50. Caraher *v.* Royal Ins. Co., 63 Hun (N. Y.) 82, 17 N. Y. Suppl. 858. And *compare* Kentucky Mut. Ins. Co. *v.* Harrison, 7 Ky. L. Rep. 43, where the insured's interest was a defeasible fee.

51. Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29.

52. Clapp *v.* Union Mut. F. Ins. Co., 27 N. H. 143; Bicknell *v.* Lancaster City, etc., F. Ins. Co., 58 N. Y. 677; Susquehanna Mut. F. Ins. Co. *v.* Staats, 102 Pa. St. 529; Millville Mut. F. Ins. Co. *v.* Wilgus, 88 Pa. St. 107; Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

53. McCormick *v.* Springfield F. & M. Ins. Co., 66 Cal. 361, 5 Pac. 617; Bradley *v.* German-American Ins. Co., 90 Mo. App. 369.

54. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Bicknell *v.* Lancaster City, etc., F. Ins. Co., 1 Thomps. & C. (N. Y.) 215 [*affirmed* in 58 N. Y. 677]; Pavey *v.* American Ins. Co., 56 Wis. 221, 13 N. W. 925. See also *supra*, XII, B, 3, b, (II), (IV).

55. Rochester Loan, etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

56. Farmers', etc., Ins. Co. *v.* Hahn, 1 Nebr. (Unoff.) 510, 513, 96 N. W. 255.

57. Turner *v.* Stetts, 28 Ala. 420; Day *v.* Charter Oak F. & M. Ins. Co., 51 Me. 91; Keely *v.* Insurance Co., 1 Phila. (Pa.) 175.

This does not apply, however, to trusts arising *ex maleficio.* Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

58. *Georgia.*— Palatine Ins. Co. *v.* Dickerson, 116 Ga. 794, 43 S. E. 52.

Indiana.— Sisk *v.* Citizens' Ins. Co., 16 Ind. App. 565, 45 N. E. 804.

Louisiana.— Adema *v.* Lafayette F. Ins. Co., 36 La. Ann. 660.

Massachusetts.— Wilbur *v.* Bowditch Mut. F. Ins. Co., 10 Cush. 446.

Michigan.— Miller *v.* Amazon Ins. Co., 46 Mich. 463, 9 N. W. 493; Ætna Ins. Co. *v.* Resh, 40 Mich. 241.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Cochran, 77 Miss. 348, 26 So. 932, 78 Am. St. Rep. 524.

New York.— Noyes *v.* Hartford F. Ins. Co., 54 N. Y. 668.

See 28 Cent. Dig. tit. "Insurance," § 624.

But *compare* Williams *v.* Buffalo German Ins. Co., 17 Fed. 63, where it was held that an outstanding one-seventh interest in fee did not prevent insured from being a sole and unconditional owner, he being entitled to the life-interest and having brought an action to perfect his title. And see Lyon *v.* Stadacona Ins. Co., 44 U. C. Q. B. 472.

In Kentucky a description of one who had but an undivided fourth, as "unconditional owner" has been held sufficiently accurate when it appeared that on a partition the building would be set off to him as his interest in the tract. Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 10 Ky. L. Rep. 587, 7 L. R. A. 81.

When mortgagor and mortgagee are together insured as owners, it is not necessary to set forth the interest of each explicitly. Ranklin *v.* Andes Ins. Co., 47 Vt. 144.

59. Scottish Union, etc., Ins. Co. *v.* Petty, 21 Fla. 399. *Contra,* Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 7 L. R. A. 81.

Although in the absence of stipulations or inquiry as to title he may insure all the property, with the consent of his coöwners, in his own name. Hebner *v.* Palatine Ins. Co., 55 Ill. App. 275.

in firm property is not sole and unconditional ownership.[60] There is no misdescription, however, if the property be described in the absence of specific inquiry as "his."[61] If the insured merely gives a share of the profits of the business to an employee, no partnership in fact being intended, there is no partnership in law and the insured's interest is sole and unconditional. There must be a true partnership.[62] In some jurisdictions, because of the form of conveyance, a deed may vest the legal title completely in an individual partner named as grantee, so that he may describe himself as the "sole owner."[63] An executory agreement for a partnership, never in fact entered into, will not render void a policy containing a condition that an insured individual is the sole owner.[64] So a surviving partner is not vested with unconditional ownership, although there is a merger to some extent of the firm and his individual title for purposes of settlement.[65]

(x) *Marital Interests.* A married woman is the unconditional and sole owner of her separate property despite her husband's interest by way of curtesy[66] or homestead.[67] A husband therefore misdescribes property by calling it his when the title is in the wife.[68] So the wife misdescribes her husband's property

60. *Alabama.*— Pelican Ins. Co. *v.* Smith, 92 Ala. 428, 9 So. 327, 107 Ala. 313, 18 So. 105.

New York.— McGrath *v.* Home Ins. Co., 88 N. Y. App. Div. 153, 84 N. Y. Suppl. 374, 13 N. Y. Annot. Cas. 469.

Texas.— Crescent Ins. Co. *v.* Camp, 64 Tex. 521.

Wisconsin.— McFetridge *v.* Phenix Ins. Co., 84 Wis. 200, 54 N. W. 326.

England.— Davies *v.* National F. & M. Ins. Co., [1891] A. C. 485, 60 L. J. P. C. 73, 65 L. T. Rep. N. S. 560.

See 28 Cent. Dig. tit. "Insurance," § 625.

61. Irving *v.* Excelsior F. Ins. Co., 1 Bosw. (N. Y.) 507; Stillman *v.* Agricultural Ins. Co., 16 Ont. 145.

62. *Iowa.*— Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261.

New York.— Noyes *v.* Hartford F. Ins. Co., 54 N. Y. 668. And *compare* Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918.

Ohio.— Queen Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49.

Pennsylvania.— Pittsburg Ins. Co. *v.* Frazee, 107 Pa. St. 521.

Vermont.— Boutelle *v.* Westchester F. Ins. Co., 51 Vt. 4, 31 Am. Rep. 666.

West Virginia.— Welch *v.* Franklin Ins. Co., 23 W. Va. 288.

United States.— Manchester F. Assur. Co. *v.* Abrams, 89 Fed. 932, 32 C. C. A. 426.

See 28 Cent. Dig. tit. "Insurance," § 625.

But in Capital City Ins. Co. *v.* Autrey, 105 Ala. 269, 17 So. 326, 53 Am. St. Rep. 121, it was held, Coleman, J., delivering the opinion of the court, that the interest of the insured under such circumstances was not "absolute, unqualified, and undivided."

A "partner" by estoppel has not such an interest in the quasi-firm goods as to make the real owner's interest less than sole. Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230.

Insurance may be effected in the name of a nominal partnership in the absence of specific statements fraudulent in character as to title, although no actual partnership exists. Phœnix Ins. Co. *v.* Hamilton, 14 Wall. (U. S.) 504, 20 L. ed. 729.

So insurance in the name of an individual is not vitiated in the absence of fraudulent representations by a failure to disclose that it belonged to a limited partnership using such individual name as its firm-name. Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847.

63. Weber *v.* American Cent. Ins. Co., 35 Mo. App. 521.

But as the partnership has the complete equitable title, it follows that it is likewise an unconditional owner. Missouri Sav. Assoc. *v.* German-American Ins. Co., 73 Mo. App. 158.

64. Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

65. Crescent Ins. Co. *v.* Camp, 71 Tex. 503, 9 S. W. 473.

As the mere assignment by a partner of his interest does not divest firm title, the firm property may after such assignment still be insured as belonging to the "firm." Wood *v.* American F. Ins. Co., 78 Hun (N. Y.) 109, 29 N. Y. Suppl. 250 [*affirmed* in 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733].

66. Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582.

67. Sun Ins. Office *v.* Beneke, (Tex. Civ. App. 1899) 53 S. W. 98.

68. Pelican Ins. Co. *v.* Smith, 107 Ala. 313, 18 So. 105, 92 Ala. 428, 9 So. 327; Eminence Mut. Ins. Co. *v.* Jesse, 1 Metc. (Ky.) 523; Trott *v.* Woolwich Mut. F. Ins. Co., 83 Me. 362, 22 Atl. 245; Froehly *v.* North St. Louis Mut. F. Ins. Co., 32 Mo. App. 302. *Contra*, under statute. See Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673. See also Georgia Home Ins. Co. *v.* Brady, (Tex. Civ. App. 1897) 41 S. W. 513; Warren *v.* Springfield F. & M. Ins. Co., 13 Tex. Civ. App. 466, 35 S. W. 810.

Although he may insure his own interest therein. Clarke *v.* Firemen's Ins. Co., 18 La. 431; Dacey *v.* Agricultural Ins. Co., 21 Hun (N. Y.) 83.

If insured's property be purchased by the wife at a judicial sale, he is not, prior to redemption, the sole owner. Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136.

when she insures it as "hers."[69] When the title is in them both in joint tenancy he cannot describe the same as his "absolutely."[70] Nor can there be a recovery if the property be described as jointly that of both when the title is in one alone.[71]

(xi) *Estates Less Than a Fee.* While a life-estate is not an "absolute" interest,[72] nor the life-tenant the "sole" owner of the property,[73] yet he may speak of the same as "his" without fraud, in the absence of specific fraudulent statements or definite inquiry,[74] or call himself the "owner."[75] Likewise a tenant by the curtesy is not the "owner" of the premises.[76] Nor is a widow the owner because of her common-law right of dower.[77] An estate for years is manifestly not sole and unconditional ownership.[78] A limitation upon the insured's right of alienation[79] or a provision disposing of the title should he die before reaching a certain age[80] constitute him other than the unconditional owner in fee simple within the meaning of an insurance policy.

(xii) *Leasehold Interests.* It is a misrepresentation for the insured to refer to premises held by him only upon a lease as "his,"[81] unless he has the

69. Reithmueller *v.* Philadelphia Fire Assoc., 20 Mo. App. 246.

70. Ætna Ins. Co. *v.* Resh, 40 Mich. 241; Schroedel *v.* Humboldt F. Ins. Co., 158 Pa. St. 459, 27 Atl. 1077.

But a description of it as "his" seems not incorrect. Miotke *v.* Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463.

Rights of the surviving husband in property held with his wife in joint tenancy see Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441.

71. Dwelling House Ins. Co. *v.* Webster, 7 Ohio Cir. Ct. 511, 4 Ohio Cir. Dec. 704. But in Webster *v.* Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 53 Am. St. Rep. 658, 30 L. R. A. 719, where personalty owned by the husband and realty owned by the wife were insured by the same policy, calling the ownership "joint" was held not to vitiate the policy. And see Perry *v.* Faneuil Hall Ins. Co., 11 Fed. 482.

72. Davis *v.* Iowa State Ins. Co., 67 Iowa 494, 25 N. W. 745.

73. Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555; Collins *v.* St. Paul F. & M. Ins. Co., 44 Minn. 440, 46 N. W. 906.

74. Andes Ins. Co. *v.* Fish, 71 Ill. 620; Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 86 N. W. 994. So, it has been held that a tenant in tail may represent the land as "his" property (Curry *v.* Commonwealth Ins. Co., 10 Pick. (Mass.) 535, 20 Am. Dec. 547), and that the term "his" in general is not a misdescription of a life-estate (Allen *v.* Charlestown Mut. F. Ins. Co., 5 Gray (Mass.) 384).

The interest of one possessing a life-estate, plus the absolute right as active testamentary trustee to dispose of the same may be described as "sole and unconditional ownership." Security Ins. Co. *v.* Kuhn, 207 Ill. 166, 69 N. E. 822.

75. Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 86 N. W. 994.

76. Leathers *v.* Farmers' Mut. F. Ins. Co., 24 N. H. 259. But see East Texas F. Ins. Co. *v.* Crawford, (Tex. Sup. 1891) 16 S. W. 1068.

77. Overton *v.* American Cent. Ins. Co., 79 Mo. App. 1; Virginia F. & M. Ins. Co. *v.* Kloeber, 31 Gratt. (Va.) 749; Southern Mut. Ins. Co. *v.* Kloeber, 31 Gratt. (Va.) 739.

Nor does the fact that an inchoate dower interest is outstanding render the husband's grantee other than the absolute owner. Ohio Farmers' Ins. Co. *v.* Bevis, 18 Ind. App. 17, 46 N. E. 928.

78. Dwelling House Ins. Co. *v.* Dowdall, 49 Ill. App. 33.

A mortgagee of course has not sole and unconditional ownership. Brown *v.* Gore Dist. Mut. Ins. Co., 10 U. C. Q. B. 353 (although he has an insurable interest if it is properly disclosed); Gettelman *v.* Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627. But an improper description of interest vitiates the policy despite a clause that the mortgagee's interest shall not be invalidated by any act of the mortgagor. Graham *v.* Fireman's Ins. Co., 87 N. Y. 69, 41 Am. Rep. 348 [*affirming* 9 Daly 341].

A second mortgagee cannot describe property as "his." Southwick *v.* Atlantic F. & M. Ins. Co., 133 Mass. 457.

79. Yost *v.* Dwelling House Ins. Co., 179 Pa. St. 381, 36 Atl. 317, 57 Am. St. Rep. 604; Sands *v.* Dwelling House Ins. Co., 26 Pittsb. Leg. J. (Pa.) 318.

80. Sands *v.* Dwelling House Ins. Co., 26 Pittsb. Leg. J. (Pa.) 318.

81. Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360; Mers *v.* Franklin Ins. Co., 68 Mo. 127; Mutual Assur. Co. *v.* Mahon, 5 Call (Va.) 517; Shaw *v.* St. Lawrence County Mut. Ins. Co., 11 U. C. Q. B. 73; Walroth *v.* St. Lawrence County Mut. Ins. Co., 10 U. C. Q. B. 525. *Contra*, Fowle *v.* Springfield F. & M. Ins. Co., 122 Mass. 191, 23 Am. Rep. 308; Lawrence *v.* St. Marks F. Ins. Co., 43 Barb. (N. Y.) 479; Niblo *v* North American F. Ins. Co., 1 Sandf. (N. Y.) 551. These cases assert that a mere insurable interest justifies the use of such a term. He is manifestly therefore not the "sole and unconditional owner" when the property brought on the premises is to become that of the landlord at the end of the term. Duda *v.*

right to remove therefrom the insured structures.[82] The fact that a lease is outstanding does not render the lessor's interest other than absolute and unconditional ownership.[83]

(XIII) *BUILDING ON LEASED LAND.* In the absence of an inquiry or provision in the policy, the insured need not disclose the fact that the insured building owned by him stands upon leased ground.[84] However, it is a frequent provision in policies that under such circumstances the fact must be disclosed to the insurer. A failure to give such information will under such a policy avoid the insurance.[85]

(XIV) *POLICIES PAYABLE "AS INTEREST MAY APPEAR."* If a policy is made payable to a designated person "as his interest may appear," there is no necessity for a specific statement as to the payee's interest, the policy amounting to a waiver of such a requirement.[86] But this does not excuse a breach of condition as to statements of title on the part of the insured, the payee not being regarded as such, nor the insurer as charged with notice of the nature of the payee's interest.[87]

(XV) *MISCELLANEOUS INTERESTS.* The owner of all the stock of a corporation has such title that he will constitute his grantee the "sole, absolute and unconditional owner" of the company's realty;[88] but he cannot describe himself as such.[89] The existence of a mere pooling arrangement between competing business interests does not alone amount to a breach of such provision.[90] Where the insured executes an instrument operating as a deed, instead of operating as a

Home Ins. Co., 20 Pa. Super. Ct. 244; Cuthbertson *v.* North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258.

82. Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336; Hope Mut. Ins. Co. *v.* Brolasky, 35 Pa. St. 282; Nichols *v.* Farmers' Mut. Ins. Co., 18 Fed. Cas. No. 10,242. In Stickney *v.* Niagara Dist. Mut. Ins. Co., 23 U. C. C. P. 372, the right to remove a leasehold building did not justify the insured in stating that he held the premises in fee. And see also Compton *v.* Mercantile Ins. Co., 27 Grant Ch. (U. C.) 334.

83. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257; Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91; Lycoming F. Ins. Co. *v.* Haven, 95 U. S. 242, 24 L. ed. 473; Lancashire Ins. Co. *v.* Chapman, 7 Rev. Lég. 47. In Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331, it was held that there was no fraud in the insured's having failed to show that a small portion of the property insured belonged to a tenant, the insured having a landlord's lien thereon.

84. Fletcher *v.* Commonwealth Ins. Co., 18 Pick. (Mass.) 419.

This statement is not applicable in the case of mutual companies which reserve a lien on the insured premises. Kibbe *v.* Hamilton Mut. Ins. Co., 11 Gray (Mass.) 163.

85. Dwelling House Ins. Co. *v.* Shaner, 52 Ill. App. 326; Ben Franklin Ins. Co. *v.* Weary, 4 Ill. App. 74; Dowd *v.* American F. Ins. Co., 41 Hun (N. Y.) 139; Home Ins. Co. *v.* Smith, (Tex. Civ. App. 1895) 29 S. W. 264; Waller *v.* Northern Assur. Co., 10 Fed. 232, 2 McCrary 637.

In Maine by statute it is a question for the jury whether such facts materially increased the risk. Atherton *v.* British America Assur. Co., 91 Me. 289, 39 Atl. 1006.

A provision invalidating the policy, if the building be on "ground not owned by the insured in fee simple," is not broken because one of the insured owns the land in fee simple, while both own the building. Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 37 Atl. 255.

A vendor of land with the right to remove the buildings thereon does not come within the prohibition. Washington Mills Emery Mfg. Co. *v.* Commercial F. Ins. Co., 13 Fed. 646.

Where the insured by mistake had encroached two feet on the adjacent lot, having acted in good faith and without subsequent objection, it was held that the insurer could not claim a breach of condition. Haider *v.* St. Paul F. & M. Ins. Co., 67 Minn. 514, 70 N. W. 805. The same case also held that such encroachment upon a public street would not justify a forfeiture. But see *contra,* Norwich Union F. Ins. Co. *v.* Le Bell, 29 Can. Sup. Ct. 470.

86. Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Liverpool, etc., Ins. Co. *v.* Davis, 56 Nebr. 684, 77 N. W. 66; De Wolf *v.* Capital City Ins. Co., 16 Hun (N. Y.) 116; Rumsey *v.* Phœnix Ins. Co., 1 Fed. 396, 17 Blatchf. 527.

87. Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; Lasher *v.* St. Joseph F. & M. Ins. Co., 86 N. Y. 423 [*affirming* 18 Hun 98, 57 How. Pr. 222 (*reversing* 55 How. Pr. 324)].

88. Phœnix Assur. Co. *v.* Deavenport, 16 Tex. Civ. App. 283, 41 S. W. 399.

89. Syndicate Ins. Co. *v.* Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614. And see North British, etc., Ins. Co. *v.* Bohn, 49 Nebr. 572, 68 N. W. 942.

90. Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918.

will as it was intended by him to operate, he ceases to be the "sole and unconditional owner."[91]

4. Encumbrances — a. Effect of. The insured is under no obligation to make disclosure concerning liens and encumbrances outstanding against the insured property unless specific inquiries in regard thereto are made by the insurer or demanded by the policy.[92] An inquiry as to one form of encumbrance likewise does not require a disclosure as to other varieties which may exist.[93] But if the applicant undertakes to make any representation concerning the presence or absence of liens or encumbrances, the policy will be vitiated if false statements are made.[94] Many cases also hold that even though the policy contains a state-

91. Messelback *v.* Norman, 46 Hun (N. Y.) 414.

A deed without consideration, prepared without the knowledge of the grantee and to have effect on condition, does not affect the insured's title. Franklin Ins. Co. *v.* Feist, 31 Ind. App. 390, 68 N. E. 188.

92. *Iowa.*— Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185.

Kentucky.— Fireman's Fund Ins. Co. *v.* Meschendorf, 14 Ky. L. Rep. 757.

Maine.— Buck *v.* Phœnix Ins. Co., 76 Me. 586.

Michigan.— Guest *v.* New Hampshire F. Ins. Co., 66 Mich. 98, 33 N. W. 31.

New York.— Huff *v.* Jewett, 20 Misc. 35, 44 N. Y. Suppl. 311.

Pennsylvania.— Dwelling-House Ins. Co. *v.* Hoffman, 125 Pa. St. 626, 18 Atl. 397; Niagara F. Ins. Co. *v.* Miller, 120 Pa. St. 504, 14 Atl. 385, 6 Am. St. Rep. 726. *Contra,* Smith *v.* Columbia Ins. Co., 17 Pa. St. 253, 55 Am. Dec. 546.

Virginia.— Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77; West Rockingham Mut. F. Ins. Co. *v.* Sheets, 26 Gratt. 854.

United States.— Pennsylvania F. Ins. Co. *v.* Hughes, 108 Fed. 497, 47 C. C. A. 459.

See 28 Cent. Dig. tit. "Insurance," § 636; and cases cited *supra,* p. 679, note 47 *et seq.*

A South Dakota statute to this effect has been declared not applicable to chattel mortgages. Harding *v.* Norwich Union F. Ins. Soc., 10 S. D. 64, 71 N. W. 755.

If the statements of the application are true when made, the insurer assumes the risk of a change in the condition of the property or conditions, in the interim prior to the granting of the policy. Day *v.* Hawkeye Ins. Co., 72 Iowa 597, 34 N. W. 435; Fourdrinier *v.* Hartford F. Ins. Co., 15 U. C. C. P. 403; Wyld *v.* London, etc., Ins. Co., 33 U. C. Q. B. 284.

A mortgage or lien does not make the insured's title other than "sole and unconditional ownership." American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. (N. Y.) 114, 20 N. Y. Suppl. 646. See also *supra,* XII, B, 3, b, (VI).

93. Phœnix Ins. Co. *v.* Coomes, 20 S. W. 900, 14 Ky. L. Rep. 603.

94. *Connecticut.*— Warner *v.* Middlesex Mut. Assur. Co., 21 Conn. 444.

Indiana.— Indiana Ins. Co. *v.* Brehm, 88 Ind. 578.

Kentucky.— Security Ins. Co. *v.* Bronger, 6 Bush 146. But *compare* Manchester Assur. Co. *v.* Dowell, 80 S. W. 207, 25 Ky. L. Rep. 2240, decided under Ky. St. (1903) § 639, holding that a false statement in the application that there was no mortgage, made at the direction of the soliciting agent, who said that it was the proper answer in view of the smallness of the encumbrance, would not prevent the recovery, in the absence of fraudulent intention.

Maine.— Richardson *v.* Maine Ins. Co., 46 Me. 394, 74 Am. Dec. 459; Battles *v.* York County Mut. F. Ins. Co., 41 Me. 208.

Maryland.— Beck *v.* Hibernia Ins. Co., 44 Md. 95.

Massachusetts.— Murphy *v.* People's Equitable Mut. F. Ins. Co., 7 Allen 239; Draper *v.* Charter Oak F. Ins. Co., 2 Allen 569; Friesmuth *v.* Agawam Mut. F. Ins. Co., 10 Cush. 587; Davenport *v.* New England Mut. F. Ins. Co., 6 Cush. 340.

Missouri.— Lama *v.* Dwelling House Ins. Co., 51 Mo. App. 447.

Nebraska.— Seal *v.* Farmers', etc., Ins. Co., 59 Nebr. 253, 80 N. W. 807.

New Hampshire.— Gahagan *v.* Union Mut. Ins. Co., 43 N. H. 176; Patten *v.* Merchants', etc., Mut. F. Ins. Co., 38 N. H. 338.

New York.— Smith *v.* Empire Ins. Co., 25 Barb. 497.

North Carolina.— Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Ohio.— Byers *v.* Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Gottsman, 48 Pa. St. 151.

Texas.— Queen Ins. Co. *v.* May, (Civ. App. 1896) 35 S. W. 829.

Virginia.— Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. 585.

Wisconsin.— O'Brien *v.* Home Ins. Co., 79 Wis. 399, 48 N. W. 714; Ryan *v.* Springfield F. & M. Ins. Co., 46 Wis. 671, 1 N. W. 426.

Canada.— Marshall *v.* Times F. Ins. Co., 9 N. Brunsw. 618; Wilby *v.* Standard Ins. Co., 3 Ont. 115; Bleakley *v.* Niagara Dist. Mut. Ins. Co., 16 Grant Ch. (U. C.) 198; Johnstone *v.* Niagara Dist. Mut. Ins. Co., 13 U. C. C. P. 331; Muma *v.* Niagara Dist. Mut. Ins. Co., 22 U. C. Q. B. 214.

See 28 Cent. Dig. tit. "Insurance," § 636 *et seq.*

Extent and limits of rule.— This is true irrespective of intent. Towne *v.* Fitchburg Mut. F. Ins. Co., 7 Allen (Mass.) 51. Failure to answer a question in an application has been held not to amount to a concealment. Parker *v.* Otsego County Farmers' Co-opera-

ment that the insurance is to be void unless all matters material to the risk are disclosed or if the property be encumbered, still the mere acceptance of such a policy does not amount to a representation and a failure to disclose an encumbrance is immaterial.[95] But the current of authority asserts that the policy stands avoided if there be an encumbrance not disclosed and the policy contains an express condition or requirement of disclosure.[96]

tive F. Ins. Co., 168 N. Y. 655, 61 N. E. 1132 [*affirming* 47 N. Y. App. Div. 204, 62 N. Y. Suppl. 199]. Where the insured drew a line with his pen through a question as to encumbrances it was held in Jersey City Ins. Co. *v.* Carson, 44 N. J. L. 210, that he made no representation that there was no encumbrance, but simply failed to answer the question and the policy was valid, although a mortgage existed. A condition avoiding a policy if foreclosure proceedings be commenced does not refer to proceedings pending when the policy was written. Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798. Although the immateriality of the false statement, if it be a warranty, is not important, statutes frequently change the rule. Phenix Ins. Co. *v.* Fulton, 80 Ga. 224, 4 S. E. 866; Fox *v.* Phenix F. Ins. Co., 52 Me. 333. And in Kentucky the encumbrance must leave the insurable interest in excess of the amount of the policy. Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238, 20 S. W. 900, 14 Ky. L. Rep. 603; Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352; Southern California Ins. Co. *v.* Lucas, 15 Ky. L. Rep. 574. Concealment generally see *supra*, XII, A, 2, b.

Renewals.— A renewal is presumed to be issued on the basis of the original representation and is vitiated if this be then untrue. Long *v.* Phœnix Ins. Co., 34 N. Brunsw. 223; Martin *v.* Home Ins. Co., 20 U. C. C. P. 447. But a renewal policy is not vitiated because the original representation was false, if there has been such a change of facts that it is true at the date of renewal. Chapman *v.* Gore Dist. Mut. Ins. Co., 26 U. C. C. P. 89. See also Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

Inaccuracy or mistake.— A mere inaccuracy of statement, particularly when it appears that the insured did not consider it necessary to answer accurately, has been held not to avoid a policy. Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444; Home Ins. Co. *v.* Koob, 113 Ky. 360, 68 S. W. 453, 24 Ky. L. Rep. 223, 101 Am. St. Rep. 354, 58 L. R. A. 58; Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315; McNamara *v.* Dakota F. & M. Ins. Co., 1 S. D. 342, 47 N. W. 288; Davis *v.* Pioneer Furniture Co., 102 Wis. 394, 78 N. W. 596; Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117, 68 N. W. 868. *Contra*, Jacobs *v.* Eagle Mut. F. Ins. Co., 7 Allen (Mass.) 132; Abbott *v.* Shawmut Mut. F. Ins. Co., 3 Allen (Mass.) 213. But if such inaccuracy substantially misrepresents the true fact, that it was inserted by mistake or not intended to be accurate will not prevent a forfeiture. Glade *v.* Germania F. Ins. Co., 56 Iowa 400, 9 N. W. 320; Falis *v.* Conway Mut. F. Ins. Co., 7 Allen (Mass.) 46; Hayward *v.* New England Mut. F. Ins. Co., 10 Cush. (Mass.) 444; Crook *v.* Phœnix Ins. Co., 38 Mo. App. 582; Smith *v.* Agricultural Ins. Co., 118 N. Y. 518, 23 N. E. 883; Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641. A false representation induced by mistake was held not to affect the policy in Crittenden *v.* Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321; Farmers' F. Ins. Co. *v.* Johnston, 113 Mich. 426, 71 N. W. 1074; Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331.

95. *Georgia.*— Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Michigan.— O'Brien *v.* Ohio Ins. Co., 52 Mich. 131, 17 N. W. 726.

Missouri.— See Boulware *v.* Farmers', etc., Co-Operative Ins. Co., 77 Mo. App. 639.

Nebraska.— Seal *v.* Farmers', etc., Ins. Co., 59 Nebr. 253, 80 N. W. 807; Slobodisky *v.* Phenix Ins. Co., 53 Nebr. 816, 74 N. W. 270; Phenix Ins. Co. *v.* Fuller, 53 Nebr. 811, 74 N. W. 269, 68 Am. St. Rep. 637, 40 L. R. A. 408; Hanover F. Ins. Co. *v.* Bohn, 48 Nebr. 743, 67 N. W. 774; Insurance Co. of North America *v.* Bachler, 44 Nebr. 549, 62 N. W. 911.

Oregon.— Arthur *v.* Palatine Ins. Co., 35 Oreg. 27, 57 Pac. 62, 76 Am. St. Rep. 450.

Tennessee.— Delahay *v.* Memphis Ins. Co., 8 Humphr. 684.

Texas.— Liverpool, etc., Ins. Co. *v.* Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248.

Virginia.— Morotock Ins. Co. *v.* Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. 362, 31 Am. Rep. 732.

West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

See 28 Cent. Dig. tit. "Insurance," § 636 *et seq.*

Such is the rule by virtue of statutes in some jurisdictions. See Light *v.* Greenwich Ins. Co., 105 Tenn. 480, 58 S. W. 851.

96. *Illinois.*— Dwelling House Ins. Co. *v.* Shaner, 52 Ill. App. 326.

Indiana.— Indiana Ins. Co. *v.* Pringle, 21 Ind. App. 559, 52 N. E. 821.

Iowa.— Baldwin *v.* German Ins. Co., 105 Iowa 379, 75 N. W. 326.

Maine.— Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494.

Massachusetts.— Fitchburg Sav. Bank *v.* Amazon Ins. Co., 125 Mass. 431; Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray 415.

Minnesota.— Devil's Lake First Nat. Bank *v.* American Cent. Ins. Co., 58 Minn. 492, 60 N. W. 345.

Mississippi.— Lester *v.* Mississippi Home Ins. Co., (1895) 19 So. 99.

Missouri.— Loehner *v.* Home Mut. Ins. Co.,

b. What Constitutes an Encumbrance — (I) *Mortgage.* An unrecorded mortgage is an encumbrance within the meaning of a policy, although any lien acquired by the policy would have precedence over it.[97] But a mortgage not delivered or delivered without authority is not.[98] Nor is a mortgage appearing of record, but as a matter of fact paid and discharged.[99]

(II) *Vendor's Lien.* It has been stated that a vendor's lien is not such an encumbrance as is contemplated by an inquiry as to encumbrances,[1] but the contrary would seem to be true.[2]

(III) *Tax Liens.* A tax lien has been said not to amount to a prohibited encumbrance, the condition being held to refer only to encumbrances created by the act or consent of the parties.[3]

(IV) *Judgments.* The cases conflict as to whether a judgment *in personam* is a prohibited encumbrance.[4]

(V) *Levy of Attachment or Execution.* It has been held that the levy

17 Mo. 247; Cagle *v.* Chillicothe Town Mut. F. Ins. Co., 78 Mo. App. 215.

Ohio.— Hickey *v.* Dwelling House Ins. Co., 20 Ohio Cir. Ct. 385, 11 Ohio Cir. Dec. 135.

Pennsylvania.— Pennsylvania Ins. Co. *v.* Gottsman, 48 Pa. St. 151; Slope Mine Coal Co. *v.* Quaker City Mut. F. Ins. Co., 13 Pa. Super. Ct. 626.

South Dakota.— Peet *v.* Dakota F. & M. Ins. Co., 7 S. D. 410, 64 N. W. 206.

Texas.— Curlee *v.* Texas Home F. Ins. Co., 31 Tex. Civ. App. 471, 73 S. W. 831, 986; Guinn *v.* Phœnix Ins. Co., (Tex. Civ. App. 1893) 31 S. W. 566.

Wisconsin.—Wilcox *v.* Continental Ins. Co., 85 Wis. 193, 55 N. W. 188. But see Vankirk *v.* Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798.

Canada.— McKay *v.* Glasgow, etc., Ins. Co., 4 Montreal Super. Ct. 124, 32 L. C. Jur. 125.

See 28 Cent. Dig. tit. "Insurance," § 636 *et seq.*

But even here the amount of encumbrance need not be disclosed unless called for, and the statement that there is an encumbrance is sufficient to prevent a forfeiture. Bersche *v.* St. Louis Mut. F. & M. Ins. Co., 31 Mo. 555.

The rule is applicable to chattel mortgages as well as real. Crikelair *v.* Citizens' Ins. Co., 168 Ill. 309, 48 N. E. 167, 61 Am. St. Rep. 119 [*affirming* 68 Ill. App. 637]; Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Fitzgerald *v.* Atlanta Home Ins. Co., 61 N. Y. App. Div. 350, 70 N. Y. Suppl. 552; Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740 [*affirming* (Civ. App. 1899) 54 S. W. 300]. But a vendor's lien cannot be regarded as equivalent to a chattel mortgage when that alone is prohibited by the policy. Pennsylvania F. Ins. Co. *v.* Hughes, 108 Fed. 497, 47 C. C. A. 459.

97. Packard *v.* Agawam Mut. F. Ins. Co., 2 Gray (Mass.) 334; Hutchins *v.* Cleveland Mut. Ins. Co., 11 Ohio St. 477.

98. Phœnix Ins. Co. *v.* Overman, 21 Ind. App. 516, 52 N. E. 771; Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530; Clifton Coal Co. *v.* Scottish Union, etc., Ins. Co., 102 Iowa 300, 71 N. W. 433; Forward *v.* Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

99. Laird *v.* Littlefield, 164 N. Y. 597, 58 N. E. 1089 [*affirming* 34 N. Y. App. Div. 43, 53 N. Y. Suppl. 1082]; Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Smith *v.* Niagara F. Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216; Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188. And see Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843; Lang *v.* Hawkeye Ins. Co., 74 Iowa 673, 39 N. W. 86. Thus a mortgage is an encumbrance only as to the amount unpaid and not to the extent of the original indebtedness. Dougherty *v.* German-American Ins. Co., 67 Mo. App. 526. Nor is an outstanding mortgage an encumbrance if the mortgagee is estopped to assert it. Brennen *v.* Connecticut F. Ins. Co., 99 Mo. App. 718, 74 S. W. 406. That a portion of the debt has been assumed by another or that there exists a set-off against the mortgagee may be shown to prove the correctness of the amount of the encumbrance asserted. Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747 [*affirming* 20 Ill. App. 559]; Ring *v.* Windsor County Mut. Ins. Co., 54 Vt. 434.

1. Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. (N. Y.) 275.

2. See Liverpool, etc., Ins. Co. *v.* Ricker, 10 Tex. Civ. App. 264, 31 S. W. 248; Mason *v.* Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19.

The fact that the purchase-price is unpaid is immaterial if no lien is reserved. O'Neill *v.* Ottawa Agricultural Ins. Co., 30 U. C. C. P. 151.

3. Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91; Hosford *v.* Hartford F. Ins. Co., 127 U. S. 404, 8 S. Ct. 1202, 32 L. ed. 198.

But where the property was sold for taxes, an encumbrance was held to have been created. Wilbur *v.* Bowditch Mut. F. Ins. Co., 10 Cush. (Mass.) 446.

4. Held prohibited see Capital City Ins. Co. *v.* Autrey, 105 Ala. 269, 17 So. 326, 53 Am. St. Rep. 121; Leonard *v.* American Ins. Co., 97 Ind. 299.

Held not prohibited see Georgia Home Ins.

of an attachment[5] or of an execution[6] on insured property is an encumbrance which must be disclosed when encumbrances are inquired about. But not so if the seizure was illegal and hence did not constitute a true lien.[7]

(VI) *MISCELLANEOUS.* A mechanic's lien is an encumbrance which must be disclosed under the encumbrance clause of a policy.[8] But a landlord's lien is not.[9] Nor is a lease of a store an encumbrance on merchandise therein.[10] A bond to convey land is not a prohibited encumbrance after the time has expired for completion of the contract and the purchase-price is unpaid.[11] Nor is any lien which is no longer enforceable.[12] A charge on land to pay an annuity is an encumbrance.[13] Liens against one member of a partnership do not constitute a breach of the condition of a policy taken out by the firm.[14]

5. OTHER INSURANCE — a. Effect of. The modern policy provides that it shall be void if the insured "now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." When this customary condition against further insurance is found, avoidance takes place even though the insured forgot to disclose such insurance or was unaware of its existence, if there actually is other insurance on the property,[15] for the provision is regarded as reasonable and valid,[16] and it is immaterial

Co. *v.* Schild, 73 Miss. 128, 19 So. 94; Somerset Ins. Co. *v.* McAnally, 46 Pa. St. 41.

5. Home Ins. Co. *v.* Allen, 13 Ky. L. Rep. 95.

6. Pennsylvania Ins. Co. *v.* Gottsman, 48 Pa. St. 151.

7. Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830; Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

8. Redmon *v.* Phœnix F. Ins. Co., 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830.

9. Caplis *v.* American F. Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535.

10. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180.

11. Newhall *v.* Union Mut. F. Ins. Co., 52 Me. 180.

12. Jackson *v.* Farmers' Mut. F. Ins. Co., 5 Gray (Mass.) 52. See also *supra*, XII, B, 4, b, (I).

13. Renninger *v.* Dwelling House Ins. Co., 168 Pa. St. 350, 31 Atl. 1083. *Contra*, Reddick *v.* Saugeen Mut. F. Ins. Co., 15 Ont. App. 363. But not so if there is merely an agreement to pay an annuity in consideration of a conveyance of the property to the insured. Mason *v.* Agricultural Mut. Assur. Assoc., 18 U. C. C. P. 19. *Quære* as to whether an outstanding dower interest is an "encumbrance." Ohio Farmers' Ins. Co. *v.* Britton, 31 Ohio St. 488.

14. Miller *v.* Germania F. Ins. Co., 13 Phila. (Pa.) 551.

But a mortgage by one of two joint — as distinct from partnership — owners on his interest is an encumbrance. Denver Tp. Mut. F. Ins. Co. *v.* Resor, 95 Ill. App. 197; Niles *v.* Farmers' Mut. F. Ins. Co., 119 Mich. 252, 77 N. W. 933.

15. Phœnix Ins. Co. *v.* Copeland, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848; Zinck *v.* Phœnix Ins. Co., 60 Iowa 266, 14 N. W. 792; Gee *v.* Cheshire County Mut. F. Ins. Co., 55 N. H. 65, 20 Am. Rep. 171; Dickson *v.* Provincial Ins. Co., 24 U. C. C. P. 157; McDonell *v.* Beacon F., etc., Assur. Co., 7 U. C. C. P. 308. The contrary was held in Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285. And see Sibley *v.* Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473.

It is immaterial that insured was not specifically examined as to whether other insurance existed. Wilcox *v.* Continental Ins. Co., 85 Wis. 193, 55 N. W. 188.

A fraudulent representation that outstanding insurance is less than it really is avoids the policy. Armour *v.* Transatlantic F. Ins. Co., 47 N. Y. Super. Ct. 352.

The rule does not apply to the case of prior but forgotten insurance in defendant company. Bridgewater Iron Co. *v.* Enterprise Ins. Co., 134 Mass. 433.

While an insured need not mention another pending application, he violates the condition if such application be accepted and ratified by him. Cutler *v.* Royal Ins. Co., 70 Conn. 566, 40 Atl. 529, 41 L. R. A. 159.

If the insured gives notice of other insurance, his policy is not vitiated by the fact that he subsequently changes one of the policies over to another company. Moore *v.* Citizens F. Ins. Co., 14 Ont. App. 582; Parsons *v.* Standard Ins. Co., 43 U. C. Q. B. 603, 4 Ont. App. 326 [*affirmed* in 5 Can. Sup. Ct. 233].

16. *Connecticut.*— Brown *v.* Hartford Ins. Co., 3 Day 58.

Louisiana.— Leavitt *v.* Western M. & F. Ins. Co., 7 Rob. 351.

Maine.— Bigelow *v.* Granite State F. Ins. Co., 94 Me. 39, 46 Atl. 808.

Missouri.— Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

Pennsylvania.— Stacey *v.* Franklin F. Ins. Co., 2 Watts & S. 506; Sitler *v.* Spring Garden Mut. F. Ins. Co., 14 York Leg. Rec. 158.

Texas.— Guinn *v.* Phœnix Ins. Co., (Tex. Civ. App. 1893) 31 S. W. 566; East Texas F. Ins. Co. *v.* Flippen, 4 Tex. Civ. App. 576, 23 S. W. 550.

Canada.— Shannon *v.* Gore Dist. Mut. F. Ins. Co., 2 Ont. App. 396; Pharand *v.* Lancashire Ins. Co., 18 Quebec Super. Ct. 35.

See 28 Cent. Dig. tit. "Insurance," § 660.

that the property is not over insured.[17] Nor can the insured protect himself by canceling the prior policy if the condition is once broken.[18] Nor does its expiration revive the subsequent policy.[19] In Illinois, however, it has been held that the policy takes life when the prior insurance expires or is canceled.[20] It has also been held that an overstatement of existing insurance under an express warranty will likewise vitiate the policy.[21] In the absence of a provision requiring an insertion of the amount of outstanding insurance in the policy, a verbal statement thereof is sufficient.[22] And even where the policy requires a disclosure of other outstanding insurance to appear in the policy, while some few cases assert that a verbal notice to the insurer is insufficient,[23] the great burden of adjudication in other fields of insurance is that the knowledge of the insurer is sufficient without indorsement, at least as to all matters arising contemporaneously with the issuance of the policy.[24]

b. What Constitutes Additional Insurance — (1) *Interest Insured.* To be insurance of the sort prohibited the prior policy must have been insurance upon the same subject-matter,[25] and upon the same interest therein.[26] The subject-matter of the two policies need not, however, be identical,[27] for a policy insuring the property in question along with other property is a breach of the condition.[28]

The rule is the same in mutual companies if the charter forbids other insurance. Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9. And see Illinois Mut. F. Ins. Co. *v.* O'Neile, 13 Ill. 89. But insured need give only such details as the charter requires. McMahon *v.* Portsmouth Mut. F. Ins. Co., 22 N. H. 15.

Permission for further insurance.— A special permission indorsed on the policy to carry further insurance applies to prior as well as to subsequent policies, so that no forfeiture takes place, although prior existing insurance was not disclosed. Frederick County Mut. F. Ins. Co. *v.* Deford, 38 Md. 404; Blake *v.* Exchange Mut. Ins. Co., 12 Gray (Mass.) 265; Kimball *v.* Howard F. Ins. Co., 8 Gray (Mass.) 33.

17. Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. (Mass.) 175.

18. Reed *v.* Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496.

But if the condition be not broken, that is, if the outstanding insurance is disclosed, and it is agreed that it shall be canceled, the subsequent policy is valid when cancellation takes place. Continental Ins. Co. *v.* Horton, 28 Mich. 173; Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110; Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328; Atlantic Mut. F. Ins. Co. *v.* Goodall, 29 N. H. 182; Train *v.* Holland Purchase Ins. Co., 62 N. Y. 598.

But if no cancellation is had, there is a breach of the condition and the latter policy stands avoided. Zimmerman *v.* Home Ins. Co., 77 Iowa 685, 42 N. W. 462.

19. Gardner *v.* Standard Ins. Co., 58 Mo. App. 611.

20. Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166.

If the prior insurance has lapsed before the policy issues the latter is not forfeited. German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

21. Armour *v.* Transatlantic F. Ins. Co., 90 N. Y. 450 [*affirming* 47 N. Y. Super. Ct. 352]; Bancroft *v.* Heath, 5 Com. Cas. 110. And see New Jersey Rubber Co. *v.* Commercial Union Assur. Co. of London, 64 N. J. L. 580, 46 Atl. 777.

22. Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. (N. Y.) 191; McEwen *v.* Montgomery County Mut. Ins. Co., 5 Hill (N. Y.) 101; Union Ins. Co. *v.* Murphy, 2 Del. Co. (Pa.) 510.

23. Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044; Billington *v.* Provincial Ins. Co., 2 Ont. App. 158; McBride *v.* Gore Dist. Mut. F. Ins. Co., 30 U. C. Q. B. 451. In Liscom *v.* Boston Mut. F. Ins. Co., 9 Metc. (Mass.) 205, it was held that the facts showed a substantial compliance with the requirement of indorsement. So also Ames *v.* New York Union Ins. Co., 14 N. Y. 253.

24. See *infra*, XIV, E.

The application has been held a part of the policy for such purposes. Fourdrinier *v.* Hartford F. Ins. Co., 15 U. C. C. P. 403.

25. Howard Ins. Co. *v.* Scribner, 5 Hill (N. Y.) 298; Peters *v.* Delaware Ins. Co., 5 Serg. & R. (Pa.) 473; Hazzard *v.* Canada Agricultural Ins. Co., 39 U. C. Q. B. 419.

26. Copeland *v.* Phœnix Ins. Co., 96 Ala. 615, 11 So. 746, 38 Am. St. Rep. 134; State Ins. Co. *v.* New Hampshire Trust Co., 47 Nebr. 62, 66 N. W. 9, 1106; Hastings *v.* Westchester F. Ins. Co., 73 N. Y. 141; Sprague *v.* Holland Purchase Ins. Co., 69 N. Y. 128; Ætna F. Ins. Co. *v.* Tyler, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; Tyler *v.* Ætna F. Ins. Co., 12 Wend. (N. Y.) 507; California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730.

27. See cases cited *infra*, note 28. *Contra*, Howard Ins. Co. *v.* Scribner, 5 Hill (N. Y.) 298; Sloat *v.* Royal Ins. Co., 49 Pa. St. 14, 88 Am. Dec. 477.

28. Horridge *v.* Dwelling-House Ins. Co., 75 Iowa 374, 39 N. W. 648. Thus insurance by the mortgagee, particularly if the mortgagor had no knowledge of the same, and

(II) *Prior Policy Invalid.* If the prior policy is totally invalid before the issuance of the policy in suit, it cannot be regarded as constituting an insurance which must be disclosed, in the absence of a specific requirement as to the disclosure of insurance whether valid or not.[29] If the policy requires "all insurance (valid or not)" to be disclosed, however, a failure to mention a former policy apparently valid on its face but in fact void will vitiate the insurance.[30] And it has been held that a policy which is not void *ipso facto* but only voidable on breach of a condition, is double insurance, although a breach has occurred, unless the forfeiture has been declared.[31] There is an irrepressible conflict among the authorities when both the prior policy and the policy in suit are conditioned to be void if there be further insurance, as to which policy is thereby affected. In case the clause is given a literal interpretation, the prior policy ceases to exist upon taking out the second and the latter is consequently the sole insurance and its condition is not broken. Such is the view of many courts.[32] In other jurisdictions the prior policy is regarded as merely voidable until the forfeiture is declared, and in consequence constitutes additional insurance which if not disclosed will vitiate the subsequent policy.[33] When two policies are simultaneously isssued, it has been held that neither is vitiated by the other.[34]

6. Special Causes Increasing the Risk. While the insured in the absence of inquiries is not required to disclose the existence of any special causes or circumstances increasing the risk unless he is acting fraudulently,[35] yet if he warrants

vice versa (Cowart *v.* Capital City Ins. Co., 114 Ala. 356, 22 So. 574; Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121. *Contra*, Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044), will not vitiate the mortgagee's subsequent policy (Carpenter *v.* Continental Ins. Co., 61 Mich. 635, 28 N. W. 749). In Perry *v.* Liverpool, etc., Ins. Co., 34 N. Brunsw. 380, however, where the mortgagee had insured not his own interest but the interest of plaintiff mortgagor, making the proceeds payable to himself as mortgagee, this was regarded as insurance of the mortgagor and a double insurance within the terms of the policy.

A policy issued to plaintiff without his authority or request and unknown to him when the subsequent policy issues cannot affect the latter policy. Nichols *v.* Fayette Mut. F. Ins. Co., 1 Allen (Mass.) 63.

29. Stevens *v.* Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769; Jackson *v.* Farmers' Mut. F. Ins. Co., 5 Gray (Mass.) 52. However, it has been stated that if the policy is valid on its face, although actually void, it should be disclosed. Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044. Although the prior policy is by mistake made to expire sooner than intended, it is additional insurance up to the time that it properly expires. Boulden *v.* Syndicate Ins. Co., (Ala. 1892) 11 So. 777; Phœnix Ins. Co. *v.* Boulden, 96 Ala. 609, 11 So. 774. That the former owner has taken out a policy after passing title cannot amount to double insurance. State Ins. Co. *v.* New Hampshire Trust Co., 47 Nebr. 62, 66 N. W. 9, 1106.

30. Phœnix Ins. Co. *v.* Copeland, 90 Ala. 386, 8 So. 48. But if it is made to run longer than intended it is not additional insurance beyond the time actually contracted for. Phœnix Ins. Co. *v.* Hague, (Tex. Civ. App. 1896) 34 S. W. 654.

31. Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489; Saville *v.* London, etc., F. Ins. Co., 8 Mont. 431, 20 Pac. 650; Saville *v.* Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542; Landers *v.* Watertown F. Ins. Co., 86 N. Y. 414, 40 Am. Rep. 554 [*reversing* 19 Hun 174].

32. Emery *v.* Mut. City, etc., F. Ins. Co., 51 Mich. 469, 16 N. W. 816, 47 Am. Rep. 590. But see Kooistra *v.* Rockford Ins. Co., 122 Mich. 626, 81 N. W. 568; Marshall *v.* Insurance Co. of North America, 10 Pa. Co. Ct. 87; Leibrandt, etc., Stove Co. *v.* Fireman's Ins. Co., 35 Fed. 30. Nor will a claim made under the first policy after loss annul the subsequent policy. Cowart *v.* Capital City Ins. Co., 114 Ala. 356, 22 So. 574.

33. Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489 [*reversing* 27 Ill. App. 590]; Reed *v.* Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; Neve *v.* Columbia Ins. Co., 2 McMull. (S. C.) 220. It is to be remembered that these decisions are not under policies providing that the policy in suit shall be void if there be other insurance whether "valid or not." This additional phrase has been added to the standard policy because of the conflict of authority and in general is regarded as reasonable, but has been most frequently in question in determining whether there has been a breach of a condition subsequent. Phœnix Ins. Co. *v.* Copeland, 90 Ala. 386, 8 So. 48. See also *infra*, XIII, I, 5, a.

34. Washington F. Ins. Co. *v.* Davison, 30 Md. 91. It has been denied that two policies can in law be presumed to be issued simultaneously, and the presumption is said to be that one is necessarily antecedent to the other. Manhattan Ins. Co. *v.* Stein, 5 Bush (Ky.) 652.

35. *Illinois.*— Keith *v.* Globe Ins. Co., 52 Ill. 518, 84 Am. Rep. 634.

that he has disclosed all circumstances material to the risk he cannot, except under penalty of a forfeiture, conceal those facts which would affect the willingness of the insurer to carry the policy.[36] And under any circumstances the false representation as to any surrounding and concomitant facts will render his policy void in its inception.[37] False statements that the insured premises are equipped with fire-fighting apparatus will avoid the policy.[38] And a like result follows from a false warranty as to the maintenance of a watchman upon the grounds.[39]

C. Parties Affected by Avoidance of Policy — 1. Assignees. In case there has been a completed assignment whereby privity of contract has been effected between the assignee and the insurer, the consent to the assignment waives all defenses prior thereto of which the insurer was cognizant,[40] and of all

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 52, 521.

New York.— Smith *v.* Home Ins. Co., 47 Hun 30.

Ohio.— Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Pennsylvania.— Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423.

Washington.— Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609.

Wisconsin.— Knox *v.* People's Ins. Co., 50 Wis. 680, 7 N. W. 780; Knox *v.* Lycoming F. Ins. Co., 50 Wis. 671, 7 N. W. 776.

United States.— Clark *v.* Manufacturers' Ins. Co., 8 How. 235, 12 L. ed. 1061; Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 41 Fed. 271.

See 28 Cent. Dig. tit. "Insurance," § 652 *et seq.*

36. Bebee *v.* Hartford County Mut. F. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553; Jacobs *v.* Eagle Mut. F. Ins. Co., 7 Allen (Mass.) 132. Concealment see *supra*, XII, A, 2, b.

He need not disclose immaterial matters. Reesor *v.* Provincial Ins. Co., 33 U. C. Q. B. 357.

37. Forbush *v.* Western Massachusetts Ins. Co., 4 Gray (Mass.) 337; Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159. Such as a statement that another insurer had accepted a risk on the same property, this being untrue (Standard Oil Co. *v.* Amazon Ins. Co., 14 Hun (N. Y.) 619; Fromherz *v.* Yankton F. Ins. Co., 7 S. D. 187, 63 N. W. 784); that the rate charged by the board of underwriters is less than it really is (Armour *v.* Transatlantic F. Ins. Co., 47 N. Y. Super. Ct. 352); that the owner was a business man personally conducting business, the insured being really a woman (Freedman *v.* Commonwealth Fire Assoc., 168 Pa. St. 249, 32 Atl. 39); that other companies had not canceled any policies or refused the risk when the contrary is true, but not so if the cancellation was because such companies had gone out of business, or if the insurer was not mislead (Hawley *v.* Liverpool, etc., Ins. Co., 102 Cal. 651, 36 Pac. 926; Chicago Mut. F. Ins. Co. *v.* Bigelow, 62 Ill. App. 200; Stott *v.* London, etc., F. Ins. Co., 21 Ont. 312), or that there was no danger from incendiarism, the insured being really apprehensive thereof (North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638; Whittle *v.* Farmville Ins. Co., 29 Fed. Cas. No. 17,603, 3 Hughes 421; Greet *v.* Citizens Ins. Co., 5 Ont. App. 596; Kniseley *v.* British America Assur. Co., 32 Ont. 376; Findley *v.* Fire Ins. Co. of North America, 25 Ont. 515; Campbell *v.* Victoria Mut. F. Ins. Co., 45 U. C. Q. B. 412; Herbert *v.* Mercantile F. Ins. Co., 43 U. C. Q. B. 384), unless the threats were made so long before as not to increase the hazard (Thompson *v.* Liverpool, etc., Ins. Co., 23 Fed. Cas. No. 13,966, 2 Hask. 363; Kelly *v.* Hochelaga Mut. F. Ins. Co., 24 L. C. Jur. 298), and a concealment of such a fear, even though no statement was made concerning incendiarism, has been held to be a fraud in law (Walden *v.* Louisiana Ins. Co., 12 La. 134, 32 Am. Dec. 116; Clark *v.* Hamilton Mut. Ins. Co., 9 Gray (Mass.) 148. But see *contra*, Smith *v.* Home Ins. Co., 47 Hun (N. Y.) 30; Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Sanford *v.* Royal Ins. Co., 11 Wash. 653, 40 Pac. 609. See also *supra*, XII, A, 2, b). Such is also the rule with reference to the disclosure of an employee's misconduct in guaranty insurance (Mechanics' Sav. Bank, etc., Co. *v.* Guarantee Co. of North America, 68 Fed. 459; Phillips *v.* Foxall, L. R. 7 Q. B. 666, 41 L. J. Q. B. 293, 27 L. T. Rep. N. S. 231, 20 Wkly. Rep. 900); or as to methods of illumination (Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50; Clark *v.* Manufacturers' Ins. Co., 8 How. (U. S.) 235, 12 L. ed. 1061).

38. Fromherz *v.* Yankton F. Ins. Co., 7 S. D. 187, 63 N. W. 784; Sayles *v.* Northwestern Ins. Co., 21 Fed. Cas. No. 12,422, 2 Curt. 610.

But an executory promise to install the same cannot be treated as a warranty *in præsenti*. Howell *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,780.

And the warranty, if one is made, is to receive a reasonable construction. Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

39. Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Blumer *v.* Phœnix Ins. Co., 45 Wis. 622; Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodh. & M. 529. But not so if the statement is a representation and not a warranty. King Brick Mfg. Co. *v.* Phœnix Ins. Co., 164 Mass. 291, 41 N. E. 277; Frisbie *v.* Fayette Mut. Ins. Co., 27 Pa. St. 325.

40. See *infra*, XIII, A, 7, a. A condition in a policy affecting its validity can only be

defenses available to the insurer, but of which it had no knowledge, which do not inhere in the estate of the assignee.[41] But if the defect continues and does not amount to a mere personal defense against the assignor, the assignee cannot recover, although he knows nothing thereof.[42]

2. MORTGAGEES. The mortgagee takes only the interest of the mortgagor, and hence if he be merely a designated payee the existence of a defense by way of a breach of a condition precedent will defeat his right to a recovery on the policy.[43] And this has been regarded as true even though the policy provides that it shall not be invalidated by any act of the mortgagor, such provisions referring to the breach of a condition subsequent.[44] But if an independent contract for insurance is entered into between the insurer and the mortgagee the latter is not affected by any misrepresentation made by the mortgagor.[45] And some courts interpret the meaning of the provision against the acts of the mortgagor as amounting to such an independently enforceable contract.[46]

D. Entire and Severable Contracts. If the policy covers several risks, and the consideration therefor be severable and the subject-matter distinct and separate, a breach of a condition precedent with respect to one of such risks or subject-matters will not prevent a recovery upon the policy for the portion as to which no condition was broken.[47] But if the breach of condition necessarily

taken advantage of by the insurer. If waived by it, the claimants to the proceeds cannot invoke a breach of the same. Burrows *v.* McCalley, 17 Wash. 269, 49 Pac. 508.

41. Ellis *v.* Council Bluffs Ins. Co., 64 Iowa 507, 20 N. W. 782; Neve *v.* Charleston Ins., etc., Co., 2 McMull. (S. C.) 237. See also *supra*, VIII, B, 3.

42. Bowditch Mut. Ins. Co. *v.* Winslow, 8 Gray (Mass.) 38; Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. (Mass.) 175; Richmond *v.* Niagara F. Ins. Co., 15 Hun (N. Y.) 248 [*reversed* in 79 N. Y. 230]; Simonds *v.* Firemen's Fund Ins. Co., (Tex. Civ. App. 1896) 35 S. W. 300; North British, etc., Ins. Co. *v.* Tourville, 25 Can. Sup. Ct. 177.

43. *New York.*— Genesee Falls Permanent Sav., etc., Assoc. *v.* U. S. Fire Ins. Co., 16 N. Y. App. Div. 587, 44 N. Y. Suppl. 979.

Pennsylvania.— Flaherty *v.* German Ins. Co., 1 Wkly. Notes Cas. 352.

Washington.— Dunham *v.* Citizens' Ins. Co., 34 Wash. 205, 75 Pac. 804. See also Burrows *v.* McCalley, 17 Wash. 269, 49 Pac. 508, *semble*.

Wisconsin.— Keith *v.* Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

United States.—Delaware Ins. Co. *v.* Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

See 28 Cent. Dig. tit. "Insurance," § 651.

44. Genesee Falls Permanent Sav., etc., Assoc. *v.* U. S. Fire Ins. Co., 16 N. Y. App. Div. 587, 44 N. Y. Suppl. 979; American Cent. Ins. Co. *v.* Cowan, (Tex. Civ. App. 1896) 34 S. W. 460; Hanover F. Ins. Co. *v.* National Exch. Bank, (Tex. Civ. App. 1896) 34 S. W. 333. And see Attleborough Sav. Bank *v.* Security Ins. Co., 168 Mass. 147, 46 N. E. 390, 60 Am. St. Rep. 373.

45. Hare *v.* Headley, 54 N. J. Eq. 545, 35 Atl. 445; Hastings *v.* Westchester F. Ins. Co., 73 N. Y. 141.

46. Magoun *v.* Fireman's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; East *v.* New Orleans Ins. Assoc., 76 Miss. 697, 26 So. 691; Hastings *v.* Westchester F. Ins. Co., 73 N. Y. 141 [*affirming* 12 Hun 416]; Smith *v.* Union Ins. Co., 25 R. I. 260, 55 Atl. 715. And see State Ins. Co. *v.* New Hampshire Trust Co., 47 Nebr. 62, 66 N. W. 9, 1106; Phenix Ins. Co. *v.* Omaha L. & T. Co., 41 Nebr. 834, 60 N. W. 133, 25 L. R. A. 679. See also *infra*, XIII, A, 7, b.

47. *Colorado.*— Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513.

Illinois.— Insurance Co. of North America *v.* Hofing, 29 Ill. App. 180.

Iowa.— Taylor *v.* Anchor Mut. F. Ins. Co., 116 Iowa 625, 88 N. W. 807, 93 Am. St. Rep. 261, 57 L. R. A. 328; Greenlee *v.* Iowa State Ins. Co., 102 Iowa 260, 71 N. W. 224.

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521; Teutonic Ins. Co. *v.* Howell, 54 S. W. 852, 21 Ky. L. Rep. 1245.

Missouri.— Koontz *v.* Hannibal Sav., etc., Co., 42 Mo. 126, 97 Am. Dec. 325; Stephens *v.* German Ins. Co., 61 Mo. App. 194.

Nebraska.— Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.

New York.— Schuster *v.* Dutchess County Ins. Co., 102 N. Y. 260, 6 N. E. 406; Mott *v.* Citizens' Ins. Co., 69 Hun 501, 23 N. Y. Suppl. 400; Smith *v.* Home Ins. Co., 47 Hun 30; Holmes *v.* Drew, 16 Hun 491; Burrill *v.* Chenango Mut. Ins. Co., 1 Edm. Sel. Cas. 233; Trench *v.* Chenango County Mut. Ins. Co., 7 Hill 122.

Ohio.— Coleman *v.* New Orleans Ins. Co., 49 Ohio St. 310, 31 N. E. 279, 34 Am. St. Rep. 565, 16 L. R. A. 174.

Texas.— German Ins. Co. *v.* Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173; North British, etc., Ins. Co. *v.* Freeman, (Civ. App. 1896) 33 S. W. 1091; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550, 30 S. W. 833.

Canada.— Date *v.* Gore Dist. Mut. F. Ins.

increases the risk on the remainder,[48] or if the contract is an entirety,[49] or the consideration indivisible,[50] then the breach of a condition precedent as to a part of the subject-matter will vitiate the entire contract.[51]

XIII. FORFEITURE FOR BREACH OF PROMISSORY WARRANTIES, OR CONDITIONS SUBSEQUENT.

A. In General — 1. NATURE OF PROMISSORY WARRANTY. Warranties may be of two types: (1) Affirmative, relating to the present or past existence of certain facts upon the exact truth of which depends the inception of the contract of insurance and thus operating by way of a condition precedent;[52] and (2) promissory, relating to the continuation or fulfilment of certain conditions upon which the life and continuation of the policy depend, which are thus in effect conditions subsequent.[53] An agreement to perform an executory stipulation is a

Co., 14 U. C. C. P. 548; Phillips *v.* Grand River Farmers' Mut. F. Ins. Co., 46 U. C. Q. B. 334.

See 28 Cent. Dig. tit. "Insurance," § 650.

And this is true, although the policy provides that the "entire policy" shall be void if any condition precedent be broken. Bills *v.* Hibernia Ins. Co., 87 Tex. 547, 29 S. W. 1063, 47 Am. St. Rep. 121, 29 L. R. A. 706; Delaware Ins. Co. *v.* Harris, (Tex. Civ. App. 1901) 64 S. W. 867. And see Home Ins. Co. *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. 240. *Contra,* Elliott *v.* Teutonia Ins. Co., 20 Pa. Super. Ct. 359. See also *supra,* XI, L.

48. Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379; Ætna Ins. Co. *v.* Resh, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228.

49. *District of Columbia.*—Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas. 245, 40 L. R. A. 358.

Indiana.— Geiss *v.* Franklin Ins. Co., 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324.

Maryland.— Bowman *v.* Franklin F. Ins. Co., 40 Md. 620.

Michigan.— In Ætna Ins. Co. *v.* Resh, 44 Mich. 55, 6 N. W. 114, 38 Am. Rep. 228, it was held that a breach in part would vitiate the entire policy unless it could be shown that the insurer would have taken each risk separately.

Missouri.—Shoup *v.* Dwelling House F. Ins. Co., 51 Mo. App. 286.

New York.— Smith *v.* Empire Ins. Co., 25 Barb. 497.

North Carolina.— Cuthbertson *v.* North Carolina Home Ins. Co., 96 N. C. 480, 2 S. E. 258.

Pennsylvania.— Gottsman *v.* Pennsylvania Ins. Co., 56 Pa. St. 210, 94 Am. Dec. 55; Todd *v.* Missouri State Ins. Co., 11 Phila. 355.

Wisconsin.— Schumitsch *v.* American Ins. Co., 48 Wis. 26, 3 N. W. 595; Hinman *v.* Hartford F. Ins. Co., 36 Wis. 159.

Canada.— Bleakley *v.* Niagara Dist. Mut. Ins. Co., 16 Grant Ch. (U. C.) 198; Samo *v.* Gore Dist. Mut. F. Ins. Co., 26 U. C. C. P. 405.

See 28 Cent. Dig. tit. "Insurance," § 650; and *supra,* XI, L.

A policy may be divisible as between realty and personalty and still be indivisible as between portions of the personalty. Springfield F. & M. Ins. Co. *v.* Green, (Tex. Civ. App. 1896) 36 S. W. 143.

50. Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494; Lovejoy *v.* Augusta Mut. F. Ins. Co., 45 Me. 472; Thomas *v.* Commercial Union Assur. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323; Brown *v.* People's Mut. Ins. Co., 11 Cush. (Mass.) 280; Friesmuth *v.* Agawam Mut. F. Ins. Co., 10 Cush. (Mass.) 587. *Contra,* Crook *v.* Phœnix Ins. Co., 38 Mo. App. 582.

51. Day *v.* Charter Oak F. & M. Ins. Co., 51 Me. 91; Vucci *v.* North British, etc., Ins. Co., 88 N. Y. Suppl. 986. Although in some cases the courts have regarded the contract so much of a complete unit that a breach as to a part only of the subject-matter will not affect the insured's right to recover in full. St. Paul F. & M. Ins. Co. *v.* Kelly, 43 Kan. 741, 23 Pac. 1046; Hartford F. Ins. Co. *v.* Walker, (Tex. Civ. App. 1901) 60 S. W. 820 [*reversed* in 94 Tex. 473, 61 S. W. 711]. See also *infra,* XIII, A, 5.

52. New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 46 Atl. 777.

Conditions precedent generally see *supra,* XII, A.

53. A warranty is none the less a warranty because it relates to future conduct and it must be strictly performed. With respect to compliance therewith there is no latitude. Houghton *v.* Manufacturers' Mut. F. Ins. Co., 8 Metc. (Mass.) 114, 41 Am. Dec. 489; Williams *v.* People's F. Ins. Co., 57 N. Y. 274; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

The use of a present tense in the policy usually denotes a warranty *in præsenti* and not a continuing or promissory warranty. U. S. Fire & M. Ins. Co. *v.* Kimberly, 34 Md. 224, 6 Am. Rep. 325.

Warranties are not construed into a contract in unimportant matters. Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

By a renewal of the policy a promissory

promissory warranty.[54] Any representation in the nature of a promise or stipulation for future conduct on the part of the insured must be inserted in the policy in order to be available to the insurer.[55]

2. Materiality. In the absence of statutory regulation, the breach of a promissory warranty avoids the policy irrespective of its materiality.[56] Many states, however, have enacted laws in a large measure annulling this rule, and providing that unless the breach of condition contributes to the loss it will not effect a forfeiture. While policies already forfeited are not affected by such statutes,[57] all policies issued after their passage come within their purview.[58]

3. Revival of Policy. There is much conflict upon the question whether a policy is revived by a termination of the prohibited condition constituting a breach of warranty. On principle, it would seem that the answer should depend on whether the policy is conditioned to be void, or is to be merely suspended for breach of condition. If the latter only is provided, the policy should revive when the breach no longer continues and when the risk is restored to its original condition.[59] If, however, the provision be that a forfeiture occurs upon a breach, that is, that the policy shall become void, the removal of the situation causing a breach of condition should not operate to revive the policy without the consent

warranty in a policy is repeated. Peoria Sugar Refining Co. *v.* People's F. Ins. Co., 52 Conn. 581. See *supra*, VII, A, 2.

54. Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. (La.) 51, 17 Am. Dec. 175; O'Neil *v.* Buffalo F. Ins. Co., 3 N. Y. 122.

55. *Indiana.*— Citizens' Ins. Co. *v.* Hoffman, 128 Ind. 370, 27 N. E. 745.

Missouri.— Wertheimer-Swarts Shoe Co. *v.* U. S. Casualty Co., 172 Mo. 135, 72 S. W. 635, 95 Am. St. Rep. 500, 61 L. R. A. 766.

New York.— New York *v.* Brooklyn F. Ins. Co., 3 Abb. Dec. 251, 4 Keyes 465 [*affirming* 41 Barb. 231]; Alston *v.* Mechanics' Mut. Ins. Co., 4 Hill 329.

West Virginia.— Travis *v.* Peabody Ins. Co., 28 W. Va. 583.

United States.—Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

See 28 Cent. Dig. tit. "Insurance," § 697 *et seq.*

Warranty indorsed on or attached to policy. — Where the policy states that it is accepted subject to such conditions as may be indorsed thereon or added thereto, a promissory warranty is sufficiently within the rule stated in the text if appearing upon a slip attached to the policy (Kelley-Goodfellow Shoe Co. *v.* Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027); but not so if merely on an attached slip not thus by reference made a part of the policy (Hart *v.* Niagara F. Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86).

A by-law of a mutual company, made by reference a part of a policy, may amount to a warranty. Hygum *v.* Ætna Ins. Co., 11 Iowa 21.

Further as to incorporating conditions and stipulations by reference to application, by laws, etc., see *supra*, XI, C, D.

56. *California.*—McKenzie *v.* Scottish Union, etc., Ins. Co., 112 Cal. 548, 44 Pac. 922.

Illinois.— Norwaysz *v.* Thuringia Ins. Co., 204 Ill. 334, 68 N. E. 551.

Louisiana.— Goicoechea *v.* Louisiana State Ins. Co., 6 Mart. N. S. 51, 17 Am. Dec. 175.

New York.— Mead *v.* Northwestern Ins. Co., 7 N. Y. 530.

Ohio.— Miller *v.* Western Farmers' Mut. Ins. Co., 1 Handy 208, 12 Ohio Dec. (Reprint) 105.

United States.— Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

See 28 Cent. Dig. tit. "Insurance," § 697 *et seq.*; and *supra*, XII, A, 3.

Balancing of risks.— In Date *v.* Gore Dist. Mut. Ins. Co., 15 U. C. C. P. 175 [*distinguishing* Henker *v.* British America Assur. Co., 13 U. C. C. P. 99], where the risk was increased by one act and diminished by another done at the same time, the risk on the whole not being increased, it was held that there could be no forfeiture of the policy.

57. Eliott *v.* Farmers' Ins. Co., 114 Iowa 153, 86 N. W. 224.

The Ontario statute provides that all the conditions mentioned in the act shall be a part of the contract whether they be explicitly embodied therein or not. Canada Citizens Ins. Co. *v.* Parsons, 7 App. Cas. 96, 51 L. J. P. C. 11, 45 L. T. Rep. N. S. 721.

Form of type.— There are also some statutes requiring that all forfeiture clauses and all promissory warranties be printed in certain forms of type. As to construction of such a statute see Cline *v.* Western Assur. Co., 101 Va. 496, 44 S. E. 700; Sands *v.* Standard Ins. Co., 27 Grant Ch. (U. C.) 167.

58. McGannon *v.* Michigan Millers' Mut. F. Ins. Co., 127 Mich. 636, 87 N. W. 61, 89 Am. St. Rep. 501, 54 L. R. A. 739. See also Boyer *v.* Grand Rapids F. Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338.

59. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Power *v.* Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665; Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202; Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368.

of the insurer.[60] The standard form of policy contains express words of forfeiture if any of the conditions or promissory warranties of the policy are broken.[61] But where policies have simply provided that notice shall be given to the company of any increase of risk or have reserved the option to declare the policy void, the courts have not declared forfeiture simply on breaches of conditions,[62] but have considered a forfeiture as thereby occurring only when on general principles a duty created by law has been violated.[63]

4. Acts of Third Persons. When a promissory warranty has been made, it is immaterial that a breach thereof has been brought about by a tenant, or a third party, for the essential purpose of the warranty is the maintenance of the uniformity of the risk.[64] If the act was done by a third party but with the knowl-

60. *Arkansas.*—German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297.

Indiana.— Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947.

Kansas.— German Ins. Co. *v.* Russell, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234.

Massachusetts.— Davis *v.* German American Ins. Co., 135 Mass. 251.

New Hampshire.— Wheeler *v.* Traders' Ins. Co., 62 N. H. 450; Moore *v.* Phœnix Ins. Co., 62 N. H. 240, 13 Am. St. Rep. 556.

New York.— Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Gray *v.* Guardian Assur. Co., 82 Hun 380, 31 N. Y. Suppl. 237. But see Tompkins *v.* Hartford F. Ins. Co., 22 N. Y. App. Div. 380, 49 N. Y. Suppl. 184.

Ohio.— Ohio Farmers' Ins. Co. *v.* Burget, 65 Ohio St. 119, 61 N. E. 712, 87 Am. St. Rep. 596, 55 L. R. A. 825; Mount Vernon Mfg. Co. *v.* Summit County Mut. F. Ins. Co., 10 Ohio St. 347.

Pennsylvania.— Chester County Mut. F. Ins. Co. *v.* Coatesville Shoe Factory, 80 Pa. St. 407; Diehl *v.* Adams County Mut. F. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

Texas.— Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740; Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930. But see Phœnix Ins. Co. *v.* Munger Improved Cotton-Mach. Mfg. Co., (Civ. App. 1898) 49 S. W. 271.

United States.— Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96.

See 28 Cent. Dig. tit. "Insurance," § 697 *et seq.*

The mutual consent of the contracting parties to a reinstatement, under this view is the only way in which the policy can be revived. Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

That the term "void" means only voidable, and that the policy revives when the cause for forfeiture no longer exists, is the view taken by many courts. Traders' Ins. Co. *v.* Catlin, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595; Phenix Ins. Co. *v.* Johnston, 42 Ill. App. 66; McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38; Born *v.* Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300; Fireman's Ins. Co. *v.* Cecil, 12 Ky. L. Rep. 48, 259; Obermyer *v.* Globe Mut. Ins. Co., 43 Mo. 573; Organ *v.* Hibernia F. Ins. Co., 3 Mo. App. 576; German Mut. F. Ins. Co. *v.* Fox, (Nebr. 1903) 96 N. W. 652; Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047, 54 Nebr. 548, 74 N. W. 866; Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

61. See *supra*, IV, B, 2.

62. Joyce *v.* Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536; Tiefenthal *v.* Citizens' Mut. F. Ins. Co., 53 Mich. 306, 19 N. W. 9.

63. Arkansas Ins. Co. *v.* Bostick, 27 Ark. 539.

64. *Georgia.*—Alston *v.* Greenwich Ins. Co., 100 Ga. 282, 29 S. E. 266.

Illinois.— Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390. *Contra*, Insurance Co. of North America *v.* McDowell, 50 Ill. 120, 99 Am. Dec. 497.

Maryland.— Howell *v.* Baltimore Equitable Soc., 16 Md. 377.

New Hampshire.— Badger *v.* Platts, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572.

New York.— Williams *v.* People's F. Ins. Co., 57 N. Y. 274; Kohlmann *v.* Selvage, 34 N. Y. App. Div. 380, 54 N. Y. Suppl. 230; Hobby *v.* Dana, 17 Barb. 111; Duncan *v.* Sun F. Ins. Co., 6 Wend. 488, 22 Am. Dec. 539.

Pennsylvania.— Long *v.* Beeber, 106 Pa. St. 466, 51 Am. Rep. 532; Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302; Steinmetz *v.* Franklin F. Ins. Co., 6 Phila. 21.

United States.— Gunther *v.* Liverpool, etc., Ins. Co., 134 U. S. 110, 10 S. Ct. 448, 33 L. ed. 857.

Canada.— Kuntz *v.* Niagara Dist. F. Ins. Co., 16 U. C. C. P. 573. But see Heneker *v.* British America Assur. Co., 14 U. C. C. P. 57.

See 28 Cent. Dig. tit. "Insurance," § 701.

Contra.— Where the landlord uses reasonable care and diligence see White *v.* Springfield Mut. F. Assur. Co., 8 Gray (Mass.) 566; Sanford *v.* Mechanics' Mut. F. Ins. Co., 12 Cush. (Mass.) 541.

Where plaintiff's grantor, after sale and conveyance without plaintiff's knowledge and without consent of the insurer as required by the policy, caused repairs to be made, it was held that plaintiff's rights under the policy were not affected therein. Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62.

Whether acts of mortgagor or assignor will forfeit the policy as to the mortgagee

edge and consent of the insured, the act, on principles of agency, is the act of the insured.[65] Under the provisions in the standard policy[66] the acts of third parties over whom the insured has no control, or of which he has no cognizance, should be immaterial.[67]

5. Breach as to Part of Risk. If the policy covers several risks, but these risks are so distinguishable as to be severable, and the consideration for the risks be also severable, a breach of a condition as to one of the risks will not avoid the policy *in toto*, but only *pro tanto*.[68] If, however, the breach of the condition necessarily increases the risk upon the other property insured,[69] or if the contract of insurance be an entirety,[70] or if the consideration be a lump sum not

or assignee to whom the loss is payable see *infra*, XIII, A, 7, b.

65. Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587; Lyman *v.* State Mut. F. Ins. Co., 14 Allen (Mass.) 329.

As to the condition against additional insurance this rule is uniformly upheld. See cases cited *infra*, XIII, J, 3.

66. The standard policy contained a stipulation that the policy shall be void "if the hazard be increased by any means within the control or knowledge of the insured." See *infra*, note 67.

67. Sanford *v.* Mechanics' Mut. F. Ins. Co., 12 Cush. (Mass.) 541; Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407; Padelford *v.* Providence Mut. F. Ins. Co., 3 R. I. 102, 67 Am. Dec. 496.

68. *Alabama.*— Hanover F. Ins. Co. *v.* Crawford, 121 Ala. 258, 25 So. 912, 77 Am. St. Rep. 55.

Illinois.— Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; German Ins. Co. *v.* Miller, 39 Ill. App. 633; Dwelling House Ins. Co. *v.* Butterly, 33 Ill. App. 626.

Iowa.— Taylor *v.* Anchor Mut. F. Ins. Co., 116 Iowa 625, 88 N. W. 807, 93 Am. St. Rep. 261, 57 L. R. A. 328; Worley *v.* Des Moines State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334; Kimball *v.* Monarch Ins. Co., 70 Iowa 513, 30 N. W. 862.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 53 Kan. 623, 36 Pac. 983; Continental Ins. Co. *v.* Ward, 50 Kan. 346, 31 Pac. 1079.

Kentucky.—Speagle *v.* Dwelling House Ins. Co., 97 Ky. 646, 31 S. W. 282, 17 Ky. L. Rep. 610.

Massachusetts.— Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126; Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342, 53 Am. Dec. 44.

Mississippi.— Mitchell *v.* Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86, 48 Am. St. Rep. 535.

Missouri.— Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247.

Nebraska.— Phenix Ins. Co. *v.* Grimes, 33 Nebr. 340, 50 N. W. 168; German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

New York.— Pratt *v.* Dwelling House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117; Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644; Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Coleman *v.* Phœnix Ins. Co., 3 N. Y. App. Div. 65, 38 N. Y. Suppl. 986; Dacey *v.* Watertown Agricultural Ins. Co., 21 Hun 83; Manley *v.* Insurance Co. of North America, 1 Lans. 20; Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. 254; Adler *v.* Germania F. Ins. Co., 17 Misc. 347, 39 N. Y. Suppl. 1070; American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. 114, 20 N. Y. Suppl. 646; Halpin *v.* Insurance Co. of North America, 10 N. Y. St. 345; Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550, 30 S. W. 833.

Virginia.— Connecticut F. Ins. Co. *v.* Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770.

West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

Wisconsin.— Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834.

United States.— Royal Ins. Co. *v.* Martin, 192 U. S. 149, 24 S. Ct. 247, 48 L. ed. 385.

Canada.— Richmond F. Ins. Co. *v.* Fee, 14 Quebec 293.

See 28 Cent. Dig. tit. "Insurance," § 702.

Severable contract see *supra*, XI, L; XII, D.

69. *Maine.*— Barnes *v.* Union Mutual F. Ins. Co., 51 Me. 110, 81 Am. Dec. 562.

Massachusetts.—Lee *v.* Howard F. Ins. Co., 3 Gray 583.

New Hampshire.— Baldwin *v.* Harford F. Ins. Co., 60 N. H. 422, 49 Am. Rep. 324.

Wisconsin.— Dohlantry *v.* Blue Mounds F., etc., Ins., Co., 83 Wis. 181, 53 N. W. 448; Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834.

Canada.— McKay *v.* Norwich Union Ins. Co., 27 Ont. 251; Ramsay Woollen Cloth Mfg. Co. *v.* Mutual F. Ins. Co., 11 U. C. Q. B. 516.

See 28 Cent. Dig. tit. "Insurance," § 702.

70. *Connecticut.*— Essex Sav. Bank *v.* Meriden F. Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759.

Maine.— Barnes *v.* Union Mut. F. Ins. Co., 51 Me. 110, 81 Am. Dec. 562.

divisible,[71] then a breach as to a part of the subject-matter of the insurance will avoid the whole policy. These rules have been applied to policies covering separate buildings[72] or different articles of personalty,[73] or to instances where a policy covered both realty and personalty.[74]

6. Proceedings Necessary to Make Forfeiture Effective. Where a policy provides that, on a breach of condition, the policy shall be void, unless the consent of the insurer is obtained or indorsed thereon, the policy is absolutely void *ipso facto*, when a breach occurs without any affirmative action on the part of the insurer.[75] If, however, the policy simply provides that there is an option

Maryland.— Associated Firemen's Ins. Co. *v.* Assum, 5 Md. 165.

Minnesota.— Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697.

Nebraska.— Home F. Ins. Co. *v.* Bernstein, 55 Nebr. 260, 75 N. W. 839.

New Jersey.— Hartshorne *v.* Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. 615.

New York.— Kiernan *v.* Agricultural Ins. Co., 72 Hun 519, 25 N. Y. Suppl. 438; Bailey *v.* Homestead F. Ins. Co., 16 Hun 503 [*affirmed* in 80 N. Y. 21, 36 Am. Rep. 570].

Pennsylvania.— Philadelphia Fire Assoc. *v.* Williamson, 26 Pa. St. 196.

Vermont.— McGowan *v.* People's Mut. F. Ins. Co., 54 Vt. 211, 41 Am. Rep. 843.

Wisconsin.— Burr *v.* German Ins. Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905; Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834. But see Stevens *v.* Queen Ins. Co., 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905.

Canada.— Gore Dist. Mut. F. Ins. Co. *v.* Samo, 2 Can. Sup. Ct. 411; Dunlop *v.* Usborne, etc., Farmers Mut. F. Ins. Co., 22 Ont. App. 364; Kuntz *v.* Niagara Dist. F. Ins. Co., 16 U. C. C. P. 573.

See 28 Cent. Dig. tit. "Insurance," § 702.

Entire contract see *supra*, XI, L; XII, D.

Although the policy provides that the "entire" policy shall be avoided, this result will not be had if the risk is really severable. Hollaway *v.* Dwelling House Ins. Co., 121 Mo. 87, 25 S. W. 850; Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.

71. McQueeny *v.* Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; Kahler *v.* Iowa State Ins. Co., 106 Iowa 380, 76 N. W. 734; Garver *v.* Hawkeye Ins. Co., 69 Iowa 202, 28 N. W. 555; Kelly *v.* Humboldt F. Ins. Co., 4 Pa. Cas. 99, 6 Atl. 740.

72. *Illinois.*— Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115.

Kentucky.— Speagle *v.* Dwelling House Ins. Co., 97 Ky. 646, 31 S. W. 282, 17 Ky. L. Rep. 610.

Massachusetts.— Clark *v.* New England Mut. Ins. Co. 6 Cush. 342, 53 Am. Dec. 44.

New York.— Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644.

Wisconsin.— Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834.

See 28 Cent. Dig. tit. "Insurance," § 702.

But where the risks in an insurance policy were distributed upon buildings situated upon farms several miles apart, the contract was held severable, although the consideration was a gross sum, so that a breach of a condition as to one of the buildings did not invalidate the insurance as to the others. Loomis *v.* Rockford Ins. Co., 77 Wis. 87, 45 N. W. 813, 20 Am. St. Rep. 96, 8 L. R. A. 834.

73. German Ins. Co. *v.* Miller, 39 Ill. App. 633; Dwelling House Ins. Co. *v.* Butterly, 33 Ill. App. 626; German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Adler *v.* Germania F. Ins. Co., 17 Misc. (N. Y.) 347, 39 N. Y. Suppl. 1070; American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. (N. Y.) 114, 20 N. Y. Suppl. 646.

74. *Illinois.*— Illinois Mut. F. Ins. Co. *v.* Fix, 53 Ill. 151, 5 Am. Rep. 38; Commercial Ins. Co. *v.* Spanknehle, 52 Ill. 53, 4 Am. Rep. 582.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 53 Kan. 623, 36 Pac. 983.

Missouri.— Hollaway *v.* Dwelling House Ins. Co., 121 Mo. 87, 25 S. W. 850; Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.

Nebraska.— Phenix Ins. Co. *v.* Grimes, 33 Nebr. 340, 50 N. W. 168; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

New York.— Merrill *v.* Agricultural Ins. Co., 10 Hun 428 [*affirmed* in 73 N. Y. 452, 29 Am. Rep. 184].

Texas.— Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955.

See 28 Cent. Dig. tit. "Insurance," § 702.

Vacancy as to part only see *infra*, XIII, B, 7, f.

75. *Arkansas.*— Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539.

Iowa.— Meadows *v.* Hawkeye Ins. Co., 62 Iowa 387, 17 N. W. 600; Supple *v.* Iowa State Ins. Co., 58 Iowa 29, 11 N. W. 716.

Kansas.— Commercial Union Assur. Co. *v.* Norwood, 57 Kan. 610, 47 Pac. 529.

Louisiana.— Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238.

Massachusetts.—Allen *v.* Massasoit Ins. Co., 99 Mass. 160.

Michigan.— New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

Minnesota.— Betcher *v.* Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971.

reserved to the company of declaring a forfeiture, all legal and affirmative steps to complete a forfeiture are requisite.[76] And some courts have regarded the term "void" as meaning only "voidable," and consequently assert that a breach of condition merely gives the insurer ground to declare a forfeiture.[77] And the insurer may waive the forfeiture and continue the policy.[78] Whether this waiver may be oral when the contract provides that it must be in writing and indorsed on the policy is a question upon which there is great judicial conflict. Some cases assert that this provision is determinative,[79] while others hold that such a provision being inserted for the benefit of the insurer may be itself waived.[80]

7. PARTIES AFFECTED BY FORFEITURE — a. Assignees.[81] An assignee steps into the shoes of the assignor and therefore takes subject to any defense available against him arising prior to the assignment.[82] He of course takes subject to all

Ohio.— Ohio Farmers' Ins. Co. *v.* Wilson, 70 Ohio St. 354, 71 N. E. 715.

Pennsylvania.— Bemis *v.* Harborcreek Mut. F. Ins. Co., 200 Pa. St. 340, 49 Atl. 769; Fire Assoc. *v.* Gilmer, 3 Walk. 234; Marshall *v.* Insurance Co. of North America, 10 Pa. Co. Ct. 87.

Vermont.— Tittemore *v.* Vermont Mut. F. Ins. Co., 20 Vt. 546.

Wisconsin.— Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

See 28 Cent. Dig. tit. "Insurance," § 703.

Nor is the date of forfeiture postponed by a delay on the part of the insurer to return any unearned premium or evidence thereof to which the insured may be entitled. Bane *v.* Travelers' Ins. Co., 85 Ky. 677, 4 S. W. 787, 9 Ky. L. Rep. 211; Buchanan *v.* Westchester County Mut. Ins. Co., 61 N. Y. 611; Davison *v.* London, etc., F. Ins. Co., 189 Pa. St. 132, 42 Atl. 2; Employers' Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

76. *Maryland.*— Martin *v.* Montgomery County Mut. F. Ins. Co., 45 Md. 51.

Michigan.— Olmstead *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 200, 15 N. W. 82.

New York.— Hyatt *v.* Wait, 37 Barb. 29.

Pennsylvania.— Sinking Springs Mut. Ins. Co. *v.* Hoff, 2 Wkly. Notes Cas. 41.

Wisconsin.— Wakefield *v.* Orient Ins. Co., 50 Wis. 532, 7 N. W. 647.

See 28 Cent. Dig. tit. "Insurance," § 703.

Revival of policy see *supra*, XIII, A, 3.

When it is sought to declare a policy void for failure to pay assessments, due notice of the assessment must have been given (Sinking Springs Mut. Ins. Co. *v.* Hoff, 2 Wkly. Notes Cas. (Pa.) 41) and all formalities complied with (Olmstead *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 200, 15 N. W. 82). See *supra*, V, B, 6.

77. *Georgia.*—Lackey *v.* Georgia Home Ins. Co., 42 Ga. 456.

Indiana.— Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947.

Kentucky.— Stephenson *v.* Phœnix Ins. Co., 6 Ky. L. Rep. 196.

Nebraska.— Hughes *v.* Insurance Co. of North America, 40 Nebr. 626, 59 N. W. 112.

New York.— Bigler *v.* New York Cent. Ins. Co., 22 N. Y. 402; Lobee *v.* Standard Live Stock Ins. Co., 12 Misc. 499, 33 N. Y. Suppl. 657.

Tennessee.— Somerfield *v.* State Ins. Co., 8 Lea 547, 41 Am. Rep. 662.

Texas.— Wilson *v.* Ætna Ins. Co., 12 Tex. Civ. App. 512, 33 S. W. 1085.

Canada.— Gauthier *v.* Waterloo Mut. Ins. Co., 6 Ont. App. 231; Mason *v.* Andes Ins. Co., 23 U. C. C. P. 37; Jacobs *v.* Equitable Ins. Co., 19 U. C. Q. B. 250.

See 28 Cent. Dig. tit. "Insurance," § 703.

Waiver and estoppel see *infra*, XIV.

78. Manufacturers', etc., Ins. Co. *v.* Armstrong, 145 Ill. 469, 34 N. E. 553; Hyatt *v.* Wait, 37 Barb. (N. Y.) 29.

79. Baumgartel *v.* Providence-Washington Ins. Co., 136 N. Y. 547, 32 N. E. 990; Quinlan *v.* Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645; Allen *v.* German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309; Messelback *v.* Norman, 122 N. Y. 578, 26 N. E. 34; Walsh *v.* Hartford F. Ins. Co., 73 N. Y. 5. See also *infra*, XIV.

80. *Illinois.*— Manufacturers', etc., Ins. Co. *v.* Armstrong, 145 Ill. 469, 34 N. E. 553.

Iowa.— Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Kansas.— German Ins. Co. *v.* Gray, 43 Kan. 497, 23 Pac. 637, 19 Am. St. Rep. 150, 8 L. R. A. 70.

Michigan.— Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

Wisconsin.— Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

See 28 Cent. Dig. tit. "Insurance," § 703.

81. **Assignment** generally see *supra*, VIII.

82. Wilson *v.* Montgomery County Mut. F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122; Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422. Thus if an assignment by the terms of the policy renders it void, the assignee cannot recover thereunder, for there is a breach of condition by the assignor. Pennsylvania Ins. Co. *v.* Trask, 8 Phila. (Pa.) 32. In Hall *v.* Niagara F. Ins. Co., 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135, it was held, however, that a new contract arose with the assignee, and that the fact that the policy was invalid as against the assignor was no defense against the assignee. See *supra*, XII, C, 1.

the terms and conditions of the risk,[83] except as to those conditions not shown in the policy and of which he has no notice.[84] When, however, an assignment has been made and assented to by the company whereby there is created a privity of contract between the insurer and the assignee, a new contract has been consummated and the assignee is not injured by subsequent acts of the assignor.[85] If no privity has been created because the assignment has not been completed, the assignee is subject to all breaches of condition by the assignor;[86] the assignee under such circumstances is not "the insured."[87]

b. Mortgagees. If there has been no true assignment creating privity, but only a direction that the proceeds shall be payable to the mortgagee "as his interest may appear," the mortgagee may be defeated by a breach of condition by the mortgagor,[88] for the reason that the contract is with the original insured

This rule is occasionally embodied in a statute. Mershon *v.* National Ins. Co., 34 Iowa 87; Swenson *v.* Sun Fire Office, 68 Tex. 461, 5 S. W. 60.

83. Ranspach *v.* Teutonia F. Ins. Co., 109 Mich. 699, 67 N. W. 967; Leavitt *v.* Western M. & F. Ins. Co., 7 Rob. (La.) 351; Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422.

84. Miller *v.* Hillsborough Mut. F. Assoc., (N. J. Ch. 1889) 17 Atl. 293.

But he is held to have notice of by-laws made a part of the policy. Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422.

85. New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221; Boyless *v.* Merchants' Town Mut. Ins. Co., 106 Mo. App. 684, 80 S. W. 289; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442; Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. (N. Y.) 570. *Contra,* Pupke *v.* Resolute F. Ins. Co., 17 Wis. 378, 84 Am. Dec. 754.

The non-payment of a cash premium note by the assignor of which the assignee was not aware will not affect the policy in the assignee's hands. Storms *v.* Canada Farmers' Mut. Ins. Co., 22 U. C. C. P. 75. See also Kreutz *v.* Niagara Dist. Mut. F. Ins. Co., 16 U. C. C. P. 131.

86. Home Mut. F. Ins. Co. *v.* Hauslein, 60 Ill. 521; Lawrence *v.* Holyoke Ins. Co., 11 Allen (Mass.) 387; Wilson *v.* Montgomery County Mut. F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122.

87. Bowditch Mut. F. Ins. Co. *v.* Winslow, 3 Gray (Mass.) 415; Kanady *v.* Gore Dist. Mut. F. Ins. Co., 44 U. C. Q. B. 261.

88. *California.*—Holbrook *v.* Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555.

Colorado.— Scania Ins. Co. *v.* Johnson, 22 Colo. 476, 45 Pac. 431.

Georgia.— Continental Ins. Co. *v.* Anderson, 107 Ga. 541, 33 S. E. 887.

Illinois.— Queen Ins. Co. *v.* Dearborn Sav., etc., Assoc., 175 Ill. 115, 51 N. E. 717; Continental Ins. Co. *v.* Hulman, 92 Ill. 145, 34 Am. Rep. 122; Home Mut. F. Ins. Co. *v.* Hauslein, 60 Ill. 521; Illinois Mut. F. Ins. Co. *v.* Fix, 53 Ill. 151, 5 Am. Rep. 38; American Cent. Ins. Co. *v.* Birds Bldg., etc., Assoc., 81 Ill. App. 258.

Kentucky.— Bergman *v.* Commercial Union Ins. Co., 12 Ky. L. Rep. 942.

Louisiana.— Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238.

Maine.— Brunswick Sav. Inst. *v.* Commercial Union Ins. Co., 68 Me. 313, 28 Am. Rep. 56.

Massachusetts.— Loring *v.* Manufacturers' Ins. Co., 8 Gray 28.

Michigan.— Jaskulski *v.* Citizens' Mut. F. Ins. Co., 131 Mich. 603, 92 N. W. 98.

Minnesota.— Gasner *v.* Metropolitan Ins. Co., 13 Minn. 483.

Missouri.— Kabrich *v.* State Ins. Co., 48 Mo. App. 393; Kempf *v.* Farmers' Mut. F. Ins. Co., 41 Mo. App. 27.

Nebraska.— Antes *v.* State Ins. Co., 61 Nebr. 55, 84 N. W. 412.

New Jersey.— Lattan *v.* Royal Ins. Co., 45 N. J. L. 453.

New York.— Perry *v.* Lorillard F. Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272; Grosvenor *v.* Atlantic F. Ins. Co., 17 N. Y. 391; Lewis *v.* Guardian F. Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525; Rosenstein *v.* Traders' Ins. Co., 79 N. Y. App. Div. 481, 79 N. Y. Suppl. 736; Merwin *v.* Star F. Ins. Co., 7 Hun 659. But see Tillou *v.* Kingston Mut. Ins. Co., 5 N. Y. 405.

Ohio.— Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 4 Am. L. Rec. 228.

Rhode Island.— Hazard *v.* Franklin Mut. F. Ins. Co., 7 R. I. 429; Hoxsie *v.* Providence Mut. F. Ins. Co., 6 R. I. 517.

South Dakota.— Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

Tennessee.— Hocking *v.* Virginia F. & M. Ins. Co., 99 Tenn. 729, 42 S. W. 451, 63 Am. St. Rep. 862, 39 L. R. A. 148.

Texas.— Swenson *v.* Sun Fire Office, 68 Tex. 461, 5 S. W. 60.

Vermont.— Moulthrop *v.* Farmers' Mut. F. Ins. Co., 52 Vt. 123.

Washington.—American Bldg., etc., Assoc. *v.* Farmers' Ins. Co., 11 Wash. 619, 40 Pac. 125.

Wisconsin.— Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395, 80 N. W. 471.

United States.— Friemansdorf *v.* Watertown Ins. Co., 1 Fed. 68; Humphry *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,875, 15 Blatchf. 504.

Canada.— Agricultural Sav., etc., Co. *v.* Liverpool, etc., Ins. Co., 3 Ont. L. Rep. 127; Mechanics' Bldg., etc., Soc. *v.* Gore Dist. Mut.

and the mortgagee becomes possessed of only the mortgagor's chose in action. It is immaterial that the mortgagee was the party who procured the insurance.[89] The same rule prevails when the designated payee is not a mortgagee, but a mere appointee.[90] Even though the transfer be with the assent of the insurer, if no privity of contract is completed, the mortgagee's rights will be defeated by the breach of conditions by the mortgagor.[91] But if a new contract be made directly between the mortgagee and the insurer, subsequent breaches of condition by the mortgagor are immaterial and do not affect the rights of the mortgagee.[92] These rules have led to statutory enactments in many states that the mortgagee shall not be prejudiced by the acts of the mortgagor after the mortgagee has thus been designated as the payee.[93] The mortgagee it seems, however, should notify the

F. Ins. Co., 3 Ont. App. 151; Livingstone *v.* Western Ins. Co., 16 Grant Ch. (U. C.) 9.

See 28 Cent. Dig. tit. "Insurance," § 704 *et seq.* See *supra*, XII, C, 2.

The mortgagee is not injured by failure of the mortgagor after loss to comply with requirements of the policy. Queen Ins. Co. *v.* Dearborn Sav., etc., Assoc., 175 Ill. 115, 51 N. E. 717; Bergman *v.* Commercial Union Ins. Co., 12 Ky. L. Rep. 942.

89. Kabrich *v.* State Ins. Co., 48 Mo. App. 393; Merwin *v.* Star F. Ins. Co., 7 Hun (N. Y.) 659. *Contra*, Humphry *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,875, 15 Blatchf. 504. And *compare* Tallman *v.* Atlantic F. & M. Ins. Co., 4 Abb. Dec. (N. Y.) 345, 3 Keyes 87, 33 How. Pr. 400.

Effect of making policy payable to mortgagee see *infra*, XIII, F, 2, l, (v).

90. Holbrook *v.* Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555; Richmond *v.* Phœnix Assur. Co., 88 Me. 105, 33 Atl. 786; Edes *v.* Hamilton Mut. Ins. Co., 3 Allen (Mass.) 362; Hale *v.* Mechanics' Mut. F. Ins. Co., 6 Gray (Mass.) 169, 66 Am. Dec. 410; Warbasse *v.* Sussex County Mut. Ins. Co., 42 N. J. L. 203.

The creditors of the insured have no better right than their debtor. Phenix Ins. Co. *v.* Willis, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566.

91. *Massachusetts.*— Lawrence *v.* Holyoke Ins. Co., 11 Allen 387.

New York.— Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401; Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. 254.

Pennsylvania.— State Mut. F. Ins. Co. *v.* Roberts, 31 Pa. St. 438.

United States.— Bilson *v.* Manufacturers' Ins. Co., 3 Fed. Cas. No. 1,410, Brunn. Col. Cas. 290.

Canada.—Burton *v.* Gore Dist. Mut. F. Ins. Co., 12 Grant Ch. (U. C.) 156.

See 28 Cent. Dig. tit. "Insurance," § 704 *et seq.*

92. Oakland Home Ins. Co. *v.* Bank of Commerce, 47 Nebr. 717, 66 N. W. 646, 58 Am. St. Rep. 663, 36 L. R. A. 673; Phœnix Ins. Co. *v.* Floyd, 19 Hun (N. Y.) 287; Boyd *v.* Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165.

This is the result when the policy expressly provides that the subsequent acts of the mortgagor shall not be visited upon the mortgagor. Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568, 33 So. 473; City Five Cents Sav. Bank *v.* Pennsylvania F. Ins. Co., 122 Mass. 165; Franklin Sav. Inst. *v.* Central Mut. F. Ins. Co., 119 Mass. 240; Foster *v.* Equitable Mut. F. Ins. Co., 2 Gray 216; Magoun *v.* Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370. See *supra*, XII, C, 2.

93. Such provisions inserted in the policy protect the mortgagee as intended.

Arkansas.— Planters' Mut. Ins. Assoc. *v.* Southern Sav. Fund, etc., Co., 68 Ark. 8, 56 S. W. 443.

Florida.— Glens Falls Ins. Co. *v.* Porter, 44 Fla. 568, 33 So. 473.

Iowa.— Christenson *v.* Fidelity Ins. Co., 117 Iowa 77, 90 N. W. 495, 94 Am. St. Rep. 286.

Kansas.— Lancashire Ins. Co. *v.* Boardman, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621.

Missouri.— Senor *v.* Western Millers' Mut. F. Ins. Co., 181 Mo. 104, 79 S. W. 687.

Nebraska.— Hanover F. Ins. Co. *v.* Bohn, 48 Nebr. 743, 67 N. W. 774, 58 Am. St. Rep. 719; Phenix Ins. Co. *v.* Omaha L. & T. Co., 41 Nebr. 834, 60 N. W. 133, 25 L. R. A. 679.

Pennsylvania.—Southern Bldg., etc., Assoc. *v.* Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

Rhode Island.— Francis *v.* Butler Mut. F. Ins. Co., 7 R. I. 159.

South Dakota.— Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

Texas.— Sun Ins. Office *v.* Beneke, (Civ. App. 1899) 53 S. W. 98; Merchants' Ins. Co. *v.* Story, 13 Tex. Civ. App. 124, 35 S. W. 68.

United States.— Syndicate Ins. Co. *v.* Bohn, 65 Fed. 165, 12 C. C. A. 531, 27 L. R. A. 614; New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 9 C. C. A. 623.

Canada.— Black *v.* National Ins. Co., 24 L. C. Jur. 65; National Assur. Co. *v.* Harris, 5 Montreal Q. B. 345, 17 Rev. Lég. 230.

See 28 Cent. Dig. tit. "Insurance," § 707.

Contra.— Gasner *v.* Metropolitan Ins. Co., 13 Minn. 483.

It seems immaterial under the standard fire policy that this clause is not inserted, if the policy refers to the rights of the mortgagee as governed by the provisions of a slip attached, when the slip that ordinarily is attached contains such a clause. Christen-

insurer of any breach of conditions of which he is cognizant in order to justify a recovery by him.[94]

8. Construction. Inasmuch as forfeitures are not favored by the law and because policies are drawn by the insurer, conditions therein amounting to promissory warranties are to be construed liberally in favor of the insured and more strongly against the insurer for whose benefit they are imposed;[95] but this does not mean that the insured can assert that he was not cognizant of the warranty contained in the policy issued to him. He is bound by those that appear therein in the absence of fraud, misrepresentation, or concealment.[96]

B. Change in Condition, Use, or Occupancy — 1. In General. Every contract of insurance is made with reference to the conditions surrounding the subject-matter of the risk and the premium is fixed with reference thereto. It has been said that if the insured were permitted to change those conditions and still assert the existence of the policy, he would be doing an unconscionable act, and that accordingly there should be implied in every policy a condition that the state or use of the premises will not be changed so as to materially increase the risk.[97] It is customary, however, to insert in the policy provisions that the contract shall be void if the hazard be increased by any means within the control of

son *v.* Fidelity Ins. Co., 117 Iowa 77, 90 N. W. 495, 94 Am. St. Rep. 286.

94. Galantschik *v.* Globe F. Ins. Co., 10 Misc. (N. Y.) 369, 31 N. Y. Suppl. 32, holding that an omission to do so will defeat a recovery. See, however, Phenix Ins. Co. *v.* Omaha L. & T. Co., 41 Nebr. 834, 60 N. W. 133, 25 L. R. A. 679, where it was said this was an independent contract; and where there was no clause in the policy stipulating a forfeiture for failure to give the notice.

Failure to give notice when he has not acquired knowledge himself does not defeat the mortgagee. Southern Bldg., etc., Assoc. *v.* Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

If the mortgagee fails to require such a clause to be inserted, even though it be required by statute, it is not a part of the contract. Rosenstein *v.* Traders' Ins. Co., 79 N. Y. App. Div. 481, 79 N. Y. Suppl. 736.

95. *Alabama.*— Burnett *v.* Eufaula Home Ins. Co., 46 Ala. 11, 7 Am. Rep. 581.

Arkansas.— Mechanics' Ins. Co. *v.* Thompson, 57 Ark. 279, 21 S. W. 468.

Delaware.— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Illinois.— Norwaysz *v.* Thuringia Ins. Co., 204 Ill. 334, 68 N. E. 551; Rockford Ins. Co. *v.* Storig, 137 Ill. 646, 27 N. E. 674.

Indiana.— Milwaukee Mechanics' Ins. Co. *v.* Niewedde, 12 Ind. App. 145, 39 N. E. 757; Schmidt *v.* German Mut. Ins. Co., 4 Ind. App. 340, 30 N. E. 939.

Kansas.— Queen Ins. Co. *v.* Excelsior Mill Co., 69 Kan. 114, 76 Pac. 423.

Maine.— North Berwick Co. *v.* New England F. & M. Ins. Co., 52 Me. 336.

Maryland.— Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

Missouri.— Bowman *v.* Pacific Ins. Co., 27 Mo. 152.

Nebraska.— Connecticut F. Ins. Co. *v.* Jeary, 60 Nebr. 338, 83 N. W. 78, 51 L. R. A. 698.

New York.— Rann *v.* Home Ins. Co., 59 N. Y. 387.

Pennsylvania.— Bentley *v.* Lumbermen's Ins. Co., 191 Pa. St. 276, 43 Atl. 209; Reck *v.* Hatboro Mut. Live-Stock, etc., Co., 163 Pa. St. 443, 30 Atl. 205.

Tennessee.— McNutt *v.* Virginia F. & M. Ins. Co., (Ch. App. 1897) 45 S. W. 61.

Texas.— Ætna Ins. Co. *v.* Fitze, (Civ. App. 1904) 78 S. W. 370.

Wisconsin.— Wakefield *v.* Orient Ins. Co., 50 Wis. 532, 7 N. W. 647.

United States.— Phœnix Ins. Co. *v.* Slaughter, 12 Wall. 404, 20 L. ed. 444; Mulville *v.* Adams, 19 Fed. 887.

See 28 Cent. Dig. tit. "Insurance," § 697 *et seq.* And see *supra*, XI, A, 3, 4; XII, A, 3, e.

For similar statements of the rule see De Lancey *v.* Rockingham Farmers' Mut. F. Ins. Co., 52 N. H. 581; Smith *v.* Commercial Union Ins. Co., 33 U. C. Q. B. 529.

For instances of construction of policy see Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390; Boatwright *v.* Ætna Ins. Co., 1 Strobh. (S. C.) 281.

Statutes controlling construction.— A forfeiture of a policy cannot be declared in a manner prohibited by law in the state of the insurer's incorporation. U. S. Equitable L. Assur. Soc. *v.* Frommhold, 75 Ill. App. 43.

96. Quinlan *v.* Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 [*affirming* 15 N. Y. Suppl. 317]; Morrison *v.* Insurance Co. of North America, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63.

97. 1 May Ins. (4th ed.) § 218 [*citing* Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101]. The authorities, however, do not in general support this assertion. *Compare* Sillem *v.* Thornton, 2 C. L. R. 1710, 3 E. & B. 868, 18 Jur. 748, 23 L. J. Q. B. 362, 2 Wkly. Rep. 524, 77 E. C. L. 868; British American Land Co. *v.* Mutual F. Ins. Co., 1 L. C. L. J. 95.

the insured, together with provisions concerning repairs and occupancy,[98] which will be hereinafter considered. The standard policy contains such clauses.[99]

2. Alterations and Additions — a. Stipulations. Alterations in a building not increasing the risk do not avoid the policy in the absence of stipulations that such shall be the result;[1] and even if notice be required of "any change in the risk," notice need not be given of an immaterial change.[2] A stipulation that the policy is to be void if material alterations be made in the premises causing an increase of the risk is uniformly upheld;[3] but stipulations that the policy is to be void, or that notice must be given to the insured, if any alteration, addition, or enlargement be made, are to be given effect irrespective of whether there is thus an increase of risk or whether such alterations were connected with the cause of the fire.[4]

b. Permission to Make. The insurer may be taken to have waived the full or partial effect of such a clause by giving permission to the insured to make repairs which otherwise would be prohibited. The extent of the repairs thus

98. See *infra*, XIII, B, 5, 6; XIII, D, 1.

99. This provision must be construed as meaning a material increase of risk. Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576. *Contra*, Lyndsay *v.* Niagara Dist. Mut. F. Ins. Co., 28 U. C. Q. B. 326.

Admissibility of expert evidence to show increase of risk see *infra*, XXI, G, 2, e (I).

1. Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423; Dorn *v.* Germania Ins. Co., 7 Fed. Cas. No. 4,005; James *v.* Lycoming Ins. Co., 13 Fed. Cas. No. 7,182, 4 Cliff. 272.

Where the policy provides that any alterations made in or about the insured property must be at the risk of the party insured, alterations do not *per se* avoid the contract; and the question whether the placing of a steam engine in a carpenter shop about twenty-five feet from the insured property increases the hazard is properly left to the jury. Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423.

2. Malin *v.* Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56; Parker *v.* Arctic F. Ins. Co., 59 N. Y. 1.

3. Hill *v.* Middlesex Mut. F. Assur. Co., 174 Mass. 542, 55 N. E. 319; Francis *v.* Somerville Mut. Ins. Co., 25 N. J. L. 78.

4. Hill *v.* Middlesex Mut. F. Assur. Co., 174 Mass. 542, 55 N. E. 319; Merriam *v.* Middlesex Mut. F. Ins. Co., 21 Pick. (Mass.) 162, 32 Am. Dec. 252; Frost's Detroit Lumber, etc., Works *v.* Miller's, etc., Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846; Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 19. It was said in Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238, that an addition to an insured building increasing its value and so furnishing an additional motive to the insured to preserve his property could not be regarded as increasing the risk. If this is to be understood as a general principle it is not sufficiently discriminating.

A change from shingle to corrugated iron roofing is not an increase of risk. Meyer *v.* Queen Ins. Co., 41 La. Ann. 1000, 6 So. 899.

The removal of an addition to the insured property does not amount *per se* to an increase of risk. Hannon *v.* Hartford F. Ins. Co., 41 N. Y. App. Div. 226, 58 N. Y. Suppl. 549.

The so-called "builder's risk" clause, that is, "that the working of carpenters . . . or other mechanics, in building, altering, or repairing the premises" shall vitiate the policy, has been held not to refer to repairs not increasing the risk and rendered necessary to remedy the defects endangering the safety of the insured property (James *v.* Lycoming Ins. Co., 13 Fed. Cas. No. 7,182, 4 Cliff. 272) or to the casual patching up of the building and current repairs such as are indispensable to the proper conduct of the business carried on therein (Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238; Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469; Jolly *v.* Baltimore Equitable Soc., 1 Harr. & G. (Md.) 295, 18 Am. Dec. 288; Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 173 N. Y. 633, 66 N. E. 1106; Rann *v.* Home Ins. Co., 59 N. Y. 387; Summerfield *v.* Phœnix Assur. Co., 65 Fed. 292; Ottawa, etc., Forwarding Co. *v.* Liverpool, etc., Ins. Co., 28 U. C. Q. B. 518). The condition must receive a reasonable construction and it cannot be construed so as to be repugnant to the nature and purpose of the policy or inconsistent with the due and customary use of the property. James *v.* Lycoming Ins. Co., *supra*. It has been said that the condition has reference to some permanent alteration of the building. Shaw *v.* Robberds, 6 A. & E. 75, 1 Jur. 6, 6 L. J. K. B. 106, 1 N. & P. 279, W. W. & D. 94, 33 E. C. L. 63. But a material change (Mack *v.* Rochester German Ins. Co., 106 N. Y. 560, 13 N. E. 343; Leibrandt, etc., Stove Co. *v.* Fireman's Ins. Co., 35 Fed. 30; Reid *v.* Gore Dist. Mut. F. Ins. Co., 11 U. C. Q. B. 345), or extensive alterations (Imperial F. Ins. Co. *v.* Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 L. ed. 231), under this clause will vitiate the policy.

Where alterations and additions are of the same general character as the original building, and not such as would have called for a higher rate of premium than before, such additions do not tend to increase the risk. Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

allowable because of a given permission is to be determined by a reasonable construction of the policy and the language of the permission.[5]

c. Standard Policy. The provision in the standard policy[6] is reasonable and valid. It permits reasonable repairs, but limits the time in which even those necessary for the preservation of the property must be completed.[7] And it is immaterial whether or not such alterations or repairs contribute to the loss.[8]

3. Falling of Building — a. Stipulations. The standard policy contains a provision that if the "building or any part thereof fall, except as the result of fire, all insurance by the policy shall immediately cease." This provision is valid.[9]

b. What Constitutes a "Falling." It is requisite that the fall be of some material or substantial part of the building.[10] Even without this stipulation of the policy, if the building had by falling ceased to be such, and had become "a mere congeries of materials" the policy would be invalid, for it is a building and not a rubbish heap that is insured.[11]

4. Erection of or Change in Adjacent Buildings — a. By Insured. It has been held that a representation as to the position of a building insured with respect to other buildings is not a warranty that the buildings will retain that position relatively during the life of the policy.[12] A mere alteration of the premises by the erection of contiguous buildings without increase of risk will not therefore avoid the policy, unless the policy so stipulated.[13] But if the policy provides that any alteration of the risk by means under the control of the insured will

5. Firemen's Ins. Co. *v.* Appleton Paper, etc., Co., 161 Ill. 9, 43 N. E. 713; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238; Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576.

But parol evidence of a contemporaneous agreement is not admissible to vary the terms of the policy. Frost's Detroit Lumber, etc., Works *v.* Millers', etc., Ins. Co., 37 Minn. 300, 34 N. W. 35, 5 Am. St. Rep. 846.

6. The standard policy provides that "if mechanics be employed in building, altering, or repairing the premises for more than fifteen days at one time" the policy shall be void.

7. German Ins. Co. *v.* Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492.

A common painter is not a mechanic within the meaning of such a clause. Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

The owner is not a "mechanic" in this sense. Mechanics' Ins. Co. *v.* Hodge, 149 Ill. 298, 37 N. E. 51.

8. Newport Imp. Co. *v.* Home Ins. Co., 163 N. Y. 237, 57 N. E. 475.

The failure of the insured to repair a defect in the property, arising after the contract was made, unless he be guilty of gross neglect, does not work a forfeiture of plaintiff's right to recover on the policy. Whitehurst *v.* Fayetteville Mut. Ins. Co., 51 N. C. 352.

What is "repairing."— Rubbing and polishing woodwork, regilding light fixtures, reburnishing, plumbing, and spouting were held to be "repairs" in German Ins. Co. *v.* Hearne, 117 Fed. 289, 54 C. C. A. 527, 59 L. R. A. 492.

9. *Illinois.*— Teutonia Ins. Co. *v.* Bonner, 81 Ill. App. 231; Security Ins. Co. *v.* Mette, 27 Ill. App. 324.

Massachusetts.— Huck *v.* Globe Ins. Co., 127 Mass. 306, 34 Am. Rep. 373.

New York.— Nelson *v.* Traders' Ins. Co., 86 N. Y. App. Div. 66, 83 N. Y. Suppl. 220.

Texas.— Home Mut. Ins. Co. *v.* Tomkies, 96 Tex. 187, 71 S. W. 814.

United States.— Kiesel *v.* Sun Ins. Office, 88 Fed. 243, 31 C. C. A. 515, where it was difficult to determine whether the fire caused the fall or the fall the fire.

See 28 Cent. Dig. tit. "Insurance," § 749.

A falling caused by an explosion against which defendants insured plaintiff does not terminate the policy as against a fire consequent upon the explosion. Davis *v.* Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393.

10. London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140; Security Ins. Co. *v.* Mette, 27 Ill. App. 324.

A building which has merely been blown from the blocks on which it rested, but remains intact, turned over on its side, has not fallen. Fireman's Fund Ins. Co. *v.* Congregation Rodeph Sholom, 80 Ill. 558; Teutonia Ins. Co. *v.* Bonner, 81 Ill. App. 231.

So long as the building remains standing, no matter how much it may be injured by storms or any other cause, the liability of the company under the policy will continue. Breuner *v.* Liverpool, etc., Ins. Co., 51 Cal. 101, 21 Am. Rep. 703.

The distinctive character of the building need not be destroyed. Home Mut. Ins. Co. *v.* Tompkies, 30 Tex. Civ. App. 404, 71 S. W. 812. See London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140.

11. Nave *v.* Home Mut. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394.

12. Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. (Ky.) 282; Stebbins *v.* Globe Ins. Co., 2 Hall (N. Y.) 675.

13. Stetson *v.* Massachusetts Mut. F. Ins. Co., 4 Mass. 330, 3 Am. Dec. 217; Gates *v.*

vitiate the contract, or that the conditions stated therein constitute a continuing warranty, the subsequent erection by the insured of additional structures upon the adjacent premises will terminate the insurer's rights under the policy.[14]

b. By Third Parties. Ordinarily the erection of new buildings by persons other than the insured adjacent to the insured premises will not avoid the policy.[15] But if it be stated in the policy that it is to be void if the hazard be increased by any means within the knowledge of the insured and that the statements with reference to exposures constitute a continuing warranty,[16] it is held that the policy is vitiated by the subsequent erection known to the insured of a building over which he has no control.[17]

5. Change in Use — a. In General. A mere statement of the present use of a building, although a warranty *in præsenti*, is not a promissory warranty that the building shall continue to be so used during the life of the policy. It is rather

Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Miller *v.* Western Farmers' Mut. Ins. Co., 1 Handy (Ohio) 208, 12 Ohio Dec. (Reprint) 105; Perry County Ins. Co. *v.* Stewart, 19 Pa. St. 45.

14. *Iowa.*— McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.

Kentucky.— Northwestern Nat. Ins. Co. *v.* Davis, 10 Ky. L. Rep. 818.

Michigan.— Michigan Shingle Co. *v.* London, etc., F. Ins. Co., 91 Mich. 441, 51 N. W. 1111.

New York.— Murdock *v.* Chenango County Mut. Ins. Co., 2 N. Y. 210.

Pennsylvania.— Yentzer *v.* Farmers' Mut. Ins. Co., 200 Pa. St. 325, 49 Atl. 767; Pottsville Mut. F. Ins. Co. *v.* Horan, 89 Pa. St. 438.

Wisconsin.— Straker *v.* Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752.

United States.— Peoria Sugar Refining Co. *v.* People's F. Ins. Co., 24 Fed. 773.

See 28 Cent. Dig. tit. "Insurance," § 748.

Such a provision is reasonable and competent. Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 585, 69 Pac. 938.

The insured cannot plead ignorance of such a provision contained in his policy. Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

A provision in a policy that a certain clear space shall be kept about the property insured is a promissory warranty. Gough *v.* Jewett, 32 N. Y. App. Div. 79, 52 N. Y. Suppl. 707; Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 585, 69 Pac. 938; Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

So if the policy provides that on renewal it is to be continued under the original representation, the failure of the insured to state a change by the erection of an adjacent building will vitiate the renewal policy. Peoria Sugar Refining Co. *v.* People's Fire Ins. Co., 52 Conn. 581; Peoria Sugar Refining Co. *v.* People's Fire Ins. Co., 24 Fed. 773.

Option of insurer.—That an increase of risk by the erection of buildings adjacent to the premises insured renders it optional with the insurer to cancel the policy does not render the policy void if the insured fails to give notice of an increase of risk by such means. Commercial Ins. Co. *v.* Mehlman, 48 Ill. 313, 95 Am. Dec. 543.

15. German Ins. Co. *v.* Wright, 6 Kan. App. 611, 49 Pac. 704; Lebanon Mut. Ins. Co. *v.* Losch, 109 Pa. St. 100.

So an increase of the risk by the owner of adjacent premises keeping explosives in his house does not avoid a policy providing that any increased risk shall vitiate the contract if without the consent of the insured. Des Moines State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281. Here the keeping of explosives in no way contributed to the loss.

Renewal policy.— Failure to apprise the insurer of a change in the surroundings caused by the erection of buildings by third parties will avoid a renewal policy which provides that it is issued on the original representations and survey. Liddle *v.* Market F. Ins. Co., 29 N. Y. 184.

16. Where no warranty exists.— An agreement "to give notice of any increase of risk by the use or occupation of neighboring premises" is not a warranty, but is satisfied by the exercise of reasonable diligence to ascertain the existence of such use or occupation. Waggonick *v.* Westchester F. Ins. Co., 34 Ill. App. 629; Eclipse Ins. Co. *v.* Schoemer, 2 Cinc. Super. Ct. 474.

17. Lebanon Mut. F. Ins. Co. *v.* Hankinson, 2 Pa. Cas. 141, 3 Atl. 672; Straker *v.* Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752.

Such a provision is reasonable. Shepherd *v.* Union Mut. F. Ins. Co., 38 N. H. 232.

Change in contiguous buildings.— If the policy provides for a notice to the insurer of a change in the contiguous surroundings, an oral notice is sufficient in the absence of a requirement that it should be written. Liddle *v.* Market F. Ins. Co., 29 N. Y. 184. A building twenty-five feet away is not "contiguous." Olson *v.* St. Paul F. & M. Ins. Co., 35 Minn. 432, 29 N. W. 125, 59 Am. Rep. 333.

Where the policy is on goods kept in a rented building, only part of which is rented by the insured, a change in the use or occupancy in the part not under his control, and which he is not aware increases the risk, has been held not to avoid the policy. McKee *v.* Susquehanna Mut. F. Ins. Co., 135 Pa. St. 544, 19 Atl. 1067.

presumed to be a mere description for purposes of identification.[18] And when the policy contains no express prohibition of a change in the use, the fact that at the time of the loss the building was used for a different purpose than that mentioned does not avoid the policy.[19] If, however, the policy provides that it shall become void by any change in use or occupation, this amounts to a promissory warranty.[20] It is customary to insert such a warranty in the policy and when

18. *Connecticut.*—Billings *v.* Tolland County Mut. F. Ins. Co., 20 Conn. 139, 50 Am. Dec. 277. *Contra,* Wood *v.* Hartford F. Ins. Co., 13 Conn. 533, 35 Am. Dec. 92.

Kentucky.— German Ins. Co. *v.* Hart, 16 Ky. L. Rep. 344; Imperial F. Ins. Co. *v.* Kiernan, 7 Ky. L. Rep. 542. *Compare* Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634.

Maryland.— Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

New York.— Smith *v.* Mechanics', etc., F. Ins. Co., 32 N. Y. 399; Whitney *v.* Black River Ins. Co., 9 Hun 37.

West Virginia.—Bryan *v.* Peabody Ins. Co., 8 W. Va. 605.

United States.— Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434.

See 28 Cent. Dig. tit. "Insurance," § 751.

19. Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Planters' Ins. Co. *v.* Sorrels, 1 Baxt. (Tenn.) 352, 25 Am. Rep. 780; Pim *v.* Reid, 12 L. J. C. P. 299, 6 M. & G. 1, 6 Scott N. R. 982, 46 E. C. L. 1.

In some of the earlier cases, however, when by a policy premises are insured as of a certain character, a total change in that character, even though no express provision is inserted, has been held to amount to an unconscionable change in the risk and so cause a forfeiture. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450; Elstner *v.* Cincinnati Equitable Ins. Co., 1 Disn. (Ohio) 411, 12 Ohio Dec. (Reprint) 703. A provision for forfeiture was also occasionally construed from provisions that proofs of loss must show no alteration or increase of risk. Hobby *v.* Dana, 17 Barb. (N. Y.) 111.

20. Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868; Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Hervey *v.* Prescott Mut. F. Ins. Co., 11 U. C. C. P. 394. In Moir *v.* Sovereign F. Ins. Co., 18 Nova Scotia 502, 6 Can. L. T. 541 [finding *reversed* in 14 Can. Sup. Ct. 612, 7 Can. L. T. 129], there was no forfeiture when the factory insured undertook the manufacture of excelsior, in being insured as a spool manufactory, it appearing that the manufacture of spools was more hazardous than the manufacture of excelsior.

Such provisions are construed narrowly and against the insurer. Mullaney *v.* National F. & M. Ins. Co., 118 Mass. 393.

A material change in the premises of which the insurer is not informed will avoid a renewal policy as the concealment virtually amounts to a false representation. Clark *v.* Manufacturers' Ins. Co., 8 How. (U. S.) 235, 12 L. ed. 1061.

What amounts to a prohibited change in use in general.— The placing of unslaked lime in the basement of a church (Minnehaha County School Dist. No. 116 *v.* German Ins. Co., 7 S. D. 458, 64 N. W. 527), the use of an insured flour mill as a cooper shop (Harris *v.* Columbiana Mut. Ins. Co., 4 Ohio St. 285), the conversion of a steam bending factory into a door and sash factory (Howes *v.* Dominion F. & M. Ins. Co., 8 Ont. App. 644), the use of a building for a restaurant within a permissive clause that "the building may be used for any mercantile purpose" (Garretson *v.* Merchants', etc., Ins. Co., 81 Iowa 727, 45 N. W. 1047), the keeping of confectionery in glass jars on a shelf in a barber shop, when the confectionery business was specified as hazardous (Wetherell *v.* City F. Ins. Co., 16 Gray (Mass.) 276), or the carrying into a loft a sailmaker's stock and tools for the extrahazardous business of sailmaking (Wetherell *v.* City F. Ins. Co., 16 Gray (Mass.) 276), has been held to be such a prohibited change in use as to avoid the policy. Insurance on a certain kind of ware is not insurance on articles in process of manufacture. Appleby *v.* Astor F. Ins. Co., 54 N. Y. 253. A "livery stable" is not a "tavern barn." Hobby *v.* Dana, 17 Barb. (N. Y.) 111.

What does not amount to a prohibited change in use in general.— The mere fact that the office is moved from one room to another (Pacaud *v.* Monarch Ins. Co., 1 L. C. Jur. 284), the fitting up of a paper mill with appliances run by the same gearing to grind grain (Wood *v.* Hartford F. Ins. Co., 13 Conn. 533, 35 Am. Dec. 92), or the setting up of machinery to manufacture boxes, an appropriation of the premises for carpenter work (U. S. Fire & M. Ins. Co. *v.* Kimberly, 34 Md. 224, 6 Am. Rep. 325) does not amount to such a prohibited change in use as to avoid the policy. The use of a part of a building to make brooms does not convert the building into a broom factory. Fire Assoc. *v.* Gilmer, 3 Walk. (Pa.) 234.

An auction sale of insured's stock after execution is not a violation of a warranty that the premises would be used as a "store occupied by the insured." Rice *v.* Tower, 1 Gray (Mass.) 426.

Keeping a bar-room for the purpose of retailing liquors to boarders does not constitute the keeper a tavern-keeper. Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 38 Am. Dec. 525.

Storage.— The building of a fire to clean up the premises from a prior and different use is not a violation of a clause providing that the building shall be used for storage only. Krug *v.* German F. Ins. Co., 147 Pa.

this is done it is immaterial whether or not the change had anything to do with the loss.[21] A provision frequently found in the policy is that the same shall be void "if the hazard be increased by any means within the control or knowledge of the insured" and certain designated uses are denominated extrahazardous and are prohibited. When such is the case it is not proper to show that in fact such uses were not more hazardous, for they have been finally agreed upon as falling within such a classification.[22] The use for a purpose considered more hazardous according to the policy vitiates the insurance, for such a provision is a warranty;[23]

St. 272, 23 Atl. 572, 30 Am. St. Rep. 729. A foundry or machine shop is put to a different use by the storage of wagons, hay, and shingles. Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34.

The use of a dwelling as a retail liquor store, although occupied without authority by one who paid no rent, is a violation of a warranty that the building shall be used as a residence. Western Assur. Co. *v.* McPike, 62 Miss. 740. A dwelling-house may be used as a boarding-house. Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 38 Am. Dec. 525.

The use of a single room of a silk factory to weave a few pieces of stuff from wool, linen, and cotton does not constitute such premises a woolen mill. Vogel *v.* People's Mut. F. Ins. Co., 9 Gray (Mass.) 23. But in Manufacturers, etc., Ins. Co. *v.* Kunkle, 6 Wkly. Notes Cas. (Pa.) 234, the use of a single room of a dwelling for a tinshop was held to be an appropriation for an unauthorized purpose. An occasional day's work by a carpenter in a single room in a dwelling is not a change of use within the provisions of a policy prohibiting a more hazardous use of the premises and specifying carpentry as a hazardous trade. Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121; Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336; Peck *v.* Phœnix Mut. Ins. Co., 45 U. C. Q. B. 620.

Where a building is insured as a sawmill the risk is not enhanced because it confines itself to sawing shingles instead of planks as formerly. Tessier *v.* Cie. D'Assurance de Rimouski, 19 Rev. Lég. 145.

More hazardous business or use.— Lighting a building with gasoline is not devoting the same to a "more hazardous business," and unless the use of gasoline be prohibited does not avoid the policy. Chester County Mut. F. Ins. Co. *v.* Coatesville Shoe Factory, 80 Pa. St. 407. Where the premises are insured as a dwelling and a change of use to that of a vinegar factory is assented to by the insurer, the fact that subsequently the use was again changed to that of a tavern will not avoid the policy. even though no consent thereto was given when it appears that use for the last mentioned purpose was no more hazardous than for the purpose assented to. Campbell *v.* Liverpool, etc., F., etc., Ins. Co., 13 L. C. Jur. 309. It is immaterial that the unauthorized use is carried on by a tenant without the knowledge or consent of the insured, when the policy prescribes a forfeiture for any unauthorized more hazardous use. Howell *v.* Baltimore Equitable Soc., 16 Md. 377; Western Assur. Co. *v.* McPike, 62 Miss. 740.

21. *Iowa.*— Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534.

Maryland.— Howell *v.* Baltimore Equitable Soc., 16 Md. 377.

Massachusetts.— Lee *v.* Howard F. Ins. Co., 3 Gray 583.

New York.— Appleby *v.* Firemen's Fund Ins. Co., 45 Barb. 454.

Pennsylvania.— Manufacturers', etc., Ins. Co. *v.* Kunkle, 6 Wkly. Notes Cas. 234.

See 28 Cent. Dig. tit. "Insurance," § 751.

This rule is often changed by statute requiring that the change must increase the risk. See Slinkard *v.* Manchester F. Assur. Co., 122 Cal. 595, 55 Pac. 417. And see Johnston *v.* Canada Farmers' Mut. F. Ins. Co., 28 U. C. C. P. 211.

Statutes frequently require such provisions to appear in the contract in a certain manner. See Campbell *v.* Charter Oak F. & M. Ins. Co., 7 Allen (Mass.) 45 note, where a memorandum of hazards referred to in the body of the policy was deemed to be a part of the body of the policy.

The risk is carried under the same terms in the new as in the old location when the property is by the assent of the insured moved from one building to another. Dougherty *v.* Greenwich Ins. Co., 64 N. J. L. 716, 42 Atl. 485, 46 Atl. 1099; Robinson *v.* Mercer County Mut. F. Ins. Co., 27 N. J. L. 134.

22. Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583.

Assured leaving the premises closed during ordinary business hours, and being absent during twenty-six days prior to the fire, and engaging with his clerk in business at another place several miles distant, does not, as a matter of law, avoid the policy conditioned to be void if the premises shall be used so as to increase the risk. O'Brien *v.* Commercial F. Ins. Co., 38 N. Y. Super. Ct. 517.

23. Gasner *v.* Metropolitan Ins. Co., 13 Minn. 483; Robinson *v.* Mercer County Mut. F. Ins. Co., 27 N. J. L. 134.

When risks are classified and more hazardous risks are prohibited, the change from one use to another within the class to which the original risk belonged will not affect the policy. Brink *v.* Merchants', etc., Ins. Co., 49 Vt. 442. In determining whether the hazard has been increased, comparison is to be made with the use set forth in the application and policy and not with a use prior to the execution thereof. State Mut. F. Ins. Co. *v.* Arthur, 30 Pa. St. 315. But if the policy simply provides that the insured shall

and the policy is avoided, although the risk be not increased.[24] When a a policy specifies the uses to which the premises are or may be applied, a mere increase of risk, so long as the premises are being put to a use contemplated and covered by the policy, unless prohibited in specific terms, will not avoid the insurance.[25] When a change of use which during its continuance increased the hazard has been terminated and the property restored to its former use, the policy should be totally void in the absence of a waiver by insurer, when it is provided that a change in use shall forfeit the policy;[26] but if the policy provides only that the life of the policy shall cease so long as the premises shall be used for any prohibited purpose, if a prior improper use has been terminated and the original condition restored the policy is revived.[27]

b. Illegal Use — (i) *Effect of.* If the direct purpose of the contract is to effect, advance, or encourage acts in violation of the law it is settled that the policy is void.[28] But it is equally well settled that a mere illegal use made of the premises, there being no provision of the policy applicable,[29] and no design,

give notice of a more hazardous use of the premises, it must appear that the insured knew that the risk would be thereby increased. McGonigle *v.* Susquehanna Mut. F. Ins. Co., 168 Pa. St. 1, 31 Atl. 868; Rife *v.* Lebanon Mut. Ins. Co., 115 Pa. St. 530, 6 Atl. 65, 2 Am. St. Rep. 580. Meaning of certain clauses as to classification of hazardous risks and the meaning of the terms "hazardous," "specially hazardous," and "extrahazardous" see Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Reynolds *v.* Commerce F. Ins. Co., 47 N. Y. 597; Pindar *v.* Continental Ins. Co., 38 N. Y. 364, 97 Am. Dec. 795.

If permission be given by the insurer to put the premises to a prohibited use for a limited time upon payment of additional premiums, it is not necessary that the insurer notify the insured that the permission has expired when the period has elapsed. Fire Assoc. *v.* Gilmer, 3 Walk. (Pa.) 234.

24. Gasner *v.* Metropolitan Ins. Co., 13 Minn. 483; Matthews *v.* Queen City Ins. Co., 2 Cinc. Super. Ct. 109.

25. *Connecticut.*— Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686.

Maryland.— Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

Missouri.— Sims *v.* State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311.

New York.— Smith *v.* Mechanics', etc., F. Ins. Co., 32 N. Y. 399; New York *v.* Hamilton F. Ins. Co., 10 Bosw. 537; New York *v.* Exchange F. Ins. Co., 9 Bosw. 424.

Pennsylvania.— Fire Assoc. *v.* Gilmer, 3 Walk. 234.

Virginia.— Virginia F. & M. Ins. Co. *v.* Thomas, 90 Va. 658, 19 S. E. 454.

See 28 Cent. Dig. tit. "Insurance," § 751 *et seq.*

26. Kyte *v.* Commercial Union Assur. Co., 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508.

The contrary has also been held. Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686. And *compare* U. S. Fire & M. Ins. Co. *v.* Kimberly, 34 Md. 224, 6 Am. Rep. 325; Gates *v.* Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Merchants', etc., Mut. Ins. Co. *v.* Washington Mut. Ins. Co., 1 Handy (Ohio) 408; Kircher *v.* Milwaukee Mechanics' Mut. Ins. Co., 74 Wis. 470, 43 N. W. 487, 5 L. R. A. 779.

27. New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221. See also *supra*, XIII, A, 3.

28. Phenix Ins. Co. *v.* Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307; Johnson *v.* Union M. & F. Ins. Co., 127 Mass. 555; Kelly *v.* Worcester Mut. F. Ins. Co., 97 Mass. 284; Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261; Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845, 99 Iowa 398, 68 N. W. 701; Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

Liquors.— The statutes of some states make the sale of liquor entirely or within certain limits illegal. The insurance of such goods, so long as the statute does not affect the legality of the right of property therein, is valid. Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845, 99 Iowa 727, 68 N. W. 701; Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124; Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687. See also *supra*, II, D, 2, e.

29. These clauses are frequently found in policies which may affect the rule: (1) "If the risk be increased by any means under the insured's control." Here a mere illegal use is insufficient to avoid a policy. Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534. (2) "If there is any change in the nature or character of the property insured, the policy shall be void." Under this provision it has been held that the conversion of an ordinary sleeping apartment into a house of assignation and prostitution avoids the policy. Indiana Ins. Co. *v.* Brehm, 88 Ind. 578. (3) The policy may expressly provide that the insurance is to be vitiated if the premises are put to an illegal use. Under such a provision the policy becomes void upon undertaking within the premises a trade illegal under the laws of the state. Concordia F. Ins. Co. *v.* Johnson, 4 Kan. App. 7, 45 Pac. 722; Kelly *v.* Worcester Mut. F. Ins. Co., 97 Mass. 284; Campbell *v.* Charter Oak F. & M. Ins. Co., 10 Allen (Mass.) 213. But even here a mere transitory, illegal act is immaterial if it be not an appropriation

by means of insurance, to promote an unlawful enterprise, does not affect the right of insured to recover.[30]

(II) *KNOWLEDGE.* The lack of knowledge of the insured, under a clause forbidding an illegal use, that illegal acts are done is wholly immaterial.[31]

(III) *REVIVAL.* When once a policy has become void by its terms, it is not revived by a termination of the illegal appropriation.[32]

e. By Operation of Factory at Night. The standard policy contains a clause that a policy on a factory shall be void if it be operated in whole or in part at night later than ten o'clock. In the absence of some such provision, operating at night would not avoid the policy,[33] although a statement in the application that the insured does not intend to run at night would amount to a promissory warranty.[34] When such a provision appears in the policy it is upheld.[35]

d. Cessation of Operation of Factory. Provisions, as that of the standard policy, that if the subject-matter of the insurance be a manufactory, the policy shall be void if it shall "cease to be operated for more than ten consecutive days," or similar provisions that if the factory "cease to be operated" the contract is terminated, are uniformly upheld.[36] What amounts to a cessation of

of the premises to an illegal purpose and if it in no wise caused the loss. Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407. In Hinckley *v.* Germania F. Ins. Co., *supra*, the court said that the term "void" did not necessarily mean permanent avoidance but might be satisfied by an interpretation of temporarily void.

If the policy but provides that notice shall be given to the insurer of any illegal appropriation of the premises, an illegal use does not *ipso facto* avoid the policy. Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347.

30. *Georgia.*— Phenix Ins. Co. *v.* Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307.

Indiana.— Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347.

Iowa.— Petty *v.* Des Moines Mut. F. Ins. Co., 11 Iowa 358, 82 N. W. 767.

Kentucky.— National F. Ins. Co. *v.* U. S. Building, etc., Assoc., 54 S. W. 714, 21 Ky. L. Rep. 1207.

Massachusetts.— Boardman *v.* Merrimack Mut. F. Ins. Co., 8 Cush. 583.

Nebraska.— Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407.

Ohio.— Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

See 28 Cent. Dig. tit. "Insurance," § 757.

31. Allen *v.* Home Ins. Co., 133 Cal. 29, 65 Pac. 138; Concordia F. Ins. Co. *v.* Johnson, 4 Kan. App. 7, 45 Pac. 722; Kelly *v.* Worcester Mut. F. Ins. Co., 97 Mass. 284. But *compare* Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407 (under a policy not prohibiting an illegal use); Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.

32. Concordia F. Ins. Co. *v.* Johnson, 4 Kan. App. 7, 45 Pac. 722. See also *supra*, XIII, A, 3.

33. German-American Ins. Co. *v.* Steiger, 109 Ill. 254.

34. Bilbrough *v.* Metropolis Ins. Co., 5 Duer (N. Y.) 587.

Statements in the application may show that the intention was to run at night. North Berwick Co. *v.* New England F. & M. Ins. Co., 52 Me. 336.

35. Alspaugh *v.* British-American Ins. Co., 121 N. C. 290, 28 S. E. 415.

It is wholly immaterial that "similar establishments are usually run at night and that the insured could not successfully carry on his business without working at night" if the policy provides against any night operation. Reardon *v.* Faneuil Hall Ins. Co., 135 Mass. 121.

Waiver.— The effect of this provision may be waived by the insurer or its agent. Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256. See also *infra*, XIV.

36. Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; Cronin *v.* Philadelphia Fire Assoc., 123 Mich. 277, 82 N. W. 45; El Paso Reduction Co. *v.* Hartford F. Ins. Co., 121 Fed. 937. And see Barker *v.* Citizens' Mut. F. Ins. Co., (Mich.) 1904) 99 N. W. 866; Central Montana Mines Co. *v.* Fireman's Fund Ins. Co., 92 Minn. 223, 99 N. W. 1120, 100 N. W. 3.

If a building is insured as an unoccupied building, the policy is not vitiated by the fact of vacancy, in the absence of fraud, even though the policy in general terms provides that a failure to operate the factory shall avoid the policy. Louck *v.* Orient Ins. Co., 176 Pa. St. 638, 35 Atl. 247, 33 L. R. A. 712; Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8. *Compare* Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79.

What is a part of a manufactory.— Pulleys, shafting, machinery, etc., are deemed to be part of the factory within the provision of the policy that if the insured property be a manufacturing establishment its non-operation would avoid the policy, and hence a policy on such articles alone is vitiated by a cessation of work. Stone *v.* Howard Ins.

operation is a question which cannot be very definitely answered.[37] A mere temporary stopping of work for repairs is not a "cessation" which will avoid the policy[38] in the absence of a provision fixing the number of days in which a stoppage may be had.[39] Endeavors of the insured while the factory is shut down to prevent loss and to actually lessen the risk that would be present were the factory in operation, as by the employing of watchmen, are immaterial.[40]

6. Change in Occupancy. A statement of the present occupancy does not amount to an implied promissory warranty that the insured will not change the nature of the occupancy during the life of the policy. An express condition to that effect must be inserted by the insurer to result in an avoidance of the policy by a change of occupancy.[41] When such a provision is inserted, it is immaterial,

Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771. *Contra*, Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532; Carr *v.* Roger Williams Ins. Co., 60 N. H. 513. Stock in the process of manufacture is not, however, a part of the factory within such a provision, and a policy thereon is good despite such a clause and despite a cessation of work by the factory. Stone *v.* Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771; Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532. Machinery and apparatus apart from the building and separately insured do not constitute a manufactory, and the insurance is good even though it be not operated, despite a provision of the policy that in the case of non-operation of any manufactory insured the policy should become void. Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79.

37. See cases cited *infra*, this and succeeding notes.

Custom of business.— A stoppage of the machinery for four months, the employees being discharged, is a cessation, although such a stop was customary during the dull season. Stone *v.* Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771. But *compare* German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698. But a statement in an application that premises are "constantly worked" is to be construed according to the general limitations and necessity of the particular branch of manufacturing insured. Prieger *v.* Exchange Mut. Ins. Co., 6 Wis. 89.

38. *Illinois.*— American F. Ins. Co. *v.* Brighton Cotton Mfg. Co., 125 Ill. 131, 17 N. E. 771 [*affirming* 24 Ill. App. 149].

Missouri.— Rosencrans *v.* North American Ins. Co., 66 Mo. App. 352.

New York.— Whitney *v.* Black River Ins. Co., 72 N. Y. 117, 28 Am. Rep. 116.

Pennsylvania.— Ehlers *v.* Aurora F. Ins. Co., 6 Pa. Dist. 441, 19 Pa. Co. Ct. 165.

United States.—Brighton Mfg. Co. *v.* Reading F. Ins. Co., 33 Fed. 232.

See 28 Cent. Dig. tit. "Insurance," § 759.

39. But if only a certain number of days of stoppage is permitted by the policy, a suspension for a longer period will forfeit the policy, although the cause thereof was the necessity of making repairs. Day *v.* Mill Owners' Mut. F. Ins. Co., 70 Iowa 710, 29 N. W. 443.

The following cases of idleness, temporary in their nature, have been held not to avoid the policy: A temporary suspension caused by a want of supply of material (City Planing, etc., Mill Co. *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552; Rosencrans *v.* North American Ins. Co., 66 Mo. App. 352; Lebanon Mut. Ins. Co. *v.* Leathers, 5 Pa. Cas. 226, 8 Atl. 424), by the increased price of material (Brighton Mfg. Co. *v.* Reading F. Ins. Co., 33 Fed. 232), by the severity of the climate (Ehlers *v.* Aurora F. Ins. Co., 6 Pa. Dist. 441, 19 Pa. Co. Ct. 165), by high water (Rosencrans *v.* North American Ins. Co., *supra*), by the interruption of the water-power by ice (Bellevue Roller-Mill Co. *v.* London, etc., F. Ins. Co., 4 Ida. 307, 39 Pac. 196), by the prevalence of yellow fever (Poss *v.* Western Assur. Co., 7 Lea (Tenn.) 704, 40 Am. Rep. 68), or by the sickness of the sawyer of a sawmill, the remainder of the business being carried on as usual (Ladd *v.* Ætna Ins. Co., 147 N. Y. 478, 42 N. E. 197). On the other hand it was held not sufficient to constitute occupancy that the tools remained in the shop, and that plaintiff's son went through the shop almost every day to look around to see if things were right. Some practical use must have been made of the building. Keith *v.* Quincy Mut. F. Ins. Co., 10 Allen (Mass.) 228. So a sawmill which has stopped running for the winter is "shut down," within the meaning of such term in a provision of an insurance policy, although men are employed about the premises shipping lumber therefrom, and the machinery has not been dismantled and put in shape for the winter. McKenzie *v.* Scottish Union, etc., Ins. Co., 112 Cal. 548, 44 Pac. 922. The putting together and sale by the foreman of engines was held an operation of the factory, although the machinery had ceased running. Bole *v.* New Hampshire F. Ins. Co., 159 Pa. St. 53, 28 Atl. 205.

40. Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264.

41. *Indiana.*— Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843.

Louisiana.— Lyon *v.* Commercial Ins. Co., 2 Rob. 266.

Maine.— Joyce *v.* Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536, where the house was described as "occupied by" the insured.

when a breach has occurred, that the risk was not thereby increased.[42] So long as no condition relative to the risk is broken the owner of an insured building may allow it to be occupied by any one he pleases;[43] but he is bound by a condition of the policy as to its future use however unreasonable.[44]

7. VACANCY — a. In General. In the absence of an express stipulation,[45] the mere statement in an application for insurance that a building is or will be occupied does not constitute a promissory warranty that the occupation shall continue during the risk.[46]

Massachusetts.— Blood *v.* Howard F. Ins. Co., 12 Cush. 472.

New York.— Gates *v.* Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Driscoll *v.* German-American Ins. Co., 74 Hun 153, 26 N. Y. Suppl. 646.

Pennsylvania.— Heffron *v.* Kittanning Ins. Co., 132 Pa. St. 580, 20 Atl. 698; Cumberland Valley Mut. Protection Co. *v.* Douglas, 58 Pa. St. 419, 98 Am. Dec. 298.

See 28 Cent. Dig. tit. "Insurance," § 760.

Provisions that the policy shall become void are, however, ordinarily construed as working a forfeiture *ipso facto* if the prohibited act occur; but the Nebraska court construes such provisions as merely affording the insurer ground to declare a forfeiture. Hunt *v.* State Ins. Co., 68 Nebr. 121, 92 N. W. 921. See also *supra*, XIII, A, 6.

The term "change of occupants" has been held applicable to personalty. Walradt *v.* Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752; Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700.

Use for certain purposes.— A statement in a policy that the premises are "to be used" for a certain purpose amounts to a warranty. Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34, 3 Tex. App. Civ. Cas. § 320. But *compare* East Texas F. Ins. Co. *v.* Kempner, 12 Tex. Civ. App. 533, 34 S. W. 393.

42. Planters' Mut. Ins. Assoc. *v.* Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195; Elliott *v.* Farmers' Ins. Co., 114 Iowa 153, 86 N. W. 224; Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539.

43. Lyon *v.* Commercial Ins. Co., 2 Rob. (La.) 266.

44. Planters' Mut. Ins. Assoc. *v.* Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195; Elliott *v.* Farmers' Ins. Co., 114 Iowa 153, 86 N. W. 224.

What constitutes a change of occupancy.— The use of a building for band rehearsals and sleeping is not allowable under a policy insuring a building "occupied for store and dwelling purposes and saloon." Pabst Brewing Co. *v.* Union Ins. Co., 63 Mo. App. 663. The renting of a room on the second floor for a political club-room is not prohibited in a building described in the application as occupied "second story . . . Storage, Cigar Manufactory and Manufacture of Tinware," although the policy prohibited a change of use. Miller *v.* Oswego, etc., Ins. Co., 18 Hun (N. Y.) 525. The change of sleeping apartments into a house of assignation and prostitution vitiates a policy which provides that a change in the nature and character of the insured property shall have such effect. Indiana Ins. Co. *v.* Brehm, 88 Ind. 578. A mere change in tenants is not a prohibited change of occupation. Hobson *v.* Wellington Dist. Mut. F. Ins. Co., 6 U. C. Q. B. 536. The mere taking of possession of a stock of goods by a levy is not fatal to a policy providing against a change of occupancy with increase of hazard. Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700. See also *infra*, XIII, B, 7.

45. See *infra*, XIII, B, 7, b *et seq.*

Miscellaneous provisions of policy.— If the policy provides that insurance shall continue "while the property is occupied by a tenant" it *ipso facto* ceases when occupancy ceases. East Texas F. Ins. Co. *v.* Smith, 3 Tex. App. Civ. Cas. § 281. When the provision is that the policy shall be void if the premises shall become vacant or unoccupied "and so remain," a period of seventeen days of vacancy will avoid the policy. Dennison *v.* Phœnix Ins. Co., 52 Iowa 457, 3 N. W. 500. Many policies provide that they are to be void if vacancy occurs without the permission of the insurer attached to or indorsed on the policy. During the period allowed by the insurer and indorsed as required, vacancy of course is immaterial, but when the time has expired the original condition reattaches. Bruner *v.* German-American Ins. Co., 103 Ky. 370, 45 S. W. 109, 20 Ky. L. Rep. 71. A conditional permission relieves the insured from forfeiture under such a clause (Steen *v.* Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297 [*affirming* 61 How. Pr. 144]), provided the condition is kept, but not otherwise (Eakin *v.* Home Ins. Co., 1 Tex. App. Civ. Cas. § 368). If the insurer accepts a policy for the purpose of attaching a vacancy permit, the permit becomes immediately operative without regard to the time when it was actually attached. Sullivan *v.* Germania F. Ins. Co., 89 Mo. App. 106.

46. *Illinois.*— Burlington Ins. Co. *v.* Brockway, 138 Ill. 644, 28 N. E. 799 [*affirming* 39 Ill. App. 43].

Louisiana.— Soye *v.* Merchants' Ins. Co., 6 La. Ann. 761.

Maine.— Herrick *v.* Union Mut. F. Ins. Co., 48 Me. 558, 77 Am. Dec. 244.

Massachusetts.— Kimball *v.* Ætna Ins. Co., 9 Allen 540, 85 Am. Dec. 786.

Michigan.— Becker *v.* Farmers' Mut. Ins. Co., 48 Mich. 610, 12 N. W. 874.

Missouri.— Schultz *v.* Merchants' Ins. Co., 57 Mo. 331.

b. Provisions in Policy — (I) *Respecting Increase of Risk Only.* Under a policy only providing generally that any increase of risk without the consent of the insurer shall avoid the policy, the mere fact that the building is unoccupied at the time of the fire is not of itself an increase of risk that will vitiate the contract.[47]

(II) *That Policy Shall Be Void.* It is, however, almost the universal custom to insert a specific condition in the policy respecting subsequent vacancy of the premises. That of the standard policy is "this policy shall be void if a building herein described whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days." Such provisions are reasonable[48] and valid.[49] When the policy provides against increase of risk and also against vacancy, the former clause should not be construed as qualifying

New York.— O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122.

Ohio.— Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336.

Pennsylvania.— Cumberland Valley Mut. Protection Co. *v.* Douglas, 58 Pa. St. 419, 98 Am. Dec. 298.

Rhode Island.— Gilliat *v.* Pawtucket Mut. F. Ins. Co., 8 R. I. 282, 91 Am. Dec. 229.

Wisconsin.— Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188.

See 28 Cent. Dig. tit. "Insurance," § 760.

Nor is there any obligation upon the insured if vacancy does arise to have the premises guarded to prevent fire. Soye *v.* Merchants' Ins. Co., 6 La. Ann. 761.

Warranty in præsenti.— A statement, however, that a house is occupied is a warranty *in præsenti*, and if it be not at the time so occupied, the warranty being broken, the policy is void. Alexander *v.* Germania F. Ins. Co., 66 N. Y. 464, 23 Am. Rep. 76 [*reversing* 2 Hun 655, 5 Thomps. & C. 208]. A promissory warranty is broad enough to embrace a warranty *in præsenti*. Hence a renewal policy is avoided if at the time of its issuance the property is unoccupied. Hotchkiss *v.* Home Ins. Co., 58 Wis. 297, 17 N. W. 138.

47. *Massachusetts.*— Mullaney *v.* National F. & M. Ins. Co., 118 Mass. 393.

Michigan.— Residence F. Ins. Co. *v.* Hannawold, 37 Mich. 103.

Mississippi.— Liverpool, etc., Ins. Co. *v.* McGuire, 52 Miss. 227.

New York.— Halpin *v.* Ætna F. Ins. Co., 10 N. Y. St. 344.

Pennsylvania.— Somerset County Mut. F. Ins. Co. *v.* Usaw, 112 Pa. St. 80, 4 Atl. 355, 56 Am. Rep. 307.

Rhode Island.— Gilliat *v.* Pawtucket Mut. F. Ins. Co., 8 R. I. 282, 91 Am. Dec. 229.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

Wisconsin.— Hawkes *v.* Dodge County Mut. Ins. Co., 11 Wis. 188.

Canada.— Foy *v.* Ætna Ins. Co., 8 N. Brunsw. 29; Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525; Gould *v.* British American Assur. Co., 27 U. C. Q. B. 473.

See 28 Cent. Dig. tit. "Insurance," § 764.

Contra.— Jones *v.* Granite State F. Ins. Co., 90 Me. 40, 37 Atl. 326.

Extent and limits of rule.— In Kirby *v.* Phœnix Ins. Co., 13 Lea (Tenn.) 340, it was held that it was proper to allow the insurer to show that there was a general custom of insurance companies not to take a risk on vacant property, as tending to prove that non-occupancy was a material increase of risk. So it has been held that if the non-vacancy was a greater risk than occupancy by tenants of ordinary care and habits, there could be no recovery, although the company would have been responsible had the loss occurred while the premises were occupied by tenants whose occupancy was more hazardous than vacancy. Luce *v.* Dorchester Mut. F. Ins. Co., 110 Mass. 361. It is an increase of risk to leave a door unlocked when a building is not occupied. Mooney *v.* Glenns Falls Ins. Co., 4 Pa. Dist. 639. When the jury finds that there has been no increase of risk the vacancy is immaterial. Todd *v.* Liverpool, etc., Ins. Co., 18 U. C. C. P. 192.

48. Cardinal *v.* Dominion F. & M. Ins. Co., 3 Montreal Leg. N. 367; Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

The clause "no liability shall exist under this policy for loss on any vacant or unoccupied building" is sufficient to embody a warranty as to the future. Snyder *v.* Fireman's Fund Ins. Co., 78 Iowa 146, 42 N. W. 630.

49. *Illinois.*— American Ins. Co. *v.* Foster, 92 Ill. 334, 34 Am. Rep. 134.

Indiana.— Ætna Ins. Co. *v.* Meyers, 63 Ind. 238.

Iowa.— Baldwin *v.* German Ins. Co., 105 Iowa 379, 75 N. W. 326; Snyder *v.* Fireman's Fund Ins. Co., 78 Iowa 146, 42 N. W. 630.

Kentucky.— Burner *v.* German-American Ins. Co., 103 Ky. 370, 45 S. W. 109, 20 Ky. L. Rep. 71; Thomas *v.* Hartford F. Ins. Co., 53 S. W. 297, 21 Ky. L. Rep. 914, 56 S. W. 264, 21 Ky. L. Rep. 1139.

Missouri.— Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42; Burnham *v.* Royal Ins. Co., 75 Mo. App. 394.

New York.— Couch *v.* Farmers' F. Ins. Co., 64 N. Y. App. Div. 367, 72 N. Y. Suppl. 95; Short *v.* Home Ins. Co., 20 Alb. L. J. 54.

Texas.— Maness *v.* Sun Ins. Co., (Civ. App. 1895) 32 S. W. 326.

Wisconsin.— Gans *v.* St. Paul F. & M. Ins.

the latter and so requiring the vacancy to be such as to increase the risk.[50] Despite such general provisions, the real contract may have been that the premises were insured as vacant premises. In this event forfeiture clauses permitted to remain in the policy form have no application.[51]

(III) *Requiring Notice.* While a vacancy under the provisions mentioned in the foregoing subsection operates *ipso facto*,[52] the rule is different in case the policy merely provides that the insured must "give notice" or "immediate notice" of the vacancy, and does not provide expressly for a forfeiture for failure to do so.[53] When notice is required, the insured has a reasonable time in which to give the same,[54] and this is true, although the policy requires "immediate notice."[55]

c. Statutory Provisions as to Risk. It being the general rule that the materiality of a breach of warranty is not in question,[56] statutes have been enacted in many states to the effect that the breach of such conditions of the policy shall not vitiate the insurance, notwithstanding any provision of the policy to the contrary, unless there is a material increase of the risk caused thereby, or unless the breach is connected with the loss.[57] In the absence of fraud an immaterial breach does not, under such statutes, affect the insurance.[58]

d. Knowledge of Insured. If the policy provides that the same is to become void by vacancy, the forfeiture does not depend at all upon the insured's knowl-

Co., 43 Wis. 108, 28 Am. Rep. 535; Wustum *v.* City F. Ins. Co., 15 Wis. 138.

Canada.— Abrahams *v.* Agricultural Mut. Assur. Assoc., 40 U. C. Q. B. 175.

See 28 Cent. Dig. tit. "Insurance," § 764.

The virtual effect is that of an express agreement that non-occupancy shall be considered an increase of risk and that an increase of risk shall avoid the policy. Halpin *v.* Ætna F. Ins. Co., 10 N. Y. St. 344.

Provisions that mechanics may be employed for fifteen days and the building unoccupied for ten days do not give the insured the right to have the building vacant during the last five days of the repair period. Limburg *v.* German F. Ins. Co., 90 Iowa 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99.

The period of time of a permitted vacancy must be calculated from the date of the payment of the premium rather than from the date of the execution of the policy by the insurer, in the absence of an agreement for credit, for the life of the policy depends on the payment of the premium. Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

How construed.— The vacancy clause, being in the nature of a forfeiture, must be construed strictly. Rockford Ins. Co. *v.* Storig, 137 Ill. 646, 27 N. E. 674. See *supra*, XII, A, 3, e.

50. Moriarty *v.* Home Ins. Co., 53 Minn. 549, 55 N. W. 740. *Contra*, Moore *v.* Phœnix F. Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

51. Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79; Louck *v.* Orient Ins. Co., 176 Pa. St. 638, 35 Atl. 247, 33 L. R. A. 712; Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8.

When warranty attaches.— Although the building be not occupied at the date of the issuance of the policy and is insured as a vacant building, the warranty contained in the policy that it shall not be vacant attaches as soon as occupancy has begun. Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843. *Contra*, Bennett *v.* Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609. But *compare* Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133.

52. See *supra*, XIII, B, 7, b, (II).

53. Alston *v.* Old North State Ins. Co., 80 N. C. 326; Strunk *v.* Firemen's Ins. Co., 160 Pa. St. 345, 28 Atl. 779, 40 Am. St. Rep. 721.

Failure to give notice is not such a "mistake" that equity will relieve from the consequences prescribed by the policy. Sleeper *v.* New Hampshire F. Ins. Co., 56 N. H. 401.

54. State *v.* Tuttgerding, 8 Ohio Dec. (Reprint) 74, 5 Cinc. L. Bul. 74; Canada Landed Credit Co. *v.* Canada Agricultural Ins. Co., 17 Grant Ch. (U. C.) 418.

55. Strunk *v.* Firemen's Ins. Co., 160 Pa. St. 345, 28 Atl. 779, 40 Am. St. Rep. 721.

56. Farmers' Ins. Co. *v.* Wells, 42 Ohio St. 519.

57. Lancy *v.* Home Ins. Co., 82 Me. 492, 20 Atl. 79; Cannell *v.* Phœnix Ins. Co., 59 Me. 582; Doten *v.* Ætna Ins. Co., 77 Minn. 474, 80 N. W. 630; Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42; Moody *v.* Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313.

A change from occupancy to disuse is included under a provision that the risk must be materially increased by any change before payment may be avoided. Cannell *v.* Phœnix Ins. Co., 59 Me. 582.

58. Cannell *v.* Phœnix Ins. Co., 59 Me. 582; Doten *v.* Ætna Ins. Co., 77 Minn. 474, 80 N. W. 630. And see Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57. In Traders' Ins. Co. *v.* Race, 142 Ill. 338, 31 N. E. 392, 29 N. E. 846, the same rule ap-

edge of the fact of vacancy.[59] If, however, the policy is conditioned to be void if the risk be increased by any means within the knowledge or control of the insured, the knowledge and control both become material and the policy is not forfeitable in their absence.[60]

e. Revival of Policy. If the policy contains a stipulation that it is to be void if the premises shall become unoccupied or vacant, reoccupancy after a breach does not revive the forfeited policy;[61] but if the provision be that "so long as the building shall be unoccupied" the policy shall cease, or the equivalent thereof, the insurance is merely in abeyance during the period of non-occupancy and revives when the vacancy ceases.[62]

f. Vacancy as to Part Only. If the contract of insurance be separable, as for instance when two buildings are insured under one policy, a prohibited vacancy in one of the separable portions of the subject-matter will not create a forfeiture of the entire policy, but only as to that part in which the condition was broken.[63] The mere fact that the buildings insured are separate and distinct will not necessarily make the contract of insurance separable, for it has been held that where a gross sum is paid as the premium the policy constitutes an entire contract, although the amount of insurance is apportioned among the several structures

pears to have been applied in the absence of a statute.

59. Schuermann *v.* Dwelling-House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377 [*affirming* 57 Ill. App. 200]; Dennison *v.* Phœnix Ins. Co., 52 Iowa 457, 3 N. W. 500; Farmers' Ins. Co. *v.* Wells, 42 Ohio St. 519.

60. North American F. Ins. Co. *v.* Zaenger, 63 Ill. 464; Waggonick *v.* Westchester F. Ins. Co., 34 Ill. App. 629. See also Northern Assur. Co. *v.* Crawford, (Tex. Civ. App. 1900) 59 S. W. 916. Thus the removal of a tenant surreptitiously the day before the fire did not vitiate such a policy in American Cent. Ins. Co. *v.* Clarey, 28 Ill. App. 195.

If the landlord is actually aware of the vacancy, there is no reason why a forfeiture clause because of vacancy should not be enforced. Royal Ins. Co. *v.* Lubelsky, 86 Ala. 530, 5 So. 768; American Ins. Co. *v.* Padfield, 78 Ill. 167.

It has been held that where both of these terms appear in the policy, even though removal by a tenant is unknown, the insured risk is still in the "control" of the insured and his ignorance of the vacancy is no excuse. Moore *v.* Phœnix F. Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

The burden of showing that the vacancy occurred by means not within insured's control was held to be on the insured in North American F. Ins. Co. *v.* Zaenger, 63 Ill. 464.

61. German Ins. Co. *v.* Russell, 65 Kan. 373, 69 Pac. 345; Moore *v.* Phœnix Ins. Co., 62 N. H. 240, 13 Am. St. Rep. 556.

62. Ætna Ins. Co. *v.* Meyers, 63 Ind. 238; Ring *v.* Phœnix Assur. Co., 145 Mass. 426, 14 N. E. 525. And see *supra*, XIII, A, 3.

63. *Illinois.*— Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115.

Iowa.— Worley *v.* State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334; Kimball *v.* Monarch Ins. Co., 70 Iowa, 513, 30 N. W. 862.

Kentucky.—Speagle *v.* Dwelling House Ins. Co., 97 Ky. 646, 31 S. W. 282, 17 Ky. L. Rep. 610.

Massachusetts.— Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126.

New York.— Halpin *v.* Insurance Co. of North America, 10 N. Y. St. 345.

Virginia.— Connecticut F. Ins. Co. *v.* Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770.

See 28 Cent. Dig. tit. "Insurance," § 778.

If, however, the subject-matter of the insurance is regarded as an entirety, as for instance if several buildings are insured under the comprehensive term "the premises," vacancy of all the various buildings may be required to render "the premises" vacant, non-occupancy of the premises being the prohibited risk by the policy. McQueeny *v.* Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; Sexton *v.* Hawkeye Ins. Co., 69 Iowa 99, 28 N. W. 462; Bryan *v.* Peabody Ins. Co., 8 W. Va. 605. But see Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644 [*reversing* 45 N. Y. Super. Ct. 394], where the court took exactly the contrary view, holding that the "premises" were not occupied unless each of the insured structures was occupied.

A ten-tenement frame block is not unoccupied when two of the tenements are in actual use and occupation as residences. Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126.

Occupancy of land upon which buildings are placed is not occupancy of "the premises" within the meaning of the policy. Sexton *v.* Hawkeye Ins. Co., 69 Iowa 99, 28 N. W. 462. In Thomas *v.* Hartford F. Ins. Co., 53 S. W. 297, 21 Ky. L. Rep. 914, 56 S. W. 264, 21 Ky. L. Rep. 1139, the term "premises" was held to mean the dwelling-house alone and not to include the various buildings on the tract on which the dwelling stood, it only being insured.

Vacancy of the dwelling-house constitutes vacancy also of an appurtenant building, such as a corn-crib, and the doctrine of severability does not in such case authorize recovery for loss of the appurtenant build-

included under the policy.[64] If the life of the policy is expressly made contingent upon the continued occupancy of all separate structures insured thereunder, the stipulated effect is had by a vacancy of one of such buildings.[65]

g. Personalty in Unoccupied Building. The insurance of personalty may be avoided by the non-occupancy of the building in which it is contained. Such will be the effect if there be a stipulation against non-occupancy.[66]

h. What Constitutes "Vacancy" or "Non-Occupancy" — (i) *In General.* As, in general, the term "vacant" means empty of everything, while "unoccupied" means that no actual use is being made of the premises, by any one corporeally present or in possession,[67] a condition against non-occupancy is much more easily broken than is a condition against vacancy. Historically it appears that the insurer has gradually increased the severity of such provisions. Originally the insurer relied upon an alleged implied agreement that the premises insured should remain in the same condition as when the policy was issued;[68] then, upon the theory that a description *in præsenti* should be construed as a promissory warranty.[69] It was next asserted that vacancy was prohibited under a clause of the policy providing that the contract should be void in case the risk was increased;[70] then "vacancy" was expressly prohibited in terms of various character.[71] Next the word "unoccupied" was linked to the term "vacant" as denoting a state prohibited;[72] and finally the modern and the standard policy provides that the contract of insurance shall terminate if the building insured shall "become vacant or unoccupied."[73]

ing. Republic County Mut. F. Ins. Co. *v.* Johnson, 69 Kan. 146, 76 Pac. 419.

64. McQueeny *v.* Phœnix Ins. Co., 52 Ark. 257, 12 S. W. 498, 20 Am. St. Rep. 179, 5 L. R. A. 744; Kelly *v.* Humboldt F. Ins. Co., 4 Pa. Cas. 99, 6 Atl. 740. See also *supra*, XIII, A, 5.

65. Hartshorne *v.* Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. 615; Sun Fire Office *v.* Hodges, 3 Tex. App. Civ. Cas. § 268.

66. Huber *v.* Manchester F. Assur. Co., 92 Hun (N. Y.) 223, 36 N. Y. Suppl. 873.

But the word "premises" was held in Carr *v.* Roger Williams Ins. Co., 60 N. H. 513, not broad enough to refer to personalty contained in a building. Stone *v.* Howard Ins. Co., 153 Mass. 475, 27 N. E. 6, 11 L. R. A. 771; Phœnix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532; Halpin *v.* Insurance Co. of North America, 120 N. Y. 73, 23 N. E. 989, 8 L. R. A. 79.

67. Herrman *v.* Merchants' Ins. Co., 44 N. Y. Super. Ct. 444 [*affirmed* in 81 N. Y. 184, 37 Am. Rep. 488].

"Vacancy" has been said to have the signification of "uninhabited" (Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448), and to be non-occupancy "for any purpose" (Pabst Brewing Co. *v.* Union Ins. Co., 63 Mo. App. 663).

Occupancy of a dwelling has been defined to be "the living in" a house. Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42. See also Stoltenberg *v.* Continental Ins. Co., 106 Iowa 565, 76 N. W. 835, 68 Am. St. Rep. 323. If a dwelling has "ceased to be occupied by human beings as a customary place of abode" it is "unoccupied." Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644.

"Untenanted" was said to be synonymous with "unoccupied" in Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

Question of law or of fact.—"What is meant by the term 'vacant and unoccupied' in a policy of insurance is a question of law, but whether the building was at the time of the loss 'vacant and unoccupied,' within the meaning of the policy, is a question of fact." Home Ins. Co. *v.* Mendenhall, 164 Ill. 458, 469, 45 N. E. 1078, 36 L. R. A. 374. See also *infra*, XXI, H, 2, b, (IX).

68. But the courts refused in general to recognize such a principle. Soye *v.* Merchants' Ins. Co., 6 La. Ann. 761; Becker *v.* Farmers' Mut. F. Ins. Co., 48 Mich. 610, 12 N. W. 874.

69. But it was uniformly held that such a theory was erroneous. Schultz *v.* Merchants' Ins. Co., 57 Mo. 331; Cumberland Valley Mut. Protection Co. *v.* Douglas, 58 Pa. St. 419, 98 Am. Dec. 298; Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336; O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122.

70. But the courts held that mere vacancy was not in law an increase of risk. Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525. See also cases cited *supra*, notes 45, 46.

71. For instances of various terms used see Worley *v.* State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334; Western Assur. Co. *v.* McPike, 62 Miss. 740; Cummins *v.* Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111.

72. Under this phraseology, it was held that both vacancy and non-occupancy must concur. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488 [*affirming* 44 N. Y. Super. Ct. 444].

73. Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644.

(II) *OF DWELLINGS*—(A) *Temporary Absence.* A mere temporary absence of the occupants from the premises, there being an intention to return, particularly if the premises be left in their usual condition, will not amount to a "non-occupancy." *A fortiori* it is not a "vacancy."[74] It is wholly immaterial that the non-occupancy had existed but a few hours, if the departure had been effected and was intended to be permanent.[75]

(B) *Furniture Left in Building.* The mere fact that furniture is left in a building is not alone sufficient to show that the house was occupied,[76] especially if such articles be few in number.[77] But the fact that furniture was left keeps

74. *Arkansas.*— Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196.

Massachusetts.— Johnson *v.* Norwalk F. Ins. Co., 175 Mass. 529, 56 N. E. 569.

Michigan.— Hill *v.* Ohio Ins. Co., 99 Mich. 466, 58 N. W. 359.

Nebraska.— Home F. Ins. Co. *v.* Peyson, 54 Nebr. 495, 74 N. W. 960; Springfield F. & M. Ins. Co. *v.* McLimans, 28 Nebr. 846, 45 N. W. 171.

New Jersey.— Laselle *v.* Hoboken F. Ins. Co., 43 N. J. L. 468.

New York.— Cummins *v.* Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111; O'Brien *v.* Commercial F. Ins. Co., 38 N. Y. Super. Ct. 517.

Texas.— Georgia Home Ins. Co. *v.* Brady, (Civ. App. 1897) 41 S. W. 513; Phœnix Ins. Co. *v.* Burton, (Civ. App. 1896) 39 S. W. 319.

Canada.—Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

See 28 Cent. Dig. tit. "Insurance," § 770.

Premises temporarily left in usual condition are not vacant (Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64, 34 Am. Rep. 106; McMurray *v.* Capital Ins. Co., 87 Iowa 453, 54 N. W. 354; Stone *v.* Granite State F. Ins. Co., 69 N. H. 438, 45 Atl. 235; Johnson *v.* New York Bowery F. Ins. Co., 39 Hun (N. Y.) 410), and it does not matter that the insured was arranging at the time to remove from the state, provided he intended returning (Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64, 34 Am. Rep. 106).

Temporary absence: To attend a funeral is not "vacancy" or "non-occupancy." Franklin F. Ins. Co. *v.* Kepler, 95 Pa. St. 492. To see a sick relative is not non-occupancy. Stupetski *v.* Transatlantic F. Ins. Co., 43 Mich. 373, 5 N. W. 401, 38 Am. Rep. 195. To obtain medical treatment does not violate a provision against non-occupancy. Home F. Ins. Co. *v.* Plyson, 54 Nebr. 495, 74 N. W. 960.

Temporary removal.— A taking away of substantially all the household goods and a departure for a protracted absence would be a non-occupancy. Hill *v.* Equitable Mut. F. Ins. Co., 58 N. H. 82. See also Agricultural Ins. Co. *v.* Frith, 21 Ill. App. 593, where it appeared that plaintiff was temporarily in jail and his wife had sold the household goods and had departed and it was held that the policy was forfeited. Even though the occupancy was intended to be but temporary, if it actually continued until the time of the fire, it is sufficient. Detroit F. & M. Ins. Co. *v.* Chetlain, 61 Ill. App. 450. In Huber *v.* Manchester F. Assur. Co., 92 Hun (N. Y.) 223, 36 N. Y. Suppl. 873, it was held that a house was unoccupied where the tenant placed all the furniture in one room, left for a six weeks' visit, and extensive repairs were to be made during her absence. The court in Lester *v.* Mississippi Home Ins. Co., (Miss. 1895) 19 So. 99, held a house "vacant" when the owners were away on a hunting trip, although a servant slept in the house every night.

75. Bennett *v.* Agricultural Ins. Co., 50 Conn. 420, 51 Conn. 504.

76. *Massachusetts.*— Corrigan *v.* Connecticut F. Ins. Co., 122 Mass. 298.

Missouri.— Cook *v.* Continental Ins. Co., 70 Mo. 610, 35 Am. Rep. 438; Craig *v.* Springfield F. & M. Ins. Co., 34 Mo. App. 481.

New Jersey.— Hartshorne *v.* Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. 615.

New York.— Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644 [*reversing* 45 N. Y. Super. Ct. 394]; Paine *v.* Agricultural Ins. Co., 5 Thomps. & C. 619.

Oregon.— Weidert *v.* State Ins. Co., 19 Oreg. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Canada.—Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

See 28 Cent. Dig. tit. "Insurance," § 764 *et seq.*

77. *Illinois.*— Traders' Ins. Co. *v.* Race, (1892) 29 N. E. 846 [*affirming* 31 Ill. App. 625]; American Ins. Co. *v.* Padfield, 78 Ill. 167.

Iowa.— Snyder *v.* Fireman's Fund Ins. Co., 78 Iowa 146, 42 N. W. 630.

Michigan.— Richards *v.* Continental Ins. Co., 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611.

Mississippi.— Home Ins. Co. *v.* Scales, 71 Miss. 975, 15 So. 134, 42 Am. St. Rep. 512.

Ohio.— Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57.

See 28 Cent. Dig. tit. "Insurance," § 764 *et seq.*

So the leaving of implements or tools is not sufficient. Feshe *v.* Council Bluffs Ins. Co., 74 Iowa 676, 39 N. W. 87; Ashworth *v.* Builders' Mut. F. Ins. Co., 112 Mass. 422, 17 Am. Rep. 117; Fritz *v.* Home Ins. Co., 78 Mich. 565, 44 N. W. 139; Martin *v.* Rochester German Ins. Co., 86 Hun (N. Y.) 35, 33 N. Y. Suppl. 404.

Using the building for storage of supplies is not sufficient. Continental Ins. Co. *v.* Kyle, 124 Ind. 132, 24 N. E. 727, 19 Am. St.

the premises from becoming vacant, and with a few added facts, as for instance that the absence is temporary, may assist in showing an occupancy.[78]

(c) *Key Not Surrendered.* The mere fact that the former occupant has not yet delivered the key is not sufficient to constitute a continuance of occupancy.[79]

(d) *Sleeping on Premises.* If in other respects the house is used as a dwelling, the mere fact that no one sleeps on the premises does not constitute non-occupancy.[80] Whether or not the sleeping by a caretaker in a house renders the same occupied, the authorities conflict.[81] Certainly a mere occasional sleeping therein is not enough to constitute of itself occupancy as a dwelling,[82] even though it be by the owner.[83] Premises are not unoccupied simply because their customary occupants are absent, provided someone else as their representative is actually using the building for the purpose under which it was insured.[84]

Rep. 77, 9 L. R. A. 81; Limburg *v.* German F. Ins. Co., 90 Iowa 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99; Watertown F. Ins. Co. *v.* Cherry, 84 Va. 72, 3 S. E. 876.

Preparations for occupancy.— The cleaning of a building preparatory to moving into it is not an occupancy. Feshe *v.* Council Bluffs Ins. Co., 74 Iowa 676, 39 N. W. 87; Thomas *v.* Hartford F. Ins. Co., 53 S. W. 297, 21 Ky. L. Rep. 914, 56 S. W. 264, 21 Ky. L. Rep. 1139. *Contra,* Stensgaard *v.* National F. Ins. Co., 36 Minn. 181, 30 N. W. 468. Nor the mere bringing of implements for cleaning upon the premises. Litch *v.* North British, etc., Ins. Co., 136 Mass. 491. But the moving in of furniture terminates vacancy and may amount to an occupancy. Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444; Shackelton *v.* Sun Fire Office, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379. *Contra,* Barry *v.* Prescott Ins. Co., 35 Hun (N. Y.) 601.

Moving furniture contemplating removal.— Even though a portion of the furniture be moved, the house may still remain "occupied." Insurance Co. of North America *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471; Norman *v.* Missouri Town Mut. F., etc., Ins. Co., 74 Mo. App. 456; Omaha F. Ins. Co. *v.* Sinnott, 54 Nebr. 522, 74 N. W. 955; Liverpool, etc., Ins. Co. *v.* Buckstaff, 38 Nebr. 146, 56 N. W. 695, 41 Am. St. Rep. 724.

78. Johnson *v.* New York Bowery F. Ins. Co., 39 Hun (N. Y.) 410; Gibbs *v.* Continental Ins. Co., 13 Hun (N. Y.) 611; Moody *v.* Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313; German-American Ins. Co. *v.* Evants, 94 Tex. 490, 62 S. W. 417 [*affirming* 25 Tex. Civ. App. 300, 61 S. W. 536]. *Compare* Halpin *v.* Phœnix Ins. Co., 4 N. Y. St. 867.

If all the furniture, supplies, and wearing apparel be moved out a residence is vacant. Sleeper *v.* New Hampshire F. Ins. Co., 56 N. H. 401.

79. American Ins. Co. *v.* Padfield, 78 Ill. 167; Corrigan *v.* Connecticut F. Ins. Co., 122 Mass. 298; Home Ins. Co. *v.* Scales, 71 Miss. 975, 15 So. 134, 42 Am. St. Rep. 512.

80. Rockford Ins. Co. *v.* Storig, 31 Ill. App. 486 [*affirmed* in 137 Ill. 646, 24 N. E. 674]; Dwelling-House Ins. Co. *v.* Osborn, 1 Kan. App. 197, 40 Pac. 1099; Gibbs *v.* Continental Ins. Co., 13 Hun (N. Y.) 611.

Taken in conjunction with the further fact that there is an intent to remove, the fact that no one sleeps in the building may render the house unoccupied. Craig *v.* Springfield F. & M. Ins. Co., 34 Mo. App. 481.

81. **That this constitutes occupancy** see Shackelton *v.* Sun Fire Office, 55 Mich. 288, 21 N. W. 343, 54 Am. Rep. 379; Home Ins. Co. *v.* Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665; German-American Ins. Co. *v.* Evants, 94 Tex. 490, 62 S. W. 417; Poor *v.* Hudson Ins. Co., 2 Fed. 432. See also Stensgaard *v.* National F. Ins. Co., 36 Minn. 181, 30 N. W. 468. But see Bonenfant *v.* American F. Ins. Co., 76 Mich. 653, 43 N. W. 682.

For the contrary view see Race *v.* Traders Ins. Co., 31 Ill. App. 625 [*affirmed* in (Sup. 1892) 29 N. E. 846]; Lester *v.* Mississippi Home Ins. Co., (Miss. 1895) 19 So. 99; Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57 [*reversing* 17 Ohio Cir. Ct. 143, 9 Ohio Cir. Dec. 118]; Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

If a member of the family be the caretaker and "some use" is made of the premises, the house is "used as a dwelling." Moody *v.* Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313.

Occupancy by a workman for sleep is not "occupancy by a family." Poor *v.* Humboldt Ins. Co., 125 Mass. 274, 28 Am. Rep. 228. *Contra,* Hartford F. Ins. Co. *v.* Smith, 3 Colo. 422.

The fact that a servant occupied a room in the house does not suffice to fulfil the promissory warranty that premises shall be used as a "dwelling." Poor *v.* Humboldt Ins. Co., 125 Mass. 274, 28 Am. Rep. 228.

82. Agricultural Ins. Co. *v.* Hamilton, 82 Md. 88, 33 Atl. 429, 51 Am. St. Rep. 457, 30 L. R. A. 633; Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448; Fitzgerald *v.* Connecticut F. Ins. Co., 64 Wis. 463, 25 N. W. 785.

83. Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

84. Imperial F. Ins. Co. *v.* Kiernan, 83 Ky. 468.

Wrongful occupancy.—An occupation without authority of the rightful occupant does not aid the insured. Western Assur. Co. *v.* McPike, 62 Miss. 740. In Names *v.* Dwelling

(E) *Eating on Premises.* The mere fact that persons eat within the building does not constitute an occupancy.[85] Nor is it necessary that persons should eat upon the premises in order that it should be occupied by a family.[86]

(F) *Periodic Visits of Inspection.* The mere fact that someone, even though he be the owner,[87] frequently or even daily inspects the premises to see if all is well, does not constitute occupancy,[88] although this may keep the premises from being vacant.[89]

(G) *Understanding of Insurer.* The understanding of the insurer as to the sort of occupancy that would be made of the premises will control, and occupancy of the sort contemplated is sufficient, even though it would not, in the absence of such understanding, satisfy the general requirement of the policy.[90]

(H) *After Partial Loss.* The insured is still deemed an occupant after a partial loss, although not in possession during the period in which the insurer is authorized to exercise its option to repair.[91]

(III) *Of Buildings Intended For Rental.* Somewhat different questions arise from those foregoing when the dwelling or other building insured is intended to be rented. If the insurer is cognizant of the purpose to which the structure is to be put, he must be aware that an occasional vacancy will be a necessary incident to such use.[92] Consequently a temporary vacancy of such premises so described merely incident to a change of tenants will not avoid the policy which prohibits vacancy or non-occupancy under penalty of a forfeiture.[93]

House Ins. Co., 95 Iowa 642, 64 N. W. 628, it was held that occupancy by one who had conspired to burn the building to procure insurance on personalty situated therein was not "occupancy," as provisions respecting occupancy are inserted to secure the safety of the building and are only fulfilled by such occupancy.

85. Ashworth *v.* Builders' Mut. F. Ins. Co., 112 Mass. 422, 17 Am. Rep. 117.

86. Poor *v.* Hudson Ins. Co., 2 Fed. 432.

A house built for dwelling purposes, and used by the owner for cooking and general work in connection with an adjacent house where the owner and his family lodge and eat, is not "vacant or unoccupied." Dwelling-House Ins. Co. *v.* Osborn, 1 Kan. App. 197, 40 Pac. 1099.

A building described as a "boarding-house" is in effect a dwelling within the condition as to occupancy. Burner *v.* German-American Ins. Co., 103 Ky. 370, 45 S. W. 109, 20 Ky. L. Rep. 71.

87. *Indiana.*— Home Ins. Co. *v.* Boyd, 19 Ind. App. 173, 49 N. E. 285.

Maryland.— Agricultural Ins. Co. *v.* Hamilton, 82 Md. 88, 33 Atl. 429, 51 Am. St. Rep. 457, 30 L. R. A. 633.

New York.— Paine *v.* Agricultural Ins. Co., 5 Thomps. & C. 619. *Compare* Gibbs *v.* Continental Ins. Co., 13 Hun 611.

Oregon.—Weidert *v.* State Ins. Co., 19 Oreg. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Canada.—Boardman *v.* North Waterloo Ins. Co., 31 Ont. 525.

See 28 Cent. Dig. tit. "Insurance," § 764 *et seq.*

88. Halpin *v.* Ætna F. Ins. Co., 120 N. Y. 70, 23 N. E. 988; Halpin *v.* Phenix F. Ins. Co., 118 N. Y. 165, 23 N. E. 482; Herrman *v.* Adriatic F. Ins. Co., 85 N. Y. 162, 39 Am. Rep. 644; Huber *v.* Manchester F. Assur. Co., 92 Hun (N. Y.) 223, 36 N. Y. Suppl. 873; Stapleton *v.* Greenwich Ins. Co., 16 Misc. (N. Y.) 483, 38 N. Y. Suppl. 973; Watertown F. Ins. Co. *v.* Cherry, 84 Va. 72, 3 S. E. 876. *Contra,* Hill *v.* Ohio Ins. Co., 99 Mich. 466, 58 N. W. 359. And *compare* Home F. Ins. Co. *v.* Peyson, 54 Nebr. 495, 74 N. W. 960.

89. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488 [*affirming* 44 N. Y. Super. Ct. 444]; Huber *v.* Manchester F. Assur. Co., 92 Hun (N. Y.) 223, 36 N. Y. Suppl. 873.

A building under the care of a person within the same inclosure was held to be vacant. Burner *v.* German-American Ins. Co., 103 Ky. 370, 45 S. W. 109, 20 Ky. L. Rep. 71. But in Home Ins. Co. *v.* Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665, such care was held to be sufficient, there being knowledge on the part of the insurer that such an arrangement would exist. And see also Halpin *v.* Phœnix Ins. Co., 4 N. Y. St. 867.

90. Fritz *v.* Home Ins. Co., 78 Mich. 565, 44 N. W. 139; Phœnix Ins. Co. *v.* Swann, (Tex. Civ. App. 1897) 41 S. W. 519; Georgia Home Ins. Co. *v.* Brady, (Tex. Civ. App. 1897) 41 S. W. 513. See also cases cited *supra,* note 89, and *infra,* note 92 *et seq.*

91. Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

92. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

93. *Iowa.*— Worley *v.* State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334; Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444.

Kentucky.— Dwelling-House Ins. Co. *v.* Walsh, 10 Ky. L. Rep. 282.

Nebraska.— Union Ins. Co. *v.* McCullough, (1901) 96 N. W. 79; German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698.

New York.— Halpin *v.* Phenix Ins. Co., 118

Such a vacancy must not, however, continue for an unreasonable length of time;[94] although it has been held that even though a long period of time had intervened, the insured was protected if he used all reasonable exertions to procure another tenant.[95] But the holding that the good faith of the insured is immaterial seems more consonant with justice.[96]

(IV) *OF OTHER BUILDINGS.* The principle that the contemplated use must govern is illustrated by what amounts to an occupancy of buildings other than dwellings. What is "non-occupancy" and "vacancy" must necessarily depend upon the nature of the premises insured.[97]

N. Y. 165, 23 N. E. 482; Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133.

Ohio.— State *v.* Tuttgerding, 8 Ohio Dec. (Reprint) 74, 5 Cinc. L. Bul. 464.

Pennsylvania.— Roe *v.* Dwelling-House Ins. Co., 149 Pa. St. 94, 23 Atl. 718, 34 Am. St. Rep. 595; Doud *v.* Citizens' Ins. Co., 141 Pa. St. 47, 21 Atl. 505, 23 Am. St. Rep. 263; Insurance Co. of North America *v.* Hannum, 1 Mona. 369.

United States.— Kelley *v.* Home Ins. Co., 14 Fed. Cas. No. 7,658.

See 28 Cent. Dig. tit. "Insurance," § 771.

Contra.— Bennett *v.* Agricultural Ins. Co., 50 Conn. 420, 51 Conn. 504; Ridge *v.* Scottish Commercial Ins. Co., 9 Lea (Tenn.) 507. And see Wheeler *v.* Phœnix Ins. Co., 53 Mo. App. 446. In Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, the policy only provided against change of risk and such incidental vacancy was not regarded as increasing the risk. In Texas this rule has been a bone of contention. In East Texas F. Ins. Co. *v.* Kempner, (Civ. App. 1894) 25 S. W. 999, the Texas court of civil appeals considered that the temporary vacancy for three days of a store building incidental to a change of tenants did not avoid the policy. This holding was reversed and the cause remanded by the supreme court in 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 990. On a second appeal the court of appeals adheres vigorously to its original views. 12 Tex. Civ. App. 533, 34 S. W. 393.

94. Dwelling-House Ins. Co. *v.* Walsh, 10 Ky. L. Rep. 282; East Texas F. Ins. Co. *v.* Smith, 3 Tex. App. Civ. Cas. § 281; Kelley *v.* Home Ins. Co., 14 Fed. Cas. No. 7,658.

The provision of the standard policy, "this policy shall be void if the building, whether intended for occupancy by owner or tenant, shall be or become vacant or unoccupied and so remain for ten days" is designed to change the rule that such incidental vacancy does not avoid the policy. Such a provision has been upheld. Robinson *v.* Ætna Ins. Co., 38 S. W. 693, 18 Ky. L. Rep. 865.

95. Gamwell *v.* Merchants', etc., Mut. F. Ins. Co., 12 Cush. (Mass.) 167. And *compare* Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.

96. Niagara F. Ins. Co. *v.* Drda, 19 Ill. App. 70; McClure *v.* Watertown F. Ins. Co., 90 Pa. St. 277, 35 Am. Rep. 656.

97. See cases cited *infra*, this note.

A church is not vacant even though no services are held therein during a period while no minister is regularly in charge, provided it is cared for as usual. Hampton *v.* Hartford F. Ins. Co., 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344. This is also true even though services have ceased for other causes if the minister who holds the title uses the buildings for his personal devotions. Caraher *v.* Royal Ins. Co., 63 Hun (N. Y.) 82, 17 N. Y. Suppl. 858.

A school building, however, is unoccupied during the period of the summer vacation. American Ins. Co. *v.* Foster, 92 Ill. 334, 34 Am. Rep. 134.

An elevator is not "vacant or unoccupied" when used for storage of tools and machinery. Clifton Coal Co. *v.* Scottish Union, etc., Ins. Co., 102 Iowa 300, 71 N. W. 433. It was likewise held when no steam was up and no men working, but the insured kept his papers at the elevator and persons were around the building, that it was not "vacant." Williams *v.* North German Ins. Co., 24 Fed. 625.

A store building is unoccupied even though certain fixtures may remain therein. Limburg *v.* German F. Ins. Co., 90 Iowa 709, 57 N. W. 626, 48 Am. St. Rep. 468, 23 L. R. A. 99; Home Ins. Co. *v.* Scales, 71 Miss. 975, 15 So. 134, 42 Am. St. Rep. 512. But as such premises are frequently intended for rental, the customary use may permit of renovation or preparation for tenants without the disuse amounting to non-occupancy. Rockford Ins. Co. *v.* Wright, 39 Ill. App. 574. *Compare* East Texas F. Ins. Co. *v.* Kempner, 12 Tex. Civ. App. 533, 34 S. W. 393 [*doubting* East Texas F. Ins. Co. *v.* Kempner, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99 (*reversing* Tex. Civ. App. (1894) 25 S. W. 999)].

Ice-houses and manufactories.— That occupancy of the type required for other premises is not necessary in the case of ice-houses and manufactories because not contemplated by the insurer has been held, the cases asserting that such occupancy is impracticable. Des Moines Ice Co. *v.* Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600; Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

Other factories.— In the case of factories and mills a mere temporary suspension of work therein does not amount to a vacancy and non-occupancy. Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479. Particularly is this so where the premises were customarily rented to tenants and the fire occurred while a new tenant was being sought, the fixtures and tools being all in the factory as usual. This was a mere temporary non-occupancy incidental to a change of tenants. Halpin *v.* Phenix Ins. Co., 118 N. Y.

C. Keeping and Use of Prohibited Articles—1. Provisions of Policy. If the policy expressly states[98] that certain articles may not be used or kept on the premises under penalty of forfeiture, this amounts to a promissory warranty and courts regard the condition as reasonable and enforceable.[99]

2. Classification of Hazards. If a policy classes articles that may be kept thereunder into groups, and differentiates these groups as ordinarily, extra, or specially hazardous, prohibiting the keeping of articles falling in other groups than those specifically permitted, the keeping of such differently grouped articles will avoid the policy.[1]

3. Increase of Risk. The same result is had if the policy provides that it is to be void should the risk be "increased by any means within the insured's knowledge," and articles intrinsically dangerous are used or kept upon the premises.[2]

165, 23 N. E. 482. The clauses of the modern policy against cessation of the operations of a mill or manufactory have accordingly resulted. See *supra*, XIII, B, 5, d.

98. Unless the policy, or the charter or by-laws of a mutual company, provide that the keeping or use of certain articles shall affect the policy, the insured has a right to use upon the premises any substance or article he desires. Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494.

99. *Louisiana.*— Dittmer *v.* Germania Ins. Co., 23 La. Ann. 458, 8 Am. Rep. 600.

New Hampshire.— Wheeler *v.* Traders' Ins. Co., 62 N. H. 326, 13 Am. St. Rep. 582.

New York.— Matson *v.* Farm Buildings F. Ins. Co., 73 N. Y. 310, 29 Am. Rep. 149 [*reversing* 9 Hun 415]; Westfall *v.* Hudson River F. Ins. Co., 12 N. Y. 289; Mead *v.* Northwestern Ins. Co., 7 N. Y. 530; Stettiner *v.* Granite Ins. Co., 5 Duer 594; Duncan *v.* Sun F. Ins. Co., 6 Wend. 488, 22 Am. Dec. 539.

Pennsylvania.— Lutz *v.* Royal Ins. Co., 205 Pa. St. 159, 54 Atl. 721; White *v.* Western Assur. Co., 3 Pa. Cas. 267, 6 Atl. 113.

United States.— Gunther *v.* Liverpool, etc., Ins. Co., 134 U. S. 110, 10 S. Ct. 448, 33 L. ed. 857.

Canada.— Gauthier *v.* Canadian Mut. Ins. Co., 29 U. C. C. P. 593.

See 28 Cent. Dig. tit. "Insurance," § 782.

A mere statement that a certain article or commodity "is not insurable" does not amount to a provision that the use or keeping of such commodity will terminate the policy. It means simply that the value thereof will be excluded from any estimate of loss unless specially insured. Duncan *v.* Sun F. Ins. Co., 6 Wend. (N. Y.) 488, 22 Am. Dec. 539.

Policies are construed, in this respect as in others, most strongly against the insurer. Phœnix Ins. Co. *v.* Slaughter, 12 Wall. (U. S.) 404, 20 L. ed. 444. Thus in the last case cited a policy stipulating that it should be void "if gunpowder, etc., be kept on the premises, or if camphene, etc., be kept in quantities exceeding one barrel" was construed to allow gunpowder on the premises up to the amount of one barrel. See *supra*, XIII, A, 8. So a general description of goods insured will operate as a permission to keep all goods customarily kept under that description (Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492. See also *infra*, XIII, C, 9, c), but not to keep goods prohibited by ordinance, particularly when the policy provides that commodities of the stated character should not be kept in a different manner than that prescribed by law (Jones *v.* Fireman's Fund Ins. Co., 51 N. Y. 318). For a construction of policy wherein there was a conflict of printed terms resulting in a permission to keep gunpowder see Bowman *v.* Pacific Ins. Co., 27 Mo. 152. See Grant *v.* Howard Ins. Co., 5 Hill (N. Y.) 10, for an instance of construction of terms to ascertain what was prohibited by a stipulation as to "house-building or repairing."

1. *Louisiana.*— Davern *v.* Merchants', etc., Ins. Co., 7 La. Ann. 344.

Maine.— Richards *v.* Protection Ins. Co., 30 Me. 273.

Massachusetts.—Whitmarsh *v.* Charter Oak F. Ins. Co., 2 Allen 581; Lee *v.* Howard F. Ins. Co., 3 Gray 583.

New York.— Jones *v.* Fireman's Fund Ins. Co., 51 N. Y. 318; Reynolds *v.* Commerce F. Ins. Co., 47 N. Y. 597; Pindar *v.* Continental Ins. Co., 38 N. Y. 364, 97 Am. Dec. 795.

Tennessee.— People's Ins. Co. *v.* Kuhn, 12 Heisk. 515.

Vermont.— Wilson *v.* Union Mut. F. Ins. Co., 75 Vt. 320, 55 Atl. 662.

Canada.— Merrick *v.* Provincial Ins. Co., 14 U. C. Q. B. 439; Mooney *v.* Imperial F. Ins. Co., 3 Montreal Super. Ct. 339.

See 28 Cent. Dig. tit. "Insurance," § 782.

The rule stated in the text applies, however, only to articles that increase the risk to the premises insured and not to those considered hazardous because of their own liability to damage, and which do not call for an increase of premium on the premises containing them. Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124.

2. Appleby *v.* Astor F. Ins. Co., 54 N. Y. 253; Heron *v.* Phœnix Mut. F. Ins. Co., 180 Pa. St. 257, 36 Atl. 740, 57 Am. St. Rep. 638, 36 L. R. A. 517.

It must affirmatively appear that the risk was increased. Such would not be the result of the use of a less inflammable substance than that specifically permitted. Grand

4. Materiality of Breach. When the keeping of a certain article is prohibited it is wholly immaterial, if it be kept, that its keeping was not connected with the occurring of the fire.[3] Under such a prohibition the increase or non-increase of risk is also generally deemed immaterial.[4] Statutory enactments, however, frequently change this rule.[5]

5. Knowledge of Insured. Unless the provision of the policy relied on by the insurer be if "the risk was increased by means within the control or knowledge of the assured," and instead the policy prohibits the keeping of specified articles, the fact that the prohibited articles were kept by another than the insured and without his knowledge is immaterial.[6]

6. Use Discontinued. If the policy provides only for a suspension thereof while prohibited articles are upon the premises, the discontinuance of such a use revives the operation of the policy.[7] If the policy provides that it shall be void

Rapids Hydraulic Co. *v.* American F. Ins. Co., 93 Mich. 396, 53 N. W. 538.

The mere failure to extinguish lamps at a time long prior to the fire is not a use that increases the risk, even though the policy provides that lamps shall be put out at the close of the day's business. Fireman's Ins. Co. *v.* Cecil, 12 Ky. L. Rep. 48, 259.

The use of a fluid, not specifically prohibited, for lighting purposes in moderate quantities is not an increase of the risk. Wheeler *v.* American Cent. Ins. Co., 6 Mo. App. 235. The keeping of gasoline and coal oil in reasonable quantities in a grocery for sale at retail will not, according to Renshaw *v.* Missouri Mut. F. & M. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904, vitiate a policy, not specifically prohibiting the same, but providing that the policy shall be void if the premises are occupied in such a way as to increase the risk.

The term "change" is a synonym of "increase" in the condition "if the risk be increased or changed by any means whatever," the policy shall be void. Gill *v.* Canada F. & M. Ins. Co., 1 Ont. 341; Ottawa, etc., Forwarding Co. *v.* Liverpool, etc., Ins. Co., 28 U. C. Q. B. 518.

3. *California.*— Bastian *v.* British American Assur. Co., 143 Cal. 287, 77 Pac. 63, 66 L. R. A. 255.

Illinois.— Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390 [*affirmed* in 204 Ill. 334, 68 N. E. 551].

Maine.— Richards *v.* Protection Ins. Co., 30 Me. 273.

Missouri.— Kennefick-Hammond Co. *v.* Norwich Union F. Ins. Soc., (App. 1904) 80 S. W. 694.

New York.— Williams *v.* People's F. Ins. Co., 57 N. Y. 274.

Texas.— Pennsylvania F. Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

See 28 Cent. Dig. tit. "Insurance," § 782 *et seq.*

4. Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390 [*affirmed* in 204 Ill. 334, 68 N. E. 551]; Richards *v.* Protection Ins. Co., 30 Me. 273.

5. Atherton *v.* British-America Assur. Co., 91 Me. 289, 39 Atl. 1006.

6. *Illinois.*— Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390 [*affirmed* in 204 Ill. 334, 68 N. E. 551].

Kansas.— German F. Ins. Co. *v.* Shawnee County, 54 Kan. 732, 39 Pac. 697, 45 Am. St. Rep. 306.

New Hampshire.— Badger *v.* Platts, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572.

New York.— Kohlmann *v.* Selvage, 34 N. Y. App. Div. 380, 54 N. Y. Suppl. 230; Duncan *v.* Sun F. Ins. Co., 6 Wend. 488, 22 Am. Dec. 539.

Pennsylvania.— Farmers', etc., Ins. Co. *v.* Simmons, 30 Pa. St. 299; Philadelphia Fire Assoc. *v.* Williamson, 26 Pa. St. 196.

United States.— Gunther *v.* Liverpool, etc., Ins. Co., 134 U. S. 110, 10 S. Ct. 448, 33 L. ed. 857; Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 6 S. Ct. 306, 29 L. ed. 575.

See 28 Cent. Dig. tit. "Insurance," § 782 *et seq.*

Extent and limits of rule.— This is true even though the act be in defiance of the insured's orders. Farmers', etc., Ins. Co. *v.* Simmons, 30 Pa. St. 299. These statements are applicable to a use by tenants. See cases cited *supra*, this note. But in Gunther *v.* Liverpool, etc., Ins. Co., 85 Fed. 846, it was held that the act of a third party taking benzine into a hotel for individual purposes not connected with the running of the hotel did not avoid the policy thereon. And see Copp *v.* German-American Ins. Co., 51 Wis. 637, 8 N. W. 127, 616, where the fact that insured believed the substance he was using was composed of ingredients not prohibited, it appearing that it was not more dangerous than the substance actually permitted, kept the policy from being vitiated.

7. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202; Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368. So when the policy provided that the insurer should be released from loss caused by the use of kerosene except for lights, the lamps to be filled without the use of artificial lights, the filling of lamps by such light was held not a forfeiture, but only as creating exemption from any loss caused thereby. Jones *v.* Howard Ins. Co., 10 N. Y. St. 120.

if prohibited articles are used or kept on the premises, the authorities are in conflict upon the question of whether or not the policy revives upon a cessation of the prohibited act.[8]

7. USE ON ADJACENT PREMISES. Without such a provision as is contained in the New York standard policy[9] the keeping of prohibited articles by the insured on land adjoining or such keeping by those under his control will not work a forfeiture.[10] An increase of the risk by the use of adjacent premises not under insured's control, there being no provision as to adjacent premises in the policy, will not affect the rights of insured.[11]

8. PERMISSION TO USE. If permission be obtained to use or keep articles prohibited by the policy, all keeping and using must be done strictly in accordance with the terms of the permission, or forfeiture results.[12]

9. WHAT CONSTITUTES A "KEEPING OR USING" — a. In General. These words have been construed to mean a permanent keeping or use. A "casual" deposit of articles in a building has therefore been said not to be a "keeping or using;"[13] so likewise of a temporary use.[14] The addition to these two terms of a third, "allowed," the policy thus providing that it shall be void if certain articles are "kept, used, or allowed" on the premises, does not seem to have modified the

8. The general rule in the case of breach of promissory warranty, the policy stipulating that it shall be void, is that the policy is dead and can be revivified only by express agreement between the parties thereto. Davis *v.* German American Ins. Co., 135 Mass. 251; Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302. See also *supra*, XIII, A, 3. This rule has been followed where the cause of the forfeiture has been the use or keeping of prohibited articles. Wheeler *v.* Traders' Ins. Co., 62 N. H. 450.

On the other hand in some states it has been asserted that the validity of the policy should depend upon the state of the premises at the time of the loss. Fireman's Ins. Co. *v.* Cecil, 12 Ky. L. Rep. 48, 259; Chester County Mut. F. Ins. Co. *v.* Coatesville Shoe Factory, 80 Pa. St. 407; Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930. And other cases reach about the same conclusion by construing the phrase "used or kept" as meaning a permanent and not a temporary keeping. Mears *v.* Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647; Springfield F. & M. Ins. Co. *v.* Wade, 95 Tex. 598, 68 S. W. 977, 93 Am. St. Rep. 870, 58 L. R. A. 714.

9. The New York standard policy provides that the keeping or use of prohibited articles on adjacent premises shall avoid the policy, and the keeping of such on premises adjacent and under the control of the insured, will cause a forfeiture. Kohlmann *v.* Selvage, 34 N. Y. App. Div. 380, 54 N. Y. Suppl. 230.

10. *Maryland.*— Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440.

Missouri.— La Force *v.* Williams City F. Ins. Co., 43 Mo. App. 518.

Nebraska.— Hanover F. Ins. Co. *v.* Stoddard, 52 Nebr. 745, 73 N. W. 291.

New York.— Rau *v.* Westchester F. Ins. Co., 36 N. Y. App. Div. 179, 55 N. Y. Suppl. 459.

Pennsylvania.— Allemania F. Ins. Co. *v.* Pitts Exposition Soc., 8 Pa. Cas. 424, 11 Atl. 572.

Texas.— Fireman's Fund Ins. Co. *v.* Shearman, 20 Tex. Civ. App. 343, 50 S. W. 598.

Wisconsin.— Northwestern Mut. L. Ins. Co. *v.* Germania F. Ins. Co., 40 Wis. 446.

United States.— Sperry *v.* Insurance Co. of North America, 22 Fed. 516.

See 28 Cent. Dig. tit. "Insurance," § 782 *et seq.*

A policy prohibiting on the premises "the use of gasoline for lighting" does not prohibit the burning therein of a gas generated from gasoline in gas-works outside of such premises. Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168.

The term "premises" is not applicable to personalty. Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142. See also *supra*, XIII, B, 7, g. Meaning of "premises" see Boyer *v.* Grand Rapids F. Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338.

Premises fifty feet away are not "contiguous." Arkell *v.* Commerce Ins. Co., 7 Hun (N. Y.) 455 [*affirmed* in 69 N. Y. 191, 25 Am. Rep. 168].

11. Des Moines State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281; McKee *v.* Susquehanna Mut. F. Ins. Co., 135 Pa. St. 544, 19 Atl. 1067.

12. Cerf *v.* Home Ins. Co., 44 Cal. 320, 13 Am. Rep. 165; Maryland F. Ins. Co. *v.* Whiteford, 31 Md. 219, 100 Am. Rep. 45; Shipman *v.* Oswego, etc., Ins. Co., 79 N. Y. 627, 21 Alb. L. J. 153; Gunther *v.* Liverpool, etc., Ins. Co., 85 Fed. 846.

The agreement of an agent with the insured that he might keep ten pounds of powder on the premises was held valid in Parsons *v.* Queen's Ins. Co., 2 Ont. 45, when the policy provided that the keeping of twenty-five pounds would avoid the policy.

13. Hynds *v.* Schenectady County Mut. Ins. Co., 11 N. Y. 554 [*affirming* 16 Barb. 119]; Nashville State Ins. Co. *v.* Hughes, 10 Lea (Tenn.) 461.

14. Merchants', etc., Mut. Ins. Co. *v.* Washington Mut. Ins. Co., 1 Handy (Ohio) 408,

foregoing rule, as the term has been construed to mean "allowed to be kept or used."[15] The term "storing," not now so frequently employed as formerly, has reference to a keeping in a mercantile sense in considerable quantities with a view to traffic or safe-keeping, not to one where the keeping is incidental and only for the purpose of consumption.[16] So a keeping only of reasonable amounts for the purpose of selling by retail has been held to be not a "storing."[17] Otherwise than in these instances the amount kept is immaterial except under statutes, for the presence of small quantities if "kept or used" will vitiate the policy.[18]

b. Effect of Custom of Business. It has repeatedly been held that a breach of a printed condition of a policy against the keeping of certain substances does not preclude recovery when the subject-matter insured was known to the insurer to be such that the use of these substances was a necessary and usual incident of the business,[19] provided that such substances be kept only in such quantities and

12 Ohio Dec. (Reprint) 209 [*affirming* 1 Handy 181, 12 Ohio Dec. (Reprint) 90]; Mears *v.* Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647; Springfield F. & M. Ins. Co. *v.* Wade, 95 Tex. 598, 68 S. W. 977, 93 Am. St. Rep. 870, 58 L. R. A. 714; Fireman's Fund Ins. Co. *v.* Shearman, 20 Tex. Civ. App. 343, 50 S. W. 598. *Contra*, Wheeler *v.* Traders' Ins. Co., 62 N. H. 450.

For household use.—The use of small quantities of gasoline for the purpose of cleaning clothes and destroying vermin is not a breach of a condition of a policy providing that it shall be void if gasoline is stored or used in or on the premises. La Force *v.* Williams City F. Ins. Co., 43 Mo. App. 518. So likewise such a use is not an increase of hazard. Columbia Planing Mill Co. *v.* American F. Ins. Co., 59 Mo. App. 204.

For exhibition.— While the keeping of articles to be exhibited or to be used as means and instruments of the exhibition is not a "keeping and storage" thereof (New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537) it yet amounts to a prohibited "use" and as such avoids the policy (Fischer *v.* London, etc., F. Ins. Co., 83 Fed. 807). In Humboldt F. Ins. Co. *v.* Mears, 29 Pittsb. Leg. J. (Pa.) 365, the temporary keeping of a prohibited illuminant used only for the purpose of cleaning machinery and for needful light was held not a prohibited "keeping." *Contra*, Westfall *v.* Hudson River F. Ins. Co., 12 N. Y. 289, a well reasoned opinion.

Materials for repair.— So a painter's temporary storage of materials used by him in repainting the premises has been held not to be a "storing" of such prohibited materials. O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122. So likewise the keeping of gasoline to be put in torches to burn off the paint in order to repair the building was held in Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368, not to violate a condition that gasoline should not be "kept, used, or allowed" on the premises. *Contra*, Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587, where the use of a naphtha torch to burn off paint was held to vitiate the policy stipulating against the keeping or using of naphtha on the premises, although repairs were considered not prohibited if properly made.

15. London, etc., F. Ins. Co. *v.* Fischer, 92 Fed. 500, 34 C. C. A. 503.

16. Rafferty *v.* New Brunswick F. Ins. Co., 18 N. J. L. 480, 38 Am. Dec. 525; Williams *v.* Fireman's Fund Ins. Co., 54 N. Y. 569, 13 Am. Rep. 620; Bayly *v.* London, etc., Ins. Co., 2 Fed. Cas. No. 1,145.

17. Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492; Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904; New York Equitable Ins. Co. *v.* Langdon, 6 Wend. (N. Y.) 623; Leggett *v.* Ætna Ins. Co., 10 Rich. (S. C.) 202. But the contrary has been held, when the policy prohibits "storing and vending," although this would not prohibit the keeping of a small amount of the article for personal use. Bayly *v.* London, etc., Ins. Co., 2 Fed. Cas. No. 1,145. The contrary has also been held when the policy stipulated that saltpeter should not be "kept" on the premises. Commercial Ins. Co. *v.* Mehlman, 48 Ill. 313, 95 Am. Dec. 543.

18. Richards *v.* Protection Ins. Co., 30 Me. 273; Boyer *v.* Grand Rapids F. Ins. Co., 124 Mich. 455, 83 N. W. 124, 83 Am. St. Rep. 338; Fischer *v.* London, etc., F. Ins. Co., 83 Fed. 807.

19. *Georgia.*— Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835.

Indiana.— Phenix Ins. Co. *v.* Walters, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. Rep. 257, holding it to be immaterial that the policy provides that any usage or custom of trade or manufacture is expressly subordinated to the printed provisions of the policy which enumerate prohibited articles.

Maine.— Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514.

Maryland.— Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440.

Michigan.— Au Sable Lumber Co. *v.* Detroit Manufacturers' F. Ins. Co., 89 Mich. 407, 50 N. W. 870; Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124.

New York.— Hall *v.* Insurance Co. of North America, 58 N. Y. 292, 17 Am. Rep. 255; Bryant *v.* Poughkeepsie Mut. Ins. Co., 17 N. Y. 200 [*affirming* 21 Barb. 154]; New

used only in such manner as was necessary and usual.[20] When the goods are insured under general terms, such as "Yankee notions,"[21] "articles usually kept for sale in retail drug stores,"[22] "merchandise such as is usually kept in a country store,"[23] "merchandise usually kept for sale in a retail hardware store,"[24] "groceries,"[25] etc., proof of custom is always admissible to complete the description. Hence printed provisions of such policies prohibiting the keeping of articles customarily sold in such places are repugnant to the actual agreement, and a breach therein does not affect the insurance.[26]

c. Specific Articles Prohibited. Substances commonly prohibited by the general terms of a policy are explosives,[27] petroleum products, and illuminants,[28] such articles being dangerous. But any article may by the express terms of the

York *v.* Brooklyn F. Ins. Co., 41 Barb. 231; Harper *v.* City Ins. Co., 1 Bosw. 520 [*affirmed* in 22 N. Y. 441]; New York Equitable Ins. Co. *v.* Langdon, 6 Wend. 623.

Pennsylvania.— McKeesport Mach. Co. *v.* Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. 16; Fraim *v.* National F. Ins. Co., 170 Pa. St. 151, 32 Atl. 613, 50 Am. St. Rep. 753; Baumgardner *v.* Insurance Co., 1 Wkly. Notes Cas. 119. But see Birmingham F. Ins. Co. *v.* Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147.

Vermont.— Mascott *v.* Granite State F. Ins. Co., 68 Vt. 253, 35 Atl. 75.

Wisconsin.— Davis *v.* Pioneer Furniture Co., 102 Wis. 394, 78 N. W. 596; Faust *v.* American F. Ins. Co., 91 Wis. 158, 64 N. W. 883, 51 Am. St. Rep. 876, 30 L. R. A. 783.

See 28 Cent. Dig. tit. "Insurance," § 782 *et seq.*

The contrary has, however, been held, the court considering that express prohibitory provisions necessarily govern a custom. Macomber *v.* Howard F. Ins. Co., 7 Gray (Mass.) 257; Beer *v.* Forest City Mut. Ins. Co., 39 Ohio St. 109; Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234; Mason *v.* Hartford F. Ins. Co., 29 U. C. Q. B. 585.

20. Maril *v.* Connecticut F. Ins. Co., 95 Ga. 604, 23 S. E. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; Lutz *v.* Royal Ins. Co., 205 Pa. St. 159, 54 Atl. 721; Citizens' Ins. Co. *v.* McLaughlin, 53 Pa. St. 485.

So, although petroleum be prohibited from a mill, it may be kept for use in lubricating the machinery (Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440), or cleaning it (Mears *v.* Humboldt Ins. Co., 92 Pa. St. 15, 37 Am. Rep. 647).

Similarly it has been held that a prohibition of the use of gasoline for culinary purposes is repugnant to insurance on household and kitchen furniture in a community where gasoline stoves are generally used. American Cent. Ins. Co. *v.* Green, 16 Tex. Civ. App. 531, 41 S. W. 74. *Compare* Dwelling-House Ins. Co. *v.* Snyder, 59 N. J. L. 18, 34 Atl. 931 [*reversed* in 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. Rep. 625].

Such articles could not be kept in a way or to an extent which could not have been contemplated at the time of the issuance of the policy. Collins *v.* Farmville Ins., etc., Co., 79 N. C. 279, 28 Am. Rep. 322.

21. Barnum *v.* Merchants' F. Ins. Co., 97 N. Y. 188.

22. Ackley *v.* Phenix Ins. Co., 25 Mont. 272, 64 Pac. 665.

23. Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857; American F. Ins. Co. *v.* Nugent, 7 Ky. L. Rep. 597; Cincinnati Mut. Ins. Co. *v.* Corey, 1 Ohio Dec. (Reprint) 379, 8 West. L. J. 470.

24. Phenix Ins. Co. *v.* Walters, 24 Ind. App. 87, 56 N. E. 257, 79 Am. St. Rep. 257; Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

25. Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124; Nicholson *v.* Phœnix Ins. Co., 45 U. C. Q. B. 359.

26. See cases cited *supra*, notes 19 *et seq.* *Contra*, Cobb *v.* Insurance Co. of North America, 17 Kan. 492; Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. 415, 9 Ky. L. Rep. 3. *Compare* Steinbach *v.* New York Relief F. Ins. Co., 13 Wall. (U. S.) 183, 20 L. ed. 615.

27. If explosives be kept contrary to the terms of an ordinance regulating their use or storage, a provision of the policy against illegal use will be upheld. Jones *v.* Fireman's Fund Ins. Co., 2 Daly (N. Y.) 307 [*affirmed* in 51 N. Y. 318].

Fireworks are not included under the designation of "firecrackers" (Steinbach *v.* New York Relief F. Ins. Co., 13 Wall. (U. S.) 183, 20 L. ed. 615) or "gunpowder" (Tischler *v.* California Farmers' Mut. F. Ins. Co., 66 Cal. 178, 4 Pac. 1169). But *compare* Mechanics', etc., Ins. Co. *v.* Floyd, 49 S. W. 543, 20 Ky. L. Rep. 1538.

Gunpowder is permitted under the term "Yankee notions." Barnum *v.* Merchants' F. Ins. Co., 97 N. Y. 188.

Dynamite and giant powder are sufficiently described by the term "nitro-glycerine." Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234.

28. Camphene.— The use of this product for lighting purposes when the policy prohibits it upon the premises will of course vitiate the policy. Westfall *v.* Hudson River F. Ins. Co., 12 N. Y. 289; Stettiner *v.* Granite Ins. Co., 5 Duer (N. Y.) 594.

Gasoline has been held to be a "refined earth oil" (Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590), and to be prohibited under the designation of "petroleum," as being a product of petroleum (Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590). Gasoline is not "used on the premises" when it is stored off the premises and there vaporized, and the vapor is carried into the build-

policy be agreed upon as hazardous within the meaning of the policy, as spirituous liquors, rags, waste, flax, or loose hay.[29]

D. Special Causes Increasing Risk — 1. In General. A statement by the insured in an application for insurance, although by the policy denominated a warranty, as to conditions prevailing, or rules and regulations as to conduct on the insured premises, is only a warranty *in præsenti* and is not promissory.[30] But if the policy requires the insured to disclose in the future any changes in such matters, increasing the risk, he is held to the same degree of strictness in disclosing such increase of risk as in disclosing facts existing at the time of the application,[31] and such a clause refers to matters not specifically referred to in the policy.[32] But such increase of hazard is one which amounts to a permanent change and not to a mere temporary cause removable and removed prior to loss.[33] The question

ing by a pipe and used for lighting. Arkell *v.* Commerce Ins. Co., 69 N. Y. 191, 25 Am. Rep. 168; Queen Ins. Co. *v.* Sinclair, 1 Ohio Cir. Ct. 496, 1 Ohio Cir. Dec. 276. A naked privilege to use a gas apparatus does not justify insured in keeping and storing gasoline. Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 6 S. Ct. 306, 29 L. ed. 575.

Kerosene is not prohibited by a stipulation against "camphene, spirit-gas, burning-fluid, or chemical oils." Wheeler *v.* American Cent. Ins. Co., 6 Mo. App. 235. Although petroleum be prohibited, it may be used for such incidental purposes as greasing machinery. Carlin *v.* Western Assur. Co., 57 Md. 515, 40 Am. Rep. 440. It has been held that in the absence of proof kerosene will not be held to be a "burning fluid or chemical oil," as these words are used in an insurance policy. Mark *v.* National F. Ins. Co., 24 Hun (N. Y.) 565. Kerosene has been held to come under the head of "rock or earth oil" (Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26), and under the designation of "crude, or refined coal or earth oils" (Bennett *v.* North British, etc., Ins. Co., 81 N. Y. 273, 37 Am. Rep. 501). But see Morse *v.* Buffalo F. & M. Ins. Co., 30 Wis. 534, 11 Am. Rep. 587.

Naphtha is not included under the term "burning fluid," for this term has a technical meaning, and does not denote any fluid that will burn. Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368.

29. Thus the placing of cold ashes in a building is not a violation of a condition against ashes and lime. Montmagny Mut. F. Ins. Co. *v.* Carbonneau, 15 Quebec 86, 16 Rev. Lég. 275.

Flax see Hynds *v.* Schenectady County Mut. Ins. Co., 16 Barb. (N. Y.) 119 [*affirmed* in 11 N. Y. 554].

Hay see Dittmer *v.* Germania Ins. Co., 23 La. Ann. 458, 8 Am. Rep. 600.

Rags.— The keeping of rags or waste is not improper except where the policy so provides. Gould *v.* York County Mut. F. Ins. Co., 47 Me. 403, 74 Am. Dec. 494. Effect of custom upon such a provision see Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray (Mass.) 139; Macomber *v.* Howard F. Ins. Co., 7 Gray (Mass.) 257.

The breach of any prohibition as to its keeping, subject to the rules announced in the text, will avoid the policy. White *v.* Western Assur. Co., 3 Pa. Cas. 267, 6 Atl. 113. Thus filling lamps by artificial light when the policy permits the use of kerosene only under the restriction that it be not drawn near an artificial light will exempt the company from a loss caused thereby. Jones *v.* Howard Ins. Co., 10 N. Y. St. 120; Gunther *v.* Liverpool, etc., Ins. Co., 34 Fed. 501.

30. Hosford *v.* Germania F. Ins. Co., 127 U. S. 399, 8 S. Ct. 1199, 32 L. ed. 196. But *compare* Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. (Del.) 101; Boatwright *v.* Ætna Ins. Co., 1 Strobh. (S. C.) 281.

31. Calvert *v.* Hamilton Mut. Ins. Co., 1 Allen (Mass.) 308, 79 Am. Dec. 744; Redman *v.* Hartford F. Ins. Co., 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751.

Verbal notice to a general agent is sufficient. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

A promissory warranty is applicable only to a future change of circumstances (Straker *v.* Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752); thus a sale under mechanics' liens filed prior to the insurance is not an increase of hazard within the meaning of such a prohibition (Greenlee *v.* North British, etc., Ins. Co., 102 Iowa 427, 71 N. W. 534, 63 Am. St. Rep. 455).

Strict construction of policy against insurer see Bentley *v.* Lumberman's Ins. Co., 191 Pa. St. 276, 43 Atl. 209, where the sprinkling of benzine over the carpet and furniture of a room, its use not being specifically prohibited on the premises, was held not to be a breach of a condition that "if the risk of the building insured shall afterwards be increased by any means" the policy should be void.

32. Thuringia Ins. Co. *v.* Norwaysz, 104 Ill. App. 390. The use of a new invention materially increasing the risk would thus avoid the policy. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450.

33. *Georgia.*— Adair *v.* Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 73 Am. St. Rep. 122, 45 L. R. A. 204.

Illinois.— Insurance Co. of North America *v.* McDowell, 50 Ill. 120, 99 Am. Dec. 497; Schmidt *v.* Peoria M. & F. Ins. Co., 41 Ill. 295.

Minnesota.— Kells *v.* Northwestern Live-

whether or not the risk is actually increased is one for the jury in an action on the policy.[34]

2. Stoves and Heating Apparatus. A statement of the method of heating in use at the time of the issuance of the policy does not amount to a promissory warranty in the absence of some express promissory stipulation.[35] But an agreement that the insured will use a certain form of heating apparatus,[36] or that he will use it in a certain way, is a warranty, the breach of which will invalidate the policy.[37]

3. Engines. The use of a steam engine is frequently a subject of prohibition in policies. If such use is entirely prohibited, a breach of the condition avoids the policy.[38] So if the requirement be that notice should be given, and the use materially increases the risk, a failure to give notice vitiates the contract.[39] If the policy prohibits a change in the premises increasing the risk, the placing of a gasoline engine therein is a violation of the policy.[40]

E. Change of Location of Property — 1. Effect of in General. A description as to the location of property, although it may be a warranty *in præsenti*, is not, in the absence of an express stipulation, a promissory warranty that the property will remain in the location described.[41] The same rule has been applied to the insurance of a building so that its removal, not increasing the risk, did not

Stock Ins. Co., 64 Minn. 390, 67 N. W. 215, 71 N. W. 5, 58 Am. St. Rep. 541.

New York.— Delonguemare *v.* Tradesmen's Ins. Co., 2 Hall 629.

South Carolina.— Leggett *v.* Ætna Ins. Co., 10 Rich. 202.

South Dakota.— Angier *v.* Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685.

United States.— Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

See 28 Cent. Dig. tit. "Insurance," § 846. See also *supra*, XII, A, 3.

An act changing the surrounding conditions to diminish the danger of fire is not a violation of such a provision. Allemania F. Ins. Co. *v.* White, 8 Pa. Cas. 308, 11 Atl. 96.

If two changes are made, one increasing and the other decreasing the risk, the forfeiture occurs despite the change causing the decrease of risk. Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

Such a provision is intended to protect against change in structure, methods of heating, care, lighting, use, and additions and not against a sale. Collins *v.* London Assur. Corp., 165 Pa. St. 298, 30 Atl. 294.

34. See *infra*, XXI, H, 2, b, (IX).

35. Schmidt *v.* Peoria M. & F. Ins. Co., 41 Ill. 295; Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219; Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. (N. Y.) 570.

36. Murdock *v.* Chenango County Mut. Ins. Co., 2 N. Y. 210; Alston *v.* Mechanics' Mut. Ins. Co., 1 Hill (N. Y.) 510.

37. Daniels *v.* Equitable F. Ins. Co., 50 Conn. 551.

The warranty may be qualified by the language used, to refer only to a material breach, but ordinarily the *quantum* of breach is immaterial, provided there is an increase of risk. Waterbury *v.* Dakota F. & M. Ins. Co., 6 Dak. 468, 43 N. W. 697; Bankhead *v.* Des Moines Ins. Co., 70 Iowa 387, 30 N. W. 740.

Likewise a warranty must always be construed with reference to the subject-matter and the use intended. Thus the temporary removal of a stovepipe for cleaning, the insured forgetting to replace the same, is not a breach of a warranty to keep all pipes "in a proper condition." Mickey *v.* Burlington Ins. Co., 35 Iowa 174, 14 Am. Rep. 494. And see Loud *v.* Citizens' Mut. Ins. Co., 2 Gray (Mass.) 221. See also *supra*, XIII, A, 8.

38. Davis *v.* Western Home Ins. Co., 81 Iowa 496, 46 N. W. 1073, 25 Am. St. Rep. 509, 10 L. R. A. 359; Wilson *v.* Union Mut. F. Ins. Co., 75 Vt. 320, 55 Atl. 662.

A mere temporary use, discontinued before loss, of a threshing engine will not work a forfeiture under a policy against a "change in the use or condition of the building." Adair *v.* Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 73 Am. St. Rep. 122, 45 L. R. A. 204.

A prohibition of the use of a steam farm engine within a certain distance of the insured building covers any engine adapted for farm purposes. Wilson *v.* Union Mut. F. Ins. Co., (Vt. 1904) 58 Atl. 799.

In the absence of a provision, the placing of a steam thresher near the property is not as a matter of law an increase of risk. Orient Ins. Co. *v.* McKnight, 96 Ill. App. 525 [*affirmed* in 197 Ill. 190, 64 N. E. 339]; German Ins. Co. *v.* Hart, 16 Ky. L. Rep. 344; Johnston *v.* Dominion Grange Mut. F. Ins. Co., 23 Ont. App. 729.

The removal of an engine does not increase the risk. Clifton Coal Co. *v.* Scottish Union, etc., Ins. Co., 102 Iowa 300, 71 N. W. 433.

39. Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361; Stokes *v.* Cox, 1 H. & N. 533, 3 Jur. N. S. 45, 26 L. J. Exch. 113, 5 Wkly. Rep. 89.

40. Matthews *v.* Northern Assur. Co., 3 Rev. Lég. 450.

41. London, etc., F. Ins. Co. *v.* Graves, 4 Ky. L. Rep. 706; Holbrook *v.* St. Paul F. &

vitiate the policy.[42] The foregoing holding is in accord with general principles as to promissory warranties, but it has been held that words descriptive of the location of an insured article do constitute a warranty that it will not be removed therefrom except for purposes incident to its use and enjoyment.[43] There are many authorities that property remains insured while being put to its adapted uses, even though temporarily outside the premises mentioned in the policy;[44] but there does not seem to be such a holding under the provision of the standard policy.

2. PROVISIONS OF POLICY. If the policy provides, as does the New York standard policy, that articles are insured "while located as described herein and not elsewhere," the insurance terminates upon the removal of the subject-matter of the policy.[45] But the policy revives upon its restoration to its original location or second removal with the insurer's consent.[46] A provision in the policy that it shall become "void" upon a removal of the property from the premises where it was insured is construed as meaning only a suspension during the period of removal.[47] If the policy provides against an "increase of risk" this is not necessarily broken by the removal to a new location of the subject-matter of the contract.[48]

3. CONSENT TO REMOVAL. An agreement for the removal of the property to a

M. Ins. Co., 25 Minn. 229; Everett *v.* Continental Ins. Co., 21 Minn. 76; Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159. Even though such a warranty be implied, it would only be such as to the acts of the insured and not against an involuntary moving caused by a flood. Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. Rep. 703. A removal beyond the territorial limit fixed by a by-law of a mutual live-stock insurance company does not vitiate the insurance unless a forfeiture be provided as a penalty. Reck *v.* Hathoro Mut. Live-Stock, etc., Ins. Co., 163 Pa. St. 443, 30 Atl. 205.

42. Griswold *v.* American Cent. Ins. Co., 70 Mo. 654 [*affirming* 1 Mo. App. 97].

43. Harris *v.* Royal Canadian Ins. Co., 53 Iowa 236, 5 N. W. 124; McCluer *v.* Girard F. & M. Ins. Co., 43 Iowa 349, 22 Am. Rep. 249; Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748; Fitchburg R. Co. *v.* Charlestown Mut. F. Ins. Co., 7 Gray (Mass.) 64; Phœnix F. Ins. Co. *v.* Vorhis, 1 Ohio Cir. Ct. 326, 1 Ohio Cir. Dec. 180; Lyons *v.* Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364 [*overruling* Lyons *v.* Providence Washington Ins. Co., 13 R. I. 347, 43 Am. Rep. 32]. And *compare* Annapolis, etc., R. Co. *v.* Baltimore F. Ins. Co., 32 Md. 37, 3 Am. Rep. 112; Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. (N. Y.) 254. Although the property be not on the premises where destroyed, when the policy was executed, but removal thereto was contemplated, such removal does not vitiate the contract. Massell *v.* Protective Mut. F. Ins. Co., 19 R. I. 565, 35 Atl. 209.

44. Longueville *v.* Western Assur. Co., 51 Iowa 553, 2 N. W. 394, 33 Am. Rep. 146; McCluer *v.* Girard F. & M. Ins. Co., 43 Iowa 349, 22 Am. Rep. 249; Mills *v.* Farmers' Ins. Co., 37 Iowa 400; Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748; Reck *v.* Hatboro Mut. Live-Stock, etc., Ins. Co., 163 Pa. St. 443, 30 Atl. 205; Noyes *v.* Northwestern Nat. Ins. Co., 64 Wis. 415, 25 N. W. 419, 54 Am. Rep. 631. Thus in the Longueville case insurance on clothing was recoverable when it was destroyed while being worn sleigh-riding, although it was described as "contained in a two-story frame building." So in the Noyes case the clothing was at a furrier's for repairs when burned. See *supra*, XI, I, 2. But see Lyons *v.* Providence Washington Ins. Co., 14 R. I. 109, 51 Am. Rep. 364 [*overruling*, it seems, Lyons *v.* Providence Washington Ins. Co., 13 R. I. 347, 43 Am. Rep. 32].

45. Bahr *v.* National F. Ins. Co., 80 Hun (N. Y.) 309, 29 N. Y. Suppl. 1031. But not if the removal is but to a different room on the same premises within the original description. West *v.* Old Colony Ins. Co., 9 Allen (Mass.) 316; Plinsky *v.* Germania F. & M. Ins. Co., 32 Fed. 47.

46. So likewise if the property be at the time of the loss at the new location consented to by the insurer, even though it were unauthorizedly for a time kept at a different place. Ohio Farmers' Ins. Co. *v.* Burget, 17 Ohio Cir. Ct. 619, 9 Ohio Cir. Dec. 369.

47. Ohio Farmers' Ins. Co. *v.* Burget, 65 Ohio St. 119, 61 N. E. 712, 87 Am. St. Rep. 596, 55 L. R. A. 825. In a dissenting opinion it is pointed out that this conclusion is not in accordance with the weight of authority upon the breach of other conditions in a policy when the parties have agreed that a breach will "avoid" the policy. A forfeiture for removal as for other cause is not favored. Hence any such provision is construed against the insurer. Reck *v.* Hatboro Mut. Live-Stock, etc., Ins. Co., 163 Pa. St. 443, 30 Atl. 205.

48. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712; Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229.

new location and for the continuance of the policy in force is in effect a new contract and gives rise to a new risk.[49] If the consent be not given in the mode prescribed by the policy, even acquiescence by the company's officers will not permit a removal.[50]

F. Change in Title, Interest, or Possession — 1. Nature of Warranty — a. Historically. In the earlier decisions it is seen that the policy makes no provision for forfeiture of the insured's rights because of any change in title, interest, or possession. The courts were therefore left to a consideration of general principles upon the query whether the insured retained any insurable interest in the subject-matter of the contract. A policy being only an agreement to indemnify the insured and not an absolute agreement to pay a sum of money when property is destroyed, an insurable interest at the time of the loss is as obviously necessary as it is in the inception of the contract.[51] If therefore the insured had parted with his insurable interest, his policy necessarily died with the transfer,[52] and the contract being in its nature personal with the insured did not pass with the subject-matter into the hands of the transferee without a new agreement with the insurer.[53] But the same result was not reached when the transferrer retained enough of interest to amount to an insurable interest. The policy still protected him as to the part retained, that is, he would be indemnified as to his own loss in case of fire affecting that interest. A conveyance of anything less than the entire interest of the insured therefore, there being no stipulation concerning such a transaction, will not defeat the policy.[54] Because of the foregoing principles the same conclusion was reached under the earlier forms of stipulation concerning title and interest contained in the policy. When it was stipulated therefore that the policy should become void upon "alienation" of the property insured, or upon "transfer" or "sale" thereof, these clauses were held to refer only to an absolute transfer of the insured's entire interest.[55] Such provisions, however, necessarily result in the termination of the contract if the insured parts with his

49. Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

Ratification is of course equivalent to a prior consent. Williamsburg City F. Ins. Co. *v.* Cary, 83 Ill. 453.

Consent to a removal does not make the removal obligatory, nor require it to be made sooner than in a reasonable time. Sharpless *v.* Hartford F. Ins. Co., 140 Pa. St. 437, 21 Atl. 451.

50. Spitzer *v.* St. Mark's Ins. Co., 6 Duer (N. Y.) 6; Phœnix F. Ins. Co. *v.* Vorhis, 1 Ohio Cir. Ct. 326, 1 Ohio Cir. Dec. 180. But see *infra*, XIV, B, 2.

51. See *supra*, II, C, 1.

If the insured has an insurable interest at the time of the loss it is immaterial that he may have at some time intermediate parted with the entire ownership, in the absence of forfeiture provisions in the policy. Power *v.* Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665; Insurance Co. of North America *v.* Lewis, 1 Ohio Cir. Ct. 79, 1 Ohio Cir. Dec. 47. But if the policy provides a forfeiture it is difficult to see how a reacquisition could give life to the policy. Bemis *v.* Harborcreek Mut. F. Ins. Co., 200 Pa. St. 340, 49 Atl. 769; Tittemore *v.* Vermont Mut. F. Ins. Co., 20 Vt. 546.

52. Wilson *v.* Hill, 3 Metc. (Mass.) 66.

53. Lahiff *v.* Ashuelot Ins. Co., 60 N. H. 75; Cummings *v.* Cheshire County Mut. F. Ins. Co., 55 N. H. 457; Sadlers Co. *v.* Badcock, 2 Atk. 554, 26 Eng. Reprint 733; Daly *v.* Lynch, 3 Bro. P. C. 478, 1 Eng. Reprint 1445. See *supra*, II, A.

54. Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Stetson *v.* Massachusetts Mut. F. Ins. Co., 4 Mass. 330, 3 Am. Dec. 217.

55. *Iowa.*— Cowan *v.* Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583.

Kentucky.— Boatman's F. & M. Ins. Co. *v.* James, 10 Ky. L. Rep. 816.

Louisiana.— Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 35 So. 271, 98 Am. St. Rep. 481; Power *v.* Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665.

Massachusetts.— Clinton *v.* Norfolk Mut. F. Ins. Co., 176 Mass. 486, 57 N. E. 998, 79 Am. St. Rep. 325, 50 L. R. A. 833.

New York.— Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624.

Texas.— Merchants' Ins. Co. *v.* Scott, 1 Tex. Unrep. Cas. 534.

Wisconsin.— Jerdee *v.* Cottage Grove F. Ins. Co., 75 Wis. 345, 44 N. W. 636.

United States.— Scanlon *v.* Union F. Ins. Co., 21 Fed. Cas. No. 12,436, 4 Biss. 511.

Canada.— Caldwell *v.* Stadacona F., etc., Ins. Co., 11 Can. Sup. Ct. 212, 3 Can. L. T. 94.

See 28 Cent. Dig. tit. "Insurance," § 794 *et seq.*

But see Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279, where it was held that this result did not follow if the policy was to be void on "any" sale, transfer, or change of title, and the insured conveyed an undi-

entire title to the property before loss. Such stipulations are reasonable, in accordance with the theory and policy of the law, and are valid.[56]

b. Transfer by Death. If the policy is made payable to the "insured, his executors or administrators," by its express provisions, the death of the insured does not vitiate the policy, although the title is thereby transferred to his heirs;[57] and the same result has been reached even though the personal representatives be not mentioned in the policy.[58] The contrary result has been reached, however,

vided interest. And *compare* McEwan *v.* Western Ins. Co., 1 Mich. N. P. 118.

56. *Connecticut.*— Bishop *v.* Clay F. & M. Ins. Co., 45 Conn. 430.

Georgia.— Farmers' Mut. Ins. Assoc. *v.* Price, 112 Ga. 264, 37 S. E. 427.

Indiana.— Insurance Co. of North America *v.* Martin, 151 Ind. 209, 51 N. E. 361.

Kentucky.— Green *v.* Kenton Ins. Co., 12 Ky. L. Rep. 750; Fireman's Fund Ins. Co. *v.* Gatewood, 10 Ky. L. Rep. 117.

Maine.— Richmond *v.* Phœnix Assur. Co., 88 Me. 105, 33 Atl. 786; Gould *v.* Patrons' Androscoggin Mut. F. Ins. Co., 76 Me. 298.

Michigan.— Jaskulski *v.* Citizens' Mut. F. Ins. Co., 131 Mich. 603, 92 N. W. 98.

Missouri.— Watts *v.* Philadelphia Fire Assoc., 87 Mo. App. 83; Cummins *v.* National F. Ins. Co., 81 Mo. App. 291.

Nebraska.— J. B. Ehrsam Mach. Co. *v.* Phenix Ins. Co., 43 Nebr. 554, 61 N. W. 722.

Ohio.— Mitchell *v.* Ætna Ins. Co., 6 Ohio S. & C. Pl. Dec. 420, 4 Ohio N. P. 386.

West Virginia.— Ritchie County Bank *v.* Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

Canada.— Salterio *v.* City of London F. Ins. Co., 23 Can. Sup. Ct. 32; Pinhey *v.* Mercantile F. Ins. Co., 2 Ont. L. Rep. 296; O'Neill *v.* Ottawa Agricultural Ins. Co., 30 U. C. C. P. 151; Russ *v.* Clinton Mutual F. Ins. Co., 29 Q. B. 73.

See 28 Cent. Dig. tit. "Insurance," § 794 *et seq.*

The same is true in a mutual company. Pfister *v.* Gerwig, 122 Ind. 567, 23 N. E. 1041; Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422. The policy becomes *ipso facto* void. Farmers' Mut. Ins. Assoc. *v.* Price, 112 Ga. 264, 37 S. E. 427. See *supra*, XIII, A, 6.

The fact that a policy insured the owner "for the account of whom it may concern" does not permit a change of title, there being a stipulation in the policy that it shall be void if any change in interest, title, or possession occur. Scottish Union, etc., Ins. Co. *v.* Hagan, 102 Fed. 919, 43 S. C. A. 55.

Effect of making the policy payable to a mortgagee with reference to change of title by act of the mortgagor see *supra*, XIII, A, 7, b; and *infra*, XIII, F, 2, f, (v).

Time of conveyance or change.— The provision is always promissory and refers therefore only to a change subsequent to the time the insurance was effected. Morotock Ins. Co. *v.* Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846; Pioneer Sav., etc., Co. *v.* Providence Washington Ins. Co., 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397. Thus the surrender of mortgaged personalty to the mortgagee upon a mortgage executed prior to the execution of the policy does not affect the insurance. Washington Ins. Co. *v.* Hayes, 17 Ohio St. 432, 93 Am. Dec. 628.

Retention of possession.— The fact that the insured retains possession of the property will not, after change of title, prevent the policy from becoming void. Robinson *v.* North British, etc., Ins. Co., 53 S. W. 660, 21 Ky. L. Rep. 982; Ohio Farmers' Ins. Co. *v.* Waters, 65 Ohio St. 157, 61 N. E. 711.

A cancellation by the government of the entry and certificate of applicant for a patent to a placer claim renders the policy on the premises of the claim void. German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

57. Forest City Ins. Co. *v.* Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; Merrett *v.* Farmers' Ins. Co., 42 Iowa 11; Richardson *v.* German Ins. Co., 89 Ky. 571, 13 S. W. 1, 12 Ky. L. Rep. 37, 8 L. R. A. 800; German Ins. Co. *v.* Read, 13 S. W. 1080, 14 S. W. 595, 12 Ky. L. Rep. 371. If the property be issued to a decedent's estate it is not extinguished by the settlement of the estate by the executor. Williams *v.* Roger Williams Ins. Co., 107 Mass. 377, 9 Am. Rep. 41; Hanover F. Ins. Co. *v.* Bohn, 48 Nebr. 743, 67 N. W. 744, 58 Am. St. Rep. 719; Stone *v.* Granite State F. Ins. Co., 69 N. H. 438, 45 Atl. 235.

58. *Arkansas.*— Planters' Mut. Ins. Assoc. *v.* Dewberry, 69 Ark. 295, 62 S. W. 1047, 86 Am. St. Rep. 195.

Illinois.— Forest City Ins. Co. *v.* Eaton, 86 Ill. App. 463.

Indiana.— Pfister *v.* Gerwig, 122 Ind. 567, 23 N. E. 1041.

Kentucky.— Richardson *v.* German Ins. Co., 89 Ky. 571, 13 S. W. 1, 12 Ky. L. Rep. 37, 8 L. R. A. 800; German Ins. Co. *v.* Reed, 10 Ky. L. Rep. 1061.

Michigan.— Westchester F. Ins. Co. *v.* Dodge, 44 Mich. 420, 6 N. W. 865.

New Hampshire.— Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300.

Pennsylvania.— Columbia Ins. Co. *v.* Mullin, 4 Leg. Op. 572.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

See 28 Cent. Dig. tit. "Insurance," § 810.

The "devolution" of property by law cannot be construed to mean the same as the term "alienation." Columbia Ins. Co. *v.* Mullin, 4 Leg. Op. (Pa.) 572.

Transfer in view of death.— Although the policy would survive the death of the insured, it will be avoided by a conveyance, even

when the policy provides against any change in "interest or title, whether by act of parties or by operation of law," such a transfer being held prohibited and a "change of title" within the meaning of the policy.[59]

c. Provisions of Policy. Transfer of title has been held to be not *per se* an increase of risk;[60] and a provision that the policy shall not be assignable does not prevent a transfer of the property insured.[61] Where the provision of the policy requiring notice of change of title is merely directory, failure of the mortgagor to give such notice does not defeat the insurance as to the mortgagee;[62] but the contrary is the rule if the policy is to be void if the title is changed, unless the mortgagee notifies the insurer.[63]

d. Consent. Consent of the insurer to a transfer of the title to an assignee of course operates as a waiver of the conditions of the policy against change of interest, title or possession.[64]

e. Change in Possession. An actual change is necessary to avoid the policy under a condition relating to possession.[65] If the insured has placed the property temporarily in the possession of another under such circumstances that he cannot immediately demand an abandonment of the premises, there is a change of possession.[66] If the person in possession is himself an insured person under the policy there is no fatal breach of such a condition, although the person who originally was in possession may have yielded the same.[67]

though in view of death and intended to avoid the expense of probate proceedings. Gillon *v.* Northern Assur. Co., 127 Cal. 480, 59 Pac. 901.

59. Hine *v.* Woolworth, 93 N. Y. 75, 45 Am. Rep. 176 [*affirming* 29 Hun 84]; Sherwood *v.* Watertown Agricultural Ins. Co., 73 N. Y. 447, 29 Am. Rep. 180 [*affirming* 10 Hun 593]; Lappin *v.* Charter Oak F. & M. Ins. Co., 58 Barb. (N. Y.) 325.

The standard policy expressly states that the death of the insured shall not affect the policy; but in Miller *v.* German Ins. Co., 54 Ill. App. 53, it was held that the death of the insured amounted to a "change of title" avoiding the policy. But see Forest City Ins. Co. *v.* Hardesty, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161.

60. Russell *v.* Cedar Rapids Ins. Co., 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538; Clinton *v.* Norfolk Mut. F. Ins. Co., 176 Mass. 486, 57 N. E. 998, 79 Am. St. Rep. 325, 50 L. R. A. 833.

61. Hoyt *v.* Hartford F. Ins. Co., 26 Hun (N. Y.) 416; Merchants' Ins. Co. *v.* Scott, 1 Tex. Unrep. Cas. 534. See also *supra*, VIII, C.

62. Whitney *v.* American Ins. Co., (Cal. 1899) 56 Pac. 50.

63. Continental Ins. Co. *v.* Anderson, 107 Ga. 541, 33 S. E. 887. See also *supra*, XIII, A, 7, b.

64. Batchelor *v.* People's F. Ins. Co., 40 Conn. 56; Buckley *v.* Garrett, 47 Pa. St. 204. See *infra*, XIV, D, 2, e. It is immaterial that the consent has been obtained after the transfer has been completed. Clifton Coal Co. *v.* Scottish Union, etc., Ins. Co., 102 Iowa 300, 71 N. W. 433. But the consent must be had before loss. Dadmun Mfg. Co. *v.* Worcester Mut. F. Ins. Co., 11 Metc. (Mass.) 429.

The provision of the standard policy is that the policy shall be void if "any change take place in the interest, title, or possession of the subject of insurance whether by legal process or judgment, or by voluntary act of the insured, or otherwise."

65. Thus a mere constructive change by transfer of warehouse receipts does not avoid a policy containing only such a prohibition. California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730. A mere formal seizure by the sheriff, not actually dispossessing the insured, is not a "change of possession." McClelland *v.* Greenwich Ins. Co., 107 La. 124, 31 So. 691. The same result is had if the seizure proceeds to sale, at which time the insured becomes the purchaser. Cleavenger *v.* Franklin F. Ins. Co., 47 W. Va. 595, 35 S. E. 998.

66. Cottingham *v.* Fireman's Fund Ins. Co., 10 Ky. L. Rep. 727. If the vendee in an executory contract of sale goes into possession the policy is avoided under a condition against change of possession, although a condition against change of title may not be broken thereby. Cottingham *v.* Fireman's Fund Ins. Co., 10 Ky. L. Rep. 727. But the possession of an agent during the insured's temporary absence is not a breach of the condition. Shearman *v.* Niagara F. Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380. So a temporary possession for the purpose of making repairs, by a lessee under a contract to lease in the future, is not ground for forfeiture for a breach of this condition. Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

67. Thus if a chattel mortgagee to whom the policy is payable takes possession this is no breach of the condition. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712. But a purchase by one partner of the other's interest works a dissolution and therefore a change of possession. Jones *v.* Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169. So when property is insured to three copartners and remains in the possession of two of them,

2. What Amounts to a Prohibited Change — a. Nominal Conveyance. As the object of the condition is that the insured shall have no greater motive to destroy the property or less interest in watching or guarding it, a transfer of interest which is merely nominal, the ownership remaining the same in fact, does not vitiate the policy.[68]

b. Incomplete Conveyance. If the conveyance be only *in fieri* and not completed at the time of loss the policy is not terminated.[69] Thus, when there has been no delivery of the bill of sale,[70] or of the deed,[71] or no acceptance of the same, one being required,[72] there is no change in the title. Under this principle a conveyance contingent upon the consent of the insurer,[73] or of the creditors of the assignor,[74] or of the court,[75] or of the transferee's attorneys,[76] does not avoid the policy. Likewise prior to the completion of legal proceedings transferring title or possession there is no change thereby sufficient to work a forfeiture.[77] But it has been held that while an incomplete conveyance is not a change in title, it may be a change in "interest," as when a deed is left in escrow until payment be completed.[78]

c. Void and Voidable Conveyances. A conveyance wholly void does not transfer title so as to avoid a policy.[79] The delivery procured by fraud, of a

there is no such change as will be a breach of this condition. Allemania F. Ins. Co. *v.* Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. Rep. 610.

68. *Illinois.*— German Ins. Co. *v.* Gibe, 59 Ill. App. 614.

Iowa.— Ayers *v.* Home Ins. Co., 21 Iowa 185.

Massachusetts.— Kyte *v.* Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518.

Nebraska.— Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.

Pennsylvania.—Bemis *v.* Harborcreek Mut. F. Ins. Co., 14 Pa. Super. Ct. 528.

Texas.— New Orleans Ins. Co. *v.* Gordon, 68 Tex. 144, 3 S. W. 718.

See 28 Cent. Dig. tit. "Insurance," § 795 *et seq.*

A mere pooling arrangement affecting the conduct of business and the division of profits, but not involving a change of title of the proprietor of one of the combining industries, does not involve other than "sole and unconditional ownership." Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918 [*affirmed* in 171 N. Y. 25, 63 N. E. 810].

The voluntary execution of a bill of sale without consideration and without the knowledge of or delivery to the vendee is a mere nominal change. Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30.

69. Magoun *v.* Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; Ardill *v.* Citizens' Ins. Co., 22 Ont. 529 [*affirmed* in 20 Ont. App. 605].

70. Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30. Where an owner of corn insured it, and afterward contracted to sell it, but was to shell it and haul it to an elevator, there to be weighed and delivered, and it was destroyed by fire before it was shelled, there was no transfer of title sufficient to avoid a policy of insurance. Orient Ins. Co. *v.* McKnight, 197 Ill. 190, 64 N. E. 339. A transfer of title to personalty by transfer of warehouse receipts is effectual to avoid the policy under a prohibition as to change of title. Southern Cotton Oil Co. *v.* Prudential Fire Assoc., 78 Hun (N. Y.) 373, 29 N. Y. Suppl. 128.

71. Porter *v.* Orient Ins. Co., 72 Conn. 519, 45 Atl. 7; Schaeffer *v.* Anchor Mut. F. Ins. Co., 113 Iowa 652, 85 N. W. 985; Westchester F. Ins. Co. *v.* Jennings, 70 Ill App. 539. The latter case was one where a blank was left in the deed for the name of the grantee.

72. Whitney *v.* American Ins. Co., 127 Cal. 464, 59 Pac. 897.

73. Clifton Coal Co. *v.* Scottish Union, etc., Ins. Co., 102 Iowa 300, 71 N. W. 433.

74. Jones *v.* Capital City Ins. Co., 122 Ala. 421, 25 So. 790.

75. Tiemann *v.* Citizens' Ins. Co., 76 N. Y. App. Div. 5, 78 N. Y. Suppl. 620.

76. Pioneer Sav., etc., Co. *v.* Providence-Washington Ins. Co., 17 Wash. 175, 49 Pac. 231, 38 L. R. A. 397.

77. Greenlee *v.* North British, etc., Ins. Co., 102 Iowa 427, 71 N. W. 534, 63 Am. St. Rep. 455; Browne Nat. Bank *v.* Southern Ins. Co., 22 Wash. 379, 60 Pac. 1123. See also *infra*, XIII, F, 2. So, although the court has ordered the sale and deeds have been prepared thereunder but not delivered. Porter *v.* Orient Ins. Co., 72 Conn. 519, 45 Atl. 7.

78. This view considers the word "interest" broader than "title," and could be of importance only when the insured was under some legal obligation to complete the conveyance. Excelsior Foundry Co. *v.* Western Assur. Co., 135 Mich. 467, 98 N. W. 9. And see Gibb *v.* Philadelphia F. Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; Skinner, etc., Ship-Building, etc., Co. *v.* Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485.

79. Phœnix Ins. Co. *v.* Asbury, 102 Ga. 565, 27 S. E. 667; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; German

deed duly executed, does not create a forfeiture of a policy conditioned to become void upon a change in title.[80] A conveyance made in fraud of creditors vitiates a policy providing for forfeiture in case of a transfer of title.[81] It is wholly immaterial that the conveyance is gratuitous if it be completed.[82]

d. Mortgages — (I) *On Realty.* The execution of a mortgage on insured property is not a violation of the covenant against a change of title in an insurance policy.[83] Nor does it operate to change the "interest, title, or possession."[84]

Ins. Co. *v.* York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313.

80. Hartford F. Ins. Co. *v.* Warbritton, 66 Kan. 93, 71 Pac. 278. But *compare* Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513. See also *infra*, XIII, F, 2, e.

So a deed executed by one mentally incapable does not effect a change of title so as to forfeit the policy. Gerling *v.* Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691.

81. Dadmum Mfg. Co. *v.* Worcester Mut. F. Ins. Co., 11 Metc. (Mass.) 429; Rosenstein *v.* Traders' Ins. Co., 79 N. Y. App. Div. 481, 79 N. Y. Suppl. 736; Phenix Ins. Co. *v.* Willis, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566; Milwaukee Trust Co. *v.* Lancashire Ins. Co., 95 Wis. 192, 70 N. W. 81.

An actual conveyance is required, and therefore when the owner and a third party agreed that they would represent to creditors that there had been a conveyance, the purpose being to prevent attachments, and there having actually been no conveyance in pursuance of the design, the policy was not affected. Orrell *v.* Hampden F. Ins. Co., 13 Gray (Mass.) 431.

82. Brown *v.* Cotton, etc., Manufacturers' Mut. Ins. Co., 156 Mass. 587, 31 N. E. 691; Home F. Ins. Co. *v.* Collins, 61 Nebr. 198, 85 N. W. 54; Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30; Rosenstein *v.* Traders' Ins. Co., 79 N. Y. App. Div. 481, 79 N. Y. Suppl. 736.

83. *Illinois.*— Ætna Ins. Co. *v.* Jacobson, 105 Ill. App. 283.

Massachusetts.— Bryan *v.* Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454.

Texas.— Lampasas Hotel, etc., Co. *v.* Phœnix Ins. Co., (Civ. App. 1896) 38 S. W. 361.

Utah.— Peck *v.* Girard F. & M. Ins. Co., 16 Utah 121, 51 Pac. 255, 67 Am. St. Rep. 600.

United States.— Friezen *v.* Allemania F. Ins. Co., 30 Fed. 352.

Canada.— Bull *v.* North British Canadian Invest. Co., 15 Ont. App. 421; Sands *v.* Standard Ins. Co., 27 Grant Ch. (U. C.) 167.

See 28 Cent. Dig. tit. "Insurance," § 800; and *supra*, XII, B, 3, b, (VI).

Contra.— In case of a trust deed, which is generally considered equivalent to a mortgage, see Nease *v.* Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233.

84. *Georgia.*— Virginia F. & M. Ins. Co. *v.* Feagin, 62 Ga. 515.

Illinois.— Aurora F. Ins. Co. *v.* Eddy, 55 Ill. 213; Forehand *v.* Niagara Ins. Co., 58 Ill. App. 161; Hanover F. Ins. Co. *v.* Connor, 20 Ill. App. 297.

Indiana.— Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

Iowa.— Taylor *v.* Merchants', etc., Ins. Co., 83 Iowa 402, 49 N. W. 994; Ayres *v.* Hartford Ins. Co., 21 Iowa 193.

Maine.— Smith *v.* Monmouth Mut. F. Ins. Co., 50 Me. 96; Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221.

Massachusetts.— Rice *v.* Tower, 1 Gray 426.

Michigan.— Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340.

Minnesota.— Loy *v.* Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346.

New Hampshire.— Shepherd *v.* Union Mut. F. Ins. Co., 38 N. H. 232; Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231; Rollins *v.* Columbian Mut. F. Ins. Co., 25 N. H. 200.

New York.— Hennessey *v.* Manhattan F. Ins. Co., 28 Hun 98; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. 442; Tallman *v.* Atlantic F. & M. Ins. Co., 29 How. Pr. 71 [*reversed* in 4 Abb. Dec. 345, 3 Keyes 87, 33 How. Pr. 400]; Conover *v.* Albany Mut. Ins. Co., 3 Den. 254 [*affirmed* in 1 N. Y. 290].

Ohio.— Sun Fire Office *v.* Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562; Byers *v.* Farmers' Ins. Co., 35 Ohio St. 606, 35 Am. Rep. 623.

Oregon.— Koshland *v.* Hartford F. Ins. Co., 31 Oreg. 402, 49 Pac. 866.

Vermont.— Hartford Steam-Boiler Inspection, etc., Co. *v.* Lasher Stocking Co., 66 Vt. 439, 29 Atl. 629, 44 Am. St. Rep. 859.

Wisconsin.— Wolf *v.* Theresa Village Mut. F. Ins. Co., 115 Wis. 402, 91 N. W. 1014.

United States.— Nussbaum *v.* Northern Ins. Co., 37 Fed. 524, 1 L. R. A. 704.

See 28 Cent. Dig. tit. "Insurance," § 800.

In Colorado and in Texas a mortgage has been held to violate a condition against a change in "interest" (East Texas F. Ins. Co. *v.* Clarke, 79 Tex. 23, 15 S. W. 166, 11 L. R. A. 293), even though the property was included in the mortgage by inattention of the owner (Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513).

A mortgage has been held to violate a condition against all "alienations and alterations in the ownership, situation or state of the property insured." Edmands *v.* Mutual Safety F. Ins. Co., 1 Allen (Mass.) 311, 79 Am. Dec. 746.

A mortgage containing a power of sale has been held to be an alienation. Sossaman *v.* Pamlico Banking, etc., Co., 78 N. C. 145.

When the insurer has recognized the existence of a mortgage by directing that the loss shall be payable to the mortgagee as his interest shall appear, even the acquisition of

(II) *Chattel Mortgages.* If no possession be taken thereunder, the giving of a chattel mortgage does not effect a change of interest, title, or possession.[85]

e. Defeasible Conveyance. The authorities differ upon the question as to whether a conveyance absolute in form, but intended as a collateral security, amounts to a change of title so as to avoid the policy. Some courts hold that inasmuch as such an instrument may by parol be shown to have been intended as a mortgage and therefore is a mortgage in equity, the real transaction is to be considered a mortgage and the effect upon the policy the same, thus not affecting the contract.[86] Other courts say, however, that whatever the ultimate effect may be as to a restoration of title, the title is for a time at least out of the insured, which avoids the policy.[87]

f. Sale and Mortgage Back. If the premises be sold and a mortgage be given for the purchase-price by the grantor, the title is changed and the policy providing a forfeiture for a change in title is thereby avoided.[88]

the legal title from the mortgagor by the mortgagee is not such a change of title as will defeat the mortgagee's right to recover on the policy. Dodge *v.* Hamburg-Bremen F. Ins. Co., 4 Kan. App. 415, 46 Pac. 25; Pioneer Sav., etc., Co. *v.* St. Paul F. & M. Ins. Co., 68 Minn. 170, 70 N. W. 979; Ethington *v.* Dwelling-House Ins. Co., 55 Mo. App. 129. See also *infra*, XIII, F, 2, l.

85. Judge *v.* Connecticut F. Ins. Co., 132 Mass. 521; Union Ins. Co. *v.* Barwick, 36 Nebr. 223, 54 N. W. 519; Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Rob. (N. Y.) 55; Strong *v.* North American F. Ins. Co., 1 Alb. L. J. 162. *Contra*, Olney *v.* German Ins. Co., 88 Mich. 94, 50 N. W. 100, 26 Am. St. Rep. 281, 13 L. R. A. 684. And see *supra*, XII, B, 3, b, (VI).

In Canada the giving of a chattel mortgage has been held not to be a sale or transfer within the meaning of the condition (Sovereign F. Ins. Co. *v.* Peters, 12 Can. Sup. Ct. 33), but it does amount to a change of title or interest (Torrop *v.* Imperial F. Ins. Co., 26 Can. Sup. Ct. 585; Citizens' Ins. Co. *v.* Salterio, 23 Can. Sup. Ct. 155).

86. *Illinois.*— German Ins. Co. *v.* Gibe, 162 Ill. 251, 44 N. E. 490 [*affirming* 59 Ill. App. 614].

Kansas.— Glasco Bank *v.* Springfield F. & M. Ins. Co., 5 Kan. App. 388, 49 Pac. 329.

Massachusetts.— Bryan *v.* Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454; Dailey *v.* Westchester F. Ins. Co., 131 Mass. 173. *Compare* Foote *v.* Hartford F. Ins. Co., 119 Mass. 259.

Nebraska.— Henton *v.* Farmers', etc., Ins. Co., 1 Nebr. (Unoff.) 425, 95 N. W. 670.

New York.— Barry *v.* Hamburg-Bremen F. Ins. Co., 110 N. Y. 1, 17 N. E. 405 [*reversing* 53 N. Y. Super. Ct. 249, and *overruling* Tatham *v.* Commerce Ins. Co., 4 Hun 136].

United States.— Holbrook *v.* American Ins. Co., 12 Fed. Cas. No. 6,589, 1 Curt. 193.

See 28 Cent. Dig. tit. "Insurance," § 801.

Whether a separate defeasance was executed and recorded or not was said to be immaterial in Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279. Statutory provisions requiring a recording of defeasances are intended to protect only purchasers and attaching creditors and their violation by such a transaction is immaterial. Bryan *v.* Traders' Ins. Co., 145 Mass. 389, 14 N. E. 454; Walsh *v.* Philadelphia F. Ins. Assoc., 127 Mass. 383. But *compare* Phœnix Ins. Co. *v.* Asberry, 95 Ga. 792, 22 S. E. 717.

87. *Georgia.*— Phœnix Ins. Co. *v.* Asberry, 95 Ga. 792, 22 S. E. 717.

Maine.— Tomlinson *v.* Monmouth Mut. F. Ins. Co., 47 Me. 232; Adams *v.* Rockingham Mut. F. Ins. Co., 29 Me. 292.

Michigan.— Western Massachusetts Ins. Co. *v.* Riker, 10 Mich. 279.

Missouri.— Cummins *v.* National F. Ins. Co., 81 Mo. App. 291.

Pennsylvania.— Bemis *v.* Harborcreek Mut. F. Ins. Co., 200 Pa. St. 340, 49 Atl. 769, where the provision was that of the standard policy prohibiting a change in the "title, interest, or possession."

See 28 Cent. Dig. tit. "Insurance," § 801. See also *supra*, XIII, F, 2, c.

The transfer of property by way of protection to a surety has been held to avoid the policy. Semmelhaack *v.* Canada F. & M. Ins. Co., 4 Montreal Leg. N. 205.

When the conveyance was made by marriage contract providing for a defeasance should the grantee prove unfaithful or die before the grantor, this was a change of title, although the grantor secured a divorce on the ground of infidelity and the defeasance thus actually occurred. Cummins *v.* National F. Ins. Co., 81 Mo. App. 291.

88. Abbott *v.* Hampden Mut. F. Ins. Co., 30 Me. 414; Miner *v.* Judson, 2 Hun (N. Y.) 441, 5 Thomps. & C. 46; Savage *v.* Howard Ins. Co., 52 N. Y. 502, 11 Am. Rep. 741 [*reversing* 44 How. Pr. 40 (*affirming* 43 How. Pr. 462)]. *Contra*, Kitts *v.* Massasoit Ins. Co., 56 Barb. (N. Y.) 177; Northern Assur. Co. *v.* City Sav. Bank, 18 Tex. Civ. App. 721, 45 S. W. 737. It has been held, however, that when an absolute deed was given by the insured and the grantee *eo instanti* gave back a deed which provided that it should be void if certain moneys were paid, the two instruments construed together did not amount to a sale and mortgage but a conditional sale, and the title was not affected more than if a contract of sale had originally

g. Retention of Lien. In the absence of a forfeiture clause, the insured who sells, but retains a purchase-money lien for the price has an insurable interest.[89] But when the policy contains a provision against change of "title" or of "title, interest, or possession" the retention of the lien will not keep the policy alive.[90]

h. Contract For Sale. A contract entered into by the insured to convey the premises, even though valid, if no deed is made, is not a breach of a condition that the interest of the insured shall remain "entire, unconditional, unincumbered and sole."[91] It is not a breach of a condition of the policy providing that it shall be void if the property is "transferred," or "alienated;"[92] or "if the property be sold or transferred in whole or in part;"[93] nor is it a change of "title."[94] The foregoing statements are universally recognized if the possession has not passed to the purchaser and the matter remains *in fieri*,[95] even though the instrument be expressed as "a bond to stand for a deed."[96] But when possession has been taken by the vendee who has paid a part of the purchase-price, this has been held a breach of a condition prohibiting a change of "interest";[97] yet payment of the part of the purchase-price and entry into possession by the vendee has been held immaterial when it has not been shown that the purchaser was entitled to a deed.[98] A contract of sale does not violate a policy providing that "if any change take place in the title, ownership or possession, by sale, incumbrance, mortgage, etc., the policy shall be void."[99]

i. Conveyance to Wife. A policy of insurance providing that it shall become void if the property insured be conveyed without the consent of the insurer is avoided if the conveyance by the insured is to his wife.[1]

been given. Tittemore *v.* Vermont Mut. F. Ins. Co., 20 Vt. 546.

Consent to a sale and mortgage back by the insurer will operate as a waiver of a forfeiture provided in the policy. Sanders *v.* Hillsborough Ins. Co., 44 N. H. 238.

89. Merchants' Ins. Co. *v.* Scott, 1 Tex. Unrep. Cas. 534. See also *supra*, XIII, F, 1.

90. California State Bank *v.* Hamburg-Bremen Ins. Co., 71 Cal. 11, 11 Pac. 798; Bates *v.* Commercial Ins. Co., 2 Cinc. Super. Ct. 195 [*reversing* 1 Cinc. Super. Ct. 523].

Nor will a reservation of a right of occupancy for life avail the insured in an action on the policy. Farmers' Ins. Co. *v.* Archer, 36 Ohio St. 608.

Nor will a retention of a lien to pay an annuity granted as the consideration of the transfer avail the insured. Abbott *v.* Hampden Mut. F. Ins. Co., 30 Me. 414.

91. Arkansas F. Ins. Co. *v.* Wilson, 67 Ark. 553, 55 S. W. 933, 77 Am. St. Rep. 129, 48 L. R. A. 510.

92. Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314; Trumbull *v.* Portage County Mut. Ins. Co., 12 Ohio 305.

93. Phenix Ins. Co. *v.* Caldwell, 85 Ill. App. 104 [*affirmed* in 187 Ill. 73, 58 N. E. 314]; Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 3 Am. Rep. 149; Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624.

94. Home Ins. Co. *v.* Bethel, 142 Ill. 537, 32 N. E. 510 [*affirming* 42 Ill. App. 475]; Grable *v.* German Ins. Co., 32 Nebr. 645, 49 N. W. 713; Browning *v.* Home Ins. Co., 6 Daly (N. Y.) 522.

95. Boston, etc., Ice Co. *v.* Royal Ins. Co., 12 Allen (Mass.) 381, 90 Am. Dec. 151.

96. Pringle *v.* Des Moines Ins. Co., 107 Iowa 742, 77 N. W. 521.

97. Gibb *v.* Philadelphia F. Ins. Co., 59 Minn. 267, 61 N. W. 137, 50 Am. St. Rep. 405; Ladd *v.* Ætna Ins. Co., 70 Hun (N. Y.) 490, 24 N. Y. Suppl. 384; Germond *v.* Home Ins. Co., 2 Hun (N. Y.) 540, 5 Thomps. & C. 120. See Davidson *v.* Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514, 60 Am. Rep. 818. See also *infra*, XIII, F, 2, t.

If the vendee takes possession under an executory contract for sale there is a "change of possession" within the meaning of the policy forbidding such a change. Cottingham *v.* Fireman's Fund Ins. Co., 10 Ky. L. Rep. 727.

98. Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624; Shotwell *v.* Jefferson Ins. Co., 5 Bosw. (N. Y.) 247; Home Mut. Ins. Co. *v.* Tomkies, 30 Tex. Civ. App. 404, 71 S. W. 812.

99. Georgia Home Ins. Co. *v.* Hall, 94 Ga. 630, 21 S. E. 828; Pringle *v.* Des Moines Ins. Co., 107 Iowa 742, 77 N. W. 521 [*explaining* Davidson *v.* Hawkeye Ins. Co., 71 Iowa 532, 32 N. W. 514, 60 Am. Rep. 818]; Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845; Kempton *v.* State Ins. Co., 62 Iowa 83, 17 N. W. 194; Home Mut. Ins. Co. *v.* Tomkies, 30 Tex. Civ. App. 404, 71 S. W. 812. *Contra*, Cottingham *v.* Fireman's Fund Ins. Co., 90 Ky. 439, 14 S. W. 417, 12 Ky. L. Rep. 409, 9 L. R. A. 627 [*reversing* 10 Ky. L. Rep. 727]; Wm. Skinner, etc., Ship Bldg., etc., Co. *v.* Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485.

1. *Maine.*— Melcher *v.* Pennsylvania Ins. Co., 97 Me. 512, 55 Atl. 411.

Massachusetts.— Oakes *v.* Manufacturers' F. & M. Ins. Co., 131 Mass. 164.

j. Partition. When a policy contains a prohibition of any alienation, or change of title or interest, the same is avoided by a completed partition proceeding.[2]

k. Premises Becoming Involved in Litigation. A condition in an insurance policy that it shall become void if the title or possession of the property is or shall become involved in litigation is not against public policy.[3] But such a condition does not apply to litigation involving no question of title or possession adverse to that of the insured.[4] If the policy be payable to a mortgagee, the commencement of foreclosure proceedings by him is not a breach of the condition in question.[5]

l. Foreclosure of Mortgage — (I) *Stipulations as to "Increase of Risk."* In the absence of stipulations, the mere commencement of foreclosure proceedings is not in itself a "change" of ownership or "increase of hazard."[6]

(II) *Stipulations as to Change of Title.* Under a provision that the policy shall be void if there is a change of title in the insured premises by legal process or decree the commencement of foreclosure proceedings will not vitiate the policy, nor will anything short of a completed sale thereunder.[7] But a

Michigan.— Glaze *v.* Three Rivers Farmers' Mut. F. Ins. Co., 87 Mich. 349, 49 N. W. 595.

Minnesota.— Langdon *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 22 Minn. 193.

Missouri.— Cummins *v.* National F. Ins. Co., 81 Mo. App. 291.

Nebraska.— Home F. Ins. Co. *v.* Collins, 61 Nebr. 198, 85 N. W. 54; Farmers', etc., Ins. Co. *v.* Jensen, 56 Nebr. 284, 76 N. W. 577, 44 L. R. A. 861.

New Hampshire.— Baldwin *v.* Phœnix Ins. Co., 60 N. H. 164.

New York.— Walton *v.* Agricultural Ins. Co., 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677.

See 28 Cent. Dig. tit. "Insurance," § 797.

Extent and limits of rule.— In some of the cases just cited the transfer was indirect, being through the instrumentality of an intermediate grantee. This is an additional reason rather than the opposite why the policy should have been considered forfeited. In Kitterlin *v.* Milwaukee Mechanics' Mut. Ins. Co., 134 Ill. 647, 25 N. E. 772, 10 L. R. A. 220 [*reversing* 24 Ill. App. 188], it was held that a conveyance by the husband of the homestead to his wife, by a deed in which she did not join, was invalid under a statute providing that "no conveyance of a homestead estate shall be valid unless signed and acknowledged by the wife," and hence did not vitiate his policy.

2. *Maine.*— Barnes *v.* Union Mut. F. Ins. Co., 51 Me. 110, 81 Am. Dec. 562.

Missouri.— Hollaway *v.* Dwelling House Ins. Co., 121 Mo. 87, 25 S. W. 850; Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.

New York.— Terpenning *v.* Agricultural Ins. Co., 14 Hun 299.

Pennsylvania.— Dornblaser *v.* Sugar Valley Mut. F. Ins. Co., 20 Pa. Super. Ct. 536.

Texas.— Hartford F. Ins. Co. *v.* Ransom, (Civ. App. 1901) 61 S. W. 144.

See 28 Cent. Dig. tit. "Insurance," § 814.

Until the sale is confirmed, however, the partition is incomplete. Terpenning *v.* Agricultural Ins. Co., 14 Hun (N. Y.) 299.

A setting off to the widow of the property for life is a prohibited change. Trabue *v.* Dwelling House Ins. Co., 121 Mo. 75, 25 S. W. 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.

3. Small *v.* Westchester F. Ins. Co., 51 Fed. 789.

It is immaterial that the litigation is wholly without insured's fault. Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa 225, 76 N. W. 676.

If the insured is required only to give notice of any legal proceedings he has a reasonable time in which to do so. Michigan State Ins. Co. *v.* Lewis, 30 Mich. 41.

4. As a creditor's bill. Small *v.* Westchester F. Ins. Co., 51 Fed. 789. So when an action of forcible entry and detainer is begun to recover possession, the occupant refusing to yield peaceably but having no color of claim, the policy is not avoided. Hall *v.* Niagara F. Ins. Co., 93 Mich. 184, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135.

The clause was held not to work a forfeiture of a policy on a gin-house situated on the same tract as a dwelling, to recover possession of which latter an action has been brought, the policy being conditioned to be void if the "premises" become involved in litigation. Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

5. Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184; Henton *v.* Farmers', etc., Ins. Co., 1 Nebr. (Unoff.) 425, 95 N. W. 670. See also *infra*, XIII, F, 2, l.

6. Phenix Ins. Co. *v.* Union Mut. L. Ins. Co., 101 Ind. 392.

7. *Kentucky.*— Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352.

Maryland.— Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

New Jersey.— Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

New York.— Haight *v.* Continental Ins. Co., 92 N. Y. 51 [*affirming* 27 Hun 617];

completed foreclosure sale under a mortgage on the insured property avoids the policy under such a provision.[8]

(III) *STIPULATIONS AS TO COMMENCEMENT OF PROCEEDINGS.* The modern policy, however, provides that the "commencement of proceedings of foreclosure" shall render the policy void.[9] The standard policy requires this to be with the knowledge of the insured.[10] Under this provision the first steps in a foreclosure proceeding when taken vitiate the policy,[11] and a discontinuance thereof thereafter does not avail the insurer.[12]

(IV) *STIPULATIONS AS TO NOTICE OF SALE.* The provision of avoidance of the standard policy if "notice be given of sale of any property covered by this policy by virtue of any mortgage or trust deed" has reference to the extrajudicial enforcement of a mortgage by means of notice and sale. The clause is valid.[13]

(V) *EFFECT OF MAKING POLICY PAYABLE TO MORTGAGEE.* If the insured has recognized the rights of the mortgagee by issuing the policy to him upon his

McLaren *v.* Hartford F. Ins. Co., 1 Edm. Sel. Cas. 210.

Pennsylvania.— Stainer *v.* Royal Ins. Co., 6 Northam. Co. Rep. 362.

See 28 Cent. Dig. tit. "Insurance," § 815 *et seq.*

Contra.— McIntire *v.* Norwich F. Ins. Co., 102 Mass. 230, 3 Am. Rep. 458.

So long as the right of redemption remains to the mortgagor he retains an insurable interest, but when his right of redemption is lost, his insurable interest is terminated and the policy must fail. Essex Sav. Bank *v.* Meriden F. Ins. Co., 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759; Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 4 Am. L. Rec. 228. See also *infra*, XIII, F, 2, n, (I).

Under the common-law view of a mortgage, however, a purchase by a third person of the equity of redemption, who also obtains an assignment of the mortgage and of the policy, operates as a foreclosure, merging the mortgage, and vitiates the policy. Macomber *v.* Camhridge Mut. F. Ins. Co., 8 Cush. (Mass.) 133. The taking possession of the property by the mortgagee under such a theory of a mortgage, if provided against, will vitiate the policy. Jacobs *v.* Eagle Mut. F. Ins. Co., 7 Allen (Mass.) 132.

8. Bishop *v.* Clay F. & M. Ins. Co., 45 Conn. 430; Commercial Union Assur. Co. *v.* Scammon, 102 Ill. 46 [*reversing* 6 Ill. App. 551]; Brunswick Sav. Inst. *v.* Commercial Union Ins. Co., 68 Me. 313, 28 Am. Dec. 56.

On a foreclosure by advertisement, the time of redemption not having expired, no forfeiture is worked. Loy *v.* Home Ins. Co., 24 Minn. 315, 31 Am. Rep. 346.

Without such a provision a completed sale under foreclosure would avoid the policy. Mt. Vernon Mfg. Co. *v.* Summit County Mut. F. Ins. Co., 10 Ohio St. 347.

9. See cases cited *infra*, this note.

An action is not commenced until a summons is served. Sharp *v.* Scottish Union, etc., Ins. Co., 136 Cal. 542, 69 Pac. 253, 615; Norris *v.* Hartford F. Ins. Co., 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765.

Meaning of the term "commencement" of foreclosure proceedings see Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 35 So. 271, 98 Am. St. Rep. 481; Collins *v.* London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924; Weiss *v.* American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991.

Such provisions have reference to the future, and hence the fact that a foreclosure has been begun when the policy is issued does not effect a forfeiture in the absence of fraud. Orient Ins. Co. *v.* Burrus, 63 S. W. 453, 23 Ky. L. Rep. 656.

The foreclosure of a statutory builder's lien is not within the meaning of the term as here used. Speagle *v.* Dwelling House Ins. Co., 97 Ky. 646, 31 S. W. 282, 17 Ky. L. Rep. 610.

10. North British, etc., Ins. Co. *v.* Freeman, (Tex. Civ. App. 1896) 33 S. W. 1091.

This does not mean that the insured must have such knowledge at the time of the commencement of the proceedings. It is enough if he has notice before the loss. Schroeder *v.* Imperial Ins. Co., 132 Cal. 18, 63 Pac. 1074, 84 Am. St. Rep. 17; Norris *v.* Hartford F. Ins. Co., 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765; Delaware Ins. Co. *v.* Greer, 120 Fed. 916, 57 C. C. A. 188, 61 L. R. A. 137.

11. Quinlan *v.* Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 [*affirming* 15 N. Y. Suppl. 317]; Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404; Norris *v.* Hartford F. Ins. Co., 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765; Findlay *v.* Union Mut. F. Ins. Co., 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885.

12. Springfield Steam Laundry Co. *v.* Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521.

In an early Ohio case, where the condition related only to a "sale," it was held, however, that when the foreclosure sale had been set aside by consent of the parties no forfeiture occurred. Mt. Vernon Mfg. Co. *v.* Summit County Mut. F. Ins. Co., 10 Ohio St. 347.

13. Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 35 So. 271, 98 Am. St. Rep. 481; Merchants' Ins. Co. *v.* Brown, 77 Md. 79, 25 Atl. 992; Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404; Medley *v.* Ger-

interest, or by agreeing to pay him the proceeds of the policy, in the nature of things, the printed provisions of the policy with reference to foreclosure proceedings cease to have full applicability.[14] Usually the mortgagee takes subject to the rights of the mortgagor and a conveyance by the latter should therefore defeat the former's right to recover,[15] but in case the policy provides otherwise, or if the mortgagee be the real party insured, the mortgagee and his assigns[16] are protected.[17]

m. Levy of Execution or Attachment. A provision that the policy shall become void if the property insured be levied on or taken into possession or custody by attachment is valid.[18] However, in the case of realty the law technically recognizes no such thing as a "levy," for any judgment operates as a lien, so that, construing the policy against the insurer, the conclusion is reached that such

man Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

Ignorance of such a condition is no excuse for its violation. Pearson *v.* German Ins. Co., 73 Mo. App. 480.

This provision is inoperative in Louisiana, as that mode of enforcing mortgages is not known to the civil law. Stenzel *v.* Pennsylvania F. Ins. Co., 110 La. 1019, 35 So. 271, 98 Am. St. Rep. 481.

In the absence of an explicit provision to that effect, such an enforcement of a mortgage does not terminate a policy to be void "if a change be made in the title," if the sale must by statute be approved by the court. Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

14. Hence a change of interest by foreclosure whereby the interest of the mortgagee is increased will not release the insurer from liability.

Kansas.— Dodge *v.* Hamburg-Bremen F. Ins. Co., 4 Kan. App. 415, 46 Pac. 25.

Massachusetts.— Smith *v.* Union Ins. Co., 120 Mass. 90.

Michigan.— Butz *v.* Ohio Farmers' Ins. Co., 76 Mich. 263, 42 N. W. 1119, 15 Am. St. Rep. 316.

Minnesota.— Pioneer Sav., etc., Co. *v.* St. Paul F. & M. Ins. Co., 68 Minn. 170, 70 N. W. 979; Washburn Mill Co. *v.* Philadelphia Fire Assoc., 60 Minn. 68, 61 N. W. 828, 51 Am. St. Rep. 500.

Nebraska.— Farmers', etc., Ins. Co. *v.* Newman, 58 Nebr. 504, 78 N. W. 933; Billings *v.* German Ins. Co., 34 Nebr. 502, 52 N. W. 397; Henton *v.* Farmers', etc., Ins. Co., 1 Nebr. (Unoff.) 425, 95 N. W. 670.

New Hampshire.— Bragg *v.* New England Mut. F. Ins. Co., 25 N. H. 289.

New Jersey.— Kane *v.* Hibernia Mut. F. Ins. Co., 38 N. J. L. 441, 20 Am. Rep. 409.

New York.— Chamberlain *v.* Insurance Co. of North America, 51 Hun 636, 3 N. Y. Suppl. 701.

Wisconsin.— Miner *v.* Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479.

See 28 Cent. Dig. tit. "Insurance," § 817.

Contra.— Springfield Steam Laundry Co. *v.* Traders' Ins. Co., 66 Mo. App. 199. See also McKinney *v.* Western Assur. Co., 97 Ky. 474, 30 S. W. 1004, 17 Ky. L. Rep. 325; Hageman *v.* Allemania F. Ins. Co., 38 Leg. Int. (Pa.) 375, where the policy was not originally issued to the mortgagee, but only the proceeds indorsed as payable to him. And *compare* Bellevue Roller Mill Co. *v.* London, etc., F. Ins. Co., 4 Ida. 307, 39 Pac. 196; Phenix Ins. Co. *v.* Union Mut. L. Ins. Co., 101 Ind. 392; Ethington *v.* Dwelling House Ins. Co., 55 Mo. App. 129.

When the foreclosure proceedings are begun before the issuance of the policy and the loss occurs after foreclosure sale, the insurance being for the benefit of the mortgagee, the insurer cannot object to the change of title. German Ins. Co. *v.* Churchill, 26 Ill. App. 206.

A policy taken out by a trustee is not avoided by a conveyance to the *cestui que trust.* Rhode Island Underwriters' Assoc. *v.* Monarch, 98 Ky. 305, 32 S. W. 959, 17 Ky. L. Rep. 876.

A conveyance by the mortgagor to the mortgagee by quitclaim with an unrecorded bond for reconveyance upon payment of the amount due has been held to violate the terms of a policy providing against change of title. Foote *v.* Hartford F. Ins. Co., 119 Mass. 259.

15. See *supra,* XIII, A, 7, b.

16. Breeyear *v.* Rockingham Farmers' Mut. F. Ins. Co., 71 N. H. 445, 52 Atl. 860.

17. Boyd *v.* Thuringia Ins. Co., 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165.

Insurer's right to subrogation see Insurance Co. of North America *v.* Martin, 157 Ind. 209, 51 N. E. 361; and *infra,* XX, F, 2.

18. Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; Pennsylvania Ins. Co. *v.* Gottsman, 48 Pa. St. 151; Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267; Burr *v.* German Ins. Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905.

That the proceeding is entirely without the insured's fault is immaterial. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

The Canadian decisions are conflicting. In May *v.* Standard F. Ins. Co., 30 U. C. C. P. 51, the provision was spoken of as just and reasonable. In Sands *v.* Standard Ins. Co., 27 Grant Ch. (U. C.) 167, 26 Grant Ch. (U. C.) 113, the converse was stated.

terms, except "attachment," are inapplicable to a proceeding to enforce a judgment upon real estate.[19] The insurer retains an insurable interest until a completed sale on execution,[20] and this is true also in the case of an attachment.[21] In the absence of such a provision the insurer cannot defend in an action on a policy insuring personalty upon the ground that the title or interest has been changed by levy or that there has been an alienation, provisions only against such latter acts being found in the policy;[22] nor is a levy a breach of a covenant forbidding a change of "possession," so long as the change is only constructive and not actual.[23]

n. Judicial Sale — (i) *Legal Sale.* While a completed judicial sale transfers title and so amounts to an "alienation, sale, or transfer," a policy is barred thereby even without conditions against such acts, for the insurable interest is terminated. Under an express condition against sale, etc., the result must be the same.[24] But this result can only be reached when the sale is finally completed. If any step remains to be taken, or if the period of redemption has not expired, the insured is not barred.[25]

(ii) *Illegal Sale.* It has been held that the sale must have been valid to effect a forfeiture under a clause forbidding alienation and that an illegal sale does not affect the right of the insured.[26] But if there was merely an irregularity

19. *Massachusetts.*— Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342, 53 Am. Rep. 44.

New York.— Colt *v.* Phœnix F. Ins. Co., 54 N. Y. 595; Caraher *v.* Royal Ins. Co., 63 Hun 82, 17 N. Y. Suppl. 858.

Pennsylvania.— Manufacturers', etc., Ins. Co. *v.* O'Maley, 82 Pa. St. 400, 22 Am. Rep. 769.

Tennessee.— Pennebaker *v.* Tomlinson, 1 Tenn. Ch. 598.

Wisconsin.— Hammel *v.* Queen's Ins. Co., 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

See 28 Cent. Dig. tit. "Insurance," § 812.

20. Clark *v.* New England Mut. F. Ins. Co., 6 Cush. (Mass.) 342, 53 Am. Rep. 44. And see *supra*, II, C, 2, b, (III).

21. Tefft *v.* Providence Washington Ins. Co., 19 R. I. 185, 32 Atl. 914, 61 Am. St. Rep. 761.

22. Keith *v.* Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 634; Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Rice *v.* Tower, 1 Gray (Mass.) 426; Walradt *v.* Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752 [*affirming* 64 Hun 129, 19 N. Y. Suppl. 293].

23. *Kentucky.*— Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352.

Massachusetts.— Rice *v.* Tower, 1 Gray 426.

Pennsylvania.— Smith *v.* Farmers', etc., Mut. F. Ins. Co., 89 Pa. St. 287; Commonwealth Ins. Co. *v.* Berger, 42 Pa. St. 285, 82 Am. Dec. 504.

Tennessee.— Herman *v.* Katz, 101 Tenn. 118, 47 S. W. 86, 41 L. R. A. 700.

Canada.— May *v.* Standard F. Ins. Co., 5 Ont. App. 605.

See 28 Cent. Dig. tit. "Insurance," § 812.

Contra.— Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

When the writ was improperly issued it is said that a forfeiture is not effected. Miami Valley Ins. Co. *v.* Stanhope, 6 Ohio Dec. (Reprint) 983, 9 Am. L. Rec. 378; Mills *v.* Insurance Co., 5 Phila. (Pa.) 28; Runkle *v.* Citizens' Ins. Co., 6 Fed. 143. But this result seems improper if the possession was actually changed thereunder, for what is sought to be prevented is the change of risk incident to the transfer of possession. Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267. *Contra*, Philadelphia F., etc., Ins. Co. *v.* Mills, 44 Pa. St. 241, 84 Am. Dec. 437.

24. Campbell *v.* Hamilton Mut. Ins. Co., 51 Me. 69.

If the policy requires notice of such proceedings, a notice that execution has been issued is enough without a notification of each successive step in the process of sale. Ulysses Elgin Butter Co. *v.* Home Ins. Co., 20 Pa. Super. Ct. 320.

The standard policy does not contain any special provision upon this point.

25. Lodge *v.* Capital Ins. Co., 91 Iowa 103, 58 N. W. 1089; Wood *v.* American F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733 [*affirming* 78 Hun 109, 29 N. Y. Suppl. 250]; Chamberlain *v.* Insurance Co. of North America, 3 N. Y. Suppl. 701; Collins *v.* London Assur. Corp., 165 Pa. St. 298, 30 Atl. 924; Farmers' Mut. Ins. Co. *v.* Graybill, 74 Pa. St. 17; Hammel *v.* Queen's Ins. Co., 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1.

26. Commercial Union Assur. Co. *v.* Scammon, 144 Ill. 506, 32 N. E. 916; Niagara F. Ins. Co. *v.* Scammon, 144 Ill. 490, 28 N. W. 919, 32 N. E. 914, 19 L. R. A. 114; Richland County Mut. Ins. Co. *v.* Sampson, 38 Ohio St. 672; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. (Va.) 88. But it was held in Tierney *v.* Phœnix Ins. Co., 4 N. D. 565, 62 N. W. 642, 36 L. R. A. 760, that a subsequent decree setting aside a decree of foreclosure as invalid, the insurer not being a party thereto, was inadmissible.

It is immaterial that the decree setting the same aside has not been rendered prior to the loss. Scammon *v.* Commercial Union Ins. Co., 20 Ill. App. 500.

not affecting the validity of the proceedings, title is passed by the sale and hence the policy stands forfeited.[27]

o. Assignment For Creditors, Bankruptcy, or Receivership. A general assignment for the benefit of creditors avoids a policy conditioned against a sale, alienation, or transfer of title.[28] The same rule obtains in case of voluntary bankruptcy when the insured transfers his property to an assignee or trustee in bankruptcy.[29] Likewise an assignment and adjudication in involuntary bankruptcy vitiates the policy.[30] The appointment of a receiver does not affect a breach of a condition against alienation or change of title or interest.[31] Nor does mere change in the *personnel* of receivers avoid the policy.[32]

p. Acquisition of Additional Interest. A change of title whereby the contingent interest of the insured becomes absolute does not defeat the insurance,[33] nor does the getting in of the legal title by the insured owner of the equitable interest.[34] This is true as to an insured mortgagee under the lien theory of a mortgage.[35] So also under the legal theory of a mortgage, the acquisition by an insured mortgagee of the mortgagor's outstanding equity does not affect the policy.[36]

q. Transfers Between Owners. A prohibition against sale, alienation, or transfer of title is not broken by such a transaction between joint or common owners

27. McKissick *v.* Mill Owners Mut. F. Ins. Co., 50 Iowa 116.

A setting aside of the sale by mutual consent will not restore the life of the policy once its terms become void. Mt. Vernon Mfg. Co. *v.* Summit County Mut. F. Ins. Co., 10 Ohio St. 347. And *compare* Bemis *v.* Harborcreek Mut. F. Ins. Co., 200 Pa. St. 340, 49 Atl. 769; Tittemore *v.* Vermont Mut. F. Ins. Co., 20 Vt. 546.

If the policy provides only for a suspension, the reacquisition of title may have the effect of reviving the policy. *Compare* Power *v.* Ocean Ins. Co., 19 La. 28, 36 Am. Dec. 665.

28. Orr *v.* Hanover F. Ins. Co., 158 Ill. 149, 41 N. E. 854, 49 Am. St. Rep. 146 [*affirming* 56 Ill. App. 621]; Dadmun Mfg. Co. *v.* Worcester Mut. F. Ins. Co., 11 Metc. (Mass.) 429; Ohio Farmers' Ins. Co. *v.* Waters, 65 Ohio St. 157, 61 N. E. 711; Little *v.* Eureka Ins. Co., 5 Ohio Dec. (Reprint) 285, 4 Am. L. Rec. 228; Guenzburger *v.* Home Ins. Co., 4 Ohio S. & C. Pl. Dec. 220, 3 Ohio N. P. 140; Milwaukee Trust Co. *v.* Lancashire Ins. Co., 95 Wis. 192, 70 N. W. 81.

Extent and limits of rule.— The result is the same, although the transfer has been made by the wife of the assignor holding title as collateral security, even though she retains an insurable interest as a creditor after the transfer. Brown *v.* New England Cotton, etc., Manufacturers' Mut. Ins. Co., 156 Mass. 587, 31 N. E. 691. And the fact that it was in fraud of creditors by reason of preferences cannot be set up by the insured. Dadmun Mfg. Co. *v.* Worcester Mut. F. Ins. Co., 11 Metc. (Mass.) 429; Milwaukee Trust Co. *v.* Lancashire Ins. Co., 95 Wis. 192, 70 N. W. 81. It was held in Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, that a deed by insured conveying goods to assignees in trust to pay creditors did not render the policy void when the insured retained the actual possession.

29. Adams *v.* Rockingham Mut. F. Ins. Co., 29 Me. 292; Young *v.* Eagle F. Ins. Co., 14 Gray (Mass.) 150, 74 Am. Dec. 673.

An assignment in bankruptcy of mortgaged insured personalty by the mortgagor does not vitiate the insurance, as the mortgagee has the title and the mortgagor's act is ineffectual. Appelton Iron Co. *v.* British America Assur. Co., 46 Wis. 23, 1 N. W. 9, 50 N. W. 1100.

30. Perry *v.* Lorillard F. Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272 [*affirming* 6 Lans. 201].

But a mere adjudication of bankruptcy, there being no transfer of the property, will not have such an effect. Fuller *v.* New York F. Ins. Co., 184 Mass. 12, 67 N. E. 879.

31. Lancashire Ins. Co. *v.* Boardman, 58 Kan. 339, 49 Pac. 92, 62 Am. St. Rep. 621; Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408. See also Small *v.* Westchester F. Ins. Co., 51 Fed. 789, where the decree appointing a receiver was held not to have such relation backward as to vest him with the title prior to the date of the loss.

32. Georgia Home Ins. Co. *v.* Bartlett, 91 Va. 305, 21 S. E. 476, 50 Am. St. Rep. 832; Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408. So when the property is insured by the receiver as such. Liverpool, etc., Ins. Co. *v.* McNeill, 89 Fed. 131, 32 C. C. A. 173.

33. Wich *v.* Equitable F. & M. Ins. Co., 2 Colo. App. 484, 31 Pac. 389; Continental Ins. Co. *v.* Ward, 50 Kan. 346, 31 Pac. 1079.

34. Michigan F. & M. Ins. Co. *v.* Wich, 8 Colo. App. 409, 46 Pac. 687.

35. Esch *v.* Home Ins. Co., 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443; Bailey *v.* American Cent. Ins. Co., 13 Fed. 250, 4 McCrary 221. See also *supra*, XIII, F, 2, l.

36. Heaton *v.* Manhattan F. Ins. Co., 7 R. I. 502. But *compare* Foote *v.* Hartford F. Ins. Co., 119 Mass. 259.

who are jointly insured, because what is contemplated is a transfer of the entire interest to one not previously interested or insured.[37]

r. Partnership Transactions — (I) *Formation of Partnership.* Whether a policy on goods owned by an individual is forfeited under a clause respecting alienation, by his taking in a partner, is a mooted question. It has been asserted that, whatever the result when both members are insured and a transfer is made between coöwners, the introduction of a previously uninsured person into the risk is a hazard which should not be put on the insurer and is what is intended to be covered by the prohibition. This view rests also in a measure on the proposition that the insured by taking a partner ceases to be sole owner.[38] On the other hand it is claimed that the insured does retain an insurable interest and the policy is intended to prevent only a transfer passing entire title.[39] The admission of a new member into an already insured partnership would seem to rest on the same considerations.[40]

(II) *Transaction Between Insured Copartners.* According to the weight of authority, where an insurance policy is issued to a partnership, a transfer by one partner to the others of all his interest in the partnership property will not vitiate the insurance, notwithstanding a condition that the policy should become void if the property should be sold or conveyed, or the interest of the parties therein changed.[41] It cannot be said as a matter of law that the transfer

37. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553; German Mut. F. Ins. Co. *v.* Fox, (Nebr. 1903) 96 N. W. 652; Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337 [*affirming* 1 Rob. 501]; Hyatt *v.* Wait, 37 Barb. (N. Y.) 29; Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. (N. Y.) 570; Royal Ins. Co. *v.* Sockman, 15 Ohio Cir. Ct. 105, 8 Ohio Cir. Dec. 404. *Contra,* Buckley *v.* Garrett, 47 Pa. St. 204.

38. Germania F. Ins. Co. *v.* Home Ins. Co., 144 N. Y. 195, 39 N. E. 77, 43 Am. St. Rep. 749, 26 L. R. A. 591 [*affirming* 4 Misc. 443, 24 N. Y. Suppl. 357]. The question does not seem to depend on whether the goods are actually received and used as firm property, as the partnership agreement transfers the title to the firm. Malley *v.* Atlantic F. & M. Ins. Co., 51 Conn. 222. A transfer of property insured by an individual to a firm in which he is a silent partner avoids the policy. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 24 S. Ct. 247, 48 L. ed. 385.

39. Cowan *v.* Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583; Blackwell *v.* Miami Valley Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 29 Am. St. Rep. 574, 14 L. R. A. 431 [*reversing* 19 Cinc. L. Bul. 87]. It would seem that such a transaction is covered by a prohibition against any change in "title or interest."

40. Card *v.* Phœnix Ins. Co., 4 Mo. App. 424. The result of forfeiture is certainly not reached prior to actual admission of the new member into the firm. London Assur. Corp. *v.* Drennen, 116 U. S. 461, 6 S. Ct. 442, 29 L. ed. 688. *Compare* Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398, in a case arising upon a renewal of the policy.

There is no forfeiture unless the person becomes a true partner; thus the policy is not avoided if a third person be admitted only to a share of the profits as compensation for services and not as a partner. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Likewise the death of an insured partner and the consequent change of title to his heirs, the business being conducted for six months as formerly when the fire occurred, has been held not to avoid a policy. Virginia F. & M. Ins. Co. *v.* Thomas, 90 Va. 658, 19 S. E. 454.

41. *Alabama.*— Burnett *v.* Eufaula Home Ins. Co., 46 Ala. 11, 7 Am. Rep. 581.

Colorado.— Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587.

Connecticut.— Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Louisiana.— Dermani *v.* Home Mut. Ins. Co., 26 La. Ann. 69, 21 Am. Rep. 544.

Massachusetts.— Powers *v.* Guardian F., etc., Ins. Co., 136 Mass. 108, 49 Am. Rep. 20.

Mississippi.— New Orleans Ins. Assoc. *v.* Holberg, 64 Miss. 51, 8 So. 175.

Nebraska.— Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532.

New Hampshire.— Pierce *v.* Nashua F. Ins. Co., 50 N. H. 297, 9 Am. Rep. 235.

New York.— Wood *v.* American F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733 [*affirming* 78 Hun 109, 29 N. Y. Suppl. 250]; Hoffman *v.* Ætna F. Ins. Co., 32 N. Y. 405, 88 Am. Dec. 337 [*distinguishing* and *explaining* Tillou *v.* Kingston Mut. F. Ins. Co., 5 N. Y. 405]; Loeb *v.* Firemen's Ins. Co., 38 Misc. 107, 77 N. Y. Suppl. 106; Roby *v.* American Cent. Ins. Co., 11 N. Y. St. 93; Tallman *v.* Atlantic F. & M. Ins. Co., 29 How. Pr. 71.

Ohio.— West *v.* Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294.

Texas.— Texas Banking, etc., Co. *v.* Cohen, 47 Tex. 406, 26 Am. Rep. 298.

Virginia.— Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

Compare Drennen *v.* London Assur. Corp.,

by one partner to another of his interest is *per se* an increase of risk.[42] Within the clause of a policy prohibiting a change of possession the better rule seems to be that the possession of one partner prior to a dissolution[43] of the partnership is the possession of all the partners insured as such.[44]

(III) *DISSOLUTION OF PARTNERSHIP.* A dissolution of the partnership by action or agreement without a division of the property does not effect a forfeiture,[45] but a completed dissolution with transfers of the property has been held to have such an effect.[46]

s. Stock in Trade. The condition in a policy avoiding the contract in the event of a sale of the property does not apply to a stock of goods kept for sale.[47]

t. Lease. A lease does not operate as a change of title or interest.[48] It does,

113 U. S. 51, 5 S. Ct. 341, 28 L. ed. 919 [*reversing* 20 Fed. 657].

See 28 Cent. Dig. tit. "Insurance," § 805½.

See also monographic notes in 52 Am. Rep. 442; 49 Am. Rep. 22.

Contra.— *Illinois.*— Dix *v.* Mercantile Ins. Co., 22 Ill. 272.

Indiana.— Hartford F. Ins. Co. *v.* Ross, 23 Ind. 179, 85 Am. Dec. 452, where, however, the prohibition was against the sale or change of title of any interest.

Iowa.— Hathaway *v.* State Ins. Co., 64 Iowa 229, 20 N. W. 164, 52 Am. Rep. 438 [*distinguishing* Cowan *v.* Iowa State Ins. Co., 40 Iowa 551, 20 Am. Rep. 583].

Pennsylvania.— Finley *v.* Lycoming County Mut. Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705.

Vermont.— Wood *v.* Rutland, etc., Mut. F. Ins. Co., 31 Vt. 552.

Wisconsin.— Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

Likewise assignment of the insured property from one partner to another does not violate a clause prohibiting an assignment. Wilson *v.* Genesee Mut. Ins. Co., 16 Barb. (N. Y.) 511; West *v.* Citizens' Ins. Co., 27 Ohio St. 1, 22 Am. Rep. 294; Texas Banking, etc., Co. *v.* Cohen, 47 Tex. 406, 26 Am. Rep. 298.

42. Powers *v.* Guardian F., etc., Ins. Co., 136 Mass. 108, 49 Am. Rep. 20.

43. Whether there has been a dissolution of a partnership may be a mixed question of law and fact for the jury under proper instructions. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712.

44. Allemania F. Ins. Co. *v.* Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610; Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712. See also cases cited *supra*, note 41. *Contra*, Dix *v.* Mercantile Ins. Co., 22 Ill. 272; Hartford F. Ins. Co. *v.* Ross, 23 Ind. 179, 85 Am. Dec. 452; Oldham *v.* Anchor Mut. F. Ins. Co., 90 Iowa 225, 57 N. W. 861; Buckley *v.* Garrett, 47 Pa. St. 204; Finley *v.* Lycoming County Mut. Ins. Co., 30 Pa. St. 311, 72 Am. Dec. 705; Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

This result of course follows if there is a mere executory contract to sell. Georgia Home Ins. Co. *v.* Hall, 94 Ga. 630, 21 S. E. 828; Allemania F. Ins. Co. *v.* Peck, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610.

45. Roby *v.* American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808. See also Virginia F. & M. Ins. Co. *v.* Thomas, 90 Va. 658, 19 S. E. 454.

The appointment of a copartner as receiver in an action for dissolution will not work a forfeiture. Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60.

46. Jones *v.* Phœnix Ins. Co., 97 Iowa 275, 66 N. W. 169; Dreher *v.* Ætna Ins. Co., 18 Mo. 128. *Contra*, Dresser *v.* United Firemen's Ins. Co., 45 Hun (N. Y.) 298 [*affirmed* in 122 N. Y. 642, 25 N. E. 956].

If a firm be dissolved by the sale by one partner of his interest to an outsider it has been held that the policy is avoided. Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408.

The sale of the property of a partnership to a limited company formed for the purpose of taking over the business is an alienation that avoids the policy, although most of the stock in the company be owned by the members of the former partnership. A. G. Peuchen Co. *v.* City Mut. F. Ins. Co., 18 Ont. App. 446.

47. The insured may sell in trade and replace his entire stock as often as his own interest may require, and the policy protects him as to whatever goods may chance to be on hand when a fire occurs. Lane *v.* Maine Mut. F. Ins. Co., 12 Me. 44, 28 Am. Dec. 150; Wolfe *v.* Security F. Ins. Co., 39 N. Y. 49; Briggs *v.* North Carolina Home Ins. Co., 88 N. C. 141; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

If the sale be in mass the foregoing statement is not applicable. Briggs *v.* North Carolina Home Ins. Co., 88 N. C. 141. It has been held, however, that a sale by a policy-holder of an interest in a stock of goods and a subsequent repurchase by him before the fire does not forfeit the policy, although it may have been temporarily suspended, the change of ownership being considered the same as a selling and replenishing. Insurance Co. of North America *v.* Lewis, 1 Ohio Cir. Ct. 79, 1 Ohio Cir. Dec. 47. The same result was reached with less of reason when there was a transfer of all the title and a subsequent repurchase. Lane *v.* Maine Mut. F. Ins. Co., 12 Me. 44, 28 Am. Dec. 150.

48. West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

however, when the lessee asserts his rights, operate as a change of possession.[49] It is manifestly a breach of a condition against a change of "title, ownership, or possession" if a lessee be allowed to occupy the premises with an option to purchase,[50] or if the lease provides that "if the lessee pays the lessor" a certain sum "the lessor doth hereby sell and convey."[51]

G. Encumbrances — 1. Provisions of Policy. The fact that the giving of a mortgage has been held to be no change in title, ownership, or interest,[52] as well as the insurer's desire to prevent a lessening of the insured's interest in protecting the insured property, has led to the insertion in many policies of a specific provision against encumbrances. Such conditions are valid and enforceable.[53] But in the absence thereof, a subsequent encumbrance will not affect the policy.[54] If the fact that the warranty is intended to have a future operation be not clearly apparent, a provision that if the premises "be" encumbered the policy shall lapse will be treated only as a warranty of present condition.[55] The provision cannot apply against an encumbrance of which the insurer was cognizant, executed before the policy.[56] The question whether the execution of an encumbrance increased the risk or not is wholly immaterial when the stipulation amounts to a promissory warranty.[57] Some policies merely require notice of an encumbrance. If this be not complied with the policy is void,[58] after a reasonable time in which notice might have been given.[59] The provisions against

49. Wenzel *v.* Commercial Ins. Co., 67 Cal. 438, 7 Pac. 817.

A lease is not a breach of a condition that the property should not be "sold or transferred, or any change take place in title or possession, whether by legal process, judicial decree, voluntary transfer or conveyance." Rumsey *v.* Phœnix Ins. Co., 1 Fed. 396, 17 Blatchf. 527.

Effect of a known intention to use the premises for rental purposes see *supra*, XIII, B, 7, h, (III).

50. Smith *v.* American F. Ins. Co., (Cal. 1890) 23 Pac. 385; Smith *v.* Phenix Ins. Co., (Cal. 1890) 23 Pac. 383.

But it is not a change of "interest" to allow the lessee the privilege of an option to purchase, if the option be not exercised. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

51. London Northern Assur. Co. *v.* Flournoy, (Tex. Sup. 1890) 19 S. W. 795; Philadelphia Fire Assoc. *v.* Flournoy, 84 Tex. 632, 19 S. W. 793, 31 Am. St. Rep. 89.

Further as to the effect of change of possession as an incident to a contract of sale see *supra*, XIII, F, 2, h.

52. See *supra*, XIII, F, 2, d.

53. *Delaware.*— Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. 32, 29 Atl. 1039, 65 Am. St. Rep. 264.

Iowa.— Houdeck *v.* Merchants', etc., Ins. Co., 102 Iowa 303, 71 N. W. 354.

Pennsylvania.— Nassauer *v.* Susquehanna Mut. F. Ins. Co., 109 Pa. St. 507; Brown *v.* Commonwealth Mut. Ins. Co., 41 Pa. St. 187.

Virginia.— Sulphur Mines Co. *v.* Phenix Ins. Co., 94 Va. 355, 26 S. E. 856.

Wisconsin.— Hogue *v.* Farmers' Mut. F. Ins. Co., 116 Wis. 656, 93 N. W. 849; Fuller *v.* Madison Mut. Ins. Co., 36 Wis. 599.

Canada.— Russ *v.* Clinton Mut. F. Ins. Co., 29 U. C. Q. B. 73; Burton *v.* Gore Dist. Mut. Ins. Co., 14 U. C. Q. B. 342.

See 28 Cent. Dig. tit. "Insurance," § 829.

They apply, however, only to encumbrances created upon the insured's interest by the insured. Richardson *v.* Canada West Farmers' Mut., etc., Ins. Co., 16 U. C. C. P. 430.

54. Tiefenthal *v.* Citizens' Mut. F. Ins. Co., 53 Mich. 306, 19 N. W. 9; Dutton *v.* New England Mut. F. Ins. Co., 29 N. H. 153; Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50; Richmond F. Ins. Co. *v.* Fee, 14 Quebec 293.

55. Collins *v.* Merchants', etc., Mut. Ins. Co., 95 Iowa 540, 64 N. W. 602, 58 Am. St. Rep. 438.

56. Cowart *v.* Capital City Ins. Co., 114 Ala. 356, 22 So. 574. See *infra*, XIV, E, 3.

57. Milwaukee Mechanics' Ins. Co. *v.* Niewedde, 12 Ind. App. 145, 39 N. E. 757. It has indeed been held that the giving of a mortgage is *per se* an increase of risk. Lee *v.* Agricultural Ins. Co., 79 Iowa 379, 44 N. W. 683. In Tiefenthal *v.* Citizens' Mut. F. Ins. Co., 53 Mich. 306, 19 N. W. 9, this was said to be not true when the mortgage was on growing crops before harvesting.

The Ohio statute requiring an increase of risk before the breach of certain warranties shall vitiate a policy has no application to this warranty. Webster *v.* Dwelling House Ins. Co., 53 Ohio St. 558, 42 N. E. 546, 53 Am. St. Rep. 658, 30 L. R. A. 719; Dwelling House Ins. Co. *v.* Webster, 7 Ohio Cir. Ct. 511, 4 Ohio Cir. Dec. 704. But see Henderson *v.* Ohio Farmers' Ins. Co., 2 Ohio S. & C. Pl. Dec. 189, 2 Ohio N. P. 17.

58. Insurance Co. of North America *v.* Wicker, (Tex. Civ. App. 1899) 54 S. W. 300 [*affirmed* in 93 Tex. 390, 55 S. W. 740].

59. McGowan *v.* People's Mut. F. Ins. Co., 54 Vt. 211, 41 Am. Rep. 843.

The mere mailing of a letter is insufficient if it be not received by the insurer. McCann *v.* Waterloo County Mut. F. Ins. Co., 34 U. C. Q. B. 376.

encumbrance are applicable to both real and personal property,[60] unless the language specially restricts their applicability.[61]

2. WHAT CONSTITUTES AN ENCUMBRANCE — a. In General — Mortgage. The placing of an encumbrance upon property pursuant to an understanding to that effect when the policy was issued between the insurer and the insured is not a forbidden encumbrance.[62] Mortgages, being voluntary in their nature, are especially within the prohibition against an encumbrance, whether the subject-matter be realty[63] or personalty.[64]

b. Inoperative Instrument. If the instrument be inoperative, the condition is not broken, for no real encumbrance has been created.[65]

c. Renewal of Existing Encumbrance. A provision against future encumbrances is not broken by a renewal of a prior mortgage existing at the date of the policy, and known to the insurer.[66] Nor does a mere change in the form of an existing encumbrance amount to a breach.[67] So the paying off of the mort-

60. Born *v.* Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300; Brown *v.* Commonwealth Mut. Ins. Co., 41 Pa. St. 187.

61. Jacoby *v.* West Chester F. Ins. Co., 11 York Leg. Rec. (Pa.) 153.

62. Sentell *v.* Oswego County Farmers' Ins. Co., 16 Hun (N. Y.) 516.

63. *Indiana.*— Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843.

Iowa.— Ellis *v.* State Ins. Co., 61 Iowa 577, 16 N. W. 744.

Missouri.— German-American Bank *v.* Agricultural Ins. Co., 8 Mo. App. 401.

New York.— Kiernan *v.* Agricultural Ins. Co., 72 Hun 519, 25 N. Y. Suppl. 438.

Vermont.— Tarbell *v.* Vermont Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533.

See 28 Cent. Dig. tit. "Insurance," § 829 *et seq.*

If a building be the subject-matter of the policy, a mortgage on merely the realty adjacent thereto and a part of the same premises is not an encumbrance of the subject-matter of the insurance. Phenix Ins. Co. *v.* Hart, 39 Ill. App. 517 [*affirmed* in 149 Ill. 513, 36 N. E. 990]; Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444.

But a mortgage of the realty on which the building stands, the latter not being expressly excepted from the operation of the mortgage, constitutes an encumbrance on the building. Mallory *v.* Farmers' Ins. Co., 65 Iowa 450, 21 N. W. 772.

A deed of trust is equivalent to a mortgage and so constitutes an encumbrance. Hunt *v.* Springfield F. & M. Ins. Co., 20 App. Cas. (D. C.) 48.

An agreement in a lease that in case of failure to pay rent the lessor may distrain and sell the property of the insured amounts to a prohibited encumbrance. Peet *v.* Dakota F. & M. Ins. Co., 7 S. D. 410, 64 N. W. 206.

64. Brown *v.* Westchester F. Ins. Co., 9 Kan. App. 526, 58 Pac. 276; Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047; Morotock Ins. Co. *v.* Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

Whether a mortgage on fixtures is within the prohibition against chattel mortgages see Morotock Ins. Co. *v.* Rodefer, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846.

65. Thus a mortgage in escrow, the event upon which it was to become operative never occurring, does not effect a breach. Weigen *v.* Council Bluffs Ins. Co., 104 Iowa 410, 73 N. W. 862; Adler *v.* Germania F. Ins. Co., 15 Misc. (N. Y.) 471, 37 N. Y. Suppl. 207. So if the mortgage was never delivered (Fitchner *v.* Fidelity Mut. F. Assoc., (Iowa 1896) 68 N. W. 710; Olmstead *v.* Iowa Mut. Ins. Co., 24 Iowa 503; Hanscom *v.* Home Ins. Co., 90 Me. 333, 38 Atl. 324; Neafie *v.* Woodcock, 15 N. Y. App. Div. 618, 44 N. Y. Suppl. 768), or if it was upon the homestead and the wife did not join (Watertown F. Ins. Co. *v.* Grover, etc., Sewing Mach. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146).

If a mortgage is intended to be effective at the time of its execution, that it was intended to lapse upon a subsequent entry of judgment to occur within a few days does not prevent a forfeiture. Thorne *v.* Ætna Ins. Co. of Hartford, 102 Wis. 593, 78 N. W. 920.

A chattel mortgage, void for fraud on creditors and afterward set aside on that ground, nevertheless avoids the policy under a condition as to encumbrance. Secrest *v.* Hartford F. Ins. Co., 68 S. C. 378, 47 S. E. 680.

66. *Indiana.*— Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 52 Kan. 486, 35 Pac. 15, 39 Am. St. Rep. 356, 53 Kan. 623, 36 Pac. 983.

Mississippi.— Georgia Home Ins. Co. *v.* Stein, 72 Miss. 943, 18 So. 414.

New York.— Mowry *v.* Agricultural Ins. Co., 64 Hun 137, 18 N. Y. Suppl. 834.

Oregon.— Koshland *v.* Home Mut. Ins. Co., 31 Oreg. 321, 49 Pac. 864, 50 Pac. 567.

See 28 Cent. Dig. tit. "Insurance," § 836.

The renewal may cover the accrued interest on the prior mortgage. Kansas Farmers' F. Ins. Co. *v.* Saindon, 52 Kan. 486, 36 Pac. 15, 39 Am. St. Rep. 356, 53 Kan. 623, 36 Pac. 983.

67. Farmers', etc., Ins. Co. *v.* Newman, 58 Nebr. 504, 78 N. W. 933; Weiss *v.* American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991.

gage debt by borrowing and giving a new mortgage for the money borrowed does not affect the policy.[68] So items of encumbrance may be changed provided the total amount is not increased over that of the original encumbrance.[69] Even though the original mortgage may have been paid off, the insured may borrow again to the extent of the mortgage existing at the time of the execution of the policy, without a breach of the condition.[70] But none of these transactions must increase the amount of the encumbrance, or the policy lapses.[71]

d. Encumbrance of a Part of Property Insured. In case the contract is severable,[72] the encumbrance of a portion of the subject-matter thereof will not vitiate the policy on the part not encumbered.[73] If the policy be not regarded as severable, even though the matter insured be of distinct and separate kinds, that is, if the insurance be regarded as an entirety, or if it be provided that an encumbrance in any manner shall vitiate the entire policy, an encumbrance placed on any article or portion of the subject-matter terminates the insurance.[74] An encumbrance by an owner of an undivided interest of his share will vitiate the entire policy on the property.[75]

68. Dougherty *v.* German-American Ins. Co., 67 Mo. App. 526; Koshland *v.* Home Mut. Ins. Co., 31 Oreg. 321, 49 Pac. 864, 50 Pac. 567; Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646.

69. Gould *v.* Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717.

Where the insured sells part of the lands on which the property insured is situated, pays off the mortgage, and, to obtain the price of another tract of land smaller than that sold, places another mortgage on the land retained, if the mortgage so procured is not greater in proportion to the quantity of land than was the mortgage upon the whole property, there is no breach of a condition against future encumbrances. Russell *v.* Cedar Rapids Ins. Co., 71 Iowa 69, 32 N. W. 95.

70. McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38; Georgia Home Ins. Co. *v.* Stein, 72 Miss. 943, 18 So. 414.

71. Johansen *v.* Home F. Ins. Co., 54 Nebr. 548, 74 N. W. 866; Koshland *v.* Philadelphia Fire Assoc., 31 Oreg. 362, 49 Pac. 865; Sentell *v.* Oswego County Farmers' Ins. Co., 16 Hun (N. Y.) 516.

72. Whether the contract is entire or divisible see *supra*, XI, L; XII, D; XIII, A, 5; XIII, B, 7, f.

73. *Illinois.*— German Ins. Co. *v.* Miller, 39 Ill. App. 633; Dwelling House Ins. Co. *v.* Butterly, 33 Ill. App. 626 [*affirmed* in 133 Ill. 534, 24 N. E. 873].

Kansas.— Kansas Farmers' F. Ins. Co. *v.* Saindon, 53 Kan. 623, 36 Pac. 983.

Missouri.— Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247.

Nebraska.— German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

New York.— Pratt *v.* Dwelling-House Mut. F. Ins. Co., 130 N. Y. 206, 29 N. E. 117 [*reversing* 53 Hun 101, 6 N. Y. Suppl. 78]; Merrill *v.* Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184 [*affirming* 10 Hun 428]; Coleman *v.* Phœnix Ins. Co., 3 N. Y. App. Div. 65, 38 N. Y. Suppl. 986; Dacey *v.* Watertown Agricultural Ins. Co., 21 Hun 83; Adler *v.* Germania F. Ins. Co., 17 Misc. 347, 39 N. Y. Suppl. 1070; American Artistic Gold Stamping Co. *v.* Glens Falls Ins. Co., 1 Misc. 114, 20 N. Y. Suppl. 646.

See 28 Cent. Dig. tit. "Insurance," § 839. See also *supra*, XI, L; XII, D; XIII, A, 5; XIII, B, 7, f.

The same result is reached if two kinds of property are insured by the same mortgage and the prohibition runs against one kind alone. Wright *v.* London F. Ins. Assoc., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211. It has been held that where a policy of insurance on specified personal property situated in a designated building provides that the same shall be void if a change takes place in the title without the consent of the company, and mortgaged personal property of the character insured is subsequently placed in the building and there destroyed, a claim for loss on such property, there having been no consent of the company to the mortgage, will avoid the entire policy; but if no claim is made as to the mortgaged property it may be good as to the balance. Schumitsch *v.* American Ins. Co., 48 Wis. 26, 3 N. W. 595.

74. Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697; Home F. Ins. Co. *v.* Bernstein, 55 Nebr. 260, 75 N. W. 839; Kiernan *v.* Agricultural Ins. Co., 72 Hun (N. Y.) 519, 25 N. Y. Suppl. 438; Bailey *v.* Homestead F. Ins. Co., 16 Hun (N. Y.) 503 [*affirmed* in 80 N. Y. 21, 36 Am. Rep. 570]; McGowan *v.* People's Mut. F. Ins. Co., 54 Vt. 211, 41 Am. Rep. 843. But see Knowles *v.* American Ins. Co., 66 Hun (N. Y.) 220, 21 N. Y. Suppl. 50.

But some states have considered that if the insurance is an entirety, an encumbrance on anything less than the entire subject-matter is not a violation of the policy's provisions. Phœnix Ins. Co. *v.* Lorenz, (Ind. App. 1892) 29 N. E. 604; Born *v.* Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300.

75. Hicks *v.* Farmers' Ins. Co., 71 Iowa 119, 32 N. W. 201, 60 Am. Rep. 781.

e. Mechanic's Lien or Judgment. The provisions against encumbrances have been construed to refer only to voluntary encumbrances and not to those placed on the property *in invitum*,[76] such as a mechanic's lien,[77] or a judgment against the insured constituting only a general and not a special lien.[78]

3. Extinguishment of Encumbrance. In accordance with the weight of authority in cases involving a breach of other warranties of a policy conditioned to be void if such warranties are broken, it is held that the subsequent removal of encumbrances before loss in no wise revives the policy prohibiting an encumbrance on pain of forfeiture,[79] but the contrary has been quite generally held.[80]

H. Precautions Against Fire or Loss of Proof — 1. In the Absence of a Stipulation. In the absence of a stipulation the insured is under no obligation to take precautions against a possible loss, even to the extent of following the custom of the particular business.[81] But a representation in the application as to the methods employed in caring for the building or for substances likely to cause fire, when made a part of the policy by reference, requires that such methods be not discontinued so as to increase the risk.[82]

Encumbrance by partner to partner.— This rule is not applicable, however, to encumbrances given from one insured partner to another, for all parties being in privity with the insurer there is no increase of risk. Alston *v.* Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981; Moulton *v.* Ætna F. Ins. Co., 25 N. Y. App. Div. 275, 49 N. Y. Suppl. 570.

76. Phenix Ins. Co. *v.* Smith, 9 Kan. App. 828, 61 Pac. 501.

77. Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30; Green *v.* Homestead F. Ins. Co., 82 N. Y. 517 [*affirming* 17 Hun 467]. *Contra*, Smith *v.* St. Paul F. & M. Ins. Co., 106 Iowa 225, 76 N. W. 676.

78. *Indiana.*— Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

Iowa.— Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126. And see Lodge *v.* Capital Ins. Co., 91 Iowa 103, 58 N. W. 1089; Hicks *v.* Farmer's Ins. Co., 71 Iowa 119, 32 N. W. 201, 60 Am. Rep. 781.

New York.— Baley *v.* Homestead F. Ins. Co., 80 N. Y. 21, 36 Am. Rep. 570 [*affirming* 16 Hun 503]; Chamberlain *v.* Insurance Co. of North America, 3 N. Y. Suppl. 701; Steen *v.* Niagara F. Ins. Co., 61 How. Pr. 144.

Ohio.— Peoples Mut. F. Ins. Co. *v.* Bowersox, 5 Ohio Cir. Ct. 444, 3 Ohio Cir. Dec. 218.

West Virginia.— Gerling *v.* Agricultural Ins. Co., 39 W. Va. 689, 20 S. E. 691.

See 28 Cent. Dig. tit. "Insurance," § 835.

Contra.— Brown *v.* Commonwealth Mut. Ins. Co., 41 Pa. St. 187.

See also *supra*, XIII, F, 2, m, n.

A judgment that could not become even a general lien, as when the property is exempt from execution, is nowhere regarded as a breach. Franklin Ins. Co. *v.* Feist, 31 Ind. App. 390, 68 N. E. 188; Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444.

If the judgment is a specific lien, it vitiates the policy under a provision against encumbrances. Kiernan *v.* Agricultural Ins. Co., 72 Hun (N. Y.) 519, 25 N. Y. Suppl. 438; Egan *v.* Mutual Ins. Co., 5 Den. (N. Y.) 326.

A judgment by confession, being the voluntary act of the insured, renders the policy void (Pennsylvania Mut. F. Ins. Co. *v.* Schmidt, 119 Pa. St. 449, 13 Atl. 317; Seybert *v.* Pennsylvania Mut. F. Ins. Co., 103 Pa. St. 282; Kensington Nat. Bank *v.* Yerkes, 86 Pa. St. 227; Hill *v.* Pennsylvania Mut. F. Ins. Co., 2 Luz. Leg. Reg. (Pa.) 465), even though the holder of the warrant to enter judgment had agreed not to enter the same (Hench *v.* Agricultural Ins. Co., 122 Pa. St. 128, 15 Atl. 671, 9 Am. St. Rep. 74).

79. German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; Gray *v.* Guardian Assur. Co., 82 Hun (N. Y.) 380, 31 N. Y. Suppl. 237; Insurance Co. of North America *v.* Wicker, (Tex. Civ. App. 1899) 54 S. W. 300 [*affirmed* in 93 Tex. 390, 55 S. W. 740]. But see Tomkins *v.* Hartford F. Ins. Co., 22 N. Y. App. Div. 380, 49 N. Y. Suppl. 184.

80. McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38; Born *v.* Home Ins. Co., 110 Iowa 379, 81 N. W. 676, 80 Am. St. Rep. 300; Home F. Ins. Co. *v.* Johansen, 59 Nebr. 349, 80 N. W. 1047; Johansen *v.* Home F. Ins. Co., 54 Nebr. 548, 74 N. W. 866; Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740; State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524. See also *supra*, XIII, A, 3, 6.

81. Williamson *v.* New Orleans Ins. Assoc., 84 Ala. 106, 4 So. 36; Grubbs *v.* Virginia F. & M. Ins. Co., 110 N. C. 108, 14 S. E. 516; Prieger *v.* Exchange Mut. Ins. Co., 6 Wis. 89; Virginia F. & M. Ins. Co. *v.* Buck, 88 Va. 517, 13 S. E. 973.

That negligence of insured will not defeat recovery see *infra*, XV, B, 6.

82. *Connecticut.*— Sheldon *v.* Hartford F. Ins. Co., 22 Conn. 235, 58 Am. Dec. 420; Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309.

Massachusetts.— Parker *v.* Bridgeport Ins. Co., 10 Gray 302; Worcester *v.* Worcester Mut. F. Ins. Co., 9 Gray 27; Underhill *v.*

2. EMPLOYMENT OF WATCHMAN — a. In General. It is, however, frequently customary to insert in the modern policy certain stipulations as to the prevention of fire by the employment of a watchman. When such a stipulation amounts to a promissory warranty, it is immaterial that the breach had nothing to do with the loss.[83] Statutory provisions that the insurer shall not be exonerated by the negligence of the insured do not relieve the latter from a compliance with his warranty in this respect.[84]

b. Who Is a Watchman.[85] One who sleeps at night in a house a short distance from the premises, visiting the buildings several times during the night, is not a watchman in the sense required by the policy;[86] nor is a person who merely sleeps on the premises a watchman.[87] The presence of individuals on the premises is not a compliance with the warranty if they are not keeping, or are not there to keep, watch.[88]

c. Duty of Watchman — (i) *In General.* This warranty is not satisfied by an occasional tour of inspection,[89] but requires that the watchman should be on duty at all times so that a fire would not progress without discovery.[90]

(ii) *Sleeping on Duty.* The fact that the watchman has fallen asleep at the time of the fire will not of itself prevent a recovery.[91]

(iii) *Temporary Absence.* The absence of the watchman from the premises temporarily for a few minutes has, however, been held immaterial when it does not appear that the loss in any way followed therefrom,[92] but when the war-

Agawam Mut. F. Ins. Co., 6 Cush 440; Houghton *v.* Manufacturers' Mut. F. Ins. Co., 8 Metc. 114, 41 Am. Dec. 489.

New York.—Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362 [*reversing* 29 Barb. 552].

Wisconsin.— Blumer *v.* Phœnix Ins. Co., 45 Wis. 622.

United States.— Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

See 28 Cent. Dig. tit. "Insurance," § 847 *et seq.*

83. Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362 [*reversing* 29 Barb. 552].

A mere slip attached to a policy, requiring that a watchman should be employed, without a penalty affixed for breach, has been considered not to be a warranty. Hart *v.* Niagara F. Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

A statement that a watchman is employed during the night has been held not to be a warranty that such a precaution would be continued, but only a representation as to the existing state of things. Worswick *v.* Canada F. & M. Ins. Co., 3 Ont. App. 487. *Contra*, Whitlaw *v.* Phœnix Ins. Co., 28 U. C. C. P. 53.

84. McKenzie *v.* Scottish Union, etc., Ins. Co., 112 Cal. 548, 44 Pac. 922.

85. It is immaterial that the party is not called a "watchman" if he exercises the duty of such a caretaker. Ausable Lumber Co. *v.* Detroit Manufacturers' F. Ins. Co., 89 Mich. 407, 50 N. W. 870.

86. McKenzie *v.* Scottish Union, etc., Ins. Co., 112 Cal. 548, 44 Pac. 922; Rankin *v.* Amazon Ins. Co., (Cal. 1890) 25 Pac. 260; Wenzel *v.* Commercial Ins. Co., 67 Cal. 438, 7 Pac. 817.

87. Brooks *v.* Standard F. Ins. Co., 11 Mo. App. 349.

88. Ballston Spa First Nat. Bank *v.* Insurance Co. of North America, 50 N. Y. 45 [*affirming* 5 Lans. 203].

89. Miller *v.* Germania F. Ins. Co., 34 Leg. Int. (Pa.) 339.

90. Gibson *v.* Farmers', etc., Ins. Co., 1 Cinc. Super. Ct. 410.

Presence on the premises is sufficient. No particular post is required unless so expressed. Andes Ins. Co. *v.* Shipman, 77 Ill. 189.

91. Burlington F. Ins. Co. *v.* Coffman, 13 Tex. Civ. App. 439, 35 S. W. 406; Phœnix Assur. Co. *v.* Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810.

92. *Kansas.*— Kansas Mill Owners', etc., Mut. F. Ins. Co. *v.* Metcalf, 59 Kan. 383, 53 Pac. 68.

Kentucky.—London, etc., Ins. Co. *v.* Gerteisen, 106 Ky. 815, 51 S. W. 617, 21 Ky. L. Rep. 471.

Massachusetts.— King Brick Mfg. Co. *v.* Phœnix Ins. Co., 164 Mass. 291, 41 N. E. 277.

Michigan.— McGannon *v.* Michigan Millers' Mut. F. Ins. Co., 127 Mich. 636, 87 N. W. 61, 89 Am. St. Rep. 501, 54 L. R. A. 739.

Nebraska.— Hanover F. Ins. Co. *v.* Gustin, 40 Nebr. 828, 59 N. W. 375.

New York.— Hovey *v.* American Mut. Ins. Co., 2 Duer 554.

See 28 Cent. Dig. tit. "Insurance," § 848.

Temporary absence immaterial.— In Au Sable Lumber Co. *v.* Detroit Manufacturers' F. Ins. Co., 89 Mich. 407, 50 N. W. 870, it was held that his temporary absence when the fire broke out was not a breach, if the absence was upon a purpose connected with his watchman's duties. So an absence of two hours by a watchman who left his post contrary to directions before his relief man came was held not to forfeit the policy, although the fire occurred in the interval. Mc-

ranty is that the watchman should be on the premises constantly, his absence at the time of the fire is fatal.[93]

d. Custom of Owners of Similar Property. The custom of owners of similar property as to the employment of a watchman is not admissible to vary the express undertaking of the policy.[94]

3. Appliances For Extinguishing Fire — a. In General. If the policy provides that the insured shall maintain appliances of a certain sort to extinguish fire, the failure to do so will avoid the policy;[95] but it has been held that a failure to keep such apparatus at a specified point is immaterial, if it would not have been accessible even if maintained, because of the proximity of the fire.[96]

b. Temporary Breach of Warranty. The insured is not responsible for a temporary breach of such a warranty, occasioned by necessary repairs put upon the protecting system;[97] nor for a disability caused by the fire itself,[98] or by the weather.[99]

4. Keeping of Inventory, Books, and Safes — a. Validity of Clause. In order to expedite the proof of loss and to verify the honesty of the claim of loss, provisions are customarily inserted in policies upon stocks in trade requiring the insured to take an inventory at frequent intervals, to keep regular books, and to preserve all papers in an iron or fireproof safe. These provisions are uniformly upheld as promissory warranties to be strictly performed to entitle the insured to recover for a loss.[1]

Gannon *v.* Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778. His absence from the immediate premises is immaterial when he is on adjacent premises continuing his watch. Sierra Milling, etc., Co. *v.* Hartford F. Ins. Co., 76 Cal. 235, 18 Pac. 267; Spies *v.* Greenwich Ins. Co., 97 Mich. 310, 56 N. W. 560.

93. Trojan Min. Co. *v.* Fireman's Ins. Co., 67 Cal. 27, 7 Pac. 4.

94. Glendale Woolen Co. *v.* Protection Ins. Co., 21 Conn. 19, 54 Am. Dec. 309; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362 [*reversing* 29 Barb. 552]. *Contra,* Crocker *v.* People's Mut. F. Ins. Co., 8 Cush. (Mass.) 79.

95. Southern Ins. Co. *v.* White, 58 Ark. 277, 24 S. W. 425; Mechanics' Ins. Co. *v.* Thompson, 57 Ark. 279, 21 S. W. 468; Sierra Milling, etc., Co. *v.* Hartford F. Ins. Co., 76 Cal. 235, 18 Pac. 267; Aurora F. Ins. Co. *v.* Eddy, 49 Ill. 106; Garrett *v.* Provincial Ins. Co., 20 U. C. Q. B. 200.

An agreement to install such apparatus gives the insured a reasonable time in which to do so. Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83; Gloucester Mfg. Co. *v.* Howard F. Ins. Co., 5 Gray (Mass.) 497, 66 Am. Dec. 376.

If the clause as to appliances is in the application and considered to be a representation and not a warranty, a substantial compliance is sufficient. Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Gilliat *v.* Pawtucket Mut. F. Ins. Co., 8 R. I. 282, 91 Am. Dec. 229.

96. Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. 867.

Likewise if the appliance could not have been of use when the fire was discovered, because the fire was then beyond control. Syndicate Ins. Co. *v.* Catchings, 104 Ala. 176, 16 So. 46.

97. Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 173 N. Y. 633, 66 N. E. 1106; Townsend *v.* Northwestern Ins. Co., 18 N. Y. 168.

98. Sayles *v.* Northwestern Ins. Co., 21 Fed. Cas. No. 12,422, 2 Curt. 610.

99. Cady *v.* Imperial Ins. Co., 4 Fed. Cas. No. 2,283, 4 Cliff. 203.

1. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537.

Arkansas.— Western Assur. Co. *v.* Attheimer, 58 Ark. 565, 25 S. W. 1067; Pelican Ins. Co. *v.* Wilkerson, 53 Ark. 353, 13 S. W. 1103.

Georgia.— Hester *v.* Scottish Union, etc., Ins. Co., 115 Ga. 454, 41 S. E. 552; Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70; Scottish Union, etc., Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180.

Illinois.— Farmers' F. Ins. Co. *v.* Bates, 60 Ill. App. 39, 65 Ill. App. 37; Forehand *v.* Niagara Ins. Co., 58 Ill. App. 161 [*reversed* in 169 Ill. 626, 48 N. E. 830].

Iowa.— Sowers *v.* Mutual F. Ins. Co., 113 Iowa 551, 85 N. W. 763.

Missouri.— Keet-Rountree Dry-Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469; Gibson *v.* Missouri Town Mut. Ins. Co., 82 Mo. App. 515. That substantial compliance is sufficient see Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

Texas.— Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. 559; Northwestern Nat. Ins. Co. *v.* Mize, (Civ. App. 1896) 34 S. W. 670; American F. Ins. Co. *v.* Center, (Civ. App. 1895) 33 S. W. 554; Home Ins. Co. *v.* Cary, 10 Tex. Civ. App. 300, 31 S. W. 321; American F. Ins. Co. *v.* First Nat. Bank, (Civ. App. 1895) 30 S. W. 384; Standard F. Ins. Co. *v.* Willock, (Civ. App. 1894) 29 S. W. 218; Kelley-

b. The Inventory. Where the policy contains a condition requiring the insured to take an inventory at least once a year, the insured is not required to take an inventory immediately upon obtaining the insurance. He has the period mentioned in which to perform.[2] If the policy does not especially direct the taking of an inventory, but only the preservation of the last one taken, the fact that no inventory has ever been taken will not defeat the policy.[3] The inventory intended by the policy is a "detailed and itemized enumeration of the articles composing the stock with the value of each,"[4] consequently an invoice of goods purchased is not a compliance with the condition requiring an inventory;[5] nor is a mere summary of the condition of the goods sufficient.[6]

c. The Books. The books required by the provision are those which show the record of the business, including purchases and sales both for cash and on

Goodfellow Shoe Co. *v.* Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027. But see Royal Ins. Co. *v.* Brown, (Civ. App. 1896) 36 S. W. 591, where, in conflict with other language of the same court, it is stated that a strict compliance is not essential.

Virginia.— Virginia F. & M. Ins. Co. *v.* Morgan, 90 Va. 290, 18 S. E. 191.

West Virginia.— L. Rosenthall Clothing, etc., Co. *v.* Scottish Union, etc., Ins. Co., 55 W. Va. 238, 46 S. E. 1021; Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 45 S. E. 1003.

United States.— Lozano *v.* Palatine Ins. Co., 78 Fed. 278, 24 C. C. A. 85.

See 28 Cent. Dig. tit. "Insurance," § 853.

These conditions have been held to be void in some states. Thus in Kentucky it has been asserted that the promise is without consideration and void. Citizens' Ins. Co. *v.* Crist, 56 S. W. 658, 22 Ky. L. Rep. 47; Mechanics', etc., Ins. Co. *v.* Floyd, 49 S. W. 543, 20 Ky. L. Rep. 1538; Phœnix Ins. Co. *v.* Angel, 38 S. W. 1067, 18 Ky. L. Rep. 1034. And see also Wynne *v.* Liverpool, etc., Ins. Co., 71 N. C. 121.

A mere condition that a claim shall be sustained "if required, by books of account and other vouchers" does not bind the insured to keep such books. Wightman *v.* Western M. & F. Ins. Co., 8 Rob. (La.) 442.

An "iron safe" clause printed only on an attached slip and not referred to in the policy is not a warranty. Georgia Home Ins. Co. *v.* McKinley, 14 Tex. Civ. App. 7, 37 S. W. 606.

Materiality.— The clauses, however, come within statutory requirements that a breach of a warranty shall not vitiate the contract unless material. Continental F. Ins. Co. *v.* Whitaker, (Tenn. Sup. 1904) 79 S. W. 119.

These clauses, as others, are to be construed most strongly in favor of the insured. — McNutt *v.* Virginia F. & M. Ins. Co., (Tenn Ch. App. 1897) 45 S. W. 61; Phœnix Assur. Co. *v.* Stenson, (Tex. Civ. App. 1904) 79 S. W. 866; Ætna Ins. Co. *v.* Fitze, (Tex. Civ. App. 1904) 78 S. W. 370. Thus, it has been held, that an agreement to do all these acts is not broken save by a failure to perform all, and not only a particular one. Connecticut F. Ins. Co. *v.* Jeary, 60 Nebr. 338, 83 N. W. 78, 51 L. R. A. 698.

Waiver.— Of course these warranties may be waived by the insurer. Keet-Rountree Dry-Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469. Ses also *infra*, XIV.

The burden is on the insurer to show a non-compliance. German Ins. Co. *v.* Pearlstone, (Tex. Civ. App. 1898) 45 S. W. 832.

2. Forehand *v.* Niagara Ins. Co., 58 Ill. App. 161; Hanover F. Ins. Co. *v.* Dole, 20 Ind. App. 333, 50 N. E. 772; Citizens' Ins. Co. *v.* Sprague, 8 Ind. App. 275, 35 N. E. 720; Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; McCollum *v.* Niagara F. Ins. Co., 61 Mo. App. 352. And see Bayless *v.* Merchants' Town Mut. Ins. Co., 106 Mo. App. 684, 80 S. W. 289; New York Continental Ins. Co. *v.* Waugh, 60 Nebr. 348, 83 N. W. 81.

3. Philadelphia Fire Assoc. *v.* Short, 100 Ill. App. 553.

The "last inventory of the business" means the last inventory of the stock and need not cover office fixtures and other articles not included in the policy. Manchester F. Ins. Co. *v.* Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722.

The last inventory preceding the taking of the policy should be preserved and produced. Continental Ins. Co. *v.* Cummings, (Tex. Sup. 1904) 81 S. W. 705 [*reversing* (Civ. App. 1903) 78 S. W. 378].

4. Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. 559; Philadelphia Fire Assoc. *v.* Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153.

The mere fact that by reason of the rapid changes in stock the inventory would not represent the quantity or kind of goods on hand a short time later does not excuse a failure to take an inventory as required. Western Assur. Co. *v.* Kemendo, 94 Tex. 367, 60 S. W. 661.

5. Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 36 S. E. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70; Home Ins. Co. *v.* Delta Bank, 71 Miss. 608, 15 So. 932; Philadelphia Fire Assoc. *v.* Masterson, 25 Tex. Civ. App. 518, 61 S. W. 962.

6. Delaware Ins. Co. *v.* Monger, (Tex. Civ. App. 1903) 74 S. W. 792. Although the production of a summarized inventory as contained in a ledger is a sufficient compliance with a requirement in a policy, for the production, at time of proof of loss, of "an inventory." Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955.

credit.[7] No artificial mode of keeping them is required if these matters be shown in a way that may be understood reasonably by a man of ordinary intelligence.[8] The requirement contemplates a keeping of books by the insured; it is therefore not met by producing books of others, although they show the same transactions.[9]

d. Preservation in a Safe. As already noted, the clause requiring the insured to preserve in an iron safe inventory and books, and to produce them in proof of his loss, is valid.[10] This casts upon him the responsibility for their loss in all cases where such loss is due to a wrongful or negligent act on his part or on the part of his agents or servants.[11] The stipulation, however, requires only that the books should be in the safe at night and when the store is not open for business.[12]

7. German Ins. Co. *v.* Bates, 67 Ill. App. 370.

If the clause appears in the policy, but the property insured is not used in business, the provision as to keeping books is inapplicable, but it cannot be said that a billiard-room keeper as a matter of law is not required to comply therewith. Sowers *v.* Mutual F. Ins. Co., 113 Iowa 551, 85 N. W. 763.

Property used by insured for domestic consumption.— It has been considered unnecessary to keep an account of goods taken out of stock for the insured's domestic consumption when the policy requires a "complete record of business transacted, including purchases and sales and shipments." Ætna Ins. Co. *v.* Fitze, (Tex. Civ. App. 1904) 78 S. W. 370.

The books referred to are those covering transactions after the date of the execution of the policy. Liverpool, etc., Ins. Co. *v.* Sheffy, 71 Miss. 919, 16 So. 307.

8. *Alabama.*— Western Assur. Co. *v.* McGlathery, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26.

Arkansas.— American Cent. Ins. Co. *v.* Ware, 65 Ark. 336, 46 S. W. 129.

Georgia.— Morris *v.* Imperial Ins. Co., 103 Ga. 567, 29 S. E. 927; Liverpool, etc., Ins. Co. *v.* Ellington, 94 Ga. 785, 21 S. E. 1006.

Missouri.— Burnett *v.* American Cent. Ins. Co., 68 Mo. App. 343.

Ohio.— Connecticut F. Ins. Co. *v.* Clark, 24 Ohio Cir. Ct. 33.

Texas.— Ætna Ins. Co. *v.* Fitze, (Civ. App. 1904) 78 S. W. 370.

United States.— Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460 [*affirming* 94 Fed. 314, 36 C. C. A. 265]; Western Assur. Co. *v.* Redding, 68 Fed. 708, 15 C. C. A. 619.

See 28 Cent. Dig. tit. "Insurance," § 853.

For example where a business is conducted on a cash basis, books are sufficiently kept to show small credit sales when the credit sale is charged on a memorandum, erased therefrom when paid, and then entered as a cash sale. American Cent. Ins. Co. *v.* Ware, 65 Ark. 336, 46 S. W. 129; Meyer *v.* Insurance Co. of North America, 73 Mo. App. 166. But see Beville *v.* Merchants' Ins. Co., (Tex. Civ. App. 1898) 46 S. W. 914. In Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539, the keeping of the totals of daily cash sales and of a bill register containing the amount of invoices of goods purchased was held not a compliance with a requirement that books should be kept. The preservation of slips from a cash register is not a compliance. Delaware Ins. Co. *v.* Monger, (Tex. Civ. App. 1903) 74 S. W. 792 [*affirmed* in 97 Tex. 362, 79 S. W. 7].

A bank pass-book showing deposits from various sources is not sufficient. Gillum *v.* Philadelphia Fire Assoc., 106 Mo. App. 673, 80 S. W. 283.

Custom of merchants.— In Jones *v.* Southern Ins. Co., 38 Fed. 19, it was said that the covenant to keep books should be construed to mean that they shall be kept in the manner customary with merchants.

The purpose of the provision is accomplished if the insured produces data from which the amount and value of stock at the time of the fire can be reasonably estimated. Malin *v.* Mercantile Town Mut. Ins. Co., 105 Mo. App. 625, 80 S. W. 56.

9. Rives *v.* Philadelphia Fire Assoc., (Tex. Civ. App. 1903) 77 S. W. 424.

10. See *supra*, XIII, H, 4, a.

11. Such an act is an inadvertent leaving of the books outside of the safe at the time they should have been within it. Goldman *v.* North British Mercantile Ins. Co., 48 La. Ann. 223, 19 So. 132; Rives *v.* Philadelphia Fire Assoc., (Tex. Civ. App. 1903) 77 S. W. 424; Philadelphia Fire Assoc. *v.* Calhoun, 28 Tex. Civ. App. 409, 67 S. W. 153; Kemendo *v.* Western Assur. Co., (Tex. Civ. App. 1900) 57 S. W. 293 [*reversed* in 94 Tex. 367, 60 S. W. 661]; Allred *v.* Hartford F. Ins. Co., (Tex. Civ. App. 1896) 37 S. W. 95; Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460 [*affirming* 94 Fed. 314, 36 C. C. A. 265 (*affirming* 2 Ind. Terr. 67, 46 S. W. 414)].

12. If the store be actually open, although it be night, the books may be left out of the safe. Sun Ins. Co. *v.* Jones, 54 Ark. 376, 15 S. W. 1034; Allemania F. Ins. Co. *v.* Fred, 11 Tex. Civ. App. 311, 32 S. W. 243; Jones *v.* Southern Ins. Co., 38 Fed. 19.

Such a clause does not apply to a suspension of business caused by a fire raging in the vicinity and threatening the building, so that business operations are interrupted by the danger. The insured under such circumstances must exercise only reasonable diligence to preserve the books. Phœnix Ins. Co. *v.* Schwartz, 115 Ga. 113, 41 S. E. 240, 90 Am. St. Rep. 98, 57 L. R. A. 752.

The fact that the insured kept but one set of books for two businesses will not justify him in leaving the books under a counter

The policy sometimes gives the insured the option of leaving the books, etc., in a safe or safe place.[13] If the insured has complied with the requirements of taking an inventory and keeping books, the fact that some of such books were destroyed will not invalidate his policy where he is able to supply the missing information by other satisfactory means.[14] If the books have been produced [15] to the adjuster, their subsequent loss is not a breach of the warranty.[16] If the policy calls for preservation in a "fireproof safe" the insured does not by this term warrant the safe to preserve the books.[17]

5. Prevention of Further Loss. A provision occasionally met with in policies that after a partial loss the insured shall protect the property from further damage and separate the damaged from the undamaged property is an absolute requirement which must be observed as a condition precedent to any recovery on the policy.[18]

I. Additional Insurance — 1. Provisions of Policies — a. Avoidance. Upon the assumption that the insured will be the less careful to protect his property from loss in proportion as the amount of his insurance is increased,[19] a usual stipulation of the policy is one that the contract shall be vitiated if additional insurance is procured on the property without the insurer's consent.[20] Such a provision is valid and reasonable.[21] There is a strange conflict of opinion as to whether the policy becomes void *ipso facto* or whether the doing of the pro-

for use in the other business, when one business is closed for the night. Southern Ins. Co. *v.* Parker, 61 Ark. 207, 32 S. W. 507.

13. Under this provision the United States supreme court has held that the insured may, when a fire threatens, remove the papers to a place he regards as safe and if they are lost in consequence the policy is not affected. Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460 [*affirming* 94 Fed. 314, 36 C. C. A. 265]. The same has also been held in East Texas F. Ins. Co. *v.* Harris, 7 Tex. Civ. App. 647, 25 S. W. 720.

14. Such a preservation and proof are considered a satisfactory compliance with the warranty.

Illinois.— Merchants' Nat. Ins. Co. *v.* Dunbar, 88 Ill. App. 574.

Kentucky.— Niagara F. Ins. Co. *v.* Heflin, 60 S. W. 393, 22 Ky. L. Rep. 1212.

Tennessee.— McNutt *v.* Virginia F. & M. Ins. Co., (Ch. App. 1897) 45 S. W. 61.

Texas.— Brown *v.* Palatine Ins. Co., 89 Tex. 590, 35 S. W. 1060; Continental F. Ins. Co. *v.* Cummings, (Civ. App. 1903) 78 S. W. 378 [*reversed* in (Sup. 1904) 81 S. W. 705]; German Ins. Co. *v.* Pearlstone, 18 Tex. Civ. App. 706, 45 S. W. 832; Pennsylvania F. Ins. Co. *v.* Brown, (Civ. App. 1896) 36 S. W. 590; Palatine Ins. Co. *v.* Brown, (Civ. App. 1896) 34 S. W. 462.

United States.— Western Assur. Co. *v.* Redding, 68 Fed. 708, 15 C. C. A. 619.

See 28 Cent. Dig. tit. "Insurance," § 853.

15. Duty to produce.— The insured must comply with the company's reasonable demands for production of books so far as possible. Seibel *v.* Lebanon Mut. Ins. Co., 197 Pa. St. 106, 46 Atl. 851.

16. Pelican Ins. Co. *v.* Wilkerson, 53 Ark. 353, 13 S. W. 1103.

17. The requirement is satisfied by the use of a safe believed by him to be fireproof, and of the kind commonly sold on the market and understood to be fireproof. Philadelphia Fire Assoc. *v.* Short, 100 Ill. App. 553; Underwriters' Fire Assoc. *v.* Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603; Knoxville F. Ins. Co. *v.* Hird, 4 Tex. Civ. App. 82, 23 S. W. 393; Liverpool, etc., Ins. Co. *v.* Kearney, 180 U. S. 132, 21 S. Ct. 326, 45 L. ed. 460 [*affirming* 94 Fed. 314, 36 C. C. A. 265]. See also Sneed *v.* British-American Assur. Co., 73 Miss. 279, 18 So. 928.

18. Thornton *v.* Security Ins. Co., 117 Fed. 773.

Duty to preserve the property see *infra*, XVI, D.

19. Carpenter *v.* Providence Washington Ins. Co., 16 Pet. (U. S.) 495, 10 L. ed. 1044.

20. The standard policy stipulates that it is to be void "if insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on the property covered, in whole or in part, by this policy." United Firemen's Ins. Co. *v.* Thomas, 92 Fed. 127, 134, 34 C. C. A. 240, 47 L. R. A. 450.

21. *Illinois.*— Halliday *v.* St. Paul F. & M. Ins. Co., 31 Ill. App. 398; Ben Franklin Ins. Co. *v.* Weary, 4 Ill. App. 74.

Indiana.— Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

Iowa.— O'Leary *v.* Merchants', etc., Mut. Ins. Co., 100 Iowa 420, 66 N. W. 175, 69 N. W. 420, 62 Am. St. Rep. 555.

Kansas.— Commercial Union Assur. Co. *v.* Norwood, 57 Kan. 610, 47 Pac. 529.

Louisiana.— Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238; Meyers *v.* Germania Ins. Co., 27 La. Ann. 63; Leavitt *v.* Western M. & F. Ins. Co., 7 Rob. 351; Battaille *v.* Merchants' Ins. Co., 3 Rob. 384.

Maine.— Shurtleff *v.* Phenix Ins. Co., 57 Me. 137.

Missouri.— Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

hibited act renders the policy only voidable at the instance of the insurer.[22] A number of courts give a literal effect to the stipulation and avoidance immediately results.[23] Other courts assert that the provision is inserted for the benefit of the company and may be waived by it as any other provision intended for its benefit, and hence the policy is voidable only.[24]

b. Requiring Notice — (I) *Result of.* A provision requiring notice does not render the policy void where no penalty is specified for failure to notify the insurer;[25] but if it is specified that failure to give notice will render the policy void, notice must be given within a reasonable time or the policy becomes void.[26] A statement that the insured intends to effect further insurance does not amount to notice of such insurance when obtained.[27]

(II) *To Whom and How Given.* If a manner is prescribed none other will suffice.[28] If none is specified, actual notice in any manner communicated is suf-

Nebraska.— Hughes *v.* Insurance Co. of North American, 40 Nebr. 626, 59 N. W. 112.

Ohio.— Harris *v.* Ohio Ins. Co., Wright 544.

Pennsylvania.— Seibel *v.* Lebanon Mut. Ins. Co., 16 Lanc. L. Rev. 356.

Texas.— Works *v.* Springfield F. & M. Ins. Co., (Civ. App. 1904) 79 S. W. 42; Orient Ins. Co. *v.* Prather, 25 Tex. Civ. App. 446, 62 S. W. 89.

United States.— Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96; Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 443.

Canada.— Western Assur. Co. *v.* Doull, 12 Can. Sup. Ct. 446; Campbell *v.* Ætna Ins. Co., 4 N. Brunsw. 21; Greet *v.* Citizens' Ins. Co., 5 Ont. App. 596; Bruce *v.* Gore Dist. Mut. Assur. Co., 20 U. C. C. P. 207; Hatton *v.* Beacon Ins. Co., 16 U. C. Q. B. 316; Western Assur. Co. *v.* Atwell, 2 L. C. Jur. 181; Beausoleil *v.* Canadian Mut. F. Ins. Co., 1 Montreal Leg. N. 4. But see partly *contra*, Graham *v.* Ontario Mut. Ins. Co., 14 Ont. 358.

See 28 Cent. Dig. tit. "Insurance," § 856.

In the absence of a provision mere over-insurance without fraudulent design does not affect the insured's right to recover. Moore *v.* Susquehanna Mut. F. Ins. Co., 196 Pa. St. 30, 46 Atl. 266. See *supra*, XII, B, 2.

The insured in a mutual society accepting a policy containing such a provision is estopped to assert its invalidity. Hygum *v.* Ætna Ins. Co., 11 Iowa 21.

22. If the policy but requires notice when insurance is taken and notice is given, very clearly the insurer may have the reserved right to cancel the policy, but the contract is not void. See *infra*, XIII, I, 1, b. But it is when the policy is expressly conditioned to become void that the conflict obtains. See cases cited *infra*, note 23.

23. *Arkansas.*— Planters' Mut. Ins. Assoc. *v.* Green, (1904) 80 S. W. 151.

Kansas.— Commercial Union Assur. Co. *v.* Norwood, 57 Kan. 610, 47 Pac. 529.

Louisiana.— Monroe Bldg., etc., Assoc. *v.* Liverpool, etc., Ins. Co., 50 La. Ann. 1243, 24 So. 238.

Michigan.— A. M. Todd Co. *v.* Farmers' Mut. F. Ins. Co., (1904) 100 N. W. 442; New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

Pennsylvania.— Marshall *v.* Insurance Co. of North America, 10 Pa. Co. Ct. 87.

See 28 Cent. Dig. tit. "Insurance," § 856.

24. Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Rep. 125; Stevenson *v.* Phœnix Ins. Co., 83 Ky. 7, 4 Am. St. Rep. 120; Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; Turner *v.* Meridan F. Ins. Co., 16 Fed. 454. See also *infra*, XIII, I, 5, a.

25. New York Fidelity, etc., Co. *v.* Carter, 23 Tex. Civ. App. 359, 57 S. W. 315.

26. Seven months (Kimball *v.* Howard F. Ins. Co., 8 Gray (Mass.) 33), twenty days' unexplained delay (Mellen *v.* Hamilton F. Ins. Co., 17 N. Y. 609 [*affirming* 5 Duer 101]), and ten days (Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397) have been considered unreasonable delay. And see also Commercial Union Assur. Co. *v.* Temple, 29 Can. Sup. Ct. 206; Picard *v.* Compagnie d'Assur., etc., 2 Montreal Super. Ct. 117, 14 Rev. Lég. 136; Beausoliel *v.* Canadian Mut. F. Ins. Co., 1 Montreal Leg. N. 4.

If the policy gives a certain period in which notice may be given the insured is entitled to the last hour in the period, but no time thereafter. Cumberland Mut. F. Ins. Co. *v.* Giltinan, 48 N. J. L. 495, 7 Atl. 424, 57 Am. Rep. 586.

A mistake in the notice as to the name of the company in which the insurance had been taken does not avoid the prior policy. Benjamin *v.* Saratoga County Mut. F. Ins. Co., 17 N. Y. 415. Nor does a mistake both as to the name of the company and the amount taken out if such amount be not understated. Osser *v.* Provincial Ins. Co., 12 U. C. C. P. 133.

The notice must have been given prior to loss. Butler *v.* Waterloo County Mut. F. Ins. Co., 29 U. C. Q. B. 553.

27. Kimball *v.* Howard F. Ins. Co., 8 Gray (Mass.) 33; Home F. Ins. Co. *v.* Wood, 50 Nebr. 381, 69 N. W. 941; Eagle F. Co. *v.* Globe L. & T. Co., 44 Nebr. 380, 62 N. W. 895; Healey *v.* Imperial F. Ins. Co., 5 Nev. 268; New Orleans Ins. Assoc. *v.* Griffin, 66 Tex. 232, 18 S. W. 505. But see McCrea *v.* Waterloo County Mut. F. Ins. Co., 26 U. C. C. P. 431, query.

28. Billington *v.* Provincial Ins. Co., 3 Can. Sup. Ct. 182 [*affirming* 2 Ont. App. 158 (*re-*

ficient.[29] Notice to an agent who effected the insurance and to whom a policy is intrusted for delivery, of existing insurance, is sufficient.[30] The same has been held as to an agent employed to solicit risks and to negotiate contracts,[31] although the contrary has been more generally held;[32] but such agents are not authorized to consent to any additional insurance in the absence of express authorization.[33]

c. Permission. The right to prohibit additional insurance involves the right to limit the amount of any additional insurance.[34] If permission be given to carry additional insurance any condition upon which the permission rests must be fulfilled or forfeiture results.[35] A recital in the policy limiting the total insurance permitted to a certain proportion of the value[36] of the property is an implied consent that the insured may carry concurrent insurance within the limit named without affecting the policy.[37] If the insured takes out a greater amount than that permitted no proportionate recovery is permitted, but a forfeiture *in toto* results.[38]

versing 24 Grant Ch. (U. C.) 299)]; Graham *v.* London Mut. F. Ins. Co., 13 Ont. 132.

Actual notice to a director is not enough when the policy requires "written notice to the secretary." Bard *v.* Penn Mut. F. Ins. Co., 153 Pa. St. 257, 25 Atl. 1124, 34 Am. St. Rep. 704.

Verbal notice is insufficient where written notice is required. Gilbert *v.* Phœnix Ins. Co., 36 Barb. (N. Y.) 372.

29. Union Ins. Co. *v.* Murphy, 1 Pa. Cas. 570, 4 Atl. 352.

Unless a writing is required verbal notice is sufficient. Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

Mailing of the notice is not sufficient when the same was not actually received. McSparran *v.* Southern Mut. F. Ins. Co., 193 Pa. St. 184, 44 Atl. 317; Lyons *v.* Manufacturers', etc., Ins. Co., 28 U. C. C. P. 13.

30. Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Farmers' Mut. Ins. Co. *v.* Taylor, 73 Pa. St. 342.

If the agent has ceased to act for the insurer the notice is of course ineffectual. Illinois Mut. F. Ins. Co. *v.* Malloy, 50 Ill. 419.

31. Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

32. Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402. See *infra*, XIV, B, 1, b, (II).

33. Heath *v.* Springfield F. Ins. Co., 58 N. H. 414.

34. Van Buren *v.* St. Joseph County Village F. Ins. Co., 28 Mich. 398; Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 18 C. C. A. 203.

35. Powell *v.* Phœnix Ins. Co., 10 Ky. L. Rep. 80.

36. Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342.

The term "estimated value" as used in this connection means the value mentioned in the policy. Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 5 Am. Dec. 323.

37. Strauss *v.* Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822; Senor *v.* Western Millers' Mut. F. Ins. Co., 181 Mo. 104, 79 S. W. 687; Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666; Bush *v.* Missouri Town Mut. Ins. Co., 85 Mo. App. 155; Palatine Ins. Co. *v.* Ewing, 92 Fed. 111, 34 C. C. A. 236.

Meaning of the term "concurrent" see Corkery *v.* Security F. Ins. Co., 99 Iowa 382, 68 N. W. 792; New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 46 Atl. 777; Caraher *v.* Royal Ins. Co., 63 Hun (N. Y.) 82, 17 N. Y. Suppl. 858; Gough *v.* Davis, 24 Misc. (N. Y.) 245, 52 N. Y. Suppl. 947. A policy for one thousand dollars was issued on property already insured for three thousand dollars. The words appeared "Total concurrent insurance $4000." This phrase was construed to include the amount on the policy in suit and a further policy of one thousand dollars vitiated the contract. East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 13 S. W. 572. And see Senor *v.* Western Millers' Mut. F. Ins. Co., 181 Mo. 104, 79 S. W. 687.

The words "additional insurance" when used in a permit indorsed upon a policy mean prior as well as subsequent insurance. Behrens *v.* Germania Ins. Co., 58 Iowa 26, 11 N. W. 719.

The mere fact that a blank space intended for a convenient place to give permission for additional insurance is not crossed out is not of itself permission for the carrying of concurrent insurance. Philadelphia Underwriters' Ins. Co. *v.* Bigelow, (Fla. 1904) 37 So. 210. But *contra*, Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

When the policy requires notice and such notice is sent to the insurer, but no dissent from the carrying of such insurance is communicated, there is an implied consent thus given to continue the further insurance. Shannon *v.* Hastings Mut. Ins. Co., 2 Ont. App. 81 [*affirming* 26 U. C. C. P. 380]. And see also *infra*, XIV, D, 2, c.

38. Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666; Allen *v.* German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309 [*affirmed* in 3 N. Y. Suppl. 170]; Bahner *v.* Stone Valley Mut. F. Ins. Co., 127 Pa. St. 464, 17 Atl. 983; Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402; Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 367; Lycoming Mut. Ins. Co. *v.* Slockbower, 26 Pa. St. 199.

That a prior policy is avoided by the taking out of additional insurance above a permitted amount thus bringing the total amount of concurrent insurance within the

2. Time of Effecting. The earlier form of prohibition that "if any member procures insurance" or "if the holder insures" in another company the policy shall be avoided was held to apply only to the procuring of subsequent insurance after the issuance of the policy,[39] and not to that previously effected.[40] The present forms refer to insurance procured at a time prior, contemporaneous, or subsequent.[41]

3. Knowledge and Good Faith of Insured. When the policy is conditioned to be void upon the taking out of additional insurance, the facts that there was no intention to defraud the insurer, that the insured was ignorant of the existence of the provision of the policy or of any prior insurance, if the existence of prior insurance is stipulated to have the same effect, or that the insurance was obtained in forgetfulness, are all immaterial; the policy is avoided.[42] Insurance obtained, however, by a third person without the knowledge or consent of the insured, upon the same interest as that of the insured, will not affect his rights under his policy.[43] If the policy simply prohibits further insurance with no penalty for a breach, a fraudulent intent on the part of the insured in obtaining the additional insurance must be shown to defeat a recovery.[44]

amount allowed by the policy in suit is immaterial; both policies are avoided. Royal Ins. Co. *v.* McCrea, 8 Lea (Tenn.) 531, 41 Am. Rep. 656.

39. Warwick *v.* Monmouth County Mut. F. Ins. Co., 44 N. J. L. 83, 43 Am. Rep. 343; Harris *v.* Ohio Ins. Co., 5 Ohio 466.

A provision that if subsequent permitted insurance is invalid the insured will be deemed to have canceled the policy refers to subsequent invalid insurance. Gurnett *v.* Atlas Mut. Ins. Co., 124 Iowa 547, 100 N. W. 542.

40. Uhler *v.* Farmers' American F. Ins. Co., 4 Leg. Gaz. (Pa.) 354. And see Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525.

41. So that a provision that the policy shall be void if the "insured now has or shall hereafter make or procure other insurance" is broken by obtaining another policy at the same time, although both policies take effect simultaneously. United Firemen's Ins. Co. *v.* Thomas, 92 Fed. 127, 34 C. C. A. 240, 47 L. R. A. 450. *Contra*, Washington F. Ins. Co. *v.* Davison, 30 Md. 91.

In Kentucky it has been held that two policies, at least when issued by different agents, cannot be simultaneous; and the necessary presumption of law and fact is that one of the policies was antecedent to the other, and consequently that both companies can assert clauses against additional insurance. Manhattan Ins. Co. *v.* Stein, 5 Bush 652.

42. Sugg *v.* Hartford F. Ins. Co., 98 N. C. 143, 3 S. E. 732; Arnold *v.* St. Paul F. & M. Ins. Co., 106 Tenn. 529, 61 S. W. 1032. But see Wilson *v.* Queen Ins. Co., 5 Fed. 674.

Mistaken statements of agent.— But the obtaining of a policy beyond the limit of insurance, based on the mistaken statements of the agents who delivered the policy in suit, as to the amount of insurance still alive on the property was held not to vitiate the policy in Boulden *v.* Syndicate Ins. Co., (Ala. 1892) 11 So. 777; Phœnix Ins. Co. *v.* Boulden, 96 Ala. 609, 11 So. 774. *Contra*, Gauthier *v.* Waterloo Ins. Co., 44 U. C. Q. B. 490.

43. *Illinois.*— Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121.

Kentucky.— London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Louisiana.— Cannon *v.* Home Ins. Co., 49 La. Ann. 1367, 22 So. 387.

Massachusetts.— Nichols *v.* Fayette Mut. F. Ins. Co., 1 Allen 63.

Minnesota.— St. George's Church *v.* Sun Fire Office Ins. Co., 54 Minn. 162, 55 N. W. 909.

New York.— De Witt *v.* Agricultural Ins. Co., 89 Hun 229, 36 N. Y. Suppl. 570 [*affirmed* in 157 N. Y. 353, 51 N. E. 977].

North Carolina.— Nelson *v.* Atlanta Home Ins. Co., 120 N. C. 302, 27 S. E. 38.

Ohio.— Knight *v.* Eureka F. & M. Ins. Co., 26 Ohio St. 664, 20 Am. Rep. 778.

Pennsylvania.— West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081.

Canada.— McLachlan *v.* Ætna Ins. Co., 9 N. Brunsw. 173; Sauvey *v.* Isolated Risk, etc., F. Ins. Co., 44 U. C. Q. B. 523; Kanady *v.* Gore Dist. Mut. F. Ins. Co., 44 U. C. Q. B. 261. *Contra*, Perry *v.* Liverpool, etc., Ins. Co., 34 N. Brunsw. 380.

See 28 Cent. Dig. tit. "Insurance," § 858.

Duty of insured.— The insured in such a case is bound in good faith on discovery of the double insurance to reveal the existence of the other policy and to unequivocally disclaim any benefit therefrom. McKelvy *v.* German-American Ins. Co., 161 Pa. St. 279, 28 Atl. 1115.

44. Insurance Co. of North America *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686.

Fraud of the insured on a subsequent insurer in representing that he was uninsured is no defense to a prior insurer in whose policy there was no clause limiting insurance. Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14.

4. Under Statutes Relating to Increase of Risk. Different holdings appear under statutes providing that no breach of condition shall affect the insured's right of recovery unless it increases the risk.[45]

5. What Constitutes — a. Invalidity of Policy. In case the provisions of the subsequent policy are not broken, or if it does not contain a provision that other insurance is prohibited, and the subsequent policy is in other respects valid, the prior policy conditioned against additional insurance is invalidated.[46] In case the second policy, for other reasons than the presence of a prohibition against additional insurance, is invalid, the additional insurance has never actually been had and the prior policy is unaffected.[47] However, if the second policy, like the first, contains a provision that it shall be void if the insured has or obtains other insurance, there is great difficulty in determining whether the second policy is *ipso facto* void by virtue of the clause and of the prior insurance, and hence does not constitute a breach of the prohibition contained in the prior policy, or whether the second policy is voidable only at the option of the second insurer and hence constitutes such additional insurance as to vitiate the prior contract. The answer in a given jurisdiction will depend on whether a policy is regarded as void, or voidable only, for breach of the condition against further insurance.[48] In many cases the former view is adopted; the second policy is therefore void and the prior policy enforceable, the condition remaining unbroken;[49] but the authorities are nearly as numerous to the effect that the second policy is valid until avoided, constitutes additional insurance, and so operates to vitiate the first

45. In Sun Fire Office *v.* Clark, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562, such a statute was held inapplicable, inasmuch as, it was said, additional insurance is as a matter of law an increase of risk. The statutory provision was a protection, however, in Lindley *v.* Union Farmers' Mut. F. Ins. Co., 65 Me. 368, 20 Am. Rep. 701, when there was no proof of actual increase of risk by the taking out of the second policy.

46. See cases cited *supra*, XIII, I, 1, a.

The matter must depend upon the validity or non-validity at the date of the insurance and not at the date of the loss. Equitable Ins. Co. *v.* McCrea, 8 Lea (Tenn.) 541.

47. Boston Dwelling House Ins. Co. *v.* Garner, 56 Ill. App. 199; Phenix Ins. Co. *v.* Lamar, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764; Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520; Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1; Funke *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216.

As for instance if the second policy is void because issued by a foreign insurer without compliance with statutory regulations (Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520); or if the second company has no license from the government, or charter, when the same is required by the local law (National Ins. Co. *v.* Rousseau, 13 Quebec 295); or where the insured had not the sole, entire, and unconditional ownership of the property as he had represented to the insurer (Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1). And in these cases it is apparently immaterial that the second insurer might have waived the forfeiture. But in Bigler *v.* New York Cent. Ins. Co., 20 Barb. (N. Y.) 635, a policy not void, but voidable only by the second insurer, was not considered to vitiate the former policy.

48. See cases cited *supra*, XII, B, 5; XIII, I, 1, a.

"We think the court adopted the proper distinction — if they were void at the time of the loss they constituted no obstacle; but if voidable only by reason of some breach of condition enabling the insurers to avoid them but which they had waived, the overinsurance undoubtedly existed." Mitchell *v.* Lycoming Mut. Ins. Co., 51 Pa. St. 402, 409, per Agnew, J.

49. *Illinois.*— Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489 [*reversing* 27 Ill. App. 590].

Iowa.— Behrens *v.* Germania F. Ins. Co., 64 Iowa 19, 19 N. W. 838; Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Rep. 125.

Kansas.— Boatman's F. & M. Ins. Co. *v.* James, 10 Ky. L. Rep. 816.

Maine.— Philbrook *v.* New England Mut. F. Ins. Co., 37 Me. 137.

Maryland.— Sweeting *v.* Hartford County Mut. F. Ins. Co., 83 Md. 63, 34 Atl. 826, 32 L. R. A. 570.

Massachusetts.— Hayes *v.* Milford Mut. F. Ins. Co., 170 Mass. 492, 49 N. E. 754; Thomas *v.* Builders' Mut. F. Ins. Co., 119 Mass. 121, 20 Am. Rep. 317; Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342, 53 Am. Rep. 44; Jackson *v.* Massachusetts Mut. F. Ins. Co., 23 Pick. 418, 34 Am. Dec. 69.

Missouri.— Dahlberg *v.* St. Louis Mut. F. & M. Ins. Co., 6 Mo. App. 121.

New Hampshire.— Gale *v.* Belknap County Ins. Co., 41 N. H. 170.

New Jersey.— Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447; Jersey City Ins. Co. *v.* Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625.

Ohio.— Fireman's Ins. Co. *v.* Holt, 35 Ohio St. 189, 35 Am. Rep. 601.

policy.[50] It would seem to follow therefore that the prior policy becoming nonexistent the condition of the second policy is not broken, so that that which would have been voidable had the prior policy survived now becomes valid.[51] Insurers have in view of this conflict inserted in their uniform policies a provision that the forfeiture is to occur whether the additional insurance be "valid or otherwise." In general such a clause is held as reasonable.[52] If the second insurer waives the defense of invalidity and pays the policy either in full or in part by way of compromise, some courts assert that the insured, having accepted the benefit of the insurance, is estopped to deny its validity, and therefore cannot recover on the prior policy; and if the second policy was only voidable there seems a greater reason for this view;[53] other courts, however, do not agree that there is any estoppel which can be set up by the first insurer under such circumstances.[54]

b. Incomplete Further Insurance. Incomplete additional or further insurance does not affect a policy containing a provision against additional insurance.[55]

Pennsylvania.— Stacey *v.* Franklin F. Ins. Co., 2 Watts & S. 506; Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. 119.

Virginia.— Sutherland *v.* Old Dominion Ins. Co., 31 Gratt. 176.

West Virginia.— Woolpert *v.* Franklin Ins. Co., 42 W. Va. 647, 26 S. E. 521.

United States.— Allison *v.* Phœnix Ins. Co., 1 Fed. Cas. No. 252, 3 Dill. 480.

See 28 Cent. Dig. tit. "Insurance," § 869.

A notice by the assured to the company, in accordance with the terms of the policy, that there was subsequent insurance on the property in another company would not estop him from claiming, in an action against the first company, that such subsequent insurance was invalid. Hubbard *v.* Hartford F. Ins. Co., 33 Iowa 325, 11 Am. Rep. 125.

50. *Georgia.*— Lackey *v.* Georgia Home Ins. Co., 42 Ga. 456.

Indiana.— Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947, 114 Ind. 1, 15 N. E. 810.

Kentucky.— Stephenson *v.* Phœnix Ins. Co., 6 Ky. L. Rep. 196.

Louisiana.— Allen *v.* Merchants' Mut. Ins. Co., 30 La. Ann. 1386, 31 Am. Rep. 243.

Michigan.— Donogh *v.* Farmers' F. Ins. Co., 104 Mich. 503, 62 N. W. 721.

Nebraska.— Hughes *v.* Insurance Co. of North America, 40 Nebr. 626, 59 N. W. 112.

New York.— Bigler *v.* New York Cent. Ins. Co., 22 N. Y. 402 [*affirming* 20 Barb. 635].

Tennessee.— Somerfield *v.* State Ins. Co., 8 Lea 547, 41 Am. Rep. 662.

Texas.— Wilson *v.* Ætna Ins. Co., 12 Tex. Civ. App. 512, 33 S. W. 1085.

Canada.— Gauthier *v.* Waterloo Mut. Ins. Co., 6 Ont. App. 231; Mason *v.* Andes Ins. Co., 23 U. C. C. P. 37; Jacobs *v.* Equitable Ins. Co., 19 U. C. Q. B. 250.

See 28 Cent. Dig. tit. "Insurance," § 869. See also cases cited *supra*, XII, B, 5, b, (II).

51. See cases cited *supra*, notes 49, 50.

The contrary was, however, held in Keyser *v.* Hartford F. Ins. Co., 66 Mich. 664, 33 N. W. 756.

52. *Illinois.*— Continental Ins. Co. *v.* Hulman, 92 Ill. 145, 34 Am. Rep. 122.

Indiana.— Phenix Ins. Co. *v.* Lamar, 106 Ind. 513, 7 N. E. 241, 55 Am. Rep. 764.

Michigan.— Donogh *v.* Farmers' F. Ins. Co., 104 Mich. 503, 62 N. W. 721; Liverpool, etc., Ins. Co. *v.* Verdier, 35 Mich. 395.

Mississippi.— Cassity *v.* New Orleans Ins. Assoc., 65 Miss. 49, 3 So. 138, the language here is somewhat different.

Nebraska.— Hughes *v.* Insurance Co. of North America, 40 Nebr. 626, 59 N. W. 112.

North Carolina.— Sugg *v.* Hartford F. Ins. Co., 98 N. C. 143, 3 S. E. 732.

See 28 Cent. Dig. tit. "Insurance," § 869.

But see Parks *v.* Hartford F. Ins. Co., 100 Mo. 373, 12 S. W. 1058 (where similar language is construed to avoid the forfeiture); Gee *v.* Cheshire County Mut. F. Ins. Co., 55 N. H. 65, 20 Am. Rep. 171 (which leaves the question in doubt).

53. David *v.* Hartford Ins. Co., 13 Iowa 69. And see Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210, 107 Iowa 275, 77 N. W. 1032; Bigler *v.* New York Cent. Ins. Co., 20 Barb. (N. Y.) 635; Dafoe *v.* Johnstown Dist. Mut. Ins. Co., 7 U. C. C. P. 55.

54. The reason assigned is that there was no reliance by the first insurer on the second insurer's payment, or change of position consequent thereon. It is therefore held that as the policy actually was void there was no breach of the condition by the acceptance of a mere gratuity. Lindley *v.* Union Farmers' Mut. F. Ins. Co., 65 Me. 368, 20 Am. Rep. 701; Hardy *v.* Union Mut. F. Ins. Co., 4 Allen (Mass.) 217; Jersey City Ins. Co. *v.* Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; Fireman's Ins. Co. *v.* Holt, 35 Ohio St. 189, 35 Am. Rep. 601.

55. See cases cited *infra*, this note.

An application for other insurance does not constitute a breach of the condition, the reason of the rule, that is, that the insured would be less anxious to protect the property from loss, not applying while the subsequent policy remains incomplete. Taylor *v.* State Ins. Co., 107 Iowa 275, 77 N. W. 1032; Temple *v.* Western Assur. Co., 35 N. Brunsw. 171 [*affirmed* in 31 Can. Sup. Ct. 373].

c. Renewal of Existing Insurance. When a policy prohibiting additional insurance is issued with the knowledge of the insurer that other policies are in existence on the same subject-matter, the renewal of such policies upon their expiration is not a breach of the condition, the insurer virtually having given permission for such an amount of other insurance.[56] It has likewise been held that no breach occurs if the insured instead of renewing the policy in the same company takes no greater amount in another company.[57]

d. Termination of Additional Insurance. The effect of a clause prohibiting additional insurance is to terminate and not merely suspend the policy. Hence the expiration of such additional insurance before loss will not revive the policy.[58]

e. Identity of Subject-Matter. To constitute double and therefore prohibited insurance, the risk must be upon the same property and the liability the same.[59]

Conditional insurance.— If the additional insurance is taken out conditionally, to be binding only provided the other insurer consents thereto, this does not affect the other policy. Gross *v.* New York, etc., Steamship Co., 107 Fed. 516.

It is no defense that after a loss a further policy was issued and antedated, even though the insured forced a compromise thereon, for liability on the policy in suit attached before the other policy issued (Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210, 107 Iowa 275, 77 N. W. 1032), that after loss the insured filed proofs of loss with the second insurer whose policy had been issued without insured's knowledge or acceptance, the prior insurer's liability becoming fixed before the further insurance became complete (Nelson *v.* Atlantic Home Ins. Co., 120 N. C. 302, 27 S. E. 38), or that the insured has collected further insurance, if the money has been paid to him by the second company by mistake under a policy not embracing the property destroyed (Home F. Ins. Co. *v.* Deets, 54 Nebr. 620, 74 N. W. 1088).

56. Dunstable First Baptist Soc. *v.* Hillsborough Mut. F. Ins. Co., 19 N. H. 580; Pitney *v.* Glens Falls Ins. Co., 65 N. Y. 6; Brown *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 385; Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525. *Contra*, Duclos *v.* Citizens' Mut. Ins. Co., 23 La. Ann. 332; Healey *v.* Imperial F. Ins. Co., 5 Nev. 268.

That a new policy instead of a renewal certificate is taken is immaterial. Stage *v.* Home Ins. Co., 76 N. Y. App. Div. 509, 78 N. Y. Suppl. 555.

If the insured in his application states that he will not renew the prior policy, his subsequent renewal will amount to a breach of a promissory warranty. Deitz *v.* Mound City Mut. F., etc., Ins. Co., 38 Mo. 85. But see Commercial Mut. Acc. Ins. Co. *v.* Bates, 176 Ill. 194, 52 N. E. 49, where the court refused to consider a promise to take the affirmative step of dropping present insurance as a warranty and has permitted a recovery, although the insured failed to do as he agreed, but continued the insurance.

A breach of the condition is effected by a material alteration in the amount of insurance on different subject-matters comprised under a policy outstanding and assented to, although there is no change in the aggregate of the sums insured. Simpson *v.* Pennsylvania F. Ins. Co., 38 Pa. St. 250.

57. New Orleans Ins. Assoc. *v.* Holberg, 64 Miss. 51, 8 So. 175; Dunstable First Baptist Soc. *v.* Hillsborough Mut. F. Ins. Co., 19 N. H. 580; Parsons *v.* Standard F. Ins. Co., 5 Can. Sup. Ct. 233; Lowson *v.* Canada Farmers' Mut. F. Ins. Co., 6 Ont. App. 512. *Contra*, Burt *v.* People's Mut. F. Ins. Co., 2 Gray (Mass.) 397.

Where the prior insurer is about to become insolvent it has been held that the condition is not broken by the insured replacing a policy for the same amount in a solvent concern. General Ins. Co. *v.* Cory, [1897] 1 Q. B. 335, 66 L. J. Q. B. 313.

58. Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947; Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96. *Contra*, Phenix Ins. Co. *v.* Johnston, 42 Ill. App. 66; Obermeyer *v.* Globe Mut. Ins. Co., 43 Mo. 573. See also *supra*, XIII, A, 3; XIII, A, 6.

When the insured and insurer contracted under a mutual mistake as to the fact of the existence of a prior policy and the insurer canceled its policy on learning thereof, the prior policy was held still in force in Wilson *v.* Queen Ins. Co., 5 Fed. 674.

59. Roots *v.* Cincinnati Ins. Co., 1 Disn. (Ohio) 138, 12 Ohio Dec. Reprint 535; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Boatman's F. & M. Ins. Co. *v.* Hocking, 5 Pa. Cas. 180, 8 Atl. 417; Parsons *v.* Queen Ins. Co., 29 U. C. C. P. 188.

This does not mean, however, that all the property insured under each policy must be precisely identical. Therefore if a subsequent policy insuring other property includes property already insured under a policy containing a provision against additional insurance the prior policy will be avoided, at least to the extent of such property so included. Phœnix Ins. Co. *v.* Michigan Southern, etc., R. Co., 28 Ohio St. 69.

An insurance upon merchandise kept for sale covers property of the same description substituted for the original articles sold. Therefore the taking out of insurance upon such substituted articles is a double insurance. Walton *v.* Louisiana State M. & F. Ins. Co., 2 Rob. (La.) 562; Whitwell *v.* Putnam F. Ins. Co., 6 Lans. (N. Y.) 166.

Whether the subsequent insurance of a part only of the property originally insured will vitiate the entire prior policy there is some conflict. The weight of authority inclines to the view that, although the items be separable, if the premium be entire, the policy is fully avoided.[60] If concurrent insurance be permitted by the policy, it is sufficiently "concurrent" so that the insurance is not of the prohibited type, if the later policy is upon a part of the subject-matter.[61]

f. Insurance of Separate Interests — (i) *In General.* In order that the condition against additional insurance be broken, it must appear, not only that the same property is covered, but also that the same interest in the same property is doubly insured.[62] If the interest, however, is greater than and includes that insured under the first policy this constitutes double insurance.[63]

Likewise a removal of an insured stock and consolidation thereof with another stock insured under a policy covering additions thereto is a double insurance. Washington Ins. Co. *v.* Hayes, 17 Ohio St. 432, 93 Am. Dec. 628. If this be done with the consent of the insurer forfeiture is waived. London Assur. Corp. *v.* Saxton, 55 Ill. App. 664; Vose *v.* Hamilton Mut. Ins. Co., 39 Barb. (N. Y.) 302.

60. *Georgia.*—Phœnix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. 948.

Indiana.— Havens *v.* Home Ins. Co., 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689.

Kentucky.— Davis *v.* Northwestern Mut. Ins. Co., 12 Ky. L. Rep. 844.

Maryland.— Associated Firemen's Ins. Co. *v.* Assum, 5 Md. 165.

Massachusetts.— Clark *v.* Hamilton Mut. Ins. Co., 9 Gray 148; Kimball *v.* Howard F. Ins. Co., 8 Gray 33.

New York.—None of the policy was avoided in Sunderlin *v.* Ætna Ins. Co., 18 Hun 522, when the subsequent insurance was upon a divisible portion of the subject-matter. But an earlier case in the same jurisdiction avoided the policy *in toto*. Whitwell *v.* Putnam F. Ins. Co., 6 Lans. 166.

Texas.— Westchester F. Ins. Co. *v.* Storm, 6 Tex. Civ. App. 390, 25 S. W. 318.

United States.— Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 18 C. C. A. 203.

See 28 Cent. Dig. tit. "Insurance," § 873; and *supra*, XI, L; XII, D; XIII, A, 5; XIII, G, 2, d.

This is particularly true when the policy stipulates against further insurance in whole or in part. Phœnix Ins. Co. *v.* Gray, 107 Ga. 110, 32 S. E. 948.

A contrary result has been had, however, when the contract was regarded as separable, the policy being vitiated only so far as the subject-matter was identical. Illinois Mut. F. Ins. Co. *v.* Fix, 53 Ill. 151, 5 Am. Rep. 38; Jones *v.* Maine Mut. F. Ins. Co., 18 Me. 155.

If the first insurer for its own convenience includes two separately insured risks under one policy, the two being regarded as separate and separable, a forfeiture will not result, although the insured procures additional insurance on one of the risks so included. Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

The insured's intention to effect insurance on different articles is immaterial if he has actually taken out insurance on identical property. Westchester F. Ins. Co. *v.* Storm, 6 Tex. Civ. App. 390, 25 S. W. 318.

61. Gough *v.* Davis, 39 N. Y. App. Div. 639, 57 N. Y. Suppl. 1139 [*affirming* 24 Misc. 245, 52 N. Y. Suppl. 947].

Effect of breach as to part of risk see *supra*, XIII, A, 5.

62. Mussey *v.* Atlas Mut. Ins. Co., 14 N. Y. 79; Gilchrist *v.* Gore Dist. Mut. F. Ins. Co., 34 U. C. Q. B. 15; Park *v.* Phœnix Ins. Co., 19 U. C. Q. B. 110.

For example insurance by several joint owners, each of his individual interest, may be effected under separate policies without a breach of the condition. Franklin M. & F. Ins. Co. *v.* Drake, 2 B. Mon. (Ky.) 47; Hall *v.* Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524. So any one having an insurable interest not identical with the interest insured under the policy in question may separately effect insurance involving the same subject-matter without affecting the validity of the insurance on any other interest. Roos *v.* Merchants' Mut. Ins. Co., 27 La. Ann. 409; Carpenter *v.* Continental Ins. Co., 61 Mich. 635, 28 N. W. 749; Burbank *v.* Rockingham Mut. F. Ins. Co., 24 N. H. 550, 57 Am. Dec. 300; De Witt *v.* Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977 [*affirming* 89 Hun 229, 36 N. Y. Suppl. 570]; Acer *v.* Merchants' Ins. Co., 57 Barb. (N. Y.) 68; Tallman *v.* Atlantic F. & M. Ins. Co., 4 Abb. Dec. (N. Y.) 345, 3 Keyes 87, 33 How. Pr. 400 [*reversing* 29 How. Pr. 71]; Harris *v.* Ohio Ins. Co., Wright (Ohio) 544; Williams *v.* Cincinnati Ins. Co., Wright (Ohio) 542; Western Ins. Co. *v.* Carson, 10 Ohio Dec. (Reprint) 728, 23 Cinc. L. Bul. 224; Cross *v.* New York, etc., Steamship Co., 107 Fed. 516. Insurance on her dower interest does not invalidate a policy effected by the widow on her husband's property for the benefit of his heirs. Haire *v.* Ohio Farmers' Ins. Co., 93 Mich. 481, 53 N. W. 623, 32 Am. St. Rep. 516. A vendor and a vendee in possession under an executory agreement to purchase have separate insurable interests. De Witt *v.* Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977 [*affirming* 89 Hun 229, 36 N. Y. Suppl. 570]. Again if one has two insurable interests in property, he may insure them both without forfeiture. Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

63. Mussey *v.* Atlas Mut. Ins. Co., 14 N. Y. 79.

(II) *Under a Mortgage.* A mortgagor and a mortgagee have distinct and separate insurable interests, so that the separate insurance thereof will not avoid a policy.[64] If the policy of the mortgagor is made "payable to the mortgagee as his interest may appear," this is regarded as an insurance of the mortgagor, and hence a subsequent insurance by the mortgagor vitiates the policy,[65] but insurance by the mortgagee does not affect the contract.[66] If the mortgagee is the real party insured and not merely a designated payee the interests of course are distinct and insurance by the mortgagor or his assigns is not duplicate.[67] Additional insurance procured by the mortgagee upon the mortgagor's interest without the consent or knowledge of the mortgagor will not affect the rights of the mortgagor;[68] but additional insurance procured by the mortgagor upon his own interest in violation of the terms of his policy will operate to defeat the right of a mortgagee to recover, unless the latter be separately insured, or unless the policy expressly exempts the mortgagee from the results of the acts of the mortgagor.[69]

(III) *Under an Assignment.* An assignee to whom a policy is transferred, with the consent of the insurer, along with the title, must notify the insurer of the existence of another policy taken out by him on the same property.[70]

6. Duty to Maintain or Drop Other Insurance. There is no implied duty to retain existing insurance upon premises under a provision of the policy that the "insured shall recover such a portion of the loss only as the sum insured bears to the whole amount of the insurance."[71] There is a disagreement as to whether a promise to drop other insurance is equivalent to a warranty, breach of which will avoid a policy.[72]

64. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

Illinois.— Commercial Union Assur. Co. *v.* Scammon, 144 Ill. 506, 32 N. E. 916; Niagara F. Ins. Co. *v.* Scammon, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 114.

Kentucky.— Home Ins. Co. *v.* Koob, 113 Ky. 360, 68 S. W. 453, 24 Ky. L. Rep. 223, 101 Am. St. Rep. 354, 58 L. R. A. 58.

Michigan.— Guest *v.* New Hampshire F. Ins. Co., 66 Mich. 98, 33 N. W. 31.

New Hampshire.— Breeyear *v.* Rockingham Farmers' Mut. F. Ins. Co., 71 N. H. 445, 52 Atl. 860.

See 28 Cent. Dig. tit. "Insurance," § 866.

Subsequent mortgagees have a distinct and separate interest from that of prior mortgagees. City Five Cents Sav. Bank *v.* Pennsylvania F. Ins. Co., 122 Mass. 165.

65. *California.*— Holbrook *v.* Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555.

Illinois.— Continental Ins. Co. *v.* Hulman, 92 Ill. 145, 34 Am. Rep. 122.

Kansas.— Cloud County Bank *v.* German Ins. Co., (App. 1897) 49 Pac. 688.

New York.— Van Alstyne *v.* Ætna Ins. Co., 14 Hun 360.

Texas.— Guinn *v.* Phœnix Ins. Co., (Civ. App. 1893) 31 S. W. 566.

Canada.— Migner *v.* St. Lawrence F. Ins. Co., 10 Quebec Q. B. 122.

See 28 Cent. Dig. tit. "Insurance," § 866.

Contra.— Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1, where the mortgagor procured insurance, his title standing in the name of his assignee in bankruptcy.

66. Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315.

67. Burke *v.* Niagara F. Ins. Co., 12 N. Y. Suppl. 254.

68. Cannon *v.* Home Ins. Co., 49 La. Ann. 1367, 22 So. 387; St. George's Church *v.* Sun Fire Office Ins. Co., 54 Minn. 162, 55 N. W. 909; De Witt *v.* Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977 [*affirming* 89 Hun 229, 36 N. Y. Suppl. 570]; Doran *v.* Franklin F. Ins. Co., 86 N. Y. 635; West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081.

Subsequent insurance by a mortgagee at the expense of the mortgagor and with his knowledge and consent forfeits the preëxisting policy. Holbrook *v.* American Ins. Co., 12 Fed. Cas. No. 6,589, 1 Curt. 193.

69. Grosvenor *v.* Atlantic F. Ins. Co., 17 N. Y. 391 [*overruling* Traders' Ins. Co. *v.* Robert, 9 Wend. 404]. See also *supra*, XIII, A, 7, b.

The result is the same if the first policy was procured in the name of the mortgagor by the mortgagee, proceeds payable to the mortgagee, under a clause of the mortgage that the mortgagor should procure insurance and if he did not do so the mortgagee might at his expense. Gillett *v.* Liverpool, etc., Ins. Co., 73 Wis. 203, 41 N. W. 78, 9 Am. St. Rep. 784.

70. Leavitt *v.* Western M. & F. Ins. Co., 7 Rob. (La.) 351.

71. This refers to the amount of insurance in existence at the time of the loss. Lattan *v.* Royal Ins. Co., 45 N. J. L. 453; Hand *v.* Williamsburgh City F. Ins. Co., 57 N. Y. 41; Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

72. **Warranty.**— Deitz *v.* Mound City Mut. F., etc., Ins. Co., 38 Mo. 85.

J. Non-Payment of Premiums or Assessments — **1. Premiums.** It has already been noted[73] that a stipulation in a policy that it should not be binding until the premium is actually paid is reasonable and enforceable.[74] If a note is accepted as conditional payment in lieu of a cash premium, a failure to pay the same at maturity under this provision renders the policy inoperative;[75] but not so if the note is taken as absolute payment and no forfeiture for failure to meet the same at maturity is provided.[76]

2. Assessments on Premium Notes. It is generally specifically provided in the policy[77] that a failure to pay assessments as levied will avoid or suspend the contract of insurance. Such provisions are constitutional[78] and reasonable,[79] and are uniformly upheld, so that the liability of the company ceases when a default in payment is made,[80] in the absence of a waiver[81] or an extension of time agreed upon by the insurer.[82] The insurer is relieved from liability for any losses occur-

No warranty.— Commercial Mut. Acc. Co. *v.* Bates, 176 Ill. 194, 52 N. E. 49, case involving accident insurance.

73. See *supra*, V, A, 1, a.

74. Harle *v.* Council Bluffs Ins. Co., 71 Iowa 401, 32 N. W. 396; German Ins. Co. *v.* Shader, 1 Nebr. (Unoff.) 704, 96 N. W. 604; Manhattan L. Ins. Co. *v.* Wright, 126 Fed. 82, 61 C. C. A. 138.

75. Continental Ins. Co. *v.* Dorman, 125 Ind. 189, 25 N. E. 213; Houston *v.* Farmers', etc., Ins. Co., 64 Nebr. 138, 89 N. W. 635; Gorton *v.* Dodge County Mut. Ins. Co., 39 Wis. 121.

76. Dwelling-House Ins. Co. *v.* Hardie, 37 Kan. 674, 16 Pac. 92; Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792.

Questions of fact and law involving inquiries as to how long a payment operated to keep the policy alive see Kimbro *v.* Continental Ins. Co., 101 Tenn. 245, 47 S. W. 413.

77. In the absence of a provision that the policy is terminated or suspended upon failure to pay assessments on premium notes not maturing at a definite date, but becoming due only as assessments are levied, the failure to pay an assessment will not render the policy inoperative. Sanford *v.* California Farmers' Mut. F. Ins. Assoc., 63 Cal. 547.

78. Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9.

With respect to a mutual company it has been held that unless this right of forfeiture has been reserved by the company, a change in the by-laws not assented to by the insured rendering policies void for delay in paying assessments interferes with the vested rights of the insured and is therefore invalid. New England Mut. F. Ins. Co. *v.* Butler, 34 Me. 451; Northampton County F. Ins. Co. *v.* Conner, 17 Pa. St. 136.

79. Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506; Sears *v.* Agricultural Ins. Co., 32 U. C. C. P. 585. But see Ballagh *v.* Royal Mut. F. Ins. Co., 5 Ont. App. 87; O'Neill *v.* Ottawa Agricultural Ins. Co., 30 U. C. C. P. 151.

80. *Colorado.*— New Zealand Ins. Co. *v.* Maaz, 13 Colo. App. 493, 59 Pac. 213.

Indiana.— American Ins. Co. *v.* Henley, 60 Ind. 515.

Iowa.— Shakey *v.* Hawkeye Ins. Co., 44 Iowa 540.

Kentucky.— Blakesley *v.* Continental Ins. Co., 5 Ky. L. Rep. 423.

Massachusetts.— Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500.

Michigan.— McIntyre *v.* Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Missouri.— Mooney *v.* Home Ins. Co., 72 Mo. App. 92.

Nebraska.— Merchants', etc., Mut. Ins. Co. *v.* Baker, (1903) 94 N. W. 627; Home F. Ins. Co. *v.* Garbacz, 48 Nebr. 827, 67 N. W. 864.

New York.— Redfield *v.* Patterson F. Ins. Co., 6 Abb. N. Cas. 456; Beadle *v.* Chenango County Mut. Ins. Co., 3 Hill 161.

North Carolina.— Perry *v.* Farmers' Mut. L. Ins. Assoc., 132 N. C. 283, 43 S. E. 837.

West Virginia.— Muhleman *v.* National Ins. Co., 6 W. Va. 508.

See 28 Cent. Dig. tit. "Insurance," § 891.

It is not necessary that the insurer should say or do anything in order to be entitled to the benefit of a forfeiture. Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539.

The note and obligation must have matured. Farmers', etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312.

The premium unpaid remains a debt which the company may collect despite the forfeiture. Boatman's F. & M. Ins. Co. *v.* James, 10 Ky. L. Rep. 816. See *supra*, V, A, 3, b.

The company may be estopped to assert the forfeiture by a custom known to insured not to exact prompt payment. La Societe de Bienfaisance, etc. *v.* Morris, 24 La. Ann. 347; Manchester F. Ins. Co. *v.* Plato, 23 Ohio Cir. Ct. 35; Doherty *v.* Millers', etc., Ins. Co., 4 Ont. L. Rep. 303.

81. Garlick *v.* Mississippi Valley Ins. Co., 44 Iowa 553.

If the insurer notifies the insured of the suspension and requests him to send his check by return mail, the policy becomes in force again upon the mailing of the check. Pennsylvania Lumberman's Mut. F. Ins. Co. *v.* Meyer, 126 Fed. 352, 61 C. C. A. 254.

82. *Iowa.*— Critchett *v.* American Ins. Co., 53 Iowa 404, 5 N. W. 543, 36 Am. Rep. 230.

Kentucky.— Home Ins. Co. *v.* Holder, 74 S. W. 267, 24 Ky. L. Rep. 2483; Home Ins.

ring during the time of such default and suspension,[83] and tender of the overdue assessment will not after loss avail the insured,[84] although, unless the policy specifically is considered to become absolutely void, a subsequent payment results in reinstatement as to all losses occurring thereafter.[85] In the absence of a provision making the policy absolutely and finally void, the policy is only voidable and suspended during the period of default.[86] A partial payment of the sum delinquent does not operate to revive the policy.[87]

3. NOTICE — a. Necessity. In the absence of an express agreement to do so, an insurer need not give the insured notice of the maturity of a premium note which does not require the levying of an assessment to become payable but which is due at a fixed time.[88] The contrary is true if the note is payable only

Co. *v.* Wood, 72 S. W. 15, 24 Ky. L. Rep. 1638; Home Ins. Co. *v.* Karn, 39 S. W. 501, 19 Ky. L. Rep. 273.

Michigan.— Mallory *v.* Ohio Farmers' Ins. Co., 90 Mich. 112, 51 N. W. 188.

Missouri.— Jackson *v.* German Ins. Co., 27 Mo. App. 62.

Texas.— East Texas F. Ins. Co. *v.* Perkey, 89 Tex. 604, 35 S. W. 1050.

See 28 Cent. Dig. tit. "Insurance," § 891 *et seq.*

An agreement by an agent to submit a proposition to the insurer as to extension of time does not of itself amount to an extension (Home Ins. Co. *v.* Karn, 39 S. W. 501, 19 Ky. L. Rep. 273), even though the insured was misled by the insurer's failure to reply, to think that the request had been granted (East Texas F. Ins. Co. *v.* Perkey, 89 Tex. 604, 35 S. W. 1050).

83. *Kentucky.*— Hodge *v.* Continental Ins. Co., 12 Ky. L. Rep. 138.

Michigan.— Williams *v.* Albany City Ins. Co., 19 Mich. 451, 2 Am. Rep. 95.

Missouri.— Mooney *v.* Home Ins. Co., 80 Mo. App. 192; Dircks *v.* German Ins. Co., 34 Mo. App. 31; Barnes *v.* Continental Ins. Co., 30 Mo. App. 539.

Nebraska.— Hooker *v.* Continental Ins. Co., (1903) 96 N. W. 663; Antes *v.* State Ins. Co., 61 Nebr. 55, 84 N. W. 412; Phenix Ins. Co. *v.* Bachelder, 32 Nebr. 490, 49 N. W. 217, 29 Am. St. Rep. 443.

New Hampshire.— Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9.

New York.— Wall *v.* Home Ins. Co., 36 N. Y. 157 [*affirming* 8 Bosw. 597].

Pennsylvania.— Fogel *v.* Lycoming Mut. Ins. Co., 3 Grant 77; Washington Mut. F. Ins. Co. *v.* Rosenberger, 33 Leg. Int. 338.

See 28 Cent. Dig. tit. "Insurance," § 899.

84. *California.*—Palmer *v.* Continental Ins. Co., (1900) 61 Pac. 784.

Illinois.— Firemen's Ins. Co. *v.* Kuessner, 59 Ill. App. 432.

Iowa.— Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126.

Michigan.— Hill *v.* Farmers' Mut. F. Ins. Co., 129 Mich. 141, 88 N. W. 392; Robinson *v.* Continental Ins. Co., 76 Mich. 641, 43 N. W. 647, 6 L. R. A. 95; Williams *v.* Republic Ins. Co., 19 Mich. 469; Williams *v.* Albany City Ins. Co., 19 Mich. 451, 2 Am. Dec. 95.

Nebraska.— Merchants', etc., Mut. Ins. Co. *v.* Baker, (1903) 94 N. W. 627; Houston *v.* Farmers', etc., Ins. Co., 64 Nebr. 138, 89 N. W. 635.

North Carolina.— Perry *v.* Farmers' Mut. L. Ins. Assoc., 132 N. C. 283, 43 S. E. 837.

Virginia.— Southern Mut. Ins. Co. *v.* Taylor, 33 Gratt. 743.

See 28 Cent. Dig. tit. "Insurance," § 905 *et seq.*

But if the charter of the company requires payment of assessments within a certain period after notice, it is liable when tender is made within the period, although after loss. MacKinnon *v.* Chicago Mut. F. Ins. Co., 83 Wis. 12, 53 N. W. 19.

A tender of payment must be unconditional and be of actual legal tender in hand. Continental Ins. Co. *v.* Busby, 3 Tex. App. Civ. Cas. § 101.

85. Houston *v.* Farmers', etc., Ins. Co., 64 Nebr. 138, 89 N. W. 635; Hummel's Appeal, 78 Pa. St. 320.

It is immaterial that the payment was enforced and not voluntary. A reinstatement in either case is effected. American Ins. Co. *v.* Klink, 65 Mo. 78.

86. *Illinois.*— Lenz *v.* German F. Ins. Co., 74 Ill. App. 341.

Indiana.— American Ins. Co. *v.* Henley, 60 Ind. 515; Continental Ins. Co. *v.* Miller, 4 Ind. App. 553, 30 N. E. 718.

Ohio.— Wilson *v.* Home Ins. Co., 6 Ohio Dec. (Reprint) 708, 7 Am. L. Rec. 480.

Pennsylvania.— Columbia Ins. Co. *v.* Buckley, 83 Pa. St. 298.

Texas.— East Texas F. Ins. Co. *v.* Perkey, 5 Tex. Civ. App. 698, 24 S. W. 1080.

See 28 Cent. Dig. tit. "Insurance," § 891 *et seq.*

87. Carlock *v.* Phœnix Ins. Co., 138 Ill. 210, 28 N. E. 53 [*affirming* 38 Ill. App. 283]; German Ins. Co. *v.* Denny, 70 Ill. App. 437; Hollister *v.* Quincy Mut. F. Ins. Co., 118 Mass. 478.

88. Continental Ins. Co. *v.* Dorman, 125 Ind. 189, 25 N. E. 213; Cecil County Mut. F. Ins. Co. *v.* Miller Lodge, I. O. O. F., 58 Md. 463; Webb *v.* Baltimore County Mut. F. Ins. Co., 63 Md. 213.

But if the note is to be payable at a place to be thereafter designated by the insurer, notice of the place of payment is essential. Blackerby *v.* Continental Ins. Co., 83 Ky. 574; Continental F. Ins. Co. *v.* Adams, 8 Ky. L. Rep. 269.

when assessments are levied.[89] Statutes have been enacted in many states requiring notice to be of a certain sort and that it should be given a certain number of days prior to the time that a forfeiture can be declared. Such statutes must be strictly complied with, where they exist, or a forfeiture does not result.[90]

b. Manner of Giving. The statutes usually provide for a personal notice or one by registered mail. In the absence of statutes, by-laws of insurance companies requiring only notice by publication are sufficient authority to forfeit a policy after such form of notice.[91] By-laws providing that notice may be by circular are not satisfied unless the circular is received;[92] but a by-law authorizing notice by mail is satisfied by the proper posting of the letter containing the notice;[93] and statutes requiring written notice by registered letter are satisfied by mailing such a letter to the address of the insured.[94]

c. Sufficiency. The notice should not alone state that the assessment will fall due at a certain time, but also that the policy will be canceled unless the assessment is paid.[95] The notice should distinctly state the date by which pay-

89. No forfeiture can result without a notice as prescribed by the by-laws of the company. McMahan *v.* Sewickly Mut. F. Ins. Co., 179 Pa. St. 52, 36 Atl. 174; Thuot *v.* La Compagnie D'Assur., etc., 10 Quebec Q. B. 104. See also cases cited *supra*, V, B, 6, b.

If a period of time is by the by-laws allowed the insured in which to pay an assessment, a forfeiture cannot be declared before that time. Sinking Springs Ins. Co. *v.* Hoff, 2 Wkly. Notes Cas. (Pa.) 841.

90. *Illinois.*— Dubuque F. & M. Ins. Co. *v.* Oster, 74 Ill. App. 139.

Iowa.— Bradford *v.* Mutual F. Ins. Co., 112 Iowa 495, 84 N. W. 693; Morrow *v.* Des Moines Ins. Co., 84 Iowa 256, 51 N. W. 3; Boyd *v.* Cedar Rapids Ins. Co., 70 Iowa 325, 30 N. W. 585.

Pennsylvania.— Shuman *v.* Juniata Farmers' Mut. F. Ins. Co., 206 Pa. St. 417, 55 Atl. 1069.

South Dakota.— Epiphany Roman Catholic Church *v.* German Ins. Co., 16 S. D. 17, 91 N. W. 332.

Wisconsin.— Milwaukee Trust Co. *v.* Farmers' Mut. F. Ins. Co., 115 Wis. 371, 91 N. W. 967.

See 28 Cent. Dig. tit. "Insurance," § 905 *et seq.*

A by-law in conflict with the statute is wholly ineffective. Hurst Home Ins. Co. *v.* Muir, 107 Ky. 148, 53 S. W. 3, 21 Ky. L. Rep. 828.

If the insured has more than one policy as to which he is in default, the statute must be complied with as to each separately. Born *v.* Home Ins. Co., 110 Iowa 379, 81 N. W. 676; Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126.

A provision in the policy that defendant is exempt from all liability for a loss occurring while an assessment remains unpaid will not defeat recovery if the statutory notice is not given. Marden *v.* Hotel Owners' Ins. Co., 85 Iowa 584, 52 N. W. 509, 39 Am. St. Rep. 316.

What law governs.— Where the policy, although signed by the officers of the company in Missouri, was to be valid only when countersigned by the company's agent in New York and then delivered to the insured on payment of the premium, it is governed by the laws of New York respecting forfeiture. Todd *v.* Missouri State Ins. Co., 11 Phila. (Pa.) 355. On the other hand where the policy was executed in Iowa on property in Nebraska, it was held that notice must be given in accordance with the law of Iowa. Marden *v.* Hotel Owners' Ins. Co., 85 Iowa 584, 52 N. W. 509, 39 Am. St. Rep. 316.

91. Jones *v.* Sisson, 6 Gray (Mass.) 288; Pennsylvania Training School *v.* Independent Mut. F. Ins. Co., 127 Pa. St. 559, 18 Atl. 392; Old *v.* Farmer's F. Ins. Co., 2 Walk. (Pa.) 110; Gonder *v.* Lancaster County Mut. F. Ins. Co., 17 Pa. Super. Ct. 119.

Despite the by-law it has been held that actual notice is required. Schmidt *v.* German Mut. Ins. Co., 4 Ind. App. 340, 30 N. E. 939.

92. Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 15 N. W. 452.

93. Lothrop *v.* Greenfield Stock, etc., F. Ins. Co., 2 Allen (Mass.) 82. What is a proper mailing so that a presumption of due receipt arises see EVIDENCE, 16 Cyc. 1065 *et seq.*

94. Greeley *v.* Iowa State Ins. Co., 50 Iowa 86.

But all the postal regulations must be complied with before the letter is considered duly registered. Ross *v.* Hawkeye Ins. Co., 93 Iowa 222, 61 N. W. 852, 34 L. R. A. 466, 83 Iowa 586, 50 N. W. 47; Holbrook *v.* Mill Owners' Mut. Ins. Co., 86 Iowa 255, 53 N. W. 229; McKenna *v.* State Ins. Co., 73 Iowa 453, 35 N. W. 519.

While receipt by the insured is immaterial, still, if the insurer knows that the postmaster has violated the postal regulations by returning the letter undelivered instead of retaining it for the period required, the notice is not properly given. Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126.

In the absence of such a by-law, or a statute, the insurer cannot assert that it has given notice without showing receipt thereof from the mail. Continental F. Ins. Co. *v.* Adams, 8 Ky. L. Rep. 269.

95. Finster *v.* Merchants', etc., Ins. Co., 97

ment is required.[96] In the absence of a statutory provision requiring it no demand is necessary.[97]

d. Who Entitled to. The assignee[98] under a completed assignment creating privity of contract with the insurer is the party entitled to notice.[99] A mortgagee whose interest is known to the insurer is entitled to such notice, and in the absence thereof his security by virtue of the policy is not affected.[1]

4. What Is Payment. There can be no forfeiture if the agent of the insurer himself advanced the money for the insured and made the insured his personal debtor,[2] and the fact that the insured's personal note to the agent was unpaid presents no ground of forfeiture.[3] Tender[4] or payment to the agent of the insured is of course sufficient,[5] whether he remits the same prior to loss or not;[6] but a personal set-off belonging to the insured against the agent has been held no payment so as to prevent a cancellation of the policy by the insurer.[7]

5. Excuses For Non-Payment. The sickness of the insured is no excuse for failure to pay an assessment at the proper time.[8] In the case of death the obligation to pay falls upon those thereupon beneficially interested in the property, and a failure by them to pay at the proper time forfeits the policy.[9] War between the countries of the insured and insurer amounts to an excuse for delinquency in the payment of premiums.[10] It is an excuse that the assessment was improperly or illegally levied,[11] or that it is levied to meet losses occurring before or after the period of his membership.[12] The failure of the insurer to have the note at the place of payment at the maturity thereof is an excuse for delay in paying an assessment, if the insured was at that time ready and willing to pay the note.[13]

Iowa 9, 65 N. W. 1004. See also cases cited *supra*, V, B, 6, b.

The date of the notice is the date of its receipt and not that of its sending (Darlington *v.* Phœnix Mut. F. Ins. Co., 194 Pa. St. 650, 45 Atl. 482), although by statute the rule may be changed (Holbrook *v.* Mill Owners' Mut. Ins. Co., 86 Iowa 255, 53 N. W. 229).

96. Williams *v.* Reserve Fund Live Stock Ins. Co., 19 Misc. (N. Y.) 515, 43 N. Y. Suppl. 1083.

97. Redfield *v.* Paterson F. Ins. Co., 6 Abb. N. Cas. (N. Y.) 456. See also cases cited *supra*, V, B, 6, b.

98. An assignee for the benefit of creditors is not entitled to notice. The original insured is the party to be notified. Lycoming F. Ins. Co. *v.* Storrs, 97 Pa. St. 354.

99. Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21.

1. Guggisberg *v.* Waterloo Mut. F. Ins. Co., 24 Grant Ch. (U. C.) 350. See also Oxford Permanent Bldg., etc., Soc. *v.* Waterloo County Mut. F. Ins. Co., 42 U. C. Q. B. 181; Duff *v.* Canadian Mut. F. Ins. Co., 27 Grant Ch. (U. C.) 391.

2. Smith *v.* Agricultural Ins. Co., 6 N. Y. St. 127; Matter of Booth, 11 Abb. N. Cas. (N. Y.) 145; Lebanon Mut. Ins. Co. *v.* Hoover, 113 Pa. St. 591, 8 Atl. 163, 57 Am. Rep. 511.

3. Mooney *v.* Home Ins. Co., 80 Mo. App. 192.

4. Continental Ins. Co. *v.* Miller, 4 Ind. App. 553, 30 N. E. 718.

5. Wilber *v.* Williamsburgh City F. Ins. Co., 1 N. Y. Suppl. 312.

A notice by the insurer to pay at the home office revokes the power of the insured to pay the agent. Home Ins. Co. *v.* Wood, 72 S. W. 15, 24 Ky. L. Rep. 1638.

6. See cases cited *supra*, V, A, 2.

7. Merchants', etc., Mut. Ins. Co. *v.* Baker, (Nebr. 1903) 94 N. W. 627.

A set-off not yet due against an insurer is no payment to avoid a forfeiture. Cecil County Mut. F. Ins. Co. *v.* Miller Lodge I. O. O. F., 58 Md. 463. And see *supra*, V, A, 2. See also Pister *v.* Keystone Mut. Ben. Assoc., 3 Pa. Super. Ct. 50.

8. Home Ins. Co. *v.* Wood, 72 S. W. 15, 24 Ky. L. Rep. 1638.

9. Continental Ins. Co. *v.* Daly, 33 Kan. 601, 7 Pac. 158; Sauner *v.* Phœnix Ins. Co., 41 Mo. App. 480.

10. Crawford *v.* Ætna Ins. Co., 2 Tenn. Cas. 329.

11. Baker *v.* Citizens' Mut. F. Ins. Co., 51 Mich. 243, 16 N. W. 391; Planters' Ins. Co. *v.* Comfort, 50 Miss. 662; Rosenberger *v.* Washington Mut. F. Ins. Co., 87 Pa. St. 207.

12. Weikel *v.* Lower Providence Live Stock Ins. Co., 3 Montg. Co. Rep. (Pa.) 207, 211; Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 15 Wkly. Notes Cas. (Pa.) 306; Seyk *v.* Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523. See also *supra*, V, B, 5, a, (II).

13. Texas F. Ins. Co. *v.* Camp County K. of T. L., 32 Tex. Civ. App. 328, 74 S. W. 809.

Foreign company.— It has been stated that the insurer cannot insist upon a forfeiture for non-payment of premiums when it has failed to provide an agent in the state of the insured to whom the premium can be paid. Blackerby *v.* Continental Ins. Co., 7 Ky. L. Rep. 653; *In re* People's Mut. Equitable F. Ins. Co., 9 Allen (Mass.) 310.

XIV. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID POLICY.[14]

A. Applicability of Doctrines — 1. WHAT CONDITIONS MAY BE WAIVED. When an insurance contract is conditioned to become void in case there be a breach of a condition precedent or subsequent, the true meaning is not that the instrument is upon a breach thenceforth a nullity and has no legal existence, but only that upon the violation of the covenants by the insured the insurer shall cease to be bound by his covenants.[15] Inasmuch therefore as such conditions are inserted for the benefit of the insurer they may all be waived by him,[16] except when the insured by the act loses his insurable interest.[17] Even a stipulation that the conditions of a policy cannot be waived, or if waived at all only in a certain manner, may itself be waived.[18] It is impossible to assert with any confidence a consistent theory upon which all the adjudications in insurance cases, commonly collected under the topics of waiver or estoppel, may rest.[19] Indeed it will be

14. Estoppel or waiver as affecting validity of contract see *supra*, VI, E.

Estoppel generally see ESTOPPEL.

15. Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

The same rules as to waiver apply to mutual companies as to other companies. Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139; McBryde *v.* South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769.

16. *Illinois.*— Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990; Phenix Ins. Co. *v.* Johnston, 42 Ill. App. 66.

Iowa.— Glasscock *v.* Des Moines Ins. Co., 125 Iowa 170, 100 N. W. 503; Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605; Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Kansas.— American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

Maine.— Bigelow *v.* Granite State F. Ins. Co., 94 Me. 39, 46 Atl. 808.

Missouri.— Bersche *v.* Globe Mut. Ins. Co., 31 Mo. 546; Keet-Rountree Dry-Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469.

Nebraska.— Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

New York.— Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195; Liddle *v.* Market F. Ins. Co., 29 N. Y. 184.

Pennsylvania.— Coursin *v.* Pennsylvania F. Ins. Co., 46 Pa. St. 323.

Virginia.— Georgia Home Ins. Co. *v.* Kinner, 28 Gratt. 88.

Wisconsin.— Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

United States.— Turner *v.* Meridan F. Ins. Co., 16 Fed. 454.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.*

Each underwriter in a Lloyd's policy is within this rule. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197, 4 N. Y. Annot. Cas. 357.

Drastic statutes exist in some states that the insurer is estopped to deny the truth of the statements of the application in the absence of fraud on the part of the insured. See Home Ins. Co. *v.* Virginia-Carolina Chemical Co., 109 Fed. 681, decided under such statute and holding it inapplicable.

17. This being an essential requirement of any valid contract of insurance, the forfeiture cannot be waived so long as the non-insurable status continues. Gibbs *v.* Richmond County Mut. Ins. Co., 9 Daly (N. Y.) 203.

18. Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990.

The insurer cannot by any stipulation in the policy avoid the legal or equitable effect of acts sufficient to constitute an estoppel or waiver. Northern Assur. Co. *v.* Grand View Bldg. Assoc., 101 Fed. 77, 41 C. C. A. 207.

19. To call the matter one of estoppel solely would not be correct, for the insurer is frequently barred from asserting the breach of a condition under circumstances where the elements of an estoppel do not exist. See cases cited *infra*, this note.

To call it waiver alone is equally inadequate, for many adjudications require that the insured must have incurred a detriment, by reason of some reliance upon the conduct of the insurer, before the latter is barred from asserting the breach. See cases cited *infra*, this note.

Waiver and estoppel have been considered as identical in the following cases among many others, thus requiring all the elements of a true equitable estoppel before the insurer can be barred by its conduct.

California.— McCormick *v.* Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003.

Connecticut.— Lewis *v.* Phœnix Mut. L. Ins. Co., 44 Conn. 72; Hoxsie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

Indiana.— Germania F. Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003.

Iowa.— Hollis *v.* State Ins. Co., 65 Iowa 454, 21 N. W. 774; Jewett *v.* Home Ins. Co., 29 Iowa 562.

Kentucky.— Phœnix Ins. Co. *v.* Stevenson, 78 Ky. 150.

Michigan.— Security Ins. Co. *v.* Fay, 22 Mich. 467, 7 Am. Rep. 670.

Nebraska.— Home F. Ins. Co. *v.* Kennedy,

found that the cases even within a single jurisdiction are by no means consistent. The only harmonious principle that pervades the subject seems to be a desire on the part of the courts to hold the company as strictly as possible to the performance of its contract and to prevent an unfair reliance, on its part, upon technical conditions of the policy. In consequence a waiver or estoppel has frequently been predicated upon the most innocent acts and the insurer barred by conduct which in other fields of contract would never produce such a result.[20]

2. CONSIDERATION. As to whether or not a new consideration is necessary to support a waiver, there is some unexpected conflict in the authorities. While a consideration plays no part in the ordinary doctrine of equitable estoppel, and cases determined upon this theory ignore the presence or absence of a further consideration moving to the insurer,[21] yet other cases, proceeding on the theory that a waiver is in effect a new contract, assert that if no new and additional consideration is present, the company is not barred by its conduct from setting up any defenses that it may have.[22]

3. NECESSITY OF KNOWLEDGE. It is a fundamental principle of the doctrine of waiver, applicable equally to insurance as to other branches of the law, that a waiver to be effective against the party making it must have occurred with full knowledge of all material facts.[23] For example it has been repeatedly held that

47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521; Billings *v.* German Ins. Co., 34 Nebr. 502, 52 N. W. 397.

New York.— Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., 159 N. Y. 418, 54 N. E. 23; Ronald *v.* Mutual Reserve Fund L. Assoc., 132 N. Y. 378, 30 N. E. 739; Armstrong *v.* Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. 991; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Meech *v.* National Acc. Soc., 50 N. Y. App. Div. 144, 63 N. Y. Suppl. 1008.

North Carolina.— Grabbs *v.* Farmers' Mut. F. Ins. Co., 125 N. C. 389, 34 S. E. 503.

Oregon.— Wiedert *v.* State Ins. Co., 19 Oreg. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Pennsylvania.— Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 5 Am. Rep. 323.

Tennessee.— Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470. 25 Am. St. Rep. 676.

Wisconsin.— Bonneville *v.* Western Assur. Co., 68 Wis. 298, 32 N. W. 34.

United States.— Globe Mut. L. Ins. Co. *v.* Wolff, 95 U. S. 326, 24 L. ed. 387; Rice *v.* Fidelity, etc., Co., 103 Fed. 427, 43 C. C. A. 270.

Canada.— Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.*

That the insurer may be barred by conduct not amounting to an equitable estoppel seems to have been asserted in the following among many other cases:

Alabama.— Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163; Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537.

Iowa.— Corson *v.* Anchor Mut. F. Ins. Co., 113 Iowa 641, 85 N. W. 806.

Kansas.— British America Assur. Co. *v.* Bradford, 60 Kan. 82, 55 Pac. 335.

Minnesota.— Mee *v.* Bankers' Ins. Co., 69 Minn. 210, 72 N. W. 74.

Missouri.— Bowen *v.* Hanover F. Ins. Co., 69 Mo. App. 272; McCollum *v.* Niagara F. Ins. Co., 61 Mo. App. 352.

Nebraska.— Hartford Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779.

New York.— Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410.

South Carolina.— Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

Tennessee.— North German Ins. Co. *v.* Morton-Scott-Robertson Co., 108 Tenn. 384, 67 S. W. 816.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.*

20. The varying adjudications are more fully collected and discussed *supra*, XIV, B.

21. Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. (Va.) 88.

22. *Illinois.*— Northwestern Mut. L. Ins. Co. *v.* Amerman, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799.

Iowa.— Baldwin *v.* German Ins. Co., 105 Iowa 379, 75 N. W. 326.

Michigan.— New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

New York.— Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362.

Pennsylvania.— Lantz *v.* Vermont L. Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 23 Am. St. Rep. 202, 10 L. R. A. 577.

Texas.— Merchants' Mut. Ins. Co. *v.* Lacroix, 45 Tex. 158.

West Virginia.— McFarland *v.* Peabody Ins. Co., 6 W. Va. 425.

See 28 Cent. Dig. tit. "Insurance," § 943.

23. Dwelling House Ins. Co. *v.* Raynolds, 41 Ill. App. 427; Ordway *v.* Continental Ins. Co., 35 Mo. App. 426; Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

For example the acceptance of premiums

the violation of the condition must have been known to the insurer or a waiver cannot be asserted by the insured.[24]

4. Effect of Waiver. The insurer having once waived his right to declare a forfeiture cannot subsequently avoid the effect of his waiver by placing or offering to place the insured *in statu quo*,[25] in the absence of fraud on the part of the insured inducing the waiver.[26] The waiver of a condition of the policy on one

or assessments on a policy which is void because of fraudulent misrepresentation or concealment will not waive the right to avoid the policy, if the insurer is ignorant of the fraud or concealment. Britton *v.* Mutual Ben. L. Ins. Co., 3 Thomps. & C. (N. Y.) 442; Dowd *v.* American F. Ins. Co., 1 N. Y. Suppl. 31; Allen *v.* Vermont Mut. F. Ins. Co., 12 Vt. 366. So the acceptance of premiums and assessments on a policy after a loss will not bind the insurer as a waiver of non-payment of the premium or assessment if the insurer was ignorant of the fact of loss. Harle *v.* Council Bluffs Ins. Co., 71 Iowa 401, 32 N. W. 396. See also *infra*, XIV, D, 2, f, (II), (B).

24. *Arkansas.*— Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136.

California.— Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408.

Colorado.— Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513.

Florida.— Philadelphia Underwriters' Ins. Co. *v.* Bigelow, (1904) 37 So. 210.

Illinois.— Illinois Mut. Ins. Co. *v.* Mette, 27 Ill. App. 330; Security Ins. Co. *v.* Mette, 27 Ill. App. 324.

Indiana.— Traders' Ins. Co. *v.* Cassell, 24 Ind. App. 238, 56 N. E. 259.

Iowa.— Houdeck *v.* Merchants', etc., Ins. Co., 102 Iowa 303, 71 N. W. 354; Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632; Green *v.* Northwestern Live-Stock Ins. Co., 87 Iowa 358, 54 N. W. 349; Antes *v.* Western Assur. Co., 84 Iowa 355, 51 N. W. 7; Ellis *v.* State Ins. Co., 68 Iowa 578, 27 N. W. 762, 56 Am. Rep. 865.

Kansas.— Cottom *v.* National F. Ins. Co., 65 Kan. 511, 70 Pac. 357; Alston *v.* Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784.

Kentucky.— Baer *v.* Phœnix Ins. Co., 4 Bush 242.

Maine.— Merrill *v.* Farmers', etc., Mut. F. Ins. Co., 48 Me. 285; Gardiner *v.* Piscataquis Mut. F. Ins. Co., 38 Me. 439.

Maryland.— Reynolds *v.* Cecil County Mut. F. Ins. Co., 34 Md. 280, 6 Am. Rep. 337.

Michigan.— A. M. Todd Co. *v.* Farmers' Mut. F. Ins. Co., (1904) 100 N. W. 442; Security Ins. Co. *v.* Fay, 22 Mich. 467, 7 Am. Rep. 670.

Minnesota.— St. Paul F. & M. Ins. Co. *v.* Parsons, 47 Minn. 352, 50 N. W. 240; Schreiber *v.* German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708.

Mississippi.— Greenwood Ice., etc., Co. *v.* Georgia Home Ins. Co., 72 Miss. 46, 17 So. 83.

Missouri.— American Ins. Co. *v.* Barnett, 73 Mo. 364, 39 Am. Rep. 517.

Nebraska.— Farmers' Mut. Ins. Co. *v.* Tighe, 3 Nebr. (Unoff.) 337, 91 N. W. 520.

New York.— Weed *v.* London, etc., F. Ins. Co., 116 N. Y. 106, 22 N. E. 229; Gray *v.* Guardian Assur. Co., 82 Hun 380, 31 N. Y. Suppl. 237; McNierney *v.* Agricultural Ins. Co., 48 Hun 239.

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Pennsylvania.— Freedman *v.* Philadelphia Fire Assoc., 168 Pa. St. 249, 32 Atl. 39, 98 Am. Dec. 302; Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443; Simpson *v.* Pennsylvania F. Ins. Co., 38 Pa. St. 250.

Rhode Island.— Cornell *v.* Tiverton, etc., Mut. F. Ins. Co., (1896) 35 Atl. 579; Hazard *v.* Franklin Mut. F. Ins. Co., 7 R. I. 429.

Tennessee.— Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676.

Texas.— McLeary *v.* Orient Ins. Co., (Civ. App. 1895) 32 S. W. 583; New York Mut. L. Ins. Co. *v.* Nichols, (Civ. App. 1894) 24 S. W. 910; Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34.

Vermont.— Allen *v.* Vermont Mut. F. Ins. Co., 12 Vt. 366.

Washington.— Bartlett *v.* British America Assur. Co., 35 Wash. 525, 77 Pac. 812.

United States.— Bennecke *v.* Connecticut Mut. L. Ins. Co., 105 U. S. 355, 26 L. ed. 990; Atlas Reduction Co. *v.* New Zealand Ins. Co., 121 Fed. 929; Fireman's Fund Ins. Co. *v.* McGreevy, 118 Fed. 415, 55 C. C. A. 543; Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96; Asheville Nat. Bank *v.* New York Fidelity, etc., Co., 89 Fed. 819, 32 C. C. A. 355; Hartford F. Ins. Co. *v.* Small, 66 Fed. 490, 14 C. C. A. 33; Lorie *v.* Connecticut Mut. L. Ins. Co., 14 Fed. Cas. No. 8,509.

Canada.— Phillips *v.* Grand River Farmers' Mut. F. Ins. Co., 46 U. C. Q. B. 334.

See 28 Cent. Dig. tit. "Insurance," § 942. See also *infra*, XIV, D, 2, g.

25. *Illinois.*— Hartford F. Ins. Co. *v.* Orr, 56 Ill. App. 629.

Maryland.— Baltimore County Mut. F. Ins. Co. *v.* Eicholtz, 88 Md. 92, 40 Atl. 706.

Missouri.— Porter *v.* German-American Ins. Co., 62 Mo. App. 520.

Nebraska.— Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

New York.— Brink *v.* Hanover F. Ins. Co., 80 N. Y. 108.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.* See also *infra*, XVII, D. 7.

26. Grant *v.* Eliot, etc., Mut. F. Ins. Co., 75 Me. 196.

occasion cannot be construed as a waiver of subsequent violations of the same condition;[27] nor is it a waiver of a right to forfeit for breaches of a different condition, past or prospective.[28] But a general consent to do a given act amounts to a waiver of all breaches of condition arising from that act.[29] A consent that a building may be occupied for a certain business implies a consent to the use of such articles, and the doing of such acts as are necessarily and customarily involved in that business, although the policy in general terms prohibits such acts and uses.[30]

B. Affected by Powers of Officers and Agents — 1. In General — a. Officers.[31] The acts of the president[32] or the secretary of an insurance company,[33] in the absence of a contrary provision of the charter or by-laws, may create a waiver by or estoppel against the company.

b. Agents[34] — (i) *General Agent.* A general agent of a company,[35] that

27. Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. (Del.) 32, 29 Atl. 1039, 65 Am. St. Rep. 264; Betcher *v.* Capitol F. Ins. Co., 78 Minn. 240, 80 N. W. 971; Moore *v.* Niagara F. Ins. Co., 199 Pa. St. 49, 18 Atl. 869, 85 Am. St. Rep. 771; Hotchkiss *v.* Home Ins. Co., 58 Wis. 297, 17 N. W. 138. *Contra*, Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83; Georgia Home Ins. Co. *v.* Kinner, 28 Gratt. (Va.) 88.

An agreement that defendant would in the future if desired issue another policy on the same premises to the insured is not a waiver of a clause prohibiting additional insurance, when it is taken out in another company. Morris *v.* Orient Ins. Co., 106 Ga. 472, 33 S. E. 430.

28. *Iowa.*— Nedrow *v.* Farmers' Ins. Co., 43 Iowa 24.

Maine.— Trott *v.* Woolwich Mut. F. Ins. Co., 83 Me. 362, 22 Atl. 245.

Massachusetts.— Hill *v.* Commercial Union Assur. Co., 164 Mass. 406, 41 N. E. 657.

New York.— Murdock *v.* Chenango County Mut. Ins. Co., 2 N. Y. 210.

North Carolina.—Ferebee *v.* North Carolina Mut. Home Ins. Co., 68 N. C. 11.

Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Slockbower, 26 Pa. St. 199.

Virginia.—Watertown F. Ins. Co. *v.* Cherry, 84 Va. 72, 3 S. E. 876.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.* See also *infra*, XVII, D, 5, e.

But a consent for vacancy during "the summer" is not confined to the three summer months only of a particular year, when the negotiation has been with reference to such a consent for "the farming season." Vanderhoef *v.* Agricultural Ins. Co., 46 Hun (N. Y.) 328.

29. Farmers' Ins. Co. *v.* Ashton, 31 Ohio St. 477. Particularly if they are unknown at the time. U. S. Ins. Co. *v.* Moriarty, (Tex. Civ. App. 1896) 36 S. W. 943. See also *supra*, XIV, A, 3.

30. Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83. See also *supra*, XIII, C.

31. **That officer of the company by whom a waiver if given by the company would have** been indorsed upon the policy may waive a condition in the policy. Illinois Live Stock Ins. Co. *v.* Koehler, 58 Ill. App. 557, a live stock insurance case.

Further as to waiver by officers see *infra*, XVII, D, 3.

32. Merchants', etc., Ins. Co. *v.* Curran, 45 Mo. 142, 100 Am. Dec. 361; Martin *v.* Jersey City Ins. Co., 44 N. J. L. 273; Stauffer *v.* Penn Mut. F. Ins. Assoc., 164 Pa. St. 199, 30 Atl. 384.

The president cannot bind the company to undertake a liability different from the business undertaken by the company. Tripp *v.* Northwestern Live Stock Ins. Co., 91 Iowa 278, 59 N. W. 1.

The president of a mutual company has been said to have no power to dispense with the conditions of a policy. Evans *v.* Trimountain Mut. F. Ins. Co., 9 Allen (Mass.) 329; Dawes *v.* North River Ins. Co., 7 Cow. (N. Y.) 462; McEvers *v.* Lawrence, Hoffm. (N. Y.) 172. Certainly not if the power is expressly reposed by the charter only in the board of directors. Farmers' Mut. Ins. Assoc. *v.* Price, 112 Ga. 264, 37 S. E. 427. See also as to a treasurer of such a company Swett *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394. In Hoxsie *v.* Providence Mut. F. Ins. Co., 6 R. I. 517, the act of the directors of a company in determining the value of a building insured and fixing therefrom the amount of insurance permitted was held to estop the company, despite a limitation on their powers contained in the by-laws of the company.

33. Tiefenthal *v.* Citizens' Mut. F. Ins. Co., 53 Mich. 306, 19 N. W. 9; Nebraska Mercantile Mut. Ins. Co. *v.* Sasek, 64 Nebr. 17, 89 N. W. 428; Conover *v.* Albany Mut. Ins. Co., 1 N. Y. 290 [*affirming* 3 Den. 254].

Notice to the secretary is notice to the company. Wilson *v.* Mutual F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122.

34. **Further as to waiver by agents** see *infra*, XVII, D, 4; and, generally, Insurance.

35. *Alabama.*— Continental F. Ins. Co. *v.* Brooks, 131 Ala. 614, 30 So. 876.

Arkansas.— American Employers' Liability Ins. Co. *v.* Fordyce, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305.

California.— Silverberg *v.* Phenix Ins. Co., 67 Cal. 36, 7 Pac. 38.

Illinois.— Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121 [*affirming* 29 Ill. App. 404]; Merchants Ins. Co. *v.* Oberman, 99 Ill. App. 357.

is, one empowered to enter into contracts, take risks, and receive premiums, has a general authority to dispense with conditions in policies issued through his agency, in the absence of any limitation upon such authority known to the insured, for such acts are within the apparent scope of his authority.[36] He may thus accordingly waive a forfeiture which has occurred by reason of a breach of condition, in the absence of collusion between himself and insured.[37] Such a power is, however, one calling for the exercise of discretion and therefore cannot be delegated.[38] Applying the rules just stated it has been held that a general

Indiana.— Western Assur. Co. *v.* McAlpin. 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

Iowa.— Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Kansas.— American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533.

Kentucky.— Mudd *v.* German Ins. Co., 56 S. W. 977, 22 Ky. L. Rep. 308.

Maine.— Packard *v.* Dorchester Mut. F. Ins. Co., 77 Me. 144.

New Jersey.— Millville Mut. F. & M. Ins. Co. *v.* Workingmen's Bldg., etc., Assoc., 43 N. J. L. 652.

New York.— Dean *v.* Ætna L. Ins. Co., 2 Hun 358, 4 Thomps. & C. 497, 48 How. Pr. 36.

North Carolina.— Horton *v.* Home Ins. Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717.

Virginia.— Farmers', etc., Benev. F. Ins. Assoc. *v.* Williams, 95 Va. 248, 28 S. E. 214.

Wisconsin.— Alexander *v.* Continental Ins. Co., 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869.

See 28 Cent. Dig. tit. "Insurance," § 948 *et seq.*

General agents of mutual companies are within this rule. Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139.

A general agent may attach memoranda with this result (Gloucester Mfg. Co. *v.* Howard F. Ins. Co., 5 Gray (Mass.) 497, 66 Am. Dec. 376), or may make erasures, particularly when the erasure itself is unknown to the insured (Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612). See also *infra*, XIV, E, 2.

He cannot waive any condition which the company by reason of limitations in its charter could not itself waive. Leonard *v.* American Ins. Co., 97 Ind. 299.

Conditions of a policy taken out by himself for his own benefit cannot be waived by the agent. Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331.

"Whether an agent has or has not the authority to issue policies [of insurance] is not the test of his authority to waive a forfeiture." So held in American Ins. Co. *v.* Walston, 111 Ill. App. 133, 137.

Knowledge of agent's limited power.— If the insured is aware of a private and actual limitation upon the agent's authority, he cannot rely on a waiver coming within that limitation. Phœnix Ins. Co. *v.* Maxson, 42 Ill. App. 164; Sutherland *v.* Eureka F. & M. Ins. Co., 110 Mich. 668, 68 N. W. 985; McLeary *v.* Orient Ins. Co., (Tex. Civ. App. 1895) 32 S. W. 583. But see in case of a limitation in the policy as to a general agent's powers Bush *v.* Missouri Town Mut. Ins. Co., 85 Mo. App. 155. A question in an application as to whether property is encumbered is not of itself notice to the insured that the insurer's agent had no authority to assert that an encumbrance of a certain amount is too small to be noted. Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366. Until the insured is apprised of the revocation of the agent's authority or agency, the acts of the agent in the scope of his former apparent authority may estop the company or constitute a waiver. Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265. But in Greenwich Ins. Co. *v.* Sahotnick, 91 Ga. 717, 17 S. E. 1026, when a retiring member of a firm of insurance agents continued business for different companies and issued a further policy to the insured who did not know of the dissolution and who supposed that the agent still represented defendant company, this did not amount to a waiver of a condition against further insurance contained in defendant's prior policy taken out with such member's firm prior to his retirement. In Bennett *v.* Western Underwriters' Assoc., 130 Mich. 216, 89 N. W. 702, it was held that if an agent pursuant to the request of the insured by telephone has written a vacancy permit which the policy required to be attached thereto to become effectual, he may attach it after his agency has terminated so as to bind the insurer.

36. Davey *v.* Glens Falls Ins. Co., 7 Fed. Cas. No. 3,590. The agent may do all such acts as are within the apparent scope of his authority. R. N. of A. *v.* Boman, 75 Ill. App. 566 [*affirmed* in 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201]; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111.

37. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399.

Iowa.— Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Massachusetts.— Stuart *v.* Reliance Ins. Co., 179 Mass. 434, 60 N. E. 929, under statute.

Texas.— Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31.

West Virginia.— Woolpert *v.* Franklin Ins. Co., 42 W. Va. 647, 26 S. E. 521.

See 28 Cent. Dig. tit. "Insurance," § 948.

38. Waldman *v.* North British, etc., Ins. Co., 91 Ala. 170, 8 So. 666, 24 Am. St. Rep.

agent may waive a condition against the use of inflammable substances on the premises,[39] a condition that the inventory and books shall be kept in an iron safe,[40] a condition that the policy shall be void if the premises be or become encumbered,[41] or a requirement in the policy as to a statement of the title or interest of the insured in the subject-matter of the risk;[42] may consent to additional insurance;[43] may issue a permit to a factory to run day and night;[44] or may bind the insurer by similar acts or waivers.[45]

(II) *Soliciting or Other Agent*— (A) *General Rule.* A mere soliciting agent, that is, one employed by the insurer only to secure customers for its insurance, and directed to forward applications, to deliver policies when approved by the company, and to remit premiums, has not the power to waive the conditions of the policy.[46] Thus he cannot consent that a building may be vacant for a cer-

883; German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297; Ruthven *v.* American F. Ins. Co., 92 Iowa 316, 60 N. W. 663; Home F. Ins. Co. *v.* Garbacz, 48 Nebr. 827, 67 N. W. 864. *Contra,* Davis *v.* Lamar Ins. Co., 18 Hun (N. Y.) 230. An apparently different doctrine with reference to knowledge of a subordinate of the agent see *infra,* XIV, E, 2, d, (II).

Subsequent ratification by the agent, however, makes it his act. German Ins. Co. *v.* Rounds, 35 Nebr. 752, 53 N. W. 660.

39. Farmers', etc., Ins. Co. *v.* Nixon, 2 Colo. App. 265, 30 Pac. 42.

40. Niagara F. Ins. Co. *v.* Brown, 123 Ill. 356, 15 N. E. 166 [*affirming* 24 Ill. App. 224] (the condition being on an attached slip signed only by the agent); Parsons *v.* Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476.

41. *Arkansas.*— German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297.

Dakota.— Lyon *v.* Dakota Ins. Co., 6 Dak. 67, 50 N. W. 483.

Iowa.— Mattocks *v.* Des Moines Ins. Co., 74 Iowa 233, 37 N. W. 174.

Kansas.—Brown *v.* Westchester F. Ins. Co., 9 Kan. App. 526, 58 Pac. 276.

Oregon.— Hardwick *v.* State Ins. Co., 23 Oreg. 290, 31 Pac. 656.

See 28 Cent. Dig. tit. "Insurance," § 948.

42. Home Ins. Co. *v.* Duke, 84 Ind. 253; Lycoming Ins. Co. *v.* Mitchell, 48 Pa. St. 367; Cumberland Valley Mut. Protection Co. *v.* Mitchell, 48 Pa. St. 374.

43. The general agent with power to make a contract of insurance has the authority to consent to additional insurance.

Illinois.— Phenix Ins. Co. *v.* Johnson, 42 Ill. App. 66.

Michigan.— Westchester F. Ins. Co. *v.* Earle, 33 Mich. 143.

Nebraska.— German Ins. Co. *v.* Rounds, 35 Nebr. 752, 53 N. W. 660.

New York.— Pechner *v.* Phœnix Ins. Co., 65 N. Y. 195 [*affirming* 6 Lans. 411]; Pitney *v.* Glens Falls Ins. Co., 65 N. Y. 6; Whitwell *v.* Putnam F. Ins. Co., 6 Lans. 166.

North Carolina.— Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

Wisconsin.— Schomer *v.* Hekla F. Ins. Co., 50 Wis. 575, 7 N. W. 544; American Ins. Co. *v.* Gallatin, 48 Wis. 36, 3 N. W. 772; Warner *v.* Peoria M. & F. Ins. Co., 14 Wis. 318.

Promise to consent to additional insurance is not equivalent to a present waiver. East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 13 S. W. 572.

44. A general agent authorized to issue policies has the power to issue a permit to a factory to run day and night. North Berwick Co. *v.* New England F. & M. Ins. Co., 52 Me. 336.

45. Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1 (issuing vacancy permit); Joy *v.* Pennsylvania Ins. Co., 35 Mo. App. 165 (issuing vacancy permit); Amazon Ins. Co. *v.* Wall, 31 Ohio St. 628, 27 Am. Rep. 533 (assenting to an assignment of the policy); Miner *v.* Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479 (waiving effect of change in title or interest).

46. *Alabama.*—Alabama State Mut. Assur. Co. *v.* Long Clothing, etc., Co., 123 Ala. 667, 26 So. 655.

Arkansas.— American Ins. Co. *v.* Hampton, 54 Ark. 75, 14 S. W. 1092.

Dakota.— Smith *v.* Continental Ins. Co., 6 Dak. 433, 43 N. W. 810.

Georgia.— Lippman *v.* Ætna Ins. Co., 120 Ga. 247, 47 S. E. 593; Graham *v.* Niagara F. Ins. Co., 106 Ga. 840, 32 S. E. 579.

Iowa.— Elliott *v.* Farmers' Ins. Co., 114 Iowa 153, 86 N. W. 224; Martin *v.* Farmers' Ins. Co., 84 Iowa 516, 51 N. W. 29; Garretson *v.* Merchants,' etc., Ins. Co., 81 Iowa 727, 45 N. W. 1047; Dickinson County *v.* Mississippi Valley Ins. Co., 41 Iowa 286.

Massachusetts.— Putnam Tool Co. *v.* Fitchburg Mut. F. Ins. Co., 145 Mass. 265, 13 N. E. 902; Tate *v.* Citizens' Mut. F. Ins. Co., 13 Gray 79.

Michigan.— A. M. Todd Co. *v.* Farmers' Mut. F. Ins. Co., (1904) 100 N. W. 442. But see Improved Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 258, 80 N. W. 1088.

Missouri.— Hausen *v.* Citizens' Ins. Co., 66 Mo. App. 29; Mensing *v.* American Ins. Co., 36 Mo. App. 602; Bush *v.* Missouri Town Mut. Ins. Co., 85 Mo. App. 155.

Nevada.— Healey *v.* Imperial F. Ins. Co., 5 Nev. 268.

New Hampshire.— Tabor *v.* Rockingham Farmers' Mut. F. Ins. Co., 69 N. H. 666, 45 Atl. 479.

tain period,[47] or waive a condition against additional insurance or a breach thereof.[48]

(B) *Extent and Limits of Rule.* The foregoing rule[49] does not apply where the agent has been given express or implied authority to waive conditions.[50] And even though a mere soliciting agent cannot waive conditions still he binds the insurer by knowledge acquired in the preparation of the application and by representations made to the insured concerning the same.[51]

c. Adjusters. The apparent scope of the authority of an insurance adjuster does not extend beyond settling the loss after it has occurred. While he may therefore waive any provisions of the policy respecting form or time of proof of loss and any formal matters connected with the procedure of settlement,[52] he has not as a matter of law power to waive a condition not connected with the business he is employed to accomplish, or to waive a forfeiture for breach of warranty or condition subsequent and reinstate a policy. If he has such a power it must rest on an express authorization and must be proved if relied upon.[53] Inasmuch as an insurance adjuster has such express authority to demand proofs of loss and to participate in an adjustment, his acts frequently give rise to an implied waiver from compelling the furnishing of such proofs or proceeding to enter into the business of adjustment when the insurer has knowledge of a right to forfeit

New York.— Wall *v.* Home Ins. Co., 8 Bosw. 597 [*affirmed* in 36 N. Y. 157].

United States.— Hambleton *v.* Home Ins. Co., 11 Fed. Cas. No. 5,972, 6 Biss. 91.

See 28 Cent. Dig. tit. "Insurance," § 948.

Contra.— Phœnix Ins. Co. *v* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254.

A waiver by such agent is effectual only when ratified by the company. Williams *v.* Maine State Relief Assoc., 89 Me. 158, 36 Atl. 63.

The insured is chargeable with knowledge of the limitations of such an agent's authority. Dryer *v.* Security F. Ins. Co., 94 Iowa 471, 62 N. W. 798. But in American Ins. Co. *v.* Gallatin, 48 Wis. 36, 3 N. W. 772, it was said that the mere fact that the application is forwarded to the company for approval is not sufficient to charge the insured with notice of the exact nature and limits of the agent's authority.

47. Burlington Ins. Co. *v.* Gibbons, 43 Kan. 15, 22 Pac. 1010, 19 Am. St. Rep. 118; Thayer *v.* Agricultural Ins. Co., 5 Hun (N. Y.) 566.

48. *Alabama.*— Phœnix Ins. Co. *v.* Copeland, 90 Ala. 386, 8 So. 48; Queen Ins. Co. *v.* Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51.

Minnesota.—Goldin *v.* Northern Assur. Co., 46 Minn. 471, 49 N. W. 246.

New York.— Wilson *v.* Genesee Mut. Ins. Co., 14 N. Y. 418 [*reversing* 16 Barb. 511].

Texas.— East Texas F. Ins. Co. *v.* Blum, 76 Tex. 653, 13 S. W. 572.

Wisconsin.— Bourgeois *v.* Marshfield Mut. F. Ins. Co., 86 Wis. 402, 57 N. W. 38.

See 28 Cent. Dig. tit. "Insurance," § 948.

49. See *supra*, XIV, B, 1, b, (II), (A).

50. Burlington Ins. Co. *v.* Threlkeld, 60 Ark. 539, 31 S. W. 265; Home Ins. Co. *v.* Mears, 105 Ky. 323, 49 S. W. 31, 20 Ky. L. Rep. 1217; McCabe *v.* Farm Buildings F. Ins. Co., 14 Hun (N. Y.) 602.

The existence of such authority cannot be proved by showing a custom among other companies to grant their agents similar powers, unless the insurer was aware of the same as a general custom. Bradford *v.* Homestead F. Ins. Co., 54 Iowa 598, 7 N. W. 48.

51. Home F. Ins. Co. *v.* Gurney, 56 Nebr. 306, 76 N. W. 553; Blass *v.* Agricultural Ins. Co., 18 N. Y. App. Div. 481, 46 N. Y. Suppl. 392; Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934. See further in this connection *infra*, XIV, E.

52. *Indiana.*— Ætna Ins. Co. *v.* Shryer, 85 Ind. 362.

Iowa.— Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696; Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683; Brown *v.* State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. Rep. 495; Stevens *v.* Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769.

Massachusetts.— Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96.

New York.— Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456.

North Carolina.—Dibbrell *v.* Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678.

See also *infra*, XVII, D, 4, c.

53. *Arkansas.*— German Ins. Co. *v.* Gibson, 53 Ark. 494, 14 S. W. 672.

Georgia.— Howard *v.* Georgia Home Ins. Co., 102 Ga. 137, 29 S. E. 143.

Iowa.— Hollis *v.* State Ins. Co., 65 Iowa 454, 21 N. W. 774.

New York.— Weed *v.* London, etc., F. Ins. Co., 116 N. Y. 106, 22 N. E. 229.

North Carolina.— Alspaugh *v.* British-American Ins. Co., 121 N. C. 290, 28 S. E. 415.

Canada.— Mason *v.* Hartford F. Ins. Co., 37 U. C. Q. B. 437.

It is not within the apparent scope of the authority of an attorney employed by the insurer to collect a premium note to waive

the policy. But this rests upon the basis of his having express power to do the particular acts in question.[54]

2. Effect of Provisions of Policy. Insurers have customarily inserted provisions in their policies limiting the powers of an agent to waive conditions and warranties. As to whether or not such provisions are effectual there is great conflict of opinion. A restriction in the policy upon such an agent's authority cannot be construed to refer to his acts prior to the delivery of the policy, as the insured cannot, until that time, be expected to have knowledge of the limitation, so long as the waiver is within the apparent scope of the agent's powers.[55] There are many cases supporting the view that the insured is, after delivery, chargeable with notice of the limitations mentioned in the policy, and that a waiver by an agent in a manner prohibited by the policy or a waiver by any agent whose powers are thus restricted is ineffectual to bind the insurer.[56] Such a restriction may itself, however, be waived by the insurer by conduct tending to justify an

a forfeiture incurred by the insured. Continental Ins. Co. *v.* Coons, 14 Ky. L. Rep. 110.

54. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537.

Arkansas.— Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136.

Indiana.— Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Iowa.— Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683; Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128; Brown *v.* State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. Rep. 495. See also Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 121.

Minnesota.— Devil's Lake First Nat. Bank *v.* Manchester F. Assur. Co., 64 Minn. 96, 66 N. W. 136.

Missouri.— Bowen *v.* Hanover F. Ins. Co., 69 Mo. App. 272.

Nebraska.— German Ins. Co. *v.* Stiner, 2 Nebr. (Unoff.) 308, 96 N. W. 122.

New York.— Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456. But see *contra,* Weed *v.* London, etc., F. Ins. Co., 116 N. Y. 106, 22 N. E. 229.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934.

Texas.— American Cent. Ins. Co. *v.* Nunn, (Civ. App. 1904) 79 S. W. 88.

See also cases cited *infra,* XIV, D, 2, g; XVII, D, 4, c.

55. *Illinois.*—Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121 [*affirming* 29 Ill. App. 404].

Indiana.— Phenix Ins. Co. *v.* Lorenz, 7 Ind. App. 266, 33 N. E. 444, 34 N. E. 495.

Michigan.— Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340; Crouse *v.* Hartford F. Ins. Co., 79 Mich. 249, 44 N. W. 496.

Missouri.— Flournoy *v.* Traders' Ins. Co., 80 Mo. App. 655; Rickey *v.* German Guarantee Town Mut. F. Ins. Co., 79 Mo. App. 485; Titsworth *v.* American Cent. Ins. Co., 62 Mo. App. 310.

Nebraska.— State Ins. Co. *v.* Hale, 1 Nebr. (Unoff.) 191, 95 N. W. 473.

New York.— Wood *v.* American F. Ins. Co., 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733 [*affirming* 78 Hun 109, 29 N. Y. Suppl. 250].

West Virginia.—Coles *v.* Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732.

See 28 Cent. Dig. tit. "Insurance," § 952.

Power to waive prepayment of the first premium may be referred to this principle. Triple Link Mut. Indemnity Assoc *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34. See also *supra,* V, A, 1, c; VI, E, 1, b.

56. *California.*— Enos *v.* Sun Ins. Co., 67 Cal. 621, 8 Pac. 379; Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408.

Illinois.— Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990 [*affirming* 39 Ill. App. 517].

Michigan.— Cleaver *v.* Traders' Ins. Co., 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908.

New Jersey.— Catoir *v.* American L. Ins., etc., Co., 33 N. J. L. 487.

New York.— Quinlan *v.* Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 [*affirming* 15 N. Y. Suppl. 317]; Woodside Brewing Co. *v.* Pacific F. Ins. Co., 11 N. Y. App. Div. 68, 42 N. Y. Suppl. 620; Thayer *v.* Agricultural Ins. Co., 5 Hun 566; Elsner *v.* Prudential Ins. Co., 13 Misc. 395, 34 N. Y. Suppl. 246.

Oklahoma.— Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 585, 69 Pac. 938.

Oregon.— Weidert *v.* State Ins. Co., 19 Oreg. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Pennsylvania.— Pottsville Mut. F. Ins. Co. *v.* Horan, 11 Wkly. Notes Cas. 198. But see Johns *v.* Insurance Co., 2 Wkly. Notes Cas. 243.

Texas.— Hartford F. Ins. Co. *v.* Walker, 94 Tex. 473, 61 S. W. 711; Waxahachie First Nat. Bank *v.* Lancashire Ins. Co., 62 Tex. 461; Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955; Northwestern Nat. Ins. Co. *v.* Mize, (Civ. App. 1896) 34 S. W. 670.

West Virginia.— Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 45 S. E. 1003.

Wisconsin.— Hankins *v.* Rockford Ins. Co., 70 Wis. 1, 35 N. W. 34.

United States.— Hartford F. Ins. Co. *v.* Small, 66 Fed. 490, 14 C. C. A. 33.

inference that it was not insisted on.[57] However, many cases view an attempted restriction in this manner upon the powers of officers or agents acting within the scope of their general authority, as to the waiving of conditions, as ineffectual, inasmuch as such person might himself issue a policy not containing such condition. The waiver of an existing condition therefore by him is under this theory binding upon the insurer.[58] Again if the agent in doing the acts relied upon as a waiver has been following the directions of the main office it is immaterial that the immediate act was done by the agent, for the ultimate waiver is by the insurer.[59]

C. Express Waiver — 1. Whether Writing Necessary. On principle there would seem to be no doubt that the parol-evidence rule is applicable to policies of insurance as well as to other contracts, and inasmuch as the written contract is presumed to be the final conclusive repository of the agreement, evidence of a prior or contemporaneous oral agreement should not be admissible to vary the

Canada.— Hawke *v.* Niagara Dist. Mut. F. Ins. Co., 23 Grant Ch. (U. C.) 139.

See 28 Cent. Dig. tit. "Insurance," § 952 *et seq.* See also *infra*, XVII, D, 7.

Such an agreement where assented to enters into and forms a part of the contract of insurance. Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696; Ruthven *v.* American F. Ins. Co., 92 Iowa 316, 60 N. W. 663. But see Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683.

If the policy expressly designates who may waive the conditions the result is the same and the one who makes the waiver is not among those designated. Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; Jenkins *v.* German Ins. Co., 58 Mo. App. 210; Stark County Mut. Ins. Co. *v.* Hurd, 19 Ohio 149. In Virginia F. & M. Ins. Co. *v.* Richmond Mica Co., (Va. 1904) 46 S. E. 463, it was held that it is necessary to call the insured's attention to the limitations placed on the agent's powers, or that he should himself see the same, and that the constructive notice afforded by the circumstance that the policy contains the limitation is insufficient.

57. Fillis *v.* Liverpool, etc., Ins. Co., (Fla. 1903) 35 So. 171; Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Lutz *v.* Anchor F. Ins. Co., 120 Iowa 136, 94 N. W. 274, 98 Am. St. Rep. 349.

The insurer by acquiescence in the act of the agent may itself waive such limitations and requirements. Morrison *v.* Insurance Co. of North America, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63. Thus a retention of premium after knowledge of an unauthorized waiver given to secure the payment of such premium amounts to a waiver by the insurer. Barrett *v.* Des Moines Mut. Hail, etc., Ins. Assoc., 120 Iowa 184, 94 N. W. 473.

To what the restriction applies.— It has been held that the restriction does not apply to a condition requiring suit to be brought within a specified time, this not being a condition entering into and forming the contract of insurance. Firemen's Fund Ins. Co. *v.* Western Refrigerating Co., 162 Ill. 322, 44 N. E. 746 [*affirming* 55 Ill. App. 329]. It has also been stated that the restriction affects only matters prior to the loss. Loeb *v.* American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Travelers' Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553.

58. *Kansas.*— German Ins. Co. *v.* Amsbaugh, 8 Kan. App. 197, 55 Pac. 481; Concordia F. Ins. Co. *v.* Johnson, 4 Kan. App. 7, 45 Pac. 722.

Michigan.— Kotwicki *v.* Thuringia Ins. Co., 134 Mich. 82, 95 N. W. 976; Pollock *v.* German F. Ins. Co., 127 Mich. 460, 86 N. W. 1017.

Missouri.— Thompson *v.* Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889; Springfield Steam Laundry Co. *v.* Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521 [*overruling* Wolf *v.* Dwelling House Ins. Co., 75 Mo. App. 337; Sprague *v.* Western Home Ins. Co., 49 Mo. App. 423, and *reversing* 66 Mo. App. 199].

Ohio.— Ohio Farmers' Ins. Co. *v.* Burget, 17 Ohio Cir. Ct. 619, 9 Ohio Cir. Dec. 369.

Wisconsin.— Dick *v.* Equitable F. & M. Ins. Co., 92 Wis. 46, 65 N. W. 742; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208.

See 28 Cent. Dig. tit. "Insurance," § 952 *et seq.*

The limited grant of authority thus contained in a policy is in this view the measure of the agent's power. Liverpool, etc., Ins. Co. *v.* T. M. Richardson Lumber Co., 11 Okla. 585, 69 Pac. 938.

Such a restriction was held inapplicable to the secretary and general manager of the company (Bankers', etc., Mut. Ben. Assoc. *v.* Stapp, 77 Tex. 517, 14 S. W. 168, 19 Am. St. Rep. 772), and to an adjuster (Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955).

In Maine the restriction conflicts with a statutory provision. Day *v.* Dwelling-House Ins. Co., 81 Me. 244, 16 Atl. 894.

59. Medearis *v.* Anchor Mut. F. Ins. Co., 104 Iowa 88, 73 N. W. 495, 65 Am. St. Rep. 428; Phenix Ins. Co. *v.* Rad Bila Hora Lodge, 41 Nebr. 21, 59 N. W. 752.

The theory of these adjudications is that the stipulation that the conditions may be waived only by a writing may be itself waived. Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990.

written policy.[60] However, the question is one involved in hopeless confusion and contradiction.[61] The admission of evidence to show a waiver by acts subsequent to the formation of the contract does not rest on the same considerations. Unless possibly in the case of sealed instruments, the parties to a contract can alter the same as they may desire, by writing or verbally.[62] It is the modern custom for insurers to insert provisions in their policies that no waiver shall be effective unless the same be in writing and attached to the policy or indorsed thereon. The effect of such provisions is differently regarded. Some courts treat the requirement as determinative and hold a parol waiver as ineffectual, the insured being charged by the terms of the policy with knowledge of the limitation.[63] Other courts state that the provision is inserted only for the benefit of

60. *Illinois.*— Forest City Ins. Co. *v.* Leach, 19 Ill. App. 151.

Indiana.— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498.

Iowa.— Cornelius *v.* Farmers' Ins. Co., 113 Iowa 183, 84 N. W. 1037.

Massachusetts.— Batchelder *v.* Queen Ins. Co., 135 Mass. 449; Tebbetts *v.* Hamilton Mut. Ins. Co., 3 Allen 569; Loring *v.* Manufacturers' Ins. Co., 8 Gray 28; Lee *v.* Howard F. Ins. Co., 3 Gray 583; Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. 175.

Michigan.— Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

New Jersey.— Bennett *v.* St. Paul F. & M. Ins. Co., 55 N. J. L. 377, 27 Atl. 641; Dewees *v.* Manhattan Ins. Co., 35 N. J. L. 366.

New York.— Lamatt *v.* Hudson River F. Ins. Co., 17 N. Y. 199 note; McNierney *v.* Agricultural Ins. Co., 48 Hun 239; Frankfurter *v.* Home Ins. Co., 10 Misc. 157, 31 N. Y. Suppl. 3.

Pennsylvania.— Smith *v.* Cash Mut. F. Ins. Co., 24 Pa. St. 320.

United States.— Sperry *v.* Springfield F. & M. Ins. Co., 26 Fed. 234.

Canada.— Crawford *v.* Western Assur. Co., 23 U. C. C. P. 365.

See 28 Cent. Dig. tit. "Insurance," § 1018; and also EVIDENCE, 17 Cyc. 606.

61. **Massachusetts and New Jersey** seem to be the only states that have consistently applied the principle. See cases cited *supra*, note 60; and *infra*, p. 809 note 70, p. 816 note 99.

In the other jurisdictions parol evidence extraneous to the written contract has been repeatedly admitted in one guise or another when it would distinctly be barred were the contract other than one of insurance. The decisions even within an individual state are far from harmonious.

Illinois.— St. Paul F. & M. Ins. Co. *v.* Wells, 89 Ill. 82.

Kentucky.— Queen Ins. Co. *v.* Kline, 32 S. W. 214, 17 Ky. L. Rep. 619.

Nebraska.— Home F. Ins. Co. *v.* Gurney, 56 Nebr. 306, 76 N. W. 553.

New York.— Gray *v.* Germania F. Ins. Co., 84 Hun 504, 32 N. Y. Suppl. 424.

Ohio.— Hammel *v.* Pennsylvania Ins. Co., 24 Ohio Cir. Ct. 101.

See 28 Cent. Dig. tit. "Insurance," § 1018. And see cases cited *infra*, XIV, E, 2.

62. Hence, in the absence of a statutory provision, or one inserted in the policy, an express waiver of the conditions of a policy may be made verbally by any one authorized to enter into contracts for the insurer. Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779; Pratt *v.* New York Cent. Ins. Co., 55 N. Y. 505, 14 Am. Rep. 304 [*affirming* 64 Barb. 589]; Bodine *v.* Exchange F. Ins. Co., 51 N. Y. 117, 10 Am. Rep. 566; Amazon Ins. Co. *v.* Wall, 31 Ohio St. 628, 27 Am. Rep. 533; Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612 [*overruling* Cockerill *v.* Cincinnati Mut. Ins. Co., 16 Ohio 148]; McFetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938; Stanhilber *v.* Mutual Mill Ins. Co., 76 Wis. 285, 45 N. W. 221; Palmer *v.* St. Paul F. & M. Ins. Co., 44 Wis. 201.

When a statute prescribes the use of a uniform policy which limits the making of waivers to agreements indorsed thereon oral waivers are incompetent. Anderson *v.* Manchester F. Assur. Co., 59 Minn. 182, 60 N. W. 1095, 50 Am. St. Rep. 400, 28 L. R. A. 609.

An unconstitutional statute does not change the preëxisting rule. Goss *v.* Agricultural Ins. Co., 92 Wis. 233, 65 N. W. 1036.

63. *California.*— Gladding *v.* California Farmers' Mut. F. Ins. Assoc., 66 Cal. 6, 4 Pac. 764.

Connecticut.— Couch *v.* City F. Ins. Co., 38 Conn. 181, 9 Am. Rep. 375.

Louisiana.— Murphy *v.* Royal Ins. Co., 52 La. Ann. 775, 27 So. 143.

Massachusetts.— Parker *v.* Rochester German Ins. Co., 162 Mass. 479, 39 N. E. 179; Pendar *v.* American Mut. Ins. Co., 12 Cush. 469; Conway Tool Co. *v.* Hudson River Ins. Co., 12 Cush. 144, 59 Am. Dec. 172; Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. 175.

Michigan.— Gould *v.* Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455, 52 N. W. 754; Allemania F. Ins. Co. *v.* Hurd, 37 Mich. 11, 26 Am. Rep. 491.

Nebraska.— Hunt *v.* State Ins. Co., 66 Nebr. 121, 92 N. W. 921; Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779; Burlington Ins. Co. *v.* Campbell, 42 Nebr. 208, 60 N. W. 599; German Ins. Co. *v.* Heiduk, 30 Nebr. 288, 46 N. W. 481, 27 Am. St. Rep. 402.

New York.— Northam *v.* Dutchess County Mut. Ins. Co., 166 N. Y. 319, 59 N. E. 912, 82 Am. St. Rep. 655; Moore *v.* Hanover F. Ins. Co., 141 N. Y. 219, 36 N. E. 191 [*reversing* 71 Hun 199, 24 N. Y. Suppl. 507]; Lett *v.* Guardian F. Ins. Co., 125 N. Y. 82, 25 N. E. 1088 [*affirming* 52 Hun 570, 5 N. Y.

the insurer and that it may be waived as well as any other condition of the policy.[64] Some cases, while holding that there may be a verbal waiver, require that it should be made by the persons authorized to make waivers; so that if the policy designates some official as the functionary to indorse waivers, he alone can

Suppl. 526]; Gilbert *v.* Phœnix Ins. Co., 36 Barb. 372. But see Carroll *v.* Charter Oak Ins. Co., 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166; Arkell *v.* Commerce Ins. Co., 7 Hun 455; Van Allen *v.* Farmers' Joint Stock Ins. Co., 4 Hun 413.

Vermont.— Findlay *v.* Union Mut. F. Ins. Co., 74 Vt. 211, 52 Atl. 429, 93 Am. St. Rep. 885.

Wisconsin.—Oshkosh Match Works *v.* Manchester F. Assur. Co., 92 Wis. 510, 66 N. W. 525; Bourgeois *v.* Northwestern Nat. Ins. Co., 86 Wis. 606, 57 N. W. 347; Carey *v.* Phenix Ins. Co., 84 Wis. 208, 54 N. W. 403; Carey *v.* German American Ins. Co., 84 Wis. 80, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267; Knudson *v.* Hekla F. Ins. Co., 75 Wis. 198, 43 N. W. 954.

United States.— Northern Assur. Co. *v.* Grand View Bldg. Assoc., 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 313 [*reversing* 101 Fed. 77, 41 C. C. A. 207]; Meigs *v.* London Assur. Co., 126 Fed. 781.

Canada.— Peck *v.* Agricultural Ins. Co., 19 Ont. 494. But see McQueen *v.* Phœnix Mut. Ins. Co., 29 U. C. C. P. 511.

See 28 Cent. Dig. tit. "Insurance," § 1020 *et seq.*

In case the insurance is effected verbally without any policy being issued, conditions of the blank form of policy requiring indorsement of permission to carry further insurance are inapplicable. Eureka Ins. Co. *v.* Robinson, 56 Pa. St. 256, 94 Am. Dec. 65.

Such provisions have been held to refer only to waivers of those conditions which relate to the formation and continuance of the contract and not to those to be performed after loss. New Orleans Ins. Assoc. *v.* Matthews, 65 Miss. 301, 4 So. 62. But an agent can waive a provision that further insurance must be indorsed on the policy unless there is also a clause that all waivers by agents must be in writing. It is this clause that cannot be waived by such official. McCabe *v.* Dutchess County Mut. Ins. Co., 14 Hun (N. Y.) 599; Phœnix Ins. Co. *v.* Witt, (Tex. Civ. App. 1894) 25 S. W. 796.

64. *Alabama.*—Alabama State Mut. Assur. Co. *v.* Long Clothing, etc., Co., 123 Ala. 667, 26 So. 655.

Arkansas.— German-American Ins. Co. *v.* Humphrey, 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297.

Illinois.— Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990 [*affirming* 39 Ill. App. 517]; Manufacturers', etc., Ins. Co. *v.* Armstrong, 145 Ill. 469, 34 N. E. 553; Orient Ins. Co. *v.* McKnight, 96 Ill. App. 525 [*affirmed* in 197 Ill. 190, 64 N. E. 339].

Indiana.— Hanover F. Ins. Co. *v.* Dole, 20 Ind. App. 333, 50 N. E. 772.

Iowa.— Mattocks *v.* Des Moines Ins. Co., 74 Iowa 233, 37 N. W. 174; King *v.* Council Bluffs Ins. Co., 72 Iowa 310, 33 N. W. 690; Viele *v.* Germania Ins. Co., 26 Iowa 9, 96 Am. Dec. 83.

Kansas.— Hartford F. Ins. Co. *v.* McCarthy, 69 Kan. 555, 77 Pac. 90; Long Island Ins. Co. *v.* Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738.

Kentucky.— New Orleans Ins. Co. *v.* O'Brian, 8 Ky. L. Rep. 785.

Minnesota.— St. Paul F. & M. Ins. Co. *v.* Parsons, 47 Minn. 352, 50 N. W. 240; Lamberton *v.* Connecticut F. Ins. Co., 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Sheffy, 71 Miss. 919, 16 So. 307.

Missouri.— Pelkington *v.* National Ins. Co., 55 Mo. 172; Burnham *v.* Greenwich Ins. Co., 56 Mo. App. 582, 63 Mo. App. 85; Barnard *v.* National F. Ins. Co., 38 Mo. App. 106. But *compare* Hutchinson *v.* Western Ins. Co., 21 Mo. 97, 64 Am. Dec. 218.

North Carolina.— Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

Ohio.— Fellowes *v.* Madison Ins. Co., 2 Disn. 128.

Oregon.— Schmurr *v.* State Ins. Co., 30 Oreg. 29, 46 Pac. 363. But *compare* Egan *v.* Westchester Ins. Co., 28 Oreg. 289, 42 Pac. 611.

Pennsylvania.— Queen Ins. Co. *v.* Harris, 2 Wkly. Notes Cas. 220.

South Carolina.— Wilson *v.* Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700.

Texas.— Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569 [*reversing* (Civ. App. 1898) 48 S. W. 49; Home Mut. Ins. Co. *v.* Nichols, (Civ. App. 1903) 72 S. W. 440; German Ins. Co. *v.* Cain, (Civ. App. 1896) 37 S. W. 657; Pennsylvania F. Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55; Burlington Ins. Co. *v.* Rivers, 9 Tex. Civ. App. 177, 28 S. W. 453. But *compare* Phœnix Ins. Co. *v.* White, 3 Tex. App. Civ. Cas. § 197.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

United States.— Davey *v.* Glens Falls Ins. Co., 7 Fed. Cas. No. 3,590, foreign insurer.

See 28 Cent. Dig. tit. "Insurance," § 1020 *et seq.*

An assignee of the person to whom an oral consent to do an act required by the policy to be indorsed thereon cannot take advantage of such consent. Hower *v.* State Ins. Co., 58 Iowa 51, 12 N. W. 79.

The rules of a mutual company requiring indorsement of additional insurance may be waived by the provisions of the policy itself. Philbrook *v.* New England Mut. F. Ins. Co., 37 Me. 137.

waive the stipulation requiring written indorsement.[65] It is also held that if the agent possesses authority to waive conditions he may waive that requiring indorsement or writing,[66] but not so if the policy restricts his powers specifically.[67]

2. Neglect to Indorse. While the insurer is the proper party to indorse a consent upon a policy and the insured has no power to do so, nevertheless it has been held that where the insured asks for some permission contrary to the conditions of the policy and the same is consented to by the insurer with an agreement to indorse the waiver thereon, the insurer cannot set up his own failure to put the indorsement on the policy as required.[68] There are cases, however, holding that

65. *Iowa.*— O'Leary *v.* Merchants', etc., Mut. Ins. Co., 100 Iowa 173, 66 N. W. 175, 69 N. W. 420, 62 Am. St. Rep. 555.

Massachusetts.— Hale *v.* Mechanics' Mut. F. Ins. Co., 6 Gray 169, 66 Am. Dec. 410; Forbes *v.* Agawam Mut. F. Ins. Co., 9 Cush 470.

Michigan.— Security Ins. Co. *v.* Fay, 22 Mich. 467, 7 Am. Rep. 670.

New Hampshire — Dunstable First Baptist Soc. Meeting House *v.* Hillsborough Mut. F. Ins. Co., 19 N. H. 580.

New York.— O'Brien *v.* Prescott Ins. Co., 134 N. Y. 28, 31 N. E. 265 [*reversing* 57 Hun 589, 11 N. Y. Suppl. 125]. But *compare* Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402.

See 28 Cent. Dig. tit. "Insurance," § 1020 *et seq.*

66. Western Assur. Co. *v.* Williams, 94 Ga. 128, 21 S. E. 370; Simonton *v.* Liverpool, etc., Ins. Co., 51 Ga. 76; Carrugi *v.* Atlantic F. Ins. Co., 40 Ga. 135, 2 Am. Rep. 567; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381; Steen *v.* Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297 [*affirming* 61 How. Pr. 144]; Parker *v.* Arctic F. Ins. Co., 1 Thomps. & C. (N. Y.) 397; Frankfurter *v.* Home Ins. Co., 6 Misc. (N. Y.) 49, 26 N. Y. Suppl. 81.

67. Lippman *v.* Ætna Ins. Co., 108 Ga. 391, 33 S. E. 897, 75 Am. St. Rep. 62; Kyte *v.* Commercial Assur. Co., 144 Mass. 43, 10 N. E. 518; Messelback *v.* Norman, 122 N. Y. 578, 26 N. E. 34 [*affirming* 46 Hun 414]; Walsh *v.* Hartford F. Ins. Co., 73 N. Y. 5 [*reversing* 9 Hun 421]; Warren *v.* Phœnix Ins. Co., 19 N. Y. Suppl. 990; Hess *v.* Washington F. & M. Ins. Co., 11 N. Y. Suppl. 299.

Such an attempted limitation on a general agent's power has been held to be invalid by some courts. German Ins. Co. *v.* Gray, 43 Kan. 497, 23 Pac. 637, 19 Am. St. Rep. 150, 8 L. R. A. 70. See also cases cited *supra*, XIV, B, 2.

68. *Florida.*— Hartford F. Ins. Co. *v.* Redding, (1904) 37 So. 62.

Georgia.— Clay *v.* Phœnix Ins. Co., 97 Ga. 44, 25 S. E. 417; Hartford City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230; Reaper City Ins. Co. *v.* Jones, 62 Ill. 458.

Iowa.— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.

Kentucky.— Rhode Island Underwriters' Assoc. *v.* Monarch, 98 Ky. 305, 32 S. W. 959, 17 Ky. L. Rep. 876.

Maine.— Emery *v.* Piscataqua F. & M. Ins. Co., 52 Me. 322.

Maryland.— National F. Ins. Co. *v.* Crane, 16 Md. 260, 77 Am. Dec. 289.

Michigan.— Copeland *v.* Dwelling-House Ins. Co., 77 Mich. 554, 43 N. W. 991, 18 Am. St. Rep. 414.

Minnesota.— Broadwater *v.* Lyon F. Ins. Co., 34 Minn. 465, 26 N. W. 455.

Missouri.— Horwitz *v.* Equitable Mut. Ins. Co., 40 Mo. 557, 93 Am. Dec. 321.

New Hampshire.— Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110.

New York.— Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; Brothers *v.* California Ins. Co., 121 N. Y. 659, 24 N. E. 1092; McCabe *v.* Farm Buildings F. Ins. Co., 14 Hun 602; Carroll *v.* Charter Oak Ins. Co., 10 Abb. Pr. N. S. 166. See also Manchester *v.* Guardian Assur. Co., 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600 [*reversing* 80 Hun 251, 30 N. Y. Suppl. 49, and *distinguishing* Baumgartel *v.* Providence-Washington Ins. Co., 136 N. Y. 547, 32 N. E. 990 (*reversing* 61 Hun 118, 15 N. Y. Suppl. 573)]. And *compare* Hill *v.* London Assur. Corp., 16 Daly 120, 9 N. Y. Suppl. 500.

North Carolina.— Cowell *v.* Phœnix Ins. Co., 126 N. C. 684, 36 S. E. 184.

Pennsylvania.— Melvin *v.* Insurance Co. of North America, 2 Luz. Leg. Reg. 219; Swartz *v.* Insurance Co., 15 Phila. 206.

Tennessee.— American Cent. Ins. Co. *v.* McCrea, 8 Lea 513, 41 Am. Rep. 647.

Texas.— Planters' Mut. Ins. Co. *v.* Lyons, 38 Tex. 253; Ætna Ins. Co. *v.* Eastman, (Civ. App. 1904) 80 S. W. 255; Hibernia Ins. Co. *v.* Malevinsky, 6 Tex. Civ. App. 81, 24 S. W. 804.

Utah.— West *v.* Norwich Union F. Ins. Soc., 10 Utah 442, 37 Pac. 685.

Virginia.— Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

Washington.— Henschel *v.* Hamburg-Magdeburg F. Ins. Co., 4 Wash. 817, 30 Pac. 736; Henschel *v.* Western Assur. Co., 4 Wash. 816, 30 Pac. 736; Henschel *v.* Oregon F. & M. Ins. Co., 4 Wash. 476, 30 Pac. 735, 31 Pac. 332, 765.

Wisconsin.—Schultz *v.* Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414.

United States.— Dupuy *v.* Delaware Ins. Co., 63 Fed. 680; Diebold *v.* Phœnix Ins. Co., 33 Fed. 807; Hun *v.* Mercantile Ins. Co., 22 Fed. 503.

the provision of the policy is intended to protect the insurer against just such claims and that the waiver is not valid until the indorsement is made.[69]

3. Effect When Written and Indorsed. The indorsed consent of the company by its authorized officer[70] or agent[71] to do an act otherwise prohibited by the policy is a waiver of the condition.[72]

D. Implied Waiver — 1. Nature of. The subject of implied waiver presents in full the conflict between the two diverse theories of a waiver and an estoppel as a basis for forbidding the insurer to set up the breach of a condition contained in the policy. Bearing in mind that some cases require all the elements of an equitable estoppel to be present, and that others assert that the absence of such elements is immaterial, it may be stated as a general rule that the insurer is deemed to have waived the performance of conditions precedent or subsequent when in good conscience he ought not to be heard to assert them, as when by reason of his conduct he has led the insured to believe that they would not be insisted upon.[73] So the inference of waiver is to be drawn from any declaration or act justifying the belief that the performance of a condition contained in the policy would not be insisted upon.[74] The same inference is to be drawn when the act fairly indicates, after a breach of condition that the insurer

See 28 Cent. Dig. tit. "Insurance," § 1016 *et seq.*

It is regarded as unfair to permit the insurer to rely on the provison when the insured has relied on the insurer's conduct to his detriment. Maryland F. Ins. Co. *v.* Gusdorf, 43 Md. 506; Redstrake *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 294; Mentz *v.* Lancaster F. Ins. Co., 79 Pa. St. 475.

Policy in insurer's possession.— Particularly is this so when the policy is in the possession of the insurer for the purpose of indorsing a waiver; an oral agreement to waive a condition has been held to bind the insurer despite a provision requiring a writing. Rathbone *v.* City F. Ins. Co., 31 Conn. 193; Moffitt *v.* Phenix Ins. Co., 11 Ind. App. 233, 38 N. E. 835.

If the agreement to indorse is upon a condition unfulfilled there is no waiver. Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121, 51 Pac. 170; Supple *v.* Iowa State Ins. Co., 58 Iowa 29, 11 N. W. 716; Hill *v.* Commercial Union Ins. Co., 164 Mass. 406, 41 N. E. 657.

Whenever the failure to indorse is the fault of the insured and not of the insurer or his agent there is no waiver. Jacobs *v.* Equitable Ins. Co., 17 U. C. Q. B. 35. But see Smith *v.* Commercial Union Ins. Co., 33 U. C. Q. B. 69.

69. Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408; Worcester Bank *v.* Hartford F. Ins. Co., 11 Cush. (Mass.) 265, 59 Am. Dec. 145; German Ins. Co. *v.* Heiduk, 30 Nebr. 288, 46 N. W. 481, 27 Am. St. Rep. 402; Hook *v.* Berks County Mut. F. Ins. Co., 160 Pa. St. 229, 28 Atl. 690; Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41.

Where an oral contract for insurance is made the company cannot be considered to have waived the conditions of the policy by not furnishing a policy to the insured when there was no demand for one. Smith *v.* State Ins. Co., 64 Iowa 716, 21 N. W. 145.

70. Nebraska Mercantile Mut. Ins. Co. *v.* Sasek, 64 Nebr. 17, 89 N. W. 428.

71. Bonefant *v.* American F. Ins. Co., 76 Mich. 653, 43 N. W. 682; New Orleans Ins. Assoc. *v.* Holberg, 64 Miss. 51, 8 So. 175; Imperial F. Ins. Co. *v.* Dunham, 117 Pa. St. 460, 12 Atl. 668, 2 Am. St. Rep. 686.

Apparent authority to bind the insurer must appear. Security Ins. Co. *v.* Fay, 22 Mich. 467, 7 Am. Rep. 670.

The fact of agency need not appear in the writing. Chauncy *v.* German-American Ins. Co., 60 N. H. 428.

If the policy mentions no person by whom the indorsement must be made the agent who procured the insurance will be deemed authorized to make the same. Grubbs *v.* Virginia F. & M. Ins. Co., 110 N. C. 108, 14 S. E. 516.

The mistake of the agent in making the indorsement will not result in the avoidance of the policy. Ladd *v.* Ætna Ins. Co., 70 Hun (N. Y.) 490, 24 N. Y. Suppl. 384.

72. Batchelor *v.* People's F. Ins. Co., 40 Conn. 56; Warren *v.* Ocean Ins. Co., 16 Me. 439, 33 Am. Dec. 674; Buchanan *v.* Exchange F. Ins. Co., 61 N. Y. 26; Kunzze *v.* American Exch. F. Ins. Co., 41 N. Y. 412; Benedict *v.* Ocean Ins. Co., 31 N. Y. 389; Benjamin *v.* Saratoga County Mut. F. Ins. Co., 17 N. Y. 415. See Pool *v.* Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919 (indorsement on a policy with reference to additional insurance); Lycoming County Ins. Co. *v.* Updegraff, 40 Pa. St. 311 (indorsement with reference to alterations).

73. Citizens' Ins. Co. *v.* Stoddard, 99 Ill. App. 469 [*affirmed* in 197 Ill. 330, 64 N. E. 355]; Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. (Va.) 389, 26 Am. Rep. 364; Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617; Lancashire Ins. Co. *v.* Chapman, 7 Rev. Lég. 47.

74. *California.*— West Coast Lumber Co. *v.* State Invest., etc., Co., 98 Cal. 502, 33 Pac. 258.

Delaware.— Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 325, 54 Atl. 952.

has chosen to treat the policy as a valid and subsisting contract.[75] A true estoppel results if the insurer by his conduct puts the insured to trouble and expense, with a full knowledge of the right to declare a forfeiture,[76] or if the insured after the breach of condition has a right to suppose from the insurer's conduct that he is still protected, and consequently relies thereon to his detriment by failing to take out further insurance.[77]

2. WHAT CONSTITUTES — a. In General. The issuing of a policy is a waiver of all matters of insufficiency of form and detail in the application or in the disclosures specifically called for and not unknown to the insurer.[78] It would be

Illinois.— Penn Mut. L. Ins. Co. *v.* Keach, 32 Ill. App. 427 [*affirmed* in 134 Ill. 583, 26 N. E. 106].

Kentucky.— Continental Ins. Co. *v.* Browning, 114 Ky. 183, 70 S. W. 660, 24 Ky. L. Rep. 992; Continental Ins. Co. *v.* Coons, 14 Ky. L. Rep. 110.

Maryland.— Globe Reserve Mut. L. Ins. Co. *v.* Duffy, 76 Md. 293, 25 Atl. 227.

Missouri.— Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

Nebraska.— Johnston *v.* Phelps County Farmers' Mut. Ins. Co., 63 Nebr. 21, 88 N. W. 142.

New York.—Manchester *v.* Guardian Assur. Co., 151 N. Y. 88, 45 N. E. 381, 56 Am. St. Rep. 600 [*reversing* 80 Hun 251, 30 N. Y. Suppl. 49]; Adams *v.* Greenwich Ins. Co., 9 Hun 45; De Freee *v.* National L. Ins. Co., 19 N. Y. Suppl. 8 [*affirmed* in 136 N. Y. 144, 32 N. E. 556].

North Carolina.— McCraw *v.* Old North State Ins. Co., 78 N. C. 149.

South Carolina.— Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762.

Wisconsin.— Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

See 28 Cent. Dig. tit. "Insurance," § 1026.

A delivery of the policy without demanding the premium amounts to a waiver of the condition thereof that the policy shall not take effect until the premium is paid. German Ins. Co. *v.* Shader, (Nebr. 1903) 93 N. W. 972; Nebraska, etc., Ins. Co. *v.* Christiensen, 29 Nebr. 572, 45 N. W. 924, 26 Am. St. Rep. 407. See also *supra*, V, A, 1, c; VI, A, 1, b, (III).

After consenting to a sale of the premises the insurer cannot declare a forfeiture for breach of warranty that the premises are unencumbered because by the terms of the sale the vendor retained a lien for the purchase-money. King *v.* Cox, 63 Ark. 204, 37 S. W. 877.

75. *Iowa.*— Hollis *v.* State Ins. Co., 65 Iowa 454, 21 N. W. 774.

Massachusetts.— Oakes *v.* Manufacturers' F. & M. Ins. Co., 135 Mass. 248.

Michigan.— Carpenter *v.* Continental Ins. Co., 61 Mich. 635, 28 N. W. 749.

Nebraska.— Hunt *v.* State Ins. Co., 66 Nebr. 121, 92 N. W. 921; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111; Billings *v.* German Ins. Co., 34 Nebr. 502, 52 N. W. 397.

Ohio.— Sun Mut. Ins. Co. *v.* Hock, 8 Ohio Cir. Ct. 341, 4 Ohio Cir. Dec. 553.

Texas.— Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.* See also *infra*, XIV, D, 2, d.

76. Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537; Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762. See also *infra*, XIV, D, 2, g.

77. Manufacturers', etc., Mut. Ins. Co. *v.* Armstrong, 45 Ill. App. 217; Hayward *v.* National Ins. Co., 52 Mo. 181, 14 Am. Rep. 400.

The insurer is not estopped if the insured was not influenced and did not rely, act, or change his position by reason of the insurer's conduct. Watts *v.* Philadelphia Fire Assoc., 87 Mo. App. 83; Quinsigamond Lake Steamboat Co. *v.* Phœnix Ins. Co., 177 Mass. 10, 58 N. E. 174.

78. *Illinois.*— Farmers' Mut. F., etc., Ins. Co. *v.* Lecroy, 91 Ill. App. 41.

Massachusetts.— Commonwealth *v.* Hide, etc., Ins. Co., 112 Mass. 136, 17 Am. Rep. 72; Nichols *v.* Fayette Mut. F. Ins. Co., 1 Allen 63; Liberty Hall Assoc. *v.* Housatonic Mut. F. Ins. Co., 7 Gray 261.

Michigan.— Miotke *v.* Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463; Gristock *v.* Royal Ins. Co., 87 Mich. 428, 49 N. W. 634; Peoria M. & F. Ins. Co. *v.* Perkins, 16 Mich. 380.

New Jersey.— Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

New York.— Ames *v.* New York Union Ins. Co., 14 N. Y. 253.

Ohio.— Dayton Ins. Co. *v.* Kelly, 24 Ohio St. 345, 15 Am. Rep. 612; Sun Mut. Ins. Co. *v.* Hock, 8 Ohio Cir. Ct. 341, 4 Ohio Cir. Dec. 553.

Rhode Island.— Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159.

Tennessee.— Home Ins. Co. *v.* Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915.

Texas.— Phœnix Assur. Co. *v.* Munger Improved Cotton Mach. Mfg. Co., (Civ. App. 1898) 49 S. W. 271; German Ins. Co. *v.* Everett, 18 Tex. Civ. App. 514, 46 S. W. 95.

Virginia.— Union Assur. Soc. *v.* Nalls, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923.

Wisconsin.— Dunbar *v.* Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

A total failure to answer the questions contained in the application seems to qualify

a fraud on the insured to permit the insurer with knowledge of the then existing breach of a condition precedent to accept the premium and to issue a policy pretending to insure, but which could be avoided after a loss by a reliance upon such a breach of condition.[79]

b. Failure to Answer Letters of Insured. The insured is not entitled to rely upon the insurer's mere failure to reply to his letters as being a waiver of any condition or as amounting of itself to consent to do an act otherwise prohibited by the policy.[80]

c. Failure to Assert Forfeiture — (i) *In General.* While the weight of authority is that a policy conditioned to become void upon a breach of a warranty is void *ipso facto* upon such a breach without formal proceedings on the part of

this rule. Milwaukee Mechanics' Ins. Co. *v.* Niewedde, 12 Ind. App. 145, 39 N. E. 757.

Failure of insurer to make inquiry.— As to whether or not a failure on the part of the insurer to inquire as to the nature of or as to defects in the insured's title is a waiver of such disclosure, there being a provision concerning the same in the policy, the cases conflict. In general a personal examination or inquiry by the insurer is not necessary if the policy is expressly conditioned against the facts which might have been found on inquiry. Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240; Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas. (D. C.) 245, 40 L. R. A. 358; Digby *v.* American Cent. Ins. Co., 3 Mo. App. 603; Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 801, 5 L. R. A. 638; Ætna Ins. Co. *v.* Holcomb, 89 Tex. 404, 34 S. W. 915; Waller *v.* Northern Assur. Co., 10 Fed. 232, 2 McCrary 637. *Contra*, Wright *v.* London F. Ins. Assoc., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211; Arthur *v.* Palatine Ins. Co., 35 Oreg. 27, 57 Pac. 62, 76 Am. St. Rep. 450; Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 47 N. W. 532; Hosford *v.* Germania F. Ins. Co., 127 U. S. 399, 8 S. Ct. 1199, 32 L. ed. 196; Geib *v.* Enterprise Co., 10 Fed. Cas. No. 5,297, 1 Dill. 449 note. See also *supra*, XII, A, 2, b, (v).

79. *Arkansas.*—Sprott *v.* New Orleans Ins. Assoc., 53 Ark. 215, 13 S. W. 799.

California.— Allen *v.* Home Ins. Co., 133 Cal. 29, 65 Pac. 138; Davis *v.* Phœnix Ins. Co., 111 Cal. 409, 43 Pac. 1115.

Iowa.— Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; Bartholomew *v.* Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65.

Michigan.— Michigan Shingle Co. *v.* Pennsylvania F. Ins. Co., 98 Mich. 609, 57 N. W. 802; Michigan Shingle Co. *v.* State Invest., etc., Co., 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 319.

Minnesota.— Anderson *v.* Manchester F. Assur. Co., 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 50 Am. St. Rep. 400, 28 L. R. A. 609; First Nat. Bank *v.* American Cent. Ins. Co., 58 Minn. 492, 60 N. W. 345; Brandup *v.* St. Paul F. & M. Ins. Co., 27 Minn. 393, 7 N. W. 735.

Mississippi.—Western Assur. Co. *v.* Phelps, 77 Miss. 625, 27 So. 745; American F. Ins. Co. *v.* Vicksburg First Nat. Bank, 73 Miss. 469, 18 So. 931.

Missouri.— Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

New York.— Landers *v.* Watertown F. Ins. Co., 19 Hun 174; Richardson *v.* Westchester F. Ins. Co., 15 Hun 472; Broadhead *v.* Lycoming F. Ins. Co., 14 Hun 452.

Pennsylvania.— McGonigle *v.* Susquehanna Mut. F. Ins. Co., 168 Pa. St. 1, 31 Atl. 868; Brumbaugh *v.* Home Mut. F. Ins. Co., 20 Pa. Super Ct. 144.

Texas.— Liverpool, etc., Ins. Co. *v.* Ende, 65 Tex. 118; Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

Virginia.— Union Assur. Soc. *v.* Nalls, 101 Va. 613, 44 S. E. 896, 99 Am. St. Rep. 923; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

United States.— Fireman's Fund Ins. Co. *v.* Norwood, 69 Fed. 71, 16 C. C. A. 136; Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368; Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 443.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.* See also *infra*, XIV, E, 3, a.

Extent and limits of rule.—And the fact that a private instruction of the agent as to the acceptance of such a risk is violated is no defense to the insurer. Howard Ins. Co. *v.* Owen, 94 Ky. 197, 21 S. W. 1037, 14 Ky. L. Rep. 881. But the issuance of a policy with notice of the expressed future intention of the insured to violate its conditions is not a waiver. Orient Ins. Co. *v.* Prather, 25 Tex. Civ. App. 446, 62 S. W. 89. See *infra*, XIV, E, 3, a. It has been held that the issuance of a policy with knowledge of an existing but remediable breach of condition only waives such a condition to the extent of allowing the insured a reasonable time in which to comply with the condition. Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140; Phœnix Assur. Co. *v.* Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810. But under a contract allowing unpaid premium notes to be deducted from the insurance in case of loss it is immaterial, so far as waiver is concerned, that they are long past due — even barred by limitation. Alexander *v.* Continental Ins. Co., 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869.

80. Armstrong *v.* Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. 991 [*reversing* 56 Hun 399, 9 N. Y. Suppl. 873]; Fry *v.* Franklin Ins. Co., 5 Ohio Dec. (Reprint) 558, 6 Am. L. Rec. 533; East Texas F. Ins. Co. *v.* Perkey, 89 Tex. 604, 35 S. W. 1050. In

the insurer,[81] yet it is true that such conditions are inserted for the benefit of the insurer and may be waived, and that the insurer may elect to continue the policy despite the breach. If it does the policy is revived and restored. Its failure to assert a forfeiture therefore is at least evidence tending to show a waiver thereof.[82] Many authorities go further, however, and hold that the failure to assert a forfeiture after knowledge of a ground thereof will amount of itself to a waiver. Whenever it appears that the insured was deluded thereby into a belief that he was protected, and consequently relied on the implied statement of validity to his detriment, a true estoppel rises.[83] Other authorities, however, assert that when the policy is conditioned to be void upon a breach, and the insurer has not induced

Rauch *v.* Michigan Millers' Mut. F. Ins. Co., 131 Mich. 281, 91 N. W. 160, however, Grant, J., dissenting, a failure of the insurer to respond to a letter of the insured stating that he had taken out additional insurance, but could not tell whether this conflicted with the terms of the policy, as it was at his banker's, but to advise him if it did, was held to estop the insurer from claiming a forfeiture under a clause prohibiting all further insurance. In Phœnix Ins. Co. *v.* Johnston, 143 Ill. 106, 32 N. E. 429 [*affirming* 42 Ill. App. 66], where the insurer had written "we cannot permit the other insurance without further information," and such information had been given, the insurer was held estopped to assert a forfeiture.

Limitations of rule.— If the insured is entitled to pay an increased premium when the risk is increased and so continue the insurance, and so offers, but the insurer fails to take any action upon notice of increase of risk and offer, it cannot assert a forfeiture. Orient Ins. Co. *v.* McKnight, 197 Ill. 190, 64 N. E. 339 [*affirming* 96 Ill. App. 525]; Farmers' Mut. F. Ins. Co. *v.* Schaeffer, 82 Md. 377, 33 Atl. 728. If the company does not, however, either cancel the policy or indorse its consent within a reasonable time, it will be considered to have waived its defense upon the condition by failure to assert a forfeiture. Swedish American Ins. Co. *v.* Knutson, 67 Kan. 71, 72 Pac. 526, 100 Am. St. Rep. 382. See also *infra*, XIV, D, 2, e. *Contra*, Girard F. & M. Ins. Co. *v.* Hebard, 95 Pa. St. 45. And an acknowledgment of receipt of such notice by the insurer in the absence of objections amounts to an implied waiver of the breach of condition. Westlake *v.* St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206; Potter *v.* Ontario, etc., Mut. Ins. Co., 5 Hill (N. Y.) 147.

81. See *supra*, XIII, A, 6.

82. Horton *v.* Home Ins. Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717; Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

83. *Indiana.*— Hanover F. Ins. Co. *v.* Dole, 20 Ind. App. 333, 50 N. E. 772.

Iowa.— Nedrow *v.* Farmers' Ins. Co., 43 Iowa 24.

Kentucky.— Phœnix Ins. Co. *v.* Coomes, 20 S. W. 900, 14 Ky. L. Rep. 603.

Missouri.— Union Trust Co. *v.* Provident Washington Ins. Co., 79 Mo. App. 362; Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

Virginia.— Wytheville Ins., etc., Co. *v.* Teiger, 90 Va. 277, 18 S. E. 195.

Wisconsin.— Osterloh *v.* New Denmark Mut. Home F. Ins. Co., 60 Wis. 126, 18 N. W. 749.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

The rule has been applied to a breach of the condition: Against additional insurance. Alabama State Mut. Assur. Co. *v.* Long Clothing, etc., Co., 123 Ala. 667, 26 So. 655; Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633; Phenix Ins. Co. *v.* Boyer, 1 Ind. App. 329, 27 N. E. 628; Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493; Swedish American Ins. Co. *v.* Knutson, 67 Kan. 71, 72 Pac. 526, 100 Am. St. Rep. 382; Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Von Bories *v.* United L., etc., Ins. Co., 8 Bush (Ky.) 133; Kitchen *v.* Hartford F. Ins. Co., 57 Mich. 135, 23 N. W. 616, 58 Am. Rep. 344; Hamilton *v.* Home Ins. Co., 94 Mo. 353, 7 S. W. 261; McCollum *v.* Hartford F. Ins. Co., 67 Mo. App. 76; Cromwell *v.* Phœnix Ins. Co., 47 Mo. App. 109; Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 522; Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; Eagle Fire Co. *v.* Globe L. & T. Co., 44 Nebr. 380, 62 N. W. 895; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169; Combs *v.* Shrewsbury Mut. F. Ins. Co., 34 N. J. Eq. 403; Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609 [*reversing* 2 N. Y. Suppl. 188]; Goldwater *v.* Liverpool, etc., Ins. Co., 39 Hun 176 [*affirmed* in 109 N. Y. 618, 15 N. E. 895]; Carroll *v.* Charter Oak Ins. Co., 40 Barb. 292 [*affirmed* in 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166]; Wilson *v.* Genesee Mut. Ins. Co., 16 Barb. 511 [*reversed* in 14 N. Y. 418]; Collins *v.* Farmville Ins., etc., Co., 79 N. C. 279, 28 Am. Rep. 322; Kalmutz *v.* Northern Mut. Ins. Co., 186 Pa. St. 571, 40 Atl. 816; Lycoming Mut. Ins. Co. *v.* Slockbower, 26 Pa. St. 199; Sitler *v.* Spring Garden Mut. F. Ins. Co., 18 Pa. Super. Ct. 148; Crescent Ins. Co. *v.* Griffin, 59 Tex. 509; Hartford F. Ins. Co. *v.* McLemore, 7 Tex. Civ. App. 317, 26 S. W. 928. Against alteration in the premises. Phœnix Ins. Co. *v.* Coomes, 20 S. W. 900, 14 Ky. L. Rep. 603, 13 Ky. L. Rep. 238; Martin *v.* Jersey City Ins. Co., 44 N. J. L. 273; Hotchkiss *v.* Germania F. Ins. Co., 5 Hun (N. Y.) 90; Stauffer *v.* Manheim Mut. F. Ins. Co., 150 Pa. St. 531, 24 Atl. 754. Against al-

the insured by its quiescence to change his condition, failure to assert the forfeiture does not amount to a waiver.[84]

(II) *Election as to Grounds of Forfeiture.* It has been generally held that if the insured after a loss has occurred claims a forfeiture for non-compliance with certain conditions of the policy, it cannot be heard afterward to assert further or different breaches as a defense.[85] The authorities are by no means unanimous. Other holdings are more in accord with general principles of contract and estoppel in holding that the assertion of a forfeiture upon one ground does not, in the

teration in the adjacent premises. Lattomus *v.* Farmers' Mut. F. Ins. Co., 3 Houst. (Del.) 404; King *v.* Council Bluffs Ins. Co., 72 Iowa 310, 33 N. W. 690; Schmurr *v.* State Ins. Co., 30 Oreg. 29, 46 Pac. 363. Against change in use. Haas *v.* Montauk F. Ins. Co., 49 Hun (N. Y.) 272, 1 N. Y. Suppl. 895; Massell *v.* Protective Mut. F. Ins. Co., 19 R. I. 565, 35 Atl. 209. Against delinquency in the payment of premiums. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620; O'Brien *v.* Prudential Ins. Co., 12 Misc. (N. Y.) 127, 33 N. Y. Suppl. 67; Brady *v.* Prudential Ins. Co., 9 Misc. (N. Y.) 6, 29 N. Y. Suppl. 44. Against increase of risk. Fireman's Fund Ins. Co. *v.* Congregation Rodeph Sholom, 80 Ill. 558; Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126; Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361. Against encumbrances. Frane *v.* Burlington Ins. Co., 87 Iowa 288, 54 N. W. 237; German Ins. Co. *v.* York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313; Beebe *v.* Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 32 Am. St. Rep. 519, 18 L. R. A. 481; Minnock *v* Eureka F. & M. Ins. Co., 90 Mich. 236, 51 N. W. 367; Phœnix Assur. Co. *v.* Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810. Against removal of the goods insured. Williamsburgh City F. Ins. Co. *v.* Cary, 83 Ill. 453. Against transfer of the property insured. Imperial F. Ins. Co. *v.* Dunham, 2 Pa. Cas. 109, 3 Atl. 579. Against the use of prohibited articles. Farmers', etc., Ins. Co. *v.* Nixon, 2 Colo. App. 265, 30 Pac. 42. Against vacancy. Rockford Ins. Co. *v.* Wright, 39 Ill. App. 574; Home F. Ins. Co. *v.* Kuhlman, 58 Nebr. 488, 78 N. W. 936, 76 Am. St. Rep. 111. *Contra,* Davey *v.* Glens Falls Ins. Co., 7 Fed. Cas. No. 3,590.

The applicability of the rule is denied when the insured deprives himself of an insurable interest. Inasmuch as the contract is personal, without a specific agreement, there is no contract between the insurer and the assignee. Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553; Green *v.* Kenton Ins. Co., 12 Ky. L. Rep. 750; Walton *v.* Agricultural Ins. Co., 116 N. Y. 317, 22 N. E. 443, 5 L. R. A. 677; Lahiff *v.* Ashuelot Ins. Co., 60 N. H. 75.

There is no waiver by failure to claim a forfeiture for a breach of a condition against further insurance when the insurer learns of such insurance only after the loss (Queen Ins. Co. *v.* Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51. See also *infra* XIV, E, 2, 3), or by simply retaining the policy as the agent of the insured until after loss, with knowledge of the breach (Young *v.* St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. 681).

A delay of eight days and an inquiry after the particulars of the breach was held not to be a waiver of the defense. Sheldon *v.* Michigan Millers' Mut. F. Ins. Co., 124 Mich. 303, 82 N. W. 1068.

Where a breach is considered not as working a forfeiture ipso facto, but only giving the insurer a right to cancel and declare a forfeiture, a failure to assert a forfeiture ought clearly to amount to a waiver. Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762.

84. *California.*— McCormick *v.* Springfield F. & M. Ins. Co., 66 Cal. 361, 5 Pac. 617.

Illinois.— Stephens *v.* Phœnix Assur. Co., 85 Ill. App. 671.

Michigan.— Robinson *v.* Philadelphia Fire Assoc., 63 Mich. 90, 29 N. W. 521; New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486.

Minnesota.—Golden *v.* Northern Assur. Co., 46 Minn. 471, 49 N. W. 246; Johnson *v.* American Ins. Co., 41 Minn. 396, 43 N. W. 59.

New Jersey.— Ordway *v.* Chace, 57 N. J. Eq. 478, 42 Atl. 149.

Tennessee.— Dale *v.* Continental Ins. Co., 95 Tenn. 38, 31 S. W. 266.

United States.— Petit *v.* German Ins. Co., 98 Fed. 800; West End Hotel, etc., Co. *v.* American F. Ins. Co., 74 Fed. 114; Davey *v.* Glens Falls Ins. Co., 7 Fed. Cas. No. 3,590.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

Failure to demand the production of an inventory is not a waiver of the "iron-safe" clause of a policy. Robinson *v.* Ætna F. Ins. Co., 135 Ala. 650, 34 So. 18.

In Canada by statute there is no waiver. Merritt *v.* Niagara Dist. Mut. F. Ins. Co., 18 U. C. Q. B. 529.

In Louisiana it was said that some affirmative act is necessary to constitute a waiver. Camors *v.* Union Mar. Ins. Co., 104 La. 349, 28 So. 926, 81 Am. St. Rep. 128.

85. Douville *v.* Farmers' Mut. F. Ins. Co., 113 Mich. 158, 71 N. W. 517; Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Cahill *v.* Andes Ins. Co., 4 Fed. Cas. No. 2,289, 5 Biss. 211; Benson *v.* Ottawa Agricultural Ins. Co., 42 U. C. Q. B. 282.

An assertion of forfeiture and non-liability upon a distinct and separate ground from failure to pay the premium will excuse the

absence of an affirmative statement[86] that other breaches are not claimed, amount to a waiver of the right to set up such further breaches.[87] Some cases affirmatively state a necessity of a change of position by the insured to his detriment in reliance upon a waiver arising from such acts,[88] but others presume a detriment or regard it as unnecessary.[89] Of course the insurer should be barred from asserting a defense already known to it and inconsistent with one previously claimed.[90] All other breaches are waived if the insurer by way of a defense to an action on the policy sets up only one specific ground for forfeiture.[91]

d. Admission of Liability. If the insurer with full knowledge of the facts on which a forfeiture might be claimed admits its liability upon the policy,[92] or if it promises to pay the same, this constitutes a waiver of its right to insist upon the forfeiture.[93]

insured from tendering any arrears of premium or assessment. Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Suppl. 79. See *supra*, VI, E, 1, b. And *compare infra*, XIV, D, 2, f, (II).

86. City Planing, etc., Mill Co. *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552; McCormick *v.* Royal Ins. Co., 163 Pa. St. 184, 29 Atl. 747.

87. Robinson *v.* Ætna F. Ins. Co., 135 Ala. 650, 34 So. 18; Vandervolgen *v.* Manchester F. Assur. Co., 123 Mich. 291, 82 N. W. 46; Keet-Rountree Dry Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469; Devens *v.* Mechanics', etc., Ins. Co., 83 N. Y. 168.

88. *Alabama.*—Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163.

Michigan.— Towle *v.* Ionia, etc., Farmers' Mut. F. Ins. Co., 91 Mich. 219, 51 N. W. 987.

New York.— Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., 159 N. Y. 418, 54 N. E. 23 [*affirming* 20 N. Y. App. Div. 625, 46 N. Y. Suppl. 1092].

Pennsylvania.— Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499; Sitler *v.* Spring Garden Mut. F. Ins Co., 14 York Leg. Rec. 158.

Wisconsin.— Gans *v.* St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

United States.— St. Onge *v.* Westchester F. Ins. Co., 80 Fed. 703.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

The private action taken by the board of directors in a meeting of the board in relying upon a single defense as a basis for rejection of a claim of loss, if not communicated to the insured, cannot be held to be a waiver. Hutton *v.* Patrons' Mut. F. Ins. Co., 191 Pa. St. 369, 43 Atl. 219.

89. Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; Billings *v.* German Ins. Co., 34 Nebr. 502, 52 N. W. 397; Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410.

90. Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 15 N. W. 452; Castner *v.* Farmers Mut. Ins. Co., 46 Mich. 15, 8 N. W. 554; Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Towle *v.* Ionia, etc., Farmers' Mut. F. Ins. Co., 91 Mich. 219, 51 N. W. 987.

For instance after an assertion that the policy was forfeited for non-payment of a premium, it cannot assert a defense that the contract was void for fraudulent concealment. Michael *v.* Nashville Mut. Ins. Co., 10 La. Ann. 737.

91. Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537; Meadows *v.* Meadows, 13 Ky. L. Rep. 495; Continental Ins. Co. *v.* Waugh, 60 Nebr. 348, 83 N. W. 81; Cleaver *v.* Traders' Ins. Co., 40 Fed. 711.

92. *Georgia.*— Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457.

New Hampshire.— Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

New York.— Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315; Pechner *v.* Phœnix Ins. Co., 6 Lans. 411.

Wisconsin.— Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448.

Canada.— St. Amand *v.* Cie. d'Assurance, 9 Quebec 162, 14 Rev. Lég. 27.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

An agreement to assume future liability for further losses under the policy is not a waiver of a prior forfeiture, for it amounts only to a new contract in future, and not to an admission of present liability. St. Onge *v.* Westchester F. Ins. Co., 80 Fed. 703.

A resolution passed by the board of directors for the payment of the policy, made without knowledge of the breach, is not a waiver. Phillips *v.* Grand River Farmers' Mut. F. Ins. Co., 46 U. C. Q. B. 334.

A statement made by an agent that he considers the claim an honest one and that he supposes that the insurer will pay it does not amount to a waiver of existing breaches of condition. Card *v.* Phœnix Ins. Co., 4 Mo. App. 424.

A statement that the insured is liable under the laws of the state notwithstanding a default by the insured, being a mere legal conclusion, is not a waiver. Garlick *v.* Mississippi Valley Ins. Co., 44 Iowa 553.

93. Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605; Todd *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Super. Ct. 371, 43 Wkly. Notes Cas. 476. And see also Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954.

A promise made without knowledge of the defense (Cornell *v.* Tiverton, etc., Mut. F.

e. Consent to Assignment of Policy — (i) *In General.* When the company consents to an assignment of the policy and thereby creates a privity of contract with the assignee, it is to be considered as having waived all defenses available against the assignor but not inhering in the estate or interest of the assignee acquired from the assignor, for this is virtually the taking out of a new policy by the assignee.[94] Consent to such an assignment is a waiver of all breaches of condition of any kind, past or existing, of which the insurer is cognizant at the time of consenting to the assignment;[95] but if the insurer does not know of the breach and it inheres in the estate of the assignee after the assignment there is no waiver thereof.[96] The insurer cannot after consenting to the assignment assert that the assignment was itself void between the assignor and the assignee, for it is a party to the transaction.[97] If an assignment has already occurred, a notation on the policy made at the request of the assignee, "Loss if any payable to the mortgagee," will amount to such a waiver that the policy is confirmed in the hands of such assignee and mortgagee.[98]

Ins. Co., (R. I. 1896) 35 Atl. 579), or itself induced by fraud does not amount to a waiver (Concordia F. Ins. Co. *v.* Koretz, 14 Colo. App. 386, 60 Pac. 191). And it has been held that a promise retracted before the insured has changed his position in reliance thereon is not a waiver. Joye *v.* South Carolina Mut. Ins. Co., 54 S. C. 371, 32 S. E. 446.

94. *Illinois.*— Illinois F. Ins. Co. *v.* Stanton, 57 Ill. 354; Hartford City F. Ins. Co. *v.* Mark, 45 Ill. 482.

Indiana.— Continental Ins. Co. *v.* Munns, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430.

Iowa.— Kimball *v.* Monarch Ins. Co., 70 Iowa 513, 30 N. W. 862.

Maryland.— Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360.

Massachusetts.— Collins *v.* Charlestown Mut. F. Ins. Co., 10 Gray 155.

New York.— Shearman *v.* Niagara F. Ins. Co., 46 N. Y. 526, 7 Am. Rep. 380 [*affirming* 2 Sweeny 470, 40 How. Pr. 393]; Pechner *v.* Phœnix Ins. Co., 6 Lans. 411.

Texas.— Home Mut. Ins. Co. *v.* Nichols, (Civ. App. 1903) 72 S. W. 440.

See 28 Cent. Dig. tit. "Insurance," § 1039.

Conditional consent.— If the consent is given upon a condition that is not fulfilled it does not amount to a waiver. Hubert *v.* Southern Live-Stock Ins. Co., 103 Ga. 294, 29 S. E. 938.

95. Phenix Ins. Co. *v.* Lindley, 111 Ill. App. 266; Rockford Ins. Co. *v.* Williams, 56 Ill. App. 338; Garland *v.* Insurance Co. of North America, 9 Ill. App. 571 [*reversed* in 108 Ill. 220]; Hale *v.* Union Mut. F. Ins. Co., 32 N. H. 295, 64 Am. Dec. 370; Steen *v.* Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297 [*affirming* 61 How. Pr. 144]; Kreutz *v.* Niagara Dist. Mut. F. Ins. Co., 16 U. C. C. P. 131; Hendrickson *v.* Queen Ins. Co., 30 U. C. Q. B. 108, 31 U. C. Q. B. 547.

The condition against assignment of the policy is of course expressly waived by such a consent. Manchester F. Assur. Co. *v.* Clenn, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225; Small *v.* Westchester F. Ins. Co., 51 Fed. 789.

A promise to consent in the future and to make the proper indorsements on the policy is not equivalent to a present consent or a waiver of the breach of a condition against assignment. Keith *v.* Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

A ratification afterward is equivalent to a prior consent. Benninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495.

96. Ellis *v.* State Ins. Co., 68 Iowa 578, 27 N. W. 762, 56 Am. Rep. 865; Merrill *v.* Farmers' etc., Mut. F. Ins. Co., 48 Me. 285; McNierney *v.* Agricultural Ins. Co., 48 Hun (N. Y.) 239. But in Ellis *v.* Insurance Co. of North America, 32 Fed. 646, Brewer, J., considered that the insurer, by consenting to an assignment, had waived a forfeiture caused by the placing of encumbrances contrary to the terms of the policy upon the property transferred, and which still existed at the time of the assignment.

Where the policy is considered only voidable by reason of a breach of condition, all breaches are waived by a completed assignment. Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21.

97. Clark *v.* Svea F. Ins. Co., 102 Cal. 252, 36 Pac. 587; Wolfe *v.* Security F. Ins. Co., 39 N. Y. 49.

In the absence of a warranty, the insurer, after consent to an assignment, cannot object that the assignee has but an equitable interest in the goods, provided he has an insurable interest. Home Protection of North America *v.* Caldwell, 85 Ala. 607, 5 So. 338.

Assignee's knowledge of assignor's breach. — In Philadelphia Fire Assoc. *v.* Flournoy, 84 Tex. 632, 19 S. W. 793, 31 Am. St. Rep. 89; Northern Assur. Co. *v.* Flournoy, (Tex. Sup. 1892) 19 S. W. 795, the fact that the assignee knew of the assignor's breach of condition was held to prevent a waiver. This test seems to have been nowhere else suggested.

98. *Iowa.*— Lewis *v.* Council Bluffs Ins. Co., 63 Iowa 193, 18 N. W. 888.

Massachusetts.— Stuart *v.* Reliance Ins. Co., 179 Mass. 434, 60 N. E. 929.

Missouri.— Northrup *v.* Mississippi Valley Ins. Co., 47 Mo. 435, 4 Am. Rep. 337.

New York.— Solms *v.* Rutgers F. Ins. Co., 4 Abb. Dec. 279, 3 Keyes 416, 2 Transcr. App.

(II) *Subsequent Assignment.* A consent to a subsequent assignment by the assignee is a waiver of the right to declare a forfeiture by reason of the first assignment having been without consent in breach of a condition of the policy.[99]

f. Demand, Acceptance, or Retention of Premiums or Assessments — (I) *Waiver of Conditions of Policy* — (A) *Acceptance Prior to Loss* — (1) In General — (a) Not Due and Earned Prior to Breach. Inasmuch as the acceptance of a premium with knowledge[1] of a right and an intention to assert a forfeiture of the policy for a prior or existing breach of condition would be a fraud upon the insured, the principle is well settled, that if the insurer, being cognizant of a right to declare a forfeiture, demands or accepts a premium not already earned and due to it prior to the breach, it has elected to treat the policy as valid and subsisting, and the forfeiture is waived.[2] This rule is applicable in

227, 5 Abb. Pr. N. S. 201 [*reversing* 8 Bosw. 578].

Wisconsin.— Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

United States.— In Bates *v.* Equitable F. & M. Ins. Co., 2 Fed. Cas. No. 1,101, 3 Cliff. 215 [*affirmed* in 10 Wall. 33, 19 L. ed. 882], a similar indorsement was construed not to amount to a waiver.

See 28 Cent. Dig. tit. "Insurance," § 1039.

After accepting a premium from the assignee, the insurer cannot object that consent to the assignment was not indorsed on the policy as required. Northam *v.* International Ins. Co., 165 N. Y. 666, 59 N. E. 1127 [*affirming* 45 N. Y. App. Div. 177, 61 N. Y. Suppl. 45].

99. Eddy *v.* Hawkeye Ins. Co., 70 Iowa 472, 30 N. W. 808, 59 Am. Rep. 444; Rines *v.* German Ins. Co., 78 Minn. 46, 80 N. W. 839; Gilliat *v.* Pawtucket Mut. F. Ins. Co., 8 R. I. 282, 91 Am. Dec. 229; North British, etc., Ins. Co. *v.* Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715.

1. Knowledge on the part of the insurer of the right to forfeit or of the facts justifying a forfeiture is of course an essential.

California.— Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408.

Iowa.— Green *v.* Northwestern Live-Stock Ins. Co., 87 Iowa 358, 54 N. W. 349.

Maryland.— Reynolds *v.* Mutual F. Ins. Co., 34 Md. 280, 6 Am. Rep. 337.

Pennsylvania.— Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

Rhode Island.— Hazard *v.* Franklin Mut. F. Ins. Co., 7 R. I. 429.

Texas.— McLeary *v.* Orient Ins. Co., (Civ. App. 1895) 32 S. W. 583.

Vermont.— Allen *v.* Vermont Mut. F. Ins. Co., 12 Vt. 366.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.* See also *supra*, XIV, A, 3.

2. *Illinois.*— Germania F. Ins. Co. *v.* Klewer, 129 Ill. 599, 22 N. E. 489 [*reversing* 27 Ill. App. 590]; German Ins. Co. *v.* Orr, 56 Ill. App. 637; Hartford F. Ins. Co. *v.* Orr, 56 Ill. App. 629; Traders' Ins. Co. *v.* Pacaud, 51 Ill. App. 252; North British, etc., Ins. Co. *v.* Steiger, 26 Ill. App. 228 [*affirmed* in 124 Ill. 81, 16 N. E. 95].

Indiana.— Phenix Ins. Co. *v.* Boyer, 1 Ind. App. 329, 27 N. E. 628.

Iowa.— Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810; Jordan *v.* State Ins. Co., 64 Iowa 216, 19 N. W. 917; Williams *v.* Niagara F. Ins. Co., 50 Iowa 561; Keenan *v.* Dubuque Mut. F. Ins. Co., 13 Iowa 375; Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126.

Kentucky.— Walls *v.* Home Ins. Co., 114 Ky. 611, 71 S. W. 650, 24 Ky. L. Rep. 1452, 102 Am. St. Rep. 298; Rogers *v.* Farmers' Mut. Aid Assoc., 106 Ky. 371, 50 S. W. 543, 20 Ky. L. Rep. 1925.

Louisiana.— Story *v.* Hope Ins. Co., 37 La. Ann. 254.

Missouri.— Barnard *v.* National F. Ins. Co., 38 Mo. App. 106; Witte *v.* Western Mut. F. Ins. Co., 1 Mo. App. 188.

Nebraska.— Phenix Ins. Co. *v.* Covey, 41 Nebr. 724, 60 N. W. 12; Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New Hampshire.— Atlantic Ins. Co. *v.* Goodall, 35 N. H. 328.

New York.— Whited *v.* Germania F. Ins. Co., 13 Hun 191 [*affirmed* in 76 N. Y. 415, 32 Am. Rep. 330]; Viall *v.* Genesee Mut. Ins. Co., 19 Barb. 440; Carroll *v.* Charter Oak Ins. Co., 10 Abb. Pr. N. S. 166. *Contra*, Neely *v.* Onondaga County Mut. Ins. Co., 7 Hill 49.

Oregon.— Frasier *v.* New Zealand Ins. Co., 39 Oreg. 342, 64 Pac. 814.

Pennsylvania.— Wilson *v.* Montgomery County Mut. F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122; Cumberland Valley Mut. Protection Co. *v.* Mitchell, 48 Pa. St. 374; Lycoming Mut. Ins. Co. *v.* Stocklomn, 3 Grant 207.

Tennessee.— McKenzie *v.* Planters' Ins. Co., 9 Heisk. 261.

Texas.— Hibernia Ins. Co. *v.* Malevinsky, 6 Tex. Civ. App. 81, 24 S. W. 804.

Vermont.— Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

Virginia.— Monger *v.* Rockingham Home Mut. F. Ins. Co., 96 Va. 442, 31 S. E. 609.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

Wisconsin.— McKinnery *v.* German Mut. F. Ins. Soc., 89 Wis. 653, 62 N. W. 413, 46 Am. St. Rep. 861; Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448; Osterloh *v.* New Denmark Mut. Home F. Ins. Co., 60 Wis. 126, 18 N. W. 749; Miner *v.* Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479.

Canada.— Cockburn *v.* British America

full to breaches of any of the conditions subsequent contained in the policy,[3] except as to the condition concerning change of title.[4] And the rule is equally applicable if the breach relied upon was a misrepresentation in the application of which the insurer was aware when the premium was accepted.[5] The premium, however, must in fact have been received by the insurer or its agent,[6] or something have been done equivalent thereto.[7]

(b) DUE AND EARNED PRIOR TO BREACH. The acceptance, however, of assessments after a breach does not amount to a waiver where the premium was due and earned prior thereto.[8]

Assur. Co., 19 Ont. 245; McIntyre *v.* East Williams Mut. F. Ins. Co., 18 Ont. 79; Klein *v.* Union F. Ins. Co., 3 Ont. 234; Lyons *v.* Globe Mut. F. Ins. Co., 27 U. C. C. P. 567; Dickson *v.* Provincial Ins. Co., 24 U. C. C. P. 157; Northern Assur. Co. *v.* Prevost, 25 L. C. Jur. 211.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

Contra.— Gardiner *v.* Piscataquis Mut. F. Ins. Co., 38 Me. 439.

Acceptance of a premium from an assignee for the benefit of creditors is a waiver of the breach by the insolvent. German Ins. Co. *v.* Orr, 56 Ill. App. 637.

Acceptance of payment from an administrator is a waiver of a forfeiture by act of the decedent. Harl *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880.

If the payment is enforced by means of judicial process the rule is of course the same. Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810.

The payment of a dividend by a mutual company to a member after knowledge of a breach of condition has been held to amount to such a recognition of his membership as to waive the forfeiture. Combs *v.* Shrewsbury Mut. F. Ins. Co., 34 N. J. Eq. 403.

If after an assignment contrary to the terms of the policy the insurer accepts further premiums from the assignee, this confirms the insurance for the latter's benefit. German Ins. Co. *v.* Orr, 56 Ill. App. 637; Highlands *v.* Lurgan Mut. F. Ins. Co., 177 Pa. St. 566, 35 Atl. 728, 55 Am. St. Rep. 739; Buckley *v.* Garrett, 47 Pa. St. 204; Bilson *v.* Manufacturers' Ins. Co., 3 Fed. Cas. No. 1,410, Brunn. Col. Cas. 290. But not so when the agent accepted the premiums without the knowledge or assent of the company. Ritchie County Bank *v.* Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

3. See cases cited *supra*, note 2.

4. As to this condition there can be a waiver as to the original insurer only so long as he retains an insurable interest. Neely *v.* Onondaga County Mut. Ins. Co., 7 Hill (N. Y.) 49; Ritchie County Bank *v.* Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

5. *California.*— Sharp *v.* Scottish Union, etc., Ins. Co., 136 Cal. 542, 69 Pac. 253, 615.

Illinois.— Kingston Mut. County F., etc., Ins. Co. *v.* Olmstead, 68 Ill. App. 111.

Nebraska.— German-American Ins. Co. *v.* Hart, 43 Nebr. 441, 61 N. W. 582.

New York.— Frost *v.* Saratoga Mut. Ins. Co., 5 Den. 154, 49 Am. Dec. 234.

South Carolina.— Schroeder *v.* Springfield F. & M. Ins. Co., 51 S. C. 180, 28 S. E. 371.

Texas.— Hartford F. Ins. C. *v.* Moore, 13 Tex. Civ. App. 644, 36 S. W. 146.

Virginia.— Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. 585.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

6. Therefore a charge on the books of the agent against another agent who had taken out the insurance and had transferred the same to defendant company does not estop the insurer. McElroy *v.* British America Assur. Co., 88 Fed. 863.

Mere retention of the premium note without assessments thereon is not sufficient. Kahler *v.* Iowa State Ins. Co., 106 Iowa 380, 76 N. W. 734.

That the agent has not remitted the premium to the insurer is immaterial, if the agent was authorized to accept premiums, or if the insurer was cognizant of its receipt and retention by him. Mechanics', etc., Ins. Co. *v.* Smith, 79 Miss. 142, 30 So. 362; Murphy *v.* Mechanics', etc., Town Mut. F. Ins. Co., 83 Mo. App. 481.

General or special agent.— It has already been noted that a general agent has power to waive a forfeiture. See *supra*, XIV, B, 1, b, (I). This he may do by the acceptance of a premium. Hartford F. Ins. Co. *v.* Orr, 56 Ill. App. 629; Phenix Ins. Co. *v.* Covey, 41 Nebr. 724, 60 N. W. 12; Miner *v.* Phœnix Ins. Co., 27 Wis. 693, 9 Am. Rep. 479. But not so a special agent. Cohen *v.* Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24.

7. See cases cited *infra*, this note.

The addition of a sum to the amount of risk is a confirmation of the validity of a policy, if any basis of forfeiture exist and be known to the insurer. Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

The issuance of a new policy extending the old one is a waiver. Elliott *v.* Ashland Mut. F. Ins. Co., 117 Pa. St. 548, 12 Atl. 676, 2 Am. St. Rep. 703.

The receiving of an additional premium for a variation of the risk is a waiver of the right to forfeit for an increase of risk. North Berwick Co. *v.* New England F. & M. Ins. Co., 52 Me. 336.

The setting up by way of counter-claim by the insurer of the amount due on the premium note, when sued on the policy, is a waiver of the forfeiture. Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

8. Burner *v.* German-American Ins. Co.,

(2) In Case of Severable Contract. If the contract be a severable one, there is no waiver by accepting payment of the premium upon that part of the risk only, concerning which there has been no breach.[9]

(3) Mistake of Insurer or Its Agent. There is no waiver if the demand was made or the acceptance was had by reason of a mistake on the part of the insurer or of its agents, provided it returns or tenders the amount collected, if any, to the insured on discovery thereof.[10]

(4) Indorsement on Policy. For the purposes of a waiver for this reason it is immaterial that the policy requires an indorsement of any waiver thereon.[11]

(B) *Acceptance After Loss.* Some cases assert that when the loss has occurred the rights of the parties are thereby fixed and that the collecting of a premium at such a time does not operate as a waiver or estoppel.[12] However the more general rule would seem to be that a waiver results,[13] at least when nothing remains after the loss to which insurance might attach.[14]

(C) *Retention of Premium After Knowledge.* If the insurer has accepted payment of a premium without knowledge of a right to declare a forfeiture, it is under a moral obligation upon discovery of the facts to return to the insured the portion thereof that has not been earned during the life of the policy, and a failure to do so operates as a waiver of the forfeiture.[15] But there are holdings

103 Ky. 370, 45 S. W. 109, 20 Ky. L. Rep. 71; Philbrook *v.* New England Mut. F. Ins. Co., 37 Me. 137.

Although a mutual company levies an assessment on a policy after knowledge of a breach, if it was to cover losses occurring prior to the forfeiture there is no waiver. Farmers' Mut. F. Ins. Co. *v.* Hull, 77 Md. 498, 27 Atl. 169. And it is immaterial that such assessment may have realized more than enough to pay such losses, if the company at all times denied its liability. Farmers' Mut. F. Ins. Co. *v.* Hull, 77 Md. 498, 27 Atl. 169.

9. Ward *v.* Lebanon Mut. Ins. Co., 10 Wkly. Notes Cas. (Pa.) 518.

If a part of the premium has been earned, it has been held that the collection of all the premium is not a waiver. But such a decision is questionable. German Ins. Co. *v.* Emporia Mut. Loan, etc., Assoc., 9 Kan. App. 803, 59 Pac. 1092.

If by the terms of the policy the whole premium be regarded as earned prior to the time of the breach, the acceptance of interest on the amount unpaid is not a waiver. Smith *v.* Continental Ins. Co., 6 Dak. 433, 43 N. W. 810.

10. Thus there was held to be no waiver when the assessment was made under the erroneous belief that it was made on another policy issued to the same party on different property (Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. (Va.) 585), or where a subordinate clerk inadvertently sent a printed notice that an assessment was due (Ryan *v.* Rockford Ins. Co., 85 Wis. 573, 55 N. W. 1025), or where an agent forgetting his instructions made a demand, but did not collect the money (Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 5 Am. Rep. 323).

Mistake see *infra,* XIV, F.

If the premium is not at once returned upon discovery of the mistake there is a waiver. Law *v.* Hand-in-hand Mut. Ins. Co., 29 U. C. C. P. 1.

11. Carroll *v.* Charter Oak Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 166; Hibernia Ins. Co. *v.* Malevinsky, 6 Tex. Civ. App. 81, 24 S. W. 804.

Indorsement on policy see *supra,* XIV, C.

12. Schimp *v.* Cedar Rapids Ins. Co., 124 Ill. 354, 16 N. E. 229; Dowd *v.* American F. Ins. Co., 1 N. Y. Suppl. 31.

13. Lobee *v.* Standard Live Stock Ins. Co., 12 Misc. (N. Y.) 499, 33 N. Y. Suppl. 657; Perry *v.* Farmers' Mut. L. Ins. Assoc., 132 N. C. 283, 43 S. E. 837; Milkman *v.* United Mut. Ins. Co., 20 R. I. 10, 36 Atl. 1121.

14. German Ins. Co. *v.* Shader, (Nebr. 1903) 93 N. W. 972.

15. *Iowa.*— Barrett *v.* Des Moines Mut. Hail, etc., Ins. Assoc., 120 Iowa 184, 94 N. W. 473.

Minnesota.—Schreiber *v.* German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708.

Mississippi.— Mississippi F. Assoc. *v.* Dobbins, 81 Miss. 630, 33 So. 506.

Nebraska.— German Ins. Co. *v.* Shader, (1903) 93 N. W. 972.

New Jersey.— New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 46 Atl. 777 [*affirming* 64 N. J. L. 51, 44 Atl. 848].

North Carolina.— Perry *v.* Farmers' Mut. F. Ins. Assoc., 132 N. C. 283, 43 S. E. 837.

See 28 Cent. Dig. tit. "Insurance," § 1045.

But see Robinson *v.* Ætna F. Ins. Co., 135 Ala. 650, 34 So. 18. Such retention was regarded in Alabama State Mut. Assur. Co. *v.* Long Clothing, etc., Co., 123 Ala. 667, 26 So. 655, only as evidence of and not as a matter of law of itself a waiver.

Return to the agent who accepted the premium is insufficient. The money must be repaid to the insured. German Ins. Co. *v.* Shader, (Nebr. 1903) 93 N. W. 972.

Tender back of a premium after trial has begun is too late. Mechanics' etc., Ins. Co. *v.* Smith, 79 Miss. 142, 30 So. 362.

that a failure to return the unearned premium after loss and subsequent discovery of a breach of condition is not a waiver of the insurer's defense.[16]

(II) *Waiver of Delinquency*—(A) *Prior to Loss.* In the absence of a waiver,[17] the prepayment of the premium is a condition precedent to the attaching of the risk, the policy taking its life only from the time the premium is paid.[18] If, however, the risk has once attached[19] and the insurer before loss accepts overdue premiums, it thereby waives the right to enforce a forfeiture by reason of the delinquency. The insured's rights are thereby completely restored.[20] So too a forfeiture is to be regarded as waived when the agent of the insurer

The insurer must at its peril determine the amount to be returned, and cannot protect itself by asserting that it does not intend to assume any liability by reason of the retention of any sum. Commercial Assur. Co. *v.* New Jersey Rubber Co., 61 N. J. Eq. 446, 49Atl. 155.

When, by the terms of the contract, premiums are to be repaid only when the policy is canceled, a retention of the premium when the insured has not returned the policy for cancellation was held not to be a waiver. Norris *v.* Hartford F. Ins. Co., 55 S. C. 450, 33 S. E. 566, 74 Am. St. Rep. 765.

When the insurer has insisted that the policy is automatically renewed and demands the payment of a premium for the year, it cannot afterward retain any of such premium on discovery of a breach of condition if it then asserts that there was no renewal. Tucker *v.* Dairy Mut. Ins. Co., 116 Iowa 37, 89 N. W. 37.

16. Sitler *v.* Spring Garden Mut. F. Ins. Co., 18 Pa. Super. Ct. 148; Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96.

17. **The delivery of the policy** amounts to such a waiver. See *supra*, V, A, 1, c; VI, E, 1, h, (III).

18. German Ins. Co. *v.* Shader, (Nebr. 1903) 93 N. W. 972; Kollitz *v.* Equitable Mut. F. Ins. Co., 92 Minn. 234, 99 N. W. 892. See *supra*, V, A, 1.

19. **If the risk has, however, once attached,** the provisions of a policy, based on premium notes or instalment premiums, as to the result of a failure promptly to pay premiums, are generally construed only to suspend the operation of the policy during the period of delinquency, or to give the insurer the right to declare a forfeiture. See *supra*, XIII, A, 3.

A mere failure to collect a premium for however long a time, provided no other act is done or assessment levied, cannot constitute a waiver. Hill *v.* Farmers' Mut. F. Ins. Co., 129 Mich. 141, 88 N. W. 392.

20. *Connecticut.*— Bouton *v.* American Mut. L. Ins. Co., 25 Conn. 542.

Dakota.— Smith *v.* St. Paul F. & M. Ins. Co., 3 Dak. 80, 13 N. W. 355.

District of Columbia.— Jacobs *v.* U. S. National L. Ins. Co., 1 MacArthur 632.

Massachusetts.— White *v.* McPeck, 185 Mass. 451, 70 N. E. 463.

Missouri.— Sims *v.* State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311.

Nebraska.— Phenix Ins. Co. *v.* Dungan, 37 Nebr. 468, 55 N. W. 1069; Phœnix Ins. Co. *v.* Lansing, 15 Nebr. 494, 20 N. W. 22.

New York.—Spitz *v.* Mutual Ben. L. Assoc., 5 Misc. 245, 25 N. Y. Suppl. 469.

Pennsylvania.— Lycoming County Mut. Ins. Co. *v.* Schollenberger, 44 Pa. St. 259. But see Insurance Co. *v.* Insurance Co., 37 Leg. Int. 4.

Vermont.— Tripp *v.* Vermont L. Ins. Co., 55 Vt. 100.

West Virginia.— Mason *v.* Citizens' F., etc., Ins. Co., 10 W. Va. 572.

Canada.— McGugan *v.* Manufacturers, etc., Mut. F. Ins. Co., 29 U. C. C. P. 494; Lyons *v.* Globe Mut. Ins. Co., 27 U. C. C. P. 567, 28 U. C. C. P. 62; Smith *v.* Clinton Mut. Ins. Co., 27 U. C. C. P. 441; Thuot *v.* La Compagnie D'Assurance, etc., 10 Quebec Q. B. 104.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

And *compare* Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810.

Acceptance of a part payment of the overdue premium will not raise the inference of a waiver. Curtin *v.* Phenix Ins. Co., 78 Cal. 619, 21 Pac. 370; Garlick *v.* Mississippi Valley Ins. Co., 44 Iowa 553; Nash *v.* Union Mut. Ins. Co., 43 Me. 343, 69 Am. Dec. 65.

An agreement to extend time after default operates as a waiver. Moore *v.* Continental Ins. Co., 107 Ky. 273, 53 S. W. 652, 21 Ky. L. Rep. 977.

An offer to reinstate upon payment of the delinquent premium is not a waiver unless the payment is made before loss. Sullivan *v.* Connecticut Indemnity Assoc., 101 Ga. 809, 29 S. E. 41; Garlick *v.* Mississippi Valley Ins. Co., 44 Iowa 553; Ware *v.* Millville Mut. M. & F. Ins. Co., 45 N. J. L. 177.

Demand of payment recognizing the policy as still existent, by asserting that it "is now liable to immediate suspension unless he gives prompt attention to the notice" that an assessment is due, or the like (Walls *v.* Home Ins. Co., 114 Ky. 611, 71 S. W. 650, 24 Ky. L. Rep. 1452, 102 Am. St. Rep. 298; Olmstead *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 200, 15 N. W. 82. But *compare* Cohen *v.* Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24), or the levying of further assessments thereon (Farmers' Mut. Relief Assoc. *v.* Koontz, 4 Ind. App. 538, 30 N. E. 145; Farmers' Union Ins. Co. *v.* Wilder, 35 Nebr. 572, 53 N. W. 587. *Contra*, Crawford County Mut. Ins. Co. *v.* Cochran, 88 Pa. St. 230), or an attempt to enforce payment (Robinson *v.* Pacific Ins. Co., 18 Hun (N. Y.) 395), has been held to constitute a waiver.

agrees that he will give the insured notice of the falling due of any premium note.[21]

(B) *After Loss* — (1) IN GENERAL. The same rule has been asserted where a payment is made after a loss has occurred, even though the insurer is not cognizant thereof;[22] but it is believed that the better rule is that a waiver and reinstatement are not had by a payment accepted after loss without knowledge of the same.[23] A payment, however, after loss and after the insurer has knowledge thereof will operate to estop the insurer from asserting a delinquency and permits a recovery on the policy.[24] A tender of payment after loss is of course insufficient if the risk has never attached.[25]

(2) PARTIAL LOSS. If overdue premiums are accepted after a partial loss, there is not necessarily a waiver as to the past loss occurring during delinquency, for the policy as to the part not destroyed is merely suspended and the insurer may by accepting payment waive delinquency only as to such part of the risk.[26]

(C) *Stipulations in Policy.* It appears that when the policy contains a stipulation that it shall stand suspended during delinquency, but that the holder shall be liable for such delinquent assessment, or that the entire premium note shall be deemed earned upon default, the insurer does not waive the delinquency as a defense to any loss occurring during such periods, by demanding or accepting premiums.[27] The rule is the same when the premium is by the policy absolutely payable whether the latter be forfeited or not.[28] The parties may validly

Whether the payment was voluntary or enforced the waiver operates equally. Phenix Ins. Co. *v.* Tomlinson, 125 Ind. 84, 25 N. E. 126, 21 Am. St. Rep. 203, 9 L. R. A. 317; American Ins. Co. *v.* Klink, 65 Mo. 78.

If the policy provides for a suspension on failure to pay within a certain time, and, with a notice of assessment, a copy of a provision of the charter of the company, providing for a forfeiture upon a delinquency for a longer period, is inclosed, the delinquency provision of the policy is waived. MacKinnon *v.* Chicago Mut. F. Ins. Co., 83 Wis. 12, 53 N. W. 19.

21. Johns *v.* Insurance Co., 2 Wkly. Notes Cas. (Pa.) 243; Alexander *v.* Continental Ins. Co., 67 Wis. 422, 30 N. W. 727, 58 Am. Rep. 869. *Contra*, Phœnix Ins. Co. *v.* Carlock, 32 Ill. App. 255.

22. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

23. *Iowa.*— Harle *v.* Council Bluffs Ins. Co., 71 Iowa 401, 32 N. W. 396.

Kentucky.— Potter *v.* Continental Ins. Co., 107 Ky. 326, 53 S. W. 669, 21 Ky. L. Rep. 1014.

Michigan.— Hill *v.* Farmers' Mut. F. Ins. Co., 129 Mich. 141, 88 N. W. 392.

Minnesota.— McMartin *v.* Continental Ins. Co., 41 Minn. 198, 42 N. W. 934.

United States.— Cardwell *v.* Republic F. Ins. Co., 5 Fed. Cas. No. 2,396.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

While imminent peril of loss is impending, of which the insurer is not cognizant, acceptance of payment does not constitute a waiver. Cardwell *v.* Republic F. Ins. Co., 5 Fed. Cas. No. 2,396.

24. *Illinois.*— Hartford F. Ins. Co. *v.* Orr, 56 Ill. App. 629.

Indiana.— Marshall Farmers' Home Ins. Co. *v.* Liggett, 16 Ind. App. 598, 45 N. E. 1062; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

Michigan.— Farmer's Mut. F. Ins. Co. *v.* Bowen, 40 Mich. 147.

Nebraska.— Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New York.— Lobee *v.* Standard Live Stock Ins. Co., 12 Misc. 499, 33 N. Y. Suppl. 657.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

25. Southern Mut. Ins. Co. *v.* Taylor, 33 Gratt. (Va.) 743. See Geraldi *v.* Provincial Ins. Co., 29 U. C. C. P. 321.

26. Beeman *v.* Farmers' Pioneer Mut. Ins. Assoc., 104 Iowa 83, 73 N. W. 597, 65 Am. St. Rep. 424; Phelps County Farmers' Mut. Ins. Co. *v.* Johnston, 66 Nebr. 590, 92 N. W. 576; Farmers' Mut. Ins. Co. *v.* Kinney, 64 Nebr. 808, 90 N. W. 926; Johnston *v.* Phelps County Farmers' Mut. Ins. Co., 63 Nebr. 21, 88 N. W. 142.

27. *Alabama.*— Robinson *v.* Ætna F. Ins. Co., 135 Ala. 650, 34 So. 18.

Colorado.— New Zealand Ins. Co. *v.* Maaz, 13 Colo. App. 493, 59 Pac. 213.

Iowa.— Beeman *v.* Farmers' Pioneer Mut. Ins. Assoc., 104 Iowa 83, 73 N. W. 597, 65 Am. St. Rep. 424.

Missouri.— Palmer *v.* Continental Ins. Co., 31 Mo. App. 467.

Texas.— Cohen *v.* Continental F. Ins. Co., 67 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; Texas F. Ins. Co. *v.* Camp County K. of T. L., 32 Tex. Civ. App. 328, 74 S. W. 809.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

Commencement of suit is not a waiver if the policy provides that suit may be brought on any premium note if unpaid by a certain time. Shakey *v.* Hawkeye Ins. Co., 44 Iowa 540.

28. Joliffe *v.* Madison Mut. Ins. Co., 39 Wis. 111, 20 Am. Rep. 35.

stipulate in advance that when a delinquency occurs the insured's rights will finally terminate and that the collection of a premium thereafter will not be regarded as a waiver.[29]

(D) *Custom and Course of Dealing.* By failure to assert forfeitures because of delinquency in meeting assessments, the insurer may establish a course of dealing which if known to the insured may estop it from asserting a forfeiture of the policy because of a delay in payment, even though the policy provides that a forfeiture shall take place.[30] Or it may estop itself by its habits of business from declaring a forfeiture without having made a demand of payment.[31]

(III) *RENEWAL PREMIUM.* Likewise the receipt of a renewal premium with knowledge of a past breach of condition, of a misrepresentation in the prior policy, or of any right to forfeit a prior policy is a waiver of all such defenses.[32]

g. Requiring Proof and Participating in Adjustment — (I) *REQUIRING AND ACCEPTING PROOFS OF LOSS.* Where there has been a breach of a condition in a policy and the insurer, with full knowledge of the facts, and without denying its liability on that ground, apparently recognizes the validity of the policy, and requires the insured to furnish, and he does furnish at some trouble and expense, proofs of a loss under the policy, the insurer is estopped to set up such a breach as a defense in an action thereon.[33] If the insurer denies all liability upon the policy by reason of the breach of condition and merely advises that the insured

29. Shultz *v.* Hawkeye Ins. Co., 42 Iowa 239.

But even this stipulation it seems may be waived. Proebstel *v.* State Ins. Co., 14 Wash. 669, 45 Pac. 308.

30. *Georgia.*— Alabama Gold L. Ins. Co. *v.* Garmany, 74 Ga. 51.

Louisiana.— La Societe de Bienfaisance, etc. *v.* Morris, 24 La. Ann. 347.

New Hampshire.— Estes *v.* Home Manufacturers', etc., Mut. Ins. Co., 67 N. H. 462, 33 Atl. 515.

New York.— In Redfield *v.* Paterson F. Ins. Co., 6 Abb. N. Cas. 456, the court seems to have regarded the contrary to be the rule when the prior course of dealing had been only with other persons and not with plaintiff.

North Carolina.— McCraw *v.* Old North State Ins. Co., 78 N. C. 149.

Ohio.— Manchester F. Ins. Co. *v.* Plato, 23 Ohio Cir. Ct. 35.

Virginia.— Farmers' Benev. F. Ins. Assoc. *v.* Kinsey, 101 Va. 236, 43 S. E. 338.

Canada.— Doherty *v.* Millers, etc., Ins. Co., 4 Ont. L. Rep. 303.

See 28 Cent. Dig. tit. "Insurance," § 1057.

Compare, partly *contra,* Burger *v.* Farmers' Mut. Ins. Co., 71 Pa. St. 422.

Custom and usage generally see CUSTOMS AND USAGES, 12 Cyc. 1066.

A single prior instance is not sufficient to establish such a custom as a matter of law. The question is one for the jury. Morrow *v.* Des Moines Ins. Co., 84 Iowa 256, 51 N. W. 3; Hubbell *v.* Pacific Mut. Ins. Co., 100 N. Y. 41, 2 N. E. 470.

When the policy stipulates that no condition shall be waived except in writing, signed by an officer of the company, it has been held that a custom not to be prompt in demanding payment of premiums cannot be shown. Barnes *v.* Continental Ins. Co., 30 Mo. App. 539. But the effect of a stipulation is differently regarded in many courts. See *supra,* XIV, C, 1.

31. North Alabama Home Protection *v.* Avery, 85 Ala. 348, 5 So. 143, 7 Am. St. Rep. 54.

32. *Georgia.*— Merchants', etc., Ins. Co. *v.* Vining, 68 Ga. 197.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200.

New York.—Ludwig *v.* Jersey City Ins. Co., 48 N. Y. 379, 8 Am. Rep. 556; Carroll *v.* Charter Oak Ins. Co., 1 Abb. Dec. 316, 10 Abb. Pr. N. S. 166; Broadhead *v.* Lycoming F. Ins. Co., 23 Hun 397; Robinson *v.* Pacific F. Ins. Co., 18 Hun 395; Pechner *v.* Phœnix Ins. Co., 6 Lans. 411; Carroll *v.* Charter Oak Ins. Co., 38 Barb. 402; Liddle *v.* Market F. Ins. Co., 4 Bosw. 179.

Ohio.—Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336.

Pennsylvania.—People's Ins. Co. *v.* Spencer, 53 Pa. St. 353, 91 Am. Dec. 217; Lebanon Mut. Ins. Co. *v.* Leathers, 20 Wkly. Notes Cas. 107.

Texas.—Philadelphia Fire Assoc. *v.* Laning, (Civ. App. 1895) 31 S. W. 681.

Wisconsin.—Mechler *v.* Phœnix Ins. Co., 38 Wis. 665.

See 28 Cent. Dig. tit. "Insurance," § 1057. See also *supra,* XIV, D, 2, f, (I), (II).

But if the insurer has no knowledge of such defenses and issues a renewal, it is to be taken as made and issued upon the same representations as the prior policy, and a misrepresentation therein will avoid the renewal policy. Agricultural Sav., etc., Co. *v.* Liverpool, etc., Ins. Co., 32 Ont. 369.

The receipt of money for a renewal even though it be a smaller sum than the regular premium is a waiver of the right to declare a forfeiture. Lebanon Mut. Ins. Co. *v.* Losch, 109 Pa. St. 100.

33. *Arkansas.*—Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St.

should furnish proofs of loss if he desires his claim considered, there is no waiver.[34] It has also been held that when the proofs of loss themselves stipulate that the furnishing of the blank or the making up of proofs shall not result in a waiver, the insurer is not estopped to assert any breach of condition.[35] Some cases assert that there cannot be any estoppel unless there be present all the ele-

Rep. 136; German Ins. Co. *v.* Gibson, 53 Ark. 494, 14 S. W. 672.

California.—Silverberg *v.* Phenix Ins. Co., 67 Cal. 36, 7 Pac. 38.

Illinois.—German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113; Rockford Ins. Co. *v.* Travelstead, 29 Ill. App. 654.

Indiana.—Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947; Home Ins. Co. *v.* Marple, 1 Ind. App. 411, 27 N. E. 633.

Iowa.— Corson *v.* Anchor Mut. F. Ins. Co., 113 Iowa 641, 85 N. W. 806; Brown *v.* State Ins. Co., 74 Iowa 428, 38 N. W. 135, 7 Am. St. Rep. 495; Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

Maine.—Hanscom *v.* Home Ins. Co., 90 Me. 333, 38 Atl. 324.

Michigan.—Pennsylvania F. Ins. Co. *v.* Kittle, 39 Mich. 51.

Missouri.—Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

Nebraska.—Fidelity Mut. F. Ins. Co. *v.* Murphy, (1903) 95 N. W. 702; Home F. Ins. Co. *v.* Phelps, 51 Nebr. 623, 71 N. W. 303; German Ins. Co. *v.* Stiner, 2 Nebr. (Unoff.) 308, 96 N. W. 122.

New York.—Kiernan *v.* Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698; Roby *v.* American Cent. Ins. Co., 120 N. Y. 510, 24 N. E. 808; Sullivan *v.* Prudential Ins. Co., 63 N. Y. App. Div. 280, 71 N. Y. Suppl. 525; Lobee *v.* Standard Live Stock Ins. Co., 12 Misc. 499, 33 N. Y. Suppl. 657; Harrington *v.* Franklin F. Ins. Co., 21 N. Y. Suppl. 31 [*affirmed* in 142 N. Y. 640, 37 N. E. 567].

North Carolina.— Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.

Pennsylvania.— Niagara F. Ins. Co. *v.* Miller, 120 Pa. St. 504, 14 Atl. 385, 6 Am. St. Rep. 726.

Texas.— German-American Ins. Co. *v.* Evants, 25 Tex. Civ. App. 300, 61 S. W. 536 [*affirmed* in 94 Tex. 490, 62 S. W. 417].

Virginia.—Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

Wisconsin.— Dick *v.* Equitable F. & M. Ins. Co., 92 Wis. 46, 65 N. W. 742; Jerdee *v.* Cottage Grove F. Ins. Co., 75 Wis. 345, 44 N. W. 636; Reiner *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208; Cannon *v.* Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Knox *v.* Lycoming F. Ins. Co., 50 Wis. 671, 7 N. W. 776; Webster *v.* Phœnix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479.

Canada.— Canada Landed Credit Co. *v.* Canada Agricultural Ins. Co., 17 Grant Ch. (U. C.) 418; Shannon *v.* Hastings Mut. F. Ins. Co., 25 U. C. C. P. 470; Campbell *v.* National L. Ins. Co., 24 U. C. C. P. 133; Davis *v.* Scottish Provincial Ins. Co., 16 U. C. C. P. 176; Shannon *v.* Gore Dist. Mut. F. Ins. Co., 37 U. C. Q. B. 380; Jacobs *v.* Equitable Ins. Co., 17 U. C. Q. B. 35. *Contra,* Abrahams *v.* Agricultural Mut. Assur. Assoc., 40 U. C. Q. B. 175, *semble.*

See 28 Cent. Dig. tit. "Insurance," § 1071 *et seq.*; and *infra,* XVII, D.

The statement of the rule is even broader in Smith *v.* St. Paul F. & M. Ins. Co., 3 Dak. 80, 13 N. W. 355, that is, that the insurer is estopped if he "permits" the insured to make out proofs of loss without asserting a forfeiture which he is aware he has a right to assert. *Contra,* American Ins. Co. *v.* Walston, 111 Ill. App. 133.

There are authorities, however, that when the policy itself provides that the loss shall not be payable until proofs of loss are rendered, there is no waiver by the insurer in requiring or accepting such proofs. Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789; Fitchpatrick *v.* Hawkeye Ins. Co., 53 Iowa 335, 5 N. W. 151.

A waiver of the requirement that books should be kept in a fireproof safe, resulting from demand of proofs of loss, operates to excuse the production of such books in an action on the policy. Corson *v.* Anchor Mut. F. Ins. Co., 113 Iowa 641, 85 N. W. 806.

Arbitration.— Insistence upon arbitration under a stipulation which applies to the measure of damages alone is a waiver of a defense to the whole policy. Home F. Ins. Co. *v.* Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521. But see Briggs *v.* Fireman's Fund Ins. Co., 65 Mich. 52, 31 N. W. 616. An agreement to arbitrate the amount of the loss is a waiver of a prior breach of condition. McGonigle *v.* Agricultural Ins. Co., 167 Pa. St. 364, 31 Atl. 626; Doull *v.* Western Assur. Co., 18 Nova Scotia 478, 6 Can. L. T. 539. And a completed arbitration is a final waiver. City of London F. Ins. Co. *v.* Smith, 15 Can. Sup. Ct. 69.

34. Donogh *v.* Farmers' F. Ins. Co., 104 Mich. 503, 62 N. W. 721; Betcher *v.* Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971; Matthie *v.* Globe F. Ins. Co., 174 N. Y. 489, 67 N. E. 57 [*affirming* 68 N. Y. App. Div. 239, 74 N. Y. Suppl. 177]; Frankfurter *v.* Home Ins. Co., 10 Misc. (N. Y.) 157, 31 N. Y. Suppl. 3. And *compare* Fair *v.* Niagara Dist. Mut. F. Ins. Co., 26 U. C. C. P. 398.

35. Curlee *v.* Texas Home F. Ins. Co., 30 Tex. Civ. App. 471, 73 S. W. 831, 986; City Drug Store *v.* Scottish Union, etc., Ins. Co., (Tex. Civ. App. 1898) 44 S. W. 21.

The furnishing of blanks for proofs of loss in the absence of knowledge of a breach of condition is not a waiver of the right to declare a forfeiture. Alston *v.* Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784.

ments of an equitable estoppel;[36] but there are many of the cases in which the insured could not have sustained any true detriment, but in which by demanding and accepting proofs of loss the insurer was held to waive its defenses.[37] The assertion of objections to proofs of loss on grounds of form waives other defenses as to the conditions of the policy,[38] unless those grounds are reserved by denying any liability thereon.[39]

(II) *PARTICIPATION IN ADJUSTMENT*— (A) *In General.* A participation in an adjustment of the loss amounting to a final understanding and an agreement to pay a sum thereunder to the insured amounts to a waiver of all breaches of condition of which the insurer was then cognizant.[40] As to whether a mere participation in adjustment will amount to a waiver, there is a conflict; some authorities assert that the slightest participation in an attempt to adjust the loss will

36. Under this theory therefore reliance by the insured to his detriment (McCormick *v.* Orient Ins. Co., 86 Cal. 260, 24 Pac. 1003; McCormick *v.* Union Ins. Co., (Cal. 1890) 24 Pac. 1005; Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; Phœnix Ins. Co. *v.* Stevenson, 78 Ky. 150; Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., 159 N. Y. 418, 54 N. E. 23; Armstrong *v.* Agricultural Ins. Co., 130 N. Y. 560, 29 N. E. 991 [*reversing* 56 Hun 399, 9 N. Y. Suppl. 873]. But *compare* Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410; Kiernan *v.* Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698; Boyd *v.* Vanderbilt Ins. Co., 90 Tenn. 212, 16 S. W. 470, 25 Am. St. Rep. 676; Bonneville *v.* Western Assur Co., 68 Wis. 298, 32 N. W. 34), as well as a full knowledge on the part of the insurer of its defense (Antes *v.* Western Assur. Co., 84 Iowa 355, 51 N. W. 7; Farmers' Mut. Ins. Co. *v.* Tighe, 3 Nebr. (Unoff.) 337, 91 N. W. 520; Gray *v.* Guardian Assur. Co., 82 Hun (N. Y.) 380, 31 N. Y. Suppl. 237; Freedman *v.* Philadelphia Fire Assoc., 168 Pa. St. 249, 32 Atl. 39; Georgia Home Ins. Co. *v.* Rosenfield, 95 Fed. 358, 37 C. C. A. 96) is of course indispensable before the insurer can be held to have waived a forfeiture by requiring proofs of loss. See also *supra*, XIV, A, 2, 3.

An objection to proofs of loss that they are made by the mortgagee to whom the loss is payable rather than by the insured mortgagor is a waiver of substantial defenses to the contract. Moore *v.* Hanover F. Ins. Co., 71 Hun (N. Y.) 199, 24 N. Y. Suppl. 507.

If the insurer requires the mortgagee to whom a policy is payable to furnish proofs of loss, there is a waiver, although the mortgagor is the insured. Granger *v.* Manchester F. Assur. Co., 119 Mich. 177, 77 N. W. 693.

37. Phœnix Assur. Co. *v.* Munger Improved Cotton Mach. Mfg. Co., (Tex. Civ. App. 1898) 49 S. W. 271; City Drug Store *v.* Scottish Union, etc., Ins. Co., (Tex. Civ. App. 1898) 44 S. W. 21; Georgia Home Ins. Co. *v.* O'Neal, 14 Tex. Civ. App. 516, 38 S. W. 62.

38. *Michigan.*— Cobbs *v.* Philadelphia Fire Assoc., 68 Mich. 463, 36 N. W. 222; Marthinson *v.* North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291.

New York.— Moore *v.* Hanover F. Ins. Co., 71 Hun 199, 24 N. Y. Suppl. 507.

Pennsylvania.— Niagara F. Ins. Co. *v.* Miller, 120 Pa. St. 504, 14 Atl. 385, 6 Am. St. Rep. 726.

Texas.— Georgia Home Ins. Co. *v.* Moriarty, (Civ. App. 1896) 37 S. W. 628.

Wisconsin.— Cannon *v.* Home Ins. Co., 53 Wis. 585, 11 N. W. 11; Northwestern Mut. L. Ins. Co. *v.* Germania F. Ins. Co., 40 Wis. 446.

See 28 Cent. Dig. tit. "Insurance," § 1071 *et seq.*

The insurer cannot avoid the effect of such conduct by asserting in objecting to the proofs of loss that "it waives none of its defenses." Marthinson *v.* North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291; Home F. Ins. Co. *v.* Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521; Georgia Home Ins. Co. *v.* Moriarty, (Tex. Civ. App. 1896) 37 S. W. 628.

39. Betcher *v.* Capital F. Ins. Co., 78 Minn. 240, 80 N. W. 971.

Waiver of proof see further *infra*, XVII, D.

40. *Florida.*— Tillis *v.* Liverpool, etc., Ins. Co., (1903) 35 So. 171.

Illinois.— German F. Ins. Co. *v.* Carrow, 21 Ill. App. 631.

Indiana.— Farmers' Mut. Relief Assoc. *v.* Koontz, 4 Ind. App. 538, 30 N. E. 145.

Michigan.— Eddy *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 651, 40 N. W. 775; Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954.

Minnesota.— Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

New York.—Gibbs *v.* Dutchess County Mut. Ins. Co., 21 N. Y. Suppl. 203.

Pennsylvania.— Wagner *v.* Dwelling-House Ins. Co., 143 Pa. St. 338, 22 Atl. 885. This is true despite a provision of the policy that no waiver is good unless indorsed thereon. Swartz *v.* Insurance Co., 15 Phila. (Pa.) 206. In Earley *v.* Hummelstown Mut. F. Ins. Co., 178 Pa. St. 631, 36 Atl. 195, such acts were held to be proper to submit to the jury for it to determine whether or not there had been a waiver.

West Virginia.— Eagan *v.* Ætna F. & M. Ins. Co., 10 W. Va. 583; Mason *v.* Citizens' F., etc., Ins. Co., 10 W. Va. 572; Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

Wisconsin.— Oshkosh Gas-Light Co. *v.* Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233.

result in a waiver;[41] while others require that there should have been such procedure that the insured has incurred a detriment before a waiver results.[42] Most cases[43] assert the customary rule and state that a waiver cannot be implied from a participation in the adjustment of a loss unless the insurer is aware of the facts giving rise to a forfeiture.[44]

(B) *Offer of Compromise.* A mere offer to compromise is not a waiver of breaches of the conditions of a policy.[45]

See 28 Cent. Dig. tit. "Insurance," § 1078 *et seq.*; and *infra*, XVII, D, 5, h.

Contra.— Baer *v.* Phœnix Ins. Co., 4 Bush (Ky.) 242; Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Colonius *v.* Hibernia F. Ins. Co., 3 Mo. App. 56.

41. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 128 Ala. 451, 30 So. 537.

Iowa.— Glasscock *v.* Des Moines Ins. Co., 125 Iowa 170, 100 N. W. 503. But see also Jewett *v.* Home Ins. Co., 29 Iowa 562, which required more of the showing of an equitable estoppel.

Kansas.— British American Assur. Co. *v.* Bradford, 60 Kan. 82, 55 Pac. 335.

Missouri.— Bowen *v.* Hanover F. Ins. Co., 69 Mo. App. 272; McCollum *v.* Niagara F. Ins. Co., 61 Mo. App. 352.

New York.— Kiernan *v.* Dutchess County Mut. Ins. Co., 80 Hun 602, 29 N. Y. Suppl. 1126 [*affirmed* in 150 N. Y. 190, 44 N. E. 698].

South Carolina.—Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

Tennessee.— North German Ins. Co. *v.* Morton-Scott-Robertson Co., 108 Tenn. 384, 67 S. W. 816.

See 28 Cent. Dig. tit. "Insurance," § 1078 *et seq.*

The examination of the insured under oath has accordingly been held to amount to a waiver, although it does not present the elements of an estoppel. German Ins. Co. *v.* Allen, 69 Kan. 729, 77 Pac. 529; Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315; Phœnix Mut. F. Ins. Co. *v.* Hoeffler, 2 Ohio Cir. Ct. 131, 1 Ohio Cir. Dec. 403.

But a voluntary examination not under oath has been held not to justify such an inference. Pratt *v.* Dwelling-House Mut. F. Ins. Co., 53 Hun (N. Y.) 101, 6 N. Y. Suppl. 78.

The mere sending of an adjuster to the scene of loss it has been declared should not throw on the insurer the risk of its being construed as having waived all breaches of condition. Burnham *v.* Royal Ins. Co., 75 Mo. App. 394. And see Young *v.* St. Paul F. & M. Ins. Co., 68 S. C. 387, 47 S. E. 681.

The entering into negotiations with other companies to determine the proportion of loss of each, with knowledge of a right to forfeit, amounts to a waiver. Sovereign F. Ins. Co. *v.* Pruneau, 14 Rev. Lég. 362.

42. Brown *v.* Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325; Allen *v.* Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. 15; Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499; McFarland *v.* Kittanning Ins. Co., 134 Pa. St. 590, 19 Atl. 796, 19 Am. St. Rep. 723.

Even though the insured incurred some expense, no waiver is worked if the agent of the insurer merely suggested a separation of the burned and the unburned goods. Labell *v.* Georgia Home Ins. Co., (Tex. Civ. App. 1894) 28 S. W. 133.

Forfeiture is not waived by the adjuster and state agent of the company eleven days after the fire by stating that he would refer the matter to the company, where he at the same time claims that the company is not liable on the policy. Burr *v.* German Ins. Co., 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905.

43. But occasional statements are to be found that the time for investigation as to breaches of warranty is when a claim is made, and if the insurer elects to adjust the claim this is a waiver, although there was then no knowledge of the grounds of forfeiture. Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399; Smith *v.* Glen's Falls Ins. Co., 62 N. Y. 85; Stache *v.* St. Paul F. & M. Ins. Co., 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772.

44. *Colorado.*— Fireman's Fund Ins. Co. *v.* Barker, 6 Colo. App. 535, 41 Pac. 513.

Illinois.— Security Ins. Co. *v.* Mette, 27 Ill. App. 324.

Indiana.— Traders' Ins. Co. *v.* Cassell, 24 Ind. App. 238, 56 N. E. 259.

Kentucky.— Baer *v.* Phœnix Ins. Co., 4 Bush 242.

Mississippi.— Greenwood Ice, etc., Co. *v.* Georgia Home Ins. Co., 72 Miss. 46, 17 So. 83.

Missouri.— American Ins. Co. *v.* Barnett, 73 Mo. 364, 39 Am. Rep. 517.

United States.— Fireman's Fund Ins. Co. *v.* McGreevy, 118 Fed. 415, 55 C. C. A. 543; Asheville Nat. Bank *v.* New York Fidelity, etc., Co., 89 Fed. 819, 32 C. C. A. 355.

See 28 Cent. Dig. tit. "Insurance," § 942.

45. Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399; Hill *v.* Commercial Union Ins. Co., 164 Mass. 406, 41 N. E. 657; Richards *v.* Continental Ins. Co., 83 Mich. 508, 47 N. W. 350, 21 Am. St. Rep. 611.

Nor is a payment of any sum under an agreement to compromise a waiver. Baer *v.* Phœnix Ins. Co., 4 Bush (Ky.) 242.

Where the insurer issues a policy on a false representation, rendering the policy void according to its terms, the fact that the insurer pays to the holder a sum of money in compromise of a claim against it, after notice to it by creditors of the holder that they claim an interest in the money due on

(c) *Payment or Its Equivalent.* If the insurer with knowledge of the breach of a condition pays the amount of the policy into court upon an interpleader,[46] or pays or partially pays any loss under the policy,[47] it has recognized the policy as still in existence and must be considered to have waived its defenses, unless the policy was severable so that under the law it would be only forfeitable in part.[48] An election by an insurance company to rebuild or repair with knowledge of the right to declare a forfeiture is a waiver of all defenses of every kind which otherwise it might assert.[49]

(d) *Sale of Salvage.* If the insurer with knowledge of a right to forfeit sells the salvage from the fire it thereby waives its defense.[50]

(e) *Contrary Stipulations.* When the policy expressly provides that an appraisement of the damage,[51] an examination of the books[52] or of the insurer,[53] or of the property insured,[54] or an arbitration to be binding as to the amount of the loss only,[55] shall not amount to a waiver,[56] in general, no waiver results, at least if the insured has incurred no detriment so as to estop the insurer from asserting the provision. If the insured signs an express agreement that participation in adjustment or that demanding or accepting proofs of loss shall not be deemed a waiver, the courts regard this as a reasonable contract and no waiver results.[57]

the policy, does not render the insurer liable on the policy, in an action by the creditors of the holder. Dunham *v.* Citizens' Ins. Co., 34 Wash. 205, 75 Pac. 804.

46. Clogg *v.* McDaniel, 89 Md. 416, 43 Atl. 795.

47. *Massachusetts.*— Silloway *v.* Neptune Ins. Co., 12 Gray 73.

Ohio.— Sun Mut. Ins. Co. *v.* Hock, 8 Ohio Cir. Ct. 341, 4 Ohio Cir. Dec. 553.

Rhode Island.— Phetteplace *v.* British, etc., Mar. Ins. Co., 23 R. I. 26, 49 Atl. 33.

South Carolina.— Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. W. 722.

Tennessee.— Westchester F. Ins. Co. *v.* McAdoo, (Ch. App. 1899) 57 S. W. 409.

Wisconsin.— Sherman *v.* Madison Mut. Ins. Co., 39 Wis. 104.

See 28 Cent. Dig. tit. "Insurance," § 1085.

Where the policy provides for payment thereof to the mortgagee despite any breaches of condition by the mortgagor, and for subrogation thereupon to the rights of the mortgagee in the mortgage, payment to the mortgagee made pursuant thereto is not a waiver by the insurer. Wisconsin Nat. Loan, etc., Assoc. *v.* Webster, 119 Wis. 476, 97 N. W. 171.

48. If this be the case a payment upon the non-forfeitable portion will not waive a defense existing as to the remainder of the risk. Elliott *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 5 Am. Rep. 323.

49. American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533; Bersche *v.* St. Louis Mut. F. & M. Ins. Co., 31 Mo. 555; Ætna Ins. Co. *v.* Langan, 108 Fed. 985, 48 C. C. A. 174.

50. Here there is a true estoppel as the insured incurs a detriment. Devils Lake First Nat. Bank *v.* Lancashire Ins. Co., 65 Minn. 462, 68 N. W. 1.

A sale even without knowledge may amount to a waiver if the insurer after obtaining such knowledge fails so far as possible to restore the insured to his former position. Devils Lake First Nat. Bank *v.* Manchester F. Assur. Co., 64 Minn. 96, 66 N. W. 136.

It is otherwise if it is provided by the policy that such shall not be the effect, but that any sale is for the benefit of all concerned. Schuyler *v.* Phœnix Ins. Co., 134 N. Y. 345, 32 N. E. 25 [*affirming* 56 Hun 493, 10 N. Y. Suppl. 205].

51. Queen Ins. Co. *v.* Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51; Holbrook *v.* Baloise F. Ins. Co., 117 Cal. 561, 49 Pac. 555.

52. Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 44 S. W. 464, 39 L. R. A. 789, 67 Am. St. Rep. 900.

53. City Drug Store *v.* Scottish Union, etc., Ins. Co., (Tex. Civ. App. 1898) 44 S. W. 21; Oshkosh Match Works *v.* Manchester F. Assur. Co., 92 Wis. 510, 66 N. W. 525.

54. Walker *v.* Phœnix Ins. Co., 89 Hun (N. Y.) 333, 35 N. Y. Suppl. 374; Hill *v.* London Assur. Corp., 16 Daly (N. Y.) 120, 9 N. Y. Suppl. 500.

55. Briggs *v.* Fireman's Fund Ins. Co., 65 Mich. 52, 31 N. W. 616; Johnson *v.* American Ins. Co., 41 Minn. 396, 43 N. W. 59; Johnson *v.* Orient Ins. Co., 41 Minn. 400, 43 N. W. 1151.

An arbitration effects a waiver, although the policy provides that no act done "in investigating the loss" shall have such an effect. Elliott *v.* Merchants', etc., F. Ins. Co., 109 Iowa 39, 79 N. W. 452.

56. Gibson Electric Co. *v.* Liverpool, etc., Ins. Co., 10 N. Y. App. Div. 225, 41 N. Y. Suppl. 675.

But if the insurer has also demanded a premium, or has made an alteration to correct a mistake and asserted that the loss would be paid, there is evidence from which the jury may properly infer a waiver. Walker *v.* Phœnix Ins. Co., 156 N. Y. 628, 51 N. E. 392.

57. *Minnesota.*— Fletcher *v.* Minneapolis F. & M. Mut. Ins. Co., 80 Minn. 152, 83 N. W. 29.

Missouri.— Keet-Rountree Dry-Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469.

E. Knowledge and Notice — 1. General Rules — a. Implied Notice. It has already been stated to be a fundamental principle of the doctrine of waiver in insurance law that knowledge of a breach of condition is essential before a waiver can be predicated of the acts of an insurer.[58] While in general such knowledge must be actual,[59] it has been stated that the insurer waives a forfeiture for breach of a condition precedent when he possessed information which if pursued would have led to actual knowledge when he issued the policy.[60] The insurer is chargeable as with actual notice with knowledge of all matters disclosed in the application or in the form of the policy itself.[61] All matters necessarily implied[62]

North Carolina.— Hayes *v.* U. S. Fire Ins. Co., 132 N. C. 702, 44 S. E. 404.

Rhode Island.— See Whipple *v.* North British, etc., F. Ins. Co., 11 R. I. 139.

South Carolina.— Joye *v.* South Carolina Mut. Ins. Co., 54 S. C. 371, 32 S. E. 446.

Texas.— Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 19 Tex. Civ. App. 338, 48 S. W. 559.

See 28 Cent. Dig. tit. "Insurance," § 1078 *et seq.*

Contra.— Corson *v.* Anchor Mut. F. Ins. Co., 112 Iowa 641, 85 N. W. 806.

If the insured refuses to sign such an agreement the statement of the insurer's agent that he is not waiving any of the company's defenses by requiring the insured to produce a list of destroyed property will not on such production prevent an estoppel. German-American Ins. Co. *v.* Evants, 25 Tex. Civ. App. 300, 61 S. W. 536 [*affirmed* in 94 Tex. 490, 62 S. W. 417].

Such an agreement is not to be extended by implication beyond its exact terms, and the insurer may be estopped if its conduct passes the stage of mere investigation and amounts to an agreement of settlement. Pennsylvania F Ins. Co. *v.* Hughes, 108 Fed. 497, 47 C. C. A. 459.

Further as to non-waiver stipulations see *infra*, XVII, D, 6.

58. See *supra*, XIV, A, 3.

59. Thus a mere opportunity for the discovery of the breach does not itself amount to knowledge.

Alabama.— Pope *v.* Glens Falls Ins. Co., 136 Ala. 670, 34 So. 29.

Connecticut.— Hoxie *v.* Home Ins. Co., 32 Conn. 21, 85 Am. Dec. 240.

District of Columbia.— Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas. 245, 40 L. R. A. 358.

Missouri.— Gibson *v.* Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Digby *v.* American Cent. Ins. Co., 3 Mo. App. 603.

New York.— Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 801, 5 L. R. A. 638.

Texas.— Ætna Ins. Co. *v.* Holcomb, 89 Tex. 404, 34 S. W. 915.

Washington.—Bartlett *v.* British American Assur. Co., 35 Wash. 525, 77 Pac. 812.

United States.— Waller *v.* Northern Assur. Co., 10 Fed. 232, 2 McCrary 637.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

The mailing of a letter giving notice is not notice to the insurer unless actually received. Plath *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 23 Minn. 479, 23 Am. Rep. 697; McSparran *v.* Southern Mut. F. Ins. Co., 193 Pa. St. 184, 44 Atl. 317.

60. Fame Ins. Co. *v.* Mann, 4 Ill. App. 485; Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

The insurer was held to have implied notice of the uses and purposes of the "Crystal Palace," an exposition building of New York city, when there was a general public knowledge of its character when the policy was issued. New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537.

A rumor coming to the knowledge of a soliciting agent was held not to amount to notice in Shimp *v.* Cedar Rapids Ins. Co., 26 Ill. App. 254.

61. Bell *v.* Fireman's Ins. Co., 5 Rob. (La.) 446; McGugan *v.* Manufacturers', etc., Mut. F. Ins. Co., 29 U. C. C. P. 494.

If the application is rejected or no application is made and the policy is issued, it will be presumed to have been issued on the knowledge of the company. Philadelphia Tool Co. *v.* British-American Assur. Co., 132 Pa. St. 236, 19 Atl. 77, 19 Am. St. Rep. 596.

Notice of title.— If the insurer is put on inquiry as to the insured's title by the latter's answers in his application, he is held to have knowledge of the facts therein. Clawson *v.* Citizens' Mut. F. Ins. Co., 121 Mich. 591, 80 N. W. 573, 80 Am. St. Rep. 538. And see Weed *v.* London, etc., F. Ins. Co., 116 N. Y. 106, 22 N. E. 229.

Notice of interest.—An application for consent to an assignment of the policy is notice of an interest on the part of the applicant in the property insured. Hooper *v.* Hudson River F. Ins. Co., 17 N. Y. 424. And he is charged with notice that another person than the insured has rights in the policy from the fact that it is so payable. Fame Ins. Co. *v.* Mann, 4 Ill. App. 485.

Where an insurance company waives a written application and issues a policy based on its personal knowledge of the property, and receives the premium therefor, it thereby waives an anti-mortgage clause of which insured had no knowledge until after the loss. Georgia Home Ins. Co. *v.* Holmes, 75 Miss. 390, 23 So. 183, 65 Am. St. Rep. 611.

62. But only of such matters as are reasonably implied is he charged with notice. Philadelphia Fire Assoc. *v.* Flournoy, 84 Tex. 632, 19 S. W. 793, 31 Am. St. Rep. 89; Northern Assur. Co. *v.* Flournoy, (Tex. Sup. 1892) 19 S. W. 795.

in the description of the property insured are likewise chargeable to the knowledge of the insurer.[63]

b. Constructive Notice. An insurer is not chargeable with constructive notice of the existence of an encumbrance or transfer, although it be duly recorded, for the registry laws are not intended for such purposes.[64]

c. Actual Notice. Of course the insurer is to be charged with notice and to be affected by whatever result the law attaches thereto, when the knowledge is actual.[65]

2. Knowledge of Officers and Agents[66] — a. At or Prior to Issuance of Policy. If an officer[67] or an agent of an insurer, whether he be general[68] or possessing limited powers only,[69] during the course of his employment prior to or con-

63. McFarland *v.* St. Paul F. & M. Ins. Co., 46 Minn. 519, 49 N. W. 253.

But he is not so chargeable that the same property is being insured over again when the descriptions vary. Ordway *v.* Chace, 57 N. J. Eq. 478, 42 Atl. 149.

64. *Georgia.*— Orient Ins. Co. *v.* Williamson, 98 Ga. 464, 25 S. E. 560.

Indiana.— Phœnix Ins. Co. *v.* Overman, 21 Ind. App. 516, 52 N. E. 771; Shaffer *v.* Milwaukee Mechanics' Ins. Co., 17 Ind. App. 204, 46 N. E. 557; Milwaukee Mechanics' Ins. Co. *v.* Niewedde, 12 Ind. App. 145, 39 N. E. 757.

Iowa.— Wicke *v.* Iowa State Ins. Co., 90 Iowa 4, 57 N. W. 632.

Maryland.— Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673.

New Jersey.— Ordway *v.* Chace, 57 N. J. Eq. 478, 42 Atl. 149.

Pennsylvania.— White *v.* Iron City Mut. F. Ins. Co., 6 Pa. Dist. 655.

Texas.— Ætna Ins. Co. *v.* Holcomb, 89 Tex. 404, 34 S. W. 915 [*reversing* (Civ. App. 1895) 31 S. W. 1086]; U. S. Ins. Co. *v.* Moriarty, (Civ. App. 1896) 36 S. W. 943.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

Constructive notice is a doctrine in no wise applicable to the doctrine of waiver. Turnbill *v.* Home F. Ins. Co., 83 Md. 312, 34 Atl. 875.

A statute requiring insurer to examine the property insured does not charge it with knowledge of a vacancy existing, the statute being intended only to govern with reference to values. Aiple *v.* Boston Ins. Co., 92 Minn. 337, 100 N. W. 8.

Publication in a newspaper as an item of news is insufficient to establish that a subscriber had actual knowledge of such mortgage. American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068.

65. See cases cited *infra*, this note.

Parol statements made by the insured are thus admissible to charge the insurer with such notice. Orient Ins. Co. *v.* McKnight, 96 Ill. App. 525 [*affirmed* in 197 Ill. 190, 64 N. E. 339]; Carey *v.* Home Ins. Co., 97 Iowa 619, 66 N. W. 920.

Insurer is presumed to have retained memory of matters of which it has once had knowledge. Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285; New York *v.* Exchange F. Ins. Co., 9 Bosw. (N. Y.) 424; Candy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655; Queen Ins. Co. *v.* May, (Tex. Civ. App. 1897) 43 S. W. 73.

66. Estoppel or waiver by agent see *supra*, XIV, B, 1, a.

67. Their knowledge is the knowledge of the insurer. McGurk *v.* Metropolitan L. Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169; Loomis *v.* Jefferson County Patrons' F. Relief Assoc., 92 N. Y. App. Div. 601, 87 N. Y. Suppl. 5.

68. *Kansas.*— Hartford F. Ins. Co. *v.* McCarthy, 69 Kan. 555, 77 Pac. 90; Capitol Ins. Co. *v.* Pleasanton Bank, 50 Kan. 449, 31 Pac. 1069.

Kentucky.— Hartford F. Ins. Co. *v.* Haas, 9 S. W. 720, 10 Ky. L. Rep. 573, 8 Ky. L. Rep. 610.

Maryland.— Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29.

New York.— McGuire *v.* Hartford F. Ins. Co., 158 N. Y. 680, 52 N. E. 1124 [*affirming* 7 N. Y. App. Div. 575, 40 N. Y. Suppl. 300]; Broadhead *v.* Lycoming F. Ins. Co., 23 Hun 397.

Virginia.— Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. 389, 26 Am. Rep. 364.

West Virginia.— Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101.

Canada.— Reddick *v.* Saugeen Mut. F. Ins. Co., 15 Ont. App. 363.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

69. *Alabama.*— Pope *v.* Glens Falls Ins. Co., 130 Ala. 356, 30 So. 496.

Arkansas.— State Mut. Ins. Co. *v.* Latourette, 71 Ark. 242, 74 S. W. 300, 100 Am. St. Rep. 63.

Colorado.— Michigan F. & M. Ins. Co. *v.* Wich, 8 Colo. App. 409, 46 Pac. 687.

Georgia.— Phenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. 779.

Illinois.— American Ins. Co. *v.* Walston, 111 Ill. App. 133.

Iowa.— Gurnett *v.* Atlas Mut. Ins. Co., 124 Iowa 547, 100 N. W. 542; Fitchner *v.* Fidelity Mut. F. Assoc., 103 Iowa 276, 72 N. W. 530.

Kentucky.— Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Germania Ins. Co. *v.* Wingfield, 57 S. W. 456, 22 Ky. L. Rep. 455; Citizens' Ins. Co. *v.* Crist, 56 S. W. 658, 22 Ky. L. Rep. 47.

temporaneously with the completion of the contract, acquires any information affecting the risk or becomes cognizant of any breach of a condition precedent or of false or conflicting statements by the insured his knowledge is imputable to the insurer.[70]

Missouri.— Ritchey *v.* Home Ins. Co., 104 Mo. App. 146, 78 S. W. 341; Ayers *v.* Phœnix Ins. Co., 66 Mo. App. 288.

Nebraska.— Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532.

North Carolina.— Horton *v.* Home Ins. Co., 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717.

South Carolina.— Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

Texas.— Continental Fire Assoc. *v.* Norris, 30 Tex. Civ. App. 299, 70 S. W. 769; German Ins. Co. *v.* Everett, 18 Tex. Civ. App. 514, 46 S. W. 95.

Virginia.— Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

Washington.— Hart *v.* Niagara F. Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

United States.— Palatine Ins. Co. *v.* McElroy, 100 Fed. 391, 40 C. C. A. 441.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

Contra.— Reed *v.* Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496; Wilson *v.* Conway F. Ins. Co., 4 R. I. 141.

"Before the execution of a policy of insurance the power and authority of a local and soliciting agent are co-extensive with the business intrusted to his care, and his positive knowledge as to material facts, and his acts and declarations within the purposes and scope of his employment, are obligatory on his principal, unless restricted by limitations well known to the parties with whom he deals at the time of a transaction." West End Hotel, etc., Co. *v.* American F. Ins. Co., 74 Fed. 114, 115.

It is a question for the jury whether the agent had knowledge of the facts or not. Collins *v.* North British Mercantile Ins. Co., 118 Mich. 281, 76 N. W. 487; Sitler *v.* Spring Garden Mut. F. Ins. Co., 14 York Leg. Rec. (Pa.) 153. And see also Morris *v.* Orient Ins. Co., 106 Ga. 472, 33 S. E. 430.

Mere casual conversations afford slight proof of actual notice. Connecticut F. Ins. Co. *v.* Smith, 10 Colo. App. 121, 51 Pac. 170; Sykes *v.* Perry County Mut. F. Ins. Co., 34 Pa. St. 79; Keith *v.* Royal Ins. Co., 117 Wis. 531, 94 N. W. 295.

70. *Alabama.*— Cowart *v.* Capital City Ins. Co., 114 Ala. 356, 22 So. 574; Phœnix Ins. Co. *v.* Copeland, 90 Ala. 386, 8 So. 48; Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379; Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500; Williamson *v.* New Orleans Ins. Assoc., 84 Ala. 106, 4 So. 36.

California.— Breedlove *v.* Norwich Union F. Ins. Soc., 124 Cal. 164, 56 Pac. 770; (1898) 54 Pac. 93; Fishbeck *v.* Phenix Ins. Co., 54 Cal. 422.

Florida.— Hartford F. Ins. Co. *v.* Redding, (1904) 37 So. 62.

Georgia.— Swain *v.* Macon F. Ins. Co., 102 Ga. 96, 29 S. E. 147; Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457; Clay *v.* Phœnix Ins. Co., 97 Ga. 44, 25 S. E. 417.

Illinois.— Security Trust Co. *v.* Tarpey, 182 Ill. 52, 54 N. E. 1041 [*affirming* 80 Ill. App. 378]; Lumbermen's Mut. Ins. Co. *v.* Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Mechanics' Ins. Co. *v.* Hodge, 149 Ill. 298, 37 N. E. 51 [*affirming* 46 Ill. App. 479]; St. Paul F. & M. Ins. Co. *v.* Wells, 89 Ill. 82; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Danvers Mut. F. Ins. Co. *v.* Schertz, 95 Ill. App. 656; Rockford Ins. Co. *v.* Cline, 72 Ill. App. 495.

Iowa.— Born *v.* Home Ins. Co., 120 Iowa 299, 94 N. W. 849; McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38; Doon Independent School Dist. *v.* Fidelity Ins. Co., 113 Iowa 65, 84 N. W. 956; Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261; Frane *v.* Burlington Ins. Co., 87 Iowa 288, 54 N. W. 237; Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Key *v.* Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614; Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870; Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652; Jordan *v.* State Ins Co., 64 Iowa 216, 19 N. W. 917; Boetcher *v.* Hawkeye Ins. Co., 47 Iowa 253.

Kentucky.— New York Mut. F. Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. Rep. 1944; Germania Ins. Co. *v.* Ashby, 65 S. W. 611, 23 Ky. L. Rep. 1564; Teutonic Ins. Co. *v.* Howell, 54 S. W. 852, 21 Ky. L. Rep. 1245.

Maine.— Hilton *v.* Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412.

Michigan.— Duby *v.* Farmers' Mut. F. Ins. Co., 133 Mich. 661, 95 N. W. 720; Beebe *v.* Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 32 Am. St. Rep. 519, 18 L. R. A. 481; Gristock *v.* Royal Ins. Co., 87 Mich. 428, 49 N. W. 634, 84 Mich. 161, 47 N. W. 549.

Minnesota.— Andrus *v.* Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200.

Mississippi.— Phœnix Ins. Co. *v.* Randle, 81 Miss. 720, 33 So. 500; Southern Ins. Co. *v.* Stewart, (1901) 30 So. 755; Home Ins. Co. *v.* Gibson, 72 Miss. 58, 17 So. 13.

Missouri.— De Soto *v.* American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1, 74 S. W. 1; Brennen *v.* Connecticut F. Ins. Co., 99 Mo. App. 718, 74 S. W. 406; Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139; O'Brien *v.* Greenwich Ins. Co., 95 Mo. App. 301, 68 S. W. 976; Ricky *v.* German Guarantee Town Mut. F. Ins. Co., 79 Mo. App. 485; Hackett *v.* Philadelphia Underwriters, 79 Mo. App. 16; Cagle *v.* Chillicothe Town Mut. F. Ins. Co., 78 Mo. App. 431; Williams *v.* Bankers', etc., Town Mut. F. Ins. Co., 73 Mo. App. 607; Prender-

b. After Issuance of Policy. If a general agent,[71] that is, one with power himself personally to issue policies or to supervise risks, subsequently to the taking out of a policy, acquires knowledge of a breach of condition by the insured, his knowledge is to be imputed to the insurer.[72] If he be an agent only to solicit

gast *v.* Dwelling House Ins. Co., 67 Mo. App. 426.

Nebraska.— Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779; German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106.

New Hampshire.— Spalding *v.* New Hampshire F. Ins. Co., 71 N. H. 441, 52 Atl. 858; Patten *v.* Merchants', etc., Mut. F. Ins. Co., 40 N. H. 375; Campbell *v.* Merchants', etc., Mut. F. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324.

New York.— Benjamin *v.* Palatine Ins. Co., 177 N. Y. 588, 70 N. E. 1095; Blass *v.* Agricultural Ins. Co., 162 N. Y. 639, 57 N. E. 1104 [*affirming* 18 N. Y. App. Div. 481, 46 N. Y. Suppl. 392]; Forward *v.* Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637 [*affirming* 66 Hun 546, 21 N. Y. Suppl. 664]; Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285; Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525; Stage *v.* Home Ins. Co., 76 N. Y. App. Div. 509, 78 N. Y. Suppl. 555; Brooks *v.* Erie F. Ins. Co., 76 N. Y. App. Div. 275, 78 N. Y. Suppl. 748; McGuire *v.* Hartford F. Ins. Co., 7 N. Y. App. Div. 575, 40 N. Y. Suppl. 300; Robbins *v.* Springfield F. & M. Ins. Co., 79 Hun 117, 29 N. Y. Suppl. 513 [*affirmed* in 149 N. Y. 477, 44 N. E. 159]; Woodward *v.* Republic F. Ins. Co., 32 Hun 365; Patridge *v.* Commercial F. Ins. Co., 17 Hun 95; Holmes *v.* Drew, 16 Hun 491; Alexander *v.* Germania F. Ins. Co., 2 Hun 665, 5 Thomps. & C. 208; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624; Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. 191; Bear *v.* Atlanta Home Ins. Co., 34 Misc. 613, 70 N. Y. Suppl. 581; Brothers *v.* California Ins. Co., 3 N. Y. Suppl. 89 [*affirmed* in 121 N. Y. 659, 24 N. E. 1092].

North Carolina.— Gerringer *v.* North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Clapp *v.* Farmers' Mut. F. Ins. Assoc., 126 N. C. 388, 35 S. E. 617.

Ohio.— Hilliard *v.* Caledonia Ins. Co., 5 Ohio S. & C. Pl. Dec. 576, 7 Ohio N. P. 561.

Pennsylvania.— Caldwell *v.* Philadelphia Fire Assoc., 177 Pa. St. 492, 35 Atl. 612; Burson *v.* Philadelphia Fire Assoc., 136 Pa. St. 267, 20 Atl. 401, 20 Am. St. Rep. 919; People's Ins. Co. *v.* Spencer, 53 Pa. St. 353, 91 Am. Dec. 217; Davis *v.* Fireman's Fund Ins. Co., 5 Pa. Super. Ct. 506, 40 Wkly. Notes Cas. 569; Missouri State Ins. Co. *v.* Todd, 4 Wkly. Notes Cas. 243. *Contra,* Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41.

South Carolina.— McBryde *v.* South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769. *Contra,* Himely *v.* South Carolina Ins. Co., 1 Mill 154, 12 Am. Dec. 623.

Texas.— Continental F. Ins. Co. *v.* Cummings, (Civ. App. 1903) 78 S. W. 378 [*reversed* in (Sup. 1904) 81 S. W. 705; Underwriters Fire Assoc. *v.* Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603; Philadelphia Fire Assoc. *v.* Bynum, (Civ. App. 1898) 44 S. W. 579.

Utah.— Osborne *v.* Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103.

Vermont.— Tarbell *v.* Vermont Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533.

Virginia.— Goode *v.* Georgia Home Ins. Co., 92 Va. 392, 23 S. E. 744, 53 Am. St. Rep. 817, 30 L. R. A. 842.

Wisconsin.— Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

United States.— Queen Ins. Co. of America *v.* Union Bank, etc., Co., 111 Fed. 697, 49 C. C. A. 555; Northern Assur. Co. *v.* Grand View Bldg. Assoc., 101 Fed. 77, 41 C. C. A. 207; McElroy *v.* British America Assur Co., 94 Fed. 990, 36 C. C. A. 615; London, etc., F. Ins. Co. *v.* Fischer, 92 Fed. 500, 34 C. C. A. 503; Glover *v.* National F. Ins. Co., 85 Fed. 125, 30 C. C. A. 95; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183.

Canada.— Quinlan *v.* Union F. Ins. Co., 8 Ont. App. 376.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*; and cases cited *infra,* XIV, E.

When the insurer is a foreign company the rule has been emphasized. Keenan *v.* Missouri State Mut. Ins. Co., 12 Iowa 126; Chamberlain *v.* British-American Assur. Co., 80 Mo. App. 589; Coldwater *v.* Liverpool, etc., Ins. Co., 39 Hun (N. Y.) 176 [*affirmed* in 109 N. Y. 618, 15 N. E. 895]; Daniels *v.* Citizens' Ins. Co., 5 Fed. 425, 10 Biss. 116.

With reference to the agents of mutual companies the rule is the same. Rickey *v.* German Guarantee Town Mut. F. Ins. Co., 79 Mo. App. 485.

Knowledge acquired by one member of a firm in prior transactions for the insurer at a time long before the policy in suit was applied for is not notice to the insurer when another member of the firm actually issued the policy. Queen Ins. Co. *v.* May, (Tex. Civ. App. 1896) 35 S. W. 829.

In Massachusetts and New Jersey parol statements are not admissible to alter in any way the written agreement. As a consequence in such states the knowledge of an agent of matters not contained in the policy is wholly immaterial. Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271. See *supra,* p. 786 note 61.

71. Who is a general agent see *supra,* XIV, B, 1, b, (I); and INSURANCE.

72. *Arkansas.*— Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959.

California.— Fishbeck *v.* Phenix Ins. Co., 54 Cal. 422.

insurance, deliver the policy, and collect the premium, his employment with respect to a given policy is terminated by the completion of such acts, and consequently knowledge obtained by him thereafter is acquired beyond the course of his employment and is not the knowledge of the insurer.[73]

c. How Acquired — (I) *GENERALLY.* Any knowledge of the agent to be considered in law that of the insurer must have been acquired in the course of his business and the company is not chargeable with information acquired by its agent in transactions without the agency,[74] unless it appears that such information was remembered and in the mind of the agent during the time of the transaction upon which the insured claims a waiver.[75]

(II) *AS AGENT OF ANOTHER INSURER.* If the agent subsequently to the issuance of the policy in suit which prohibits further insurance has written other policies for the same insured for other insurance companies that he represents his knowledge as to the existence of such policies is the knowledge of defendant

Connecticut.— Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

Iowa.— King *v.* Council Bluffs Ins. Co., 72 Iowa 310, 33 N. W. 690.

Maryland.— Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361.

Mississippi.— Rivara *v.* Queen's Ins. Co., 62 Miss. 720.

Missouri.— Millis *v.* Scottish Union, etc., Ins. Co., 95 Mo. App. 211, 68 S. W. 1066.

Nebraska.— Hunt *v.* State Ins. Co., 66 Nebr. 121, 92 N. W. 921; Home F. Ins. Co. *v.* Bernstein, 55 Nebr. 260, 75 N. W. 839; Slobodisky *v.* Phenix Ins. Co., 52 Nebr. 395, 72 N. W. 483; German Ins. Co. *v.* Rounds, 35 Nebr. 752, 53 N. W. 660.

New Jersey.— Combs *v.* Shrewsbury Mut. F. Ins. Co., 34 N. J. Eq. 403.

Texas.— Ætna Ins. Co. *v.* Eastman, (Civ. App. 1904) 80 S. W. 255.

Wisconsin.— Dick *v.* Equitable F. & M. Ins. Co., 92 Wis. 46, 65 N. W. 742; Gans *v.* St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

73. *Alabama.*— Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163.

Dakota.— Smith *v.* Continental Ins. Co., 6 Dak. 433, 43 N. W. 810.

Illinois.— Shimp *v.* Cedar Rapids Ins. Co., 26 Ill. App. 254.

Iowa.— Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210; Russell *v.* Cedar Rapids Ins. Co., 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538.

Kentucky.— Phœnix Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 122.

Massachusetts.— Harrison *v.* City F. Ins. Co., 9 Allen 231, 85 Am. Dec. 751.

Michigan.— A. M. Todd Co. *v.* Farmers' Mut. F. Ins. Co., (1904) 100 N. W. 442.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Van Os, 63 Miss. 431, 56 Am. Rep. 810; Liverpool, etc., Ins. Co. *v.* Sorsby, 60 Miss. 302.

Missouri.— Hamilton *v.* Aurora F. Ins. Co., 15 Mo. App. 59.

New Hampshire.— Heath *v.* Springfield F. Ins. Co., 58 N. H. 414.

New Jersey.— Martin *v.* Jersey City Ins. Co., 44 N. J. L. 273; Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

New York.— Devens *v.* Mechanics', etc., Ins. Co., 83 N. Y. 168.

North Carolina.— Alspaugh *v.* British-American Ins. Co., 121 N. C. 290, 28 S. E. 415.

Texas.— Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

Compare Insurance Co. of North America *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471; German Ins. Co. *v.* York, 48 Kan. 488, 29 Pac. 586, 30 Am. St. Rep. 313.

An exception has been suggested if the insurer be a foreign corporation. Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453 [*reversing* 7 Ky. L. Rep. 370].

It is immaterial that the insured did not know of the limited extent of the agent's authority. Harrison *v.* City F. Ins. Co., 9 Allen (Mass.) 231, 85 Am. Dec. 751.

The rule is the same if the employment of the agent with reference to the policy in question has ceased with its execution, although he may have had some power to issue policies. Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210.

74. *Arkansas.*— Phœnix Ins. Co. *v.* Flemming, 65 Ark. 54, 44 S. W. 464, 67 Am. St. Rep. 900, 39 L. R. A. 789.

Minnesota.— St. Paul F. & M. Ins. Co. *v.* Parsons, 47 Minn. 352, 50 N. W. 240.

Pennsylvania.— Sitler *v.* Spring Garden Mut. F. Ins. Co., 18 Pa. Super. Ct. 139.

Texas.— Queen Ins. Co. *v.* May, (Civ. App. 1896) 35 S. W. 829; Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., 4 Tex. App. Civ. Cas. § 31, 15 S. W. 34.

Vermont.— Tarbell *v.* Vermont Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533.

United States.— Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 18 C. C. A. 203.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

75. Stennett *v.* Pennsylvania F. Ins. Co., 68 Iowa 674, 28 N. W. 12; McDonald *v.* Phil-

insurer, although the act be in behalf of a different principal, provided only that he be an agent of the type whose knowledge ever is imputable to his principal.[76] However, that he has acquired knowledge of material facts prior to the issuance of the policy in suit, while acting as the agent of another insurer, gives rise to no different rule than an acquisition of knowledge in any other employment.[77] Knowledge thus acquired contemporaneously is imputable to both insurers.[78]

d. Must Be Agent of Insurer[79] — (i) *In General.* If the person whose knowledge is alleged to have been that of the insurer was not in fact the agent of the insurer, his knowledge is immaterial.[80] An attempt, however, on the part of the insurer to make any person who acts in obtaining the policy an agent of the insured by the assertion of such a fact in the policy is not recognized in general as changing the actual situation and relationship.[81] Where the courts have held the contrary rule, statutory enactments have frequently settled the law in accordance with the foregoing statement.[82] Although some jurisdictions uphold the provisions of a policy requiring that all waivers must be indorsed thereon, yet, inasmuch as the mere fact of knowledge by the agent is not itself a waiver, but, being imputed to the principal, is only a basis from which its subsequent actions are to be judged, such provisions requiring indorsement should have no effect upon the doctrines herein treated;[83] but some courts say that the

adelphia Fire Assoc., 93 Wis. 348, 67 N. W. 719; Stevens *v.* Queen Ins. Co., 81 Wis. 335, 51 N. W. 555, 29 Am. St. Rep. 905; Shafer *v.* Phœnix Ins. Co., 53 Wis. 361, 10 N. W. 381.

76. *Iowa.*— Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493.

Kentucky.— Von Bories *v.* United L., etc., Ins. Co., 8 Bush 133.

Minnesota.— Brandup *v.* St. Paul F. & M. Ins. Co., 27 Minn. 393, 7 N. W. 735.

Missouri.— Rickey *v.* German Guarantee Town Mut. F. Ins. Co., 79 Mo. App. 485; McCollum *v.* Liverpool, etc., Ins. Co., 67 Mo. App. 66.

New Hampshire.— Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110.

Utah.— West *v.* Norwich Union F. Ins. Soc., 10 Utah 442, 37 Pac. 685.

See 28 Cent. Dig. tit. "Insurance," § 972.

77. Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379; Mellen *v.* Hamilton F. Ins. Co., 17 N. Y. 609; Vilas *v.* New York Cent. Ins. Co., 9 Hun (N. Y.) 121. And see also Forbes *v.* Agawam Mut. F. Ins. Co., 9 Cush. (Mass.) 470.

78. Brandup *v.* St. Paul F. & M. Ins. Co., 27 Minn. 393, 7 N. W. 735.

79. Agent for insured or insurer see *supra*, X, A, 2, e, (III), (B), (2); and INSURANCE.

80. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; McFarland *v.* Peabody Ins. Co., 6 W. Va. 425.

If the agent has ceased to represent the insurer notice to him is ineffectual. Smith *v.* Continental Ins. Co., 6 Dak. 433, 43 N. W. 810. But the contrary was held in Whitney *v.* American Ins. Co., (Cal. 1899) 56 Pac. 50, where the notice was given to the person who signed the policy when it was issued and whom the insured still supposed was agent.

81. *Alabama.*— Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202.

Connecticut.— Bebee *v.* Hartford County Mut. F. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553.

Illinois.— Union Ins. Co. *v.* Chipp, 93 Ill. 96.

Kentucky.— Springfield F. & M. Ins. Co. *v.* McNulty, 8 Ky. L. Rep. 876.

Missouri.— Wooldridge *v.* German Ins. Co., 69 Mo. App. 413.

New York.— Patridge *v.* Commercial F. Ins. Co., 17 Hun 95.

Washington.— Hart *v.* Niagara F. Ins. Co., 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

Contra.—Abbott *v.* Shawmut Mut. F. Ins. Co., 3 Allen (Mass.) 213; Philadelphia Fire Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617.

82. Hartford F. Ins. Co. *v.* Walker, (Tex. Civ. App. 1901) 60 S. W. 820 [*reversed* in 94 Tex. 473, 61 S. W. 711]; Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227; Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91; Sias *v.* Roger Williams Ins. Co., 8 Fed. 183. But see Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. 867, under Texas statute.

83. *Maryland.*— Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29, 63 Am. St. Rep. 499.

Missouri.— Ross-Langford *v.* Mercantile Town Mut. Ins. Co., 97 Mo. App. 79, 71 S. W. 720; Thackery Min., etc., Co. *v.* American F. Ins. Co., 62 Mo. App. 293.

North Carolina.— Grabbs *v.* Farmers' Mut. F. Ins. Assoc., 125 N. C. 389, 34 S. E. 503.

Texas.— Continental Fire Assoc. *v.* Norris, 30 Tex. Civ. App. 299, 70 S. W. 769. But see Phœnix Ins. Co. *v.* Dunn, (Civ. App. 1897) 41 S. W. 109.

Wisconsin.— Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227; Hobkirk *v.* Phœnix Ins. Co., 102 Wis. 13, 78 N. W. 160; St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805; Roberts *v.* Continental Ins. Co., 41 Wis. 321. By statute the rule is changed. Straker *v.* Phœnix Ins. Co.,

knowledge of the agent under such circumstances is not the knowledge of the principal.[84]

(II) *Agent's Clerk or Subagent.* If the agent be of the type that his knowledge is to be imputed to the insurer, the knowledge of his clerk or subagent acquired in his employment during or subsequently to the issuance of the policy is likewise attributable to the insurer.[85]

(III) *Insurance Broker.* An insurance broker in fact exercising an independent employment is not the agent of the insurer but the agent of the insured, and consequently his knowledge either contemporaneously with or subsequent to the issuance of the policy is not the knowledge of the insurer.[86]

3. Effect of Knowledge — a. At Time of Issuance of Policy — (I) *Existing and Presumably Permanent Breach of Condition* — (A) *In General.* If the insurer has knowledge at the time the policy is issued — and for this purpose the knowledge of its agent is the knowledge of the principal[87] — that matters material to the risk are falsely stated in the application, such misrepresentations will not avoid the policy and the insurer can take no advantage thereof.[88] And

101 Wis. 413, 77 N W. 752; Bourgeois *v.* Northwestern Nat. Ins. Co., 86 Wis. 606, 57 N. W. 347.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

84. German Ins. Co *v.* Heiduk, 30 Nebr. 288, 46 N. W. 481, 27 Am. St. Rep. 402; Woodside Brewing Co. *v.* Pacific F. Ins. Co., 159 N. Y. 549, 54 N. E. 1095; Whited *v.* Germania F. Ins. Co., 76 N. Y. 415, 32 Am. Rep. 330; Tompkins *v.* Hartford F. Ins. Co., 22 N. Y. App. Div. 380, 49 N. Y. Suppl. 184; Warren *v.* Phœnix Ins. Co., 19 N. Y. Suppl. 990. But see Richmond *v.* Niagara F. Ins. Co., 79 N. Y. 230; Stage *v.* Home Ins. Co., 76 N. Y. App. Div. 509, 78 N. Y. Suppl. 555; Phœnix F. Ins. Co. *v.* Vorhis, 1 Ohio Cir. Ct. 326, 1 Ohio Cir. Dec. 180; Hook *v.* Berks County Mut. F. Ins. Co., 160 Pa. St. 229, 28 Atl. 690; Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41.

85. *Iowa.*— Bennett *v.* Council Bluffs Ins. Co., 70 Iowa 600, 31 N. W. 948.

Michigan.— Steele *v.* German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

New York.— Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Arff *v.* Star F. Ins. Co., 125 N. Y. 57, 25 N. E. 1073, 21 Am. St. Rep. 721, 10 L. R. A. 609.

North Carolina.— Bergeron *v.* Pamlico Ins., etc., Co., 111 N. C. 45, 15 S. E. 883.

Texas.— Phœnix Ins. Co. *v.* Ward, 7 Tex. Civ. App. 13, 26 S. W. 763.

Vermont.— Mullin *v.* Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 Atl. 817.

See 28 Cent. Dig. tit. "Insurance," § 973.

Thus if one insurance agent procures insurance but requests defendant's agent to take a part thereof, the prior agent's knowledge is that of defendant. Ahlberg *v.* German Ins. Co., 94 Mich. 259, 53 N. W. 1102; Turner *v.* Providence-Washington Ins. Co., 86 Mo. App. 387. But see otherwise Parrish *v.* Rosebud Min., etc., Co., 140 Cal. 635, 74 Pac. 312.

86. *California.*— Parrish *v.* Rosebud Min., etc., Co., 140 Cal. 635, 74 Pac. 312, (1903) 71 Pac. 694.

Illinois.— Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590; Ben Franklin Ins. Co. *v.* Weary, 4 Ill. App. 74; Lycoming F. Ins. Co. *v.* Ruben, 8 Chic. Leg. N. 150.

Missouri.— Lange *v.* Lycoming F. Ins. Co., 3 Mo. App. 591.

New York.— Allen *v.* German-American Ins. Co., 123 N. Y. 6, 25 N. E. 309 [*affirming* 3 N. Y. Suppl. 170]; Devens *v.* Mechanics', etc., Ins. Co., 83 N. Y. 168; Mellen *v.* Hamilton F. Ins. Co., 17 N. Y. 609; McGrath *v.* Home Ins. Co., 88 N. Y. App. Div. 153, 84 N. Y. Suppl. 374, 13 N. Y. Annot. Cas. 469.

Texas.— East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713.

Virginia.— Philadelphia Fire Assoc. *v.* Hogwood, 82 Va. 342, 4 S. E. 617.

United States.— Crane *v.* City Ins. Co., 3 Fed. 558, 2 Flipp. 576.

Canada.— Samo *v.* Gore Dist. Mut. F. Ins. Co., 26 U. C. C. P. 405.

See 28 Cent. Dig. tit. "Insurance," § 974.

But the ultimate inquiry must always be whether the alleged broker be in fact such or the agent of the insurer. German Ins. Co. *v.* Everett, (Tex. Civ. App. 1896) 36 S. W. 125; Mullin *v.* Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 Atl. 817. See Michael *v.* Nashville Mut. Ins. Co., 10 La. Ann. 737.

87. See *supra*, XIV, E, 2.

88. *Arkansas.*— State Mut. Ins. Co. *v.* Latourette, 71 Ark. 242, 74 S. W. 300, 100 Am. St. Rep. 63.

Colorado.— American Cent. Ins. Co. *v.* Donlon, 16 Colo. App. 416, 66 Pac. 249.

Connecticut.— Beehe *v.* Hartford County Mut. F. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553.

Georgia.— Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457.

Iowa.— Anson *v.* Winnesheik Ins. Co., 23 Iowa 84.

Kentucky.— London, etc., F. Ins. Co. *v.* Gerteisen, 51 S. W. 617, 21 Ky. L. Rep. 471; Phœnix Ins. Co. *v.* Angel, 38 S. W. 1067, 18 Ky. L. Rep. 1034; Western Assur. Co. *v.* Rector, 7 Ky. L. Rep. 523.

this is true, although all representations are expressly made warranties by the terms of the policy.[89] It is immaterial that the policy provides that all variations of the contract from the printed conditions shall be indorsed thereon or written therein.[90]

Minnesota.— Andrus *v.* Maryland Casualty Co., 91 Minn. 358, 98 N. W. 200.

Missouri.— Ayres *v.* Phœnix Ins. Co., 66 Mo. App. 288.

New Hampshire.— Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110; Patten *v.* Merchants', etc., Mut. F. Ins. Co., 40 N. H. 375.

New York.— Cross *v.* National F. Ins. Co., 132 N. Y. 133, 30 N. E. 390 [*affirming* 57 Hun 586, 11 N. Y. Suppl. 948]; Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285; Benjamin *v.* Palatine Ins. Co., 80 N. Y. App. Div. 260, 80 N. Y. Suppl. 256; Wood *v.* American F. Ins. Co., 78 Hun 109, 29 N. Y. Suppl. 250 [*affirmed* in 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733]; Liddle *v.* Market F. Ins. Co., 4 Bosw. 179. See also Solms *v.* Rutgers F. Ins. Co., 4 Abb. Dec. 279, 3 Keyes 416, 5 Abb. Pr. N. S. 201, 2 Transcr. App. 227.

North Carolina.— Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256.

Pennsylvania.— Universal F. Ins. Co. *v.* Swartz, 2 Walk. 34; Uhler *v.* Farmers' American F. Ins. Co., 4 Leg. Gaz. 354.

Texas.— Crescent Ins. Co. *v.* Camp, 71 Tex. 503, 9 S. W. 473; Merchants' Ins. Co. *v.* Dwyer, 1 Tex. Unrep. Cas. 441. See also East Texas F. Ins. Co. *v.* Crawford, (Sup. 1891) 16 S. W. 1068.

Wisconsin.— Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227; Schultz *v.* Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.* See also cases cited *supra*, XIV, B; XIV, E.

The contrary is the rule in Massachusetts (Batchelder *v.* Queen Ins. Co., 135 Mass. 449; Barrett *v.* Union Mut. F. Ins. Co., 7 Cush. 175; Tebbetts *v.* Hamilton Mut. Ins. Co., 3 Allen 569; Lee *v.* Howard F. Ins. Co., 3 Gray 583; Jackson *v.* Massachusetts Mut. F. Ins. Co., 23 Pick. 418, 34 Am. Dec. 69; Liscom *v.* Boston Mut. F. Ins. Co., 9 Metc. 205; Holmes *v.* Charlestown Mut. F. Ins. Co., 10 Metc. 211, 43 Am. Dec. 428), and also in New Jersey (Bennett *v.* St. Paul F. & M. Ins. Co., 55 N. J. L. 377, 27 Atl. 641; Dewees *v.* Manhattan Ins. Co., 35 N. J. L. 366).

If the knowledge of the agent is supplemented by a verbal consent by the agent to do the prohibited act, the waiver is the stronger. Gray *v.* Germania F. Ins. Co., 84 Hun (N. Y.) 504, 32 N. Y. Suppl. 424.

The failure of the agent to follow instructions has been held not to relax the rule. Anson *v.* Winnesheik Ins. Co., 23 Iowa 84.

Knowledge of a misrepresentation as to one condition will not operate to estop the insurer from setting up a misrepresentation in another respect. Hartford F. Ins. C. *v.* Ransom, (Tex. Civ. App. 1901) 61 S. W. 144. But see German Ins. Co. *v.* Horan, 15 Ky. L. Rep. 208.

89. *Alabama.*— Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

Arkansas.— Dwelling-House Ins. Co. *v.* Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458.

Iowa.— McMurray *v.* Capitol Ins. Co., 87 Iowa 453, 54 N. W. 354; Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652.

Michigan.— Robison *v.* Ohio Farmers' Ins. Co., 93 Mich. 533, 53 N. W. 821.

Missouri.— Ayres *v.* Phœnix Ins. Co., 66 Mo. App. 288.

Texas.— Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

Contra.— Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41; State Mut. F. Ins. Co. *v.* Arthur, 30 Pa. St. 315. In Kennedy *v.* St. Lawrence County Mut. Ins. Co., 10 Barb. (N. Y.) 285, and Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451, in which last mentioned case there was also a stipulation that the agent was to be considered the agent of the insured, this provision was upheld.

90. *Georgia.*— Clay *v.* Phœnix Ins. Co., 97 Ga. 44, 25 S. E. 417; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230; Reaper City Ins. Co. *v.* Jones, 62 Ill. 458.

Iowa.— Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497.

Kentucky.— Rhode Island Underwriters' Assoc. *v.* Monarch, 98 Ky. 305, 32 S. W. 959, 17 Ky. L. Rep. 876; Kenton Ins. Co. *v.* Shea, 6 Bush 174, 99 Am. Dec. 676.

Maine.— Emery *v.* Piscataqua F. & M. Ins. Co., 52 Me. 322.

Michigan.— Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202.

Minnesota.— Broadwater *v.* Lion F. Ins. Co., 34 Minn. 465, 26 N. W. 455.

Missouri.— Parsons *v.* Knoxville F. Ins. Co., 132 Mo. 583, 31 S. W. 117, 34 S. W. 476.

New Hampshire.— Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668; Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110.

New York.— Carpenter *v.* German-American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548 [*affirming* 55 Hun 612, 2 N. Y. Suppl. 762]; Brothers *v.* California Ins. Co., 121 N. Y. 659, 24 N. E. 1092; Van Schoick *v.* Niagara F. Ins. Co., 68 N. Y. 434; Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6; McCabe *v.* Farm Buildings F. Ins. Co., 14 Hun 602.

(B) *Particular Conditions* — (1) As to Title or Interest of Insured. The insurance company is therefore taken to have waived a defect in the title of the insured, against which a condition of the policy is directed, of which it was cognizant when the policy was issued.[91] The company cannot assert that the fact that the building insured stands upon leased ground vitiates the insurance, by the terms of the policy, when such fact was disclosed or known to the agent or to the company.[92] And indeed it has been held that the rule is the same where the policy is conditioned to be void in case the title to the property be involved in

North Carolina.— Cowell *v.* Phœnix Ins. Co., 126 N. C. 684, 36 S. E. 184.

Virginia.— Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

Wisconsin.— Schultz *v.* Caledonian Ins. Co., 94 Wis. 42, 68 N. W. 414; Goss *v.* Agricultural Ins. Co., 92 Wis. 233, 65 N. W. 1036; Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804.

United States.— Diebold *v.* Phœnix Ins. Co., 33 Fed. 807; Hunt *v.* Mercantile Ins. Co., 22 Fed. 503.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*; and cases cited *supra*, XIV, B.

Contra.— German Ins. Co. *v.* Heiduk, 30 Nebr. 288, 46 N. W. 481, 27 Am. St. Rep. 402; Smith *v.* Farmers' Mut. F. Ins. Co., 19 Ohio St. 287.

91. *Arkansas.*— State Mut. Ins. Co. *v.* Latourette, 71 Ark. 242, 74 S. W. 300, 100 Am. St. Rep. 63.

Colorado.— American Cent. Ins. Co. *v.* Donlon, 16 Colo. App. 416, 66 Pac. 249.

Connecticut.— Peck *v.* New London County Mut. Ins. Co., 22 Conn. 575.

Georgia.— Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457.

Illinois.— Union Ins. Co. *v.* Chipp, 93 Ill. 96; German Ins. Co. *v.* Miller, 39 Ill. App. 633; German F. Ins. Co. *v.* Carrow, 21 Ill. App. 631.

Indiana.— Manchester F. Assur. Co. *v.* Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231.

Iowa.— Key *v.* Des Moines Ins. Co., 77 Iowa 174, 41 N. W. 614.

Kentucky.— London, etc., Ins. Co. *v.* Gerteisen, 106 Ky. 815, 51 S. W. 617, 21 Ky. L. Rep. 471; Phœnix Ins. Co. *v.* Beechland Grange, 7 Ky. L. Rep. 670.

Michigan.— Hamilton *v.* Dwelling House Ins. Co., 98 Mich. 535, 57 N. W. 735, 22 L. R. A. 527.

Missouri.— Clark *v.* Knoxville F. Ins. Co., 61 Mo. App. 181.

New Hampshire.— Leach *v.* Republic F. Ins. Co., 58 N. H. 245.

New York.— Forward *v.* Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Suppl. 79; Neafie *v.* Woodcock, 15 N. Y. App. Div. 618, 44 N. Y. Suppl. 768; Miaghan *v.* Hartford F. Ins. Co., 24 Hun 58; Broadhead *v.* Lycoming F. Ins. Co., 23 Hun 397.

North Carolina.— Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256.

South Carolina.— Graham *v.* American F. Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707.

Texas.— Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569.

United States.— Field *v.* Insurance Co. of North America, 9 Fed. Cas. No. 4,767, 6 Biss. 121.

See 28 Cent. Dig. tit. "Insurance," § 986 *et seq.*

Compare Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202, where the rule was applied, it appearing that the insurance agent lived in the town where the property was situated and hence must have known of the true situation of affairs.

The case is all the stronger against the insurer in case the insured has made no misrepresentation. Rockford Ins. Co. *v.* Farmers' State Bank, 50 Kan. 427, 31 Pac. 1063; American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533; Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35; Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64; Hilliard *v.* Caledonia Ins. Co., 5 Ohio S. & C. Pl. Dec. 576, 7 Ohio N. P. 561; Burson *v.* Philadelphia Fire Assoc., 136 Pa. St. 267, 20 Atl. 401, 20 Am. St. Rep. 919.

Where the agent knew that the building was owned by the firm, and that the premium was paid by both, it is no defense to an action on a policy that it was issued in the name of one of two partners. Gerard F. & M. Ins. Co. *v.* Frymier, (Tex. Civ. App. 1895) 32 S. W. 55.

The amount of recovery has been held to be the same as though the insured had the extent of title that he asserted he had, he having paid a premium as though he held the larger title. Western Assur. Co. *v.* Stoddard, 88 Ala. 606, 7 So. 379.

92. *Illinois.*— Germania F. Ins. Co. *v.* Hick, 23 Ill. App. 381 [*affirmed* in 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384].

Michigan.— Ahlberg *v.* German Ins. Co., 94 Mich. 259, 53 N. W. 1102 [*following* Hoose *v.* Prescott Ins. Co., 84 Mich. 309, 47 N. W. 587, 11 L. R. A. 340].

Mississippi.— Home Ins. Co. *v.* Gibson, 72 Miss. 58, 17 So. 13.

New York.— Brothers *v.* California Ins. Co., 121 N. Y. 659, 24 N. E. 1092; Van Schoick *v.* Niagara F. Ins. Co., 68 N. Y. 434; Baldwin *v.* Citizens' Ins. Co., 60 Hun 389, 15 N. Y. Suppl. 587.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Utah.— West *v.* Norwich Union F. Ins. Soc., 10 Utah 442, 37 Pac. 685.

litigation,[93] or if foreclosure proceedings be commenced, and a breach of such conditions is known to the insurer when the policy is issued.[94] It seems, however, that the rule cannot be applied to a knowledge of the fact that the insured had no insurable interest.[95]

(2) As to Encumbrances. So, although the policy is conditioned to be void if the premises be encumbered, if the policy is issued with a knowledge of the existing encumbrance on the part of the insurer or its agent, the condition is thereby waived, although the insured does not disclose the encumbrance or represents that none exists.[96]

(3) As to Additional Insurance. Likewise the insurer is estopped from setting up a misrepresentation concerning, or the existence of, additional insurance contrary to the provisions of the policy when it was aware of such insurance outstanding at the time the contract was completed.[97]

Virginia.— Manhattan F. Ins. Co. *v.* Weill, 28 Gratt. 389, 26 Am. Rep. 364.

See 28 Cent. Dig. tit. "Insurance," § 987.

93. American Cent. Ins. Co. *v.* Brown, 29 Ill. App. 602.

94. Benjamin *v.* Palatine Ins. Co., 80 N. Y. App. Div. 260, 80 N. Y. Suppl. 256.

95. Agricultural Ins. Co. *v.* Montague, 38 Mich. 548, 31 Am. Rep. 326. But see Mechanics', etc., Ins. Co. *v.* Mutual Real Estate, etc., Assoc., 98 Ga. 262, 25 S. E. 457.

96. *Alabama.*— Phœnix Ins. Co. *v.* Copeland, 90 Ala. 386, 8 So. 48.

Illinois.— Home Mut. F. Ins. Co. *v.* Garfield, 60 Ill. 124, 14 Am. Rep. 27.

Iowa.— Bartlett *v.* Fireman's Fund Ins. Co., 77 Iowa 155, 41 N. W. 601; Boetcher *v.* Hawkeye Ins. Co., 47 Iowa 253; Huntley *v.* Home Ins. Co., 42 Iowa 709.

Kentucky.— German Ins. Co. *v.* Horan, 15 Ky. L. Rep. 208.

Michigan.— Gristock *v.* Royal Ins. Co., 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634.

Minnesota.— Wilson *v.* Minnesota Farmers' Mut. F. Assoc., 36 Minn. 112, 30 N. W. 401, 1 Am. St. Rep. 659.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; Rosencrans *v.* North American Ins. Co., 66 Mo. App. 352.

Nebraska.— German-American Ins. Co. *v.* Hart, 43 Nebr. 441, 61 N. W. 582.

New York.— Robbins *v.* Springfield F. & M. Ins. Co., 149 N. Y. 477, 44 N. E. 159 [*affirming* 79 Hun 117, 29 N. Y. Suppl. 513]; Forward *v.* Continental Ins. Co., 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; Dresser *v.* United Firemen's Ins. Co., 45 Hun 298; Woodward *v.* Republic F. Ins. Co., 32 Hun 365; Owen *v.* Farmers' Joint Stock Ins. Co., 10 Abb. Pr. N. S. 166 note.

Pennsylvania.— Brown *v.* Commonwealth Mut. Ins. Co., 41 Pa. St. 187.

Texas.— German Ins. Co. *v.* Everett, (Civ. App. 1896) 36 S. W. 125; Phœnix Ins. Co. *v.* Ward, 7 Tex. Civ. App. 13, 26 S. W. 763; Hartford F. Ins. Co. *v.* Josey, 6 Tex. Civ. App. 290, 25 S. W. 685.

Utah.— West *v.* Norwich Union F. Ins. Soc., 10 Utah 442, 37 Pac. 685.

Virginia.— Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. 585.

Wisconsin.— McDonald *v.* Philadelphia Fire Assoc., 93 Wis. 348, 67 N. W. 719; Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208; Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

See 28 Cent. Dig. tit. "Insurance," § 989.

For example where a widow insures property for the benefit of the heirs and represents that there is no encumbrance, the insurer cannot set up that her dower interest for life constituted an encumbrance contrary to the terms of the policy, when the agent was aware of the fact that she had dower rights therein. Haire *v.* Ohio Farmers' Ins. Co., 93 Mich. 481, 53 N. W. 623, 32 Am. St. Rep. 516. So where the company has previously insured the estate of the encumbrancer, it is deemed to have knowledge of the encumbrance. Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285.

Failure to give notice of the existence of a mortgage on property insured, when required by the terms of the policy, is not waived by the insurer's knowledge of a mortgage subsequently given on the property to secure money with which to pay a mortgage at the time the policy was issued. Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740.

97. *Georgia.*— City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230.

Iowa.— Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411.

Kansas.— Niagara F. Ins. Co. *v.* Johnson, 4 Kan. App. 16, 45 Pac. 789.

Kentucky.— Kenton Ins. Co. *v.* Shea, 6 Bush 174, 99 Am. Dec. 676.

Minnesota.— Brandup *v.* St. Paul F. & M. Ins. Co., 27 Minn. 393, 7 N. W. 735.

Mississippi.— Equitable F. Ins. Co. *v.* Alexander, (1892) 12 So. 25.

Missouri.— Carr *v.* Hibernia Ins. Co., 2 Mo. App. 466.

New York.— Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6; Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285; Landers *v.* Watertown F. Ins. Co., 19 Hun 174; McCabe *v.* Farm Buildings F. Ins. Co., 14 Hun 602.

(4) Other Conditions or Misrepresentations. So also the general rule as to the effect of the insurer's knowledge at the time of issuing the policy to create an estoppel to claim a forfeiture, or to show a waiver of condition, has also been applied with respect to other particular conditions and misrepresentations.[98]

(II) *Acts Which if Continued Would Be a Breach of Condition*— (A) *In General.* It has been said that a mere knowledge of a future intent to violate any of the provisions of a policy can never be held to constitute a waiver.[99] However language distinctly appears in the adjudications to the effect

Pennsylvania.— Farmers' Mut. Ins. Co. *v.* Taylor, 73 Pa. St. 342; Uhler *v.* Farmers' American F. Ins. Co., 4 Leg. Gaz. 354.

Rhode Island.— Reed *v.* Equitable F. & M. Ins. Co., 17 R. I. 785, 24 Atl. 833, 18 L. R. A. 496.

See 28 Cent. Dig. tit. "Insurance," §§ 991, 992.

If the insurer has issued the prior policy, its knowledge thereof is a waiver of a condition of the subsequent policy against any other insurance. Rowley *v.* Empire Ins. Co., 36 N. Y. 550, 4 Abb. Dec. 131, 3 Keyes 557, 3 Transcr. App. 285.

The estoppel is all the stronger if the agent has agreed that the prior insurance shall be canceled within a reasonable time, and cancellation is had pursuant to such agreement. Knowles *v.* American Ins. Co., 66 Hun (N. Y.) 220, 21 N. Y. Suppl. 50.

Where an agent accepts an application with the understanding that the insurance is to be divided with another company, this is a waiver of notice of the additional insurance. Brumfield *v.* Union Ins. Co., 87 Ky. 122, 7 S. W. 893, 10 Ky. L. Rep. 13.

When sued upon an oral contract the insurer cannot assert that the policy if issued would have contained a prohibition against any additional insurance, when the agent was informed of such insurance and made no objection thereto. Baile *v.* St. Joseph F. & M. Ins. Co., 73 Mo. 371.

98. See cases cited *infra*, this note.

For example if the present condition of the premises be not disclosed or be misrepresented, the knowledge thereof of the insurer or agent serves to estop the insurer from objection. Waterbury *v.* Dakota F. & M. Ins. Co., 6 Dak. 468, 43 N. W. 697; Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586; Campbell *v.* Merchants', etc., Mut. F. Ins. Co., 37 N. H. 35, 72 Am. Dec. 324; Beal *v.* Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719. So likewise if the exposures be misrepresented but the true situation is known (Michigan Shingle Co. *v.* State Invest., etc., Co., 94 Mich. 389, 53 N. W. 945, 22 L. R. A. 319; Thomas *v.* Hartford F. Ins. Co., 20 Mo. App. 150), or if the valuation of the building is not correct and the insurer knew that the insured's statement was but an estimate (Merchants', etc., Ins. Co. *v.* Vining, 68 Ga. 197; Dacey *v.* Agricultural Ins. Co., 21 Hun (N. Y.) 83), or if the facts from which a valuation could be determined were known to the insurer, the breaches are waived (German Ins. Co. *v.* Miller, 39 Ill. App. 633; Virginia F. & M. Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794. *Contra*, Hartford F. Ins. Co. *v.* Magee, 47 Ill. App. 367). Concealment cannot be asserted in case the insurer's agent examined the premises and made out the application, in the absence of collusion. Richards *v.* Washington F. & M. Ins. Co., 60 Mich. 420, 27 N. W. 586; Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110; Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50. And the rule has been invoked to create an estoppel against the assertion of a forfeiture for failure to observe the "iron-safe" clause. Curnow *v.* Phœnix Ins. Co., 46 S. C. 79, 24 S. E. 74. Also to prevent forfeiture for breach of condition against running a factory at night (Couch *v.* Rochester German F. Ins. Co., 25 Hun (N. Y.) 469), and against the cessation of operation of a factory (Bellevue Roller Mill Co. *v.* London, etc., F. Ins. Co., 4 Ida. 307, 39 Pac. 196), and against change in title or interest (Walsh *v.* Dwelling-House Ins. Co., 2 Lack. Leg. N. (Pa.) 125).

99. This rule appears to be uniform in those states where parol evidence is inadmissible to vary the written policy.

Georgia.— Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595.

Iowa.— Sowers *v.* Des Moines Mut. F. Ins. Co., 113 Iowa 551, 85 N. W. 763. But see Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261, where the court found a waiver when the agent knew that the insured in violation of the conditions of the policy had applied for concurrent insurance and that it would be issued. And see Doon Independent School Dist. *v.* Des Moines Fidelity Ins. Co., 113 Iowa 65, 84 N. W. 956, *semble*.

New York.— Gray *v.* Germania F. Ins. Co., 155 N. Y. 180, 49 N. E. 675 [*reversing* 84 Hun 504, 32 N. Y. Suppl. 424]; Schachne *v.* Hamburg-Bremen F. Ins. Co., 10 N. Y. St. 705. But see McCabe *v.* Dutchess County Mut. Ins. Co., 14 Hun 599.

Ohio.— Elstner *v.* Cincinnati Equitable Ins. Co., 1 Disn. 412, 12 Ohio Dec. (Reprint) 703.

Texas.— Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

Wisconsin.— Worachek *v.* New Denmark Mut. Home F. Ins. Co., 102 Wis. 81, 78 N. W. 165.

United States.— United Firemen's Ins. Co. *v.* Thomas, 82 Fed. 406, 27 C. C. A. 42, 47 L. R. A. 450.

Massachusetts and New Jersey do not admit parol evidence as to a different contemporaneous understanding from that mentioned in the policy. Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583; Dewees *v.* Man-

that when a prohibited act has been customary and the agent knows the insured intends to continue the same when the policy is issued, there is a waiver.[1]

(B) *Keeping of an Iron Safe.* In connection with the breach of a condition requiring the keeping of an iron safe, etc.,[2] some authorities assert that a mere knowledge when the policy is issued that the insured has no such safe is a waiver,[3] and others state the opposite rule to be true.[4]

(C) *Keeping or Use of Prohibited Article.* The knowledge of an insurer that articles prohibited by the policy as dangerous are used or kept on the premises when the policy is issued will estop it to claim a forfeiture because of the continuation of such use;[5] but the contrary has been stated, inasmuch as *non constat* that such use will be continued, and the insurer is entitled to suppose that the insured will comply with the provisions of the policy.[6]

(D) *Prohibited Occupancy or Use.* If the insurer on accepting the policy knows that a prohibited occupancy or use is had of the insured premises, a waiver is held to result from such knowledge,[7] although some authorities are to the effect

hattan Ins. Co., 35 N. J. L. 366. See *supra*, p. 786 note 61, p. 809 note 70.

Breach of condition against commencement of foreclosure proceedings is not waived where the agent knew that a mortgage would mature during the life of the policy. Hartford F. Ins. Co. *v.* Clayton, 17 Tex. Civ. App. 644, 43 S. W. 910.

If an express recognition is made of a possible future use of a prohibited character by a provision that if such use occurs the premium may be increased, the doing of such act will not avoid the policy. Steers *v.* Home Ins. Co., 38 La. Ann. 952.

There is no misdescription, however, in describing the property insured as it would be when additions are completed, which are intended when the policy issues, if the agent knows of such intention. Perry County Ins. Co. *v.* Stewart, 19 Pa. St. 45.

When an insurer cancels a part of the amount it is carrying with the insured, being notified then that the latter intends to replace the sum in another company, the insurer is charged with notice of the insurance so placed. Parsons *v.* Victoria Mut. F. Ins. Co., 29 U. C. C. P. 22. See also Lyons *v.* Globe Mut. F. Ins. Co., 27 U. C. C. P. 567. See also *supra*, XIV, E, 3, a, (I), (B), (3).

1. Germania Ins. Co. *v.* Ashby, 65 S. W. 611, 23 Ky. L. Rep. 1564; German Ins. Co. *v.* Hart, 16 Ky. L. Rep. 344; Hartley *v.* Pennsylvania F. Ins. Co., 91 Minn. 382, 98 N. W. 198, 103 Am. St. Rep. 512; Mitchell *v.* Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86, 48 Am. St. Rep. 535.

2. In Andes Ins. Co. *v.* Shipman, 77 Ill. 189, it was said that a waiver had occurred of a provision that a record by means of a watch-clock should be kept of the watchman's performance of duty when the agent knew that the insured did not possess such a clock. And so with reference to the keeping of books of account. German Ins. Co. *v.* Allen, 69 Kan. 729, 77 Pac. 529.

The Kentucky doctrine is that the iron safe clause is unreasonable. Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 295.

3. Mitchell *v.* Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86, 48 Am. Rep. 535; Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

4. Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595; Sowers *v.* Des Moines Mut. F. Ins. Co., 113 Iowa 551, 85 N. W. 763; Crigler *v.* Standard F. Ins. Co., 49 Mo. App. 11.

5. *California.*— Kruger *v.* Western F. & M. Ins. Co., 72 Cal. 91, 13 Pac. 156, 1 Am. St. Rep. 42.

Colorado.— State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

Illinois.— Kings County F. Ins. Co. *v.* Swigert, 11 Ill. App. 590.

Indiana.— Farmers' Ins. Assoc. *v.* Reavis, (1904) 70 N. E. 518, 71 N. E. 905.

Kentucky.— Kenton Ins. Co. *v.* Downs, 90 Ky. 236, 13 S. W. 882, 12 Ky. L. Rep. 115; American F. Ins. Co. *v.* Nugent, 7 Ky. L. Rep. 597. But see Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. 415, 9 Ky. L. Rep. 3.

Michigan.— Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202.

Mississippi.— Rivara *v.* Queen's Ins. Co., 62 Miss. 720.

New Hampshire.— Wheeler *v.* Traders' Ins. Co., (1885) 1 Atl. 293.

See 28 Cent. Dig. tit. "Insurance," § 985; and *supra*, XIII, C.

6. Birmingham F. Ins. Co. *v.* Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147. And see Georgia Home Ins. Co. *v.* Jacobs, 56 Tex. 366.

When the prohibited user was by the preceding occupant this principle has been applied, although the building was not equipped for the use of any other illuminant than that prohibited. Minzesheimer *v.* Continental Ins. Co., 37 N. Y. Super. Ct. 332.

7. *Illinois.*—Imperial F. Ins. Co. *v.* Shimer, 96 Ill. 580; Rockford Ins. Co. *v.* Warne, 22 Ill. App. 19.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Farnsworth Lumber Co., 72 Miss, 555, 17 So. 445.

Missouri.— Columbia Planing Mill Co. *v.* American F. Ins. Co., 59 Mo. App. 204.

Nebraska.— Springfield F. & M. Ins. Co. *v.* McLimans, 28 Nebr. 846, 45 N. W. 171.

that to constitute a waiver of conditions as to future use something more must appear than the mere knowledge of the agent or the insurer that such use had previously been customary.[8]

(E) *Vacancy of Premises.* Although it does not follow that vacancy of the premises will continue because the premises are vacant and unoccupied at the time when they are insured, yet it has generally been held that the insurance company cannot claim a forfeiture by reason of the continuance of a vacancy existing with its knowledge at the time the policy issues.[9] But if the building

New York.— Driscoll *v.* German-American Ins. Co., 74 Hun 153, 26 N. Y. Suppl. 646.

Ohio.—United Firemen's Ins. Co. *v.* Kukral, 7 Ohio Cir. Ct. 356, 4 Ohio Cir. Dec. 633.

Canada.— Gouinlock *v.* Manufacturers, etc., Mut. Ins. Co., 43 U. C. Q. B. 563.

See 28 Cent. Dig. tit. "Insurance," § 982.

The principle has been applied to a case where the breach assigned was the operation of a factory at night (Improved Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; American Cent. Ins. Co. *v.* McCrea, 8 Lea (Tenn.) 513, 41 Am. Rep. 647) or the non-operation of a factory (Humphry *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,875, 15 Blatchf. 504).

Knowledge of customary usage or acts.— It should be remembered that many courts hold that conditions as to the use of prohibited articles and as to the doing of prohibited acts are waived when the insurer issues its policy with knowledge that such articles are customarily used or such acts are done by the necessities of the trade carried on in the premises insured. New York *v.* Brooklyn F. Ins. Co., 41 Barb. (N. Y.) 231; McKeesport Mach. Co. *v.* Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. 16. But other courts deny this and assert that a specific prohibition governs over custom. Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163. See also *supra*, XIII, C. There is no waiver of the clause of a policy requiring the maintenance of a clear space of a certain distance around a mill, where the agent knows that such a space has not previously been maintained and he states the respective rates with or without compliance therewith, issuing the policy at the higher rate, but the same containing a clause requiring compliance. Keller *v.* Liverpool, etc., Ins. Co., 27 Tex. Civ. App. 102, 65 S. W. 695.

Where objection is made by the agent and an amendment of the conditions is promised by the insured there is no waiver. Merchants' Ins. Co *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174.

8. Concordia F. Ins. Co. *v.* Johnson, 4 Kan. App. 7, 45 Pac. 722; Reardon *v.* Faneuil Hall Ins. Co., 135 Mass. 121; Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583; Dewees *v.* Manhattan Ins. Co., 35 N. J. L. 366. And see also Petit *v.* German Ins. Co., 98 Fed. 800.

This rule should always be true where the insurer has no reason to believe that the insured intends in the future to do any prohibited act. Dodge County Mut. Ins. Co. *v.* Rogers, 12 Wis. 337.

9. This is virtually the insurance of property as vacant.

California.— Smith *v.* Phœnix Ins. Co., 91 Cal. 323, 27 Pac. 738, 25 Am. St. Rep. 191, 13 L. R. A. 475; Smith *v.* Pennsylvania F. Ins. Co., (1891) 27 Pac. 742.

Illinois.— Germania F. Ins. Co. *v.* Klewer, 27 Ill. App. 590 [*reversed* in 129 Ill. 599, 22 N. E. 489].

Michigan.— Aurora F. & M. Ins. Co. *v.* Kranich, 36 Mich. 289.

Mississippi.— Liverpool, etc., Ins. Co. *v.* McGuire, 52 Miss. 227.

Missouri.— Hackett *v.* Philadelphia Underwriters, 79 Mo. App. 16; McCollum *v.* Hartford F. Ins. Co., 67 Mo. App. 76; Thackery Min., etc., Co. *v.* American F. Ins. Co., 62 Mo. App. 293.

Nebraska.— Rochester Loan, etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

New Hampshire.— Carr *v.* Roger Williams Ins. Co., 60 N. H. 513.

New York.—Haight *v.* Continental Ins. Co., 92 N. Y. 51 [*affirming* 27 Hun 617]; Short *v.* Home Ins. Co., 90 N. Y. 16, 43 Am. Rep. 138; Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133; Chase *v.* People's F. Ins. Co., 14 Hun 456.

Ohio— Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336.

Wisconsin.— Alkan *v.* New Hampshire Ins. Co., 53 Wis. 136, 10 N. W. 91.

See 28 Cent. Dig. tit. "Insurance," § 983.

Contra.— Newmarket Sav. Bank *v* Royal Ins. Co., 150 Mass. 374, 23 N. E. 210, opinion by Knowlton, J.

Thus insurance of an uncompleted building is a waiver of a clause of the policy against non-occupancy. Queen Ins. Co. *v.* Kline, 32 S. W. 214, 17 Ky. L. Rep. 619; German Ins. Co. *v.* Penrod, 35 Nebr. 273, 53 N. W. 74; Bear *v.* Atlanta Home Ins. Co., 34 Misc. (N. Y.) 613, 70 N. Y. Suppl. 581.

If the policy provides that a vacancy existing beyond a certain length of time shall avoid the policy, it would seem that a knowledge of an existing terminable vacancy when the policy is issued should not operate as a waiver of the provision, for the contract may be construed to require a termination of the existing prohibited condition before the period has elapsed. Ranspach *v.* Teutonia F. Ins. Co., 109 Mich. 699, 67 N. W. 967; Queen Ins. Co. *v.* Chadwick, 13 Tex. Civ. App. 318, 35 S. W. 26; Connecticut F. Ins. Co. *v.* Tilley, 88 Va. 1024, 14 S. E. 851, 29 Am. St. Rep. 770; England *v.* Westchester F. Ins. Co., 81 Wis. 583, 51 N. W. 954, 29 Am. St. Rep. 917. But see Devine *v.* Home Ins. Co., 32 Wis. 471. *Contra*, Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35.

becomes occupied and vacancy thereafter occurs there is no waiver of such subsequent vacancy.[10]

b. After Issuance of Policy. The weight of authority[11] is in favor of the rule that if the insurer acquires notice of facts authorizing a forfeiture after the policy is delivered and fails to assert the same, but acts as though the policy were still subsisting and valid, it is to be taken to have waived its right to declare a forfeiture.[12]

F. Mistake, Negligence, Fraud, or Assertions of Agent — 1. Effect of — a. In General. The mistake or negligence of the insurer's agent must naturally fall upon his principal rather than upon the insured, so long as the act is within the scope of his employment.[13]

b. Extent, Limits, and Application of Rule — (I) *In General.* All varieties of misrepresentation[14] are within the application of this general rule as to the

10. Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843. *Contra*, Bennett *v.* Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609. But see Woodruff *v.* Imperial F. Ins. Co., 83 N. Y. 133.

11. Some authorities, however, require that the insured must have incurred a detriment in relying on the apparent recognition, thus requiring a true equitable estoppel. See *supra*, XIV, A, 1; XIV, D, 1.

12. See *supra*, XIV, A, 1; XIV, D, 1.

That notice to a soliciting agent is not notice to the principal after the policy has been issued is always to be borne in mind. Sun Mut. Ins. Co. *v.* Texarkana Foundry, etc., Co., (Tex. App. 1889) 15 S. W. 34. See also *supra*, XIV, B, 1, b, (II).

13. See *infra*, XIV, F, 1, b *et seq.*

The knowledge of the agent is of course the knowledge of the insurer, and it can be said that the conclusion of waiver results from such knowledge. Scott *v.* German Ins. Co., 69 Mo. App. 337.

In the case of mutual companies the rule is the same. Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210; Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31. But see Sykora *v.* Forest City Mut. Ins. Co., 7 Ohio Dec. (Reprint) 372, 2 Cinc. L. Bul. 223.

14. See cases cited in this and succeeding notes.

Description of property.—*Arkansas.*—Sprott *v.* New Orleans Ins. Assoc., 53 Ark. 215, 13 S. W. 799.

California.— Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.

Indiana.—Phenix Ins. Co. *v.* Allen, 109 Ind. 273, 10 N. E. 85.

Kansas.—Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410.

New York.— Plumb *v.* Cattaraugus County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526; Benedict *v.* Ocean Ins. Co., 1 Daly 8. But see Sarsfield *v.* Metropolitan Ins. Co., 61 Barb. 479, 42 How. Pr. 97.

Pennsylvania.— Dowling *v.* Merchants' Ins. Co., 168 Pa. St. 234, 31 Atl. 1087; Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50; Susquehanna Mut. F. Ins. Co. *v.* Cusick, 16 Wkly. Notes Cas. 133. But see Pottsville Mut. F. Ins. Co. *v.* Fromm, 100 Pa. St. 347.

See 28 Cent. Dig. tit. "Insurance," § 1004.

Other or additional insurance.— American Ins. Co. *v.* Luttrell, 89 Ill. 314; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; Hornthal *v.* Western Ins. Co., 88 N. C. 71. But see Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41.

Statements as to encumbrances.— *Colorado.* — German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206.

Illinois.— Phenix Ins. Co. *v.* La Pointe, 118 Ill. 384, 8 N. E. 353 [*affirming* 17 Ill. App. 248].

Indiana.— Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

Iowa.—Bartholomew *v.* Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65; Anson *v.* Winnesheik Ins. Co., 23 Iowa 84.

Kansas.— German Ins. Co. *v.* Gray, 43 Kan. 497, 23 Pac. 637, 19 Am. St. Rep. 150, 8 L. R. A. 70.

Kentucky.—Continental Ins. Co. *v.* Haynes, 10 Ky. L. Rep. 276.

Michigan.— Beebe *v.* Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 32 Am. St. Rep. 519, 18 L. R. A. 481; Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646. 48 N. W. 296; Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356; Baker *v.* Ohio Farmers' Ins. Co., 70 Mich. 199, 38 N. W. 216, 14 Am. St. Rep. 485; Michigan State Ins. Co. *v.* Lewis, 30 Mich. 41.

New York.— Benninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495; Mowry *v.* Agricultural Ins. Co., 64 Hun 137, 18 N. Y. Suppl. 834; Holmes *v.* Drew, 16 Hun 491; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624; Smith *v.* Agricultural Ins. Co., 6 N. Y. St. 127. But see Smith *v.* Empire Ins. Co., 25 Barb. 497.

Ohio.—Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Pennsylvania.—Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331. But see Blooming Grove Mut. F. Ins. Co. *v.* McAnerney, 102 Pa. St. 335, 48 Am. Rep. 209.

Vermont.— Tarbell *v.* Vermont Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533; Ring *v.* Windsor County Mut. F. Ins. Co., 51 Vt. 563.

Wisconsin.— Bourgeois *v.* Marshfield Mut. F. Ins. Co., 86 Wis. 402, 57 N. W. 38; Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208.

See 28 Cent. Dig. tit. "Insurance," § 1007.

effect of mistake, negligence, or fraud on the part of the agent. If in any case it be shown that the agent has been guilty of fraud or deceit in leading the insured to believe that the application accurately represents the facts as stated to him, the insurer must bear the burden of the agent's wrongful conduct.[15] So if the agent sends an application prepared by himself without the authority of the insured,[16] or includes an unauthorized representation,[17] or if the company issues its policy in reliance upon the agent's independent investigations, in the absence of *mala fides* on the part of the insured,[18] it cannot claim that the policy is vitiated. It is immaterial that the policy provides that the knowledge of the agent not contained in

But see Richardson *v.* Maine Ins. Co., 46 Me. 394, 74 Am. Dec. 459; Lowell *v.* Middlesex Mut. F. Ins. Co., 8 Cush. (Mass.) 127.

Statements as to title or interest.— *Alabama.*— Creed *v.* Sun Fire Office, 101 Ala. 522, 14 So. 323, 46 Am. St. Rep. 134, 23 L. R. A. 177.

Colorado.— State Ins. Co. *v.* Du Bois, 7 Colo. App. 214, 44 Pac. 756; Wich *v.* Equitable F. & M. Ins. Co., 2 Colo. App. 484, 31 Pac. 389.

Connecticut.— Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.

Illinois.— Germania F. Ins. Co. *v.* Hick, 125 Ill. 361, 17 N. E. 792, 8 Am. St. Rep. 384 [*affirming* 23 Ill. App. 381]; Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64, 34 Am. Rep. 106; Rockford Ins. Co. *v.* Nelson, 75 Ill. 548; Commercial Ins. Co. *v.* Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Dwelling House Ins. Co. *v.* Dowdall, 55 Ill. App. 622; Phœnix Ins. Co. *v.* Whiteleather, 34 Ill. App. 60; Rockford Ins. Co. *v.* Seyferth, 29 Ill. App. 513.

Iowa.— Young *v.* Hartford F. Ins. Co., 45 Iowa 377, 24 Am. Rep. 784.

Kansas.— National Mut. F. Ins. Co. *v.* Barnes, 41 Kan. 161, 21 Pac. 165.

Kentucky.— Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. 415, 9 Ky. L. Rep. 3; Phœnix Ins. Co. *v.* Beechland Grange, 7 Ky. L. Rep. 671.

Michigan.—Ætna Live Stock F., etc., Ins. Co. *v.* Olmstead, 21 Mich. 246, 4 Am. Rep. 483.

Missouri.—Shoup *v.* Dwelling House F. Ins. Co., 51 Mo. App. 286.

New York.—Patridge *v.* Commercial F. Ins. Co., 17 Hun 95; Gates *v.* Penn F. Ins. Co., 10 Hun 489.

Pennsylvania.— Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Carnes *v.* Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

West Virginia.— Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

See 28 Cent. Dig. tit. "Insurance," § 1006.

Valuation of property.—*California.*—Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

Indiana.— Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898.

Nebraska.— Home F. Ins. Co. *v.* Fallon, 45 Nebr. 554, 62 N. W. 860.

New York.— Owens *v.* Holland Purchase Ins. Co., 56 N. Y. 565.

Pennsylvania.— Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31.

See 28 Cent. Dig. tit. "Insurance," § 1005.

But see Mercer County School Dist. No. 4 *v.* State Ins. Co., 61 Mo. App. 597; Shell *v.* German Ins. Co., 60 Mo. App. 644.

15. *Illinois.*— Germania F. Ins. Co. *v.* McKee, 94 Ill. 494.

Indiana.— Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898.

Kansas.— Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410.

Michigan.— Beebe *v.* Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 32 Am. St. Rep. 519, 18 L. R. A. 481.

Mississippi.— Rivara *v.* Queen's Ins. Co., 62 Miss. 720.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

An unauthorized alteration of the application by the agent is a fraud on the insured. Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37.

16. *Colorado.*— State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

Illinois.— Germania F. Ins. Co. *v.* McKee, 94 Ill. 494; Phenix Ins. Co. *v.* La Pointe, 17 Ill. App. 248 [*affirmed* in 118 Ill. 384, 8 N. E. 353].

Indiana.— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498.

Iowa.— Hingston *v.* Ætna Ins. Co., 42 Iowa 46.

New York.— Blass *v.* Agricultural Ins. Co., 162 N. Y. 639, 57 N. E. 1104 [*affirming* 18 N. Y. App. Div. 481, 46 N. Y. Suppl. 392]; Benninghoff *v.* Agricultural Ins. Co., 93 N. Y. 495; Mead *v.* Saratoga, etc., F. Ins. Co., 81 N. Y. App. Div. 282, 80 N. Y. Suppl. 885.

Rhode Island.— Wilson *v.* Conway F. Ins. Co., 4 R. I. 141.

South Dakota.— South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 2 S. D. 17, 48 N. W. 310.

Texas.— Phœnix Assur. Co. *v.* Coffman, 10 Tex. Civ. App. 631, 32 S. W. 810.

United States.— Dupuy *v.* Delaware Ins. Co., 63 Fed. 680; Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 443.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

17. Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37; Dunbar *v.* Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386; Guardian Assur. Co. *v.* Connely, 20 Can. Sup. Ct. 208.

It is always a question of fact whether the misdescription and error was really the act of the agent. Sarsfield *v.* Metropolitan Ins. Co., 61 Barb. (N. Y.) 479, 42 How. Pr. 97. See also *infra*, XXI, H, 2.

18. Atlantic Ins. Co. *v.* Wright, 22 Ill. 462;

the application shall not be binding on the insurer.[19] And the rule is not different although the policy expressly makes the statements in the application warranties.[20] If no application has been prepared, the policy is presumed to have been issued, upon the knowledge of the agent.[21]

(II) *False or Mistaken Interpretation of Terms and Their Effect.* The agent having the implied and apparent power to make necessary explanations of the meaning and effect of the terms employed by the insurer in its interrogatories or policy and to agree with the applicant as to the terms which he shall employ to express the facts stated by him,[22] if the agent interprets the meaning of the conditions of the policy mistakenly and in consequence the insured answers erroneously, thereby misrepresenting his title or the nature of the risk, the insurer can assert no forfeiture.[23] If the statements of the agent as to the legal construction of the policy put upon it by the insurer are relied upon by the insured to his detriment after the issuance of the policy, and he acts in accordance

Bennett *v.* Agricultural Ins. Co., 15 Abb. N. Cas. (N. Y.) 234 [*affirmed* in 106 N. Y. 243, 12 N. E. 609]; Continental Ins. Co. *v.* Kasey, 25 Gratt. (Va.) 268, 18 Am. Rep. 681; Roth *v.* City Ins. Co., 20 Fed. Cas. No. 12,084, 6 McLean 324.

Thus if it promises to investigate in a matter on which the insured has no knowledge and fails to do so, it cannot forfeit the policy. Skinner *v.* Norman, 165 N. Y. 565, 59 N. E. 309, 80 Am. St. Rep. 776 [*reversing* 18 N. Y. App. Div. 609, 46 N. Y. Suppl. 65].

19. Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210.

But occasional holdings are found that where the policy provides that no statement shall bind unless inserted in the contract, the insured cannot show that the statement he made was different from that appearing in the contract. Shoup *v.* Dwelling House F. Ins. Co., 51 Mo. App. 286.

20. *Arkansas.*— Sprott *v.* New Orleans Ins. Assoc., 53 Ark. 215, 13 S. W. 799.

California.— Parrish *v.* Rosebud Mining, etc., Co., (1903) 71 Pac. 694; Menk *v.* Home Mut. Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158.

Iowa.— Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870.

Kansas.— Continental Ins. Co. *v.* Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557.

Michigan.— Tubbs *v.* Dwelling House Ins. Co., 84 Mich. 646, 48 N. W. 296.

Missouri.— Rissler *v.* American Cent. Ins. Co., 150 Mo. 366, 51 S. W. 755; Shell *v.* German Ins. Co., 60 Mo. App. 644; Thomas *v.* Hartford F. Ins. Co., 20 Mo. App. 150.

Nebraska.— German-American Ins. Co. *v.* Hart, 43 Nebr. 441, 61 N. W. 582.

New York.— Bennett *v.* Agricultural Ins. Co., 106 N. Y. 243, 12 N. E. 609; Owens *v.* Holland Purchase Ins. Co., 56 N. Y. 565.

Pennsylvania.—Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567. *Contra,* Commonwealth Mut. F. Ins. Co. *v.* Huntzinger, 98 Pa. St. 41.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

Wisconsin.— Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117, 68 N. W. 868.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

The rule that parol evidence is not admissible to vary a written instrument is not applicable in case of accident, fraud, or mistake. Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581; Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646. See Evidence, 16 Cyc. 821.

21. Maher *v.* Hibernian Ins. Co., 6 Hun (N. Y.) 353; Keck *v.* Porter, 9 Kulp (Pa.) 428.

22. Malleable Iron Works *v.* Phœnix Ins. Co., 25 Conn. 465; Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408 [*affirming* 40 Ill. App. 64]; Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659; Combs *v.* Hannibal Sav., etc., Co., 43 Mo. 148, 97 Am. Dec. 383.

23. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517; Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581.

Iowa.— Ayres *v.* Home Ins. Co., 21 Iowa 185.

Kentucky.— Manchester Assur. Co. *v.* Dowell, 80 S. W. 207, 25 Ky. L. Rep. 2240.

Missouri.— Rissler *v.* American Cent. Ins. Co., 150 Mo. 366, 51 S. W. 755; Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139; Ross-Langford *v.* Mercantile Town Mut. Ins. Co., 97 Mo. App. 79, 71 S. W. 720.

Virginia.— Farmers', etc., Benev. F. Ins. Assoc. *v.* Williams, 95 Va. 248, 28 S. E. 214; Lynchburg F. Ins. Co. *v.* West, 76 Va. 575, 44 Am. Rep. 177.

United States.— Carrollton Furniture Mfg. Co. *v.* American Credit Indemnity Co., 115 Fed. 77, 52 C. C. A. 671.

Canada.—Naughter *v.* Ottawa Agricultural Ins. Co., 43 U. C. Q. B. 121. And see also Hopkins *v.* Manufacturers, etc., Mut. F. Ins. Co., 43 U. C. Q. B. 254.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

If after the application has been forwarded the insured apprises the agent of further facts but the agent assures him that they are not

therewith, in general the company is held to be estopped to assert the breach of condition thereby occurring,[24] unless the construction is obviously in conflict with the terms of the policy;[25] but it is sometimes said that a representation of law by the agent cannot bind the insurer.[26]

(III) *Failure to Make Insertion in Application or Policy.* It has been stated similarly that if the insured understood that certain stipulations should be inserted in the application by the agent and was informed that they had been so inserted, the insurer is bound by the policy and application in the form the insured understood that it would exist, despite the parol-evidence rule.[27] So the insured is entitled to presume that the policy is in accordance with the application, and he need not examine it to ascertain whether or not it corresponds.[28]

(IV) *Insertion in Application of Mistaken or Intentional False Statements.* Upon the same principle if the insured at the time of applying for the policy truthfully states to such agent the facts involved in the risk, and the

material, the insurer cannot set up these facts to defeat the policy. Jacobs *v.* St. Paul F. & M. Ins. Co., 86 Iowa 145, 53 N. W. 101.

If the agent assures the insured that an accurate answer is not material, the insurer is likewise estopped to set up a misrepresentation. Michigan State Ins. Co. *v.* Lewis, 30 Mich. 41; Rissler *v.* American Cent. Ins. Co., 150 Mo. 366, 51 S. W. 755; Montgomery *v.* Lebanon Town Mut. F. Ins. Co., 80 Mo. App. 500; McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Hornthal *v.* Western Ins. Co., 88 N. C. 71; Hartford F. Ins. Co. *v.* Walker, 94 Tex. 473, 61 S. W. 711 [*reversing* (Civ. App. 1901) 60 S. W. 820]; Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

If the agent directs a certain answer because his interpretation of the facts justifies such an answer, the insurer cannot assert a misrepresentation. Travelers' Ins. Co. *v.* Snowden, 60 Nebr. 263, 83 N. W. 66; Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331; Farmers', etc., Benev. F. Ins. Assoc. *v.* Williams, 95 Va. 248, 28 S. E. 214.

If, however, the insurer directs the agent to write that there is no encumbrance, the insurer is not estopped to assert the existence of such encumbrance. Blooming Grove Mut. F. Ins. Co. *v.* McAnerney, 102 Pa. St. 335, 48 Am. Rep. 209.

24. *Illinois.*— Phenix Ins. Co. *v.* Hart, 149 Ill. 513, 36 N. E. 990 [*affirming* 39 Ill. App. 517]; American Ins. Co. *v.* Walston, 111 Ill. App. 133; Manufacturers', etc., Mut. Ins. Co. *v.* Armstrong, 45 Ill. App. 217.

Michigan.— Cronin *v.* Philadelphia Fire Assoc., 119 Mich. 74, 77 N. W. 648.

Pennsylvania.— Wachter *v.* Phœnix Assur. Co., 132 Pa. St. 428, 19 Atl. 289, 19 Am. St. Rep. 600.

Virginia.— Virginia F. & M. Ins. Co. *v.* Richmond Mica Co., 102 Va. 429, 46 S. E. 463, 102 Am. St. Rep. 846; Virginia F. & M. Ins. Co. *v.* Goode, 95 Va. 762, 30 S. E. 370.

West Virginia.— Stolle *v.* Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593.

Wisconsin.— Hotchkiss *v.* Phœnix Ins. Co., 76 Wis. 269, 44 N. W. 1106, 20 Am. St. Rep. 69.

Canada.— Lyon *v.* Stadacona Ins. Co., 44 U. C. Q. B. 472.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

25. Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. 415, 9 Ky. L. Rep. 3.

26. Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163; Union Nat. Bank *v.* German Ins. Co., 71 Fed. 473, 18 C. C. A. 203. See also Bosworth *v.* Merchants' F. Ins. Co., 80 Wis. 393, 49 N. W. 750. And *compare* Dircks *v.* German Ins. Co., 34 Mo. App. 31.

27. *Illinois.*— Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121.

Iowa.— Dryer *v.* Security F. Ins. Co., (1900) 82 N. W. 494.

Minnesota.— Soli *v.* Farmers' Mut. Ins. Co., 51 Minn. 24, 52 N. W. 979; Bergstrom *v.* Farmers' Mut. Ins. Co., 51 Minn. 29, 52 N. W. 980.

Missouri.—Gillum *v.* Philadelphia Fire Assoc., 106 Mo. App. 673, 80 S. W. 283.

Wisconsin.— Kelly *v.* Troy F. Ins. Co., 3 Wis. 254. And see Beal *v.* Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

28. St. Paul F. & M. Ins. Co. *v.* Wells, 89 Ill. 82; Dryer *v.* Security F. Ins. Co., (Iowa 1900) 82 N. W. 494; Donnelly *v.* Cedar Rapids Ins. Co., 70 Iowa 693, 28 N. W. 607; Commercial Union Assur. Co. *v.* Urbansky, 113 Ky. 624, 68 S. W. 653, 24 Ky. L. Rep. 462; Smith *v.* Farmers', etc., Mut. F. Ins. Co., 89 Pa. St. 287.

Notice of the mistake, under a policy providing therefor, cures the error (Best *v.* German Ins. Co., 68 Mo. App. 598); while if the insurance company by fraud inserts in the policy stipulations that were not to have been included the insured is not bound thereby (Liverpool, etc., Ins. Co. *v.* Morris, 84 Ga. 759, 11 S. E. 895).

Statement of the agent that proper indorsement of a permit for vacancy has been made on the policy may be relied on by insured. Morgan *v.* Illinois Ins. Co., 130 Mich. 427, 90 N. W. 40.

agent without the actual knowledge of the insured inserts in the application mistaken or intentionally false statements, the insurer cannot claim a forfeiture for misrepresentation, as the misrepresentation is its own.[29]

(v) *Fraudulent Concealment.* The case is the same if the insurer asserts a fraudulent concealment and it appears that the omission is due to the fault of the agent of the insurer.[30]

(vi) *In Connection With the Signing of the Application*—(a) *In General.* That the application is signed by the insured while containing the

29. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210.

Arkansas.— Southern Ins. Co. *v.* Hastings, 64 Ark. 253, 41 S. W. 1093.

California.—Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

Illinois.— Home Ins. Co. *v.* Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374 [*affirming* 64 Ill. App. 30]; Commercial Ins. Co. *v.* Ives, 56 Ill. 402; New England F. & M. Ins. Co. *v.* Schettler, 38 Ill. 166; German Ins. Co. *v.* Miller, 39 Ill. App. 633.

Indiana.— Phœnix Ins. Co. *v.* Stark, 120 Ind. 444, 22 N. E. 413; Phenix Ins. Co. *v.* Allen, 109 Ind. 273, 10 N. E. 85; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

Iowa.— Taylor *v.* Anchor Mut. F. Ins. Co., 116 Iowa 625, 88 N. W. 807, 93 Am. St. Rep. 261, 57 L. R. A. 328; McComb *v.* Council Bluffs Ins. Co., 83 Iowa 247, 48 N. W. 1038; Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

Kentucky.— Western Assur. Co. *v.* Rector, 85 Ky. 294, 3 S. W. 415, 9 Ky. L. Rep. 3; Home Ins. Co. *v.* Patterson, 12 Ky. L. Rep. 941; Springfield F. & M. Ins. Co. *v.* McNulty, 8 Ky. L. Rep. 876; Western Assur. Co. *v.* Rector, 7 Ky. L. Rep. 524.

Maine.— The rule is of statutory origin in this state. Caston *v.* Monmouth Mut. F. Ins. Co., 54 Me. 170.

Michigan.— Crouse *v.* Hartford F. Ins. Co., 79 Mich. 249, 44 N. W. 496.

Minnesota.— Kausal *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

Missouri.—Franklin *v.* Atlantic F. Ins. Co., 42 Mo. 456; Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139; Phœnix Ins. Co. *v.* Owens, 81 Mo. App. 201; Dahlberg *v.* St. Louis Mut. F. & M. Ins. Co., 6 Mo. App. 121. But see Loehner *v.* Home Mut. Ins. Co., 19 Mo. 628.

Nebraska.— Fidelity Mut. F. Ins. Co. *v.* Lowe, (1903) 93 N. W. 749; German Ins. Co. *v.* Frederick, 57 Nebr. 538, 77 N. W. 1106; Home F. Ins. Co. *v.* Fallon, 45 Nebr. 554, 63 N. W. 860.

New Hampshire.— Clark *v.* Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721.

New York.— Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Mead *v.* Saratoga, etc., F. Ins. Co., 81 N. Y. App. Div. 282, 80 N. Y. Suppl. 885; Poughkeepsie Sav. Bank *v.* Manhattan F. Ins. Co., 30 Hun 473; Holmes *v.* Drew, 16 Hun 491; Hodgkins *v.* Montgomery County Mut. Ins. Co., 34 Barb. 213; Benedict *v.* Ocean Ins. Co., 1 Daly 8; Wilder *v.* Preferred Mut. Acc. Assoc., 14 N. Y. St. 365; Lasher *v.* Northwestern Nat. Ins. Co., 55 How. Pr. 324 [*reversed* in 18 Hun 98].

Ohio.— Farmers' Ins. Co. *v.* Williams, 39 Ohio St. 584, 48 Am. Rep. 474; Union Ins. Co. *v.* McGookey, 33 Ohio St. 555.

Pennsylvania.— Gould *v.* Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646; Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50; Commercial Union Assur. Co. *v.* Elliot, 10 Pa. Cas. 331, 13 Atl. 970; Carnes *v.* Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634; Dwelling House Ins. Co. *v.* Gould, 26 Wkly. Notes Cas. 168; Farmers, etc., Mut. Ins. Co. *v.* Meckes, 10 Wkly. Notes Cas. 306.

Rhode Island.—Greene *v.* Equitable F. & M. Ins. Co., 11 R. I. 434.

South Dakota.— South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 2 S. D. 17, 48 N. W. 310.

Tennessee.— Continental F. Ins. Co. *v.* Whitaker, (Sup. 1904) 79 S. W. 119; Home Ins. Co. *v.* Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665.

Texas.— Home Ins., etc., Co. *v.* Lewis, 48 Tex. 622; Westchester F. Ins. Co. *v.* Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876.

Vermont.— Mullin *v.* Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 Atl. 817; Ring *v.* Windsor County Mut. F. Ins. Co., 51 Vt. 563.

West Virginia.— Coles *v.* Jefferson Ins. Co., 41 W. Va. 261, 23 S. E. 732; Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

Wisconsin.— Dunbar *v.* Phenix Ins. Co., 72 Wis. 492, 40 N. W. 386; Mechler *v.* Phœnix Ins. Co., 38 Wis. 665; May *v.* Buckeye Mut. Ins. Co., 25 Wis. 291, 3 Am. Rep. 76; Beal *v.* Park F. Ins. Co., 16 Wis. 241, 82 Am. Dec. 719.

United States.— Phœnix Ins. Co. *v.* Wartemberg, 79 Fed. 245, 24 C. C. A. 547; Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.

Canada.— Le Bell *v.* Norwich Union F. Ins. Soc., 34 N. Brunsw. 515; Somers *v.* Athenæum Ins. Soc., 3 L. C. Jur. 67, 9 L. C. Rep. 61.

See 28 Cent. Dig. tit. "Insurance," § 999 *et seq.* See also *infra*, XXI, H, 2, b, (v).

Contra.— Lowell *v.* Middlesex Mut. F. Ins. Co., 8 Cush. (Mass.) 127. See also *infra*, XXI, H, 2, b, (v).

30. *Illinois.*— Lycoming F. Ins. Co. *v.* Jackson, 83 Ill. 302, 25 Am. Rep. 386.

Kansas.— German Ins. Co. *v.* Gray, 43 Kan. 497, 23 Pac. 637, 19 Am. St. Rep. 150, 8 L. R. A. 70.

misrepresentation does not make the same his if in fact it was prepared by the agent and he had no knowledge of the misstatement.[31] It has been stated even more broadly that if the insured has no accurate knowledge or does nothing in the preparation of the application, but the agent has full knowledge, relies thereon, and draws up the application himself, the misrepresentation does not become that of the insured, although he signs and thereby adopts the same.[32]

Michigan.— Baker *v.* Ohio Farmers' Ins. Co., 70 Mich. 199, 38 N. W. 216, 14 Am. St. Rep. 485.

Missouri.— Fuller Bros. Toll Lumber, etc., Co. *v.* Fidelity, etc., Co., 94 Mo. App. 490, 68 S. W. 222.

Pennsylvania.— Howard F. Ins. Co. *v.* Bruner, 23 Pa. St. 50.

Texas.— Sun Mut. Ins. Co. *v.* Campbell, 3 Tex. App. Civ. Cas. § 407.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

The rule is most frequently applied to an omission to state the fact of an encumbrance or the full amount thereof in the application, where the agent is apprised of the facts. German Ins. Co. *v.* Hayden, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400; Bartholomew *v.* Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65; Continental Ins. Co. *v.* Haynes, 10 Ky. L. Rep. 276; Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296; Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356; Michigan State Ins. Co. *v.* Lewis, 30 Mich. 41; Benninghoff *v.* Watertown Agricultural Ins. Co., 93 N. Y. 495; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624; Tarbell *v.* Vermont Mut. F. Ins. Co., 63 Vt. 53, 22 Atl. 533; Bourgeois *v.* Marshfield Mut. F. Ins. Co., 86 Wis. 402, 57 N. W. 38. *Contra,* Richardson *v.* Maine Ins. Co., 46 Me. 394, 74 Am. Dec. 459 (where the policy expressly referred to the application, but which was signed by the agent without the insured's knowledge); Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247 (where the policy provided that the insurer would be bound by no statement made to the agent not contained in the application); Smith *v.* Agricultural Ins. Co., 6 N. Y. St. 127.

31. *California.*— Yoch *v.* Home Mut. Ins. Co., 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.

Georgia.— Clubb *v.* American Acc. Co., 97 Ga. 502, 25 S. E. 333.

Illinois.— American Ins. Co. *v.* Luttrell, 89 Ill. 314.

Indiana.— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498.

Iowa.— McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38.

Kansas.—Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410.

Kentucky.— Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238.

Michigan.— Ætna Live Stock F., etc., Ins. Co. *v.* Olmstead, 21 Mich. 246, 4 Am. Rep. 483.

Missouri.— Combs *v.* Hannibal Sav., etc., Co., 43 Mo. 148, 97 Am. Dec. 383; Shell *v.* German Ins. Co., 60 Mo. App. 644.

New York.— Owens *v.* Holland Purchase Ins. Co., 56 N. Y. 565; Hayes *v.* Saratoga, etc., F. Ins. Co., 81 N. Y. App. Div. 287, 80 N. Y. Suppl. 888. *Contra,* Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75.

Pennsylvania.— Dowling *v.* Merchants' Ins. Co., 168 Pa. St. 234, 31 Atl. 1087; Susquehanna Mut. F. Ins. Co. *v.* Cusick, 16 Wkly. Notes Cas. 133. *Contra,* Pottsville Mut. F. Ins. Co. *v.* Fromm, 100 Pa. St. 347.

Wisconsin.— Renier *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208; Hanson *v.* Milwaukee Mechanics' Mut. Ins. Co., 45 Wis. 321.

United States.— Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 443.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.* See also *infra,* XXI, H, 2, b, (v).

Contra.— Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587; Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Ætna Ins. Co. *v.* Grube, 6 Minn. 82; Fitzmaurice *v.* New York Mut. L. Ins. Co., 84 Tex. 61, 19 S. W. 301. See Kansas Mill-Owners', etc., Mut. F. Ins. Co. *v.* Central Nat. Bank, 60 Kan. 630, 57 Pac. 524 (where it was held that no recovery could be had on the policy if the insured, at the time he signed the application, or after he received the policy, might, by the exercise of ordinary care and prudence, have known the contents of the same); Mercer County School Dist. No. 4 *v.* State Ins. Co., 61 Mo. App. 597 (where it was said that in the absence of fraud and deceit on the part of the agent the insured would be presumed to have read the application before signing it). And see Mullen *v.* Union Cent. L. Ins. Co., 7 Kulp (Pa.) 422. In Murphrey *v.* Old Dominion Ins. Co., 17 Fed. Cas. No. 9,945, it was said that the insured is bound unless he proves that the answers were not his answers and not assented to by him. In Sitler *v.* Spring Garden Mut. F. Ins. Co., 14 York Leg. Rec. (Pa.) 158, it was said that unless the insured was illiterate his signature bound him and parol evidence was inadmissible. See also cases cited in XXI, H, 2, b, (v).

32. *Indiana.*— Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498; Phenix Ins. Co. *v.* Golden, 121 Ind. 524, 23 N. E. 503.

Kansas.— Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410.

Kentucky.— White *v.* Dwelling-House Ins. Co., 12 Ky. L. Rep. 191.

New York.— Plumb *v.* Cattarangus County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526.

North Carolina.— Hornthal *v.* Western Ins. Co., 88 N. C. 71.

(B) *Signed in Blank.* If the application is signed in blank by the insured and filled out by the agent from his own knowledge, the insurer is estopped to assert a misrepresentation therein,[33] particularly if the insured never saw the completed application,[34] but if the insured reads the application and without any fraud or deceit on the part of the agent signs the same, the insurer may set up the falsehood of statements in the application.[35]

(VII) *MALA FIDES OF INSURED* — (A) *In General.* Want of good faith on the part of the insured qualifies the application of the general rule; and the statements foregoing can be said to be true only so long as the insured would, if no waiver resulted, occupy the position of the injured party.[36]

(B) *Collusion Between Agent and Insured.* If there is collusion between the agent and the insured, although the erroneous statements are inserted by the agent, the representations are those of the insured and he cannot recover on the policy.[37] Likewise when a policy has become void by breach of a condition, if the agent by collusion renews or reëstablishes the same the insurer is not bound by his acts.[38]

(C) *Knowledge of Misstatements.* The result is the same if the insured is aware of the misstatement inserted by the agent and does not correct the same or notify the insurer thereof.[39]

Ohio.— Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Wisconsin.— Johnston *v.* Northwestern Live-Stock Ins. Co., 94 Wis. 117, 68 N. W. 868.

United States.— Roth *v.* City Ins. Co., 20 Fed. Cas. No. 12,084, 6 McLean 324.

See 28 Cent. Dig. tit. "Insurance," § 998 *et seq.*

Where the applicant is ignorant or unable to read, or where a suspicion appears of fraud upon him, the principle is applied with most salutary results (Rogers *v.* Phenix Ins. Co., 121 Ind. 570, 23 N. E. 498; Phenix Ins. Co. *v.* Golden, 121 Ind. 524, 23 N. E. 503; Sullivan *v.* Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112; Hartford F. Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64; Omaha F. Ins. Co. *v.* Crigton, 50 Nebr. 314, 69 N. W. 766; Des Moines State Ins. Co. *v.* Jordon, 29 Nebr. 514, 45 N. W. 792; Hayes *v.* Saratoga, etc., F. Ins. Co., 81 N. Y. App. Div. 287, 80 N. Y. Suppl. 888; Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 443; Chatillon *v.* Canadian Mut. F. Ins. Co., 27 U. C. C. P. 450), particularly when the agent has not read the application over to the insured, the rule of contract that a man is bound by what he signs without reading being declared inapplicable (State Ins. Co. *v.* Gray, 44 Kan. 731, 25 Pac. 197; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238; White *v.* Dwelling-House Ins. Co., 12 Ky. L. Rep. 191; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464).

33. Donnelly *v.* Cedar Rapids Ins. Co., 70 Iowa 693, 28 N. W. 607; National Mut. F. Ins. Co. *v.* Barnes, 41 Kan. 161, 21 Pac. 165; Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 105 Mo. App. 143, 79 S. W. 733; Sprague *v.* Holland Purchase Ins. Co., 69 N. Y. 128.

34. Metropolitan Acc. Assoc. *v.* Clifton, 63 Ill. App. 197.

When the application is prepared by the agent and not signed by the insured, the misrepresentations therein cannot be said to be those of the insured. Mowry *v.* Agricultural Ins. Co., 64 Hun (N. Y.) 137, 18 N. Y. Suppl. 834.

35. Pottsville Mut. F. Ins. Co. *v.* Fromm, 100 Pa. St. 347.

Where the application contained a statement that the insured had read and approved the answer, it was held that he was not relieved from the binding effect of erroneous answers inserted by the agent. Delaware Ins. Co. *v.* Harris, 26 Tex. Civ. App. 537, 64 S. W. 867. See also cases cited *infra,* **note 39.**

36. See cases cited *infra,* notes 37, 38, 39.

37. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Shannon *v.* Gore Dist. Mut. F. Ins. Co., 37 U. C. Q. B. 380.

Any assent procured from the insurer for the doing of an act otherwise prohibited, procured by the collusion of the agent and the insured, is invalid and cannot be shown against the insurer. Phenix Ins. Co. *v.* Willis, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566; Parker *v.* Agricultural Mut. Ins. Co., 28 U. C. C. P. 80.

The fact that the agent advised the insured to say nothing of a mortgage placed after the issuance of the policy, and not to request an indorsement on the policy that the proceeds should be payable to the mortgagee is not collusion, although the agent knows that the insurer does not carry policies on mortgaged property. Phœnix Ins. Co. *v.* McKernan, 104 Ky. 224, 46 S. W. 10, 698, 20 Ky. L. Rep. 337.

38. Pomeroy *v.* Rocky Mountain Ins. Co., (Colo. Sup. 1885) 7 Pac. 295.

39. American Ins. Co. *v.* Gilbert, 27 Mich. 429; Union Ins. Co. *v.* McGookey, 33 Ohio St. 555.

But this is not so if the agent represented to him that the proper construction of the

2. Must Be Insurer's Agent. Again the foregoing rules have of course no application if the agent who erroneously or wilfully inserts misstatements is in fact the agent of the insured and not of the insurer.[40] But it is the settled policy of the law to treat local agents who are authorized to procure and forward applications for insurance, for the purposes herein considered, as agents of the insurer and not of the insured.[41] The attempt of the insurer to constitute its agent in fact the agent of the insured in such matters by a statement to that effect in the policy has in general failed of accomplishment, the courts on varying grounds refusing to regard the true status as thus overturned.[42]

condition did not render them material. Reynolds *v.* Iowa, etc., Ins. Co., 80 Iowa 563, 46 N. W. 659.

Delay in making objections.— In Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37, the insured while not held responsible for unauthorized insertions by the agent was held bound by the policy issued thereon when after a reasonable time he made no objection thereto.

Some courts have said that perfect good faith requires the insured to read the application before signing the same, and that he is therefore to be taken to have knowledge of any statements therein when he has an opportunity to but does not read the instrument. Sun Fire Office *v.* Wich, 6 Colo. App. 103, 39 Pac. 587; Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Bartholomew *v.* Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65; Ætna Ins. Co. *v.* Gruhe, 6 Minn. 82; Mercer County School Dist. No. 4 *v.* State Ins. Co., 61 Mo. App. 597; Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. (N. Y.) 75; Sitler *v.* Spring Garden Mut. F. Ins. Co., 14 York Leg. Rec. (Pa.) 158; Fitzmaurice *v.* New York Mut. L. Ins. Co., 84 Tex. 61, 19 S. W. 301; Kniseley *v.* British America Ins. Co., 32 Ont. 376. *Contra*, however, under general rule see cases cited *supra*, XIV, F, 1, b, (VI), (A) *et seq.*

Failure to read the application when attached to the policy after delivery of the latter has been said to make the fraud of the agent that of the insurer. Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799. *Contra*, Donnelly *v.* Cedar Rapids Ins. Co., 70 Iowa 693, 28 N. W. 607.

40. Thus an insurance broker represents the applicant and any errors or fraud on his part are properly chargeable to the insured. Sellers *v.* Commercial F. Ins. Co., 105 Ala. 282, 16 So. 798; Commercial Union Assur. Co. *v.* Elliott, 10 Pa. Cas. 331, 13 Atl. 970.

It is possible, however, for the insurer to constitute the broker temporarily its own agent (Mullin *v.* Vermont Mut. F. Ins. Co., 58 Vt. 113, 4 Atl. 817), or the agent of another company its own for the purposes of the present transaction, as when such agent being unable to place insurance in the company he represents has applied for and obtained it through defendant's agents (McGraw *v.* Germania F. Ins. Co., 54 Mich. 145, 19 N. W. 927). See also Insurance.

If the insured's agent is acting as the amanuensis of the insurer's agent he is temporarily the agent of the insurer. Pennsylvania Ins. Co. *v.* O'Connell, 34 Ill. App. 357.

41. *Connecticut.*— Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517.

Indiana.— Bowlus *v.* Phenix Ins. Co., 133 Ind. 106, 32 N. E. 319, 20 L. R. A. 400.

Iowa.— Bartholemew *v.* Merchants' Ins. Co., 25 Iowa 507, 96 Am. Dec. 65.

Kansas.— State Ins. Co. *v.* Gray, 44 Kan. 731, 25 Pac. 197.

Kentucky.— German Ins. Co. *v.* Miller, 11 Ky. L. Rep. 721.

Missouri.— Combs *v.* Hannibal Sav., etc., Co., 43 Mo. 148, 97 Am. Dec. 383.

New York.— Rowley *v.* Empire Ins. Co., 36 N. Y. 550.

Ohio.— Phœnix Mut. F. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 321.

England.— *In re* Universal Non-Tariff F. Ins. Co., L. R. 19 Eq. 485, 44 L. J. Ch. 761, 23 Wkly. Rep. 464.

See 28 Cent. Dig. tit. "Insurance," § 1001. See also *supra*, XIV, B, 1; XIV, E, 2.

Contra.— Pottsville Mut. F. Ins. Co. *v.* Fromm, 100 Pa. St. 347; Wilson *v.* Conway F. Ins. Co., 4 R. I. 141.

But the insured may constitute the insurer's agent his own agent for the transaction. Smith *v.* Empire Ins. Co., 25 Barb. (N. Y.) 497; Harrison *v.* Hartford F. Ins. Co., 30 Fed. 862.

Where the insurer's agent had been accustomed also to act for the insured in watching his insurance and was accustomed to affix vacancy permits when necessary, his mistake in considering a vacancy permit unnecessary on a certain occasion will not work an estoppel when the insured did not know of or rely upon his non-action. Home Ins. Co. *v.* Scales, 71 Miss, 975, 15 So. 134, 42 Am. St. Rep. 512.

42. *Illinois.*—Pennsylvania Ins. Co. *v.* O'Connell, 34 Ill. App. 357.

Iowa.— Boetcher *v.* Hawkeye Ins. Co., 47 Iowa 253.

Kansas.— Continental Ins Co. *v.* Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; Sullivan *v.* Phenix Ins. Co., 34 Kan. 170, 8 Pac. 112.

Minnesota.— Kausal *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

Missouri.— Rosencrans *v.* North American Ins. Co., 66 Mo. App. 352.

New York.— Patridge *v.* Commercial F. Ins. Co., 17 Hun 95; Bernard *v.* United L. Ins. Assoc., 17 Misc. 115, 39 N. Y. Suppl.

XV. RISKS AND CAUSES OF LOSS.

A. Fire as Proximate Cause — 1. Loss by Fire. To constitute a "direct loss or damage by fire," within the usual terms of a fire policy, there must be a fire in the proper sense of that term, from which the loss or damage results.[43]

2. Losses as a Consequence of Fire — a. Fire as Proximate Cause. The frequent controversy as to whether or not a given loss is a loss caused by fire usually depends, however, on the question whether or not a conceded fire is the proximate cause of such loss; and as a general proposition it may be safely stated

356 [*affirming* 15 Misc. 694, 37 N. Y. Suppl. 1143]; Bernard *v.* United L. Ins. Assoc., 12 Misc. 10, 33 N. Y. Suppl. 22 [*reversing* 8 Misc. 499, 28 N. Y. Suppl. 756, 11 Misc. 441, 32 N. Y. Suppl. 223].

Ohio.— Amazon Ins. Co. *v.* McIntyre, 7 Ohio Dec. (Reprint) 577, 4 Cinc. L. Bul. 21.

Pennsylvania.— Meyers *v.* Lebanon Mut. Ins. Co., 156 Pa. St. 420, 27 Atl. 39; Kister *v.* Lebanon Mut. Ins. Co., 128 Pa. St. 553, 18 Atl. 447, 15 Am. St. Rep. 696, 5 L. R. A. 646; Columbia Ins. Co. *v.* Cooper, 50 Pa. St. 331.

South Dakota.— South Bend Toy Mfg. Co. *v.* Dakota F. & M. Ins. Co., 2 S. D. 17, 48 N. W. 310.

West Virginia.— Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

See 28 Cent. Dig. tit. "Insurance," § 1003; and, generally, Insurance.

Contra.— Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316; Kibbe *v.* Hamilton Mut. Ins. Co., 11 Gray (Mass.) 163.

In Canada the provisions of the policy govern. Shannon *v.* Hastings Mut. Ins. Co., 2 Ont. App. 81 [*affirmed* in 2 Can. Sup. Ct. 394]; Bleakley *v.* Niagara Dist. Mut. Ins. Co., 16 Grant Ch. (U. C.) 198. But see Burton, J., in Sowden *v.* Standard F. Ins. Co., 5 Ont. App. 290.

Mutual companies.— The rule is the same as to the agents of mutual companies. Kausal *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776. And so even though the stipulation is contained in the by-laws of the company. Clark *v.* Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. (N. Y.) 624. *Contra*, Susquehanna Ins. Co. *v.* Perrine, 7 Watts & S. (Pa.) 348.

Extent and limits of rule.— Some courts have given greater effect to such a clause inserted in the application itself (Lama *v.* Dwelling House Ins. Co., 51 Mo. App. 447), but even this holding is generally denied (German Ins. Co. *v.* Horan, 15 Ky. L. Rep. 208). Again some cases have drawn a distinction between cases where the insured has or has not knowledge of the stipulation. Gates *v.* Penn F. Ins. Co., 10 Hun (N. Y.) 489; Eilenberger *v.* Protective Mut. F. Ins. Co., 89 Pa. St. 464.

43. See cases cited *infra*, this note.

Injury to insured property by heat, although the heat is caused by combustion, if it does not result from fire outside of its usual limits, that is, from a fire such as is contemplated by an insurance contract as distinguished from a fire in general, is not covered by the policy. This rule has been applied: To scorching of sugar in a refinery due to overheating the pans used in drying. Austin *v.* Drew, 4 Campb. 360, Holt 126, 3 E. C. L. 58, 2 Marsh. 130, 6 Taunt. 436, 1 E. C. L. 691, 16 Rev. Rep. 647. To damage to a library, due to a break in the steam-heating pipes, resulting in the charring of furniture and books. Gibbons *v.* German Ins., etc., Inst., 30 Ill. App. 263. To damage by smoke from the flame of a flaring lamp (Fitzgerald *v.* German-American Ins. Co., 30 Misc. (N. Y.) 72, 62 N. Y. Suppl. 824; Samuels *v.* Continental Ins. Co., 2 Pa. Dist. 397), or from smoke and soot escaping from a defective stovepipe (Cannon *v.* Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124. See 62 Alb. L. J. 274, distinguishing a "friendly" and a "hostile" fire).

But where a fire in a chimney caused by the accidental ignition of soot damaged the insured property, it was held that the loss was a loss by fire within the terms of the policy. Way *v.* Abington Mut. F. Ins. Co., 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608.

So where the oil in a coal-oil stove took fire, damaging with smoke and soot the furniture covered by the fire policy, it was held to be for the jury to say whether the fire was outside of the place where it was intended to burn, so as to constitute a fire by the terms of the policy. Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576, 7 Del. Co. 365.

The ignition of any explosive, such as gunpowder or illuminating gas, by accidental means no doubt constitutes a fire the results of which may be considered a loss by fire under the general terms of a policy. Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904. But by stipulation in the policy losses due to explosion are usually excluded. See *infra*, XV, B, 3.

A lighted match is not a fire. Heuer *v.* Winchester F. Ins. Co., 151 Ill. 331, 37 N. E. 837; Heuer *v.* Northwestern Nat. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 N. W. 569, 97 Am. St. Rep. 330; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42, 22 S. Ct. 22, 46 L. ed. 74.

that the policy will cover only the direct and immediate and not the remote losses from fire.[44]

b. Damage by Removal. Where the removal of goods is necessitated by a fire, whether in the insured building or in another building, which causes peril to goods, loss or damage resulting from such removal is covered by a fire policy on the goods, the fire being regarded as the proximate cause.[45]

c. Damage by Water. Under a fire policy damage by water used to extinguish the fire is covered.[46]

d. Loss by Theft.[47] Loss of goods stolen during or as the result of the fire, or during the removal of the goods to save them from loss by fire, is covered by a fire policy.[48]

e. Fall or Blowing Up of Building.[49] Fall of a building due to its partial destruction by fire is of course a part of the loss by fire; and even if the fire results only after the fall of the building and as a consequence of such fall, nevertheless the damage, so far as it is attributable to the fire and not merely to the falling of the building, is a loss by fire.[50] And if to prevent the spread of a

44. Case *v.* Hartford F. Ins. Co., 13 Ill. 676; Caballero *v.* Home Mut. Ins. Co., 15 La. Ann. 217; Brady *v.* Northwestern Ins. Co., 11 Mich. 425; Hillier *v.* Alleghany Mut. Ins. Co., 3 Pa. St. 470, 45 Am. Dec. 656.

Rule explained.— The rule that the law looks to the proximate and not to the remote cause does not necessarily mean that the cause nearest in time or place is to be considered, but only that the efficient cause, that is, the cause which necessarily sets the other causes in motion, is to be sought. Imperial F. Ins. Co. *v.* Fargo, 95 U. S. 227, 24 L. ed. 428; Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395; Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. (U. S.) 44, 19 L. ed. 65.

Where a policy covered loss from lightning but excluded loss from wind, recovery was denied from loss by wind, although but for the weakening of the building by lightning it would not have been blown down. Beakes *v.* Phœnix Ins. Co., 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267.

Where damage by storm was excluded, and the building was destroyed by fire communicated from a stove within the building, it was held that the loss was the result of the storm and not of fire. Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153.

Where the machinery of an electric company was covered by a fire policy, and by reason of an accidental fire a short circuit was produced within the building, causing the machinery to break to pieces as a result of the increased electrical power applied to it, the damage was held to be a loss by fire. Lynn Gas, etc., Co. *v.* Meriden F. Ins. Co., 158 Mass. 570, 33 N. E. 690, 35 Am. St. Rep. 540, 20 L. R. A. 297. And see Transatlantic F. Ins. Co. *v.* Dorsey, 56 Md. 70, 40 Am. Rep. 403.

45. *Illinois.*— Case *v.* Hartford F. Ins. Co., 13 Ill. 676.

Louisiana.— Balestracci *v.* Firemen's Ins. Co., 34 La. Ann. 844.

Maine.— White *v.* Republic F. Ins. Co., 57 Me. 91, 2 Am. Rep. 22.

Pennsylvania.— Independent Mut. Ins. Co. *v.* Agnew, 34 Pa. St. 96, 75 Am. Dec. 638 [*affirming* 3 Phila. 193]; Hillier *v.* Alleghany County Mut. Ins. Co., 3 Pa. St. 470, 45 Am. Dec. 656.

United States.— Holtzman *v.* Franklin Ins. Co., 12 Fed. Cas. No. 6,649, 4 Cranch C. C. 295.

England.— Marsden *v.* City, etc., Assur. Co., L. R. 1 C. P. 232, 1 H. & R. 53, 12 Jur. N. S. 76, 35 L. J. C. P. 60, 13 L. T. Rep. N. S. 465, 14 Wkly. Rep. 106.

See 28 Cent. Dig. tit. "Insurance," § 1142.

46. Geisek *v.* Crescent Mut. Ins. Co., 19 La. Ann. 297; Davis *v.* Insurance Co. of North America, 115 Mich. 382, 73 N. W. 393; Whitehurst *v.* Fayetteville Mut. Ins. Co., 51 N. C. 352.

Damage due to water from an automatic fire-extinguisher is covered by the policy, as is also damage to the goods by being trampled upon or thrown about in the efforts to extinguish the fire, although the actual damage results after the fire has been extinguished. Cohn *v.* National F. Ins. Co., 96 Mo. App. 315, 70 S. W. 259.

47. See *infra*, XV, B, 2.

48. *Kentucky.*— Leiber *v.* Liverpool, etc., Ins. Co., 6 Bush 639, 99 Am. Dec. 695.

Louisiana.— Fernandez *v.* Merchants' Ins. Co., 17 La. Ann. 131; Talamon *v.* Home, etc., Mut. Ins. Co., 16 La. Ann. 426.

Maine.— Witherell *v.* Maine Ins. Co., 49 Me. 200.

Missouri.— Newark *v.* Liverpool, etc., F., etc., Ins. Co., 30 Mo. 160, 77 Am. Dec. 608.

New York.— Tilton *v.* Hamilton F. Ins. Co., 14 How. Pr. 363.

North Carolina.— Whitehurst *v.* Fayetteville Mut. Ins. Co., 51 N. C. 352.

Pennsylvania.— Independent Mut. Ins. Co. *v.* Agnew, 34 Pa. St. 96, 75 Am. Dec. 638; Lukens *v.* Insurance Co., 25 Leg. Int. 61.

Canada.— Thompson *v.* Montreal Ins. Co., 6 U. C. Q. B. 319; McGibbon *v.* Queen Ins. Co., 10 L. C. Jur. 227.

See 28 Cent. Dig. tit. "Insurance," § 1143.

49. See *infra*, XV, B, 5.

50. Lewis *v.* Springfield F. & M. Ins. Co., 10 Gray (Mass.) 159.

fire, and in the exercise of a reasonable judgment, a building is torn down and removed, the damage will be covered by a fire policy.[51]

f. Explosion.[52] In the absence of any limitation in the policy, damage from an explosion which is the direct result of a fire is a loss by fire,[53] but an explosion due to the ignition by a match or spark of an explosive substance, no fire resulting, is not within the terms of an ordinary fire policy.[54]

B. Limitations as to Causes of Loss — 1. Invasion, Insurrection, Mob Violence, Military Power, Etc. A clause is usually inserted in the standard policies[55] exempting the company from liability for loss "caused directly or indirectly by invasion, insurrection, riot, civil commotion, military, or usurped power, or by order of any civil authority."

2. Theft.[56] An exception exempting the company from liability for loss caused by theft, which is now found in standard policies,[57] relieves the company from the liability which would otherwise rest upon it[58] to pay for property stolen during

Limitations of rule.— If the falling of the building, although it occurs after a fire, is not the result of the fire, the loss is not covered by the policy. Cuesta *v.* Royal Ins. Co., 98 Ga. 720, 27 S. E. 172; Alter *v.* Home Ins. Co., 50 La. Ann. 1316, 24 So. 180; Liverpool, etc., Ins. Co. *v.* Ende, 65 Tex. 118. And if the building is by some other cause reduced to rubbish, so that it no longer has the characteristics of a building, the subsequent destruction by fire of the *débris* will not be covered by a fire policy on the building. Nave *v.* Home Mut. Ins. Co., 37 Mo. 430, 90 Am. Dec. 394; Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153.

51. City F. Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367, 34 Am. Dec. 258; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323, 7 Am. L. Reg. 282.

52. See *infra*, XV, B, 3.

53. Caballero *v.* Home Mut. Ins. Co., 15 La. Ann. 217; Washburn *v.* Artisans' Ins. Co., 29 Fed. Cas. No. 17,212; Washburn *v.* Union F. Ins. Co., 29 Fed. Cas. No. 17,215; Washburn *v.* Western Ins. Co., 29 Fed. Cas. No. 17,216.

54. Phœnix Ins. Co. *v.* Greer, 61 Ark. 509, 33 S. W. 840; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 N. W. 569, 97 Am. St. Rep. 330; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42, 22 S. Ct. 22, 46 L. ed. 741. *Contra*, Scripture *v.* Lovell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, 57 Am. Dec. 111; Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904.

Explosion in other building.— So where the damage to the insured premises was due to the force of an explosion occurring in a building at some distance, it was held that the loss was not covered by a fire policy, although the explosion in the distant building was due to fire. Miller *v.* London, etc., F. Ins. Co., 41 Ill. App. 395; Caballero *v.* Home Mut. Ins. Co., 15 La. Ann. 217; Everett *v.* London Assur. Co., 19 C. B. N. S. 126, 11 Jur. N. S. 546, 34 L. J. C. P. 299, 13 Wkly. Rep. 862, 115 E. C. L. 126.

Damage from explosion being excluded by the policy, where the damage for which recovery was sought resulted from an explosion of illuminating gas, it was held that the explosion and the lighted match causing such explosion was the proximate cause. Heuer *v.* Winchester F. Ins. Co., 151 Ill. 331, 37 N. E. 873; Heuer *v.* Northwestern Nat. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594.

55. See *supra*, IV, B, 2; and cases cited *infra*, this note.

Invasions — Military power.— A loss resulting from acts of the lawful military authorities of the United States in resisting an attack by the Confederate forces was held to be within the exception so far as it applied to invasion and military power, these being the proximate causes of the loss. Barton *v.* Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329; Ætna Ins. Co. *v.* Boon, 95 U. S. 117, 24 L. ed. 395. But in other cases it has been held that force resulting from the acts of a lawful military authority were not within the exception. Boon *v.* Ætna Ins. Co., 40 Conn. 575; Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. (Va.) 613.

Mob violence — Riots.— In determining whether the destruction of the property by fire is due to a riot within the exception, the usual legal definition of a riot is to be applied. Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868; Dupin *v.* Mutual Ins. Co., 5 La. Ann. 482; Strauss *v.* Imperial F. Ins. Co., 16 Mo. App. 555; Lycoming F. Ins. Co. *v.* Schwenk, 95 Pa. St. 89, 40 Am. Rep. 629. See, generally, Riot. But the consequences of the act of lawful military authority in resisting armed forces is not within the exception as to mobs or riots. Harris *v.* York Mut. Ins. Co., 50 Pa. St. 341. The exception as to invasion, etc., does not cover acts of a mob (Drinkwater *v.* London Assur. Co., 2 Wils. P. C. 363); nor are "civil commotion" and "riot" synonymous (Condlin *v.* Home Dist. Mut. F. Ins. Co., (Hil. T.) 6 Vict.). An exception of loss directly caused by riot or incendiarism does not cover loss by fire communicated to the insured building from another building set on fire by rioters or incendiaries. Michigan F. & M. Ins. Co. *v.* Whitelaw, 25 Ohio Cir. Ct. 197. But *contra*, see Walker *v.* London, etc., Ins. Co., 22 L. R. Ir. 572.

56. See *supra*, XV, A, 2, d.

57. See *supra*, IV, B, 2.

58. See *supra*, XV, A, 2, d.

the progress of a fire, or during the process of the removal of the property necessitated by fire.[59]

3. EXPLOSION[60]— a. In General. The usual exception of loss by explosion of any kind exempts the company from liability for an explosion, no matter how caused;[61] and perhaps under such an exemption without qualification, there would be no liability for fire resulting from an explosion;[62] but under the further provision that the exemption does not extend to loss by fire resulting from explosion, although the risk is limited to the damage by fire, the company is liable for the fire loss, whatever it may be.[63]

b. Of Boiler. With a like effect policies sometimes exempt the company from liability for fire due to the explosion of steam boilers.[64]

4. LIGHTNING, STORMS, ETC. An exception of liability from lightning, unless fire ensues, excludes a recovery against the company under the policy for damage due to lightning and not to burning;[65] but it is usual to add a lightning clause by which the company is rendered liable for loss caused by lightning as well

59. Liverpool, etc., Ins. Co. *v.* Creighton, 51 Ga. 95; Webb *v.* Ætna Protection, etc., Ins. Co., 14 Mo. 3.

60. See *supra*, XV, A, 2, f.

61. Hustace *v.* Phenix Ins. Co., 175 N. Y. 292, 67 N. E. 592 [*reversing* 71 N. Y. App. Div. 309]; German F. Ins. Co. *v.* Roost, 55 Ohio St. 581, 45 N. E. 1097, 60 Am. St. Rep. 711, 36 L. R. A. 236; Smiley *v.* Citizens' Fire, etc., Ins. Co., 14 W. Va. 33.

Explosion of gas as within the rule see Heuer *v.* Winchester F. Ins. Co., 151 Ill. 331, 37 N. E. 873; Heuer *v.* Northwestern Nat. Ins. Co., 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Iowa 555, 93 N. W. 569, 97 Am. St. Rep. 330, 60 L. R. A. 838; Stanley *v.* Western Ins. Co., L. R. 3 Exch. 71, 37 L. J. Exch. 73, 17 L. T. Rep. N. S. 513, 16 Wkly. Rep. 369; Hobbs *v.* Northern Assur. Co., 12 Can. Sup. Ct. 631.

Permission to keep explosives.—Even though under the terms of the policy the insured is authorized to keep explosives on the premises, the exception of loss by explosion excludes liability for loss due to explosion of articles thus authorized to be kept. Smiley *v.* Citizens' F., etc., Ins. Co., 14 W. Va. 33; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42, 22 S. Ct. 22, 46 L. ed. 74; Washburn *v.* Miami Valley Ins. Co., 2 Fed. 633, 2 Flipp. 664. Where the policy contained a condition that the company shall not be liable for a loss caused by the use of kerosene oil used for light in any barn or outbuilding, it was held that a loss by fire due to the accidental upsetting of a kerosene lamp was within the exception. Matson *v.* Farm Bldg. F. Ins. Co., 73 N. Y. 310, 29 Am. Rep. 149. A policy on printing and book materials in a printing establishment contained a condition exempting the company from liability for any loss occasioned by camphene; but it was held that the exemption extended only to a loss occasioned by its use for purposes other than that of printing, it being shown that its use in printing was necessary. Harper *v.* New York City Ins. Co., 22 N. Y. 441.

Collision.—Under the provision in a policy issued to an express company on goods and merchandise in its care for transportation while on board cars or other conveyances that no loss was to be paid in case of collision, except fire ensue, and then only for loss from fire, and that no loss was to be paid arising from petroleum or other explosive oils, it was held that destruction of goods in an express car due to a collision of the train with freight cars containing petroleum oil was not covered by the policy. Imperial F. Ins. Co. *v.* Fargo, 95 U. S. 227, 24 L. ed. 428.

62. Tanneret *v.* Merchants' Mut. Ins. Co., 34 La. Ann. 249; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323.

63. *Illinois.*— Commercial Ins. Co. *v.* Robinson, 64 Ill. 265, 16 Am. Rep. 557.

Missouri.— Cohn *v.* National Ins. Co., 96 Mo. App. 315, 70 S. W. 259.

New York.— Briggs *v.* North American Mercantile Ins. Co., 53 N. Y. 446; Hustace *v.* Phenix Ins. Co., 71 N. Y. App. Div. 309, 75 N. Y. Suppl. 568; Briggs *v.* People's Ins. Co., 66 Barb. 330.

Pennsylvania.— Heffron *v.* Kittanning Ins. Co., 132 Pa. St. 580, 20 Atl. 698.

United States.— Leonard *v.* Orient Ins. Co., 109 Fed. 286, 48 C. C. A. 369, 54 L. R. A. 706.

See 28 Cent. Dig. tit. "Insurance," § 1128.

64. *Louisiana.*— Millaudon *v.* New Orleans Ins. Co., 4 La. Ann. 15, 50 Am. Dec. 550.

New York.— St. John *v.* American Mut. F. & M. Ins. Co., 11 N. Y. 516 [*affirming* 1 Duer 371]; Hayward *v.* Liverpool, etc., Ins. Co., 2 Abb. Dec. 349, 3 Keyes 456, 3 Transcr. App. 180, 5 Abb. Pr. N. S. 142, 3 How. Pr. 618 note [*affirming* 7 Bosw. 385].

Ohio.— Boatman's F. & M. Ins. Co. *v.* Parker, 23 Ohio St. 85, 13 Am. Rep. 228; United L., etc., Ins. Co. *v.* Foote, 22 Ohio St. 340, 10 Am. Rep. 735.

Wisconsin.— Thurston *v.* Burnett, etc., Farmers' Mut. F. Ins. Co., 98 Wis. 476, 74 N. W. 131, 41 L. R. A. 316.

United States.— American Steam Boiler Ins. Co. *v.* Chicago Sugar Refining Co., 57 Fed. 294, 6 C. C. A. 336, 21 L. R. A. 572.

65. Kenniston *v.* Merimack County Mut. Ins. Co., 14 N. H. 341, 40 Am. Dec. 193; Babcock *v.* Montgomery County Mut. Ins. Co., 4 N. Y. 326.

as by fire; and under such a provision, it is immaterial whether fire results from the lightning or not.[66]

5. Falling of Building.[67] For the purpose of excluding any question as to measure of damage by fire, when fire results after a building has fallen, it is usual to provide that, on the falling of a building except as the result of fire, all insurance by the policy on such building or its contents shall immediately cease.[68]

6. Negligence or Misconduct — a. Of Insured or His Servants. In the absence of fraud or design on the part of the insured, or some stipulation in the policy,[69] the insurer is not relieved from liability by mere negligence or carelessness of the insured or his servants, although directly causing or contributing to the loss;[70] but on the other hand even in the absence of stipulation in the policy, the failure of the insured to take reasonable care to avoid loss, or the doing of

66. Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535; Haws *v.* St. Paul F. & M. Ins. Co., 130 Pa. St. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52; Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 11 N. W. 894.

Excluding damage by wind-storm.— Where the policy covered liability for direct damage by lightning, but excluded damage by windstorm, and the insured building was damaged by lightning and subsequently by wind, it was held there could be recovery only for the damage directly due to lightning. Warincastle *v.* Scottish Union, etc., Ins. Co., 201 Pa. St. 302, 50 Atl. 941.

67. See *supra*, XV, A, 2, e.

68. See cases cited *infra*, this note; and note to 42 Am. St. Rep. 465; Ostrander Ins. § 314.

Such a provision is effectual to relieve the company from liability for fire resulting from the fall of the building from some other cause, such as storm (Nichols *v.* Sun Mut. Ins. Co., 71 Miss. 326, 14 So. 263, 42 Am. Rep. 465), explosion (Waldeck *v.* Springfield F. & M. Ins. Co., 56 Wis. 96, 14 N. W. 1), or the like.

If a fire is the efficient cause of the falling of the building the exemption will not apply, although the immediate cause was an explosion resulting from such fire. Dows *v.* Faneuil Hall Ins. Co., 127 Mass. 346, 34 Am. Rep. 384; Renshaw *v.* Fireman's Ins. Co., 33 Mo. App. 394.

Where the fall of a building was due to a fire in an adjoining building, it was held that the exemption did not apply. Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346.

69. It is usual to stipulate that the company shall not be liable for loss caused by the neglect of the insured to use all reasonable means to save and preserve the property when it is endangered by fire; and under such a stipulation the question of negligence as to the saving of property should be submitted to the jury. Raymond *v.* Farmers' Mut. F. Ins. Co., 114 Mich. 386, 72 N. W. 254; Fleisch *v.* Insurance Co. of North America, 58 Mo. App. 596.

An express exception of loss resulting from design in the insured admits all losses not by design to be within the terms of the policy. Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434.

The term "gross negligence," as used in a condition exempting the company from loss on that account, means want of that diligence which even careless men are accustomed to exercise. Lycoming Ins. Co. *v.* Barringer, 73 Ill. 230.

The insane act of the insured will not defeat recovery under an exception excluding loss caused by the voluntary act, assent, procurement, or design of insured. D'Autremont *v.* Philadelphia Fire Assoc., 65 Hun (N. Y.) 475, 20 N. Y. Suppl. 344; Showalter *v.* Chester County Mut. F. Ins. Co., 3 Pa. Super. Ct. 448, 40 Wkly. Notes Cas. 76; Showalter *v.* Chester County Mut. F. Ins. Co., 17 Pa. Co. Ct. 558; Karow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

70. *Illinois.*— Firemen's Ins. Co. *v.* Appleton Paper, etc., Co., 59 Ill. App. 511.

Kentucky.— Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 24 Ky. L. Rep. 958.

Louisiana.— Henderson *v.* Western M. & F. Ins. Co., 10 Rob. 164, 43 Am. Dec. 176.

Maine.— Williams *v.* New England Mut. F. Ins. Co., 31 Me. 219.

Massachusetts.—Johnson *v.* Berkshire Mut. F. Ins. Co., 4 Allen 388.

Missouri.— Wertheimer-Swarts Shoe Co. *v.* U. S. Casualty Co., 172 Mo. 135, 72 S. W. 635, 95 Am. St. Rep. 500, 61 L. R. A. 766.

New Hampshire.—Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238.

New York.— Gates *v.* Madison County Mut. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360; Champlin *v.* Railway Pass. Assur. Co., 6 Lans. 71.

Pennsylvania.— Cumberland Valley Mut. Protection Co. *v.* Douglas, 58 Pa. St. 419, 98 Am. Dec. 298.

Wisconsin.— Pool *v.* Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919; Karow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

United States.— Rogers *v.* Ætna Ins. Co., 95 Fed. 103, 35 C. C. A. 396; Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434.

England.— Shaw *v.* Roberds, 6 A. & E. 75, 1 Jur. 6, 6 L. J. K. B. 106, 1 N. & P. 279,

wrongful acts directly calculated to bring about the loss, may be such as to defeat recovery under the policy.[71]

b. Of Others.[72] The usual stipulation against loss caused by the negligence of insured, however, does not relieve the company from liability for a loss due to the negligence or misconduct of others;[73] for example, the negligence or misconduct of an agent[74] or of the husband or wife of the insured,[75] where it does not appear that there was any fault or connivance on the part of the insured.

C. Limitations as to Time and Place of Loss. The property may be so described that the risk under the policy continues only while the property remains in the location thus described.[76] By express stipulation the policy may be rendered void in case the risk is increased by the subsequent erection or

33 E. C. L. 63; Jameson *v.* Royal Ins. Co., Ir. R. 7 C. L. 126.

See 28 Cent. Dig. tit. "Insurance," § 1137.

71. *Illinois.*— Phœnix Ins. Co. *v.* Mills, 77 Ill. App. 546.

Iowa.— Des Moines Ice Co. *v.* Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600; Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628.

Kentucky.—Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. 282.

Louisiana.— McCarty *v.* Louisiana Mut. Ins. Co., 25 La. Ann. 354.

Massachusetts.— Chandler *v.* Worcester Mut. F. Ins. Co., 3 Cush. 328.

Nebraska.— Western Horse, etc., Ins. Co. *v.* O'Neill, 21 Nebr. 548, 32 N. W. 581.

New York.— Hynds *v.* Schenectady County Mut. Ins. Co., 16 Barb. 119.

Oregon.— Portland First Nat. Bank *v.* Philadelphia Fire Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8.

United States.— Williams *v.* New England Ins. Co., 29 Fed. Cas. No. 17,731, 3 Cliff. 244.

Canada.— Mann *v.* Western Assur Co., 17 U. C. Q. B. 190.

See 28 Cent. Dig. tit. "Insurance," § 1138; and *infra*, XVI, D.

After the peril of loss by fire has arisen neglect or misconduct of the insured in failing to save property will only defeat recovery as to property lost in consequence of such neglect or misconduct. Wolters *v.* Western Assur. Co., 95 Wis. 265, 70 N. W. 62.

72. See *supra*, note 70.

73. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242. Thus, where the policy was issued to A and B, loss, if any, payable first to A as his interest might appear, B having in reality no interest in the policy, it was held that the wrongful act of B in causing the building to be burned without his knowledge or consent would not defeat A's right to recover. Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121.

Where it is provided that an insurance on a mortgagee's interest shall not be invalidated by any act or neglect of the mortgagor, voluntary destruction by the owner will not prevent recovery by the mortgagee. Hartford F. Ins. Co. *v.* Williams, 63 Fed. 925, 11 C. C. A. 503.

74. Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540; Wertheimer-Swarts Shoe Co. *v.* U. S. Casualty Co., 172 Mo. 135, 72 S. W. 635, 95 Am. St. Rep. 500, 61 L. R. A. 766.

75. Mickey *v.* Burlington Ins. Co., 35 Iowa 174, 14 Am. Rep. 494; Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Plinsky *v.* Germania F. &. M. Ins. Co., 32 Fed. 47; Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 485.

76. *Michigan.*— Wildey *v.* Farmers' Mut. F. Ins. Co., 52 Mich. 446, 18 N. W. 212.

Missouri.— Farrell *v.* Farmers' Mut. F. Ins. Co., 66 Mo. App. 153; Giboney *v.* German Ins. Co., 48 Mo. App. 185.

New York.— Eddy *v.* Farmers' Mut. Ins. Co., 20 N. Y. App. Div. 109, 46 N. Y. Suppl. 695.

Pennsylvania.— McKeesport Mach. Co. *v.* Ben Franklin Ins. Co., 173 Pa. St. 53, 34 Atl. 16; Haws *v.* St. Paul F. & M. Ins. Co., 130 Pa. St. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52; Reck *v.* Hatboro Mut. Live Stock, etc., Ins. Co., 10 Montg. Co. Rep. 17.

Texas.— Waxahachie First Nat. Bank *v.* Lancashire Ins. Co., 62 Tex. 461.

See 28 Cent. Dig. tit. "Insurance," § 1122 *et seq.*

Further as to location and removal see *supra*, XI, I, 2; *infra*, XV, C.

"Building and contents."— Thus a policy on a building and contents does not cover property removed from the building or while not contained in the building. Farmers' Mut. F. Ins. Assoc *v.* Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284; Benton *v.* Farmers' Mut. F. Ins. Co., 102 Mich. 281, 60 N. W. 691, 26 L. R. A. 237.

"While contained in building."— And especially is this rule applicable to a policy which describes the property as insured while contained in a building described. Lakings *v.* Phœnix Ins. Co., 94 Iowa 476, 62 N. W. 783, 28 L. R. A. 70; Green *v.* Liverpool, etc., Ins. Co., 91 Iowa 615, 60 N. W. 189; Leventhal *v.* Home Ins. Co., 32 Misc. (N. Y.) 685, 66 N. Y. Suppl. 502; British America Assur. Co. *v.* Miller, 91 Tex. 414, 44 S. W. 60, 66 Am. St. Rep. 901, 39 L. R. A. 545.

"Contained in."— Even where the description is of property "contained in" a specified building, the language may be construed as excluding property which at the time of loss was not in the building specified. Bradbury *v.* Westchester F. Ins. Co., 80 Me. 396, 15 Atl. 34, 6 Am. St. Rep. 219; Shertzer *v.* Hartford County Mut. F. Ins. Co., 46 Md. 506; Annapolis, etc., R. Co. *v.* Baltimore F.

occupancy of neighboring buildings.[77] But description of the place where the property is kept does not necessarily constitute a promissory warranty that the property will not be temporarily removed; and such removal, if not changing the permanent location of the property, so as to take it out of the description, will not avoid the policy.[78]

D. Limitations as to Proper Use. The stipulation of the policy may be such as to cover the property only while employed in a particular use or in a particular manner.[79]

XVI. EXTENT OF LOSS AND LIABILITY.

A. Extent of Loss — 1. TOTAL LOSS — a. In General. A total loss, that is, a loss which renders the company liable for the entire value of the property up to the limit of the insurance under the terms of the contract, does not necessarily amount to a complete destruction and obliteration of the property; but to constitute such loss it is sufficient that the property be so destroyed by fire as that it is deprived of the character in which it was insured and rendered useless for that

Ins. Co., 32 Md. 37, 3 Am. Rep. 112. Thus a policy on household goods, furniture, etc., contained in a building described as the residence of the insured was held not to cover the loss of such property after its removal to the barn connected with the residence as a consequence of a previous fire. English *v.* Franklin F. Ins. Co., 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377.

"Contained in cars in transit."— A policy on property contained in cars in transit upon lines owned, leased, or operated by insured was held not to apply to property being transported by the insured not on its own lines or lines leased or operated by it at the time of loss. Traders' Ins. Co. *v.* Northern Pac. Express Co., 70 Ill. App. 143.

77. Northwestern Nat. Ins. Co. *v.* Davis, 9 Ky. L. Rep. 933.

If there is no prohibition as to rebuilding within a prescribed area, the act of the insured in rebuilding another building within such area does not avoid the risk. Young *v.* Washington County Mut. Ins. Co., 14 Barb. (N. Y.) 545.

Theater.— Where it was stipulated that the policy on a theater should not cover loss or damage by fire originating in the theater proper, it was held that a fire occurring without the wall of the theater, but by heat causing damage within the theater, was not covered by the exception. Sohier *v.* Norwich F. Ins. Co., 11 Allen (Mass.) 336.

78. See cases cited *infra*, this note.

Goods in transit.— By express provision of the policy goods may be covered while in transit. Ætna Ins. Co. *v.* Stivers, 47 Ill. 86, 95 Am. Dec. 467; Kratzenstein *v.* Western Assur. Co., 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799 [*reversing* 1 N. Y. St. 712].

Live stock.— The description of live stock as kept on certain premises or in a certain barn does not defeat recovery for loss of the stock while temporarily kept or in use elsewhere. Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748; Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535; De Graff *v.* Queen Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; Boright *v.* Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796; Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159; Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281; American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107.

Vehicles.— Where the policy covers vehicles of various descriptions contained in a certain building, the fact that the destruction of such vehicles occurs elsewhere while in temporary and proper use does not defeat recovery. McCluer *v.* Girard F. & M. Ins. Co., 43 Iowa 349, 22 Am. Rep. 249; London, etc., F. Ins. Co. *v.* Graves, 4 Ky. L. Rep. 706; Niagara F. Ins. Co. *v.* Elliott, 85 Va. 962, 9 S. E. 694, 17 Am. St. Rep. 115.

Wearing apparel.— A policy on wearing apparel describing it by the residence of the owner where it is usually kept will cover a loss of the wearing apparel while in actual use away from the residence. Towne *v.* Philadelphia Fire Assoc., 27 Ill. App. 433; Longueville *v.* Western Assur. Co., 51 Iowa 553, 2 N. W. 394, 33 Am. Rep. 146; Eaton *v.* Phœnix Ins. Co., 15 Ky. L. Rep. 441.

Consent to removal given by the company may amount to a new contract, so that the goods referred to will be covered by the policy, both in the place from which and the place to which they are to be removed, the loss occurring within a reasonable time allowed for removal. Sharpless *v.* Hartford F. Ins. Co., 8 Pa. Co. Ct. 387.

79. *California.*— Mawhinney *v.* Southern Ins. Co., 98 Cal. 184, 32 Pac. 945, 20 L. R. A. 87; Benicia Agricultural Works *v.* Germania Ins. Co., 97 Cal. 468, 32 Pac. 512.

Georgia.— Edwards *v.* Planters', etc., Mut. Fire Assoc., 111 Ga. 449, 36 S. E. 755.

New York.— Marsh *v.* Glens Falls Ins. Co., 11 N. Y. App. Div. 398, 42 N. Y. Suppl. 622.

England.— Glen *v.* Lewis, 8 Exch. 607, 17 Jur. 842, 22 L. J. Exch. 228; Dobson *v.* Sotheby, M. & M. 90, 31 Rev. Rep. 718, 22 E. C. L. 481; McEwan *v.* Guthridge, 13 Moore P. C. 304, 8 Wkly. Rep. 265, 15 Eng. Reprint 114.

Canada.— London Assur. Corp. *v.* Great

purpose.[80] Thus there is a total loss of a building where the building is substantially destroyed, although some of the walls remain standing.[81] But there is not a total loss of a building where the remnant left standing is reasonably adapted and of value as a basis upon which to restore the building to the condition in which it was before the fire.[82]

b. Under Statutes. In states where the statutes provide that in case of total loss the company shall be liable for the full amount of the insurance, and shall not be allowed to show that the property destroyed was of less value than the insurance which they carried upon it,[83] there is a total loss when the remnant of the property remaining undestroyed is inconsiderable as compared with the part destroyed, and does not constitute a sufficient basis for restoration.[84]

Northern Transit Co., 29 Can. Sup. Ct. 577 [*reversing* 25 Ont. App. 393].

80. *Alabama.*— Manchester F. Assur. Co. *v.* Feibelman, 112 Ala. 308, 23 So. 759.

Kansas.— Liverpool, etc., Ins. Co. *v.* Heckman, 64 Kan. 388, 67 Pac. 879.

Minnesota.— Poppitz *v.* German Ins. Co., 85 Minn. 118, 88 N. W. 438; Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Northwestern Mut. L. Ins. Co. *v.* Rochester German Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108.

New York.— Corbett *v.* Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318.

Ohio.— Phœnix Ins. Co. *v.* Port Clinton Fish Co., 14 Ohio Cir. Ct. 160, 7 Ohio Cir. Dec. 468. If a building is so far destroyed by fire as to lose its identity and specific character, and the parts that remain cannot be utilized to advantage in its reconstruction the loss is total. Pennsylvania F. Ins. Co. *v.* Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608.

See 28 Cent. Dig. tit. "Insurance," § 1266.

Loss of use and occupation.—Where a hotelkeeper's policy indemnified him against loss and occupancy it was held that there was a total loss where the building was so far destroyed as to not be capable of further use for a hotel. Chatfield *v.* Ætna Ins. Co., 71 N. Y. App. Div. 164, 75 N. Y. Suppl. 620.

81. Williams *v.* Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77; Insurance Co. of North America *v.* Bachler, 44 Nebr. 549, 62 N. W. 911; Hamburg-Bremen F. Ins. Co. *v.* Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613; Murphy *v.* American Cent. Ins. Co., (Tex. Civ. App. 1899) 54 S. W. 407; Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93; Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125.

82. Corbett *v.* Spring Garden Ins. Co., 155 N. Y. 389, 50 N. E. 282, 41 L. R. A. 318; Royal Ins. Co. *v.* McIntyre, 90 Tex. 170, 37 S. W. 1068, 59 Am. St. Rep. 797, 35 L. R. A. 672; Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679.

The question is whether a reasonable owner, uninsured, desiring such a structure as the one in question was before the injury, in proceeding to restore the building to its original condition would utilize what is left. Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679.

Cost of repair.— The mere fact that the cost of repair would exceed the value of the property when repaired will not prove that the loss is total. The liability under a fire policy is limited in case of partial loss to the depreciation in the value of the property due to fire. Detroit *v.* Grummond, 121 Fed. 963, 58 C. C. A. 301. On the other hand the loss may be total, although the property could be replaced for a portion only of its original cost. Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93.

83. See *supra*, XI, J, 1.

84. *Kentucky.*— Thuringia Ins. Co. *v.* Mallott, 64 S. W. 991, 23 Ky. L. Rep. 1248, 55 L. R. A. 277; Palatine Ins. Co. *v.* Weiss, 59 S. W. 509, 22 Ky. L. Rep. 994.

Missouri.— O'Keefe *v.* Liverpool, etc., Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107; Ampleman *v.* Citizens' Ins. Co., 35 Mo. App. 308.

Nebraska.— German Ins. Co. of Freeport *v.* Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707.

Ohio.— Phœnix Ins. Co. *v.* Port Clinton Fish Co., 14 Ohio Cir. Ct. 160, 7 Ohio Cir. Dec. 468.

Texas.— American Cent. Ins. Co. *v.* Murphy, (Civ. App. 1901) 61 S. W. 956; Murphy *v.* American Cent. Ins. Co., 25 Tex. Civ. App. 241, 54 S. W. 407.

Wisconsin.— St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767; Seyk *v.* Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523; Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

United States.— Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200.

See 28 Cent. Dig. tit. "Insurance," § 1266. And see *infra*, XVI, B, 2.

Cannot show excessive valuation.— Under such provisions the company cannot in case of total loss avoid its liability by showing that there was an excessive valuation. German Ins. Co. *v.* Jansen, 18 Tex. Civ. App. 190, 45 S. W. 220. See also *supra*, XI, J, 1.

In Iowa the statute makes the amount of insurance *prima facie* evidence only of the value of the property in case of total loss. Zalesky *v.* Home Ins. Co., 108 Iowa 341, 79 N. W. 69; Des Moines Ice Co. *v.* Niagara

c. Municipal Building Regulations. If by reason of municipal regulations as to the rebuilding of buildings destroyed by fire, such rebuilding is prohibited, then the loss is total, although some portion of the building remains which might otherwise have been available in rebuilding.[85] If by the fire the insured building is so injured as to be unsafe and is condemned by the municipal authorities the loss is total.[86]

2. Partial Loss. In case of partial loss the company is liable only for the amount of the loss, not exceeding the amount of the insurance.[87]

B. Extent of Liability — 1. In General — a. Cash Value at Time of Loss. The general rule is that in case of total loss the insured is entitled to recover the fair cash value of the property at the time and place of the fire.[88]

F. Ins. Co., 99 Iowa 193, 68 N. W. 600; Davis *v.* Anchor Mut. F. Ins. Co., 96 Iowa 70, 64 N. W. 687; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493. The statute applies to buildings only, and not to personal property. Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237; Martin *v.* Capital Ins. Co., *supra*; Joy *v.* Security F. Ins. Co., 83 Iowa 12, 48 N. W. 1049.

In Kentucky under such a provision it is held that a stipulation in the policy limiting the right of recovery to the cost of replacing the building is invalid (Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850), and there can be no deduction on account of depreciation (Hartford F. Ins. Co. *v.* Bourbon County Ct., *supra*). Where the policy covered building and machinery and there was a total loss of the building, it was held that the full amount of the insurance on the building could be recovered, although the loss to the machinery was only partial. Ætna Ins. Co. *v.* Glasgow Electric Light, etc., Co., 107 Ky. 77, 52 S. W. 975, 21 Ky. L. Rep. 726.

In Ohio the amount to be recovered is in such cases a matter of public policy and cannot be waived or arbitrated. Pennsylvania F. Ins. Co. *v.* Drackett, 63 Ohio St. 41, 57 N. E. 962, 81 Am. St. Rep. 608; Eureka F. & M. Ins. Co. *v.* Gray, 24 Ohio Cir. Ct. 268.

85. Larkin *v.* Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286; Hamburg-Bremen F. Ins. Co. *v.* Garlington, 66 Tex. 103, 18 S. W. 337, 59 Am. Rep. 613.

Right to repair.— Where it was provided in the policy that the company should have the right to repair in cases of partial loss, the increased cost of repairing by reason of municipal regulations existing at the time of the issuance of the policy may be taken into account. Hewins *v.* London Assur. Corp., 184 Mass. 177, 68 N. E. 62; McCready *v.* Hartford F. Ins. Co., 61 N. Y. App. Div. 583, 70 N. Y. Suppl. 778; Pennsylvania L., etc., Co. *v.* Philadelphia Contributionship, 201 Pa. St. 497, 51 Atl. 351.

86. Monteleone *v.* Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784.

87. Hicks *v.* McGehee, 39 Ark. 264.

If a portion of the property has been removed prior to the fire, so that it is not covered by the policy, and the remainder is totally destroyed, the loss is not partial, but total; the value of the property removed, however, will be deducted from the valuation of the property covered by the policy. Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 165, 26 L. R. A. 107.

88. *Colorado.*— State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

Maryland.— Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

Montana.— Holter Lumber Co. *v.* Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207.

New Hampshire.—Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238.

North Carolina.— Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389; Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62; Fowler *v.* Old North State Ins. Co., 74 N. C. 89.

Pennsylvania.— Commonwealth Ins. Co. *v.* Sennett, 37 Pa. St. 205, 78 Am. Dec. 418; Ellmaker *v.* Franklin F. Ins. Co., 5 Pa. St. 183.

Texas.— German Ins. Co. *v.* Everett, (Civ. App. 1896) 36 S. W. 125; Westchester F. Ins. Co. *v.* Wagner, 10 Tex. Civ. App. 398, 30 S. W. 959.

Utah.— Osborne *v.* Phenix Ins. Co., 23 Utah 428, 64 Pac. 1103.

United States.— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 485; Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211.

See 28 Cent. Dig. tit. "Insurance," § 1274.

Insured must therefore prove the value of the property. Hanover F. Ins. Co. *v.* Lewis, 23 Fla. 193, 1 So. 863.

Buildings.— The ordinary measure of damage for the loss of an insured building is the value of the building as it stood upon the ground on the day it was destroyed, as compared with a new building of the same kind and dimensions, and not the original cost of the building or a sum sufficient to erect a new one, or the difference between the value of the lot and the building upon it and its value with the building destroyed, or the marketable value of the building to be removed from the premises. Ætna Ins. Co. *v.* Johnson, 11 Bush (Ky.) 587, 21 Am. Rep. 223. It is not the value of a building for a special purpose nor its value to the owner

b. Cost of Replacement. If the policy, however, limits the amount of recovery to the cost of restoring or replacing the property, then the measure is not the cash value of the damage or loss but the cost of such restoration or replacement.[89]

c. Agreed Valuation. The amount stated in the application or policy as the value of the property is not even *prima facie* evidence of the value at the time of loss;[90] but there may be a valuation of the property in the policy in the nature of a contract for liquidated damages which will be binding on the parties and preclude inquiry as to the actual value.[91]

2. Under Valued-Policy Statutes.[92] Fire policies are ordinarily open and not valued policies;[93] but in many states there are statutory provisions which give to fire policies, to some extent, the effect of valued policies, that is, making the amount of the insurance named in the policy payable absolutely in the event of a total loss without further evidence as to the actual loss,[94] and any stipulation

as affected by the fact that it stands on leased ground and must soon be removed, but its value as a building which can be recovered. Washington Mills Emery Mfg. Co. *v.* Weymouth, etc., Mut. F. Ins. Co., 135 Mass. 503; Laurent *v.* Chatham F. Ins. Co., 1 Hall (N. Y.) 45; Fisher *v.* Crescent Ins. Co., 33 Fed. 544; Washington Mills Emery Mfg. Co. *v.* Commercial F. Ins. Co., 13 Fed. 646; Collingridge *v.* Royal Exch. Assur. Corp., 3 Q. B. D. 173, 47 L. J. Q. B. 32, 37 L. T. Rep. N. S. 525, 26 Wkly. Rep. 112.

Manufactures.— The cash value of the manufactured product and not merely what it will cost to reproduce the goods destroyed is the amount recoverable. Mitchell *v.* St. Paul German F. Ins. Co., 92 Mich. 594, 52 N. W. 1017; Hartford F. Ins. Co. *v.* Cannon, 19 Tex. Civ. App. 305, 46 S. W. 851.

Household furniture and wearing apparel in actual use are not to be valued by what they could be sold for as second-hand goods, but by their fair value to the owner. Sun Fire Office *v.* Ayerst, 37 Nebr. 184, 55 N. W. 635.

Sale pending settlement.— Where the insured, against the protest of the company, pending an arbitration to determine the damage of goods by fire, sold the goods at auction, it was held that the company was not concluded as to the value of the salvage by the amount realized. Reading Ins. Co. *v.* Egelhoff, 115 Fed. 393. Nor is the company entitled to have the owner restrained from disposing of the property saved until the value can be ascertained. New York F. Ins. Co. *v.* Delavan, 8 Paige (N. Y.) 419.

An assessment company, unless it is otherwise expressly provided, is liable for the total loss not exceeding the amount of the policy, without regard to the amount which an assessment from the members of the company will yield. Harl *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880.

89. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594; Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336; Standard Sewing Mach. Co. *v.* Royal Ins. Co., 201 Pa. St. 645, 51 Atl. 354; Burkett *v.* Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. 848.

Even if the company agrees to pay damages instead of repairing or replacing, the insured can recover under a policy which makes the cost of repairing or replacing the measure of recovery only the amount which it would reasonably cost to repair or replace. Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679.

But in the absence of such a provision the measure of damages is the value of the property before the fire and not what it would cost to replace it. Hilton *v.* Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412; McCready *v.* Hartford F. Ins. Co., 61 N. Y. App. Div. 583, 90 N. Y. Suppl. 778; Commonwealth Ins. Co. *v.* Sennett, 37 Pa. St. 205, 78 Am. Dec. 418.

90. *Illinois.*— Standard F. Ins. Co. *v.* Wren, 11 Ill. App. 242.

Minnesota.— Peoria M. & F. Ins. Co. *v.* Wilson, 5 Minn. 53.

Ohio.— Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336.

Pennsylvania.— Waynesboro Mut. F. Ins. Co. *v.* Creaton, 98 Pa. St. 451.

Texas.— Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45.

See 28 Cent. Dig. tit. "Insurance," § 1274.

Evidence of a custom whereby the valuation in the policy is taken as the true value is not admissible, since it violates the principles on which the contract is based. Meeker *v.* Klemn, 11 La. Ann. 104; Focht *v.* Douglass Mut. Live Stock Assoc., 1 Woodw. (Pa.) 346.

91. *Louisiana.*— Westinghouse Electric Co. *v.* Western Assur. Co., 42 La. Ann. 28, 7 So. 73; Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

Maine.— Cushman *v.* Northwestern Ins. Co., 34 Me. 487.

New York.— Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918; Harris *v.* Eagle F. Ins. Co., 5 Johns. 368.

Ohio.—Howell *v.* Protection Ins. Co., 7 Ohio 284.

United States.— Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 485.

See 28 Cent. Dig. tit. "Insurance," § 1274.

92. Valued policy see *supra*, XI, J, 1.

93. See *supra*, XVI, A, 1, b.

94. *Georgia.*— Word *v.* Southern Mut. Ins. Co., 112 Ga. 585, 37 S. E. 897.

Kentucky.— Continental Ins. Co. *v.* Moore, 62 S. W. 517, 23 Ky. L. Rep. 72.

Missouri.— Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep.

in such a policy as to how the loss shall be estimated or determined when total will be invalid.[95]

570, 26 L. R. A. 107; Bode *v.* Firemen's Ins. Co., 103 Mo. App. 289, 77 S. W. 116; Gibson *v.* Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Warren *v.* Bankers', etc., Town Mut. Co., 72 Mo. App. 188; Hausen *v.* Citizens' Ins. Co., 66 Mo. App. 29.

Nebraska.— Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

Ohio.— Russell *v.* Milwaukee Mechanics' Ins. Co., 8 Ohio S. & C. Pl. Dec. 613, 6 Ohio N. P. 325; Schild *v.* Phœnix Ins. Co., 8 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 134.

Wisconsin.— Oshkosh Gas-Light Co. *v.* Germania F. Ins. Co., 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233.

See 28 Cent. Dig. tit. "Insurance," § 1275 *et seq.*

Not applicable to personal property.— In many states these provisions are applicable only to buildings or real property and not to personalty. Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534; Joy *v.* Security F. Ins. Co., 83 Iowa 12, 48 N. W. 1049; Hudson *v.* Scottish Union, etc., Ins. Co., 62 S. W. 513, 23 Ky. L. Rep. 116; Trask *v.* German Ins. Co., 53 Mo. App. 625; Queen Ins. Co. *v.* Jefferson Ice Co., 64 Tex. 578. But machinery constructed for and used in the insured building is regarded as realty and not personalty under this construction (British America Assur. Co. *v.* Bradford, 60 Kan. 82, 55 Pac. 335; Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107; Millis *v.* Scottish Union, etc., Ins. Co., 95 Mo. App. 211, 68 S. W. 1066); and it is so held as to a building on leased ground (Orient Ins. Co. *v.* Parlin-Orendorff Co., 14 Tex. Civ. App. 512, 38 S. W. 60).

Depreciation.— By some statutes the company is allowed to show that by depreciation in value of the building between the time of the issuance of the policy and the loss, the value is less than the amount of insurance named in the policy. Caledonian Ins. Co. *v.* Cooke, 101 Ky. 412, 41 S. W. 279, 19 Ky. L. Rep. 651; Gibson *v.* Missouri Town Mut. Ins. Co., 82 Mo. App. 515; Meyer *v.* Insurance Co. of North America, 73 Mo. App. 166; Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Baker *v.* Phœnix Assur. Co., 57 Mo. App. 559.

Valuation by agents.— Under statute making the valuation of the property by the agent whose name is on the policy conclusive, it was held that the valuation not thus named in the policy did not come within the special provision. Campbell *v.* Monmouth Mut. F. Ins. Co., 59 Me. 430.

Prima facie value.— In Iowa the provision is not for a valued policy, but only that the amount of the insurance named in the policy is *prima facie* evidence of the value of the property in case of total loss. Des Moines Ice Co. *v.* Niagara F. Ins. Co., 99 Iowa 193, 68 S. W. 600; Scott *v.* Security F. Ins. Co., 98 Iowa 67, 66 N. W. 1054; Davis *v.* Anchor Mut. F. Ins. Co., 96 Iowa 70, 64 N. W. 687; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534.

Partial loss.— Notwithstanding a valued-policy law, the liability in case of partial loss is for the actual damage. Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

Second loss.— If under a valued policy the property is totally destroyed as the result of two or more fires the measure of recovery for the final loss is the amount of insurance named in the policy less the amount paid in settlement of previous losses. Lancashire Ins. Co. *v.* Bush, 60 Nebr. 116, 82 N. W. 313.

Foreign contracts.— A valued-policy statute is applicable to all contracts of insurance on real property in the state, although executed in another state. Scottish Union, etc., Ins. Co. *v.* Enslie, 78 Miss. 157, 28 So. 822; Seyk *v.* Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

95. *Kentucky.*— Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850; Caledonian Ins. Co. *v.* Cooke, 101 Ky. 412, 41 S. W. 279, 19 Ky. L. Rep. 651.

Mississippi.— Hartford F. Ins. Co. *v.* Schlenker, 80 Miss. 667, 32 So. 155; Western Assur. Co. *v.* Phelps, 77 Miss. 625, 27 So. 745.

Nebraska.—Insurance Co. of North America *v.* Bachler, 44 Nebr. 549, 62 N. W. 911; Home F. Ins. Co. *v.* Bean, 42 Nebr. 537, 60 N. W. 907, 47 Am. St. Rep. 711.

Tennessee.— Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796.

Texas.— Continental Ins. Co. *v.* McCulloch, 15 Tex. Civ. App. 190, 39 S. W. 374; Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 448.

Wisconsin.— Thompson *v.* Citizens Ins. Co., 45 Wis. 388; Bammessel *v.* Brewers' F. Ins. Co., 43 Wis. 463; Thompson *v.* St. Louis Ins. Co., 43 Wis. 459; Reilly *v.* Franklin Ins. Co., 43 Wis. 449, 28 Am. Rep. 552.

See 28 Cent. Dig. tit. "Insurance," § 1275.

Thus under such a statute an agreement in the policy to submit the amount of the loss to arbitration is invalid. Queen Ins. Co. *v.* Leslie, 47 Ohio St. 409, 24 N. E. 107, 2 L. R. A. 45; Phœnix Ins. Co. *v.* Luce, 11 Ohio Cir. Ct. 476, 5 Ohio Cir. Dec. 210; Thompson *v.* Citizens' Ins. Co., 45 Wis. 388. Likewise a three-fourths valuation clause is invalid. Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 295; Phœnix Ins. Co. *v.* Peak, 47 S. W. 1089, 20 Ky. L. Rep. 1035; Hickerson *v.* German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172. But in Georgia it is held that a requirement that the insured shall carry other insurance is valid notwithstanding such a statute. Fireman's Fund Ins. Co. *v.* Pekor, 106 Ga. 1, 31 S. E. 779. So also a stipulation that the company shall

3. Partial Loss; Part Value; Pro-Rating. In case of partial loss the company is liable under the ordinary policy to pay the full damage up to the amount of the insurance,[96] but it may be provided in the contract that the insured shall carry a part of the risk and the company shall assume the risk as to a portion only of the value of the property.[97] A somewhat different question as to proportionate liability arises when by charter or contract the liability of the company is limited to two thirds or three quarters of the value of the property.[98]

4 Items Separately Valued. If each of several classes or items is separately valued so that the liability for each class or item is distinct, the recovery for any one class or item is limited to the damage thereto.[99]

be liable only for cost of replacement is held invalid under such a statute. Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850. *Contra*, in Tennessee, see Burkett *v.* Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. 848. And where the statute gives to the company the option to replace, the cost of replacement may be shown to be less than the amount of the insurance notwithstanding the statute. Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209. Where the statute provides only that the amount of the insurance shall be *prima facie* evidence of the value of the building at the time of the loss a stipulation for ascertainment of actual value by appraisers is not invalid. Zalesky *v.* Home Ins. Co., 108 Iowa 341, 78 N. W. 69. But see Harrison *v.* German-American F. Ins. Co., 67 Fed. 577.

96. *Louisiana.*— Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216; Nicolet *v.* Insurance Co., 3 La. 366, 23 Am. Dec. 458.

Massachusetts.—Underhill *v.* Agawam Mut. F. Ins. Co., 6 Cush. 440.

Mississippi.— Mississippi Mut. Ins. Co. *v.* Ingram, 34 Miss. 215.

United States.— Detroit *v.* Grummond, 121 Fed. 963, 58 C. C. A. 301.

Canada.— Peddie *v.* Quebec F. Assur. Co., Stuart (L. C.) 174; Thompson *v.* Montreal Ins. Co., 6 U. C. Q. B. 319.

See 28 Cent. Dig. tit. "Insurance," § 1277.

97. Under such a policy the liability of the company is limited to the proportion of the loss assumed by it.

Alabama.—Christian *v.* Niagara F. Ins. Co., 101 Ala. 634, 14 So. 374; Teague *v.* Germania F. Ins. Co., 71 Ala. 473.

Michigan.— Chesebrough *v.* Home Ins. Co., 61 Mich. 333, 28 N. W. 110.

Minnesota.— Peoria M. & F. Ins. Co. *v.* Wilson, 5 Minn. 53.

New York.— Farmers' Feed Co. *v.* Scottish Union, etc., Ins. Co., 173 N. Y. 241, 65 N. E. 1105.

Pennsylvania.— Teutonia F. Ins. Co. *v.* Mund, 102 Pa. St. 89.

Texas.— Pennsylvania F. Ins. Co. *v.* Moore, 21 Tex. Civ. App. 528, 51 S. W. 878.

Wisconsin.—Stephenson *v.* Agricultural Ins. Co., 116 Wis. 277, 93 N. W. 19.

See 28 Cent. Dig. tit. "Insurance," § 1277.

Such a stipulation is usually made with a view to other insurance to be carried on the property, and in such a case results in a pro-rating of liability among the different insurers. Chesebrough *v.* Home Ins. Co., 61 Mich. 333, 28 N. W. 110; Kansas City Paper Box Co. *v.* American F. Ins. Co., 100 Mo. App. 691, 75 S. W. 186; Farmers' Feed Co. *v.* Scottish Union, etc., Ins. Co., 173 N. Y. 241, 65 N. E. 1105; Meigs *v.* Insurance Co. of North America, 205 Pa. St. 378, 54 Atl. 1053; Eckardt *v.* Lancashire Ins. Co., 31 Can. Sup. Ct. 72 [*affirming* 27 Ont. App. 373 (*affirming* 29 Ont. 695)]; Wanless *v.* Lancashire Ins. Co., 23 Ont. App. 224.

Further as to pro-rating by coinsuring companies see *infra*, XVI, C, 2.

98. If the limitation in the charter is simply that the company is not authorized to insure property at a larger proportion of its value than that stated, the question is as to the validity of the policy and not the measure of liability, and the company must pay in case of total loss the total amount of the insurance providing the policy is valid. Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. (Mass.) 350; Holmes *v.* Charlestown Mut. F. Ins. Co., 10 Metc. (Mass.) 211, 43 Am. Dec. 428; Fuller *v.* Boston Mut. F. Ins. Co., 4 Metc. (Mass.) 206; Crombie *v.* Portsmouth Mut. F. Ins. Co., 26 N. H. 389; Shoemaker *v.* Line Lexington Mut. F. Ins. Co., 16 Pa. Super. Ct. 18, 16 Montg. Co. Rep. 162. And see *supra*, XI, J, 2. But if by charter or contract the liability of the company is limited to a certain proportion of the value of the property at the time of loss, such as two thirds or three fourths, then the liability in case of total loss is for that proportion only, not exceeding the amount of the insurance, and in case of partial loss the full amount of the damage, not exceeding the full amount of insurance on the property. Blinn *v.* Dresden Mut. F. Ins. Co., 85 Me. 389, 27 Atl. 263; Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90; Brown *v.* Quincy Mut. F. Ins. Co., 105 Mass. 396, 7 Am. Rep. 538; Post *v.* Hampshire Mut. F. Ins. Co., 12 Metc. (Mass.) 555, 46 Am. Dec. 702; Singleton *v.* Boone County Home Mut. Ins. Co., 45 Mo. 250; Millis *v.* Scottish Union, etc., Ins. Co., 95 Mo. App. 211, 68 S. W. 1066; Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238; Atwood *v.* Union Mut. F. Ins. Co., 28 N. H. 234; Erwin *v.* New York Cent. Ins. Co., 3 Thomps. & C. (N. Y.) 213; Egan *v.* Albany Mut. Ins. Co., 5 Den. (N. Y.) 326; Ashland Mut. F. Ins. Co. *v.* Housinger, 10 Ohio St. 10; Shoemaker *v.* Line Lexington Mut. Ins. Co., 15 Montg. Co. Rep. (Pa.) 192.

99. The insured cannot apply a portion of the insurance on one class or item not ex-

5. Limitation to Interest of Insured — a. In General. Where the insurance is on the property and not specifically on the interest of the insured in the property, the insured, if he has an insurable interest, recovers the full amount of the loss as provided by the policy regardless of the nature or extent of his peculiar interest;[1] but if the insurance is on the interest of the insured in the property the recovery is limited to the value of such interests.[2]

b. Of Mortgagee. A mortgagee may insure his own interest, but in the absence of some stipulation in the policy, he has no right to recover under a policy issued to the mortgagor.[3] But if a policy is made payable to the mortgagee as his interest may appear, his recovery is to the extent of his interest, not exceeding the liability of the company to the mortgagor.[4] The mortgagee's right to recover under an insurance covering his interest, or payable to him as his interest may appear, is not reduced or lessened by the fact that he has other security for the

hausted in paying the damage on that account to the satisfaction of damage to another class or item as to which the actual damage exceeds the amount of the insurance. Ætna Ins. Co. *v.* Glasgow Electric Light, etc., Co., 107 Ky. 77, 52 S. W. 975, 21 Ky. L. Rep. 726; Dwelling House Ins. Co. *v.* Freeman, 10 Ky. L. Rep. 496; Carlwitz *v.* Germania F. Ins. Co., 5 Fed. Cas. No. 2,415*a*.

If the liability of the company is limited to a certain portion such as two thirds or three fourths of the value of the property at the time of the loss, then as to each item separately covered by the policy, the rule of proportion is to be applied. Home Ins. Co. *v.* Adler, 71 Ala. 516; Roberts *v.* Insurance Co. of America, 94 Mo. App. 142, 72 S. W. 144; Sun Mut. Ins. Co. *v.* Tufts, 20 Tex. Civ. App. 147, 50 S. W. 180; King *v.* Prince Edward County Mut. Ins. Co., 19 U. C. C. P. 134; McCulloch *v.* Gore Dist. Mut. F. Ins. Co., 32 U. C. Q. B. 610. See *supra*, XVI, B, 3.

1. *Illinois.*— Andes Ins. Co. *v.* Fish, 71 Ill. 620.

Maine.— Grant *v.* Elliot, etc., Mut. F. Ins. Co., 76 Me. 514.

Massachusetts.— Boston, etc., Ice Co. *v.* Royal Ins. Co., 12 Allen 381, 90 Am. Dec. 151.

Michigan.— Convis *v.* Citizens' Mut. F. Ins. Co., 127 Mich. 616, 86 N. W. 994.

Missouri.— Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299.

New York.— Tiemann *v.* Citizens' Ins. Co., 76 N. Y. App. Div. 5, 78 N. Y. Suppl. 620.

See 28 Cent. Dig. tit. "Insurance," § 1280. See also *infra*, XIX, A, 6.

Where the husband or wife is recognized as having an insurable interest in the real property of the other by virtue of homestead or other right, the recovery in case of loss is the value of the property insured and not the value of interest insured in the property. Merrett *v.* Farmers' Ins. Co., 42 Iowa 11; Trade Ins. Co. *v.* Barracliff, 45 N. J. L. 543, 46 Am. Rep. 792. It is otherwise where the insurance is upon the interest of the husband or wife only. Doyle *v.* American F. Ins. Co., 181 Mass. 139, 63 N. E. 394. And see *supra*, II, C, 2, b, (II).

2. *Georgia.*— Monroe *v.* Southern Mut. Ins. Co., 63 Ga. 669.

Louisiana.— Macarty *v.* Commercial Ins. Co., 17 La. 365; Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

Maryland.— Charleston Ins., etc., Co. *v.* Corner, 2 Gill 410.

Massachusetts.— Pearson *v.* Lord, 6 Mass. 81.

New York.— Shotwell *v.* Jefferson Ins. Co., 5 Bosw. 247; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490; Niblo *v.* North American F. Ins. Co., 1 Sandf. 551.

Pennsylvania.— West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081; Imperial F. Ins. Co. *v.* Murray, 73 Pa. St. 13.

See 28 Cent. Dig. tit. "Insurance," § 1280.

Life-estate.— One insuring a life-interest can recover only the value of such life-interest and not the full value of the property. Hartford Ins. Co. *v.* Haas, 87 Ky. 531, 9 S. W. 720, 10 Ky. L. Rep. 573, 2 L. R. A. 64; Agricultural Ins. Co. *v.* Yates, 10 Ky. L. Rep. 984; Beekman *v.* Fulton, etc., Counties Farmers' Mut. F. Ins. Assoc., 66 N. Y. App. Div. 72, 73 N. Y. Suppl. 110. But see *infra*, XIX, A, 3.

Warehouseman.— One who has insured as warehousman or commission merchant cannot recover for property as to which he has no liability. Allen *v.* Royal Ins. Co., (Tex. Civ. App. 1899) 49 S. W. 931 Home Ins. Co. *v.* Gwathmey, 82 Va. 923, 1 S. E. 209. But if he has a liability contingent on his usual obligation to account, he may recover to the value of the property loss. See *supra*, II, C, 2, b, (I); *infra*, XIX, A, 7.

3. Breeyear *v.* Rockingham Farmers' Mut. F. Ins. Co., 71 N. H. 445, 52 Atl. 860. See *supra*, II, C, 2, b, (I); *infra*, XIX, A, 6.

4. *Maine.*— Biddeford Sav. Bank *v.* Dwelling-House Ins. Co., 81 Me. 566, 18 Atl. 298.

Massachusetts.— Franklin Sav. Inst. *v.* Central Mut. F. Ins. Co., 119 Mass. 240.

New Hampshire.— Sanders *v.* Hillsborough Ins. Co., 44 N. H. 238.

New York.— Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817; Baltis *v.* Dobin, 67 Barb. 507.

Pennsylvania.— State Mut. F. Ins. Co. *v.* Roberts, 31 Pa. St. 438.

Texas.— Sun Ins. Office *v.* Beneke, (Civ. App. 1899) 53 S. W. 98.

See 28 Cent. Dig. tit. "Insurance," § 1281.

payment of the mortgage debt remaining after the destruction of the insured property.[5]

6. Profits, Loss of Rent, Etc. Rents, profits of business, or other such losses as may result from the destruction of property insured constitute separate interests and are not to be taken into account as a part of the damages under a policy covering the property only.[6]

C. Concurrent Insurance; Pro-Rating — 1. Full Indemnity. The existence of other insurance on the same property does not affect the liability of the company under a policy if the total amount of the insurance under all of the policies does not exceed the total amount of the loss; and in the absence of some contract provision each insurer is liable to the insured for the full loss up to the amount of insurance named in the policy.[7] While the insured is entitled to but one indemnity for his loss, he may nevertheless look for that

Payment made to the mortgagee by the mortgagor after an action brought to recover under the policy will not reduce the company's liability to the mortgagee. Northwestern Mut. L. Ins. Co. *v.* Germania F. Ins. Co., 40 Wis. 446.

The mortgagee's interest may be pledged so as to give the pledgor the right to recover what the mortgagee might have recovered under a stipulation in his favor. Breeyear *v.* Rockingham Farmers' Mut. F. Ins. Co., 71 N. H. 445, 52 Atl. 860.

5. *Indiana.*— Ætna Ins. Co. *v.* Baker, 71 Ind. 102.

Maine.— Motley *v.* Manufacturers' Ins. Co., 29 Me. 337, 50 Am. Dec. 591.

Massachusetts.— Haley *v.* Manufacturers' F. & M. Ins. Co., 120 Mass. 292; Foster *v.* Equitable Mut. F. Ins. Co., 2 Gray 216.

New York.— Cone *v.* Niagara F. Ins. Co., 60 N. Y. 619; Excelsior F. Ins. Co. *v.* Royal Ins. Co., 55 N. Y. 343, 14 Am. Rep. 271; De Wolf *v.* Capital City Ins. Co., 16 Hun 116; Kernochan *v.* New York Bowery F. Ins. Co., 5 Duer 1.

Pennsylvania.— Rex *v.* Merchants' Ins. Co., 2 Phila. 357.

West Virginia.— Colby *v.* Parkersburg Ins. Co., 37 W. Va. 789, 17 S. E. 303.

Right of insurer to be subrogated to other security held by the mortgagee see *infra*, XX, F, 2.

Respective rights of mortgagor and mortgagee to proceeds of insurance on the mortgaged property see *infra*, XIX, A, 6.

6. *Kentucky.*— Niagara F. Ins. Co. *v.* Heflin, 60 S. W. 393, 22 Ky. L. Rep. 1212.

Louisiana.— Pontalba *v.* Phœnix Assur. Co., 2 Rob. 131, 37 Am. Dec. 205.

New York.— Buffalo Elevating Co. *v.* Prussian Nat. Ins. Co., 64 N. Y. App. Div. 182, 71 N. Y. Suppl. 918; Niblo *v.* North American F. Ins. Co., 1 Sandf. 551.

Pennsylvania.— Farmers' Mut. Ins. Co. *v.* New Holland Turnpike Co., 122 Pa. St. 37, 15 Atl. 563.

England.— Matter of Wright, 1 A. & E. 621, 28 E. C. L. 294, 3 N. & M. 819, 28 E. C. L. 627.

Canada.— Equitable F., etc., Ins. Co. *v.* Quinn, 11 L. C. Rep. 170.

See 28 Cent. Dig. tit. "Insurance," §§ 1282, 1283.

Separately insured.— When profits or the value of the use of the property are separately insured they may be recovered for. Planters', etc., Ins. Co. *v.* Thurston, (Ala. 1891) 9 So. 268; Protection Ins. Co. *v.* Hall, 15 B. Mon. (Ky.) 411; National Filtering Oil Co. *v.* Citizens' Ins. Co., 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473; Carey *v.* London Provincial F. Ins. Co., 33 Hun (N. Y.) 315.

7. *Delaware.*— Lattomus *v.* Farmers' Mut. F. Ins. Co., 3 Houst. 254.

Iowa.— Erb *v.* Fidelity Ins. Co., 99 Iowa 727, 69 N. W. 261.

Kentucky.— Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232.

Louisiana.— Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

Missouri.— Armour Packing Co. *v.* Reading F. Ins. Co., 67 Mo. App. 215.

Nebraska.— German Ins. Co. *v.* Heiduk, 30 Nebr. 288, 46 N. W. 481, 27 Am. St. Rep. 402.

New Hampshire.— McMahon *v.* Portsmouth Mut. F. Ins. Co., 22 N. H. 15.

New York.— Farmers' Feed Co. *v.* Scottish Union, etc., Ins. Co., 173 N. Y. 241, 65 N. E. 1105; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396; Crow *v.* Greenwich Ins. Co., 66 Hun 54, 20 N. Y. Suppl. 753; Cook *v.* Loew, 34 Misc. 276, 69 N. Y. Suppl. 614.

Pennsylvania.— Royal Ins. Co. *v.* Roedel, 78 Pa. St. 19, 21 Am. Rep. 1; Lycoming Mut. Ins. Co. *v.* Slockbower, 26 Pa. St. 199; Phillips *v.* Perry County Ins. Co., 7 Phila. 673.

South Carolina.— Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562.

Texas.— American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

Washington.— Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

See 28 Cent. Dig. tit. "Insurance," § 1285.

Contribution when one insurer has paid more than his share see *infra*, XX, E.

An insurer who is only liable for a fixed proportion of the loss cannot be rendered liable for a greater proportion on account of the existence of other insurance; the liability of each insurer will be determined by the provision of its policy. Bardwell *v.* Conway Mut. F. Ins. Co., 118 Mass. 465; Farmers' Feed Co. *v.* Scottish Union, etc., Ins. Co., 65 N. Y. App. Div. 70, 72 N. Y. Suppl. 732; Catoosa Springs Co. *v.* Linch, 18 Misc. (N. Y.)

indemnity to any one or more of his policies in the absence of any stipulation for pro-rating.[8]

2. Pro-Rating Liability — a. General Rule. It is usual, however, where concurrent insurance is contemplated, to provide in the policy that the company shall not be liable for more than its *pro-rata* share of the loss.[9]

b. Other Insurance Invalid. A general provision for pro-rating applies only where there is other valid and enforceable insurance.[10] To obviate the difficulty arising out of a determination as to the validity of other insurance, it is usual also to insert a stipulation by which the company is liable only for its *pro-rata* share, whether the other insurance is valid or not.[11]

209, 41 N. Y. Suppl. 377; Lebanon Mut. Ins. Co. *v.* Kepler, 106 Pa. St. 28; Queen Ins. Co. *v.* Jefferson Ice Co., 64 Tex. 578.

8. Cromie *v.* Kentucky, etc., Mut. Ins. Co., 15 B. Mon. (Ky.) 432; Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433; Sherman *v.* Madison Mut. Ins. Co., 39 Wis. 104.

If, however, the insured has agreed to take other insurance or to carry a part of the risk, he cannot throw a greater burden on the company with whom his contract is made than is contemplated by the contract. Farmers' Feed Co. *v.* Scottish Union, etc., Ins. Co., 173 N. Y. 241, 65 N. E. 1105. And see *supra*, XVI, B, 3.

9. Thus restricting the insured to a recovery of its proper share from each company carrying a policy which covers the risk, in the proportion which the amount covered by each policy bears to the total amount of concurrent insurance.

Illinois.— Illinois Mut. Ins. Co. *v.* Hoffman, 132 Ill. 522, 24 N. E. 413 [*affirming* 31 Ill. App. 295].

Indiana.— Citizens' Ins. Co. *v.* Hoffman, 128 Ind. 370, 27 N. E. 745; Indiana Ins. Co. *v.* Hoffman, 128 Ind. 250, 27 N. E. 561.

Maryland.— Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am. St. Rep. 386.

Massachusetts.— Richmondville Union Seminary *v.* Hamilton Mut. Ins. Co., 14 Gray 459; Haley *v.* Dorchester Mut. F. Ins. Co., 12 Gray 545.

Minnesota.— Hoffman *v.* Minneapolis Mut. F. Ins. Co., 42 Minn. 291, 44 N. W. 67.

New York.— Golde *v.* Whipple, 7 N. Y. App. Div. 48, 39 N. Y. Suppl. 964; Lucas *v.* Jefferson Ins. Co., 6 Cow. 635.

Ohio.— Merchants' Nat. Bank *v.* Insurance Co. of North America, 4 Ohio Dec. (Reprint) 340, 1 Clev. L. Rep. 339.

Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Stocklomn, 3 Grant 207.

Tennessee.— Hoffman *v.* Germania Ins. Co., 88 Tenn. 735, 14 S. W. 72.

United States.— Barnes *v.* Hartford F. Ins. Co., 9 Fed. 813, 3 McCrary 226; Robbins *v.* People's Ins. Co., 20 Fed. Cas. No. 11,885.

See 28 Cent. Dig. tit. "Insurance," § 1289.

Valued policy.— Such a stipulation is, however, invalid under statutory provisions rendering the company liable for total loss, to the full amount of the insurance. Western Assur. Co. *v.* Phelps, 77 Miss. 625, 27 So. 745; Havens *v.* Germania F. Ins. Co., 123 Mo. 403, 27 S. W. 718, 45 Am. St. Rep. 570, 26 L. R. A. 107; Barnard *v.* National F. Ins. Co., 38 Mo. App. 106. And see *supra*, XVI, B, 2.

10. *Kentucky.*— London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Louisiana.— Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

Massachusetts.— Forbush *v.* Western Massachusetts Ins. Co., 4 Gray 337.

Missouri.— Parks *v.* Hartford F. Ins. Co., 100 Mo. 373, 12 S. W. 1058; Clem *v.* German Ins. Co., 36 Mo. App. 560.

New York.— Rölker *v.* Great Western Ins. Co., 2 Sweeny 275.

Pennsylvania.— Clarke *v.* Western Assur. Co., 146 Pa. St. 561, 23 Atl. 248, 28 Am. St. Rep. 821, 15 L. R. A. 127; Marshall *v.* Insurance Co. of North America, 28 Wkly. Notes Cas. 283.

See 28 Cent. Dig. tit. "Insurance," § 1285 *et seq.*

But one company is not to be prejudiced by a settlement made by the insured with another company for less than its clear liability. Good *v.* Buckeye Mut. F. Ins. Co., 43 Ohio St. 394, 2 N. E. 420.

Insolvent companies.— In determining the contribution of several companies to the expenses of a suit which they have joined to defend, insolvent companies cannot be considered. Security Ins. Co. *v.* St. Paul F. & M. Ins. Co., 50 Conn. 233.

11. Under such a stipulation the insured cannot take advantage of invalidity of other policies which have attached or might have attached to the property.

Kentucky.— London, etc., F. Ins. Co. *v.* Turnbull, 86 Ky. 230, 5 S. W. 542, 9 Ky. L. Rep. 544.

Michigan.— Liverpool, etc., Ins. Co. *v.* Verdier, 35 Mich. 395.

Mississippi.— Cassity *v.* New Orleans Ins. Assoc., 65 Miss. 49, 3 So. 138.

New York.— Rickerson *v.* German-American Ins. Co., 6 N. Y. App. Div. 550, 39 N. Y. Suppl. 547; Galantschik *v.* Globe F. Ins. Co., 10 Misc. 369, 31 N. Y. Suppl. 32.

Pennsylvania.— Bateman *v.* Lumbermen's Ins. Co., 189 Pa. St. 465, 42 Atl. 184.

South Carolina.— Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

Canada.— Heron *v.* Hartford Ins. Co., 4 Montreal Super. Ct. 388.

c. What Insurance Is Concurrent. To constitute concurrent insurance the policies must be on the same property,[12] on the same interest[13] in the property, against the same risks, and in favor of the same party.[14] Thus separate policies on the interest of mortgagor and mortgagee are not concurrent, and the policy on the interest of the mortgagee is not entitled to pro-rate with a policy on the interest of the mortgagor.[15] The policies may be so drawn that they will pro-rate, if they relate to the same risk, although they are issued on distinct interests.[16]

d. Specific and General Policies. By stipulation[17] a general or componnd policy may be excluded from *pro-rata* liability with a specific policy on a particular portion of the property covered by the general policy, and in such case the

See 28 Cent. Dig. tit. "Insurance," § 1285 *et seq.*

12. If not on the same property they are not concurrent. Storer *v.* Elliot F. Ins. Co., 45 Me. 175; Roots *v.* Cincinnati Ins. Co., 1 Disn. (Ohio) 138, 12 Ohio Dec. (Reprint) 535; Robbins *v.* Firemen's Fund Ins. Co., 20 Fed. Cas. No. 11,881, 16 Blatchf. 122.

13. Must be on the same interest.—Traders' Ins. Co. *v.* Pacaud, 150 Ill. 245, 37 N. E. 460, 41 Am. St. Rep. 355 [*affirming* 51 Ill. App. 252]; Sun Ins. Office *v.* Varble, 103 Ky. 758, 46 S. W. 486, 20 Ky. L. Rep. 556, 41 L. R. A. 792; Lowell Mfg. Co. *v.* Safeguard F. Ins. Co., 88 N. Y. 591.

Floating policies on goods held on commission will pro-rate with each other, and with other policies taken by persons for whose benefit the goods are held on commission. Fire Ins. Assoc. *v.* Merchants', etc., Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162; Lowell Mfg. Co. *v.* Safeguard F. Ins. Co., 88 N. Y. 591; New York Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868. But a policy taken by a commission merchant on his own goods and a floating policy taken by him on his own goods and other goods held on commission will not pro-rate. Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20.

Policy in favor of one partner which is understood by all the parties concerned as being for the benefit of the partnership will pro-rate with other policies in favor of the firm. Liverpool, etc., Ins. Co. *v.* Verdier, 33 Mich. 138.

14. Hough *v.* People's F. Ins. Co., 36 Md. 398.

15. *Illinois.*—Commercial Union Assur. Co. *v.* Scammon, 144 Ill. 506, 32 N. E. 916; Niagara F. Ins. Co. *v.* Scammon, 144 Ill. 490, 28 N. E. 919, 32 N. E. 914, 19 L. R. A. 114; Hartford F. Ins. Co. *v.* Olcott, 97 Ill. 439; Traders' Ins. Co. *v.* Pacaud, 51 Ill. App. 252.

Kentucky.— Home Ins. Co. *v.* Koob, 113 Ky. 360, 68 S. W. 453, 24 Ky. L. Rep. 223, 101 Am. St. Rep. 354, 58 L. R. A. 58.

Maine.— Fox *v.* Phenix F. Ins. Co., 52 Me. 333.

Massachusetts.— Hardy *v.* Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 55 Am. St. Rep. 395, 33 L. R. A. 241.

Nebraska.— Home F. Ins. Co. *v.* Weed, 55 Nebr. 146, 75 N. W. 539.

New Hampshire.— Tuck *v.* Hartford F. Ins. Co., 56 N. H. 326.

New York.— Eddy *v.* London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686; Hastings *v.* Westchester F. Ins. Co., 73 N. Y. 141 [*affirming* 12 Hun 416].

United States.— Hartford F. Ins. Co. *v.* Williams, 63 Fed. 925, 11 C. C. A. 503; Johnson *v.* North British, etc., Ins. Co., 13 Fed. Cas. No. 7,400, Holmes 117.

See 28 Cent. Dig. tit. "Insurance," §§ 1287, 1288.

16. Sun Ins. Office *v.* Varble, 103 Ky. 758, 46 S. W. 486, 20 Ky. L. Rep. 556, 41 L. R. A. 792.

17. But in the absence of such a stipulation in the general policy the specific policy which contains a provision for pro-rating will cover only that portion of the loss to the specific property which its amount bears to the total insurance on such property, and the general policy must pro-rate with it.

Connecticut.— Schmaelzle *v.* London, etc., F. Ins. Co., 75 Conn. 397, 53 Atl. 863, 96 Am. St. Rep. 233, 60 L. R. A. 536.

Illinois.— Niagara F. Ins. Co. *v.* Heenan, 81 Ill. App. 678.

Iowa.— Washburn-Halligan Coffee Co. *v.* Merchants' Brick Mut. F. Ins. Co., 110 Iowa 423, 81 N. W. 707, 80 Am. St. Rep. 311; Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761.

Massachusetts.— Haley *v.* Dorchester Mut. Ins. Co., 1 Allen 536; Blake *v.* Exchange Mut. Ins. Co., 12 Gray 265.

Missouri.— Angelrodt *v.* Delaware Mut. Ins. Co., 31 Mo. 593.

New York.— Mayer *v.* American Ins. Co., 2 N. Y. Suppl. 227.

Pennsylvania.— Merrick *v.* Germania F. Ins. Co., 54 Pa. St. 277.

South Carolina.— Cave *v.* Home Ins. Co., 57 S. C. 347, 35 S. E. 577.

Texas.— American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

Vermont.— Chandler *v.* Insurance Co. of North America, 70 Vt. 562, 41 Atl. 502.

Virginia.— Home Ins. Co. *v.* Gwathmey, 82 Va. 923, 1 S. E. 209.

United States.— Page *v.* Sun Ins. Office, 74 Fed. 203, 20 C. C. A. 397, 33 L. R. A. 249 [*affirming* 64 Fed. 194].

Canada.— Toronto First Unitarian Congregation *v.* Western Assur. Co., 26 U. C. Q. B. 175; Williamson *v.* Gore Dist. Mut. F. Ins. Co., 26 U. C. Q. B. 145.

See 28 Cent. Dig. tit. "Insurance," § 1285 *et seq.*

general policy will be held with reference to the property covered by the specific policy only to the extent to which the specific policy fails to satisfy the loss.[18]

D. Duty of Insured to Preserve Property After Loss. It is usually provided in the policy that where the loss is partial the insured shall use all reasonable and proper means for the security and preservation of any property covered by the policy and not destroyed,[19] and failure to comply with such conditions will preclude a recovery for any increase of the loss due to such non-compliance.[20]

E. Deductions and Offsets. There is no rule in fire insurance as there is in marine insurance,[21] by which the company is entitled to deduct some proportion of the estimated cost of replacing a lost building, with another building, on account of the assumed greater value of a new building;[22] nor is there any rule as to salvage, that is, estimated value of materials saved from destruction.[23] The insured is entitled to indemnity for the loss whatever it may be, that is, the value of the property at the time of the loss, or the cost of replacing as the policy may provide.[24] But of course any salvage is to be deducted to the extent of its real value from the total of the value of the property insured in determining the amount of the loss.[25] Where goods are subject to the payment of a tax, the amount of such tax due and unpaid is not to be deducted from the value of the goods in determining the loss.[26] Under provisions in the policy the company is usually entitled to deduct any amount of premium remaining due.[27]

XVII. NOTICE AND PROOF OF LOSS.

A. Requirements in General — 1. Compliance With Contract. The usual requirement in policies that notice and proof of loss be given to the company

18. Cromie *v.* Kentucky, etc., Mut. Ins. Co., 15 B. Mon. (Ky.) 432; Fairchild *v.* Liverpool, etc., F., etc., Ins. Co., 51 N. Y. 65 [*affirming* 48 Barb. 420]; Meigs *v.* Insurance Co. of North America, 205 Pa. St. 378, 54 Atl. 1053; Deming *v.* Merchants Cotton Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Royster *v.* Roanoke, etc., Steamboat Co., 26 Fed. 492.

19. Davis *v.* American Cent. Ins. Co., 158 N. Y. 688, 53 N. E. 1124; Hoffman *v.* Ætna F. Ins. Co., 1 Rob. (N. Y.) 501; Oshkosh Match Works *v.* Manchester F. Assur. Co., 92 Wis. 510, 66 N. W. 525.

Without any condition to that effect in the policy it seems that such an obligation would exist. Devlin *v.* Queen Ins. Co., 46 U. C. Q. B. 611.

Negligence or wrong of insured in general see *supra*, XV, B, 6. And see XIII, H, 5.

20. Franklin Ins. Co. *v.* Cobb, 2 Cinc. Super. Ct. 87.

21. See Marine Insurance.

22. Brinley *v.* National Ins. Co., 11 Metc. (Mass.) 195.

23. Liscom *v.* Boston Mut. F. Ins. Co., 9 Metc. (Mass.) 205.

24. Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202; Brinley *v.* National Ins. Co., 11 Metc. (Mass.) 195. See also *supra*, XVI, B.

25. German Ins. Co. *v.* Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707; Harris *v.* Gaspee F. & M. Ins. Co., 9 R. I. 207. If there is a total loss the insured is not subject to any offset for value of materials remaining undestroyed, unless he has converted such materials to his own use. Royal Ins. Co. *v.* McIntyre, (Tex. Civ. App. 1896) 34 S. W. 669.

If separate interests in the same property are insured under different policies no salvage or reimbursement received for the loss under one policy can be taken into account to lessen the liability under the other. Decatur Land Co. *v.* Cook, (Ala. 1900) 27 So. 559; Clover *v.* Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724.

But where different policies cover the same property and interest, there may be an apportionment of salvage as there is of loss. Pentz *v.* Ætna F. Ins. Co., 9 Paige (N. Y.) 568 [*reversing* 3 Edw. 341]; North German Ins. Co. *v.* Morton-Scott-Robertson Co., 108 Tenn. 384, 67 S. W. 816.

Under a policy providing for a deduction of two hundred dollars in all cases of loss, it was held that this provision applied not alone to the first loss paid, but to each subsequent loss payable under the policy. Fernald *v.* Providence Washington Ins. Co., 27 N. Y. App. Div. 137, 50 N. Y. Suppl. 838.

26. Queen Ins. Co. *v.* McCoin, 105 Ky. 806, 49 S. W. 800, 20 Ky. L. Rep. 1633; Wolfe *v.* Howard Ins. Co., 7 N. Y. 583 [*affirming* 1 Sandf. 124].

No drawbacks to which the owner of the goods would be entitled on exportation is to be deducted from the value in determining the amount of loss. Gahn *v.* Broome, 1 Johns. Cas. (N. Y.) 120.

27. Union Ins. Co. *v.* Grant, 68 Me. 229, 28 Am. Rep. 42; Tripp *v.* Pacific Mut. Ins. Co., 7 Allen (Mass.) 230; Livermore *v.* Newbury-

after loss has occurred must be complied with to entitle the insured to recover.[28] But the provisions in the policy in this respect as in others are to be liberally construed in favor of the insured.[29]

2. By Whom Given. The usual stipulation in the policy is that the notice and proofs shall be given and furnished by the insured,[30] but notice sent by the local agent of the company on information furnished by the insured is sufficient;[31] and notice by the local agent has generally been held sufficient, although given on his own motion without any request from the insured.[32] Under the proper circumstances notice and proof of loss may be furnished by the legal representative

port Mar. Ins. Co., 2 Mass. 232; Swamscot Mach. Co. *v.* Partridge, 25 N. H. 369; Aldrich *v.* Equitable Safety Ins. Co., 1 Fed. Cas. No. 155, 1 Woodb. & M. 272.

28. *Alabama.*— Central City Ins. Co. *v.* Oates, 86 Ala. 558, 6 So. 83, 11 Am. St. Rep. 67; Fire Ins. Companies *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58.

Georgia.— Jackson *v.* Southern Mut. L. Ins. Co., 36 Ga. 429.

Illinois.— Rockford Ins. Co. *v.* Seyferth, 29 Ill. App. 513.

Indiana.— Indiana Ins. Co. *v.* Capehart, 108 Ind. 270, 8 N. E. 285.

Iowa.— Barre *v.* Council Bluffs Ins. Co., 76 Iowa 609, 41 N. W. 373; Edgerly *v.* Farmers' Ins. Co., 43 Iowa 587; Mitchell *v.* Home Ins. Co., 32 Iowa 421.

Kansas.— Western Home Ins. Co. *v.* Thorp, 48 Kan. 239, 28 Pac. 991; Burlington Ins. Co. *v.* Ross, 48 Kan. 228, 29 Pac. 469; Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029; Alston *v.* Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784.

Massachusetts.— Smith *v.* Haverill Mut. F. Ins. Co., 1 Allen 297, 79 Am. Dec. 733.

Michigan.— McGraw *v.* Germania F. Ins. Co., 54 Mich. 145, 19 N. W. 927.

Missouri.— Burnham *v.* Royal Ins. Co., 75 Mo. App. 394; McCollum *v.* Hartford F. Ins. Co., 67 Mo. App. 76.

New York.— Blossom *v.* Lycoming F. Ins. Co., 64 N. Y. 162.

North Carolina.— Woodfin *v.* Asheville Mut. Ins. Co., 51 N. C. 558.

Pennsylvania.— German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586; Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397; Weikel *v.* Lower Providence Live Stock Ins. Co., 3 Montg. Co. Rep. 207, 211; Busch *v.* Insurance Co., 6 Phila. 252.

See 28 Cent. Dig. tit. "Insurance," § 1322 *et seq.*

But proofs of loss are no part of the contract, they only serve to fix the time when the loss becomes payable, and when an action may be commenced therefor. McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239.

Under agreement to insure.— It is said that under a parol contract to issue a policy which has never been issued, the insured is not required to make proofs as stipulated in the policy which should have been issued in accordance with the contract. Springfield F. & M. Ins. Co. *v.* Jenkins, 9 Ky. L. Rep. 932; Nebraska, etc., Ins. Co. *v.* Seivers, 27 Nebr. 541, 43 N. W. 351. But this is plainly erroneous, for the parol contract is presumed to have been made with reference to the terms and conditions of the usual policy, which the insured had reason to believe the company would issue. See *supra*, III, D, 5.

What law governs.— The statutory regulations relating to notice and proof which are in force where the contract is made are to be applied in an action under the contract. Bailey *v.* Hope Ins. Co., 56 Me. 474.

29. Bartlett *v.* Union Ins. Co., 46 Me. 500; Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427 [*affirming* 3 Rob. 202]; McLaughlin *v.* Washington County Mut. Ins. Co., 23 Wend. (N. Y.) 525; Brown *v.* Fraternal Acc. Assoc., 18 Utah 265, 55 Pac. 63. And see *supra*, XI, A, 3.

30. **If the policy is delivered with blank** as to the name of the person that is to give notice and furnish proofs of loss, no notice or proofs are required. Prendergast *v.* Dwelling House Ins. Co., 67 Mo. App. 426.

Persons jointly insured.— Failure by one of two persons jointly interested to make proofs will defeat recovery by the other. Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

31. Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Phœnix Ins. Co. *v.* Perry, 131 Ind. 572, 30 N. E. 637; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

32. *Maine.*— Stimpson *v.* Monmouth Mut. F. Ins. Co., 47 Me. 379.

Missouri.— Loeb *v.* American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

Nebraska.— Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

West Virginia.— Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

See 28 Cent. Dig. tit. "Insurance," § 1324.

Proofs by the agent of the insured or one properly acting for him will be sufficient (Lumbermen's Mut. Ins. Co. *v.* Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113; Burns *v.* Michigan Manufacturers' Mut. F. Ins. Co., 130 Mich. 561, 90 N. W. 411; Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; O'Brien *v.* Phœnix Ins. Co., 76 N. Y. 459; Phœnix Mut. F. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 321;

of the insured,[33] his assignee,[34] his attaching creditor,[35] or his executor or administrator;[36] by a purchaser of the insured property at a probate sale;[37] or by the real party in interest.[38]

3. To Whom Given. The usual requirement in policies is that proofs of loss be furnished to the company or to the secretary of the company, and the delivery of proofs to some representative of the company in its general offices is sufficient.[39] Proofs may, however, be sufficiently made by delivery to a general agent of the company having authority to issue policies,[40] especially if he is the agent

Findeisen *v.* Metropole F. Ins. Co., 57 Vt. 520; Western Assur. Co. *v.* Pharand, 11 Quebec Q. B. 144), especially if the insurance was procured by the same person as agent (Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704).

33. Fuller *v.* New York F. Ins. Co., 184 Mass. 12, 67 N. E. 879.

34. Where assignment of the policy has been permitted, notice and proofs should be furnished by the assignee.

New Hampshire.— Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21.

New York.— Cornell *v.* Le Roy, 9 Wend. 163.

Pennsylvania.— Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25.

Wisconsin.— Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

United States.— Wolcott *v.* Sprague, 55 Fed. 545.

Canada.— Fitzgerald *v.* Gore Dist. Mut. L. Ins. Co., 30 U. C. Q. B. 97; Stanton *v.* Home Ins. Co., 24 L. C. Jur. 38; Wilson *v.* State F. Ins. Co., 7 L. C. Jur. 23; Brush *v.* Ætna Ins. Co., 5 Nova Scotia 459.

See 28 Cent. Dig. tit. "Insurance," § 1324 *et seq.*

The mortgagee to whom the policy has been assigned or on whose interest it has been taken must make proofs of loss, if they have not been made by the insured (Southern Home Bldg., etc., Assoc. *v.* Home Ins. Co., 94 Ga. 167, 21 S. E. 375, 47 Am. St. Rep. 147, 27 L. R. A. 844; Lombard Invest. Co. *v.* Dwelling-House Ins. Co., 62 Mo. App. 315; Graham *v.* Phœnix Ins. Co., 77 N. Y. 171; De Witt *v.* Agricultural Ins. Co., 89 Hun (N. Y.) 229, 36 N. Y. Suppl. 570; Armstrong *v.* Agricultural Ins. Co., 56 Hun (N. Y.) 399, 9 N. Y. Suppl. 873 [*reversed* in 130 N. Y. 560, 29 N. E. 991]; Graham *v.* Firemen's Ins. Co., 8 Daly (N. Y.) 421); but if made by the mortgagor as the insured, additional proofs by the mortgagee are not usually required (Northern Assur. Co. *v.* Chicago Mut. Bldg., etc., Assoc., 98 Ill. App. 152 [*affirmed* in 198 Ill. 474, 64 N. E. 979]; Dwelling-House Ins. Co. *v.* Kansas L. & T. Co., 5 Kan. App. 137, 48 Pac. 891; Watertown F. Ins. Co. *v.* Grover, etc., Sewing Mach. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; State Ins. Co. *v.* Maackens, 38 N. J. L. 564).

35. Northwestern Ins. Co. *v.* Atkins, 3 Bush (Ky.) 328, 96 Am. Dec. 239.

36. Meyerson *v.* Hartford F. Ins. Co., 16 Misc. (N. Y.) 286, 38 N. Y. Suppl. 112; Delameter *v.* Prudential Ins. Co., 1 Silv. Sup. (N. Y.) 538, 5 N. Y. Suppl. 586.

37. Farmers' Mut. Ins. Co. *v.* Graybill, 74 Pa. St. 17.

38. Milwaukee Mechanics' Ins. Co. *v.* Brown, 3 Kan. App. 225, 44 Pac. 35; Karelsen *v.* Sun Fire Office, 122 N. Y. 545, 25 N. E. 921; Graham *v.* Phœnix Ins. Co., 17 Hun (N. Y.) 156; Warren *v.* Springfield F. & M. Ins. Co., 13 Tex. Civ. App. 466, 35 S. W. 810.

Person without interest.— But where the policy requires proofs to be signed by the insured, they are not sufficient if signed by one having no authority from the insured. Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

39. *Illinois.*—Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272.

Iowa.— Lewis *v.* Burlington Ins. Co., 80 Iowa 259, 45 N. W. 749; Edgerly *v.* Farmers' Ins. Co., 48 Iowa 644.

Michigan.—Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236, 51 N. W. 367.

New York.—Brooklyn First Baptist Church *v.* Brooklyn F. Ins. Co., 18 Barb. 69.

Pennsylvania.— Sparrow *v.* Universal F. Ins. Co., 17 Phila. 329.

See 28 Cent. Dig. tit. "Insurance," § 1327.

Notice to a director is not sufficient. Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397.

Notice to a local agent is not sufficient. Patrick *v.* Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197; Cornell *v.* Milwaukee Mut. F. Ins. Co., 18 Wis. 387.

Proofs may be made to one who has assumed the liabilities of the company and who has been authorized by the company to receive them. Whitney *v.* American Ins. Co., (Cal. 1899) 56 Pac. 50.

40. *California.*— Bernero *v.* South British, etc., Ins. Co., 65 Cal. 386, 4 Pac. 382.

Indiana.— Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

Massachusetts.—Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467.

Nebraska.— Insurance Co. of North America *v.* McLimans, 28 Nebr. 653, 44 N. W. 991.

New York.— Kendall *v.* Holland Purchase Ins. Co., 2 Thomps. & C. 375; Ralli *v.* White, 21 Misc. 285, 47 N. Y. Suppl. 197, 4 N. Y. Annot. Cas. 357; Walker *v.* Beecher, 15 Misc. 149, 36 N. Y. Suppl. 470.

Pennsylvania.— Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226.

who issued the policy in suit, delivery to him being in law delivery to the company.[41]

4. Time — a. Of Notice. The requirement that notice of the loss be given immediately or forthwith is satisfactory if it is given within a reasonable time,[42] and what is a reasonable time will depend on the circumstances of the case.[43]

b. Of Proofs. It is not usually contemplated that the proofs of loss be presented as promptly as the notice of loss, and clauses relating to the time within which proofs are to be made should be liberally construed.[44] If the requirement is that they be furnished as soon as possible or immediately, or without an unnecessary delay, reasonable diligence under the circumstances is sufficient,[45] and

United States.— Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422.

See 28 Cent. Dig. tit. "Insurance," § 1327.

Proofs to a general adjuster have been held sufficient. Merchants', etc., Ins. Co. *v.* Vining, 67 Ga. 661.

41. North British, etc., Ins. Co. *v.* Crutchfield, 108 Ind. 518, 9 N. E. 458; Greenlee *v.* Hanover Ins. Co., 104 Iowa 481, 78 N. W. 1050; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207. See Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

42. *Illinois.*— Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553; Sun Acc. Assoc. *v.* Olson, 59 Ill. App. 217.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

Kentucky.— Phœnix Ins. Co. *v.* Coomes, 20 S. W. 900, 14 Ky. L. Rep. 603.

Maryland.— Edwards *v.* Baltimore F. Ins. Co., 3 Gill 176.

Missouri.— Phillips *v.* Protection Ins. Co., 14 Mo. 220.

New York.— Brink *v.* Hanover F. Ins. Co., 70 N. Y. 593; Solomon *v.* Continental F. Ins. Co., 28 N. Y. App. Div. 213, 50 N. Y. Suppl. 922.

Ohio.— Kirk *v.* Ohio Valley Ins. Co., 8 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200.

Virginia.— Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. 362, 31 Am. Rep. 732.

United States.— Fisher *v.* Crescent Ins. Co., 33 Fed. 544; Brown *v.* Mechanics', etc., Ins. Co., 4 Fed. Cas. No. 2,019.

See 28 Cent. Dig. tit. "Insurance," § 1328.

The term "immediately" is not to receive a literal construction. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

In Indiana there is a statute prohibiting conditions requiring notice to be given immediately, and hence, whatever the provision in the policy, notice within a reasonable time is sufficient. Pickel *v.* Phenix Ins. Co., 119 Ind. 291, 21 N. E. 898; Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315; Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868.

43. *Illinois.*— Knickerbocker Ins. Co. *v.* McGinnis, 87 Ill. 70.

Louisiana.— Wightman *v.* Western M. & F. Ins. Co., 8 Rob. 442.

Missouri.— St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 49 Am. Dec. 74.

Nebraska.— Continental Ins. Co. *v.* Lippold, 3 Nebr. 391.

New York.— Bennett *v.* Lycoming County Mut. Ins. Co., 67 N. Y. 274; New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468; Savage *v.* Corn Exch. F., etc., Nav. Ins. Co., 4 Bosw. 1.

Pennsylvania.— Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573.

Texas.— Oakland Home Ins. Co. *v.* Davis, (Civ. App. 1895) 33 S. W. 587.

See 28 Cent. Dig. tit. "Insurance," § 1329.

What is a reasonable time under particular circumstances see the following cases:

Massachusetts.—Cook *v.* North British, etc., Ins. Co., 183 Mass. 50, 66 N. E. 597.

Minnesota.— Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346.

Missouri.— Burnham *v.* Royal Ins. Co., 75 Mo. App. 394.

New York.— Solomon *v.* Continental F. Ins. Co., 160 N. Y. 595, 55 N. E. 279, 73 Am. St. Rep. 707, 46 L. R. A. 682; Matthews *v.* American Cent. Ins. Co., 9 N. Y. App. Div. 339, 41 N. Y. Suppl. 304; Brown *v.* London Assur. Corp., 40 Hun 101; Sherwood *v.* Agricultural Ins. Co., 10 Hun 593; Lake Geneva Ice Co. *v.* Selvage, 36 Misc. 212, 73 N. Y. Suppl. 193; McEvers *v.* Lawrence, Hoffm. 172.

North Carolina.—Whitehurst *v.* North Carolina Mut. Ins. Co., 52 N. C. 433, 78 Am. Dec. 246.

Pennsylvania.— Edwards *v.* Lycoming County Mut. Ins. Co., 75 Pa. St. 378; Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622.

Wisconsin.— Cornell *v.* Milwaukee Mut. F. Ins. Co., 18 Wis. 387.

44. Southern F. Ins. Co. *v.* Knight, 111 Ga. 622, 36 S. W. 821, 78 Am. St. Rep. 216, 52 L. R. A. 70; Phenix Ins. Co. *v.* Mechanics', etc., Sav., etc., Assoc., 51 Ill. App. 479; Wightman *v.* Western M. & F. Ins. Co., 8 Rob. (La.) 442; Shell *v.* German Ins. Co., 60 Mo. App. 644.

45. *Illinois.*— Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553.

Maryland.— Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Edwards *v.* Baltimore F. Ins. Co., 3 Gill 176.

Minnesota.— Fletcher *v.* German-American Ins. Co., 79 Minn. 337, 82 N. W. 647.

where no time is prescribed a reasonable time is contemplated;[46] but if a reasonable and certain time is fixed within which proofs are to be furnished, they must be furnished within that time in the absence of any waiver or excuse for delay.[47]

c. Forfeiture For Failure or Delay. A requirement that proofs be furnished within a specified time, when the requirement is reasonable, constitutes according to many cases a condition precedent, which must be complied with in order to recover under the policy.[48] The courts, however, are reluctant to construe

Mississippi.— McPike *v.* Western Assur. Co., 61 Miss. 37.

Ohio.— Kirk *v.* Ohio Valley Ins. Co., 38 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200.

Oregon.— Carey *v.* Farmers' Ins. Co., 27 Oreg. 146, 40 Pac. 91.

Pennsylvania.— American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605.

Wisconsin.— Palmer *v.* St. Paul F. & M. Ins. Co., 44 Wis. 201.

Canada.— Smith *v.* Queen Ins. Co., 12 N. Brunsw. 311; Parsons *v.* Queen Ins. Co., 43 U. C. Q. B. 271.

See 28 Cent. Dig. tit. "Insurance," § 1331.

Negligent delay will defeat recovery under the policy. Parker *v.* Farmers' F. Ins. Co., 179 Mass. 528, 61 N. E. 215; McEvers *v.* Lawrence, Hoffm. (N. Y.) 172.

It is for the jury to determine under the circumstances whether the proofs have been furnished within a reasonable time. See *infra*, XXI, H, 2, b, (x).

46. Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411; Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Springfield F. & M. Ins. Co. *v.* Brown, 128 Pa. St. 392, 18 Atl. 396.

What is a reasonable time under particular circumstances see the following cases:

Illinois.— Scammon *v.* Germania Ins. Co., 101 Ill. 621; Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644.

Iowa.— Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652.

Louisiana.— Edson *v.* Merchants' Mut. Ins. Co., 35 La. Ann. 353.

Massachusetts.—Cook *v.* North British, etc., Ins. Co., 183 Mass. 50, 66 N. E. 597.

Michigan.— Marthinson *v.* North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291.

Minnesota.— Rines *v.* German Ins. Co., 78 Minn. 46, 80 N. W. 839; Powers Dry Goods Co. *v.* Imperial F. Ins. Co., 48 Minn. 380, 51 N. W. 123.

Mississippi.— Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704.

Missouri.— Caldwell *v.* Dwelling House Ins. Co., 61 Mo. App. 4; Maddox *v.* Dwelling House Ins. Co., 56 Mo. App. 343; Grigsby *v.* German Ins. Co., 40 Mo. App. 276.

New York.— McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; O'Brien *v.* Phœnix Ins. Co., 76 N. Y. 459; Brink *v.* Hanover F. Ins. Co., 70 N. Y. 593, 80 N. Y. 108; Sherwood *v.* Agricultural Ins. Co., 10 Hun 593; Hodgkins *v.* Montgomery County Mut. Ins. Co., 34 Barb. 213.

Pennsylvania.—Cummins *v.* German-American Ins. Co., 192 Pa. St. 359, 43 Atl. 1016.

United States.— Germania F. Ins. Co. *v.* Boykin, 12 Wall. 433, 20 L. ed. 442; Betts *v.* Franklin F. Ins. Co., 3 Fed. Cas. No. 1,373, Taney 171.

47. Dwelling House Ins. Co. *v.* Jones, 47 Ill. App. 261; Edson *v.* Merchants' Mut. Ins. Co., 35 La. Ann. 353; Birmingham *v.* Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595.

In some cases, however, the requirement of time has been disregarded and it has been held sufficient that proofs be furnished before the bringing of suit. German Ins. Co. *v.* Brown, 29 S. W. 313, 16 Ky. L. Rep. 601; American Cent. Ins. Co. *v.* Heaverin, 16 Ky. L. Rep. 95; Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238; Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846; Steele *v.* German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

Sixty days is a reasonable time. Missouri Pac. R. Co. *v.* Western Assur. Co., 129 Fed. 610. A requirement that proofs be served within sixty days means that they shall be served sixty days after the fire has terminated, so that a careful inspection of the property can be had. National Wall Paper Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 175 N. Y. 226, 67 N. E. 440.

Mailing.— Where the requirement is that proofs be "furnished" within a specified time, it has been held that the mailing of the proofs within that time is sufficient, although not received by the company until after the expiration of the specified time. Manufacturers', etc., Ins. Co. *v.* Zeitinger, 168 Ill. 286, 48 N. E. 179, 61 Am. St. Rep. 105; McKibban *v.* Des Moines Ins. Co., 114 Iowa 41, 86 N. W. 38. *Contra*, Peabody *v.* Satterlee, 166 N. Y. 174, 59 N. E. 818, 52 L. R. A. 956; Lake Geneva Ice Co. *v.* Selvage, 36 Misc. (N. Y.) 212, 73 N. Y. Suppl. 193; Huse, etc., Ice, etc., Co. *v.* Wielar, 86 N. Y. Suppl. 24.

48. *Massachusetts.*— Cook *v.* North British, etc., Ins. Co., 181 Mass. 101, 62 N. E. 1049.

Minnesota.— Shapiro *v.* Western Home Ins. Co., 51 Minn. 239, 53 N. W. 463.

Missouri.— Burnham *v.* Royal Ins. Co., 75 Mo. App. 394; Maddox *v.* Dwelling-House Ins. Co., 56 Mo. App. 343.

New York.— Quinlan *v.* Providence Washington Ins. Co., 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645 [*affirming* 15 N. Y. Suppl. 317]; Sergent *v.* London, etc., Ins. Co., 85 Hun 31, 32 N. Y. Suppl. 594.

West Virginia.— Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194.

Canada.— Cameron *v.* Canada F. & M. Ins. Co., 6 Ont. 392; Mann *v.* Western Assur. Co., 17 U. C. Q. B. 190; Cinqu Mars *v.* Equitable Ins. Co., 15 U. C. Q. B. 143; Shaw *v.* St.

such provisions as in the nature of forfeitures.[49] If it is impossible by reason of accident or mistake to furnish such proofs as required by the policy, the insured will be excused for his failure to do so.[50]

d. Extension. A general agent has authority to extend the time within which proofs may be furnished.[51]

B. Form, Requisites, and Sufficiency — 1. Sufficiency of Notice. No particular form of notice of loss is necessary.[52] It is sufficient if the information be conveyed by letter.[53] Under a policy requiring the insured to give immediate

Lawrence County Mut. Ins. Co., 11 U. C. Q. B. 73; McFaul *v.* Montreal Inland Ins. Co., 2 U. C. Q. B. 59; Manchester F. Assur. Co. *v.* Guerin, 5 Quebec Q. B. 434.

See 28 Cent. Dig. tit. "Insurance," § 1333.

Under this view failure to give notice is not simply a breach of contract to be compensated by deducting the damages sustained by the company for want of such notice. Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397.

Additional proofs furnished long after the time required by the policy cannot be considered. McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475.

49. Unless there is a specific clause providing for forfeiture on the failure to furnish notice or proofs as required, many courts hold that failure to give notice and furnish proofs within the required time will not constitute a defense to the action on the policy (Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252; Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644; St. Paul F. & M. Ins. Co. *v.* Owens, 69 Kan. 602, 77 Pac. 544; Capitol Ins. Co. *v.* Wallace, 48 Kan. 400, 29 Pac. 755, 50 Kan. 453, 31 Pac. 1070; Orient Ins. Co. *v.* Clark, 59 S. W. 863, 22 Ky. L. Rep. 1066; American Cent. Ins. Co. *v.* Heaverin, 35 S. W. 922, 18 Ky. L. Rep. 190; Phœnix Ins. Co. *v.* Creason, 14 Ky. L. Rep. 573; Dwelling House Ins. Co. *v.* Freeman, 12 Ky. L. Rep. 894; Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. (Mass.) 393; Rynalski *v.* Pennsylvania Ins. Co., 96 Mich. 395, 55 N. W. 981; Steele *v.* German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; Gould *v.* Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455, 52 N. W. 754; Mason *v.* St. Paul F. & M. Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 443; Northern Assur. Co. *v.* Hanna, 60 Nebr. 29, 82 N. W. 97; Sergent *v.* Liverpool, etc., Ins. Co., 155 N. Y. 349, 49 N. E. 935; Carpenter *v.* German American Ins. Co., 52 Hun (N. Y.) 249, 4 N. Y. Suppl. 925; Eureka F. & M. Ins. Co. *v.* Gray, 24 Ohio Cir. Ct. 268; Weiss *v.* American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991; Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281; Epiphany Roman Catholic Church *v.* German Ins. Co., 16 S. D. 17, 91 N. W. 332; Continental F. Ins. Co. *v.* Whitaker, (Tenn. Sup. 1904) 79 S. W. 119; Sun Mut. Ins. Co. *v.* Mattingly, 77 Tex. 162, 13 S. W. 1016; Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45; Peninsular Land Transp., etc., Co. *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237), but will only postpone the bringing of the action until the requirement is satisfied (Hartford F. Ins. Co. *v.* Redding, (Fla. 1904) 37 So. 62; Indian River State Bank *v.* Hartford F. Ins. Co., (Fla. 1903) 35 So. 228; Kenton Ins. Co. *v.* Downs, 90 Ky. 236, 13 S. W. 882, 12 Ky. L. Rep. 115; Hall *v.* Concordia F. Ins. Co., 90 Mich. 403, 51 N. W. 524; Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296; Mason *v.* St. Paul F. & M. Ins. Co., 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433; Gerringer *v.* North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773; Welch *v.* Philadelphia Fire Assoc., 120 Wis. 456, 98 N. W. 227; Flatley *v.* Phenix Ins. Co., 95 Wis. 618, 70 N. W. 828; Vangindertaelen *v.* Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. 562).

50. Hawke *v.* Niagara Dist. Mut. Ins. Co., 23 Grant Ch. (U. C.) 139; Goldsmith *v.* Gore Dist. Mut. F. Ins. Co., 27 U. C. C. P. 435; Morrow *v.* Waterloo County Mut. F. Ins. Co., 39 U. C. Q. B. 441; Perry *v.* Niagara Dist. Mut. F. Ins. Co., 21 L. C. Jur. 257.

Bankruptcy of the insured does not render compliance with the requirements of the policy as to proofs impossible. Fuller *v.* New York F. Ins. Co., 184 Mass. 12, 67 N. E. 879.

That the insured was insane at the time of the loss may constitute sufficient excuse for not making proofs. Germania F. Ins. Co. *v.* Boykin, 12 Wall. (U. S.) 433, 20 L. ed. 442.

The legislature may dispense with the necessity of complying with such conditions. Dean *v.* Western Assur. Co., 41 U. C. Q. B. 553.

51. Van Allen *v.* Farmers' Joint-Stock Ins. Co., 10 Hun (N. Y.) 397; Lycoming County Mut. Ins. Co. *v.* Schollenberger, 44 Pa. St. 259; Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622; Reiner *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208.

52. Notice in fact.— If the officers of the company visit the place of the fire and thus become aware of the loss under the policy, further notice is unnecessary. Roumage *v.* Mechanics F. Ins. Co., 13 N. J. L. 110. See further as to evidence of notice, *infra*, XXI, G, 2, g.

Where the proofs are sufficiently specific to serve also as notice and are sent in time, they may also serve as notice. Hartford F. Ins. Co. *v.* Redding, (Fla. 1904) 37 So. 62.

53. *Illinois.*— Phenix Ins. Co. *v.* Lewis, 63 Ill. App. 228.

Iowa.— Huesinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696.

Massachusetts.—Heath *v.* Franklin Ins. Co., 1 Cush. 257.

notice in case of loss, verbal notice is sufficient.[54] It is not the object of the notice to give information as to the nature of the risk, but only as to the fact of loss.[55]

2. Sufficiency of Proofs — a. Policy Provisions. The object of the clause usually found in insurance policies, requiring the insured to furnish proofs of loss, is to give the company reasonable information as to the facts rendering it liable under the policy.[56] Such a requirement is valid, and failure to reasonably comply with it, if not waived by the company, will defeat recovery for the loss;[57] but a substantial compliance is all that is required.[58]

b. Statutory Provisions. Proofs which meet the requirements of statutory

Nebraska.— Phœnix Ins. Co. *v.* Rad Bila Hora Lodge, 41 Nebr. 21, 59 N. W. 752.

New Hampshire.— Rix *v.* Mutual Ins. Co., 20 N. H. 198.

Pennsylvania.— Beatty *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 9, 5 Am. Rep. 318.

See 28 Cent. Dig. tit. "Insurance," § 1338.

Mailing.— Under a policy providing for the mailing of notice, proof of such mailing is sufficient, although the notice never reaches the company. Ohio Farmers' Ins. Co. *v.* Burget, 17 Ohio Cir. Ct. 619, 9 Ohio Cir. Dec. 369. The question whether in fact the insured mailed the notice is for the jury. Peabody *v.* Satterlee, 36 N. Y. App. Div. 426, 55 N. Y. Suppl. 363. Proof of deposit of the notice in the mail properly addressed is *prima facie* but not conclusive proof of its receipt by the company. Munson *v.* German-American F. Ins. Co., 55 W. Va. 423, 47 S. E. 160. And see Evidence, 16 Cyc. 1065.

54. O'Conner *v.* Hartford F. Ins. Co., 31 Wis. 160.

But if the requirement is that notice be given in writing, notice by parol is not sufficient. Patrick *v.* Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197.

55. Misrecitals as to immaterial matters will not render the notice insufficient. Walker *v.* Metropolitan Ins. Co., 56 Me. 371; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21.

Under statutes providing what notice shall be given, it is sufficient to show compliance with the statute, although the policy requires a different notice. Westenhaver *v.* German-American Ins. Co., 113 Iowa 726, 84 N. W. 717; Russell *v.* Fidelity F. Ins. Co., 84 Iowa 93, 50 N. W. 546. And on the other hand if the notice required by the policy is given the company cannot object that it has not received statutory notice. Campbell *v.* Monmouth Mut. F. Ins. Co., 59 Me. 430.

56. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427 [*affirming* 3 Rob. 202]; Barker *v.* Phœnix Ins. Co., 8 Johns. (N. Y.) 307, 5 Am. Dec. 339.

57. *Indiana.*— Indiana Ins. Co. *v.* Capehart, 108 Ind. 270, 8 N. E. 285.

Iowa.— Ervay *v.* Philadelphia Fire Assoc., 119 Iowa 304, 93 N. W. 290.

Louisiana.— Battaille *v.* Merchants' Ins. Co., 3 Rob. 384.

Massachusetts.— Shawmut Sugar Refining Co. *v.* People's Mut. F. Ins. Co., 12 Gray 535.

Missouri.— Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673.

Pennsylvania.— Commonwealth Ins. Co. *v.* Sennett, 41 Pa. St. 161; Lycoming County Ins. Co. *v.* Updegraff, 40 Pa. St. 311.

See 28 Cent. Dig. tit. "Insurance," § 1340.

58. *Delaware.*— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Iowa.— Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411.

Michigan.— Wicking *v.* Citizens' Mut. F. Ins. Co., 118 Mich. 640, 77 N. W. 275; Knop *v.* Hartford Nat. F. Ins. Co., 101 Mich. 359, 59 N. W. 653.

Minnesota.— De Raiche *v.* Liverpool, etc., Ins. Co., 83 Minn. 398, 86 N. W. 425.

Missouri.— Swofford Bros. Dry-Goods Co. *v.* American Cent. Ins. Co., 76 Mo. App. 27; Murphy *v.* New York Bowery F. Ins. Co., 62 Mo. App. 495.

Montana.— Randall *v.* Liverpool, etc., Ins. Co., 10 Mont. 368, 25 Pac. 962; Randall *v.* Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 961; Randall *v.* American F. Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50.

Nebraska.— Hanover F. Ins. Co. *v.* Parrotte, 47 Nebr. 576, 66 N. W. 636; Rochester L., etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745.

New Jersey.—Jersey City Ins. Co. *v.* Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625.

New York.— Davis *v.* Grand Rapids F. Ins. Co., 157 N. Y. 685, 51 N. E. 1090; Force *v.* St. Paul F. & M. Ins. Co., 81 N. Y. App. Div. 633, 80 N. Y. Suppl. 708; Partridge *v.* Milwaukee Mechanics' Ins. Co., 13 N. Y. App. Div. 519, 43 N. Y. Suppl. 632 [*affirmed* in 162 N. Y. 597, 57 N. E. 1119]; Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. 191.

Ohio.— National Ins. Co. *v.* Strong, 25 Ohio Cir. Ct. 101; Schild *v.* Phœnix Ins. Co., 8 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 134.

Pennsylvania.— Melvin *v.* Insurance Co. of North America, 2 Luz. Leg. Reg. 219.

Texas.— Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93.

Virginia.— Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

United States.— Field *v.* Insurance Co. of North America, 9 Fed. Cas. No. 4,767, 6 Biss. 121.

See 28 Cent. Dig. tit. "Insurance," § 1340.

Proofs were held sufficient as against technical objections in the following cases:

Delaware.— Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 325, 54 Atl. 952; Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

provisions are sufficient, although they do not comply with the requirements of the policy.[59]

c. Certainty. If the proofs are reasonably certain, it will be sufficient.[60]

d. Mistake. That the insured by oversight or mistake, and not with intent to perpetrate a fraud, makes misstatements will not defeat his right to recover.[61]

e. Prepared by Agent of Insurer. Where the proofs are prepared by defendant's agent, or on forms furnished for the purpose, the company cannot complain that they are not sufficient as to matters not called for.[62]

f. As to Particular Matters — (I) *Description and Valuation* — (A) *In General.* Requirements of the policy as to description and valuation of the items of property for which claim is made must be substantially complied with.[63]

(B) *In Case of Total Loss.* In the case of a total loss, however, such a description and valuation does not seem to be necessary.[64]

Iowa.— Parks *v.* Anchor Mut. F. Ins. Co., 106 Iowa 402, 76 N. W. 743.

Massachusetts.— Heath *v.* Franklin Ins. Co., 1 Cush. 257.

Michigan.— Wicking *v.* Citizens' Mut. F. Ins. Co., 118 Mich. 640, 77 N. W. 275.

New York.— Dakin *v.* Liverpool, etc., Ins. Co., 13 Hun 122.

Pennsylvania.— Howard Ins. Co. *v.* Hocking, 115 Pa. St. 415, 8 Atl. 592; German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586; Farmers' Mut. F. Ins. Co. *v.* Moyer, 97 Pa. St. 441; Lycoming County Mut. Ins. Co. *v.* Schollenberger, 44 Pa. St. 259; American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107; Powell *v* Watertown Agricultural Ins. Co., 2 Pa. Super. Ct. 151.

As to evidence that proofs were furnished see *infra*, XXI, G, 2, g.

59. Parks *v.* Anchor Mut. F. Ins. Co., 106 Iowa 402, 76 N. W. 743; Dyer *v.* Des Moines Ins. Co., 103 Iowa 524, 72 N. W. 681; Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237; Brownfield *v.* Mercantile Town Mut. Ins. Co., 84 Mo. App. 134.

The ordinary valued-policy statute does not obviate the necessity of making proofs as required by the policy. McCollum *v.* Hartford F. Ins. Co., 67 Mo. App. 76. *Contra*, Continental Ins. Co. *v.* Chase, (Tex. Civ. App. 1895) 33 S. W. 602.

60. The same precision is not required as in pleadings. Lovering *v.* Mercantile Mar. Ins. Co., 12 Pick. (Mass.) 348; Erwin *v.* Springfield F. & M. Ins. Co., 24 Mo. App. 145.

61. *Arkansas.*— American Cent. Ins. Co. *v.* Ware, 65 Ark. 336, 46 S. W. 129.

Iowa.— Garner *v.* Mutual F. Ins. Co., (1901) 86 N. W. 289.

Louisiana.— Pearce *v.* State, 49 La. Ann. 643, 21 So. 737.

Maine.— Hilton *v.* Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412.

Missouri.— White *v.* Merchants' Ins. Co., 93 Mo. App. 282.

New York.— Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 328, 83 N. Y. Suppl. 730.

Pennsylvania.— Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226; Thomas *v.* Western Ins. Co., 5 Pa. Super. Ct. 383.

Vermont.— Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142.

Wisconsin.— Parker *v.* Amazon Ins. Co., 34 Wis. 363.

See 28 Cent. Dig. tit. "Insurance," § 1340.

62. Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185; Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

63. *Iowa.*— Heusinkveld *v.* St. Paul F. & M. Ins. Co., 96 Iowa 224, 64 N. W. 769; Brock *v.* Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685.

Massachusetts.— Towne *v.* Springfield F. & M. Ins. Co., 145 Mass. 582, 15 N. E. 112; Clement *v.* British America Assur. Co., 141 Mass. 298, 5 N. E. 847; Wyman *v.* People's Equity Ins. Co., 1 Allen 301, 79 Am. Dec. 737; Harkins *v.* Quincy Mut. F. Ins. Co., 16 Gray 591.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Young *v.* Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454.

New York.— Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Davis *v.* Grand Rapids F. Ins. Co., 15 Misc. 263, 36 N. Y. Suppl. 792; Norton *v.* Rensselaer, etc., Ins. Co., 7 Cow. 645.

Pennsylvania.— Boyle *v.* Hamburg-Bremen F. Ins. Co., 169 Pa. St. 349, 32 Atl. 553.

South Dakota.— Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 47 N. W. 532.

Vermont.— Platt *v.* Continental Ins. Co., 62 Vt. 166, 19 Atl. 637.

United States.— Summerfield *v.* Phœnix Assur Co., 65 Fed. 292; Ætna Ins. Co. *v.* People's Bank, 62 Fed. 222, 10 C. C. A. 342; Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102; Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31.

See 28 Cent. Dig. tit. "Insurance," § 1341.

Cash value and cost price.— If the policy requires that the proofs state the cash value of each item, the company cannot demand that the cost price be given. McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143. And on the other hand it is not sufficient to give the cost price, where the property destroyed has been in use for an indefinite period. Germier *v.* Springfield F. & M. Ins. Co., 109 La. 341, 33 So. 361.

64. See cases cited *infra*, this note.

(II) *INTEREST OF INSURED.* Although the statement shows a total loss, nevertheless the requirement as to stating the nature and value of the interest of insured must be complied with.[65]

(III) *OTHER INSURANCE AND ENCUMBRANCES.* It is usual to require the insured to state any other insurance on the property, but a substantial compliance with this requirement is sufficient.[66] The insured may also be required to state whether there were encumbrances on the property.[67]

(IV) *CAUSES OF LOSS.* The requirement that the insured state the facts as to how the loss occurred,[68] so far as they are within his knowledge, is sufficiently complied with by stating that the cause of loss is not known to the insured,[69] and that it happened without any fraud or breach of the conditions of the policy.[70]

3. PRODUCTION OF DOCUMENTS. In case of insurance on a stock of goods, it is usual to require that the insured produce his books of account, duplicate invoices, and other vouchers which may assist the company in determining the extent and value of the stock; and such requirement must be complied with.[71] But com-

Amount of property saved or value of the débris need not be stated where the building is totally destroyed. Thomas *v.* Western Ins. Co., 5 Pa. Super. Ct. 383.

Cost and quantity of goods damaged.— If the requirement is that the insured make a statement of the quantity and cost of the goods damaged, no such statement is necessary in case of total loss. McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143.

In case of a total loss of a single article, no schedule need be furnished. Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804.

Where the loss includes several articles, a failure of the insured to give a particular account of the items and values is fatal to recovery. Gottlieb *v.* Dutchess County Mut. Ins. Co., 89 Hun (N. Y.) 36, 35 N. Y. Suppl. 71; Beatty *v.* Lycoming County Mut. Ins. Co., 66 Pa. St. 9, 5 Am. Rep. 318; Lindsay *v.* Lancashire F. Ins. Co., 34 U. C. Q. B. 440.

65. Wellcome *v.* People's Mut. F. Ins. Co., 2 Gray (Mass.) 480.

Change of interest.—It is not a valid ground of objection where the insurance is effected by one for the benefit of himself and others that the preliminary proof does not state changes in the respective interests of such owners. Walsh *v.* Washington Mar. Ins. Co., 32 N. Y. 427. Nor is it necessary that changes of interest after the loss be stated. Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578.

Condition that the insured deliver a particular account of the loss, etc., inserted in the policy, does not require a statement of the nature of the insured's interest. Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543.

Limited partnership.— It is not necessary to disclose the fact that the name of the insured in fact represents a limited partnership. Clement *v.* British America Assur. Co., 141 Mass. 298, 5 N. E. 847.

66. *Connecticut.*— Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686.

Delaware.— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Illinois.— Phœnix Ins. Co. *v.* Perkey, 92 Ill. 164.

Maryland.— Scottish Union, etc., Ins. Co. *v.* Keene, 85 Md. 263, 37 Atl. 33.

Massachusetts.— Towne *v.* Springfield F. & M. Ins. Co., 145 Mass. 582, 15 N. E. 112.

New York.— Gough *v.* Davis, 39 N. Y. App. Div. 639, 57 N. Y. Suppl. 1139; McMaster *v.* Insurance Co. of North America, 64 Barb. 536.

See 28 Cent. Dig. tit. "Insurance," § 1344.

The requirement to furnish copies of other policies on the property must be substantially complied with. Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Blakeley *v.* Phœnix Ins. Co., 20 Wis. 205, 91 Am. Dec. 388.

67. Markle *v.* Niagara Dist. Mut. F. Ins. Co., 28 U. C. Q. B. 525.

The statement that no other person has any interest in the property is in effect a statement that there is no encumbrance upon it. Davis *v.* Grand Rapids F. Ins. Co., 157 N. Y. 685, 51 N. E. 1090.

Where the policy calls only for a statement as to ownership, it is not necessary that encumbrances be specified in the proofs. Walsh *v.* Philadelphia Fire Assoc., 127 Mass. 383; Taylor *v.* Ætna Ins. Co., 120 Mass. 254.

68. **The mere requirement of a particular account** of the loss or damage does not call for a statement as to the manner or cause of loss. Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434.

69. Hartford F. Ins. Co. *v.* Redding, (Fla. 1904) 37 So. 62; Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578.

70. McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475; Howard Ins. Co. *v.* Hocking, 115 Pa. St. 415, 8 Atl. 592.

71. *Maryland.*— Farmers' F. Ins. Co. *v.* Mispelhorn, 50 Md. 180.

Missouri.— Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Fleisch *v.* Insurance Co. of North America, 58 Mo. App. 596.

New York.— O'Brien *v.* Commercial F. Ins.

pliance may be excused by showing that the books and other documents have been destroyed[72] or are beyond the control of the insured.[73] However, the provision for production of documents is to be liberally construed in favor of the insured, and a substantial compliance is sufficient.[74]

4. Verification — a. In General. A requirement that the insured shall verify his proofs of loss or make affidavit as to his loss must be substantially complied with.[75]

b. By Whom Verified. Where the contract requires the proofs to be sworn to by the owner[76] the verification by the husband or wife of the owner[77] or by his agent[78] will not be sufficient.

5. Certificate by Magistrate, Notary, or Other Officer — a. Policy Provisions. Where a policy of insurance provides that proofs of loss shall be accompanied by a certificate[79] of the nearest magistrate or notary or other like officer, such requirement must be complied with,[80] so far as such a requirement is not

Co., 63 N. Y. 108 [*reversing* 38 N. Y. Super. Ct. 517]; Jube *v.* Brooklyn F. Ins. Co., 28 Barb. 412.

Pennsylvania.— Seibel *v.* Lebanon Mut. Ins. Co., 16 Lanc. L. Rev. 356.

Washington.— Ward *v.* National F. Ins. Co., 10 Wash. 361, 38 Pac. 1127.

See 28 Cent. Dig. tit. "Insurance," § 1348.

After the company has retained the proofs for a considerable time without making objection on account of failure to produce books, etc., it will be presumed to have waived the objection. Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Dec. 60.

72. Bumstead *v.* Dividend Mut. Ins. Co., 12 N. Y. 81.

The fact that insured kept no such book as he is required by the policy to produce will not constitute an excuse. Niagara F. Ins. Co. *v.* Forehand, 169 Ill. 626, 48 N. E. 830.

The insurer complaining of the non-production of books and other documents must first show their existence. Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290.

73. Nichols *v.* Mechanics' F. Ins. Co., 10 N. J. L. 410; Coleman *v.* New York Bowery F. Ins. Co., 177 Pa. St. 239, 35 Atl. 729.

He must show reasonable effort, however, to obtain duplicates. Langan *v.* Royal Ins. Co., 162 Pa. St. 357, 29 Atl. 710.

74. *Arkansas.*— American Cent. Ins. Co. *v.* Ware, 65 Ark. 336, 46 S. W. 129.

California.— Stockton Combined Harvester, etc., Works *v.* Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565.

Kansas.— Milwaukee Mechanics' Ins. Co. *v.* Winfield, 6 Kan. App. 527, 51 Pac. 567.

Pennsylvania.— McKee *v.* Susquehanna Mut. F. Ins. Co., 135 Pa. St. 544, 19 Atl. 1067.

Virginia.— Home Ins. Co. *v.* Cohen, 20 Gratt. 312.

See 28 Cent. Dig. tit. "Insurance," § 1348; and *supra*, XIII, H, 4.

If the insurer having no office within the state fails to reasonably advise insured of a convenient place within the state where the documents may be produced, he is excused from producing them. Seibel *v.* Firemen's Ins. Co., 24 Pa. Super. Ct. 154.

75. Phœnix Ins. Co. *v.* Creason, 14 Ky. L. Rep. 573; McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143; Universal F. Ins. Co. *v.* Morin, 13 Wkly. Notes Cas. (Pa.) 345.

Not a condition precedent.— A stipulation that the affidavit of loss should be made before the nearest magistrate is not a condition precedent to recovery. Ætna Ins. Co. *v.* Miers, 5 Sneed (Tenn.) 139.

76. Where the policy is issued to a firm, proof of loss, verified by one of the firm, is necessary. Myers *v.* Council Bluffs Ins. Co., 72 Iowa 176, 33 N. W. 453.

77. Spooner *v.* Vermont Mut. F. Ins. Co., 53 Vt. 156.

78. Konicz *v.* Teutonia Ins. Co., 8 Pa. Dist. 575, 22 Pa. Co. Ct. 249.

But in the absence of a requirement for verification by the owner verification by agent will be sufficient (German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113), especially where it appears that the insurance was procured by the agent, and the owner was not acquainted with the facts (Sims *v.* State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311).

79. No part of proofs.— The certificate required under such a provision in the policy is not a part of the proofs of loss. Merchants' Ins. Co. *v.* Gibbs, 56 N. J. L. 679, 29 Atl. 485, 44 Am. St. Rep. 413.

80. *Alabama.*— Fire Ins. Companies *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58.

Illinois.—Great Western Ins. Co. *v.* Staaden, 26 Ill. 360.

Massachusetts.—Johnson *v.* Phœnix Ins. Co., 112 Mass. 49, 17 Am. Rep. 65.

Missouri.— Nooman *v.* Hartford F. Ins. Co., 21 Mo. 81; De Land *v.* Ætna Ins. Co., 68 Mo. App. 277; Hubbard *v.* North British, etc., Ins. Co., 57 Mo. App. 1.

New York.— Gottlieb *v.* Dutchess County Mut. Ins. Co., 89 Hun 36, 35 N. Y. Suppl. 71.

Pennsylvania.— Fisher *v.* Allemania F. Ins. Co., 31 Pittsb. Leg. J. 294.

United States.— People's Bank *v.* Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630; Ætna Ins. Co. *v.* People's Bank, 62 Fed. 222, 10 C. C. A. 342.

Canada.— Logan *v.* Commercial Union Ins. Co., 13 Can. Sup. Ct. 270; Morrow *v.* Waterloo County Mut. F. Ins. Co., 39 U. C. Q. B. 441; Racine *v.* Equitable Ins. Co., 6 L. C.

unreasonable;[81] but a substantial compliance is sufficient.[82] And the contract in this respect, as in others, is to be liberally construed in favor of the insured.[83]

b. Statutory Provisions. It is sufficient to comply with the statutory provisions on this subject, notwithstanding the provisions of the policy.[84]

6. Examination of Insured. A condition providing for the examination of the insured[85] on oath, touching his loss, if required by the company, is reasonable; and a refusal to comply with such requirement will forfeit recovery if so provided in the policy.[86] A reasonable compliance with such requirement is

Jur. 89; O'Connor *v.* Commercial Union Assur. Co., 14 Nova Scotia 338; Moody *v.* Ætna Ins. Co., 3 Nova Scotia 173; Scott *v.* Phœnix Ins. Co., Stuart (L. C.) 354. But under statute such a requirement is held unreasonable. Shannon *v.* Hastings Mut. F. Ins. Co., 26 U. C. C. P. 380 [*affirmed* in 2 Ont. App. 81].

See 28 Cent. Dig. tit. "Insurance," § 1350.

A notary is not a magistrate within the meaning of a policy requiring a magistrate's certificate. Cayon *v.* Dwelling-House Ins. Co., 68 Wis. 510, 32 N. W. 540.

Disqualification.— Under a policy requiring a certificate by a magistrate "not concerned in the loss as a creditor," it was held that a magistrate who was a general creditor only of the insured was not disqualified. Dolliver *v.* St. Joseph F. & M. Ins. Co., 131 Mass. 39. And see Ganong *v.* Ætna Ins. Co., 11 N. Brunsw. 75. Under the requirement that the certificate of loss be under seal of the magistrate or notary nearest the fire and not concerned in the loss, it was held that, the object being to secure an impartial statement, a magistrate was disqualified whose house was destroyed by fire communicated from the property of the insured, and before whom complaint had been entered, charging him with setting the fire. Wright *v.* Hartford F. Ins. Co., 36 Wis. 522. And see Ganong *v.* Ætna Ins. Co., 11 N. Brunsw. 75.

"Next nearest magistrate."— The requirement that the certificate be given by the next nearest magistrate should receive a reasonable interpretation (Noone *v.* Transatlantic Ins. Co., 88 Cal. 152, 26 Pac. 103; American Cent. Ins. Co. *v.* Rothchild, 82 Ill. 166; Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466; Williams *v.* Niagara F. Ins. Co., 50 Iowa 561; Agricultural Ins. Co. *v.* Bemiller, 70 Md. 400, 17 Atl. 380; Turley *v.* North American F. Ins. Co., 25 Wend. (N. Y.) 374; Oswalt *v.* Hartford F. Ins. Co., 175 Pa. St. 427, 34 Atl. 735), but in some cases the requirement has been applied with strictness (Protection Ins. Co. *v.* Pherson, 5 Ind. 417; Leadbetter *v.* Ætna Ins. Co., 13 Me. 265, 29 Am. Dec. 505; Gilligan *v.* Commercial F. Ins. Co., 20 Hun (N. Y.) 93; Williams *v.* Queen's Ins. Co., 39 Fed. 167). And it has been said that it is no excuse for not furnishing a certificate of the nearest magistrate that he refused to make the certificate. Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110. But *contra*, see Smith *v.* Home Ins. Co., 47 Hun (N. Y.) 30.

81. Lang *v.* Eagle F. Co., 12 N. Y. App. Div. 39, 42 N. Y. Suppl. 539; Kelly *v.* Sun Fire Office, 141 Pa. St. 10, 21 Atl. 447, 23 Am. St. Rep. 254; Davis Shoe Co. *v.* Kittanning Ins. Co., 138 Pa. St. 73, 20 Atl. 838, 21 Am. St. Rep. 904; Universal F. Ins. Co. *v.* Block, 109 Pa. St. 535, 1 Atl. 523.

"If required."— The provision is sometimes that such certificate be furnished if required by the company; and under such a provision it is only failure to furnish the certificate after demand therefor has been made that will defeat recovery. German-American Ins. Co. *v.* Norris, 100 Ky. 29, 37 S. W. 267, 18 Ky. L. Rep. 537, 66 Am. St. Rep. 324; Sullivan *v.* Germania F. Ins. Co., 89 Mo. App. 106; Burnett *v.* American Cent. Ins. Co., 68 Mo. App. 343; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Moyer *v.* Sun Ins. Office, 176 Pa. St. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

82. *Connecticut.*— Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Kansas.— Germania F. Ins. Co. *v.* Curran, 8 Kan. 9.

Missouri.— Swearinger *v.* Pacific F. Ins. Co., 66 Mo. App. 90.

New York.— Brown *v.* Hartford F. Ins. Co., 52 Hun 260, 5 N. Y. Suppl. 230 [*affirmed* in 132 N. Y. 539, 30 N. E. 68]; Ætna F. Ins. Co. *v.* Tyler, 16 Wend. 385, 30 Am. Dec. 90.

Wisconsin.— Badger *v.* Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

United States.— Williams *v.* Queen's Ins. Co., 39 Fed. 167.

Canada.— A certificate not stating the amount of the loss was held not sufficient. Borden *v.* Provincial Ins. Co., 18 N. Brunsw. 381.

See 28 Cent. Dig. tit. "Insurance," § 1350.

83. Turley *v.* North American F. Ins. Co., 25 Wend. (N. Y.) 374.

84. Bailey *v.* Hope Ins. Co., 56 Me. 474; Vorous *v.* Phenix Ins. Co., 102 Wis. 76, 78 N. W. 162.

85. **No part of proofs.**— The examination of the insured under such a provision is not a part of the proofs of loss. Winnesheik Ins. Co. *v.* Schueller, 60 Ill. 465.

86. *Connecticut.*— Harris *v.* Phœnix Ins. Co., 35 Conn. 310.

Georgia.— Firemen's Fund Ins. Co. *v.* Sims, 115 Ga. 939, 42 S. E. 269.

Missouri.— Fleisch *v.* Insurance Co. of North America, 58 Mo. App. 596.

Wisconsin.— Bonner *v.* Home Ins. Co., 13 Wis. 677.

United States.— Gross *v.* St. Paul F. & M. Ins. Co., 22 Fed. 74; Sims *v.* Union Assur. Co., 129 Fed. 804.

See 28 Cent. Dig. tit. "Insurance," § 1354.

sufficient.[87] Failure to comply may be excused by showing inability to do so.[88] And in a proper case the insured may be entitled to the assistance of an attorney if he desires it.[89]

7. Amendment of Proofs. Any mistake or innocent misstatement made by the insured in his statements or proofs may be corrected by amendment.[90]

C. Effect of Statements and Proofs — 1. In General. If the insurer has been misled by, or has changed its position in reliance on, the statements or proofs furnished by the insured, the latter will of course be estopped from questioning their truthfulness.[91] But, as the proofs are primarily intended for the purpose of securing an adjustment between the insured and the company, the statement as to the amount and circumstances of the loss will not be binding on the insured so as to preclude his recovery of the real amount of the loss, unless there has been a violation of some provision of the policy.[92] Especially is it true that the state-

But if the policy does not expressly so provide, the refusal to submit to an examination does not forfeit the right to recover, and only suspends the enforcement of the liability until the requirement is complied with. Weide *v.* Germania Ins. Co., 29 Fed. Cas. No. 17,358, 1 Dill. 441; Wiede *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,617.

Sufficiency of request by insurer.— Where the company requested the insured to fix a time when he would submit to an examination, but receiving no answer repeated the request, naming the date, it was held that there had been a sufficient requirement for the examination. Fleisch *v.* Insurance Co. of North America, 58 Mo. App. 596. But a request that the insured swear to a statement made out by his attorney is not a demand for examination of insured under oath. Dougherty *v.* German-American Ins. Co., 67 Mo. App. 526.

87. Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

A mistake made by the insured in such examination may be corrected on the trial. Commercial Ins. Co. *v.* Huckberger, 52 Ill. 464; Huston *v.* State Ins. Co., 100 Iowa 402, 69 N. W. 674; McKee *v.* Susquehanna Mut. F. Ins. Co., 135 Pa. St. 544, 19 Atl. 1067.

88. American Cent. Ins. Co. *v.* Simpson, 43 Ill. App. 98; Phillips *v.* Protection Ins. Co., 14 Mo. 220; Fleisch *v.* Insurance Co. of North America, 58 Mo. App. 596.

89. As where there is a dispute as to the property covered or otherwise, and the company demands that the insured submit to an examination. American Cent. Ins. Co. *v.* Simpson, 43 Ill. App. 98; Thomas *v.* Burlington Ins. Co., 47 Mo. App. 169.

90. *Florida.*— Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Indiana.— Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817.

Iowa.— Names *v.* Union Ins. Co., 104 Iowa 612, 74 N. W. 14.

Kentucky.— Sun Mut. Ins. Co. *v.* Crist, 39 S. W. 837, 19 Ky. L. Rep. 305.

Massachusetts.— Campbell *v.* Charter Oak F. & M. Ins. Co., 10 Allen 213.

Mississippi.— Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704.

Pennsylvania.— Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226.

See 28 Cent. Dig. tit. "Insurance," § 1357.

Venue of jurat.— Where the statement of the insured under oath was not valid for want of a venue in the jurat, it was held that the subsequent affidavit of the notary before whom the oath was administered would not cure the defect. McManus *v.* Western Assur Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143.

91. Case *v.* Manufacturers' F. & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083; Schmidt *v.* Mutual City, etc., F. Ins. Co., 55 Mich. 432, 21 N. W. 875.

92. *Illinois.*—Commercial Ins. Co. *v.* Huckberger, 52 Ill. 464; Ætna Ins. Co. *v.* Stevens, 48 Ill. 31; Birmingham Fire Ins. Co. *v.* Pulver, 27 Ill. App. 17 [*affirmed* in 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598].

Iowa.— Corkery *v.* Security F. Ins. Co., 99 Iowa 382, 68 N. W. 792.

Kentucky.—New Orleans Ins. Co. *v.* O'Brian, 8 Ky. L. Rep. 785.

Michigan.— Gristock *v.* Royal Ins. Co., 84 Mich. 161, 47 N. W. 549; Sibley *v.* Prescott Ins. Co., 57 Mich. 14, 23 N. W. 473.

New York.— Miaghan *v.* Hartford F. Ins. Co., 24 Hun 58; Hoffman *v.* Ætna F. Ins. Co., 1 Rob. 501; American Ins. Co. *v.* Griswold, 14 Wend. 399.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

Wisconsin.— Beyer *v.* St. Paul F. & M. Ins. Co., 112 Wis. 138, 88 N. W. 57.

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

See 28 Cent. Dig. tit. "Insurance," § 1359 *et seq.*

The insured is not bound by the certificate made under the requirements of the policy by the nearest magistrate or notary. Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598. To the contrary it has been said that the affidavit of loss estops the insured from denying any material fact stated therein. Irving *v.* Excelsior F. Ins. Co., 1 Bosw. (N. Y.) 507.

Origin of fire.— Misstatements in the proofs as to the origin of the fire not fraudulently made will not defeat recovery. White *v.* Merchants' Ins. Co., 93 Mo. App. 282; Smiley *v.*

ments in the proofs are not binding on the insured where they are prepared by the company's agent.[93]

2. False Swearing or Fraud — a. By Insured. There is usually, however, a provision in the policy that any fraud or false swearing[94] by the insured relating to the loss, or in the proofs of loss, will forfeit any right of recovery under the policy; and such a provision is valid.[95] In general, however, the misstatement,

Citizens' F., etc., Ins. Co., 14 W. Va. 33; Waldeck *v.* Springfield F. & M. Ins. Co., 53 Wis. 129, 10 N. W. 88.

Value of property.— The statements in the proofs do not constitute evidence of the value of the property in an action on the policy. German Ins. Co. *v.* Bear, 63 Ill. App. 118. See also XXI, G, 2, f, (III).

Additional insurance.— A statement in the proofs of additional insurance which would avoid the policy does not estop the insured from proving that there was no valid additional insurance. McMaster *v.* Insurance Co. of North America, 55 N. Y. 222, 14 Am. Rep. 239 [*affirming* 64 Barb. 536]; Mead *v.* American F. Ins. Co., 13 N. Y. App. Div. 476, 43 N. Y. Suppl. 334.

Breach of warranty.— Any statements in the proofs tending to show breach of warranty may be overcome by proof that there was no breach of warranty in fact. White *v.* Royal Ins. Co., 149 N. Y. 485, 44 N. E. 77; Cummins *v.* Agricultural Ins. Co., 67 N. Y. 260, 23 Am. Rep. 111; Parmelee *v.* Hoffman F. Ins. Co., 54 N. Y. 193.

93. Cook *v.* Lion F. Ins. Co., 67 Cal. 368, 7 Pac. 784; Crittenden *v.* Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321; Castner *v.* Farmers' Mut. F. Ins. Co., 50 Mich. 273, 15 N. W. 452; Star Union Lumber Co. *v.* Finney, 35 Nebr. 214, 52 N. W. 1113.

But where in his final proofs the insured adopted the valuation of the arbitrators, it was held that he was bound by such valuation, in the absence of fraud. Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502.

94. **False swearing** consists in knowingly and intentionally stating upon oath what is not true, or the statement of a fact as true which the party does not know to be true, and which he has no reasonable ground for believing to be true. Atherton *v.* British America Assur. Co., 91 Me. 289, 39 Atl. 1006; Moadinger *v.* Mechanics' F. Ins. Co., 2 Hall (N. Y.) 527. False swearing may defeat recovery, although it is not done with intent to defraud the company. Ellis *v.* Agricultural Ins. Co., 7 Pa. Super. Ct. 264, 42 Wkly. Notes Cas. 374; Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 3 S. Ct. 507, 28 L. ed. 76. Evidence of fraud or false swearing, see *infra*, XXI, G, 2, h, (I).

95. *Iowa.*— Lewis *v.* Council Bluffs Ins. Co., 63 Iowa 193, 18 N. W. 888.

Kentucky.— German Ins. Co. *v.* Reed, 13 Ky. L. Rep. 207.

Tennessee.— Phœnix Ins. Co. *v.* Munday, 5 Coldw. 547.

Texas.— Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45.

Wisconsin.—Gettelman *v.* Commercial Union Assur. Co., 97 Wis. 237, 72 N. W. 627.

United States.— Weide *v.* Germania Ins. Co., 29 Fed. Cas. No. 17,358, 1 Dill. 441.

See 28 Cent. Dig. tit. "Insurance," § 1362 *et seq.*

False swearing as to one item covered by the policy will avoid the whole policy, although as to other items the statements are correct. Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388; Fowler *v.* Phœnix Ins. Co., 35 Oreg. 559, 57 Pac. 421; Home Ins. Co. *v.* Connelly, 104 Tenn. 93, 56 S. W. 828; Moore *v.* Firemen's Fund Ins. Co., 28 Gratt. (Va.) 524; Moore *v.* Virginia F. & M. Ins. Co., 28 Gratt. (Va.) 508, 26 Am. Rep. 373.

False statement as to title or encumbrance will defeat the policy under such a stipulation. Security Ins. Co. *v.* Bronger, 6 Bush (Ky.) 146 (provided it is substantially false); Carey *v.* Home Ins. Co., 97 Iowa 619, 66 N. W. 920; Lamb *v.* Council Bluffs Ins. Co., 70 Iowa 238, 30 N. W. 497; Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Chamberlain *v.* Insurance Co. of North America, 3 N. Y. Suppl. 701. Mere failure to disclose an encumbrance will not constitute fraud or false swearing. Reddick *v.* Sangeen Mut. F. Ins. Co., 14 Ont. 506 [*affirmed* in 15 Ont. App. 363].

The inclusion of property not covered by the policy in a claim for loss will not defeat recovery if there is no intention to defraud. Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296; Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954; Boyd *v.* Royal Ins. Co., 111 N. C. 372, 16 S. E. 389; Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

Not material or misleading.— False swearing will defeat recovery under the policy, although the company is not misled thereby. Fowler *v.* Phœnix Ins. Co., 35 Oreg. 559, 57 Pac. 421. But where the condition in the policy relates to fraud or attempt to defraud, a mere false statement not deceiving the company to its injury will not affect the right of insured to recover. Shaw *v.* Scottish Commercial Ins. Co., 1 Fed. 761. It has been said that false swearing as to matters which are wholly immaterial as affecting the liability of the company will not defeat recovery. Forehand *v.* Niagara Ins. Co., 58 Ill. App. 161; Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388; Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908; Steeves *v.* Sovereign F. Ins. Co., 20 N. Brunsw. 394. Even though the actual loss exceeds the amount of the policy, false swearing as to

although under oath, if not intentionally false and made with the purpose to defraud, does not constitute such fraud or false swearing as to defeat recovery.[96]

b. By Another. However, a fraud or false statement on the part of another will not prevent recovery by the insured;[97] although a false statement made by the person whose duty it is to make proofs[98] or to whom the loss is payable[99] may defeat recovery.

3. Overvaluation. Under the usual provision[1] by which recovery under the policy is defeated by any fraud or attempted fraud or false swearing, a fraudulent overvaluation in the proofs or statements of loss will defeat recovery under the policy;[2] but it is only fraud or false swearing that avoids the policy, and if

any item included in the claim of loss will forfeit the policy. Dolloff *v.* Phœnix Ins. Co., 82 Me. 266, 19 Atl. 396, 17 Am. St. Rep. 482.

Other insurance.— A statement that there is no other insurance will not constitute such fraud as to defeat recovery if the other insurance is in fact invalid. Bennett *v.* Council Bluffs Ins. Co., 70 Iowa 600, 31 N. W. 948; Jersey City Ins. Co. *v.* Nichol, 35 N. J. Eq. 291, 40 Am. Rep. 625.

96. *Georgia.*— Watertown F. Ins. Co. *v.* Grehan, 74 Ga. 642.

Illinois.— Home Ins. Co. *v.* Mendenhall, 164 Ill. 458, 45 N. E. 1078, 36 L. R. A. 374; Firemen's Ins. Co. *v.* Kuessner, 164 Ill. 275, 45 N. E. 540.

Indiana.— Franklin Ins. Co. *v.* Culver, 6 Ind. 137.

Iowa.— Huston *v.* State Ins. Co., 100 Iowa 402, 69 N. W. 674; Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712.

Maine.— Hilton *v.* Phœnix Assur. Co. of London, 92 Me. 272, 42 Atl. 412; Hanscom *v.* Home Ins. Co., 90 Me. 333, 38 Atl. 324.

Missouri.— Marion *v.* Great Republic Ins. Co., 35 Mo. 148.

New York.— Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 8 Abb. N. Cas. 315; Rohrbach *v.* Ætna Ins. Co., 62 N. Y. 613; Dresser *v.* United Firemen's Ins. Co., 45 Hun 298; Gough *v.* Davis, 24 Misc. 245, 52 N. Y. Suppl. 947; Mortimer *v.* New York F. Ins. Co., 2 U. S. L. Mag. 452.

Ohio.— Merchants' Nat. Bank *v.* Insurance Co. of North America, 4 Ohio Dec. (Reprint) 340, 1 Clev. L. Rep. 339; Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

Pennsylvania.— Thierolf *v.* Universal F. Ins. Co., 110 Pa. St. 37, 20 Atl. 412; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226.

Tennessee.— Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743.

Texas.— Lion F. Ins. Co. *v.* Starr, 71 Tex. 733, 12 S. W. 45; Westchester F. Ins. Co. *v.* Wagner, 24 Tex. Civ. App. 140, 57 S. W. 876; Phœnix Ins. Co. *v.* Swann, (Civ. App. 1897) 41 S. W. 519.

Washington.— Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031.

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

United States.— Merrill *v.* Insurance Co. of North America, 23 Fed. 245; Betts *v.* Franklin F. Ins. Co., 3 Fed. Cas. No. 1,373, Taney 171; Wiede *v.* Insurance Co. of North America, 29 Fed. Cas. No. 17,617.

See 28 Cent. Dig. tit. "Insurance," § 1362 *et seq.* And see *supra*, XII, A, 2.

But the fact that the false statement under oath is carelessly made, or made without reading, will not avoid its effect as a forfeiture. Dumas *v.* Northwestern Nat. Ins. Co., 12 App. Cas. (D. C.) 245, 40 L. R. A. 358; Knop *v.* National F. Ins. Co., 107 Mich. 323, 65 N. W. 228; Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

97. Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 63 N. W. 650.

98. Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

99. Merchants' Nat. Bank *v.* Insurance Co. of North America, 4 Ohio Dec. (Reprint) 340, 1 Clev. L. Rep. 339.

"Legal representatives."—Where the policy provided that it should be void by reason of fraud or false swearing by the insured, and that the term "insured" covered legal representatives, it was held that "legal representative" referred to one who succeeded to the legal rights of the insured, by reason of his death or the transfer of the policy, and not to a mere agent. Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 63 N. W. 650.

1. **But in the absence of an express stipulation** such fraudulent overvaluation of the loss will not render the policy void. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56 Am. Rep. 31.

Under valued-policy statutes rendering the company liable for the loss of buildings to the extent of the insurance without regard to the real value at the time of loss, a fraudulent overvaluation in the proofs is immaterial. Barnard *v.* People's F. Ins. Co., 66 N. H. 401, 29 Atl. 1033; Cayon *v.* Dwelling House Ins. Co., 68 Wis. 510, 32 N. W. 540; Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200.

2. *Nebraska.*— Home Ins. Co. *v.* Winn, 42 Nebr. 331, 60 N. W. 575 [*distinguishing* Springfield F. & M. Ins. Co. *v.* Winn, 27 Nebr. 649, 43 N. W. 401, 5 L. R. A. 841].

Nevada.— Gerhauser *v.* North British, etc., Ins. Co., 6 Nev. 15.

New Hampshire.— Sleeper *v.* New Hampshire F. Ins. Co., 56 N. H. 401.

New York.— Sternfield *v.* Park F. Ins. Co., 50 Hun 262, 2 N. Y. Suppl. 766; Hickman *v.* Long Island Ins. Co., 1 Edm. Sel. Cas. 374.

Wisconsin.— F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

the overvaluation is innocent the insured may nevertheless recover the amount of his actual loss.[3]

D. Waiver or Estoppel[4] as to Notice or Proofs — 1. In General. When the company with knowledge that notice and proofs have not been given and furnished as required by the policy so acts in relation to the matter as to lead the assured to reasonably believe that the policy is still in force and binding, there is a waiver of objection to the manner or time of notice and proofs, and accordingly the company cannot take advantage of the default.[5]

2. Effect — a. In General. A waiver of notice or proofs eliminates from the contract the condition with reference to the furnishing of such notice or proofs,

United States.— Geib *v.* International Ins. Co., 10 Fed. Cas. No. 5,298, 1 Dill. 433; Howell *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,780; Huchberger *v.* Home F. Ins. Co., 12 Fed. Cas. No. 6,821, 5 Biss. 106; Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31.

England.— Chapman *v.* Pole, 22 L. T. Rep. N. S. 306.

Canada.— Gastonguay *v.* Sovereign F. Ins. Co., 15 Nova Scotia 334; McLeod *v.* Citizens' Ins. Co., 13 Nova Scotia 21; McMillan *v.* Gore Dist. Mut. F. Ins. Co., 21 U. C. C. P. 123; Grenier *v.* Monarch F., etc., Assur. Co., 3 L. C. Jur. 100.

See 28 Cent. Dig. tit. "Insurance," § 1363.

The rendering of false invoices in connection with the proofs avoids the policy, although the actual loss exceeds the amount of insurance. Capital F. Ins. Co. *v.* Beverly, 14 Ohio Cir. Ct. 468, 8 Ohio Cir. Dec. 37; Vaughan *v.* Virginia F. & M. Ins. Co., 102 Va. 541, 46 S. E. 692.

Where the policy covers both real and personal property, a fraudulent overvaluation as to the personalty will defeat recovery only as to the portion of insurance on the personalty. Sullivan *v.* Hartford F. Ins. Co., 89 Tex. 665, 36 S. W. 73. In other cases it has been held, however, that even under such circumstances fraudulent overvaluation as to the personalty will entirely defeat recovery under the policy. Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200; Harris *v.* Waterloo Mut. F. Ins. Co., 10 Ont. 718; Cashman *v.* London, etc., F. Ins. Co., 10 N. Brunsw. 246.

3. *Iowa.*—Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845.

Louisiana.— Daul *v.* Firemen's Ins. Co., 35 La. Ann. 98; Rafel *v.* Nashville M. & F. Ins. Co., 7 La. Ann. 244.

Michigan.— Tiefenthal *v.* Citizens' Mut. F. Ins. Co., 53 Mich. 306, 19 N. W. 9.

Missouri.— Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209.

New Hampshire.— Leach *v.* Republic F. Ins. Co., 58 N. H. 245.

New Jersey.— Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

New York.— Owens *v.* Holland Purchase Ins. Co., 56 N. Y. 565 [*affirming* 1 Thomps. & C. 285]; Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 328, 83 N. Y. Suppl. 730.

Texas.— Phœnix Ins. Co. *v.* Shearman, 17 Tex. Civ. App. 456, 43 S. W. 930.

United States.— Republic F. Ins. Co. *v.* Weides, 14 Wall. 375, 20 L. ed. 894; Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368; Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265 [*affirmed* in 12 Wall. 164, 20 L. ed. 364]; Huchberger *v.* Providence Washington Ins. Co., 12 Fed. Cas. No. 6,823 [*affirmed* in 12 Wall. 164, 20 L. ed. 364].

Canada.— Doull *v.* Fire Ins. Co., 18 Nova Scotia 511, 6 Can. L. T. 541; Rice *v.* Provincial Ins. Co., 7 U. C. C. P. 548; Parsons *v.* Citizens' Ins. Co., 43 U. C. Q. B. 261; Park *v.* Phœnix Ins. Co., 19 U. C. Q. B. 110.

See 28 Cent. Dig. tit. "Insurance," § 1363. And see *supra*, XII, B, 2.

It is a question for the jury to determine whether there is fraudulent overvaluation. Western Assur Co. *v.* Ray, 105 Ky. 523, 49 S. W. 326, 20 Ky. L. Rep. 1360; Goldstein *v.* Franklin Mut. F. Ins. Co., 170 Mass. 243, 49 N. E. 115; Rice *v.* Provincial Ins. Co., 7 U. C. C. P. 548.

4. **Waiver or estoppel:** Affecting right to avoid policy see *supra*, XIV. Affecting validity of contract see *supra*, VI, E.

5. Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456.

Necessity of estoppel or consideration.— While it has been said that a condition of the policy as to notice or proofs can be waived only by agreement supported by a consideration or by an estoppel which involves some act of the insured to his detriment in reliance on the conduct of the company (McDermott *v.* Lycoming F. Ins. Co., 44 N. Y. Super. Ct. 221), the general rule as has been stated (see *supra*, XIV, A, 2) is that a waiver may be effectual, although there is neither estoppel (Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673) nor a consideration (Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456).

Necessity of writing.— It is not necessary that waiver of notice or proofs be in writing. It is sufficient that the company has acted in such a manner as to authorize a person of ordinary prudence to believe that the requirements of the policy have been waived. National F. Ins. Co. *v.* U. S. Building, etc., Assoc., 54 S. W. 714, 21 Ky. L. Rep. 1207; American F. Ins. Co. *v.* Bland, 40 S. W. 670, 19 Ky. L. Rep. 287. Requirement that waiver by agent must be in writing see *infra*, XVII, D, 4, d, (II).

so that breach of such condition cannot be relied on as a defense to recovery under the policy.[6]

b. Dependent Upon Time of Waiver. A waiver of conditions as to notice or proofs of loss will be effectual, although the act or conduct of the company relied upon to constitute such waiver is subsequent to the time when, by the terms of the policy, such notice or proofs should have been furnished.[7]

c. Partial Waiver. There may be a waiver as to preliminary notice which does not amount to a waiver of formal notice and proofs as to the particulars of the loss.[8]

3. Waiver by Officers.[9] Any officer of the company having authority to bind it in the conduct of its business may waive the conditions of the policy as to notice and proofs.[10]

4. Waiver by Agents[11]**— a. With Limited Authority.** Neither mere soliciting agents having no authority to bind the company by contract of insurance[12] nor agents having only authority to countersign and deliver policies issued by the company[13] can waive the requirements in such policies as to notice and proofs.

6. *California.*— Williams *v.* Hartford Ins. Co., 54 Cal. 442, 35 Am. Rep. 77.

Indiana.— American F. Ins. Co. *v.* Sisk, 9 Ind. App. 305, 36 N. E. 659.

Iowa.—Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652.

Pennsylvania.— Snowden *v.* Kittanning Ins. Co., 122 Pa. St. 502, 16 Atl. 22; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Commonwealth Ins. Co. *v.* Sennett, 41 Pa. St. 161; Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397; Insurance Co. *v.* O'Hanlon, 1 Wkly. Notes Cas. 33.

West Virginia.—Rheims *v.* Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670.

United States.— Perry *v.* Faneuil Hall Ins. Co., 11 Fed. 482.

Canada.— Walker *v.* Western Assur. Co., 18 U. C. Q. B. 19.

See 28 Cent. Dig. tit. "Insurance," § 1370. And see *supra*, XIV, A, 4.

A mortgagee entitled to the benefit of the policy may take advantage of the waiver, although such waiver has been made only with reference to the mortgagor, by whom the policy was taken. State Ins. Co. *v.* Ketcham, 9 Kan. App. 552, 58 Pac. 229; Nickerson *v.* Nickerson, 80 Me. 100, 12 Atl. 880.

What law governs.— The effect of a waiver is to be determined by the laws of the place where the action is brought and not by that of the place where the contract was made. Waydell *v.* Provincial Ins. Co., 21 U. C. Q. B. 612.

7. Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673; Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456; Baumgartel *v.* Providence Washington Ins. Co., 61 Hun (N. Y.) 118, 15 N. Y. Suppl. 573; United Firemen's Ins. Co. *v.* Kukral, 7 Ohio Cir. Ct. 356, 4 Ohio Cir. Dec. 633.

It has been suggested that the waiver should have become effectual before the expiration of the time limited (Bolan *v.* Philadelphia Fire Assoc., 58 Mo. App. 225; Gale *v.* Des Moines State Ins. Co., 33 Mo. App. 664; Brown *v.* London Assur Corp., 40 Hun (N. Y.) 101), and that at any rate the waiver should have taken place before the bringing of action (Smith *v.* State Ins. Co., 64 Iowa 716, 21 N. W. 145; Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029), unless the subsequent action or conduct of the company is such as to work an estoppel (Bolan *v.* Philadelphia Fire Assoc., 58 Mo. App. 225). But these cases are not in harmony with those first cited in this note.

8. Desilver *v.* State Mut. Ins. Co., 38 Pa. St. 130; Warner *v.* Insurance Co. of North America, 35 Leg. Int. (Pa.) 293.

9. Waiver by officers see also *supra*, XIV, B, 1, a.

10. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Officers of a mutual company have such authority. Lewis *v.* Monmouth Mut. F. Ins. Co., 52 Me. 492; Priest *v.* Citizens' Mut. F. Ins. Co., 3 Allen (Mass.) 602.

Where the policy stipulated that proofs should be delivered at the company's office, and delivery was made to an officer in charge of the office, it was held that such officer was authorized to waive further proofs than those submitted. Edgerly *v.* Farmers' Ins. Co., 48 Iowa 644.

11. Waiver by agent see also *supra*, XIV, B, 1, b.

12. American Cent. Ins. Co. *v.* Birds Bldg., etc., Assoc., 81 Ill. App. 258; Forest City Ins. Co. *v.* School Directors Dist. No. 1, 4 Ill. App. 145; Ide *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 7,001, 2 Biss. 333.

13. *Arkansas.*—Burlington Ins. Co. *v.* Kennerly, 60 Ark. 532, 31 S. W. 155.

Massachusetts.— Lohnes *v.* Insurance Co. of North America, 121 Mass. 439.

Minnesota.— Ermentraut *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346; Shapiro *v.* St. Paul F. & M. Ins. Co., 61 Minn. 135, 63 N. W. 614; Bowlin *v.* Hekin F. Ins. Co., 36 Minn. 433, 31 N. W. 859.

Missouri.— McCollum *v.* North British, etc., Ins. Co., 65 Mo. App. 304.

New York.— Bush *v.* Westchester F. Ins.

b. With General Authority. But an agent who has authority to bind the company by a contract for insurance and to issue a policy in pursuance of such contract may waive the conditions of the contract as to notice and proofs,[14] and by holding an agent out as having authority to bind the company by his acts, the company may be bound by his waiver.[15]

c. With Power to Adjust Losses. One who is intrusted by the insurer with apparent power to adjust the loss has authority to waive notice and proofs of loss.[16]

Co., 63 N. Y. 531 [*reversing* 2 Thomps. & C. 629].

Vermont.— Smith *v.* Niagara F. Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216.

Wisconsin.— Knudson *v.* Hekla F. Ins. Co., 75 Wis. 198, 43 N. W. 954.

United States.— Harrison *v.* Hartford F. Ins. Co., 59 Fed. 732.

See 28 Cent. Dig. tit. "Insurance," § 1374.

14. *Alabama.*—Syndicate Ins. Co. *v.* Catchings, 104 Ala. 176, 16 So. 46.

Florida.— Indian River State Bank *v.* Hartford F. Ins. Co., (1903) 35 So. 228.

Illinois.— Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. 355.

Kentucky.— Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846.

Massachusetts.— Eastern R. Co. *v.* Relief F. Ins. Co., 105 Mass. 570.

Michigan.— Security Ins. Co. *v.* Fay, 22 Mich. 467, 7 Am. Rep. 670.

Missouri.— Thompson *v.* Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889; Nickell *v.* Phœnix Ins. Co., 144 Mo. 420, 46 S. W. 435; Burge *v.* Greenwich Ins. Co., 106 Mo. App. 244, 80 S. W. 342; Harness *v.* National F. Ins. Co., 76 Mo. App. 410; McCollum *v.* Hartford F. Ins. Co., 67 Mo. App. 76.

New Jersey.— Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. Rep. 625; Gray *v.* Blum, 55 N. J. Eq. 553, 38 Atl. 646.

New York.— McCoubray *v.* St. Paul F. & M. Ins. Co., 169 N. Y. 590, 62 N. E. 1097 [*affirming* 50 N. Y. App. Div. 416, 64 N. Y. Suppl. 112]; McGuire *v.* Hartford F. Ins. Co., 158 N. Y. 680, 52 N. E. 1124; Amaldone *v.* Insurance Co. of North America, 15 N. Y. App. Div. 232, 44 N. Y. Suppl. 201.

Ohio.— Stacy *v.* Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67.

Canada.— Western Assur. Co. *v.* Pharand, 11 Quebec Q. B. 144.

See 28 Cent. Dig. tit. "Insurance," § 1374.

15. Van Allen *v.* Farmers' Joint-Stock Ins. Co., 10 Hun (N. Y.) 397; Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796.

16. By acts or conduct in proceeding to adjust the loss without notice or proofs having been furnished he waives the condition in the policy requiring notice and proofs as a condition precedent to liability on the part of the company..

Alabama.— Liverpool, etc., Ins. Co. *v.* Tillis, 110 Ala. 201, 17 So. 672.

Arkansas.— Minneapolis F. & M. Mut. Ins. Co. *v.* Fultz, (1904) 80 S. W. 576.

Colorado.— California Ins. Co. *v.* Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376; Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242.

Indiana.— Germania F. Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; Ætna Ins. Co. *v.* Shryer, 85 Ind. 362; Prussian Nat. Ins. Co. *v.* Peterson, 30 Ind. App. 289, 64 N. E. 102; Western Assur. Co. *v.* McCarty, 18 Ind. App. 449, 48 N. E. 265.

Iowa.— Ervay *v.* Philadelphia Fire Assoc., 119 Iowa 304, 93 N. W. 290; Lake *v.* Farmers' Ins. Co., 110 Iowa 473, 81 N. W. 710; Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126.

Kansas.— Des Moines State Ins. Co. *v.* Ketcham, 9 Kan. App. 552, 58 Pac. 229; Dwelling-House Ins. Co. *v.* Osborn, 1 Kan. App. 197, 40 Pac. 1099.

Louisiana.— McClelland *v.* Greenwich Ins. Co., 107 La. 124, 31 So. 691.

Maine.— Day *v.* Dwelling-House Ins. Co., 81 Me. 244, 16 Atl. 894.

Maryland.— Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184; Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29.

Michigan.— Gristock *v.* Royal Ins. Co., 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634.

Missouri.— Terti *v.* American Ins. Co., 76 Mo. App. 42; Landrum *v.* American Cent. Ins. Co., 68 Mo. App. 339; McCollum *v.* Liverpool, etc., Ins. Co., 67 Mo. App. 66.

New Hampshire.— Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

New Jersey.— Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. Rep. 625.

New York.— Smaldone *v.* Insurance Co. of North America, 162 N. Y. 580, 57 N. E. 168; Sergent *v.* Liverpool, etc., Ins. Co., 155 N. Y. 349, 49 N. E. 935; Messmer *v.* Niagara F. Ins. Co., 24 N. Y. App. Div. 241, 48 N. Y. Suppl. 478; Sharpey *v.* Milwaukee Mechanics' Ins. Co., 8 N. Y. App. Div. 354, 40 N. Y. Suppl. 817; McGuire *v.* Hartford F. Ins. Co., 7 N. Y. App. Div. 575, 40 N. Y. Suppl. 300; Ralli *v.* White, 20 Misc. 635, 46 N. Y. Suppl. 376; Bishop *v.* Agricultural Ins. Co., 9 N. Y. Suppl. 350.

North Carolina.— Strause *v.* Palatine Ins. Co., 128 N. C. 64, 38 S. E. 256.

Pennsylvania.— Fritz *v.* Lebanon Mut. Ins. Co., 154 Pa. St. 384, 26 Atl. 7; Carnes *v.* Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

South Dakota.— Hitchcock *v.* State Ins. Co., 10 S. D. 271, 72 N. W. 898.

Virginia.— Travelers' Ins. Co. *v.* Harvey, 82 Va. 949, 5 S. E. 553.

d. Limitation on Power of Agent — (I) *By Statute.* A statutory provision that no agent shall have power to waive any conditions of the policy in writing indorsed thereon is valid, and a verbal waiver of proofs by an agent is not binding on the company.[17]

(II) *In Policy.* However, an agent having power to bind the company by a contract of insurance may waive the condition in a policy that no waiver of such conditions shall be valid unless in writing indorsed on the policy,[18] and therefore may, notwithstanding such limitation of authority, waive conditions as to notice and proofs of loss.[19] In some cases this conclusion is supported on the theory that the stipulation against varying the terms of the contract except by writing indorsed, etc., has reference to the conditions affecting the validity of the contract and not to provisions as to the liability to the company for a loss, to which notice and proofs of loss necessarily relate.[20]

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

Canada.— Western Assur. Co. *v.* Pharand, 11 Quebec Q. B. 144.

See 28 Cent. Dig. tit. "Insurance," § 1375; and *supra*, XIV, B, 1, c.

But it is said in some cases that the mere fact that a person is the adjusting agent for a company does not of itself establish his authority to waive the conditions of the contract (Lake *v.* Farmers' Ins. Co., 110 Iowa 473, 81 N. W. 710; Barre *v.* Council Bluffs Ins. Co., 76 Iowa 609, 41 N. W. 373; Hollis *v.* State Ins. Co., 65 Iowa 454, 21 N. W. 774; German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698), and the adjusting agent for one company cannot delegate this power to the adjuster for another company who acts at his request (Atlantic Ins. Co. *v.* Carlin, 58 Md. 336; McCollum *v.* North British, etc., Ins. Co., 65 Mo. App. 304). But one who is in fact authorized to adjust a particular loss may be presumed to have authority to waive notice and proofs. Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181; Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128 [*distinguishing* Barre *v.* Council Bluffs Ins. Co., 76 Iowa 609, 41 N. W. 373].

17. Wadhams *v.* Western Assur. Co., 117 Mich. 514, 76 N. W. 6.

18. See *supra*, XIV, B, 2.

19. *Arkansas.*— Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Burlington Ins. Co. *v.* Kennerly, 60 Ark. 532, 31 S. W. 155.

California.— Carroll *v.* Girard F. Ins. Co., 72 Cal. 297, 13 Pac. 863.

Illinois.— Dwelling House Ins. Co. *v.* Dowdall, 159 Ill. 179, 42 N. E. 606 [*affirming* 55 Ill. App. 622].

Iowa.— Pringle *v.* Des Moines Ins. Co., 107 Iowa 742, 77 N. W. 521; Huesinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696; Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683 [practically *overruling* Kirkman *v.* Farmers' Ins Co., 90 Iowa 457, 57 N. W. 952, 48 Am. St. Rep. 454]; O'Leary *v.* German American Ins. Co., 100 Iowa 390, 69 N. W. 686.

Kansas.— Phenix Ins. Co. *v.* Munger, 49 Kan. 178, 30 Pac. 120, 33 Am. St. Rep. 360.

Mississippi.— Phenix Ins. Co. *v.* Bowdre, 67 Miss. 620, 7 So. 596, 19 Am. Rep. 326.

New Jersey.— Carson *v.* Jersey City Ins. Co., 43 N. J. L. 300, 39 Am. Rep. 584.

New York.— Smaldone *v.* Insurance Co. of North America, 15 N. Y. App. Div. 232, 44 N. Y. Suppl. 201; Baumgartel *v.* Providence Washington Ins. Co., 61 Hun 118, 15 N. Y. Suppl. 573; Lowry *v.* Lancashire Ins. Co., 32 Hun 329.

Pennsylvania.— Mix *v.* Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460.

See 28 Cent. Dig. tit. "Insurance," § 1376.

In a few cases it is held that oral waiver cannot be shown as against a stipulation requiring a waiver to be indorsed in writing.

Michigan.— Gould *v.* Dwelling-House Ins. Co., 90 Mich. 302, 51 N. W. 455, 52 N. W. 754.

Oregon.— Weidert *v.* State Ins. Co., 19 Oreg. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

Pennsylvania.— Universal Mut. F. Ins. Co. *v.* Weiss, 106 Pa. St. 20.

South Carolina.—Commercial Union Assur. Co. *v.* Margeson, 29 Can. Sup. Ct. 601 [*reversing* 31 Nova Scotia 337]; Atlas Assur. Co. *v.* Brownell, 29 Can. Sup. Ct. 537; Logan *v.* Commercial Union Ins. Co., 13 Can. Sup. Ct. 270; Caldwell *v.* Stadacona F., etc., Ins. Co., 15 Nova Scotia 218.

Vermont.— Smith *v.* Niagara F. Ins. Co., 60 Vt. 682, 15 Atl. 353, 6 Am. St. Rep. 144, 1 L. R. A. 216.

See 28 Cent. Dig. tit. "Insurance," § 1376.

20. *Florida.*— Indian River State Bank *v.* Hartford F. Ins. Co., (1903) 35 So. 228.

Illinois.— Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. 355.

Indiana.— Indiana Ins. Co. *v.* Capehart, 108 Ind. 270, 8 N. E. 285; American F. Ins. Co. *v.* Sisk, 9 Ind. App. 305, 36 N. E. 659.

Iowa.— Lake *v.* Farmers' Ins. Co., 110 Iowa 473, 81 N. W. 710; Washburn-Halligan Coffee Co. *v.* Merchants' Brick Mut. F. Ins. Co., 110 Iowa 423, 81 N. W. 707, 80 Am. St. Rep. 311; Stevens *v.* Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769.

Maryland.— Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184; Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323; Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469.

Michigan.— Young *v.* Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454.

Missouri.— Titsworth *v.* American Cent.

5. What Constitutes a Waiver — a. In General — (I) *Express Waiver.* Any direction or assurance by a competent officer or agent that notice or proofs need not be given or will not be insisted upon will constitute an express waiver of the requirements in the policy that such notice or proofs be furnished.[21]

(II) *Implied Waiver.* Notice or proofs may also be waived by acts or conduct of authorized officers or agents inconsistent[22] with the requirement that notice or proofs be furnished as required by the conditions or stipulations in the policy.[23]

b. Failure to Demand Proofs. The mere silence of the company, even with notice of the loss and failure to require the insured to comply with the conditions as to proofs, will not constitute a waiver thereof.[24]

c. Assistance in Furnishing Proofs. Where the company furnishes to the insured blanks for proofs or assists him in making such proofs it cannot afterward complain that they are not in proper form if such requirements are com-

Ins. Co., 62 Mo. App. 310; Okey *v.* State Ins. Co., 29 Mo. App. 105.

New Jersey.— Snyder *v.* Dwelling House Ins. Co., 59 N. J. L. 544, 37 Atl. 1022, 59 Am. St. Rep. 625.

Texas.— Philadelphia Fire Assoc. *v.* Jones, (Civ. App. 1897) 40 S. W. 44.

Wisconsin.— Matthews *v.* Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675.

See 28 Cent. Dig. tit. "Insurance," § 1376.

But in one case it is said that such an explanation does not avoid the effect of a stipulation against waiver of any provision of the policy and therefore the provisions of the policy as to notice and proofs of loss cannot be waived by an agent except in writing as provided by the policy. Dwelling-House Ins. Co. *v.* Snyder, 59 N. J. L. 18, 34 Atl. 931.

21. *Indiana.*— Phenix Ins. Co. *v.* Pickel, 3 Ind. App. 332, 29 N. E. 432.

Iowa.— Scott *v.* Security F. Ins. Co., 98 Iowa 67, 66 N. W. 1054.

Kentucky.— Citizens' Ins. Co. *v.* Bland, 39 S. W. 825, 19 Ky. L. Rep. 110; American Cent. Ins. Co. *v.* Heaverin, 35 S. W. 922, 18 Ky. L. Rep. 190; American Cent. Ins. Co. *v.* Heaverin, 16 Ky. L. Rep. 95; Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846.

Massachusetts.— Priest *v.* Citizens' Mut. F. Ins. Co., 3 Allen 602.

Michigan.— Young *v.* Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454.

Minnesota.— Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

Montana.— Wright *v.* Fire Ins. Co., 12 Mont. 474, 31 Pac. 87, 19 L. R. A. 211.

New Hampshire.— Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

New York.— Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Rob. 55.

Pennsylvania.— Carey *v.* Allemania F. Ins. Co., 171 Pa. St. 204, 33 Atl. 185.

Texas.— German Ins. Co. *v.* Norris, 11 Tex. Civ. App. 250, 32 S. W. 727.

United States.—Harrison *v.* German-American F. Ins. Co., 67 Fed. 577.

Canada.— Duffy *v.* La Compagnie D'Assurance, etc., 23 Quebec Super. Ct. 181.

See 28 Cent. Dig. tit. "Insurance," § 1378.

22. **The conduct relied upon must be such as is inconsistent** with a subsequent claim that the right to recover under the policy has been defeated by the failure to give notice or furnish proofs. Smith *v.* Haverhill Mut. F. Ins. Co., 1 Allen (Mass.) 297, 79 Am. Dec. 733; Grigsby *v.* German Ins. Co., 40 Mo. App. 276; Boyle *v.* North Carolina Mut. Ins. Co., 52 N. C. 373.

23. *Kentucky.*— Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846; Agricultural Ins. Co. *v.* Yates, 10 Ky. L. Rep. 984.

Maryland.— Rokes *v.* Amazon Ins. Co., 51 Md. 512, 34 Am. Rep. 323.

Minnesota.— McCarvel *v.* Phenix Ins. Co., 64 Minn. 193, 66 N. W. 367.

Missouri.— Maddox *v.* German Ins. Co., 39 Mo. App. 198; Erwin *v.* Springfield F. & M. Ins. Co., 24 Mo. App. 145.

New York.— Trippe *v.* Provident Fund Soc., 140 N. Y. 23, 35 N. E. 316, 37 Am. St. Rep. 529, 22 L. R. A. 432; Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231.

Ohio.— Hobson *v.* Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296.

Pennsylvania.— Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397.

South Carolina.— Neve *v.* Charleston Ins., etc., Co., 2 McMull. 237.

United States.— Weeks *v.* Lycoming F. Ins. Co., 29 Fed. Cas. No. 17,353.

See 28 Cent. Dig. tit. "Insurance," § 1382 *et seq.*

Knowledge of failure to comply with the conditions of the policy or of the act of an unauthorized agent in attempting to waive such conditions is essential to the validity of the waiver. Guernsey *v.* American Ins. Co., 17 Minn. 104.

24. *Alabama.*— Central City Ins. Co. *v.* Oates, 86 Ala. 558, 6 So. 83, 11 Am. St. Rep. 67.

Indiana.— Continental Ins. Co. *v.* Dorman, 125 Ind. 189, 25 N. E. 213.

Massachusetts.— Smith *v.* Haverhill Mut. F. Ins. Co., 1 Allen 297, 79 Am. Dec. 733.

Pennsylvania.— Mueller *v.* South Side F. Ins. Co., 87 Pa. St. 399.

Wisconsin.— Cornell *v.* Milwaukee Mut. F. Ins. Co., 18 Wis. 387.

United States.— Williams *v.* Queen's Ins. Co., 39 Fed. 167.

plied with;[25] and if the agent offers to furnish blanks and fails to do so the want of proofs is waived.[26]

d. Retaining Without Objection. The receipt and retention without objection by the company of what purport to be proofs of loss in compliance with the requirements of the policy will constitute a waiver of defects in such proof;[27]

Canada.— O'Connor *v.* Commercial Union Ins. Co., 12 Nova Scotia 119; Cameron *v.* Times, etc., F. Ins. Co., 7 U. C. C. P. 234; Whyte *v.* Western Assur. Co., 22 L. C. Jur. 215, 7 Rev. Lég. 106.

See 28 Cent. Dig. tit. "Insurance," § 1385.

25. Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196; Bromberg *v.* Minnesota Fire Assoc., 45 Minn. 318, 47 N. W. 975; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207; Palmer *v.* St. Paul F. & M. Ins. Co., 44 Wis. 201; Warner *v.* Peoria M. & F. Ins. Co., 14 Wis. 318.

26. Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 7 L. R. A. 81; Craighton *v.* Agricultural Ins. Co., 39 Hun (N. Y.) 319; Davison *v.* Guardian Assur. Co., 176 Pa. St. 525, 35 Atl. 220; Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499; Hutchinson *v.* Niagara Dist. Mut. F. Ins. Co., 39 U. C. Q. B. 483.

But mere failure to furnish blanks when requested does not constitute a waiver. Birmingham *v.* Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595; Coldham *v.* American Casualty, etc., Co., 8 Ohio Cir. Ct. 620, 4 Ohio Cir. Dec. 548; Lycoming County Ins. Co. *v.* Updegraff, 40 Pa. St. 311. By a statute, however, in Missouri the company is required on request to furnish blanks for making proofs, and failure to do so on a request constitutes a waiver. Meyer *v.* Insurance Co. of North America, 73 Mo. App. 166; Warren *v.* Bankers', etc., Town Mut. Co., 72 Mo. App. 188.

27. *Alabama.*—Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252; Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355.

Connecticut.— Daniels *v.* Equitable F. Ins. Co., 50 Conn. 551.

Georgia.— Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67.

Illinois.— Hartford F. Ins. Co. *v.* Walsh, 54 Ill. 164, 5 Am. Rep. 115; Manchester F. Assur. Co. *v.* Ellis, 85 Ill. App. 634; Phenix Ins. Co. *v.* Lewis, 63 Ill. App. 228; New York Nat. Acc. Soc. *v.* Taylor, 42 Ill. App. 97; Germania F. Ins. Co. *v.* Frazier, 22 Ill. App. 327.

Indiana.— Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

Iowa.— Condon *v.* Des Moines Mut. Hail Assoc., 120 Iowa 80, 94 N. W. 477; Ruthven *v.* American F. Ins. Co., 102 Iowa 550, 71 N. W. 574.

Louisiana.— Purves *v.* Germania Ins. Co., 44 La. Ann. 123, 10 So. 495.

Massachusetts.— Faulkner *v.* Manchester F. Assur. Co., 171 Mass. 349, 50 N. E. 529; Merrill *v.* Colonial Mut. F. Ins. Co., 169 Mass. 10, 47 N. E. 439, 61 Am. St. Rep. 268.

Michigan.— Residence F. Ins. Co. *v.* Hannawold, 37 Mich. 103; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241.

Minnesota.— Devil's Lake First Nat. Bank *v.* American Cent. Ins. Co., 58 Minn. 492, 60 N. W. 345; Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

Mississippi.— American L. Ins. Co. *v.* Mahone, 56 Miss. 180.

Missouri.— St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 49 Am. Dec. 74; Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687.

New Hampshire.— Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

New Jersey.— Gray *v.* Blum, 55 N. J. Eq. 553, 38 Atl. 646.

New York.— Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 173 N. Y. 633, 66 N. E. 1106; Sharp *v.* Milwaukee Mechanics' Ins. Co., 158 N. Y. 696, 53 N. E. 1132; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 157 N. Y. 690, 51 N. E. 1090; De Witt *v.* Agricultural Ins. Co., 157 N. Y. 353, 51 N. E. 977 [*affirming* 89 Hun 229, 36 N. Y. Suppl. 570]; Bumstead *v.* Dividend Mut. Ins. Co., 12 N. Y. 81; Weber *v.* Germania F. Ins. Co., 16 N. Y. App. Div. 596, 44 N. Y. Suppl. 976; Partridge *v.* Milwaukee Mechanics' Ins. Co., 13 N. Y. App. Div. 519, 43 N. Y. Suppl. 632 [*affirmed* in 162 N. Y. 597, 57 N. E. 1119]; Bear *v.* Atlanta Home Ins. Co., 34 Misc. 613, 70 N. Y. Suppl. 581; Palmer *v.* Great Western Ins. Co., 10 Misc. 167, 30 N. Y. Suppl. 1044; Brink *v.* Guaranty Mut. Acc. Assoc., 7 N. Y. Suppl. 847; Brothers *v.* California Ins. Co., 3 N. Y. Suppl. 89; Strong *v.* North American F. Ins. Co., 1 Alb. L. J. 162.

Pennsylvania.— Moyer *v.* Sun Ins. Office, 176 Pa. St. 579, 35 Atl. 221, 53 Am. St. Rep. 690; Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786; Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499; Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25; Yuengling *v.* Jennings, 6 Pa. Super. Ct. 614.

Texas.— Merchants' Ins. Co. *v.* Richman, (Civ. App. 1897) 40 S. W. 831; Northern Assur. Co. *v.* Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239.

Virginia.—Georgia Home Ins. Co. *v.* Goode, 95 Va. 751, 30 S. E. 366.

West Virginia.— Rheims *v.* Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670.

Wisconsin.— Vergeront *v.* German Ins. Co., 86 Wis. 425, 56 N. W. 1096; Vangindertaelen *v.* Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Badger *v.* Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848.

for the insured having attempted to comply with the policy should be advised in what respect he has failed to comply, in order that the objection may be cured.[28] If the company intends to insist on defects, it should point out what defects it intends to rely upon in order that they may be obviated;[29] a mere indefinite objection is not sufficient,[30] but an objection that the insured has failed entirely to comply with the conditions of the policy as to proofs is sufficient.[31] So if it refuses to return the proofs for correction it waives its objection.[32]

e. Specific Objection Waiving Others. Where the objection to the proofs is based on one ground which is specified, the company cannot afterward rely upon another ground of objection.[33] So a demand of further proofs to cure a specific

United States.—American Credit Indemnity Co. *v.* Carrollton Furniture Mfg. Co., 95 Fed. 111, 36 C. C. A. 671; Hamilton *v.* Connecticut F. Ins. Co., 46 Fed. 42 [*affirmed* in 59 Fed. 258, 8 C. C. A. 114]; Spratley *v.* Hartford Ins. Co., 21 Fed. Cas. No. 13,256, 1 Dill. 392; Tisdale *v.* Mutual Ben. L. Ins. Co., 23 Fed. Cas. No. 14,059.

Canada.— Bowes *v.* National Ins. Co., 20 Nova Scotia 437; Bull *v.* North British Canadian Invest. Co., 15 Ont. App. 421, 14 Ont. 322; Shannon *v.* Hastings Mut. Ins. Co., 2 Ont. App. 81 [*affirming* 26 U. C. C. P. 380]; Stickney *v.* Niagara Dist. Mut. Ins. Co., 23 U. C. C. P. 372; Mason *v.* Andes Ins. Co., 23 U. C. C. P. 37; Western Assur. Co. *v.* Pharand, 11 Quebec Q. B. 144.

See 28 Cent. Dig. tit. "Insurance," §§ 1384, 1393.

28 *Indiana.*— Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817.

Iowa.— Pringle *v.* Des Moines Ins. Co., 107 Iowa 742, 77 N. W. 521; George Dee, etc., Co. *v.* Key City F. Ins. Co., 104 Iowa 167, 73 N. W. 594.

New York.— Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668.

Pennsylvania.— Sutton *v.* American F. Ins. Co., 188 Pa. St. 380, 41 Atl. 537.

South Carolina.— McBryde *v.* South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 760.

See 28 Cent. Dig. tit. "Insurance," §§ 1384, 1393.

29. *Florida.*—Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Iowa.— Dyer *v.* Des Moines Ins. Co., 103 Iowa 524, 72 N. W. 681.

Maine.— Walker *v.* Metropolitan Ins. Co., 56 Me. 371.

Maryland.— Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469.

Massachusetts.— Eliot Five Cents Sav. Bank *v.* Commercial Assur. Co., 142 Mass. 142, 7 N. E. 550.

Missouri.— Parks *v.* Phœnix F. Ins. Co., 26 Mo. App. 511.

New York.— Karelson *v.* Sun Fire Office, 9 N. Y. St. 831.

Pennsylvania.— Universal F. Ins. Co. *v.* Block, 109 Pa. St. 535, 1 Atl. 523; Susquehanna Mut. F. Ins. Co. *v.* Cusick, 109 Pa. St. 157; Ben Franklin F. Ins. Co. *v.* Flynn, 98 Pa. St. 627.

South Carolina.— Madsden *v.* Phœnix F. Ins. Co., 1 S. C. 24.

Texas.— Gerard F. & M. Ins. Co. *v.* Frymier, (Civ. App. 1895) 32 S. W. 55 [*citing* Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93].

Virginia.— Virginia F. & M. Ins. Co. *v.* Goode, 95 Va. 762, 30 S. E. 370; Morotock Ins. Co. *v.* Cheek, 93 Va. 8, 24 S. E. 464, 57 Am. St. Rep. 782; Home Ins. Co. *v.* Cohen, 20 Gratt. 312.

See 28 Cent. Dig. tit. "Insurance," §§ 1384, 1393, 1394.

30. *Illinois.*—Insurance Co. of North America *v.* Hope, 58 Ill. 75, 11 Am. Rep. 48; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553; American Cent. Ins. Co. *v.* Brown, 29 Ill. App. 602.

Iowa.— Myers *v.* Council Bluffs Ins. Co., 72 Iowa 176, 33 N. W. 453.

Nebraska.— Hartford F. Ins. Co. *v.* Meyer, 30 Nebr. 135, 46 N. W. 292, 27 Am. St. Rep. 384.

New York.—Paltrovitch *v.* Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. 639, 25 L. R. A. 198.

Oregon.— Schmurr *v.* State Ins. Co., 30 Oreg. 29, 46 Pac. 363.

South Carolina.— Madsden *v.* Phœnix F. Ins. Co., 1 S. C. 24.

South Dakota.— Angier *v.* Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685.

Texas.— Merchants' Ins. Co. *v.* Reichman, (Civ. App. 1897) 40 S. W. 831.

Virginia.— Home Ins. Co. *v.* Cohen, 20 Gratt. 312.

United States.— Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102.

See 28 Cent. Dig. tit. "Insurance," § 1393 *et seq.*

31. Spring Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 30; Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. (N. Y.) 495.

32. Turley *v.* North American F. Ins. Co., 25 Wend. (N. Y.) 374; Findeisen *v.* Metropole F. Ins. Co., 57 Vt. 520.

33. *Alabama.*— Fire Ins. Companies *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58.

Florida.— Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Illinois.— Kuznik *v.* Orient Ins. Co., 73 Ill. App. 201.

Maine.— Bailey *v.* Hope Ins. Co., 56 Me. 474.

Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

Missouri.— Phillips *v.* Protection Ins. Co., 14 Mo. 220; Travis *v.* Continental Ins. Co., 32 Mo. App. 198.

objection is a waiver of a failure to file the proofs in time,[34] and the requirement that the insured furnish proofs uncalled for by the policy is a waiver of all proofs.[35]

f. Timely Objection. If the objection is one which might be cured if made when the proofs are presented, it should be urged promptly so that the insured shall have opportunity to obviate it within the proper time,[36] and if not made within a reasonable time the objection will be deemed waived.[37] The requirement already stated that specific objection must be made or the retention of the proofs will be deemed a waiver of objection thereto, leads to the result that

Nebraska.— Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New York.— Craighton *v.* Agricultural Ins. Co., 39 Hun 319.

South Dakota.— Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 47 N. W. 532.

Wisconsin.— Badger *v.* Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845.

United States.— Thompson *v.* Liverpool, etc., Ins. Co., 23 Fed. Cas. No. 13,966, 2 Hask. 363.

See 28 Cent. Dig. tit. "Insurance," § 1397.

But it is said that the making of a specific objection is not a waiver of the entire obligation to make proofs (Sheehan *v.* Southern Ins. Co., 53 Mo. App. 351), and that retention of proofs which comply with one condition of the policy is not a waiver of a distinct condition relating to proofs (Lane *v.* St. Paul F. & M. Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197; Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110).

34. Merchants' Ins. Co. *v.* Gibbs, 56 N. J. L. 679, 29 Atl. 485, 44 Am. St. Rep. 413; German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586; Ligon *v.* Equitable F. Ins. Co., 87 Tenn. 341, 10 S. W. 768.

35. Waggonick *v.* Westchester F. Ins. Co., 34 Ill. App. 629; McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 22 Misc. 269, 48 N. Y. Suppl. 820.

36. *Alabama.*— Firemen's Ins. Co. *v.* Crandall, 33 Ala. 9.

Illinois.— Winnesheik Ins. Co. *v.* Schuller, 60 Ill. 465; Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272.

Kansas.— German Ins. Co. *v.* Hall, 1 Kan. App. 43, 41 Pac. 69.

Maine.— Bartlett *v.* Union Mut. F. Ins. Co., 46 Me. 500.

Maryland.— Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184.

Michigan.— Mercantile Ins. Co. *v.* Holthaus, 43 Mich. 423, 5 N. W. 642.

Missouri.— Robinson *v.* Robinson, 65 Mo. App. 216; Dautel *v.* Pennsylvania F. Ins. Co., 65 Mo. App. 44; Arnold *v.* Hartford F. Ins. Co., 55 Mo. App. 149.

New Hampshire.— Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

New York.— O'Niel *v.* Buffalo F. Ins. Co., 3 N. Y. 122; Child *v.* Sun Mut. Ins. Co., 3 Sandf. 26.

Pennsylvania.— Fritz *v.* Quaker City Mut. F. Ins. Co., (1893) 26 Atl. 14; Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366, 44 Wkly. Notes Cas. 226; Ehlers *v.* Aurora F. Ins. Co., 6 Pa. Dist. 441, 19 Pa. Co. Ct. 165; Hall *v.* Insurance Co., 3 Phila. 331.

United States.— *In re* Republic Ins. Co., 20 Fed. Cas. No. 11,705.

See 28 Cent. Dig. tit. "Insurance," § 1398 *et seq.*

This rule applies even though the objection is that the proofs are not furnished within proper time, it is waived if not seasonably made (Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355; Mickley *v.* Burlington Ins. Co., 35 Iowa 174, 14 Am. Rep. 494; Hibernia Ins. Co. *v.* O'Connor, 29 Mich. 241; Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Rheims *v.* Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670), although in some cases it has been said that in such case retention without objection is not a waiver (Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 49 Am. Dec. 74; Cohn *v.* Orient Ins. Co., 62 Mo. App. 271; Bell *v.* Lycoming F. Ins. Co., 19 Hun (N. Y.) 238; American Express Co. *v.* Triumph Ins. Co., 7 Ohio Dec. (Reprint) 51, 1 Cinc. L. Bul. 85).

37. *Iowa.*— Young *v.* Hartford F. Ins. Co., 45 Iowa 377, 24 Am. Rep. 784.

Maryland.— Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382; Frederick County Mut. F. Ins. Co. *v.* Deford, 38 Md. 404.

Mississippi.— Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704.

Nebraska.— Union Ins. Co. *v.* Barwick, 36 Nebr. 223, 54 N. W. 519.

New Jersey.— Hibernia Mut. F. Ins. Co. *v.* Meyer, 39 N. J. L. 482; State Ins. Co. *v.* Maackens, 38 N. J. L. 564; Jones *v.* Mechanics' F. Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405.

New York.— Bush *v.* Westchester F. Ins. Co., 2 Thomps. & C. 629.

West Virginia.— Nease *v.* Ætna Ins. Co., 32 W. Va. 283, 9 S. E. 233.

See 28 Cent. Dig. tit. "Insurance," § 1398 *et seq.*

For illustrations of what is a reasonable time under particular circumstances see the following cases:

Connecticut.— Daniels *v.* Equitable F. Ins. Co., 50 Conn. 551.

Illinois.— Great Western Ins. Co. *v.* Staaden, 26 Ill. 360; German Ins. Co. *v.* Gibe, 59 Ill. App. 614.

Iowa.— Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411.

objections not made before commencement of action are deemed waived and cannot for the first time be interposed in the way of defense to an action on the policy.[38]

g. Proof Delayed by Insurer. So far as objection might be made on the ground that the notice or proofs are not furnished within the time specified by the policy, any conduct on the part of the company or its authorized agents which has induced or necessitated delay in giving notice or furnishing proofs so that they cannot reasonably be given or furnished within the required time will constitute a waiver of the delay.[39]

h. Steps For Adjustment or Settlement. Negotiations or proceedings by the company with reference to settlement of loss will be a waiver of failure to give notice or make proofs of loss,[40] and proceedings to adjust the loss in the usual way will waive objection on account of defects in the proofs or failure to furnish

Kansas.— Capitol Ins. Co. *v.* Wallace, 48 Kan. 400, 29 Pac. 755, 50 Kan. 453, 31 Pac. 1070.

Maine.— Biddeford Sav. Bank *v.* Dwelling-House Ins. Co., 81 Me. 566, 18 Atl. 298.

New York.— Keeney *v.* Home Ins. Co., 71 N. Y. 396, 27 Am. Rep. 60; Dakin *v.* Liverpool, etc., Ins. Co., 13 Hun 122; Jones *v.* Howard Ins. Co., 10 N. Y. St. 120.

Pennsylvania.— Carey *v.* Allemania F. Ins. Co., 171 Pa. St. 204, 33 Atl. 185; Carpenter *v.* Allemania F. Ins. Co., 156 Pa. St. 37, 26 Atl. 781; Weiss *v.* American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991; Whitmore *v.* Dwelling-House Ins. Co., 148 Pa. St. 405, 23 Atl. 1131, 33 Am. St. Rep. 838; Gould *v.* Dwelling-House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562.

Wisconsin.— Killips *v.* Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506.

United States.— Connecticut F. Ins. Co. *v.* Hamilton, 59 Fed. 258, 8 C. C. A. 114 [*affirming* 46 Fed. 42].

38. *Alabama.*— Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252.

Connecticut.— Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Georgia.— Alston *v.* Phenix Ins. Co., 100 Ga. 287, 27 S. E. 981.

Indiana.— Byrne *v.* Rising Sun Ins. Co., 20 Ind. 103.

Maine.— Patterson *v.* Triumph Ins. Co., 64 Me. 500; Works *v.* Farmers' Mut. F. Ins. Co., 57 Me. 281.

Maryland.— Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

Mississippi.— Swan *v.* Liverpool, etc., Ins. Co., 52 Miss. 704.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62.

New York.— Barnum *v.* Merchants' F. Ins. Co., 97 N. Y. 188; Kernochan *v.* New York Bowery F. Ins. Co., 17 N. Y. 428; Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Rob. 55; Savage *v.* Corn Exch. F. Ins. Co., 4 Bosw. 1; Bilbrough *v.* Metropolis Ins. Co., 5 Duer 587; Brown *v.* Kings County F. Ins. Co., 31 How. Pr. 508.

Pennsylvania.—Cummins *v.* German-American Ins. Co., 197 Pa. St. 61, 46 Atl. 902; German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586; Miller *v.* Iron City F. Ins. Co., 11 York Leg. Rec. 61.

Texas.— Ætna Ins. Co. *v.* Shacklett, (Civ. App. 1900) 57 S. W. 583; Royal Ins. Co. *v.* McIntyre, (Civ. App. 1896) 34 S. W. 669.

United States.— Frankle *v.* Pennsylvania F. Ins. Co., 10 Fed. Cas. No. 5,052*a*.

See 28 Cent. Dig. tit. "Insurance," § 1401.

39. *Illinois.*— German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113; Dwelling-House Ins. Co. *v.* Dowdall, 55 Ill. App. 622 [*affirmed* in 159 Ill. 179, 42 N. E. 606].

Indiana.— Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984.

Massachusetts.— Eastern R. Co. *v.* Relief F. Ins. Co., 105 Mass. 570.

Michigan.— Marthinson *v.* North British, etc., Ins. Co., 64 Mich. 372, 31 N. W. 291.

Missouri.— Hanna *v.* American Cent. Ins. Co., 36 Mo. App. 538; Hicks *v.* Empire Ins. Co., 6 Mo. App. 254.

New York.— Van Allen *v.* Farmers' Joint-Stock Ins. Co., 10 Hun 397; Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. 275; Owen *v.* Farmers' Joint-Stock Ins. Co., 57 Barb. 518, 10 Abb. Pr. N. S. 166 note.

Pennsylvania.— State Ins. Co. *v.* Todd, 83 Pa. St. 272.

Texas.— Burlington Ins. Co. *v.* Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111.

Virginia.— Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. 88.

Canada.— Kelly *v.* Hochelaga Mut. F. Ins. Co., 24 L. C. Jur. 298; Ducharme *v.* Laval Mut. Ins. Co., 2 Montreal Leg. N. 115.

See 28 Cent. Dig. tit. "Insurance," §§ 1382 *et seq.*, 1393 *et seq.*

40. *Alabama.*— Western Assur. Co. *v.* McGlathery, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26.

Iowa.— Condon *v.* Des Moines Mut. Hail Assoc., 120 Iowa 80, 94 N. W. 477.

Louisiana.— Daul *v.* Firemen's Ins. Co., 35 La. Ann. 98.

Maryland.—McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Planters' Mut. Ins. Co. *v.* Engle, 52 Md. 468; Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469.

Massachusetts.— Graves *v.* Washington Mar. Ins. Co., 12 Allen 391; Blake *v.* Exchange Mut. Ins. Co., 12 Gray 265.

Missouri.— Baile *v.* St. Joseph F. & M. Ins.

proofs as required by the policy.[41] But by stipulation entered into before proceeding to an adjustment, the effect of such proceeding as a waiver may be obviated.[42]

Co., 73 Mo. 371; Murphy *v.* North British, etc., Ins. Co., 70 Mo. App. 78; Coffman *v.* Niagara F. Ins. Co., 57 Mo. App. 647; Erwin *v.* Springfield F. & M. Ins. Co., 24 Mo. App. 145.

Nebraska.— Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; Home F. Ins. Co. *v.* Hammang, 44 Nebr. 566, 62 N. W. 883.

New York.— Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231; Bodle *v.* Chenango County Mut. Ins. Co., 2 N. Y. 53.

United States.— Petit *v.* German Ins. Co., 98 Fed. 800.

Canada.— Ouimet *v.* Glasgow, etc., Ins. Co., 19 Rev. Lég. 27; Lampkin *v.* Ontario M. & F. Ins. Co., 12 U. C. Q. B. 578; Demontigny *v.* Compagnie d'Assurance, etc., 2 Dorion (L. C.) 27.

See 28 Cent. Dig. tit. "Insurance," § 1406.

For example requiring an examination under oath is a waiver of proofs (Wicking *v.* Citizens' Mut. F. Ins. Co., 118 Mich. 640, 77 N. W. 275; Carpenter *v.* German American Ins. Co., 135 N. Y. 298, 31 N. E. 1015; Enos *v.* St. Paul F. & M. Ins. Co., 4 S. D. 639, 57 N. W. 919, 46 Am. St. Rep. 796; Zielke *v.* London Assur. Corp., 64 Wis. 442, 25 N. W. 436; Badger *v.* Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848; Badger *v.* Glens Falls Ins. Co., 49 Wis. 389, 5 N. W. 845); but on the other hand it is said that merely taking the statement of the insured under oath does not constitute a waiver (Phenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. 779; Williams *v.* Queen's Ins. Co., 39 Fed. 167; Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102); and the fact that the company proceeds to make an investigation on its own account as to the loss will not waive proofs (Dwelling House Ins. Co. *v.* Dowdall, 159 Ill. 179, 42 N. E. 606; Smith *v.* Haverhill Mut. F. Ins. Co., 1 Allen (Mass.) 297, 79 Am. Dec. 733; Riker *v.* Fire Ins. Co. of North America, 90 N. Y. App. Div. 391, 85 N. Y. Suppl. 546; Lycoming County Ins. Co. *v.* Updegraff, 40 Pa. St. 311; Trask *v.* State F. & M. Ins. Co., 29 Pa. St. 198, 72 Am. Dec. 622; Busch *v.* Insurance Co., 6 Phila. (Pa.) 252; Scottish Union, etc., Ins. Co. *v.* Clancey, 83 Tex. 113, 18 S. W. 439; Greenville People's Bank *v.* Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630).

An offer of settlement made before a final investigation will be a waiver. Smith *v.* Haverhill Mut. F. Ins. Co., 1 Allen (Mass.) 297, 79 Am. Dec. 733; German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698; Cornell *v.* Milwaukee Mut. F. Ins. Co., 18 Wis. 387.

41. *California.*— West Coast Lumber Co. *v.* State Invest., etc., Co., 98 Cal. 502, 33 Pac. 258.

Illinois.— Home Ins., etc., Co. *v.* Myer, 93 Ill. 271; Mitchell *v.* Orient Ins. Co., 40 Ill. App. 111.

Indiana.— Germania F. Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; Milwaukee Mechanics' Ins. Co. *v.* Stewart, 13 Ind. App. 640, 42 N. E. 290; German F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286.

Iowa.— Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128; Green *v.* Des Moines F. Ins. Co., 84 Iowa 135, 50 N. W. 558; Graves *v.* Merchants', etc., Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507.

Kentucky.— Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. 668, 11 Ky. L. Rep. 539, 7 L. R. A. 81.

Louisiana.— Monteleone *v.* Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784.

Massachusetts.— Wholley *v.* Western Assur. Co., 174 Mass. 263, 54 N. E. 548, 75 Am. St. Rep. 314; Butterworth *v.* Western Assur. Co., 132 Mass. 489.

Michigan.— Gristock *v.* Royal Ins. Co., 84 Mich. 161, 47 N. W. 549, 87 Mich. 428, 49 N. W. 634.

Mississippi.— Western Assur. Co. *v.* White, (1899) 25 So. 494.

Missouri.— Gerhart Realty Co. *v.* Northern Assur. Co., 86 Mo. App. 596; McCollum *v.* Liverpool, etc., Ins. Co., 67 Mo. App. 66; Fulton *v.* Phœnix Ins. Co., 51 Mo. App. 460.

Nebraska.— Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

New Mexico.— Robinson *v.* Palatine Ins. Co., (1901) 66 Pac. 535.

New York.— Smith *v.* Home Ins. Co., 47 Hun 30; Smith *v.* Exchange F. Ins. Co., 46 N. Y. Super. Ct. 543; O'Brien *v.* Prescott Ins. Co., 11 N. Y. Suppl. 125.

North Dakota.— Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

Pennsylvania.— Gould *v.* Dwelling House Ins. Co., 134 Pa. St. 570, 19 Atl. 793, 19 Am. St. Rep. 717; Susquehanna Mut. F. Ins. Co. *v.* Staats, 102 Pa. St. 529; Lycoming Ins. Co. *v.* Schreffler, 42 Pa. St. 188, 82 Am. Dec. 501; Carnes *v.* Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634; Hower *v.* Susquehanna Mut. F. Ins. Co., 9 Pa. Super. Ct. 153.

Texas.— Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93.

Washington.— Cushing *v.* Williamsburg City F. Ins. Co., 4 Wash. 538, 30 Pac. 736.

West Virginia.— Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

United States.— Fisher *v.* Crescent Ins. Co., 33 Fed. 544; Perry *v.* Faneuil Hall Ins. Co., 11 Fed. 482.

See 28 Cent. Dig. tit. "Insurance," § 1406 *et seq.*

A mere promise to send an adjuster, however, is said not to be a waiver of objection to the sufficiency of the proofs. Ervay *v.* Philadelphia Fire Assoc., 119 Iowa 304, 93 N. W. 290; Harrison *v.* Hartford F. Ins. Co., 59 Fed. 732.

42. Ruthven *v.* American F. Ins. Co., 92 Iowa 316, 60 N. W. 663; Cook *v.* North Brit-

i. Appraisement or Arbitration. The demand by the company of an appraisement to determine the amount of the loss as provided for by the policy will be a waiver of proofs,[43] and the demand for arbitration has the same effect.[44] A final submission to arbitration as to the amount of the loss is a recognition of liability waiving defect or want of proofs.[45] Reliance on an award as a defense,[46] or on the demand for an award as a condition precedent to bringing action,[47] or an offer to pay the award,[48] will constitute a waiver of proofs.

j. Recognition of Liability. A recognition of the liability of the company for the loss will constitute a waiver of proofs.[49] Thus an offer to pay is a waiver,[50] but an offer of settlement on a basis which is rejected is not a waiver.[51]

k. Denial of Liability — (i) *In General.* If the company upon being advised of a claim against it for a loss and within the time for filing proofs

ish, etc., Ins. Co., 181 Mass. 101, 62 N. E. 1049; Knudson *v.* Hekla F. Ins Co., 75 Wis. 109, 43 N. W. 954.

Non-waiver stipulations see also *infra*, XVII, D, 6.

A settlement subsequently made is not, however, obviated by the effect of such a non-waiver stipulation. McLean *v.* American Mut. F. Ins. Co., 122 Iowa 355, 98 N. W. 146.

43. Harrison *v.* Hartford F. Ins. Co., (Iowa 1899) 80 N. W. 309; Pretzfelder *v.* Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424; Margeson *v.* Guardian F., etc., Assur. Co., 31 Nova Scotia 359.

But apparently ignoring the distinction between waiver and estoppel it has been said that a mere demand for appraisal which has not misled the insured into believing that he would not be required to furnish proofs did not constitute a waiver. Porter *v.* German-American Ins. Co., 62 Mo. App. 520.

44. Home F. Ins. Co. *v.* Bean, 42 Nebr. 537, 60 N. W. 907, 47 Am. St. Rep. 711.

But an offer by the insured to arbitrate will not affect a waiver on the part of the company (Cowan *v.* Phenix Ins. Co., 78 Cal. 181, 20 Pac. 408); and it is said that a proposal to arbitrate, made after the time for filing proofs has expired, which proposal is never carried out, will not be a waiver of failure to make proofs (Niagara Dist. Mut. F. Ins. Co. *v.* Lewis, 12 U. C. C. P. 123).

45. *Georgia.*— Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975.

Iowa.— Jacobs *v.* St. Paul F. & M. Ins. Co., 86 Iowa 145, 53 N. W. 101.

Kentucky.— Smith *v.* Herd, 110 Ky. 56, 60 S. W. 841, 1121, 22 Ky. L. Rep. 1596; Caledonian Ins. Co. *v.* Cooke, 101 Ky. 412, 41 S. W. 279, 19 Ky. L. Rep. 651.

Missouri.— Branigan *v.* Jefferson Mut. F. Ins. Co., 102 Mo. App. 70, 76 S. W. 643; Gale *v.* Des Moines State Ins. Co., 33 Mo. App. 664.

New York.— Bishop *v.* Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844 [*affirming* 9 N. Y. Suppl. 350].

Pennsylvania.— McGonigle *v.* Susquehanna Mut. F. Ins. Co., 168 Pa. St. 1, 31 Atl. 868.

Canada.— Duffy *v.* La Compagnie D'Assurance, etc., 23 Quebec Super. Ct. 181; Fonderie de Joliette *v.* Cie. d'Assurance, etc., 27 L. C. Jur. 194; Canadian Mut. F. Ins. Co. *v.* Donovan, 2 Montreal Leg. N. 229.

See 28 Cent. Dig. tit. "Insurance," § 1407.

46. Carroll *v.* Girard F. Ins. Co., 72 Cal. 297, 13 Pac. 863; St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

47. Walker *v.* German Ins. Co., 51 Kan. 725, 33 Pac. 597.

48. Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904.

49. *Alabama.*— Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202.

California.— Emery *v.* Svea F. Ins. Co., 88 Cal. 300, 26 Pac. 88.

Maryland.— Hartford F. Ins. Co. *v.* Keating, 86 Md. 130, 38 Atl. 29; Caledonia F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782.

Minnesota.— Larkin *v.* Glens Falls Ins. Co., 80 Minn. 527, 83 N. W. 409, 81 Am. St. Rep. 286.

Missouri.— Fink *v.* Lancashire Ins. Co., 66 Mo. App. 513.

New York.— Solomon *v.* Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22; Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

See 28 Cent. Dig. tit. "Insurance," § 1405 *et seq.*

50. Westlake *v.* St. Lawrence County Mut. Ins. Co., 14 Barb. (N. Y.) 206; Mason *v.* Citizens' F. etc., Ins. Co., 10 W. Va. 572.

51. *Kentucky.*— Phœnix Ins. Co. *v.* Gibbons, 64 S. W. 909, 23 Ky. L. Rep. 1130.

Michigan.— Allen *v.* Milwaukee Mechanics' Ins. Co., 106 Mich. 204, 64 N. W. 15.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Sorshy, 60 Miss. 302.

Missouri.— Maddox *v.* German Ins. Co., 39 Mo. App. 198.

Pennsylvania.— Warner *v.* Insurance Co. of North America, 1 Walk. 315.

Texas.— Scottish Union, etc., Ins. Co. *v.* Clancy, 71 Tex. 5, 8 S. W. 630.

Wisconsin.— Knudson *v.* Hekla F. Ins. Co., 75 Wis. 198, 43 N. W. 954.

See 28 Cent. Dig. tit. "Insurance," § 1405 *et seq.*

An offer to pay a portion of the loss is not a waiver of proofs as to another portion. Thompson *v.* Farmers' Mut. Ins. Co., 10 Ky. L. Rep. 282; Noonan *v.* Hartford F. Ins. Co., 21 Mo. 81.

Payment to the mortgagee with right of subrogation is not a waiver of proofs on the part of the mortgagor. Hare *v.* Headley, 54 N. J. Eq. 545, 35 Atl. 445.

unqualifiedly denies any liability, it thereby estops itself from afterward interposing failure to furnish proofs as a defense;[52] and on the ground that the failure to furnish proofs should be seasonably and specifically made if relied on to avoid liability, it is generally held that a denial of liability not predicated upon failure to furnish proofs is a waiver of any objection on that ground, irrespective of whether the denial precedes or is subsequent to the time when proofs should have been furnished;[53] and for the same reason a denial of liability on any other specified ground will be a waiver of objection on account of failure to furnish

52. *Georgia.*— Phenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. 779.

Illinois.—Phenix Ins. Co. *v.* Belt R. Co., 182 Ill. 33, 54 N. E. 1046 [*affirming* 82 Ill. App. 265].

Indiana.—Germania F. Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; Home Ins. Co. *v.* Boyd, 19 Ind. App. 173, 49 N. E. 285.

Kentucky.—Home Ins. Co. *v.* Mears, 105 Ky. 323, 49 S. W. 31, 20 Ky. L. Rep. 1217; Continental Ins. Co. *v.* Daniel, 78 S. W. 866, 25 Ky. L. Rep. 1501.

Maine.— Robinson *v.* Pennsylvania F. Ins. Co., 90 Me. 385, 38 Atl. 320.

Missouri.— Siegle *v.* Phœnix Ins. Co., 107 Mo. App. 456, 81 S. W. 637.

Ohio.— Stacy *v.* Norwich Union F. Ins. Soc., 25 Ohio Cir. Ct. 67; Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336.

Pennsylvania.— Dennis *v.* Citizens Ins. Co., 4 Pa. Super. Ct. 225.

Texas.—Scottish Union, etc., Ins. Co. *v.* Moore, (Civ. App. 1904) 81 S. W. 573.

Wisconsin.— Cooper *v.* Pennsylvania Ins. Co., 96 Wis. 362, 71 N. W. 606.

United States.—Royal Ins. Co. *v.* Martin, 192 U. S. 149, 24 S. Ct. 247, 48 L. ed. 385; Phenix Ins. Co. *v.* Kerr, 129 Fed. 723, 64 C. C. A. 251.

Canada.—Agricultural Ins. Co. *v.* Ansley, 15 Quebec 256, 17 Rev. Lég. 108; Garceau *v.* Niagara Mut. F. Ins. Co., 3 Quebec 337.

See 28 Cent. Dig. tit. "Insurance," § 1391.

Refusal to receive proofs of loss on the ground that there is no liability on the part of the company is a waiver of such proofs. German Ins. Co. *v.* Ward, 90 Ill. 550; Lycoming F. Ins. Co. *v.* Dunmore, 75 Ill. 14; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Akin *v.* Liverpool, etc., Ins. Co., 1 Fed. Cas. No. 121.

Repudiation of contract.— A denial of liability on the ground that no contract was ever entered into or that the contract was not in force at the time of the loss is a waiver of proofs of loss (Gold *v.* Sun Ins. Co., 73 Cal. 216, 14 Pac. 786; Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. 264, 53 Pac. 242; Lumberman's Mut. Ins. Co. *v.* Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140; Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; Soorholtz *v.* Marshall County Farmers' Mut. F. Ins. Co., 109 Iowa 522, 80 N. W. 542; Carson *v.* German Ins. Co., 62 Iowa 433, 17 N. W. 650; Morgan *v.* Illinois Ins. Co., 130 Mich. 427, 90 N. W. 40; Lansing *v.* Commercial Union Assur. Co., (1903) 93 N. W. 756; Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; Hicks *v.* British America Assur. Co., 13 N. Y. App. Div. 444, 43 N. Y. Suppl. 623; Stickley *v.* Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838; Tayloe *v.* Merchants F. Ins. Co., 9 How. (U. S.) 390, 13 L. ed. 187), but a denial of the contract by the agent will not constitute a waiver by the company of its right to defend for failure to furnish proofs as required by the policy, which should have been issued under the terms of the contract (Hicks *v.* British American Assur. Co., 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424).

53. *Colorado.*— American Cent. Ins. Co. *v.* Donlon, 16 Colo. App. 416, 66 Pac. 249.

Florida.— Indian River State Bank *v.* Hartford F. Ins. Co., (1903) 35 So. 228, Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887.

Illinois.—Ætna Ins. Co. *v.* Jacobson, 105 Ill. App. 283; Erie F. Ins. Co. *v.* Hill, 99 Ill. App. 178; Northern Assur. Co. *v.* Chicago Mut. Bldg., etc., Assoc., 98 Ill. App. 152 [*affirmed* in 198 Ill. 474, 64 N. E. 979]; American Cent. Ins. Co. *v.* Henninger, 87 Ill. App. 440.

Indiana.— German F. Ins. Co. *v.* Seibert, 24 Ind. App. 279, 56 N. E. 686.

Iowa.— Bradford *v.* Mutual F. Ins. Co., 112 Iowa 495, 84 N. W. 693.

Kansas.—Milwaukee Mechanics' Ins. Co. *v.* Winfield, 6 Kan. App. 527, 51 Pac. 567.

Kentucky.— Home Ins. Co. *v.* Kobb, 113 Ky. 360, 68 S. W. 453, 24 Ky. L. Rep. 223, 101 Am. St. Rep. 354, 58 L. R. A. 58; Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 299; Orient Ins. Co. *v.* Clark, 59 S. W. 863, 22 Ky. L. Rep. 1066; Kenton Ins. Co. *v.* Wiggenton, 10 Ky. L. Rep. 587; Springfield F. & M. Ins. Co. *v.* Heaverin, 9 Ky. L. Rep. 406.

Missouri.— Keller *v.* Home L. Ins. Co., 95 Mo. App. 627, 69 S. W. 612; Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311.

Nebraska.— Omaha F. Ins. Co. *v.* Hildebrand, 54 Nebr. 306, 74 N. W. 589.

New York.— Brink *v.* Hanover F. Ins. Co., 80 N. Y. 108; Flaherty *v.* Continental Ins. Co., 20 N. Y. App. Div. 275, 46 N. Y. Suppl. 934; Karelsen *v.* Sun Fire Office, 45 Hun 144.

North Carolina.— Gerringer *v.* North Carolina Home Ins. Co., 133 N. C. 407, 45 S. E. 773.

Ohio.—Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684; Ohio Farmers' Ins. Co. *v.* Burget, 17 Ohio Cir. Ct. 619, 9 Ohio Cir. Dec. 369; Eureka F. & M.

proofs or because of defects in the proofs furnished.[54] Similarly want of or defect

Ins. Co. *v.* Baldwin, 17 Ohio Cir. Ct. 143, 9 Ohio Cir. Dec. 118.

Oregon.—Heidenreich *v.* Ætna Ins. Co., 26 Oreg. 70, 37 Pac. 64; Hahn *v.* Guardian Assur. Co., 23 Oreg. 576, 32 Pac. 683, 37 Am. St. Rep. 709.

South Carolina.— McBryde *v.* South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769.

South Dakota.— Angier *v.* Western Assur. Co., 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685.

Texas.— Connecticut F. Ins. Co. *v.* Hilbrant, (Civ. App. 1903) 73 S. W. 558.

Vermont.— Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374.

Virginia.—Virginia F. & M. Ins. Co. *v.* Goode, 95 Va. 762, 30 S. E. 370.

West Virginia.— Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

Wisconsin.—Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

Canada.—Cie. d'Assur. de Watertown *v.* Ansley, 17 Rev. Lég. 109; Fowlie *v.* Ocean Acc., etc., Corp., 4 Ont. L. Rep. 146; Morrow *v.* Lancashire Ins. Co., 29 Ont. 377 [*affirmed* in 26 Ont. App. 173].

See 28 Cent. Dig. tit. "Insurance," § 1391.

But in a few cases it is practically held that denial of liability does not waive failure to furnish proofs unless the circumstances are such as to work an estoppel to set up the objection. State Ins. Co. *v.* School Dist. No. 19, 66 Kan. 77, 71 Pac. 272; Ermentrout *v.* Girard F. & M. Ins. Co., 63 Minn. 305, 65 N. W. 635, 56 Am. St. Rep. 481, 30 L. R. A. 346; Patrick *v.* Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197.

54. *Arkansas.*— German Ins. Co. *v.* Gibson, 53 Ark. 494, 14 S. W. 672.

Colorado.—Hartford F. Ins. Co. *v.* Smith, 3 Colo. 422.

Connecticut.— Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

Georgia.— Liverpool, etc., Ins. Co. *v.* Ellington, 94 Ga. 785, 21 S. E. 1006; Merchants', etc., Ins. Co. *v.* Vining, 67 Ga. 661, 68 Ga. 197; German-American Ins. Co. *v.* Davidson, 67 Ga. 11; Ætna Ins. Co. *v.* Sparks, 62 Ga. 187.

Illinois.— German F. Ins. Co. *v.* Gueck, 130 Ill. 345, 23 N. E. 112, 6 L. R. A. 835; Continental Ins. Co. *v.* Ruckman, 127 Ill. 364, 20 N. E. 77, 11 Am. St. Rep. 121; Grange Mill Co. *v.* Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Phœnix Ins. Co. *v.* Tucker, 92 Ill. 64, 34 Am. Rep. 106; Williamsburg City F. Ins. Co. *v.* Cary, 83 Ill. 453; Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466; Millers' Nat. Ins. Co. *v.* Jackson County Milling, etc., Co., 60 Ill. App. 224; American Cent. Ins. Co. *v.* Hill, 60 Ill. App. 163; New York Fidelity, etc., Co. *v.* Waterman, 59 Ill. App. 297; Massachusetts Ben. L. Assoc. *v.* Sibley, 57 Ill. App. 246; Waggonick *v.* Westchester F. Ins. Co., 34 Ill. App. 629; New Home L. Assoc. *v.* Hagler, 23 Ill. App. 457; Cedar Rapids Ins. Co. *v.* Shimp, 16 Ill. App. 248.

Indiana.— Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984; American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; Commercial Union Assur. Co. *v.* State, 113 Ind. 331, 15 N. E. 518; Ætna Ins. Co. *v.* Shryer, 85 Ind. 362; National L. Maturity Ins. Co. *v.* Whitacre, 15 Ind. App. 506, 43 N. E. 905; German Mut. Ins. Co. *v.* Niewedde, 11 Ind. App. 624, 39 N. E. 534; Continental Ins. Co. *v.* Chew, 11 Ind. App. 330, 38 N. E. 417, 54 Am. St. Rep. 506.

Iowa.— Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126; Bloom *v.* State Ins. Co., 94 Iowa 359, 62 N. W. 810; Boyd *v.* Cedar Rapids Ins. Co., 70 Iowa 325, 30 N. W. 585; Carson *v.* German Ins. Co., 62 Iowa 433, 17 N. W. 650; Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

Kansas.— Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410.

Kentucky.— Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Manhattan Ins. Co. *v.* Stein, 5 Bush 652; Pennsylvania F. Ins. Co. *v.* Young, 78 S. W. 127, 25 Ky. L. Rep. 1350; Standard L., etc., Ins. Co. *v.* Thomas, 17 S. W. 275, 13 Ky. L. Rep. 593; American Cent. Ins. Co. *v.* Heaverin, 16 Ky. L. Rep. 95; Northwestern Mut. Ins. Co. *v.* Campbell, 11 Ky. L. Rep. 762; Dwelling House Ins. Co. *v.* Freeman, 10 Ky. L. Rep. 496; Phœnix Ins. Co. *v.* Adams, 8 Ky. L. Rep. 532; Continental Ins. Co. *v.* Randolph, 2 Ky. L. Rep. 313.

Maine.— Hilton *v.* Phœnix Assur. Co., 92 Me. 272, 42 Atl. 412; Lewis *v.* Monmouth Mut. F. Ins. Co., 52 Me. 492.

Maryland.— Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904; Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398; Frederick County Mut. F. Ins. Co. *v.* Deford, 38 Md. 404; Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382; Franklin F. Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, 11 Am. Rep. 469; Franklin F. Ins. Co. *v.* Coates, 14 Md. 285; Maryland Ins. Co. *v.* Bathurst, 5 Gill & J. 159; Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Massachusetts.— Graves *v.* Washington Mar. Ins. Co., 12 Allen 391; Blake *v.* Exchange Mut. Ins. Co., 12 Gray 265; Martin *v.* Fishington Ins. Co., 20 Pick. 389, 32 Am. Dec. 220.

Michigan.— Improved Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088; Lum *v.* U. S. Fire Ins. Co., 104 Mich. 397, 62 N. W. 562; Young *v.* Ohio Farmers' Ins. Co., 92 Mich. 68, 52 N. W. 454; Coryeon *v.* Providence-Washington Ins. Co., 79 Mich. 187, 44 N. W. 431; O'Brien *v.* Ohio Ins. Co., 52 Mich. 131, 17 N. W. 726; Aurora F. & M. Ins. Co. *v.* Kranich, 36 Mich. 289.

Minnesota.—Phœnix Ins. Co. *v.* Taylor, 5 Minn. 492.

Mississippi.— Home Ins. Co. *v.* Gibson, 72 Miss. 58, 17 So. 13; McPike *v.* Western Assur. Co., 61 Miss. 37; Liverpool, etc., Ins.

in notice of loss will be waived under the same circumstances.[55] But denial of

Co. *v.* Sorsby, 60 Miss. 302; American L. Ins. Co. *v.* Mahone, 56 Miss. 180.

Missouri.— Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86; McComas *v.* Covenant Mut. L. Ins. Co., 56 Mo. 573; Probst *v.* Insurance Co. of North America, 64 Mo. App. 484; Stephens *v.* German Ins. Co., 61 Mo. App. 194; Anthony *v.* German American Ins. Co., 48 Mo. App. 65; Maddox *v.* German Ins. Co., 39 Mo. App. 198; Mensing *v.* American Ins. Co., 36 Mo. App. 602; Weber *v.* American Cent. Ins. Co., 35 Mo. App. 521; Kantrener *v.* Penn Mut. L. Ins. Co., 5 Mo. App. 581.

Nebraska.— Rochester Loan, etc., Co. *v.* Liberty Ins. Co., 44 Nebr. 537, 62 N. W. 877, 48 Am. St. Rep. 745; German Ins., etc., Inst. *v.* Kline, 44 Nebr. 395, 62 N. W. 857; Dwelling House Ins. Co. *v.* Brewster, 43 Nebr. 528, 61 N. W. 746; Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597; Phenix Ins. Co. *v.* Bachelder, 32 Nebr. 490, 49 N. W. 217, 29 Am. St. Rep. 443.

New Hampshire.— Marston *v.* Massachusetts L. Ins. Co., 59 N. H. 92; Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

New Jersey.— State Ins. Co. *v.* Maackens, 38 N. J. L. 564; Jones *v.* Mechanics' F. Ins. Co., 36 N. J. L. 29, 13 Am. Rep. 405; Basch *v.* Humboldt Mut. F. & M. Ins. Co., 35 N. J. L. 429; Francis *v.* Somerville Mut. F. Ins. Co., 25 N. J. L. 78; Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110.

New York.— Brink *v.* Hanover F. Ins. Co., 80 N. Y. 108; Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842; Boice *v.* Thames, etc., Mar. Ins. Co., 38 Hun 246; Dean *v.* Ætna L. Ins. Co., 2 Hun 358, 4 Thomps. & C. 497 [*reversed* in 62 N. Y. 642]; Dohn *v.* Farmers' Joint-Stock Ins. Co., 5 Lans. 275; Post *v.* Ætna Ins. Co., 43 Barb. 351; Heilner *v.* China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Suppl. 177; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith 268; Chamberlain *v.* Insurance Co. of North America, 3 N. Y. Suppl. 701; Wilber *v.* Williamsburgh City F. Ins. Co., 1 N. Y. Suppl. 312; Karelson *v.* Sun Fire Office, 9 N. Y. St. 831; McMasters *v.* Westchester County Mut. Ins. Co., 25 Wend. 379; Francis *v.* Ocean Ins. Co., 6 Cow. 404; Vos *v.* Robinson, 9 Johns. 192.

Ohio.— Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Wilson *v.* Home Ins. Co., 6 Ohio Dec. (Reprint) 708, 7 Am. L. Rep. 480; Merchants' Ins. Co. *v.* Frick, 5 Ohio Dec. (Reprint) 47, 2 Am. L. Rec. 336; People's Ins. Co. *v.* Straehle, 2 Cinc. Super. Ct. 186.

Pennsylvania.— Weiss *v.* American F. Ins. Co., 148 Pa. St. 349, 23 Atl. 991; Lebanon Mut. Ins. Co. *v.* Erb, 112 Pa. St. 149, 4 Atl. 8; Pennsylvania F. Ins. Co. *v.* Dougherty, 102 Pa. St. 568; Consolidated Mfg. Co. *v.* West Chester F. Ins. Co., 13 Pa. Co. Ct. 321; Farmers', etc., Mut. Ins. Co. *v.* Meckes, 10 Wkly. Notes Cas. 306; Eckel *v.* New Era L. Assoc., 10 Wkly. Notes Cas. 64.

South Carolina.— Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Texas.— East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713; Sun Mut. Ins. Co. *v.* Mattingly, 77 Tex. 162, 13 S. W. 1016; Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024; East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133; Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344; Phœnix Ins. Co. *v.* Center, 10 Tex. Civ. App. 535, 31 S. W. 446; Hartford F. Ins. Co. *v.* Josey, 6 Tex. Civ. App. 290, 25 S. W. 685; Texas Mut. L. Ins. Co. *v.* Brown, 2 Tex. Unrep. Cas. 160.

Vermont.—Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142; Noyes *v.* Washington County Mut. Ins. Co., 30 Vt. 659.

Virginia.—Portsmouth Ins. Co. *v.* Reynolds, 32 Gratt. 613; West Rockingham Mut. F. Ins. Co. *v.* Sheets, 26 Gratt. 854.

West Virginia.—Medley *v.* German Alliance Ins. Co., 55 W. Va. 342, 47 S. E. 101; Gerling *v.* Agricultural Ins. Co., 39 W. Va, 689, 20 S. E. 691; Sheppard *v.* Peabody Ins. Co., 21 W. Va. 368.

Wisconsin.—Gross *v.* Milwaukee Mechanics' Ins. Co., 92 Wis. 656, 66 N. W. 712; Faust *v.* American F. Ins. Co., 91 Wis. 158, 64 N. W. 883, 51 Am. St. Rep. 876, 30 L. R. A. 783; Roberts *v.* Northwestern Nat. Ins. Co., 90 Wis. 210, 62 N. W. 1048; Vergeront *v.* German Ins. Co., 86 Wis. 425, 56 N. W. 1096; Vankirk *v.* Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798; Campbell *v.* American F. Ins. Co., 73 Wis. 100, 40 N. W. 661; Zielke *v.* London Assur. Corp., 64 Wis. 442, 25 N. W. 436; Parker *v.* Amazon Ins. Co., 34 Wis. 363; McBride *v.* Republic F. Ins. Co., 30 Wis. 562; Warner *v.* Peoria M. & F. Ins. Co., 14 Wis. 318.

United States.— Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866, 115 U. S. 339, 6 S. Ct. 74, 29 L. ed. 432 [*reversing* 5 Fed. 238]; German Ins. Co. *v.* Frederick, 58 Fed. 144, 7 C. C. A. 122; Steamship Samana Co. *v.* Hall, 55 Fed. 663; Ball, etc., Wagon Co. *v.* Aurora F. & M. Ins. Co., 20 Fed. 232; Miller *v.* Alliance Ins. Co., 7 Fed. 649, 19 Blatchf. 308; Rumsey *v.* Phœnix Ins. Co., 1 Fed. 396, 17 Blatchf. 527; Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422; Carlwitz *v.* Germania F. Ins. Co., 5 Fed. Cas. No. 2,415*a*; Dutton *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,211; Field *v.* Insurance Co. of North America, 9 Fed. Cas. No. 4,767, 6 Biss. 121; Norwich, etc., Transp. Co. *v.* Western Massachusetts Ins. Co., 18 Fed. Cas. No. 10,363, 6 Blatchf. 241, 34 Conn. 561; Whittle *v.* Farmville Ins. Co., 29 Fed. Cas. No. 17,603, 3 Hughes 421.

Canada.— Caldwell *v.* Stadacona F., etc., Ins. Co., 11 Can. Sup. Ct. 212; Converse *v.* Providence Ins. Co., 21 L. C. Jur. 276; Green *v.* Manitoba Ins. Co., 13 Manitoba 395.

See 28 Cent. Dig. tit. "Insurance," § 1391.

55. *Georgia.*— Ætna Ins. Co. *v.* Sparks, 62 Ga. 187.

liability on the ground of failure to furnish proofs may be coupled with denial of liability on other grounds without any waiver of failure or defect of notice or proofs.[56]

(II) *PARTIAL OR QUALIFIED DENIAL.* A partial or qualified denial of liability does not waive proofs.[57]

(III) *DENIAL TO THIRD PERSON.* Declarations in behalf of the company denying liability under the policy will not constitute a waiver as to the insured,[58] unless such denial is within the period prescribed for making proofs and comes to the knowledge of the insured.[59]

(IV) *BY WHOM MADE.* Denial of liability in order to constitute a waiver of proofs must be by an authorized agent, not merely by a third person, even though within the hearing of the agent.[60]

6. WAIVER OF WAIVER; NON-WAIVER CLAUSE. After waiver by the company the subsequent action of the insured in attempting to furnish proofs will not defeat such waiver.[61] It may be stipulated after the loss that proceedings for adjustment of the loss shall not constitute waiver of notice and proofs;[62] but

Iowa.— Ayres *v.* Hartford F. Ins. Co., 17 Iowa 176, 85 Am. Dec. 553.

Louisiana.— La Societe de Bienfaisance, etc. *v.* Morris, 24 La. Ann. 347.

Massachusetts.—Underhill *v.* Agawam Mut. F. Ins. Co., 6 Cush. 440; Clark *v.* New England Mut. F. Ins. Co., 6 Cush. 342, 53 Am. Dec. 44.

Missouri.— McComas *v.* Covenant Mut. L. Ins. Co., 56 Mo. 573; La Force *v.* Williams City F. Ins. Co., 43 Mo. App. 518.

Montana.— Savage *v.* Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591.

Nebraska.— German Ins., etc., Inst. *v.* Kline, 44 Nebr. 395, 62 N. W. 857; Omaha F. Ins. Co. *v.* Dierks, 43 Nebr. 473, 61 N. W. 740 [*followed* in 43 Nebr. 569, 61 N. W. 745].

New Hampshire.— Marston *v.* Massachusetts L. Ins. Co., 59 N. H. 92.

New Jersey.— Francis *v.* Somerville Mut. Ins. Co., 25 N. J. L. 78; Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

New York.— Post *v.* Ætna Ins. Co., 43 Barb. 351; Bennett *v.* Agricultural Ins. Co., 15 Abb. N. Cas. 234.

Pennsylvania.— Farmers', etc., Mut. Ins. Co. *v.* Meekes, 10 Wkly. Notes Cas. 306.

Vermont.— Walsh *v.* Vermont Mut. F. Ins. Co., 54 Vt. 351.

United States.— Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422; Unthank *v.* Travelers' Ins. Co., 29 Fed. Cas. No. 16,795, 4 Biss. 357.

See 28 Cent. Dig. tit. "Insurance," § 1391.

56. *Connecticut.*— Daniels *v.* Equitable F. Ins. Co., 50 Conn. 551.

Iowa.— Welsh *v.* Des Moines Ins. Co., 77 Iowa 376, 42 N. W. 324; Cornett *v.* Phenix Ins. Co., 67 Iowa 388, 25 N. W. 673.

Maryland.— Farmers' F. Ins. Co. *v.* Mispelhorn, 50 Md. 180; Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360; Edwards *v.* Baltimore F. Ins. Co., 3 Gill 176.

Minnesota.— Lane *v.* St. Paul F. & M. Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197.

New Jersey.— Roumage *v.* Mechanics' F. Ins. Co., 13 N. J. L. 110.

New York.— Brink *v.* Hanover F. Ins. Co., 70 N. Y. 593; Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. 495.

Ohio.— Farmers' Ins. Co. *v.* Frick, 29 Ohio St. 466 [*reversing* 7 Ohio Dec. (Reprint) 247, 2 Cinc. L. Bul. 16].

Pennsylvania.—Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

West Virginia.— Peninsular Land Transp., etc., Co., *v.* Franklin Ins. Co., 35 W. Va. 666, 14 S. E. 237.

Wisconsin.— Engerbretson *v.* Hekla F. Ins. Co., 58 Wis. 301, 17 N. W. 5.

See 28 Cent. Dig. tit. "Insurance," § 1391.

57. Milwaukee Mechanics' Ins. Co. *v.* Winfield, 6 Kan. App. 527, 51 Pac. 567; Greenville People's Bank *v.* Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630.

58. Employers' Liability Assur. Corp. *v.* Rochelle, 13 Tex. Civ. App. 232, 35 S. W. 869.

59. Merchants' Ins. Co. *v.* Nowlin, (Tex. Civ. App. 1900) 56 S. W. 198.

60. East Texas F. Ins. Co. *v.* Coffe, 61 Tex. 287.

61. Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237.

It is said, however, that the insured may by a failure to rely upon the waiver lose his right to interpose it as against breach of condition (Ulysses Elgin Butter Co. *v.* Hartford F. Ins. Co., 20 Pa. Super. Ct. 384), and that the parties may by subsequent agreement stipulate that the condition is to be held not to be waived (Insurance Co. of North America *v.* Caruthers, (Miss. 1895) 16 So. 911).

A subsequent agreement of arbitration subject to the conditions of the policy will not defeat a previous waiver as to notice and proofs. Perry *v.* Mechanics' Mut. Ins. Co., 11 Fed. 478.

62. *Iowa.*— McLean *v.* American Mut. F. Ins. Co., 122 Iowa 355, 98 N. W. 146; Ruthven *v.* American F. Ins. Co., 92 Iowa 316, 60 N. W. 663.

Massachusetts.— Cook *v.* North British, etc., Ins. Co., 181 Mass. 101, 62 N. E. 1049.

Missouri.— Keet-Rountree Dry Goods Co. *v.* Mercantile Town Mut. Ins. Co., 100 Mo. App. 504, 74 S. W. 469.

such a stipulation does not prevent a waiver by the company based on subsequent statements of its adjuster.[63]

7. Withdrawal of Waiver. The company cannot after a waiver has become effectual to relieve the insured from furnishing notice and proofs withdraw such waiver and require them to be furnished.[64]

XVIII. Adjustment of Loss.

A. Adjustment and Settlement — 1. Authority to Adjust. Any officer or agent generally or specially authorized by the company to act for it in the matter may bind the company by adjusting with the insured the amount to be paid for the loss under the terms of the policy.[65]

2. Effect of Adjustment — a. As to Subject-Matter. An adjustment made on an investigation of the facts is binding on the company,[66] and in many jurisdictions when fully completed and agreed to by both parties a new contract arises to pay the amount agreed upon as the result of the adjustment.[67] In some cases

New York.— Sergent *v.* Liverpool, etc., Ins. Co., 66 N. Y. App. Div. 46, 73 N. Y. Suppl. 120.

Rhode Island.— Fournier *v.* German American Ins. Co., 23 R. I. 36, 49 Atl. 98.

Wisconsin.— Knudson *v.* Hekla F. Ins. Co., 75 Wis. 198, 43 N. W. 954.

United States.— Missouri Pac. R. Co. *v.* Western Assur. Co., 129 Fed. 610.

See 28 Cent. Dig. tit. "Insurance," § 1406.

63. Indiana Ins. Co. *v.* Pringle, 21 Ind. App. 559, 52 N. E. 821.

64. Atlantic Ins. Co. *v.* Wright, 22 Ill. 462; Phœnix Ins. Co. *v.* Spiers, 87 Ky. 285, 8 S. W. 453, 10 Ky. L. Rep. 254; Dwelling-House Ins. Co. *v.* Freeman, 10 Ky. L. Rep. 496; Roberts *v.* Insurance Co. of America, 94 Mo. App. 142, 72 S. W. 144; Brownfield *v.* Mercantile Town Mut. Ins. Co., 84 Mo. App. 134; Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578; Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456. *Contra,* Hahn *v.* Guardian Assur. Co., 23 Oreg. 576, 32 Pac. 683, 37 Am. St. Rep. 709; Scott *v.* Niagara Dist. Mut. Ins. Co., 25 U. C. Q. B. 119. See also *supra,* XIV, A, 4.

65. *Illinois.*— Millers' Nat. Ins. Co. *v.* Kinneard, 136 Ill. 199, 26 N. E. 368.

Iowa.— Miller *v.* Consolidated Patrons', etc., Mut. Ins. Co., 113 Iowa 211, 84 N. W. 1049; Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181.

Massachusetts.— Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96.

Minnesota.— Trebby *v.* Western Ins. Co., 83 Minn. 452, 86 N. W. 407; Devils Lake First Nat. Bank *v.* Lancashire Ins. Co., 65 Minn. 462, 68 N. W. 1; Swain *v.* Agricultural Ins. Co., 37 Minn. 390, 34 N. W. 738.

New York.— Schlesinger *v.* Columbian F. Ins. Co., 37 N. Y. App. Div. 531, 56 N. Y. Suppl. 37; Bordes *v.* Hallet, 1 Cai. 444.

Pennsylvania.— Mercer County Mut. F. Ins. Co. *v.* Stranahan, 104 Pa. St. 246; Todd *v.* Quaker City Mut. F. Ins. Co., 9 Pa. Super. Ct. 371, 43 Wkly. Notes Cas. 476.

United States.— Lancashire Ins. Co. *v.* Barnard, 111 Fed. 702, 49 C. C. A. 559.

See 28 Cent. Dig. tit. "Insurance," § 1412. And see *supra,* XIV, B; and Insurance.

Ratification.— Recognition by the company of the adjustment is a ratification of the authority of the person purporting to act for the company in making it. Flannery *v.* State Mut. F. Ins. Co., 175 Pa. St. 387, 34 Atl. 798.

Power cannot be delegated.— An agent of the company authorized to adjust a loss cannot delegate such authority to another. Ruthven *v.* American F. Ins. Co., 92 Iowa 316, 60 N. W. 663; Dwelling-House Ins. Co. *v.* Snyder, 39 N. J. L. 18, 34 Atl. 931.

Agent of insured.— An agent effecting insurance for his principal and having possession of his policy has power for the insured to enter into an adjustment of loss and to receive payment. Erick *v.* Johnson, 6 Mass. 193.

66. Fame Ins. Co. *v.* Norris, 18 Ill. App. 570; Saville *v.* London, etc., F. Ins. Co., 8 Mont. 431, 20 Pac. 650; Saville *v.* Ætna Ins. Co., 8 Mont. 419, 20 Pac. 646, 3 L. R. A. 542; Remington *v.* Westchester F. Ins. Co., 14 R. I. 245.

Although the parties have entered into a non-waiver agreement by which the company in entering upon the adjustment does not waive any defenses it may have nevertheless a completed adjustment is binding. McLean *v.* American Mut. F. Ins. Co., 122 Iowa 355, 98 N. W. 146.

67. *Illinois.*— Illinois Mut. F. Ins. Co. *v.* Archdeacon, 82 Ill. 236, 25 Am. Rep. 313; Farmers', etc., Ins. Co. *v.* Chesnut, 50 Ill. 111, 99 Am. Dec. 492; Royal Ins. Co. *v.* Roodhouse, 25 Ill. App. 61.

Louisiana.— Godchaux *v.* Merchants' Mut. Ins. Co., 34 La. Ann. 235; Lapeyre *v.* Thompson, 7 La. Ann. 218.

Massachusetts.— Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray 596.

Michigan.— Granger *v.* Manchester F. Assur. Co., 119 Mich. 177, 77 N. W. 693.

New York.— Smith *v.* Glens Falls Ins. Co., 66 Barb. 556.

Ohio.— Untersinger *v.* Niagara Ins. Co., 6 Ohio Dec. (Reprint) 986, 9 Am. L. Rec. 401. *Contra,* Dwelling House Ins. Co. *v.* Garvey, 14 Ohio Cir. Ct. 657, 8 Ohio Cir. Dec. 86.

West Virginia.— Stolle *v.* Ætna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593; Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

See 28 Cent. Dig. tit. "Insurance," § 1413.

it is held, however, that the adjustment does not give rise to a new obligation on the part of the company.[68]

b. As to Parties. Where more than one is interested in the insurance an adjustment with one is not necessarily binding upon the others.[69]

3. Compromise or Settlement.[70] A full compromise or settlement of the claim under the policy is binding in the absence of fraud or mistake.[71]

4. Fraud or Mistake. Fraud or mistake on the part of the insured misleading the company will avoid the adjustment or settlement of the loss as to the company.[72] So fraud on the part of the insurer or its representative in procuring an adjustment or settlement will render it void as to the insured.[73]

B. Appraisal and Arbitration[74] — **1. Validity of Provisions — a. In General.** A clause in the policy requiring submission to arbitration of any disagreement as to the amount of the loss, before action can be brought on the policy, thus in effect making arbitration a condition precedent to recovery, is generally held to be valid;[75] but some courts have held that a general arbitration clause

As against a subsequent agreement for settlement by which the company undertakes to pay a larger amount the adjustment will not be conclusive. Revere F. Ins. Co. *v.* Chamberlin, 56 Iowa 508, 8 N. W. 338, 9 N. W. 386.

In an action against a mutual company, the report of an adjusting committee is not conclusive as to the amount of the loss. Sinking Springs Mut. F. Ins. Co. *v.* Rupp, 29 Pa. St. 526.

Limitation of action.— On the theory that the express or implied promise to pay the amount found due on an adjustment is a new undertaking, the limitation in the policy as to the time of bringing action thereon is not applicable to an action brought on the adjustment. Illinois Mut. F. Ins. Co. *v.* Archdeacon, 82 Ill. 236, 25 Am. Rep. 313; Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596; McCallum *v.* National Credit Ins. Co., 84 Minn. 134, 86 N. W. 892; Smith *v.* Glen's Falls Ins. Co., 62 N. Y. 85.

68. Willoughby *v.* St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. 272; Gerhart Realty Co. *v.* Northern Assur. Co., 86 Mo. App. 596; London Fire Assoc. *v.* Blum, 63 Tex. 282.

While such an adjustment is an accord, it is said that it is not a satisfaction; and therefore it is no defense to an action on the policy. Vining *v.* Franklin F. Ins. Co., 89 Mo. App. 311.

69. See cases cited *infra*, this note.

Likewise an adjustment with the assignor or the assignee is not binding on the other where the insurance has been assigned as security or otherwise. Grange Mill Co. *v.* Western Assur. Co., 17 Ill. App. 299; German Ins. Co. *v.* Curry, 13 Ky. L. Rep. 237; Summers *v.* Home Ins. Co., 56 Mo. App. 653; London Fire Assoc. *v.* Blum, 63 Tex. 282.

Where a mortgagor and a mortgagee are both interested in the insurance, their respective rights having attached at the time of loss or prior thereto, an adjustment with one is not binding on the other. Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126; Hall *v.* Philadelphia Fire Assoc., 64 N. H. 405, 13 Atl. 648; Hathaway *v.* Orient Ins. Co., 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514.

A company carrying other insurance on the same property, but in no way interested in the insurance as between the insuring company and the insured, cannot question the correctness of an adjustment as between them. London Assur. Corp. *v.* Paterson, 106 Ga. 538, 32 S. E. 650.

70. See, generally, Compromise and Settlement, 8 Cyc. 499 *et seq.*

71. Stoehlke *v.* Hahn, 158 Ill. 79, 42 N. E. 150; Barlow *v.* Ocean Ins. Co., 4 Metc. (Mass.) 270; King *v.* Ætna Ins. Co., 36 Mo. App. 128.

Acceptance of return of premium after loss, on the claim by the company that the policy had been canceled, was held not to be a compromise of the claim for a loss. Cassville Roller Mill Co. *v.* Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720.

72. *California.*— Stockton Combined Harvester, etc., Works *v.* Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633.

Louisiana.— Matthews *v.* General Mut. Ins. Co., 9 La. Ann. 590.

Nebraska.— Nebraska, etc., Ins. Co. *v.* Segard, 29 Nebr. 354, 45 N. W. 681.

New York.— Faugier *v.* Hallett, 2 Johns. Cas. 233.

Rhode Island.— Remington *v.* Westchester F. Ins. Co., 14 R. I. 245.

Wisconsin.—Commercial Bank *v.* Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391.

See 28 Cent. Dig. tit. "Insurance," § 1418.

Testimony of the adjusters that had they known of certain facts they would not have made the adjustment is not competent. Commercial Bank *v.* Firemen's Ins. Co., 87 Wis. 297, 58 N. W. 391.

73. Burnham *v.* Lamar Ins. Co., 79 Ill. 160; Titus *v.* Rochester German Ins. Co., 97 Ky. 567, 31 S. W. 127, 17 Ky. L. Rep. 385, 53 Am. St. Rep. 426, 28 L. R. A. 478; London, etc., Ins. Co. *v.* Oaks, 15 Ky. L. Rep. 540; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548; Platt *v.* Continental Ins. Co., 62 Vt. 166, 19 Atl. 637.

74. Arbitration generally see Arbitration and Award, 3 Cyc. 568.

75. *Alabama.*— Western Assur. Co. *v.* Hall, 112 Ala. 318, 20 So. 447.

requiring submission to arbitrators of the liability of the company before action can be brought on the policy is invalid as an agreement ousting the courts of their jurisdiction.[76]

b. As to Amount of Damage. An agreement in the policy that the amount of the damage shall be estimated by appraisers or arbitrators is valid under either of the views suggested above,[77] for it does not relate to the right of recovery, but to the amount.[78] And aside from any provision in the policy, the parties may by

Iowa.— George Dee, etc., Co. *v.* Key City F. Ins. Co., 104 Iowa 167, 73 N. W. 594; Zalesky *v.* Home Ins. Co., 102 Iowa 613, 71 N. W. 566; Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761.

Michigan.— Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

Missouri.— McNees *v.* Southern Ins. Co., 69 Mo. App. 232; Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323.

New Jersey.— Wolff *v.* Liverpool, etc., Ins. Co., 50 N. J. L. 453, 14 Atl. 561; Wolff *v.* Liverpool, etc., Ins. Co., 10 N. J. L. J. 325.

New York.— Yendel *v.* Western Assur. Co., 21 Misc. 348, 47 N. Y. Suppl. 141 [*citing* Seward *v.* Rochester, 109 N. Y. 164, 16 N. E. 348, where the distinction between executory agreements of arbitration which ousts the court of jurisdiction and those which are sustained as the sole remedy between the parties is pointed out]. But *compare* Keeffe *v.* National Acc. Soc., 4 N. Y. App. Div. 392, 38 N. Y. Suppl. 854.

Ohio.— Hamilton *v.* Fireman's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407.

Wisconsin.—Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

United States.— Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. ed. 419; Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. 562; Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102; Yeomans *v.* Girard F. & M. Ins. Co., 30 Fed. Cas. No. 18,136.

Canada.— Guerin *v.* Manchester F. Assur. Co., 29 Can. Sup. Ct. 139; Adams *v.* National Ins. Co., 20 N. Brunsw. 569; Pharand *v.* Lancashire Ins. Co., 19 Quebec Super. Ct. 35.

See 28 Cent. Dig. tit. "Insurance," § 1420.

Indefiniteness.— But it is said that such a clause, which is indefinite as to the number of appraisers and their method of selection, is too vague to be insisted upon as a condition precedent. Case *v.* Manufacturers' F. & M. Ins. Co., 82 Cal. 263, 21 Pac. 843, 22 Pac. 1083.

Place of arbitration.— Under a clause entitling the company to require arbitration, it cannot compel the insured to submit to an arbitration outside of the state. American Cent. Ins. Co. *v.* Simpson, 43 Ill. App. 98.

76. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297; Stephenson *v.* Piscataqua F. & M. Ins. Co., 54 Me. 55; Insurance Co. of North America *v.* Bachler, 44 Nebr. 549, 62 N. W. 911; Home F. Ins. Co. *v.* Bean, 42 Nebr. 537, 60 N. W. 907, 47 Am. St. Rep. 711; German-American Ins. Co. *v.* Etheron, 25 Nebr. 505, 41 N. W. 406; Schollenberger *v.* Phœnix Ins. Co., 21 Fed. Cas. No. 12,476; Trott *v.* City Ins. Co., 24 Fed. Cas. No. 14,189, 1 Cliff. 439.

If the arbitration covers only the amount of the loss and not the liability of the company under the policy, such objection is not available. Mentz *v.* Armenia F. Ins. Co., 33 Leg. Int. (Pa.) 239; Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504.

Revocation.— In Pennsylvania the objection that an agreement to arbitrate as a condition precedent deprives the courts of jurisdiction is obviated by holding that the agreement is revocable. Needy *v.* German-American Ins. Co., 197 Pa. St. 460, 47 Atl. 739; Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810; Yost *v.* Dwelling House Ins. Co., 179 Pa. St. 381, 36 Atl. 317, 57 Am. St. Rep. 604; Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562; Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80; Seibel *v.* Firemen's Ins. Co., 24 Pa. Super. Ct. 154; Seibel *v.* Lebanon Mut. Ins. Co., 16 Lanc. L. Rev. 356. And in New Hampshire the right of revocation is sustained even after submission, but before the award has been made. Franklin *v.* New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91. But in New Jersey it is said that after submission the insured cannot revoke the submission, having demanded appraisers who have been duly appointed and qualified. American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 49 Atl. 738. The insured cannot revoke where the submission is only to ascertain the value of the property burned and not the company's liability. Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

77. See *supra*, XVIII, B, 1, a.

78. *Florida.*—Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Indiana.— Germania F. Ins. Co. *v.* Warner, 13 Ind. App. 466, 41 N. E. 969.

Michigan.— Hogadone *v.* Grange Mut. F. Ins. Co., 138 Mich. 339, 94 N. W. 1045; Kearney *v.* Washtenae Mut. F. Ins. Co., 126 Mich. 246, 85 N. W. 733; Denton *v.* Farmers' Mut. F. Ins. Co., 120 Mich. 690, 79 N. W. 929.

Minnesota.— Gasser *v.* Sun Fire Office, 42 Minn. 315, 44 N. W. 252.

North Carolina.— Herndon *v.* Imperial F. Ins. Co., 107 N. C. 183, 12 S. E. 126; Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057.

Ohio.— Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805.

Texas.— Philadelphia Fire Assoc. *v.* Colgin, (Civ. App. 1896) 33 S. W. 1004.

voluntary agreement submit the amount of loss to determination by arbitrators or appraisers.[79]

c. As to Total Loss. A stipulation for appraisal or arbitration is applicable to cases of total as well as of partial loss, and the arbitrators or appraisers may determine whether the loss is total.[80] But under valued-policy statutes which provide that in case of total loss the company shall pay the amount of the insurance, a stipulation in the policy for appraisal or arbitration is not applicable in case of total loss, as it is contrary to the provisions of such statute.[81]

2. Necessity of Disagreement. The provisions in policies for appraisement or arbitration are usually conditioned on failure or inability of the parties to agree as to the amount of the loss;[82] and if there is no such disagreement, but total denial of liability on the part of the company, arbitration is not required.[83]

See 28 Cent. Dig. tit. "Insurance," § 1420 *et seq.* But see *infra*, XXI, A, 3, d.

Such an agreement is not a statutory submission to arbitration, and the statutory provisions relating to arbitration in general are not applicable. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297; Christianson *v.* Norwich Union F. Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379; Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

79. *Connecticut.*— Hall *v.* Norwalk F. Ins. Co., 57 Conn. 105, 17 Atl. 356.

Illinois.— Security Live Stock Ins. Assoc. *v.* Briggs, 22 Ill. App. 107.

Kansas.— Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315.

Wisconsin.—Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

United States.— Brown *v.* Hartford F. Ins. Co., 4 Fed. Cas. No. 2,009, Brunn. Col. Cas. 663.

See 28 Cent. Dig. tit. "Insurance," § 1425.

80. *Alabama.*— Rutter *v.* Hanover F. Ins. Co., 138 Ala. 202, 35 So. 33.

Minnesota.— Gasser *v.* Sun Fire Office, 42 Minn. 315, 44 N. W. 252.

New Jersey.— Stout *v.* Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691.

New York.— Yendel *v.* Western Assur. Co., 21 Misc. 348, 47 N. Y. Suppl. 141. But *compare* Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. Suppl. 539.

United States.— Williamson *v.* Liverpool, etc., Ins. Co., 122 Fed. 59, 58 C. C. A. 241.

See 28 Cent. Dig. tit. "Insurance," § 1420 *et seq.*

Contra.— Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 114, 10 Ohio Cir. Dec. 186, where it is said that where the property insured has been totally destroyed no appraisement can be demanded, as the result would be to require the appraisers to call witnesses and become arbitrators.

81. *Kentucky.*— Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850; Merchants' Ins. Co. *v.* Stephens, 59 S. W. 511, 22 Ky. L. Rep. 999.

Minnesota.— Ohage *v.* Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

Missouri.— O'Keefe *v.* Liverpool, etc., Ins. Co., 140 Mo. 558, 41 S. W. 922, 39 L. R. A. 819; Marshall *v.* American Guarantee Mut. F. Ins. Co., 80 Mo. App. 18; Jacobs *v.* North British, etc., Ins. Co., 61 Mo. App. 572; Baker *v.* Phœnix Assur. Co., 57 Mo. App. 559.

Nebraska.— German Ins. Co. *v.* Eddy, 36 Nebr. 461, 54 N. W. 856, 19 L. R. A. 707.

Wisconsin.— Seyk *v.* Millers' Nat. Ins. Co., 74 Wis. 67, 41 N. W. 443, 3 L. R. A. 523.

See 28 Cent. Dig. tit. "Insurance," § 1420 *et seq.*

The Iowa statute which only makes the policy *prima facie* evidence of the value of the buildings covered by the policy and totally destroyed does not render inoperative a provision for appraisal as a condition precedent. Zalesky *v.* Home Ins. Co., 108 Iowa 341, 79 N. W. 69.

82. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Kansas.— Capitol Ins. Co. *v.* Wallace, 50 Kan. 453, 31 Pac. 1070, 48 Kan. 400, 29 Pac. 755.

Kentucky.— Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846.

Michigan.— Kersey *v.* Phœnix Ins. Co., 135 Mich. 10, 97 N. W. 57.

Minnesota.— Kelly *v.* Liverpool, etc., Ins. Co., (1905) 102 N. W. 380.

Missouri.— Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323.

New York.— Rosenwald *v.* Phœnix Ins. Co., 50 Hun 172, 3 N. Y. Suppl. 215.

Ohio.— Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805.

Pennsylvania.— Moyer *v.* Sun Ins. Office, 176 Pa. St. 579, 35 Atl. 221, 53 Am. St. Rep. 690.

Texas.— Virginia F. & M. Ins. Co. *v.* Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

See 28 Cent. Dig. tit. "Insurance," § 1420 *et seq.*

83. Continental Ins. Co. *v.* Vallandingham, 116 Ky. 287, 76 S. W. 22, 25 Ky. L. Rep. 468; Lasher *v.* Northwestern Nat. Ins. Co., 18 Hun (N. Y.) 98; American F. Ins. Co. *v.* Stuart, (Tex. Civ. App. 1896) 38 S. W. 395. And see *infra*, XVIII, B, 7, d.

Arbitration entered into before there is any disagreement as to the amount of loss is not valid under the terms of the policy, and may be revoked. Harrison *v.* Hartford F. Ins. Co., 112 Iowa 77, 83 N. W. 820.

Insured cannot claim that there was no disagreement, after stating a disagreement in

3. Proceedings — a. In General. The proceedings for appraisement and arbitration must reasonably comply with the statutory provisions and the provisions in the policy relating thereto.[84]

b. Demand — (i) *Necessity.* Under the provisions usually found in policies, arbitration or appraisal is not a condition precedent to action on the policy unless there has been a demand for such a proceeding on the part of the company.[85] But the requirement of the policy may be such that the provision as to arbitration is mandatory on both parties.[86]

(ii) *Sufficiency.* A demand made in accordance with the provisions of the policy is sufficiently definite.[87] But the company cannot require a submission otherwise than as provided in the policy.[88] It is essential that the demand be made in good faith with the intention to secure the arbitration or appraisal provided for.[89]

(iii) *When to Be Made.* Demand for appraisal or arbitration must be made within the time prescribed by the policy.[90]

(iv) *Upon Agent.* A demand made upon an agent authorized to represent

writing and joining in the selection of arbitrators. Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

Where the loss is partial, there may be a submission to arbitration. Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

84. See *infra*, XVIII, B, 3, b, *et seq.*

85. Commercial Ins. Co. *v.* Robinson, 64 Ill. 265, 16 Am. Rep. 557; Randall *v.* Liverpool, etc., Ins. Co., 10 Mont. 368, 25 Pac. 962; Randall *v.* Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 961; Randall *v.* American F. Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; Grand Rapids F. Ins. Co. *v.* Finn, 60 Ohio St. 513, 54 N. E. 545, 71 Am. St. Rep. 736, 50 L. R. A. 555; Bowes *v.* National Ins. Co., 20 N. Brunsw. 437; McIntyre *v.* National Ins. Co., 5 Ont. App. 580; Hughes *v.* London Assur. Co., 4 Ont. 293. See also *infra*, XXI, A, 3, d.

86. Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Flaherty *v.* Germania Ins. Co., 1 Wkly. Notes Cas. (Pa.) 352.

Where the obligation to select appraisers is mutual, no duty rests upon the company to take the initiative. Phœnix Ins. Co. *v.* Lorton, 109 Ill. App. 63.

Where the requirement is obligatory as to arbitration in the event of disagreement, the insurer cannot complain of a demand made without giving reasonable time to accept proofs of loss. Brock *v.* Dwelling House Ins. Co., 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623.

87. Zalesky *v.* Home Ins. Co., 102 Iowa 613, 71 N. W. 566; Hamilton *v.* Royal Ins. Co., 4 Ohio S. & C. Pl. Dec. 437.

88. Walker *v.* German Ins. Co., 51 Kan. 725, 33 Pac. 597; Wheeler *v.* Watertown F. Ins. Co., 131 Mass. 1; Zallee *v.* Laclede Mut. F. & M. Ins. Co., 44 Mo. 530.

For example therefore a joint demand by two or more companies for submission of their several liabilities in one appraisement or arbitration is not authorized (Wicking *v.* Citizens' Mut. F. Ins. Co., 118 Mich. 640, 77 N. W. 275; Hamilton *v.* Fireman's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407; Palatine Ins. Co. *v.* Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787; Connecticut F. Ins. Co. *v.* Hamilton, 59 Fed. 258, 8 C. C. A. 114 [*affirming* 46 Fed. 42]); and there cannot be a demand for arbitration for part only of the loss (Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 51 N. W. 1149; Palatine Ins. Co. *v.* Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787). But if there are two losses covered by the same policy, they may both be included in the same demand for arbitration. Mechanics' Ins. Co. *v.* Hodge, 149 Ill. 298, 37 N. E. 51 [*affirming* 46 Ill. App. 479]. And it is said that, although the policy has been avoided as to a portion of it, there may be a demand of arbitration with reference to other property as to which the policy remains valid. Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323.

89. Chainless Cycle Mfg. Co. *v.* Security Ins. Co., 169 N. Y. 304, 62 N. E. 392.

The intent with which the insurer acts in making the demand is immaterial. Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 114, 10 Ohio Cir. Dec. 186.

90. American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235.

But if no such time is specified, then within such reasonable time as will render an appraisal or arbitration practicable. Chainless Cycle Mfg. Co. *v.* Security Ins. Co., 169 N. Y. 304, 62 N. E. 392; Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Hamilton *v.* Royal Ins. Co., 4 Ohio S. & C. Pl. Dec. 437; Phœnix Assur. Co. *v.* Stenson, (Tex. Civ. App. 1904) 79 S. W. 866; Astrich *v.* German-American Ins. Co., 128 Fed. 477 [*affirmed* in 131 Fed. 13, 65 C. C. A. 251].

After an action has once been brought, although subsequently dismissed, it is too late to demand appraisement or arbitration. Davis *v.* Imperial Ins. Co., 16 Wash. 241, 47 Pac. 439.

If either party is entitled to make the demand, then a delay by one will not preclude his right to do so, unless the delay has been so great as to render arbitration or appraisal impossible. McNees *v.* Southern Ins. Co., 69

the company in its general business of soliciting insurance, collecting premiums, and issuing policies is sufficient.[91]

c. Appointment of Appraisers or Arbitrators. While the usual provisions in a policy for appraisement or arbitration require the appointment of one appraiser or arbitrator by each party and the selection of an umpire by the two in the event that they cannot agree, nevertheless it is contemplated that the persons appointed by the parties be impartial and disinterested.[92] It is sometimes provided by statute that the arbitrators shall be residents of the county in which the loss occurred.[93]

d. Appointment of Umpire. While the appointment of an umpire is usually provided for only in the event of the disagreement[94] of the two appraisers or arbitrators, the fact that he is chosen beforehand will not affect the validity of the appraisement.[95] A fair, impartial, and convenient person should be chosen as umpire.[96]

e. Notice. The parties should have notice of the proceedings of the appraisers or arbitrators.[97]

f. Joint Action. The appraisers or arbitrators and the umpire, when one has been selected, should act together, and a finding as the result of a proceeding in

Mo. App. 232; Johnson *v.* Phœnix Ins. Co., 69 Mo. App. 226; Hamilton *v.* Fireman's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407.

If there is a limitation of time for bringing suit, the demand must be reasonable with reference to such limitation. Zimeriski *v.* Ohio Farmers' Ins. Co., 91 Mich. 600, 52 N. W. 55; American Cent. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 445, 69 S. W. 235; Lion F. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 203, 68 S. W. 305.

91. Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408; Milwaukee Mechanics' Ins. Co. *v.* Schallman, 90 Ill. App. 280.

92. If the person selected by one of the parties is interested in the result, or otherwise open to the charge of partiality, the other party to the proceeding is not bound to submit to an appraisal or arbitration by such person, and the finding will be invalid.

Alabama.— Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48.

Illinois.— Ætna Ins. Co. *v.* Stevens, 48 Ill. 31.

Massachusetts.— Bullman *v.* North British, etc., Ins. Co., 159 Mass. 118, 34 N. E. 169.

Minnesota.— Produce Refrigerating Co. *v.* Norwich Union F. Ins. Soc., 91 Minn. 210, 97 N. W. 875, 98 N. W. 100.

New York.— Kaiser *v.* Hamburg-Bremen F. Ins. Co., 172 N. Y. 663, 65 N. E. 1118.

Canada.— Vineberg *v.* Guardian F., etc., Assur. Co., 19 Ont. App. 293.

See 28 Cent. Dig. tit. "Insurance," § 1426.

To be disinterested, the appraiser should not only be without pecuniary interest in the result, but also without bias or prejudice (Bradshaw *v.* Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055), and the required competency does not relate alone to disinterestedness, but also to general capacity to act with judgment (Ætna Ins. Co. *v.* Stevens, 48 Ill. 31). But the fact that one has acted in the same capacity on other occasions for the same party does not necessarily disqualify him. Christianson *v.* Norwich Union F. Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379; Bishop *v.* Agricultural Ins. Co., 130 N. Y. 488, 29 N. E. 844; Meyerson *v.* Hartford F. Ins. Co., 17 Misc. (N. Y.) 121, 39 N. Y. Suppl. 329.

The burden of showing disqualification is on the party complaining. Hall *v.* Western Assur. Co., 133 Ala. 637, 32 So. 257.

93. Germania Ins. Co. *v.* Cincinnati, etc., Packet Co., 7 Ohio S. & C. Pl. Dec. 571, 6 Ohio N. P. 173, upholding the constitutionality of such a statute.

94. **A mere inability to agree** as to the result is sufficient ground for choosing an umpire. Ætna F. Ins. Co. *v.* Davis, 55 S. W. 705, 21 Ky. L. Rep. 1456.

If an arbitrator improperly prevents the selection of an umpire the consequences of the failure of the arbitration should be visited upon the party selecting him. Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485.

95. Enright *v.* Montauk F. Ins. Co., 15 N. Y. Suppl. 893 [*affirmed* in 142 N. Y. 667, 37 N. E. 570]; Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

On the other hand the umpire may be chosen after the appraisement has begun. Caledonian Ins. Co. *v.* Traub, 83 Md. 524, 35 Atl. 13.

96. Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485.

In arriving at a result the umpire chosen should consider the findings of both appraisers or arbitrators. Strome *v.* London Assur. Corp., 162 N. Y. 627, 57 N. E. 1125; New York Mut. Sav., etc., Assoc. *v.* Manchester F. Assur. Co., 94 N. Y. App. Div. 104, 87 N. Y. Suppl. 1075.

97. The reason is that the parties may be able to appear before them and make proper representations or explanations with relation to their interests; and without such opportunity the appraisement or arbitration will not be binding. Redner *v.* New York F. Ins. Co., 92 Minn. 306, 99 N. W. 886; Christianson *v.* Norwich Union F. Ins. Soc., 84 Minn. 526.

which one has not acted will not be valid;[98] but one appraiser or arbitrator cannot by refusing to act prevent further proceedings.[99]

g. Basis of Finding. The appraisers or arbitrators should receive evidence on which to base their findings.[1] They may call in the aid of third persons skilled in determining the particular kind of damage involved;[2] or if they are themselves experts they may make use of their expert knowledge without calling in the assistance of others.[3] The finding should be in detail and not in gross;[4] and if it is as to a part of the loss only it is not binding.[5] The arbitrators, however, need not reveal their conclusions as to particular questions arising before them until the award is made.[6]

h. Compensation. The compensation to be paid the referees or arbitrators is to be determined by the parties appointing them.[7]

4. Validity and Effect — a. In General. Mere irregularities in the proceedings of the appraisers or arbitrators not substantially affecting the result will not be a ground for disregarding or setting aside their finding;[6] but if the irregularity

88 N. W. 16, 87 Am. St. Rep. 379; Schreiber *v.* German-American Hail Ins. Co., 43 Minn. 367, 45 N. W. 708; Stout *v.* Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691; Kaiser *v.* Hamburg-Bremen F. Ins. Co., 172 N. Y. 663, 65 N. E. 1118; Schmitt *v.* Boston Ins. Co., 82 N. Y. App. Div. 234, 81 N. Y. Suppl. 767; Linde *v.* Republic F. Ins. Co., 50 N. Y. Super. Ct. 362; Phœnix Ins. Co. *v.* Moore, (Tex. Civ. App. 1898) 46 S. W. 1131; Continental Ins. Co. *v.* Garrett, 125 Fed. 589, 60 C. C. A. 395. But it is said that appraisers appointed by the parties under the provisions of the policy are not arbitrators, and failure to notify the parties of their meeting will not invalidate their findings. Townsend *v.* Greenwich Ins. Co., 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909. At any rate formal notice is not required. Kaiser *v.* Hamburg-Bremen F. Ins. Co., 59 N. Y. App. Div. 525, 69 N. Y. Suppl. 344.

98. *Kentucky.*— Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232.

Maryland.— Caledonian Ins. Co. *v.* Traub, 83 Md. 524, 35 Atl. 13.

New Hampshire.— Franklin *v.* New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91.

New York.— Schmitt *v.* Boston Ins. Co., 82 N. Y. App. Div. 234, 81 N. Y. Suppl. 767.

Tennessee.— North German Ins. Co. *v.* Morton-Scott-Robertson Co., 108 Tenn. 384, 67 S. W. 816.

If the policy authorizes a finding by a majority, but there is no agreement even by a majority as to the result to be reached, the insured is not compelled to submit to another arbitration, but may bring action notwithstanding the requirement of arbitration as a condition precedent. Pretzfelder *v.* Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424.

99. On refusal of the party appointing the one who refuses to act to provide a substitute the others may proceed. Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48; Citizens' Ins. Co. *v.* Doying, 55 N. J. L. 573, 27 Atl. 929; Broadway Ins. Co. *v.* Doying, 55 N. J. L. 569, 27 Atl. 927; American Cent. Ins. Co. *v.* Landau, 62 N. J. Eq. 73, 49 Atl. 738.

1. Christianson *v.* Norwich Union F. Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379.

A mere inspection of books and papers or of the salvage is not enough. Phœnix Ins. Co. *v.* Romeis, 15 Ohio Cir. Ct. 697, 8 Ohio Cir. Dec. 633; British America Assur. Co. *v.* Darragh, 128 Fed. 890, 63 C. C. A. 426; Hartford F. Ins. Co. *v.* Bonner Mercantile Co., 44 Fed. 151, 11 L. R. A. 623.

Considering matters of general knowledge not shown by legal evidence will not, however, authorize the setting aside of the award. Ætna F. Ins. Co. *v.* Davis, 55 S. W. 705, 21 Ky. L. Rep. 1456.

2. Bangor Sav. Bank *v.* Niagara F. Ins. Co., 85 Me. 68, 26 Atl. 991, 35 Am. St. Rep. 341, 20 L. R. A. 650.

3. Vincent *v.* German Ins. Co., 120 Iowa 272, 94 N. W. 458.

4. Schmitt *v.* Boston Ins. Co., 82 N. Y. App. Div. 234, 81 N. Y. Suppl. 767.

5. Rutter *v.* Hanover F. Ins. Co., 138 Ala. 202, 35 So. 33; American F. Ins. Co. *v.* Bell, (Tex. Civ. App. 1903) 75 S. W. 319.

6. Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

7. Alden *v.* Christianson, 83 Minn. 21, 85 N. W. 824; Muench *v.* Globe F. Ins. Co., 8 Misc. (N. Y.) 328, 28 N. Y. Suppl. 569.

Statutory provisions as to compensation of referees are not applicable to referees appointed under provisions of a policy of insurance. Alden *v.* Christianson, 83 Minn. 21, 85 N. W. 824.

8. *Kentucky.*— Ætna F. Ins. Co. *v.* Davis, 55 S. W. 705, 21 Ky. L. Rep. 1456.

Massachusetts.— Farrell *v.* German American Ins. Co., 175 Mass. 340, 56 N. E. 572.

Michigan.— Michels *v.* Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. 56.

New York.— Eisenberg *v.* Stuyvesant Ins. Co., 87 N. Y. Suppl. 463.

United States.—Barnard *v.* Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170.

See 28 Cent. Dig. tit. "Insurance," § 1430.

That appraisers or arbitrators were not sworn will not render their findings void. Zallee *v.* Laclede Mut. F. & M. Ins. Co., 44 Mo. 530; Stout *v.* Phœnix Assur. Co., 65 N. J. Eq. 566, 56 Atl. 691; Barnard *v.* Lancashire Ins. Co., 101 Fed. 36, 41 C. C. A. 170.

has been such as to substantially affect their decision it will be set aside or disregarded.[9]

b. Fraud — (I) *In General.* Fraud in the selection of appraisers[10] or fraud in presenting the case to the arbitrators[11] will vitiate the award.

(II) *Rescission.* A party to the arbitration desiring to rescind on account of fraud in the award must tender back whatever advantage has been received under such award.[12]

c. Inadequacy. Inadequacy of the award will not be sufficient ground for setting it aside,[13] unless it is such as to show fraud.[14]

d. Misconduct of Arbitrators. The award should be disregarded if the arbitrators are guilty of misconduct substantially affecting the result.[15]

e. Effect on Recovery Under Policy. Where submission to appraisement or arbitration has been made, the appraisal or arbitration is conclusive as to the amount of the loss for which the company is liable under the policy;[16] but if the award is invalid suit may be maintained on the policy, without regard to such award.[17]

9. Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 66 N. E. 902; Kaiser *v.* Hamburg-Bremen F. Ins. Co., 172 N. Y. 663, 65 N. E. 1118.

10. Kaiser *v.* Hamburg-Bremen F. Ins. Co., 172 N. Y. 663, 65 N. E. 1118; Kiernan *v.* Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 N. E. 698; Bradshaw *v.* Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055 [*affirming* 16 N. Y. Suppl. 639].

In employ of party.— The fact that each of the two appraisers who came to the agreement without calling in an umpire is in the employ of the party selecting him will not be a ground for setting aside their finding. Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218, 43 N. Y. Suppl. 431.

11. Stockton Combined Harvester, etc., Works *v.* Glen's Falls Ins. Co., 98 Cal. 557, 33 Pac. 633; Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 66 N. E. 902; Herndon *v.* Imperial F. Ins. Co., 110 N. C. 279, 14 S. E. 742.

But if the facts are equally within the knowledge of the parties, false representations with reference thereto will not constitute fraud. Michels *v.* Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. 56; Mayhew *v.* Phœnix Ins. Co., 23 Mich. 105; Townsend *v.* Greenwich Ins. Co., 39 Misc. (N. Y.) 87, 78 N. Y. Suppl. 897; Ætna Ins. Co. *v.* Reed, 33 Ohio St. 283.

A false promise as to the future will not avoid the award. American Ins. Co. *v.* Crawford, 7 Ill. App. 29.

A matter of opinion will not avoid the award. Dunn *v.* Commonwealth Ins. Co., 8 Fed. Cas. No. 4,174, 1 Flipp. 379.

Misrepresentation of a matter of law will not vitiate the award. Royal Ins. Co. *v.* Roodhouse, 25 Ill. App. 61; Indiana Ins. Co. *v.* Brehm, 88 Ind. 578; Ordway *v.* Continental Ins. Co., 35 Mo. App. 426.

12. Harkey *v.* Mechanics', etc., Ins. Co., 62 Ark. 274, 35 S. W. 230, 54 Am. St. Rep. 295; Norwich Union F. Ins. Soc. *v.* Girton, 124 Ind. 217, 24 N. E. 984; Home Ins. Co. *v.* McRichards, 121 Ind. 121, 22 N. E. 875; Home Ins. Co. *v.* Howard, 111 Ind. 544, 13 N. E. 103; Potter *v.* Monmouth Mut. F. Ins. Co., 63 Me. 440; Berry *v.* American Cent. Ins. Co., 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548.

13. Michels *v.* Western Underwriters' Assoc., 129 Mich. 417, 89 N. W. 56; Strome *v.* London Assur. Corp., 162 N. Y. 627, 57 N. E. 1125; Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

14. Kaiser *v.* Hamburg-Bremen F. Ins. Co., 172 N. Y. 663, 65 N. E. 1118.

15. Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 66 N. E. 902; Davis *v.* Guardian Assur. Co., 87 Hun (N. Y.) 414, 34 N. Y. Suppl. 332. *Compare* Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485.

16. *Florida.*—Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Kansas.— Springfield F. & M. Ins. Co. *v.* Payne, 57 Kan. 291, 46 Pac. 315.

Maine.— Fisher *v.* Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282, 85 Am. St. Rep. 428.

New York.— Spink *v.* Co-operative F. Ins. Co., 25 N. Y. App. Div. 484, 49 N. Y. Suppl. 730.

Oregon.— Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

Wisconsin.—Montgomery *v.* American Cent. Ins. Co., 108 Wis. 146, 84 N. W. 175.

United States.— Robertson *v.* Scottish Union, etc., Ins. Co., 68 Fed. 173.

Canada.— Heron *v.* Hartford Ins. Co., 4 Montreal Super. Ct. 388.

See 28 Cent. Dig. tit. "Insurance," § 1431.

In New Hampshire by statute authorizing a compulsory arbitration, the recovery under the policy is not limited to the amount as thus determined. Franklin *v.* New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91.

Mere appraisement.— Where the parties agree to an appraisement of the amount of the loss as distinct from an arbitration, they are not bound by the finding of the appraisers, which are admissible only as evidence. Commercial Ins. Co. *v.* Friedlander, 156 Ill. 595, 41 N. E. 183; Smith *v.* Herd, 110 Ky. 56, 60 S. W. 841, 1121, 22 Ky. L. Rep. 1596; Patterson *v.* Triumph Ins. Co., 64 Me. 500; Soars *v.* Home Ins. Co., 140 Mass. 343, 5 N. E. 149.

17. *Massachusetts.*— Soars *v.* Home Ins. Co., 140 Mass. 343, 5 N. E. 149.

f. Persons Bound. An appraisal or award will not be binding on those who are not parties to it.[18]

5. Failure or Refusal to Arbitrate.[19] If the insurer refuses to arbitrate in accordance with the provisions of the policy, the insured may maintain action without regard to such provision.[20] And likewise if through the fault of the company the arbitration fails, the insured need make no further efforts to secure an arbitration, and may maintain his action.[21] If on the other hand the insured by his fault or refusal defeats an arbitration his action on the policy is defeated.[22]

6. Failure of Arbitrators to Agree. In the event of the failure of appraisers or arbitrators properly appointed and acting in good faith to agree as to the result of the appraisement or arbitration, the parties should under the usual requirement proceed by the appointment of other arbitrators or appraisers to carry out the conditions of the policy.[23]

Minnesota.—Christianson *v.* Norwich Union F. Ins. Soc., 84 Minn. 526, 88 N. W. 16, 87 Am. St. Rep. 379.

Ohio.— Phœnix Ins. Co. *v.* Romeis, 15 Ohio Cir. Ct. 697, 8 Ohio Cir. Dec. 633.

Texas.— Phœnix Ins. Co. *v.* Moore, (Civ. App. 1898) 46 S. W. 1131.

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

See 28 Cent. Dig. tit. "Insurance," § 1431.

For example if the submission to appraisement is not in accordance with the requirements of the policy (New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 9 C. C. A. 623), is made without authority (Providence Washington Ins. Co. *v.* Board of Education, 49 W. Va. 360, 38 S. E. 679), or is partial only (Liverpool, etc., Ins. Co. *v.* Colgin, (Tex. Civ. App. 1896) 34 S. W. 291; Hong Sling *v.* National Assur. Co., 7 Utah 441, 27 Pac. 171), the award may be disregarded.

18. *Colorado.*— Scania Ins. Co. *v.* Johnson, 22 Colo. 476, 45 Pac. 431.

Kentucky.—Bergman *v.* Commercial Union Assur. Co., 92 Ky. 494, 18 S. W. 122, 13 Ky. L. Rep. 720, 15 L. R. A. 270; Morris *v.* German-American Ins. Co., 14 Ky. L. Rep. 859; Chenowith *v.* Phœnix Ins. Co., 12 Ky. L. Rep. 232.

Mississippi.— Georgia Home Ins. Co. *v.* Stein, 72 Miss. 943, 18 So. 414.

New York.— Fleming *v.* Phœnix Assur. Co., 75 Hun 530, 27 N. Y. Suppl. 488.

Rhode Island.— Brown *v.* Roger Williams Ins. Co., 5 R. I. 394.

Wisconsin.— Chandos *v.* American F. Ins. Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321.

See 28 Cent. Dig. tit. "Insurance," § 1432.

19. Not a condition precedent see *infra*, XXI, A, 3, d.

20. Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48; Dunn *v.* Springfield F. & M. Ins. Co., 109 La. 520, 33 So. 585; Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Germania Ins. Co. *v.* Cincinnati, etc., Packet Co., 7 Ohio S. & C. Pl. Dec. 571, 6 Ohio N. P. 173.

21. *Illinois.*— Niagara Ins. Co. *v.* Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105; Germania F. Ins. Co. *v.* Frazier, 22 Ill. App. 327.

Maryland.— Connecticut F. Ins. Co. *v.* Cohen, 97 Md. 294, 55 Atl. 675, 99 Am. St. Rep. 445.

Michigan.— Brock *v.* Dwelling-House Ins. Co., 102 Mich. 583, 61 N. W. 67, 47 Am. St. Rep. 562, 26 L. R. A. 623.

Minnesota.— Powers Dry-Goods Co. *v.* Imperial F. Ins. Co., 48 Minn. 380, 51 N. W. 123.

Missouri.— McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 21 S. W. 207. See also Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485.

New York.— Uhrig *v.* Williamsburg City F. Ins. Co., 101 N. Y. 362, 4 N. E. 745; Bishop *v.* Agricultural Ins. Co., 9 N. Y. Suppl. 350.

North Carolina.—Pretzfelder *v.* Merchants' Ins. Co., 116 N. C. 491, 21 S. E. 302; Braddy *v.* New York Bowery F. Ins. Co., 115 N. C. 354, 20 S. E. 477.

Tennessee.— Hickerson *v.* German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172.

Washington.— Davis *v.* Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885.

Wisconsin.—Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

See 28 Cent. Dig. tit. "Insurance," § 1435.

22. *Maryland.*— Caledonian Ins. Co. *v.* Traub, 83 Md. 524, 35 Atl. 13.

Michigan.— Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502.

Minnesota.— Powers Dry-Goods Co. *v.* Imperial F. Ins. Co., 48 Minn. 380, 51 N. W. 123.

New York.— Davenport *v.* Long Island Ins. Co., 10 Daly 535.

Ohio.— Hamilton *v.* Royal Ins. Co., 4 Ohio S. & C. Pl. Dec. 437; Hamilton *v.* Fireman's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407.

United States.— Hamilton *v.* Liverpool, etc., Ins. Co., 136 U. S. 242, 10 S. Ct. 945, 34 L. ed. 419; Astrich *v.* German-American Ins. Co., 131 Fed. 13, 65 C. C. A. 251 [*affirming* 128 Fed. 477].

See 28 Cent. Dig. tit. "Insurance," § 1435. See also *infra*, XXI, A, 3, d.

23. Vernon Ins., etc., Co. *v.* Maitlen, 158 Ind. 393, 63 N. E. 755; Westhaver *v.* German-American Ins. Co., 113 Iowa 726, 84 N. W. 717; Seibel *v.* Lebanon Mut. Ins. Co., 16 Lanc. L. Rev. (Pa.) 356.

It has been said, however, that the insured

7. Waiver of Appraisement or Arbitration[24] — **a. In General.** Any action of either party inconsistent with reliance on the provisions of the policy as to appraisement or arbitration constitutes a waiver thereof.[25]

b. Failure to Demand or Accept.[26] Where the policy provides for or contemplates that an appraisal or arbitration shall be due on the demand of either party, a failure to make such demand or take the necessary steps toward securing an appraisement or arbitration will be a waiver of the provisions of the policy in that respect.[27] And a refusal to comply with a proper request is also a waiver.[28] However, a demand for arbitration, if made in bad faith and without intention

has complied with the condition of the policy when he has appointed an arbitrator, and that, irrespective of the result of the arbitration, he may thereupon maintain his action. Western Assur. Co. *v.* Decker, 98 Fed. 381, 39 C. C. A. 383; Harrison *v.* German-American F. Ins. Co., 67 Fed. 577. At any rate he is not bound to submit to a second arbitration if to do so would postpone the bringing of his action beyond the time limited by the policy. Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 44 N. Y. Suppl. 832.

Right to undestroyed stock.— Where the policy provided that the company should take the undestroyed stock at its appraised value, it was held that the right to take did not attach in the absence of an appraisement, regardless of whose fault caused the failure to appraise. Swearinger *v.* Pacific F. Ins. Co., 66 Mo. App. 90.

24. Waiver or estoppel as affecting: Notice of proofs of loss see *supra*, XVII, D, 5, i. Right of forfeiture, see *supra*, XIV, D, 2, g, (II).

25. *Indiana.*— Manchester F. Assur. Co. *v.* Koerner, 13 Ind. App. 372, 40 N. E. 1110, 41 N. E. 848, 55 Am. St. Rep. 231.

Kentucky.— Morris *v.* German American Ins. Co., 14 Ky. L. Rep. 859.

Maryland.— Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Massachusetts.— McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665.

Michigan.— Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502.

New York.— Wynkoop *v.* Niagara F. Ins. Co., 91 N. Y. 478, 43 Am. Rep. 686; Chainless Cycle Mfg. Co. *v.* Security Ins. Co., 52 N. Y. App. Div. 104, 64 N. Y. Suppl. 1060; Newman *v.* Blessing, 4 N. Y. Suppl. 269.

Ohio.— Hobson *v.* Queen Ins. Co., 2 Ohio S. & C. Pl. Dec. 475, 2 Ohio N. P. 296.

See 28 Cent. Dig. tit. "Insurance," § 1436. See also *infra*, XXI, A, 3, d.

For example by entering into an agreement for submission not in accordance with the terms of the policy (Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6, 51 N. W. 1149; Davis *v.* Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885), by insisting on a submission not contemplated by the policy (George Dee, etc., Co. *v.* Key City F. Ins. Co., 104 Iowa 167, 73 N. W. 594; Walker *v.* German Ins. Co., 51 Kan. 725, 33 Pac. 597), or by insisting on a void appraisement (Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855; Remington Paper Co. *v.* London Assur. Corp., 12 N. Y. App. Div. 218, 43 N. Y. Suppl. 431; American F. Ins. Co. *v.* Bell, (Tex. Civ. App. 1903) 75 S. W. 319) the provision of the policy as to appraisal or arbitration is waived. So acceptance of proofs by the company is said to be a waiver of arbitration. Scottish Union, etc., Ins. Co. *v.* Clancy, 71 Tex. 5, 8 S. W. 630; Hartford F. Ins. Co. *v.* Cannon, 19 Tex. Civ. App. 305, 46 S. W. 851; Springfield F. & M. Ins. Co. *v.* Cannon, (Tex. Civ. App. 1898) 46 S. W. 375; Virginia F. & M. Ins. Co. *v.* Cannon, (Tex. Civ. App. 1898) 45 S. W. 945. If the company has prevented submission to arbitration it cannot afterward rely upon failure to arbitrate as a defense. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180; Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Astrich *v.* German-American Ins. Co., 128 Fed. 477 [*affirmed* in 131 Fed. 13, 65 C. C. A. 251].

26. Failure or refusal to arbitrate see *supra*, XVIII, B, 5.

27. *Illinois.*— German American Ins. Co. *v.* Steiger, 109 Ill. 254.

Iowa.— Garretson *v.* Merchants', etc., F. Ins. Co., 114 Iowa 17, 86 N. W. 32.

Kentucky.— Insurance Co. of North America *v.* Forewood Cotton Co., 12 Ky. L. Rep. 846.

Massachusetts.— Hayes *v.* Milford Mut. F. Ins. Co., 170 Mass. 492, 49 N. E. 754.

Missouri.— Probst *v.* American Cent. Ins. Co., 64 Mo. App. 408.

Virginia.— Tilley *v.* Connecticut F. Ins. Co., 86 Va. 811, 11 S. E. 120.

United States.—British America Assur. Co. *v.* Darragh, 128 Fed. 890, 63 C. C. A. 426; Kahnweiler *v.* Phenix Ins. Co., 67 Fed. 483, 14 C. C. A. 485.

See 28 Cent. Dig. tit. "Insurance," § 1436.

28. *Illinois.*— Milwaukee Mechanics' Ins. Co. *v.* Schallman, 188 Ill. 213, 59 N. E. 12.

Louisiana.— Dunn *v.* Springfield F. & M. Ins. Co., 109 La. 520, 33 So. 585.

Massachusetts.— McDowell *v.* Ætna Ins. Co., 164 Mass. 444, 41 N. E. 665.

New York.— Silver *v.* Western Assur. Co., 33 N. Y. App. Div. 450, 54 N. Y. Suppl. 27.

South Dakota.— Schouweiler *v.* Merchants' Mut. Ins. Assoc., 11 S. D. 401, 78 N. W. 356.

Texas.— Northern Assur. Co. *v.* Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239.

See 28 Cent. Dig. tit. "Insurance." § 1436.

A request for a joint appraisal of the liabilities of different companies for the same loss need not be accepted by the insurer. Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810.

that it shall be accepted and acted upon, is not sufficient to require a submission to arbitration.[29]

c. Delay in Demanding or Accepting. Mere delay in demanding or accepting appraisal or arbitration will not alone constitute waiver thereof;[30] but if by such delay the other party is prejudiced and put in such a position that he cannot enforce his rights the delay will constitute a waiver.[31]

d. Denial of Liability.[32] An unqualified denial of any liability under the policy is a waiver of provisions relating to appraisement or arbitration of the amount of the loss.[33] So a denial of liability on other grounds is a waiver of the requirement for appraisal or arbitration.[34]

C. Independent Action to Enforce or Set Aside Arbitration or Settlement. An independent action may be brought on a settlement or arbitration of the loss.[35] On the other hand an action in equity may be maintained to set aside

29. Continental Ins. Co. *v.* Vallandingham, 76 S. W. 22, 25 Ky. L. Rep. 468; Silver *v.* Western Assur. Co., 164 N. Y. 381, 58 N. E. 284; Williams *v.* German Ins. Co., 90 N. Y. App. Div. 413, 86 N. Y. Suppl. 98; Rice *v.* Palatine Ins. Co., 17 Pa. Super. Ct. 261.

So a demand peremptorily made before there is a failure of the parties to agree to an adjustment of the loss is not sufficient. Boyle *v.* Hamburg-Bremen F. Ins. Co., 169 Pa. St. 349, 32 Atl. 553.

30. Smith *v.* California Ins. Co., 87 Me. 190, 32 Atl. 872; Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005; Williams *v.* German Ins. Co., 90 N. Y. App. Div. 413, 86 N. Y. Suppl. 98.

Mere silence as to the subject of appraisement or arbitration will not constitute a waiver. Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

31. Harrison *v.* Hartford F. Ins. Co., (Iowa 1899) 80 N. W. 309; Powers Dry Goods Co. *v.* Imperial F. Ins. Co., 48 Minn. 380, 51 N. W. 123; Stephens *v.* Union Assur. Soc., 16 Utah 22, 50 Pac. 626, 67 Am. St. Rep. 595.

Question for jury.— The question whether delay or failure to demand an appraisal constitutes a waiver is a question for the jury under the facts. Lamson Consol. Store-Service Co. *v.* Prudential F. Ins. Co., 171 Mass. 433, 50 N. E. 943; McManus *v.* Western Assur. Co., 22 Misc. (N. Y.) 269, 48 N. Y. Suppl. 820.

32. Denial of liability see also *supra*, XVII, D, 5, k.

33. *California.*— Farnum *v.* Phœnix Ins. Co., 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.

Illinois.— Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408 [*affirming* 40 Ill. App. 64]; Glens Falls Ins. Co. *v.* Hite, 83 Ill. App. 549.

Kentucky.— Insurance Co. of North America *v.* Forwood, 13 Ky. L. Rep. 261.

Louisiana.— Millaudon *v.* Atlantic Ins. Co., 8 La. 557.

Massachusetts.—Wainer *v.* Milford Mut. F. Ins. Co., 153 Mass. 335, 26 N. E. 877, 11 L. R. A. 598.

Minnesota.— Hamberg *v.* St. Paul F. & M. Ins. Co., 68 Minn. 335, 71 N. W. 388.

Missouri.— Seigle *v.* Badger Lumber Co., 106 Mo. App. 110, 80 S.W. 4; White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707; Thomas *v.* Lebanon Town Mut. F. Ins. Co., 78 Mo. App. 268.

Nebraska.— Ætna Ins. Co. *v.* Simmons, 49 Nebr. 811, 69 N. W. 125; Home F. Ins. Co. *v.* Kennedy, 47 Nebr. 138, 66 N. W. 278, 53 Am. St. Rep. 521; Western Horse, etc., Ins. Co. *v.* Putnam, 20 Nebr. 331, 30 N. W. 246.

New York.— Lang *v.* Eagle F. Ins. Co., 12 N. Y. App. Div. 39, 42 N. Y. Suppl. 539; Baldwin *v.* Fraternal Acc. Assoc., 21 Misc. 124, 46 N. Y. Suppl. 1016.

North Carolina.— Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057.

Pennsylvania.— Sands *v.* Dwelling House Ins. Co., 26 Pittsb. Leg. J. 318.

Tennessee.— Hickerson *v.* German-American Ins. Co., 96 Tenn. 193, 33 S. W. 1041, 32 L. R. A. 172.

Texas.—Connecticut F. Ins. Co. *v.* Hilbrant, (Civ. App. 1903) 73 S. W. 558.

Vermont.— Stoddard *v.* Cambridge Mut. F. Ins. Co., 75 Vt. 253, 54 Atl. 284.

Washington.— Hennessy *v.* Niagara F. Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

See 28 Cent. Dig. tit. "Insurance," § 1437. See also *infra*, XXI, A, 3, d.

But to have this effect the denial of liability must be inconsistent with an agreement for appraisal or arbitration. Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805. And the denial of liability for the first time in an action brought under the policy is not a waiver. Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323; Yendel *v.* Western Assur. Co., 21 Misc. (N. Y.) 348, 47 N. Y. Suppl. 141.

The fact that suit is pending is not sufficient justification for refusing an offer to arbitrate. Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Johnson *v.* Phœnix Ins. Co., 69 Mo. App. 226.

34. Westfield Cigar Co. *v.* Insurance Co. of North America, 169 Mass. 382, 47 N. E. 1026; Denton *v.* Farmers' Mut. F. Ins. Co., 120 Mich. 690, 79 N. W. 929; American Cent. Ins. Co. *v.* Bass, 90 Tex. 380, 38 S. W. 1119; American F. Ins. Co. *v.* Stuart, (Tex. Civ. App. 1896) 38 S. W. 395.

35. Georgia Home Ins. Co. *v.* Warten, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129; Stockton Combined Harvester, etc., Works *v.*

a settlement or award which has been procured by fraud, or on other equitable grounds.[36]

XIX. RIGHT TO PROCEEDS.

A. Under Provisions of Policy — 1. In General. As the policy is a personal contract between the insurer and the insured and not a contract which in any sense runs with the property,[37] the insurance money is generally payable to the insured without regard to the nature and extent of his interest in the property, provided he had an insurable interest at the time of making the contract and also at the time of the loss.[38] And where different persons have different interests in the same property, the insurance taken by one in his own right and on his own interest does not in any way inure to the benefit of another.[39]

2. Tenants in Common. On the principle mentioned in the preceding section an insurance on his own interest taken by one tenant in common does not inure to the benefit of his cotenant,[40] especially if the insured has used the money in restoring

Glens Falls Ins. Co., 121 Cal. 167, 53 Pac. 565; Haslinger *v.* Long Island Ins. Co., 62 Mich. 144, 28 N. W. 762; Nichols *v.* Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125.

If made by an agent acting without authority the rule does not apply. Georgia Home Ins. Co. *v.* Warten, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129; Merchants' Ins. Co. *v.* New Mexico Lumber Co., 10 Colo. App. 223, 51 Pac. 174; Grier *v.* Northern Assur. Co., 183 Pa. St. 334, 39 Atl. 10.

If made under duress the rule does not apply. Hartford F. Ins. Co. *v.* Kirkpatrick, 111 Ala. 456, 20 So. 651.

36. *Connecticut.*— Bulkley *v.* Starr, 2 Day 552.

Minnesota.— Produce Refrigerating Co. *v.* Norwich Union F. Ins. Soc., 91 Minn. 210, 97 N. W 875, 98 N. W. 100.

New York.— Bradshaw *v.* Watertown Agricultural Ins. Co., 137 N. Y. 137, 32 N. E. 1055.

Texas.— Royal Ins. Co. *v.* Parlin, etc., Co., 12 Tex. Civ. App. 572, 34 S. W. 401.

Washington.— Glover *v.* Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

United States.— Robertson *v.* Lion Ins. Co., 73 Fed. 928.

See 28 Cent. Dig. tit. "Insurance," § 1434. See also *infra*, XXI, A, 3, d.

Equity having obtained jurisdiction to set aside an award may retain the case for the purpose of determining the amount of damages (Continental Ins. Co. *v.* Garrett, 125 Fed. 589, 60 C. C. A. 395), or action may be brought to set aside the award and for recovery on the policy for the real loss (New York Mut. Sav., etc., Assoc. *v.* Manchester F. Assur. Co., 94 N. Y. App. Div. 104, 87 N. Y. Suppl. 1075).

In the absence of equitable grounds the court will not interfere with the award. Georgia Home Ins. Co. *v.* Warten, 113 Ala. 479, 22 So. 288, 59 Am. St. Rep. 129; Kentucky Chair Co. *v.* Rochester German Ins. Co., 49 S. W. 780, 20 Ky. L. Rep. 157; Davis *v.* Grand Rapids F. Ins. Co., 157 N. Y. 685, 51 N. E. 1090.

In an action at law an award cannot be impeached or set aside for fraud. Philadelphia Fire Assoc. *v.* Allesina, 45 Oreg. 154, 77 Pac. 123.

37. See *supra*, II, B.

38. See *supra*, II, C, 3.

This is only true of course in the absence of any stipulation to the contrary in the contract itself (see *supra*, II, C, 3), and also in the absence of any assignment by the insured of the right to recover the proceeds from the company (see *supra*, VIII), and where the insured has not by any misrepresentation or change of title defeated his right to recover on the policy (see *supra*, XII, B, 3; XIII, F).

After the death of the insured, in the absence of any provision continuing the policy in favor of legal representatives or successors, the company is not liable to his devisee. Cook *v.* Kentucky Growers' Ins. Co., 72 S. W. 764, 24 Ky. L. Rep. 1956. See *infra*, XIX, A, 8.

39. *Alabama.*— Shadgett *v.* Phillips, etc., Co., 131 Ala. 478, 31 So. 20, 90 Am. St. Rep. 95, 56 L. R. A. 461.

Kansas.— Continental Ins. Co. *v.* Maxwell, 9 Kan. App. 268, 60 Pac. 539.

Maine.— Rose *v.* O'Brien, 50 Me. 188.

Michigan.— Miotke *v.* Milwaukee Mechanics' Ins. Co., 113 Mich. 166, 71 N. W. 463.

New Hampshire.— Amey *v.* Granite State F. Ins. Co., 68 N. H. 446, 44 Atl. 601.

New York.— Harvey *v.* Cherry, 12 Hun 354 [*affirmed* in 76 N. Y. 436].

North Carolina.— Clapp *v.* Farmers' Mut. F. Ins. Assoc., 126 N. C. 388, 35 S. E. 617.

Utah.— McLaughlin *v.* Park City Bank, 22 Utah 473, 63 Pac. 589, 54 L. R. A. 343.

Wisconsin.— St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767.

England.— Loft *v.* Dennis, 1 E. & A. 474, 28 L. J. Q. B. 168, 5 Jur. N. S. 727, 7 Wkly. Rep. 199, 102 E. C. L. 474.

See 28 Cent. Dig. tit. "Insurance," § 1439 *et seq.*

40. Hammer *v.* Johnson, 44 Ill. 192; Harvey *v.* Cherry, 76 N. Y. 436.

But if the insurance is taken for the benefit and at the expense of all, each is entitled to his share of the proceeds. Lebanon Nat. Bank *v.* Bond, 89 Tenn. 462, 14 S. W. 1078.

the property or improvements,[41] although it is held that he is not bound to use his insurance money in restoring the property.[42]

3. LIFE-TENANT; REMAINDER-MAN. One having only a life-interest in property, but insuring that interest in his own right and at his own expense, is entitled to the proceeds of the insurance, and the remainder-man has no claim on such proceeds.[43]

4. LANDLORD AND TENANT. In the absence of any contract between landlord and tenant as to insurance by one for the benefit of the other, neither has any interest in insurance taken by the other in his own interest.[44]

5. VENDOR AND VENDEE. Likewise in the absence of contract neither vendor nor vendee is entitled to the benefit of the insurance taken by the other;[45] but if the vendee takes insurance for the benefit of the vendor, the latter receiving the insurance money should give credit to the vendee on the purchase-price.[46]

41. Annely *v.* De Saussure, 26 S. C. 497, 2 S. E. 490, 4 Am. St. Rep. 725.

42. McIntosh *v.* Ontario Bank, 20 Grant Ch. (U. C.) 24.

43. *Kentucky.*— Sanders *v.* Armstrong, 61 S. W. 700, 22 Ky. L. Rep. 1789.

Massachusetts.— Harrison *v.* Pepper, 166 Mass. 288, 44 N. E. 222, 55 Am. St. Rep. 404, 33 L. R. A. 239; Lerow *v.* Wilmarth, 9 Allen 382.

New York.— Addis *v.* Addis, 14 N. Y. Suppl. 657.

Ohio.— Hubbard *v.* Austin, 8 Ohio S. & C. Pl. Dec. 111, 6 Ohio N. P. 249.

Pennsylvania.— Zehring's Estate, 4 Pa. Super. Ct. 243.

Tennessee.— Bennett *v.* Featherstone, 110 Tenn. 27, 71 S. W. 589.

England.—Norris *v.* Harrison, 2 Madd. 268.

Canada.— Caldwell *v.* Stadacona, etc., Ins. Co., 11 Can. Sup. Ct. 212; *Re* Curry, 33 Nova Scotia 392.

See 28 Cent. Dig. tit. "Insurance," § 1442.

At any rate the remainder-men are only entitled to the excess over the value of the life-estate. Grant *v.* Buchanan, (Tex. Civ. App. 1904) 81 S. W. 820.

A widow entitled to a life-estate in the insured property is not on that account entitled to any life-estate in the insurance money under insurance effected on the property by her husband before his death. Quarles *v.* Clayton, 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170.

A tenant in tail in possession is entitled to insurance money as part of his personal estate. Warwicker *v.* Bretnall, 23 Ch. D. 188, 31 Wkly. Rep. 520; Seymour *v.* Vernon, 16 Jur. 189, 21 L. J. Ch. 433.

So a residuary devisee has an insurable interest, and if he insures such interest the proceeds in case of loss go to him and not to a tenant for life. Lee's Estate, 4 Kulp (Pa.) 44.

44. Home Ins. Co. *v.* Gibson, 72 Miss. 58, 17 So. 13; Northern Trust Co. *v.* Snyder, 76 Fed. 34, 22 C. C. A. 47; Lovett *v.* U. S., 9 Ct. Cl. 479; Leeds *v.* Cheetham, 5 L. J. Ch. O. S. 105, 1 Sim. 146, 27 Rev. Rep. 181, 2 Eng. Ch. 146.

But if the tenant stipulates to keep the premises insured for the benefit of the landlord, then the landlord is entitled to the proceeds of the insurance taken by the tenant. Eberts *v.* Fisher, 54 Mich. 294, 20 N. W. 80; Keteltas *v.* Coleman, 2 E. D. Smith (N. Y.) 408; Hayes *v.* Ferguson, 15 Lea (Tenn.) 1, 54 Am. Rep. 398; Northern Trust Co. *v.* Snyder, 77 Fed. 818, 23 C. C. A. 480, 76 Fed. 34, 22 C. C. A. 47.

45. *Illinois.*—Fanning *v.* Equitable F. & M. Ins. Co., 46 Ill. App. 215.

Louisiana.— King *v.* Preston, 11 La. Ann. 95.

Maine.— Whitehouse *v.* Cargill, 88 Me. 479, 34 Atl. 276; McIntire *v.* Plaisted, 68 Me. 363.

West Virginia.— Dunbrack *v.* Neall, 55 W. Va. 565, 47 S. E. 303.

England.—Castellain *v.* Preston, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. Rep. N. S. 29, 31 Wkly. Rep. 559; Rayner *v.* Preston, 18 Ch. D. 1, 45 J. P. 829, 50 L. J. Ch. 472, 44 L. T. Rep. N. S. 787, 29 Wkly. Rep. 546.

See 28 Cent. Dig. tit. "Insurance," § 1440.

The purchaser is not entitled to the insurance money, although the insured has parted with all his interest in the property before the loss.

Massachusetts.—Wilson *v.* Hill, 3 Metc. 66.

New York.— Lett *v.* Guardian F. Ins. Co., 52 Hun 570, 5 N. Y. Suppl. 526.

Ohio.—Walker *v.* Firemen's Ins. Co., 2 Handy 256, 12 Ohio Dec. (Reprint) 431.

Tennessee.— Hobbs *v.* Memphis Ins. Co., 1 Sneed 444.

Canada.— Forgie *v.* Royal Ins. Co., 16 L. C. Jur. 34.

See 28 Cent. Dig. tit. "Insurance," § 1440.

Option to purchase.— A tenant exercising an option to purchase after loss by fire covered by policy taken by the landlord under the contract of lease is entitled to the benefit of the insurance money. Edwards *v.* West, 7 Ch. D. 858, 47 L. J. Ch. 463, 38 L. T. Rep. N. S. 481, 26 Wkly. Rep. 507. But see Reynard *v.* Arnold, L. R. 10 Ch. 386, 23 Wkly. Rep. 804.

46. Reed *v.* Lukens, 44 Pa. St. 200, 84 Am. Dec. 425.

If the vendee uses the insurance money for repairing the loss to the property, the vendor has no right to recover the insurance money from him. Sheridan *v.* Peninsular Sav. Bank, 116 Mich. 545, 74 N. W. 874.

The vendor, insuring for the benefit of the vendee, may recover the full amount of the

6. Mortgagor and Mortgagee — a. In General. As the mortgagor and mortgagee each has an insurable interest in the mortgaged property, insurance taken by one on his own interest does not in any way inure to the benefit of the other.[47]

b. Insurance For Benefit of Mortgagee — (I) *Recovery by Mortgagee* — (A) *In General.* If the insurance is taken by the mortgagor for the benefit of the mortgagee, then the mortgagee is entitled to maintain an action on, and recover the proceeds of the policy,[48] to the full amount of the insurance,[49] holding the surplus, however, after the extinguishment of his debt for the benefit of the mortgagor.[50] But the mortgagee cannot recover under such circumstances after his debt has been fully satisfied,[51] the proceeds in such event being payable to the mortgagor.[52]

(B) *Application of Proceeds.* The mortgagee is under obligation to apply the proceeds of insurance taken by the mortgagor for the mortgagee's benefit to the satisfaction or reduction of the mortgage debt.[53]

(C) *Other Insurance.* The mortgagee is not entitled to any advantage of other insurance not taken for his benefit.[54]

(II) *Recovery by Mortgagor.* On the other hand, although the policy is

insurance, accounting to the vendee for the balance over the unpaid purchase-money. Keefer *v.* Phœnix Ins. Co., 31 Can. Sup. Ct. 144.

47. *Alabama.*— Ridley *v.* Ennis, 70 Ala. 463; Vandegraaff *v.* Medlock, 3 Port. 389, 29 Am. Dec. 256.

Illinois.— Fergus *v.* Wilmarth, 117 Ill. 542, 7 N. E. 508 [*affirming* 17 Ill. App. 98]; Lindley *v.* Orr, 83 Ill. App. 70.

Indiana.— Nordyke, etc., Co. *v.* Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

Iowa.— Ryan *v.* Adamson, 57 Iowa 30, 10 N. W. 287.

Ohio.— McDonald *v.* Black, 20 Ohio 185, 55 Am. Dec. 448.

Pennsylvania.— Carnes *v.* Farmers' F. Ins. Co., 20 Pa. Super. Ct. 634.

Rhode Island.— Nichols *v.* Baxter, 5 R. I. 491.

United States.— Columbia Ins. Co. *v.* Lawrence, 10 Pet. 507, 9 L. ed. 512; Farmers' L. & T. Co. *v.* Penn Plate-Glass Co., 103 Fed. 132, 43 C. C. A. 114, 56 L. R. A. 710.

Canada.— Goldie *v.* Hamilton Bank, 31 Ont. 142.

See 28 Cent. Dig. tit. "Insurance," § 1441.

48. Aachen, etc., F. Ins. Co. *v.* Crawford, 199 Ill. 367, 65 N. E. 134 [*affirming* 100 Ill. App. 454]; Bartlett *v.* Iowa State Ins. Co., 77 Iowa 86, 41 N. W. 579; Stainer *v.* Royal Ins. Co., 6 Northam. Co. Rep. (Pa.) 362; Harris *v.* Gaspee F. & M. Ins. Co., 9 R. I. 207. And see Harryman *v.* Collins, 18 Beav. 11, 18 Jur. 501, 52 Eng. Reprint 5; Garden *v.* Ingram, 23 L. J. Ch. 478.

49. Panhandle Nat. Bank *v.* Security Co., 18 Tex. Civ. App. 96, 44 S. W. 15; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

50. Cone *v.* Niagara F. Ins. Co., 60 N. Y. 619; Baltis *v.* Dobin, 67 Barb. (N. Y.) 507.

51. During the period for redemption the mortgage is not fully satisfied and the mortgagee must apply the proceeds for the benefit of the mortgagor having a right to redeem. Carlson *v.* Presbyterian Bd. of Relief, 67 Minn. 436, 70 N. W. 3; Russel *v.* Robertson, 6 Can. L. J. O. S. 143. But the purchaser from the mortgagor of the right to redeem may insure his own interest and is not bound to account to the mortgagee therefor. Cushing *v.* Thompson, 34 Me. 496.

52. *California.*— Reynolds *v.* London, etc., F. Ins. Co., 128 Cal. 16, 60 Pac. 467, 79 Am. St. Rep. 17; D. O. Mills, etc., Nat. Bank *v.* Union Ins. Co., 88 Cal. 497, 26 Pac. 509, 22 Am. St. Rep. 324.

Illinois.— Norwich F. Ins. Co. *v.* Boomer, 52 Ill. 442, 4 Am. Rep. 618.

Nebraska.— Billings *v.* German Ins. Co., 34 Nebr. 502, 52 N. W. 397.

New Hampshire.— Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110.

New York.— Thomas *v.* Montauk F. Ins. Co., 43 Hun 218.

Texas.— Phœnix Assur. Co. *v.* Allison, (Civ. App. 1894) 27 S. W. 894.

See 28 Cent. Dig. titl "Insurance," § 1445.

53. *Kansas.*— Home Ins. Co. *v.* Marshall, 48 Kan. 235, 29 Pac. 161.

Maine.— Concord Union Mut. F. Ins. Co. *v.* Woodbury, 45 Me. 447.

Minnesota.— Sterling F. Ins. Co. *v.* Beffrey, 48 Minn. 9, 50 N. W. 922.

Missouri.— McDowell *v.* Morath, 64 Mo. App. 290.

New Hampshire.— Smith *v.* Packard, 19 N. H. 575.

See 28 Cent. Dig. tit. "Insurance," § 1447.

54. *Illinois.*— Wilson *v.* Guyer, 53 Ill. App. 348; Wilson *v.* Hakes, 36 Ill. App. 539.

Indiana.— Nordyke, etc., Co. *v.* Gery, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

Minnesota.— Ames *v.* Richardson, 29 Minn. 330, 13 N. W. 137.

Missouri.— Kirchgraber *v.* Park, 57 Mo. App. 35.

United States.— Wheeler *v.* Factors, etc., Ins. Co., 101 U. S. 439, 25 L. ed. 1055.

See 28 Cent. Dig. tit. "Insurance," § 1444 *et seq.*

not made payable to the mortgagee, yet if it is procured by the mortgagor under an obligation previously assumed to insure for the mortgagee's benefit, the proceeds recovered by the mortgagor are held in trust for the mortgagee, who is deemed to have an equitable lien on the proceeds of the insurance for the satisfaction of his mortgage.[55] But the right of action on the policy is in the mortgagor in whose name and for whose benefit it is taken, notwithstanding the equitable right of the mortgagee to the proceeds.[56]

7. Persons Holding Property in Trust; Bailee, Etc. One who holds property in trust for another and insures it as trustee holds the proceeds of the insurance as he would the property for the beneficiary.[57] It is usual for bailees, carriers, factors, consignees, and others who hold property in trust to insure for the benefit of "whom it may concern," and the owners of the property covered by such a policy are entitled to share *pro rata* in the proceeds.[58] And one having an interest in the property may claim the advantage of the policy, although it

55. *District of Columbia.*— Brown *v.* Commercial F. Ins. Co., 21 App. Cas. 325.

Illinois.— Lindley *v.* Orr, 83 Ill. App. 70; Elgin Lumber Co. *v.* Langman, 23 Ill. App. 250.

Iowa.— Lewis *v.* Council Bluffs Ins. Co., 63 Iowa 193, 18 N. W. 888.

Kansas.— Chipman *v.* Carroll, 53 Kan. 163, 35 Pac. 1109, 25 L. R. A. 305; Branch *v.* Milford Sav. Bank, 5 Kan. App. 246, 47 Pac. 555.

Maryland.— Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184; Giddings *v.* Seevers, 24 Md. 363.

Massachusetts.— Hazard *v.* Draper, 7 Allen 267.

New York.—Reid *v.* McCrum, 91 N. Y. 412; Hathaway *v.* Orient Ins. Co., 11 N. Y. Suppl. 413 [*affirmed* in 134 N. Y. 409, 32 N. E. 40, 17 L. R. A. 514].

Ohio.— James *v.* West, 67 Ohio St. 28, 65 N. E. 156.

Pennsylvania.— People's St. R. Co. *v.* Spencer, 156 Pa. St. 85, 27 Atl. 113, 36 Am. St. Rep. 22; Insurance Co. of Pennsylvania *v.* Phœnix Ins. Co., 71 Pa. St. 31.

Rhode Island.— Nichols *v.* Baxter, 5 R. I. 491.

South Carolina.— Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722.

United States.— Wheeler *r.* Factors', etc., Ins. Co., 101 U. S. 439, 25 L. ed. 1055; Connecticut Mut. L. Ins. Co. *v.* Scammon, 4 Fed. 263.

See 28 Cent. Dig. tit. "Insurance," § 1444 *et seq.*

After acquisition of mortgage.— The mortgagee has no equitable right to insurance taken by the mortgagor for the mortgagee's benefit after the acquisition of the mortgage, and without any new consideration. Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722.

If the mortgagor uses the proceeds in restoring the property the mortgagee cannot complain. Matter of Moore, 6 Daly (N. Y.) 541; Huey *v.* Ewell, 22 Tex. Civ. App. 638, 55 S. W. 606.

If the policy covers property not mortgaged as well as mortgaged property, the equitable lien of the mortgagee covers only the portion of the proceeds representing the loss to the mortgaged property. Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126; Wilcox *v.* Mutual F. Ins. Co., 81 Minn. 478, 84 N. W. 334; Parker *v.* Ross, 73 Tex. 633, 11 S. W. 865; Washington Nat. Bank *v.* Smith, 15 Wash. 160, 45 Pac. 736.

If without knowledge of the mortgagee's equitable lien the insurance is paid to the mortgagor the mortgagee has no claim against the company. Stearns *v.* Quincy Mut. F. Ins. Co., 124 Mass. 61, 26 Am. Rep. 647.

The mortgagee is not entitled to priority over one for whose benefit the policy is directly taken. Palmer Sav. Bank *v.* Insurance Co. of North America, 166 Mass. 189, 44 N. E. 211, 55 Am. St. Rep. 387, 32 L. R. A. 615; Dunlop *v.* Avery, 89 N. Y. 592 [*reversing* 23 Hun 509]; Bristol Bank, etc., Co. *v.* Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228.

56. Minnock *v.* Eureka F. & M. Ins. Co., 90 Mich. 236, 51 N. W. 367 [*distinguishing* Richelieu, etc., Nav. Co. *v.* Thames, etc., Ins. Co., 58 Mich. 132, 24 N. W. 547]; Kane *v.* Hibernia Mut. F. Ins. Co., 38 N. J. L. 441, 20 Am. Rep. 409.

57. Hawes *v.* Lathrop, 38 Cal. 493; Phœnix Ins. Co. *v.* Mitchell, 67 Ill. 43; Mosher *v.* Lansing Lumber Co., 112 Mich. 517, 71 N. W. 161; Howard F. Ins. Co. *v.* Chase, 5 Wall. (U. S.) 509, 18 L. ed. 524.

Partner for firm.— Thus insurance effected on partnership property by a member of the firm in his own name is for the benefit of the partnership (Tebbetts *v.* Dearborn, 74 Me. 392) and the surviving partner of the partnership may maintain an action on a policy issued to the firm (Oakman *v.* Dorchester Mut. F. Ins. Co., 98 Mass. 57).

58. *Alabama.*— Snow *v.* Carr, 61 Ala. 363, 32 Am. Rep. 3; Durand *v.* Thouron, 1 Port. 238.

Massachusetts.— Johnson *v.* Campbell, 120 Mass. 449.

Mississippi.— Hope Oil Mill, etc., Co. *v.* Phœnix Assur. Co., 74 Miss. 320, 21 So. 132.

Missouri.— Beidelman *v.* Powell, 10 Mo. App. 280.

New York.— Waring *v.* Indemnity F. Ins. Co., 45 N. Y. 606, 6 Am. Rep. 146; Matter of McElheny, 91 N. Y. App. Div. 131, 86 N. Y. Suppl. 326 [*affirmed* in 178 N. Y. 610, 70

was taken without his direction or knowledge, ratification of the act of the holder of the property insuring it for the benefit of others being sufficient.[59] However if the insurance is really for the benefit of the insured, although the policy is payable to others as their interests may appear, the insured is entitled to the entire proceeds.[60]

8. Legal Representatives. Where the policy runs to the insured and his "legal representatives," and the loss occurs after the death of the insured, any person natural or artificial who by operation of law stands in the place of and represents the insured is entitled to recover under the policy.[61] But the legal representative holds the proceeds in the same right and interest as he would hold the property.[62]

B. Right of Lien-Holder. One who has a lien only on the insured property has no claim to the insurance money realized by the insured in the event of a loss of the property, for a claim on the insurance money can arise only out of contract.[63]

C. Right of Creditor — 1. In General. A general creditor of the owner of the property has no insurable interest therein,[64] and accordingly he has no claim

N. E. 1102]; Dakin *v.* Liverpool, etc., Ins. Co., 13 Hun 122; Stilwell *v.* Staples 6 Duer 63 [*reversed* in 19 N. Y. 401].

Pennsylvania.— Thomas *v.* Cummiskey, 108 Pa. St. 354; Stetson *v.* Insurance Co., 4 Phila. 8.

Tennessee.— Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518.

United States.— Sturm *v.* Boker, 150 U. S. 312, 14 S. Ct. 99, 37 L. ed. 1093; Hooper *v.* Robinson, 98 U. S. 528, 25 L. ed. 219; Pennefeather *v.* Baltimore Steam-Packet Co., 58 Fed. 481.

See 28 Cent. Dig. tit. "Insurance," § 1449.

59. *Alabama.*— Snow *v.* Carr, 61 Ala. 363, 32 Am. Rep. 3; Watkins *v.* Durand, 1 Port. 251; Durand *v.* Thouron, 1 Port. 238.

Illinois.— Fish *v.* Seeberger, 154 Ill. 30, 39 N. E. 982 [*affirming* 47 Ill. App. 580].

Missouri.— Ferguson *v.* Pekin Plow Co., 141 Mo. 161, 42 S. W. 711.

Pennsylvania.— Miltenberger *v.* Beacom, 9 Pa. St. 198.

Texas.— Southern Cold Storage, etc., Co. *v.* Dechman, (Civ. App. 1903) 73 S. W. 545.

See 28 Cent. Dig. tit. "Insurance," § 1448.

60. *Louisiana.*— Alliance Mar. Assur. Co. *v.* Louisiana State Ins. Co., 8 La. 1, 28 Am. Dec. 117.

Massachusetts.— Reitenbach *v.* Johnson, 129 Mass. 316.

New York.— New York *v.* Hamilton F. Ins. Co., 10 Bosw. 537; Owen *v.* Farmers' Joint Stock Ins. Co., 10 Abb. Pr. N. S. 166 note.

Wisconsin.—Wunderlich *v.* Palatine F. Ins. Co., 104 Wis. 395, 80 N. W. 471.

United States.— Virginia-Carolina Chemical Co. *v.* Sundry Ins. Companies, 108 Fed. 451.

See 28 Cent. Dig. tit. "Insurance," § 1448.

A carrier insuring property in his possession belonging to different owners is entitled to have the proceeds as to each owner applied to any claim in behalf of such owner against the carrier. Home Ins. Co. *v.* Minneapolis, etc., R. Co., 71 Minn. 296, 74 N. W. 140.

A warehouseman insuring his own goods and those of others in his possession is entitled to his share of the proceeds. Boyd *v.* McKee, 99 Va. 72, 37 S. E. 810. And his failure to make proofs of loss for the bailor (his own loss exceeding the insurance) will not prejudice the bailor's rights. Snow *v.* Carr, 61 Ala. 363, 32 Am. Rep. 3.

61. German Ins. Co. *v.* Wright, 6 Kan. App. 611, 49 Pac. 704; Alford *v.* Consolidated F. & M. Ins. Co., 88 Minn. 478, 93 N. W. 517; Herkimer *v.* Rice, 27 N. Y. 163; Parry *v.* Ashley, 3 Sim. 97, 6 Eng. Ch. 97.

A receiver is within the term "legal representative." Alford *v.* Consolidated F. & M. Ins. Co., 88 Minn. 478, 93 N. W. 517.

"Heirs and assigns."— Under a policy in favor of insured "his heirs and assigns" it was held that the proceeds of a loss after his death should go to heirs and assigns of the property. Keefer *v.* Phœnix Ins. Co., 29 Ont. 394.

62. *Minnesota.*— Culbertson *v.* Cox, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204.

Missouri.— Dix *v.* German Ins. Co., 65 Mo. App. 34.

North Carolina.— Graham *v.* Roberts, 43 N. C. 99.

Pennsylvania.— Nichols' Appeal, 128 Pa. St. 428, 18 Atl. 333, 5 L. R. A. 597.

South Carolina.— Clyburn *v.* Reynolds, 31 S. C. 91, 9 S. E. 973.

63. *Illinois.*— Lindley *v.* Orr, 83 Ill. App. 70.

Maryland.— Eichelberger *v.* Miller, 20 Md. 332.

New Hampshire.— Rackley *v.* Scott, 61 N. H. 140.

New York.— Carter *v.* Rockett, 8 Paige 437.

Pennsylvania.— Mosser *v.* Donaldson, 7 Pa. Cas. 277, 10 Atl. 766.

Tennessee.— Galyon *v.* Ketchem, 85 Tenn. 55, 1 S. W. 508.

United States.— Kortlander *v.* Elston, 52 Fed. 180, 2 C. C. A. 657.

See 28 Cent. Dig. tit. "Insurance," § 1439.

64. See *supra*, II, C, 2.

on the proceeds of a policy of insurance thereon taken out by the owner thereof.[65]

2. Effect of Assignment — a. In General. An equitable assignment of the insurance is good as against creditors.[66]

b. By Way of Collateral Security. However, an assignment of the insurance to a creditor by way of collateral security gives to such creditor a prior claim on the proceeds of the insurance.[67]

3. Attaching Creditor. On the other hand an attaching creditor who has himself obtained insurance on the property is not bound to apply the proceeds of such insurance to the benefit of the debtor.[68]

XX. DISCHARGE OF LIABILITY.

A. Option to Restore or Repair — 1. Election. The privilege usually reserved to the company to restore or repair the property instead of paying the amount of the insurance must be exercised by some unequivocal act indicating its intention to avail itself of the provisions of the policy in this respect.[69] The

Insurance by an administrator of an insolvent estate is for the benefit of the creditors so far as required to pay the debts of the estate. Herkimer *v.* Rice, 27 N. Y. 163.

65. *Maryland.*— Giddings *v.* Seevers, 24 Md. 363.

Michigan.— Williams *v.* Buchanan Mfg. Co., 102 Mich. 49, 60 N. W. 308.

New Hampshire.— Burbank *v.* McCluer, 54 N. H. 339.

New York.—Leinkauf *v.* Calman, 110 N. Y. 50, 17 N. E. 389; Mapes *v.* Coffin, 5 Paige 296.

Wisconsin.— Manson *v.* Phœnix Ins. Co., 64 Wis. 26, 24 N. W. 407, 54 Am. Rep. 573.

England.— Westminster Fire Office *v.* Glasgow Provident Invest. Soc., 13 App. Cas. 699, 59 L. T. Rep. N. S. 641.

See 28 Cent. Dig. tit. "Insurance," § 1453 *et seq.*

Even after levying on the property the creditor has no interest in an insurance policy which the debtor has placed upon the property nor in the proceeds of such insurance. Lindley *v.* Orr, 83 Ill. App. 70.

In case of fraudulent conveyance.— Property having been conveyed by the husband to his wife in fraud of creditors it was held that insurance taken out by the wife on such property could not be reached by creditors of the husband. St. Paul F. & M. Ins. Co. *v.* Brunswick Grocery Co., 113 Ga. 786, 39 S. E. 483.

66. *Illinois.*— Greenwich Ins. Co. *v.* Columbia Mfg. Co., 73 Ill. App. 560.

Massachusetts.— Providence County Bank *v.* Benson, 24 Pick. 204.

Missouri.— Parks *v.* Connecticut F. Ins. Co., 26 Mo. App. 511.

New York.— Mickles *v.* Rochester City Bank, 11 Paige 118, 42 Am. Dec. 103.

South Carolina.— Swearingen *v.* Hartford Ins. Co., 52 S. C. 309, 29 S. E. 722.

Wisconsin.— Edwards *v.* Agricultural Ins. Co., 88 Wis. 450, 60 N. W. 782.

See 28 Cent. Dig. tit. "Insurance," § 1453 *et seq.*

Payment after notice of assignment.— The company paying the proceeds of insurance to the insured or his creditors with notice of an equitable assignment does not discharge itself of liability to the assignee. Grange Mill Co. *v.* Western Assur. Co., 118 Ill. 396, 9 N. E. 274; Allyn *v.* Allyn, 154 Mass. 570, 28 N. E. 779; Cromwell *v.* Brooklyn F. Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583.

67. Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78; Ellis *v.* Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270; Leinauf *v.* Calman, 110 N. Y. 50, 17 N. E. 389.

Proper party plaintiff.— Action at law on the policy should, however, be brought by the insured and not by the creditor, under an assignment made by way of collateral security. Peabody *v.* Washington County Mut. Ins. Co., 20 Barb. (N. Y.) 339.

68. International Trust Co. *v.* Boardman, 149 Mass. 158, 23 N. E. 239. And see Archambault *v.* Galarneau, 22 L. C. Jur. 105.

69. *Iowa.*— Zalesky *v.* Iowa State Ins. Co., 106 Iowa 512, 70 N. W. 187, 71 N. W. 433.

Louisiana.— Daul *v.* Firemen's Ins. Co., 35 La. Ann. 98.

Maryland.— Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170.

Missouri.— Rieger *v.* Mechanics' Ins. Co., 69 Mo. App. 674.

New York.— McAllaster *v.* Niagara F. Ins. Co., 156 N. Y. 80, 50 N. E. 502.

Pennsylvania.— Philadelphia Fire Assoc. *v.* Rosenthal, 108 Pa. St. 474, 1 Atl. 303.

Texas.— Northwestern Nat. Ins. Co. *v.* Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185.

England.— Anderson *v.* Commercial Union Assur. Co., 55 L. J. Q. B. 146, 34 Wkly. Rep. 189.

See 28 Cent. Dig. tit. "Insurance," § 1486.

Impossibility.— If by reason of building ordinances it is made unlawful to repair or restore the building the company must pay the insurance money. Brady *v.* Northwestern Ins. Co., 11 Mich. 425; Philadelphia Fire Assoc. *v.* Rosenthal, 108 Pa. St. 474, 1 Atl. 303; Brown *v.* Royal Ins. Co., 1 E. & E. 853, 5 Jur. N. S. 1255, 27 L. J. Q. B. 275, 7 Wkly. Rep. 479, 102 E. C. L. 853. And if the building is incapable of being put in

option must be exercised within the time prescribed by the policy.[70] In the absence of any provision in the contract authorizing it, the company has no option of repairing or restoring but must pay the amount of the loss.[71] And statutory provisions requiring that the company in case of total loss[72] shall pay the full amount of the insurance are inconsistent with and nullify any stipulation of the policy as to right to replace or repair.[73]

2. Waiver — a. In General. If the company has by waiving its right to replace the property elected to pay the loss, such election becomes irrevocable and fixes the rights and duties of the respective parties.[74] Thereafter the insured cannot waive the obligation of the company to pay as against a mortgagee;[75] nor can a judgment creditor insist that the company shall replace or repair for the benefit of such creditor.[76]

b. Assent to Assignment. The assent of the insurer to an assignment after loss does not waive the option to replace the property.[77]

c. Election to Arbitrate. An election to arbitrate or to submit to appraisers the amount of the loss is a waiver of the right to rebuild or repair.[78]

3. Effect of Exercise. After an insurance company has elected to restore or repair the insured property its liability is for breach of the obligation[79] to restore

the same condition in which it was before the loss the company will be liable under its obligation to pay. Northwestern Nat. Ins. Co. *v.* Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185. See *supra*, XVI, A, 1, c.

The act of the insured in beginning repairs before the expiration of the time in which the company may elect to repair will not defeat his action on the policy. Eliot Five Cents Sav. Bank *v.* Commercial Union Assur. Co., 142 Mass. 142, 7 N. E. 550.

70. *Illinois.*—Insurance Co. of North America *v.* Hope, 58 Ill. 75, 11 Am. Rep. 48.

Maryland.— Maryland Home F. Ins. Co. *v.* Kimmell, 89 Md. 437, 43 Atl. 764.

New York.— Clover *v.* Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724; McAllister *v.* Niagara F. Ins. Co., 84 Hun 322, 32 N. Y. Suppl. 353; Beals *v.* Home Ins. Co., 36 Barb. 614 [*affirmed* in 36 N. Y. 522].

Pennsylvania.— Kelly *v.* Sun Fire Office, 141 Pa. St. 10, 21 Atl. 447, 23 Am. St. Rep. 254.

United States.— Lancashire Ins Co. *v.* Barnard, 111 Fed. 702, 49 C. C. A. 559; Langan *v.* Ætna Ins. Co., 96 Fed. 705.

See 28 Cent. Dig. tit. "Insurance," § 1486.

The insurer is not entitled to have the insured enjoined from removing or disposing of his remaining goods pending the exercise of the company of the right to elect to replace them. New York F. Ins. Co. *v.* Delavan, 8 Paige (N. Y.) 419.

71. Wallace *v.* Insurance Co., 4 La. 289; Bradfield *v.* Union Mut. Ins. Co., 10 Pa. L. J. 550.

72. "Total loss" as referred to in such a statute means that the building has lost its specific character and identity as a building. Royal Ins. Co. *v.* McIntyre, (Tex. Civ. App. 1896) 34 S. W. 669. And see *supra*, XVI, A, 1, b.

73. Milwaukee Mechanics' Ins. Co. *v.* Russell, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159; Royal Ins. Co. *v.* McIntyre, (Tex. Civ. App. 1896) 34 S. W. 669; Phœnix Ins. Co. *v.* Levy, 12 Tex. Civ. App. 45, 33 S. W. 992.

In Wisconsin a statute reserves to the company the right to rebuild or repair. Temple *v.* Niagara F. Ins. Co., 109 Wis. 372, 85 N. W. 361.

74. Philadelphia Fire Assoc. *v.* Rosenthal, 108 Pa. St. 474, 1 Atl. 303.

75. Iowa Cent., etc., Assoc. *v.* Merchants', etc., F. Ins. Co., 120 Iowa 530, 94 N. W. 1100.

76. Stamps *v.* Commercial F. Ins. Co., 77 N. C. 209, 24 Am. Rep. 443.

77. Tolman *v.* Manufacturers' Ins. Co., 1 Cush. (Mass.) 73.

78. Platt *v.* Ætna Ins. Co., 153 Ill. 113, 38 N. E. 580, 46 Am. St. Rep. 877, 26 L. R. A. 853 [*reversing* 53 Ill. App. 107]; Elliott *v.* Merchants', etc., F. Ins. Co., 109 Iowa 39, 79 N. W. 452; Alliance Co-operative Ins. Co. *v.* Arnold, 65 Kan. 163, 69 Pac. 174; McAllaster *v.* Niagara F. Ins. Co., 156 N. Y. 80, 50 N. E. 502 [*affirming* 84 Hun 322, 32 N. Y. Suppl. 353].

The submission may be so qualified, however, as to preserve the right of the company to rebuild or repair. Platt *v.* Ætna Ins. Co., 153 Ill. 113, 38 N. E. 580, 46 Am. St. Rep. 877, 26 L. R. A. 853 [*affirming* 40 Ill. App. 191, 53 Ill. App. 107].

79. *Louisiana.*— Henderson *v.* Crescent Ins. Co., 48 La. Ann. 1176, 20 So. 658, 35 L. R. A. 385.

Massachusetts.— Parker *v.* Eagle F. Ins. Co., 9 Gray 152.

New York.— Heilmann *v.* Westchester F. Ins. Co., 75 N. Y. 7; Beals *v.* Home Ins. Co., 36 N. Y. 522; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

Ohio.— Good *v.* Buckeye Mut. F. Ins. Co., 43 Ohio St. 394, 2 N. E. 420.

Pennsylvania.— Philadelphia Fire Assoc. *v.* Rosenthal, 108 Pa. St. 474, 1 Atl. 303.

United States.— Hartford F. Ins. Co. *v.* Peebles' Hotel Co., 82 Fed. 546, 27 C. C. A. 223; Collins *v.* Ætna Ins. Co., 6 Fed. Cas. No. 3,009.

See 28 Cent. Dig. tit. "Insurance," § 1488 *et seq.*

or repair, and not under the obligation to pay the insurance, and the rights and remedies of the insured are governed accordingly.[80]

B. Payment of Loss — 1. Time and Place. Under usual provisions in policies the company has a specified time, sixty days for instance, in which to pay after notice and proofs of loss;[81] but such a stipulation has reference to the preliminary proofs and not to subsequent duplicate bills or other instruments or certificates which the insured may be required to furnish.[82] Where no place is stipulated for payment of loss it will be regarded as payable in the state,[83] and at the head office of the insurer.[84]

2. To Whom Made. Payment to the person who by the terms of the policy is entitled to receive payment for loss will as a general rule relieve the company.[85] Valid payment may be made, however, to one who under the circumstances is authorized to receive the money for the insured.[86]

3. Method of Making.[87] Payment may be made in any method by which a debt may be discharged.[88]

80. Franklin F. Ins. Co. *v.* Hamill, 5 Md. 170; Beals *v.* Home Ins. Co., 36 N. Y. 522 [*affirming* 36 Barb. 614]; Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

Failure to replace or repair.— The election to replace or repair is not a defense to the action unless the company has substantially performed its obligations in this respect. Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202; Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432.

Liability for loss of rent.— Having elected to repair, the company is not liable for damages on account of loss of rent during the reasonable time necessary for making repairs. St. Paul F. & M. Ins. Co. *v.* Johnson, 77 Ill. 598. But the insured may recover rental value for any unnecessary delay. Philadelphia Fire Assoc. *v.* Rosenthal, 108 Pa. St. 474, 1 Atl. 303.

Refusal of the insured to furnish plans and specifications of the original building, on the election of the company to repair, estops him from complaining that the new parts do not correspond with the original. Collins *v.* Ætna Ins. Co., 6 Fed. Cas. No. 3,009.

Destruction of restored building.— Where the company exercises the option to restore the buildings covered by the policy, and while the policy still continues in force the restored buildings are destroyed by fire, the owner is entitled to recover the difference between the expense of restoring and the total insurance specified in the policy. Trull *v.* Roxbury Mut. F. Ins. Co., 3 Cush. (Mass.) 263.

81. Doyle *v.* Phœnix Ins. Co., 44 Cal. 264; Cargill *v.* Millers', etc., Mut. Ins. Co., 33 Minn. 90, 22 N. W. 6; State Ins. Co. *v.* Maackens, 38 N. J. L. 564; Kirk *v.* Ohio Valley Ins. Co., 8 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200. And see *infra*, XXI, C, 1.

82. Ætna Ins. Co. *v.* McLead, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320; McNally *v.* Phœnix Ins. Co., 137 N. Y. 389, 33 N. E. 475 [*reversing* 16 N. Y. Suppl. 696]; Clover *v.* Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724.

Effect of waiver of proofs.— The provision for sixty days in which to make payment after the furnishing of proofs is waived by waiver of proofs. Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779. And if proofs are waived by the requirement of an appraisement or examination, the loss is payable at least within sixty days after the completion of such appraisement or examination. Badger *v.* Phœnix Ins. Co., 49 Wis. 396, 5 N. W. 848; Lancashire Ins. Co. *v.* Barnard, 111 Fed. 702, 49 C. C. A. 559.

83. Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297, 21 Atl. 538.

Place of performance in general see *supra*, XI, G.

84. Clark *v.* Union F. Ins. Co., 10 Ont. Pr. 313. *Compare* Curnow *v.* Phœnix Ins. Co., 37 S. C. 406, 16 S. E. 132, 34 Am. St. Rep. 766, where it is held that a stipulation that the loss shall be payable sixty days after proofs have been received at the home office does not imply that the loss is payable at the home office.

85. This is true notwithstanding any arrangement between the insured and a third person not brought to the knowledge of the company, by which the third person is entitled to receive the amount of the insurance.

Maine.— Burns *v.* Collins, 64 Me. 215.

Maryland.— Wm. Skinner, etc., Ship-Building, etc., Co. *v.* Houghton, 92 Md. 68, 48 Atl. 85, 84 Am. St. Rep. 485.

Minnesota.— Linder *v.* Fidelity, etc., Co., 52 Minn. 304, 54 N. W. 95.

New York.— Smith *v.* Agricultural Ins. Co., 6 N. Y. St. 127.

South Carolina.— Swearingen *v.* Hartford F. Ins. Co., 56 S. C. 355, 34 S. E. 449.

See 28 Cent. Dig. tit. "Insurance," § 1496.

But if the insurer has knowledge of the right of a third person to receive the proceeds, it cannot make payment to one who is not entitled to such proceeds. Haskell *v.* Monmouth F. Ins. Co., 52 Me. 128; Clark *v.* German Ins. Co., 84 Mo. App. 243.

86. Slocomb *v.* Merchants' Mut. Ins. Co., 24 La. Ann. 291; Braden *v.* Louisiana State Ins. Co., 1 La. 220, 20 Am. Dec. 277; Erick *v.* Johnson, 6 Mass. 193.

87. **Method of payment** generally see Payment.

88. See cases cited *infra*, this note.

C. Release[89] — **1. By Insured.** If the loss is payable to one of two persons jointly, a release by one will relieve the company of liability to the other.[90]

2. By Satisfaction From Third Party. As the contract of insurance is for indemnity, if the insured receives satisfaction or part satisfaction for his loss from another source, as for instance from a wrong-doer who has caused the loss,[91] or from other insurance,[92] the amount so received will be applied in full or partial discharge of the policy.

D. Recovery of Payments Made. Payments made to the insured by the

By draft.— Acceptance of a draft constitutes payment. Kern Brewing Co. *v.* Royal Ins. Co., 127 Mich. 39, 86 N. W. 388. But if the insurance company repudiates the settlement and refuses to pay the draft, the insured may bring suit on the policy. Insurance Co. of North America *v.* Osborn, 26 Ind. App. 88, 59 N. E. 181. On the other hand in a suit on the draft, the insurance company may set up as a defense that it was procured by false and fraudulent proofs. Miller *v.* Iron City Mut. F. Ins. Co., 4 Pa. Super. Ct. 605.

Conditional payment.— Where the money was paid to the insured under an agreement that he was to hold it as a loan until it was determined by a suit whether he or a third person was responsible for the loss, it was held as to him that the receipt of the money constituted payment. Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Lancaster Mills *v.* Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586.

Mutual companies; assessments.— If by its terms a policy in a mutual company is an absolute promise to pay, in event of loss, judgment may be rendered against the company, and insured is not limited to enforcing an assessment. Byrnes *v.* American Mut. F. Ins. Co., 114 Iowa 738, 87 N. W. 699. But if the business of the company is divided into classes, and only the funds derived from a particular class of business are to be used to pay losses in that class, an execution can be enforced only as to funds of the class to which the loss pertains. Naill *v.* Kansas Mut. F. Ins. Co., 47 Kan. 223, 27 Pac. 854, 45 Kan. 74, 25 Pac. 211; Kansas Farmers' Mut. F. Ins. Co. *v.* Amick, 45 Kan. 738, 26 Pac. 944; Judkins *v.* Union Mut. F. Ins. Co., 39 N. H. 172. If the policy provides that in event of loss the member shall be entitled only to the proceeds of an assessment he may by mandamus compel such assessment for his benefit. Perry *v.* Farmers Mut. F. Ins. Assoc., 132 N. C. 283, 43 S. E. 837. In the distribution of the proceeds of an assessment made to pay losses, all accrued losses should be paid *pro rata* without reference to prior indemnity. Richards *v.* New Hampshire Ins. Co., 43 N. H. 263.

89. Release generally see Release.

90. Ridge *v.* Home Ins. Co., 64 Mo. App. 108.

The doctrine that payment in part of the amount due on a contract at or after maturity does not operate as a satisfaction of the whole does not apply to an unliquidated loss under a fire policy. Riggs *v.* Home Mut. Fire Protection Assoc., 61 S. C. 448, 39 S. E. 614.

91. *Iowa.*— Kennedy *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831.

Kansas.— Atchison, etc., R. Co. *v.* Neet, 7 Kan. App. 495, 54 Pac. 134.

Maryland.— Svea Assur. Co. *v.* Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95.

New York.— Connecticut F. Ins. Co. *v.* Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171.

United States.— New England Mut. Mar. Ins. Co. *v.* Dunham, 18 Fed. Cas. No. 10,155, 3 Cliff. 332, 371.

See 28 Cent. Dig. tit. "Insurance," § 1499.

On the other hand the wrong-doer has no right to the benefits of the insurance and cannot rely either in full or *pro tanto* as a defense on the insurance money received by the owner of the property from his insurance. Hart *v.* Western R. Corp., 13 Metc. (Mass.) 99, 46 Am. Dec. 719; Perrott *v.* Sheaver, 17 Mich. 48; Mathews *v.* St. Louis, etc., R. Co., 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161; Clark *v.* Blything, 2 B. & C. 254, 3 D. & R. 489, 2 L. J. K. B. O. S. 7, 26 Rev. Rep. 334, 9 E. C. L. 118. Subrogation of insurance company to claim against wrong-doer see *infra*, XX, F, 1.

92. Norwich Union F. Ins. Soc. *v.* Wellhouse, 113 Ga. 970, 39 S. E. 397; Williamsburg City F. Ins. Co. *v.* Gwinn, 88 Ga. 65, 13 S. E. 837.

General release in terms.— Where the object of a release executed by insured and indorsed on the back of the policy on settling the same with the insurer was merely to secure the discharge of the debt mentioned in the release and the surrender and cancellation of the policy creating it, the fact that the release recited that the money was received "in full satisfaction of all loss or damage by fire which occurred on" a certain date would not extend the release to claims against the same company on account of the same fire arising under other policies. Post *v.* Ætna Ins. Co., 43 Barb. (N. Y.) 351.

Discharge of the company as to a part of the loss will not relieve it from liability for the remainder. Redfield *v.* Holland Purchase Ins. Co., 56 N. Y. 354, 15 Am. Rep. 424.

If the liability of different companies is pro rata, a release of one will not relieve another from payment of its share (Good *v.* Buckeye Mut. F. Ins. Co., 43 Ohio St. 394, 2 N. E. 420), and overpayment by one will not relieve another from its share of the liability (Fitzsimmons *v.* New Haven City F. Ins. Co., 18 Wis. 234, 86 Am. Dec. 761).

Receipt of a portion of the amount of the loss from one company furnishes no consid-

insurer by reason of fraud or false representations on the part of the insured,[93] or under the mistaken belief that the policy was valid, whereas it was in fact void by reason of some act by the insured,[94] may be recovered back. Joint action against the insured and his creditor as assignee will not lie to recover a payment although by joint check to them.[95] A bill in equity will not lie to recover back payment made by reason of fraud or mistake.[96]

E. Contribution[97] Against Other Insurers. As the insured is entitled only to indemnity, if he recovers his full loss from one company he thereby releases any other company which may be liable for the same loss;[98] but the company which is thus compelled to pay more than its proportionate share of the loss, for which both companies are liable may have contribution from the other company so as to make the loss fall upon them equitably in proportion to the insurance carried, under the same principle by which contribution is allowed as among cosureties.[99]

eration for the discharge of another company. Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347.

Indemnity paid by subsequent insurance.— If by stipulation in the policy the insurance company is liable only for the amount of the loss remaining unsatisfied by prior insurance, but is not to be entitled to contribution from subsequent insurance, the company cannot have the advantage of an indemnity paid by subsequent insurance. Palmer *v.* Great Western Ins. Co., 10 Misc. (N. Y.) 167, 30 N. Y. Suppl. 1044.

The insurer is not entitled to the advantage of insurance money paid by another company under a policy which was not valid. Knapp *v.* North Wales Mut. Live Stock Ins. Co., 11 Montg. Co. Rep. (Pa.) 119.

Where a policy was issued to three persons, and a loss having occurred the insurer proposed to two of the insured that it would pay them a given sum if they would release the entire policy, or a less sum if they would release their proportionate interest in the insurance money, and they accepted the latter proposition and signed a paper which the insurer represented to be a release of only their two-thirds interest, when in fact by its terms it was a release of the entire policy, the release did not discharge the obligation on the policy as to the insured person who did not join in the release, he having had no knowledge of its execution. Lumberman's Ins. Co. *v.* Preble, 50 Ill. 332.

93. McConnel *v.* Delaware Mut. Safety Ins. Co., 18 Ill. 228; Berkshire Mut. F. Ins. Co. *v.* Sturgis, 13 Gray (Mass.) 177.

Burden of proving the fraud and that the payment was made without knowledge thereof is upon the insurer. Rome Grocery Co. *v.* Greenwich Ins. Co., 110 Ga. 618, 36 S. E. 63; Berkshire Mut. F. Ins. Co. *v.* Sturgis, 13 Gray (Mass.) 177.

Affirmative fraud on the part of the insured must be shown. Hartford Live Stock Ins. Co. *v.* Matthews, 102 Mass. 221.

Recovery of excess.— If the fraud consists in obtaining payment in excess of the amount of actual loss, the company can only recover the excess. Western Assur. Co. *v.* Towle, 65 Wis. 247, 26 N. W. 104. Where through a fraudulent adjustment the company acknowledged its liability to the insured for a claim for which it was not in fact liable, and afterward by the direction of the insured paid the amount of the claim to a creditor, it was held that the company could not recover from the creditor the amount so paid, not exceeding the amount of his claim against the insured. Merchants' Ins. Co. *v.* Abbott, 131 Mass. 397.

94. Columbus Ins. Co. *v.* Walsh, 18 Mo. 229. One who effects a settlement with an insurance company under a policy conditioned to be void in case other insurance on the property is taken, knowing that the company is ignorant of the breach of the condition, is deemed to have conspired to defraud the company and may be compelled to refund the amount paid. Teutonia Ins. Co. *v.* Bussell, (Tenn. Ch. App. 1897) 48 S. W. 703.

The mistake must be clearly made out. Elting *v.* Scott, 2 Johns. (N. Y.) 157.

95. Merchants' Ins. Co. *v.* Abbott, 131 Mass. 397.

96. Charleston Ins. Co. *v.* Potter, 3 Desauss. (S. C.) 6.

97. **Contribution:** In general see CONTRIBUTION. Between sureties see PRINCIPAL AND SURETY.

98. See *supra*, XX, C, 2.

99. *Georgia.*— Williamsburg City F. Ins. Co. *v.* Gwinn, 88 Ga. 65, 13 S. E. 837.

Illinois.— Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553.

Louisiana.— Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

Maryland.—Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20; Whiting *v.* Independent Mut. Ins. Co., 15 Md. 297.

Massachusetts.—Wiggin *v.* Suffolk Ins. Co., 18 Pick. 145, 29 Am. Dec. 576.

Missouri.— Clem *v.* German Ins. Co., 36 Mo. App. 560.

New York.— Morrell *v.* Irving F. Ins. Co., 33 N. Y. 429, 88 Am. Dec. 396.

United States.— Thurston *v.* Koch, 23 Fed. Cas. No. 14,016, 4 Dall. 348.

See 28 Cent. Dig. tit. "Insurance," § 1502.

The rule has no application under provisions which are usual in fire policies rendering each company, in case of concurrent insurance, liable under its policy only for its proportional share. Hanover F. Ins. Co. *v.* Brown, 77 Md. 64, 25 Atl. 989, 27 Atl. 314, 39 Am.

F. Subrogation[1] — **1. As Against Person Bound to Indemnify — a. In General.** The rule as heretofore stated[2] in respect to satisfaction from a third party results in its just application in the further rule that if the loss is not satisfied by the third person thus legally bound for its satisfaction, and the insurance company is compelled to pay the loss, it is entitled to equitable subrogation to the claim of the insured against such third person to the extent to which the company has been compelled to pay for a loss which should have been paid by such third person;[3]

St. Rep. 386; Lucas *v.* Jefferson Ins. Co., 6 Cow. (N. Y.) 635; Meigs *v.* London Assur. Co., 126 Fed. 781; North British, etc., Ins. Co. *v.* London, etc., Ins. Co., 5 Ch. D. 569, 46 L. J. Ch. 537, 36 L. T. Rep. N. S. 629; McCausland *v.* Quebec F. Ins. Co., 25 Ont. 330. Liability in case of concurrent insurance see *supra*, XVI, C, 2.

1. Subrogation generally see Subrogation.

Distinguished from contribution.— One insurer after payment of a loss covered by its policy is not subrogated to the claim of the insured against another insurer, the remedy being by contribution. Home Ins. Co. *v.* Minneapolis, etc., R. Co., 71 Minn. 296, 74 N. W. 140. See also *supra*, XX, E.

2. Namely, the rule that a third person, such for instance as a wrong-doer who is legally liable to the insured to make good to him any loss which he has suffered, although it is covered by insurance, and that the insurance company therefore is released from liability on satisfaction of the loss by such third person. See *supra*, XX, C, 2.

3. *Arkansas.*— St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163, 18 S. W. 43.

California.— Liverpool, etc., Ins. Co. *v.* Southern Pac. Co., 125 Cal. 434, 58 Pac. 55.

Maine.— Leavitt *v.* Canadian Pac. R. Co., 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; Rockingham Mut. F. Ins. Co. *v.* Bosher, 39 Me. 253, 63 Am. Dec. 618.

Maryland.— Georgia Ins., etc., Co. *v.* Dawson, 2 Gill 365.

Massachusetts.—Hart *v.* Western R. Corp., 13 Metc. 99, 46 Am. Dec. 719.

Missouri.— Lumberman's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281.

New Jersey.— Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

New York.— Connecticut F. Ins. Co. *v.* Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171; Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun 182.

North Carolina.— Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. C. 75, 43 S. E. 548.

Pennsylvania.— Stoughton *v.* Manufacturers' Natural Gas Co., 165 Pa. St. 428, 30 Atl. 1001.

Tennessee.— Deming *v.* Merchants' Cotton-Press, etc., Co., 90 Tenn. 306, 17 S. W. 89, 13 L. R. A. 518; Louisville, etc., R. Co. *v.* Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Kentucky M. & F. Ins. Co. *v.* Western, etc., R. Co., 8 Baxt. 268.

Texas.— Houston Direct Nav. Co. *v.* Insurance Co. of North America, (Civ. App. 1895) 31 S. W. 560, 685.

Virginia.— Brighthope R. Co. *v.* Rogers, 76 Va. 443.

United States.— Liverpool, etc., Steam Co. *v.* Insurance Co. of North America, 129 U. S. 464, 9 S. Ct. 480, 32 L. ed. 800; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 9 S. Ct. 469, 32 L. ed. 788; Garrison *v.* Memphis Ins. Co., 19 How. 312, 15 L. ed. 656; The Sydney, 27 Fed. 119; The Montana, 22 Fed. 715, 22 Blatchf. 372; Mutual Safety Ins. Co. *v.* The George, 17 Fed. Cas. No. 9,981, Olcott 89; The Montana, 17 Fed. 377; The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490.

England.— West of England F. Ins. Co. *v.* Isaacs, (1897) 1 Q. B. 226, 66 L. J. Q. B. 36, 75 L. T. Rep. N. S. 564.

Canada.— Quebec F. Ins. Co. *v.* St. Louis & Molson, 1 L. C. Rep. 222, 2 R. J. R. Q. 472 [*affirmed* in 7 Moore P. C. 286, 13 Eng. Reprint 891]. See London Assur. Co. *v.* Sainsbury, 3 Dougl. 245, 26 E. C. L. 167; Mason *v.* Sainsbury, 3 Dougl. 61, 26 E. C. L. 51.

See 28 Cent. Dig. tit. "Insurance," § 1507.

Pro tanto.— Under equitable right the insurance company can recover only to the extent to which it has been compelled to reimburse the insured for his loss.

Illinois.— Chicago, etc., R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. 896.

Kansas.— Atchison, etc., R. Co. *v.* Neet, 7 Kan. App. 495, 54 Pac. 134.

Ohio.— Sun Oil Co. *v.* Ohio Farmers' Ins. Co., 15 Ohio Cir. Ct. 355, 8 Ohio Cir. Dec. 145.

Tennessee.— Cumberland Tel., etc., Co. *v.* Dooley, 110 Tenn. 104, 72 S. W. 457.

Wisconsin.— Wunderlich *v.* Chicago, etc., R. Co., 93 Wis. 132, 66 N. W. 1144.

See 28 Cent. Dig. tit. "Insurance," § 1506.

The insured is entitled to be fully indemnified and the company is not subrogated if his claim is not satisfied by the remedy against the wrong-doer. National F. Ins. Co. *v.* McLaren, 12 Ont. 682.

Under a statutory as well as a legal liability the insurer may recover against the wrong-doer. Crissey, etc., Lumber Co. *v.* Denver, etc., R. Co., 17 Colo. App. 275, 68 Pac. 670.

Where buildings are destroyed by the municipal authorities under such circumstances as to render the city liable to the owner, the insurance company on paying the loss is entitled to subrogation against the city. Pentz *v.* Ætna F. Ins. Co., 3 Edw. (N. Y.) 341.

After the company has paid the loss the insured cannot recover from the third person, whose wrong has caused it, as the right of action passes to the insurance company. Al-

but the recovery by the company is under the right of the insured, and if the insured has no right of action against the third person sought to be held liable, no such right will be acquired by the company.[4]

b. Assignment of Claim Against Third Person. To entitle the insurance company to assert its right by way of subrogation, no assignment of the claim against the third party liable to the insured is necessary.[5]

c. Invalidity of Claim Against Insurer. The third person liable for the loss cannot question the right of the insurance company on the ground that the claim of the insured against the company was not valid.[6]

d. Nature of Claim Against Third Person. The right of subrogation is not limited to cases where the liability of the third person is founded in tort. Any right of the insured to indemnity will pass to the insurer on payment of the loss.[7]

e. Release of Third Person by Insured. Recognition of the right of the company to subrogation leads to the further result that any release by the insured of a claim for indemnity from a third person liable to him for the loss will to that extent relieve the insurance company from liability under its policy.[8]

len *v.* Chicago, etc., R. Co., 94 Wis. 93, 68 N. W. 873.

4. Phœnix Ins. Co. *v.* Trenton Water Co., 42 Mo. App. 118; Michael *v.* Prussian Nat. Ins. Co., 171 N. Y. 25, 63 N. E. 810; Phœnix Ins. Co. *v.* Parsons, 129 N. Y. 86, 29 N. E. 87; H. C. Judd *v.* New York, etc., Steamship Co., 130 Fed. 991; Savannah F. & M. Ins. Co. *v.* Pelzer Mfg. Co., 60 Fed. 39; Midland Counties Ins. Co. *v.* Smith, 6 Q. B. D. 561, 45 J. P. 699, 50 L. J. Q. B. 329, 45 L. T. Rep. N. S. 411, 29 Wkly. Rep. 850.

The insurer will not be subrogated in case of a loss to the right of the insured, against one who sold him the insured property through fraudulent misrepresentations. Farmers' F. Ins. Co. *v.* Johnston, 113 Mich. 426, 71 N. W. 1074.

5. *Arkansas.*— St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163, 18 S. W. 43.

North Carolina.— Hamburg-Bremen F. Ins. Co. *v.* Atlantic Coast Line R. Co., 132 N. C. 75, 43 S. E. 548.

Pennsylvania.— Fidelity Title, etc., Co. *v.* People's Natural Gas Co., 150 Pa. St. 8, 24 Atl. 339; Insurance Co. of North America *v.* Fidelity Title, etc., Co., 123 Pa. St. 523, 16 Atl. 791, 10 Am. St. Rep. 546, 2 L. R. A. 586.

Wisconsin.— Swarthout *v.* Chicago, etc., R. Co., 49 Wis. 625, 6 N. W. 314.

United States.— Over *v.* Lake Erie, etc., R. Co., 63 Fed. 34.

See 28 Cent. Dig. tit. "Insurance," § 1506 *et seq.*

6. St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83; U. S. Casualty Co. *v.* Bagley, 129 Mich. 70, 87 N. W. 1044, 95 Am. St. Rep. 424, 55 L. R. A. 616; U. S. *v.* American Tobacco Co., 166 U. S. 468, 17 S. Ct. 619, 41 L. ed. 1081; Pearse *v.* Quebec Steamship Co., 24 Fed. 285; Sun Mut. Ins. Co. *v.* Mississippi Valley Transp. Co., 17 Fed. 919, 5 McCrary 477; Amazon Ins. Co. *v.* The Iron Mountain, 1 Fed. Cas. No. 270, 1 Flipp. 616; King *v.* Victoria Ins. Co., [1896] A. C. 250, 65 L. J. C. P. 38, 74 L. T. Rep. N. S. 206, 44 Wkly. Rep. 592.

7. Monteleone *v.* Harding, 50 La. Ann. 1147, 23 So. 990; American Tobacco Co. *v.* U. S., 32 Ct. Cl. 207; West of England F. Ins. Co. *v.* Isaacs, [1896] 2 Q. B. 377 [*affirmed* in [1897] 1 Q. B. 226, 66 L. J. Q. B. 36, 75 L. T. Rep. N. S. 564].

8. *Colorado.*— Home Ins. Co. *v.* Atchison, etc., R. Co., 19 Colo. 46, 34 Pac. 281.

Illinois.— Hartford Ins. Co. *v.* Pennell, 2 Ill. App. 609.

Iowa.— Kennedy *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831.

Maryland.— Packham *v.* German F. Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828.

New York.— Dilling *v.* Draemel, 16 Daly 104, 9 N. Y. Suppl. 497; Bloomingdale *v.* Columbia Ins. Co., 84 N. Y. Suppl. 572; Atlantic Ins. Co. *v.* Storrow, 5 Paige 285.

Ohio.— Norwich Union F. Ins. Soc. *v.* Stang, 18 Ohio Cir. Ct. 464, 9 Ohio Cir. Dec. 576.

Pennsylvania.— Seymour *v.* Tradesmen's Trust, etc., Fund Co., 203 Pa. St. 151, 52 Atl. 125; Niagara F. Ins. Co. *v.* Fidelity Title, etc., Co., 123 Pa. St. 516, 15 Atl. 790, 10 Am. St. Rep. 543.

Wisconsin.— Sims *v.* La Prairie Mut. F. Ins. Co., 101 Wis. 586, 77 N. W. 908.

See 28 Cent. Dig. tit. "Insurance," § 1507.

The effect of the rule stated in the text is that as the wrong-doer is not entitled to the benefit of the insurance held by the owner of the property, the owner cannot throw the loss on the insurance company to the advantage of the wrong-doer. Atchison, etc., R. Co. *v.* Home Ins. Co., 59 Kan. 432, 53 Pac. 459.

Partial liability of third person.— If the third person is liable only for a portion of the loss covered by the policy, a release will operate to the benefit of the insurance company only to the extent to which the third person might have been held for the loss for which the company is also liable. Svea Assur. Co. *v.* Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95; Insurance Co. of North America *v.* Fidelity Title, etc., Co., 123 Pa. St. 523, 16 Atl. 791, 10 Am. St. Rep. 546, 2 L. R. A. 586.

Another application of the same rule is that after the loss has been paid by the company, the wrong-doer, having knowledge of the fact, cannot make settlement with the insured for the loss, his liability being to the company to the extent of the insurance paid.[9]

f. Recovery of Insurance Money Paid. If after receiving insurance money the property-owner secures from a third person compensation for such loss, the insurance company may recover from the insured the insurance money paid, or so much thereof as is not in excess of the amount necessary to indemnify the insured for his actual loss, after deducting the amount received from the third person liable.[10]

2. As Against Mortgagor. If insurance is taken by a mortgagor for his own benefit, or for the benefit of the mortgagee, or by the mortgagee in the mortgagor's interest, and at his expense, payment of insurance money to the mortgagee goes to the benefit of the mortgagor in satisfaction *pro tanto* of the mortgage debt;[11] but where the insurance is for the mortgagee's sole protection and the mortgagor has not procured it, or has lost the right to rely upon it, the company, on paying to the mortgagee the insurance money, becomes entitled to equitable subrogation *pro tanto* to the security held by the mortgagee;[12] and this

Exhausting remedy against third person.— If the insured has recourse under contract against the third person for the loss, he cannot look to the insurance company without having exhausted his remedy against such person. Kennedy *v.* Iowa State Ins. Co., 119 Iowa 29, 91 N. W. 831.

Conclusiveness of adjudication against third person.— An adjudication against a third person liable for the loss is conclusive against insured as to the amount thereof, and he cannot recover an additional amount from the company. Pentz *v.* Ætna F. Ins. Co., 3 Edw. (N. Y.) 341.

9. *Colorado.*— Home Ins. Co. *v.* Atchison, etc., R. Co., 19 Colo. 46, 34 Pac. 281.

Illinois.— Chicago, etc., R. Co. *v.* Emmons, 42 Ill. App. 138.

Missouri.—Hartford F. Ins. Co. *v.* Wabash R. Co., 74 Mo. App. 106.

New Jersey.— Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

New York.—Connecticut F. Ins. Co. *v.* Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171 [*reversing* 10 Hun 59]; Home Ins. Co. *v.* Western Transp. Co., 33 How. Pr. 102.

Virginia.— Brighthope R. Co. *v.* Rogers, 76 Va. 443.

See 28 Cent. Dig. tit. "Insurance," § 1506 *et seq.*

10. *Maryland.*— Svea Assur. Co. *v.* Packham, 92 Md. 464, 48 Atl. 359, 52 L. R. A. 95.

New Jersey.— Weber *v.* Morris, etc., R. Co., 35 N. J. L. 409, 10 Am. Rep. 253; Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107.

Ohio.— Newcomb *v.* Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. Rep. 746.

Pennsylvania.— Ætna Ins. Co. *v.* Confer, 158 Pa. St. 598, 28 Atl. 153.

England.—Castellain *v.* Preston, 11 Q. B. D. 380, 52 L. J. Q. B. 366, 49 L. T. Rep. N. S. 29, 31 Wkly. Rep. 557; Darrell *v.* Tibbitts, 5 Q. B. D. 560, 44 J. P. 695, 50 L. J. Q. B. 33, 42 L. T. Rep. N. S. 797, 29 Wkly. Rep. 66.

See 28 Cent. Dig. tit. "Insurance," § 1508.

Extent of recovery.— The company may recover from the insured the full value of any rights or remedies to which he was entitled under the contract relating to subject-matter between himself and the third parties, and to which, but for renunciation, the insurer would have had a right to be subrogated. West of England F. Ins. Co. *v.* Isaacs, [1897] 1 Q. B. 226, 66 L. J. Q. B. 36, 75 L. T. Rep. N. S. 564.

11. *Illinois.*— Traders' Ins. Co. *v.* Race, (1892) 29 N. E. 846, 142 Ill. 338, 31 N. E. 392 [*affirming* 31 Ill. App. 625].

Indiana.— Ætna Ins. Co. *v.* Baker, 71 Ind. 102.

Massachusetts.— Suffolk F. Ins. Co. *v.* Boyden, 9 Allen 123.

Missouri.— Dick *v.* Franklin F. Ins. Co., 10 Mo. App. 376 [*affirmed* in 81 Mo. 103].

New Jersey.— Nelson *v.* Bound Brook Mut. F. Ins. Co., 43 N. J. Eq. 256, 11 Atl. 681, 3 Am. St. Rep. 308.

New York.— Prinz *v.* Citizens' Ins. Co., 80 N. Y. App. Div. 638, 81 N. Y. Suppl. 141; Eddy *v.* London Assur. Corp., 65 Hun 307, 20 N. Y. Suppl. 216 [*affirmed* in 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686]; Robert *v.* Traders' Ins. Co., 17 Wend. 631.

Canada.— Imperial F. Ins. Co. *v.* Bull, 18 Can. Sup. Ct. 697; Montreal Loan, etc., Co. *v.* Denis, 14 Quebec Super. Ct. 106.

See 28 Cent. Dig. tit. "Insurance," § 1509.

12. *Maryland.*— Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 3 Am. Rep. 149.

Missouri.— Havens *v.* Germania Ins. Co., 135 Mo. 649, 37 S. W. 497.

New Jersey.— Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Bound Brook Mut. F. Ins. Assoc. *v.* Nelson, 41 N. J. Eq. 485, 5 Atl. 590.

New York.— Ulster County Sav. Inst. *v.* Leake, 73 N. Y. 161, 29 Am. Rep. 115 [*reversing* 11 Hun 515]; Springfield F. & M. Ins. Co. *v.* Allen, 43 N. Y. 389, 3 Am. Rep. 711; Thomas *v.* Montauk F. Ins. Co., 12 N. Y. St. 738; Kernochan *v.* New York Bow-

right of subrogation is usually made a contract right, by a provision in the policy that on payment of the loss under the policy the mortgagee shall assign his mortgage security to the company in full or *pro tanto* as the case may be.[13] Where the company is entitled to subrogation, a release or satisfaction of the mortgage will relieve it correspondingly from liability under its policy.[14]

3. As Against Carrier. The equitable doctrine of subrogation is also applicable in favor of an insurance company paying a loss under a policy in favor of the owner[15] of goods destroyed while in the hands of a common carrier, and for which the carrier is responsible.[16]

ery F. Ins. Co., 5 Duer 1; Matter of Kip, 4 Edw. 86.

Pennsylvania.— Utter *v.* Lewis, 10 Pa. Dist. 50.

See 28 Cent. Dig. tit. "Insurance," § 1509.

In Massachusetts the right of equitable subrogation in such cases has been denied. Suffolk F. Ins. Co. *v.* Boyden, 9 Allen (Mass.) 123; King *v.* State Mut. F. Ins. Co., 7 Cush. (Mass.) 1, 54 Am. Dec. 683. But subrogation is now provided for in that state by statute. Eliot Five Cents Sav. Bank *v.* Commercial Assur. Co., 142 Mass. 142, 7 N. E. 550.

Assignment of security.— The company is not entitled to an assignment of the mortgagee's security until payment of the loss (Morrison *v.* Tennessee M. & F. Ins. Co., 18 Mo. 262, 59 Am. Dec. 299), and the mortgagee's debt must be fully satisfied before the company is entitled to an assignment of the evidences of such debt (Phœnix Ins. Co. *v.* Harrisonburg First Nat. Bank, 85 Va. 765, 8 S. E. 719, 17 Am. St. Rep. 101, 2 L. R. A. 667).

13. *Massachusetts.*— Davis *v.* Quincy Mut. F. Ins. Co., 10 Allen 113.

Missouri.— Dick *v.* Franklin F. Ins. Co., 81 Mo. 103 [*affirming* 10 Mo. App. 376].

New Jersey.— Hare *v.* Headley, 52 N. J. Eq. 496, 28 Atl. 452.

New York.— Ulster County Sav. Inst. *v.* Leake, 73 N. Y. 161, 29 Am. Rep. 115 [*reversing* 11 Hun 515]; Springfield F. & M. Ins. Co. *v.* Allen, 43 N. Y. 389, 3 Am. Rep. 711.

Pennsylvania.— Niagara F. Ins. Co. *v.* Fidelity Title, etc., Co., 123 Pa. St. 516, 16 Atl. 790, 10 Am. St. Rep. 543; Thornton *v.* Enterprise Ins. Co., 71 Pa. St. 234.

Texas.— Alamo F. Ins. Co. *v.* Davis, 25 Tex. Civ. App. 342, 60 S. W. 802; Merchants' Ins. Co. *v.* Story, 13 Tex. Civ. App. 124, 35 S. W. 68.

See 28 Cent. Dig. tit. "Insurance," § 1511.

Until the mortgagee's debt is satisfied in full he is not bound to transfer his security to the company under the usual clause for assignment, but the company may pay off the mortgage in full and step into the mortgagee's shoes. Allen *v.* Watertown F. Ins. Co., 132 Mass. 480; New Hampshire F. Ins. Co. *v.* National L. Ins. Co., 112 Fed. 199, 50 C. C. A. 188, 57 L. R. A. 692. But the policy may provide for a part assignment. New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221.

Where foreclosure proceedings had been commenced before the loss, it was held that the mortgagee could sell the premises thereunder after the loss, and enforce payment on the policy for the deficiency. Eddy *v.* London Assur. Corp., 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686.

Stipulations in mortgage against subrogation.— It has been held that a stipulation in the mortgage contract under which the mortgagor agrees that the mortgagee may insure at his expense, and that the insurance money shall be applied to the satisfaction of the debt, is not valid against the stipulations in a subsequent policy of insurance that the insurance company shall be subrogated to the mortgagee's lien. Foster *v.* Van Reed, 70 N. Y. 19, 26 Am. Rep. 544 [*reversing* 5 Hun 321]. But this case seems to be contrary in principle to cases relating to stipulations between shippers and carriers. See *infra*, XX, F, 3.

14. Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541; Pearman *v.* Gould, 42 N. J. Eq. 4, 5 Atl. 811; Thomas *v.* Montauk F. Ins. Co., 12 N. Y. St. 738.

15. **Under a policy in favor of the carrier** there is no subrogation in behalf of the insurance company to the shipper's rights against the carrier, and the carrier may assign his right to insurance money to the shipper in satisfaction of his liability. Wager *v.* Providence Ins. Co., 150 U. S. 99, 14 S. Ct. 55, 37 L. ed. 1013.

16. New Orleans Mut. Ins. Co. *v.* New Orleans, etc., R. Co., 20 La. Ann. 302; Platt *v.* Pennsylvania R. Co., 58 N. Y. Super. Ct. 587, 11 N. Y. Suppl. 632; Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725; Hall *v.* Nashville, etc., R. Co., 13 Wall. (U. S.) 367, 20 L. ed. 594; Kidd *v.* Greenwich Ins. Co., 35 Fed. 351.

Stipulations in bill of lading.— Nevertheless this right of subrogation being equitable in its character may be cut off by a stipulation in the bill of lading by which it is provided that the benefit of any insurance shall go to the satisfaction of any claims of the shipper against the carrier (North British, etc., Ins. Co. *v.* Central Vermont R. Co., 158 N. Y. 726, 53 N. E. 1128; Platt *v.* Richmond, etc., R. Co., 108 N. Y. 358, 15 N. E. 393; Mercantile Mut. Ins. Co. *v.* Calebs, 20 N. Y. 173; Home Ins. Co. *v.* Western Transp. Co., 4 Rob. (N. Y.) 257; Ross *v.* Philadelphia, etc., R. Co., 13 Pa. Super. Ct. 563; British, etc., Mar. Ins. Co. *v.* Gulf, etc., R. Co., 63 Tex. 475, 51 Am. Rep. 661; Phœnix Ins. Co. *v.* Erie, etc., Transp. Co., 19 Fed. Cas. No. 11,112, 10 Biss. 18), but there is authority the other way (Southard *v.* Min-

4. Actions to Enforce Rights Under — a. In General. In actions by an insurance company to enforce rights gained by subrogation, the pleadings,[17] evidence,[18] instructions, etc.,[19] are governed by the same rules that control these matters in general.

b. Parties.[20] The equitable right of subrogation only entitles the insurance company to bring action against a third person liable for the loss in the name of the insured.[21]

c. Joinder and Splitting.[22] At any rate the insurance company which has paid only a part of the loss cannot maintain an action against the third party, as this would result in a splitting up of the cause of action.[23] But under statutory provisions it is usually possible by joinder to maintain a single action by which the rights of all shall be determined.[24]

d. Right of Insurer to Intervene. In an action by the owner against the

neapolis, etc., R. Co., 60 Minn. 382, 62 N. W. 442, 619; Fayerweather *v.* Phenix Ins. Co., 118 N. Y. 324, 23 N. E. 192, 6 L. R. A. 805. And see Foster *v.* Van Reed, 70 N. Y. 19, 26 Am. Rep. 544 [*reversing* 5 Hun 321]).

17. See, generally, Pleading; Subrogation.

Answer when proper method of raising objection as to improper parties see Home Ins. Co. *v.* Pennsylvania R. Co., 11 Hun (N. Y.) 182.

18. See, generally, Evidence; Subrogation.

Burden of proof see Union Ins. Co. *v.* Shaw, 24 Fed. Cas. No. 14,366, 2 Dill. 14.

Admissibility of evidence see St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43; New Orleans Mut. Ins. Co. *v.* New Orleans, etc., R. Co., 20 La. Ann. 302.

Sufficiency of evidence see Home Ins. Co. *v.* Atchison, etc., R. Co., 19 Colo. 46, 34 Pac. 281.

19. See, generally, Trial; Subrogation.

Instruction see Boston Mar. Ins. Co. *v.* Slocovitch, 55 N. Y. Super. Ct. 452, 14 N. Y. St. 718.

20. Parties generally see Parties.

21. *Arkansas.*— St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

Connecticut.— Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571.

Georgia.— Holcombe *v.* Richmond, etc., R. Co., 78 Ga. 776, 3 S. E. 755.

Illinois.— Peoria M. & F. Ins. Co. *v.* Frost, 37 Ill. 333.

Maine.— Rockingham Mut. F. Ins. Co. *v.* Bosher, 39 Me. 253, 63 Am. Dec. 618.

Pennsylvania.— Gales *v.* Hailman, 11 Pa. St. 515.

United States.— Hall *v.* Nashville, etc., R. Co., 13 Wall. 367, 20 L. ed. 594; Over *v.* Lake Erie, etc., R. Co., 63 Fed. 34; Norwich Union F. Ins. Soc. *v.* Standard Oil Co., 59 Fed. 984, 8 C. C. A. 433; The Planter, 19 Fed. Cas. No. 11,207*a*, 2 Woods 490.

See 28 Cent. Dig. tit. "Insurance," § 1516.

It may use the name of the insured without his consent, having the right to do so by virtue of the subrogation. Monmouth County Mut. F. Ins. Co. *v.* Hutchinson, 21 N. J. Eq. 107; Kennebec Coal, etc., Co. *v.* Wilmington, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 29, 13 Wkly. Notes Cas. 162.

Real party in interest.— Under statutory provisions allowing the real party in interest to sue, the company may no doubt maintain the action in its own name. Chicago, etc., R. Co. *v.* German Ins. Co., 2 Kan. App. 395, 42 Pac. 594; Nichols *v.* Chicago, etc., R. Co., 36 Minn. 452, 32 N. W. 176; Hartford F. Ins. Co. *v.* Wabash R. Co., 74 Mo. App. 106. See also XXI, D, 1, b.

22. See, generally, Joinder and Splitting of Actions.

23. The wrong-doer is not bound to submit to more than one action for damages.

Missouri.— Hartford F. Ins. Co. *v.* Wabash R. Co., 74 Mo. App. 106.

Nebraska.— Omaha, etc., R. Co. *v.* Granite State F. Ins. Co., 53 Nebr. 514, 73 N. W. 950.

South Carolina.— Mobile Ins. Co. *v.* Columbia, etc., R. Co., 41 S. C. 408, 19 S. E. 858, 44 Am. St. Rep. 725.

United States.— Watts *v.* Southern Bell Telephone, etc., Co., 66 Fed. 453 [*affirmed* in 66 Fed. 460, 13 C. C. A. 579]; Ætna Ins. Co. *v.* Hannibal, etc., R. Co., 1 Fed. Cas. No. 96, 3 Dill. 1.

England.— Commercial Union Assur. Co. *v.* Lister, L. R. 9 Ch. 483, 47 L. J. Ch. 601.

Canada.— Central Vermont R. Co. *v.* La Compagnie d'Assurance, etc., 2 Quebec Q. B. 450.

See 28 Cent. Dig. tit. "Insurance," § 1516.

Assignment of cause of action to insurer.— If, however, the right of action of the insured against the third person is transferred to the insurance company, it may recover the full amount of the damage. Home Ins. Co. *v.* North Western Packet Co., 32 Iowa 223, 7 Am. Rep. 183; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584, 4 S. Ct. 566, 28 L. ed. 527.

24. Home Mut. Ins. Co. *v.* Oregon R., etc., Co., 20 Oreg. 569, 26 Pac. 857, 23 Am. St. Rep. 151; Kennebec Coal, etc., Co. *v.* Wilmington, etc., R. Co., 2 Chest. Co. Rep. (Pa.) 29, 13 Wkly. Notes Cas. 162; Wunderlich *v.* Chicago, etc., R. Co., 93 Wis. 132, 66 N. W. 1144; Pratt *v.* Radford, 52 Wis. 114, 8 N. W. 606; Swarthout *v.* Chicago, etc., R. Co., 49 Wis. 625, 6 N. W. 314; Crandall *v.* Goodrich Transp. Co., 16 Fed. 75, 11 Biss. 516; Michigan Cent. R. Co. *v.* Wealleans, 24 Can. Sup. Ct. 309.

third person liable, the insurance company which has paid the loss may intervene for the protection of its rights.[25]

XXI. ACTIONS.

A. Right of Action — 1. Nature and Form. The action against the company for an amount claimed to be due for loss of the insured property, whether it be on the policy or on an executory contract evidenced by binding receipt or otherwise,[26] is simply for breach of contract, and in jurisdictions in which forms of action have been abolished a discussion of the nature and form of action is unnecessary, but in jurisdictions where the common-law forms of action are preserved the action is properly by assumpsit.[27] But if the policy is under seal an action of debt may be brought.[28] An action of assumpsit may likewise be maintained on a contract of renewal of the policy made by a renewal receipt.[29] If there is an equitable ground of relief, the action on the policy may be in equity,[30] and the court in the same action may render judgment on the policy.[31] However where there is an adequate remedy at law a suit in equity will not lie.[32]

2. Joinder of Causes of Action. Persons having separate interests in property covered by the same policy cannot join in an action thereon.[33] But if several interests have vested in one person he may join all his claims in one action.[34]

3. Conditions Precedent — a. In General. The happening of the event on which the loss becomes payable as specified by the policy gives rise to a cause of

25. Lake Erie, etc., R. Co. *v.* Falk, 62 Ohio St. 297, 56 N. E. 1020.

26. As to liability on executory contracts see *supra*, III, D.

27. Brown *v.* Commercial F. Ins. Co., 21 App. Cas. (D. C.) 325; Luciani *v.* American F. Ins. Co., 2 Whart. (Pa.) 167.

28. Franklin F. Ins. Co. *v.* Massey, 33 Pa. St. 221.

29. Peoria M. & F. Ins. Co. *v.* Hervey, 34 Ill. 46; Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

Covenant also will lie upon a renewal receipt continuing a sealed policy. Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272.

It seems that debt will lie on the renewal of a policy under seal. Franklin F. Ins. Co. *v.* Massey, 33 Pa. St. 221. But see Luciani *v.* American F. Ins. Co., 2 Whart. (Pa.) 167.

If the renewal is to a new firm the original firm insured cannot maintain an action on the renewal. Firemen's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

Negligent failure to make contract.— Under an action predicated upon a contract of insurance plaintiff cannot recover for negligence in failing to make a contract of insurance. Walker *v.* Farmers' Ins. Co., 51 Iowa 679, 2 N. W. 583.

In an action for breach of contract to deliver a policy, it seems that provisions which were to be inserted in the policy are not applicable. Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358. But see *supra*, III, D, 4.

30. Combs *v.* Shrewsbury Mut. F. Ins. Co., 32 N. J. Eq. 512; Bodle *v.* Chenango County Mut. Ins. Co., 2 N. Y. 53; Hammel *v.* Queen Ins. Co., 50 Wis. 240, 6 N. W. 805.

31. Globe Ins. Co. *v.* Boyle, 21 Ohio St. 119; Reynand *v.* Memphis Ins. Co., 7 Baxt. (Tenn.) 279. See also *supra*, III, D, 6. And see, generally, as to retention of suit to afford complete relief Equity, 16 Cyc. 106, 109.

Even where there is ground for reformation it is not necessary to have reformation before suing at law. Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423; Walrath *v.* Royal Ins. Co., 16 Ohio Cir. Ct. 413, 9 Ohio Cir. Dec. 233.

32. Wood *v.* Hillsborough Mut. F. Assur. Assoc., (N. J. Ch. 1886) 4 Atl. 662; New York Ice Co. *v.* Northwestern Ins. Co., 20 How. Pr. (N. Y.) 424; Carter *v.* United Ins. Co., 1 Johns. Ch. (N. Y.) 463; De Ghettoff *v.* London Assur. Co., 4 Bro. P. C. 436, 2 Eng. Reprint 295. And see as to adequate remedy at law Equity, 16 Cyc. 45 *et seq.*

33. Des Moines State Ins. Co. *v.* Belford, 2 Kan. App. 280, 42 Pac. 409.

34. Beebe *v.* Ohio Farmers' Ins. Co., 93 Mich. 514, 53 N. W. 818, 32 Am. St. Rep. 519, 18 L. R. A. 481; Mercantile Ins. Co. *v.* Holthaus, 43 Mich. 423, 5 N. W. 642.

An action to reform the policy may be joined with one to recover on the policy as reformed, especially in jurisdictions where joinder of actions at law and in equity is permitted. McHoney *v.* German Ins. Co., 44 Mo. App. 426.

An action to compel specific performance of a contract to issue a policy may be joined with an action for breach of agreement for insurance, the loss having occurred before the issuance of the policy. Preferred Acc. Ins. Co. *v.* Stone, 61 Kan. 48, 58 Pac. 986.

Foreclosure and recovery.—A mortgagee entitled to the proceeds of a policy taken by mortgagor for mortgagee's interest may in an action to foreclose his mortgage make the insurance company a joint defendant, a loss having occurred rendering the company liable for the insurance. Sun Ins. Office *v.* Beneke, (Tex. Civ. App. 1899) 53 S. W. 98.

action, unless there are by the terms of the contract some conditions precedent to be performed by the insured before he is entitled to maintain an action.[35]

b. Demand. No demand of payment need be made before bringing action.[36]

c. Notice and Proofs of Loss. It is usual to provide in the policy that the company is not liable until after notice of the loss is given and proofs thereof are made.[37] Under such stipulation a compliance with the requirement as to notice and proofs of loss is a condition precedent to maintaining action on the policy.[38]

35. **Conditions precedent** generally see ACTIONS, 1 Cyc. 692 *et seq.*

Right to rebuild.—While the exercise by the company of its option to rebuild or repair would bar an action for damages under the policy (see *supra*, XVI, B, 1, b), yet if the option to rebuild is not exercised in accordance with the terms of the policy the action for the amount of the loss may be maintained. Farmers', etc., Ins. Co. *v.* Warner, (Nebr. 1904) 98 N. W. 48; Lancashire Ins. Co. *v.* Barnard, 111 Fed. 702, 49 C. C. A. 559; Langan *v.* Ætna Ins. Co., 99 Fed. 374 [*affirmed* in 108 Fed. 985, 48 C. C. A. 174]. And under a statute rendering the company liable for the full amount named in the policy in case of total loss of the property a demand of the company for plans or specifications with the view of rebuilding and insured's refusal to furnish them is immaterial. Milwaukee Mechanics' Ins. Co. *v.* Russell, 65 Ohio St. 230, 62 N. E. 338, 56 L. R. A. 159.

Examination of insured.— It is said that a provision that in case of loss the insured shall submit to an examination under oath is not a condition precedent to an action on the policy. Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 24 Ky. L. Rep. 958. But see *supra*, page 853 note 86.

Actions on Lloyd's policy.— It is usually provided in the so-called Lloyd's policies, which are issued by unincorporated associations of underwriters, that the insured must have recourse to the fund of the association provided for the payment of losses before maintaining action against the individual underwriters, and an action against a trustee of the fund to enforce payment must therefore be resorted to before suing the underwriters or any of them separately or collectively. McCredy *v.* Thrush, 37 N. Y. App. Div. 465, 56 N. Y. Suppl. 68; Wheelock *v.* Chapman, 34 N. Y. App. Div. 464, 54 N. Y. Suppl. 327; Gough *v.* Satterlee, 32 N. Y. App. Div. 33, 52 N. Y. Suppl. 492; Leiter *v.* Beecher, 2 N. Y. App. Div. 577, 37 N. Y. Suppl. 1114; Ketchum *v.* Belding, 32 Misc. (N. Y.) 506, 66 N. Y. Suppl. 307 [*affirmed* in 58 N. Y. App. Div. 295, 68 N. Y. Suppl. 1099]; Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350. But see *contra*, Farjeon *v.* Fogg, 16 Misc. (N. Y.) 219, 37 N. Y. Suppl. 980. The effect of such provision is to require the insured to resort to the common fund before attempting to enforce any liability on the individual underwriters. Conant *v.* Jones, 50 N. Y. App. Div. 336, 64 N. Y. Suppl. 189; Compton *v.* Beecher, 17 N. Y. App. Div. 38, 44 N. Y. Suppl. 887; Lawrence *v.* Schaefer, 19 Misc. (N. Y.) 239, 42 N. Y. Suppl. 992. A provision in a Lloyd's policy that no suit shall be brought against more than one of the underwriters at the same time merely prohibits the bringing of more than one suit at the same time. Peabody *v.* Germain, 40 N. Y. App. Div. 146, 57 N. Y. Suppl. 860. But where a number of individuals formed an association by which each became bound for his share only of the loss, severally and not jointly, it was held that the insured might recover against each individual subscriber to the full amount of his liability until satisfaction for the loss was obtained. Sumner *v.* Piza, 91 Fed. 677.

36. Ganser *v.* Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943; Heffron *v.* Kittanning Ins. Co., 132 Pa. St. 580, 20 Atl. 698. One to whom the policy is made payable by indorsement thereon need not notify the company of his claim before bringing suit. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

In the absence of any demand for payment or any notice of loss it is said, however, that the company could not be in default for not making payment. Thwing *v.* Great Western Ins. Co., 111 Mass. 93.

37. See *supra*, XVII, A, 1.

38. *California.*— White *v.* Home Mut. Ins. Co., 128 Cal. 131, 60 Pac. 666.

Indiana.— Hanover F. Ins. Co. *v.* Johnson, 26 Ind. App. 122, 57 N. E. 277.

Kentucky.— Dwelling House Ins. Co. *v.* Freeman, 12 Ky. L. Rep. 894.

Maine.— Davis *v.* Davis, 49 Me. 282.

Maryland.— Leftwich *v.* Royal Ins. Co., 91 Md. 596, 46 Atl. 1010; Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Michigan.— Steele *v.* German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

Nebraska.— McCann *v.* Ætna Ins. Co., 3 Nebr. 198.

New York.— Washington Mar. Ins. Co. *v.* Herckenrath, 3 Rob. 325.

Tennessee.— Phœnix Ins. Co. *v.* Munday, 5 Coldw. 547.

Texas.— Fire Ins. Assoc. *v.* Miller, 2 Tex. App. Civ. Cas. § 332.

West Virginia.—Munson *v.* German-American F. Ins. Co., 55 W. Va. 423, 47 S. E. 160.

Wisconsin.— Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

United States.— Gauche *v.* London, etc., Ins Co., 10 Fed. 347, 4 Woods 102.

England.— Mason *v.* Harvey, 8 Exch. 819, 22 L. J. Exch. 336; Weir *v.* Northern Counties of England Ins. Co., 4 L. R. Ir. 689. And see Gamble *v.* Accident Assur. Co., Ir. R. 4 C. L. 204.

See 28 Cent. Dig. tit. "Insurance," § 1521. See also *supra*, page 844 note 28.

But a waiver of notice and proofs will relieve insured from compliance with such conditions.[39]

d. Appraisal or Arbitration. It is a usual provision in policies that no action shall be maintained thereon until after the amount of the loss has been determined by appraisal or arbitration, and under such a stipulation appraisal or arbitration as required is a condition precedent to maintaining an action on the policy.[40] Such a stipulation is generally sustained.[41] But if in effect the award is also made final and conclusive it is held in some jurisdictions that the stipulation is invalid as an attempt to oust the courts of their jurisdiction.[42] A mere agreement, however, to ascertain the amount of the loss by arbitration does not make arbitration a condition precedent.[43] And in such cases the agreement is regarded

Sufficiency of compliance.— Insured is not generally required to comply with technical strictness either as to time or manner, with provisions making proofs of loss a condition precedent to his right of action. Northwestern Ins. Co. *v.* Atkins, 3 Bush (Ky.) 328, 96 Am. Dec. 239. And if without his fault it has become impossible for him to comply, as where books and inventories required by the policy to be produced have been destroyed by the fire, compliance with such condition is not requisite. Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411. But it is said that failure to furnish a certificate of the magistrate or notary living nearest the place of the fire as required by the terms of the policy will defeat recovery, although without the fault of the insured it is impossible to secure such certificate. Lane *v.* St. Paul F. & M. Ins. Co., 50 Minn. 227, 52 N. W. 649, 17 L. R. A. 197. Production of the inventories of a stock of goods taken before the issuance of a policy, although such production is required by the policy, is not a condition precedent which must be affirmed in plaintiff's pleading in an action for a loss. Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762. Sufficiency of compliance generally see *supra*, XVII, B.

39. Indian River State Bank *v.* Hartford F. Ins. Co., (Fla. 1903) 35 So. 228; Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514; Phenix Ins. Co. *v.* Luce, 123 Fed. 257. See also *supra*, XVII, D.

40. *California.*— Adams *v.* South British, etc., F. & M. Ins. Co., 70 Cal. 198, 11 Pac. 627.

Illinois.— Phœnix Ins. Co. *v.* Lorton, 109 Ill. App. 63.

Iowa.— Vincent *v.* German Ins. Co., 120 Iowa 272, 94 N. W. 458.

Kentucky.— Continental Ins. Co. *v.* Vallandingham, 116 Ky. 287, 76 S. W. 22, 25 Ky. L. Rep. 468.

Maine.— Fisher *v.* Merchants' Ins. Co., 95 Me. 486, 50 Atl. 282.

Michigan.— Kersey *v.* Phœnix Ins. Co., 135 Mich. 10, 97 N. W. 57.

Missouri.— Murphy *v.* Northern British, etc., Co., 61 Mo. App. 323.

Nebraska.— Wisconsin Mut. Hail Ins. Co. *v.* Wilde, 8 Nebr. 427, 1 N. W. 384.

New Jersey.— Wolff *v.* Liverpool, etc., F. Ins. Co., 10 N. J. L. J. 325.

New York.— Warner *v.* Schoharie, etc., Counties Farmers' Mut. F. Ins. Co., 15 N. Y. Suppl. 632.

Ohio.— Hamilton *v.* Fireman's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407, 29 Cinc. L. Bul. 209.

Tennessee.— Palatine Ins. Co. *v.* Morton-Scott-Robertson Co., 106 Tenn. 558, 61 S. W. 787.

Texas.— Scottish Union, etc., Ins. Co. *v.* Clancy, 71 Tex. 5, 8 S. W. 630.

Wisconsin.— Chapman *v.* Rockford Ins. Co., 89 Wis. 572, 62 N. W. 422, 28 L. R. A. 405.

United States.— Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102; Yeomans *v.* Girard F. & M. Ins. Co., 30 Fed. Cas. No. 18,136.

England.— Viney *v.* Bignold Ins. Soc., 20 Q. B. D. 172, 57 L. J. Q. B. 82, 58 L. T. Rep. N. S. 26, 36 Wkly. Rep. 479; Elliott *v.* Royal Exch. Assur. Co., L. R. 2 Exch. 237, 36 L. J. Exch. 129, 16 L. T. Rep. N. S. 399, 15 Wkly. Rep. 907.

Canada.— Nolan *v.* Ocean Acc., etc., Corp., 5 Ont. L. Rep. 544.

See 28 Cent. Dig. tit. "Insurance," §§ 1522, 1527. See also *supra*, XVIII, B, 5.

Under such a stipulation the insured must show that he has either complied with the condition or has a legal excuse for non-performance thereof. Continental Ins. Co. *v.* Vallandingham, 116 Ky. 287, 76 S. W. 22, 25 Ky. L. Rep. 468; Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805.

The insured must take the initiative by demanding appraisal or arbitration. Phœnix Ins. Co. *v.* Lorton, 109 Ill. App. 63; Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

41. See *supra*, XVIII, B, 1, a.

42. See *supra*, XVIII, B, 1, a.

43. *Georgia.*— Liverpool, etc., Ins. Co. *v.* Creighton, 51 Ga. 95.

Illinois.— Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. Rep. 598.

Iowa.— Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180; Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

Kansas.— Continental Ins. Co. *v.* Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720.

Kentucky.— Bergmann *v.* Commercial Union Ins. Co., 12 Ky. L. Rep. 942.

as collateral only,[44] and revocable.[45] Indeed the tendency of the courts is to regard the provisions of the policy in this respect as not requiring appraisal or arbitration as a condition precedent if the latter construction can be avoided.[46] The condition may, however, be waived by the company by action inconsistent with reliance thereon.[47] Reliance on arbitration as a condition precedent is in

Maine.— Robinson *v.* Georges Ins. Co., 17 Me. 131, 35 Am. Dec. 239.

Massachusetts.— Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572.

Missouri.— Winn *v.* Farmers' Mut. F. Ins. Co., 83 Mo. App. 123.

New Jersey.— Wolff *v.* Liverpool, etc., F. Ins. Co., 10 N. J. L. J. 325.

Wisconsin.— Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

United States.—Hamilton *v.* Home Ins. Co., 137 U. S. 370, 11 S. Ct. 133, 34 L. ed. 708; British America Assur. Co. *v.* Darragh, 128 Fed. 890, 63 C. C. A. 426; New York Mut. F. Ins. Co. *v.* Alvord, 61 Fed. 752, 9 C. C. A. 623; Crossley *v.* Connecticut F. Ins. Co., 27 Fed. 30.

See 28 Cent. Dig. tit. "Insurance," § 1523. See also *supra*, XVIII, B, 1, b.

44. Mark *v.* National F. Ins. Co., 24 Hun (N. Y.) 565; Roper *v.* Lendon, 1 E. & E. 825, 5 Jur. N. S. 491, 28 L. J. Q. B. 260, 7 Wkly. Rep. 441, 102 E. C. L. 825.

45. See *supra*, XVIII, B, 1, a, text and note.

46. If the mode of procedure prescribed is indefinite it is said that the provision as to arbitration will not be construed as a condition precedent. Ætna Ins. Co. *v.* McLead, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320.

In case of disagreement.— If the stipulation is that any controversy or difference between the parties as to the amount of loss shall be submitted to arbitration, the condition will not be construed as defeating an action unless it appears that there was such disagreement or difference.

Iowa.— Garrettson *v.* Merchants', etc., F. Ins. Co., 114 Iowa 17, 86 N. W. 32.

Minnesota.— Fletcher *v.* German-American Ins. Co., 79 Minn. 337, 82 N. W. 647.

North Carolina.— Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057.

Texas.— Manchester F. Ins. Co. *v.* Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722.

Wisconsin.— Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504.

United States.— Harrison *v.* Hartford F. Ins. Co., 59 Fed. 732.

See 28 Cent. Dig. tit. "Insurance," § 1523.

Contra.— Old Saucelito Land, etc., Co. *v.* Commercial Union Assur. Co., 66 Cal. 253, 5 Pac. 232; McNees *v.* New Orleans Southern Ins. Co., 61 Mo. App. 335; Murphy *v.* North British, etc., Co., 61 Mo. App. 323; Hamilton *v.* Firemen's Ins. Co., 4 Ohio S. & C. Pl. Dec. 407, 29 Cinc. L. Bul. 209; Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102.

Demand.— If the provision is that at the the written request of either party the difference or dispute as to the amount of loss shall be submitted to arbitration, such submission is not a condition precedent unless demand has been made by the party entitled.

Illinois.— Farmers' Mut. F., etc., Ins. Co. *v.* Lecroy, 91 Ill. App. 41.

Iowa.— Davis *v.* Anchor Mut. F. Ins. Co., 96 Iowa 70, 64 N. W. 687.

Michigan.— National Home Bldg., etc., Assoc. *v.* Dwelling House Ins. Co., 106 Mich. 236, 64 N. W. 21; Nurney *v.* Union Ins. Co., 63 Mich. 638, 30 N. W. 352; Nurney *v.* Fireman's Fund Ins. Co., 63 Mich. 633, 30 N. W. 350, 6 Am. St. Rep. 338.

New York.— Chainless Cycle Mfg. Co. *v.* Security Ins. Co., 169 N. Y. 304, 62 N. E. 392 [*affirming* 52 N. Y. App. Div. 104, 64 N. Y. Suppl. 1060]; Lawrence *v.* Niagara F. Ins. Co., 2 N. Y. App. Div. 267, 37 N. Y. Suppl. 811.

Pennsylvania.— Wright *v.* Susquehanna Mut. F. Ins. Co., 110 Pa. St. 29, 20 Atl. 716.

Wisconsin.— Vangindertaelen *v.* Phenix Ins. Co., 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; Phœnix Ins. Co. *v.* Badger, 53 Wis. 283, 10 N. W. 504.

United States.— Wallace *v.* German-American Ins. Co., 41 Fed. 742, 2 Fed. 658, 1 McCrary 335.

See 28 Cent. Dig. tit. "Insurance," § 1526. See also *supra*, page 876 note 85.

If the provision is for arbitration in case of disagreement a demand is not essential. Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. 562.

Partial or total loss.— If arbitration is required only in case of partial loss it will not be a condition precedent to an action where the loss is total. Rosenwald *v.* Phœnix Ins. Co., 50 Hun (N. Y.) 172, 3 N. Y. Suppl. 215; Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673; Doxey *v.* Royal Ins. Co., (Tenn. Ch. App. 1896) 36 S. W. 950. But if the stipulation is for arbitration of the amount of loss or damage which is made a condition precedent, action cannot be brought for a total loss until after compliance with the condition. Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055.

47. *Indiana.*— Milwaukee Mechanics' Ins. Co. *v.* Stewart, 13 Ind. App. 640, 42 N. E. 290.

Missouri.— Dautel *v.* Pennsylvania F. Ins. Co., 65 Mo. App. 44.

Montana.— Randall *v.* Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960.

Pennsylvania.— Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

United States.—Harrison *v.* German-American F. Ins. Co., 67 Fed. 577.

See 28 Cent. Dig. tit. "Insurance," § 1528. And see further as to waiver of conditions

some states precluded by statute.[48] For misconduct of an appraiser, but not for mere inadequacy of estimate, an appraisal may be set aside and recovery may then be had on the policy.[49]

B. Place of Bringing Suit — 1. Jurisdiction. The courts of the state in which the company has its home office or of a state in which it is authorized to do business and allowed to be sued may entertain jurisdiction of an action against the company whether the cause of action has arisen in that state or in another state,[50] for an action on a policy is transitory and may be brought wherever service can be had on the company.[51]

2. Venue. In many states there are statutory provisions as to the court or county in which an action on a policy of insurance may be brought.[52] But in the absence of such statute the venue of the action is as provided by the ordinary

as to appraisal and arbitration *supra*, XVIII, B, 7.

Refusal to arbitrate will constitute a waiver (Continental Ins. Co. *v.* Wilson, 45 Kan. 250, 25 Pac. 629, 23 Am. St. Rep. 720; Summerfield *v.* North British, etc., Ins. Co., 62 Fed. 249), or refusal except on conditions not contemplated by the policy (Hamilton *v.* Royal Ins. Co., 4 Ohio S. & C. Pl. Dec. 437, 29 Cinc. L. Bul. 106).

Denial of liability will be a waiver of the right to an arbitration as to the amount of the loss. Savage *v.* Phœnix Ins. Co., 12 Mont. 458, 31 Pac. 66, 33 Am. St. Rep. 591; Pencil *v.* Home Ins. Co., 3 Wash. 485, 28 Pac. 1031; Bailey *v.* Ætna Ins. Co., 77 Wis. 336, 46 N. W. 440; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. See also *supra*, page 882 note 33.

A qualified denial of liability does not operate as a waiver. Phœnix Ins. Co. *v.* Lorton, 109 Ill. App. 63.

A denial first made after action brought is not a waiver. Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757; Kahnweiler *v.* Phœnix Ins. Co., 57 Fed. 562.

Waiver of proofs does not constitute a waiver of arbitration. Hutchinson *v.* Liverpool, etc., Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558.

Bad faith.— Stipulations for arbitration are usually in the interest of the company and it will not be allowed to rely thereon in bad faith. Continental Ins. Co. *v.* Vallandingham, 76 S. W. 22, 25 Ky. L. Rep. 468; Kersey *v.* Phœnix Ins. Co., 135 Mich. 10, 97 N. W. 57; Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757. Thus if the company insists on an arbitrator who is disqualified the insured may bring action without complying with the condition. Hall *v.* Western Assur. Co., 133 Ala. 637, 32 So. 257. If both parties endeavor to prevent faithful compliance with the stipulation it ceases to be a condition precedent. Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

If the arbitration is void the insured may maintain an action to set aside the award and for recovery on the policy. Vincent *v.* German Ins. Co., 120 Iowa 272, 94 N. W. 458. See also *supra*, XVIII, C. But if the company has paid the amount of the debt or a portion thereof the amount paid must be tendered back before maintaining an action in disregard of such award. Townsend *v.* Greenwich Ins. Co., 86 N. Y. App. Div. 323, 83 N. Y. Suppl. 909 [*affirming* 39 Misc. 87, 78 N. Y. Suppl. 897].

48. Ohage *v.* Union Ins. Co., 82 Minn. 426, 85 N. W. 212; Franklin *v.* New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91; Cincinnati Coffin Co. *v.* Home Ins. Co., 8 Ohio Dec. (Reprint) 422, 7 Cinc. L. Bul. 342; Ætna Ins. Co. *v.* Shacklett, (Tex. Civ. App. 1900) 57 S. W. 583.

49. Strome *v.* London Assur. Corp., 20 N. Y. App. Div. 571, 47 N. Y. Suppl. 481 [*affirmed* in 162 N. Y. 627, 57 N. E. 1125].

50. *Maryland.*— Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212.

Massachusetts.—Johnston *v.* Trade Ins. Co., 132 Mass. 432.

New York.— O'Neill *v.* Massachusetts Ben. Assoc., 63 Hun 292, 18 N. Y. Suppl. 22; Burns *v.* Provincial Ins. Co., 35 Barb. 525, 13 Abb. Pr. 425.

South Carolina.— Carpenter *v.* American Acc. Co., 46 S. C. 541, 24 S. E. 500; Curnow *v.* Phœnix Ins. Co., 37 S. C. 406, 16 S. E. 132, 34 Am. St. Rep. 766.

United States.—Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. ed. 451.

See 28 Cent. Dig. tit. "Insurance," § 1535.

51. Insurance Co. of North America *v.* McLimans, 28 Nebr. 653, 44 N. W. 991; Mohr, etc., Distilling Co. *v.* Insurance Companies, 12 Fed. 474. But statutory provisions may be such that an action against a foreign company cannot be brought in any court of the state on a cause of action not arising in the state. Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194.

52. *Georgia.*— Ætna Ins. Co. *v.* Brigham, 120 Ga. 925, 48 S. E. 348; Atlanta Acc. Assoc. *v.* Bragg, 102 Ga. 748, 29 S. E. 706.

Indiana.— Ohio Farmers' Ins. Co. *v.* Stowman, 16 Ind. App. 205, 44 N. E. 558, 940.

Iowa.— Benesh *v.* Mill Owners' Mut. F. Ins. Co., 103 Iowa 465, 72 N. W. 674; Hunt *v.* Farmers' Ins. Co., 67 Iowa 742, 24 N. W. 745.

Kentucky.— New York Mut. F. Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. Rep. 1944; Owen *v.* Howard Ins. Co., 87 Ky. 571, 10 S. W. 119, 10 Ky. L. Rep. 608; Howard *v.* Kentucky, etc., Mut. Ins. Co., 13 B. Mon. 282; Sun Mut. Ins. Co. *v.* Crist, 39 S. W. 837, 19 Ky. L. Rep. 305; Owen *v.* Howard Ins. Co., 9 Ky. L. Rep. 147.

Maine.— Martin *v.* Penobscot Mut. F. Ins. Co., 53 Me. 419.

statutes,[53] and the company cannot by stipulation in its policy limit the right of the insured to bring action in any court in which it might be maintained in the absence of such stipulation.[54]

C. Time of Bringing Suit — 1. Postponement of Right to Sue. It is a usual provision that action shall not be brought under the policy until some specified period, such as sixty or ninety days after the cause of action has matured, or, as usually specified, after notice and proofs of loss. Such a stipulation is valid and an action brought before the expiration of the period will be premature and cannot be maintained.[55] Such a provision in the policy is, however, to be strictly

Maryland.— Henderson *v.* Maryland Home F. Ins. Co., 90 Md. 47, 44 Atl. 1020.

Massachusetts.—Boynton *v.* Middlesex Mut. Ins. Co., 4 Metc. 212.

Ohio.— Knox County Mut. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 275, 3 Ohio Cir. Dec. 451.

Pennsylvania.— Shipton *v.* Fees, 10 Pa. Co. Ct. 583.

Virginia.— Morotock Ins. Co. *v.* Pankey, 91 Va. 259, 21 S. E. 487.

West Virginia.— Brabham *v.* Phœnix Ins. Co., 41 W. Va. 139, 23 S. E. 553; Carson *v.* Phœnix Ins. Co., 41 W. Va. 136, 23 S. E. 552; Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580.

See 28 Cent. Dig. tit. "Insurance," § 1536.

53. *Georgia.*— Atlanta Home Ins. Co. *v.* Tullis, 99 Ga. 225, 25 S. E. 401.

Massachusetts.— Allen *v.* Pacific Ins. Co., 21 Pick. 257.

Missouri.— Stone *v.* Travelers' Ins. Co., 78 Mo. 655.

Nebraska.— Insurance Co. of North America *v.* McLimans, 28 Nebr. 653, 44 N. W. 991.

Pennsylvania.— Southern Bldg., etc., Assoc. *v.* Pennsylvania F. Ins. Co., 23 Pa. Super. Ct. 88.

See 28 Cent. Dig. tit. "Insurance," § 1536.

54. Bartlett *v.* Union Mut. F. Ins. Co., 46 Me. 500; Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596; Hall *v.* People's Mut. F. Ins. Co., 6 Gray (Mass.) 185; Nute *v.* Hamilton Mut. Ins. Co., 6 Gray (Mass.) 174. *Contra,* Greve *v.* Ætna Live Stock Ins. Co., 81 Hun (N. Y.) 28, 30 N. Y. Suppl. 668, 1 N. Y. Annot. Cas. 14.

55. *California.*— Gillon *v.* Northern Assur. Co., 127 Cal. 480, 59 Pac. 901.

Illinois.—Dwelling House Ins. Co. *v.* Shaner, 52 Ill. App. 326.

Iowa.— Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761; Von Genechtin *v.* Citizens' Ins. Co., 75 Iowa 544, 39 N. W. 881.

Massachusetts.— Bryant *v.* Commonwealth Ins. Co., 6 Pick. 131.

New York.— O'Brien *v.* Mechanics', etc., F. Ins. Co., 45 How. Pr. 453.

Pennsylvania.— Camberling *v.* McCall, 2 Dall. 280, 1 L. ed. 381, 1 Am. Dec. 341.

Texas.— Philadelphia Fire Assoc. *v.* Colgin, (Civ. App. 1896) 33 S. W. 1004.

Virginia.— Farmers' Benev. F. Ins. Assoc. *v.* Kinsey, 101 Va. 236, 43 S. E. 338.

United States.— Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102.

Canada.— City of London F. Ins. Co. *v.* Smith, 15 Can. Sup. Ct. 69; Wellington County Mut. F. Ins. Co. *v.* Frey, 5 Can. Sup. Ct. 82; Hartney *v.* North British F. Ins. Co., 13 Ont. 581; Johnston *v.* Western Assur. Co., 4 Ont. App. 281; Prevost *v.* Scottish Union, etc., Ins. Co., 14 Quebec Super. Ct. 203; Dupuis *v.* North British, etc., Ins. Co., 13 Quebec Super. Ct. 443.

See 28 Cent. Dig. tit. "Insurance," § 1542.

By statute.— In Iowa the company is by statute allowed ninety days after notice and proofs within which to pay before action can be maintained. Jones *v.* German Ins. Co., 110 Iowa 75, 81 N. W. 188, 46 L. R. A. 860; Woodcock *v.* Hawkeye Ins. Co., 97 Iowa 562, 66 N. W. 764; Worley *v.* State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334; Wilhelmi *v.* Des Moines Ins. Co., 86 Iowa 326, 53 N. W. 233; Taylor *v.* Merchants', etc., Ins. Co., 83 Iowa 402, 49 N. W. 994; Vore *v.* Hawkeye Ins. Co., 76 Iowa 548, 41 N. W. 309. And these statutory provisions cannot be waived. Blood *v.* Hawkeye Ins. Co., 103 Iowa 728, 69 N. W. 1141; Finster *v.* Merchants', etc., Ins. Co., 97 Iowa 9, 65 N. W. 1004; Quinn *v.* Capital Ins. Co., 71 Iowa 615, 33 N. W. 130; Harrison *v.* Hartford F. Ins. Co., 59 Fed. 732. But they have no extraterritorial force. Des Moines State Ins. Co. *v.* Du Bois, 7 Colo. App. 214, 44 Pac. 756. The defect may be cured by afterward filing a supplemental petition. Franklin Ins. Co. *v.* McCrea, 4 Greene (Iowa) 229. In other states the provision is that action may be maintained if the company has withheld payment for a specified time after payment is due under the policy. Putze *v.* Saginaw Valley Mut. F. Ins. Co., 132 Mich. 670, 86 N. W. 814, 94 N. W. 191; Jackson First Baptist Church *v.* Citizens' Mut. F. Ins. Co., 119 Mich. 203, 77 N. W. 702; Franklin *v.* New Hampshire F. Ins. Co., 70 N. H. 251, 47 Atl. 91; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 442; Utica Ins. Co. *v.* American Mut. Ins. Co., 16 Barb. (N. Y.) 171.

Where equitable action to set aside an award was instituted before the expiration of sixty days from the time of the award, and it was provided in the policy that no action should be brought within that time, it was held that the court of equity having found no ground to set aside the award could not proceed in the same action to render judgment for the amount of the award, the action with reference to such purpose being prematurely brought. Bellinger *v.* German Ins. Co.,

construed,[56] and may be waived by the company.[57] Absolute denial of liability under the policy constitutes such a waiver and action may be brought at once on such denial.[58] So if the company waives proofs of loss the right of action at once accrues.[59]

95 N. Y. App. Div. 262, 88 N. Y. Suppl. 1020. And see as to the practice under similar circumstances EQUITY, 16 Cyc. 111.

Corrected proofs.— It seems that where the first proofs are defective and corrected proofs are furnished the company has the specified period after the proofs are thus completed. Kimball *v.* Hamilton F. Ins. Co., 8 Bosw. (N. Y.) 495; McNally *v.* Phenix Ins. Co., 16 N. Y. Suppl. 696 [*reversed* in 137 N. Y. 389, 33 N. E. 475]; German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586. *Contra*, Huchberger *v.* Providence Washington Ins. Co., 12 Fed. Cas. No. 6,823 [*affirmed* in 12 Wall. 164, 20 L. ed. 364].

Pleading.— Objection that the action is prematurely brought should be specially pleaded. Barnes *v.* McMurtry, 29 Nebr. 178, 45 N. W. 285; Farmers' Benev. F. Ins. Assoc. *v.* Kinsey, 101 Va. 236, 43 S. E. 338; Hatton *v.* Provincial Ins. Co., 7 U. C. C. P. 555; Rice *v.* Provincial Ins. Co., 7 U. C. C. P. 548. But such a defense is not pleadable in abatement in such sense that the issue must be tried before the determination of issues in bar. Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12. Plea in abatement see also *infra*, XXI, F, 3, a.

56. State Ins. Co. *v.* Maackens, 38 N. J. L. 564.

Mutual companies.— A stipulation in a policy issued by a mutual insurance company that the loss shall be payable sixty days after the claim has been allowed by the directors is not to be construed as prohibiting an action where no allowance is made. Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975.

57. *Nebraska.*— Star Union Lumber Co. *v.* Finney, 35 Nebr. 214, 52 N. W. 1113.

New York.— Howard *v.* Franklin M. & F. Ins. Co., 9 How. Pr. 45.

Virginia.— Farmers' Benev. F. Ins. Assoc. *v.* Kinsey, 101 Va. 236, 43 S. E. 338.

Washington.— Glover *v.* Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

Canada.— Smith *v.* City of London Ins. Co., 11 Ont. 38 [*affirmed* in 14 Ont. App. 328]; Lampkin *v.* Western Assur. Co., 13 U. C. Q. B. 237.

See 28 Cent. Dig. tit. "Insurance," § 1543.

58. *Arkansas.*— German Ins. Co. *v.* Gibson, 53 Ark. 494, 14 S. W. 672.

Colorado.— California Ins. Co. *v.* Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376.

Delaware.—Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. 101.

Georgia.— Continental Ins. Co. *v.* Wickham, 110 Ga. 129, 35 S. E. 287; Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103.

Illinois.— Williamsburg City F. Ins. Co. *v.* Cary, 83 Ill. 453; Ætna Ins. Co. *v.* Maguire, 51 Ill. 342.

Indiana.— Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991.

Kansas.— Phenix Ins. Co. *v.* Weeks, 45 Kan. 751, 26 Pac. 410; Cobb *v.* Insurance Co. of North America, 11 Kan. 93.

Maryland.— Baltimore F. Ins. Co. *v.* Loney, 20 Md. 20.

Massachusetts.— Whitten *v.* New England Live Stock Ins. Co., 165 Mass. 343, 43 N. E. 121.

Minnesota.— Hand *v.* National Live Stock Ins. Co., 57 Minn. 519, 59 N. W. 538.

Missouri.— Landis *v.* Home Mut. F. & M. Ins. Co., 56 Mo. 591; Phillips *v.* Protection Ins. Co., 14 Mo. 220; Hosmer *v.* St. Joseph Town Mut. F. Ins. Co., 80 Mo. App. 419.

Nebraska.— Northern Assur. Co. *v.* Hanna, 60 Nebr. 29, 82 N. W. 97; Home F. Ins. Co. *v.* Fallon, 45 Nebr. 554, 63 N. W. 860; Western Home Ins. Co. *v.* Richardson, 40 Nebr. 1, 58 N. W. 597.

New Jersey.— State Ins. Co. *v.* Maackens, 38 N. J. L. 564.

New York.— Edwards *v.* Fireman's Ins. Co., 43 Misc. 354, 87 N. Y. Suppl. 507.

Pennsylvania.— Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. St. Rep. 703; Farmers' Mut. F. Ins. Co. *v.* Ensminger, 12 Wkly. Notes Cas. 9.

Rhode Island.— Massell *v.* Protective Mut. F. Ins. Co., 19 R. I. 565, 35 Atl. 209.

Tennessee.— Home Ins. Co. *v.* Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665.

Texas.— Georgia Home Ins. Co. *v.* Jacobs, 56 Tex. 366; Connecticut F. Ins. Co. *v.* Hilbrant, (Tex. Civ. App. 1903) 73 S. W. 558; Hartford F. Ins. Co. *v.* Josey, 6 Tex. Civ. App. 290, 25 S. W. 685; Texas Mut. L. Ins. Co. *v.* Brown, 2 Tex. Unrep. Cas. 160.

Washington.— Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331.

United States.— Norwich, etc., Transp. Co. *v.* Western Massachusetts Ins. Co., 18 Fed. Cas. No. 10,363, 6 Blatchf. 241, 34 Conn. 561.

Canada.— Hatton *v.* Provincial Ins. Co., 7 U. C. C. P. 555; Penley *v.* Beacon Assur. Co., 7 Grant Ch. (U. C.) 130; Liverpool, etc., Ins. Co. *v.* Valentine, 7 Quebec Q. B. 400.

See 28 Cent. Dig. tit. "Insurance," § 1543.

59. *Alabama.*— Commercial F. Ins. Co. *v.* Allen, 80 Ala. 571, 1 So. 202.

Kentucky.— Insurance Co. of North America *v.* Forwood Cotton Co., 12 Ky. L. Rep. 846.

Maryland.— Allegre *v.* Maryland Ins. Co., 6 Harr. & J. 408, 14 Am. Dec. 289.

Nebraska.— Omaha F. Ins. Co. *v.* Hildebrand, 54 Nebr. 306, 74 N. W. 589.

Pennsylvania.— Snowden *v.* Kittanning Ins. Co., 122 Pa. St. 502, 16 Atl. 22.

See 28 Cent. Dig. tit. "Insurance," § 1542.

But if proofs are furnished, although defective, the company by waiving the requirement of further proofs does not waive time

2. Limitation of Time For Bringing Action — a. Validity of Stipulations. It is usual to provide in policies of insurance that action thereon must be brought within a specified period shorter than that prescribed by the statute of limitations applicable to such an action; and if the action is not brought within the specified period it cannot be maintained, in the absence of some valid excuse or waiver.[60] The limitation thus imposed by contract on the prosecution of the right of action on the policy is generally held to be valid,[61] provided that the time prescribed is

of payment after the filing of the defective proofs. Howard Ins. Co. *v.* Hocking, 115 Pa. St. 415, 8 Atl. 592; Commercial Union Assur. Co. *v.* Hocking, 115 Pa. St. 407, 8 Atl. 589, 2 Am. St. Rep. 562; German-American Ins. Co. *v.* Hocking, 115 Pa. St. 398, 8 Atl. 586.

60. *Arkansas.*— Planters' Mut. Ins. Assoc. *v.* Southern Sav. Fund, etc., Co., 68 Ark. 8, 56 S. W. 443.

Georgia.—Brooks *v.* Georgia Home Ins. Co., 99 Ga. 116, 24 S. E. 869; Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

Illinois.— Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472.

Iowa.— Vore *v.* Hawkeye Ins. Co., 76 Iowa 548, 41 N. W. 309.

Kansas.— Mead *v.* Phœnix Ins. Co., 68 Kan. 432, 75 Pac. 475, 104 Am. St. Rep. 412, 64 L. R. A. 79.

Louisiana.— Carraway *v.* Merchants' Mut. Ins. Co., 26 La. Ann. 298.

Michigan.— Steele *v.* German Ins. Co., 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85.

Mississippi.— Ohio *v.* Western Assur. Co., 65 Miss. 532, 5 So. 102.

Missouri.— Keim *v.* Home Mut. F. & M. Ins. Co., 42 Mo. 38, 97 Am. Dec. 291.

New York.— Williams *v.* German Ins. Co., 90 N. Y. App. Div. 413, 86 N. Y. Suppl. 98.

Ohio.— Corn City Mut. Ins. Co. *v.* Schwan, 1 Ohio Cir. Ct. 192, 1 Ohio Cir. Dec. 105.

Pennsylvania.— North Western Ins. Co. *v.* Phœnix Oil, etc., Co., 31 Pa. St. 448; Warner *v.* Insurance Co. of North America, 1 Walk. 315.

United States.— Thompson *v.* Phœnix Ins. Co., 25 Fed. 296; Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280.

Canada.— Allen *v.* Merchants Mar. Ins. Co., 15 Can. Sup. Ct. 488, 33 L. C. Jur. 51; Blair *v.* Sovereign F. Ins. Co., 19 Nova Scotia 372, 7 Can. L. T. 410; Simpson *v.* Caledonian Ins. Co., 2 Quebec Q. B. 209; Whyte *v.* Western Assur. Co., 22 L. C. Jur. 215, 7 Rev. Lég. 106; Cornell *v.* Liverpool, etc., F., etc., Ins. Co., 14 L. C. Jur. 256; Allen *v.* Merchants' Mar. Ins. Co., 3 Montreal Super. Ct. 293, 16 Rev. Lég. 232; Rousseau *v.* Cie. d'Assurance Royale d'Angleterre, 1 Montreal Super. Ct. 395.

See 28 Cent. Dig. tit. "Insurance," §§ 1544, 1545.

An action to enforce an agreement to compromise made between the parties after the loss has occurred is not within such a provision. Hanover F. Ins. Co. *v.* Hatton, 55 S. W. 681, 21 Ky. L. Rep. 1533.

Charter limitations.— Similar limitations are sometimes found in the charter of the company, and if the charter is referred to and made part of the contract such a limitation is effectual. Portage County Mut. F. Ins. Co. *v.* West, 6 Ohio St. 599; Higgins *v.* Windsor County Mut. F. Ins. Co., 54 Vt. 270; Williams *v.* Vermont Mut. F. Ins. Co., 20 Vt. 222.

Demand or presentation of claim within the period of limitation is not sufficient. Suit must be brought. Merchants' Mut. Ins. Co. *v.* Lacroix, 45 Tex. 158, 35 Tex. 249, 14 Am. Rep. 370.

Pleading.— The bar of the contract limitation must be specially pleaded. Humboldt Ins. Co. *v.* Johnson, 1 Ill. App. 309; Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652; Barber *v.* Wheeling F. & M. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800. See, however, Moore *v.* State Ins. Co., 72 Iowa 414, 34 N. W. 183; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287. Plaintiff need not allege that the action is commenced within the time limited. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529. On the other hand plaintiff intending to rely on facts constituting a waiver should set them up in his petition or complaint, if the facts alleged by him show that the action would be barred in the absence of such waiver or excuse. Oakland Home Ins. Co. *v.* Allen, 1 Kan. App. 108, 40 Pac. 928; Boon *v.* State Ins. Co., 37 Minn. 426, 34 N. W. 902; Minerick *v.* People's Mut. F. Ins. Co., 4 Ohio Dec. (Reprint) 228, 1 Clev. L. Rep. 134; Oakman *v.* City Ins. Co., 9 R. I. 356. The general issue puts plaintiff on proof of such facts. Illinois Live Stock Ins. Co. *v.* Baker, 49 Ill. App. 92.

61. *Connecticut.*—Chichester *v.* New Hampshire F. Ins. Co., 74 Conn. 510, 51 Atl. 545.

Georgia.— Graham *v.* Niagara F. Ins. Co., 106 Ga. 840, 32 S. E. 579; Hartford F. Ins. Co. *v.* Amos, 98 Ga. 533, 25 S. E. 575.

Illinois.— Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466; Stephens *v.* Phœnix Assur. Co., 85 Ill. App. 671.

Iowa.— Wilhelmi *v.* Des Moines Ins. Co., 103 Iowa 532, 72 N. W. 685; Harrison *v.* Hartford F. Ins. Co., 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709; Moore *v.* State Ins. Co., 72 Iowa 414, 34 N. W. 183; Stout *v.* City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Carter *v.* Humboldt F. Ins. Co., 12 Iowa 287.

Kansas.— Des Moines State Ins. Co. *v.* Stoffels, 48 Kan. 205, 29 Pac. 479.

Kentucky.— Smith *v.* Herd, 110 Ky. 56, 60 S. W. 841, 1121, 22 Ky. L. Rep. 1596.

New Hampshire.— Tasker *v.* Kenton Ins. Co., 58 N. H. 469; Patrick *v.* Farmers' Ins. Co., 43 N. H. 621, 80 Am. Dec. 197.

New York.— Roach *v.* New York, etc., Ins. Co., 30 N. Y. 546 [*affirming* 29 Barb. 552];

not unreasonable and that there is no statute specially defeating such a contractual limitation.[62]

b. Construction of Policy; Computation of Time. Such a limitation is not to be construed, however, so as to deny to the insured a reasonable time within

Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Ryan *v.* Metropolitan L. Ins. Co., 2 N. Y. City Ct. 421.

Ohio.— Corn City Mut. Ins. Co. *v.* Schwan, 1 Ohio Cir. Ct. 192, 1 Ohio Cir. Dec. 105.

Texas.— Suggs *v.* Travelers' Ins. Co., 71 Tex. 579, 9 S. W. 676, 1 L. R. A. 847; Merchants' Mut. Ins. Co. *v.* Lacroix, 35 Tex. 249, 14 Am. Rep. 370.

Vermont.— Morrill *v.* New England F. Ins. Co., 71 Vt. 281, 44 Atl. 358.

Virginia.— Virginia F. & M. Ins. Co. *v.* Wells, 83 Va. 736, 3 S. E. 349; Virginia F. & M. Ins. Co. *v.* Aiken, 82 Va. 424.

United States.— Riddlesbarger *v.* Hartford F. Ins. Co., 7 Wall. 386, 19 L. ed. 257; Vette *v.* Clinton F. Ins. Co., 30 Fed. 668; Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,374.

See 28 Cent. Dig. tit. "Insurance," § 1545.

62. Brown *v.* Savannah Mut. Ins. Co., 24 Ga. 97; Fireman's Fund Ins. Co. *v.* Western Refrigerating Co., 55 Ill. App. 329.

Thus a limitation to twelve months after the loss has been sustained.

Georgia.— Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

Illinois.— Andes Ins. Co. *v.* Fish, 71 Ill. 620.

Missouri.— Glass *v.* Walker, 66 Mo. 32.

Ohio.— Fellowes *v.* Madison Ins. Co., 1 Disn. 217, 12 Ohio Dec. (Reprint) 584, 2 Disn. 128; Corn City Mut. Ins. Co. *v.* Schwan, 1 Ohio Cir. Ct. 192, 1 Ohio Cir. Dec. 105.

Pennsylvania.— Waite *v.* Spring Garden Ins. Co., 1 Wkly. Notes Cas. 155.

Rhode Island.— Brown *v.* Roger Williams Ins. Co., 5 R. I. 394.

Texas.— Lacroix *v.* Merchants' Mut. Ins. Co., 35 Tex. 249, 14 Am. Rep. 370, 45 Tex. 158.

Vermont.— Wilson *v.* Ætna Ins. Co., 27 Vt. 99.

United States.— O'Laughlin *v.* Union Cent. L. Ins. Co., 11 Fed. 280, 3 McCrary 543; Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280; Davidson *v.* Phœnix Ins. Co., 7 Fed. Cas. No. 3,607, 4 Sawy. 594.

See 28 Cent. Dig. tit. "Insurance," § 1545.

A limitation to six months has been sustained. Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517; Brown *v.* Savannah Mut. Ins. Co., 24 Ga. 97; North Western Ins. Co. *v.* Phœnix Oil, etc., Co., 31 Pa. St. 448; Edwards *v.* Metropolitan L. Ins. Co., 5 Kulp (Pa.) 259; Schroeder *v.* Keystone Ins. Co., 2 Phila. (Pa.) 286; McFarland *v.* Peabody Ins. Co., 6 W. Va. 425. *Contra,* Eagle Ins. Co. *v.* Lafayette Ins. Co., 9 Ind. 443.

Four months.— A limitation contained in a by-law of a mutual company that if the insured shall not acquiesce in the determination by the directors of the amount of loss, action for the loss must be brought within four months after such determination has been sustained. Amesbury *v.* Bowditch Mut. F. Ins. Co., 6 Gray (Mass.) 596.

Unreasonable limitation.— But a provision limiting the right of action to six months or a year after the loss, while at the same time it is provided that action shall not be commenced until a specified period after the amount of the loss has been determined by arbitration, has been held unreasonable, as delay in the arbitration might result in entirely defeating the right of action. Leach *v.* Republic F. Ins. Co., 58 N. H. 245; Peoria Sugar Refining Co. *v.* Canada F. & M. Ins. Co., 12 Ont. App. 418. And see *infra,* XXI, C, 2, b.

Against public policy.— In a few cases it has been held, however, that any stipulation limiting the action to a shorter period than that authorized by the statute of limitations is invalid as against public policy. Omaha F. Ins. Co. *v.* Drennan, 56 Nebr. 623, 77 N. W. 67; Barnes *v.* McMurtry, 29 Nebr. 178, 45 N. W. 285; French *v.* Lafayette Ins. Co., 9 Fed. Cas. No. 5,102, 5 McLean 461 [*affirmed* in 18 How. 404, 51 L. ed. 451]; Wilson *v.* State F. Ins. Co., 7 L. C. Jur. 223. And charter limitations of the same character have sometimes been held not to be effectual. Bartlett *v.* Union Mut. F. Ins. Co., 46 Me. 500; Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22; Smith *v.* Atlantic Mut. F. Ins. Co., 22 Fed. Cas. No. 13,005, Brunn. Col. Cas. 573.

In some states there are statutory provisions specially regulating the time within which action may be brought on insurance policies and defeating any provision on the subject in the policy itself.

Indiana.— Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315.

Iowa.—Farmers' Co-operative Creamery Co. *v.* Iowa State Ins. Co., 112 Iowa 608, 84 N. W. 904; Bradford *v.* Mutual F. Ins. Co., 112 Iowa 495, 84 N. W. 693; Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Cornett *v.* Phenix Ins. Co., 67 Iowa 388, 25 N. W. 673.

Maine.— Dolbier *v.* Agricultural Ins. Co., 67 Me. 180; Williams *v.* Mutual F. Ins. Co., 29 Me. 465.

Mississippi.—Ward *v.* Pennsylvania F. Ins. Co., 82 Miss. 124, 33 So. 841.

New York.— Hamilton *v.* Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.

North Carolina.— Lowe *v.* U. S. Mutual Acc. Assoc., 115 N. C. 18, 20 S. E. 169; Muse *v.* London Assur. Corp., 108 N. C. 240, 13 S. E. 94.

North Dakota.— Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799.

South Carolina.— Sample *v.* London, etc.,

which to maintain an action.[63] Thus if the policy gives to the company a specified time after proofs of loss are furnished or the amount of the loss has been determined by arbitration to make payment before action can be brought, and then limits the time for bringing action to six months or a year after the loss, so that it might happen that an unreasonably short time or no period whatever would intervene between the time when action might be brought and the time after which by the strict language of the policy an action would be barred, the short period of limitation named in the policy will be construed as commencing from the time when action might first have been brought under its provisions and not from the time of the loss.[64]

F. Ins. Co., 46 S. C. 491, 24 S. E. 334, 57 Am. St. Rep. 701, 47 L. R. A. 696.

Texas.— German Ins. Co. *v.* Luckett, 12 Tex. Civ. App. 139, 34 S. W. 173.

Wisconsin.— Hart *v.* Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 39 Am. St. Rep. 877, 21 L. R. A. 743.

United States.— Small *v.* Westchester F. Ins. Co., 51 Fed. 789.

See 28 Cent. Dig. tit. "Insurance," § 1545.

63. *Kansas.*— Dwelling House Ins. Co. *v.* Kansas L. & T. Co., 5 Kan. App. 137, 48 Pac. 891.

New Hampshire.— Leach *v.* Republic F. Ins. Co., 58 N. H. 245.

New Jersey.— Martin *v.* State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397.

New York.— Hay *v.* Star F. Ins. Co., 13 Hun 496.

Canada.— Peoria Sugar Refining Co. *v.* Canada F. & M. Ins. Co., 12 Ont. App. 418.

See 28 Cent. Dig. tit. "Insurance," § 1546.

64. *Arkansas.*— Sun Ins. Co. *v.* Jones, 54 Ark. 376, 15 S. W. 1034.

California.— Case *v.* Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48.

Iowa.— Bradford *v.* Mutual F. Ins. Co., 112 Iowa 495, 84 N. W. 693; Harrison *v.* Hartford F. Ins. Co., (1899) 80 N. W. 309; Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180; Matt *v.* Iowa Mut. Aid Assoc., 81 Iowa 135, 46 N. W. 857, 25 Am. St. Rep. 483; McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188; Miller *v.* Hartford F. Ins. Co., 70 Iowa 704, 29 N. W. 411; Ellis *v.* Council Bluffs Ins. Co., 64 Iowa 507, 20 N. W. 782.

Kentucky.— Owen *v.* Howard Ins. Co., 9 Ky. L. Rep. 147.

Nebraska.— German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698; Fireman's Fund Ins. Co. *v.* Buckstaff, 38 Nebr. 150, 56 N. W. 697, 41 Am. St. Rep. 727; German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459.

New York.— Steen *v.* Niagara F. Ins. Co., 89 N. Y. 315, 42 Am. Rep. 297 [*affirming* 61 How. Pr. 144]; Hay *v.* Star F. Ins. Co., 77 N. Y. 235, 33 Am. Rep. 607; New York *v.* Hamilton F. Ins. Co., 39 N. Y. 45, 100 Am. Dec. 400 [*affirming* 10 Bosw. 537]; Cooper *v.* U. S. Mutual Acc. Assoc., 57 Hun 407, 10 N. Y. Suppl. 748; Mix *v.* Andes Ins. Co., 9 Hun 397.

Ohio.— Corn City Mut. Ins. Co. *v.* Schwan, 1 Ohio Cir. Ct. 192, 1 Ohio Cir. Dec. 105.

Oregon.— Egan *v.* Oakland Home Ins. Co., 29 Oreg. 403, 42 Pac. 990, 54 Am. St. Rep. 798.

Pennsylvania.—Hocking *v.* Howard Ins. Co., 130 Pa. St. 170, 18 Atl. 614.

South Carolina.— Sample *v.* London, etc., F. Ins. Co., 46 S. C. 491, 24 S. E. 334, 57 Am. St. Rep. 701, 47 L. R. A. 696.

Tennessee.— Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743.

Utah.— Hong Sling *v.* Royal Ins. Co., 8 Utah 135, 30 Pac. 307.

West Virginia.— Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572; Barber *v.* Wheeling F. & M. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800.

United States.— Vette *v.* Clinton F. Ins. Co., 30 Fed. 668; Friezen *v.* Allemania F. Ins. Co., 30 Fed. 352; Spare *v.* Home Mut. Ins. Co., 17 Fed. 568, 9 Sawy. 142; Levy *v.* Virginia F. & M. Ins. Co., 15 Fed. Cas. No. 8,304.

See 28 Cent. Dig. tit. "Insurance," § 1546.

There is no necessity for such a construction, however, if by the terms of the policy the contract limitation does not commence to run until the proofs have been furnished or the arbitration is had. Garrettson *v.* Merchants', etc., F. Ins. Co., 114 Iowa 17, 86 N. W. 32; Hutchinson *v.* Liverpool, etc., Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Rottier *v.* German Ins. Co., 84 Minn. 116, 86 N. W. 888; State Ins. Co. *v.* Maackens, 38 N. J. L. 564.

If the limitation is to be computed from the time the claim accrues the stipulation will be enforced as written. Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn. 85, 18 Am. Rep. 385. And where thirty days were given for filing proofs and the loss became payable when the proofs were filed it was held that a twelve months' limitation from the time of the loss for bringing action would not be construed as meaning twelve months from the time the loss became payable. Corn City Mut. Ins. Co. *v.* Schwan, 1 Ohio Cir. Ct. 192, 1 Ohio Cir. Dec. 105.

Waiver of proofs of loss.— Even under the rule that the specified period of limitation is to be computed from the time the loss becomes payable it was held that where the company waived proofs of loss the right of action accrued at once and the limitation should be computed from that time. Northwestern Mut. Ins. Co. *v.* Campbell, 11 Ky. L. Rep. 762.

e. Excuses For Delay. The contractual limitation, unlike a statutory limitation in this respect, may be avoided by showing the impossibility of bringing the action within the time limited, as for instance on account of impossibility of securing service on defendant,[65] or some legal obstacle,[66] or disability of plaintiff to sue,[67] or legal prohibition.[68] But mere ignorance or mistake on the part of the insured as to the limitation will not be a sufficient excuse.[69]

d. Waiver by Company. The company by introducing negotiations with insured and inducing him to believe that a settlement or adjustment will be effected without suit waives the contract limitation.[70] But the insured will not be justified in postponing the bringing of suit until after the expiration of the

Many courts have, however, refused to give an equitable construction to conditions in policies limiting the right of action to a specified period after the loss and have enforced the limitation as written.

Colorado.— Daly *v.* Concordia F. Ins. Co., 16 Colo. App. 349, 65 Pac. 416.

Connecticut.—Chichester *v.* New Hampshire F. Ins. Co., 74 Conn. 510, 51 Atl. 545; Chambers *v.* Atlas Ins. Co., 51 Conn. 17, 50 Am. Rep. 1.

Illinois.—Johnson *v.* Humboldt Ins. Co., 91 Ill. 92, 33 Am. Rep. 47 [*affirming* 1 Ill. App. 309].

Kansas.— Des Moines State Ins. Co. *v.* Stoffels, 48 Kan. 205, 29 Pac. 479; McElroy *v.* Continental Ins. Co., 48 Kan. 200, 29 Pac. 478.

Massachusetts.—Fullam *v.* New York Union Ins. Co., 7 Gray 61, 66 Am. Dec. 462.

Missouri.— Grigsby *v.* German Ins. Co., 40 Mo. App. 276; Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7.

New York.— Allen *v.* Dutchess County Mut. Ins. Co., 95 N. Y. App. Div. 86, 88 N. Y. Suppl. 530; King *v.* Watertown F. Ins. Co., 47 Hun 1.

North Dakota.— Travelers' Ins. Co. *v.* California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769.

Virginia.— Virginia F. & M. Ins. Co. *v.* Wells, 83 Va. 736, 3 S. E. 349.

Washington.— State Ins. Co. *v.* Meesman, 2 Wash. 459, 27 Pac. 77, 26 Am. St. Rep. 870.

Wisconsin.— Hart *v.* Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 39 Am. St. Rep. 877, 21 L. R. A. 743.

United States.— Steel *v.* Phenix Ins. Co., 47 Fed. 863 [*reversed* in 51 Fed. 715, 2 C. C. A. 463]; Thompson *v.* Phœnix Ins. Co., 25 Fed. 296, 11 Sawy. 276.

See 28 Cent. Dig. tit. "Insurance," § 1546.

Computation of the period in specific cases see Daly *v.* Concordia F. Ins. Co., 16 Colo. App. 349, 65 Pac. 416; Allemania Ins. Co. *v.* Little, 20 Ill. App. 431; Boston Dwelling-House Ins. Co. *v.* Osborn, 1 Kan. App. 197, 40 Pac. 1099; Owen *v.* Howard Ins. Co., 87 Ky. 571, 10 S. W. 119, 10 Ky. L. Rep. 608.

65. Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252; Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202; Georgia Home Ins. Co. *v.* Holmes, 75 Miss. 390, 23 So. 183, 65 Am. St. Rep. 611; Quinn *v.* Royal Ins. Co., 81 Hun (N. Y.) 207, 30 N. Y. Suppl. 714.

66. Longhurst *v.* Star Ins. Co., 19 Iowa 364; Stout *v.* New Haven City F. Ins. Co., 12 Iowa 371, 79 Am. Dec. 539; Hay *v.* Star F. Ins. Co., 13 Hun (N. Y.) 496; Rosenbaum *v.* Council Bluffs Ins. Co., 37 Fed. 7, 3 L. R. A. 189.

67. Matthews *v.* American Cent. Ins. Co., 154 N. Y. 449, 48 N. E. 751, 61 Am. St. Rep. 627, 39 L. R. A. 433; Phœnix Ins. Co. *v.* Underwood, 12 Heisk. (Tenn.) 424; Semmes *v.* Hartford City F. Ins. Co., 13 Wall. (U. S.) 158, 20 L. ed. 490.

68. Ward *v.* Pennsylvania F. Ins. Co., 82 Miss. 124, 33 So. 841; Wilkinson *v.* First Nat. F. Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166 [*affirming* 9 Hun 522]; Schroeder *v.* Keystone Ins. Co., 2 Phila. (Pa.) 286.

69. De Grove *v.* Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305; Farmers' Mut. F. Ins. Co. *v.* Barr, 94 Pa. St. 345. The fact that the amount of the loss has been adjusted does not excuse failure to bring suit on the policy within the time limited. Willoughby *v.* St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. 272.

70. *Georgia.*—Hartford F. Ins. Co. *v.* Amos, 98 Ga. 533, 25 S. E. 575.

Illinois.— Illinois Live Stock Ins. Co. *v.* Baker, 153 Ill. 240, 38 N. E. 627 [*affirming* 49 Ill. App. 92]; Allemania F. Ins. Co. *v.* Pech, 133 Ill. 220, 24 N. E. 538, 23 Am. St. Rep. 610 [*affirming* 33 Ill. App. 548]; Home Ins., etc., Co. *v.* Myer, 93 Ill. 271; Derrick *v.* Lamar Ins. Co., 74 Ill. 404; Andes Ins. Co. *v.* Fish, 71 Ill. 620; Fireman's Fund Ins. Co. *v.* Western Refrigerating Co., 55 Ill. App. 329; Phœnix Ins. Co. *v.* Stewart, 53 Ill. App. 273; German Ins. Co. *v.* Johnson, 52 Ill. App. 585; Mutual Ben. L. Assoc. of America *v.* Coats, 48 Ill. App. 185.

Indiana.— Grant *v.* Lexington F., etc., Ins. Co., 5 Ind. 23, 61 Am. Dec. 74.

Iowa.— Goodwin *v.* Merchants', etc., Mut. Ins. Co., 118 Iowa 601, 92 N. W. 894; Bish *v.* Hawkeye Ins. Co., 69 Iowa 184, 28 N. W. 553; Eggleston *v.* Council Bluffs Ins. Co., 65 Iowa 308, 21 N. W. 652; Mickey *v.* Burlington Ins. Co., 35 Iowa 174, 14 Am. Rep. 494.

Michigan.— Voorheis *v.* People's Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109; Peoria M. & F. Ins. Co. *v.* Hall, 12 Mich. 202.

Nebraska.— Phenix Ins. Co. *v.* Rad Bila Hora Lodge, 41 Nebr. 21, 59 N. W. 752.

New Hampshire.—Moore *v.* Phœnix Ins. Co., 64 N. H. 140, 6 Atl. 27, 10 Am. St. Rep. 384.

New Jersey.— Martin *v.* State Ins. Co., 44 N. J. L. 485, 43 Am. Rep. 397.

contract period in reliance on mere negotiations with the company for a settlement,[71] especially where ample time to sue remains after the negotiations terminate.[72] Any conduct on the part of the company indicating an election not to rely upon the contractual limitation will bar reliance by it on such limitation as a defense to an action.[73] An agent authorized to bind the company by contract

New York.— Barnum *v.* Merchants' F. Ins. Co., 97 N. Y. 188; Ames *v.* New York Union Ins. Co., 14 N. Y. 253; Solomon *v.* Metropolitan Ins. Co., 42 N. Y. Super. Ct. 22.

Texas.— Horst *v.* City of London F. Ins. Co., 73 Tex. 67, 11 S. W. 148; St. Paul F. & M. Ins. Co. *v.* McGregor, 63 Tex. 399; Merchants' Mut. Ins. Co. *v.* Lacroix, 45 Tex. 158.

Virginia.— Cochran *v.* London Assur. Corp., 93 Va. 553, 25 S. E. 597.

Washington.— David *v.* Oakland Home Ins. Co., 11 Wash. 181, 39 Pac. 443.

Wisconsin.— Black *v.* Winneshiek Ins. Co., 31 Wis. 74.

United States.— Thompson *v.* Phenix Ins. Co., 136 U. S. 287, 10 S. Ct. 1019, 34 L. ed. 408; Alten *v.* McFall, 89 Fed. 463; *In re* State Ins. Co., 16 Fed. 756; Akin *v.* Liverpool, etc., Ins. Co., 1 Fed. Cas. No. 121; Curtis *v.* Home Ins. Co., 6 Fed. Cas. No. 3,503, 1 Biss. 485.

See 28 Cent. Dig. tit. "Insurance," §§ 1551, 1553.

If the company prolongs the investigation or adjustment of the loss until it is too late to bring action under the policy the limitation of the policy is waived.

Massachusetts.— Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96.

Michigan.— Westchester F. Ins. Co. *v.* Dodge, 44 Mich. 420, 6 N. W. 865.

New York.— New York *v.* Hamilton F. Ins. Co., 10 Bosw. 537 [*affirmed* in 39 N. Y. 45, 100 Am. Dec. 400].

Pennsylvania.— Bonnert *v.* Pennsylvania Ins. Co., 129 Pa. St. 558, 18 Atl. 552, 15 Am. St. Rep. 739.

United States.— De Farconnet *v.* Western Ins. Co., 110 Fed. 405.

See 28 Cent. Dig. tit. "Insurance," §§ 1551, 1553.

If proceedings for appraisement or arbitration are pending, the limitation in the policy is thereby extended. Austen *v.* Niagara F. Ins. Co., 16 N. Y. App. Div. 86, 45 N. Y. Suppl. 106; Fritz *v.* British America Assur. Co., 208 Pa. St. 268, 57 Atl. 573.

71. *California.*—Garido *v.* American Cent. Ins. Co., (1885) 8 Pac. 512.

Georgia.— Underwriters' Agency *v.* Sutherlin, 55 Ga. 266.

Illinois.— Metropolitan Acc. Assoc. *v.* Clifton, 63 Ill. App. 152; Allemania Ins. Co. *v.* Little, 20 Ill. App. 431.

Louisiana.— Blanks *v.* Hibernia Ins. Co., 36 La. Ann. 599.

Michigan.— Lentz *v.* Teutonia F. Ins. Co., 96 Mich. 445, 55 N. W. 993.

Pennsylvania.— Schroeder *v.* Keystone Ins. Co., 2 Phila. 286.

West Virginia.— McFarland *v.* Peabody Ins. Co., 6 W. Va. 425.

See 28 Cent. Dig. tit. "Insurance," § 1553.

A simple adjustment of the amount of the loss does not constitute an implied promise to pay and will not waive the limitation. Garretson *v.* Hawkeye Ins. Co., 65 Iowa 468, 21 N. W. 781.

Payment of a portion of the loss to the mortgagee to whom the policy is made payable as his interest may appear will not be a waiver as to an action by the mortgagor. King *v.* Watertown F. Ins. Co., 47 Hun (N. Y.) 1.

72. Allen *v.* Dutchess County Mut. Ins. Co., 95 N. Y. App. Div. 86, 88 N. Y. Suppl. 530.

73. *District of Columbia.*—Brown *v.* Commercial F. Ins. Co., 21 App. Cas. 325.

Illinois.— Metropolitan Acc. Assoc. *v.* Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359 [*affirming* 59 Ill. App. 522]; Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466.

Iowa.— Harrison *v.* Hartford Ins. Co., (1899) 80 N. W. 309.

New York.— Williams *v.* German Ins. Co., 90 N. Y. App. Div. 413, 86 N. Y. Suppl. 98.

Pennsylvania.— Coursin *v.* Pennsylvania Ins. Co., 46 Pa. St. 323; Edwards *v.* Metropolitan L. Ins. Co., 5 Kulp 259.

South Carolina.— Sample *v.* London, etc., F. Ins. Co., 42 S. C. 14, 19 S. E. 1020.

Virginia.— Virginia F. & M. Ins. Co., *v.* Aiken, 82 Va. 424.

See 28 Cent. Dig. tit. "Insurance," § 1551.

A promise to pay the amount of the loss will be a waiver.

Mississippi.— Scottish Union, etc., Ins. Co. *v.* Ensile, 78 Miss. 157, 28 So. 822.

New Jersey.— Martin *v.* State Ins. Co., 6 N. J. L. J. 28.

West Virginia.— Galloway *v.* Standard F. Ins. Co., 45 W. Va. 237, 31 S. E. 969.

Wisconsin.— Frels *v.* Little Black Farmers' Mut. Ins. Co., 120 Wis. 590, 98 N. W. 522.

Canada.— Brady *v.* Western Ins. Co., 17 U. C. C. P. 597.

See 28 Cent. Dig. tit. "Insurance," §§ 1551, 1553.

Inducing insured to dismiss an action brought (Goodwin *v.* Merchants', etc., Mut. Ins. Co., 118 Iowa 601, 92 N. W. 894) or to take some action involving trouble or expense after the bar is completed (De Farconnet *v.* Western Ins. Co., 110 Fed. 405; Cousineau *v.* City of London F. Ins. Co., 15 Ont. 329 [*discussing* Cornish *v.* Abington, 4 H. & N. 548, 28 L. J. Exch. 262, 7 Wkly. Rep. 504; Thomas *v.* Brown, 1 Q. B. D. 714, 45 L. J. Q. B. 811, 35 L. T. Rep. N. S. 237, 24 Wkly. Rep. 821]) will be a waiver.

Prolonging an arbitration may constitute a waiver. Fritz *v.* British America Assur. Co., 208 Pa. St. 268, 57 Atl. 573.

may waive the limitation.[74] But a mere local agent having no such authority cannot waive.[75]

e. Commencement of Action — Second Action. What will constitute the bringing of an action under the terms of a contract limitation depends largely upon the rules of procedure in the various states.[76] But even if a timely action is brought, a second action commenced after the contract bar has become completed cannot be maintained, although the first has been terminated by dismissal or nonsuit so that no trial has been had on the merits of the case.[77] And it seems

After waiver the limitation cannot be revived so as to entitle the company to rely upon it as a defense. Illinois Live-Stock Ins. Co. *v.* Baker, 153 Ill. 240, 38 N. E. 627 [*affirming* 49 Ill. App. 92].

Estoppel.— Contrary to the weight of authority (see cases cited *supra*, at the head of this note) it has been said that to constitute a waiver the act relied upon must have been done during the period of limitation (Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499), and that waiver must be supported by an agreement founded on a valuable consideration or consist of an act sufficient to constitute an estoppel (Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362. See *supra*, XIV, A.

No waiver.— That the company does not waive the limitation by entering into or carrying on negotiations for a settlement, if the insured has not been induced to rely thereon in delaying the bringing of his action beyond the contract period, see the following cases:

New York.— Allen *v.* Dutchess County Mut. Ins. Co., 95 N. Y. App. Div. 86, 88 N. Y. Suppl. 530.

Pennsylvania.— Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

Vermont.— Morrell *v.* New England F. Ins. Co., 71 Vt. 281, 44 Atl. 358.

Washington.— Hill *v.* Phœnix Ins. Co., 14 Wash. 164, 44 Pac. 146.

Canada.— Davis *v.* Canada Farmers' Mut. Ins. Co., Trin. T. [1876] R. & J. Dig. 1851.

See 28 Cent. Dig. tit. "Insurance," §§ 1551, 1553.

A mere failure to raise the objection of the contract limitation until after suit is brought does not waive the defense. Rottier *v.* German Ins. Co., 84 Minn. 116, 86 N. W. 888; Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; People *v.* Liverpool, etc., Ins. Co., 2 Thomps. & C. (N. Y.) 268; Hocking *v.* Howard Ins. Co., 130 Pa. St. 170, 18 Atl. 614; National F. Ins. Co. *v.* Brown, 128 Pa. St. 386, 18 Atl. 389. Nor will the fact that other objections are interposed to recovery by the insured be a waiver of the defense of the contract limitation. Coryeon *v.* Providence-Washington Ins. Co., 79 Mich. 187, 44 N. W. 431; La Plant *v.* Fireman's Ins. Co., 68 Minn. 82, 70 N. W. 856; De Grove *v.* Metropolitan Ins. Co., 61 N. Y. 594, 19 Am. Rep. 305; Farmers' Mut. F. Ins. Co. *v.* Barr, 94 Pa. St. 345.

74. *Arkansas.*—Dwelling-House Ins. Co. *v.* Brodie, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458.

North Carolina.—Dibbrell *v.* Georgia Home Ins. Co., 110 N. C. 193, 14 S. E. 783, 28 Am. St. Rep. 678.

Pennsylvania.— Universal F. Ins. Co. *v.* Stewart, 3 Pennyp. 536.

Texas.— Burlington Ins. Co. *v.* Toby, 10 Tex. Civ. App. 425, 30 S. W. 1111.

United States.—Idle *v.* Phœnix Ins. Co., 12 Fed. Cas. No. 7,001, 2 Biss. 333.

75. Underwriters' Agency *v.* Sutherlin, 55 Ga. 266; Barry, etc., Lumber Co. *v.* Citizens' Ins. Co., (Mich. 1904) 98 N. W. 761; Waynesboro Mut. F. Ins. Co. *v.* Conover, 98 Pa. St. 384, 42 Am. Rep. 618.

76. *Illinois.*— Schroeder *v.* Merchants', etc., Ins. Co., 104 Ill. 71; Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472.

Kansas.— Des Moines State Ins. Co. *v.* Stoffels, 48 Kan. 205, 29 Pac. 479.

Nebraska.— Home F. Ins. Co. *v.* Murray, 40 Nebr. 597, 59 N. W. 102.

Ohio.— Burton *v.* Buckeye Ins. Co., 26 Ohio St. 467.

Pennsylvania.— Everett *v.* Niagara Ins. Co., 142 Pa. St. 322, 21 Atl. 817; American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107; Com. *v.* Rochester Ins. Co., 2 Lanc. L. Rev. 253.

Texas.— East Texas F. Ins. Co. *v.* Templeton, 3 Tex. App. Civ. Cas. § 424.

Virginia.— Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

See 28 Cent. Dig. tit. "Insurance," § 1548. And see ACTIONS, 1 Cyc. 747 *et seq.*

Attachment of the claim by garnishment or otherwise, at the suit of a creditor, is the commencement of action within the terms of the policy. Harris *v.* Phœnix Ins. Co., 35 Conn. 310; Ritter *v.* Boston Underwriters' Ins. Co., 28 Mo. App. 140.

Lloyd's policy.— The usual limitation in a Lloyd's policy that action thereon must be commenced within twelve months refers only to the action to establish the claim and not to proceedings against the several underwriters to enforce judgment. Lawrence *v.* Schroeder, 19 Misc. (N. Y.) 239, 42 N. Y. Suppl. 992; New Jersey, etc., Concentrating Works *v.* Ackerman, 6 N. Y. App. Div. 540, 39 N. Y. Suppl. 585 [*affirming* 15 Misc. 605, 37 N. Y. Suppl. 489].

Subsequent proceedings.— The limitation does not affect subsequent proceedings in the case to correct an error in entering a verdict or other act. Hamburg-Bremen F. Ins. Co. *v.* Pelzer Mfg. Co., 76 Fed. 479, 22 C. C. A. 283.

77. *Connecticut.*—Chichester *v.* New Hampshire F. Ins. Co., 74 Conn. 510, 51 Atl. 545.

Georgia.— Williams *v.* Greenwich Ins. Co.,

to be immaterial with reference to this result that the first action was brought in good faith,[78] and that it failed without fault on plaintiff's part.[79] As long as the first action technically continues, the contract bar cannot be interposed on account of the subsequent joinder of[80] or intervention by[81] a new party, or by an amendment changing the parties[82] or setting up additional facts.[83]

D. Parties — 1. Plaintiffs — a. Insured. The insured being the person with whom the contract was made is primarily the proper person to bring suit thereon.[84]

98 Ga. 532, 25 S. E. 31; Melson *v.* Phœnix Ins. Co., 97 Ga. 722, 25 S. E. 189.

Iowa.— Wilhelmi *v.* Des Moines Ins. Co., 103 Iowa 532, 72 N. W. 685.

Mississippi.— Ward *v.* Pennsylvania F. Ins. Co., 82 Miss. 124, 33 So. 841.

New York.— Arthur *v.* Homestead F. Ins. Co., 78 N. Y. 462, 34 Am. Rep. 550; New York Ice Co. *v.* Northwestern Ins. Co., 32 Barb. 534, 11 Abb. Pr. 419.

Texas.— Sun Mut. Ins. Co. *v.* Levy, 3 Tex. App. Civ. Cas. § 428.

West Virginia.— McFarland *v.* Ætna F. & M. Ins. Co., 6 W. Va. 437.

United States.— Riddlesbarger *v.* Hartford Ins. Co., 7 Wall. 386, 19 L. ed. 257.

See 28 Cent. Dig. tit. "Insurance," § 1548.

Statutory provisions, as to second actions under the statute of limitations, do not apply so as to save the right to bring a second action after the contract period on failure of the first action.

Connecticut.— Chichester *v.* New Hampshire F. Ins. Co., 74 Conn. 510, 51 Atl. 545.

Iowa.— Harrison *v.* Hartford F. Ins. Co., 102 Iowa 112, 71 N. W. 220, 47 L. R. A. 709.

Kansas.— McElroy *v.* Continental Ins. Co., 48 Kan. 200, 29 Pac. 478.

Mississippi.— Ward *v.* Pennsylvania F. Ins. Co., 82 Miss. 124, 33 So. 841.

Pennsylvania.— Hocking *v.* Howard Ins. Co., 130 Pa. St. 170, 18 Atl. 614.

Rhode Island.— Brown *v.* Roger Williams Ins. Co., 7 R. I. 301.

United States.— Harrison *v.* Hartford F. Ins. Co., 67 Fed. 298.

See 28 Cent. Dig. tit. "Insurance," § 1548.

Specific statutory provision is sometimes made with reference to the contract limitation as in case of the statute of limitations. Lancashire Ins. Co. *v.* Stanley, 70 Ark. 1, 62 S. W. 66.

78. McIntyre *v.* Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781. It has been held, however, that the contract requirement is satisfied if an action is brought within the contract period in good faith and on its dismissal a new action is promptly instituted, although the second action is not brought until the time has expired. Madison Ins. Co. *v.* Fellowes, 1 Disn. (Ohio) 217, 12 Ohio Dec. (Reprint) 584, 2 Disn. (Ohio) 128; Rogers *v.* New York Home Ins. Co., 95 Fed. 109, 35 C. C. A. 402.

79. Wilson *v.* Ætna Ins. Co., 27 Vt. 99. If, however, the dismissal or nonsuit has been without the authority of the insured and due to some fault on the part of the company a second action may be maintained. Taylor *v.* Glens Falls Ins. Co., 44 Fla. 273, 32 So. 887; Phenix Ins. Co. *v.* Belt R. Co., 182 Ill. 33, 54 N. E. 1046. So if by reason of mistake in the execution of the policy it is necessary to have it reformed in equity, and the necessity of such reformation is not discovered until the bringing of an action at law, the action in equity may be regarded as ancillary to or a continuation of the first action and will not be barred if the first action was brought in time. Woodbury Sav. Bank, etc., Assoc. *v.* Charter Oak F. & M. Ins. Co., 31 Conn. 517; Jacobs *v.* St. Paul F. & M. Ins. Co., 86 Iowa 145, 53 N. W. 101.

80. Jamison *v.* State Ins. Co., 85 Iowa 229, 52 N. W. 185.

81. Stevens *v.* Citizens' Ins. Co., 69 Iowa 658, 29 N. W. 769.

82. Thomas *v.* Fame Ins. Co., 108 Ill. 91 [*affirming* 10 Ill. App. 545].

83. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759; Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25. But an amendment which sets up substantially a new cause of action cannot be interposed after the period of contract limitation has expired. Connecticut F. Ins. Co. *v.* Monroe Civ. Judge, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398; Grier *v.* Northern Assur. Co., 183 Pa. St. 334, 39 Atl. 10. And as to similar amendments in connection with the statute of limitations see, generally, Pleading.

84. *Delaware.*— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Illinois.— Phœnix Ins. Co. *v.* Mitchell, 67 Ill. 43.

Iowa.— Worley *v.* State Ins. Co., 91 Iowa 150, 59 N. W. 16, 51 Am. St. Rep. 334.

Nebraska.— Union Ins. Co. *v.* Barwick, 36 Nebr. 223, 54 N. W. 519.

New Hampshire.— Perry *v.* Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

New York.— Conover *v.* Albany Mut. Ins. Co., 1 N. Y. 290; McManus *v.* Western Assur. Co., 43 N. Y. App. Div. 550, 48 N. Y. Suppl. 820, 60 N. Y. Suppl. 1143.

Canada.— Every *v.* Provincial Ins. Co., 10 U. C. C. P. 20.

The agent of an undisclosed principal may sue on a policy taken by him in his own name. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Goodall *v.* New England Mut. F. Ins. Co., 25 N. H. 169. And see, generally, Principal and Agent.

A vendor insuring as owner and in his own interest, having made settlement with the company in his own name, cannot afterward

b. Real Party in Interest. It is generally provided in the codes and practice acts that actions are to be maintained by the real party in interest,[85] and under such provision it is proper for the person for whose benefit the contract is made to sue thereon, although he is not named or otherwise designated in the policy.[86]

c. Assignee. Under an assignment of the claim against the company made after loss, the assignee may sue in the same method and under the same restrictions as any other assignee of a chose in action.[87] If the assignment is made before loss and with the consent of the company, action on the policy may be brought by the assignee.[88]

sue for the use of the vendee. Wright *v.* Continental Ins. Co., 117 Ga. 499, 43 S. E. 700.

85. See, generally, PARTIES.

86. *Alabama.*— Capital City Ins. Co. *v.* Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152.

Georgia.— Traders' Ins. Co. *v.* Mann, 118 Ga. 381, 45 S. E. 426.

Iowa.— Benesh *v.* Mill Owners' Mut. F. Ins. Co., 103 Iowa 465, 72 N. W. 674.

Louisiana.—Gordon *v.* Wright, 29 La. Ann. 812.

Massachusetts.— Rider *v.* Ocean Ins. Co., 20 Pick. 259; Farrow *v.* Commonwealth Ins. Co., 18 Pick. 53, 29 Am. Dec. 564.

Ohio.— Phœnix Ins. Co. *v.* Carnahan, 63 Ohio St. 258, 58 N. E. 805; Blackwell *v.* Miami Valley Ins. Co., 48 Ohio St. 533, 29 N. E. 278, 29 Am. St. Rep. 574, 14 L. R. A. 431.

See 28 Cent. Dig. tit. "Insurance," § 1562.

An undisclosed principal as the real party in interest may sue on a policy taken in the name of the agent.

Illinois.— New Orleans Ins. Co. *v.* Spruance, 18 Ill. App. 576.

Maryland.— Maryland Ins. Co. *v.* Graham, 3 Harr. & J. 62.

Massachusetts.— Shawmut Sugar Refining Co. *v.* Hampden Mut. Ins. Co., 12 Gray 540.

Missouri.—Platho *v.* Merchants', etc., Ins. Co., 38 Mo. 248.

New York.— Bridge *v.* Niagara Ins. Co., 1 Hall 247; Lane *v.* Columbus Ins. Co., 2 Code Rep. 65.

United States.— Daniels *v.* Citizens' Ins. Co., 5 Fed. 425, 10 Biss. 116; Ruan *v.* Gardner, 20 Fed. Cas. No. 12,100, 1 Wash. 145.

See 28 Cent. Dig. tit. "Insurance," § 1562.

Extrinsic evidence is admissible to show who is the insured under a policy issued in the name of a deceased person. Lumberman's Mut. Ins. Co. *v.* Bell, 166 Ill. 400, 45 N. E. 130, 57 Am. St. Rep. 140.

The owner of a qualified interest in real property may sue on a policy taken out for his protection, although nominally issued to the owner of the legal title. *In re* Zehring, 4 Pa. Super. Ct. 243.

But a wife cannot maintain an action at law on a policy taken out by her husband apparently covering his own property, no agency or trusteeship being made to appear. Zimmerman *v.* Farmers' Ins. Co., 76 Iowa 352, 41 N. W. 39.

87. *Alabama.*— Perry *v.* Merchants' Ins. Co., 25 Ala. 355.

Iowa.— Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

Michigan.— Watertown F. Ins. Co. *v.* Grover, etc., Sewing Mach. Co., 41 Mich. 131, 1 N. W. 961, 32 Am. Rep. 146.

Nebraska.—Star Union Lumber Co. *v.* Finney, 35 Nebr. 214, 52 N. W. 1113.

United States.— Spratley *v.* Hartford Ins. Co., 22 Fed. Cas. No. 13,256, 1 Dill. 392.

See 28 Cent. Dig. tit. "Insurance," § 1561. And see, generally, PARTIES. See also ASSIGNMENTS, 4 Cyc. 99 *et seq.*

The suit may be in the name of the insured for the benefit of the assignee. Virginia F. & M. Ins. Co. *v.* Feagin, 62 Ga. 515; New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225; New Orleans Ins. Co. *v.* Gordon, 68 Tex. 144, 3 S. W. 718.

The assignor is not a necessary party if the suit is by the assignee. Indian River State Bank *v.* Hartford F. Ins. Co., (Fla. 1903) 35 So. 228; Continental Ins. Co. *v.* Pratt, 8 Kan. App. 424, 55 Pac. 671.

88. *Georgia.*— National F. Ins. Co. *v.* Grace, 106 Ga. 264, 32 S. E. 100.

Massachusetts.— Bullman *v.* North British, etc., Ins. Co., 159 Mass. 118, 34 N. E. 169; Phillips *v.* Merrimack Mut. F. Ins. Co., 10 Cush. 350.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62.

New Hampshire.— Crafts *v.* Union Mut. F. Ins. Co., 36 N. H. 44.

West Virginia.— Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

See 28 Cent. Dig. tit. "Insurance," § 1561.

Where choses in action are not assignable at law, the assignee even in the cases stated in the text is not allowed to sue in his own name (Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221; Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231; Bayles *v.* Hillsborough Ins. Co., 27 N. J. L. 163; Ripley *v.* Ætna Ins. Co., 29 Barb. (N. Y.) 552; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583; East Texas F. Ins. Co. *v.* Coffee, 61 Tex. 287; Beemer *v.* Anchor Ins. Co., 16 U. C. Q. B. 485), unless the right to bring such suit is expressly given by stipulation between the company and the assignee (Jessel *v.* Williamsburgh Ins. Co., 3 Hill (N. Y.) 88).

In an action by the assignor, the assignees should be made parties. German-American Ins. Co. *v.* Johnson, 4 Kan. App. 357, 45 Pac. 972.

d. Mortgagor and Mortgagee. If the policy is taken by the mortgagor in his own interest, although the insurance is payable to the mortgagee, the action may properly be maintained in the name of the mortgagor, for he is not only the party with whom the contract is made, but the person for whose ultimate benefit the insurance is to be paid.[89] If the policy is taken by the mortgagee in his own interest and for his own benefit he is the proper plaintiff.[90] Likewise, if there has been an assignment by the consent of the company to the mortgagee of a policy taken by the mortgagor under such stipulations as to create practically a new contract of insurance between the company and the mortgagee, the action on the policy should properly be by the mortgagee.[91] And it is generally held that even where the policy taken by the mortgagor is made payable to the mortgagee, as his interest may appear, the mortgagee may recover thereon in his own name to the extent of his interest[92] or the mortgagor and the mortgagee may sue jointly.[93] If the mortgagee's interest exceeds the insurance, the entire right of recovery is in him.[94] But if the mortgagee's interest is less than the full amount

If the policy has been pledged as collateral security, the action should be brought by the insured. Northam *v.* International Ins. Co., 165 N. Y. 666, 59 N. E. 1127; Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. Suppl. 539. And see Mahr *v.* Norwich Union F. Ins. Soc., 127 N. Y. 452, 28 N. E. 391.

89. *Iowa.*— Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126.

Missouri.— Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

New Hampshire.— Bragg *v.* New England Mut. F. Ins. Co., 25 N. H. 289.

New Jersey.— Franklin F. Ins. Co. *v.* Martin, 40 N. J. L. 568, 29 Am. Rep. 271; Martin *v.* Franklin F. Ins. Co., 38 N. J. L. 140, 20 Am. Rep. 372.

Pennsylvania.— Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25.

Vermont.— Powers *v.* New England F. Ins. Co., 69 Vt. 494, 38 Atl. 148.

United States.— Friemansdorf *v.* Watertown Ins. Co., 1 Fed. 68.

See 28 Cent. Dig. tit. "Insurance," § 1564.

But the mortgagee should be made a party to the suit (Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525) unless he has expressly assented to the suit by the mortgagor (Patterson *v.* Triumph Ins. Co., 64 Me. 500; Coates *v.* Pennsylvania F. Ins. Co., 58 Md. 172, 42 Am. Rep. 327; Turner *v.* Quincy Mut. F. Ins. Co., 109 Mass. 568; Jackson *v.* Farmers' Mut. F. Ins. Co., 5 Gray (Mass.) 52; Ennis *v.* Harmony F. Ins. Co., 3 Bosw. (N. Y.) 516).

90. Hopkins Mfg. Co. *v.* Aurora F. & M. Ins. Co., 48 Mich. 148, 11 N. W. 846; Chamberlain *v.* New Hampshire F. Ins. Co., 55 N. H. 249; Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. 231.

91. Meriden Sav. Bank *v.* Home Mut. F. Ins. Co., 50 Conn. 396; Westchester F. Ins. Co. *v.* Coverdale, 48 Kan. 446, 29 Pac. 682; Palmer Sav. Bank *v.* Insurance Co. of North America, 166 Mass. 189, 44 N. E. 211, 55 Am. St. Rep. 387, 32 L. R. A. 615; Smith *v.* Union Ins. Co., 25 R. I. 260, 55 Atl. 715.

92. *Illinois.*— Hartford F. Ins. Co. *v.* Olcott, 97 Ill. 439.

Iowa.— Bartlett *v.* Iowa State Ins. Co., 77 Iowa 86, 41 N. W. 579.

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

Missouri.— Anthony *v.* German American Ins. Co., 48 Mo. App. 65; Berthold *v.* Clay F. & M. Ins. Co., 2 Mo. App. 311.

New York.— Cone *v.* Niagara F. Ins. Co., 60 N. Y. 619; Ennis *v.* Harmony F. Ins. Co., 3 Bosw. 516.

Oregon.— Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466.

Virginia.— Tilley *v.* Connecticut F. Ins. Co., 86 Va. 811, 11 S. E. 120.

West Virginia.— Ritchie County Bank *v.* Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

Canada.— Agricultural Sav., etc., Co. *v.* Liverpool, etc., Ins. Co., 3 Ont. L. Rep. 127; Burton *v.* Gore Dist. Mut. F. Ins. Co., 14 U. C. Q. B. 342.

See 28 Cent. Dig. tit. "Insurance," § 1565.

For mortgagee's use.— But in such case the action may be in the name of the mortgagor for the mortgagee's use or benefit (Hartford F. Ins. Co. *v.* Peterson, 209 Ill. 112, 70 N. E. 757; Peterson *v.* Hartford F. Ins. Co., 87 Ill. App. 567; Hall *v.* Philadelphia Fire Assoc., 64 N. H. 405, 13 Atl. 648); and the mortgagor refusing to sue as plaintiff should be made defendant (Great Western Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373).

Interpleader by mortgagee.— Where insurance has inured to the benefit of the mortgagee, he is entitled by interpleader to interpose his equitable claim in an action brought by the mortgagor. McKenzie *v.* Ætna Ins. Co., Ritch. Eq. Cas. (Nova Scotia) 346.

93. Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

94. *Alabama.*— Capital City Ins. Co. *v.* Jones, 128 Ala. 361, 30 So. 674, 86 Am. St. Rep. 152.

Arkansas.— Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196.

Indiana.— Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549, 54 N. E. 772.

recoverable under the policy, the action should be brought by the mortgagor;[95] or if brought by the mortgagee the mortgagor should be made a party in order that the respective interests of the mortgagor and mortgagee may be determined.[96]

e. Persons For Whose Benefit Insurance Is Procured. Where the policy is taken wholly or in part for the benefit of another, even though it is expressly made payable to such other person, as his interest may appear, the insured may bring action thereon.[97] But the one for whose benefit the policy is taken has also the right to sue as plaintiff under the procedure recognized in most of the states, by which the real party in interest is authorized to sue.[98]

f. Legal Representatives. The administrator and not the heir is entitled to

Maine.—Motley *v.* Manufacturers' Ins. Co., 29 Me. 337, 50 Am. Dec. 591.

Minnesota.— Maxcy *v.* New Hampshire F. Ins. Co., 54 Minn. 272, 55 N. W. 1130, 40 Am. St. Rep. 325.

Mississippi.— Lowry *v.* Insurance Co. of North America, 75 Miss. 43, 21 So. 664, 65 Am. St. Rep. 587, 37 L. R. A. 779.

New Hampshire.— Hadley *v.* New Hampshire F. Ins. Co., 55 N. H. 110.

North Dakota.—Travelers' Ins. Co. *v.* California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769.

Utah.— Peck *v.* Girard F. & M. Ins. Co., 16 Utah 121, 51 Pac. 255, 67 Am. St. Rep. 600.

Wisconsin.— Hammel *v.* Queen Ins. Co., 50 Wis. 240, 6 N. W. 805.

See 28 Cent. Dig. tit. "Insurance," § 1565.

The mortgagor is not a necessary party in such a case. State Trust Co. *v.* Scottish Union, etc., Ins. Co., 119 Ga. 672, 46 S. E. 855; Farmers' F. Ins. Co. *v.* Baker, 94 Md. 545, 51 Atl. 184; Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817; Cone *v.* Niagara F. Ins. Co., 3 Thomps. & C. (N. Y.) 33 [*affirmed* in 60 N. Y. 619]; Rogers *v.* Traders' Ins. Co., 6 Paige (N. Y.) 583.

95. *Alabama.*— Fire Ins. Companies *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58.

Illinois.— St. Paul F. & M. Ins. Co. *v.* Johnson, 77 Ill. 598.

Indiana.— Ætna Ins. Co. *v.* Baker, 71 Ind. 102.

Louisiana.— Lane *v.* Sun Mut. Ins. Co., 35 La. Ann. 224.

Michigan.— Hartford F. Ins. Co. *v.* Davenport, 37 Mich. 609.

Mississippi.— Scottish Union, etc., Ins. Co. *v.* Enslie, 78 Miss. 157, 28 So. 822.

Texas.— Georgia Home Ins. Co. *v.* Leaverton, (Civ. App. 1895) 33 S. W. 579.

Wisconsin.— Carberry *v.* German Ins. Co., 86 Wis. 323, 56 N. W. 920.

See 28 Cent. Dig. tit. "Insurance," § 1565.

96. Kent *v.* Ætna Ins. Co., 84 N. Y. App. Div. 428, 82 N. Y. Suppl. 817; Proctor *v.* Georgia Home Ins. Co., 124 N. C. 265, 32 S. E. 716; Williamson *v.* Michigan F. & M. Ins. Co., 86 Wis. 393, 57 N. W. 46, 39 Am. St. Rep. 906.

97. *Delaware.*— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Louisiana.—Lane *v.* Sun Mut. Ins. Co., 35 La. Ann. 224.

Massachusetts.— Copeland *v.* Mercantile Ins. Co., 6 Pick. 198; Ward *v.* Wood, 13 Mass. 539.

Missouri.— Branigan *v.* Jefferson Mut. F. Ins. Co., 102 Mo. App. 70, 76 S. W. 643.

New Hampshire.—Folsom *v.* Orient F. Ins. Co., 59 N. H. 54.

New York.— Sturm *v.* Atlantic Mut. Ins. Co., 63 N. Y. 77 [*affirming* 38 N. Y. Super. Ct. 281]; People *v.* Liverpool, etc., Ins. Co., 2 Thomps. & C. 268; Owen *v.* Farmers' Joint Stock Ins. Co., 10 Abb. Pr. N. S. 166 note; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72, 22 Am. Dec. 567.

Ohio.— Protection Ins. Co. *v.* Wilson, 6 Ohio St. 553.

Pennsylvania.— American Ins. Co. *v.* Insley, 7 Pa. St. 223, 47 Am. Dec. 509; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. 68, 33 Am. Dec. 38.

West Virginia.— Murdock *v.* Franklin Ins. Co., 33 W. Va. 407, 10 S. E. 777, 7 L. R. A. 572.

United States.— California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730; Queen Ins. Co. *v.* Union Bank, etc., Co., 111 Fed. 697, 49 C. C. A. 555; Thatch *v.* Metropole Ins. Co., 11 Fed. 29, 3 McCrary 387; Hatch *v.* Metropole Ins. Co., 11 Fed. Cas. No. 6,207*a*.

Canada.— Marrin *v.* Stadacona Ins. Co., 43 U. C. Q. B. 556 [*affirmed* in 4 Ont. App. 330]; Dear *v.* Western Assur. Co., 41 U. C. Q. B. 553.

See 28 Cent. Dig. tit. "Insurance," § 1558.

An agent insuring for the benefit of his principal may bring action in his own name on the policy. Davis *v.* Boardman, 12 Mass. 80; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21; Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6.

Where one procured insurance for himself and others concerned, and had already protected his own interest by a prior policy, it was held that he could not recover in his own name. Gardner *v.* Bedford Ins. Co., 17 Mass. 613.

A policy insuring two parties as their interest may appear constitutes a several contract on which either may sue without joining the other. Sullivan *v.* Spring Garden Ins. Co., 34 N. Y. App. Div. 128, 54 N. Y. Suppl. 629.

98. *Illinois.*— Traders' Ins. Co. *v.* Pacaud, 51 Ill. App. 252.

Kansas.—German F. Ins. Co. *v.* Thompson, 43 Kan. 567, 23 Pac. 608.

the proceeds of a policy of insurance on real property on the death of the insured, and the action should therefore be brought in the name of the former.[99]

g. In Actions Against Mutual Companies. On a policy issued by a mutual company which insures only its members, the action should be brought by the member,[1] and not by an assignee,[2] unless by the provisions of the charter the assignee under an assignment approved by the company becomes a member of the company.[3]

2. Joinder of Plaintiffs. If two or more persons are named, either as having a joint or a several interest in the property covered by the policy, they may sue as joint plaintiffs.[4] And if two persons have become jointly interested in the proceeds, they may be joined as plaintiff under the usual statutory provisions.[5]

Louisiana.—Ballard *v.* Merchants' Ins. Co., 9 La. 258, 29 Am. Dec. 444.

New Jersey.— State Ins. Co. *v.* Maackens, 38 N. J. L. 564.

New York.— Harvey *v.* Cherry, 76 N. Y. 436 [*affirming* 12 Hun 354]; Pitney *v.* Glen's Falls Ins. Co., 65 N. Y. 6; Frink *v.* Hampden Ins. Co., 31 How. Pr. 30.

Texas.— Allison *v.* Phœnix Ins. Co., 87 Tex. 593, 30 S. W. 547.

West Virginia.— Ritchie County Bank *v.* Fireman's Ins. Co., 55 W. Va. 261, 47 S. E. 94.

Canada.— Hamilton Bank *v.* Western Assur. Co., 38 U. C. Q. B. 609.

See 28 Cent. Dig. tit. "Insurance," § 1559. See also *supra*, XXI, D, 1, b. And see, generally, Parties.

Suit by beneficiary alone.— If the interest of the person for whose benefit the policy is taken exceeds the amount of the insurance, the suit may be brought in his name alone (Donaldson *v.* Sun Mut. Ins. Co., 95 Tenn. 280, 32 S. W. 251), especially if the policy has been taken at his expense (Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121).

99. Pfister *v.* Gerwig, 122 Ind. 567, 23 N. E. 1041; Westchester F. Ins. Co. *v.* Dodge, 44 Mich. 420, 6 N. W. 865; Farmers' Mut. Ins. Co. *v.* Graybill, 74 Pa. St. 17. This rule is recognized by the usual provision in policies that the insurance is to the insured or his legal representatives. Lappin *v.* Charter Oak F. & M. Ins. Co., 58 Barb. (N. Y.) 325; Baldwin *v.* Pennsylvania F. Ins. Co., 206 Pa. St. 248, 55 Atl. 970; Georgia Home Ins. Co. *v.* Kinnier, 28 Gratt. (Va.) 88.

1. Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9; Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22.

2. Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231; Rollins *v.* Columbian Mut. F. Ins. Co., 25 N. H. 200.

3. Stimpson *v.* Monmouth Mut. F. Ins. Co., 47 Me. 379; Barnes *v.* Union Mut. F. Ins. Co., 45 N. H. 21; Shepherd *v.* Union Mut. F. Ins. Co., 38 N. H. 232; Folsom *v.* Belknap County Mut. F. Ins. Co., 30 N. H. 231; Rollins *v.* Columbian Mut. F. Ins. Co., 25 N. H. 200; Flanagan *v.* Camden Mut. Ins. Co., 25 N. J. L. 506; Mann *v.* Herkimer County Mut. Ins. Co., 4 Hill (N. Y.) 187.

4. *Indiana.*— Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. 118.

Iowa.— Graves *v.* Merchants', etc., Ins. Co., 82 Iowa 637, 49 N. W. 65, 31 Am. St. Rep. 507.

Kentucky.— Kenton Ins. Co. *v.* Osborne, 51 S. W. 306, 21 Ky. L. Rep. 330.

Maryland.— Fireman's Ins. Co. *v.* Floss, 67 Md. 403, 10 Atl. 139, 1 Am. St. Rep. 398.

Massachusetts.— Tate *v.* Citizens' Mut. F. Ins. Co., 13 Gray 79.

Michigan.— Castner *v.* Farmers' Mut. F. Ins. Co., 46 Mich. 15, 8 N. W. 554.

Minnesota.—Kausel *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

New York.—Besant *v.* Glens Falls Ins. Co., 72 N. Y. App. Div. 276, 76 N. Y. Suppl. 35.

Pennsylvania.— Manhattan Ins. Co. *v.* Webster, 59 Pa. St. 227, 98 Am. Dec. 332.

Tennessee.— Hobbs *v.* Memphis Ins. Co., 1 Sneed 444.

Texas.— Lion F. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 203, 68 S. W. 305.

Vermont.— Davis *v.* New England F. Ins. Co., 70 Vt. 217, 39 Atl. 1095.

Washington.— Hedican *v.* Pennsylvania F. Ins. Co., 21 Wash. 488, 58 Pac. 574.

See 28 Cent. Dig. tit. "Insurance," § 1568.

If one has assigned his interest to another interested party, the suit may be brought by the person in whom both interests are thus combined. Murdock *v.* Chenango County Mut. Ins. Co., 2 N. Y. 210; Howard *v.* Albany Ins. Co., 3 Den. (N. Y.) 301; Hutchinson *v.* Niagara Dist. Mut. F. Ins. Co., 39 U. C. Q. B. 483.

5. *Arkansas.*— Burlington Ins. Co. *v.* Lowery, 61 Ark. 108, 32 S. W. 383, 54 Am. St. Rep. 196.

Louisiana.— McClelland *v.* Greenwich Ins. Co., 107 La. 124, 31 So. 691.

Minnesota.— Ermentrout *v.* American F. Ins. Co., 60 Minn. 418, 62 N. W. 543.

Missouri.— Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299; Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

New York.— Winne *v.* Niagara F. Ins. Co., 91 N. Y. 185 [*affirming* 25 Hun 563]; Lasher *v.* Northwestern Nat. Ins. Co., 18 Hun 98 [*affirming* 55 How. Pr. 324]; Bruckheimer *v.* Merchants' Ins. Co., 1 N. Y. City Ct. 363.

Texas.— Georgia Home Ins. Co. *v.* Leaverton, (Civ. App. 1895) 33 S. W. 579; Alamo F. Ins. Co. *v.* Schmitt, 10 Tex. Civ. App. 550, 30 S. W. 833.

3. DEFENDANTS. If there are two or more policies in different companies covering the same loss, the insured may bring action on any one of them, or separate actions on any number of them, recovering to the extent of the insurance under each policy, until his loss is fully satisfied, leaving the companies to settle their respective liabilities between themselves by contribution;[6] unless by the provisions of the policies the liability of the companies is limited to their *pro-rata* share of the loss.[7] Insurers who have become jointly or severally liable under the same policy may be joined as defendants in an action thereon; and if they are severally liable, separate judgments may be had against them.[8] A necessary party united in interest with plaintiff who refuses to join with the latter may be made a defendant.[9]

E. Service of Process. Process may be served upon officers of the company, as in other cases of actions against corporations,[10] but not on a mere agent,[11] unless statutory provisions authorize service upon agents.[12] For the purpose of

Wisconsin.— Great Western Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373.

See 28 Cent. Dig. tit. "Insurance," § 1568. And see, generally, PARTIES.

Where the entire loss is payable to the mortgagee or assignee, it seems that it is not necessary to join the mortgagor or assignor. Michael *v.* St. Louis Mut. F. Ins. Co., 17 Mo. App. 23; Cone *v.* Niagara F. Ins. Co., 60 N. Y. 619 [*affirming* 3 Thomps. & C. 33]; Roussel *v.* St. Nicholas Ins. Co., 52 How. Pr. (N. Y.) 495; Bruckheimer *v.* Merchants' Ins. Co., 1 N. Y. City Ct. 363.

6. Cromie *v.* Kentucky, etc., Mut. Ins. Co., 15 B. Mon. (Ky.) 432; Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433; Wiggin *v.* Suffolk Ins. Co., 18 Pick. (Mass.) 145, 29 Am. Dec. 576. See *supra*, XX, E.

7. Fire Ins. Assoc. *v.* Merchants', etc., Transp. Co., 66 Md. 339, 7 Atl. 905, 59 Am. Rep. 162. See *supra*, XVI, C.

8. Germania F. Ins. Co. *v.* Boykin, 12 Wall. (U. S.) 433, 20 L. ed. 442.

Lloyd's policies.—Underwriters agreeing to pay their proportionate shares of the loss, not exceeding in the aggregate the amount insured, under the form of joint obligation known as a Lloyd's policy, may be all sued in an action on the policy. Sutherlin *v.* Underwriters' Agency, 53 Ga. 442; American Lucol Co. *v.* Lowe, 41 N. Y. App. Div. 500, 58 N. Y. Suppl. 687; Isear *v.* McMahon, 16 Misc. (N. Y.) 95, 37 N. Y. Suppl. 1101, 25 N. Y. Civ. Proc. 217. If the underwriters act as an association, using a common name, the action may be brought against them as an association (Toronto Bank *v.* Manufacturers', etc., Fire Assoc., 63 N. J. L. 5, 42 Atl. 761) under statutory provisions in some jurisdictions (see ASSOCIATIONS, 4 Cyc. 313, 314); but it is usually provided in such policies that action shall only be brought against the manager or attorney in fact representing the individual underwriters, and such a provision is valid (Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063; Leiter *v.* Beecher, 2 N. Y. App. Div. 577, 37 N. Y. Suppl. 1114; Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350), especially if the manager or attorney thus named is one of the underwriters (Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197, 4 N. Y. Annot. Cas. 357; Perrysburg, etc., Transp. Co. *v.* Gilchrist, 24 Ohio Cir. Ct. 165). But if the attorney named is not one of the underwriters, it seems that the action should be brought against one of the parties liable under the policy. Toronto Bank *v.* Manufacturers', etc., Fire Assoc., 63 N. J. L. 5, 42 Atl. 761; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197, 4 N. Y. Annot. Cas. 357. At any rate if the attorney or manager named has ceased to represent the association, the action should be brought against the underwriters, or some one of them. Ralli *v.* White, 20 Misc. (N. Y.) 635, 46 N. Y. Suppl. 376; American Lucol Co. *v.* Lowe, 41 N. Y. App. Div. 500, 58 N. Y. Suppl. 687; Perrysburg, etc., Transp. Co. *v.* Gilchrist, 24 Ohio Cir. Ct. 165; Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350. So if for any other reason the action cannot be maintained against the attorney suit may be brought against the underwriters (American Lucol Co. *v.* Blanchard, 26 Misc. (N. Y.) 315, 57 N. Y. Suppl. 14) and the recovery of judgment against the attorney will not bar a subsequent action against the underwriters (Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063).

9. Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525.

10. Henderson *v.* Maryland Home F. Ins. Co., 90 Md. 47, 44 Atl. 1020; Whalan *v.* Mutual Aid Soc., 2 Leg. Rec. (Pa.) 370. See, generally, PROCESS.

11. Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761; Weight *v.* Liverpool, etc., Ins. Co., 30 La. Ann. 1186; Parke *v.* Commonwealth Ins. Co., 44 Pa. St. 422; Means *v.* Lycoming Ins. Co., 1 C. Pl. (Pa.) 6.

12. *Georgia.*—Gaines *v.* Bankers' Alliance, 113 Ga. 1138, 39 S. E. 502.

Illinois.— Michigan State Ins. Co. *v.* Abens, 3 Ill. App. 488.

Iowa.— Fred Miller Brewing Co. *v.* Council Bluffs Ins. Co., 95 Iowa 31, 63 N. W. 565; Philp *v.* Covenant Mut. Ben. Assoc., 62 Iowa 633, 17 N. W. 903; State Ins. Co. *v.* Granger, 62 Iowa 272, 17 N. W. 504; Niagara Ins. Co.

enabling the courts of a state to secure jurisdiction in actions against foreign companies, it is often provided that a foreign company seeking to do business in a state shall appoint an agent or attorney within the state upon whom service may be made, and that in default of such appointment service may be made upon some state officer.[13]

F. Pleadings — 1. Declaration, Complaint, or Petition — a. General Requisites. Plaintiff in stating his cause of action against the company for the recovery of money which he claims to be due under the terms of his policy, on a loss, should allege the making of the contract, his interest in the property at the time the contract was made and at the time of the loss such as to entitle him to enter into and enforce a valid contract of insurance thereof, a consideration, the performance of all the conditions required on his part under the terms of the

v. Rodecker, 47 Iowa 162; Farmers' Ins. Co. *v.* Highsmith, 44 Iowa 330.

Kansas.— German Ins. Co. *v.* Boonville First Nat. Bank, 58 Kan. 86, 48 Pac. 592, 62 Am. St. Rep. 601.

Kentucky.— Kenton Ins. Co. *v.* Osborne, 51 S. W. 306, 21 Ky. L. Rep. 330.

Louisiana.— Milwaukee Trust Co. *v.* Germania Ins. Co., 106 La. 669, 31 So. 298.

Michigan.— Hartford F. Ins. Co. *v.* Owen, 30 Mich. 441.

Pennsylvania.— Eberman *v.* American F. Ins. Co., 164 Pa. St. 515, 30 Atl. 398; Felty *v.* New York Nat. Acc. Soc., 19 Pa. Co. Ct. 473.

Texas.— Southern Ins. Co. *v.* Wolverton Hardware Co., (Sup. 1892) 19 S. W. 615.

See 28 Cent. Dig. tit. "Insurance," §§ 1572, 1574.

After termination of agency.— Under a statute authorizing service upon the agent who issued the policy, such service will be valid, although the agent has ceased to represent the company. Gillespie *v.* Commercial Mut. Mar. Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743; Pervangher *v.* Union Casualty, etc., Co., 81 Miss. 32, 32 So. 909.

By mail.— As to provisions for service without the state by mail see Heart *v.* Lycoming F. Ins. Co., 26 Ohio St. 594, 5 Ohio Dec. (Reprint) 61, 2 West. L. Rec. 354.

13. *Kansas.*— Westchester F. Ins. Co. *v.* Coverdale, 48 Kan. 446, 29 Pac. 682; Long Island Ins. Co. *v.* Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738; German Ins. Co. *v.* Hall, 1 Kan. App. 43, 41 Pac. 69.

Massachusetts.— Gibson *v.* Manufacturers' Ins. Co., 144 Mass. 81, 10 N. E. 729.

Missouri.— Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673; U. S. Mut. Acc. Ins. Co. *v.* Reisinger, 43 Mo. App. 571.

New York.— Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513.

Pennsylvania.— Darlington *v.* Rogers, 13 Phila. 102.

West Virginia.— Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314.

United States.— Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501.

See 28 Cent. Dig. tit. "Insurance," § 1573. And see Insurance; Process.

Defendant cannot deny consent to such service in conformity to requirements of the state law, in the absence of pleading and proof to the contrary, if it transacts business in the state. New York Mut. F. Ins. Co. *v.* Hammond, 106 Ky. 386, 50 S. W. 545, 20 Ky. L. Rep. 1944.

As to policies issued in the state, such a provision is effectual, even after the company has ceased to do business in the state. Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 295; Woodward *v.* Mutual Reserve L. Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519.

Other service authorized by statute will be sufficient, the provisions for service upon a state officer being cumulative. Burlington Ins. Co. *v.* Mortimer, 52 Kan. 784, 35 Pac. 807; Jones *v.* Hartford Ins. Co., 88 N. C. 499.

Omission to file consent.—Service upon the state officer designated by statute will be valid, although the foreign company doing business in the state has not filed the consent required by statute as a condition. Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. 27; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123. *Contra,* Lubrano *v.* Imperial Council O. of U. F., 20 R. I. 27, 37 Atl. 345, 38 L. R. A. 546.

Action based on foreign business.— It seems that a foreign company consenting as required by statute that it may be served by process directed to an agent designated for that purpose in the state may be so served in an action arising out of business transacted in another state. Mooney *v.* Buford, etc., Mfg. Co., 72 Fed. 32, 18 C. C. A. 421 [*distinguishing* Rehm *v.* German Ins., etc., Inst., 125 Ind. 135, 25 N. E. 173]. But the statutory provisions are applicable only to companies doing business within the state. Romaine *v.* Union Ins. Co., 55 Fed. 751; Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743.

Contract consummated in foreign state.— It seems that the statutory provisions are applicable to a policy of insurance on property in the state, although the contract is consummated in another state. Firemen's Ins. Co. *v.* Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335 [*affirming* 51 Ill. App. 339]; Fred Miller Brewing Co. *v.* Council Bluffs Ins. Co., 95 Iowa 31, 63 N. W. 565; Gude *v.* Dakota F. & M. Ins. Co., 7

contract, the loss or damage without his fault to the property during the term of the insurance, and the non-payment of the amount thus becoming due.[14] Compliance with conditions qualifying the contract of the insurer,[15] as distinguished from distinct and collateral provisions in the nature of defeasances,[16] must be alleged by plaintiff. Where the declaration follows a statutory short form it is the better practice to allege a loss by fire and compliance with conditions precedent or a waiver thereof even if the form does not contain those averments.[17]

b. Setting Out the Policy. As in any other action on a written contract[18] the policy itself or so much thereof as pertains to the obligation the breach of which is complained of should be set out in the pleadings or by way of exhibit in an action brought thereon.[19] But if the action is on an agreement to insure, although the terms of the agreement are to be ascertained from the terms of the policy which the company should have issued,[20] yet it is not necessary to set out such a policy, nor allege the specific terms thereof, inasmuch as the action is not on the policy, but on the agreement.[21] Nor is it necessary to set out any collateral agree-

S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860; Osborne *v.* Shawmut Ins. Co., 51 Vt. 278.

14. Cases as to proper allegations under special headings are cited *infra*, subsections XXI, F, 1, b *et seq.* The following cases illustrate the general requirements of plaintiff's pleadings:

California.— Clark *v.* Phœnix Ins. Co., 36 Cal. 168.

Colorado.— Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537.

Missouri.— Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687; Murphy *v.* North British, etc., Ins. Co., 70 Mo. App. 78.

Ohio.— Hughs *v.* Farmers' Ins. Co., 4 Ohio Dec. (Reprint) 412, 2 Clev. L. Rep. 125.

Texas.—Underwriters' Fire Assoc. *v.* Henry, (Civ. App. 1904) 79 S. W. 1072.

Vermont.— Hersey *v.* Northern Assur. Co., 75 Vt. 441, 56 Atl. 95.

Washington.— Madigan *v.* West Coast F. & M. Ins. Co., 3 Wash. 454, 28 Pac. 1027; Emigh *v.* State Ins. Co., 3 Wash. 122, 27 Pac. 1063.

United States.— Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211.

See 28 Cent. Dig. tit. "Insurance," § 1575.

Domicile of defendant.— Where defendant was named as the "Phœnix Insurance Co. of Brooklyn, New York," in the title of the cause and was likewise designated in the policy, it was held that the state under whose laws defendant was organized was sufficiently alleged. Phœnix Ins. Co. *v.* McAtee, (Ind. App. 1904) 70 N. E. 947, the court refusing to concede, however, that such an allegation was essential.

The expression "for the use and benefit" of a named person appearing only as an adjunct to the description of plaintiff has no force to change the issue that would otherwise be made. Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

15. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331; Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798, both cases holding that insurance of property while in a specified location must not be alleged without the qualification.

16. These are matters of defense. Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798. See also *infra*, XXI, F, 3, c.

17. German-American Ins. Co. *v.* Davidson, 67 Ga. 11.

18. See CONTRACTS, 9 Cyc. 712–714; and, generally, PLEADINGS.

19. *Georgia.*— Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975.

Illinois.— Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117.

Indiana.— Indiana Ins. Co. *v.* Hartwell, 100 Ind. 566; Western Assur. Co. *v.* McCarty, 18 Ind. App. 449, 48 N. E. 265.

Maryland.— Caledonian Ins. Co. *v.* Traub, 80 Md. 214, 30 Atl. 904.

Missouri.— McHoney *v.* German Ins. Co., 37 Mo. App. 218.

New York.— Sullivan *v.* Spring Garden Ins. Co., 34 N. Y. App. Div. 128, 54 N. Y. Suppl. 629.

Texas.— Commercial Union Assur. Co. *v.* Dunbar, 7 Tex. Civ. App. 418, 26 S. W. 628.

See 28 Cent. Dig. tit. "Insurance," § 1588.

Under the common counts alone, the policy is not admissible in evidence. Rochester German Ins. Co. *v.* Heffron, 89 Ill. App. 659.

A part of the pleadings.— The terms of the contract thus set out in the pleadings, or incorporated therein by reference, are to be considered a part of the pleadings. Ætna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934; Hudson *v.* Scottish Union, etc., Ins. Co., 110 Ky. 722, 62 S. W. 513, 23 Ky. L. Rep. 116.

If it is impossible to set out a copy of the instrument, plaintiff's excuse for not doing so should be alleged. Hartford Nat. F. Ins. Co. *v.* Strebe, 16 Ind. App. 110, 44 N. E. 768.

20. See *supra*, III, D, 4.

21. *Indiana.*— New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; Western Assur. Co. *v.* McAlphin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

Minnesota.— Ganser *v.* Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

Missouri.— Duff *v.* Philadelphia Fire Assoc., 129 Mo. 460, 30 S. W. 1034 [*reversing* 56 Mo. App. 355]; King *v.* Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55.

ments or stipulations which do not constitute an essential part of the formal written instrument.[22] Thus it is not necessary to set out the application, even though it contains stipulations on the part of the insured,[23] unless by the terms of the policy such stipulations in the application are incorporated into and made a part of the policy.[24]

c. Consideration. Plaintiff should allege a consideration for the contract,[25] as in other actions founded on contract.[26] But the conditions in the policy are not a part of the consideration.[27]

d. Cause of Action Accrued. It is usual to provide that the money to be paid shall not be due, nor any action brought therefor within a specified time after notice and proofs of loss have been given;[28] and it is therefore necessary to show that a cause of action has accrued, by alleging the giving of notice and the making of proofs and the date thereof.[29]

e. Assignment or Beneficial Interest. If plaintiff is not the party with whom the contract was made, but claims thereunder as assignee, he must make such

Texas.— Merchants' Ins. Co. *v.* Arnold, (Civ. App. 1895) 32 S. W. 579.

Wisconsin.—Schwahn *v.* Michigan F. & M. Ins. Co., 89 Wis. 84, 61 N. W. 78.

See 28 Cent. Dig. tit. "Insurance," § 1588.

Contra.— Concordia F. Ins. Co. *v.* Heffron, 84 Ill. App. 610; Mallette *v.* British-American Assur. Co., 91 Md. 471, 46 Atl. 1005; Trask *v.* German Ins. Co., 58 Mo. App. 431.

22. East Texas F. Ins. Co. *v.* Dyches, 56 Tex. 565; Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331; Farrell *v.* American Employers' Liability Ins. Co., 68 Vt. 136, 34 Atl. 478; Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798; Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474; Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

23. *California.*— Tischler *v.* California Farmers' Mut. F. Ins. Co., 66 Cal. 178, 4 Pac. 1169.

District of Columbia.— Jacobs *v.* National L. Ins. Co., 1 MacArthur 632.

Illinois.— Phenix Ins. Co. *v.* Stocks, 149 Ill. 319, 36 N. E. 408 [*affirming* 40 Ill. App. 64]; New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272.

Indiana.— Phœnix Ins. Co. *v.* Stark, 120 Ind. 444, 22 N. E. 413; Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Continental L. Ins. Co. *v.* Kessler, 84 Ind. 310; Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264; Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352; Indiana Farmers' Live Stock Ins. Co. *v.* Byrkett, 9 Ind. App. 443, 36 N. E. 779; Phenix Ins. Co. *v.* Lorenz, 7 Ind. App. 266, 34 N. E. 495.

North Carolina.— Britt *v.* Mutual Ben. L. Ins. Co., 105 N. C. 175, 10 S. E. 896.

United States.— Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519.

See 28 Cent. Dig. tit. "Insurance," § 1588.

24. Cowan *v.* Phenix Ins. Co., 78 Cal. 181, 20 Pac. 408; Gilmore *v.* Lycoming F. Ins. Co., 55 Cal. 123; Throop *v.* North American F. Ins. Co., 19 Mich. 423.

The by-laws of the company need not be set out, although they are attached to the policy. Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

25. Ohio Farmers' Ins. Co. *v.* Stowman, 16 Ind. App. 205, 44 N. E. 558, 940; Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620; Fire Ins. Assoc. *v.* Miller, 2 Tex. App. Civ. Cas. § 332; River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506.

26. See CONTRACTS, 9 Cyc. 717 *et seq.*

27. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553, they need not be alleged.

28. See *supra*, XXI, C, 1.

29. *California.*—Cowan *v.* Phenix Ins. Co., 78 Cal. 181, 20 Pac. 408; Doyle *v.* Phœnix Ins. Co., 44 Cal. 264.

Delaware.— Pierson *v.* Springfield F. & M. Ins. Co., 7 Houst. 307, 31 Atl. 966.

Kansas.— German Ins. Co. *v.* Hall, 1 Kan. App. 43, 41 Pac. 69.

Missouri.— Taylor *v.* National Temperance Relief Union, 94 Mo. 35, 6 S. W. 71.

New York.— Clemens *v.* American F. Ins. Co., 70 N. Y. App. Div. 435, 75 N. Y. Suppl. 484, 10 N. Y. Annot. Cas. 420.

South Dakota.— Baton Rouge First Nat. Bank *v.* Dakota F. & M. Ins. Co., 6 S. D. 424, 61 N. W. 439.

Texas.— Pennsylvania F. Ins. Co. *v.* Faires, 13 Tex. Civ. App. 111, 35 S. W. 55.

Vermont.— Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798.

West Virginia.— Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

Wisconsin.— Butternut Mfg. Co. *v.* Manufacturers' Mut. F. Ins. Co., 78 Wis. 202, 47 N. W. 366; Benedix *v.* German Ins. Co., 78 Wis. 77, 47 N. W. 176; Carberry *v.* German Ins. Co., 51 Wis. 605, 8 N. W. 406.

See 28 Cent. Dig. tit. "Insurance," § 1579. And see CONTRACTS, 9 Cyc. 719.

General allegation.— It is said, however, that under a statute authorizing plaintiff to plead generally the performance of the conditions of a contract on his part, it is sufficient in this respect to make such general allegation with reference to the conditions of the policy. McGannon *v.* Millers' Nat. Ins. Co., 171 Mo. 143, 71 S. W. 160, 94 Am. St. Rep. 778. See CONTRACTS, 9 Cyc. 722.

allegations as to assignment as will entitle him to bring the action.[30] And if he claims as the person for whose benefit the policy was taken, he should allege his interest in such way as to bring himself within the conditions of the policy.[31]

f. Ownership and Insurable Interest. Insurable interest on the part of the insured in the property is essential, not only at the time of the loss, but also at the time of the making of the contract.[32] Therefore it is essential for plaintiff in stating his cause of action under the policy to allege such interest as existing at the time the policy was executed, and also at the time of the loss.[33] As the insurable interest is usually that of owner, it is commonly said in the cases that plaintiff must allege ownership of the property.[34] But such allegation may be made in general terms or inferentially; and indeed it has been repeatedly held that it

30. *Georgia.*—Hartford F. Ins. Co. *v.* Amos, 98 Ga. 533, 25 S. E. 575.

Illinois.— Commercial Ins. Co. *v.* Treasury Bank, 61 Ill. 482, 14 Am. Rep. 73.

Minnesota.— Morley *v.* Liverpool, etc., Ins. Co., 76 Minn. 285, 79 N. W. 103.

New York.— Granger *v.* Howard Ins. Co., 5 Wend. 200.

Pennsylvania.— Harley *v.* Lebanon Mut. Ins. Co., 120 Pa. St. 182, 13 Atl. 833.

Wisconsin.— River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506.

See 28 Cent. Dig. tit. "Insurance," § 1581. And see ASSIGNMENTS, 4 Cyc. 105 *et seq.*

31. Bartlett *v.* Iowa State Ins. Co., 77 Iowa 86, 41 N. W. 579; Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466; Donaldson *v.* Sun Mut. Ins. Co., 95 Tenn. 280, 32 S. W. 251; Great Western Compound Co. *v.* Ætna Ins. Co., 40 Wis. 373.

32. See *supra*, II, C, 1.

33. *Indiana.*— Ætna Ins. Co. *v.* Kittles, 81 Ind. 96; Home Ins. Co. *v.* Duke, 75 Ind. 535; Prussian Nat. Ins. Co. *v.* Peterson, 30 Ind. App. 289, 64 N. E. 102; Ohio Farmers' Ins. Co. *v.* Vogel, 30 Ind. App. 281, 65 N. E. 1056; Vernon Ins., etc., Co. *v.* Toronto Bank, 29 Ind. App. 678, 65 N. E. 23; Farmers' Ins. Co. *v.* Burris, 23 Ind. App. 507, 55 N. E. 773; Phenix Ins. Co. *v.* Moffitt, (App. 1898) 51 N. E. 948) Western Assur Co. *v.* McCarty, 18 Ind. App. 449, 48 N. E. 265; Western Assur Co. *v.* Koontz, 17 Ind. App. 54, 46 N. E. 95; Indiana Live Stock Ins. Co. *v.* Bogeman, 4 Ind. App. 237, 30 N. E. 7.

Missouri.— Clevinger *v.* Northwestern Nat. Ins. Co., 71 Mo. App. 73; Scott *v.* Phœnix Ins. Co., 65 Mo. App. 75; Harness *v.* National F. Ins. Co., 62 Mo. App. 245.

New York.— Fowler *v.* New York Indemnity Ins. Co., 26 N. Y. 422 [*reversing* 23 Barb. 143]; Bryan *v.* Farmers' Mut. Indemnity Assoc., 81 N. Y. App. Div. 542, 81 N. Y. Suppl. 145; Freeman *v.* Fulton F. Ins. Co., 38 Barb. 247; Williams *v.* Insurance Co. of North America, 9 How. Pr. 365.

Oregon.— Hardwick *v.* State Ins. Co., 20 Oreg. 547, 26 Pac. 840; Chrisman *v.* State Ins. Co., 16 Oreg. 283, 18 Pac. 466.

Texas.— Alamo F. Ins. Co. *v.* Davis, (Civ. App. 1898) 45 S. W. 604; German Ins. Co. *v.* Everett, (Civ. App. 1896) 36 S. W. 125; Commercial Union Assur. Co. *v.* Dunbar, 7 Tex. Civ. App. 418, 26 S. W. 628.

Vermont.— Davis *v.* New England F. Ins. Co., 70 Vt. 217, 39 Atl. 1095; Dickerman *v.* Vermont Mut. F. Ins. Co., 67 Vt. 99, 30 Atl. 808.

West Virginia.— Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

United States.— Earnmoor *v.* California Ins. Co., 40 Fed. 847.

See 28 Cent. Dig. tit. "Insurance," § 1582.

Contra.— But it is said that the issuance of the policy to the insured is *prima facie* an admission by the company of an insurable interest obviating the necessity of a direct allegation.

Alabama.— Commercial F. Ins. Co. *v.* Capital City Ins. Co., 81 Ala. 320, 8 So. 222, 60 Am. Rep. 162.

Colorado.— Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537.

Nebraska.— Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

Ohio.— People's F. Ins. Co. *v.* Heart, 24 Ohio St. 331.

Texas.— German Ins. Co. *v.* Gibbs, (Civ. App. 1896) 35 S. W. 679, "an averment of ownership would have been better form," per Collard, J.

See also cases cited *infra*, page 935 note 81.

Agent for undisclosed principal.— If insurance is taken by one for the benefit of another, and an action is brought on the policy by the person in whose name it is taken, he must allege insurable interest in the beneficiary. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66; Freeman *v.* Fulton F. Ins. Co., 38 Barb. (N. Y.) 247.

Person to whom insurance is payable.— One who is entitled to the proceeds of the insurance as collateral security or otherwise need not allege insurable interest in himself. Frink *v.* Hampden Ins. Co., 45 Barb. (N. Y.) 384, 1 Abb. Pr. N. S. 343, 31 How. Pr. 30.

34. Vernon Ins., etc., Co. *v.* Toronto Bank, 29 Ind. App. 678, 65 N. E. 23; White *v.* Merchants' Ins. Co., 93 Mo. App. 282; Wolf *v.* Sun Ins. Co., 75 Mo. App. 306; Continental Fire Assoc. *v.* Bearden, 29 Tex. Civ. App. 569, 69 S. W. 982.

Under a valued policy statute by which the company is not permitted to deny that the property was worth the full amount of the insurance, it has been held to be unnecessary to allege interest of the insured in the property at the time of the loss. Bode *v.* Firemen's Ins. Co., 103 Mo. App. 289, 77 S. W. 116.

is not necessary that the specific facts showing ownership of the insured property be directly alleged.[35]

g. Compliance With Conditions or Warranties. The general rule requiring plaintiff in an action on contract to allege performance of those things which by the terms of the contract he is required to perform[36] is applied in actions for recovery under policies of insurance, so as to require plaintiff to allege performance of the conditions and warranties contained in the contract which are made essential to its validity as a contract; but such allegation may be in general terms.[37] But the general requirement as to averring performance of conditions and warranties relates only to conditions precedent; it is not necessary to nega-

35. *California.*— Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416.

Indiana.— Insurance Co. of North America *v.* Hegewald, 161 Ind. 631, 66 N. E. 902; Phœnix Ins. Co. *v.* Stark, 120 Ind. 444, 22 N. E. 413; Phœnix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Phœnix Ins. Co. *v.* Rowe, 117 Ind. 202, 20 N. E. 122.

Kansas.— St. Paul F. & M. Ins. Co. *v.* Kelly, 43 Kan. 741, 23 Pac. 1046.

Michigan.— Rediker *v.* Queen Ins. Co., 107 Mich. 224, 65 N. W. 105.

Missouri.— Rogers *v.* Western Home Town Mut. F. Ins. Co., 93 Mo. App. 24; Shaver *v.* Mercantile Town Mut. Ins. Co., 79 Mo. App. 420; Jones *v.* Philadelphia Underwriters, 78 Mo. App. 296; Bondurant *v.* German Ins. Co., 73 Mo. App. 477.

New York.— Young *v.* Phenix Ins. Co., 61 N. Y. 650; Sullivan *v.* Spring Garden Ins. Co., 34 N. Y. App. Div. 128, 54 N. Y. Suppl. 629; Fowler *v.* New York Indemnity Ins. Co., 23 Barb. 143 [*reversed* in 26 N. Y. 422]; Van Natta *v.* Mutual Security Ins. Co., 2 Sandf. 490.

Texas.— American Cent. Ins. Co. *v.* White, 32 Tex. Civ. App. 197, 73 S. W. 827; Pennsylvania F. Ins. Co. *v.* Jameson, 31 Tex. Civ. App. 651, 73 S. W. 418; German Ins. Co. *v.* Pearlstone, 18 Tex. Civ. App. 706, 45 S. W. 832; Northwestern Nat. Ins. Co. *v.* Woodward, 18 Tex. Civ. App. 496, 45 S. W. 185.

Virginia.— Loudoun County Mut. F. Ins. Co. *v.* Ward, 95 Va. 231, 28 S. E. 209.

See 28 Cent. Dig. tit. "Insurance," § 1582.

Proof of insurable interest sustains an allegation of ownership. Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

Ownership presumed to continue.— An allegation of ownership at the time of the making of the contract seems to be sufficient, as continuance of ownership will be presumed. Roussel *v.* St. Nicholas Ins. Co., 41 N. Y. Super. Ct. 279, 52 How. Pr. 495; Davis *v.* Grand Rapids F. Ins. Co., 15 Misc. (N. Y.) 263, 36 N. Y. Suppl. 792 [*affirmed* in 157 N. Y. 685, 51 N. E. 1090]. And see cases cited in EVIDENCE, 16 Cyc. 1054 note 33.

36. See CONTRACTS, 9 Cyc. 719 *et seq.*

37. *Indiana.*— Phenix Ins. Co. *v.* Wilson, 132 Ind. 449, 25 N. E. 592; Commercial Union Assur. Co. *v.* State, 113 Ind. 331, 15 N. E. 518; American Ins. Co. *v.* Leonard, 80 Ind. 272.

Louisiana.— Mason *v.* Louisiana State M. & F. Ins. Co., 1 Rob. 192.

New York.— Guarino *v.* Fireman's Ins. Co., 44 Misc. 218, 88 N. Y. Suppl. 1044.

Texas.— London, etc., F. Ins. Co. *v.* Schwulst, (Civ. App. 1898) 46 S. W. 89.

Wisconsin.— Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

See 28 Cent. Dig. tit. "Insurance," § 1593. And see CONTRACTS, 9 Cyc. 722.

If the policy contains specific conditions, it is said, however, that a general allegation that plaintiff has performed all things by him to be performed is not sufficient. Perry *v.* Phœnix Assur. Co., 8 Fed. 643. *Contra*, American Cent. Ins. Co. *v.* Sweetser, 116 Ind. 370, 19 N. E. 159; Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159.

In an action on an oral contract of insurance, the petition should allege in general terms the performance of all the conditions of the policy to be issued. Trask *v.* German Ins. Co., 58 Mo. App. 431. *Contra*, as to a contract of renewal. King *v.* Phœnix Ins. Co., 101 Mo. App. 163, 76 S. W. 55. And see *supra*, XXI, F, 1, b.

In an action by the beneficiary, it should be alleged that the insured has complied with the terms of the policy. Western Ins. Co. *v.* Carson, 9 Ohio Dec. (Reprint) 848, 17 Cinc. L. Bul. 357.

By statutes relating to the pleading of performance of conditions precedent, general allegations of performance are sufficient.

Florida.— Tillis *v.* Liverpool, etc., Ins. Co., (1903) 35 So. 171.

Indiana.— Security Acc., etc., Assoc. *v.* Lee, 160 Ind. 249, 66 N. E. 745; Hanover F. Ins. Co. *v.* Johnson, 26 Ind. App. 122, 57 N. E. 277; Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817; Indiana Ins. Co. *v.* Pringle, 21 Ind. App. 559, 52 N. E. 821.

Missouri.— Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

Montana.— Ackley *v.* Phenix Ins. Co., 25 Mont. 272, 64 Pac. 665.

New Jersey.— Vail *v.* Pennsylvania F. Ins. Co., 67 N. J. L. 66, 50 Atl. 671.

New York.— Clemens *v.* American F. Ins. Co., 70 N. Y. App. Div. 435, 75 N. Y. Suppl. 484, 10 N. Y. Annot. Cas. 420; Sullivan *v.* Spring Garden Ins. Co., 34 N. Y. App. Div. 128, 54 N. Y. Suppl. 629.

See 28 Cent. Dig. tit. "Insurance," § 1593. And see CONTRACTS, 9 Cyc. 722.

Where the statute specifically provides for the form of complaint in an action on a policy such general allegation is authorized. Phœnix Ins. Co. *v.* Moog, 78 Ala. 284, 56

tive the occurrence of facts which would constitute a breach of condition subsequent;[38] nor to aver that the loss is not within exceptions contained in the policy.[39] Nor need plaintiff aver the truth of representations made in the application.[40] And in general plaintiff need not negative facts which might be set up by the company as a defense.[41]

h. Notice and Proofs. Where the policy makes the giving of notice and furnishing of proofs a condition precedent to a loss becoming payable, there should be an averment of the performance of the condition;[42] but it is usually

Am. Rep. 31; Hersey *v.* Northern Assur. Co., 75 Vt. 441, 56 Atl. 95. And the prescribed form sometimes dispenses with the allegation altogether. Rosenthall Clothing, etc., Co. *v.* Scottish Union, etc., Ins. Co., 55 W. Va. 238, 46 S. E. 1021.

Under general code provision.— Indeed it is said that under a statutory provision that the complaint shall contain only a statement of all the facts in an action in ordinary and concise language (see PLEADING) the conditions in the policy need not be referred to. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242.

38. *Florida.*— Tillis *v.* Liverpool, etc., Ins. Co., (1903) 35 So. 171.

Illinois.— Knickerbocker Ins. Co. *v.* Tolman, 80 Ill. 106.

Indiana.— Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

Massachusetts.— Forbes *v.* American Mut. L. Ins. Co., 15 Gray 249, 77 Am. Dec. 360.

Missouri.— Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

Rhode Island.— Whipple *v.* United F. Ins. Co., 20 R. I. 260, 38 Atl. 498.

Tennessee.— London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140.

Texas.— East Texas F. Ins. Co. *v.* Dyches, 56 Tex. 565.

Vermont.— Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

Wisconsin.— Redman *v.* Ætna Ins. Co., 49 Wis. 431, 4 N. W. 591.

See 28 Cent. Dig. tit. "Insurance," § 1593. And see CONTRACTS, 9 Cyc. 719, 727.

Increase of hazard.— Thus it is not necessary to allege that the hazard is not increased in violation of a condition of the policy. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123; Hunt *v.* Hudson River F. Ins. Co., 2 Duer (N. Y.) 481.

Vacancy.— Nor is it necessary to allege that the premises have not been vacated or unoccupied. Phenix Ins. Co. *v.* Golden, 121 Ind. 524, 23 N. E. 503; Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; Insurance Co. of North America *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471; Home Ins. Co. *v.* Boyd, 19 Ind. App. 173, 49 N. E. 285; Moody *v.* Amazon Ins. Co., 52 Ohio St. 12, 38 N. E. 1011, 49 Am. St. Rep. 699, 26 L. R. A. 313; Butternut Mfg. Co. *v.* Manufacturers' Mut. F. Ins. Co., 78 Wis. 202, 47 N. W. 366. But see Ætna Ins. Co. *v.* Black, 80 Ind. 513.

Change of title.— Nor is it necessary to allege that no change in the title has taken place in violation of the conditions of the policy. Clay F. & M. Ins. Co. *v.* Wusterhausen, 75 Ill. 285.

Proofs of loss.— A general allegation of performance of all the conditions on the part of the insured is sufficient without specific allegation of the furnishing of proofs of loss, as required by the policy.

California.— Blasingame *v.* Home Ins. Co., 75 Cal. 633, 17 Pac. 925.

Missouri.— Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299; Rieger *v.* Mechanics' Ins. Co., 69 Mo. App. 674; Okey *v.* Des Moines State Ins. Co., 29 Mo. App. 105.

New York.— National Wall Paper Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 60 N. Y. App. Div. 222, 70 N. Y. Suppl. 124.

Ohio.— Union Ins. Co. *v.* McGookey, 33 Ohio St. 555.

Texas.— Texas Home Mut. F. Ins. Co. *v.* Bowlin, (Civ. App. 1902) 70 S. W. 797.

See 28 Cent. Dig. tit. "Insurance," § 1608.

Arbitration.— It is not necessary for plaintiff to allege performance of conditions as to arbitration (Long Island Ins. Co. *v.* Hall, 4 Kan. App. 641, 46 Pac. 47; Ackley *v.* Phenix Ins. Co., 25 Mont. 272, 64 Pac. 665), for the reason that it is the duty of the company to propose arbitration if a difference exists (Sun Mut. Ins. Co. *v.* Crist, 39 S. W. 837, 19 Ky. L. Rep. 305).

39. Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005; Hartford F. Ins. Co. *v.* Watt, (Tex. Civ. App. 1897) 39 S. W. 200.

40. Cowan *v.* Phenix Ins. Co., 78 Cal. 181, 20 Pac. 408; Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272; Phenix Ins. Co. *v.* Pickel, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

41. Indian River State Bank *v.* Hartford F. Ins. Co., (Fla. 1903) 35 So. 228; Ætna Ins. Co. *v.* McLead, 57 Kan. 95, 45 Pac. 73, 57 Am. St. Rep. 320; Gardner *v.* Continental Ins. Co., 75 S. W. 283, 25 Ky. L. Rep. 426; Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299; Winn *v.* Farmers Mut. F. Ins. Co., 83 Mo. App. 123.

Compliance with regulations as to foreign companies.— Plaintiff need not allege compliance with the statutory provisions relating to the transaction of business by foreign companies. New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536; Fitzsimmons *v.* New Haven City F. Ins. Co., 18 Wis. 234, 86 Am. Dec. 761.

42. Sidney Dist. Tp. *v.* Des Moines Ins. Co., 75 Iowa 647, 36 N. W. 902; Edgerly *v.* Farmers' Ins. Co., 43 Iowa 587; Crescent

considered sufficient in this respect that the pleading contains a general allegation of the performance of the conditions as to notice and proofs.[43]

i. Waiver or Estoppel. If plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to defendant under the facts stated in the complaint or petition, the facts constituting such waiver or estoppel may be pleaded in the first instance.[44] Plaintiff cannot, either generally or specifically, allege performance of conditions of the contract, and support such allegation by proof of waiver,[45] unless at least he alleges waiver in reply to defendant's aver-

Ins. Co. *v.* Camp, 64 Tex. 521; East Texas F. Ins. Co. *v.* Brantley, 3 Tex. App. Civ. Cas. § 64; Quarrier *v.* Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

43. *California.*— Emery *v.* Svea F. Ins. Co., 88 Cal. 300, 26 Pac. 88.

Indiana.— Baker *v.* German F. Ins. Co., 124 Ind. 490, 24 N. E. 1041; Phenix Ins. Co. *v.* Rogers, 11 Ind. App. 72, 38 N. E. 865; Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868.

Kentucky.— Phœnix Ins. Co. *v.* Coomes, 13 Ky. L. Rep. 238.

Maine.— Dolbier *v.* Agricultural Ins. Co., 67 Me. 180; Conway F. Ins. Co. *v.* Sewall, 54 Me. 352.

New York.— Heilner *v.* China Mut. Ins. Co., 60 N. Y. Super. Ct. 362, 18 N. Y. Suppl. 177; Inman *v.* Western F. Ins. Co., 12 Wend. 452.

Texas.— Cornish *v.* Cornish, 56 Tex. 564; Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443.

Wisconsin.— Benedix *v.* German Ins. Co., 78 Wis. 77, 47 N. W. 176; River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506; Scheiderer *v.* Travelers' Ins. Co., 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618.

See 28 Cent. Dig. tit. "Insurance," § 1603.

Certificate of magistrate.— A general allegation as to furnishing the certificate of a notary or magistrate, as required in the policy, is sufficient without particulars as to the qualification of the person whose certificate was furnished (Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686; Phœnix Ins. Co. *v.* Perkey, 92 Ill. 164; Herron *v.* Peoria M. & F. Ins. Co., 28 Ill. 235, 81 Am. Dec. 272), although it has been said that plaintiff should allege which one of the officers named in the policy gave such certificate, in order that the court might determine whether he was a proper person to do so (Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474). *Contra,* it has sometimes been held that the particulars of the performance of conditions as to proofs, certificates, etc., must be alleged. Home Ins. Co. *v.* Duke, 43 Ind. 418; Royal Ins. Co. *v.* Smith, 8 Ky. L. Rep. 521; Mueller *v.* Putnam F. Ins. Co., 45 Mo. 84; Furlong *v.* Agricultural Ins. Co., 18 N. Y. Suppl. 844, 28 Abb. N. Cas. 444.

44. *Indiana.*— Germania F. Ins. Co. *v.* Pitcher, 160 Ind. 392, 64 N. E. 921, 66 N. E. 1003; Vernon Ins., etc., Co. *v.* Maitlen, 158 Ind. 393, 63 N. E. 755; Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991; Phenix Ins. Co. *v.* Rogers, 11 Ind. App. 72, 38 N. E. 865; American F. Ins. Co. *v.* Sisk, 9 Ind. App. 305, 36 N. E. 659; Phenix Ins. Co. *v.* Pickel, 3 Ind. App. 332, 29 N. E. 432.

Iowa.— McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529.

Massachusetts.— Goodhue *v.* Hartford F. Ins. Co., 175 Mass. 187, 55 N. E. 1039.

Nebraska.— German Ins. Co. *v.* Shader, 1 Nebr. (Unoff.) 704, 96 N. W. 604.

Oregon.— Bruce *v.* Phœnix Ins. Co., 24 Oreg. 486, 34 Pac. 16.

Texas.—St. Paul F. & M. Ins. Co. *v.* Hodge, 30 Tex. Civ. App. 257, 70 S. W. 574, 71 S. W. 386; German-American Ins. Co. *v.* Waters, 10 Tex. Civ. App. 363, 30 S. W. 576.

See 28 Cent. Dig. tit. "Insurance," § 1605. And see ESTOPPEL, 16 Cyc. 808.

For a sufficient averment of waiver of requirement of appraisal see Virginia F. & M. Ins. Co. *v.* Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

Under W. Va. Code, c. 125, § 61, plaintiff suing for the use of his wife may properly allege that the policy was made payable to her by mistake of defendant's agent and facts showing that defendant is estopped to deny it. Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909.

If the complaint shows breach of condition and alleges no excuse therefor, plaintiff cannot recover without amendment. Guerin *v.* St. Paul F. & M. Ins. Co., 44 Minn. 20, 46 N. W. 138, holding proof of waiver inadmissible.

45. *California.*—Gillon *v.* Northern Assur. Co., 127 Cal. 480, 59 Pac. 901.

Georgia.— Fidelity, etc., Co. *v.* Gate City Nat. Bank, 97 Ga. 634, 25 S. E. 392, 54 Am. St. Rep. 440, 33 L. R. A. 821.

Iowa.— Kahler *v.* Iowa State Ins. Co., 106 Iowa 380, 76 N. W. 734; Heusinkveld *v.* St. Paul F. & M. Ins. Co., 96 Iowa 224, 64 N. W. 769; Brock *v.* Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685; Welsh *v.* Des Moines Ins. Co., 71 Iowa 337, 32 N. W. 369; Edgerly *v.* Farmers' Ins. Co., 43 Iowa 587.

Kansas.— Gillett *v.* Burlington Ins. Co., 53 Kan. 108, 36 Pac. 52; Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029. *Compare* Capitol Ins. Co. *v.* Pleasanton Bank, 48 Kan. 397, 29 Pac. 578.

New York.— Allen *v.* Dutchess County Mut. Ins. Co., 95 N. Y. App. Div. 86, 88 N. Y. Suppl. 530; Fayerweather *v.* Phenix Ins. Co., 7 N. Y. St. 25.

Texas.—St. Paul F. & M. Ins. Co. *v.* Hodge,

ments of non-performance.[46] Nor can he prove waiver of one condition under an allegation of waiver of another condition only.[47] But facts alleged as constituting substantial performance may be proved even though they may in some aspect involve waiver.[48]

j. Loss. Plaintiff should allege loss of or damage to the property[49] by fire,[50] but it is not necessary to allege that the loss was not within any of the excepted causes specified in the policy.[51]

30 Tex. Civ. App. 257, 70 S. W. 574, 71 S. W. 386 (condition precedent); German Ins. Co. *v.* Daniels, (Civ. App. 1895) 33 S. W. 549.

See 28 Cent. Dig. tit. "Insurance," § 1640.

Contra.— Atlantic Ins. Co. *v.* Manning, 3 Colo. 224; Nickell *v.* Phœnix Ins. Co., 144 Mo. 420, 46 S. W. 435; McCullough *v.* Phœnix Ins. Co., 113 Mo. 606, 616, 21 S. W. 207 [*citing* Russell *v.* State Ins. Co., 55 Mo. 585; St. Louis Ins. Co. *v.* Kyle, 11 Mo. 278, 49 Am. Dec. 74; Roy *v.* Boteler, 40 Mo. App. 213; Maddox *v.* German Ins. Co., 39 Mo. App. 198; Travis *v.* Continental Ins. Co., 32 Mo. App. 198; Okey *v.* Des Moines State Ins. Co., 29 Mo. App. 105] (where Burgess, J., said: "It has been uniformly held by this court that under the allegations in the petition that all of the conditions of the policy had been complied with, proof of waiver is permissible, and is proof of performance, within the meaning of the conditions of the policy"); Murphy *v.* North British, etc., Ins. Co., 70 Mo. App. 78; Hooker *v.* Phœnix Ins. Co., 69 Mo. App. 141; McCollum *v.* North British, etc., Ins. Co., 65 Mo. App. 304; McCollum *v.* Niagara F. Ins. Co., 61 Mo. App. 352; Stephens *v.* German Ins. Co., 61 Mo. App. 194; Fulton *v.* Phœnix Ins. Co., 51 Mo. App. 460; Stavinow *v.* Home Ins. Co., 43 Mo. App. 513; Eureka F. & M. Ins. Co. *v.* Baldwin, 17 Ohio Cir. Ct. 143, 9 Ohio Cir. Dec. 118; Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

A waiver of mere defect in a proof of loss specifically estops the company and sustains an allegation of performance. Long Creek Bldg. Assoc. *v.* State Ins. Co., 29 Oreg. 569, 46 Pac. 366, where such a waiver is distinguished from a waiver of the condition as a whole.

46. Replication alleging waiver see *infra*, XXI, F, 4, b.

47. Allen *v.* Dutchess County Mut. Ins. Co., 95 N. Y. App. Div. 86, 88 N. Y. Suppl. 530.

48. Zielke *v.* London Assur. Corp., 64 Wis. 442, 25 N. W. 436.

49. Minneapolis, etc., R. Co. *v.* Home Ins. Co., 64 Minn. 61, 66 N. W. 132; Maxcy *v.* New Hampshire F. Ins. Co., 54 Minn. 272, 55 N. W. 1130, 40 Am. St. Rep. 325; Shaver *v.* Mercantile Town Mut. Ins. Co., 79 Mo. App. 420; Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

The property should be so described in the petition as to bring it within the terms of the policy.

California.— Allen *v.* Home Ins. Co., 133 Cal. 29, 65 Pac. 138.

Iowa.— Martin *v.* Farmers' Ins. Co., 84 Iowa 516, 51 N. W. 29.

Michigan.— Dove *v.* Royal Ins. Co., 98 Mich. 122, 57 N. W. 30.

Missouri.— Wright *v.* Bankers', etc., Town Mut. F. Ins. Co., 73 Mo. App. 365.

Texas.— Ætna F. Ins. Co. *v.* Brannon, (Civ. App. 1904) 81 S. W. 560.

Location of property need not be described as in the first story of a building where the latter was described in the policy as a one-story building. Pence *v.* Mercantile Town Mut. Ins. Co., 106 Mo. App. 402, 80 S. W. 746.

Policy in force.— The loss should be so alleged with reference to time as to bring it within the period of the existence of the policy. Phœnix Ins. Co. *v.* Heaverin, 15 Ky. L. Rep. 302; Shaver *v.* Mercantile Town Mut. Ins. Co., 79 Mo. App. 420; Fire Ins. Assoc. *v.* Miller, 2 Tex. App. Civ. Cas. § 332; Hartford F. Ins. Co. *v.* Kahn, 4 Wyo. 364, 34 Pac. 895. And see, generally, as to necessity of allegations of time, PLEADING.

Date of policy.— The policy being pleaded as a written instrument should be correctly described as to date. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117; Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474. But it is said, on the other hand, that a variance as to date between the pleading and the proof is not fatal. Lum *v.* U. S. Fire Ins. Co., 104 Mich. 397, 62 N. W. 562. And to the point that dates need not usually be correctly alleged, see, generally, PLEADING.

50. Ferrer *v.* Home Mut. Ins. Co., 47 Cal. 416; Louisville M. & F. Ins. Co. *v.* Bland, 9 Dana (Ky.) 143; Rodi *v.* Rutgers F. Ins. Co., 6 Bosw. (N. Y.) 23; Western Refrigerator Co. *v.* American Casualty Ins., etc., Co., 51 Fed. 155.

51. *California.*— Blasingame *v.* Home Ins. Co., 75 Cal. 633, 17 Pac. 925.

Connecticut.— Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686.

Kentucky.— Ætna Ins. Co. *v.* Glasgow Electric Light, etc., Co., 107 Ky. 77, 52 S. W. 975, 21 Ky. L. Rep. 726.

Texas.— Burlington Ins. Co. *v.* Rivers, 9 Tex. Civ. App. 177, 28 S. W. 453, where the court expressed the opinion that a contrary rule could not be regarded as established by Phœnix Ins. Co. *v.* Boren, 83 Tex. 97, 18 S. W. 484, and Pelican Ins. Co. *v.* Troy Co-operative Assoc., 77 Tex. 225, 13 S. W. 980.

Wisconsin.— River Falls Bank *v.* German American Ins. Co., 72 Wis. 535, 40 N. W. 506.

United States.— Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; Catlin *v.* Springfield F. Ins. Co., 5 Fed. Cas. No. 2,522, 1 Sumn. 434.

k. Damages. For the purpose of showing the amount of damage suffered, for which plaintiff is entitled to recover up to the amount of the insurance, the value of the property destroyed, or the extent of the damage thereto, should be alleged.[52] If the policy provides for *pro-rata* liability only, then plaintiff should allege the amount of other insurance.[53]

l. Adjustment and Non-Payment. If submission to arbitration or appraisal is made a condition of liability for the amount of the loss, performance of such condition should be at least generally alleged;[54] but as the policies are usually drawn, the refusal to submit to appraisal or arbitration on demand is to be interposed by way of defense if relied upon.[55] Plaintiff should allege also that the amount claimed on account of the loss is due and payable and has not been paid.[56]

2. DEMURRER. In code pleading mere indefiniteness in averments is not ordinarily a ground for demurrer.[57] Where the declaration follows a statutory short form, omission to allege loss by fire is a ground for special demurrer, not for motion to dismiss.[58] A complaint by a mortgagee is not demurrable on the ground that the mortgagor is not joined as plaintiff if the complaint does not show that

See 28 Cent. Dig. tit. "Insurance," § 1600.

It is for defendant to avail himself of exceptions in the policy by proper pleading. See *supra*, XXI, F, 1, g.

52. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594; Phœnix Ins. Co. *v.* Benton, 87 Ind. 132; Shaver *v.* Mercantile Mut. Ins. Co., 85 Mo. App. 73; Ramsey *v.* Philadelphia Underwriters Assoc., 71 Mo. App. 380. It seems that an allegation as to the value of plaintiff's interest in the property is sufficient. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594; Knickerbocker Ins. Co. *v.* Tolman, 80 Ill. 106; American Ins. Co. *v.* Leonard, 80 Ind. 272. On the contrary it is said that an allegation that plaintiff had an interest in the property to an amount exceeding the insurance is not sufficient, apparently for the reason that it is an allegation only of a conclusion. Royal Ins. Co. *v.* Smith, 8 Ky. L. Rep. 521; Wright *v.* Bankers', etc., Town Mut. F. Ins. Co., 73 Mo. App. 365; Sappington *v.* St. Joseph Mut. F. Ins. Co., 72 Mo. App. 74.

Under the valued policy acts, it is unnecessary to allege the value of the property, so far as the policy is made conclusive on the question of value. Coleman *v.* Phœnix Ins. Co., 69 Mo. App. 566; Green *v.* Lancashire Ins. Co., 69 Mo. App. 429. And see *supra*, XVI, B, 2. But see Summers *v.* Home Ins. Co., 53 Mo. App. 521.

53. Coats *v.* West Coast F. & M. Ins. Co., 4 Wash. 375, 30 Pac. 404, 850.

54. Carroll *v.* Girard F. Ins. Co., 72 Cal. 297, 13 Pac. 863; Mosness *v.* German-American Ins. Co., 50 Minn. 341, 52 N. W. 932; Randall *v.* Phœnix Ins. Co., 10 Mont. 362, 25 Pac. 960; Wolff *v.* Liverpool, etc., Ins. Co., 10 N. J. L. J. 325.

A complaint alleging an award and stating the facts leading up thereto, the policy and the award being filed as exhibits, is not open to the objection that it shows settlement of the loss by arbitration while the action is on the policy. Phœnix Ins. Co. *v.* McAtee, (Ind. App. 1904) 70 N. E. 947.

55. *Kansas.*— Phenix Ins. Co. *v.* Arnoldy, 5 Kan. App. 174, 47 Pac. 178.

Missouri.— Jones *v.* Philadelphia Underwriters, 78 Mo. App. 296.

Nebraska.— German-American Ins. Co. *v.* Etherton, 25 Nebr. 505, 41 N. W. 406.

Virginia.— Tilley *v.* Connecticut F. Ins. Co., 86 Va. 811, 11 S. E. 120.

Washington.— Davis *v.* Atlas Assur. Co., 16 Wash. 232, 47 Pac. 436, 885.

Wisconsin.— Hughes *v.* Vinland F. Ins. Co., 43 Wis. 323.

See 28 Cent. Dig. tit. "Insurance," § 1606.

56. Wright *v.* Bankers', etc., Town Mut. F. Ins. Co., 73 Mo. App. 365; Gill *v.* Ætna Live Stock Ins. Co., 82 Hun (N. Y.) 363, 31 N. Y. Suppl. 485.

In Nebraska, it is said, however, that payment is an affirmative defense, and non-payment need not be alleged. Hanover F. Ins. Co. *v.* Schellak, 35 Nebr. 701, 53 N. W. 605.

Rebuilding.— A provision for rebuilding is for the benefit of the company, and it is not necessary for plaintiff to aver failure or refusal of the company to replace or rebuild. Ætna Ins. Co. *v.* Phelps, 27 Ill. 71, 81 Am. Dec. 217; Howard F. & M. Ins. Co. *v.* Cornick, 24 Ill. 455; Union Ins. Co. *v.* McGookey, 33 Ohio St. 555; Benedix *v.* German Ins. Co., 78 Wis. 77, 47 N. W. 176. See XVI, B, 1, b.

Assessments in mutual companies.— In an action on a policy in a mutual company which entitles insured only to an assessment, his remedy is to proceed by mandamus, or otherwise, to compel the making of an assessment to pay his claim (Harl *v.* Pottawattamie County Mut. F. Ins. Co., 74 Iowa 39, 36 N. W. 880); but if the contract is for payment on the part of the company, it is unnecessary for plaintiff to allege a demand for an assessment and refusal, nor that the company has assets out of which payment could be made (Brookshier *v.* Chillicothe Town Mut. F. Ins. Co., 91 Mo. App. 599).

57. Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347, the remedy is by motion to make more definite. And see, generally, PLEADING.

58. German-American Ins. Co. *v.* Davidson, 67 Ga. 11.

the latter is interested.[59] A demurrer to a complaint cannot be aided by facts in the record but not appearing on the face of the complaint.[60] Validity of an award by appraisers cannot be disputed under a demurrer to a complaint alleging the facts concerning the award and disclosing no irregularity therein.[61]

3. Plea or Answer — a. In Abatement. Objection that the action is prematurely brought,[62] that defendant refused to submit to an examination,[63] or that an action on a Lloyd's policy should have been brought against the attorney in fact instead of the underwriters,[64] should be raised by plea in abatement.

b. General Issue or General Denial. Defendant may disprove, under a general denial, anything which it is necessary for plaintiff to establish.[65] As it is necessary for plaintiff to allege compliance with conditions or warranties in the policy,[66] it has been decided in some jurisdictions that under the general issue defendant may prove breaches of warranties or violations of the conditions contained in the policy without having specifically pleaded such violations or breaches.[67] Limitation of liability by reason of additional insurance according to stipulations in the policy need not be specially pleaded.[68]

c. Special Defenses. But by the great weight of authority the rule is established that a defendant cannot show breach of warranty or violation of conditions, even where plaintiff has alleged fulfilment or compliance, without specially pleading the facts constituting the breach or violation relied on, whether constituting a breach of condition precedent or a violation of a promissory or subsequent condition.[69] In general defendant relying on breach of warranties or condition must allege the warranty or condition relied on as having been violated and the

59. Hammel *v.* Queen Ins. Co., 50 Wis. 240, 6 N. W. 805.

60. Benedix *v.* German Ins. Co., 78 Wis. 77, 47 N. W. 176.

61. Langan *v.* Palatine Ins. Co., 93 Fed. 730.

62. Rosser *v.* Georgia Home Ins. Co., 101 Ga. 716, 29 S. E. 286; Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810 (*dictum* as to action brought before appraisal); Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743; Hatton *v.* Provincial Ins. Co., 7 U. C. C. P. 555; Rice *v.* Provincial Ins. Co., 7 U. C. C. P. 548. *Contra*, Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804; Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

The objection must be specially pleaded. Barnes *v.* McMurtry, 29 Nebr. 178, 45 N. W. 285; Farmers' Benev. F. Ins. Assoc. *v.* Kinsey, 101 Va. 236, 43 S. E. 338. See also Actions, 1 Cyc. 744 note 19; and XXI, C, 1.

63. Weide *v.* Germania Ins. Co., 29 Fed. Cas. No. 17,358, 1 Dill. 441.

64. Ketchum *v.* Belding, 31 Misc. (N. Y.) 498, 64 N. Y. Suppl. 550; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197, 4 N. Y. Annot. Cas. 357 [*affirming* 20 Misc. 635, 46 N. Y. Suppl. 376].

65. Cheever *v.* British American Ins. Co., 86 N. Y. App. Div. 333, 83 N. Y. Suppl. 728 (amount of plaintiff's loss); Queen Ins. Co. *v.* Jefferson Ice Co., 64 Tex. 578 (plaintiff's ownership of the property); German Ins. Co. *v.* Gibbs, (Tex. Civ. App. 1896) 35 S. W. 679 (plaintiff's ownership of the policy).

Misrepresentations antecedent to delivery of the policy may be proved under a plea of non-assumpsit to a declaration on the policy, since a policy issued in reliance thereon is not a binding contract; and plaintiff may prove a waiver of objection, although not pleaded by him, as by retention of premiums after knowledge of the facts. New Jersey Rubber Co. *v.* Commercial Union Assur. Co., 64 N. J. L. 580, 46 Atl. 777.

66. See *supra*, XXI, F, 1, g.

67. Emmons *v.* Home Ins. Co., 1 Pennew. (Del.) 83, 39 Atl. 775; Home Ins. Co. *v.* Field, 42 Ill. App. 392; Western Assur. Co. *v.* Mason, 5 Ill. App. 141 (other insurance, mortgage not disclosed, and increase of risk); Farmers' Mut. F. Ins. Co. *v.* Yetter, 30 Ind. App. 187, 65 N. E. 762; North British, etc., Ins. Co. *v.* Rudy, 26 Ind. App. 472, 60 N. E. 9; Knoxville F. Ins. Co. *v.* Avery, 95 Tenn. 296, 32 S. W. 256 (that plaintiff set fire to the property, and breach of the iron-safe clause); Phœnix Ins. Co. *v.* Munday, 5 Coldw. (Tenn.) 547 (fraud and false swearing). See, however, cases cited *infra*, notes 69, 70.

In Vermont general issue with notice of the defense is the proper form of pleading. Wilson *v.* Union Mut. F. Ins. Co., 75 Vt. 320, 55 Atl. 662. And see, generally, as to pleading by general issue with notice, Pleadings.

If plaintiff alleges facts constituting performance a general denial raises an issue thereon. Brock *v.* Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685.

68. McFetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938.

69. *Alabama.*—Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163; Girard F. Ins. Co. *v.* Boulden, (1892) 11 So. 773.

California.— Tischler *v.* California Mut. F.

specific facts constituting such violation;[70] and he must bring his case clearly

Ins. Co., 66 Cal. 178, 4 Pac. 1169. See also Cassacia *v.* Phœnix Ins. Co., 28 Cal. 628.

Colorado.— British American Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147.

Georgia.— Smith *v.* Champion, 102 Ga. 92, 29 S. E. 160.

Louisiana.— Theodore *v.* New Orleans Mut. Ins. Assoc., 28 La. Ann. 917; Pino *v.* Merchants' Mut. Ins. Co., 19 La. Ann. 214, 92 Am. Dec. 529.

Michigan.— Cronin *v.* Philadelphia Fire Assoc., 112 Mich. 106, 70 N. W. 448.

Minnesota.— Caplis *v.* American F. Ins. Co., 60 Minn. 376, 62 N. W. 440, 51 Am. St. Rep. 535.

Nebraska.— Farmers', etc., Ins. Co. *v.* Wiard, 59 Nebr. 451, 81 N. W. 312; Farmers', etc., Ins. Co. *v.* Newman, 58 Nebr. 504, 78 N. W. 933; Phœnix Ins. Co. *v.* Barnd, 16 Nebr. 89, 20 N. W. 105.

New York.—New York *v.* Brooklyn F. Ins. Co., 3 Abb. Dec. 251, 4 Keyes 465; Smith *v.* Home Ins. Co., 47 Hun 30; Baumiller *v.* Workingman's Co-operative Assoc., 9 Misc. 157, 29 N. Y. Suppl. 26.

Pennsylvania.— Miller *v.* Iron City Mut. F. Ins. Co., 11 York Leg. Rec. 61.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934.

Wisconsin.— Schaetzel *v.* Germantown Farmers' Mut. Ins. Co., 22 Wis. 412.

United States.— Bittinger *v.* Providence Washington Ins. Co., 24 Fed. 549; Bennett *v.* Maryland F. Ins. Co., 3 Fed. Cas. No. 1,321, 14 Blatchf. 422.

See 28 Cent. Dig. tit. "Insurance," §§ 1617, 1618.

Breach of agreement to build a chimney within a specified time must be specially alleged. Phœnix Ins. Co. *v.* Barnd, 16 Nebr. 89, 20 N. W. 105.

Fraud or false swearing must be specially alleged in order to admit evidence thereof as a defense. Flynn *v.* Merchants' Mut. Ins. Co., 17 La. Ann. 135; Cheever *v.* British American Ins. Co., 86 N. Y. App. Div. 333, 83 N. Y. Suppl. 728. See also Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 784.

Under statutory rules allowing plaintiff to make a general allegation of performance of condition precedent and requiring defendant in his answer to controvert such allegations specifically if he relies on nonperformance (see *supra*, XXI, F, 1, g) it seems that specific allegations by plaintiff as to the facts relied on as constituting performance relieve defendant of the necessity of making a specific denial and under a general denial he may controvert performance. Brock *v.* Des Moines Ins. Co., 96 Iowa 39, 64 N. W. 685.

70. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Elliott *v.* Agricultural Ins. Co., (N. J. Sup. 1886) 3 Atl. 171; Bittinger *v.* Providence Washington Ins. Co., 24 Fed. 549.

For instance it has been held that defendant must specially plead such defenses as other insurance (Smith *v.* Home Ins. Co., 47 Hun (N. Y.) 30, although at the date of the policy and in the nature of a condition precedent); overvaluation (Phœnix Mut. F. Ins. Co. *v.* Bowersox, 6 Ohio Cir. Ct. 1, 3 Ohio Cir. Dec. 321); illegality of the business carried on in the premises (Petty *v.* Des Moines Mut. F. Ins. Co., 111 Iowa 358, 82 N. W. 767); theft (Hong Sling *v.* National Assur. Co., 7 Utah 441, 27 Pac. 170); loss by reason of civil commotion, riot, etc. (German Ins. Co. *v.* Cain, (Tex. Civ. App. 1896) 37 S. W. 657) within an exception excluding such losses from the risk; failure to arbitrate on demand, or failure to agree (Smith *v.* Continental Ins. Co., 108 Iowa 382, 79 N. W. 126; Liverpool, etc., Ins. Co. *v.* Hall, 1 Kan. App. 18, 41 Pac. 65; American F. Ins. Co. *v.* Bland, 40 S. W. 670, 19 Ky. L. Rep. 287; Sun Mut. Ins. Co. *v.* Crist, 39 S. W. 837, 19 Ky. L. Rep. 305; Citizens' Ins. Co. *v.* Bland, 39 S. W. 825, 19 Ky. L. Rep. 110; Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. But see Morley *v.* Liverpool, etc., Ins. Co., 85 Mich. 210, 48 N. W. 502); failure to make proofs of loss or to furnish a certificate of a magistrate by virtue of a rule of court (Caston *v.* Monmouth Mut. F. Ins. Co., 54 Me. 170; Fox *v.* Conway F. Ins. Co., 53 Me. 107; McManus *v.* Western Assur Co., 22 Misc. (N. Y.) 269, 48 N. Y. Suppl. 820); violation of warranty or condition as to ownership or title (Sprigg *v.* American Cent. Ins. Co., 101 Ky. 185, 40 S. W. 575, 19 Ky. L. Rep. 363; Queen Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49; American Cent. Ins. Co. *v.* Murphy, (Tex. Civ. App. 1901) 61 S. W. 956; Temple *v.* Western Assur. Co., 35 N. Brunsw. 171), or misrepresentations concerning it (Sussex County Mut. Ins. Co. *v.* Woodruff, 26 N. J. L. 541); misrepresentations as to condition of the property (Mulry *v.* Mohawk Valley Ins. Co., 5 Gray (Mass.) 541, 66 Am. Dec. 380; Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray (Mass.) 432); existence of encumbrances (Danvers Mut. F. Ins. Co. *v.* Schertz, 95 Ill. App. 656; Home Ins. Co. *v.* Gaddis, 3 Ky. L. Rep. 159); increase of hazard by change of use of the property insured (Peiree *v.* Cohasset Mut. F. Ins. Co., 123 Mass. 572; New York *v.* Brooklyn F. Ins. Co., 3 Abb. Dec. (N. Y.) 251, 4 Keyes 465) or otherwise (Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123); or change of possession in violation of the terms of the policy (Phenix Ins. Co. *v.* Caldwell, 187 Ill. 73, 58 N. E. 314).

Allegation of fraud or false swearing without averment of specific facts is insufficient. Phœnix Ins. Co. *v.* McAtee, (Ind. App. 1904) 70 N. E. 947.

In West Virginia the statute which provides for the filing of a statement by defendant specifying the particular clause, condition, or warranty not complied with does

within the conditions or warranty relied on.[71] Wilful or fraudulent destruction of the property by the insured must be specially pleaded.[72] The defense that plaintiff's insurable interest was less than the amount of his policy should be pleaded.[73] Where plaintiff alleges performance of conditions generally, an answer sufficiently alleges a breach by setting out a condition and alleging nonperformance thereof.[74] In some jurisdictions execution of the policy need not be proved by plaintiff unless defendant denies it by plea verified by affidavit.[75] A plea setting up a misrepresentation which does not constitute a warranty should allege not only its falsity but its materiality.[76] An answer alleging that prohibited articles were kept by plaintiff need not specify the articles.[77]

d. Denial of Knowledge or Information, Etc. In code pleading plaintiff's allegations may be put in issue by denial of knowledge or information sufficient to form a belief where the facts are not presumptively within defendant's knowledge,[78] and plaintiff's allegation of ownership of the property at the time of the fire may be answered in that form where defendant is a foreign corporation.[79]

4. Replication or Reply — a. In General. Where defendant pleads that it did not execute the policy and that the agent issuing it had no authority in that behalf, a replication alleging ratification by the company is not a departure.[80] And where the answer pleads want of insurable interest by reason of a conveyance by plaintiff, a replication alleging that the deed was not delivered is not a departure from the complaint.[81] In code practice an averment in the answer

not require further specification or the legal certainty of formal pleading. Rosenthal Clothing, etc., Co. *v.* Scottish Union, etc., Ins. Co., 55 W. Va. 238, 46 S. E. 1021. But see Petit *v.* German Ins. Co., 98 Fed. 800, holding that such statements are pleadings and subject to demurrer.

71. *California.*— Capuro *v.* Builders' Ins. Co., 39 Cal. 123.

Delaware.— Hoffecker *v.* New Castle County Mut. Ins. Co., 5 Houst. 101.

Illinois.— Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553; Forehand *v.* Niagara Ins. Co., 58 Ill. App. 161 [*reversed* on other grounds in 169 Ill. 626, 48 N. E. 830].

Indiana.— Germania F. Ins. Co. *v.* Stewart, 13 Ind. App. 627, 42 N. E. 286; Ætna Ins. Co. *v.* Norman, 12 Ind. App. 652, 40 N. E. 1116.

Kansas.— Queen Ins. Co. *v.* Excelsior Milling Co., 69 Kan. 114, 76 Pac. 423; Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449, 18 Pac. 528.

Kentucky.— Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. 634.

For an insufficient plea of breach of the iron-safe clause see Western Assur. Co. *v.* McGlathery, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26, holding also that pleas must be construed most strongly against defendant, on which point see, generally, Pleading.

Failure to furnish proofs of loss must be specially alleged with distinctness and certainty even though plaintiff has alleged that such proofs were made and has attached the policy as an exhibit. Phœnix Assur. Co. *v.* Deavenport, 16 Tex. Civ. App. 283, 41 S. W. 399.

72. *Louisiana.*— Flynn *v.* Merchants' Mut. Ins. Co., 17 La. Ann. 135.

Michigan.— Morley *v.* Liverpool, etc., Ins. Co., 92 Mich. 590, 52 N. W. 939.

Minnesota.— Fletcher *v.* German-American Ins. Co., 79 Minn. 337, 82 N. W. 647.

Oregon.— Heidenreich *v.* Ætna Ins. Co., 26 Oreg. 70, 37 Pac. 64.

Texas.— Alamo F. Ins. Co. *v.* Heidemann Mfg. Co., (Civ. App. 1894) 28 S. W. 910.

Contra.— See cases cited *supra*, note 67.

Defense that plaintiff wilfully burned the property cannot be made under a mere denial of plaintiff's allegation that the loss was caused without his fault or negligence. Corkery *v.* Security F. Ins. Co., 99 Iowa 382, 68 N. W. 792.

73. Home Ins. Co. *v.* Gaddis, 3 Ky. L. Rep. 159.

74. Birmingham *v.* Farmers' Joint Stock Ins. Co., 67 Barb. (N. Y.) 595.

75. Firemen's Ins. Co. *v.* Barusch, 161 Ill. 629, 44 N. E. 285 [*affirming* 59 Ill. App. 78]; Phœnix Ins. Co. *v.* Rowe, 117 Ind. 202, 20 N. E. 122; Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

76. Kentucky, etc., Mut. Ins. Co. *v.* Southard, 8 B. Mon. (Ky.) 634.

77. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 18, 81 Am. Dec. 521, "defendant, not being presumed to know what prohibited articles were kept."

78. See, generally, Pleading.

79. Bartow *v.* Northern Assur. Co., 10 S. D. 132, 72 N. W. 86.

80. German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 15 Ind. App. 623, 43 N. E. 41. In Texas where defendant's answer denies the authority of the agent issuing the policy evidence of ratification is admissible under a replication of general denial. Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344.

81. Franklin Ins. Co. *v.* Feist, 31 Ind. App. 390, 68 N. E. 188. Where the answer alleges that insured was not the owner of the property, a reply alleging that he was not

that plaintiff concealed facts material to the risk is an affirmative defense which plaintiff may disprove without a replication.[82] A reply alleging a parol contemporaneous stipulation in contravention of the terms of the policy set forth in the complaint, but not alleging fraud or mistake, is demurrable.[83] But if defendant pleads an award no reply is necessary to enable plaintiff to have it annulled for fraud.[84] To a plea alleging breach of the iron-safe clause and non-production of books and inventories a replication is sufficient which alleges compliance with the clause and destruction of the books and inventories in the fire.[85] Where a plea alleges that no proofs of loss were furnished in compliance with the terms of the policy a replication alleging that proofs were furnished on blanks supplied by the company is insufficient.[86] A replication pleading facts in bar of defenses alleged in the answer cannot be deemed a plea of *non est factum* so as to require verification.[87]

b. Waiver or Estoppel. Except in some of the code states where the use of replications is restricted by general provisions,[88] if defendant pleads breach of conditions or stipulations in the policy, plaintiff relying upon waiver or estoppel must specially plead it by way of reply,[89] unless he has alleged it in his first

the owner of the legal title and failing to allege that he had any interest is bad on demurrer. Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549, 54 N. E. 772.

82. Crittenden *v.* Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321. In Texas without special pleading plaintiff may prove that his statements alleged by defendant to have been false were not intentionally false. Phœnix Ins. Co. *v.* Swann, (Civ. App. 1897) 41 S. W. 519.

83. Continental Ins. Co. *v.* Dorman, 125 Ind. 189, 25 N. E. 213. Where a complaint alleged that the policy was for three years and the answer alleged that it was for one year, a reply alleging that the policy by mistake read "one year" instead of three years did not state a new cause of action. Orient Ins. Co. *v.* Clark, 59 S. W. 863, 22 Ky. L. Rep. 1066.

84. Sullivan *v.* Traders' Ins. Co., 169 N. Y. 213, 62 N. E. 146 [*reversing* 45 N. Y. App. Div. 631, 61 N. Y. Suppl. 1149].

85. Sneed *v.* British-America Assur. Co., 73 Miss. 279, 18 So. 928.

86. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

87. Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991.

88. See, generally, PLEADING. If by rules of pleading no reply is necessary to matters in avoidance, unless required by the court, the waiver or estoppel may be proved without having been alleged. Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210; Crittenden *v.* Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321; Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; Gans *v.* St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535.

89. *Illinois.*— Merchants' Nat. Ins. Co. *v.* Pearce, 84 Ill. App. 255.

Indiana.— Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843; Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817.

Iowa.— McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529; Kahler *v.* Iowa State Ins. Co., 106 Iowa 380, 76 N. W. 734; Jacobs *v.* St. Paul F. & M. Ins. Co., 86 Iowa 145, 53 N. W. 101; Eiseman *v.* Hawkeye Ins. Co., 74 Iowa 11, 36 N. W. 780; Zinck *v.* Phœnix Ins. Co., 60 Iowa 266, 14 N. W. 792.

Kansas.— Gillett *v.* Burlington Ins. Co., 53 Kan. 108, 36 Pac. 52; Dwelling-House Ins. Co. *v.* Johnson, 47 Kan. 1, 27 Pac. 100.

Nebraska.— Burlington Ins. Co. *v.* Campbell, 42 Nebr. 208, 60 N. W. 599; Phenix Ins. Co. *v.* Bachelder, 32 Nebr. 490, 49 N. W. 217, 29 Am. St. Rep. 443.

Pennsylvania.— Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

Texas.— Texas Banking, etc., Co. *v.* Stone, 49 Tex. 4.

See 28 Cent. Dig. tit. "Insurance," § 1637.

If the answer pleads non-payment of premium until after the fire plaintiff cannot avail himself of a waiver without pleading the same specifically in his reply. German Ins. Co. *v.* Shader, 1 Nebr. (Unoff.) 704, 96 N. W. 604.

For a sufficient replication alleging performance of the iron-safe clause condition the breach of which was alleged in defendant's plea and for another replication held insufficient in that behalf see Western Assur. Co. *v.* McGlathery, 115 Ala. 213, 22 So. 104, 67 Am. St. Rep. 26.

Sufficiency of allegation of waiver of condition against encumbrances see Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779.

Where forfeiture for breach of a gasoline clause is pleaded as a defense, waiver thereof is properly set up in the replication. Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163, where are set forth verbatim replications held sufficient in this behalf, and others held insufficient.

After verdict objection to evidence of waiver because it was not specially pleaded comes too late. Union Ins. Co. *v.* Murphy, 2 Del. Co. (Pa.) 510.

pleading[90] or has therein alleged performance of conditions.[91] No issue of waiver is tendered by a reply consisting only of a general denial,[92] nor, it has been held, by a replication pleading waiver accompanied by a general denial.[93] Nor can a replication only by general traverse be amended so as to allege a waiver where amendments are governed by common-law rules.[94] A replication relying upon waiver by an agent should expressly aver the agency[95] or state facts which constitute agency as a conclusion of law.[96] Where waiver is pleaded by reply in general terms a motion requiring plaintiff to specify whether the waiver was oral or written and to identify the officer or agent making the alleged waiver should be granted.[97] After trial on the merits allegations of waiver in a replication will be liberally construed in favor of the pleader;[98] and formal defects may be waived by failure to object therefor.[99]

5. Rejoinder. Where a replication states facts constituting waiver or estoppel a rejoinder must answer all the material allegations.[1] In code pleading allegations of new matter in a reply are deemed to be controverted as upon direct denial or avoidance and no pleading is allowed to a reply except a demurrer.[2]

6. Amendment of Pleadings — a. Declaration, Complaint, or Petition. An amendment not introducing a new cause of action[3] may be allowed, although the

Where plaintiff's allegation of performance is denied by the answer plaintiff may plead a waiver by replication. Sun Fire Office *v.* Fraser, 5 Kan. App. 63, 47 Pac. 327.

Estoppel may be pleaded in reply to a defense set up in the answer. American Cent. Ins. Co. *v.* McLanathan, 11 Kan. 533; Virginia F. & M. Ins. Co. *v.* Saunders, 86 Va. 969, 11 S. E. 794; Levy *v.* Peabody Ins. Co., 10 W. Va. 560, 27 Am. Rep. 598.

In North Carolina where plaintiff did not allege in his complaint nor by replication a waiver of a condition set up by defendant the court said that if "on the trial in the action he fails to prove sufficiently his compliance with some requirement that does not affect the real and substantial merits of the matter in controversy, there is no sufficient reason why he may not at once suggest and prove the waiver if he can, and thus help out his defective proofs. If the party offering such proof had been negligent the Court might decline to admit the same, and if the opposing party should be surprised, it might, in a proper case, allow a mistrial on just terms as to costs." Pioneer Mfg. Co. *v.* Phœnix Assur Co., 110 N. C. 176, 182, 14 S. E. 731, 28 Am. St. Rep. 673.

Under W. Va. Code, c. 125, § 65, providing for a reply by a statement specifying in general terms any waiver on which he intends to rely such statement is a pleading and subject to demurrer. Petit *v.* German Ins. Co., 98 Fed. 800. But *compare* Rosenthal Clothing, etc., Co., *v.* Scottish Union, etc., Ins. Co., 55 W. Va. 238, 46 S. E. 1021; Rheims *v.* Standard F. Ins. Co., 39 W. Va. 672, 20 S. E. 670.

90. As to pleading waiver or estoppel in the declaration, complaint, or petition see *supra*, XXI, F, 1, i.

91. In Missouri and some other jurisdictions waiver is provable under an allegation of performance in the complaint. See *supra*, note 45. Formerly the rule was otherwise in Missouri. Mueller *v.* Putnam F. Ins. Co., 45 Mo. 84.

92. *Illinois.*— Merchants' Nat. Ins. Co. *v.* Pearce, 84 Ill. App. 255.

Indiana.— Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817; Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843.

Kansas.— Westchester F. Ins. Co. *v.* Coverdale, 9 Kan. App. 651, 58 Pac. 1029.

Kentucky.— Johnson *v.* Connecticut F. Ins. Co., 84 Ky. 470, 2 S. W. 151, 8 Ky. L. Rep. 460.

Pennsylvania.— Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

See 28 Cent. Dig. tit. "Insurance," § 1637.

93. Meadows *v.* Hawkeye Ins. Co., 62 Iowa 387, 17 N. W. 600.

A single paragraph of a reply cannot be good as a denial and as an averment of waiver. Continental Ins. Co. *v.* Vanlue, 126 Ind. 410, 26 N. E. 119, 10 L. R. A. 843.

94. Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

95. Phœnix Ins. Co. *v.* Copeland, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848, averment held sufficient.

96. Brown *v.* Commercial F. Ins. Co., 86 Ala. 189, 5 So. 500, averments held insufficient. See also Cassimus *v.* Scottish Union, etc., Ins. Co., 135 Ala. 256, 33 So. 163. An allegation of waiver by the company was held sufficient as against an objection that waiver by an agent was provided against by the policy unless indorsed thereon. Boehm *v.* Central Ohio Ins. Co., 5 Ohio S. & C. Pl. Dec. 161, 7 Ohio N. P. 387, denying defendant's motion for judgment on the pleadings.

97. Webster *v.* Continental Ins. Co., 67 Iowa 393, 25 N. W. 675.

98. Phenix Ins. Co. *v.* Holcombe, 57 Nebr. 622, 78 N. W. 300, 73 Am. St. Rep. 532.

99. Oriental Ins. Co. *v.* Drake, 10 Ky. L. Rep. 445.

1. Boulden *v.* Liberty Ins. Co., 112 Ala. 490, 20 So. 526.

2. Continental Ins. Co. *v.* Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557.

3. It is otherwise if the amendment intro-

time limited in the policy for bringing an original action has expired.[4] An amendment alleging waiver of a condition in the policy is not objectionable as stating a new cause of action.[5] The complaint may be amended to obviate a variance between the policy described therein and the policy offered in evidence[6] or so as to allege more explicitly the performance of a condition precedent.[7] Plaintiff's omission of averment of insurable interest may be supplied by amendment even after motion for nonsuit on account of the omission.[8] In an action on the policy the complaint may be amended to support recovery on proof of an independent agreement after the loss to pay a stated amount.[9] The amount of damages claimed may be increased by amendment.[10] Plaintiff having sued for a partial loss may be allowed to amend by alleging a total loss caused by a subsequent fire under the same policy.[11] A declaration by an assignee may be amended by adding the name of the assignor.[12] Where the action is brought in the name of the insured for the use of the real party in interest the name of the former may be struck out by amendment.[13] Where the action is brought on a renewed policy, plaintiff cannot amend by declaring on a refusal to renew.[14] And where the action is brought on a policy an amendment declaring on an oral contract to deliver a policy cannot be allowed.[15] Where plaintiff in an action against underwriters of a Lloyd's policy alleged recovery of judgment against their attorney, but the judgment was vacated and a new one rendered after the cause was at issue in the first mentioned action, it was held that he should be allowed to file a supplemental complaint setting up the final judgment.[16]

b. Plea or Answer. Defendant should be allowed to amend after report of a commissioner when necessary to make available a defense arising out of facts found in the report.[17] It is *prima facie* an abuse of discretion to refuse leave to file a plea in apt time setting up a legally sufficient defense in addition to defenses already pleaded.[18] Ordinarily defendant will not be allowed to amend on the trial so as to introduce a new issue to the surprise of plaintiff.[19] And it

duces a new cause of action. Grier *v.* Northern Assur Co., 183 Pa. St. 334, 39 Atl. 10, same rule applied as in case of such amendments barred by the statute of limitations, and as to these latter see, generally, PLEADING.

4. Manchester F. Ins. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759, amendment specifying additional items of loss, and alleging assignment of the policy to plaintiff. The reason is that such amendments relate back to the time of filing the original pleading. See, generally, PLEADING.

5. California Ins. Co. *v.* Gracey, 15 Colo. 70, 24 Pac. 577, 22 Am. St. Rep. 376. An averment of performance of conditions may be amended so as to allege waiver of performance. Lycoming County Mut. Ins. Co. *v.* Schollenberger, 44 Pa. St. 259.

6. Clark *v.* Phœnix Ins. Co., 36 Cal. 168; Bonner *v.* Home Ins. Co., 13 Wis. 677.

7. North British, etc., Ins. Co. *v.* Rudy, 26 Ind. App. 472, 60 N. E. 9, amendment allowed on the trial.

8. Koshland *v.* Philadelphia Fire Assoc., 31 Oreg. 362, 49 Pac. 865.

9. Smith *v.* Glens Falls Ins. Co., 66 Barb. (N. Y.) 556.

10. Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584. Where an action is brought in the name of the owner for the use of a mortgagee claiming to recover the amount of the mortgage debt, an amendment claiming recovery for the full amount of the policy is not objectionable. Stainer *v.* Royal Ins. Co., 13 Pa. Super. Ct. 25.

11. Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 24 Ky. L. Rep. 958.

12. Spring Garden Ins. Co. *v.* Scott, 1 Walk. (Pa.) 181.

13. Virginia F. & M. Ins. Co. *v.* Feagin, 62 Ga. 515.

14. Roberts *v.* Germania F. Ins. Co., 71 Ga. 478, the amendment introduces a new cause of action.

15. Connecticut F. Ins. Co. *v.* Monroe Cir. Judge, 77 Mich. 231, 43 N. W. 871, 18 Am. St. Rep. 398.

16. Peabody *v.* Germain, 40 N. Y. App. Div. 146, 57 N. Y. Suppl. 860.

17. Ætna Ins. Co. *v.* Glasgow Electric Light, etc., Co., 107 Ky. 77, 52 S. W. 975, 21 Ky. L. Rep. 726.

18. Merchants' Nat. Ins. Co. *v.* Pearce, 84 Ill. App. 255. Amendment of an answer presenting an additional ground of defense should be allowed where it is based on plaintiff's own testimony. Southern Ins. Co. *v.* Hastings, 64 Ark. 253, 41 S. W. 1093.

After reversal and remand leave to amend the answer by setting up a new defense may properly be denied. Continental Ins. Co. *v.* Moore, 62 S. W. 517, 23 Ky. L. Rep. 72.

19. Deline *v.* Michigan F. & M. Ins. Co., 70 Mich. 435, 38 N. W. 298. See also Jackson First Baptist Church *v.* Citizens' Mut. F. Ins. Co., 119 Mich. 203, 77 N. W. 702. But it may be otherwise where the court offers

has been held that leave to file an insufficient amendment to the answer may properly be denied.[20]

7. BILL OF PARTICULARS. Where plaintiff in response to an order files a bill of particulars giving no additional information whatsoever evidence offered by him should be excluded on objection.[21]

8. ISSUES, PROOF, AND VARIANCE — a. Issues and Proof in General. No evidence should be heard to defeat a recovery which the issues of fact made by the pleadings do not require.[22] Plaintiff alleging compliance with all conditions and setting out the policy as an exhibit cannot prove by parol evidence that he never agreed to the iron-safe clause in the policy.[23] An averment that defendant undertook and promised to pay plaintiff may be sustained by proof of promise by an authorized agent.[24] Generally where plaintiff alleges performance of conditions evidence of waiver thereof is inadmissible.[25] Performance of a condition need not be proved by plaintiff where defendant's answer properly construed admits it.[26] Where plaintiff's complaint specifies the property destroyed in the same language that is used in the policy, but describes it as real property, he is not limited to real property in his proof or recovery.[27] Plaintiff cannot prove misdescription of the property by mistake in the absence of allegation thereof or of estoppel.[28] Notice and proofs of loss need not be introduced in evidence where copies are attached to the complaint and defendant admits that the papers were received,[29] or where the answer admits that defective proofs were furnished and retained without objection.[30] Mistake in proofs of loss alleged to have been furnished may be shown without an allegation of mistake.[31] Plaintiff may prove the value of the property under an allegation that it was totally destroyed and a prayer for judgment for the amount of the insurance.[32] If the evidence does not enable the jury to fix the value of property destroyed there can be no finding for plaintiff as to such property.[33] Under a denial that it ever insured plaintiff, defendant cannot prove facts showing a right to avoid the policy.[34] Non-payment of premiums not set up as a defense cannot be proved where by statute the policy imports a consideration.[35] Defendant cannot prove that the premises were erroneously described in the policy where the fact is not alleged in his answer.[36] Defendant who pleads that additional insurance was taken out need not prove it if plaintiff's replication merely pleads notice thereof.[37] Change of use of the insured premises after issuance of the policy cannot be proved under an answer alleging only that the use to which the proof is directed was at the date of the policy and in contravention of a warranty therein.[38] Evidence to prove the condition of an entire building immediately before the fire is not admissible under

a continuance to plaintiff at defendant's expense. Thompson *v.* Caledonia F. Ins. Co., 92 Wis. 664, 66 N. W. 801.

20. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

21. Knop *v.* Hartford Nat. F. Ins. Co., 101 Mich. 359, 59 N. W. 653. And see, generally, PLEADING.

22. Jacoby *v.* Westchester F. Ins. Co., 10 Pa. Super. Ct. 171.

23. Liverpool, etc., Ins. Co. *v.* Morris, 79 Ga. 666, 5 S. E. 125, there being no allegation of fraud or mistake or prayer for reformation.

24. St. Paul F. & M. Ins. Co. *v.* McGregor, 63 Tex. 399.

25. See *supra*, XXI, F, 1, i.

26. Rieger *v.* Mechanics' Ins. Co., 69 Mo. App. 674.

27. Granite State F. Ins. Co. *v.* Buckstaff Bros. Mfg. Co., 53 Nebr. 123, 73 N. W. 544.

28. Martin *v.* Farmers' Ins. Co., 84 Iowa 516, 51 N. W. 29.

29. Taylor *v.* State Ins. Co., 98 Iowa 521, 67 N. W. 577, 60 Am. St. Rep. 210.

30. Devil's Lake First Nat. Bank *v.* American Cent. Ins. Co., 58 Minn. 492, 60 N. W. 345, answer thereby admitting waiver.

31. Waldeck *v.* Springfield F. & M. Ins. Co., 53 Wis. 129, 10 N. W. 88, the variance held immaterial in code practice.

32. German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

33. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

34. British America Assur. Co. *v.* Cooper, 6 Colo. App. 25, 40 Pac. 147. See also *supra*, XXI, F, 3, c.

35. Phœnix Ins. Co. *v.* Hague, (Tex. Civ. App. 1896) 34 S. W. 654.

36. Bromberg *v.* Minnesota Fire Assoc., 45 Minn. 318, 47 N. W. 975.

37. Warbasse *v.* Sussex County Mut. Ins. Co., 42 N. J. L. 203.

38. Peirce *v.* Cohasset Mut. F. Ins. Co., 123 Mass. 572.

an answer alleging that the roof was defective.[39] Evidence of an independent agreement to arbitrate is inadmissible under an answer relying solely on a provision in the policy relating to arbitration.[40]

b. Variance — (1) *In General.* In code practice variances are to be disregarded if the party objecting does not show that he has been misled.[41] Plaintiff's allegation of sole ownership is not sustained by proof that he was part owner.[42] An interest insured jointly by two cannot be given in evidence under an averment of interest solely in one.[43] An averment of insurance of a joint interest will not authorize recovery for a joint loss on proof of insurance to one joint owner alone.[44] But a proper allegation of plaintiff's title to the property may be sustained by proof of assignment to him by the party to whom the policy issued, since it is immaterial how plaintiff acquired title.[45] For the same reason plaintiff may prove title by deed under an averment of title by will, and *vice versa*.[46] Plaintiff suing as owner of the property and holder of a policy issued to himself cannot recover on proof of assignment with consent of defendant and reassignment to himself.[47] Under an averment of ownership proof only of an insurable interest suffices if the contract of insurance requires no more.[48] Variance between the date of the fire as alleged and the date proved is not necessarily material.[49] Where variance between an averment of waiver and evidence thereof is slight the pleading may be considered as amended to conform to the facts proved.[50] An allegation of waiver in a particular manner will admit proof of waiver in a different manner.[51] An averment that proofs of loss were furnished by plaintiffs is not satisfied by proof that they were furnished by one of the plaintiffs and a third person.[52] Under an averment that proofs of loss were forwarded to a specified address evidence of proofs sent to another place is inadmissible.[53] But evidence of notice given at an earlier date than the date alleged by plaintiff under a *videlicet* may be admitted.[54] Total waiver of proofs of loss cannot be proved under an averment of waiver of defect in proofs furnished.[55] Recovery may be had for a partial loss under an averment of total loss.[56] Where defendant's answer specifies prohibited articles kept by plaintiff evidence as to other prohibited articles should not be considered.[57] Variance between alleged contents of a writing and proof thereof cannot be deduced by doing violence to the language used.[58]

39. Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123, the theory of the answer being that defendant had thereby suffered the risk to increase.

40. Elliott *v.* Merchants', etc., F. Ins. Co., 109 Iowa 39, 79 N. W. 452.

41. McComber *v.* Granite Ins. Co., 15 N. Y. 495, holding that defendant may prove that a building contained no force pump, in violation of a warranty, under an answer alleging removal of the pump after insurance. See, generally, PLEADING.

42. White *v.* Merchants' Ins. Co., 93 Mo. App. 282.

43. Stetson *v.* Insurance Co., 3 Phila. (Pa.) 380.

44. Burgher *v.* Columbian Ins. Co., 17 Barb. (N. Y.) 274.

45. Rediker *v.* Queen Ins. Co., 107 Mich. 224, 65 N. W. 105.

46. Monaghan *v.* Agricultural F. Ins. Co., 53 Mich. 238, 18 N. W. 797.

47. Bonefant *v.* American F. Ins. Co., 76 Mich. 653, 43 N. W. 682.

48. Rockford Ins. Co. *v.* Nelson, 65 Ill. 415.

49. Lum *v.* U. S. Fire Ins. Co., 104 Mich. 397, 62 N. W. 562.

50. Capitol Ins. Co. *v.* Pleasanton Bank, 48 Kan. 397, 29 Pac. 578. As to amendments to conform to proof see, generally, PLEADING.

51. Ben Franklin Ins. Co. *v.* Flynn, 98 Pa. St. 627. But see Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540, holding that acts constituting a waiver cannot be proved under an averment of waiver specifying different acts.

52. Citizens' Ins. Co. *v.* Shrader, (Tex. Civ. App. 1895) 33 S. W. 584.

53. Coryeon *v.* Providence-Washington Ins. Co., 79 Mich. 187, 44 N. W. 431.

54. Hovey *v.* American Mut. Ins. Co., 2 Duer (N. Y.) 554.

55. Greenville People's Bank *v.* Ætna Ins. Co., 74 Fed. 507, 20 C. C. A. 630.

56. Peoria M. & F. Ins. Co. *v.* Whitehill, 25 Ill. 466; Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673; Watson *v.* Insurance Co. of North America, 4 Dall. (Pa.) 283, 1 L. ed. 835.

57. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521.

58. Lounsbury *v.* Protection Ins. Co., 8 Conn. 459, 21 Am. Dec. 686.

(II) *Between Pleading and Contract.* Recovery cannot be had on an alleged oral contract of insurance where the proof shows a materially different contract.[59] An oral agreement for a renewal of an existing policy will support an allegation of an oral agreement to insure.[60] Plaintiff suing as owner cannot recover on a policy issued to him as attorney for an undisclosed principal.[61] An action on the policy alone cannot be sustained by evidence of an agreement to insure.[62] There is no fatal variance where plaintiff's complaint demands judgment for a smaller amount than is specified in a binding slip upon which the action is brought.[63] A policy attached to the complaint as an exhibit is admissible, although it contains clauses affecting liability which are not mentioned in the pleading.[64] Material misdescription of the amount of insurance and its apportionment on the properties is fatal.[65] A policy providing that loss is not payable until sixty days after proofs furnished is not variant from an averment of a contract to pay at that time,[66] but it is otherwise where the promise to pay is alleged without limitation as to time;[67] there is no variance between plaintiff's allegation that he was insured for a specified amount and a policy insuring him for loss not to exceed that amount.[68] Variance between the date of the policy as alleged and the date as given in evidence has been held fatal.[69] Courts are disinclined, however, to entertain objections for slight variances not tending to surprise.[70] Variance between conditions subsequent in the policy and the contract alleged in plaintiff's declaration is immaterial.[71] A policy is inadmissible under a declaration thereon not alleging conditions precedent.[72] A policy containing conditional or modifying clauses incorporated in the general clause of the contract is inadmissible under a pleading which states the contract without the conditions or qualifications,[73] or with materially different conditions.[74] Plaintiff may declare as upon a contract with himself alone on a renewal to him of a

59. Waldron *v.* Home Mut. Ins. Co., 9 Wash. 534, 38 Pac. 136.

60. Mallette *v.* British-American Assur. Co., 91 Md. 471, 46 Atl. 1005.

61. Hamburg-Bremen F. Ins. Co. *v.* Lewis, 4 App. Cas. (D. C.) 66.

62. Northam *v.* Dutchess County Mut. Ins. Co., 177 N. Y. 73, 69 N. E. 222 [*reversing* 79 N. Y. App. Div. 644, 80 N. Y. Suppl. 1144].

63. Van Tassel *v.* Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. 365 [*reversing* 72 Hun 141, 25 N. Y. Suppl. 301].

64. Phœnix Ins. Co. *v.* Boren, 83 Tex. 97, 18 S. W. 484.

65. Dove *v.* Royal Ins. Co., 98 Mich. 122, 57 N. W. 30.

66. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

67. Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798.

68. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

69. Germania F. Ins. Co. *v.* Lieberman, 58 Ill. 117.

70. Pelican Ins. Co. *v.* Schwartz, (Tex. Sup. 1892) 19 S. W. 374; Hanover F. Ins. Co. *v.* Shrader, 11 Tex. Civ. App. 255, 31 S. W. 1100, 32 S. W. 344, variance in number of the policy. See also Phœnix Ins. Co. *v.* Boren, 83 Tex. 97, 18 S. W. 484. Misstatement of the place of execution of the policy was held immaterial where defendant was not misled or surprised. Clay F. & M. Ins. Co *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346. Where the policy introduced in evidence is one which defendant's plea has treated as the basis of the action he cannot object that it is variant from the policy described in plaintiff's complaint. Southern Mut. Ins. Co. *v.* Turnley, 100 Ga. 296, 27 S. E. 975. Immaterial variance between the style of defendant corporation in plaintiff's declaration and in the policy will be disregarded. Ulysses Elgin Butter Co. *v.* Hartford F. Ins. Co., 20 Pa. Super. Ct. 384. Misnomer of the insured (Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580) or misdescription of the property (State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524) is not fatal where it is proved to be a mistake of the company.

71. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331.

72. Rockford Ins. Co. *v.* Nelson, 65 Ill. 415. But proof of a conditional promise under a complaint alleging an absolute promise is, however, only a variance and not a failure of proof. Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

73. Powers *v.* New England F. Ins. Co., 68 Vt. 390, 35 Atl. 331; Cooledge *v.* Continental Ins. Co., 67 Vt. 14, 30 Atl. 798 (fatal variance between an allegation of a contract to insure generally and a policy confining the insurance to property while in a specified location); Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

74. Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

policy originally to him and another.[75] Material discrepancy between the period of the insurance as specified in the policy and the period stated in the pleading is a fatal variance.[76] A policy bearing an assignment to a third person is inadmissible under a pleading describing the assignment as made to plaintiff.[77]

G. Evidence — 1. Presumptions and Burden of Proof — a. In General. In the absence of any admission by defendant plaintiff is bound to establish by a preponderance of evidence:[78] (1) The execution of the contract or policy of insurance sued on; (2) the destruction, total or partial, of the property insured; (3) the amount of the loss, or, in other words, the value of the insured property destroyed; and (4) that such notice and preliminary proof of loss as the policy requires has been given.[79]

b. As to the Contract. By raising an issue as to the essential averments of plaintiff's declaration, complaint, or petition,[80] defendant throws the burden upon plaintiff to establish ownership or other insurable interest,[81] the making of the contract,[82] and the payment of premiums.[83] Defendant alleging cancellation of

75. Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

76. Simmons *v.* West Virginia Ins. Co., 8 W. Va. 474.

77. Niagara Ins. Co. *v.* Lee, 73 Tex. 641, 11 S. W. 1024.

78. As to preponderance of evidence see, generally, Evidence, 17 Cyc. 754 *et seq.*

79. Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 60, 2 McCrary 211, per McCrary, J. "To entitle the plaintiff to recover . . . he must make out to the satisfaction of the jury, that the contract of insurance was fairly entered into; that he has performed his part of it; that he had, at the date of the contract, an insurable interest in the property covered by the policy; and that the same was injured or destroyed by fire during the continuance of the contract." Smith *v.* Cash Ins. Co., 1 Pittsb. (Pa.) 428, 429, per Hampton, P. J.

80. See *supra*, XXI, F, 1, a.

81. Illinois Mut. F. Ins. Co. *v.* Marseilles Mfg. Co., 6 Ill. 236; Milwaukee F. Ins. Co. *v.* Todd, 32 Ind. App. 214, 67 N. E. 697; Clark *v.* Dwelling-House Ins. Co., 81 Me. 373, 17 Atl. 303; Gilbert *v.* North American F. Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; Planters Ins. Co. *v.* Diggs, 8 Baxt. (Tenn.) 563. But the fact that a policy was issued to the insured on the property is *prima facie* an admission of title or interest in him. American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620; German Ins. Co. *v.* Gibbs, (Tex. Civ. App. 1896) 35 S. W. 679; Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252. See also cases cited *supra*, page 920 note 33. If the policy is made payable to a person named "as his interest may appear" the burden of proof is upon him seeking to maintain an action on the policy to show his right, title, or interest. Wilcox *v.* Minnesota Mut. F. Ins. Co., 81 Minn. 478, 84 N. W. 334.

In an action by one classed as assignee the company seeking to defeat his action by relying on a prior assignment to another has the burden of proving such prior assignment. Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986.

82. By setting out the policy plaintiff puts upon defendant the denial of its execution. See *supra*, XXI, F, 1, b.

Presumption of delivery of a policy arising from plaintiff's possession of it may be rebutted by proof that it was obtained in a surreptitious manner. Pennsburg Mfg. Co. *v.* Pennsylvania F. Ins. Co., 16 Pa. Super. Ct. 91.

The company is presumed to know the meaning which a valid local usage has attached to a term in the policy. Barker *v.* Citizens' Mut. F. Ins. Co., (Mich. 1904) 99 N. W. 866.

If the suit is on an executory contract of insurance the burden is on plaintiff to prove the contract and the authority of the agent to make it. Smith *v.* State Ins. Co., 58 Iowa 487, 12 N. W. 542. It will be presumed that an oral contract to insure was an agreement to insure in the terms of the policy then in use by the company. Smith *v.* State Ins. Co., 64 Iowa 716, 21 N. W. 145. The burden of proving an alleged oral contract of renewal of a policy is upon plaintiff. Giddings *v.* Phœnix Ins. Co., 90 Mo. 272, 2 S. W. 139. See *supra*, **III, D.**

Agency of an intermediary who procured the insurance, whereby defendant was bound, need not be proved by plaintiff where defendant admits issue and delivery of the policy. Healey *v.* Pennsylvania State Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055.

That the policy was in force at the time of the fire must be proved by plaintiff. Schroeder *v.* Trade Ins. Co., 12 Ill. App. 651. Mere possession of a policy is not conclusive evidence that it was in force at the time of the fire. White *v.* New York Ins. Co., 93 Fed. 161.

83. Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. (Del.) 325, 54 Atl. 952; Moore *v.* Rockford Ins. Co., 90 Iowa 636, 57 N. W. 597; Hooker *v.* Continental Ins. Co., (Nebr. 1903) 96 N. W. 663.

Conduct of the company may support an inference of fact that the premium was duly

the policy has the burden of proving it,[84] and must prove compliance with conditions precedent to the right to cancel.[85]

c. As to Avoidance or Forfeiture in General. While plaintiff is required to allege performance of conditions precedent,[86] and therefore may logically be said to have the burden of proving such performance,[87] yet under the rule now generally recognized that defendant to raise an issue on general allegation of performance must particularly allege the breach relied on, it is almost uniformly held that without regard to whether the breach complained of is that of a condition precedent or a promissory warranty or condition subsequent defendant has the burden of proving the facts constituting such a breach.[88] Thus defendant must prove breach of warranty against alienation,[89] encumbrance in violation of the conditions of the policy,[90] that the premises were vacant or unoccupied in violation of provisions on that subject,[91] or the existence of other or additional insurance.[92] While the burden of proving notice and proofs of loss is usually upon plain-

paid, Weisman *v.* Commercial F. Ins. Co., 3 Pennew. (Del.) 224, 50 Atl. 93.

Waiver of objection for non-payment of premium may be presumed in the absence of satisfactory evidence to the contrary, where the company treats the policy as valid and binding until the loss occurs. Mauck *v.* Merchants', etc., F. Ins. Co., 4 Pennew. (Del.) 325, 54 Atl. 952.

84. *Alabama.*— Phœnix Assur. Co. *v.* McAuthor, 116 Ala. 659, 22 So. 903, 67 Am. St. Rep. 154.

Louisiana.— Gomila *v.* Hibernia Ins. Co., 40 La. Ann. 553, 4 So. 490.

Maryland.—American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

Missouri.— McCartney *v.* State Ins. Co., 45 Mo. App. 373.

Nebraska.— Home F. Ins. Co. *v.* Johnasen, 59 Nebr. 349, 80 N. W. 1047.

United States.— Runkle *v.* Citizens' Ins. Co., 6 Fed. 143.

85. American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373.

86. See *supra*, XXI, F, 1, g.

87. Lamson Consol. Store-Service Co. *v.* Prudential F. Ins. Co., 171 Mass. 433, 50 N. E. 943; Wilson *v.* Hampden F. Ins. Co., 4 R. I. 159; Hersey *v.* Northern Assur. Co., 75 Vt. 441, 56 Atl. 95; L. Rosenthall Clothing, etc., Co. *v.* Scottish Union, etc., Ins. Co., 55 W. Va. 238, 46 S. E. 1021, stating that such was the rule at common law and that it still obtains in West Virginia if defendant files the statement provided for in W. Va. Code (1899), c. 125, § 64.

88. *Alabama.*— Boulden *v.* Phœnix Ins. Co., 112 Ala. 422, 20 So. 587.

Mississippi.— Liverpool, etc., Ins. Co. *v.* Farnsworth Lumber Co., 72 Miss. 555, 17 So. 445.

Missouri.— Ritter *v.* Sun Mut. Ins. Co., 40 Mo. 40.

Pennsylvania.— Susquehanna Mut. F. Ins. Co. *v.* Tunkhannock Toy Co., 15 Wkly. Notes Cas. 306.

South Carolina.— Copeland *v.* Western Assur. Co., 43 S. C. 26, 20 S. E. 754.

South Dakota.— Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

Texas.— Sullivan *v.* Hartford F. Ins. Co., (Civ. App. 1896) 34 S. W. 999. See also Phœnix Assur. Co. *v.* Stenson, (Civ. App. 1904) 79 S. W. 866.

Wisconsin.— Redman *v.* Ætna Ins. Co., 49 Wis. 431, 4 N. W. 591.

United States.— Cotten *v.* Fidelity, etc., Co., 41 Fed. 506; Bittinger *v.* Providence-Washington Ins. Co., 24 Fed. 549. But see Craig *v.* U. S. Insurance Co., 6 Fed. Cas. No. 3,340, Pet. C. C. 410.

See 28 Cent. Dig. tit. "Insurance," §§ 1650, 1651, 1654, 1655.

There is no presumption of fact either in favor of or against a forfeiture. Denver Tp. Mut. F. Ins. Co. *v.* Resor, 95 Ill. App. 197.

89. Orrell *v.* Hampden F. Ins. Co., 13 Gray (Mass.) 431; Farmers', etc., Ins. Co. *v.* Peterson, 47 Nebr. 747, 66 N. W. 847.

90. Mistilski *v.* German Ins. Co., 64 Minn. 366, 67 N. W. 80; Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779. In the absence of evidence to the contrary it has been held that a mortgage is presumed to be unpaid unless sufficient time has elapsed to create presumption of payment. Gould *v.* Holland Purchase Ins. Co., 16 Hun (N. Y.) 538.

91. Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42. And the insurer should allege that a factory ceased to be operated for a period so long as to avoid the policy. Barker *v.* Citizens' Mut. F. Ins. Co., (Mich. 1904) 99 N. W. 866; Cronin *v.* Philadelphia F. Assoc., 123 Mich. 277, 82 N. W. 45, holding that the undisputed evidence established the fact. Premises recently vacated by the occupant are presumed to continue in that condition unless shown to have been subsequently occupied. Stottenberg *v.* Continental Ins. Co., 106 Iowa 565, 76 S. W. 835, 68 Am. St. Rep. 323. See, generally, as to presumption of continuance, EVIDENCE, 16 Cyc. 1052 *et seq.*

92. Russell *v.* Fidelity F. Ins. Co., 84 Iowa 93, 50 N. W. 546; Clark *v.* Hamilton Mut. Ins. Co., 9 Gray (Mass.) 148. But where it is shown that additional insurance was taken out, the burden of proving notice thereof to defendant is upon the insured. Sun Ins. Co. *v.* Earle, 29 Mich. 406.

tiff,[93] yet if plaintiff proves facts which are sufficient *prima facie* to show that notice or proofs were given[94] defendant has the burden of proving non-compliance with the conditions of the policy in that respect.[95] It is clear that breach of a condition subsequent[96] or of a warranty of existing conditions[97] or other affirmative defense[98] must be established by defendant.

93. McCall *v.* Merchants' Ins. Co., 33 La. Ann. 142; German Ins. Co. *v.* Davis, 40 Nebr. 700, 59 N. W. 698; German Ins. Co. *v.* Fairbank, 32 Nebr. 750, 49 N. W. 711, 29 Am. St. Rep. 459; Flanaghan *v.* Phenix Ins. Co., 42 W. Va. 426, 26 S. E. 513.

94. Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447. There is a presumption, until the contrary appears, that notice and proofs of loss properly mailed to the company were received in due course of mail. Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48. And see, generally, as to such presumption, EVIDENCE, 16 Cyc. 821. See *supra*, XVII, A.

95. Foster *v.* Jackson Mar. Ins. Co., 1 Edm. Sel. Cas. (N. Y.) 290; Killips *v.* Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506. The burden of proving that the magistrate who certified to the loss was interested is upon defendant. Cornell *v.* Le Roy, 9 Wend. (N. Y.) 163.

Under N. Y. Code Civ. Proc. § 533, where plaintiff has alleged generally performance of conditions precedent and the allegation is controverted the burden of proof is upon him; but proof need not be offered by him until some evidence of a violation of the condition has been given by defendant. Rau *v.* Westchester F. Ins. Co., 50 N. Y. App. Div. 428, 64 N. Y. Suppl. 290 [*affirmed* in 168 N. Y. 665, 61 N. E. 1134].

In West Virginia by virtue of Code, c. 125, § 64, plaintiff need not furnish such proof unless defendant pleads non-performance of the condition. Adkins *v.* Globe F. Ins. Co., 45 W. Va. 384, 32 S. E. 194.

96. Increase of risk.— Where the policy provides against increase of risk or hazard, whether generally or in particular respects, the burden is on defendant to establish such increase of risk.

Illinois.— Catlin *v.* Traders' Ins. Co., 83 Ill. App. 40.

Kansas.— Niagara F. Ins. Co. *v.* Johnson, 4 Kan. App. 16, 45 Pac. 789.

Maine.— Newhall *v.* Union Mut. F. Ins. Co., 52 Me. 180.

Minnesota.— Taylor *v.* Security Mut. F. Ins. Co., 88 Minn. 231, 92 N. W. 952.

Missouri.— Ritter *v.* Sun Mut. Ins. Co., 40 Mo. 40.

United States.— Merrill *v.* Insurance Co. of North America, 23 Fed. 245.

See 28 Cent. Dig. tit. "Insurance," § 1655.

When an insured building becomes unoccupied there is a *prima facie* presumption of increase of risk. White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167.

Fall of building.— Where a condition relied on is that if the building should fall except as the result of fire all insurance should immediately cease, the burden is on defendant relying on breach of such condition to show that the building fell before the fire started. N. & M. Friedman Co. *v.* Atlas Assur. Co., 133 Mich. 212, 94 N. W. 757; Phenix Ins. Co. *v.* Luce, 123 Fed. 257 [*following* Western Assur. Co. *v.* J. H. Mohlman, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561].

Fire protection.— Violation by the insured of stipulations to provide fire protection must be proved by the company. Fuller *v.* New York F. Ins. Co., 184 Mass. 12, 67 N. E. 879; Jones Mfg. Co. *v.* Manufacturers' Mut. F. Ins. Co., 8 Cush. (Mass.) 82, 54 Am. Dec. 742; Redman *v.* Ætna Ins. Co., 49 Wis. 431, 4 N. W. 591.

Plaintiff's refusal to have appraisal, alleged by defendant and denied in plaintiff's reply, must be proved by defendant. Lancashire Ins. Co. *v.* Murphy, 10 Kan. App. 251, 62 Pac. 729.

97. Morotock Ins. Co. *v.* Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850, holding that erroneous description of the property, constituting breach of warranty, must be proved by defendant.

98. Lucas *v.* Jefferson Ins. Co., 6 Cow. (N. Y.) 635.

Alleged election to repair and notice thereof to insured as required by the policy must be proved by defendant. Harrington *v.* Hanover F. Ins. Co., 5 N. Y. St. 417.

False representations.— Thus if the company relies upon false misrepresentations on the part of the insured to avoid the policy, it has the burden of proving the falsity of such representations (Helbing *v.* Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; New England F. & M. Ins. Co. *v.* Wetmore, 32 Ill. 221; Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210; Jones Mfg. Co. *v.* Manufacturers' Mut. F. Ins. Co., 8 Cush. (Mass.) 82, 54 Am. Dec. 742; State Ins. Co. *v.* New Hampshire Trust Co., 47 Nebr. 62, 66 N. W. 9, 1106; Queen Ins. Co. *v.* Leonard, 9 Ohio Cir. Ct. 46, 6 Ohio Cir. Dec. 49; Redman *v.* Ætna Ins. Co., 49 Wis. 431, 4 N. W. 591; Tidmarsh *v.* Washington F. & M. Ins. Co., 23 Fed. Cas. No. 14,024, 4 Mason 439; Whittle *v.* Farmville Ins. Co., 29 Fed. Cas. No. 17,603, 3 Hughes 421), and it is for the company to prove the materiality of such representations and knowledge of their falsity on the part of the insured (Wilkins *v.* Germania F. Ins. Co., 57 Iowa 529, 10 N. W. 916; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192; Ætna Ins. Co. *v.* Grube, 6 Minn. 82; McCarty *v.* Imperial Ins. Co., 126 N. C.

d. Waiver or Estoppel. If the insured relies on waiver or estoppel to avoid the effect of breach of condition or warranty the burden is upon him to prove it,[99] including alleged authority of defendant's agent to receive notice of facts as a basis of waiver.[1] But the burden is on defendant to show notice to insured of defects in his proofs of loss.[2]

e. Amount and Cause of Loss. It is for plaintiff to prove the amount of his

820, 36 S. E. 284. See also Home Ins. Co. *v.* Koob, 113 Ky. 360, 68 S. W. 453, 58 L. R. A. 58). But it is said, contrary to the weight of authority just cited, that where the company pleads that answers to certain questions as to the condition of the title are untrue the burden is on plaintiff to show that he made a full and true statement on that point. Williamson *v.* New Orleans Ins. Assoc., 84 Ala. 106, 4 So. 36. See also Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

Overvaluation such as to defeat the insurance, if relied on, must be proved by the company. Eakin *v.* Home Ins. Co., 1 Tex. App. Civ. Cas. § 368; Field *v.* Insurance Co. of North America, 9 Fed. Cas. No. 4,767, 6 Biss. 121. See also Helbing *v.* Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72.

If the concealment of material facts is relied on it must be affirmatively made out by the company. Folsom *v.* Mercantile Mut. Ins. Co., 9 Fed. Cas. No. 4,902, 8 Blatchf. 170 [*affirmed* in 18 Wall. 237, 21 L. ed. 827].

Where fraud or false swearing is relied upon as a defense the burden of proof to show that the statements were false and fraudulent is upon the company. Helbing *v.* Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72; Baillie *v.* Western Assur. Co., 49 La. Ann. 658, 21 So. 736; Stache *v.* St. Paul F. & M. Ins. Co., 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772; Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200; Huchberger *v.* Home F. Ins. Co., 12 Fed. Cas. No. 6,821, 5 Biss. 106; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265 [*affirmed* in 12 Wall. 164, 20 L. ed. 364]; Whittle *v.* Farmville Ins. Co., 29 Fed. Cas. No. 17,603, 3 Hughes 421. But it is said that where the falsity of the statements appears it is for plaintiff to show that they were innocently made. Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216; Virginia F. & M. Ins. Co. *v.* Vaughan, 88 Va. 832, 14 S. E. 754.

If the company relies upon misdescription as avoiding the policy the burden of proof as to such fact is upon the company and not upon the insured. Morotock Ins. Co. *v.* Fostoria Novelty Co., 94 Va. 361, 26 S. E. 850; Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561. But if plaintiff claims the misdescription was a mistake made by defendant's agent the burden is upon him to prove it. Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

Negligence or wrong.— If the company relies upon negligent failure of the insured to save the property (Spencer *v.* Farmers' Mut. Ins. Co., 79 Mo. App. 213; Wolters *v.* Western Assur. Co., 95 Wis. 265, 70 N. W. 62) or failure to make reasonable exertions to that end (Fletcher *v.* German-American Ins. Co., 79 Minn. 337, 82 N. W. 647) it has the burden of proving such negligence or failure. **And in general any negligent** or wrongful act which is relied upon by the company to defeat recovery must be proved by it. Morris *v.* Farmers' Mut. F. Ins. Co., 63 Minn. 420, 65 N. W. 655; Mars *v.* Virginia Home Ins. Co., 17 S. C. 514; Dwyer *v.* Continental Ins. Co., 57 Tex. 181; Alamo F. Ins. Co. *v.* Lancaster, 7 Tex. Civ. App. 677, 28 S. W. 126; Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265 [*affirmed* in 12 Wall. 164, 20 L. ed. 364].

But where defendant pleads an award plaintiff has the burden of proving his allegation in reply that it was void for fraud. German-American Ins. Co. *v.* Johnson, 4 Kan. App. 357, 45 Pac. 972.

99. *Arkansas.*— Hartford F. Ins. Co. *v.* Enoch, (1903) 77 S. W. 899; Planters' Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. 44, 77 Am. St. Rep. 136.

Iowa.— Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128. See also Moore *v.* Rockford Ins. Co., 90 Iowa 636, 57 N. W. 597.

Massachusetts.— Lamson Consol. Store-Service Co. *v.* Prudential F. Ins. Co., 171 Mass. 453, 50 N. E. 943.

Michigan.— A. M. Todd Co. *v.* Farmers' Mut. F. Ins. Co., (1904) 100 N. W. 442; Wierengo *v.* American F. Ins. Co., 98 Mich. 621, 57 N. W. 833.

Missouri.— Giddings *v.* Phœnix Ins. Co., 90 Mo. 272, 2 S. W. 139; Miller *v.* Insurance Co. of North America, 106 Mo. App. 205, 80 S. W. 330; Reithmiller *v.* Philadelphia Fire Assoc., 38 Mo. App. 118.

Nebraska.— German Ins. Co. *v.* Shader, 1 Nebr. (Unoff.) 704, 96 N. W. 604.

New York.— Sergent *v.* Liverpool, etc., Ins. Co., 66 N. Y. App. Div. 46, 73 N. Y. Suppl. 120, 96 N. Y. App. Div. 117, 89 N. Y. Suppl. 35; Stapleton *v.* Greenwich Ins. Co., 16 Misc. 483, 38 N. Y. Suppl. 973.

Texas.— East Texas F. Ins. Co. *v.* Perky, 5 Tex. Civ. App. 698, 24 S. W. 1080.

West Virginia.— Flanaghan *v.* Phenix Ins. Co., 42 W. Va. 426, 26 S. E. 513.

United States.— Hambleton *v.* Home Ins. Co., 11 Fed. Cas. No. 5,972, 6 Biss. 91.

See 28 Cent. Dig. tit. "Insurance," § 1658. And see *supra*, XXI, F, 1, i.

1. Alabama State Mut. Assur. Co. *v.* Long Clothing, etc., Co., 123 Ala. 667, 26 So. 655.

2. Killips *v.* Putnam F. Ins. Co., 28 Wis. 472, 9 Am. Rep. 506.

loss or damage,[3] and that it was due to fire within the provisions of the policy.[4] But the loss appearing to have been by fire, it is for defendant to show that it falls within some of the excepted risks.[5]

f. Value of Property. Except under valued policy statutes[6] it is incumbent upon plaintiff to prove the value of the property destroyed[7] or of his interest therein.[8]

2. Admissibility, and Weight and Sufficiency — a. The Contract — Policy and Application. Oral evidence is admissible to show an executory contract of insurance,[9] and a preponderance of evidence suffices to establish the contract.[10] The form of policy with reference to which the parties contracted may be proved as constituting a part of the executory contract.[11] Narrative declarations of defendant's agent[12] are inadmissible as evidence in chief against defendant to prove that the agent made an oral contract of insurance.[13] Where the action is based on a "binding slip" in the usual form, evidence of a custom that would substitute new terms in the contract is inadmissible.[14] If a policy has been issued it is of course the best evidence of its terms and conditions, but if it refers to the application which is made a part thereof it is only admissible in connection with such application, as otherwise it would not show the entire contract.[15] The

3. German F. Ins. Co. *v.* Von Gunten, 13 Ill. App. 593; Merchants' Mut. Ins. Co. *v.* Wilson, 2 Md. 217; Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; Citizens' Ins. Co. *v.* Lefrançois, 2 Quebec Q. B. 550.

The fact that defendant denied liability *in toto* does not dispense with the necessity for competent evidence of the amount of loss. Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810, proofs of loss held inadmissible.

Defendant's admission at the trial that the amount claimed is due if it is liable at all dispenses with the necessity of proof of an adjustment or the extent of loss. Jacoby *v.* North British, etc., Ins. Co., 10 Pa. Super. Ct. 366.

Under a statute making the amount stated in the policy *prima facie* evidence of the insurable value defendant has the burden of proving depreciation in value between the date of the policy and the time of loss. Des Moines Ice Co. *v.* Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600.

4. Howell *v.* Baltimore Equitable Soc., 16 Md. 377; Pelican Ins. Co. *v.* Troy Co-operative Assoc., 77 Tex. 225, 13 S. W. 980.

5. Kingsley *v.* New England Mut. F. Ins. Co., 8 Cush. (Mass.) 393. If, however, the loss appears to be within a class of excepted risks then it is for plaintiff to show that the fire did not originate from an excepted cause. Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167; Sohier *v.* Norwich F. Ins. Co., 11 Allen (Mass.) 336.

Whether fall of building preceded or followed fire see *supra*, page 937 note 96.

6. No proof of value necessary. Minneapolis F. & M. Ins. Co. *v.* Fultz, (Ark. 1904) 80 S. W. 576; Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534. See further as to valued policy statutes *supra*, XVI, B, 2.

7. Schroeder *v.* Trade Ins. Co., 72 Ill. App. 651; Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; De Soto *v.* American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1, 74 S. W. 1.

8. Millaudon *v.* Western M. & F. Ins. Co., 9 La. 27, 29 Am. Dec. 433.

9. Sanford *v.* Orient Ins. Co., 174 Mass. 416, 54 N. E. 883, 75 Am. St. Rep. 358. See *supra*, III, D, 5.

Narrative declarations of the company's agent after the fire are not admissible against the company. Crawford *v.* Trans-Atlantic F. Ins. Co., 125 Cal. 609, 57 Pac. 177. And see, generally, Evidence, 16 Cyc. 1008.

Mere silence of defendant, if there was no duty of speech, will not support an inference of a contract to insure. Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622.

10. Farmers' Co-operative Soc. *v.* German Ins. Co., 97 Iowa 749, 66 N. W. 878; Chaney *v.* Phœnix Ins. Co., 62 Mo. App. 45; Consolidated Mfg. Co. *v.* West Chester F. Ins. Co., 13 Pa. Co. Ct. 321, 328; Waldron *v.* Home Mut. Ins. Co., 16 Wash. 193, 47 Pac. 425, clear and conclusive proof not required. See, generally, Evidence, 17 Cyc. 755 *et seq.*

Evidence held sufficient to sustain verdict see Michigan Pipe Co. *v.* North British, etc., Ins. Co., 97 Mich. 493, 56 N. W. 849; Ganser *v.* Fireman's Fund Ins. Co., 38 Minn. 74, 35 N. W. 584; Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674; Abel *v.* Phœnix Ins. Co., 57 N. Y. App. Div. 629, 68 N. Y. Suppl. 19; Consolidated Mfg. Co. *v.* West Chester F. Ins. Co., 13 Pa. Co. Ct. 321.

11. Underwriters' Agency *v.* Sutherlin, 46 Ga. 652; Home Ins. Co. *v.* Favorite, 46 Ill. 263; Western Assur. Co. *v.* McAlpin, 23 Ind. App. 220, 55 N. E. 119, 77 Am. St. Rep. 423.

12. Narrative declarations of an agent to affect his principal see Evidence, 16 Cyc. 821.

13. German F. Ins. Co. *v.* Schroeder, 48 Kan. 643, 29 Pac. 1078.

14. Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Suppl. 79.

15. Rogers *v.* Cedar Rapids Ins. Co., 72 Iowa 448, 34 N. W. 202; American Under-

application alone is inadmissible to show the terms of the contract,[16] but it may be admissible for other purposes.[17] A clause attached to the policy and referred to therein as part of it is admissible.[18] Likewise a renewal receipt for a premium in connection with other evidence of the contract.[19] Evidence is admissible to show that the policy in suit was intended as a substitute for a former policy and not as additional insurance;[20] and defendant may show that a policy was by mistake issued for a longer period than was agreed upon.[21] In the absence of fraud

writers' Assoc. *v.* George, 97 Pa. St. 238; Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108; Farmers, etc., Mut. Ins. Co. *v.* Meckes, 10 Wkly. Notes Cas. (Pa.) 306. If the insured denies having signed the application he may introduce the policy as constituting the entire contract (Commercial Union Assur. Co. *v.* Elliott, 10 Pa. Cas. 331, 13 Atl. 970), or if defendant pleads to the narr. without craving oyer of the application (Franklin Ins. Co. *v.* Staib, 1 Walk. (Pa.) 361), or refuses to produce the application on notice (American Underwriters' Assoc. *v.* George, *supra*).

Another policy taken out in a different company at the same time cannot be introduced in evidence to explain or vary the policy sued on. Westinghouse Electric Co. *v.* Western Assur. Co., 42 La. Ann. 28, 7 So. 73.

A policy apparently altered is admissible in connection with testimony that it was altered by the company's agent. German F. Ins. Co. *v.* Gerber, 4 Ill. App. 222. See also Davidson *v.* Guardian Assur. Co., 176 Pa. St. 525, 35 Atl. 220.

Mere possession of a policy is not conclusive proof of a right to recover the insurance money. Wood *v.* Phœnix Mut. L. Ins. Co., 22 La. Ann. 617.

16. Saunders *v.* Watertown Agricultural Ins. Co., 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683; Dow *v.* Whetten, 8 Wend. (N. Y.) 160; Folsom *v.* Mercantile Ins. Co., 9 Fed. Cas. No. 4,903, 9 Blatchf. 201 [*affirmed* in 18 Wall. 237, 21 L. ed. 827]. See also Pindar *v.* Resolute F. Ins. Co., 47 N. Y. 114.

17. Rankin *v.* Amazon Ins. Co., 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; Richmondville Union Seminary *v.* Hamilton Mut. Ins. Co., 14 Gray (Mass.) 459.

By statute in some states the application is not admissible in evidence unless it has been attached to or incorporated into the policy. Corson *v.* Iowa Mut. F. Ins. Assoc., 115 Iowa 485, 88 N. W. 1086; Moore *v.* Bestline, 23 Pa. Super. Ct. 6; Imperial F. Ins. Co. *v.* Dunham, 2 Pa. Cas. 109, 3 Atl. 579, too late to offer to attach it on the trial.

Application filled out by company's agent.— If the application is made out by the agent of the company without being signed or approved by the insured it is not admissible in evidence against the latter. Harvey *v.* Parkersburg Ins. Co., 37 W. Va. 272, 16 S. E. 580. Parol evidence is admissible to show that even though the application is signed by the insured it was in fact filled out by the agent of the company and that he incorrectly stated therein information given him by the assured. Menk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; North British, etc., Ins. Co. *v.* Steiger, 124 Ill. 81, 16 N. E. 95 [*affirming* 26 Ill. App. 228]; Millers' Nat. Ins. Co. *v.* Jackson County Milling, etc., Co., 60 Ill. App. 224; Parno *v.* Iowa Merchants' Mut. Ins. Co., 114 Iowa 132, 86 N. W. 210; Continental Ins. Co. *v.* Pearce, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557; Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352; North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638; Kausel *v.* Minnesota Farmers' Mut. F. Ins. Assoc., 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776; Dwelling House Ins. Co. *v.* Weikel, 33 Nebr. 668, 50 N. W. 949; Vanderhoef *v.* Agricultural Ins. Co., 46 Hun 328; Smith *v.* Agricultural Ins. Co., 6 N. Y. St. 127. See also Burke *v.* Niagara F. Ins. Co., 12 N. Y. Suppl. 254 [*affirmed* in 128 N. Y. 668, 29 N. E. 148]; Johnson *v.* Dakota F. & M. Ins. Co., 1 N. D. 167, 45 N. W. 799; Moliere *v.* Pennsylvania F. Ins. Co., 5 Rawle 342, 28 Am. Dec. 675. See also Manhattan Ins. Co. *v.* Webster, 59 Pa. St. 227, 98 Am. Dec. 332; Home Ins. Co. *v.* Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915; Texas Banking, etc., Co. *v.* Stone, 49 Tex. 4; Deitz *v.* Providence-Washington Ins. Co., 31 W. Va. 851, 8 S. E. 616, 13 Am. St. Rep. 909; Hanson *v.* Milwaukee Mechanics' Mut. Ins. Co., 45 Wis. 321. *Contra*, Thomas *v.* Commercial Union Assur. Co., 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323; Jenkins *v.* Quincy Mut. F. Ins. Co., 7 Gray (Mass.) 370. See also Batchelder *v.* Queen Ins. Co., 135 Mass. 449; McCluskey *v.* Providence Washington Ins. Co., 126 Mass. 306; Fitchburg Sav. Bank *v.* Amazon Ins. Co., 125 Mass. 431; Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583.

18. Hartford F. Ins. Co. *v.* Post, 25 Tex. Civ. App. 428, 62 S. W. 140.

Binder slip.— As to the extent to which parol evidence is admissible to prove the character of the obligation incurred by a binder slip see Underwood *v.* Greenwich Ins. Co., 54 N. Y. App. Div. 386, 66 N. Y. Suppl. 651.

19. McCullough *v.* Hartford F. Ins. Co., 2 Pa. Super. Ct. 233.

20. Walker *v.* American Cent. Ins. Co., 21 N. Y. Suppl. 751 [*affirmed* in 143 N. Y. 167, 38 N. E. 106], holding, however, that the evidence was sufficient to support a verdict against defendant as for additional insurance.

21. Davidson *v.* Guardian Assur. Co., 176 Pa. St. 525, 35 Atl. 220; Latimore *v.* Dwell-

plaintiff's testimony that he did not understand and assent to certain provisions in the policy is not admissible.[22] If cancellation of the policy is relied on as a defense evidence of notice of cancellation given to an alleged agent of plaintiff should be admitted where other evidence sustains an inference of the agent's authority in the premises.[23]

b. Identification of Property. Except under some of the codes or practice acts, and then only with proper allegations as a basis therefor,[24] it is incompetent in an action at law on the policy to introduce evidence that the intention of the parties was to insure other property than that described.[25] But evidence is admissible to connect the description with the property intended to be covered,[26] and plaintiff's admissions as to his intention not to have the particular property covered by the policy are admissible against him,[27] but his statements of intention to a person not an agent of defendant are not admissible in his favor.[28] Declarations in the report of defendant's surveyor of which plaintiff was not cognizant cannot be used against the latter.[29] Evidence of destruction of property essentially different from the description in plaintiff's pleading is inadmissible.[30]

c. Ownership — Insurable Interest. The issuance of a policy to the insured by the company on the property is *prima facie* evidence of the title of the insured to such property.[31] A *prima facie* case as to ownership is also made by proof of possession.[32] But the insured may testify as to the fact of his ownership,[33] and so may his manager of the property,[34] and evidence of statements of his authorized agent as to his ownership is admissible against him.[35] Plaintiff's claim of title to the insured property by purchase being in issue his bank-book showing deposits at the time of the alleged purchase is admissible to show that he had means of purchasing.[36] To show want of insurable interest plaintiff's

ing House Ins. Co., 153 Pa. St. 324, 25 Atl. 757, both cases holding, however, that the evidence was sufficient to support a verdict against the company on the issue of mistake.

22. Virginia F. & M. Ins. Co. *v.* Morgan, 90 Va. 290, 18 S. E. 191, although he was unable to read the English language.

23. Dickert *v.* Farmers' Mut. Ins. Assoc., 52 S. C. 412, 29 S. E. 786.

24. Ætna F. Ins. Co. *v.* Brannon, (Tex. Civ. App. 1904) 81 S. W. 560.

25. Franklin Ins. Co. *v.* Feist, 31 Ind. App. 390, 68 N. E. 108; Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. 212, 12 Am. St. Rep. 801, 5 L. R. A. 638.

26. Saunders *v.* Watertown Agricultural Ins. Co., 167 N. Y. 261, 60 N. E. 635 [*reversing* 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683].

Evidence held sufficient see Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62.

27. Leftwich *v.* Royal Ins. Co., 91 Md. 596, 46 Atl. 1010. As to weight of admissions see EVIDENCE, 17 Cyc. 814.

28. Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 44 N. Y. Suppl. 832.

29. Saunders *v.* Agricultural Ins. Co., 39 N. Y. App. Div. 631, 57 N. Y. Suppl. 683 [*reversed* in 167 N. Y. 261, 60 N. E. 635].

30. Underwriters' Fire Assoc. *v.* Henry, (Tex. Civ. App. 1904) 79 S. W. 1072.

31. Kansas Ins. Co. *v.* Berry, 8 Kan. 159; American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Farmers', etc., Ins. Co. *v.* Peterson, 47 Nebr. 747, 66 N. W. 847; Wood *v.* American F. Ins. Co., 78 Hun (N. Y.) 109, 29 N. Y. Suppl. 250. And see *supra*, XXI, G, 1, a.

A policy describing the property as that of the insurer is *prima facie* evidence of his insurable interest. Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. 252.

32. *Georgia.*— Morris *v.* Imperial Ins. Co., 106 Ga. 461, 32 S. E. 595.

Kentucky.— Sprigg *v.* American Cent. Ins. Co., 101 Ky. 185, 40 S. W. 575, 19 Ky. L. Rep. 363.

New York.— Wood *v.* American F. Ins. Co., 78 Hun 109, 29 N. Y. Suppl. 250.

Texas.— Liverpool, etc., Ins. Co. *v.* Nations, 24 Tex. Civ. App. 562, 59 S. W. 817.

Wisconsin.— Lindner *v.* St. Paul F. & M. Ins. Co., 93 Wis. 526, 67 N. W. 1125. See also EVIDENCE, 17 Cyc. 821.

33. Phœnix Ins. Co. *v.* McAtee, (Ind. App. 1905) 70 N. E. 947; American Cent. Ins. Co. *v.* White, 32 Tex. Civ. App. 197, 73 S. W. 827, holding that such testimony is *prima facie* evidence of ownership.

Circumstantial evidence was held to sustain a finding that plaintiff had no interest in the property insured, although he and his wife testified that he owned it, in McCarty *v.* Hartford F. Ins. Co., (Tex. Civ. App. 1903) 75 S. W. 934.

34. Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. (Del.) 293, 55 Atl. 1014.

35. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759. And see, generally, EVIDENCE, 16 Cyc. 1003.

36. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

admissions that he had none are competent evidence against him.[37] Plaintiff may introduce a record of judicial proceedings where his equitable title to the property was established.[38] A plaintiff to whom the loss is payable "as his interest may appear" may introduce his contract with the owner to show the extent of his interest.[39] Plaintiff may prove by parol that an absolnte deed to him was fraudulently altered after execution and delivery so as to express only a qualified interest.[40] Extrajudicial admissions by plaintiff that he had no insurable interest may outweigh his testimony to the contrary.[41] Defendant may show that a deed under which plaintiff claims was delivered in escrow upon a condition not performed.[42] Parol evidence is not admissible to prove that plaintiff did not read an application signed by him and that no question was asked him as to encumbrances on the property.[43]

d. Misrepresentation or Concealment of Facts. Representations for insurance which was declined are not admissible in an action on a policy subsequently issued on new representations.[44] Latent ambiguity in a statement of the location of property may be explained by testimony.[45] Evidence of usage is admissible on the question of substantial compliance with a representation as to precautions against fire where there is a latent ambiguity in the stipulation.[46] On the issue of intentional concealment of facts the insured may testify to the absence of fraudulent intent.[47] When the defense is fraudulent concealment of material facts evidence of statements made to defendant prior to and not connected with the application for the policy is not admissible on behalf of plaintiff.[48] Overvaluation cannot be proved by plaintiff's oral statements preceding a written application where the valuation was left in blank,[49] nor by expressed opinions of others as to the value not assented to by plaintiff as correct.[50] Plaintiff's good faith in his statement of value cannot be shown by evidence of offers made to him for the property after the insurance was effected.[51] To repel the imputation of intentional overvaluation plaintiff may show that his statement was made under the supervision of one of defendant's agents who had personally inspected the property.[52] Whether premises were or were not unoccupied by plaintiff may depend largely upon his intention to be gathered from the circumstances of the case.[53] That a house was a brothel, instead of a dwelling-house as represented, cannot be proved by reputation.[54] Testimony that the premises were partly burned prior to the application may constitute evidence, although slight, of an apprehension of incendiarism.[55]

37. McCarty *v.* Louisiana Mut. Ins. Co., 25 La. Ann. 354.
38. Coursin *v.* Pennsylvania Ins. Co., 46 Pa. St. 323.
39. Graham *v.* American F. Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707.
40. Mix *v.* Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460, holding also that the rule requiring clear and strong proof to reform or change written instruments (see EVIDENCE, 17 Cyc. 773, 775) does not apply to such a case.
41. Clark *v.* Dwelling-House Ins. Co., 81 Me. 373, 17 Atl. 303. Where there is conflicting evidence as to plaintiff's ownership his affidavit denying ownership, if entirely unexplained, should be decisive against him. Henning *v.* Western Assur. Co., 77 Iowa 319, 42 N. W. 308.
42. Pangborn *v.* Continental Ins. Co., 62 Mich. 638, 29 N. W. 475.
43. Southern Mut. Ins. Co. *v.* Yates, 28 Gratt. (Va.) 585.
44. Nicoll *v.* American Ins. Co., 18 Fed. Cas. No. 10,259, 3 Woodb. & M. 529.
45. Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, 14 Am. Rep. 249, 46 How. Pr. 498 [*affirming* 35 N. Y. Super. Ct. 394].
46. Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.
47. Vankirk *v.* Citizens' Ins. Co., 79 Wis. 627, 48 N. W. 798.
48. Boggs *v.* American Ins. Co., 30 Mo. 63.
49. Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90.
50. Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90.
51. Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316, where it seems that offers previously made were regarded as admissible.
52. Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417, 93 N. C. 237, although the inspection was in connection with application for insurance in another company.
53. Home Ins. Co. *v.* Wood, 47 Kan. 521, 28 Pac. 167, holding the evidence sufficient to sustain a verdict against the company.
54. Loehner *v.* Home Mut. Ins. Co., 17 Mo. 247.
55. Roberts *v.* Ætna Ins. Co., 58 Cal. 83.

e. Matters Affecting Risk — (1) *Increase of Hazard in General.* It may be a matter for expert testimony whether certain changes of condition in the property increase the risk in violation of a condition in the policy.[56] And experts in the insurance business may testify as to the rates for different classes of risks for the purpose of showing that the change of condition rendered the risk one for which a higher rate would have been charged on the ground that it was more hazardous.[57] But where the question involves matters of common knowledge or observation it is for the jury, and expert evidence is not admissible.[58] If the increase of risk relied upon is one arising out of breach of warranty or condition evidence is not admissible to show that as a matter of fact the risk was not increased,[59] or that the fire was not caused thereby;[60] and on the other hand the fact of increase of risk is irrelevant if in the particular case it constitutes no breach of warranty or condition.[61] Evidence as to the bad character of persons frequenting an insured house is not admissible where it is not claimed that plaintiff conducted the house so as to avoid the policy.[62] Unlawful use of adjoining premises is irrelevant where a condition forbids such use only of the premises in which the insured property is located.[63] To show that cessation of operations in a mill was merely temporary evidence that other mills in the vicinity temporarily suspended for the same reason is admissible.[64] As tending to rebut implication of plaintiff's consent to objectionable erections on his adjacent land his lease of the land antedating the policy is admissible.[65] Evidence that an addition to a building brought it nearer to objectionable premises is too indefinite to prove increase of risk without evidence of the distance between the premises.[66] Parol

56. *Illinois.*— German American Ins. Co. *v.* Steiger, 109 Ill. 254.

Iowa.— Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237.

Maryland.—Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257.

Massachusetts.— Luce *v.* Dorchester Mut. F. Ins. Co., 105 Mass. 297, 7 Am. Rep. 522; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192; Merriam *v.* Middlesex Mut. F. Ins. Co., 21 Pick. 162, 32 Am. Dec. 252.

Missouri.— Kern *v.* South St. Louis Mut. F. Ins. Co., 40 Mo. 19.

New Jersey.— Schenck *v.* Mercer County Mut. F. Ins. Co., 24 N. J. L. 447.

Tennessee.— Kirby *v.* Phœnix Ins. Co., 13 Lea 340. But see Kirby *v.* Phœnix Ins. Co., 9 Lea 142.

See 28 Cent. Dig. tit. "Insurance," § 1683. See also cases cited in EVIDENCE, 17 Cyc. 71 notes 59, 60, 191 note 73.

Their testimony is not controlling. Carroll *v.* Home Ins. Co., 51 N. Y. App. Div. 149, 64 N. Y. Suppl. 522.

Expert's answer to a hypothetical question not embracing all or any of the material facts bearing on the increase of hazard in the particular case should be excluded. Carroll *v.* Home Ins. Co., 51 N. Y. App. Div. 149, 64 N. Y. Suppl. 522.

Expert testimony is irrelevant where the policy contains no stipulation or condition against the particular change or risk. Liverpool, etc., Ins. Co. *v.* McGuire, 52 Miss. 227.

57. Russell *v.* Cedar Rapids Ins. Co., 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538; Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508. The circumstance that an increased premium was demandable by reason of a change in use of the premises does not alone prove that the change increased the risk. Monteleone *v.* Royal Ins. Co., 47 La. Ann. 1563, 18 So. 472, 56 L. R. A. 784; Taylor *v.* Security Mut. F. Ins. Co., 88 Minn. 231, 92 N. W. 952.

58. Thayer *v.* Providence Washington Ins. Co., 70 Me. 531; Joyce *v.* Maine Ins. Co., 45 Me. 168, 71 Am. Dec. 536; Carroll *v.* Home Ins. Co., 51 N. Y. App. Div. 149, 64 N. Y. Suppl. 522; Cornish *v.* Farm Buildings F. Ins. Co., 10 Hun 466 [*affirmed* in 74 N. Y. 295]; Hahn *v.* Guardian Assur. Co., 23 Oreg. 576, 32 Pac. 683, 37 Am. St. Rep. 709. See also White *v.* Phœnix Ins. Co., 83 Me. 279, 22 Atl. 167, 85 Me. 97, 26 Atl. 1049; Mulry *v.* Mohawk Valley Ins. Co., 5 Gray (Mass.) 541, 66 Am. Dec. 380.

59. Lee *v.* Howard F. Ins. Co., 3 Gray (Mass.) 583; North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638; Diehl *v.* Adams County Mut. Ins. Co., 58 Pa. St. 443, 98 Am. Dec. 302.

60. Turnbull *v.* Home F. Ins. Co., 83 Md. 312, 34 Atl. 875, gasoline kept in violation of specific condition.

61. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 37 Am. Rep. 488.

62. Russell *v.* St. Nicholas F. Ins. Co., 51 N. Y. 643.

63. Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54.

64. City Planing, etc., Mill Co. *v.* Merchants', etc., Mut. F. Ins. Co., 72 Mich. 654, 40 N. W. 777, 16 Am. St. Rep. 552.

65. Franklin F. Ins. Co. *v.* Gruver, 100 Pa. St. 266.

66. Mitchell *v.* Mississippi Home Ins. Co., 72 Miss. 53, 18 So. 86, 48 Am. Rep. 535.

evidence is admissible to prove the company's consent to the use of a prohibited article which its agent forgot to indorse on the policy.[67] An admission by one not a party to the suit is not competent evidence against plaintiff if no relation of agency or privity between them is shown or no assent by plaintiff.[68] Evidence showing merely an increase of risk of money loss in case of fire is not admissible to show increase of hazard of fire.[69] Proof that the company's agent had casually heard of an increase of risk is not "notice" thereof as required by the policy.[70]

(II) *Other or Additional Insurance.* Where the existence of other or additional insurance on the property is set up as a defense[71] the facts from which a forfeiture results must be strictly proved.[72] The fact and the amount of insurance in other companies may be proved by parol evidence.[73] Admissions of a third person are not competent evidence against a party without proof of agency or relationship so as to make them chargeable to the party.[74] Where plaintiff introduces his proofs of loss which disclose the existence of other insurance it dispenses with further proof thereof against him.[75] Contents of a letter notifying defendant of additional insurance cannot be proved without sufficient preliminary evidence of its receipt.[76] Testimony by plaintiff that he obtained other insurance because he was advised that the first was invalid is irrelevant.[77] Plaintiff may show that the further insurance was not authorized by him, and to that end may testify to his conversation with the insurance agent who obtained the policy.[78] Conversation between plaintiff and defendant's agent is admissible to show knowledge by the latter of other insurance, although the conversation related to a prior surrendered policy.[79] Testimony of defendant's agent that when he issued the policy he had forgotten that he had placed other insurance on the property does not conclusively prove his want of knowledge.[80] Failure of the insured to testify positively that he gave notice of additional insurance may require a finding that he did not give notice.[81]

(III) *Change of Title or Interest.* Plaintiff may prove by parol evidence that notwithstanding a conveyance by him the real ownership of the property remained unchanged.[82] It may be proved by parol evidence that an encumbrance of record has been paid.[83] An absolute deed may be shown by parol to be a mortgage, and thus not within a condition forbidding a "transfer," although a statute requires defeasances to be in writing.[84] A finding that a mortgage has been paid may be sustained by plaintiff's testimony on cross-examination that the

67. Insurance Co. of North America *v.* Melvin, 1 Walk. (Pa.) 362.

68. London, etc., F. Ins. Co. *v.* Schwulst, (Tex. Civ. App. 1898) 46 S. W. 89.

69. Davis *v.* Ætna Mut. F. Ins. Co., 68 N. H. 315, 44 Atl. 521.

70. Sykes *v.* Perry County Mut. F. Ins. Co., 34 Pa. St. 79.

71. See *supra*, XIII, I.

72. Farmers', etc., Ins. Co. *v.* Newman, 58 Nebr. 504, 78 N. W. 933.

73. Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388. But see California Ins. Co. *v.* Union Compress Co., 133 U. S. 387, 10 S. Ct. 365, 33 L. ed. 730, holding that the existence of other insurance policies covering the same property cannot be proved by parol evidence without excuse for non-production of the policies.

74. Carpenter *v.* Continental Ins. Co., 61 Mich. 635, 28 N. W. 749. And see, generally, Evidence, 16 Cyc. 821.

75. Continental Ins. Co. *v.* Hulman, 92 Ill. 145, 34 Am. Rep. 122; New York Cent. Ins. Co. *v.* Watson, 23 Mich. 486. See also Cumberland Mut. F. Ins. Co. *v.* Giltinan, 48 N. J. L. 495, 7 Atl. 424, 57 Am. Rep. 586.

76. Sun Ins. Co. *v.* Earle, 29 Mich. 406.

77. Pennsylvania F. Ins. Co. *v.* Kittle, 39 Mich. 51, holding that "absence of any purpose to defraud cannot excuse the breach of a contract."

78. Price *v.* Home Ins. Co., 54 Mo. App. 119.

79. Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368 (holding that defendant's knowledge cannot be shown by plaintiff's conversation with defendant's errand boy, who delivered the policy); Stavinow *v.* Home Ins. Co., 43 Mo. App. 513.

80. Home Ins. Co. *v.* Wood, 47 Kan. 521, 28 Pac. 167.

81. Illinois Mut. F. Ins. Co. *v.* Malloy, 50 Ill. 419.

82. German Ins. Co. *v.* Gibe, 59 Ill. App. 614.

83. Commercial Union Assur. Co. *v.* Elliott, 10 Pa. Cas. 331, 13 Atl. 970.

84. Burkhart *v.* Farmers' Union Assoc., etc., Co., 11 Pa. Super. Ct. 280, holding that

mortgage was executed but afterward paid.[85] An abstract of judgment is not sufficient proof of a judgment lien on property.[86] Foreclosure proceedings to which plaintiff, a prior mortgagee, was a party are admissible to show his knowledge of a change of title effected thereby.[87] In an action by a mortgagee to whom the loss was made payable admissions made by the insured after the loss concerning alleged change of title are not competent evidence against plaintiff.[88]

f. Loss and Damage — (I) *Extent of Loss.* Evidence of the actual extent of the injury by fire is admissible.[89] Evidence of the basis on which another company carrying insurance on the same property had settled for the loss is not competent.[90] The amount of goods on hand in a store at the time of the fire may be shown by the last previous invoice and the goods bought, and amounts received on sales in the meantime,[91] by books of account kept in the usual course of business and duly verified or authenticated,[92] or by an inventory taken shortly before the fire by a third person who then owned the goods.[93] An invoice taken by a sheriff on attachment process after the fire is admissible to show the amount of goods then on hand.[94] Evidence of a custom of a limited number of persons in a similar business is not admissible to discredit plaintiff's testimony as to the amount of stock on hand.[95]

(II) *Value of Property — Amount of Damage.* If the policy provides a specific way in which the value shall be settled before suit, evidence of value is inadmissible.[96] Where no arbitration was had pursuant to a provision in the policy, evidence of the amount of loss is admissible.[97] In arriving at the value of the property at the time of destruction, the original cost with the cost of handling and freight charges[98] and the depreciation between the time of purchase or construction and the time of loss[99] may be shown. Cost of rebuilding or replacing is

the statutory provision applies only between parties to the mortgage or their privies.

85. State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524.

86. North British, etc., Ins. Co. *v.* Gunter, 12 Tex. Civ. App. 598, 35 S. W. 715.

87. Ormsby *v.* Phenix Ins. Co., 5 S. D. 72, 58 N. W. 301.

88. Browning *v.* Home Ins. Co., 6 Daly (N. Y.) 522.

89. Savage *v.* Corn Exch. F., etc., Ins. Co., 4 Bosw. (N. Y.) 1.

For evidence held insufficient to show conclusively a total loss see Northwestern Mut. L. Ins. Co. *v.* Rochester German Mut. L. Ins. Co., 85 Minn. 48, 88 N. W. 265, 56 L. R. A. 108.

Photographs of a building taken during and after a fire are not of much value as showing that the walls are not sprung, cracked, or otherwise impaired. Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850. As to admissibility of photographs generally see Evidence, 17 Cyc. 414 *et seq.*

90. Goodwin *v.* Merchants', etc., Mut. Ins. Co., 118 Iowa 601, 92 N. W. 894; Pennsylvania F. Ins. Co. *v.* Kittle, 39 Mich. 51; Lambert *v.* Smith, 14 Fed. Cas. No. 8,028, 1 Cranch C. C. 361.

91. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180. See also Scottish Union, etc., Ins. Co. *v.* Keene, 85 Md. 263, 37 Atl. 33.

92. Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855. But not by testimony to the contents of books not kept by the witness, nor verified in any manner, nor put in evidence. F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

93. Scottish Union, etc., Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180. See also Fisher *v.* Crescent Ins. Co., 33 Fed. 544.

94. Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

95. Townsend *v.* Merchants' Ins. Co., 45 How. Pr. (N. Y.) 501.

96. Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

97. Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48.

Where the company waives appraisement evidence of the value of goods destroyed is admissible. Springfield F. & M. Ins. Co. *v.* Cannon, (Tex. Civ. App. 1898) 46 S. W. 375.

98. St. Paul F. & M. Ins. Co. *v.* Gotthelf, 35 Nebr. 351, 53 N. W. 137.

99. *Colorado.*— Des Moines State Ins. Co. *v.* Taylor, 14 Colo. 499, 24 Pac. 333, 20 Am. St. Rep. 281.

Montana.—Holter Lumber Co. *v.* Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207.

New York.— Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 328, 83 N. Y. Suppl. 730; Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842.

Pennsylvania.—Cummins *v.* German-American Ins. Co., 192 Pa. St. 359, 43 Atl. 1016.

Texas.— Virginia F. & M. Ins. Co. *v.* Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945.

See 28 Cent. Dig. tit. "Insurance," § 1695.

The insured may testify as to the value of each of the items of property covered, and it will be presumed that such testimony relates to the actual cash value at the time

also incompetent.[1] General evidence of value is admissible,[2] and if direct evidence is not available that which is somewhat remote or inferential[3] or of a secondary

of loss within the terms of the policy. Erb *v.* German-American Ins. Co., 98 Iowa 606, 67 N. W. 583, 40 L. R. A. 845; Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

By statute.— Evidence of value is immaterial in case of total loss under a statute making the policy conclusive that the property was worth the amount of the insurance. Minneapolis F. & M. Mut. Ins. Co. *v.* Fultz, (Ark. 1904) 80 S. W. 576; Marshal *v.* American Guarantee Mut. F. Ins. Co., 80 Mo. App. 18; Schild *v.* Phœnix Ins. Co., 8 Ohio S. & C. Pl. Dec. 45, 6 Ohio N. P. 134; Royal Ins. Co. *v.* McIntyre, 90 Tex. 170, 37 S. W. 1068, 59 Am. St. Rep. 797, 35 L. R. A. 672. But evidence of depreciation between the date of the policy and the time of loss may be introduced. Marshal *v.* American Guarantee Mut. F. Ins. Co., *supra*. If the policy is made *prima facie* evidence only of value then proof of actual value should be received (Des Moines Ice Co. *v.* Niagara F. Ins. Co., 99 Iowa 193, 68 N. W. 600), and if the statute has no application to personalty then proof of the value of the personalty destroyed is essential to recover therefor (De Soto *v.* American Guaranty Fund Mut. F. Ins. Co., 102 Mo. App. 1, 74 S. W. 1). As to such statutory provisions see also *supra*, XVI, B, 2.

1. Sherlock *v.* German-American Ins. Co., 162 N. Y. 656, 57 N. E. 1124 [*affirming* 21 N. Y. App. Div. 18, 47 N. Y. Suppl. 315]; Cummins *v.* German-American Ins. Co., 192 Pa. St. 359, 43 Atl. 1016. This is especially true if the policy provides that the cost of rebuilding shall constitute a limit to the amount of recovery. Phœnix Ins. Co. *v.* Copeland, 86 Ala. 551, 6 So. 143, 4 L. R. A. 848. See also Caraher *v.* Royal Ins. Co., 63 Hun (N. Y.) 82, 17 N. Y. Suppl. 858 [*affirmed* in 136 N. Y. 645, 32 N. E. 1015]. And under such a provision evidence as to the market or cash value furnishes no standard for estimating the damages. Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055. In determining whether there is a total loss evidence is admissible as to the cost of restoration. Northwestern Mut. L. Ins. Co. *v.* Sun Ins. Office, 85 Minn. 65, 88 N. W. 272; Royal Ins. Co. *v.* McIntyre, 90 Tex. 170, 37 S. W. 1068, 59 Am. St. Rep. 797, 35 L. R. A. 672. *Contra*, where a valued policy statute exists. Hartford F. Ins. Co. *v.* Bourbon County Ct., 115 Ky. 109, 72 S. W. 739, 24 Ky. L. Rep. 1850, holding, however, that a competent witness may testify in detail as to what is necessary to restore the property. An unverified estimate made by a person since deceased is inadmissible. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

2. Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605; Reed *v.* Washington F. & M. Ins. Co., 138 Mass. 572; Schlesinger *v.* Springfield F. & M. Ins. Co., 58 N. Y. Super. Ct. 112, 9 N. Y. Suppl. 727.

Second-hand goods.— If the property insured consists of old or second-hand furniture which cannot be said to have a fixed market value, the price at which insured had offered to sell it may be shown. Joy *v.* Security F. Ins. Co., 83 Iowa 12, 48 N. W. 1049.

3. *Maryland.*— Scottish Union, etc., Ins. Co. *v.* Keene, 85 Md. 263, 37 Atl. 33.

Michigan.— Johnston *v.* Farmers' F. Ins. Co., 106 Mich. 96, 64 N. W. 5; Jackson *v.* British American Assur Co., 106 Mich. 47, 63 N. W. 899, 30 L. R. A. 636. See also Livings *v.* Home Mut. F. Ins. Co., 50 Mich. 207, 15 N. W. 85.

Missouri.— Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

New York.— Sherlock *v.* German-American Ins. Co., 162 N. Y. 656, 57 N. E. 1124 [*affirming* 21 N. Y. App. Div. 18, 47 N. Y. Suppl. 315]; Cheever *v.* Scottish Union, etc., Ins. Co., 86 N. Y. App. Div. 328, 83 N. Y. Suppl. 730.

United States.— Home Ins. Co. *v.* Weide, 11 Wall. 438, 20 L. ed. 197.

See 28 Cent. Dig. tit. "Insurance," §§ 1695, 1696.

In case of personal property evidence of value at a remote period or of the value of property not similar to that destroyed is not admissible. Commercial Ins. Co. *v.* Freidlander, 156 Ill. 505, 41 N. E. 183; Kelly *v.* Norwich F. Ins. Co., 82 Iowa 137, 47 N. W. 986; Lewis *v.* Burlington Ins. Co., 80 Iowa 259, 45 N. W. 749; Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159; Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908. See also German Ins. Co. *v.* Everett, (Tex. Civ. App. 1896) 36 S. W. 125.

Evidence of rental value at the time of the loss is relevant (Cumberland Valley Mut. Protection Co. *v.* Schell, 29 Pa. St. 31), but not the price at which the property was rented at a remote time (Atlantic Ins. Co. *v.* Manning, 3 Colo. 224).

Price at which the property was purchased is admissible, but not a higher price asked at the inception of the negotiation. Gilchrist *v.* Perrysburg, etc., Transp. Co., 21 Ohio Cir. Ct. 19, 11 Ohio Cir. Dec. 350.

What the land sold for after the buildings were destroyed, with proof of what both together had before been offered for at sale, is not necessarily evidence of the value of the buildings when standing. Bardwell *v.* Conway Mut. F. Ins. Co., 122 Mass. 90.

Former policy.— The amount of insurance which the owner had on the property under a former policy may be shown as evidence of value. Gulf City Ins. Co. *v.* Stephens, 51 Ala. 121; Goulstone *v.* Royal Ins. Co., 1 F. & F. 276.

In case of partial loss the measure of the damage is the difference between the value of the property as it was at the time of the

nature [4] may be received. But the testimony may be so loose and vague that a verdict for plaintiff cannot be sustained.[5] As evidence of the value of goods damaged plaintiff may testify to the percentage of cost price he was able to get for them.[6] The cost of goods is the most satisfactory proof of their value when they were purchased near the time when, and at or near the place where, the risk commences.[7] Evidence of the amount for which the insured sold the policy is inadmissible.[8] Worthlessness of destroyed machines built by plaintiff cannot be proved by evidence that other machines of the same kind built by him were worthless.[9] Although an inventory made by the party himself would not generally be admissible, yet such an inventory or a list of the property, even if made some time prior to the loss, testified to as being correct, with further evidence as to intermediate sales and like matters may be introduced.[10] A universal custom

fire and its value after the fire (Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180; German Ins. Co. *v.* Everett, (Tex. Civ. App. 1898) 46 S. W. 95), and on that question the selling price of the damaged goods may be shown (Savage *v.* Corn Exch., etc., Ins. Co., 4 Bosw. (N. Y.) 1), a fair sale at public auction being a reasonable test as to value (Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216; Wightman *v.* Western M. & F. Ins. Co., 8 Rob. (La.) 442; Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847).

Private offers for an oil painting are not admissible as evidence of actual value. Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316.

4. German Ins. Co. *v.* Amsbaugh, 8 Kan. App. 197, 55 Pac. 481; Coleman *v.* Retail Lumbermen's Ins. Assoc., 76 Minn. 31, 79 N. W. 588.

5. De Soto *v.* American Guarantee Fund Mut. F. Ins. Co., 102 Mo. App. 1, 74 S. W. 1. See also Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 63 N. W. 650; Rockey *v.* Firemen's Ins. Co., 83 N. Y. App. Div. 638, 82 N. Y. Suppl. 120; Linde *v.* Republic F. Ins. Co., 50 N. Y. Super. Ct. 362.

The amount of insurance as fixed by defendant's agent, coupled with the fact that the loss was total, does not show the actual cash value at the time of the loss some months after issuance of the policy. Home Ins. Co. *v.* Stone River Nat. Bank, 88 Tenn. 369, 12 S. W. 915. But where defendant fails to cross-examine plaintiff a verdict for the latter may be sustained on evidence which otherwise might be insufficient. Improved-Match Co. *v.* Michigan Mut. F. Ins. Co., 122 Mich. 256, 80 N. W. 1088.

6. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180.

7. Marchesseau *v.* Merchants' Ins. Co., 1 Rob. (La.) 438, 442.

8. Commercial Ins. Co. *v.* Friedlander, 156 Ill. 595, 41 N. E. 183.

9. Stockton Combined Harvester, etc., Works *v.* American F. Ins. Co., 121 Cal. 167, 53 Pac. 565.

10. *Georgia.*— Scottish Union, etc., Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Case *v.* Hartford F. Ins. Co., 13 Ill. 676.

Indian Territory.— Liverpool, etc., Ins. Co. *v.* Kearney, 2 Indian Terr. 67, 46 S. W. 414.

Iowa.— Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180.

Kansas.— German Ins. Co. *v.* Amsbaugh, 8 Kan. App. 197, 55 Pac. 481.

Kentucky.— Western Assur. Co. *v.* Ray, 105 Ky. 523, 49 S. W. 326, 20 Ky. L. Rep. 1360.

Minnesota.— Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

New York.— Machin *v.* Lamar F. Ins. Co., 90 N. Y. 689; Wallach *v.* Commercial F. Ins. Co., 12 Daly 387 [*affirmed* in 98 N. Y. 634].

Pennsylvania.— West Branch Lumberman's Exch. *v.* American Cent. Ins. Co., 183 Pa. St. 366, 38 Atl. 1081 [*affirming* 9 Pa. Dist. 363]; Allegheny Ins. Co. *v.* O'Hanlon, 1 Walk. 359.

Texas.— Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

United States.— Ætna Ins. Co. *v.* Weide, 9 Wall. 677, 19 L. ed. 810.

See 28 Cent. Dig. tit. "Insurance," §§ 1695, 1696.

But an inventory not verified in any way is inadmissible. F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Wis. 38, 71 N. W. 69.

An invoice taken by a sheriff under an attachment process after the fire has been held admissible to show the amount of goods saved and their value. Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

Inventory required.— Where the policy requires inventories to be kept in an iron safe or otherwise and to be produced, it is error to permit proofs of the footing of inventories not thus preserved or produced. Gillum *v.* Philadelphia Fire Assoc., 106 Mo. App. 673, 80 S. W. 283. Inventories required to be kept by the terms of the policy may when produced be looked to in determining the amount of the loss. Phœnix Ins. Co. *v.* Padgitt, (Tex. Civ. App. 1897) 42 S. W. 800. But cash books and an inventory not made and kept as required by the policy are inadmissible. Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539. Testimony as to value of the property destroyed is competent even though the company had the right to require the production of inventories and books. Rissler *v.* American Cent. Ins. Co., 150 Mo. 366, 51 S. W. 755.

among insurance adjusters as to the method of estimating loss on retail stocks of goods where there is no inventory and no books of account is admissible.[11] It is said that as plaintiff has a better knowledge of the quantity and value of his goods than any one else his estimate of value is entitled to much consideration.[12] Plaintiff's detailed testimony as to value should control his testimony as to cost price for a larger amount.[13] The jury are at liberty to adopt the highest of estimates made by several expert witnesses.[14] Evidence of expenses incurred for repairs after the fire, although not controlling, is admissible as to the extent of the damage.[15] An *ex parte* appraisement by the insured is not competent evidence of the amount of loss.[16] An appraisal made in accordance with a provision in the policy is admissible.[17]

(III) *Proofs of Loss.* The requirement of the policy that the insured shall make proofs of loss does not render such proofs competent evidence as to the amount of the loss or the value of the property.[18] But such proofs are admissible to refresh the memory of the witness as to the cost of various items.[19]

(IV) *Appraisement or Arbitration.* If by the policy a specific way is provided in which the value of the property shall be determined before suit other evidence of value is not admissible.[20] But if there has been no appraisement or arbitration other evidence is competent.[21]

11. Sherlock *v.* German-American Ins. Co., 21 N. Y. App. Div. 18, 47 N. Y. Suppl. 315 [*affirmed* in 162 N. Y. 656, 57 N. E. 1124].

12. Sisk *v.* American Cent. F. Ins. Co., 95 Mo. App. 695, 69 S. W. 687. But see as to estimates by biased witnesses EVIDENCE, 17 Cyc. 818 text and note 66.

13. Rockey *v.* Firemen's Ins. Co., 83 N. Y. App. Div. 638, 82 N. Y. Suppl. 120.

14. British America Assur. Co. *v.* Kellner, 60 Nebr. 411, 83 N. W. 175.

15. Sherlock *v.* German-American Ins. Co., 21 N. Y. App. Div. 18, 47 N. Y. Suppl. 315 [*affirmed* in 162 N. Y. 656, 57 N. E. 1124].

16. Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810.

17. De Groot *v.* Fulton F. Ins. Co., 4 Rob. (N. Y.) 504.

18. *Delaware.*— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014.

Illinois.— Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; American Ins. Co. *v.* Walston, 111 Ill. App. 133.

Iowa.— Neese *v.* Farmer's Ins. Co., 55 Iowa 604, 8 N. W. 450; Edgerly *v.* Farmers' Ins. Co., 48 Iowa 644.

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521.

Maryland.— Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360.

Missouri.— Breckinridge *v.* American Cent. Ins. Co., 87 Mo. 62; Browne *v.* Clay F. & M. Ins. Co., 68 Mo. 133; Newmark *v.* Liverpool, etc., F., etc., Ins. Co., 30 Mo. 160, 77 Am. Dec. 608; Summers *v.* Home Ins. Co., 53 Mo. App. 521.

New York.— Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842; Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. 191.

Pennsylvania.— Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. 671; Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810; Cole *v.* Manchester F. Assur. Co., 188 Pa. St. 345, 41 Atl. 593; Kittanning Ins. Co. *v.* O'Neill, 110 Pa. St. 548, 1 Atl. 592; Lycoming County Mut. Ins. Co. *v.* Schreffler, 44 Pa. St. 269, 42 Pa. St. 188, 82 Am. Dec. 501; Commonwealth Ins. Co. *v.* Sennett, 41 Pa. St. 161; Klein *v.* Franklin Ins. Co., 13 Pa. St. 247.

Tennessee.— Farrell *v.* Ætna F. Ins. Co., 7 Baxt. 542.

Washington.— Cascade F. & M. Ins. Co. *v.* Journal Pub. Co., 1 Wash. 452, 25 Pac. 331.

Wisconsin.— Hiles *v.* Hanover F. Ins. Co., 65 Wis. 585, 27 N. W. 348, 56 Am. Rep. 637.

See 28 Cent. Dig. tit. "Insurance," § 1701.

19. Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842.

20. Everett *v.* London, etc., Ins. Co., 142 Pa. St. 332, 21 Atl. 819, 24 Am. St. Rep. 499.

Reference.— Notwithstanding a provision in the policy for reference to arbitrators, a reference by the court may be had in a proper case to determine the amount of damage. Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847; Pechner *v.* Phœnix Ins. Co., 6 Lans. (N. Y.) 411; Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 37 How. Pr. 399. But the fact that fraud is pleaded as a defense will not entitle defendant to a reference, as fraud is for the jury. McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687. References see also *infra*, XXI, H, 1, c.

21. Western Assur. Co. *v.* Hall, 120 Ala. 547, 24 So. 936, 74 Am. St. Rep. 48; McIlrath *v.* Farmers' Mut. Hail Ins. Assoc., 114 Iowa 244, 86 N. W. 310; Morgan *v.* Merchants' Co-operative F. Ins. Assoc., 52 N. Y. App. Div. 61, 64 N. Y. Suppl. 873; Springfield F. & M. Ins. Co. *v.* Cannon, (Tex. Civ. App. 1898) 46 S. W. 375; Virginia F. & M.

g. Notice and Proofs of Loss. Proof that notice of loss was duly mailed supports a finding that the notice was received.[22] Plaintiff's positive testimony that persons to whom he gave notice of loss were agents of defendant sufficiently establishes the fact of agency.[23] Notice of loss is conclusively shown by proof that defendant sent an adjuster to the scene of the fire.[24] Plaintiff's testimony that he delivered proofs of loss to defendant's agent suffices to establish the fact as against the agent's testimony that he has no recollection thereof.[25] A letter of the secretary of the company acknowledging receipt of proofs of loss is competent evidence that the company received them.[26] Proofs of loss are admissible to show compliance or attempted compliance with the terms of the policy.[27] It is no objection to admission of proofs of loss that they contain untrue statements.[28] The fact that notice and proofs of loss were furnished may be proved by parol evidence,[29] but the contents of the papers must be proved by production of the originals or by secondary evidence after a proper foundation is laid therefor.[30] A proof of loss offered by plaintiff which shows on its face that defendant is not liable may properly be excluded.[31] Slight evidence is *prima facie* sufficient to show that the magistrate who certified to a loss was the magistrate most contiguous to the insured premises destroyed by the fire.[32] Parol evidence is inadmissible to supplement and validate an insufficient proof of loss.[33] Evidence that proofs of loss were furnished is unnecessary where defendant admits

Ins. Co. *v.* Cannon, 18 Tex. Civ. App. 588, 45 S. W. 945. An *ex parte* appraisement is incompetent evidence. Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. 138, 69 Am. St. Rep. 810. But an appraisement by persons selected by the parties may be introduced even though such appraisement is not made conclusive. De Groot *v.* Fulton F. Ins. Co., 4 Rob. (N. Y.) 504. See further as to appraisement and arbitration, *supra*, XVIII, B.

22. Phenix Ins. Co. *v.* Pickel, 3 Ind. App. 332, 29 N. E. 432. And see, generally, EVIDENCE, 16 Cyc. 821.

23. State Ins. Co. *v.* Schreck, 27 Nebr. 527, 43 N. W. 340, 20 Am. St. Rep. 696, 6 L. R. A. 524, holding that in the absence of cross-examination or any showing to the contrary, it will be presumed that he testified from personal knowledge.

24. Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786.

25. Oakland Home Ins. Co. *v.* Davis, (Tex. Civ. App. 1895) 33 S. W. 587.

26. Troy F. Ins. Co. *v.* Carpenter, 4 Wis. 20.

27. *Illinois.*— Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388.

Kentucky.— Phœnix Ins. Co. *v.* Lawrence, 4 Metc. 9, 81 Am. Dec. 521.

Missouri.— Browne *v.* City F. & M. Ins. Co., 68 Mo. 133; Newmark *v.* Liverpool, etc., F., etc., Ins. Co., 30 Mo. 160, 77 Am. Dec. 608.

Pennsylvania.— Klein *v.* Franklin Ins. Co., 13 Pa. St. 247; Fleming *v.* Commonwealth Ins. Co., 12 Pa. St. 391.

Texas.— Continental Ins. Co. *v.* Pruitt, 65 Tex. 125; Hibernia Ins. Co. *v.* Starr, (Sup. 1890) 13 S. W. 1017.

Washington.— Hennessy *v.* Niagara F. Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

Wyoming.— Kahn *v.* Traders' Ins. Co., 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47.

But they are not competent evidence of facts recited therein (Neese *v.* Farmer's Ins. Co., 55 Iowa 604, 8 N. W. 450; Howard *v.* City F. Ins. Co., 4 Den. (N. Y.) 502; Commonwealth Ins. Co. *v.* Sennett, 41 Pa. St. 161), and the court should so instruct the jury (Phœnix Ins. Co. *v.* Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; Citizens' F. Ins., etc., Co. *v.* Doll, 35 Md. 89, 6 Am. Rep. 360).

Admissible generally.— Proofs of loss are admissible for any purpose for which they are competent and may be offered in evidence without limitation. Healy *v.* Pennsylvania Ins. Co., 50 N. Y. App. Div. 327, 63 N. Y. Suppl. 1055.

28. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712.

29. Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34; Bish *v.* Hawkeye Ins. Co., 69 Iowa 184, 28 N. W. 553; Pelzer Mfg. Co. *v.* Sun Fire Office, 36 S. C. 213, 15 S. E. 562; Bon Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764, 12 S. E. 771. But plaintiff's testimony simply that he had complied with all the conditions of the policy without producing the policy in evidence is insufficient. Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48.

30. Dade *v.* Ætna Ins. Co., 54 Minn. 336, 56 N. W. 48. Plaintiff may introduce a copy of the proofs of loss after notice to defendant to produce the original. Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. 738, 31 L. R. A. 112. See also Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352; Warner *v.* Peoria M. & F. Ins. Co., 14 Wis. 318, holding that a copy of the notice retained by plaintiff was admissible without notice to defendant to produce the original.

31. Cannon *v.* Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124.

32. Cornell *v.* Le Roy, 9 Wend. (N. Y.) 163.

33. Cannon *v.* Phœnix Ins. Co., 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124.

that it did not supply plaintiff with blank forms of proofs, and such omission is made an estoppel by statute.[34]

h. Fraud or Wilful Wrong of Insured — (1) *Fraud or False Swearing.* Although the fraud or false swearing which will defeat recovery by the insured may constitute a crime, nevertheless it is sufficient for the company to make out such defense by a preponderance of evidence.[35] Plaintiff's admissions as to cost of property destroyed are competent evidence against him on the question of *bona fides* of his claim for a greater amount in his proofs of loss.[36] His offer to sell is admissible for the same purpose,[37] and is of great force on the question of fraud.[38] Relevant declarations or admissions against interest made by the assignor of the policy are admissible against his assignee.[39] Defendant may prove plaintiff's attempt to conceal the origin and prevent the discovery of the fire in violation of a fraud clause, although incendiarism be not alleged.[40] Fraudulent overestimate of the value of buildings may be considered in determining whether misstatements of the value of personal property were fraudulent.[41] Mere discrepancy, although large, between the sworn statement by the insured as to his loss and the amount of the loss as shown on the trial will not in itself constitute sufficient evidence to establish such fraud or false swearing,[42] but may in connec-

34. Farmers' Bank *v.* Manchester Assur. Co., 106 Mo. App. 114, 80 S. W. 299.

35. Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31. *Contra*, Cochran *v.* Amazon Ins. Co., 7 Ohio Dec. (Reprint) 276, 2 Cinc. L. Bul. 54. And see, generally, Evidence, 17 Cyc. 757, 760. In Huchberger *v.* Home F. Ins. Co., 12 Fed. Cas. No. 6,821, 5 Biss. 106, it was said that "evidence of fraud must be either direct and positive or the circumstances must be so strong, convincing, and preponderating as to admit of no other rational conclusion." But see cases cited in Evidence, 17 Cyc. 760 note 44. Where defendant produces evidence exciting just suspicion that errors in invoices sworn to and furnished by plaintiff were fraudulent and plaintiff gives an unsatisfactory explanation or no explanation at all, a verdict for defendant will not be disturbed. Vaughan *v.* Virginia F. & M. Ins. Co., 102 Va. 541, 46 S. E. 692.

Loose testimony is insufficient to prove the fact of fraud or false swearing. Phœnix F. Ins. Co. *v.* Philip, 13 Wend. (N. Y.) 81.

A new trial will be granted where a verdict against defendant is directly repugnant to the evidence as a whole. Shaw *v.* Scottish Commercial Ins. Co., 21 Fed. Cas. No. 12,723, 2 Hask. 246.

36. Merchants' Nat. Ins. Co. *v.* Pearce, 84 Ill. App. 255; Marchesseau *v.* Merchants' Ins. Co., 1 Rob. (La.) 438. But his admissions as to value of the property are explainable. Probst *v.* American Cent. Ins. Co., 64 Mo. App. 408, explained that his tax lists were false, etc. Admissions generally see Evidence.

37. Hersey *v.* Merrimack County Mut. F. Ins. Co., 27 N. H. 149.

38. Hersey *v.* Merrimack County Mut. F. Ins. Co., 27 N. H. 149.

39. Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822, alleged conspiracy of assignor and others to burn the property. And see, generally, Evidence, 16 Cyc. 821.

40. Dunn *v.* Springfield F. & M. Ins. Co., 104 La. 31, 28 So. 931.

41. Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200.

42. *California.*— Obersteller *v.* Commercial Assur. Co., 96 Cal. 645, 31 Pac. 587; Fitzgerald *v.* Union Ins. Co., 54 Cal. 599; Clark *v.* Phœnix Ins. Co., 36 Cal. 168.

Illinois.— Commercial Ins. Co. *v.* Friedlander, 156 Ill. 595, 41 N. E. 183.

Indiana.— Franklin Ins. Co. *v.* Culver, 6 Ind. 137. See also Citizens' F. & M. Ins. Co. *v.* Short, 62 Ind. 316, holding that a verdict for plaintiff for less than the face of the policy is equivalent to a finding that there was an overvaluation, but that it was made by an honest mistake.

Iowa.— Goldstein *v.* St. Paul F. & M. Ins. Co., 124 Iowa 143, 99 N. W. 696; Stone *v.* Hawkeye Ins. Co., 68 Iowa 737, 28 N. W. 47, 56 Am. Rep. 870, so holding in the absence of a finding that the overestimate was fraudulent.

Louisiana.— Israel *v.* Teutonia Ins. Co., 28 La. Ann. 689; Beck *v.* Germania Ins. Co., 23 La. Ann. 510; Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216.

Maine.— Williams *v.* Phœnix F. Ins. Co., 61 Me. 67.

Mississippi.— Home Ins. Co. *v.* Lowenthal, (1904) 36 So. 1042, where insured gave a reasonable explanation.

Nevada.— Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174, holding that no definite rule can be laid down that where the verdict in an action on a fire policy, defended on the ground that the value of the property was fraudulently overstated in the policy, finds the value of the property to have been only one third or one half the valuation stated by the insured, the verdict in his favor should be set aside as evidencing fraud in his statement.

New York.— Davis *v.* Guardian Assur. Co., 87 Hun 414, 34 N. Y. Suppl. 332.

Pennsylvania.— Insurance Co. of North America *v.* Melvin, 1 Walk. 362.

tion with other evidence require reversal of a judgment in his favor.[43] Plaintiff's own declarations may be admissible on his behalf to show that his erroneous statement of title to the property was not wilfully false.[44] Fraudulent representation of sole ownership by plaintiff is not established by proof of his statement easily susceptible of a different construction.[45] A trial balance taken by a bookkeeper shortly before the fire and delivered to the insured, who based his proofs of loss thereon, is admissible to rebut the charge of furnishing wilfully false proofs.[46] The fact that plaintiff was doing a losing business has no tendency to prove falsity in his statement of the amount of goods on hand at the time of the fire.[47] Plaintiff's drunkenness and idleness after the fire is too remote as evidence of falsity of his statement of the amount of goods saved from the fire.[48]

(11) *INCENDIARISM.* As the wilful destruction of insured property is usually criminal,[49] the question has arisen whether such an act relied on by the company as a defense in a suit on the policy may be established by a preponderance of the evidence or whether it must be proven beyond a reasonable doubt. The weight of authority is that a preponderance of the evidence is sufficient.[50] The

Texas.— Pelican Ins. Co. *v.* Schwartz, (Sup. 1892) 19 S. W. 374.

Wisconsin.— Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 91 N. W. 666.

United States.— Huchberger *v.* Home F. Ins. Co., 12 Fed. Cas. No. 6,821, 5 Biss. 106.

See 28 Cent. Dig. tit. "Insurance," §§ 1712, 1786.

But such discrepancy, if large, may constitute some evidence of fraud. Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200; Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211. See also Williams *v.* Phœnix F. Ins. Co., 61 Me. 67; Wall *v.* Howard Ins. Co., 51 Me. 32; Furlong *v.* Agricultural Ins. Co., 18 N. Y. Suppl. 844, 28 Abb. N. Cas. 444; Ferris *v.* Kenton Ins. Co., 9 Ohio Dec. (Reprint) 634, 16 Cinc. L. Bul. 6.

The burden of explaining the difference is upon the insured. Israel *v.* Teutonia Ins. Co., 28 La. Ann. 689. See also Hanover F. Ins. Co. *v.* Mannasson, 29 Mich. 316. He may explain by showing that his first claim was made under a misconstruction of the policy. Ætna Ins. Co. *v.* Strout, 16 Ind. App. 160, 44 N. E. 934.

Failure by the insured by direct evidence to sustain the truth of his statements does not in itself constitute sufficient evidence of false swearing. Wightman *v.* Western M. & F. Ins. Co., 8 Rob. (La.) 442; Marchesseau *v.* Merchants' Ins. Co., 1 Rob. (La.) 438. Where there is a clear case of falsity the evidence offered in explanation must be such as to show at least an appearance of good faith. Hanover F. Ins. Co. *v.* Mannasson, 29 Mich. 316.

43. See also Marchesseau *v.* Merchants' Ins. Co., 1 Rob. (La.) 438; Anibal *v.* Insurance Co. of North America, 84 N. Y. App. Div. 634, 82 N. Y. Suppl. 600.

44. Insurance Co. of North America *v.* Wicker, 93 Tex. 390, 55 S. W. 740.

45. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242.

46. Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

47. Morley *v.* Liverpool, etc., Ins. Co., 92 Mich. 590, 52 N. W. 939.

48. Phœnix Ins. Co. *v.* Padgitt, (Tex. Civ. App. 1897) 42 S. W. 800.

49. See ARSON, 3 Cyc. 982. It is not necessary in order to authorize the company to interpose the defense of wilful or criminal destruction of property that it first proceed in a criminal court against the insured. Dupin *v.* Mutual Ins. Co., 5 La. Ann. 482; Crescent Ins. Co. *v.* Camp, 64 Tex. 521; Liverpool, etc., Ins. Co. *v.* Joy, 26 Tex. Civ. App. 613, 62 S. W. 546, 64 S. W. 786; Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31. And see, generally, as to the obsolete rule contended for by plaintiff in those cases, ACTIONS, 1 Cyc. 681 *et seq.*

50. Smith *v.* California Ins. Co., 85 Me. 348, 27 Atl. 191; Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225; Agnew *v.* Farmers' Mut. Protective F. Ins. Co., 95 Wis. 445, 70 N. W. 554; Carlwitz *v.* Germania F. Ins. Co., 5 Fed. Cas. No. 2,415*a*; Howell *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,780. See also Portland First Nat. Bank *v.* Phœnix Ins. Co., 33 Oreg. 43, 52 Pac. 1050, and cases cited in EVIDENCE, 17 Cyc. 758 note 32. *Contra*, German *v.* Hand-in-Hand Ins. Co., Ir. R. 11 C. L. 224; and cases cited in EVIDENCE, 17 Cyc. 759 note 33.

Clear and satisfactory proof at least is required in order to establish the defense. Flynn *v.* Merchants' Mut. Ins. Co., 17 La. Ann. 135; Hoffman *v.* Western M. & F. Ins. Co., 1 La. Ann. 216; Decker *v.* Somerset Mut. F. Ins. Co., 66 Me. 406; Anderson *v.* American Mut. Ins. Co., 33 N. J. L. 151; Sibley *v.* St. Paul F. & M. Ins. Co., 22 Fed. Cas. No. 12,830, 9 Biss. 31.

The presumption of innocence is a circumstance to be considered by the jury. Portland First Nat. Bank *v.* Commercial Union Assur. Co., 33 Oreg. 43, 52 Pac. 1050; Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795. See also cases cited in EVIDENCE, 17 Cyc. 759 note 35.

Good character.— As in criminal cases, it has been held admissible for the insured thus charged with a crime to introduce evidence

fact of wilful and criminal destruction of the property by the insured may be made out by circumstantial evidence,[51] and the charge may be refuted in like manner;[52] but evidence that no one has been indicted is inadmissible as tending to disprove the fact.[53] Testimony that defendant had made strenuous efforts to convict plaintiff of arson may be admissible on behalf of the latter.[54] Failure of plaintiff to testify in a criminal prosecution against him for burning the property is not competent evidence for defendant,[55] nor is plaintiff's acquittal evidence in his favor.[56] Evidence is admissible to show a possible motive of the insured to destroy the property,[57] or on the other hand in behalf of the insured to show that such destruction was to his disadvantage.[58] Plaintiff's failure to produce a witness who might corroborate him as to exculpatory circumstances is not conclusive against him.[59] It has been held that evidence that the husband or wife[60] or

of good character. Spears *v.* International Ins. Co., 1 Baxt. (Tenn.) 370. But this theory is clearly erroneous (see EVIDENCE, 16 Cyc. 1263) and in the civil case proof of good character is not admissible (see cases cited in EVIDENCE, 16 Cyc. 1268 note 20).

As to testimony of accomplices see Howell *v.* Hartford F. Ins. Co., 12 Fed. Cas. No. 6,780.

51. *Illinois.*— Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122.

Louisiana.— Regnier *v.* Louisiana State M. & F. Ins. Co., 12 La. 336; Wightman *v.* Western M. & F. Ins. Co., 8 Rob. 442.

Texas.— Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822.

Washington.— McWilliams *v.* Cascade F. & M. Ins. Co., 7 Wash. 48, 34 Pac. 140.

United States.— Huchberger *v.* Merchants' F. Ins. Co., 12 Fed. Cas. No. 6,822, 4 Biss. 265 [*affirmed* in 12 Wall. 164, 20 L. ed. 364].

Degree of proof.— Proof by circumstantial evidence must be not only consistent with plaintiff's guilt, but inconsistent with any other rational conclusion. Flynn *v.* Merchants' Mut. Ins. Co., 17 La. Ann. 135. See further as to weight of circumstantial evidence in civil cases EVIDENCE, 17 Cyc. 817.

Materiality of evidence.— As illustrating circumstances which may be taken into account as against the insured see Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122; Huckins *v.* Peoples' Mut. F. Ins. Co., 31 N. H. 238; Joy *v.* Liverpool, etc., Ins. Co., 32 Tex. Civ. App. 433, 74 S. W. 822; Goodfellow Shoe Co. *v.* Liberty Ins. Co., 8 Tex. Civ. App. 227, 28 S. W. 1027; Agnew *v.* Farmers' Mut. Protective F. Ins. Co., 95 Wis. 445, 70 N. W. 554. For illustration of circumstances deemed too remote to be shown see Farmers' Alliance Mut. F. Ins. Co. *v.* Trombly, 17 Colo. App. 513, 69 Pac. 74; Goodwin *v.* Merchants', etc., Mut. Ins. Co., 118 Iowa 601, 92 N. W. 894; Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954; Phœnix Ins. Co. *v.* Padgitt, (Tex. Civ. App. 1897) 42 S. W. 800; Northern Assur. Co. *v.* Samuels, 11 Tex. Civ. App. 417, 33 S. W. 239. The fact that an employee of the insured was reputed to be an incendiary is incompetent on behalf of defendant. Portland First Nat. Bank *v.* Commercial Union Assur. Co., 33 Oreg. 43, 52 Pac. 1050.

As to incriminating circumstances held insufficient to warrant reversal of finding in favor of plaintiff see Connecticut F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 114, 10 Ohio Cir. Dec. 186.

52. Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013. See also Klein *v.* Franklin Ins. Co., 13 Pa. St. 247.

53. Liverpool, etc., Ins. Co. *v.* Joy, 26 Tex. Civ. App. 613, 62 S. W. 546, 64 S. W. 786.

54. Phœnix Assur. Co. *v.* Stenson, (Tex. Civ. App. 1901) 63 S. W. 542.

55. Orient Ins. Co. *v.* Moffatt, 15 Tex. Civ. App. 385, 39 S. W. 1013.

56. Crescent Ins. Co. *v.* Camp, 64 Tex. 521.

57. Dwyer *v.* Continental Ins. Co., 63 Tex. 354; Agnew *v.* Farmers' Mut. Protective F. Ins. Co., 95 Wis. 445, 70 N. W. 554. Evidence that the insured goods were undesirable and in some respects unsalable and that insured was financially embarrassed is admissible. Portland First Nat. Bank *v.* Philadelphia Fire Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8. Evidence of trouble in plaintiff's family, his separation from his wife, and disputes between them as to property matters is admissible as tending to prove motive for him to burn the property. Barnett *v.* Farmers' Mut. F. Ins. Co., 115 Mich. 247, 73 N. W. 372. The fact of plaintiff's poverty is irrelevant. Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

58. Menk *v.* Home Ins. Co., 76 Cal. 50, 14 Pac. 837, 18 Pac. 117, 9 Am. St. Rep. 158; Farmers' Mut. F. Ins. Co. *v.* Crampton, 43 Mich. 421, 5 N. W. 447. See also Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625]. Evidence that plaintiff lost money in the fire, as showing want of motive to set the fire, is properly excluded in the absence of an offer to show that the amount lost was considerable. Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795.

59. Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625]. See, generally, as to presumption from non-production of available evidence, EVIDENCE, 16 Cyc. 821.

60. Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209. See also Plinsky *v.* Germania F. & M. Ins. Co., 32 Fed. 47; Midland Ins. Co.

agent[61] of the insured wilfully burned the property is irrelevant. Great latitude is allowed in cross-examination of plaintiff where defendant charges that he burned the property.[62] Evidence, although not perfectly clear and explicit, may be sufficient to sustain a verdict for plaintiff especially where credibility of witnesses is involved.[63]

i. Waiver or Estoppel. Waiver of a condition in the policy may be established by a preponderance of evidence; the clear and convincing proof required in order to reform a written instrument[64] is not demanded.[65] Waiver may be proved indirectly by circumstances as well as by direct testimony.[66] Waiver cannot be established by evidence of doubtful constructive knowledge of the facts.[67] Testimony to oral declarations alleged to constitute a waiver is unsatisfactory evidence if considerable time has elapsed, and it is important to know what was the exact language used.[68] Such testimony is seriously weakened where the veracity of the witness in regard to other matters is doubtful,[69] but the fact that the witness is disinterested is a favorable circumstance.[70] In determining whether defendant's agent waived payment of the premium previous dealings with him in this respect may be considered.[71] Admissions by an authorized agent of defendant are competent evidence that defects in notice and proofs of loss were waived.[72] Correspondence between plaintiff and defendant may be admissible to show waiver of defects in proofs of loss.[73] Defendant's denial of liability and

v. Smith, 6 Q. B. D. 561, 45 J. P. 699, 50 L. J. Q. B. 329, 45 L. T. Rep. N. S. 411, 29 Wkly. Rep. 850.

61. Henderson *v.* Western M. & F. Ins. Co., 10 Rob. (La.) 164, 43 Am. Dec. 176.

62. Barnett *v.* Farmers' Mut. F. Ins. Co., 115 Mich. 247, 73 N. W. 372 (plaintiff may be asked about insurance that he had in another company and whether his claim of loss made to that company was not false); Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625].

63. Hartley *v.* Pennsylvania F. Ins. Co., 91 Minn. 382, 98 N. W. 198, 103 Am. St. Rep. 512.

64. See EVIDENCE, 17 Cyc. 775.

65. Bergeron *v.* Pamlico Ins., etc., Co., 111 N. C. 45, 15 S. E. 883. Clear proof is required in order to establish a parol waiver in the face of a provision in the policy prohibiting a parol waiver. Grier *v.* Northern Assur. Co., 183 Pa. St. 334, 352, 39 Atl. 10, it cannot be "made out largely of inferences and implications from facts and declarations, most of which are disputed." As to proof of parol waiver of a provision in a written contract, see cases cited in EVIDENCE, 17 Cyc. 774 note 35.

66. Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. 527, 23 L. ed. 868. Waiver may be inferred from declarations or conduct of defendant's agents; express waiver need not be proved. Searle *v.* Dwelling House Ins. Co., 152 Mass. 263, 25 N. E. 290; Little *v.* Phœnix Ins. Co., 123 Mass. 380, 25 Am. Rep. 96; Loeb *v.* American Cent. Ins. Co., 99 Mo. 50, 12 S. W. 374; Roberts, etc., Co. *v.* Sun Mut. Ins. Co., 13 Tex. Civ. App. 64, 35 S. W. 955. Defendant's retention of proofs of loss for nine or ten days after they were served is some evidence of a waiver of objection that they were not served in time. Dobson *v.* Hartford F. Ins. Co., 86 N. Y. App. Div. 115, 83 N. Y. Suppl. 456, holding also that on all the evidence a finding of waiver should be sustained.

67. Turnbull *v.* Home F. Ins. Co., 83 Md. 312, 34 Atl. 875. Waiver is satisfactorily proved by *prima facie* evidence thereof not disputed by defendant who has the means of falsifying it if untrue. McGuire *v.* Hartford F. Ins. Co., 7 N. Y. App. Div. 575, 40 N. Y. Suppl. 300 [*affirmed* in 158 N. Y. 680, 52 N. E. 1124]. As to adverse presumption arising from non-production of evidence in general see EVIDENCE, 16 Cyc. 1062 *et seq.*

68. Shimp *v.* Cedar Rapids Ins. Co., 26 Ill. App. 254, 256. And see, generally, the numerous cases cited in EVIDENCE, 17 Cyc. 794 note 9; 807 note 18.

69. Bruce *v.* Phœnix Ins. Co., 24 Oreg. 486, 34 Pac. 16. See also cases cited in EVIDENCE, 17 Cyc. 812 notes 79, 82.

70. Mix *v.* Royal Ins. Co., 169 Pa. St. 639, 32 Atl. 460. And see cases cited in EVIDENCE, 17 Cyc. 813 note 5.

71. Commercial F. Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. 34. See also East Texas F. Ins. Co. *v.* Perky, 5 Tex. Civ. App. 698, 24 S. W. 1080. Waiver of payment of premium is not shown by evidence clearly susceptible to the opposite construction. Marland *v.* Royal Ins. Co., 71 Pa. St. 393. Where the evidence clearly shows that there was no intention to extend credit and no expectation thereof evidence of past dealings between the parties in respect to extending time is immaterial. Moore *v.* Rockford Ins. Co., 90 Iowa 636, 57 N. W. 597. Extension of credit on a former policy may greatly aid other evidence of waiver of payment of premium on the policy in suit. Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521 [*affirming* 2 Thomps. & C. 261].

72. Lewis *v.* Monmouth Mut. F. Ins. Co., 52 Me. 492.

73. Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

refusal to pay will sustain a finding of waiver of requirement of proofs of loss.[74] Statements of defendant's adjuster may be admissible to establish a tacit waiver of proofs of loss.[75] Usage and custom of other companies as to waiver of proofs of loss is inadmissible.[76] Waiver of notice and proofs of loss may be shown by letters to the company from its authorized agent,[77] or by conversations between him and plaintiff.[78] Defendant's knowledge that plaintiff's books and papers were destroyed would tend to corroborate other evidence that strict proofs of loss were waived.[79] Slight circumstances have been held sufficient to show intent on the part of defendant to waive forfeiture for breach of condition as to occupancy after knowledge thereof.[80] Declarations of defendant's agent made *dum fervet opus* in the course of his employment may be proved as tending to establish waiver.[81] Uncorroborated testimony of plaintiff contradicted by his testimony on a former trial and by his admission is insufficient to prove a waiver.[82] Testimony of defendant's agent that at the time of the insurance he had no recollection of certain information given him before he became agent must be believed in the absence of evidence to the contrary, where it cannot be presumed that he would have remembered the information.[83] On an issue of waiver if it becomes a material question whether plaintiff was aware of a particular provision in the policy he may testify that he did not read the instrument.[84] An unimpeached witness' denial of waiver cannot be corroborated by his testimony to his habitual refusal to waive in such cases.[85] Where a claim of waiver is predicated upon alleged denial of liability, defendant is entitled to show all the circumstances under which the denial was made.[86] Defendant's knowledge of a hazardous use of premises may be implied from the fact that an extra rate was charged for the insurance.[87] A non-waiver contract signed by plaintiff after the fire is admissible to rebut inference of waiver from subsequent conduct of defendant's adjuster.[88] Authority of one assuming to act as agent for the company cannot be proved by his own declarations.[89] Authority of an adjuster to waive performance of conditions may be shown by defendant's admissions.[90] An offer of settlement by defendant has been held admissible on the question of waiver.[91] Where defendant's agent consented to storage of the property in another place plaintiff may show that he informed the agent of all the facts affecting the new risk.[92]

74. Home Ins. Co. *v.* Sylvester, 25 Ind. App. 207, 57 N. E. 991.

75. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759.

76. Phenix Ins. Co. *v.* Munger, 49 Kan. 178, 30 Pac. 120, 33 Am. St. Rep. 360, holding, however, that custom of defendant in that regard in the vicinity would be admissible.

77. Ruthven *v.* American F. Ins. Co., 102 Iowa 550, 71 N. W. 574.

78. Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. Suppl. 539.

79. Sagers *v.* Hawkeye Ins. Co., 94 Iowa 519, 63 N. W. 194.

80. Hoover *v.* Mercantile Town Mut. Ins. Co., 93 Mo. App. 111, 69 S. W. 42 [*citing* Hanscom *v.* Home Ins. Co., 90 Me. 333, 38 Atl. 324; Springfield Steam Laundry Co. *v.* Traders' Ins. Co., 151 Mo. 90, 52 S. W. 238, 74 Am. St. Rep. 521; Dohlantry *v.* Blue Mounds F., etc., Ins. Co., 83 Wis. 181, 53 N. W. 448; Gans *v.* St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535].

81. Arnold *v.* Hartford F. Ins. Co., 55 Mo. App. 149.

82. Ætna Ins. Co. *v.* Eastman, (Tex. Civ. App. 1903) 72 S. W. 431. And as to the weight of clearly proved admissions generally see EVIDENCE, 17 Cyc. 814.

83. Sergent *v.* Liverpool, etc., Ins. Co., 66 N. Y. App. Div. 46, 73 N. Y. Suppl. 120, insurance nearly two years after alleged information. And as to judicial and other observations on the capacity of memory generally see EVIDENCE, 17 Cyc. 781 *et seq.*

84. Putnam *v.* Commonwealth Ins. Co., 4 Fed. 753, 18 Blatchf. 368.

85. Adams *v.* Greenwich Ins. Co., 70 N. Y. 166. Evidence of defendant's habitual waiver of the same and like conditions in policies to other persons would not be admissible. Adams *v.* Greenwich Ins. Co., 70 N. Y. 166.

86. Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057.

87. Virginia F. & M. Ins. Co. *v.* Feagin, 62 Ga. 515.

88. Sun Mut. Ins. Co. *v.* Dudley, 65 Ark. 240, 45 S. W. 539.

89. Heusinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696.

90. Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399.

91. Stavinow *v.* Home Ins. Co., 43 Mo. App. 513. See also cases cited in EVIDENCE, 16 Cyc. 949 note 27.

92. Rathbone *v.* City F. Ins. Co., 31 Conn. 193.

H. Trial[93] — **1. Course and Conduct — a. In General.** The course and conduct of the trial in an action on a fire-insurance policy are governed by the same rules that apply in civil actions generally.[94]

b. Reception of Evidence. The reception of evidence in an action on a fire-insurance policy is governed by the rules that apply in civil actions generally.[95]

93. See, generally, Trial. See also Insurance.

94. See, generally, Trial. See also Insurance.

Order of trial of issues.— Under Wis. Rev. St. § 2844, providing that where in any action there shall arise issues triable by a jury and by the court, the court shall in its discretion order the trial of either to be first had, and "when both" shall be found render judgment, it is error in an action on an insurance policy, where a claim is made by the contractor of the building insured against the owner, and the policy is sought by such contractor to be reformed so as to include his interest in the building as builder, to order the reformation of the contract on the trial of such equitable issue before the other issues have been tried. St. Clara Female Academy *v.* Delaware Ins. Co., 93 Wis. 57, 66 N. W. 1140. Where the answer was that the policy contained a condition avoiding it in case the interest of the assured in the property were other than the sole and unconditional ownership for his own benefit, and that fact was not represented to the insurer and expressed in the written part of the policy; that the property was held in trust by plaintiff for others, and he did not disclose the fact to defendant when he applied for insurance; and that he did not, in his proofs of loss, disclose such trust, or the names of the persons beneficially interested, as required by the terms of the policy, this was essentially a plea in bar, and not merely one in abatement, and there was no error in refusing defendant's motion to try first the question whether plaintiff had failed to make due proofs of loss. Smith *v.* Commonwealth Ins. Co., 49 Wis. 322, 5 N. W. 804. Where a fire policy provides that the loss shall not be payable until the expiration of a specified time after proofs have been furnished, an averment in an answer in a suit on the policy that such proofs were not furnished for the specified length of time before the action was brought does not create an issue in abatement which must be tried before the other issues in bar. Harriman *v.* Queen Ins. Co., 49 Wis. 71, 5 N. W. 12.

Remarks of court.— Where the insurer was trying to show that certain photographs destroyed were those of plaintiff's family, and therefore had no value, a remark of the court in the presence of the jury, "You don't expect to insure property for value, and refuse to pay for it simply because it is a picture of a man's father or mother," is not error; the court leaving the jury to determine the question as to the value of the photograph. German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 630, 53 S. W. 442.

Right to close argument.— Where defendant in an action on a policy which provided that "if the building, or any part thereof falls, except as a result of fire, all insurance under this policy on it or its contents shall immediately cease and determine," admitted the insurance, destruction of the goods, and amount of loss, but alleged that the building had fallen before the contents caught fire, it was held that under Ky. Code Civ. Proc. § 526, providing that the burden of proof is on the party who would be defeated if no evidence were given, and section 317, subsection 6, providing that "in the argument the party having the burden of proof shall have the conclusion," defendant should conclude the argument. Royal Ins. Co. *v.* Schwing, 87 Ky. 410, 9 S. W. 242, 10 Ky. L. Rep. 380.

95. See, generally, Trial. See also Insurance.

Error cured.— Where a policy contained a clause of forfeiture in case of additional insurance not assented to, error in admitting evidence that additional insurance was obtained because insured understood that the original policy was invalid was cured by an instruction that the policy was avoided by the additional insurance unless the breach of condition had been waived. Pennsylvania F. Ins. Co. *v.* Kittle, 39 Mich. 51.

Necessity of showing relevancy.— Where defendant called a police officer and asked what kind of persons frequented the insured premises, the evidence was properly excluded, there being no offer to show that the house was occupied in any manner in violation of the policy, or that the mode or purpose for which it was kept contributed to the fire. Russell *v.* Metropolitan Ins. Co., 51 N. Y. 650. Evidence as to the amount of furniture in plaintiff's house six months before it was burned, and as to the furniture in plaintiff's new house after the fire, is inadmissible where it is not shown that further evidence will make it relevant. Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

Offering part of document.— Where plaintiff offers the policy in evidence, he cannot be compelled to read subsequent indorsements thereon showing a cancellation as alleged in the answer. McCartney *v.* State Ins. Co., 45 Mo. App. 373. It is sufficient for plaintiff to read in evidence only those clauses of the policy bearing on the defense set up. Travis *v.* Continental Ins. Co., 32 Mo. App. 198, holding that defendant should offer the remainder if he deems it material.

Rebuttal.— Where defendant introduces evidence as to the value of the building, plaintiff may introduce evidence in rebuttal on the same point, since under Iowa Acts 18 Gen. Assem. c. 211, § 3, making the policy *prima facie* proof of the insurable value of the building, plaintiff is not obliged to offer

c. Reference.[96] The rules applicable to references in civil actions in general usually apply to references in actions on policies of fire insurance.[97]

2. Questions For Court and For Jury — a. General Rules. Questions of law are ordinarily to be determined by the court, and it is error to submit them to the jury.[98] Issues of fact, on the other hand, are ordinarily to be determined by the jury under proper instructions from the court.[99] Consequently if there is

any evidence on that subject in the first instance. Martin *v.* Capital Ins. Co., 85 Iowa 643, 52 N. W. 534. Although the court, with the consent of counsel, arranges to submit to the jury only the questions whether plaintiff voluntarily caused the fire, and whether the use of the property was changed after issuance of the policy so as to avoid it, it is within the court's discretion to allow plaintiff to rebut evidence that in her proofs of loss she concealed the use made of the premises, by testimony that she told defendant's agent before the issuance of the policy that she intended so to use them. Bullman *v.* North British, etc., Ins. Co., 159 Mass. 118, 34 N. E. 169.

Waiver of objections.— Objection to the irrelevancy of preliminary proofs of loss offered in evidence is waived, objection being merely that they did not comply with the requirements of the policy as to proofs of loss. Sutton *v.* American F. Ins. Co., 188 Pa. St. 380, 41 Atl. 537.

96. See, generally, References.

97. See cases cited *infra*, this note. See also *supra*, note 20.

Propriety of reference.— There may be a reference to an auditor in an action on an insurance policy of the standard form requird to be used in Massachusetts, notwithstanding the clause providing for a reference to arbitrators without suit. Clement *v.* British American Assur. Co., 141 Mass. 298, 5 N. E. 847. Where defendants admit their liability, and the controversy relates solely to items of account and the amount of loss sustained by plaintiff, the court will refer the matter to referees for adjustment. Pechner *v.* Phœnix Ins. Co., 6 Lans. (N. Y.) 411. Where the pleadings and proofs of loss submitted by the insured show one hundred and forty-five items of goods consumed by fire, of the alleged aggregate value of eleven thousand one hundred and twenty-seven dollars and twenty-four cents, and forty-nine items of goods saved from the fire, but damaged to the extent of two hundred and sixty-three dollars, a reference of the account on motion is properly granted; the account being a "long account," within the meaning of N. Y. Code, § 271, authorizing the reference of long accounts. Batchelor *v.* Albany City Ins. Co., 1 Sweeny (N. Y.) 346, 37 How. Pr. 399. Where fraud of insured is raised as a defense, a motion for a reference should be denied; the question of fraud being for the jury. McLean *v.* East River Ins. Co., 8 Bosw. (N. Y.) 700; Freeman *v.* Atlantic Mut. Ins. Co., 13 Abb. Pr. (N. Y.) 124; Levy *v.* Brooklyn F. Ins. Co., 25 Wend. (N. Y.) 687.

Questions for referee see Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527.

Verification of exceptions to award see Virginia Home Ins. Co. *v.* Gray, 61 Ga. 515.

Waiver of objections.— Where matters of defense, such as insurance in other companies, overinsurance, fraudulent concealment, compromise, payment, etc., were not pleaded to the action prior to a reference thereof to arbitrators, and were not directly put in issue and insisted upon before the arbitrators, they cannot be urged as exceptions to the award. Virginia Home Ins. Co. *v.* Gray, 61 Ga. 515.

Decision of referee see Chase *v.* Hamilton Mut. Ins. Co., 22 Barb. (N. Y.) 527. Where in an action on a policy which was to be avoided in case of its assignment without the consent of the company, the answer alleged that plaintiff had duly assigned the policy to one A before the action was brought and no longer had a claim under it against defendant, and the referee for trial found that "no sufficient assignment under the terms and conditions prescribed by said policy was ever made and delivered to said" A, the finding was defective, not determining the issue made. Dogge *v.* Northwestern Nat. Ins. Co., 49 Wis. 501, 5 N. W. 889.

98. Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122 (question whether interrogatories propounded by the insurer to the insured were impertinent, immaterial, and unauthorized); Alliance Co-operative Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. 108 (question of amount of attorney's fee to be awarded as part of the costs); Fleischner *v.* Beaver, 21 Wash. 6, 56 Pac. 840 (question of insurance adjuster's right to question the insured).

The construction of a policy is a question for the court. Lapeer County Farmers' Mut. F. Ins. Assoc. *v.* Doyle, 30 Mich. 159 (question whether a word written in a policy in a clause stating the number of rods the buildings were from any other building was the word "six" and therefore intelligible, or the word "oix" and therefore without meaning); St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348 (holding that an instruction that the jury are to take the words used in their plain, ordinary, and popular sense is properly refused); Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 36 N. W. 594 (so holding where there is no ambiguity in the language of a policy when applied to the undisputed facts).

The question of waiver is for the court where the evidence is undisputed and there is no conflict. Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Phenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. 779.

99. *District of Columbia.*— Mitchell *v.* Potomac Ins. Co., 16 App. Cas. 241, whether

evidence sufficient to justify the jury in finding that a disputed fact exists,[1] it is proper to submit the question to them for determination,[2] and it is error to take

combustion was caused by explosion or by fire.

Iowa.— Mitchell *v.* Home Ins. Co., 32 Iowa 421, insurable interest.

Kansas.— Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347, consideration for release.

Massachusetts.— Baxter *v.* Massasoit Ins. Co., 13 Allen, 320 (reasonable time for payment of premium); Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192 (meaning of word "room").

Michigan.—Cronin *v.* Philadelphia Fire Assoc., 123 Mich. 277, 82 N. W. 45, whether policy was issued on written or oral application.

New York.— Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674 (whether oral contract of insurance was made); Walker *v.* American Cent. Ins. Co., 21 N. Y. Suppl. 751 [*affirmed* in 143 N. Y. 167, 38 N. E. 106] (whether the policy in suit was intended as a substitute for a former policy or as additional insurance).

Pennsylvania.— Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961 (how and when fire originated); Latimore *v.* Dwelling House Ins. Co., 153 Pa. St. 324, 25 Atl. 757 (whether policy was issued by mistake for a longer period than was agreed upon); Fleming *v.* State Ins. Co., 12 Pa. St. 391 (whether insured had parted with title); Vanderslice *v.* Royal Ins. Co., 9 Pa. Super. Ct. 233, 43 Wkly. Notes Cas. 381 (whether the leaving of blanks for the name of the transferee of insurance policies was negligence on the part of the holder of them, who intrusted them to a person to have the transfer noted on the books of the company, such as would cast the loss of an erroneous payment on the holder rather than the insurance company).

Texas.—Connecticut F. Ins. Co. *v.* Hilbrant, (Civ. App. 1903) 73 S. W. 558 (meaning of term "attached additions"); Home Mut. Ins. Co. *v.* Tompkies, 30 Tex. Civ. App. 404, 71 S. W. 812 (falling of material part of building).

Vermont.— McCloskey *v.* Springfield F. & M. Ins. Co., 76 Vt. 151, 56 Atl. 662 (mental capacity); Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687 (whether contract of insurance was a part of an illegal scheme).

United States.—Phœnix Assur. Co. *v.* Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144.

See 28 Cent. Dig. tit. "Insurance," § 1732 *et seq.*

The question of waiver is usually for the jury. Concordia Bank *v.* German Ins. Co., 6 Kan. App. 219, 49 Pac. 688; Baldwin *v.* Chouteau Ins. Co., 56 Mo. 151, 17 Am. Rep. 671; Montgomery *v.* Delaware Ins. Co., 55 S. C. 1, 32 S. E. 723.

1. See cases cited *infra*, note 5.

2. *Illinois.*— German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113.

Massachusetts.— Batcheller *v.* Commercial Union Assur. Co., 143 Mass. 495, 10 N. E. 321 (issue as to insurable interest); Haskins *v.* Hamilton Mut. Ins. Co., 5 Gray 432 (question whether repairs made by insurers under a right reserved in the policy are made within a reasonable time).

Michigan.—Dove *v.* Royal Ins. Co., 98 Mich. 122, 57 N. W. 30, question as to cancellation of policy.

Minnesota.— Chandler *v.* St. Paul F. & M. Ins. Co., 21 Minn. 85, 18 Am. Rep. 385, question as to ownership.

Missouri.— Renshaw *v.* Missouri State Mut. F. & M. Ins. Co., 103 Mo. 595, 15 S. W. 945, 23 Am. St. Rep. 904, question whether the loss was occasioned by fire.

Nebraska.— Farmers', etc., Ins. Co. *v.* Dobney, 62 Nebr. 213, 86 N. W. 1070, 97 Am. St. Rep. 624, question of severance of policy as to items of property insured.

New York.— Church *v.* La Fayette F. Ins. Co., 66 N. Y. 222; Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521 [*affirming* 2 Thomps. & C. 261] (in both of which cases the question was whether prepayment of premiums had been waived); Welsh *v.* Continental Ins. Co., 47 Hun 598 (question whether the insurance was satisfactory to the company, and rejected only because the property was burned before the policy was made out and delivered); Smith *v.* Glens Falls Ins. Co., 66 Barb. 556 (question of a new promise and an admission of indebtedness arising by implication from the liquidation of the amount due for the loss); Guggenheimer *v.* Greenwich F. Ins. Co., 9 N. Y. St. 316 (question whether contract was made as claimed).

Ohio.— Fry *v.* Franklin Ins. Co., 40 Ohio St. 108, question of consent to non-payment of premium note when due.

Pennsylvania.— Long *v.* North British, etc., Ins. Co., 137 Pa. St. 335, 20 Atl. 1014, 21 Am. St. Rep. 879 (question whether the policy was in force at the time of the loss); Farmers' Mut. F. Ins. Co. *v.* Bair, 82 Pa. St. 33 (question whether receipt for insurance had been altered); Franklin *v.* Ins. Co. *v.* Updegraff, 43 Pa. St. 350 (question whether storerooms of the assured were in the building described in the policy); Girard F. & M. Ins. Co. *v.* Stephenson, 37 Pa. St. 293, 78 Am. Dec. 423 (question whether stoves are customary and necessary in a carpenter shop); Farmers' Mut. Ins. Co. *v.* Mylin, (1888) 15 Atl. 710 (question of proper payment of the premium).

Wisconsin.— Rickeman *v.* Williamsburg City F. Ins. Co., 120 Wis. 655, 98 N. W. 960 (question whether the removal by insured of the *débris* from a fire was with the intent and for the purpose of destroying evidence); Whiting *v.* Mississippi Valley Manufacturers Mut. Ins. Co., 76 Wis. 592, 45 N. W. 672

the question from them by nonsuit, dismissal, direction of a verdict, or instruction,[3] and all this is so where the evidence is in conflict.[4] If, however, there is no evidence on an issue of fact, or if the evidence of its existence or its non-existence, as the case may be, is so slight that a finding of its existence or its non-existence would not be sustained, or if the evidence is conclusive of its existence or its non-existence, as the case may be, then the question becomes one of law for the court and should not be submitted to the jury.[5] And if a fact is not in dispute, the court should not submit to the jury the question of its existence.[6]

b. Particular Questions — (i) *As to Agency For Insurer.* The question whether a certain person was in fact the agent of the insurer is generally one for the jury.[7] So too the question of the actual extent of an insurance agent's authority[8] has repeatedly been held to be one of fact for the determination of

(question whether the premium had been paid or payment had been waived).

United States.— Chadbourne *v.* German-American Ins. Co., 31 Fed. 533, question of reasonable notice of cancellation.

See 28 Cent. Dig. tit. "Insurance," § 1732 *et seq.*

3. *Delaware.*— Schilansky *v.* Merchants', etc., F. Ins. Co., 4 Pennew. 293, 55 Atl. 1014, issue as to ownership.

Maryland.— Franklin F. Ins. Co. *v.* Hamill, 6 Gill 87, question as to when fire occurred.

Missouri.— McCluer *v.* Home Ins. Co., 31 Mo. App. 62, waiver of payment of premium note at maturity.

Nebraska.— Farmers', etc., Ins. Co. *v.* Graff, 1 Nebr. (Unoff.) 790, 96 N. W. 605, waiver of payment of premium.

New York.— Clarkson *v.* Western Assur. Co., 92 Hun 527, 37 N. Y. Suppl. 53, question whether boat was "laid up" within meaning of winter policy.

Pennsylvania.— Latimore *v.* Dwelling House Ins. Co., 153 Pa. St. 324, 25 Atl. 757 (question of mistake); Pittsburgh Boat-Yard Co. *v.* Western Assur. Co., 118 Pa. St. 415, 11 Atl. 801 (question of payment of premium).

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934 (question of identity of insured); McBryde *v.* South Carolina Mut. Ins. Co., 55 S. C. 589, 33 S. E. 729, 74 Am. St. Rep. 769; Copeland *v.* Western Assur. Co., 43 S. C. 26, 20 S. E. 754 (the question in the last two cases being of waiver or estoppel).

United States.— Phenix Ins. Co. *v.* Luce, 123 Fed. 257, question whether building fell as the result of fire.

See 28 Cent. Dig. tit. "Insurance," § 1732 *et seq.* See also *infra*, XXI, H, 3.

4. *Arkansas.*— Phœnix Ins. Co. *v.* Minner, 64 Ark. 590, 44 S. W. 75, holding that the question of waiver is for the jury on conflicting inferences.

Michigan.— Cronin *v.* Philadelphia Fire Assoc., 112 Mich. 106, 70 N. W. 448, holding that on conflicting evidence the question whether the policy was issued on a written or an oral application is for the jury.

Nebraska.—Oakland Home Ins. Co. *v.* Bank of Commerce, 47 Nebr. 717, 66 N. W. 646, 58 Am. St. Rep. 663, 36 L. R. A. 673 (question whether the insured was, at the time the policy issued, the owner of the property); Farmers', etc., Ins. Co. *v.* Graff, 1 Nebr. (Unoff.) 790, 96 N. W. 605 (issue of waiver of payment of premium).

Pennsylvania.— Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. 671, question whether, after the fire, insured complied with the terms of the policy relating to permitting the examination of the property, the production of books and papers, and the submission to an examination under oath.

United States.— Phenix Ins. Co. *v.* Luce, 123 Fed. 257, where the court properly refused to direct verdict on a question whether a building fell before or after the fire.

See 28 Cent. Dig. tit. "Insurance," § 1732 *et seq.*

5. Cronin *v.* Philadelphia Fire Assoc., 119 Mich. 74, 77 N. W. 648; Ryder *v.* Commonwealth F. Ins. Co., 52 Barb. (N. Y.) 447; Royal Ins. Co. *v.* Beatty, 119 Pa. St. 6, 12 Atl. 607, 4 Am. St. Rep. 622; Sharpless *v.* Hartford F. Ins. Co., 8 Pa. Co. Ct. 387.

To justify a direction of a verdict based upon the truthfulness of a witness' testimony, there must be nothing in the circumstances or surroundings tending to throw discredit upon his statements. Michigan Pipe Co. *v.* Michigan F. & M. Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

6. Zaleskey *v.* Iowa State Ins. Co., 108 Iowa 392, 79 N. W. 148.

7. Lewis *v.* Guardian F., etc., Assur. Co., 93 N. Y. App. Div. 157, 87 N. Y. Suppl. 525; Commercial Union Assur. Co. *v.* Elliott, 10 Pa. Cas. 331, 13 Atl. 970.

The question may and should be withdrawn from the jury where there is no evidence of agency or the evidence conclusively shows that there was no agency. Security Ins. Co. *v.* Metté, 27 Ill. App. 324; Rahr *v.* Manchester F. Assur. Co., 93 Wis. 355, 67 N. W. 725.

8. *Alabama.*— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665, question whether notice to local agents and adjuster of insurance company of the loss of inventories was notice to the company.

Connecticut.— Hough *v.* City F. Ins. Co., 29 Conn. 10, 76 Am. Dec. 581, question of authority to fill out applications.

Maryland.— American F. Ins. Co. *v.* Brooks, 83 Md. 22, 34 Atl. 373, question whether broker was authorized to deliver a renewal receipt and collect the premium.

Missouri.— Bolan *v.* Philadelphia Fire As-

the jury. And the same has been held to be true with respect to questions concerning agency for the insured.[9]

(II) *As to Appraisal or Arbitration.* Questions of fact relating to appraisal or arbitration are generally for the jury to determine.[10] Thus the question whether plaintiff was to blame for failure of an arbitration so that his suit was prematurely brought,[11] even where it depends on inferences to be drawn from written correspondence,[12] is for the determination of the jury;[13] and the same is of course true of the question whether it was the fault of defendant that an arbitration failed.[14]

(III) *As to Conditions and Warranties.* Questions of fact concerning conditions and warranties and the breach or waiver thereof are generally for the determination of the jury;[15] but as warranties are made material as a matter of

soc., 58 Mo. App. 225, question whether local agent had authority to make statement to insured waiving proofs of loss.

New York.— Ruggles *v.* American Cent. Ins. Co., 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.

Oregon.— Hardwick *v.* State Ins. Co., 20 Oreg. 547, 26 Pac. 840, 23 Oreg. 290, 31 Pac. 656, question of authority to insure orally.

Pennsylvania.— Lycoming County Mut. Ins. Co. *v.* Schollenberger, 44 Pa. St. 259, question of authority to waive proofs of loss within prescribed time.

South Carolina.— Cave *v.* Home Ins. Co., 57 S. C. 347, 35 S. E. 577, question of authority to consent to a change in the ownership and to an increase in the amount of insurance by policies in other companies.

See 28 Cent. Dig. tit. "Insurance," §§ 1732, 1753.

9. Edwards *v.* Sun Ins. Co., 101 Mo. App. 45, 73 S. W. 886, holding that the question whether an agent of plaintiff to whom notice of cancellation was given had authority to receive the same is one for the jury.

10. McManus *v.* Western Assur. Co., 22 Misc. 269, 48 N. Y. Suppl. 820 [*affirmed* in 43 N. Y. App. Div. 550, 60 N. Y. Suppl. 1143]; Robertson *v.* New Hampshire Ins. Co., 16 N. Y. Suppl. 842 [*affirmed* in 137 N. Y. 530, 33 N. E. 336] (the question in both cases being whether defendant waived an appraisal); Meyerson *v.* Hartford F. Ins. Co., 17 Misc. (N. Y.) 121, 30 N. Y. Suppl. 329 [*affirmed* in 16 Misc. 286, 38 N. Y. Suppl. 112] (question of competency of appraiser); Herndon *v.* Imperial F. Ins. Co., 110 N. C. 279, 14 S. E. 742 (question whether the paper signed by the arbitrators was completed and delivered as their award); Hamilton *v.* Phœnix Ins. Co., 61 Fed. 379, 9 C. C. A. 530 (question whether an insurance company objected to proof of loss and demanded an appraisal within a reasonable time).

11. See *supra*, XXI, A, 3, d.

12. Carp *v.* Queen Ins. Co., 104 Mo. App. 502, 79 S. W. 757.

13. Fowble *v.* Phœnix Ins. Co., 106 Mo. App. 527, 81 S. W. 485; Rademacher *v.* Greenwich Ins. Co., 75 Hun (N. Y.) 83, 27 N. Y. Suppl. 155.

14. Lancashire Ins. Co. *v.* Murphy, 10 Kan. App. 251, 62 Pac. 729.

If the evidence conclusively shows that defendant was blameless the question is properly taken from the jury. Westenhaver *v.* German-American Ins. Co., 113 Iowa 726, 84 N. W. 717.

15. *Iowa.*— Martin *v.* Fidelity Ins. Co., 119 Iowa 570, 93 N. W. 562; Russell *v.* Fidelity F. Ins. Co., 84 Iowa 93, 50 N. W. 546.

Missouri.— Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27.

North Carolina.— Nelson *v.* Atlanta Home Ins. Co., 120 N. C. 302, 27 S. E. 38.

Pennsylvania.— Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. 671; Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934; Shute *v.* Manchester F. Assur. Co., 58 S. C. 186, 36 S. E. 541.

Texas.— Kemendo *v.* Western Assur. Co., (Civ. App. 1900) 57 S. W. 293; Manchester F. Ins. Co. *v.* Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722.

See 28 Cent. Dig. tit. "Insurance," §§ 1735 *et seq.*, 1758 *et seq.*

Occupancy of premises.— It has been held that the question whether a house was vacant within the meaning of an insurance policy is for the court. Schuermann *v.* Dwelling-House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377. See, however, Stone *v.* Granite State F. Ins. Co., 69 N. H. 438, 45 Atl. 235, holding that where the occupant of a dwelling is temporarily absent, the question whether it is "vacant by the removal" of the occupant, within a vacancy condition in a policy, is for the determination of the jury. Whether premises were or were not occupied in fact is a question for the jury. Home Ins. Co. *v.* Wood, 47 Kan. 521, 28 Pac. 167; Percival *v.* Maine M. M. Ins. Co., 33 Me. 242; Hampton *v.* Hartford F. Ins. Co., 65 N. J. L. 265, 47 Atl. 433, 52 L. R. A. 344; Vanderhoef *v.* Agricultural Ins. Co., 46 Hun (N. Y.) 328; Appleby *v.* Firemen's Fund Ins. Co., 45 Barb. (N. Y.) 454; Grant *v.* Howard Ins. Co., 5 Hill (N. Y.) 10; Fire Assoc. *v.* Gilmer, 3 Walk. (Pa.) 234.

The question of notice is ordinarily for the jury. Martin *v.* Fidelity Ins. Co., 119 Iowa 570, 93 N. W. 562; Alamo F. Ins. Co. *v.* Davis, 25 Tex. Civ. App. 342, 60 S. W. 802.

law by the contract itself, it is for the court, interpreting the language of the contract to determine its meaning, to say whether under conceded states of fact there has been a violation of a condition or warranty.[16]

(IV) *As to Extent of Loss.* Whether the loss is total or partial is usually a question for the jury to determine;[17] as are also questions as to the value of the property[18] and the amount of the loss.[19]

Thus the question whether defendant's agent was notified of additional insurance is for the jury where the evidence is conflicting. Magoun *v.* Firemen's Fund Ins. Co., 86 Minn. 486, 91 N. W. 5, 91 Am. St. Rep. 370; Bowman *v.* Mutual F. Ins. Co., 203 Pa. St. 150, 52 Atl. 87; Wilson *v.* Montgomery County Mut. F. Ins. Co., 174 Pa. St. 554, 34 Atl. 122. See also Turner *v.* Providence-Washington Ins. Co., 86 Mo. App. 387.

The question of waiver of a condition or warranty or a forfeiture arising from breach thereof is generally one for the jury on the facts.

Alabama.— Robinson *v.* Ætna Ins. Co., 128 Ala. 477, 30 So. 665.

Iowa.— Lutz *v.* Anchor F. Ins. Co., 120 Iowa 136, 94 N. W. 274, 98 Am. St. Rep. 349; Martin *v.* Fidelity Ins. Co., 119 Iowa 570, 93 N. W. 562.

Michigan.— Power *v.* Monitor Ins. Co., 121 Mich. 364, 80 N. W. 111; Walter *v.* Mutual City, etc., F. Ins. Co., 120 Mich. 35, 78 N. W. 1011.

Pennsylvania.— Fritz *v.* British America Assur. Co., 208 Pa. St. 268, 57 Atl. 573.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 67 S. C. 399, 45 S. E. 934; Shute *v.* Manchester F. Assur. Co., 58 S. C. 186, 36 S. E. 541; Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572; Cave *v.* Home Ins. Co., 57 S. C. 347, 35 S. E. 577.

Texas.— Couch *v.* Home Protective F. Ins. Co., 32 Tex. Civ. App. 44, 73 S. W. 1077.

Wisconsin.— McFetridge *v.* Phenix Ins. Co., 84 Wis. 200, 54 N. W. 326.

See 28 Cent. Dig. tit. "Insurance," §§ 1735 *et seq.*, 1761.

The question whether the keeping of certain articles under the circumstances constitutes a violation of the terms of the policy is for the jury.

Iowa.— Garretson *v.* Merchants', etc., Ins. Co., 92 Iowa 293, 60 N. W. 540.

North Carolina.— Willis *v.* Germania, etc., F. Ins. Companies, 79 N. C. 285.

Pennsylvania.— Fire Assoc. *v.* Gilmer, 3 Walk. 234.

Tennessee.— People's Ins. Co. *v.* Kuhn, 12 Heisk. 515.

Vermont.— Carrigan *v.* Lycoming F. Ins. Co., 53 Vt. 418, 38 Am. Rep. 687.

See 28 Cent. Dig. tit. "Insurance," § 1735 *et seq.*, 1760.

Taking case from jury.— If there is no evidence of a disputed fact (Pope *v.* Glenn Falls Ins. Co., 136 Ala. 670, 34 So. 29; Scottish Union, etc., Ins. Co. *v.* Strain, 70 S. W. 274, 24 Ky. L. Rep. 958; Philadelphia Fire Assoc. *v.* Masterson, 25 Tex. Civ. App. 518, 61 S. W. 962), or if the evidence of a fact is not sufficient in law to justify a finding of the fact (Rankin *v.* Amazon Ins. Co., 89 Cal. 203, 26 Pac. 872, 23 Am. St. Rep. 460; Cronin *v.* Philadelphia Fire Assoc., 127 Mich. 612, 86 N. W. 1028) the court should take the case from the jury.

16. *Massachusetts.*— Kimball *v.* Howard F. Ins. Co., 8 Gray 33.

Missouri.— Baxter *v.* State Ins. Co., 65 Mo. App. 255; La Force *v.* Williams City F. Ins. Co., 43 Mo. App. 518; St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348. See, however, Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

New Jersey.— Hartshorne *v.* Agricultural Ins. Co., 50 N. J. L. 427, 14 Atl. 615.

New York.— Huntley *v.* Providence Washington Ins. Co., 77 N. Y. App. Div. 196, 79 N. Y. Suppl. 35. See also Stapleton *v.* Greenwich Ins. Co., 15 Misc. 642, 37 N. Y. Suppl. 347.

Ohio.— Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196.

Pennslyvania.— Ulysses Elgin Butter Co. *v.* Home Ins. Co., 20 Pa. Super. Ct. 320, 384.

Wisconsin.— Home Mut. Ins. Co. *v.* Roe, 71 Wis. 33, 36 N. W. 594.

See also Pope *v.* Glenn Falls Ins. Co., 136 Ala. 670, 34 So. 29; Alberts *v.* Insurance Co. of North America, 117 Ga. 854, 45 S. E. 282; Scottish Union, etc., Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180; Cloud County Bank *v.* German Ins. Co., 6 Kan. App. 219, 49 Pac. 688.

See 28 Cent. Dig. tit. "Insurance," §§ 1740, 1760.

17. Liverpool, etc., Ins. Co. *v.* Heckman, 64 Kan. 388, 67 Pac. 879; Poppitz *v.* German Ins. Co., 85 Minn. 118, 88 N. W. 438; Corbett *v.* Spring Garden Ins. Co., 167 N. Y. 596, 60 N. E. 1109 [*affirming* 40 N. Y. App. Div. 628, 58 N. Y. Suppl. 148].

18. Petty *v.* Des Moines Mut. F. Ins. Co., 111 Iowa 358, 82 N. W. 767; Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 536, 58 Atl. 671; McSparran *v.* Southern Mut. Ins. Co., 193 Pa. St. 184, 44 Atl. 317, holding that where plaintiff's testimony as to the value of the goods differs from the value as stated by him in the proof of loss, the truth of his explanation of the discrepancy is for the jury.

19. Birmingham F. Ins. Co. *v.* Pulver, 27 Ill. App. 17 [*affirmed* in 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598]; Brinley *v.* National Ins. Co., 11 Metc. (Mass.) 195 (holding that in estimating the loss where an insured building is totally destroyed by fire, there is no settled rule of deduction from the estimated cost of a new building for the difference between the value of the new and the old one analogous to the rule in marine

(v) *As to Falsity and Materiality of Representations or Concealment.* It is only where the facts are undisputed that the materiality and intentional falsity of the representations made by the insured in procuring the policy can be passed on by the court;[20] usually such questions are for the jury.[21] So the materiality and fraudulent character of an alleged concealment of facts are for the jury.[22]

(vi) *As to Fraud and False Swearing.* While it may be for the court to pass upon the question whether false statements are as to a material matter,[23] yet as fraud or false swearing which will avoid the policy under usual provisions must be wilful and with intent to defraud, the issue raised by such a defense is always one for the jury.[24] It is not for the court to say whether fraud is to be

insurance, but the jury are to decide what sum will be an indemnity to the assured); Marx *v.* Pennsylvania F. Ins. Co., 32 Misc. (N. Y.) 637, 66 N. Y. Suppl. 481.

If, however, it is conceded that the loss was greater than the amount for which the property was insured, it is not error to direct a verdict for plaintiff. Ohage *v.* Union Ins. Co., 82 Minn. 426, 85 N. W. 212.

20. *Connecticut.*— Bennett *v.* Agricultural Ins. Co., 51 Conn. 504.

Kentucky.— Springfield F. & M. Ins. Co. *v.* Phillips, 16 Ky. L. Rep. 352.

Michigan.— North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638.

Wisconsin.— Ryan *v.* Springfield F. & M. Ins. Co., 46 Wis. 671, 1 N. W. 426. See also Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641.

United States.— Fireman's Fund Ins. Co. *v.* McGreevy, 118 Fed. 415, 55 C. C. A. 543.

See 28 Cent. Dig. tit. "Insurance," §§ 1735, 1758.

21. *Colorado.*— State Ins. Co. *v.* Du Bois, 7 Colo. App. 214, 44 Pac. 756.

Iowa.— Goldstein *v.* St. Paul F. & M. Ins. Co., 124 Iowa 143, 99 N. W. 696; Garner *v.* Mutual F. Ins. Co., (1901) 86 N. W. 289; Schaeffer *v.* Anchor Mut. F. Ins. Co., 113 Iowa 652, 85 N. W. 985; Petty *v.* Des Moines Mut. F. Ins. Co., 111 Iowa 358, 82 N. W. 767.

Louisiana.— Lyon *v.* Commercial Ins. Co., 2 Rob. 266; Hodgson *v.* Mississippi Ins. Co., 2 La. 341.

Maine.—Sweat *v.* Piscataquis Mut. Ins. Co., 79 Me. 109, 8 Atl. 457; Thayer *v.* Providence Washington Ins. Co., 70 Me. 531; Bellatty *v.* Thomaston Mut. F. Ins. Co., 61 Me. 414; Garcelon *v.* Hampden F. Ins. Co., 50 Me. 580.

Maryland.— Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Franklin F. Ins. Co. *v.* Coates, 14 Md. 285.

Massachusetts.— Elliott *v.* Hamilton Mut. Ins. Co., 13 Gray 139; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

Missouri.— Schroeder *v.* Stock, etc., Ins. Co., 46 Mo. 174; Tesson *v.* Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Rosenheim *v.* America Ins. Co., 33 Mo. 230; Dolan *v.* Missouri Town Mut. F. Ins. Co., 88 Mo. App. 666.

New Hampshire.— Clark *v.* Union Mut. F. Ins. Co., 40 N. H. 333, 77 Am. Dec. 721; Boardman *v.* New Hampshire Mut. F. Ins. Co., 20 N. H. 551.

New York.— Le Roy *v.* Market F. Ins. Co., 39 N. Y. 90; Gates *v.* Madison County Mut. Ins. Co., 2 N. Y. 43; Masters *v.* Madison County Mut. Ins. Co., 11 Barb. 624; Farmers' Ins., etc., Co. *v.* Snyder, 16 Wend. 481, 30 Am. Dec. 118; New York Firemen Ins. Co. *v.* Walden, 12 Johns. 513, 7 Am. Dec. 340; Mackay *v.* Rhinelander, 1 Johns. Cas. 408.

Ohio.— Hartford Protection Ins. Co. *v.* Harmer, 2 Ohio St. 452, 59 Am. Dec. 684.

Pennsylvania.— Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961; Cumberland Valley Mut. Protection Co. *v.* Mitchell, 48 Pa. St. 374.

Vermont.— Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 37 Atl. 255.

Wisconsin.— Keeler *v.* Niagara F. Ins. Co., 16 Wis. 523, 84 Am. Dec. 714.

United States.— Maryland Ins. Co. *v.* Ruden, 6 Cranch 338, 3 L. ed. 242; Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 3 L. ed. 222; Pelzer Mfg. Co. *v.* St. Paul F. & M. Ins. Co., 41 Fed. 271; Hardman *v.* Firemen's Ins. Co., 20 Fed. 594; Mulville *v.* Adams, 19 Fed. 887; Williams *v.* Buffalo German Ins. Co., 17 Fed. 63.

See 28 Cent. Dig. tit. "Insurance," §§ 1737, 1758.

22. *Louisiana.*— Lyon *v.* Commercial Ins. Co., 2 Rob. 266.

Massachusetts.— Houghton *v.* Manufacturers' Mut. F. Ins. Co., 8 Metc. 114, 41 Am. Dec. 489.

Missouri.— Boggs *v.* America Ins. Co., 30 Mo. 63.

New York.— Sexton *v.* Montgomery County Mut. Ins. Co., 9 Barb. 191; Tyler *v.* Ætna F. Ins. Co., 12 Wend. 507.

Pennsylvania.— Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961.

Vermont.— Mascott *v.* First Nat. F. Ins. Co., 69 Vt. 116, 37 Atl. 255.

United States.— Fireman's Fund Ins. Co. *v.* McGreevy, 118 Fed. 415, 55 C. C. A. 543.

See 28 Cent. Dig. tit. "Insurance," §§ 1737, 1758.

23. Orient Ins. Co. *v.* Weaver, 22 Ill. App. 122.

24. *Iowa.*— Garner *v.* Mutual F. Ins. Co., (1901) 86 N. W. 289; Petty *v.* Des Moines Mut. F. Ins. Co., 111 Iowa 358, 82 N. W. 767.

Mississippi.— Phœnix Ins. Co. *v.* Summerfield, 70 Miss. 827, 13 So. 253.

inferred, for instance, from excessive overvaluation of the property in the proofs of loss;[25] or whether removal of *débris* after the fire was for the purpose of destroying evidence.[26]

(VII) *As to Identification of Property Insured.* Whether or not the property destroyed was the property covered by the policy is a question of fact for the jury where its determination depends on other evidence than the policy alone.[27]

(VIII) *As to Incendiarism.* The defense that plaintiff feloniously caused the fire raises a question of fact for the jury.[28]

(IX) *As to Increase of Hazard.* If the policy specifies certain acts as constituting an increase of hazard or risk, such as to avoid the policy, and the facts are not in dispute there is no question for the jury;[29] but generally the question whether there has been an increase of the hazard in violation of a provision that such increase avoids the policy is for the jury.[30]

(X) *As to Proofs of Loss.* It is for the court rather than the jury to

New York.— Dolan *v.* Ætna Ins. Co., 22 Hun 396.

Wisconsin.— Beyer *v.* St. Paul F. &. M. Ins. Co., 112 Wis. 138, 88 N. W. 57.

United States.— Republic F. Ins. Co. *v.* Weide, 14 Wall. 375, 20 L. ed. 894; Oshkosh Packing, etc., Co. *v.* Mercantile Ins. Co., 31 Fed. 200.

See 28 Cent. Dig. tit. "Insurance," §§ 1740, 1760.

25. *California.*— Helbing *v.* Svea Ins. Co., 54 Cal. 156, 35 Am. Rep. 72.

Iowa.— See Goldstein *v.* St. Paul F. & M. Ins. Co., 124 Iowa 143, 99 N. W. 696.

Kentucky.— Ætna Ins. Co. *v.* Strickle, 3 Ky. L. Rep. 535.

Louisiana.— Israel *v.* Teutonia Ins. Co., 28 La. Ann. 689.

Maine.— Williams *v.* Phœnix F. Ins. Co., 61 Me. 67.

Missouri.— Schulter *v.* Merchants Mut. Ins. Co., 62 Mo. 236.

See 28 Cent. Dig. tit. "Insurance," §§ 1740, 1760.

Explanation of discrepancy between witness' testimony and his statement of value in the proofs of loss should be submitted to the jury as to its truthfulness. McSparran *v.* Southern Mut. Ins. Co., 193 Pa. St. 184, 44 Atl. 317.

26. Rickeman *v.* Williamsburg City F. Ins. Co., 120 Wis. 655, 98 N. W. 960.

27. Leftwich *v.* Royal Ins. Co., 91 Md. 596, 46 Atl. 1010; Augusta Ins., etc., Co. *v.* Abbott, 12 Md. 348; Gustin *v.* Concordia F. Ins. Co., 90 Mo. App. 373.

Whether certain property comes within the description in the policy is for the jury.

Illinois.— Home Ins. Co. *v.* Favorite, 46 Ill. 263.

Massachusetts.— Daniels *v.* Hudson River F. Ins. Co., 12 Cush. 416, 59 Am. Dec. 192.

Michigan.— Niagara F. Ins. Co. *v.* De Graff, 12 Mich. 124.

Montana.— Holter Lumber Co. *v.* Fireman's Fund Ins. Co., 18 Mont. 282, 45 Pac. 207.

Pennsylvania.— Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108; Beatty *v.* Lycoming County Ins. Co., 52 Pa. St. 456.

South Carolina.—Neve *v.* Columbia Ins. Co., 2 McMull. 220.

Texas.—Connecticut F. Ins. Co. *v.* Hilbrant, (Civ. App. 1903) 73 S. W. 558.

United States.—Bassell *v.* American F. Ins. Co., 2 Fed. Cas. No. 1,094, 2 Hughes 531.

See 28 Cent. Dig. tit. "Insurance," § 1737.

28. Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. 671. However, a suggestion by an assured person who is called on to account for the fire by which the insured property was destroyed that it might have originated in some oiled shavings in a lumber room in the cellar is no evidence to go to the jury that the assured set fire to the property. Farmers' Mut. F. Ins. Co. *v.* Gargett, 42 Mich. 289, 3 N. W. 954.

29. *Illinois.*— Schuermann *v.* Dwelling-House Ins. Co., 161 Ill. 437, 43 N. E. 1093, 52 Am. St. Rep. 377.

Iowa.— Russell *v.* Cedar Rapids Ins. Co., 78 Iowa 216, 42 N. W. 654, 4 L. R. A. 538.

Kentucky.— Northwestern Nat. Ins. Co. *v.* Davis, 9 Ky. L. Rep. 933.

Michigan.— North American F. Ins. Co. *v.* Throop, 22 Mich. 146, 7 Am. Rep. 638.

Minnesota.— Taylor *v.* Security Mut. F. Ins. Co., 88 Minn. 231, 92 N. W. 952.

Texas.— Galveston Ins. Co. *v.* Long, 51 Tex. 89.

See 28 Cent. Dig. tit. "Insurance," §§ 1741, 1760.

30. *Connecticut.*— Lockwood *v.* Middlesex Mut. Assur. Co., 47 Conn. 553.

Delaware.— Lattomus *v.* Farmers' Mut. F. Ins. Co., 3 Houst. 404.

Georgia.— Adair *v.* Southern Mut. Ins. Co., 107 Ga. 297, 33 S. E. 78, 73 Am. St. Rep. 122, 45 L. R. A. 204.

Illinois.— Orient Ins. Co. *v.* McKnight, 197 Ill. 190, 64 N. E. 339 [*affirming* 96 Ill. App. 525]; German American Ins. Co. *v.* Steiger, 109 Ill. 254; Crete Farmers' Mut. Tp. Ins. Co. *v.* Miller, 70 Ill. App. 599; North British, etc., Ins. Co. *v.* Steiger, 13 Ill. App. 482.

Iowa.— Warshawky *v.* Anchor Mut. F. Ins. Co., 98 Iowa 221, 67 N. W. 237; Collins *v.* Merchants', etc., Mut. Ins. Co., 95 Iowa 540, 64 N. W. 602, 58 Am. St. Rep. 438; Crittenden *v.* Springfield F. & M. Ins. Co., 85 Iowa 652, 52 N. W. 548, 39 Am. St. Rep. 321; Russell *v.* Cedar Rapids Ins. Co., 71 Iowa 69, 32 N. W. 95.

determine the legal effect and the sufficiency of proofs of loss to comply with the requirements of the policy;[31] but if their sufficiency in the particular case depends upon the facts of the case the question is for the jury.[32]

Kentucky.— Western Assur. Co. *v.* Ray, 105 Ky. 523, 49 S. W. 326, 20 Ky. L. Rep. 1360.

Maine.— Thayer *v.* Providence Washington Ins. Co., 70 Me. 531; Moore *v.* Protection Ins. Co., 29 Me. 97, 48 Am. Dec. 514.

Maryland.— Farmers' Mut. F. Ins. Co. *v.* Schaeffer, 82 Md. 377, 33 Atl. 728; Schaeffer *v.* Farmers' Mut. F. Ins. Co., 80 Md. 563, 31 Atl. 317, 45 Am. St. Rep. 361; Jolly *v.* Baltimore Equitable Soc., 1 Harr. & G. 295, 18 Am. Dec. 288.

Massachusetts.— Parker *v.* Bridgeport Ins. Co., 10 Gray 302; Gamwell *v.* Merchants', etc., Mut. F. Ins. Co., 12 Cush. 167; Curry *v.* Commonwealth Ins. Co., 10 Pick. 535, 20 Am. Dec. 547. See also White *v.* Springfield Mut. F. Assur. Co., 8 Gray 566.

Michigan.— Smith *v.* German Ins. Co., 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368.

Minnesota.—Taylor *v.* Security Mut. F. Ins. Co., 88 Minn. 231, 92 N. W. 952.

Missouri.— Griswold *v.* American Cent. Ins. Co., 70 Mo. 654 [*affirming* 1 Mo. App. 97]; Ritter *v.* Sun Mut. Ins. Co., 40 Mo. 40; Anthony *v.* German American Ins. Co., 48 Mo. App. 65.

New Hampshire.— Janvrin *v.* Rockingham Farmers' Mut. F. Ins. Co., 70 N. H. 35, 46 Atl. 686.

New Jersey.— Schenck *v.* Mercer County Mut. Ins. Co., 24 N. J. L. 447.

New York.— Walradt *v.* Phœnix Ins. Co., 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752 [*affirming* 64 Hun 129, 19 N. Y. Suppl. 293]; Cornish *v.* Farm Buildings F. Ins. Co., 74 N. Y. 295 [*affirming* 10 Hun 466]; Williams *v.* People's F. Ins. Co., 57 N. Y. 274; Jones *v.* Fireman's Fund Ins. Co., 51 N. Y. 318; Smith *v.* Mechanics', etc., F. Ins. Co., 32 N. Y. 399; Eager *v.* Fireman's Fund Ins. Co., 71 Hun 352, 25 N. Y. Suppl. 35 [*affirmed* in 148 N. Y. 726, 42 N. E. 722].

Ohio.— Eureka F. & M. Ins. Co. *v.* Baldwin, 62 Ohio St. 368, 57 N. E. 57; Harris *v.* Protection Ins. Co., Wright 548.

Pennsylvania.— Franklin F. Ins. Co. *v.* Gruver, 100 Pa. St. 266; Farmers' Mut. F. Ins. Co. *v.* Moyer, 97 Pa. St. 441; Perry County Ins. Co. *v.* Stewart, 19 Pa. St. 45; Manheim Mut. F. Ins. Co. *v.* Thompson, 1 Pa. Cas. 18, 1 Atl. 370; Fire Assoc. *v.* Gilmer, 3 Walk. 234.

South Dakota.— Minneapolis Threshing Mach. Co. *v.* Darnall, 13 S. D. 279, 83 N. W. 266; Peet *v.* Dakota F. & M. Ins. Co., 1 S. D. 462, 47 N W. 532.

Wisconsin.— Pool *v.* Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919.

United States.— Phœnix Assur. Co. *v.* Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144; Albion Lead Works *v.* Williamsburg City F. Ins. Co., 2 Fed. 479.

See 28 Cent. Dig. tit. "Insurance," §§ 1741, 1760.

Plaintiff's knowledge or control of the acts constituting increased hazard, where the provision in the policy is thus qualified, is a question for the jury on conflicting evidence. Northern Assur. Co. *v.* Crawford, 24 Tex. Civ. App. 574, 59 S. W. 916.

31. *Kansas.*— Burlington Ins. Co. *v.* Ross, 48 Kan. 228, 29 Pac. 469; Des Moines State Ins. Co. *v.* Belford, 2 Kan. App. 280, 42 Pac. 409.

Maryland.— Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Missouri.— Thomas *v.* Burlington Ins. Co., 47 Mo. App. 169.

Pennsylvania.— Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. 671; Cummins *v.* German-American Ins. Co., 192 Pa. St. 359, 43 Atl. 1016 (both holding that proofs of loss cannot be received in evidence, nor read to the jury on an issue whether sufficient proofs have been furnished to warrant the institution of suit, that issue being for the court alone); Commonwealth Ins. Co. *v.* Sennett, 41 Pa. St. 161; Humboldt F. Ins. Co. *v.* Mears, 1 Pennyp. 513; Ulysses Elgin Butter Co. *v.* Home Ins. Co., 20 Pa. Super. Ct. 320.

Washington.— Hennessy *v.* Niagara F. Ins. Co., 8 Wash. 91, 35 Pac. 585, 40 Am. St. Rep. 892.

United States.— Gauche *v.* London, etc., L. Ins. Co., 10 Fed. 347, 4 Woods 102.

See 28 Cent. Dig. tit. "Insurance," §§ 1747, 1766.

32. People's F. Ins. Co. *v.* Pulver, 127 Ill. 246, 20 N. E. 18; Witherell *v.* Maine Ins. Co., 49 Me. 200; Franklin F. Ins. Co. *v.* Updegraff, 43 Pa. St. 350; Wilson *v.* Commercial Union Ins. Co., 15 S. D. 322, 89 N. W. 649.

Reasonable time.— It has been said that the question whether the proofs were furnished within a reasonable time is for the court. Mispelhorn *v.* Farmers' F. Ins. Co., 53 Md. 473; American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605. But if the reasonableness of the time depends upon the facts of the case it is for the jury. Fire Ins. Companies *v.* Felrath, 77 Ala. 194, 54 Am. Rep. 58; Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Insurance Co. of North America *v.* Brim, 111 Ind. 281, 12 N. E. 315; Fletcher *v.* German-American Ins. Co., 79 Minn. 337, 82 N. W. 647; O'Brien *v.* Phœnix Ins. Co., 76 N. Y. 459; Carey *v.* Farmers' Ins. Co., 27 Oreg. 146, 40 Pac. 91; American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. 605.

"Immediately" or "forthwith."— Where the requirement is that proofs be sent immediately (Davis Shoe Co. *v.* Kittanning Ins. Co., 138 Pa. St. 73, 20 Atl. 838, 21 Am. St. Rep. 904) or forthwith (Edwards *v.* Baltimore F. Ins. Co., 3 Gill (Md.) 176; Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 41 N. E. 658, 49 Am. St. Rep. 467; Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 3 N. E. 309, 53 Am. Rep. 202;

3. INSTRUCTIONS.[33] The general rules applicable to instructions in civil actions[34] of contract,[35] more particularly in actions on insurance policies in general,[36] are ordinarily applicable in actions on policies of fire insurance.[37] Issues of fact must be submitted to the jury[38] by instructions which clearly and fully state and define them;[39] and the parties are entitled to instructions correctly stating the

Kirk *v.* Ohio Valley Ins. Co., 8 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200; Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374; Brown *v.* Mechanics', etc., Ins. Co., 4 Fed. Cas. No. 2,019. *Compare* Cook *v.* North British, etc., Ins. Co., 181 Mass. 101, 62 N. E. 1049), it has been held that the question is for the jury under the facts.

The question of waiver of proofs of loss is for the jury (Okey *v.* Des Moines State Ins. Co., 29 Mo. App. 105; Southern Bldg., etc., Assoc. *v.* Insurance Co., 23 Pa. Super. Ct. 88; Rice *v.* Palatine Ins. Co., 17 Pa. Super. Ct. 261), unless the evidence is undisputed (Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Pretzfelder *v.* Merchants' Ins. Co., 123 N. C. 164, 31 S. E. 470, 44 L. R. A. 424).

33. **Special interrogatories** see *infra*, XXI, H, 4.

34. See, generally, TRIAL.

35. See CONTRACTS, 9 Cyc. 778 *et seq.*

36. See, generally, INSURANCE.

37. See cases cited *infra*, note 38 *et seq.*

38. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399; Williamson *v.* New Orleans Ins. Assoc., 84 Ala. 106, 4 So. 36.

Arkansas.— Phœnix Ins. Co. *v.* Minner, 64 Ark. 590, 44 S. W. 75.

Illinois.— State Ins. Co. *v.* Manchester F. Assur. Co., 77 Ill. App. 673.

Kentucky.— Brumfield *v.* Union Ins. Co., 87 Ky. 122, 7 S. W. 893, 10 Ky. L. Rep. 13.

Michigan.— Michigan Pipe Co. *v.* Michigan F. & M. Ins. Co., 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

Missouri.—Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. 27; McCartney *v.* State Ins. Co., 33 Mo. App. 652.

New York.— Karelsen *v.* Sun Fire Office, 122 N. Y. 545, 25 N. E. 921 [*affirming* 1 N. Y. Suppl. 387]; Underwood *v.* Farmers' Joint Stock Ins. Co., 57 N. Y. 500.

South Dakota.— Wilson *v.* Commercial Union Ins. Co., 15 S. D. 322, 89 N. W. 649.

Texas.— Texas Banking, etc., Co. *v.* Hutchins, 53 Tex. 61, 37 Am. Rep. 750.

Wisconsin.— F. Dohmen Co. *v.* Niagara F. Ins. Co., 96 Minn. 38, 71 N. W. 69.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.* And see *supra*, XXI, H, 2.

See, however, London, etc., F. Ins. Co. *v.* Crunk, 91 Tenn. 376, 23 S. W. 140; Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176, in both of which cases the instructions were held not objectionable as taking the issue from the jury.

Assuming facts in dispute.— An instruction which assumes the existence or non-existence of a fact in dispute is erroneous. Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67; Kingman *v.* Lancashire Ins. Co., 54 S. C. 599, 32 S. E. 762; People's Ins. Co. *v.* Kuhn, 12 Heisk. (Tenn.) 515. Instruction held not to be objectionable in this respect see Moriarty *v.* U. S. Fire Ins. Co., 19 Tex. Civ. App. 669, 49 S. W. 132. Where the pleadings, including the answer, and the evidence, proceed on the theory that plaintiff is the owner of the insured property, the court is justified in assuming such ownership in its instructions. Price *v.* Patrons', etc., Home Protection Co., 77 Mo. App. 236.

39. Baltimore County Mut. F. Ins. Co. *v.* Deale, 18 Md. 26, 79 Am. Dec. 673; Sun Mut. Ins. Co. *v.* Holland, 2 Tex. App. Civ. Cas. § 443. See, however, Agnews *v.* Farmers' Mut. Protective F. Ins. Co., 95 Wis. 445, 70 N. W. 554; Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176, in both of which cases the instructions were held not objectionable in this respect.

Ignoring matters in dispute.— An instruction which in submitting the case to the jury ignores material matters in dispute is error.

Illinois.— German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113.

Indiana.— Indiana Ins. Co. *v.* Pringle, 21 Ind. App. 559, 52 N. E. 821.

Indian Territory.— German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

Iowa.— Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128.

Kentucky.— Boatman's F. & M. Ins. Co. *v.* James, 10 Ky. L. Rep. 816.

Maryland.— Transatlantic F. Ins. Co. *v.* Dorsey, 56 Md. 70, 40 Am. Rep. 403; Franklin F. Ins. Co. *v.* Coates, 14 Md. 285.

Missouri.— Ormsby *v.* Laclede Farmers' Mut. F., etc., Ins. Co., 98 Mo. App. 371, 72 S. W. 139; Roberts *v.* Insurance Co. of America, 94 Mo. App. 142, 72 S. W. 144; White *v.* Merchants' Ins. Co., 93 Mo. App. 282.

Nebraska.— Agricultural Ins. Co. *v.* Morrow, 43 Nebr. 788, 62 N. W. 212.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

Misleading instructions.—Instructions which are misleading as applied to the facts of the case are ground for reversal.

Colorado.— Strauss *v.* Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822.

Georgia.— Phenix Ins. Co. *v.* Hart, 112 Ga. 765, 38 S. E. 67.

Illinois.— Peoria M. & F. Ins. Co. *v.* Anapow, 45 Ill. 86; Western Assur. Co. *v.* Weaver, 23 Ill. App. 95.

Missouri.— Bowne *v.* Hartford F. Ins. Co., 46 Mo. App. 473; Ampleman *v.* North British, etc., Ins. Co., 35 Mo. App. 317; St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348.

Texas.— Moriarty *v.* U. S. Fire Ins. Co., 19 Tex. Civ. App. 669, 49 S. W. 132.

law of the case.[40] Following the rule the instructions must be applicable to the

Virginia.— Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

See, however, Eiseman *v.* Hawkeye Ins. Co., 74 Iowa 11, 36 N. W. 780; Georgia Home Ins. Co. *v.* Brady, (Tex. Civ. App. 1897) 41 S. W. 513, where the instructions were held unobjectionable in this respect.

Refined distinctions.— An instruction which draws a distinction between an agent's knowledge "in his individual capacity" of the ownership of property insured by him and such knowledge in his capacity as agent is properly refused, such distinction being too refined for the comprehension of the average juryman. Deitz *v.* Providence Washington Ins. Co., 33 W. Va. 526, 11 S. E. 50, 25 Am. St. Rep. 908.

Undue emphasis.— Where insurer claims that insured caused the fire an instruction using insured's name to illustrate the meaning of "direct evidence" is not so unwarrantable as to mislead the jury by attracting undue attention to insured's alleged criminality. Portland First Nat. Bank *v.* Philadelphia Fire Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8.

40. *District of Columbia.*— Mitchell *v.* Potomac Ins. Co., 16 App. Cas. 241.

Georgia.— Scottish Union, etc., Ins. Co. *v.* Stubbs, 98 Ga. 754, 27 S. E. 180.

Illinois.— Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747, holding that it is error to refuse to instruct whether certain representations in an application for insurance constitute a warranty.

Iowa.— Slater *v.* Capital Ins. Co., 89 Iowa 628, 57 N. W. 422, 23 L. R. A. 181.

Massachusetts.— Haley *v.* Dorchester Mut. F. Ins. Co., 12 Gray 545.

New Hampshire.— Huckins *v.* People's Mut. F. Ins. Co., 31 N. H. 238.

North Carolina.— Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057.

South Carolina.— Montgomery *v.* Delaware Ins. Co., 55 S. C. 1, 32 S. E. 723.

United States.— Phœnix Assur. Co. *v.* Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

Instructions as to amount of recovery see East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713; Hibernia Ins. Co. *v.* Starr, (Tex. Sup. 1890) 13 S. W. 1017. Where the court let in proof of the loss of property not included in the contract, an instruction that plaintiff could not recover anything for the loss thereof was proper. Manchester F. Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. 759. There is no inconsistency in giving an instruction stating what might be recovered if facts be found showing a valid award, and one stating what might be recovered if the facts show that there was no valid award; the evidence being conflicting as to validity of award. Caledonian F. Ins. Co. *v.* Traub, 86 Md. 86, 37 Atl. 782. An instruction that insured must prove that the property covered by the policy was destroyed is erroneous as excluding damages to goods not destroyed. Boston Mar. Ins. Co. *v.* Scales, 101 Tenn. 628, 49 S. W. 743. It is not error to instruct the jury to assess damages according to the "fair cash value" (Birmingham F. Ins. Co. *v.* Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. Rep. 598) or the "fair market value" (Manchester F. Ins. Co. *v.* Simmons, 12 Tex. Civ. App. 607, 35 S. W. 722) of the property destroyed, although the policy requires the estimate to be according to "the actual cash value." So an instruction that if the insured items were each "worth" the amount of the insurance thereon the verdict should be so and so is equivalent to stating that if the jury believe the "cash value" of the property at the time of the loss equaled the amount of the insurance their verdict should be as directed. Sappington *v.* St. Joseph Town Mut. F. Ins. Co., 77 Mo. App. 270.

Instructions as to burden of proof.— On an issue of arson a charge that "fraud is never presumed but must be clearly proved" is not error. Bannon *v.* Insurance Co. of North America, 115 Wis. 250, 91 N. W. 666. But an instruction that when an insurance company relies on a forfeiture as a defense it is held to strict proof, and no presumption will be indulged in to support the forfeiture, but the insured is entitled to the benefit of all reasonable presumption in his favor, is inaccurate; for while forfeitures as defenses to suits on policies are not favored in law, there is no presumption of fact either in favor of or against them. Denver Tp. Mut. F. Ins. Co. *v.* Resor, 95 Ill. App. 197. Where an insurer who is sued as trustee of the insured after a loss pleads that the loss was occasioned through the design or gross carelessness of the insured, and the insurer's counsel admits that the burden of proof upon him is the same as in criminal cases, and that there is no different rule as to the strength of evidence necessary to establish the gross carelessness from that necessary to establish the alleged design, and the evidence introduced at the trial is not such as to require any difference, it is proper to instruct the jury that the "matter relied on in defense" must be proved beyond a reasonable doubt. Butman *v.* Hobbs, 35 Me. 227.

Instructions as to fraud and false swearing see Linscott *v.* Orient Ins. Co., 88 Me. 497, 34 Atl. 405, 51 Am. St. Rep. 435; Gerhauser *v.* North British, etc., Ins. Co., 7 Nev. 174; Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625]; Underwriters' Fire Assoc. *v.* Palmer, 32 Tex. Civ. App. 447, 74 S. W. 603.

Instructions as to increase of risk see Northern Assur. Co. *v.* Crawford, 24 Tex. Civ. App. 574, 59 S. W. 916; Dodge County Mut. Ins. Co. *v.* Rogers, 12 Wis. 337; Phœnix Assur. Co. *v.* Franklin Brass Co., 58 Fed. 166, 7 C. C. A. 144.

issues,[41] and to the facts which are admitted or which the evidence tends to prove.[42] The court must not invade the province of the jury in commenting on the evidence,[43]

Instructions as to negligence of insured see Southern Mut. Ins. Co. *v.* Hudson, 113 Ga. 434, 38 S. E. 964; Price *v.* Patrons', etc., Home Protection Co., 77 Mo. App. 236; Ellsworth *v.* Ætna Ins. Co., 89 N. Y. 186; Landes *v.* Safety Mut. F. Ins. Co., 190 Pa. St. 536, 42 Atl. 961.

Instructions as to ownership see the following cases:

California.— Benninger *v.* Phœnix Ins. Co., 57 Cal. 644.

Georgia.— Phenix Ins. Co. *v.* Searles, 100 Ga. 97, 27 S. E. 779.

Indian Territory.— German-American Ins. Co. *v.* Paul, 2 Indian Terr. 625, 53 S. W. 442.

Maryland.— Westchester F. Ins. Co. *v.* Weaver, 70 Md. 536, 17 Atl. 401, 18 Atl. 1034, 5 L. R. A. 478, holding that where the insured has warranted that he is the sole and unconditional owner of insured goods when in fact he holds them under a conditional contract of purchase, a request to charge that if the conditions of the purchase have not been complied with the assured cannot recover should he granted, although it describes him as lessee or bailee instead of conditional owner.

Texas.— East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

Instructions as to risks insured against see Mitchell *v.* Potomac Ins. Co., 16 App. Cas. (D. C.) 241; Renshaw *v.* Fireman's Ins. Co., 33 Mo. App. 394.

Instructions as to vacancy of premises see Cronin *v.* Philadelphia Fire Assoc., 119 Mich. 74, 77 N. W. 648; Commercial Union Assur. Co. *v.* Dunbar, 7 Tex. Civ. App. 418, 26 S. W. 628.

Instructions as to waiver.— An instruction as to the effect of waiver of proofs of loss should be accompanied by an instruction as to what acts or conduct are sufficient to constitute waiver. Pentz *v.* Pennsylvania F. Ins. Co., 92 Md. 444, 48 Atl. 139. In those jurisdictions where proof of waiver of conditions is proof of performance (see *supra*, page 924 note 45, cases cited at the end of the note), an instruction submitting an issue of performance need not mention the defense of waiver. Hooker *v.* Phœnix Ins. Co., 69 Mo. App. 141.

41. *Alabama.*— Georgia Home Ins. Co. *v.* Allen, 119 Ala. 436, 24 So. 399; Feibelman *v.* Manchester F. Assur. Co., 108 Ala. 180, 19 So. 540.

California.— Greiss *v.* State Invest., etc., Co., 98 Cal. 241, 33 Pac. 195.

Indiana.— Ft. Wayne Ins. Co. *v.* Irwin, 23 Ind. App. 53, 54 N. E. 817.

Iowa.— McCoy *v.* Iowa State Ins. Co., 107 Iowa 80, 77 N. W. 529; Eiseman *v.* Hawkeye Ins. Co., 74 Iowa 11, 36 N. W. 780.

Kansas.— Dwelling-House Ins. Co. *v.* Johnson, 47 Kan. 1, 27 Pac. 100.

Kentucky.— Continental Ins. Co. *v.* Coons, 14 Ky. L. Rep. 110.

New York.— Northam *v.* Dutchess County Mut. Ins. Co., 177 N. Y. 73, 69 N. E. 222 [*reversing* 79 N. Y. App. Div. 644, 80 N. Y. Suppl. 1144]; McCreauy *v.* Hartford F. Ins. Co., 61 N. Y. App. Div. 583, 70 N. Y. Suppl. 778.

Pennsylvania.— Davison *v.* London, etc., F. Ins. Co., 189 Pa. St. 132, 42 Atl. 2.

South Carolina.— Stickley *v.* Mobile Ins. Co., 37 S. C. 56, 16 S. E. 280, 838.

Texas.— East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713; Knoxville F. Ins. Co. *v.* Hird, 4 Tex. Civ. App. 82, 23 S. W. 393.

Virginia.— Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77.

United States.— Western Assur. Co. *v.* J. H. Mohlman Co., 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

42. *California.*— Shuggart *v.* Lycoming F. Ins. Co., 55 Cal. 408.

Colorado.— Strauss *v.* Phenix Ins. Co., 9 Colo. App. 386, 48 Pac. 822.

Illinois.— Niagara F. Ins. Co. *v.* Heenan, 181 Ill. 575, 54 N. E. 1052 [*affirming* 81 Ill. App. 678]; American Ins. Co. *v.* Crawford, 89 Ill. 62.

Iowa.— Harris *v.* Phœnix Ins. Co., 85 Iowa 238, 52 N. W. 128; Rogers *v.* Cedar Rapids Ins. Co., 72 Iowa 448, 34 N. W. 202; Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

Kansas.— Western Home Ins. Co. *v.* Thorpe, 40 Kan. 255, 19 Pac. 631.

Massachusetts.— Cook *v.* North British, etc., Ins. Co., 181 Mass. 101, 62 N. E. 1049.

Michigan.— Walter *v.* Mutual City, etc., F. Ins. Co., 120 Mich. 35, 78 N. W. 1011; Briggs *v.* Fireman's Fund Ins. Co., 65 Mich. 52, 31 N. W. 616.

Missouri.— Schulter *v.* American Cent. Ins. Co., 1 Mo. App. 285.

South Carolina.— Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655.

Texas.— German-American Ins. Co. *v.* Waters, 10 Tex. Civ. App. 363, 30 S. W. 576.

United States.— Shaw *v.* Scottish Commercial Ins. Co., 1 Fed. 761.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

See, however, Names *v.* Dwelling House Ins. Co., 95 Iowa 642, 64 N. W. 628; Southern Ins. Co. *v.* Estes, 106 Tenn. 472, 62 S. W. 149, 82 Am. St. Rep. 892, 52 L. R. A. 915, in both of which cases the instruction was held applicable to the evidence.

43. Rothschild *v.* American Cent. Ins. Co., 62 Mo. 356; Brownfield *v.* Phœnix Ins. Co., 35 Mo. App. 54. See also Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

Instructions held unobjectionable in this respect see Fowler *v.* Ætna F. Ins. Co., 7 Wend. (N. Y.) 270; Norris *v.* Hartford F. Ins. Co., 57 S. C. 358, 35 S. E. 572.

or misstate the evidence or its effect;[44] but it may instruct the jury by what rules they are governed in arriving at a verdict and give them proper cautions in regard thereto.[45] The instructions are to be construed as a whole, and the fact that one portion considered separately might be open to objection does not constitute error if the charge is correct in the entirety.[46] An instruction that covers the case generally is ordinarily sufficient in the absence of a request for further

Taking case from jury.— If there is no evidence or if the evidence is insufficient in law to justify the jury in finding a fact, the court may so instruct. Packham *v.* German F. Ins. Co., 91 Md. 515, 46 Atl. 1066, 80 Am. St. Rep. 461, 50 L. R. A. 828; Spring Garden Mut. Ins. Co. *v.* Evans, 9 Md. 1, 66 Am. Dec. 30. So it is not error to instruct on a special issue whether plaintiff was the owner of insured property, that if the jury believed the evidence they should answer in the affirmative, where plaintiff's possession under deeds duly executed and recorded was shown, and there is no evidence impeaching his title. Nelson *v.* Atlanta Home Ins. Co., 120 N. C. 302, 27 S. E. 38.

Where two witnesses contradict each other as to whether one of them had given notice to another, who was agent of defendant insurance company, of subsequent insurance, as required by the policy, it is not error to charge the jury that the one could not have sworn he gave the notice unless he recollected giving it, and that if he did not recollect, he had committed perjury. Carroll *v.* Charter Oak Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 166.

44. C. A. Smith Lumber Co. *v.* Central Manufacturers' Mut. Ins. Co., 68 Minn. 45, 70 N. W. 866; Worachek *v.* New Denmark Mut. Home F. Ins. Co., 102 Wis. 81, 78 N. W. 165.

Oral and written evidence.— Where the evidence on the question of a waiver by an insurance company of a condition of a policy requiring an appraisal of the amount of loss consisted partly of letters between the parties, such letters should be submitted to the jury with the other evidence, without instruction as to their legal effect standing alone. Davis *v.* Western Massachusetts Ins. Co., 8 R. I. 277.

45. Corson *v.* Iowa Mut. F. Ins. Assoc., 115 Iowa 485, 88 N. W. 1086 (holding that an instruction which in substance cautions the jury against going to extremes in finding the value of the property on the evidence is not improper); St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348 (holding that an instruction that the jury are not bound to adopt the opinion of any witness, but that it is for them to determine in the light of all the circumstances what weight should be given to any opinion, theory, or conclusion stated by any witness is correct); Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 108, 10 Ohio Cir. Dec. 225 (holding that it is not error for the judge to charge the jury that "the attorneys engaged in the trial of this case may call your attention to the evidence; they may present it in such a way as to best suit their respective sides; and they can comment upon the testimony, but they have no right to tell you what disputed point has been proven or disproven").

Instructions as to arson.— The court may instruct the jury on the defense of arson that they should take into consideration the serious nature of the charge. Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 97, 10 Ohio Cir. Dec. 225. *Contra*, Rothschild *v.* American Cent. Ins. Co., 62 Mo. 356. So instructing the jury to consider the improbability that one will commit such an act does not invade the province of the jury. Portland First Nat. Bank *v.* Commercial Assur. Co., 33 Oreg. 43, 52 Pac. 1050. And where insurer claims that insured caused the fire, instructions that there is no question whether a crime has been committed and that a verdict for insurer could not be used in a criminal prosecution of insured are not erroneous, if it is apparent that the court intended merely to caution the jury against allowing the criminal phase of the case to influence their verdict. Portland First Nat. Bank *v.* Philadelphia Fire Assoc., 33 Oreg. 172, 50 Pac. 568, 53 Pac. 8. Where defendant charged that the fire was intentionally caused by plaintiff, and, while bringing no direct evidence to that effect, showed various circumstances tending to prove it, it was error to refuse a charge that fraudulent acts are generally concealed, and the direct proofs rest wholly in the breasts of the guilty parties; that the usual proofs of such acts are the facts and circumstances surrounding the transaction, which, in order to establish fraud in any case, must be such as will convince an ordinarily prudent person and as are not susceptible of any reasonable explanation consistent with the honesty of the person charged. McWilliams *v.* Cascade F. & M. Ins. Co., 7 Wash. 48, 34 Pac. 140.

46. *Illinois.*— North British, etc., Ins. Co. *v.* Steiger, 124 Ill. 81, 16 N. E. 95 [*affirming* 26 Ill. App. 228]; Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747.

Iowa.— Huston *v.* State Ins. Co., 100 Iowa 402, 69 N. W. 674; Eiseman *v.* Hawkeye Ins. Co., 74 Iowa 11, 36 N. W. 780; Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605.

Kentucky.— German Ins. Co. *v.* Read, 13 S. W. 1080, 14 S. W. 595, 12 Ky. L. Rep. 371.

Mississippi.— See Phœnix Ins. Co. *v.* Summerfield, 70 Miss. 827, 13 So. 253.

Texas.— East Texas F. Ins. Co. *v.* Brown, 82 Tex. 631, 18 S. W. 713. See, nowever, Moriarty *v.* U. S. Fire Ins. Co., (Civ. App. 1898) 49 S. W. 132.

United States.— Bayly *v.* London, etc., Ins. Co., 2 Fed. Cas. No. 1,145.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

instructions in detail.[47] A proper request need not ordinarily be given in its exact language; it is sufficient if it is covered in substance by the instructions as given.[48] Errors in the instructions may be cured in the trial.[49]

4. VERDICT AND FINDINGS. The rules governing general[50] and special[51] ver-

47. Nelson *v.* Atlanta Home Ins. Co., 120 N. C. 302, 27 S. E. 38; Philadelphia Fire Assoc. *v.* McNerney, (Tex. Civ. App. 1900) 54 S. W. 1053; Moriarty *v.* U. S. Fire Ins. Co., (Tex. Civ. App. 1898) 49 S. W. 132. See also Huston *v.* State Ins. Co., 100 Iowa 402, 69 N. W. 674.

48. *Georgia.*— Georgia Home Ins. Co. *v.* Campbell, 102 Ga. 106, 29 S. E. 148.

Kentucky.— Transatlantic Ins. Co. *v.* Bamberger, 11 S. W. 595, 11 Ky. L. Rep. 101.

Massachusetts.— Jones Mfg. Co. *v.* Manufacturers' Mut. F. Ins. Co., 62 Mass. 82, 54 Am. Dec. 742.

Mississippi.— Moyers *v.* Columbus Banking, etc., Co., 64 Miss. 48, 8 So. 206.

New Hampshire.— Taylor *v.* Roger Williams Ins. Co., 51 N. H. 50.

Wisconsin.— Knopke *v.* Germantown Farmers' Mut. Ins. Co., 99 Wis. 289, 74 N. W. 795.

United States.— Bayly *v.* London, etc., Ins. Co., 2 Fed. Cas. No. 1,145.

See 28 Cent. Dig. tit. "Insurance," § 1771 *et seq.*

49. Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747; Eiseman *v.* Hawkeye Ins. Co., 74 Iowa 11, 36 N. W. 780; Gandy *v.* Orient Ins. Co., 52 S. C. 224, 29 S. E. 655, holding that an erroneous charge respecting the amount which plaintiff is entitled to recover is cured by a remittitur of the greatest amount which could have been given under the charge. See, however, Pioneer Mfg. Co. *v.* Phœnix Assur. Co., 106 N. C. 28, 10 S. E. 1057, where the error was held not to have been cured.

50. Germania F. Ins. Co. *v.* Boykin, 12 Wall. (U. S.) 433, 20 L. ed. 442, holding that where four companies join in one policy, agreeing to become liable for one fourth each of the amount insured, and all are made defendants in a suit on the policy, a verdict finding that defendants did assume in manner and form as in the declaration alleged and assessing the whole damage at the face of the policy is a good verdict.

51. See cases cited *infra*, this note.

Special findings must be consistent with the general verdict (American Cent. Ins. Co. *v.* Hathaway, 43 Kan. 399, 23 Pac. 428. For cases held unobjectionable in this respect see Phœnix Ins. Co. *v.* Rowe, 117 Ind. 202, 20 N. E. 122; Ohio Farmers' Ins. Co. *v.* Scowman, 16 Ind. App. 205, 44 N. E. 558, 940), and with each other (Stache *v.* St. Paul F. & M. Ins. Co., 49 Wis. 89, 5 N. W. 36, 35 Am. Rep. 772, holding, however, that the findings in question were not objectionable in this respect). Where the defense in an action on a policy is based on the application, both instruments will be resorted to in determining whether the general verdict is consistent with the special findings. Gilbert *v.* American Ins. Co., 30 Mich. 400.

Construction.—A special verdict which finds that defendant insured plaintiff against loss on her one and two story dwelling-house is a sufficient finding that she owned the property at the time it was insured. Insurance Co. of North America *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471. Where defendant set up breach of conditions of the policy by the use of a naphtha torch to remove old paint from the building previous to repainting it, a finding that the method used was "the method ordinarily pursued to remove paint on the outside of a building preparatory to scraping it off, to paint it," was not equivalent to an affirmative finding that the change of conditions occurred through the making of ordinary repairs in a reasonable and proper way. Rockland First Cong. Church *v.* Holyoke Mut. F. Ins. Co., 158 Mass. 475, 33 N. E. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587. In a verdict finding that the loss of plaintiff was three thousand and sixty-two dollars, of which the sum of four hundred and sixty-two dollars is the value of the store, and two thousand six hundred dollars the value of the stock on hand, the word "value" should be read as meaning the damage on account of the destruction of the store and goods. Wynne *v.* Liverpools, etc., Ins. Co., 71 N. C. 121. A finding that the goods destroyed were at the time of the fire worth a certain amount is equivalent to a finding that such amount was their actual cash value. German Ins. Co. *v.* Norris, 11 Tex. Civ. App. 250, 32 S. W. 727.

Necessity of findings on particular facts.— A judgment in favor of plaintiff, rendered on a special verdict which does not find that plaintiff was the owner at the time of the fire, will be reversed, but a finding that plaintiff was owner of the property when it was insured is sufficiently implied in a finding that defendant insured plaintiff against loss on the property. Insurance Co. of North America Co. *v.* Coombs, 19 Ind. App. 331, 49 N. E. 471. The failure to find that notice of loss under the policy of insurance declared upon was given within a reasonable time is not supplied by a finding that defendant received from plaintiff "proof of loss." German F. Ins. Co. *v.* Columbia Encaustic Tile Co., 11 Ind. App. 385, 39 N. E. 304. It is not necessary that a special verdict finding the facts should find the conditions and provisions of the policy, where such policy is set out in, and made part of, the complaint. Evans *v.* Queen Ins. Co., 5 Ind. App. 198, 31 N. E. 843. A special verdict that plaintiffs owned the lumber insured, that the quantity was greater in value than the insurance sought to be recovered, that the lumber was not piled three hundred feet from the mill, and that the fire was caused by a general forest conflagration, is defective for failure to state the terms of the policy, and that any lumber was destroyed by fire, and should be set aside. McCormick *v.* Royal Ins. Co., 163 Pa. St. 184,

dicts and findings by the court[52] in actions on fire-insurance policies are the same as those that apply in civil actions generally.[53]

I. New Trial. New trials of actions on fire-insurance policies are governed by the same rules that apply in civil actions generally.[54]

J. Judgment[55] **— 1. General Rules — a. In General.** If the policy stipulates that the loss shall be payable to a mortgagee of the insured premises, and he is a party plaintiff, judgment for the amount recovered should be awarded to him.[56] In a proper case judgment may be rendered for defendant notwithstanding a general verdict against it.[57]

b. Conformity to Pleadings, Evidence, and Verdict. Following the rules relating to judgments in general the judgment must conform to the pleadings[58]

29 Atl. 747. A special verdict must find all the material facts even if the evidence be undisputed. Bartow *v.* Northern Assur. Co., 10 S. D. 132, 72 N. W. 86. Where there is evidence *pro* and *con* on the issue whether insurer waived a provision avoiding the policy in suit, the special verdict should state whether the provision was waived. McFetridge *v.* American F. Ins. Co., 90 Wis. 138, 62 N. W. 938.

Propriety of special interrogatories.—Where fraudulent overvaluation of plaintiff's stock was claimed as a defense to an action on a policy of fire insurance, and it appeared that the stock had been shipped from one town to another on removal by plaintiff, a special interrogatory which sought to have the jury find whether all the goods claimed to have been destroyed by plaintiff were placed in his stock at the place to which he removed is not objectionable as being equivalent to a general finding for plaintiff or defendant on the issue; and interrogatories having no direct bearing on the facts in issue should not be submitted to the jury. Goldstein *v.* St. Paul F. & M. Ins. Co., 124 Iowa 143, 99 N. W. 696. Since a special verdict should find ultimate facts special interrogatories calling for the method or elements considered in reaching such facts are improper. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180. Where the account-books of insured are admitted without objection to show the amount and value of the goods at the time of the fire, and evidence is also admitted to explain alterations in the account, but no request is made by the defendant to exclude the books as evidence on account of presumptions raised against them by the fact of such alterations, it is not error to submit the question, "Have the account books of plaintiff been falsely or fraudulently altered?" Kelly *v.* Indemnity F. Ins. Co., 38 N. Y. 322. Special interrogatories relating to matters not in dispute should not be submitted. Runkle *v.* Hartford Ins. Co., 99 Iowa 414, 68 N. W. 712; Grubbs *v.* North Carolina Home Ins. Co., 108 N. C. 172, 13 S. E. 236, 22 Am. St. Rep. 62.

Setting aside findings.— If the evidence of the value of the goods destroyed is conflicting, the trial court is not justified in setting aside the jury's findings of value, and awarding plaintiff the full amount of the policy. Thorne *v.* Ætna Ins. Co., 102 Wis. 593, 78 N. W. 920.

52. Hegard *v.* California Ins. Co., (Cal. 1886) 11 Pac. 594 (holding that where a policy provides that in no case shall the recovery be greater than the actual damage or cash value of the property, a finding that the loss sustained on account of the destruction of a building by fire was a certain sum, the amount insured for, is sufficient, and the court need not state the evidential fact that the cash value of the property when destroyed was a certain sum); Milwaukee F. Ins. Co. *v.* Todd, 32 Ind. App. 214, 67 N. E. 697 (holding that the court should state in its special finding that insured owned the property at the time of loss, and the absence of such a statement in the special finding is to be treated as indicating that the court did not find such to be the fact).

53. See, generally, Trial. See also Insurance.

54. Bebee *v.* Hartford County Mut. F. Ins. Co., 25 Conn. 51, 65 Am. Dec. 553; Nudd *v.* Home Ins. Co., 25 Minn. 100. See, generally, New Trial. See also Insurance.

55. See, generally, Judgments. See also Insurance.

56. Fred Miller Brewing Co. *v.* Capital Ins. Co., 111 Iowa 590, 82 N. W. 1023, 82 Am. St. Rep. 529.

57. Gross *v.* St. Paul F. & M. Ins. Co., 22 Fed. 74, so holding where a policy provides for the examination of insured under oath touching his loss, and the jury finds in answer to special questions that insured has refused to submit to examination on request, and plaintiff has not moved to compel defendant to elect whether it will rely on such defense or on that of loss by the wrongful act of insured, which defendant has also pleaded.

58. See, generally, Judgments. See also Insurance.

Judgment on award in action on policy.— In code practice judgment may be rendered against defendant on an award where plaintiff seeks to set aside the award and recover on the policy and fails as to the former relief. Maher *v.* Home Ins. Co., 75 N. Y. App. Div. 226, 78 N. Y. Suppl. 44.

Judgment on policy sought to be reformed. — Under a prayer for general relief plaintiff may recover the amount of the policy as written, although his petition sought a reformation of the policy, which was denied. Wagner *v.* Westchester F. Ins. Co., 92 Tex. 549, 50 S. W. 569. See also State Trust Co.

and the evidence.[59] And similarly the judgment, to be valid and regular, must conform to the verdict or findings.[60]

c. Amount of Recovery.[61] In case of a total loss the amount of the recovery is the amount of the policy,[62] less any depreciation in value from the date of the policy to the time of the loss,[63] in the absence of other provisions to the contrary.[64] In the case of a partial loss, in the absence of different provisions in the policy, the measure of recovery is the difference between the value of the property whole and its value as damaged within the amount of the policy.[65]

d. Motion in Arrest. The objection that the action was prematurely brought may be taken by motion in arrest of judgment.[66]

2. By Default.[67] The propriety of entering a judgment by default in an

v. Scottish Union, etc., Ins. Co., 119 Ga. 672, 46 S. E. 855.

Legal or equitable cause of action.— In jurisdictions where legal and equitable causes of action may be joined plaintiff may have judgment on the former, although he fails on the latter. State Trust Co. *v.* Scottish Union, etc., Ins. Co., 119 Ga. 672, 46 S. E. 855.

Suing on one theory and recovering on another.— Where plaintiff sought to recover on a fire policy as assignee, and alleged performance of the conditions precedent by the assignor, and the jury found that such conditions had not been performed by the assignor, but found facts which would warrant a recovery by plaintiff as subrogated to the rights of a mortgagee, judgment for plaintiff was erroneous. Hanover F. Ins. Co. *v.* Johnson, 26 Ind. App. 122, 57 N. E. 277.

Judgment for partial loss under declaration for total loss see *supra*, XXI, F, 8, b, (I).

59. Hopkins *v.* Hawkeye Ins. Co., 57 Iowa 203, 10 N. W. 605, 42 Am. Rep. 41, holding that although, in an action on an insurance policy, the sole defense is the non-payment of the premium notes, nevertheless plaintiff cannot recover more than the application, which was made a part of his own case, showed he was entitled to after making the reduction therein stipulated on account of an encumbrance on the property.

Necessity of evidence.— No judgment can be rendered in favor of an intervener who offers no evidence as a basis therefor. Grant *v.* Buchanan, (Tex. Civ. App. 1904) 81 S. W. 820.

Sufficiency of evidence to support verdict see *supra*, XXI, G, 2; *infra*, XXI, M, 3, b.

60. Commonwealth's Ins. Co. *v.* Monninger, 18 Ind. 352 (holding that the statute authorizing judgment for a sum larger than the verdict in actions on policies where plaintiffs are entitled to a certain per cent damages refers to domestic corporations only); Hanover F. Ins. Co. *v.* Johnson, 26 Ind. App. 122, 57 N. E. 277. Where, however, it was admitted that the parties had fixed the amount due by arbitrators, but the amount of the award was disputed, and the jury by special verdict found the amount, which was larger than the policy, the question of amount of the judgment became one of law, and the court could enter one of the amount of the policy. Imperial F. Ins. Co. *v.* Kiernan, 83 Ky. 468.

61. **Conformity of judgment to pleadings, evidence, and verdict** see *supra*, XXI, J, 1, b.

Attorney's fees see *infra*, XXI, L, 3.

Damages for delay or refusal to pay loss see *infra*, XXI, L, 2.

Harmless error see *infra*, XXI, M, 3, c.

Interest see *infra*, XXI, L, 1.

Sufficiency of evidence to support judgment see *supra*, XXI, G, 2, f; *infra*, XXI, M, 3, b.

62. Welsh *v.* London Assur. Corp., 151 Pa. St. 607, 25 Atl. 142, 31 Am. St. Rep. 786, holding that where an insurance company, knowing that insured is a life-tenant, through a mistake of its agent issued the policy on the fee and collected the full premium, insured may recover the entire loss, the company being protected by the judgment, and insured being a trustee for the benefit of the remainder-men.

63. Marshal *v.* American Guarantee Mut. F. Ins. Co., 80 Mo. App. 18.

64. Continental Ins. Co. *v.* Coons, 14 Ky. L. Rep. 110, holding that where a policy provides that if other insurance on the same property is taken with the consent of the company, the company shall be liable only for its proportion of the loss, a judgment for the full amount of the policy is erroneous, if plaintiff's pleadings show that additional insurance was taken.

65. German Ins. Co. *v.* Everett, 18 Tex. Civ. App. 514, 46 S. W. 95.

If the items of loss are severable the amount recoverable on account of each item is the amount limited to that item in the policy. Hooker *v.* Continental Ins. Co., (Nebr. 1903) 96 N. W. 663.

Fair value.— Where the evidence in an action on a policy fails to show that the property destroyed had a distinctly recognized market value, it is not error to instruct the jury to allow the fair value of such property. Gere *v.* Council Bluffs Ins. Co., 67 Iowa 272, 23 N. W. 137, 25 N. W. 159.

66. Woodcock *v.* Hawkeye Ins. Co., 97 Iowa 562, 66 N. W. 764, holding that if a statute prohibits the bringing of an action to recover on an insurance policy within ninety days after notice of loss is given, and an action is brought before the expiration of such time, the objection may be raised by motion in arrest of judgment.

67. **As affected by sufficiency of service of process on foreign insurance company** see Process.

action on a fire-insurance policy is generally governed by statute or rule of court.[68]

K. Execution. The enforcement of the judgment in an action on a fire-insurance policy is governed generally by the rules applicable to judgments in actions of contract in general.[69]

L. Interest, Damages, and Attorney's Fees — 1. Recovery of Interest. Where the time for payment of the insurance money is specific, as for instance sixty days after furnishing of proofs of loss, interest on the amount subsequently found due should be allowed from that date as a matter of law.[70] Interest,

68. See the statutes and rules of court of the different states.

Action on policy as one "for the recovery of money only."— An action on an insurance policy is "for the recovery of money only," although the damages demanded are unliquidated, within Wis. Rev. St. § 2891, subd. 1, providing that the clerk after default may enter judgment for the amount demanded without proof. Schobacher *v.* Germantown Farmers' Mut. Ins. Co., 59 Wis. 86, 17 N. W. 969.

Action on policy as "founded on an instrument in writing ascertaining the plaintiff's demand."— An action on a fire-insurance policy not being "founded on an instrument in writing ascertaining the plaintiff's demand," within the meaning of Ala. Code, § 2740, judgment cannot be rendered without the intervention of a jury to ascertain the amount of plaintiff's damage. North Alabama Home Protection *v.* Caldwell, 85 Ala. 607, 5 So. 338; Manhattan F. Ins. Co. *v.* Fowler, 76 Ala. 372.

Action on policy as founded on "writing for the payment of money."— A policy of fire insurance containing a provision that if there be other insurance on the property the loss, if any, shall be adjusted among the several insurers, is not a "writing for the payment of money," within Va. Code, § 3285, dispensing with an inquiry of damages in an action on such writing in case of judgment by default. Commercial Union Assur. Co. *v.* Everhart, 88 Va. 952, 14 S. E. 836. To the contrary see Lycoming F. Ins. Co. *v.* Dickinson, 4 Wkly. Notes Cas. (Pa.) 271, holding that a policy of fire insurance is an instrument of writing for the payment of money within the rule of the common pleas allowing judgments to be entered in suits upon such instruments for want of an affidavit of defense.

Where loss has been ascertained as provided by policy.— Where plaintiff files his declaration together with the policy, and makes affidavit showing the amount claimed to be due, and it appears by the terms of the policy that the method of ascertaining the amount due in case of loss is prescribed therein, and that plaintiff has ascertained such loss according to its terms, and made oath thereto, he is entitled to a judgment by default under Md. Acts (1864), c. 6, § 6, regulating practice in certain cases in Baltimore city, for the want of a sworn plea filed to the rule day by defendants; and that the data necessary to enable the amount due to be ascertained appears in the policy, and justifies plaintiff in verifying the same by his oath. Orient Mut. Ins. Co. *v.* Andrews, 66 Md. 371, 7 Atl. 693.

Where promise to pay is contingent.— Where a policy contained only a contingent promise to pay, and was therefore not within the affidavit of defense law, a judgment by default for want of an affidavit of defense was properly stricken from the record. Makin *v.* Insurance Co., 1 Wkly. Notes Cas. (Pa.) 101.

69. See, generally, Executions, 17 Cyc. 878 *et seq.* See also Insurance.

Where judgment is recovered on a Lloyd's policy against the attorneys in fact as such, an execution may properly be issued under N. Y. Code Civ. Proc. § 1371, directing its satisfaction from a trust fund delivered to and held by them under the terms of the policy upon an express trust for the satisfaction of such judgments; and upon its return unsatisfied supplementary proceedings may be instituted against defendants for the purpose of reaching the fund. Matter of Gough, 31 N. Y. App. Div. 307, 52 N. Y. Suppl. 627.

70. *Florida.*—Hanover F. Ins. Co. *v.* Lewis, 28 Fla. 209, 10 So. 297.

Illinois.— Knickerbocker Ins. Co. *v.* Gould, 80 Ill. 388; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553.

Kentucky.— Home Ins. Co. *v.* Patterson, 12 Ky. L. Rep. 941.

Massachusetts.— Hardy *v.* Lancashire Ins. Co., 166 Mass. 210, 44 N. E. 209, 55 Am. St. Rep. 395, 33 L. R. A. 241. But see Oriental Bank *v.* Tremont Ins. Co., 4 Metc. 1.

Montana.— Randall *v.* Lancashire Ins. Co., 10 Mont. 367, 25 Pac. 961; Randall *v.* American F. Ins. Co., 10 Mont. 340, 25 Pac. 953, 24 Am. St. Rep. 50; Randall *v.* Liverpool, etc., Ins. Co., 10 Mont. 368, 25 Pac. 962.

New York.— Hastings *v.* Westchester F. Ins. Co., 73 N. Y. 141 [*affirming* 12 Hun 416].

Ohio.— Webb *v.* Protection Ins. Co., 6 Ohio 456.

United States.— Reading Ins. Co. *v.* Egelhoff, 115 Fed. 393; Huchberger *v.* Home F. Ins. Co., 12 Fed. Cas. No. 6,821, 5 Biss. 106.

See 28 Cent. Dig. tit. "Insurance," § 1494.

Interest should not be allowed from the date of the loss, under such a policy, but only from the date when the insurance becomes payable by the terms of the policy. Phœnix Ins. Co. *v.* Public Parks Amusement Co., 63 Ark. 187, 37 S. W. 959; Southern Ins. Co. *v.*

however, should not be allowed for a period of delay caused by the default or negligence of the plaintiff himself.[71]

2. DAMAGES FOR DELAY OR REFUSAL TO PAY LOSS. By statute in some states damages may be assessed for vexatious or unreasonable delay or refusal to pay the amount of the loss.[72]

3. ATTORNEY'S FEES. In some states there are statutory provisions for allowing attorney's fees to the successful plaintiff in an action on a fire-insurance policy where it appears that the company has in bad faith or without reasonable ground refused or unreasonably delayed payment of the amount of the loss.[73] Such provisions are not unconstitutional.[74] To recover the fees the complaint should specifically demand them;[75] but a demand in writing when the judgment is rendered may be treated as a proper amendment of the complaint.[76] What is a "reason-

White, 58 Ark. 277, 24 S. W. 425; White *v.* Farmers' Mut. F. Ins. Co., 97 Mo. App. 590, 71 S. W. 707; Queen Ins. Co. *v.* Jefferson Ice Co., 64 Tex. 578. But if by waiver of proofs the time of payment does not become fixed under such a stipulation, interest may be recovered from the time of loss. Hartford F. Ins. Co. *v.* Landfare, 63 Nebr. 559, 88 N. W. 779; Western, etc., Pipe Lines *v.* Home Ins. Co., 145 Pa. St. 346, 22 Atl. 665, 27 Am. Rep. 703; Glover *v.* Rochester-German Ins. Co., 11 Wash. 143, 39 Pac. 380.

If the amount is left to be adjusted by the parties, and there is no specific provision as to time of payment, interest is recoverable only from time of bringing suit. Queen Ins. Co. *v.* Dearborn Sav., etc., Assoc., 175 Ill. 115, 51 N. E. 717; Gettwerth *v.* Teutonia Ins. Co., 29 La. Ann. 30; Hutchinson *v.* Liverpool etc., Ins. Co., 153 Mass. 143, 26 N. E. 439, 10 L. R. A. 558; Thwing *v.* Great Western Ins. Co., 111 Mass. 93; People *v.* Highland Mut. F. Ins. Co., 26 Misc. (N. Y.) 205, 56 N. Y. Suppl. 83; McLaughlin *v.* Washington County Mut. Ins. Co., 23 Wend. (N. Y.) 525.

If there is provision for payment depending on adjustment interest runs from the time of such adjustment. Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005; Schmitt *v.* Boston Ins. Co., 82 N. Y. App. Div. 234, 81 N. Y. Suppl. 767.

In a suit to set aside an award and recover on the policy if the award is upheld and defendant adjudged liable for the amount interest should not be allowed. Stemmer *v.* Scottish Union, etc., Ins. Co., 33 Oreg. 65, 49 Pac. 588, 53 Pac. 498.

Even where interest is not recoverable, the jury as a matter of right may as in other cases of unliquidated damages add interest in making up their verdict. Marthinson *v.* North British, etc., Ins. Co., 64 Mich. 372, 37 N. W. 291; Anonymous, 1 Johns. (N. Y.) 315; Budd *v.* Union Ins. Co., 4 McCord (S. C.) 1.

The law of the forum determines the rule as to interest. Lancashire Ins. Co. *v.* Barnard, 111 Fed. 702, 49 C. C. A. 559.

71. Schrepfer *v.* Rockford Ins. Co., 77 Minn. 291, 79 N. W. 1005.

72. *Georgia.*— Phenix Ins. Co. *v.* Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307, where refusal to pay is in bad faith.

Indiana.— Commonwealth Ins. Co. *v.* Monninger, 18 Ind. 352.

Missouri.— Blackwell *v.* American Cent. Ins. Co., 80 Mo. App. 75; Sappington *v.* St. Joseph Town Mut. F. Ins. Co., 77 Mo. App. 270; Ramsey *v.* Philadelphia Underwriter's Assoc., 71 Mo. App. 380.

Texas.— Ætna L. Ins. Co. *v.* Parker, 30 Tex. Civ. App. 521, 72 S. W. 621.

United States.— Mack *v.* Lancashire Ins. Co., 4 Fed. 59, 2 McCrary 211.

See 28 Cent. Dig. tit. "Insurance," § 1498.

73. *Florida.*— Hartford F. Ins. Co. *v.* Redding, (1904) 37 So. 62.

Georgia.— Phenix Ins. Co. *v.* Clay, 101 Ga. 331, 28 S. E. 853, 65 Am. St. Rep. 307; Watertown F. Ins. Co. *v.* Grehan, 74 Ga. 642; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220.

Kansas.—Alliance Co-operative Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. 108.

Missouri.— Thompson *v.* Traders' Ins. Co., 169 Mo. 12, 68 S. W. 889.

Nebraska.— American F. Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. 1068; Home F. Ins. Co. *v.* Weed, 55 Nebr. 146, 75 N. W. 539; Hartford F. Ins. Co. *v.* Corey, 53 Nebr. 209, 73 N. W. 674; Home F. Ins. Co. *v.* Skoumal, 51 Nebr. 655, 71 N. W. 290; Eddy *v.* German Ins. Co., 51 Nebr. 291, 70 N. W. 947; Omaha F. Ins. Co. *v.* Thompson, 50 Nebr. 580, 70 N. W. 30; Hanover F. Ins. Co. *v.* Gustin, 40 Nebr. 828, 59 N. W. 375.

Wisconsin.— St. Clara Female Academy *v.* Northwestern Nat. Ins. Co., 98 Wis. 257, 73 N. W. 767, 67 Am. St. Rep. 805.

See 28 Cent. Dig. tit. "Insurance," § 1806. And see, generally, as to attorney's fees, COSTS, 11 Cyc. 104 *et seq.*

Under the Nebraska statute the supreme court cannot allow an additional fee for services in that court. Home F. Ins. Co. *v.* Skoumal, 51 Nebr. 655, 71 N. W. 290.

74. Hartford F. Ins. Co. *v.* Redding, (Fla. 1904) 37 So. 62; Hartford F. Ins. Co. *v.* Warbritton, 66 Kan. 93, 71 Pac. 278; Shawnee F. Ins. Co. *v.* Bawha, 8 Kan. App. 169, 55 Pac. 474; Lansing *v.* Commercial Union Assur. Co., (Nebr. 1903) 93 N. W. 756; Farmers' Mut. Ins. Co. *v.* Cole, (Nebr. 1903) 93 N. W. 730.

75. German Ins. Co. *v.* Eddy, 37 Nebr. 461, 55 N. W. 1073.

76. Hartford F. Ins. Co. *v.* Corey, 53 Nebr. 209, 73 N. W. 674.

able" fee within the statute, where the latter is evidently not of a punitive character but designed to provide indemnity, is to be determined by the court.[77]

M. Appeal and Error[78] — **1. Presentation and Reservation in Lower Court of Grounds of Review.** As a rule questions of whatever nature not raised in the trial court[79] or in the application for new trial[80] will not be noticed on appeal.

2. Record. A party alleging error as ground for reversal must show the error complained of affirmatively and clearly by the record.[81]

3. Review — a. In General. The decision of the trial court as to the submission of questions of fact to the jury will not ordinarily be reviewed on appeal;[82] and an appellate court will not review the judgment of an intermediate

77. Alliance Co-operative Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. 108.

78. See, generally, Appeal and Error. See also Insurance.

79. *California.*— Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216, misleading instruction as to waiver of forfeiture for misrepresentation.

Illinois.— Insurance Co. of North America *v.* Bird, 175 Ill. 42, 51 N. E. 686, variance between pleading and proof.

Indiana.— North British, etc., Ins. Co. *v.* Crutchfield, 108 Ind. 518, 9 N. E. 458, sufficiency of evidence of proofs of loss.

Kansas.— Swedish American Ins. Co. *v.* Knutson, 67 Kan. 71, 72 Pac. 526, 100 Am. St. Rep. 382 (failure to instruct); Western Massachusetts Ins. Co. *v.* Duffey, 2 Kan. 347 (indefiniteness of petition).

Louisiana.—Theodore *v.* New Orleans Mut. Ins. Assoc., 28 La. Ann. 917.

Missouri.— Swearinger *v.* Pacific F. Ins. Co., 66 Mo. App. 90, failure of plaintiff to demand arbitration.

New York.— Adams *v.* Greenwich Ins. Co., 70 N. Y. 166 (holding that a motion for a nonsuit on the ground that there was no proof of plaintiff's right or title to recover the amount of loss does not cover a defect in the title of insured, or any breach of a condition of the policy by reason thereof, and hence that such objection is not available on appeal); Linde *v.* Republic F. Ins. Co., 50 N. Y. Super. Ct. 362 (holding that where an award was pleaded as a bar to recovery of greater damages than were therein given, and the court directed a verdict in accordance therewith, and no exception was taken or request made to go to the jury, but plaintiff asked that the court direct a verdict for a lesser sum, which was refused, and exception taken, plaintiff has no remedy on appeal, although the award pleaded was invalid for lack of due notice to plaintiff, unless the evidence shows as a matter of law that plaintiff was entitled to the direction asked); Van Deusen *v.* Charter Oak F. & M. Ins. Co., 1 Rob. 55, 1 Abb. Pr. N. S. 349 (holding that an objection to the preliminary proofs of a loss, taken on a motion to dismiss the complaint in an action on a policy of insurance, that a paper served on defendants was not in compliance with the terms of the policy, will not cover an objection, taken on appeal, that the service was not made upon the proper person).

South Dakota.— Lindsay *v.* Pettigrew, 5 S. D. 500, 59 N. W. 726, failure of complaint to allege that plaintiff owned the property at the time of its destruction.

Virginia.— Sulphur Mines Co. *v.* Phenix Ins. Co., 94 Va. 355, 26 S. E. 856, objection that a defense is based upon provisions in the policy printed in small type proscribed by statute.

See 28 Cent. Dig. tit. "Insurance," § 1796. And see, generally, Appeal and Error, 2 Cyc. 660 *et seq.*

80. Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216.

81. Girard F. Ins. Co. *v.* Boulden, (Ala. 1892) 11 So. 773 (holding that a ruling of the trial court excluding an executory agreement by plaintiff to purchase certain lots will not be reviewed on appeal, where the record contains no testimony, either given or offered, showing that the house in which the insured property was burned was situated on the land mentioned in the agreement, or that plaintiff was in default as to the performance of the conditions in such agreement contained, or that he had made any representations or warranties as to his ownership in or title to the house in which the destroyed property was situated); Heart *v.* Lycoming F. Ins. Co., 26 Ohio St. 594 (holding that where a statute authorizes service of summons within the limits of the state by mail only in suits on insurance policies outstanding in the hands of a resident of the state, and on appeal in a suit on a policy where such service had been attempted and set aside by the court below, the record does not disclose that either the party insured or plaintiff, to whom the loss was payable, was or had been a resident of Ohio, the judgment would be affirmed). And see, generally, Appeal and Error, 2 Cyc. 1042 *et seq.*

82. New Orleans Ins. Assoc. *v.* Matthews, 65 Miss. 301, 4 So. 62 (holding that where it appears to the trial court that the question of a waiver of conditions should be submitted to a jury, its rulings will not ordinarily be reviewed); Curry *v.* Sun Fire Office, 155 Pa. St. 467, 26 Atl. 658 (holding that, although plaintiff failed to tell defendant at the time certain insurance was applied for that he believed an attempt had been made by unknown parties to fire his house, yet if his subsequent explanation of such neglect was fairly submitted to the jury,

court affirming or reversing the judgment of the trial court on the facts, when there is any evidence to support the finding of the intermediate court.[83] A party cannot complain of error in his favor.[84] Presumptions are indulged or not on appeals in actions on fire-insurance policies the same as on appeals in other civil actions.[85]

b. Conclusiveness of Verdict and Findings.[86] The verdict of a jury,[87] or the finding of the trial court sitting as a jury,[88] is as a rule conclusive on all questions of fact, provided that there is any evidence to support the verdict or findings.[89]

whether their findings were justified was for the trial court to determine on a motion for a new trial). And see, generally, APPEAL AND ERROR, 3 Cyc. 345 *et seq.*

83. Home Ins. Co. *v.* Bethel, 142 Ill. 537, 32 N. E. 510 [*affirming* 42 Ill. App. 475] (issue of waiver of proofs of loss); North British, etc., Ins. Co. *v.* Steiger, 124 Ill. 81, 16 N. E. 95 (issue of whether risk was increased). And see, generally, APPEAL AND ERROR, 3 Cyc. 394 *et seq.*

84. *Iowa.*— Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180.

Kentucky.— German-American Ins. Co. *v.* Norris, 100 Ky. 29, 37 S. W. 267, 18 Ky. L. Rep. 537, 66 Am. St. Rep. 324.

New York.— Wolf *v.* Goodhue F. Ins. Co., 43 Barb. 400; Unger *v.* People's F. Ins. Co., 4 Daly 96, in both of which cases a verdict was sustained as to the amount of recovery.

Pennsylvania.— Home Ins. Co. *v.* Davis, 98 Pa. St. 280.

Wisconsin.— Agnew *v.* Farmers' Mut. Protective F. Ins. Co., 95 Wis. 445, 70 N. W. 554.

See 28 Cent. Dig. tit. "Insurance," § 1799. And see, generally, APPEAL AND ERROR, 3 Cyc. 233 *et seq.*

85. Western Home Ins. Co. *v.* Thorp, 48 Kan. 239, 127 Pac. 991 (holding that all the evidence not being brought up, the court cannot presume that there was evidence that defendant waived the provision requiring proof of loss, where such evidence would have been inadmissible under the pleadings); Planters' Mut. Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. 257 (holding that in an action on a policy of insurance on a flour mill, where the policy provides that it shall be of no effect if the mill should be so altered or used for carrying on therein any business which, "according to the class of hazards thereto annexed," would increase the risks, etc., the appellate court will not, where the class of hazards annexed to the policy is not to be found in the record, assume as matter of fact that the mere change in the machinery of the mill from the burr to the roller process was such an alteration as would, according to the class of hazards annexed to the policy, increase the risk). And see, generally, APPEAL AND ERROR, 3 Cyc. 266 *et seq.*

86. Weight and sufficiency of evidence see also *supra*, XXI, G, 2.

87. *Connecticut.*— Daniels *v.* Equitable F. Ins. Co., 48 Conn. 105, issue whether risk was increased.

Iowa.— Scott *v.* Security F. Ins. Co., 98 Iowa 67, 66 N. W. 1054, issue as to value.

Louisiana.— Guma *v.* Hope Ins. Co., 16 La. Ann. 415, issue as to fraudulent overestimate of loss in proofs of loss.

Missouri.— Arnold *v.* Hartford F. Ins. Co., 55 Mo. App. 149 (issue of waiver of proofs of loss); St. Louis Gaslight Co. *v.* American F. Ins. Co., 33 Mo. App. 348 (issue as to cause of loss).

New York.— Jones *v.* Howard Ins. Co., 117 N. Y. 103, 22 N. E. 578 (issue of whether insured made diligent effort to save his property); Robertson *v.* New Hampshire Ins. Co., 16 N. Y. Suppl. 842 [*affirmed* in 137 N. Y. 530, 33 N. E. 336] (issue whether defendant waived its right under the policy to call for an examination of plaintiff and of her books, and for the appraisal of the property by appraisers selected by the parties); Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625] (issue of whether insured fraudulently caused the fire).

Wisconsin.— Beyer *v.* St. Paul F. & M. Ins. Co., 112 Wis. 138, 88 N. W. 57 (issue as to false swearing); Wright *v.* Hartford F. Ins. Co., 36 Wis. 522 (issue of ownership of property).

See 28 Cent. Dig. tit. "Insurance," § 1801. And see, generally, APPEAL AND ERROR, 3 Cyc. 348 *et seq.*

Mistake or bias.— A verdict will not be set aside as against the weight of evidence unless it is so clearly unsupported as to indicate misapprehension, mistake, or bias on the part of the jury. Pennsylvania F. Ins. Co. *v.* Carnahan, 19 Ohio Cir. Ct. 114, 10 Ohio Cir. Dec. 186, where a verdict against the company on an issue of incendiarism was sustained.

88. Niagara F. Ins. Co. *v.* Scammon, 100 Ill. 644 (issue of whether notice of loss was given in due time); Alamo F. Ins. Co. *v.* Heidemann Mfg. Co., (Tex. Civ. App. 1894) 28 S. W. 910 (holding that, although the judgment as to the amount is supported by plaintiff's evidence only, it will not be disturbed, even though he, in an affidavit used in making settlement with another company, stated the amount of the loss to be much less than found by the court). And see, generally, APPEAL AND ERROR, 3 Cyc. 357 *et seq.*

89. Cody *v.* Commercial F. Ins. Co., 13 Ill. App. 110; Guinn *v.* Phœnix Ins. Co., 80 Iowa 346, 45 N. W. 880; Long Island Ins. Co. *v.* Great Western Mfg. Co., 2 Kan. App. 377, 42 Pac. 738; Epstein *v.* State Ins. Co., 21 Oreg.

Consequently, following the general rule in such cases, if the evidence is conflicting the case will not be disturbed on appeal.[90]

c. Harmless Error. A judgment will not be reversed for error in a trial which resulted in no prejudice to the party seeking to take advantage of it.[91]

179, 27 Pac. 1045, all being cases where the issue was as to the amount of the loss. See also Arnold *v.* Hartford F. Ins. Co., 55 Mo. App. 149.

90. Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 605, 64 Am. St. Rep. 180; Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236 (holding that where a witness for plaintiff testified that he addressed and mailed the notice and proofs of loss to defendant, and defendant's officers and clerks who received its mail testified that no such documents were received, a verdict for plaintiff will not be disturbed on appeal); Horridge *v.* Dwelling-House Ins. Co., 75 Iowa 374, 39 N. W. 648 (issue of whether the company knew of prior insurance when they issued the policy); Unger *v.* People's F. Ins. Co., 4 Daly (N. Y.) 96 (issue of amount of loss); Hartford F. Ins. Co. *v.* Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158; Wytheville Ins. Co. *v.* Stultz, 87 Va. 629, 13 S. E. 77 (issue of fraud).

Contrary findings justified.—Findings based on sufficient evidence, will be sustained, although other evidence, taken alone, would have warranted a contrary finding. Blackwell *v.* American Cent. Ins. Co., 80 Mo. App. 75. See also Lion F. Ins. Co. *v.* Wicker, 93 Tex. 397, 55 S. W. 741.

91. Firemen's Ins. Co. *v.* Barnsch, 161 Ill. 629, 44 N. E. 285 [*affirming* 59 Ill. App. 78] (error in bringing action for use of another); Niagara F. Ins. Co. *v.* Bishop, 154 Ill. 9, 39 N. E. 1102, 45 Am. St. Rep. 105 [*affirming* 49 Ill. App. 388] (error in refusing to hold that insured cannot compel payment unless arbitration has been had or has been abandoned by agreement or prevented by insurer); Ohio Farmers' Ins. Co. *v.* Stowman, 16 Ind. App. 205, 44 N. E. 558, 940 (error in special findings); Continental Ins. Co. *v.* McCulloch, 15 Tex. Civ. App. 190, 39 S. W. 374 (error in sustaining a demurrer to a defense); Chadbourne *v.* German-American Ins. Co., 31 Fed. 533 (error in submitting case to jury). And see, generally, APPEAL AND ERROR, 3 Cyc. 383 *et seq.*

Error in admitting or rejecting evidence held harmless see the following cases:

California.— Hegard *v.* California Ins. Co., 72 Cal. 535, 14 Pac. 180, 359, error in refusing to admit testimony as to the probable depreciation in the value of the property prior to the issuance of the policy.

Illinois.— Mutual Mill Ins. Co. *v.* Gordon, 121 Ill. 366, 12 N. E. 747 [*affirming* 20 Ill. App. 559], error in allowing insured to testify to his understanding of a question in the application. And see Firemen's Ins. Co. *v.* Barnsch, 161 Ill. 629, 44 N. E. 285 [*affirming* 59 Ill. App. 78].

Iowa.— Huesinkveld *v.* St. Paul F. & M. Ins. Co., 106 Iowa 229, 76 N. W. 696 (erroneous admission of secondary evidence of the contents of a letter); Brock *v.* Des Moines Ins. Co., 106 Iowa 30, 75 N. W. 683 (erroneous admission of evidence of conversations with persons not positively identified as defendant's officers or agents); Hagan *v.* Merchants', etc., Ins. Co., 81 Iowa 321, 46 N. W. 1114, 25 Am. St. Rep. 493 (error in admitting evidence that the company, in reply to plaintiff's letter giving notice of loss, made no objection to the form and sufficiency of his proof; and in admitting secondary evidence of the notice and proofs of loss); Siltz *v.* Hawkeye Ins. Co., 71 Iowa 710, 29 N. W. 605 (error in admitting evidence of the statement of one who claimed to be defendant's adjuster that he was also its assistant secretary); Carson *v.* German Ins. Co., 62 Iowa 433, 17 N. W. 650 (error in admitting incompetent evidence as proof of loss).

Minnesota.— Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123, holding that the admission of evidence of material acts by an insurance agent, before proof was given of his authority, is not reversible error when his authority was afterward shown.

Missouri.— Price *v.* Home Ins. Co., 54 Mo. App. 119, error in admitting affidavits of value forming part of the proof of loss.

New York.— Storm *v.* Phenix Ins. Co., 15 N. Y. Suppl. 281 [*affirmed* in 133 N. Y. 656, 31 N. E. 625], error in cross-examination.

Oregon.— Koshland *v.* Hartford F. Ins. Co., 31 Oreg. 402, 49 Pac. 866, error in admitting evidence for plaintiff to prove what was admitted by defendant.

Virginia.— Morotock Ins. Co. *v.* Cheek, 93 Va. 8, 24 S. E. 464, 57 Am. St. Rep. 782, error in admitting a statement of loss.

Wisconsin.—Reiner *v.* Dwelling-House Ins. Co., 74 Wis. 89, 42 N. W. 208, error in admitting evidence on issue of amount of loss.

See 28 Cent. Dig. tit. "Insurance," § 1803.

Error in instructing or refusing to instruct held harmless see the following cases:

California.— Wheaton *v.* North British, etc., Ins. Co., 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216, instruction as to waiver of delay in submitting proofs of loss.

Illinois.— Dwelling House Ins. Co. *v.* Dowdall, 159 Ill. 179, 42 N. E. 606 [*affirming* 55 Ill. App. 622] (instruction as to waiver of proofs of loss); German F. Ins. Co. *v.* Grunert, 112 Ill. 68, 1 N. E. 113 (instruction as to waiver of delay in submitting proof of loss).

Iowa.— Read *v.* State Ins. Co., 103 Iowa 307, 72 N. W. 665, 64 Am. St. Rep. 180, instruction requiring plaintiff to prove more than the law requires.

Kentucky.— German-American Ins. Co. *v.* Norris, 100 Ky. 29, 37 S. W. 267, 18 Ky. L. Rep. 537, 66 Am. St. Rep. 324, instruction as to concealment.

Maine.— Campbell *v.* Monmouth Mut. F.

4. REARGUMENT. A reargument may be granted on sufficient grounds on an appeal in an action on a fire-insurance policy as in other cases.[92]

FIRE JOB. See JOB.

FIREMAN. See MASTER AND SERVANT; MUNICIPAL CORPORATIONS.

FIRE-ORDEAL. In Saxon and old English law, the ordeal by fire or red-hot iron, which was performed either by taking up in the hand a piece of red-hot iron, of one, two, or three pounds weight, or by walking barefoot and blindfolded over nine red-hot plowshares, laid lengthwise at unequal distances.[1]

FIREPROOF. Proof against fire; incombustible.[2] (See, generally, FIRE INSURANCE.)

Ins. Co., 59 Me. 430, instruction requiring a higher degree of diligence on the part of plaintiff than he was bound to exercise.

Michigan.— Tubbs *v.* Dwelling-House Ins. Co., 84 Mich. 646, 48 N. W. 296 (instruction that certain articles might be included in loss); Russell *v.* Detroit Mut. F. Ins. Co., 80 Mich. 407, 45 N. W. 356 (refusal to charge that the jury must find the "actual cash value" of the property).

Mississippi.— Phœnix Ins. Co. *v.* Summerfield, 70 Miss. 827, 13 So. 253, instruction as to false swearing.

Missouri.— Rieger *v.* Mechanics' Ins. Co., 69 Mo. App. 674, instruction requiring plaintiff to prove waiver of performance of a condition which defendant admitted was performed.

New York.— Clover *v.* Greenwich Ins. Co., 101 N. Y. 277, 4 N. E. 724, instruction that if the jury found that if the arbitrators exceeded their authority plaintiff was entitled to whatever damages he had suffered by the loss.

Pennsylvania.— Strunk *v.* Firemen's Ins. Co., 160 Pa. St. 345, 28 Atl. 779, 40 Am. St. Rep. 721 (instruction as to notice of vacancy to one whose agency for company had terminated); Humboldt F. Ins. Co. *v.* Mears, 1 Pennyp. (Pa.) 513 (instruction as to proofs of loss).

South Carolina.— Wilson *v.* Commercial Union Assur. Co., 51 S. C. 540, 29 S. E. 245, 64 Am. St. Rep. 700, instruction as to immaterial stipulations.

Texas.— Lion F. Ins. Co. *v.* Heath, 29 Tex. Civ. App. 203, 68 S. W. 305 (instruction as to value); Philadelphia Fire Assoc. *v.* McNerney, (Civ. App. 1900) 54 S. W. 1053 (instruction as to ownership); Virginia F. & M. Ins. Co. *v.* Cannon, (Civ. App. 1898) 45 S. W. 945 (refusal to instruct that proofs of loss are not evidence of value); Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 29 S. W. 93 (refusal to charge on the question of fixing a partial loss).

United States.— Orient Ins. Co. *v.* Leonard, 120 Fed. 808, 57 C. C. A. 176, instruction as to damages.

See 28 Cent. Dig. tit. "Insurance," § 1802.

Error held prejudicial see Replogle *v.* American Ins. Co., 132 Ind. 360, 31 N. E. 947 (where a demurrer to a reply was erroneously sustained); C. A. Smith Lumber Co. *v.* Central Manufacturers' Mut. Ins. Co., 68 Minn. 45, 70 N. W. 866 (instruction); Philadelphia Fire Assoc. *v.* McNerney, (Tex. Civ. App. 1900) 54 S. W. 1053 (taking case from jury).

92. Eichner *v.* Liverpool, etc., Ins. Co., 9 N. Y. Suppl. 954. And see, generally, APPEAL AND ERROR, 3 Cyc. 213 *et seq.*

1. Black L. Dict. [*citing* 4 Blackstone Comm. 343].

2. Webster Dict. [*quoted* in Diebold Safe, etc., Co. *v.* Huston, 55 Kan. 104, 111, 39 Pac. 1035, 28 L. R. A. 53].

"Fireproof" and "incombustible materials" see Chimene *v.* Baker, 32 Tex. Civ. App. 520, 522, 75 S. W. 330.

As applied to a building, the term excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. Hickey *v.* Morrell, 102 N. Y. 454, 460, 7 N. E. 321, 55 Am. Rep. 824 [*cited* in Dietz *v.* Yetter, 34 N. Y. App. Div. 453, 456, 54 N. Y. Suppl. 258].

Fireproof warehouse see Vaughan *v.* Matlock, 23 Ark. 9, 11.

FIRES

By Henry H. Skyles*

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CROSS-REFERENCES

For Matters Relating to:
Arson, see Arson.

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* Author of "Fish and Game," 19 Cyc. 986; and of "Fornication," 19 Cyc. 1433; and joint author of "A Treatise on the Law of Agency."

For Matters Relating to (*continued*)
Fire Caused by:
Negligence, see NEGLIGENCE.
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Fireworks, see EXPLOSIVES.

I. CRIMINAL LIABILITY.[1]

A. Wilful Burning — 1. NATURE AND ELEMENTS OF OFFENSE — a. Of Another's Property. The act of wilfully[2] or unlawfully burning another's property, other than buildings and similar structures and their contents, such as stacks of hay or grain, grasses, fences, woods, and the like, is punishable as a misdemeanor, both at common law,[3] and under most of the statutes,[4] although in some jurisdictions and under some circumstances the offense constitutes a penitentiary offense.[5] Under some statutes some of these offenses are treated as arson.[6]

b. Of One's Own Property. In some jurisdictions it is made a misdemeanor to set fire to one's own property, such as woods or prairie, with the intent of thereby setting fire to another's grasses, fences, etc.;[7] or without giving proper notice thereof to the owners of adjoining lands;[8] or to set fire to prairie or timber land, and to allow the fire to escape from his control.[9]

2. INDICTMENT OR INFORMATION[10] — a. In General. The indictment or information should charge all the elements of the offense with particularity and clearness;[11] but it need not pursue strictly the language of the statute, if words of equivalent import are employed.[12]

1. General matters relating to criminal law and criminal procedure see CRIMINAL LAW.

2. "Wilfully," within the meaning of such statutes, means with evil intent, legal malice, or bad purpose. Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

3. Black *v.* State, 2 Md. 376; Phillips *v.* State, 19 Tex. 158.

4. *California.*— Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.
Maryland.— Black *v.* State, 2 Md. 376.
Massachusetts.—Com. *v.* Macomber, 3 Mass. 254.
Michigan.— See Boyd *v.* Rice, 38 Mich. 599.
North Carolina.— State *v.* Huskins, 126 N. C. 1070, 35 S. E. 608; State *v.* Avery, 109 N. C. 798, 13 S. E. 931; State *v.* Simpson, 9 N. C. 460.
South Carolina.— State *v.* Lewis, 10 Rich. 20.
Texas.— State *v.* White, 41 Tex. 64.
See 23 Cent. Dig. tit. "Fires," § 1.

For early English statutes punishing certain burnings as a misdemeanor see 4 Blackstone Comm. 244–247.

One burning cotton in a railroad car cannot be convicted under a statute making it a misdemeanor to burn such cotton, in a stack, hill, or pen, or secured in some other way out of doors. State *v.* Avery, 109 N. C. 798, 13 S. E. 931.

Public lands.— The California statute making it unlawful to wilfully and deliberately set fire to woods relates only to public lands, and is penal in its nature. Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93.

5. Creed *v.* People, 81 Ill. 565; State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110, 141 Mo. 343, 42 S. W. 938.

For early English statutes punishing certain burnings as a felony see 4 Blackstone Comm. 244–247; 1 Hawkins P. C. 105.

6. State *v.* Harvey, 131 Mo. 339, 32 S. W. 1110, 141 Mo. 343, 42 S. W. 938; State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000 (cordwood); Reg. *v.* Spencer, 7 Cox C. C. 189, Dears. & B. 131, 2 Jur. N. S. 1212, 26 L. J. M. C. 16, 5 Wkly. Rep. 70; Reg. *v.* Baldock, 2 Cox C. C. 55. See ARSON, 3 Cyc. 990.

Burning of a stack of corn was anciently counted arson. 4 Blackstone Comm. 221; 1 Hawkins P. C. 105.

But burning a stack of hay was not arson at common law, nor is it so under the statutes. Creed *v.* People, 81 Ill. 565; State *v.* Pope, 9 S. C. 273.

7. Pipe *v.* State, 3 Tex. App. 56.

8. Lamb *v.* Sloan, 94 N. C. 534. See also Averitt *v.* Murrell, 49 N. C. 322; Wright *v.* Yarborough, 4 N. C. 687.

9. Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266, holding that a tract of land two to four miles wide and five to six miles long, covered with wild grass, which has never been cultivated, is prairie land, within such a statute.

A cultivated field is not prairie or timber land within the meaning of such statute. Brunell *v.* Hopkins, 42 Iowa 429.

10. See, generally, INDICTMENTS AND INFORMATIONS.

11. State *v.* Simpson, 9 N. C. 460, holding that an indictment charging that defendant unlawfully, wickedly, maliciously, and mischievously did set fire to, burn, etc., certain barrels of tar, and concluding at common law, is sufficient.

12. State *v.* McMahon, 17 Nev. 365, 30 Pac. 1000; State *v.* White, 41 Tex. 64; Earhart *v.*

b. Charging Grade of Offense. It should not charge the offense as of a grade other than that made by the statute.[13]

c. Particular Averments — (I) *Description of Property.* The property should be described in the language of the statute; and except where such language is general the species of property should be specified.[14] The ownership of the property should also be averred.[15]

(II) *Time and Place of Offense.* Where time is an element of the offense it should be averred with sufficient certainty.[16] And although as a general rule the place of the offense should be particularly averred, a mistake in the name of the place is immaterial, where the burning is of property which has no particular locality.[17]

3. Evidence — **a. Sufficiency.** In order to warrant a conviction of the offense of setting fire, under the statutes, or under particular circumstances, the evidence must be sufficient to show beyond a reasonable doubt, as in other criminal cases, all the elements constituting the offense alleged, or in the statutes.[18] It should be shown that the burning was done wilfully or maliciously.[19]

b. Variance. The proof must correspond with all material allegations in the indictment or information; otherwise there can be no conviction.[20]

4. Defenses. Under statutes requiring notice of the burning to be given to adjoining landowners, waiver of such notice by such owners is no defense to an indictment for the misdemeanor.[21]

5. Judgment. In jurisdictions making the offense a misdemeanor only, a valid judgment cannot be pronounced on an indictment and verdict charging and finding it as a felony.[22]

B. Refusing Aid in Extinguishing Fire. It is sometimes made a misdemeanor to refuse aid in extinguishing fires.[23]

Com., 9 Leigh (Va.) 671; Rex *v.* Swatkins, 4 C. & P. 548, 19 E. C. L. 643.

Not averring that stacks burned were "out of doors" does not make the indictment insufficient, as it is a matter of common knowledge that stacks of oats, etc., are out of doors. State *v.* Huskins, 126 N. C. 1070, 35 S. E. 608.

13. Black *v.* State, 2 Md. 376, holding that a valid judgment cannot be pronounced on an indictment charging the burning of a stack of hay as a felony, under a statute making it a misdemeanor only.

14. Rex *v.* Woodward, 1 Moody C. C. 323. Thus charging a party with setting fire to a "stack of barley" is sufficient under a statute creating the offense for burning "any stack of corn or grain." Rex *v.* Swatkins, 4 C. & P. 548, 19 E. C. L. 643.

15. Rex *v.* Swatkins, 4 C. & P. 548, 19 E. C. L. 643.

16. State *v.* White, 41 Tex. 64, holding that under a statute prescribing a penalty for wilfully burning or causing to be burned any woodland or prairie "between the 1st of July and the 15th of February succeeding," an indictment charging the burning of a prairie on the first day of December is sufficient, without an allegation that this was between July and February, as prohibited by statute.

17. Rex *v.* Woodward, 1 Moody C. C. 323.

18. State *v.* White, 41 Tex. 64, holding that where the statutory offense, as burning woodland or prairie, may be committed only between certain periods of time, proof that it was done at any time between those periods, and not so remote as to be barred by limitation, would warrant a conviction.

Insufficient evidence.—Under an indictment charging defendant with instigating his minor sons to wilfully burn another's fence rails, evidence showing that the fire was started by the sons on their father's land, but that the father made earnest, but unsuccessful, effort to prevent the spreading of the fire and to save the fence is insufficient. Pipe *v.* State, 3 Tex. App. 56.

19. See Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93, holding that mere proof of setting fire on his own land, which spreads to another's land, without proof of evil intent or negligence, does not show an unlawful act.

20. Denbow *v.* State, 18 Ohio 11 (holding that evidence of burning shocks of wheat does not support an indictment for burning stacks of wheat); Reg. *v.* Satchwell, L. R. 2 C. C. 21, 12 Cox C. C. 449, 42 L. J. M. C. 63, 28 L. T. Rep. N. S. 569, 21 Wkly. Rep. 642 (holding that proof of setting fire to a quantity of straw on a lorry will not sustain a conviction under an indictment for setting fire to a stack of wheat); Rex *v.* Tottenham, 7 C. & P. 237, 32 E. C. L. 590 (holding that evidence showing a stack to consist partly of cole-seed straw and partly of wheat stubble is not sufficient to convict under a charge for burning "a stack of straw"). Evidence of burning sedge and rushes does not support an indictment for burning straw. Reg. *v.* Baldock, 2 Cox C. C. 55.

21. Lamb *v.* Sloan, 94 N. C. 534.

22. Black *v.* State, 2 Md. 376.

23. See Okla. St. (1893) § 2271.

II. LIABILITY FOR PENALTY.[24]

A. In General. By statute in some jurisdictions setting fire to another's woods, prairie, etc., or to one's own woods, prairie, etc., without giving proper notice thereof to adjoining landowners, and without taking effectual care to extinguish such fire before it shall reach near or adjoining lands, renders the wrong-doer liable to a penalty at the suit of any one;[25] but this rule as to requiring notice does not apply to fires from necessity, as by seeking to subdue a fire by firing against it.[26] It is also provided that the penalty shall not be exacted where a person is burning up anything on his own farm and the fire accidentally escapes to an adjoining farm or woods.[27]

B. Defenses. It is no defense to this action that the land on which the fire was set out belonged to defendant;[28] or that an adjoining landowner waived the required notice.[29]

III. LIABILITY FOR DAMAGES.

A. For Wilful or Criminal Burning or Setting Fire — 1. In General. Aside from the punishment of these offenses[30] or the imposition of penalties[31] as already shown, the wrong-doer is also civilly liable to the party injured for any damage caused by setting fire wilfully, or in violation of the statute,[32] unless it was done lawfully and the damage was caused without any fault on his part.[33]

24. Penalties generally see PENALTIES.

25. Averitt *v.* Murrell, 49 N. C. 322 (holding that setting fire to heaps of timber cut in part of his woods from which fire escapes to his woodland and thence to his neighbor's land is not a setting on fire of his own woods as contemplated in Rev. Code, c. 16); Tyson *v.* Rasberry, 8 N. C. 60; Wright *v.* Yarborough, 4 N. C. 687.

An old field, which has been "turned out" without fencing around it, and which had grown up under broom sedge and pine bushes surrounded by forest land, is woods, and one setting fire thereto is liable to the penalty imposed. Hall *v.* Cranford, 50 N. C. 3.

But a field grown up in broom sedge and wild grass, surrounded by an old fence, is not woods within the meaning of such statute; and the owner burning off the same is not liable to the penalty imposed for the act on an alleged injury to an adjoining proprietor. Achenbach *v.* Johnston, 84 N. C. 264 [*distinguishing* Hall *v.* Cranford, 50 N. C. 3]. See Okla. St. (1893) § 2903.

The word "farms" as used in such statute is not confined to inclosures. Finley *v.* Langston, 12 Mo. 120.

Woods, within the meaning of such statute, means forest lands in their actual state, and is used in contradistinction to lands cleared and inclosed for cultivation. Averitt *v.* Murrell, 49 N. C. 322.

26. Tyson *v.* Rasberry, 8 N. C. 60; Tiller *v.* Wilson, 1 Lea (Tenn.) 392.

27. Finley *v.* Langston, 12 Mo. 120.

28. Finley *v.* Langston, 12 Mo. 120.

29. Lamb *v.* Sloan, 94 N. C. 534; Roberson *v.* Kirby, 52 N. C. 477; Wright *v.* Yarborough, 4 N. C. 687.

30. See *supra*, I.

31. See *supra*, II.

32. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

Colorado.—Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

Connecticut.— Grannis *v.* Cummings, 25 Conn. 165. See also Ayer *v.* Starkey, 30 Conn. 304.

Florida.— Saussy *v.* South Florida R. Co., 22 Fla. 327.

Illinois.— Armstrong *v.* Cooley, 10 Ill. 509; Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

Iowa.— Lewis *v.* Schultz, 98 Iowa 341, 67 N. W. 266; Brunell *v.* Hopkins, 42 Iowa 429.

Kansas.— Interstate Galloway Cattle Co. *v.* Kline, 51 Kan. 23, 32 Pac. 628; Jarrett *v.* Apple, 31 Kan. 693, 3 Pac. 571; Hunt *v.* Haines, 25 Kan. 210.

Missouri.— Waters *v.* Brown, 44 Mo. 302; Finley *v.* Langston, 12 Mo. 120; Kahle *v.* Hobein, 30 Mo. App. 472.

North Carolina.— Lamb *v.* Sloan, 94 N. C. 534. Under Code, §§ 52, 53, an action for damages by fire cannot be maintained by one damaged by fire, started on land not adjacent to plaintiff's; but where the complaint alleges that defendant wilfully permitted the fire to spread over and burn plaintiff's fences, etc., it may be treated as a common-law action for negligence. Roberson *v.* Morgan, 118 N. C. 991, 24 S. E. 667.

See 23 Cent. Dig. tit. "Fires," § 5. See also Okla. St. (1893) §§ 2902–2909.

Prairie fires.— Parties setting fire to prairies otherwise than in consequence of unavoidable accident, which could not be prevented by proper care, are liable for all property destroyed thereby. Bizzell *v.* Booker, 16 Ark. 308.

33. *Arkansas.*— Bizzell *v.* Booker, 16 Ark. 308.

California.— Garnier *v.* Porter, 90 Cal. 105, 27 Pac. 55, burning stubble on one's own land.

Under some statutes this liability for an unlawful burning is absolute, irrespective of the question of diligence used to prevent its spreading.[34]

2. Remedies — a. In General. The aggrieved party may seek his remedy either under the statutes or, if in respect to property not within the statute, under the common-law rule, and probably both at the same time in the same action.[35]

b. In Whose Name Action Should Be Brought. An action for the damages sustained must be brought by, or in the name of, the owner of the property damaged,[36] although he need not be the owner of the freehold.[37]

3. Defenses — a. In General. It is no defense to an action for the damages sustained by the fire that defendant had been indicted for the misdemeanor;[38] that plaintiff had already recovered the penalty imposed by the statute;[39] that the property had been insured[40] and plaintiff had been paid his loss by the insurers;[41] or that he had agreed to sue for their benefit, after being indemnified.[42]

b. Under Statutes Requiring Notice of Burning. In actions for damages under statutes requiring notice of the burning, as the failure to give the required notice and damage done confer the right of action, it is no defense that defendant used reasonable care to prevent the spread of the fire.[43] But it is a good defense that the burning was done from necessity;[44] or that plaintiff waived[45] or had the required notice;[46] and it is immaterial so far as plaintiff is concerned that such notice was not given to others.[47]

Iowa.— Brunell *v.* Hopkins, 42 Iowa 429, kindling fire on a cultivated field.

Missouri.— Russell *v.* Reagan, 34 Mo. App. 242, holding that under Rev. St. (1879) § 2129, providing that if any person shall "wilfully" set on fire any woods, marshes, or prairies, whether his own or not, so as thereby to occasion any damage to any other person, such person shall be liable in double damages to the party injured, to be recovered in civil action, there is no cause of action against one who in good faith starts a fire on his own land to facilitate the cutting of the timber for making charcoal, because the fire accidentally escapes to another's property.

Nebraska.— Vansyoc *v.* Freewater Cemetery Assoc., 63 Nebr. 143, 88 N. W. 162.

New York.— Stuart *v.* Hawley, 22 Barb. 619; Clark *v.* Foot, 8 Johns. 421.

Wisconsin.— Fahn *v.* Reichart, 8 Wis. 255, 76 Am. Dec. 237.

See 23 Cent. Dig. tit. "Fires," § 5. And see, generally, Negligence.

A fire arising from negligence is not a fire "accidentally begun," within the meaning of 6 Anne, c. 31, § 67, as amended by 14 Geo. III, c. 78, § 76, providing for exemption of liability for fires accidentally begun. Webb *v.* Rome, etc., R. Co., 49 N. Y. 420, 10 Am. Rep. 389 [*affirming* 3 Lans. 453].

Fire by servant.— When stubble is fired by a hired servant without his master's knowledge, and neighboring property is thereby injured, neither the servant nor his master, to whom no neglect is imputed in employing him, comes within the terms of a statute making any one convicted of such an offense liable in double damages to the party injured. Boyd *v.* Rice, 38 Mich. 599.

Unforeseen result.— Mo. Rev. St. § 2129, providing that any person wilfully setting on fire any woods, etc., whether his own or not, shall be liable in double damages to the party injured, has no application where the fire was the unforeseen result of an attempt to burn up log heaps resulting from the clearance of timber land. Kahle *v.* Hobein, 30 Mo. App. 472.

34. Thus setting fire to prairie land, except between certain dates, renders the one so doing absolutely liable for damages caused by its escape on to the premises of another, regardless of the diligence used to control it. Thoburn *v.* Campbell, 80 Iowa 338, 45 N. W. 759; Conn *v.* May, 36 Iowa 241; Dunleavy *v.* Stockwell, 45 Ill. App. 230.

35. If under the statute the test of liability is, Did defendant set the fire? If under the common-law rule and some statutes, Did he do it wilfully or negligently? Jarrett *v.* Apple, 31 Kan. 693, 3 Pac. 571; Hunt *v.* Haines, 25 Kan. 210; Emerson *v.* Gardiner, 8 Kan. 452. See also, generally, Negligence.

36. Rockingham Mut. F. Ins. Co. *v.* Bosher, 39 Me. 253, 63 Am. Dec. 618, holding that an insurance company cannot maintain an action in its own name against the wrongdoer for the money paid by the company to the owner of the property destroyed, it being merely an equitable assignee of the owner's rights.

37. Armstrong *v.* Cooley, 10 Ill. 509.

38. Lamb *v.* Sloan, 94 N. C. 534.

39. Lamb *v.* Sloan, 94 N. C. 534.

40. Dunleavy *v.* Stockwell, 45 Ill. App. 230.

41. Hayward *v.* Cain, 105 Mass. 213.

42. Hayward *v.* Cain, 105 Mass. 213.

43. Lamb *v.* Sloan, 94 N. C. 534.

44. Lamb *v.* Sloan, 94 N. C. 534; Tyson *v.* Rasberry, 8 N. C. 60; Tiller *v.* Wilson, 1 Lea (Tenn.) 392.

Law of necessity generally see Actions, 1 Cyc. 653.

45. Lamb *v.* Sloan, 94 N. C. 534; Roberson *v.* Kirby, 52 N. C. 477.

46. Saussy *v.* South Florida R. Co., 22 Fla. 327.

47. Saussy *v.* South Florida R. Co., 22 Fla. 327.

c. Matters of Justification. Matters of excuse or justification cannot be set up on a general denial; they must be specially pleaded.[48]

4. Evidence[49] **— a. Burden of Proof** — (I) *In General.* Plaintiff must prove every material fact necessary to constitute the offense and to connect it with the loss sustained; proving the loss alone is not sufficient.[50] Under some statutes he need only prove that defendant set out the fire causing the injury;[51] and if the latter has any excuse or justification for the act he must prove its existence.[52]

(II) *Of Evil Intent.* At common law, and, under some statutes, there can be no recovery on a civil action for damages caused by these offenses unless they are shown to have been done wilfully and maliciously, or negligently;[53] but under other statutes the injured party may recover the damages sustained by the burning, irrespective of the wrong-doer's motive.[54]

b. Admissibility of Evidence — (I) *In General.* The general rules governing the admissibility of evidence in civil cases apply in actions for damages caused by wilfully or maliciously setting fires, etc.[55] Evidence tending to show the malice or intent of defendant is always admissible.[56]

(II) *Under Statutes Requiring Notice of Burning.* Evidence as to the giving of the statutory notice to persons other than plaintiff is immaterial where the latter has received such notice, and may not be admitted.[57]

c. Sufficiency of Evidence. In order that plaintiff may recover damages sustained, the evidence produced by him must be sufficient to show the offense alleged and the damages sustained thereby.[58]

5. Questions For Jury. Whether defendant did or did not start the fire[59] or whether the land on which the fire was set out still retains the character required by the statute[60] are questions for the jury.

6. Damages[61] **— a. In General.** As a general rule the measure of damages is the loss which has been actually sustained by plaintiff by reason of the fire,[62]

48. Thoburn *v.* Campbell, 80 Iowa 338, 45 N. W. 769.

49. Evidence see Evidence, 16 Cyc. 821.

50. Galvin *v.* Gualala Mill Co., 98 Cal. 268, 33 Pac. 93; Russell *v.* Reagan, 34 Mo. App. 242, holding that in such action a verdict for plaintiff should be set aside and a new trial granted, when there is no direct testimony that the fire set by defendant was the one that escaped to plaintiff's property, and every fact and circumstance, and the testimony of plaintiff's own witnesses, tend to show that it was not.

51. Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

52. Johnson *v.* Barber, 10 Ill. 425, 50 Am. Dec. 416.

53. Jarrett *v.* Apple, 31 Kan. 693, 3 Pac. 571; Emerson *v.* Gardiner, 8 Kan. 452; Russell *v.* Reagan, 34 Mo. App. 242. See also, generally, Negligence.

Presumption of wilfulness.— Where defendant admits that he set fire to his woods without giving the statutory notice, nothing else appearing, the law presumes that he did it wilfully. Lamb *v.* Sloan, 94 N. C. 534.

54. Ayer *v.* Starkey, 30 Conn. 304; Grannis *v.* Cummings, 25 Conn. 165.

Prairies, woods, etc.— These statutes usually apply to the setting out fires in woods, prairies, or timber lands except between certain periods of the year. Conn *v.* May, 36 Iowa 241; Jarrett *v.* Apple, 31 Kan. 693, 3 Pac. 571; Hunt *v.* Haines, 25 Kan. 210 (holding that defendant is liable if he intentionally sets fire to prairie); Emerson *v.* Gardiner, 8 Kan. 452; Finley *v.* Langston, 12 Mo. 120.

55. As to admissibility of evidence in an action against defendant for burning a barn see Stephens *v.* Vroman, 18 Barb. (N. Y.) 250.

56. Sturgis *v.* Robbins, 62 Me. 289, holding that where on trial of an action for negligently setting a fire which spread to plaintiff's woodland, the declaration alleged that the fire was set with intent to injure plaintiff, it was proper to ask defendant if when he set the fire he thought it a proper time to burn.

57. Saussy *v.* South Florida R. Co., 22 Fla. 327.

58. As to the sufficiency of evidence in an action against defendant for burning a mill see Shadoan *v.* Hall, 30 S. W. 876, 17 Ky. L. Rep. 230.

59. Hunt *v.* Haines, 25 Kan. 210.

60. Interstate Galloway Cattle Co. *v.* Kline, 51 Kan. 23, 32 Pac. 628, holding that, where lands are inclosed and in the actual use of the owner, it is a question for the jury whether they still retain the character of prairie, within a statute providing that if any one set on fire any prairie he shall be liable for any damages thereby caused another.

61. Damages see Damages, 13 Cyc. 1.

62. Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841; Brunell *v.* Hopkins, 42 Iowa 429; Interstate Galloway Cattle Co. *v.* Kline, 51 Kan. 23, 32 Pac. 628; Waters *v.* Brown, 44 Mo. 302.

although under some statutes the recovery of exemplary damages is also provided for.[63]

b. Elements of Damages. The damages recoverable generally include only such as plaintiff by reasonable endeavors and expense could not prevent.[64] But an attorney's fees are not an element of the damages in such cases;[65] nor are voluntary services rendered by plaintiff in putting out the fire.[66]

c. Questions For Jury. Whether defendant has used reasonable endeavors to prevent loss is a question for the jury to determine.[67]

B. Refusing Aid or Obstructing Extinguishment of Fire. In some jurisdictions one who refuses aid or obstructs the extinguishment of a fire is liable for damages to the person whose property is damaged by the fire in consequence thereof.[68]

FIREWORKS. See EXPLOSIVES.

FIRM. See PARTNERSHIP.

FIRMIOR ET POTENTIOR EST OPERATIO LEGIS QUAM DISPOSITIO HOMINIS. A maxim meaning "The operation of law is firmer and more powerful than the will of man."[1]

FIRMLY. In a firm manner; solidly; compactly; strongly; steadily.[2]

FIRST. Being before all others; being the initial unit or aggregate in order of occurrence or arrangement as to time, place, or rank; the ordinal of one.[3]

63. Garnier *v.* Porter, 90 Cal. 105, 27 Pac. 55; Boyd *v.* Rice, 38 Mich. 599; Russell *v.* Reagan, 34 Mo. App. 242; Kahle *v.* Hobein, 30 Mo. App. 472.

Exemplary damages are not allowable under Colo. Gen. St. § 1036. Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

64. Waters *v.* Brown, 44 Mo. 302.

65. Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

66. Spencer *v.* Murphy, 6 Colo. App. 453, 41 Pac. 841.

67. Waters *v.* Brown, 44 Mo. 302.

68. Kiernan *v.* Metropolitan Constr. Co., 170 Mass. 378, 49 N. E. 648, obstructing the use of a city hydrant by firemen.

1. Bouvier L. Dict. [*citing* Coke Litt. 102].

2. Century Dict.

"**Firmly believes**" see Thompson *v.* White, 4 Serg. & R. (Pa.) 135, 137; Bradley *v.* Eccles, 1 Browne (Pa.) 258.

3. Century Dict.

In connection with other words the word "first" has often received judicial interpretation; as for example as used in the following phrases: "First accrued" (see Randall *v.* Stevens, 1 C. L. R. 642, 2 E. & B. 641, 649, 18 Jur. 128, 23 L. J. Q. B. 68, 75 E. C. L. 641); "first and nearest of my kindred" (see Leigh *v.* Leigh, 15 Ves. Jr. 92, 99, 10 Rev. Rep. 31, 33 Eng. Reprint 690); "first and other sons of my said eldest son" (see Lewis *v.* Waters, 6 East 336, 337); "first charge" (see Coates *v.* Reg., [1900] A. C. 217, 223, 69 L. J. C. P. 26, 82 L. T. Rep. N. S. 162; Wheatley *v.* Silkstone, etc., Coal Co., 29 Ch. D. 715, 718, 54 L. J. Ch. 778, 52 L. T. Rep. N. S. 798, 33 Wkly. Rep. 797); "first cost and charges" (see Loraine *v.* Cartwright, 15 Fed. Cas. No. 8,500, 3 Wash. 151); "first day of the term" (see Matter of Burt, 5 B. & C. 668, 670, 11 E. C. L. 630); "first devisee" (see Den *v.* Robinson, 5 N. J. L. 689, 709, 710; Wilcox *v.* Heywood, 12 R. I. 196, 198); "first established" (see State *v.* Alcorn, 78 Tex. 387, 396, 14 S. W. 663); "first giving notice in writing" (see Ashdown *v.* Curtis, 8 Jur. N. S. 511, 512, 31 L. J. M. C. 216, 6 L. T. Rep. N. S. 331, 10 Wkly. Rep. 667); "first had and obtained" (see Com. *v.* Camac, 1 Serg. & R. (Pa.) 87, 89); "first half of August next" (see Grosvenor *v.* Magill, 37 Ill. 239, 241); "first heir male of his body" (see Dubber *v.* Trollope, Ambl. 453, 27 Eng. Reprint 300); "first, if by casualty or otherwise I should lose my life during this voyage" (see Damon *v.* Damon, 8 Allen (Mass.) 192, 194); "first Lord of the Admiralty" (see 30 & 31 Vict. c. 98, § 3); "first made" (see Thompson *v.* Grand Gulf R., etc., Co., 3 How. (Miss.) 240, 247, 34 Am. Dec. 81; Redman *v.* Philadelphia, etc., R. Co., 33 N. J. Eq. 165, 166); "first male heir" (see Doe *v.* Perratt, 5 B. & C. 48, 58, 11 E. C. L. 363); "first money, &c." (see Blower *v.* Morret, 2 Ves. 420, 421, 28 Eng. Reprint 268); "first moneys so received" (see State *v.* Bishop, 41 Mo. 16, 21); "first open water" (see Kempe *v.* Batt, 5 T. L. R. 27); "first or eldest son" (see Driver *v.* Frank, 8 Taunt. 468, 480, 4 E. C. L. 233); "first paid" (see Seaward *v.* Drew, 67 L. J. Q. B. 322, 325); "first place" (see Everett *v.* Carr, 59 Me. 325, 330; Perrine *v.* Perrine, 6 N. J. L. 133, 137, 10 Am. Dec. 392; *In re* Hardy, 17 Ch. D. 798, 802, 50 L. J. Ch. 241, 44 L. T. Rep. N. S. 49, 29 Wkly. Rep. 834); "first privilege" (see Hapgood *v.* Brown, 102 Mass. 451, 452; Schroeder *v.* Gemeinder, 10 Nev. 355, 361; Holloway *v.* Schmidt, 33 Misc. (N. Y.) 747, 67 N. Y. Suppl. 169); "first published" (see Routledge *v.* Low, L. R. 3 H. L. 108, 116, 37 L. J. Ch. 454, 18 L. T. Rep. N. S. 874, 16

FIRST-CLASS. Of the best quality; first-rate.[4]

FIRST COUSIN. The relation first in degree to whom that appellation is given; that is, the child of an uncle or aunt.[5] (See Cousins; Cousins German.)

FIRST DRAW. Under an agreement relative to the compensation which a pensioner agreed to allow an agent for procuring a pension, a term which has been construed to mean the first annuity.[6] (See, generally, Pensions.)

FIRST FLOOR. A term equivalent to "first story" of the building, and it naturally includes the walls.[7]

FIRST INVENTOR. See Patents.

FIRST MORTGAGE. A term which has a fixed, definite meaning, and implies that the lien of the mortgage is prior to that of any other claim.[8] (See, generally, Mortgages.)

FIRST MORTGAGE BOND. A bond secured by a first mortgage upon the property covered by the mortgage.[9] (See, generally, Mortgages.)

FIRST PURCHASER. A purchaser who first acquired the estate through his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.[10]

FIRST TERM. In criminal law, the term at which the prosecuting officer of

Wkly. Rep. 1081; Thomas *v.* Turner, 33 Ch. D. 292, 297, 56 L. J. Ch. 56, 55 L. T. Rep. N. S. 534, 35 Wkly. Rep. 177; Boucicault *v.* Chatterton, 5 Ch. D. 267, 280, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287; Cocks *v.* Purday, 5 C. B. 860, 882, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860); "first put into good repair" (see Neale *v.* Ratcliff, 15 Q. B. 916, 920, 15 Jur. 166, 20 L. J. Q. B. 130, 69 E. C. L. 916); "first-rate building plot of freehold ground" (see Dykes *v.* Blake, 1 Arn. 209, 216, 4 Bing. N. Cas. 463, 6 Scott 320, 33 E. C. L. 806); "first refusal" (see Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1900] 2 Ch. 352, 364, 69 L. J. Ch. 850, 83 L. T. Rep. N. S. 274 [*affirmed* in [1901] 2 Ch. 37, 46, 84 L. T. Rep. N. S. 436, 49 Wkly. Rep. 418]); "first rent reserved by the former lease" (see Horlbeck *v.* St. Philip's Parish Protestant Episcopal Church, 13 Rich. Eq. (S. C.) 123); "first son" (see Parker *v.* Tootal, 11 H. L. Cas. 143, 156, 11 Jur. N. S. 185, 12 L. T. Rep. N. S. 89, 13 Wkly. Rep. 442, 11 Eng. Reprint 1286); "first steamer" (see Johnson *v.* Chambers, 12 Ind. 102, 103); "first to be taken out of proceeds of sale of realty" (see Hutchinson *v.* Fuller, 75 Ga. 88, 92); "first trial of the case" (see Anderson *v.* O'Donnell, 29 S. C. 355, 359, 7 S. E. 523, 13 Am. St. Rep. 728, 1 L. R. A. 632); "first tried" (see Scott *v.* Clinton, etc., R. Co., 21 Fed. Cas. No. 12,527, 6 Biss. 529, 536; Warner *v.* Pennsylvania R. Co., 29 Fed. Cas. No. 17,186, 13 Blatchf. 231); "first voyage" (see Pirie *v.* Steele, 8 C. & P. 200, 202, 2 M. & Rob. 49, 34 E. C. L. 689).

4. Webster Int. Dict.

"First class fraud and of the first water" see Meas *v.* Johnson, 185 Pa. St. 12, 17, 39 Atl. 562.

"First class funeral" see Mackovsky *v.* Manhattan R. Co., 11 N. Y. St. 649, 650, per McAdam, C. J.

"First-class investments" are investments which require little or no personal care or supervision in order to avoid loss. Sparks Mfg. Co. *v.* Newton, 57 N. J. Eq. 367, 412, 41 Atl. 385.

"First-class interest-paying securities" see Woodruff *v.* Ward, 35 N. J. Eq. 467, 470.

First-class station see Hood *v.* North Eastern R. Co., L. R. 8 Eq. 666, 20 L. T. Rep. N. S. 970, 17 Wkly. Rep. 1085.

"First-class title" is a clean record or at least one not depending on presumptions that may be overcome, or facts that are uncertain. Vought *v.* Williams, 46 Hun (N. Y.) 638, 642.

5. Saunderson *v.* Bailey, 2 Jur. 958, 8 L. J. Ch. 18, 4 Myl. & C. 56, 59, 18 Eng. Ch. 56, 41 Eng. Reprint 22, where it is said: "And to no other does the appellation belong; for though the child of such first cousin is called a first cousin once removed, it is not known by the appellation of first cousin; and, in fact, it is a cousin in the second degree, though not called a second cousin, as being the second class of persons to whom the appellation of cousin is given." And see *In re* Parker, 15 Ch. D. 528, 529 [*affirmed* in 17 Ch. D. 262, 263, 50 L. J. Ch. 639, 44 L. T. Rep. N. S. 885, 29 Wkly. Rep. 855], where first cousins are defined as cousins german. See also *In re* Parker, 15 Ch. D. 528, 530; Stevenson *v.* Abingdon, 31 Beav. 305, 309, 9 Jur. N. S. 1063, 9 L. T. Rep. N. S. 74, 11 Wkly. Rep. 935; Stoddart *v.* Nelson, 6 De G. M. & G. 68, 73, 2 Jur. N. S. 27, 25 L. J. Ch. 116, 4 Wkly. Rep. 109, 55 Eng. Ch. 54, 43 Eng. Reprint 1156.

6. Trimble *v.* Ford, 5 Dana (Ky.) 517, 519.

7. Lowell *v.* Strahan, 145 Mass. 1, 8, 12 N. E. 401, 1 Am. St. Rep. 422, where the court said: "The words differ somewhat from the word 'room.'"

8. Green's Appeal, 97 Pa. St. 342, 348.

9. Minnesota, etc., R. Co. *v.* Sibley, 2 Minn. 13, 18. See also Com. *v.* Williamstown, 156 Mass. 70, 74, 30 N. E. 472.

10. Blair *v.* Adams, 59 Fed. 243, 247 [*quoting* 2 Blackstone Comm. 220]. See also Gardner *v.* Collins, 2 Pet. (U. S.) 58, 93, 7 L. ed. 347.

the government demands the arraignment and trial of an accused person.[11] (See, generally, CRIMINAL LAW.)

FISCAL. Of or pertaining to the treasury or public finances.[12] (Fiscal: Management — Of County, see COUNTIES; Of Municipal Corporation, see MUNICIPAL CORPORATIONS; Of State, see STATES; Of Town, see TOWNS; Of United States, see UNITED STATES.)

11. John *v.* State, 1 Head (Tenn.) 49, 51.

12. English L. Dict.

"**Fiscal agent**" see State *v.* Dubuclet, 27 La. Ann. 29, 35.

"**Fiscal affairs**" see Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

"**Fiscal concerns**," "**fiscal affairs**," and "**affairs**" and "**government**" used interchangeably see Martin *v.* Tyler, 4 N. D. 278, 60 N. W. 392, 25 L. R. A. 838.

"**Fiscal duties**" of each officer see Folger *v.* U. S., 13 Ct. Cl. 86, 93.

"**Fiscal quarter**" see Opinion of Judges, 5 Nebr. 566, 570.

"**Fiscal year**" see Moose *v.* State, 49 Ark. 499, 502, 5 S. W. 885.

FISH AND GAME

By Henry H. Skyles*

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Animals, see ANIMALS.
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Fishing and Hunting:
On Indian Reservation, see INDIANS.
On Sunday, see SUNDAY.

I. NATURE AND PROPERTY IN GENERAL.

A. Meaning of Terms. The term "game" has been defined as birds and beasts of a wild nature obtained by fowling and hunting.[1] Within the meaning of the game laws, however, it refers primarily to game fit for food,[2] although under some statutes it applies also to animals valuable for their fur or otherwise.[3] Within these laws the term "fish" is included in the term "game,"[4] and in itself includes oysters, clams, and other shell-fish.[5]

1. Black L. Dict.; Bouvier L. Dict. See Meul *v.* People, 198 Ill. 258, 64 N. E. 1106.

2. See People *v.* O'Neil, 71 Mich. 325, 39 N. W. 1; Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656.

Noxious animals may not be within the meaning of this rule. See Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656.

3. McMahon *v.* State, (Nebr. 1904) 97 N. W. 1035 (holding that the word "game" includes beasts, fowl, and fish); State *v.* House, 65 N. C. 315, 6 Am. Rep. 744.

4. State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561.

"Game fish" is any fish, the capture of which requires skill and affords sport. Com. *v.* Penn Forest Brook Trout Co., 26 Pa. Co. Ct. 163.

5. Caswell *v.* Johnson, 58 Me. 164; Maldon *v.* Woolvet, 12 A. & E. 13, 9 L. J. Q. B. 370, 4 P. & D. 26, 40 E. C. L. 17 (oyster spat); Caygill *v.* Thwaite, 1 T. L. Rep. 386 (crayfish).

The term "fisheries" includes oyster and

B. Property in Fish and Game. Fish and game being wild animals, their ownership, so far as they are capable of ownership, is in the state for the benefit of all its people in common, and a private person cannot acquire an exclusive property therein except by taking and reducing them to actual possession,[6] or by a grant from the government.[7] Property in fish, as well swimming as shell-fish, is in the public, until they are taken and reduced to actual possession, in which case absolute property is acquired by the individual so taking them and continues as long as he retains such possession,[8] but subject to be divested if the fish escape or are returned to other waters.[9]

II. RIGHTS OF HUNTING AND FISHING.

A. On Private Lands and Waters — 1. IN GENERAL. As a general rule the exclusive right of hunting or fishing on lands or waters owned by a private individual is in the owner or his tenant,[10] unless that right has been transferred to

shell fisheries. Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57.

A fishing place as defined by N. J. Act (1808), § 3, applies only to shore fisheries. Bennett *v.* Boggs, 3 Fed. Cas. No. 1,319, Baldw. 60.

6. *Arkansas.*— State *v.* Mallory, (1904) 83 S. W. 955, 67 L. R. A. 773.

California.— *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177.

Illinois.— Cummings *v.* People, 211 Ill. 392, 71 N. E. 1031; American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

North Carolina.—State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

United States.— Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 [*affirming* 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804].

See 23 Cent. Dig. tit. "Fish," § 1; 24 Cent. Dig. tit. "Game," § 1. And see cases cited *infra*, notes 8, 9. See also ANIMALS, 2 Cyc. 306.

7. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684. And see *infra*, II, B, 2, b, (I).

8. *Illinois.*— People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684.

Indiana.— State *v.* Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52; Gentile *v.* State, 29 Ind. 409.

Maine.— State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 50 L. R. A. 544, 80 Am. St. Rep. 380; Treat *v.* Parsons, 84 Me. 520, 24 Atl. 946.

Maryland.— Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

Massachusetts.— Dunham *v.* Lamphere, 3 Gray 268.

Michigan.— Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

Minnesota.— State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

Missouri.— State *v.* Blount, 85 Mo. 543.

New Jersey.— Oysters partake more of character of *feræ domitæ* than *feræ naturæ*, hence there may be an absolute property in them. State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347.

New York.— People *v.* Doxtater, 75 Hun 472, 27 N. Y. Suppl. 481; Sutter *v.* Van Derveer, 47 Hun 366; Brinckerhoff *v.* Starkins, 11 Barb. 248.

Ohio.— State *v.* Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481.

Vermont.— State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

Washington.— Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

England.— Young *v.* Hichens, 6 Q. B. 606, Dav. & M. 592, 51 E. C. L. 606.

See 23 Cent. Dig. tit. "Fish," § 1.

Property in fish becomes vested only when their possession is so far established by the aid of nets or other means that they cannot escape. People *v.* Doxtater, 75 Hun (N. Y.) 472, 27 N. Y. Suppl. 481; Buster *v.* Newkirk, 20 Johns. (N. Y.) 75; Pierson *v.* Post, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264.

Constructing a fence across a public tide-water cove and thus preventing fish from escaping does not create property in such fish. Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404.

9. People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684; Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94; Mullett *v.* Bradley, 24 Misc. (N. Y.) 695, 53 N. Y. Suppl. 781; Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114. See 2 Blackstone Comm. 395.

10. *Arkansas.*— State *v.* Mallory, (1904) 83 S. W. 955, 67 L. R. A. 773.

Michigan.— Hall *v.* Alford, 114 Mich. 165, 72 N. W. 137, 38 L. R. A. 205; Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405; Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

Minnesota.— L. Realty Co. *v.* Johnson, 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439.

North Carolina.—State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

Vermont.— Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656.

England.— Ewart *v.* Graham, 7 H. L. Cas. 331, 5 Jur. N. S. 773, 29 L. J. Exch. 88, 7 Wkly. Rep. 621, 11 Eng. Reprint 132; Sutton *v.* Moody, 1 Ld. Raym. 250.

Canada.— Beatty *v.* Davis, 20 Ont. 373; Long Point Co. *v.* Anderson, 19 Ont. 487.

another by grant[11] or prescription.[12] This right, however, may be regulated or restricted by the state.[13]

2. By Another Than Owner of Soil — a. By Grant. The right of hunting[14] or fishing[15] on another's lands or waters may be acquired by a grant or lease

See 23 Cent. Dig. tit. "Fish," § 11; 24 Cent. Dig. tit. "Game," § 1; 2 Blackstone Comm. 395.

Rights of hunting and fishing under inclosure allotments in accordance with an English act directing the allotment of certain common and waste land see Devonshire *v.* O'Connor, 24 Q. B. D. 468, 54 J. P. 740, 59 L. J. Q. B. 206, 62 L. T. Rep. N. S. 917, 38 Wkly. Rep. 420; Musgrave *v.* Forster, L. R. 6 Q. B. 590, 40 L. J. Q. B. 207, 24 L. T. Rep. N. S. 614, 19 Wkly. Rep. 1141; Hilton Tp. *v.* Bowes Tp., L. R. 1 Q. B. 359, 35 L. J. M. C. 137, 13 L. T. Rep. N. S. 512, 14 Wkly. Rep. 368; Ecroyd *v.* Coultherd, [1898] 2 Ch. 358, 67 L. J. Ch. 458, 78 L. T. Rep. N. S. 702; Sowerby *v.* Smith, L. R. 9 C. P. 524, 43 L. J. C. P. 290, 31 L. T. Rep. N. S. 309, 23 Wkly. Rep. 79; Robinson *v.* Wray, L. R. 1 C. P. 490, 14 L. T. Rep. N. S. 434; Leconfield *v.* Dixon, L. R. 3 Exch. 30, 37 L. J. Exch. 33, 17 L. T. Rep. N. S. 288, 16 Wkly. Rep. 157; Ewart *v.* Graham, 7 H. L. Cas. 331, 5 Jur. N. S. 773, 29 L. J. Exch. 88, 7 Wkly. Rep. 621, 11 Eng. Reprint 132; Rigg *v.* Lonsdale, 1 H. & N. 923, 3 Jur. N. S. 390, 26 L. J. Exch. 196, 5 Wkly. Rep. 335.

11. See *infra*, II, A, 2, a.

12. See *infra*, II, A, 2, b.

13. See *infra*, III, A.

14. Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152; Webber *v.* Lee, 9 Q. B. D. 315, 47 J. P. 4, 51 L. J. Q. B. 485, 47 L. T. Rep. N. S. 215, 30 Wkly. Rep. 866; Allhusen *v.* Brooking, 26 Ch. D. 559, 53 L. J. Ch. 520, 51 L. T. Rep. N. S. 57, 32 Wkly. Rep. 657 (reservation of a right to shoot ground game): Beauchamp *v.* Winn, L. R. 6 H. L. 223, 27 Wkly. Rep. 193 [*affirming* 38 L. J. Ch. 566, 21 L. T. Rep. N. S. 253]; Smith *v.* Wilson, 3 B. & Ad. 728, 1 L. J. K. B. 194, 23 E. C. L. 319; Hayward *v.* Grant, 1 C. & P. 448, 12 E. C. L. 262; Gardiner *v.* Colyer, 10 L. T. Rep. N. S. 715, 12 Wkly. Rep. 979.

The privilege conferred by the grant of the exclusive right to hunt on the grantor's land is limited strictly to the places designated (Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152); and to hunt in the usual and reasonable way, and not to tread over fields of standing crops at a time when it is not usual or reasonable to do so (Bingham *v.* Salene, *supra*; Hilton *v.* Green, 2 F. & F. 821), nor to lay down an unreasonable and excessive amount of game under a license to lay down some game (Farrer *v.* Nelson, 15 Q. B. D. 258, 49 J. P. 725, 54 L. J. Q. B. 385, 52 L. T. Rep. N. S. 786, 33 Wkly. Rep. 800; Birkbeck *v.* Paget, 31 Beav. 403, 54 Eng. Reprint 1194; Paget *v.* Birkbeck, 3 F. & F. 683. See Harrington *v.* Harrington, 20 L. T. Rep. N. S. 512). Nor does the grantee's license authorize the indiscriminate giving by him of permits to various persons to exercise the privilege granted, although he may sell or assign it. Bingham *v.* Salene, *supra*.

Liability of licensee for damages to an occupier of land, for turning rabbits thereon (Hilton *v.* Green, 2 F. & F. 821), or for not keeping down and destroying rabbits as he had covenanted to do (West *v.* Houghton, 4 C. P. D. 197, 40 L. T. Rep. N. S. 364, 27 Wkly. Rep. 678).

A grant of an easement across his premises for purposes of a public highway by a landowner does not surrender to the public his right to foster and protect wild game on the land, nor does the public acquire any right to pursue and kill the same while it is passing temporarily to and fro across a highway. L. Realty Co. *v.* Johnson, 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439.

Rights of lessee of sporting rights under the English Ground Game Act of 1880 see Morgan *v.* Jackson, [1895] 1 Q. B. 885, 59 J. P. 327, 63 L. J. Q. B. 462, 72 L. T. Rep. N. S. 593, 15 Reports 411, 43 Wkly. Rep. 479; Hansard *v.* Clark, 13 L. R. Ir. 391.

Implied covenant as to cultivation of land. — Where a right of shooting over land is demised, there is no implied covenant that the surface of the land or the course of cultivation shall remain unchanged. Jeffryes *v.* Evans, 19 C. B. N. S. 246, 11 Jur. N. S. 584, 34 L. J. C. P. 261, 13 L. T. Rep. N. S. 72, 13 Wkly. Rep. 864, 115 E. C. L. 246.

15. *Illinois.*— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Maine.— Treat *v.* Parsons, 84 Me. 520, 24 Atl. 946; Matthews *v.* Treat, 75 Me. 594; Wyman *v.* Oliver, 75 Me. 421 (assigned as part of dower); Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

Massachusetts.— Butrick *v.* Tilton, 155 Mass. 461, 29 N. E. 1088; Waters *v.* Lilly, 4 Pick. 145, 16 Am. Dec. 333.

New Jersey.— Fitzgerald *v.* Faunce, 46 N. J. L. 536; Cobb *v.* Davenport, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718.

New York.— Jackson *v.* Halsted, 5 Cow. 216; Brink *v.* Richtmeyer, 14 Johns. 255.

North Carolina.— Read *v.* Granberry, 30 N. C. 109.

Pennsylvania.— Gibbs *v.* Sweet, 20 Pa. Super. Ct. 275.

England.— Devonshire *v.* Pattinson, 20 Q. B. D. 263, 52 J. P. 276, 57 L. J. Q. B. 189, 58 L. T. Rep. N. S. 392; Rolle *v.* Whyte, L. R. 3 Q. B. 286, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. Rep. N. S. 560, 16 Wkly. Rep. 593; Grove *v.* Portal, [1902] 1 Ch. 727, 71 L. J. Ch. 299, 86 L. T. Rep. N. S. 350; Hanbury *v.* Jenkins, [1901] 2 Ch. 401, 65 J. P. 631, 70 L. J. Ch. 730, 49 Wkly. Rep. 615; Fitzgerald *v.* Firbank, [1897] 2 Ch. 96, 66 L. J. Ch. 529, 76 L. T. Rep. N. S. 584; Smith *v.* Andrews, [1891] 2 Ch. 678, 65 L. T. Rep. N. S. 175; Seymour *v.* Courtenay, 5 Burr. 2814 (reservation of oysters and fish

from the owner, either with or without the soil, and with such restrictions or limitations as the owner may see fit to impose. This right being a right of profit in the land passes by grant or lease of the land, unless expressly reserved.[16]

b. By Prescription. The exclusive right of hunting or fishing on another's lands or waters may also be acquired by prescription;[17] but being a right of profit in lands as distinguished from an easement, it cannot be claimed by custom, but must be acquired by prescription as belonging to some estate and must be so pleaded with a *que* estate.[18]

c. By the Public. Such rights, however, cannot be acquired by a person, as one of the public, either by grant or prescription, since the public cannot prescribe or accept a grant.[19] Stocking private streams or waters with fish raised at

for the grantor's table); Holford *v.* Pritchard, 3 Exch. 793, 18 L. J. Exch. 315; Johnston *v.* Bloomfield, Ir. R. 8 C. L. 88. See Greenbank *v.* Sanderson, 49 J. P. 40; Hamilton *v.* Musgrove, Ir. R. 6 C. L. 129, 19 Wkly. Rep. 443.

The right to take fish follows the ownership of the water if that is separated from the ownership of the soil. Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386.

A grant to fish proved by a user is only commensurate with such user. Hart *v.* Chalker, 5 Conn. 311.

A right in gross to fish in a brook can neither be assigned nor inherited. Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692.

16. *Georgia.*— Lee *v.* Mallard, 116 Ga. 18, 42 S. E. 372.

Illinois.— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Maine.— Matthews *v.* Treat, 75 Me. 594.

United States.— Smith *v.* Miller, 22 Fed. Cas. No. 13,080, 5 Mason 191.

England.— Pannell *v.* Mill, 3 C. B. 625, 11 Jur. 109, 16 L. J. C. P. 91, 54 E. C. L. 625; Jeffryes *v.* Evans, 19 C. B. N. S. 246, 11 Jur. N. S. 584, 34 L. J. C. P. 261, 13 L. T. Rep. N. S. 72, 13 Wkly. Rep. 864, 115 E. C. L. 246; Jones *v.* Davies, 20 Cox C. C. 184, 66 J. P. 439, 86 L. T. Rep. N. S. 447; Ewart *v.* Graham, 7 H. L. Cas. 331, 5 Jur. N. S. 773, 29 L. J. Exch. 88, 7 Wkly. Rep. 621, 11 Eng. Reprint 132; Moore *v.* Plymouth, 1 Moore C. P. 346, 7 Taunt. 614, 18 Rev. Rep. 604, 2 E. C. L. 516. See Coleman *v.* Bathhurst, L. R. 6 Q. B. 366, 40 L. J. M. C. 131, 24 L. T. Rep. N. S. 426, 19 Wkly. Rep. 848; Moore *v.* Plymouth, 3 B. & Ald. 66, 5 E. C. L. 48; Lethbridge *v.* Lethbridge, 3 De G. F. & J. 523, 8 Jur. N. S. 856, 10 Wkly. Rep. 449, 64 Eng. Ch. 410, 45 Eng. Reprint 981; Paget *v.* Milles, 3 Dougl. 43, 26 E. C. L. 40; Wickham *v.* Hawker, 10 L. J. Exch. 153, 7 M. & W. 63. But see Morris *v.* Dimes, 1 A. & E. 654, 3 L. J. K. B. 170, 3 N. & M. 671, 28 E. C. L. 308.

By the Scotch law, however, if an agricultural lease is silent as to hunting, shooting, fishing, or other similar sports, the right to these enjoyments does not pass to the lessee but remains in the landlord by law without any express or especial reservation. Copland *v.* Maxwell, L. R. 2 H. L. Sc. 103.

Reservation in a lease of land of the exclusive right of sporting under the English Ground Game Act of 1880. See Sherrard *v.* Gascoigne, [1900] 2 Q. B. 279, 69 L. J. Q. B. 720, 82 L. T. Rep. N. S. 850, 48 Wkly. Rep. 557; Stanton *v.* Brown, [1900] 1 Q. B. 671, 64 J. P. 326, 69 L. J. Q. B. 301, 48 Wkly. Rep. 333.

17. *Connecticut.*— Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 886.

Massachusetts.—McFarlin *v.* Essex County, 10 Cush. 304; Waters *v.* Lilly, 4 Pick. 145, 16 Am. Dec. 333.

New Jersey.—Cobb *v.* Davenport, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718.

Pennsylvania.— Gibbs *v.* Sweet, 7 Lack. Leg. N. 18.

England.— Rolle *v.* Whyte, L. R. 3 Q. B. 286, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. Rep. N. S. 560, 16 Wkly. Rep. 593; Gray *v.* Bond, 2 B. & B. 667, 5 Moore C. P. 527, 23 Rev. Rep. 530, 6 E. C. L. 321; Little *v.* Wingfield, 8 Ir. C. L. 279, 11 Ir. C. L. 63. See Tilbury *v.* Silva, 45 Ch. D. 98, 63 L. T. Rep. N. S. 141; Pickering *v.* Noyes, 4 B. & C. 639, 7 D. & R. 49, 4 L. J. K. B. O. S. 10, 28 Rev. Rep. 430, 10 E. C. L. 736.

Requisites of prescription.— A prescriptive right of fishery on the land of another can be acquired by an actual and exclusive occupation and enjoyment of the fishery, adverse to the riparian proprietor, and continued for the period required by the statute of limitations. Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; McFarlin *v.* Essex Co., 10 Cush. (Mass.) 304; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597.

The annual temporary use of a fishing privilege does not disseize him entitled to the privilege. Freary *v.* Cooke, 14 Mass. 488; Nickerson *v.* Brackett, 10 Mass. 212.

A trespasser cannot acquire a prescriptive right of fishery. Heckman *v.* Swett, 99 Cal. 303, 33 Pac. 1099.

18. McFarlin *v.* Essex County, 10 Cush. (Mass.) 304; Waters *v.* Lilly, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Albright *v.* Cortright, 64 N. J. L. 330, 45 Atl. 634, 81 Am. St. Rep. 504, 48 L. R. A. 616; Cobb *v.* Davenport, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718; Allgood *v.* Gibson, 34 L. T. Rep. N. S. 883, 25 Wkly. Rep. 60.

19. *Connecticut.*— Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951. 14 L. R. A. 386.

the expense of the state gives the public no right of fishing therein without the owner's consent.[20]

3. Fishing in Non-Navigable Waters. The right of fishing in non-navigable waters *prima facie* belongs exclusively to the owner of the land covered by such waters or to his tenant,[21] unless another shows a right acquired in some way recognized by law, as by grant or prescription.[22] If he owns the land on both sides of the stream he has the sole right of fishing therein, but if he is the owner or proprietor on one side only his right extends only to the center of the stream.[23]

New Jersey.— Albright *v.* Cortright, 64 N. J. L. 330, 45 Atl. 634, 81 Am. St. Rep. 504, 48 L. R. A. 616.

North Carolina.— Winder *v.* Blake, 49 N. C. 332.

Pennsylvania.— Gibbs *v.* Sweet, 20 Pa. Super. Ct. 275.

England.— Hargreaves *v.* Diddams, L. R. 10 Q. B. 582, 44 L. J. M. C. 178, 32 L. T. Rep. N. S. 600, 23 Wkly. Rep. 828; Smith *v.* Andrews, [1891] 2 Ch. 678, 65 L. T. Rep. N. S. 175; Lloyd *v.* Jones, 6 C. B. 81, 17 L. J. C. P. 206, 60 E. C. L. 81; Bland *v.* Lipscombe, 3 C. L. R. 261, 4 E. & B. 713 note, 1 Jur. N. S. 707 note, 24 L. J. Q. B. 155 note, 3 Wkly. Rep. 57, 82 E. C. L. 713.

20. Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; Albright *v.* Cortright, 64 N. J. L. 330, 45 Atl. 634, 81 Am. St. Rep. 504, 48 L. R. A. 616.

21. *Connecticut.*— Adams *v.* Pease, 2 Conn. 481.

Illinois.— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Maine.— Matthews *v.* Treat, 75 Me. 594.

Maryland.— See Browne *v.* Kennedy, 5 Harr. & J. 195, 9 Am. Dec. 503.

Massachusetts.— Com. *v.* Chapin, 5 Pick. 189, 16 Am. Dec. 386; Waters *v.* Lilly, 4 Pick. 145, 16 Am. Dec. 333.

New Hampshire.— Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 68 Am. St. Rep. 692; State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

New Jersey.— Albright *v.* Cortright, 64 N. J. L. 330, 45 Atl. 634, 81 Am. St. Rep. 504, 48 L. R. A. 616; Cobb *v.* Davenport, 32 N. J. L. 369, 33 N. J. L. 223, 97 Am. Dec. 718.

New York.—Hooker *v.* Cummings, 20 Johns. 90, 11 Am. Dec. 249; People *v.* Platt, 17 Johns. 195, 8 Am. Dec. 382. See Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

North Carolina.— State *v.* Glen, 52 N. C. 321. See Ingram *v.* Threadgill, 14 N. C. 59.

Pennsylvania.— Baylor *v.* Decker, 133 Pa. St. 168, 19 Atl. 351.

Vermont.— State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

Washington.— Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

England.— In England an owner of land bordering on streams not affected by the flow and reflow of the tides, whether in fact navigable or not, has the exclusive right of fishing in front of his land to the middle of the stream. Reece *v.* Miller, 8 Q. B. D. 626, 47 J. P. 37, 51 L. J. M. C. 64; Hargreaves *v.* Diddams, L. R. 10 Q. B. 582, 44 L. J. M. C. 178, 32 L. T. Rep. N. S. 600, 23 Wkly. Rep. 828; Bristow *v.* Cormican, 3 App. Cas. 641; Carter *v.* Murcot, 4 Burr. 2162; Child *v.* Greenhill, Cro. Car. 553; Johnston *v.* Bloomfield, Ir. R. 8 C. L. 88.

Canada.— Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444; Reg. *v.* Robertson, 6 Can. Sup. Ct. 52; Phair *v.* Venning, 22 N. Brunsw. 362.

See 23 Cent. Dig. tit. "Fish," § 11.

A tenant at will is entitled to be treated as a riparian owner, so far as regards the right of fishing. Phair *v.* Venning, 22 N. Brunsw. 362.

A patent for land lying on a non-navigable stream passes to the patentee the exclusive right of fishery, unless the bed of the stream or the right of fishery is reserved to the public. People *v.* Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Robertson *v.* Steadman, 16 N. Brunsw. 621.

The right of fishery does not depend upon the ownership of the bed of the river, but of the bank. Steadman *v.* Robertson, 18 N. Brunsw. 580. But see Baylor *v.* Decker, 133 Pa. St. 168, 19 Atl. 351.

22. Beach *v.* Morgan, 67 N. H. 529, 41 Atl. 349, 61 Am. St. Rep. 692. And see *supra*, II, A, 2, a, b.

The owner of water in a stream or pond not navigable, or of all the privileges therein, has the exclusive right of fishing in the same, although the land lying under the water belongs to another. Lee *v.* Mallard, 116 Ga. 18, 42 S. E. 372.

23. *Illinois.*— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Massachusetts.— Com. *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386.

New York.— Hooker *v.* Cummings, 20 Johns. 90, 11 Am. Dec. 249.

North Carolina.— State *v.* Glen, 52 N. C. 321; Ingram *v.* Threadgill, 14 N. C. 59.

Washington.— Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

And see cases cited *supra*, note 21 *et seq.*

New channel.— Where a stream entirely changes its course the right of fishery belongs to the owner over whose land the new channel runs. Carlisle *v.* Graham, L. R. 4 Exch. 361, 38 L. J. Exch. 226, 21 L. T. Rep. N. S. 133, 18 Wkly. Rep. 318. But where the change is gradual and by accretion the rights of fishery of the riparian owners on opposite sides of the stream remain the same — that is to the center of the new channel.

This right, however, is subject to regulations by the legislature for the good of the public in general,[24] and is also subject to the qualification that the right of fishery be so used as not to injure other proprietors above and below on the same stream,[25] and subject to an easement in the public to use the stream as a public highway for purposes of transportation and commercial intercourse.[26] He must not by means of dams or other artificial obstructions prevent the passage of fish up and down the stream,[27] nor can a prescriptive right to maintain such obstructions be acquired.[28]

B. On Public Lands and Waters — 1. In General. The right of hunting or fishing on public lands and waters belongs in common to all the members of the public, except in so far as an exclusive right to hunt or fish on a portion of such lands or waters may have been acquired by a private person by grant or prescription.[29]

2. Fishing in Public Waters — a. In General. By the common law all persons have a common and general right of fishing in the sea, and in all other navigable or tidal waters; and no one can maintain an exclusive privilege to any part of such waters unless he has acquired it by grant or prescription,[30] notwithstand-

Zetland *v.* Glover Incorporation, L. R. 2 H. L. Sc. 70; Miller *v.* Little, 4 L. R. Ir. 302. Or if the channel was originally within the lands of one proprietor, but gradually and imperceptibly encroaches upon another proprietor's land, the former's exclusive right of fishery will remain the same even in the waters covering the latter's land. Foster *v.* Wright, 4 C. P. D. 438, 44 J. P. 7, 49 L. J. C. P. 97.

24. Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Com. *v.* Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199. And see *infra*, III, A.

25. *Massachusetts.*— Com. *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386.

New Hampshire.— State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

Vermont.— State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290.

Washington.— Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

England.— Weld *v.* Hornby, 7 East 195, 3 Smith K. B. 244, 8 Rev. Rep. 608.

But see People *v.* Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382.

A riparian owner's exclusive right to fish does not include the right to destroy the fish he does not take. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581.

26. Adams *v.* Pease, 2 Conn. 481; Hooker *v.* Cummings, 20 Johns. (N. Y.) 90, 11 Am. Dec. 249; State *v.* Glenn, 52 N. C. 321; Beatty *v.* Davis, 20 Ont. 373. See Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

27. State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199. And see *infra*, III, B, 4, a.

28. State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

29. Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808, 838, 35 L. ed. 428; Bristow *v.* Cormican, 3 App. Cas. 641. See Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405, as to a grant of the exclusive right of shooting wild fowl on the waters of a particular bay. And see cases cited *infra* note 30 *et seq.*

Riparian owners upon a lake, the soil under which belongs to the state, have no exclusive right to hunt and fish upon its waters. Ne-pee-nauk Club *v.* Wilson, 96 Wis. 290, 71 N. W. 661.

A lease of an island with authority to the lessee to "utilize the wild goats" found thereon in moderation so as not to destroy them creates a property right in all the animals which precludes others from hunting them or makes the product of such hunting the property of the lessee. Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. 684.

30. *Alaska.*— Sutter *v.* Heckman, 1 Alaska 81, 188.

California.— Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 72 Pac. 161.

Connecticut.— Lay *v.* King, 5 Day 72; Pitkin *v.* Olmstead, 1 Root 217, holding, however, that where one clears a fishing place he is entitled to its exclusive use so long as he occupies it during the fishing season.

Delaware.— Bickel *v.* Polk, 5 Harr. 325.

Maine.— Parsons *v.* Clark, 76 Me. 476; Preble *v.* Brown, 47 Me. 284; Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57; Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400; Parker *v.* Cutler Milldam Co., 20 Me. 353, 37 Am. Dec. 56.

Massachusetts.— Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Packard *v.* Ryder, 144 Mass. 440, 11 N. E. 578, 59 Am. Rep. 101; Proctor *v.* Wells, 103 Mass. 216; Weston *v.* Sampson, 8 Cush. 347, 54 Am. Dec. 764; Com. *v.* Chapin, 5 Pick. 199, 16 Am. Dec. 386.

Michigan.— Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

New Hampshire.— State *v.* Welch, 66 N. H. 178, 18 Atl. 21; State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

New Jersey.— Polhemus *v.* Bateman, 60 N. J. L. 163, 37 Atl. 1015; Wooley *v.* Campbell, 37 N. J. L. 163; Arnold *v.* Mundy, 6

ing the title to the bed of such a stream is in the riparian owner.[31] This right, however, is subject to the paramount right of navigation,[32] and to legislative restriction;[33] and to the restriction that one in the exercise of such right must not trespass on adjoining private lands above high-water mark.[34] A private individual has the exclusive right of using that portion of the shore or beach above high-water mark which belongs to him individually.[35] Fishing in the Great Lakes is governed by the above rules.[36]

N. J. L. 1, 10 Am. Dec. 356; Yard *v.* Carman, 3 N. J. L. 936.

New York.— Lowndes *v.* Dickerson, 34 Barb. 586; Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493; Hooker *v.* Cummings, 20 Johns. 90, 11 Am. Dec. 249.

North Carolina.— Skinner *v.* Hettrick, 73 N. C. 53; State *v.* Glen, 52 N. C. 321; Fagan *v.* Armistead, 33 N. C. 433; Collins *v.* Benbury, 25 N. C. 277, 38 Am. Dec. 722, 27 N. C. 118, 42 Am. Dec. 155.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

Pennsylvania.— Shrunk *v.* Schuylkill Nav. Co., 14 Serg. & R. 71; Carson *v.* Blazer, 2 Binn. 475, 4 Am. Dec. 463.

South Carolina.— Boatwright *v.* Bookman, Rice 447.

Washington.— Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33.

Wisconsin.— Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

United States.— Shively *v.* Bowlby, 152 U. S. 1, 14 S. Ct. 548, 38 L. ed. 331 (below high-water mark); McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248; Martin *v.* Waddell, 16 Pet. 367, 10 L. ed. 997, 18 N. J. L. 495.

England.— Carter *v.* Murcot, 4 Burr. 2162; Malcolmson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155; Warren *v.* Mathews, 6 Mod. 73, 1 Salk. 357; Fitzwalter's Case, 1 Mod. 105.

Canada.— Gage *v.* Bates, 7 U. C. C. P. 116; Daragh *v.* Dunn, 7 U. C. L. J. 273; Steadman *v.* Robertson, 18 N. Brunsw. 580; Rose *v.* Belyea, 12 N. Brunsw. 109.

See 23 Cent. Dig. tit. "Fish," § 3.

As to what waters are navigable see, generally, NAVIGABLE WATERS.

The public right of fishery is paramount to the private right to cut grass below high-water mark. Allen *v.* Allen, 19 R. I. 114, 32 Atl. 166, 61 Am. St. Rep. 738, 30 L. R. A. 497.

Boatable waters within the meaning of Vt. Const. c. 2, § 40, giving the right to fish "in all boatable and other waters (not private property)," are waters that are of common passage as highways for business or pleasure, and do not include all waters which may be boatable in fact. New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569.

Tidal waters only.— In England the public's right of fishery extends only to tidal waters, and not to inland or non-tidal waters whether navigable in fact or not. Pearce *v.* Scotcher, 9 Q. B. D. 162, 46 J. P. 248, 46 L. T. Rep. N. S. 342; Reece *v.* Miller, 8 Q. B. D. 626, 47 J. P. 37, 51 L. J. M. C. 64; Bristow *v.* Cormican, 3 App. Cas. 641; Smith *v.* Andrews, [1891] 2 Ch. 678, 65 L. T. Rep. N. S. 175; Johnston *v.* Bloomfield, Ir. R. 8 C. L. 88; Murphy *v.* Ryan, Ir. R. 2 C. L. 143, 16 Wkly. Rep. 678; Mussett *v.* Burch, 35 L. T. Rep. N. S. 486; Fitzwalter's Case, 1 Mod. 105. Some of the earlier decisions in this country are to the same effect. See Adams *v.* Pease, 2 Conn. 481; Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146; Parker *v.* Cutler Milldam Co., 20 Me. 353, 37 Am. Dec. 56. And see cases cited above in this note.

31. *Delaware.*— Bickel *v.* Polk, 5 Harr. 325.

Maine.— Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57.

Maryland.— Wilson *v.* Inloes, 6 Gill 121.

Ohio.— Hogg *v.* Beerman, 41 Ohio St. 81, 52 Am. Rep. 71.

Wisconsin.— Willow River Club *v.* Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

See 23 Cent. Dig. tit. "Fish," § 3.

32. Lewis *v.* Keeling, 46 N. C. 299, 62 Am. Dec. 168; Boatwright *v.* Bookman, Rice (S. C.) 447; Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807; Colchester *v.* Brooke, 7 Q. B. 339, 9 Jur. 1090, 15 L. J. Q. B. 59, 53 E. C. L. 339. And see cases cited *supra*, note 30 *et seq.*

33. Com. *v.* Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386; Daragh *v.* Dunn, 7 U. C. L. J. 273. See *infra*, III, B, 1.

34. Bickel *v.* Polk, 5 Harr. (Del.) 325; Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439. See Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87.

The erection of a hut on private lands adjoining a public fishery by one exercising his right therein gives rise to an action of trespass by the owner of the land. Cortelyou *v.* Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439.

35. Lay *v.* King, 5 Day (Conn.) 72; Bickel *v.* Polk, 5 Harr. (Del.) 325 (holding that the public have no right to land fish on private property above high-water mark); Skinner *v.* Hettrick, 73 N. C. 53; Parker *v.* Elliott, 1 U. C. C. P. 470.

36. Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116 (holding also that fishing in such waters, remote from the land, may be carried on with any suitable machinery and even with stakes where it does not interfere with navigation and is not forbidden by law); Bodi *v.* Winous Point Sporting Club, 57 Ohio St. 226, 48 N. E. 944; Sloane *v.* Biemiller, 34 Ohio St. 492;

b. Private Rights — (i) *By Grant.* A several or exclusive right of fishery in a portion of navigable or public waters may be acquired by ancient grant or by legislative enactment,[37] subject to rights of navigation.[38] Such grants, however, are strictly construed, and an intention to part with any portion of such public right will not be presumed unless clear and special words are used to denote it.[39]

Dwelle *v.* Wilson, 14 Ohio Cir. Ct. 551; Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444.

37. *California.*— Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420 [*affirming* 99 Cal. 303, 33 Pac. 1099] new channel.

Connecticut.— Stannard *v.* Hubbard, 34 Conn. 370; Munson *v.* Baldwin, 7 Conn. 168; Adams *v.* Pease, 2 Conn. 481, right of fishing under the statute non-assignable.

Maine.— Preble *v.* Brown, 47 Me. 284; Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57.

Maryland.— See Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654, *quære.*

Massachusetts.—Com. *v.* Vincent, 108 Mass. 441; Proctor *v.* Wells, 103 Mass. 216.

New Jersey.— Wooley *v.* Campbell, 37 N. J. L. 163. See Gough *v.* Bell, 22 N. J. L. 441; Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

New York.— Brookhaven *v.* Strong, 60 N. Y. 56; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493. Under Const. art. 3, § 18, however, forbidding the granting of any franchise except to promote the public welfare, an exclusive right to one person of fishing in any part of the Hudson river cannot be granted. Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

North Carolina.— Fagan *v.* Armistead, 33 N. C. 433; Jones *v.* Jones, 2 N. C. 488.

Washington.— Halleck *v.* Davis, 22 Wash. 393, 60 Pac. 1116; Walker *v.* Stone, 17 Wash. 578, 50 Pac. 488.

United States.— Damon *v.* Hawaii, 194 U. S. 154, 24 S. Ct. 617, 48 L. ed. 916; Russell *v.* Jersey Co., 15 How. 426, 14 L. ed. 757. See Martin *v.* Waddell, 16 Pet. (U. S.) 367, 10 L. ed. 997, 18 N. J. L. 495.

England.— Williams *v.* Wilcox, 8 A. & E. 314, 7 L. J. Q. B. 229, 3 N. & P. 606, 35 E. C. L. 609; Carter *v.* Murcot, 4 Burr. 2162. See Warrand *v.* Mackintosh, 15 App. Cas. 52; Lord Advocate *v.* Sinclair, L. R. 1 H. L. Sc. 174; Snape *v.* Dobbs, 1 Bing. 202, 1 L. J. C. P. O. S. 58, 8 Moore C. P. 23, 25 Rev. Rep. 616, 8 E. C. L. 473.

Canada.— A riparian proprietor before confederation had an exclusive right of fishing in navigable non-tidal waters, the beds of which had been granted to them by the crown. Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444; Reg. *v.* Robertson, 6 Can. Sup. Ct. 52; Steadman *v.* Robertson, 18 N. Brunsw. 580.

A term for years in a several fishery in a navigable river cannot be created without a deed. Somerset *v.* Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, 11 E. C. L. 719.

Effect of Magna Charta.— According to some authorities the crown has no power since the passage of Magna Charta to grant a several right of fishery in navigable tidal waters (Carlisle *v.* Graham, L. R. 4 Exch. 361, 38 L. J. Exch. 226, 21 L. T. Rep. N. S. 133, 18 Wkly. Rep. 318; Somerset *v.* Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, 11 E. C. L. 719; Meisner *v.* Fanning, 3 Nova Scotia 97. See Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Gough *v.* Bell, 21 N. J. L. 156; Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597), except where the right had already been enjoyed for some time prior to that statute (Neill *v.* Devonshire, 8 App. Cas. 135, 31 Wkly. Rep. 622; Northumberland *v.* Houghton, L. R. 5 Exch. 127, 39 L. J. Exch. 66, 22 L. T. N. S. 491, 18 Wkly. Rep. 495; Malcomson *v.* O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. Rep. N. S. 93, 12 Wkly. Rep. 178, 11 Eng. Reprint 1155; Bridges *v.* Highton, 11 L. T. Rep. N. S. 653. See Weston *v.* Sampson, 8 Cush. (Mass.) 347, 54 Am. Dec. 764). By other authorities, however, it is held that Magna Charta has no effect and in no way restricts the power of the crown to grant such a several right of fishery. See Brookhaven *v.* Strong, 60 N. Y. 56; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493. But see Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586. In those provinces in which the provisions of Magna Charta are not in force, as in the province of Quebec, the crown in right of the province may grant exclusive rights of fishing in tidal waters. Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444.

A quo warranto may issue to try the title of one who claims a sole fishery in a navigable stream under a grant from the crown. Warren *v.* Mathews, 6 Mod. 73, 1 Salk. 357.

Extent of right.— A grant of a several fishery in certain waters extends only to such waters as they exist at the time of the grant. O'Neill *v.* McEilaine, 16 Ir. Ch. 280.

38. *Michigan.*— Sterling *v.* Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

New Jersey.— Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570.

New York.— Brookhaven *v.* Strong, 60 N. Y. 56; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493.

England.— Colchester *v.* Brooke, 7 Q. B. 339, 9 Jur. 1090, 15 L. J. Q. B. 59, 53 E. C. L. 339.

Canada.— Beatty *v.* Davis, 20 Ont. 373.

39. Sutter *v.* Heckman, 1 Alaska 81, 188; Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec.

(II) *By Prescription.* A prescriptive right of several fishery in navigable or public waters may be acquired by the long, exclusive, and uninterrupted enjoyment of such right.[40] But as this right is based upon the supposition that a previous grant has been made, every presumption is against it and it must be clearly proved.[41] It cannot be presumed where a prior grant could not have been made;[42] nor can it be presumed from the mere uninterrupted use and enjoyment of such right in common with others; but it must appear that all others have been kept out by the claimant and his grantors from fishing in the particular place in any manner.[43]

3. Oysters, Clams, and Other Shell-Fish — a. In General. As a general rule the right of taking oysters, clams, and other shell-fish from land or flats under public waters, below high-water mark, is in the public,[44] unless restricted by

57; Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586; Martin *v.* Waddell, 16 Pet. (U. S.) 367, 10 L. ed. 997, 18 N. J. L. 495. The grant of a parcel of land covered with or adjoining tide water without any word showing an intention to grant a fishery will not pass the right of the fishery but that will remain public. Brink *v.* Richtmyer, 14 Johns. (N. Y.) 255; Hierlihy *v.* Loggie, 8 N. Brunsw. 204; Wilson *v.* Codyre, 27 N. Brunsw. 320. But see Brookhaven *v.* Strong, 60 N. Y. 56 [*affirming* 1 Thomps. & C. 415].

Presumption.— An owner of a several fishery in ordinary cases and where the terms of the grant are unknown may be presumed to be the owner of the soil. Somerset *v.* Fogwell, 5 B. & C. 875, 8 D. & R. 747, 5 L. J. K. B. O. S. 49, 29 Rev. Rep. 449, 11 E. C. L. 719; Partheriche *v.* Mason, 2 Chit. 658, 18 E. C. L. 835. See Scratton *v.* Brown, 4 B. & C. 485, 10 E. C. L. 670; Rex *v.* Ellis, 1 M. & S. 652.

The words "libera piscaria" in a patent do not mean an exclusive fishery, and are not to be so construed by a judge; and he ought not to leave it to the jury to say whether, from the acts and usage of the grantees, a several fishery was intended to pass. Johnston *v.* Bloomfield, Ir. R. 8 C. L. 88.

40. *Connecticut.*— Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; Chalker *v.* Dickinson, 1 Conn. 382, 6 Am. Dec. 250.

Maryland.— Delaware, etc., R. Co. *v.* Stump, 8 Gill & J. 479, 29 Am. Dec. 561.

New York.— Brookhaven *v.* Strong, 60 N. Y. 56; Gould *v.* James, 6 Cow. 369; Rogers *v.* Jones, 1 Wend. 237, 19 Am. Dec. 493. But see Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

North Carolina.— Fagan *v.* Armistead, 33 N. C. 433.

South Carolina.— Jackson *v.* Lewis, Cheves 259.

England.— Lord Advocate *v.* Lovat, 5 App. Cas. 273; McDouall *v.* Advocate, L. R. 2 H. L. Sc. 431; Carter *v.* Murcot, 4 Burr. 2162; Rogers *v.* Allen, 1 Campb. 309, 10 Rev. Rep. 689 (holding also that such a right once acquired may pass as appurtenant to the land); Mannall *v.* Fisher, 5 C. B. N. S. 856, 5 Jur. N. S. 389, 94 E. C. L. 856; Reg. *v.* Downing, 11 Cox C. C. 580, 23 L. T. Rep. N. S. 398; O'Neill *v.* Allen, 9 Ir. C. L. 152; Edgar *v.* English Fisheries, 23 L. T. Rep. N. S. 732; Orford *v.* Richardson, 4 T. R. 437, 3 Rev. Rep. 579. See Ward *v.* Creswell, Willes 265.

41. Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57; Melvin *v.* Whiting, 13 Pick. (Mass.) 184; Gould *v.* James, 6 Cow. (N. Y.) 369; Neill *v.* Devonshire, 8 App. Cas. 135, 31 Wkly. Rep. 622; Carter *v.* Murcot, 4 Burr. 2162; Edgar *v.* English Fisheries, 23 L. T. Rep. N. S. 732; Pim *v.* Curell, 6 M. & W. 234. See Warrand *v.* Mackintosh, 15 App. Cas. 52; Mills *v.* Colchester, L. R. 3 C. P. 575, 37 L. J. C. P. 278, 16 Wkly. Rep. 987 [*affirming* 16 L. T. Rep. N. S. 626]; Tighe *v.* Sinnott, [1897] 1 Ir. R. 140; Warwick *v.* Gonville, etc., College, 6 T. L. R. 447 [*affirming* 5 T. L. R. 461].

Occupation of a spot for five or six weeks annually as a fishing place is not sufficient to establish a prescriptive right of exclusive fishery, either as against the public or as against an individual proprietor. Jackson *v.* Lewis, Cheves (S. C.) 259.

Merely clearing out a fishing place does not give an exclusive right of fishery. Freary *v.* Cooke, 14 Mass. 488; Westfall *v.* Van Anker, 12 Johns. (N. Y.) 425; Collins *v.* Benbury, 27 N. C. 118, 42 Am. Dec. 155. *Compare* Pitkin *v.* Olmstead, 1 Root (Conn.) 217.

42. Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 72 Pac. 161; State *v.* Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597.

43. *Maine.*—Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57.

Maryland. — Delaware, etc., R. Co. *v.* Stump, 8 Gill & J. 479, 29 Am. Dec. 561. See Day *v.* Day, 4 Md. 262.

North Carolina.— Collins *v.* Benbury, 25 N. C. 277, 38 Am. Dec. 722, 27 N. C. 118, 42 Am. Dec. 155.

Ohio.— Sloan *v.* Biemiller, 34 Ohio. St. 492.

England.— Bevins *v.* Bird, 12 L. T. Rep. N. S. 306.

44. *Connecticut.*—Hayden *v.* Noyes, 5 Conn. 391; Peck *v.* Lockwood, 5 Day 22.

Louisiana.— See Morgan *v.* Nagodish, 40 La. Ann. 246, 3 So. 636.

Maine.— Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57.

grant, by acts of the legislature,[45] or an exclusive privilege is acquired by prescription.[46]

b. By Statute — (I) *In General.* In most jurisdictions the right of planting and taking oysters, clams, etc., is now regulated by general or local statutes, which have generally been held constitutional.[47] Under these statutes it is usually provided that an individual may locate or have allotted to him by the proper authorities a limited area of public flats or lands not already planted, and in

Massachusetts.— Com. *v.* Manimon, 136 Mass. 456; Proctor *v.* Wells, 103 Mass. 216; Lakeman *v.* Burnham, 7 Gray 437; Weston *v.* Sampson, 8 Cush. 347, 54 Am. Dec. 764.

New Jersey.— Grace *v.* Willets, 50 N. J. L. 414, 14 Atl. 559; Brown *v.* De Groff, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794; Wooley *v.* Campbell, 37 N. J. L. 163; Paul *v.* Hazelton, 37 N. J. L. 106; Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Shepherd *v.* Leverson, 2 N. J. L. 391.

North Carolina.— In this state the right of any citizen to take oysters from any natural oyster bed is expressly provided for by statute (Code, § 3390); but ground under a navigable water where there are no oyster rocks or masses of oysters, but where oysters grow naturally, although not in such quantities as to induce the public to resort thereto, does not constitute a natural oyster bed within the meaning of the statute. State *v.* Willis, 104 N. C. 764, 10 S. E. 764.

Rhode Island.— Allen *v.* Allen, 19 R. I. 114, 32 Atl. 166, 61 Am. St. Rep. 738, 30 L. R. A. 497.

Texas.— Gustafson *v.* State, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615.

England.— Bagott *v.* Orr, 2 B. & P. 472, 5 Rev. Rep. 668.

See 23 Cent. Dig. tit. "Fish," § 9.

Tenants in common of a natural oyster bed have an equal right to enter thereon and to remove natural oysters; and one of them cannot deprive his cotenant of the right to take any of the natural oysters by scattering a few seed oysters over the premises in such a manner as to render it impossible to remove the natural ones without disturbing those being planted. Mott *v.* Underwood, 148 N. Y. 463, 42 N. E. 1048, 51 Am. St. Rep. 711, 32 L. R. A. 270.

The right to an oyster fishery depends on the right to the soil on which the oysters are planted and grown. Russell *v.* Jersey Co.'s Assoc., 15 How. (U. S.) 426, 14 L. ed. 757.

45. *Louisiana.*— Morgan *v.* Nagodish, 40 La. Ann. 246, 3 So. 636.

Massachusetts.—Proctor *v.* Wells, 103 Mass. 216; Lakeman *v.* Burnham, 7 Gray 437.

New Jersey.— Paul *v.* Hazelton, 37 N. J. L. 106.

Rhode Island.— Allen *v.* Allen, 19 R. I. 114, 32 Atl. 166, 61 Am. St. Rep. 735, 30 L. R. A. 497.

United States.—Martin *v.* Waddell, 16 Pet. 367, 10 L. ed. 997, 18 N. J. L. 495.

See 23 Cent. Dig. tit. "Fish," § 9.

Lease from town.— The exclusive right to take oysters from lands covered by a bay may be acquired by an individual by a lease from a town which acquired title under letters patent. Hand *v.* Newton, 92 N. Y. 88; Robins *v.* Ackerly, 91 N. Y. 98.

46. Proctor *v.* Wells, 103 Mass. 216; Ipswich Common, etc., Land *v.* Herrick, 9 Gray (Mass.) 529; Lakeman *v.* Burnham, 7 Gray (Mass.) 437; Bagott *v.* Orr, 2 B. & P. 472, 5 Rev. Rep. 668. See Riddell *v.* Brown, 25 Wash. 514, 65 Pac. 758; Truro *v.* Rowe, [1902] 2 K. B. 709, 66 J. P. 821, 71 L. J. K. B. 974, 87 L. T. Rep. N. S. 386, 51 Wkly. Rep. 68; Goodman *v.* Saltash, 7 App. Cas. 633, 47 J. P. 276, 52 L. J. Q. B. 193, 48 L. T. Rep. N. S. 239, 31 Wkly. Rep. 293. But see People *v.* Lowndes, 55 Hun (N Y.) 469, 8 N. Y. Suppl. 908; Jones *v.* Johnson, 6 Tex. Civ. App. 262, 25 S. W. 650.

Non-resident.— A prescriptive right of taking oysters cannot be obtained by a non-resident nor retained by a former resident after he has removed from the state. Huntington *v.* Lowndes, 40 Fed. 625.

47. See Louisiana Land, etc., Co. *v.* Gasquet, 45 La. Ann. 759, 13 So. 171; State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780; Holt *v.* Follett, 65 Tex. 550 (construing the Texas act of March 8, 1879); Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

Statutes for determination of natural or public oyster beds see Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006; *In re* Darien Oyster Ground Committee, 52 Conn. 61; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375; State *v.* Spencer, 114 N. C. 770, 19 S. E. 93. A statute providing for the determination of the location and extent of natural oyster beds should not be construed as applying to beds designated to individuals under earlier statutes. *In re* Darien Oyster Ground Committee, *supra.*

Under a Maryland statute (Act (1894), c. 380, §§ 46, 47), in creeks less than one hundred yards wide at the mouth, riparian owners have the exclusive right to use the creek for bedding oysters. Powell *v.* Wilson, 85 Md. 347, 37 Atl. 216. If such creek becomes less than one hundred yards in width subsequent to a prior location, such location is superseded in right by the rights given by statute to the riparian owners, but the former locator is entitled to a reasonable time within which to remove his oysters (Powell *v.* Wilson, *supra*).

The imposition of a license-fee upon all boats engaged in planting or taking oysters is not obnoxious to the requirement in the state constitution that property shall be assessed under general laws and by uniform rules according to its true value. State *v.* Loper, 46 N. J. L. 321; Dize *v.* Lloyd, 36 Fed. 651.

which oysters or clams do not naturally exist, in which he will have the exclusive right of planting and taking oysters, clams, etc., for a limited time;[48] upon his making a proper application therefor,[49] and complying with all other statutory

A statute prohibiting a taking for destruction does not prohibit a taking of oyster spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. Bridger *v.* Richardson, 2 M. & S. 568.

The legislature has power to prescribe regulations for the taking of clams from their beds with a penalty for their violation. Com. *v.* Bailey, 13 Allen (Mass.) 541. See, generally, *infra*, III, A.

48. *Connecticut.*— Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884; Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006; Clinton *v.* Bacon, 56 Conn. 508, 16 Atl. 548; Clinton *v.* Buell, 55 Conn. 263, 11 Atl. 38; Rowe *v.* Smith, 48 Conn. 444; Gulf Pond Oyster Co. *v.* Baldwin, 42 Conn. 255; Averill *v.* Hull, 37 Conn. 320.

Florida.— State *v.* Gibson, (1904) 37 So. 651.

Georgia.— Parsons *v.* Prey, 115 Ga. 955, 42 S. E. 234; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Maryland.— Travers *v.* Dean, 98 Md. 72, 56 Atl. 388; Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

Massachusetts.— Griffith *v.* Savary, 181 Mass. 227, 63 N. E. 426.

Mississippi.—Barataria Canning Co. *v.* Ott, 84 Miss. 737, 37 So. 121, construing Code (1880), § 956.

New Jersey.— Townsend *v.* Brown, 24 N. J. L. 80 (cannot stake off oyster beds below low-water mark); De Graff *v.* Truesdale, 10 N. J. L. J. 90 (holding that oyster men's encroachment on public clam-fishing grounds is a public nuisance). Under Const. § 7, par. 11, the legislature cannot grant an exclusive privilege to plant oysters on lands of the state by private, special, or local laws. State *v.* Post, 55 N. J. L. 264, 26 Atl. 683.

New York.— Denton *v.* Bennett, 102 N. Y. App. Div. 454, 92 N. Y. Suppl. 522 (lease by fish commissioners); Sutter *v.* Van Derveer, 47 Hun 366 [*affirmed* in 122 N. Y. 652, 25 N. E. 907]; Abrams *v.* Hempstead, 45 Hun 272; Robins *v.* Ackerly, 24 Hun 499 [*affirmed* in 91 N. Y. 98]. Laws (1879), c. 384, and Laws (1871), c. 639, § 3, prohibiting any one from occupying grounds in Hempstead bay, and from planting oysters therein without a license, abrogates the common-law right to plant oysters. Abrams *v.* Johnson, 10 N. Y. St. 371.

North Carolina.— State *v.* Goulding, 131 N. C. 715, 42 S. E. 563; State *v.* Spencer, 114 N. C. 770, 19 S. E. 93.

Rhode Island.— State *v.* Burdick, 15 R. I. 239, 2 Atl. 764 (lease by commissioners of shell-fisheries); State *v.* Cozzens, 2 R. I. 561; State *v.* Sutton, 2 R. I. 434.

Virginia.— Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463; Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802.

See 23 Cent. Dig. tit. "Fish," § 10.

The designation of a natural oyster bed is void and cannot affect the right of the public to take oysters on such grounds (Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006), and the fact that the ground designated was at the time of designation a natural oyster bed may be proved by parol (Cook *v.* Raymond, *supra*; Averill *v.* Hull, 37 Conn. 320).

Unoccupied ground is open to location to him who first applies for it in the manner provided by statute (Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463); and the mere fact that other parties had previously rented the ground under a former statute gives them no superior claim thereto over other applicants who have complied with the statute (Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463; Abrams *v.* Johnson, 10 N. Y. St. 371; Housman *v.* Weir, 15 Abb. N. Cas. (N. Y.) 415); nor is unoccupied ground bound to be allotted before ground that has been previously occupied (Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802).

Ground already planted within this rule means legally planted, and does not apply to ground occupied by a trespasser. Abrams *v.* Hempstead, 45 Hun (N. Y.) 272. *Compare* Sutter *v.* Van Derveer, 47 Hun (N. Y.) 366 [*affirmed* in 122 N. Y. 652, 25 N. E. 907].

Evidence of natural oyster bed.— That oysters grow naturally at a certain place and have existed there beyond memory in great abundance and have been openly and constantly taken by the public is very high, if not conclusive, evidence that the place is a natural oyster bed. Gulf Pond Oyster Co. *v.* Baldwin, 42 Conn. 255.

Allotment by town committee, selectmen, etc. State *v.* Bassett, 64 Conn. 217, 29 Atl. 471; Abrams *v.* Johnson, 10 N. Y. St. 371. It is not necessary that the members of a committee appointed by a town for staking out oyster grounds should be notified to meet, or should meet together, before acting. Gallup *v.* Tracy, 25 Conn. 10. Where a committee appointed by a town to stake out oyster grounds consists of four members, and one of them, with the consent of two others, staked out ground and planted oysters thereon for himself, such proceeding was valid, since the committee might act by a majority of those qualified to act in a given instance. Gallup *v.* Tracy, 25 Conn. 10.

49. Gulf Pond Oyster Co. *v.* Baldwin, 42 Conn. 255 (sufficiency of application to dam a salt-water inlet for an oyster pond questioned); Abrams *v.* Johnson, 10 N. Y. St. 371; Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802; West *v.* Adams, (Va. 1897) 27 S. E. 496. And see cases cited in preceding notes.

Application may be verbal under Va. Code, § 2137. Sinclair *v.* Quackenbush, 101 Va. 245, 43 S. E. 354. But a request to an inspector of oysters that if any one else applies for a certain ground for planting and propagating oysters the party preferring the re-

requirements,[50] such as giving the statutory notice of his intention to locate an oyster bed,[51] designating such bed by proper stakes and lines so as to distinguish it from other parts of the water in which other individuals or the public generally have the right of fishery;[52] and recording a written description thereof in the proper office.[53] Some statutes prohibit all persons from taking oysters and clams from certain public beds, except for family use, without a license from the proper local authorities.[54]

(II) *Nature of Privilege.* The privilege of locating oyster beds on public lands, and of planting and taking oysters therefrom, is merely a license which may be revoked at the pleasure of the legislature,[55] and which ceases with the use of the land for that purpose.[56] It is also subject to the public's right of navigation and of fishery,[57] and if it interferes therewith, the oysters or clams, etc., may be removed as a nuisance.[58] It has been held to be a personal privilege which can neither be inherited nor assigned.[59]

(III) *Non-Residents.* Some statutes expressly exclude a non-resident from planting or taking oysters or other shell-fish from waters within the limits of the

quest should be allowed to take it is not such an application for a location as the law contemplates or requires. Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463.

Objection to such application cannot be made by any private citizen, except one who has already planted the territory applied for. Parsons *v.* Prey, 115 Ga. 955, 42 S. E. 234.

50. Jones *v.* Johnson, 6 Tex. Civ. App. 262, 25 S. W. 650; West *v.* Adams, (Va. 1897) 27 S. E. 496. And see cases cited in preceding notes.

Where one plants his oysters before complying with the statutory requisites, such as obtaining a certificate from the town authorities, he cannot afterward justify his planting under his subsequent compliance. Sutter *v.* Van Derveer, 47 Hun (N. Y.) 366 [*affirmed* in 122 N. Y. 652, 25 N. E. 907].

51. Handy *v.* Maddox, 85 Md. 547, 37 Atl. 222; Coleman *v.* Claytor, 93 Va. 20, 24 S. E. 463; West *v.* Adams, (Va. 1897) 27 S. E. 496.

52. *Connecticut.*— Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006; Rowe *v.* Luddington, 51 Conn. 184. See Hamilton *v.* Smith, 74 Conn. 374, 50 Atl. 884.

Maryland.— Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

New Jersey.— Birdsall *v.* Rose, 46 N. J. L. 361 (mere staking off without planting gives no right); Paul *v.* Hazelton, 37 N. J. L. 106.

New York.— Abrams *v.* Johnson, 10 N. Y. St. 371.

Rhode Island.—State *v.* Sutton, 2 R. I. 434.

If adjoining owners disagree as to a dividing line, under a Connecticut statute (Acts (1879), c. 70, § 3) application may be made by either for the appointment of a surveyor to trace and mark out the line, in which case it is necessary to the jurisdiction of the judge that the owners be adjoining owners, and that there should be a map for the guidance of the surveyor. Rowe *v.* Luddington, 51 Conn. 184, holding, however, that a map on which courses, distances, monuments, etc., were erroneously laid out was not such a map, and that if a space of clear water intervened between the beds, the owners were not adjoining owners.

53. Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

54. Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475.

A statute limiting the granting of such a license to taxpayers is invalid and cannot be enforced to the extent of requiring a license from those within its privileges. Gustafson *v.* State, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615.

55. Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654; Paul *v.* Hazleton, 37 N. J. L. 106; Purcell *v.* Conrad, 84 Va. 557, 5 S. E. 545.

A notice served upon the licensee by one to whom the state had ceded all its rights in such land amounts to a revocation. Lowndes *v.* Huntington, 153 U. S. 1, 14 S. Ct. 758, 38 L. ed. 615.

56. Housman *v.* Weir, 15 Abb. N. Cas. (N. Y.) 415.

57. Lane *v.* Smith, 71 Conn. 65, 41 Atl. 18; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654; Lowndes *v.* Dickerson, 34 Barb. (N. Y.) 586; Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Whitstable *v.* Gann, 20 C. B. N. S. 1, 115 E. C. L. 803, 11 H. L. Cas. 192, 11 Eng. Reprint 1305, 35 L. J. C. P. 29, 12 L. T. Rep. N. S. 150, 13 Wkly. Rep. 589.

Excavation of a harbor channel, duly authorized, across a person's oyster beds, does not give the owner thereof a right of action for damages thereto, if the channel is made in a reasonable and proper manner. Lane *v.* Smith, 71 Conn. 65, 41 Atl. 18.

A riparian owner's right to connect his upland with a navigable water in front thereof by means of wharves and channels is paramount to any right in others to plant or cultivate oysters on the land covered by such wharves or channels. Prior *v.* Swartz, 62 Conn. 132, 25 Atl. 398, 36 Am. St. Rep. 683, 18 L. R. A. 668.

58. State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347.

59. Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673. But see Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

state,[60] even though he be either the sole or the part owner of land within a state having such a statute.[61]

C. Small Lakes and Ponds — 1. In General. The right of fishing in small lakes and ponds inclosed by the owner's land and having no communication through which fish are accustomed to pass to other waters belongs exclusively to the owners thereof, and in general is expressly excepted from the statutory restrictions relating to other streams or bodies of water,[62] although it has been held otherwise as to lakes having outlets to other waters through which fish are accustomed to pass.[63]

2. Great Ponds. The right to take fish from a great pond of more than a specified area is, by statute in some jurisdictions, a public right which every inhabitant who can obtain access to the pond without trespass may exercise so long as he does not interfere with the reasonable exercise by others of these and like rights in the pond, and complies with any rules established by the legislature or under its authority.[64] Under some statutes such a pond may be leased to

60. *Alabama.*— State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761.

Maryland.— Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

Massachusetts.— Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475, statute held constitutional.

New Jersey.— State *v.* Corson, 67 N. J. L. 178, 50 Atl. 780; Haney *v.* Compton, 36 N. J. L. 507.

New York.— People *v.* Lowndes, 130 N. Y. 455, 29 N. E. 751 [*reversing* 55 Hun 469, 8 N. Y. Suppl. 908].

Rhode Island.— New England Oyster Co. *v.* McGarvey, 12 R. I. 385 (holding, however, that an agreement between a non-resident and a citizen by which the latter is to lease certain grounds and ship the oysters to the non-resident may be enforced); State *v.* Medbury, 3 R. I. 138 (statute constitutional).

Virginia.—See McCready *v.* Com., 27 Gratt. 982.

United States.— McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248 [*affirming* 27 Gratt. (Va.) 985], holding a Virginia law to this effect not unconstitutional.

But see Gustafson *v.* State, 40 Tex. Cr. 67, 45 S. W. 717, 48 S. W. 518, 43 L. R. A. 615, as to the constitutionality of such a statute.

61. Hess *v.* Muir, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

62. *Illinois.*— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Massachusetts.— Com. *v.* Follett, 164 Mass. 477, 41 N. E. 676. See Com. *v.* Tiffany, 119 Mass. 300.

Michigan.— People *v.* Conrad, 125 Mich. 1, 83 N. W. 1012.

New Hampshire.— State *v.* Welch, 66 N. H. 178, 18 Atl. 21; State *v.* Roberts, 59 N. H. 256, 47 Am. Dec. 119.

Ohio.— Lembeck *v.* Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578.

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

Vermont.— New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 25 Atl. 323, 33 L. R. A. 569.

England.— Bristow *v.* Cormican, 3 App. Cas. 641. See Lisle *v.* Brown, 5 Taunt. 440, 1 E. C. L. 229.

Such ponds, whether natural or artificial, are regarded as private property and the owners thereof may take fish therefrom whenever they choose without restraint from any legislative enactment, since the exercise of this right in no way interferes with the rights of others. State *v.* Roberts, 59 N. H. 256, 47 Am. Dec. 119.

Dedication of non-navigable lake.— The use of a non-navigable inland lake by the public for the purpose of boating, hunting, and fishing without the knowledge of the owner will not establish a dedication of any kind against him, no matter how long continued such use may be. Lembeck *v.* Nye, 47 Ohio St. 336, 24 N. E. 686, 21 Am. St. Rep. 828, 8 L. R. A. 578.

63. Where a lake is so situated that fish from a river migrate to and from the same at different periods of the year, the fact that it is wholly located on defendant's land, which he posted, and that he himself stocked the lake with fish acquired from private sources, does not deprive the public of its right to take fish therefrom. People *v.* Horling, (Mich. 1904) 100 N. W. 691; Marsh *v.* Colby, 39 Mich. 626, 33 Am. Rep. 439.

64. *Maine.*— Barrows *v.* McDermott, 73 Me. 441.

Massachusetts.—Rowell *v.* Doyle, 131 Mass. 474; West Roxbury *v.* Stoddard, 7 Allen 158.

New Hampshire.— Percy Summer Club *v.* Welch, 66 N. H. 180, 28 Atl. 22; State *v.* Welch, 66 N. H. 178, 28 Atl. 21.

New Jersey.— Albright *v.* Sussex County Lake, etc., Commission, 68 N. J. L. 523, 53 Atl. 612.

Vermont.— New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 35 Atl. 323, 33 L. R. A. 569, construing Const. c. 2, § 40, and Acts (1892), No. 80, §§ 1, 31.

Inclosed stream.— Mass St. (1871) c. 281, § 2, giving the proprietor of any "unnavigable tidal stream" the control of the same "within his own premises," etc., applies only to cases where the waters of such stream are

private individuals for the purpose of fish culture, the lessees having the exclusive right of fishing therein.[65]

D. Remedies For Invasion of Rights — 1. TRESPASS — a. In General. Trespass will lie against any one interrupting or interfering with another's right of hunting[66] or fishing,[67] even against the owner of the land;[68] unless a special

inclosed by him for the purpose of cultivating fish. Eastham *v.* Anderson, 119 Mass. 526.

65. Com. *v.* Eliot, 146 Mass. 5, 15 N. E. 81 (construing Pub. St. c. 91, § 13, as to notice of such lease); Com. *v.* Tiffany, 119 Mass. 300; Com. *v.* Weatherhead, 110 Mass. 175; Com. *v.* Vincent, 108 Mass. 441 (construing St. (1869) c. 384). See Benscoter *v.* Long, 157 Pa. St. 208, 27 Atl. 674.

A pond more than twenty acres in area, connected with the sea only by a narrow channel, partly natural and partly artificial, not suited to any other use than the passage of fish, nor always sufficient for that purpose without being artificially cleared, and not a navigable stream within the definition of St. (1869) c. 384, is a great pond within the meaning of that statute, of which the commissioners on inland fisheries may make a lease under section 9. Com. *v.* Vincent, 108 Mass. 441.

The terms of such a lease are within the discretion of the commissioners having authority to make it. Com. *v.* Vincent, 108 Mass. 441.

Stocking a great pond with a new species of fish and closing the outlet with a wire screen are a sufficient occupation of the pond for the purpose of artificially cultivating and maintaining fish therein, within the meaning of St. (1869) c. 384. Com. *v.* Weatherhead, 110 Mass. 175.

66. Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656. See Pickering *v.* Noyes, 4 B. & C. 639, 7 D. & R. 49, 4 L. J. K. B. O. S. 10, 28 Rev. Rep. 430, 10 E. C. L. 736.

Frightening away game as grounds for trespass see Keeble *v.* Hickeringill, 11 East 574, 11 Rev. Rep. 273 note; Carrington *v.* Taylor, 2 Campb. 258, 11 East 571, 11 Rev. Rep. 270; Ibottson *v.* Peat, 3 H. & C. 644, 11 Jur. N. S. 394, 34 L. J. Exch. 118, 12 L. T. Rep. N. S. 813, 13 Wkly. Rep. 691.

A mere licensee of the right of sporting cannot recover damages thereto from one who purchases part of the land from the owner. Bird *v.* Great Eastern R. Co., 19 C. B. N. S. 268, 11 Jur. N. S. 782, 34 L. J. C. P. 366, 13 L. T. Rep. N. S. 365, 13 Wkly. Rep. 989, 115 E. C. L. 268.

Entering upon uninclosed and uncultivated land for the purpose of hunting wild game is not an actionable trespass in Vermont. Payne *v.* Gould, 74 Vt. 208, 52 Atl. 421.

67. *Connecticut.*— Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; Adams *v.* Pease, 2 Conn. 481.

Illinois.— Beckman *v.* Kreamer, 43 Ill. 447, 92 Am. Dec. 146.

Maine.— Matthews *v.* Treat, 75 Me. 594. See also Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

Massachusetts.— Melvin *v.* Whiting, 13 Pick. 184. *Compare* Locke *v.* Motley, 2 Gray 265.

Michigan.— Solomon *v.* Grosbeck, 65 Mich. 540, 36 N. W. 163.

New York.— Seamen *v.* Lee, 10 Hun 607.

North Carolina.— Collins *v.* Benbury, 27 N. C. 118, 42 Am. Dec. 155.

Pennsylvania.— Hart *v.* Hill, 1 Whart. 124; Gibbs *v.* Sweet, 20 Pa. Super. Ct. 275. See Com. *v.* Singer, 3 Lack. Leg. N. 230.

Washington.— Griffith *v.* Holman, 23 Wash. 347, 63 Pac. 239, 83 Am. St. Rep. 821, 54 L. R. A. 178.

United States.—Mason *v.* Mansfield, 16 Fed. Cas. No. 9,234, 4 Cranch C. C. 580, interference by vessel.

England.— Holford *v.* Bailey, 13 Q. B. 426, 13 Jur. 278, 18 L. J. Q. B. 109, 66 E. C. L. 426; Child *v.* Greenhill, Cro. Car. 553; Hamilton *v.* Donegal, 3 Ridg. 311; Whelan *v.* Hewson, Ir. R. 6 C. L. 283. See also Wenman *v.* Mackenzie, 5 E. & B. 447, 1 Jur. N. S. 1015, 1049 note, 25 L. J. Q. B. 44, 3 Wkly. Rep. 626, 85 E. C. L. 447; Clarke *v.* Mercer, 1 F. & F. 492; Acheson *v.* Henry, Ir. R. 7 C. L. 486; Crichton *v.* Collery, 19 Wkly. Rep. 107.

Canada.— Parker *v.* Elliott, 1 U. C. C. P. 470.

See 23 Cent. Dig. tit. "Fish," § 14.

An injury to a fishery caused by a pier erected under authority of the legislature cannot be recovered for. Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 100 Am. Dec. 597, 90 Pa. St. 85, 35 Am. Rep. 632.

Burden of proof.— An exclusive right of fishing in public waters being in derogation of a common right, the burden of proof is upon plaintiff suing to recover for a trespass on such fishery to show his exclusive right thereto. Yard *v.* Carman, 3 N. J. L. 936.

Whether or not plaintiff has a several fishery is a question for the jury. Bristow *v.* Cormican, 3 App. Cas. 641.

Fish caught and placed in a cove within the ebb and flow of the tide, being confined therein by a wire fence extending across its mouth, are not private property to such an extent as will support an action of trespass against a person for catching them and appropriating them to his own use. Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94.

A custom to take fish in alieno solo in an unnavigable river cannot be given in evidence under the general issue in defense to an action of trespass; such custom ought to be pleaded specially. Waters *v.* Lilley, 4 Pick. (Mass.) 145, 16 Am. Dec. 333.

68. Turner *v.* Hebron, 61 Conn. 175, 22 Atl. 951, 14 L. R. A. 386; Marshall *v.* Ulleswater Steam Nav. Co., 3 B. & S. 732, 9

remedy for such interference is provided by statute.[69] Thus trespass will lie where one's fishery is injured by an unlawful weir, dam, or other obstruction on a stream above or below him;[70] or where his right of fishery in a navigable stream is injured by a boat or vessel wantonly or designedly running into his nets or other fishing appliances,[71] or by his being otherwise wrongfully excluded from or interfered with in such right.[72]

b. For Injury to Oysters, Clams, Etc. An owner or licensee of an oyster or clam bed clearly designated and staked out may maintain trespass against any one who wrongfully interferes with[73] or takes[74] oysters or clams planted by him,

Jur. N. S. 988, 32 L. J. Q. B. 139, 8 L. T. Rep. N. S. 416, 11 Wkly. Rep. 489, 113 E. C. L. 732; Smith *v.* Kemp, Carth. 285, Comb. 11, 433, 464, 2 Salk. 637, 4 Mod. 186.

The right of shooting is a right to shoot over the lands as they may happen to be at the time, the landlord of course not doing anything for the express purpose of destroying the right (Gearns *v.* Baker, L. R. 10 Ch. 355, 44 L. J. Ch. 334, 33 L. T. Rep. N. S. 86, 23 Wkly. Rep. 543); but this does not prevent him from cutting down trees in the proper course of management of the estate, even though the result of the cutting will be prejudicial to the shooting (Gearns *v.* Baker, *supra*).

69. In Connecticut the special charter remedy for assessing damages to owners of fisheries resulting from an obstruction by a dam precludes a common-law action, at least until the charter remedy is exhausted. Bristol *v.* Ousatonic Water Co., 42 Conn. 403.

Penal liability for trespassing on private parks and ponds see *infra*, III, B, 6.

70. See Bristol *v.* Ousatonic Water Co., 42 Conn. 403.

The declaration in such a case need not aver where the obstruction was erected. Barden *v.* Crocker, 10 Pick. (Mass.) 383.

71. Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570; Hopkins *v.* Norfolk, etc., R. Co., 131 N. C. 463, 42 S. E. 902; Lewis *v.* Keeling, 46 N. C. 299, 62 Am. Dec. 168; Cobb *v.* Bennett, 75 Pa. St. 326, 15 Am. Rep. 752; Wright *v.* Mulvaney, 78 Wis. 89, 46 N. W. 1045, 23 Am. St. Rep. 393, 9 L. R. A. 807.

The measure of damages in such a case is not confined to the injury to the net, but may include all loss of fish which might otherwise have been taken. Post *v.* Munn, 4 N. J. L. 61, 7 Am. Dec. 570.

72. Pacific Steam Whaling Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 72 Pac. 161. See Upton *v.* Dawkin, 3 Mod. 97.

Temporary occupation of open and public waters for stake fishing cannot be wantonly interfered with so long as the business does not impede navigation, or amount to a nuisance causing special damages to private persons. Lincoln *v.* Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

A person in possession of a weir built below low-water mark may maintain trespass against a wrong-doer who interferes with his possession, although, as against the crown, the weir was wrongfully there. Wilson *v.* Codyre, 27 N. Brunsw. 320.

Damages for wrongful exclusion from public right of fishery see Pacific Steam Whaling, Co. *v.* Alaska Packers' Assoc., 138 Cal. 632, 72 Pac. 161.

73. Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125; Paul *v.* Hazleton, 37 N. J. L. 106; De Graff *v.* Truesdale, 10 N. J. L. J. 90; Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42; Castalia Trout Club Co. *v.* Castalia Sporting Club, 8 Ohio Cir. Ct. 194, 8 Ohio Cir. Dec. 693. See Hettrick *v.* Page, 82 N. C. 65; Richardson *v.* U. S., 100 Fed. 714.

Negligently dumping a scow load of mud on an oyster bed is ground for an action of trespass, and evidence that defendant obeyed a dumping inspector's direction is immaterial. Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125, holding also that the measure of damages in such case may be the value per bushel of the oysters killed.

Injury incident to navigation.— A lawful digging or dredging for the purpose of improving the channel does not give rise to an action of trespass for consequential damages to an oyster bed. Lane *v.* Smith, 71 Conn. 65, 41 Atl. 18. See Richardson *v.* U. S., 100 Fed. 714.

Pleading.— As against the wrong-doer, a complaint in such an action is sufficient if it alleges plaintiff's ownership; and it is not necessary to allege that the ground had been duly designated to plaintiff or his grantors for oyster cultivation. Palmer *v.* Hartford Dredging Co., 73 Conn. 182, 47 Atl. 125.

74. *Connecticut.*— Gallup *v.* Tracy, 25 Conn. 10. This form of action may be employed for the purpose of questioning the title of a claimant to a natural oyster bed. Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006.

Massachusetts.— Griffith *v.* Savary, 181 Mass. 227, 63 N. E. 426. See Mitchell *v.* Hart, 132 Mass. 297, as to the sufficiency of the description of the tract on which the trespass is alleged to have been committed.

New Jersey.— Grace *v.* Willets, 50 N. J. L. 414, 14 Atl. 559; Metzger *v.* Post, 44 N. J. L. 74, 43 Am. Rep. 341. *Compare* Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356.

New York.— Post *v.* Kreischer, 103 N. Y. 110, 8 N. E. 365 [*reversing* 32 Hun 49]; Davis *v.* Davis, 72 N. Y. App. Div. 593, 76 N. Y. Suppl. 539; McCarty *v.* Holman, 22 Hun 53; Lowndes *v.* Dickerson, 34 Barb. 586; Decker *v.* Fisher, 4 Barb. 592. *Compare* Brinckerhoff *v.* Starkins, 11 Barb. 248.

North Carolina.— McKenzie *v.* Hulet, 4 N. C. 613.

although his planting constitutes a public nuisance or other misdemeanor,[75] or amounts to a trespass on another's land,[76] or is on a spot which is a common fishery,[77] unless he has planted them where other oysters or clams naturally exist.[78]

2. INJUNCTION. Where an action at law will not give adequate relief and irreparable injury will result to the owner of a right of hunting or fishing, he may obtain an injunction to restrain an unlawful interference therewith,[79] such as the continuance of an unlawful weir or dam,[80] the pollution of a stream,[81] or an

Texas.— See Holt *v.* Follett, 65 Tex. 550. See 23 Cent. Dig. tit. "Fish," § 15.

Where a prior licensee fails to properly secure a second license, and the license to the oyster beds formerly occupied by him is granted to another, he will be guilty of trespass for going on such beds and taking oysters therefrom, although they were oysters originally planted by him. Keene *v.* Gifford, 158 Mass. 120, 32 N. E. 946; Abrams *v.* Johnson, 10 N. Y. St. 371.

Pleading and proof.— In order to maintain an action against any persons for taking away oysters planted in navigable waters, plaintiff must show that he has the power of present actual possession, accompanied by a continued assertion of ownership, and by such evidence of the right of possession as will necessarily exclude the right of any other person, as by an inclosure by stakes or similar manner. Brinckerhoff *v.* Starkins, 11 Barb. (N. Y.) 248.

The rule of damages in such cases is the fair profit made by defendant. McKenzie *v.* Hulet, 4 N. C. 613.

Several lessees of such a right may use the lands jointly for the purposes of planting oysters, and in such use may join in an action to recover damages for taking their joint property. Wooley *v.* Campbell, 37 N. J. L. 163.

75. Grace *v.* Willets, 50 N. J. L. 414, 14 Atl. 559; State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347.

76. If plaintiff is guilty of trespass in planting or cultivating oysters on the land of another, such fact does not authorize the owner to take those oysters to his own use, although the owner might compel him to take them up or might remove them as a nuisance. State *v.* Tayler, 27 N. J. L. 117, 72 Am. Dec. 347; Vroom *v.* Tilly, 99 N. Y. App. Div. 516, 91 N. Y. Suppl. 51; Davis *v.* Davis, 72 N. Y. App. Div. 593, 76 N. Y. Suppl. 539; Sutter *v.* Van Derveer, 47 Hun 366 [*affirmed* in 122 N. Y. 652, 25 N. E. 907].

77. Fleet *v.* Hegeman, 14 Wend. (N. Y.) 42.

78. Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006; Grace *v.* Willets, 50 N. J. L. 414, 14 Atl. 559; Brown *v.* De Groff, 50 N. J. L. 409, 14 Atl. 219, 7 Am. St. Rep. 794; State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347; Shepard *v.* Leverson, 2 N. J. L. 391; Decker *v.* Fisher, 4 Barb. (N. Y.) 592. *Compare* Wooley *v.* Campbell, 37 N. J. L. 163.

Whether the planting of oysters was upon a natural oyster bed is a question for the jury (Grace *v.* Willets, 50 N. J. L. 414, 14 Atl. 559), which may be proved by parol evidence (Cook *v.* Raymond, 66 Conn. 285, 33 Atl. 1006).

79. *California.*— Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420.

Louisiana.— Morgan *v.* Nagodish, 40 La. Ann. 246, 3 So. 636.

New Jersey.— Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097, where a persistent trespasser is irresponsible.

Washington.— Cherry Point Fish. Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55; Fall, etc., Fish Co. *v.* Point Roberts Fishing, etc., Co., 24 Wash. 630, 64 Pac. 792; Walker *v.* Stone, 17 Wash. 578, 50 Pac. 488; Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33. See Womer *v.* O'Brien, (1905) 79 Pac. 474.

England.— Fitzgerald *v.* Firbank, [1897] 2 Ch. 96, 66 L. J. Ch. 529, 76 L. T. Rep. N. S. 584; Bathurst *v.* Burden, 2 Bro. Ch. 64, 29 Eng. Reprint 37; Ashworth *v.* Browne, 10 Ir. Ch. 421; Pery *v.* Thornton, 23 L. R. Ir. 402; Micklethwait *v.* Vincent, 67 L. T. Rep. N. S. 225. See Pattisson *v.* Gilford, L. R. 18 Eq. 259, 43 L. J. Ch. 524, 22 Wkly. Rep. 673.

Seizure of fishing apparatus in virtue of the statute (Rev. St. p. 430, § 27), in case of a persistent trespasser who disputes each seizure, is not an adequate remedy at law which will preclude the interference of a court of equity by injunction. Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097.

A grantor may be restrained by injunction from interfering with his grantee or tenant in the exercise of the exclusive right of sporting, and killing game, according to agreement (Frogley *v.* Lovelace, 1 Johns. 333), unless the latter is making an unwarranted abuse of his privilege (Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152).

On general demurrer the fact that the fishery to which plaintiff claims title is subject to private ownership is sufficient to sustain the allegation of title in the bill to enjoin. Wilson *v.* Hill, 46 N. J. Eq. 367, 19 Atl. 1097.

80. See Stannard *v.* Hubbard, 34 Conn. 370; Barker *v.* Faulkner, 79 L. T. Rep. N. S. 24.

Necessary wall.— A stone wall on adjoining land abutting on a fishery in such a manner as to prevent the taking of fish at high water will not be enjoined where it appears that the wall is necessary to the preservation of defendant's property from erosion by water. Howell *v.* Robb, 7 N. J. Eq. 17.

81. Fitzgerald *v.* Firbank, [1897] 2 Ch. 96, 66 L. J. Ch. 529, 76 L. T. Rep. N. S. 584; Oldaker *v.* Hunt, 6 De G. M. & G. 376, 3 Eq. Rep. 671, 1 Jur. N. S. 785, 3 Wkly. Rep. 297, 55 Eng. Ch. 294.

interference with his oyster beds,[82] even though the interference or obstruction amounts to a public nuisance or other misdemeanor.[83] But an injunction will not issue to restrain interference with the public right of fishery, unless plaintiff shows special injuries to himself.[84] The attorney-general may proceed without the intervention of a private relator to enjoin the unlawful destruction of fish.[85]

3. Other Remedies. A bill to quiet possession may be maintained by one who has been in possession of a fishery for a considerable length of time and claims a sole right to it, although he has not established his right at law;[86] but ejectment will not lie to recover a right of fishery.[87] An action of unlawful detainer may be maintained against a party who enters upon and holds oyster beds allotted to and staked off by another.[88]

E. Whale Fisheries. A whale not being the product of human care or labor does not of itself purport to be property,[89] but, by usage peculiar to whale fishery, property in a whale generally belongs to the ship from which the first iron is placed, whether attached to the boat or not,[90] although the actual killing is by the crew of another vessel or they take part therein.[91] Any one taking such whale while it still has marks of appropriation on it is guilty of conversion,[92] and liable to the owner thereof for full indemnity.[93] A usage in the whaling business

82. *Connecticut.*— White *v.* Petty, 57 Conn. 576, 18 Atl. 253, 19 Atl. 152.

Georgia.— Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Louisiana.— Morgan *v.* Negodish, 40 La. Ann. 246, 3 So. 636.

Maryland.— Powell *v.* Wilson, 85 Md. 347, 37 Atl. 216.

New Jersey.— Britton *v.* Hill, 27 N. J. Eq. 389.

Compare Tenham *v.* Herbert, 2 Atk. 483, 26 Eng. Reprint 692.

Evidence of pendency of a suit against complainant under Conn. Rev. St. (1875) p. 215, § 11, providing for actions to remove stakes improperly inclosing natural oyster beds, is not admissible in a suit to restrain interference with complainant's oyster bed, as the question of title is not involved in the former suit. White *v.* Petty, 57 Conn. 576, 18 Atl. 253, 19 Atl. 152.

83. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375; Cherry Point Fish Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55; Walker *v.* Stone, 17 Wash. 578, 50 Pac. 488; Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33.

84. Delaware, etc., R. Co. *v.* Stump, 8 Gill & J. (Md.) 479, 29 Am. Dec. 561; Percy Summer Club *v.* Welch, 66 N. H. 180, 28 Atl. 22; Reyburn *v.* Sawyer, 128 N. C. 8, 37 S. E. 954; Kuehn *v.* Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553.

85. People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581.

86. York *v.* Pilkington, 1 Atk. 282, 9 Mod. 273, 26 Eng. Reprint 180; Dorset *v.* Girdler, Prec. Ch. 531, 24 Eng. Reprint 238.

87. Herbert *v.* Laughluyn, Cro. Car. 492; Waddy *v.* Newton, 8 Mod. 275. See Ejectment, 15 Cyc. 16.

88. Power *v.* Tazewells, 25 Gratt. (Va.) 786.

89. Taber *v.* Jenny, 23 Fed. Cas. No. 13,720, 1 Sprague 315.

90. Ghen *v.* Rich, 8 Fed. 159; Bourne *v.* Ashley, 3 Fed. Cas. No. 1,698.

The fastening of a harpoon in a whale, with a line attached, gives the boat the right to the whale under the usage of whaling, although the whale subsequently escapes and is captured by another. Bourne *v.* Ashley, 3 Fed. Cas. No. 1,698; Swift *v.* Gifford, 23 Fed. Cas. No. 13,696, 2 Lowell 110.

Fast and loose rule.— By the custom of the Greenland whale fishery a whale does not become appropriated by merely being harpooned. It is necessary that the line should remain attached to the boat and that the whale should be fastened or entangled therein. If the line gets detached, the whale becomes a loose fish and is the lawful prey of any one who captures and secures it, unless the whale's becoming loose was caused by the interference of the second captor. Hogarth *v.* Jackson, 2 C. & P. 595, 12 E. C. L. 753, M. & M. 58, 22 E. C. L. 471; Aberdeen Arctic Co. *v.* Sutter, 6 L. T. Rep. N. S. 229, 4 Macq. H. L. 355, 10 Wkly. Rep. 516; Skinner *v.* Chapman, M. & M. 59 note, 22 E. C. L. 471. See Littledale *v.* Scaith, 1 Taunt. 243 note; Fennings *v.* Greenville, 1 Taunt. 241, 9 Rev. Rep. 760.

91. Bourne *v.* Ashley, 3 Fed. Cas. No. 1,698.

92. Ghen *v.* Rich, 8 Fed. 159.

Where a dead whale is anchored and left with marks of appropriation it is the property of the captors, and there is no usage or principle of law by which the property of the original captors is divested, even though the whale may have dragged from its first anchorage, and is removed by another. Taber *v.* Jenny, 23 Fed. Cas. No. 13,720, 1 Sprague 315. See Bartlett *v.* Budd, 2 Fed. Cas. No. 1,075, 1 Lowell 223.

93. Swift *v.* Gifford, 23 Fed. Cas. No. 13,696, 2 Lowell 110; Taber *v.* Jenny, 23 Fed. Cas. No. 13,720, 1 Sprague 315.

for masters of ships meeting at sea to enter into a contract of mateship is a reasonable one, and binding on the owners of the ships, unless they prohibit the masters from making such contracts.[94]

F. Town Fisheries. In the absence of statute, the right of fishery in navigable waters within the limits of a municipal corporation belongs to the public, and the corporation as such can exercise no control over it;[95] and where two towns adjoin a navigable river, the citizens of each may take the fish swimming therein.[96] But power to regulate and control fisheries within its limits has generally been given to such towns by patent or grant,[97] or by an act of the legislature.[98] Under such grants or acts the right of fishing in waters within the limits

The measure of damages for the conversion of a whale at sea is the value of the oil and bone at the home port, less the expense of cutting and boiling, freight, and insurance, with interest. Ghen *v.* Rich, 8 Fed. 159; Bartlett *v.* Budd, 2 Fed. Cas. No. 1,075, 1 Lowell 223; Bourne *v.* Ashley, 3 Fed. Cas. No. 1,699, 1 Lowell 27. No deduction from the owner's damage for the conversion of a whale killed and drifting from its anchorage is to be made for the labor of securing and transporting the property, where that could have been done without cost by the owner, nor for the uncertainty as to whether the owner could have found and secured the property. Bartlett *v.* Budd, 2 Fed. Cas. No. 1,075, 1 Lowell 223; Taber *v.* Jenny, 23 Fed. Cas. No. 13,720, 1 Sprague 315.

94. Baxter *v.* Rodman, 3 Pick. (Mass.) 435. If one of the masters refuses to make a division of the oil while at sea as is usual in case of such contracts, an action will be sustained after the return of the ships, between their respective owners. Baxter *v.* Rodman, *supra.*

For form of contract of mate-ship see Baxter *v.* Rodman, 3 Pick. (Mass.) 435.

95. State *v.* Bunker, 98 Me. 387, 57 Atl. 95; Proctor *v.* Wells, 103 Mass. 216; Com. *v.* Bailey, 13 Allen (Mass.) 541; Weston *v.* Sampson, 8 Cush. (Mass.) 347, 54 Am. Dec. 764; Dill *v.* Wareham, 7 Metc. (Mass.) 438; Randolph *v.* Braintree, 4 Mass. 315; Coolidge *v.* Williams, 4 Mass. 140; Palmer *v.* Hicks, 6 Johns. (N. Y.) 133. When a town has never fixed at any town-meeting the times in which clams may be taken within its limits nor the prices for which its municipal officers may grant permits therefor, the residents of the town may take clams without written permit, free from all restrictions as to their use. State *v.* Gross, 89 Me. 542, 36 Atl. 1003.

96. Coolidge *v.* Williams, 4 Mass. 140.

97. Robins *v.* Ackerly, 91 N. Y. 98; Brookhaven *v.* Strong, 60 N. Y. 56; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; The Martha Anne, 16 Fed. Cas. No. 9,146, Olcott 18; Wilson *v.* Codyre, 27 N. Brunsw. 320; *Ex p.* Wilson, 25 N. Brunsw. 209. See Reg. *v.* St. John Gas Light Co., 4 Can. Exch. 326.

A presumption of a grant of the right to regulate and control fisheries by a municipal corporation within its limits will arise from its continuous exercise of that right for a considerable length of time. Mannall *v.* Fisher, 5 C. B. N. S. 856, 5 Jur. N. S. 389, 94 E. C. L. 856. See Palmer *v.* Hicks, 6 Johns. (N. Y.) 133.

98. Southport *v.* Ogden, 23 Conn. 128 (holding, however, that a by-law passed by a borough under authority of its charter for the regulation of its oyster fishery was abrogated by a general law of the state regulating such fishery); Hayden *v.* Noyes, 5 Conn. 391 (certain by-laws, however, held void for want of proper notification); State *v.* Bunker, 98 Me. 387, 57 Atl. 95; State *v.* Gross, 89 Me. 542, 36 Atl. 1003; Bearce *v.* Fossett, 34 Me. 575, 27 Me. 117; Spear *v.* Robinson, 29 Me. 531; Peables *v.* Hannaford, 18 Me. 106; Cottrill *v.* Myrick, 12 Me. 222; Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Swift *v.* Falmouth, 167 Mass. 115, 45 N. E. 184; Eastham *v.* Anderson, 119 Mass. 526; Robinson *v.* Wareham, 2 Gray (Mass.) 315; Briggs *v.* Murdock, 13 Pick. (Mass.) 305; Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Taunton *v.* Caswell, 4 Pick. (Mass.) 275; Watertown *v.* White, 13 Mass. 477; Nickerson *v.* Brackett, 10 Mass. 212; Truro *v.* Rowe, [1901] 2 K. B. 870, 65 J. P. 806, 70 L. J. K. B. 1026, 85 L. T. Rep. N. S. 422, 50 Wkly. Rep. 151. See also Gallup *v.* Tracy, 25 Conn. 10.

The lessee from a town of a right of fishery cannot deny the right of the town to make the lease in order to avoid payment of the rent. Eastham *v.* Anderson, 119 Mass. 526.

An owner of land adjoining a river within such a town is liable for a violation of its regulations, notwithstanding he was accustomed to take fish from such river before the grant of the commonwealth to the town. Nickerson *v.* Brackett, 10 Mass. 212.

Upon the division of a town, if the original town holds fisheries in trust for its inhabitants, the legislature may provide that it shall still hold such fisheries in trust for the inhabitants of both towns. North Yarmouth *v.* Skillings, 45 Me. 133, 71 Am. Dec. 530.

A town may lease the right to take oysters; and the town trustees are not precluded from granting such right because at other times, formerly, they may have restricted the rights of lessees, and not have allowed the taking of oysters from natural oyster beds. Hand *v.* Newton, 92 N. Y. 88 [*affirming* 26 Hun 536].

Pleading.— In an action by a town to recover the price of a right of fishing sold by it under statutory authority, it is not neces-

of a particular town may be given exclusively to the inhabitants thereof,[99] such as the exclusive right of planting and taking oysters or other shell-fish from waters within its limits.[1]

G. Interstate Fisheries. The right of fishery in waters lying between two states is generally regulated and controlled by treaty between those states,[2] but in the absence of such treaty the right of fishery in citizens on one side of the main channel of the river can be regulated only by the laws of the state on that side.[3]

H. International Fisheries — 1. In General. The right of subjects of the different nations to fish in the sea is generally regulated or restrained by custom[4] and by treaties, and statutes enacted to give effect thereto.[5]

sary to set forth in the declaration the town's authority to make the sale. Taunton *v.* Caswell, 4 Pick. (Mass.) 275.

99. Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Locke *v.* Motley, 2 Gray (Mass.) 265; Rohins *v.* Ackerly, 91 N. Y. 98; Wilson *v.* Codyre, 27 N. Brunsw. 320. *Compare* Hallock *v.* Dominy, 7 Hun (N. Y.) 52 [*reversed* on other grounds in 69 N. Y. 238].

1. Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Hand *v.* Newton, 92 N. Y. 88 [*affirming* 26 Hun 536]; Brookhaven *v.* Strong, 60 N. Y. 56; People *v.* Thompson, 30 Hun (N. Y.) 457; Rogers *v.* Jones, 1 Wend. (N. Y.) 237, 19 Am. Dec. 493; The Martha Anne, 16 Fed. Cas. No. 9,146, Olcott 18. But see Hayden *v.* Noyes, 5 Conn. 391.

The selectmen of a town may prohibit the digging of clams without a permit, except for the purpose and in the quantities authorized by statute, and may provide that permits be granted only to inhabitants of the town. Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Williams *v.* Delano, 155 Mass. 10, 28 N. E. 1122.

In Maine, since Pub. Laws (1901), p. 300, c. 284, § 37, took effect, which act repealed Rev. St. (1883) c. 40, §§ 1–33, there is no statute in force in the state prohibiting a person from taking clams from their beds within the limits of a town of which he is not a resident, or which authorizes inhabitants of a town to adopt any by-law prohibiting a non-resident from taking clams within the limits of a town without a license. State *v.* Bunker, 98 Me. 387, 57 Atl. 95.

2. **Compact of March 28, 1785, between Maryland and Virginia,** in relation to the waters of Chesapeake bay and the Potomac and the Pocomoke rivers. See Hendricks *v.* Com., 75 Va. 934; Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669 [*criticizing* and *questioning* Hendricks *v.* Com., *supra*]; *Ex p.* Marsh, 57 Fed. 719. The tenth section of that compact providing that offenses committed upon such waters by citizens of either state against citizens of the other should be tried in the courts of the state of which the offender is a citizen does not prevent one state from trying and convicting citizens of the other for offenses against the former state herself as distinguished from her citizens, as for a violation of her fish laws. Wharton *v.* Wise, 153 U. S. 155, 14 S. Ct. 783, 38 L. ed. 669; Hendrick *v.* Com., 75 Va. 934. Laws passed by one state in reference to such waters must by the terms of that compact receive the assent of the other. State *v.* Hoofman, 9 Md. 28; Hendrick *v.* Com., 75 Va. 934. An indictment under Acts (1845), c. 148, for fishing with gill nets in the Potomac river, was held defective in not averring that said act had been assented to by Virginia, according to the eighth article of the compact recited in Acts (1785), c. 1. State *v.* Hoofman, 9 Md. 28.

Construction of compact of 1783 between New Jersey and Pennsylvania see Bennett *v.* Boggs, 3 Fed. Cas. No. 1,319, Baldw. 60. The right of fishing in the Delaware river, by that compact, belongs to riparian owners on such river, subject to rights of navigation. Atty.-Gen. *v.* Delaware, etc., R. Co., 27 N. J. Eq. 1.

3. See Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953, holding that the term "concurrent jurisdiction on the water," in the acts of congress admitting the states of Minnesota and Wisconsin to the Union, and referring to the Mississippi river, must be restrained to the ordinary meaning thereof at the time the term came into use in the legislative enactments of the country, and does not empower one state to regulate the individual enjoyment by people of another state, within its boundaries, of property held in trust by such other state for the people within its limits, such as the public water and the fish and the game that inhabit the same.

The states of Oregon and Washington own the bed of the Columbia river from their respective sides to the middle of the channel, and the citizens of each state within such boundary have a common right of fishing, so long as the navigation in the river does not obstruct it. This right is not a mere privilege or immunity of citizenship but a right of citizenship and property combined which each state may make exclusive in its citizens, and which is not subject to control or regulation by the other, unless there is a mutual agreement to that end. *In re* Mattson, 69 Fed. 535.

4. Fennings *v.* Grenville, 1 Taunt. 241, 9 Rev. Rep. 760.

Customs as to whale fisheries see *supra*, II. E.

5. See Marshall *v.* Nicholls, 18 Q. B. 882, 16 Jur. 1155, 21 L. J. Q. B. 343, 83 E. C. L.

2. Seal and Other Fur Fisheries. Seal and other fur fisheries in waters within the Alaskan territory are regulated by the treaty of arbitration between the United States and Great Britain, and by statutes enacted to give effect thereto,[6] under which it is unlawful to kill fur seals anywhere within certain boundaries, and vessels, their cargoes, implements, etc., found within such boundaries engaged in that business are subject to seizure and condemnation as forfeited to the United States.[7] Under such acts the United States has leased sealing privileges in the Alaskan waters.[8] But by the award of arbitrators under the Treaty of Arbitration between the United States and Great Britain, the jurisdiction of the United States in waters of the Alaskan territory does not extend outside of the ordinary three-mile limit; and therefore acts of congress which forbid the killing of fur-bearing animals in Alaska and waters thereof must be construed to mean the waters within three miles of the shores of Alaska.[9]

III. Protection and Regulation.

A. Power to Protect and Regulate. It is well established that by reason of the state's control over fish and game within its limits, it is within the police power of the state legislature, subject to constitutional restrictions, to enact such general or special laws as may be reasonably necessary for the protection and regulation of the public's right in such fish and game, even to the extent of

882; Fennings *v.* Grenville, 1 Taunt. 241, 9 Rev. Rep. 760; Reg. *v.* The Ship Frederick Gerring Jr., 5 Can. Exch. 164 [*affirmed* in 27 Can. Sup. Ct. 271] (holding an American vessel guilty of illegal fishing within the meaning of the treaty of 1818, and Imperial Act 59 Geo. III, and also under Can. Rev. St. c. 94); The Grace, 4 Can. Exch. 283.

Forfeiture of vessels found fishing in violation of such treaties and statutes see *infra*, II, H, 2; III, G.

6. See 28 U. S. St. at L. 57 [U. S. Comp. St. (1901) p. 3002]; 57 Vict. c. 2.

7. U. S. *v.* The Jane Gray, 77 Fed. 908; The James G. Swan, 77 Fed. 473; Reg. *v.* The Ship Aurora, 5 Can. Exch. 372 (circumstances justifying arrest of vessel); Reg. *v.* The Ship Viva, 5 Can. Exch. 360; Reg. *v.* The Ship Beatrice, 5 Can. Exch. 9.

Forfeitures under Act of April 6, 1894, do not depend upon the intent of the owners of the vessel nor her equipage, and therefore the instruments forming part of her equipage, although belonging to others than her owners, are forfeited. The James G. Swan, 77 Fed. 473. On such forfeiture the crew are not entitled to share in the proceeds of a sale to the extent of their wages (The James G. Swan, *supra*); nor are sealskins, forming a part of the cargo which were taken outside of the prohibited limits and before any violation of the act, subject to forfeiture (The James G. Swan, *supra*).

Presumption of violation.— If a vessel equipped for sealing is found within the prohibited zone, it is presumed that she and her equipment were being used in violation of the act, until otherwise proved; and the fact that such a vessel is near the prohibited zone would put her master upon the alert to keep a full and accurate record of his positions, courses, etc., that he may not pass the line and that by his records and charts he may be able if called upon to demonstrate clearly that he was not within the prohibited area. U. S. *v.* The Jane Gray, 77 Fed. 908; Reg. *v.* The Ship Beatrice, 5 Can. Exch. 378; Reg. *v.* The Ship Ainoko, 5 Can. Exch. 366; Reg. *v.* The Ship Shelby, 5 Can. Exch. 1; Reg. *v.* The Ship Minnie, 4 Can. Exch. 151 [*affirmed* in 23 Can. Sup. Ct. 478].

Wrongful arrest.— Where a vessel so seized is found to be innocent of any offense against the Bering Sea Award Act (1894), it has been held that the courts may award damages for the wrongful seizure and detention together with interest upon ascertaining the amount of such damages. Reg. *v.* The Ship Beatrice, 5 Can. Exch. 160. But where the circumstances under which the arrest was made created sufficient suspicion to warrant the arrest no costs will be given against the government in dismissing the petition. Reg. *v.* The ship E. B. Marvin, 4 Can. Exch. 453.

For decisions in respect to forfeitures under earlier acts of congress see The St. Paul, 1 Alaska 71; The Challenge, 1 Alaska 70; The Kodiak, 53 Fed. 126; The James G. Swan, 50 Fed. 108; The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105.

8. See North American Commercial Co. *v.* U. S., 171 U. S. 110, 18 S. Ct. 817, 43 L. ed. 98 [*reversing* 74 Fed. 145], construing the agreement of March 12, 1890, between the United States and the North American Commercial Company as to the rights and liabilities of a lessee under such an agreement as affected by U. S. Rev. St. (1878) § 1962.

9. The Alexander, 75 Fed. 519, 21 C. C. A. 441 [*reversing* 60 Fed. 914]; The La Ninfa, 75 Fed. 513, 21 C. C. A. 434 [*reversing* 49 Fed. 575]. See 27 Am. L. Rev. 699. *Compare* The James G. Swan, 50 Fed. 108.

This award is the supreme law of the land and is as binding on the courts as an act of congress. La Ninfa, 75 Fed. 513, 21 C. C. A. 434 [*reversing* 49 Fed. 575].

restricting the use of or right of property in the game after it is taken or killed; and such statutes have been enacted in probably all jurisdictions.[10] In England, Canada, and the British provinces this power is in their respective parliaments or legislatures.[11]

10. *Alabama.*— State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761.

Arkansas.— State *v.* Mallory, (1904) 83 S. W. 955, 67 L. R. A. 773.

California.— *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261; Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420.

Illinois.— Cummings *v.* People, 211 Ill. 392, 71 N. E. 1031 (construing the game laws of 1903); American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

Maine.— State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544; State *v.* Thompson, 85 Me. 189, 27 Atl. 97; Donnell *v.* Joy, 85 Me. 118, 26 Atl. 1017; Borrows *v.* McDermott, 73 Me. 441; Moulton *v.* Libbey, 37 Me. 472, 59 Am. Dec. 57; Fuller *v.* Spear, 14 Me. 417.

Maryland.— Hughes *v.* State, 87 Md. 298, 39 Atl. 747; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

Massachusetts.— Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439; Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 820; Com. *v.* Vincent, 108 Mass. 441; Com. *v.* Westworth, 15 Mass. 188.

Minnesota.— State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

Missouri.— Haggerty *v.* St. Louis Ice Mfg., etc., Co., 143 Mo. 238, 44 S. W. 1114, 65 Am. St. Rep. 647, 40 L. R. A. 151.

Montana.— See State *v.* Brown, 29 Mont. 179, 74 Pac. 366.

Nebraska.— McMahon *v.* State, (1904) 97 N. W. 1035; West Point Water Power, etc., Co. *v.* State, 49 Nebr. 218, 66 N. W. 6.

New Hampshire.— State *v.* Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314.

New York.— People *v.* Bootman, 180 N. Y. 1, 72 N. E. 505 [*affirming* 95 N. Y. App. Div. 469, 88 N. Y. Suppl. 887]. See Smith *v.* Levinus, 8 N. Y. 472.

North Carolina.— Brooks *v.* Tripp, 135 N. C. 159, 47 S. E. 401 (holding that an act to protect and promote the shell-fish industry of a certain county is within the police powers of the state); State *v.* Gallop, 126 N. C. 979, 35 S. E. 180; Rea *v.* Hampton, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21.

Ohio.— See Derby *v.* State, 24 Ohio Cir. Ct. 304.

Pennsylvania.— Kean *v.* Rice, 12 Serg. & R. 203 (holding that New Jersey has a right to protect oysters in Delaware bay, opposite Maurice river, although she has no absolute property in them); Hart *v.* Hill, 1 Whart. 124; Com. *v.* Barnett, 9 Pa. Dist. 517.

Rhode Island.— Clark *v.* Providence, 16 R. I. 337, 15 Atl. 763, 1 L. R. A. 725.

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

Virginia.— Boggs *v.* Com., 76 Va. 989.

United States.— Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 [*affirming* 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804]; Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134 (*affirming* 6 N. Y. Suppl. 15)]; McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248 [*affirming* 27 Gratt. (Va.) 985]; U. S. *v.* Alaska Packers' Assoc., 79 Fed. 152 (holding that in the control of fisheries within the state, the state government is supreme); Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500, 21 L. ed. 133 [*affirming* 104 Mass. 446, 6 Am. Rep. 247]; Bennett *v.* Boggs, 3 Fed. Cas. No. 1,319, Baldw. 60.

See 23 Cent. Dig. tit. "Fish," § 16; 24 Cent. Dig. tit. "Game," § 2.

Fishing within the limits of a town is a corporate right which may be restrained and regulated by the legislature. Nickerson *v.* Brackett, 10 Mass. 212.

Condemnation of land for fish-culture and fishways see EMINENT DOMAIN, 15 Cyc. 600.

Discrimination.— A statute prohibiting all aliens incapable of becoming electors of a state from fishing in the waters of the state violates the fourteenth amendment of the constitution of the United States, also articles five and six of the treaty with China, and is void. *In re* Ah Chong, 2 Fed. 733, 6 Sawy. 451.

The title to a fish and game law does not embrace two subjects and therefore is not unconstitutional by reason of the fact that it includes within its meaning both game fowl and birds as well as fowl and birds other than game. Meul *v.* People, 198 Ill. 258, 64 N. E. 1106. See McMahon *v.* State, (Nebr. 1904) 97 N. W. 1035.

Judicial notice.— Acts for the preservation of fish are public acts which will be taken notice of by the court. Com. *v.* McCurdy, 5 Mass. 324.

11. Atty.-Gen. for Canada *v.* Atty.-Gen. for Ontario, etc., [1898] A. C. 700, 67 L. J. P. C. 90, 78 L. T. Rep. N. S. 697; Matter of Provincial Fisheries, 26 Can. Sup. Ct. 444; Reg. *v.* Robertson, 6 Can. Sup. Ct. 52; Beatty *v.* Davis, 20 Ont. 373; Steadman *v.* Robertson, 18 N. Brunsw. 580; Bayer *v.* Kaizer, 26 Nova Scotia 280. See Evans *v.* Owen, [1895] 1 Q. B. 237, 64 L. J. M. C. 59, 72 L. T. Rep. N. S. 54, 15 Reports 228, 43 Wkly. Rep. 237; Venning *v.* Steadman, 9 Can. Sup. Ct. 206. Although the British North American act of 1867 did not convey to the Dominion of Canada any proprietary rights in regard to fisheries and fishing rights, the legislative jurisdiction conferred by that act enables it to affect those rights to an unlimited extent,

B. Specific Regulations and Offenses — 1. In General. Statutes may be enacted regulating the time and manner of taking fish or game, and making it an offense to violate these regulations,[12] including fishing in the sea,[13] although the national government also has jurisdiction over such waters.[14] The state may grant the exclusive right of hunting or fishing in certain places so far as it does not impair vested rights,[15] or confer an exclusive right of fishing or hunting upon its citizens to the exclusion of non-residents,[16] and may impose greater restrictions and higher penalties on non-residents who violate its game laws than on residents.[17] It may also exempt certain waters from the operation of its fish laws.[18]

short of transferring them to others. Under this act the dominion or provincial parliaments or legislatures may impose a tax by way of license and the condition of a right to fish, but it cannot grant an exclusive fishing right over provincial property. Atty.-Gen. for Canada *v.* Atty.-Gen. Ontario, etc., [1898] A. C. 700, 67 L. J. P. C. 90, 78 L. T. Rep. N. S. 697.

At common law title to game was in the king, and no one could hunt game even on his own land without a franchise from the sovereign. See State *v.* Gallop, 126 N. C. 979, 35 S. E. 180 [*citing* 4 Blackstone Comm. 174; 2 Blackstone Comm. 411].

Regulation of district fisheries see Reg. *v.* Yorkshire, [1899] 1 Q. B. 201, 63 J. P. 68, 68 L. J. Q. B. 93, 79 L. T. Rep. N. S. 521, 47 Wkly. Rep. 205; George *v.* Carpenter, [1893] 1 Q. B. 505, 57 J. P. 311, 68 L. T. Rep. N. S. 714, 41 Wkly. Rep. 366; Hall *v.* Reid, 10 Q. B. D. 134 note, 48 L. T. Rep. N. S. 221 note; Harbottle *v.* Terry, 10 Q. B. D. 131, 47 J. P. 186, 52 L. J. M. C. 31, 48 L. T. Rep. N. S. 219, 31 Wkly. Rep. 289; Reg. *v.* Grey, L. R. 1 Q. B. 469, 12 Jur. N. S. 685, 35 L. J. M. C. 198, 14 L. T. Rep. N. S. 477, 14 Wkly. Rep. 671; Merricks *v.* Cadwallader, 46 J. P. 216, 51 L. J. M. C. 20, 46 L. T. Rep. N. S. 29.

12. *California.*— Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420.

Indiana.— State *v.* Boone, 30 Ind. 225; Gentile *v.* State, 29 Ind. 409.

Iowa.— State *v.* Haug, 95 Iowa 413, 64 N. W. 398, 29 L. R. A. 390.

Maine.— Sawyer *v.* Beal, 97 Me. 356, 54 Atl. 848.

New Hampshire.— State *v.* Roberts, 59 N. H. 256, 47 Am. Dec. 119.

United States.— Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134 (*affirming* 6 N. Y. Suppl. 15)].

The right to erect a removable weir below low-water mark may be given to the adjoining landowner by statute, or if he fails to exercise the right it may be exercised by others in front of his land. Perry *v.* Carleton, 91 Me. 349, 40 Atl. 134. See Matthews *v.* Treat, 75 Me. 594; Duncan *v.* Sylvester, 24 Me. 482, 41 Am. Dec. 400.

Dogs.— It is an offense under some statutes to permit deer hounds to run at large in a locality where deer are usually found (Reg. *v.* Crandall, 27 Ont. 63) or to keep a sporting dog for the purpose of killing or destroying game (Hayward *v.* Horner, 5 B. & Ald. 317, 7 E. C. L. 178; Read *v.* Phelps, 15 East 271).

13. Com. *v.* Hilton, 174 Mass. 29, 54 N. E. 362, 45 L. R. A. 475; Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236; Com. *v.* Vincent, 108 Mass. 441; Burnham *v.* Webster, 5 Mass. 266; Dunham *v.* Lamphere, 3 Gray (Mass.) 268; Corfield *v.* Coryell, 6 Fed. Cas. No. 3,230, 4 Wash. 371.

In those waters which are navigable from the sea for any useful purpose, there can be no restriction upon the state's authority to regulate the public right of fishing. Com. *v.* Vincent, 108 Mass. 441; Cleaveland *v.* Norton, 6 Cush. (Mass.) 380.

A Maine statute prohibits the destruction of lobsters within the state, even though taken and caught more than a marine league from the shore. State *v.* Craig, 80 Me. 85, 13 Atl. 129.

14. Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236.

15. Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420; Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654; Howes *v.* Grush, 131 Mass. 207 (holding that it is within the power of the legislature to authorize such a use of a non-navigable stream as will wholly destroy a public fishery); Com. *v.* Weatherhead, 119 Mass. 175; Hathaway *v.* Thomas, 16 Gray (Mass.) 290 (construing St. (1856) c. 50, empowering towns and cities to license any person to construct fish weirs, under certain restrictions); Lansing *v.* Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89. See Chalker *v.* Dickinson, 1 Conn. 510.

16. State *v.* Harrub, 95 Ala. 176, 10 So. 753, 36 Am. St. Rep. 195, 15 L. R. A. 761; State *v.* Tower, 84 Me. 444, 24 Atl. 898; Chambers *v.* Church, 14 R. I. 398, 51 Am. Rep. 410; Walker *v.* Stone, 17 Wash. 578, 50 Pac. 588. But see State *v.* Mallory, (Ark. 1904) 83 S. W. 955, 67 L. R. A. 773.

A statute forbidding the citizens of any other county from fishing in the waters of two specified counties without a license without anything to forbid the citizens of those counties of fishing in other counties without a license violates a constitutional guaranty of the equal protection of the laws. State *v.* Higgins, 51 S. C. 51, 28 S. E. 15, 38 L. R. A. 561.

17. Cummings *v.* People, 211 Ill. 392, 71 N. E. 1031; Allen *v.* Wyckoff, 48 N. J. L. 90, 2 Atl. 659, 57 Am. Rep. 548; State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

18. State *v.* Haug, 95 Iowa 413, 64 N. W. 398, 29 L. R. A. 390 (holding, however, that a lake lying more than a quarter of a mile

2. Possession and Sale in Close-Season — a. In General. Statutes have been enacted and held constitutional in most jurisdictions making it an offense and prescribing a penalty for any person to take or to kill or to have in his possession certain kinds of fish or game or any part thereof during a particular season of the year, commonly called the close-season,[19] or as to certain game for a certain number of

away from a river wholly within the state of Iowa is not a part of the Mississippi river within the meaning of the statute of that state, which exempts fishing in that river from the statutory penalty); People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157.

19. *California.*— People *v.* Haagen, 139 Cal. 115, 72 Pac. 836, fresh salmon.

District of Columbia.— Javins *v.* U. S., 11 App. Cas. 345.

Indiana.— Smith *v.* State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404; Stuttsman *v.* State, 57 Ind. 119.

Iowa.— State *v.* Fields, 118 Iowa 530, 92 N. W. 651.

Maine.— Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33; Baker *v.* Wentworth, 17 Me. 347.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929.

Massachusetts.— Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439 (trout); Com. *v.* Look, 108 Mass. 452.

Michigan.— People *v.* Dornbos, 127 Mich. 136, 86 N. W. 529.

Minnesota.— State *v.* Northern Pac. Express Co., 58 Minn. 403, 59 N. W. 1100; State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

Missouri.— Haggerty *v.* St. Louis Ice Mfg., etc., Co., 143 Mo. 238, 44 S. W. 1114, 65 Am. St. Rep. 647, 40 L. R. A. 151; State *v.* Farrell, 23 Mo. App. 176; State *v.* Judy, 7 Mo. App. 524.

Nevada.— *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96.

New York.— Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140; People *v.* Gerber, 92 Hun 554, 36 N. Y. Suppl. 720; Rollins *v.* Breed, 54 Hun 485, 8 N. Y. Suppl. 48; People *v.* Reed, 47 Barb. 235.

North Carolina.—State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

Pennsylvania.— Com. *v.* Wilkinson, 139 Pa. St. 298, 21 Atl. 14.

Vermont.— State *v.* Jewett, 76 Vt. 435, 58 Atl. 725; State *v.* Smith, 61 Vt. 346, 17 Atl. 492.

England.—Saunders *v.* Baldy, L. R. 1 Q. B. 87, 6 B. & S. 791, 12 Jur. N. S. 334, 35 L. J. M. C. 71, 13 L. T. Rep. N. S. 322, 14 Wkly. Rep. 177; Loome *v.* Baily, 3 E. & E. 444, 6 Jur. N. S. 1299, 30 L. J. M. C. 31, 3 L. T. Rep. N. S. 406, 9 Wkly. Rep. 119, 107 E. C. L. 444; Swanwick *v.* Varney, 46 J. P. 613, 45 L. T. Rep. N. S. 716, 30 Wkly. Rep. 79; Watkins *v.* Price, 47 L. J. M. C. 1, 37 L. T. Rep. N. S. 578, 27 Wkly. Rep. 692.

Canada.— Reg. *v.* Vachon, 3 Can. Cr. Cas. 558, unauthorized possession by servant.

See 23 Cent. Dig. tit. "Fish," § 22; 24 Cent. Dig. tit. "Game," § 7.

Decisions construing particular statutes.— *Kentucky.*— Com. *v.* England, 38 S. W. 492, 18 Ky. L. Rep. 780, construing Acts (1891–1893), c. 183, § 2, and Act, Feb. 27, 1894, as amended by Act, March 3, 1894, in reference to the killing of squirrels.

Minnesota.— State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098, construing Laws (1891), c. 9, § 11, as amended by Laws (1893), c. 124, § 9.

New York.— People *v.* Fishbough, 134 N. Y. 393, 31 N. E. 983 [*reversing* 58 Hun 404, 12 N. Y. Suppl. 24] (holding that under Laws (1879), c. 534, § 12, as amended by Laws (1880), c. 584, § 2, providing that no person shall "kill or expose for sale, or have in possession after the same is killed" certain specified birds, the person is not liable for having live birds in his possession, exposing them for sale); People *v.* Cohen, 91 N. Y. App. Div. 89, 86 N. Y. Suppl. 475 (construing Laws (1902), p. 1236, c. 517, prohibiting any one from having certain classes of birds in his possession as unconstitutional in so far as it applies to birds in possession of one when the act went into effect); People *v.* Gerber, 92 Hun 554, 36 N. Y. Suppl. 720, 11 N. Y. Cr. 142 (construing Laws (1892), c. 488, §§ 40, 41, providing a close-season for wild deer); People *v.* Bootman, 40 Misc. 27, 81 N. Y. Suppl. 195 (construing Laws (1901), c. 91, § 30, providing a close-season for certain birds).

Rhode Island.—State *v.* Stone, 20 R. I. 269, 38 Atl. 654, construing Gen. Laws, c. 112, § 4, making it an offense for any person to have in his possession any ruffled grouse between certain dates.

Texas.— Dickinson *v.* State, 38 Tex. Cr. 472, 41 S. W. 759, 43 S. W. 520, construing the act of 1893, amending previous statutes in respect to the killing of deer.

A contract for the cold storage of game during the close-season to be withdrawn during the open season when the game could be lawfully disposed of is void, under a statute making it a misdemeanor to have such game in possession during the close-season. Haggerty *v.* St. Louis Ice Mfg., etc., Co., 143 Mo. 238, 44 S. W. 1114, 65 Am. St. Rep. 647, 40 L. R. A. 151.

Eels are included in the words "every kind of fish known as river fish" in a statute. Woodhouse *v.* Etheridge, L. R. 6 C. P. 570, 24 L. T. Rep. N. S. 709.

Class legislation.— An act regulating the catching of fish in the waters of the state is not void as class legislation because the close-season is shorter in the waters adjoining a particular county than elsewhere. Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982.

Protection of property.— A statute prohibiting the destruction of certain fur-bearing animals is not applicable to cases in which such destruction is necessary for the protec-

years,[20] and as to some game, at any time,[21] without a license.[22] Statutes have also been enacted and held constitutional in some jurisdictions making it an offense to sell, offer for sale, or to have in possession for sale certain fish and game during the close-season,[23] or as to some game at any time;[24] and these statutes have been held to apply, although such fish and game were acquired

tion of property. Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339.

Following a moose in a forest until it becomes snow-bound and then capturing it during close-time is a violation of a statute prohibiting hunting, killing, or destroying a moose during that time. James *v.* Wood, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448.

A common carrier having prohibited game in packages in its possession, not knowing or having reason to know that the packages contained prohibited game, is not liable to a penalty ordinarily attaching to one having possession of such game during the close-season. State *v.* Swett, 87 Me. 99, 32 Atl. 806, 47 Am. St. Rep. 306, 29 L. R. A. 714. See Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33.

20. State *v.* Gallop, 126 N. C. 979, 35 S. E. 180; Com. *v.* Bender, 7 Pa. Co. Ct. 620 (Act June 10, 1881, § 3, making it a misdemeanor to take trout in a stream planted by the fish commissioners for three years after such planting); State *v.* Eldredge, 71 Vt. 374, 45 Atl. 753 (holding that under Vt. St. § 4568, providing that when fish commissioners place fish in a stream or pond, they may prohibit fishing therein for a period of three years, they may after the expiration of such period restock the stream and again prohibit fishing therein); State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290 (holding that section 4568 is not unconstitutional, although construed so as to prevent the owner of land from fishing in a stream constituting a part thereof during the time involved in the prohibition); State *v.* Norton, 45 Vt. 258 (Act Nov. 8, 1865, forbidding killing of deer running at large for ten years from the date of the act).

21. *Ex p.* Hewlett, 22 Nev. 333, 40 Pac. 96 (statute forbidding the catching of trout from certain rivers); People *v.* Cohen, 91 N. Y. App. Div. 89, 86 N. Y. Suppl. 475 (construing Laws (1900), c. 20, § 33, as amended by Laws (1900), c. 741, Laws (1901), c. 91, and Laws (1902), c. 517, which provide that birds for which there is no open season shall not be taken or possessed at any time); State *v.* Gallop, 126 N. C. 979, 35 S. E. 180; State *v.* Ward, 75 Vt. 438, 56 Atl. 85; State *v.* St. John, (Vt. 1905) 59 Atl. 826 (holding that a deer which has no horns protruding through the skin so that they can be seen and ascertained to be horns is not a deer having horns within the meaning of a statute making it an offense to kill deer not having horns); State *v.* Jewett, 76 Vt. 435, 58 Atl. 725 (deer without horns). See Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982, fish under a prescribed size.

To create the offense of taking birds for which there is no open season, under a statute prohibiting such taking, it must appear not only that the birds in the possession of the offender are wild birds, but also that they are birds for which there is no open season. People *v.* Bootman, 40 Misc. (N. Y.) 27, 81 N. Y. Suppl. 195.

22. Hornbeke *v.* White, (Colo. App. 1904) 76 Pac. 926.

The mere possession of the hides of such game is in the absence of permission therefor unlawful. Hornbeke *v.* White, (Colo. App. 1904) 76 Pac. 926.

23. *Illinois.*— American Express Co. *v.* People, 133 Ill. 649, 24 N. C. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

Kentucky.— Com. *v.* Chase-Davidson Co., 109 Ky. 236, 58 S. W. 609, 22 Ky. L. Rep. 727.

Maine.— State *v.* Lewis, 87 Me. 498, 33 Atl. 10 (holding that the word "trout" as used in Rev. St. c. 40, § 49, means a fresh-water fish); State *v.* Beal, 75 Me. 289.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929.

Massachusetts.— Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439.

Michigan.—People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696.

New York.— Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140; People *v.* Gerber, 92 Hun 554, 36 N. Y. Suppl. 720.

Ohio.— Roth *v.* State, 51 Ohio St. 209, 37 N. E. 259, 46 Am. St. Rep. 566 [*affirming* 7 Ohio Cir. Ct. 62, 3 Ohio Cir. Dec. 663].

Pennsylvania.— Com. *v.* Wilkinson, 139 Pa. St. 298, 21 Atl. 14; Com. *v.* Penn Forest Brook Trout Co., 26 Pa. Co. Ct. 163.

England.— Whitehead *v.* Smithers, 2 C. P. D. 553, 46 L. J. M. C. 234, 37 L. T. Rep. N. S. 378.

See 23 Cent. Dig. tit. "Fish," § 22; 24 Cent. Dig. tit. "Game," § 7.

An innkeeper having trout or other game not alive in his possession out of season, and serving them to his guests at their meals, the bills of fare for such meals showing such fact constitutes a sale of trout out of season, in violation of the statute. State *v.* Beal, 75 Me. 289. See State *v.* Randolph, 1 Mo. App. 15.

24. *Ex p.* Kenneke, 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177; *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138; State *v.* Dow, 70 N. H. 286, 47 Atl. 734, 53 L. R. A. 314 (holding that a statute forbidding fishing for trout with intent to sell or trade the fish caught is a valid exercise of the legislative power to enact equal laws for the protection of the public right of fishery and of the police power of the state); State *v.* Schuman, 36 Oreg. 16, 58 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153.

lawfully,[25] or, under some statutes, without any wrongful knowledge or intent;[26] and even though imported from another state or country.[27] Packing and canning certain fish during the close-season is prohibited under some statutes.[28]

b. Possession or Sale of Game Acquired During Open Season. Under most statutes the possession or sale during the close-season of prohibited fish or game is unlawful, although they were lawfully acquired during the open season.[29]

c. Fish or Game Caught Without the State. In most jurisdictions the statutory provisions making it unlawful for any person to sell, offer for sale, or to have in his possession certain fish and game, during the close-season, extend to such fish and game caught without the state or country and imported into it,[30] unless the language of the statute limits its application to fish or game caught within the state.[31] But in some jurisdictions it is held that such provisions do not extend to fish and game caught without the state,[32] and statutory provisions to that effect

25. Bellows *v.* Elmendorf, 7 Lans. (N. Y.) 462. And see *infra*, III, B, 2, b.

26. State *v.* Huff, 89 Me. 521, 36 Atl. 1000; State *v.* Ward, 75 Vt. 438, 56 Atl. 85. But see under other statutes Com. *v.* Look, 108 Mass. 452; People *v.* Deremo, 106 Mich. 621, 64 N. W. 489; People *v.* McMasters, 74 Hun (N. Y.) 226, 26 N. Y. Suppl. 221; Hopton *v.* Thirlwall, 9 L. T. Rep. N. S. 327, 12 Wkly. Rep. 72.

27. See *infra*, III, B, 2, c.

28. State *v.* Kaufman, 98 Me. 546, 57 Atl. 886.

29. *California.*— People *v.* Haagen, 139 Cal. 115, 72 Pac. 836.

Illinois.—American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138.

Indiana.— Smith *v.* State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404.

Kentucky.— Com. *v.* Chase-Davidson Co., 109 Ky. 236, 58 S. W. 609, 22 Ky. L. Rep. 727.

Michigan.— People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696.

Minnesota.— State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

Missouri.— State *v.* Farrell, 23 Mo. App. 176; State *v.* Judy, 7 Mo. App. 524.

New York.— Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140 [*affirming* 5 Daly 235].

Contra.— State *v.* Parker, 89 Me. 81, 35 Atl. 1021, 35 L. R. A. 279; State *v.* Buckman, 88 Me. 385, 34 Atl. 170, 51 Am. St. Rep. 406; Allen *v.* Young, 76 Me. 80; State *v.* McGuire, 24 Oreg. 366, 33 Pac. 666, 21 L. R. A. 478. See Simpson *v.* Unwin, 3 B. & Ad. 134, 1 L. J. M. C. 28, 23 E. C. L. 67.

30. *California.*— *Ex p.* Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129.

District of Columbia.— Javins *v.* U. S., 11 App. Cas. 345.

Illinois.— Merritt *v.* People, 169 Ill. 218, 48 N. E. 325 [*affirming* 68 Ill. App. 273]; Magner *v.* People, 97 Ill. 220. But see People *v.* Merritt, 91 Ill. App. 620. Under section 2 of the Illinois Game Law as amended by laws of 1889, one may have in his possession for sale during the time when under section 1 of the same act it is lawful to kill in Illinois, those animals and birds killed in other states which the second clause of section 2 forbids a sale of at any time if taken or killed in Illinois. Merritt *v.* People, *supra*; Magner *v.* People, *supra*.

Maryland.— Stevens *v.* State, 89 Md. 669, 43 Atl. 929. *Compare* Dickhaut *v.* State, 85 Md. 451, 37 Atl. 21, 60 Am. St. Rep. 332, 36 L. R. A. 765, construing an earlier statute.

Massachusetts.— Com. *v.* Savage, 155 Mass. 278, 29 N. E. 468.

Michigan.— People *v.* Dornbos, 127 Mich. 136, 86 N. W. 529; People *v.* O'Neil, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696. *Compare* People *v.* O'Neil, 71 Mich. 325, 39 N. W. 1.

Missouri.— State *v.* Farrell, 23 Mo. App. 176; State *v.* Judy, 7 Mo. App. 524; State *v.* Randolph, 1 Mo. App. 15.

Ohio.— Roth *v.* State, 51 Ohio St. 209, 37 N. E. 359, 46 Am. St. Rep. 566 [*affirming* 7 Ohio Cir. Ct. 62, 3 Ohio Cir. Dec. 663].

Oregon.— State *v.* Schuman, 36 Oreg. 16, 56 Pac. 661, 78 Am. St. Rep. 754, 47 L. R. A. 153, trout. *Compare* State *v.* McGuire, 24 Oreg. 366, 33 Pac. 666, 21 L. R. A. 478.

England.— Price *v.* Bradley, 16 Q. B. D. 148, 50 J. P. 150, 55 L. J. M. C. 53, 53 L. T. Rep. N. S. 816, 34 Wkly. Rep. 165; Whitehead *v.* Smithers, 2 C. P. D. 553, 46 L. J. M. C. 234, 37 L. T. Rep. N. S. 378. See Porritt *v.* Baker, 3 C. L. R. 432, 10 Exch. 759, 1 Jur. N. S. 336. But it has been held that an excise license under 23 & 24 Vict. c. 90, § 14, is not required for the sale of game killed abroad (Pudney *v.* Eccles, [1893] 1 Q. B. 52, 17 Cox C. C. 594, 57 J. P. 38, 62 L. J. M. C. 27, 67 L. T. Rep. N. S. 713, 5 Reports 52, 41 Wkly. Rep. 125); and that such a licensed person cannot be convicted for selling during the close-season game killed abroad (Guyer *v.* Reg, 23 Q. B. D. 100, 16 Cox C. C. 657, 53 J. P. 436, 58 L. J. M. C. 81, 60 L. T. Rep. N. S. 824, 37 Wkly. Rep. 586).

Canada.— Reg. *v.* Strauss, 1 Can. Cr. Cas. 103. See *Ex p.* Turner, 33 N. Brunsw. 2.

31. See Com. *v.* Hall, 128 Mass. 410, 35 Am. Rep. 387; Robertson *v.* Johnson, [1893] 1 Q. B. 129, 17 Cox C. C. 580, 57 J. P. 39, 62 L. J. M. C. 1, 67 L. T. Rep. N. S. 560, 5 Reports 108, 41 Wkly. Rep. 223, oysters.

32. People *v.* Bootman, 180 N. Y. 1, 72 N. E. 505 [*affirming* 95 N. Y. App. Div. 469, 88 N. Y. Suppl. 887]; People *v.* Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34, 79 Am. St. Rep. 622, 52 L. R. A. 803 [*affirming* 30 Misc. 130, 62 N. Y. Suppl. 543]; People *v.* Booth,

have been held unconstitutional, on the ground that they interfere with the power of congress to regulate interstate commerce, and with the rights of property guaranteed by the state constitutions.[33]

3. Method of Taking Fish or Game. It is also within the police power of the state to regulate the method of taking fish or game within the state, and in many jurisdictions penal statutes to this effect have been enacted,[34] as by making it an offense to catch or kill particular game by means of certain devices such as floating batteries, machine guns, spring traps, etc.,[35] or to catch fish in certain waters or at certain periods by means of seines, nets, traps,[36] dams, or

42 Misc. (N. Y.) 321, 86 N. Y. Suppl. 272; People *v.* Cone, 33 Misc. (N. Y.) 393, 67 N. Y. Suppl. 624, 15 N. Y. Cr. 287; Com. *v.* Wilkinson, 139 Pa. St. 298, 21 Atl. 14; *In re* Davenport, 102 Fed. 540. But see Phelps *v.* Racey, 60 N. Y. 10, 19 Am. Rep. 140 [*affirming* 5 Daly 235]; New York Game Protection Assoc. *v.* Durham, 51 N. Y. Super. Ct. 306.

33. People *v.* Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 34, 79 Am. St. Rep. 622, 52 L. R. A. 803 [*affirming* 30 Misc. 130, 62 N. Y. Suppl. 543]; People *v.* Booth, 42 Misc. (N. Y.) 321, 86 N. Y. Suppl. 272.

N. Y. Laws (1902), p. 487, c. 194, § 141, prohibiting the possession in the close-season of trout taken outside the state, is void as depriving citizens of the rights of property and liberty guaranteed by the state constitution, and is not a proper exercise of the police power. People *v.* Booth, 42 Misc. 321, 86 N. Y. Suppl. 272.

34. Hughes *v.* State, 87 Md. 298, 39 Atl. 747; People *v.* Collison, 85 Mich. 105, 48 N. W. 292; Fidalgo Island Canning Co. *v.* Womer, 29 Wash. 503, 69 Pac. 1121, construing Laws (1899), § 4, relating to the locating of fish-traps. And see cases more specifically cited *infra*, note 35 *et seq.*

35. Powers *v.* State, 129 Ala. 126, 29 So. 784 (using nets to capture partridges or quail); People *v.* Featherly, 12 N. Y. Suppl. 389 (construing Laws (1879), c. 534, § 6); Jenkin *v.* King, L. R. 7 Q. B. 478, 41 L. J. M. C. 145, 26 L. T. Rep. N. S. 428, 20 Wkly. Rep. 669 (nets for catching hares); Saunders *v.* Pitfield, 16 Cox C. C. 369, 52 J. P. 694, 58 L. T. Rep. N. S. 108 (holding a tenant of land within such a statute, although he is entitled to the game and right of shooting thereon); Smith *v.* Hunt, 16 Cox C. C. 54, 50 J. P. 279, 54 L. T. Rep. N. S. 422 (holding an owner of land not within such a statute as to game on his own land). See State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

Where the taking or killing by one person of more than a specified number of certain game in one day is the manifest purpose of a statute or ordinance, it is not a reasonable exercise of the police power to prohibit the killing within such limit by the use of a repeating shot-gun or a magazine gun. *In re* Marshall, 102 Fed. 323.

Camp hunting, which means camping in the woods with guns and dogs for the purpose of hunting game, etc., is prohibited by an Arkansas statute [Act (1897), p. 26]. Du Bose *v.* State, 71 Ark. 347, 74 S. W. 292.

Using ferrets to catch rabbits, except by the owner of the premises, is an offense under some statutes. Hart *v.* State, 29 Ohio St. 666, holding that one violating this statute is guilty of the offense, although he uses the ferrets with permission of the owner of the premises.

36. *Arkansas.*— Roetzel *v.* State, 68 Ark. 487, 60 S. W. 27, in respect to fishing with seines of various sizes. It is no offense under the statute to place a seine in exempted streams. Rennau *v.* State, (1904) 81 S. W. 605.

California.— People *v.* Miles, 143 Cal. 636, 77 Pac. 666, misdemeanor to use set nets.

Connecticut.— Eastman *v.* Curtis, 1 Conn. 323.

Illinois.— People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684 [*reversing* 39 Ill. App. 656].

Kentucky.— Com. *v.* Drain, 99 Ky. 162, 35 S. W. 269, 18 Ky. L. Rep. 50.

Maine.— State *v.* Thompson, 85 Me. 189, 27 Atl. 97; Oliver *v.* Bailey, 85 Me. 161, 27 Atl. 90; State *v.* Murray, 84 Me. 135, 24 Atl. 789; McClain *v.* Tillson, 82 Me. 281, 19 Atl. 457; State *v.* Towle, 80 Me. 349, 14 Atl. 729; Fuller *v.* Spear, 14 Me. 417.

Maryland.— Hughes *v.* State, 87 Md. 298, 39 Atl. 747.

Massachusetts.— Com. *v.* Follett, 164 Mass. 477, 41 N. E. 676; Hanscomb *v.* Russell, 15 Gray 162; Cleveland *v.* Norton, 6 Cush. 380.

Michigan.— Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982; *In re* Yell, 107 Mich. 228, 65 N. W. 97; People *v.* Miller, 88 Mich. 383, 50 N. W. 296; People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157.

Missouri.— State *v.* Blount, 85 Mo. 543 (construing the terms "persons" and "waters of the state" in the statute); State *v.* Lewis, 73 Mo. App. 619.

New Jersey.— Weller *v.* Snover, 42 N. J. L. 341; Doughty *v.* Conover, 42 N. J. L. 193. See Budd *v.* Sip, 13 N. J. L. 348.

New York.— See People *v.* Fish, 89 Hun 163, 34 N. Y. Suppl. 1013, construing Laws (1892), c. 488, § 138. "Knowingly possessed," within the meaning of section 102 of this statute, providing that fish taken contrary to the provisions of this section shall not be knowingly possessed see People *v.* McMasters, 74 Hun 226, 26 N. Y. Suppl. 221.

North Carolina.— State *v.* Woodard, 123 N. C. 710, 31 S. E. 219; Rea *v.* Hampton, 101 N. C. 51, 7 S. E. 649, 9 Am. St. Rep. 21. See Hettrick *v.* Page, 82 N. C. 65.

Ohio.— Edson *v.* Crangle, 62 Ohio St. 49, 56 N. E. 647; State *v.* Moder, 5 Ohio S. & C.

weirs,[37] poisons or explosives,[38] or by any device,[39] except rod, hook, and line;[40]

Pl. Dec. 564, 7 Ohio N. P. 514 (holding that Rev. St. § 6968, as amended by 92 Ohio Laws, p. 332, does not prohibit the shooting of fish); State *v.* Owens, 4 Ohio S. & C. Pl. Dec. 163, 3 Ohio N. P. 181 (construing Rev. St. § 6968, making it a criminal offense to maintain nets within half a mile of any river flowing into Lake Erie).

Pennsylvania.— Com. *v.* Lohman, 8 Kulp 485.

Texas.— Venturio *v.* State, 37 Tex. Cr. 653, 40 S. W. 974.

Vermont.— Drew *v.* Hilliker, 56 Vt. 641.

Washington.— Cherry Point Fish Co. *v.* Nelson, 25 Wash. 558, 66 Pac. 55.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.— See Bennett *v.* Boggs, 3 Fed. Cas. No. 1,319, Baldw. 60.

England.— Briggs *v.* Swanwick, 10 Q. B. D. 510, 47 J. P. 564, 52 L. J. M. C. 63, 31 Wkly. Rep. 565; Ruther *v.* Harris, 1 Ex. D. 97, 45 L. J. M. C. 103, 33 L. T. Rep. N. S. 825; Davies *v.* Evans, 20 Cox C. C. 177, 66 J. P. 392, 86 L. T. Rep. N. S. 419; Thomas *v.* Evans, E. B. & E. 171, 4 Jur. N. S. 710, 27 L. J. M. C. 172, 6 Wkly. Rep. 497, 96 E. C. L. 171; Alexander *v.* Shiel, Ir. R. 6 C. L. 510; Colbeck *v.* Ashfield, 62 J. P. 214, 67 L. J. Q. B. 333, 46 Wkly. Rep. 302; Wood *v.* Venton, 54 J. P. 662; Pidler *v.* Berry, 53 J. P. 6, 59 L. T. Rep. N. S. 230; Bridger *v.* Richardson, 2 M. & S. 568. Fixed nets or engines within 24 & 25 Vict. c. 109, § 11, and 28 & 29 Vict. c. 121, § 9. Gore *v.* English Fisheries, L. R. 6 Q. B. 561, 40 L. J. Q. B. 252, 24 L. T. Rep. N. S. 702, 19 Wkly. Rep. 1083; Watts *v.* Lucas, L. R. 6 Q. B. 226, 40 L. J. M. C. 73, 24 L. T. Rep. N. S. 128, 19 Wkly. Rep. 470; Thomas *v.* Jones, 5 B. & S. 916, 11 Jur. N. S. 306, 34 L. J. M. C. 45, 11 L. T. Rep. N. S. 450, 13 Wkly. Rep. 154, 117 E. C. L. 916; Olding *v.* Wild, 14 L. T. Rep. N. S. 402. As to prescriptive right to use fixed engines or weirs see Holford *v.* George, L. R. 3 Q. B. 639, 37 L. J. Q. B. 185, 18 L. T. Rep. N. S. 817, 16 Wkly. Rep. 1204; Rawstorne *v.* Backhouse, L. R. 3 C. P. 67, 37 L. J. C. P. 26, 17 L. T. Rep. N. S. 441, 16 Wkly. Rep. 249; Robson *v.* Robinson, 3 Dougl. 307, 26 E. C. L. 205; Bevins *v.* Bird, 12 L. T. Rep. N. S. 306.

Canada.— Mowat *v.* McFee, 5 Can. Sup. Ct. 66; Bayer *v.* Kaizer, 26 Nova Scotia 280.

See 23 Cent. Dig. tit. "Fish," § 23.

Setting nets for turtles with openings for fish to escape is not a violation of the statute making it unlawful to take or catch or to attempt to catch fish with nets, although fish are accidentally caught therein, if they are returned alive, so far as possible, to the water. People *v.* Deremo, 106 Mich. 621, 64 N. W. 489.

A statute providing that nets having meshes of a certain size may be used has reference to the size of the meshes when the net is manufactured. People *v.* Gillingham, 131 Mich. 105, 90 N. W. 1027.

A landing net used after hooking a game fish is not within the meaning of a statute prohibiting the use of seines, nets, etc. Com. *v.* Wetherill, 8 Pa. Dist. 653, 23 Pa. Co. Ct. 59.

Set-line.— A common fishing-line with one hook attached and fastened to some object on shore is not a set-line within the meaning of a statute prohibiting the use of a set-line. State *v.* Stevens, 69 Vt. 411, 38 Atl. 80.

37. Lynch *v.* State, 69 Ark. 555, 64 S. W. 950 (holding the erection or maintenance of dams for the purpose of catching fish unlawful under the act of June 26, 1897, unless the waters in which the dams were erected are wholly on the premises of the persons using them); Hodgson *v.* Little, 16 C. B. N. S. 198, 10 Jur. N. S. 953, 33 L. J. M. C. 229, 11 L. T. Rep. N. S. 136, 12 Wkly. Rep. 1103, 111 E. C. L. 198. The provisions of Magna Charta and the other early statutes which prohibit fishing weirs apply only to navigable rivers. See Rolle *v.* Whyte, L. R. 3 Q. B. 286, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. Rep. N. S. 560, 16 Wkly. Rep. 593; Leconfield *v.* Lonsdale, L. R. 5 C. P. 657, 39 L. J. C. P. 305, 23 L. T. Rep. N. S. 155, 18 Wkly. Rep. 1165; Robson *v.* Robinson, 3 Dougl. 307, 26 E. C. L. 205.

The maintenance of a fish weir "in front of the shore or flats of another" is an offense under Me. Rev. St. c. 3, § 63. Dunton *v.* Parker, 97 Me. 461, 54 Atl. 1115, holding that, in determining whether or not a weir is so situated, the criterion is whether it causes injury to another in the enjoyment of his rights. See Perry *v.* Carleton, 91 Me. 349, 40 Atl. 134.

38. Keoun *v.* State, 64 Ark. 231, 41 S. W. 808. See Stead *v.* Tillotson, 64 J. P. 343, 69 L. J. Q. B. 240, 48 Wkly. Rep. 431, holding that it is an offense, under Freshwater Fisheries Act (1878), § 7, to take trout by hand from a poisoned stream, although there is no evidence to connect the person so taking them with the poisoning of the stream.

39. *Indiana.*— Lewis *v.* State, 148 Ind. 346, 47 N. E. 675, gig, etc.

Michigan.— *In re* Yell, 107 Mich. 228, 65 N. W. 97; People *v.* Miller, 88 Mich. 383, 50 N. W. 296; People *v.* Collison, 85 Mich. 105, 48 N. W. 292.

Minnesota.— State *v.* Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76.

Pennsylvania.— See Com. *v.* Nihil, 4 Pa. Dist. 582.

Vermont.— State *v.* Goodwin, 62 Vt. 191, 20 Atl. 824.

Washington.— Halleck *v.* Davis, 22 Wash. 393, 60 Pac. 1116.

England.— Moulton *v.* Wilby, 9 Cox C. C. 318, 2 H. & C. 25, 9 Jur. N. S. 472, 32 L. J. M. C. 164, 8 L. T. Rep. N. S. 284, 11 Wkly. Rep. 670; Bridger *v.* Richardson, 2 M. & S. 568.

See 23 Cent. Dig. tit. "Fish," § 23.

40. *Iowa.*— Collins *v.* Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. Rep. 367.

Massachusetts.—Com. *v.* Prescott, 151 Mass. 60, 23 N. E. 729, smelts.

and by making it a misdemeanor for any person to have in his possession such nets, seines, or other devices,[41] and providing for the forfeiture or destruction of such nets or other devices when found in use in violation of the statute.[42]

4. REGULATION OF STREAMS — a. In General. For the purpose of protecting and preserving the public's right of fishery, the legislature may also regulate fisheries which by the common law would be private property,[43] and in navigable as well as other waters,[44] as by prohibiting even an owner of land from catching certain fish in streams or waters thereon at certain seasons of the year, or by certain methods,[45] unless the water from which they are taken is so inclosed as to prevent the passage of fish to other waters.[46] Statutes have also been enacted to protect the passage of migratory fish up and down streams, although such streams flow over lands entirely subject to private ownership, as by prohibiting seines or other obstructions to their passage,[47] and authorizing certain local officers or committees

Michigan.— People *v.* Conrad, 125 Mich. 1, 83 N. W. 1012; *In re* Yell, 107 Mich. 228, 65 N. W. 97; People *v.* Miller, 88 Mich. 383, 50 N. W. 296; People *v.* Horling, (1904) 100 N. W. 691.

Minnesota.— State *v.* Mrozinski, 59 Minn. 465, 61 N. W. 560, 27 L. R. A. 76.

New York.— People *v.* Tanner, 128 N. Y. 416, 28 N. E. 364 [*affirming* 14 N. Y. Suppl. 334] (construing Laws (1879), c. 534, § 23, as amended by Laws (1884), c. 127); Josh *v.* Marshall, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419; People *v.* Fish, 89 Hun 163, 34 N. Y. Suppl. 1013; People *v.* Doxtater, 75 Hun 472, 27 N. Y. Suppl. 481; People *v.* Gillette, 11 N. Y. Suppl. 461.

Pennsylvania.— Com. *v.* Wetherill, 8 Pa. Dist. 653, 23 Pa. Co. Ct. 59.

Vermont.— State *v.* Goodwin, 62 Vt. 191, 20 Atl. 824.

England.— Ruther *v.* Harris, 1 Ex. D. 97, 45 L. J. M. C. 103, 33 L. T. Rep. N. S. 825; Paley *v.* Birch, 8 B. & S. 336, 16 L. T. Rep. N. S. 410; Davies *v.* Evans, 20 Cox C. C. 177, 66 J. P. 392, 86 L. T. Rep. N. S. 419; Moulton *v.* Wilby, 9 Cox C. C. 318, 2 H. & C. 25, 9 Jur. N. S. 472, 32 L. J. M. C. 164, 8 L. T. Rep. N. S. 284, 11 Wkly. Rep. 670. See Gazard *v.* Cooke, 55 J. P. 102.

See 23 Cent. Dig. tit. "Fish," § 23.

Taking fish by means of numerous single baited hooks and lines set in as many holes cut through the ice and tended by one person is a clear violation of a statute (Me. Pub. Laws (1870), c. 310, § 2) which prohibits fishing in certain waters otherwise than by "ordinary process of angling with single bait hook and line or artificial fly." State *v.* Skolfield, 63 Me. 266.

Fishing with a rod and line without a license with no intention of catching prohibited fish is not an offense under a statute prohibiting the catching of certain fish by such means without a license. Marshall *v.* Richardson, 16 Cox C. C. 614, 53 J. P. 596, 58 L. J. M. C. 45, 60 L. T. Rep. N. S. 605.

41. Lewis *v.* State, 148 Ind. 346, 47 N. E. 675; State *v.* Lewis, 134 Ind. 250, 33 N. E. 1024, 20 L. R. A. 52 (holding that Rev. St. § 2117, making it a misdemeanor for any one to have in his possession a gill-net or seine, except in certain cases which are particularly specified, and prescribing a penalty therefor, is a constitutional exercise of the police power); Jones *v.* Davies, [1898] 1 Q. B. 405, 18 Cox C. C. 706, 62 J. P. 182, 67 L. J. Q. B. 294, 78 L. T. Rep. N. S. 44.

42. See *infra*, III, G.

43. Peables *v.* Hannaford, 18 Me. 106; Vinton *v.* Welsh, 9 Pick. (Mass.) 87.

Stocking streams.— A state may authorize its officers to go upon a stream running through the lands of a private proprietor and stock it with fish whether he consents or not. State *v.* Theriault, 70 Vt. 617, 41 Atl. 1030, 67 Am. St. Rep. 695, 43 L. R. A. 290. Effect of stocking private parks with fish by the state under N. Y. Laws (1900), c. 20, § 200. See Rockefeller *v.* Lamora, 96 N. Y. App. Div. 91, 89 N. Y. Suppl. 1.

44. State *v.* Tower, 84 Me. 444, 24 Atl. 898; Lunt *v.* Hunter, 16 Me. 9; Fuller *v.* Spear, 14 Me. 417; State *v.* Woodard, 123 N. C. 710, 31 S. E. 219.

45. *Illinois.*— People *v.* Bridges, 142 Ill. 30, 31 N. E. 115, 16 L. R. A. 684 [*reversing* 39 Ill. App. 656].

Maryland.— Hughes *v.* State, 87 Md. 298, 39 Atl. 747.

Massachusetts.— Com. *v.* Follett, 164 Mass. 477, 41 N. E. 676 (trout by net); Com. *v.* Gilbert, 160 Mass. 157, 35 N. E. 454, 22 L. R. A. 439; Com. *v.* Look, 108 Mass. 452.

Michigan.— People *v.* Horling, (1904) 100 N. W. 691.

New Hampshire.— State *v.* Roberts, 59 N. H. 484; State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199.

New York.— People *v.* Doxtater, 75 Hun 472, 27 N. Y. Suppl. 481.

North Carolina.— See State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

Pennsylvania.— Com. *v.* Bender, 7 Pa. Co. Ct. 620.

Tennessee.— Peters *v.* State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114.

And see cases cited *supra*, III, B, 2, 3.

But see Venning *v.* Steadman, 9 Can. Sup. Ct. 206.

46. State *v.* Roberts, 59 N. H. 484; State *v.* Roberts, 59 N. H. 256, 47 Am. Rep. 199. And see *supra*, II, C.

47. *California.*— People *v.* Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, 58 Am. St. Rep. 183, 39 L. R. A. 581.

to remove such obstructions,[48] or by compelling the owners of dams on such streams to maintain adequate sluices and fishways for the passage of fish, and making it an offense not to do so, after due notice,[49] notwithstanding such dam or other obstruction had been maintained for the usual period of prescription.[50]

b. Pollution of Streams. It is also an offense under some statutes to pollute

Illinois.— Smith *v.* People, 46 Ill. App. 130; Summers *v.* People, 29 Ill. App. 170.

Maine.—Peables *v.* Hannaford, 18 Me. 106; Cottrill *v.* Myrick, 12 Me. 222.

Massachusetts.— Com. *v.* Alger, 7 Cush. 53; Cleaveland *v.* Norton, 6 Cush. 380; Watertown *v.* Draper, 4 Pick. 165; Com. *v.* Ruggles, 10 Mass. 391; Burnham *v.* Webster, 5 Mass. 266; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236.

New Hampshire.— State *v.* Roberts, 59 N. H. 256, 47 Am. Dec. 199.

England.— Sutherland *v.* Ross, 3 App. Cas. 736; Hodgson *v.* Little, 14 C. B. N. S. 111, 9 Cox C. C. 327, 10 Jur. N. S. 46, 32 L. J. M. C. 220, 8 L. T. Rep. N. S. 358, 11 Wkly. Rep. 782, 108 E. C. L. 111; Reg. *v.* Pomfret, 4 Wkly. Rep. 207. See Rossiter *v.* Pike, 4 Q. B. D. 24, 48 L. J. M. C. 81, 39 L. T. Rep. N. S. 496, 27 Wkly. Rep. 339, 37 L. T. Rep. N. S. 635.

The obstructions prohibited are such only as impede, obstruct, or hinder the passage of fish; and whether or not an obstruction exists is a question of fact to be decided by the jury. Hyde *v.* Russell, 2 Cush. (Mass.) 251. See Summers *v.* People, 29 Ill. App. 170.

A trot line placed across a stream is not an unlawful act, unless so placed as to obstruct the free passage of fish up and down the stream. Collins *v.* Bankers' Acc. Ins. Co., 96 Iowa 216, 64 N. W. 778, 59 Am. St. Rep. 367.

48. Hyde *v.* Russell, 2 Cush. (Mass.) 251. And see *infra*, III, E.

49. *Illinois.*— Parker *v.* People, 111 Ill. 581, 53 Am. Rep. 643.

Iowa.— State *v.* Meek, 112 Iowa 338, 89 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414; State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138.

Maine.— Hancock County *v.* Eastern River Lock, etc., Co., 16 Me. 303.

Massachusetts.— Swift *v.* Falmouth, 167 Mass. 115, 45 N. E. 184; Howes *v.* Grush, 131 Mass. 207; Inland Fisheries Comrs. *v.* Holyoke Water Power Co., 104 Mass. 446, 6 Am. Rep. 247; Briggs *v.* Murdock, 13 Pick. 305; Vinton *v.* Welsh, 9 Pick. 87. *Compare* Com. *v.* Essex County, 13 Gray 239.

Missouri.— State *v.* Griffin, 89 Mo. 49, 1 S. W. 87.

Nebraska.— West Point Water Power, etc., Imp. Co. *v.* State, 49 Nebr. 218, 66 N. W. 6.

Pennsylvania.— *In re* French Creek, 8 Pa. Dist. 702. See Criswell *v.* Clugh, 3 Watts 330.

United States.— Holyoke Water Power Co. *v.* Lyman, 15 Wall. 500, 21 L. ed. 133 [*affirming* 104 Mass. 446, 6 Am. Rep. 247].

England.— See Rolle *v.* Whyte, L. R. 3 Q. B. 286, 8 B. & S. 116, 37 L. J. Q. B. 105, 17 L. T. Rep. N. S. 560, 16 Wkly. Rep. 593.

An implied obligation to maintain a passageway for fish has been held to rest upon the owner of a dam, independent of any statute. Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236; State *v.* Gilmore, 141 Mo. 506, 42 S. W. 817; Holyoke Water Power Co. *v.* Lyman, 15 Wall. (U. S.) 500, 21 L. ed. 133.

At common law it was an indictable offense to obstruct the passage of migratory fish in an unnavigable river by the maintenance of dams without fishways. State *v.* Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513. But see Com. *v.* Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386.

Interstate waters.— The power of a state to require fishways in dams across streams extends to a navigable stream that flows beyond the bounds of the state, so long as intercommunication between the states is not thereby affected. State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414.

A dam erected by the commonwealth and by it sold to private parties is exempted from provisions of the statute making it criminal to maintain a dam across a navigable stream without providing a passage for fish, if the dam is maintained in the same manner as when sold to such parties. *In re* French Creek Dam, 15 Pa. Super. Ct. 57.

Damnum absque injuria.— Where a person authorized by statute to build a dam across a non-navigable stream uses reasonable care in the erection and management of his dam, so as to work the least injury to a public fishery in the stream consistent with a reasonable exercise of his rights, he is not responsible for an injury to the fishery, and the fish committee has no right to remove his dam. Howes *v.* Grush, 131 Mass. 207.

The omission in an order to an owner of a dam to open a passage through said dam to specify the width or the time during which it is to remain open does not excuse the owner from liability for the penalty, since the word "passage" *ex vi termini* means an opening of sufficient width to permit the free passage of fish, and the time during which the passage should remain open could be subsequently fixed by the committee. Briggs *v.* Murdock, 13 Pick. (Mass.) 305.

50. *Illinois.*— Parker *v.* People, 111 Ill. 581, 53 Am. Rep. 643.

Iowa.— State *v.* Beardsley, 108 Iowa 396, 79 N. W. 138.

Maine.— Cottrill *v.* Myrick, 12 Me. 222.

New Hampshire.— State *v.* Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513.

England.— See Weld *v.* Hornby, 7 East 195, 3 Smith K. B. 244, 8 Rev. Rep. 608.

Contra.— Woolever *v.* Stewart, 36 Ohio St. 146, 38 Am. Rep. 569.

the waters of a stream, etc., to which fish or game resort.[51] Under such statutes the pollution must be in quantities sufficient to drive away fish and game in order to justify a conviction.[52]

5. Exportation Beyond the State. Some statutes forbid the exportation of dead game beyond the borders of the state or the killing or having it in possession for that purpose,[53] and it has been held that the state may even make it unlawful for any carrier to transport game killed in the state, knowing the same to have been sold or that it was to be sold or offered for sale.[54]

6. Trespass on Private Lands and Fisheries.[55] It is an offense under some statutes to hunt or fish without the owner's permission on private inclosed lands or waters, on which proper notices have been posted;[56] or to fish without the pro-

51. Blydenburgh *v.* Miles, 39 Conn. 484; State *v.* American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127; Cartwright *v.* Canandaigua Gaslight Co., 32 Hun (N. Y.) 403.

A mill that saws shingles is within a statute making it a criminal offense to cast sawdust into streams where fish resort to spawn. State *v.* Kroenert, 13 Wash. 644, 43 Pac. 876.

52. Cartwright *v.* Canandaigua Gaslight Co., 32 Hun (N. Y.) 403.

53. *Alabama.*— State *v.* Harrub, 95 Ala. 176, 10 So. 752, 36 Am. St. Rep. 195, 15 L. R. A. 761.

Arkansas.— Organ *v.* State, 56 Ark. 267, 19 S. W. 840, holding that such an act does not violate the commerce clause of the federal constitution.

Maine.— State *v.* Whitten, 90 Me. 53, 37 Atl. 331.

Michigan.— People *v.* Van Pelt, 130 Mich. 621, 90 N. W. 424 (construing Pub. Acts (1901), No. 217, Pub. Acts (1893), No. 196).

Minnesota.— Selkirk *v.* Stephens, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759; State *v.* Northern Pac. Express Co., 58 Minn. 403, 59 N. W. 1100; State *v.* Rodman, 58 Minn. 393, 59 N. W. 1098.

North Carolina.— See State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

United States.— Geer *v.* Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793 [*affirming* 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804].

Contra.— Territory *v.* Nelson, 2 Ida. (Hasb.) 651, 23 Pac. 116; Territory *v.* Evans, 2 Ida. (Hasb.) 658, 23 Pac. 115, 7 L. R. A. 288; State *v.* Saunders, 19 Kan. 127, 27 Am. Rep. 98.

54. American Express Co. *v.* People, 133 Ill. 649, 24 N. E. 758, 23 Am. St. Rep. 641, 9 L. R. A. 138. But see Bennett *v.* American Express Co., 83 Me. 236, 22 Atl. 159, 23 Am. St. Rep. 774, 13 L. R. A. 33.

55. Trespassing on private oyster beds as an offense see *infra*, III, B, 7.

56. *Connecticut.*— State *v.* Turner, 60 Conn. 222, 22 Atl. 542.

Georgia.— See State *v.* Campbell, T. U. P. Charlt. 166.

Maryland.— Sollers *v.* Sollers, 77 Md. 148, 26 Atl. 188, 39 Am. St. Rep. 404, 20 L. R. A. 94, holding that the Maryland statute applies only to artificial ponds.

Mississippi.— Valentine *v.* State, (1903) 35 So. 170, evidence held insufficient to sustain a conviction for fishing on such land.

New York.— People *v.* Hall, 8 N. Y. App. Div. 15, 40 N. Y. Suppl. 183.

North Carolina.— See State *v.* Gallop, 126 N. C. 979, 35 S. E. 180.

Ohio.— State *v.* Shannon, 36 Ohio St. 423, 38 Am. Rep. 599.

Texas.— Davis *v.* State, (Tex. Cr. App. 1903) 74 S. W. 909. See Holtzgraft *v.* State, 23 Tex. App. 404, 5 S. W. 117.

Vermont.— Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656. See New England Trout, etc., Club *v.* Mather, 68 Vt. 338, 25 Atl. 323, 33 L. R. A. 569.

Private parks.— The posted notices required by N. Y. Laws (1892), c. 488, §§ 212, 213, 214, of a person desiring to devote lands or lands and water to the propagation of fish or game, must contain not simply a notice warning all persons from trespassing upon the land, but must also state that the premises will he used as a private park for the purpose of propagating and protecting fish, birds, and game, and that trespassing is forbidden. People *v.* Hall, 8 N. Y. App. Div. 15, 40 N. Y. Suppl. 183. Evidence that a pond had been stocked with carp about five years before, but specifying no quantity, is insufficient to show that certain lands and water were devoted to such purposes. People *v.* Hall, *supra*.

Pleading and proof.— An action for such trespass may be brought by the owner of the land, although the land is occupied by a tenant (Parmenter *v.* Caswell, 53 Vt. 6); or by the owner of the right to shoot, although not the owner of the fee (Payne *v.* Sheets, 75 Vt. 335, 55 Atl. 656). A complaint for such a trespass need not be brought at the request of the owner of the land (State *v.* Turner, 60 Conn. 222, 22 Atl. 542); nor does it affect the case that the persons described in the complaint as owners of land had leased the right of fishing in the stream to certain parties; nor that certain facts made it doubtful to defendant whether certain signs forbidding fishing were placed along the stream in good faith by parties who have a right to fish there (State *v.* Turner, *supra*).

Knowledge by defendant that his act was unlawful is immaterial, and evidence thereof will be excluded. State *v.* Turner, 60 Conn. 222, 22 Atl. 542.

prietors' consent in private ponds or streams entirely within their control, and in which fish are lawfully cultivated,[57] notwithstanding such ponds or streams were stocked with fish procured from the state fish and game commissioners.[58]

7. Offenses as to Oysters, Clams, and Other Shell-Fish. It is an offense under the various statutes to take or destroy oysters, lobsters, or other shell-fish at cer-

Trespass in pursuit of game under the English Game Act of 1831 (1 & 2 Wm. IV, c. 32) see Paul *v.* Summerhayes, 4 Q. B. D. 9, 14 Cox C. C. 202, 48 L. J. M. C. 33, 39 L. T. Rep. N. S. 574, 27 Wkly. Rep. 215 (pursuit of fox as a sport is no justification); Taylor *v.* Jackson, 62 J. P. 424, 78 L. T. Rep. N. S. 555; Horn *v.* Raine, 62 J. P. 420, 67 L. J. Q. B. 533, 78 L. T. Rep. N. S. 654. But see Reg. *v.* Littlechild, L. R. 6 Q. B. 293, 40 L. J. M. C. 137, 24 L. T. Rep. N. S. 233, 19 Wkly. Rep. 748 (holding that there may be separate convictions of two persons charged with such offence); Watkins *v.* Major, L. R. 10 C. P. 662, 44 L. J. M. C. 164, 33 L. T. Rep. N. S. 352, 24 Wkly. Rep. 164 (claim of right); Codd *v.* Cabe, 1 Ex. D. 352, 13 Cox C. C. 202, 45 L. J. M. C. 101, 34 L. T. Rep. N. S. 453; Matter of Pratt, 7 A. & E. 27, 2 N. & P. 102, 34 E. C. L. 40 (jurisdiction of queen's bench to order rehearing of appeal from a conviction under such statute); Cornwell *v.* Sanders, 3 B. & S. 206, 9 Jur. N. S. 510, 32 L. J. M. C. 6, 7 L. T. Rep. N. S. 356, 11 Wkly. Rep. 87, 113 E. C. L. 206 (title attempted to be set up must be in defendant and not in a third person); Legg *v.* Pardoe, 9 C. B. N. S. 289, 7 Jur. N. S. 499, 30 L. J. M. C. 108, 3 L. T. Rep. N. S. 371, 9 Wkly. Rep. 234, 99 E. C. L. 289; Reg. *v.* Cridland, 7 E. & B. 853, 3 Jur. N. S. 1213, 27 L. J. M. C. 28, 5 Wkly. Rep. 679, 90 E. C. L. 853; Burrows *v.* Gillingham, 57 J. P. 423 (holding that hearing report of gun and seeing defendant come out of the woods is admissible evidence); Philpot *v.* Bugler, 54 J. P. 646; Pochin *v.* Smith, 52 J. P. 4; Jones *v.* Williams, 46 L. J. M. C. 270, 36 L. T. Rep. N. S. 559 (by licensee not a trespass); Leatt *v.* Vine, 30 L. J. M. C. 207, 8 L. T. Rep. N. S. 581; Watkins *v.* Smith, 38 L. T. Rep. N. S. 525, 26 Wkly. Rep. 692; Birnie *v.* Marshall, 35 L. T. Rep. N. S. 373; Lovesy *v.* Stallard, 30 L. T. Rep. N. S. 792; Adams *v.* Masters, 24 L. T. Rep. N. S. 502; Reg. *v.* Kayley, 10 L. T. Rep. N. S. 339; Gundry *v.* Feltham, 1 T. R. 334, 1 Rev. Rep. 215; Reg. *v.* Critchlow, 26 Wkly. Rep. 681.

Night poaching under 9 Geo. IV, c. 69, § 1. Rex *v.* Lines, [1902] 1 K. B. 199, 20 Cox C. C. 142, 66 J. P. 24, 71 L. J. K. B. 125, 85 L. T. Rep. N. S. 790, 50 Wkly. Rep. 303; Bevan *v.* Hopkinson, 34 L. T. Rep. N. S. 142.

57. *Massachusetts.*— Com. *v.* Skatt, 162 Mass. 219, 38 N. E. 499 (holding this to be true under Pub. St. c. 91, § 27, although the pond is an artificial one and there is nothing to prevent the fish from swimming into other portions not owned by the proprietor who propagated the fish); Com. *v.* Perley, 130 Mass. 469 (holding that a complaint cannot be maintained under such a statute, if the fish are cultivated by lessees under leases signed by some only of the proprietors); Com. *v.* Weatherhead, 110 Mass. 175; Com. *v.* Vincent, 108 Mass. 441, construing St. (1869) c. 384, § 9.

New Hampshire.— State *v.* Welch, 66 N. H. 178, 28 Atl. 21. An action of debt for a penalty for catching fish in plaintiff's pond, in violation of Gen. Laws, c. 179, § 1, cannot be maintained by one who was not owner or lessee of all the land under or around and adjoining the pond. Chase *v.* Baker, 59 N. H. 347.

New York.— Hills *v.* Bishop, 17 N. Y. Suppl. 297, construing Laws (1887), c. 623, in reference to private parks for propagating and protecting fish.

Pennsylvania.— Benscoter *v.* Long, 157 Pa. St. 208, 27 Atl. 674 (construing the act of June 3, 1878, section 1, as to the sufficiency of a posted notice against fishing in a private pond); Reynolds *v.* Com., 93 Pa. St. 458 (holding that the whole stream or pond must be so far private property as to confine therein the fish with which it is stocked).

Tennessee.— Maney *v.* State, 6 Lea 218.

England.—See Hudson *v.* MacRae, 4 B. & S. 585, 33 L. J. M. C. 65, 9 L. T. Rep. N. S. 678, 12 Wkly. Rep. 80, 116 E. C. L. 585; Reg. *v.* Stimpson, 4 B. & S. 301, 9 Cox C. C. 356, 10 Jur. N. S. 41, 32 L. J. M. C. 208, 8 L. T. Rep. N. S. 536, 116 E. C. L. 301; Rex *v.* Sadler, 2 Chit. 519, 18 E. C. L. 766; Embleton *v.* Brown, 3 E. & E. 234, 6 Jur. N. S. 1298, 30 L. J. M. C. 1, 107 E. C. L. 234; *Ex p.* Higgins, 10 Jur. 838; Blower *v.* Ellis, 50 J. P. 326; Caygill *v.* Thwaite, 49 J. P. 614, 33 Wkly. Rep. 581; Reg. *v.* Steer, 6 Mod. 183.

Canada.— See Reg. *v.* Plows, 26 Ont. 339.

One who paddles a boat in which another is fishing in violation of such a statute may be convicted as a participant in the offense. Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26.

Trespassing on private land to reach a public fishery is not a criminal offense within such statutes. State *v.* Welch, 66 N. H. 178, 28 Atl. 21.

Evidence that defendants were fishing for other than useful fish is inadmissible upon the trial of a complaint charging defendants with illegally fishing in a private pond. Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26.

The mere placing of fish in a pond without any "improvement" whatever "for the propagation of fish or of game fish" is insufficient to place the pond within the protection of the Pennsylvania act of June 3, 1878. Benscoter *v.* Long, 157 Pa. St. 208, 27 Atl. 674.

58. Rockefeller *v.* Lamora, 85 N. Y. App. Div. 254, 83 N. Y. Suppl. 289, holding this to be true where a private park was stocked by a third person with fish so procured.

tain seasons;[59] to take more than a specified quantity at one time;[60] to take oysters or other shell-fish from certain waters,[61] by means of dredges, drags, etc.,[62] or to fail to cull in the prescribed manner oysters so taken;[63] to plant or take oysters without a license;[64] to take oysters from a licensed or private bed without the consent of the licensee or owner;[65] or to take, sell, or have in possession certain shell-fish under a specified size, although obtained without the state.[66]

59. State *v.* Craig, 80 Me. 85, 13 Atl. 129 (lobsters); Com. *v.* Savage, 155 Mass. 278, 29 N. E. 468 (lobsters). See Bridger *v.* Richardson, 2 M. & S. 568.

Mass. Pub. St. c. 91, § 81, as to returning lobsters alive to the waters whence they were taken, does not apply to those caught outside of the commonwealth and sent here for sale, but to lobsters inadvertently taken by one lawfully fishing in the waters of this commonwealth during the period when the taking of lobsters is prohibited. Com. *v.* Savage, 155 Mass. 278, 29 N. E. 468.

60. Com. *v.* Bailey, 13 Allen (Mass.) 541, clams for bait.

61. State *v.* Nelson, 65 N. J. L. 500, 47 Atl. 500 (holding that Laws (1899), c. 194, making it an offense to take oysters from certain waters is not unconstitutional); Brooks *v.* Tripp, 135 N. C. 159, 47 S. E. 401 (holding that the state legislature has power to forbid residents or non-residents to take shell-fish from the waters of a particular county in the state).

62. People *v.* Hazen, 121 N. Y. 313, 24 N. E. 484 [*reversing* 52 Hun 370, 5 N. Y. St. 337] (holding, however, that such statute does not apply to persons taking their own oysters out of their private lots or beds in such waters); State *v.* Conner, 107 N. C. 931, 11 S. E. 992 (construing N. C. Code, § 3379); Smith *v.* Maryland, 18 How. (U. S.) 71, 15 L. ed. 269; Maldon *v.* Woolvet, 12 A. & E. 13, 9 L. J. Q. B. 370, 4 P. & D. 26, 40 E. C. L. 17. See Eaton *v.* State, 80 Miss. 588, 32 So. 2.

63. State *v.* Hand, (N. J. Sup. 1904) 58 Atl. 641. It is not necessary to cull an entire cargo to determine the percentage of unmerchantable oysters. Dean *v.* State, 98 Md. 80, 56 Atl. 481.

64. State *v.* Loper, 46 N. J. L. 321; Morgan *v.* Com., 26 Gratt. (Va.) 992.

65. *Connecticut.*— Averill *v.* Hull, 37 Conn. 320, other than a natural oyster bed.

Georgia.— Fraser *v.* State, 112 Ga. 13, 37 S. E. 114; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375.

Maryland.— Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654.

Massachusetts.— Com. *v.* Manimon, 136 Mass. 456, holding that a person may be indicted under such a statute, if in digging quahogs he disturbs and destroys oysters.

New Jersey.— An indictment will lie for stealing oysters planted in the public or navigable waters of this state if they are planted in a place where oysters do not grow naturally, and the spot is so designated by stakes or otherwise, that the oysters can be readily distinguished from others in the same waters. State *v.* Lee, 70 N. J. L. 368, 57 Atl. 142 (holding also that it is not necessary for the state to show that the oyster bed has been marked, etc., by or under the supervision of the state oyster commission); State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347.

New York.— People *v.* Lowndes, 130 N. Y. 455, 29 N. E. 751 [*reversing* 55 Hun 469, 8 N. Y. Suppl. 908], holding that a non-resident planting or gathering oysters in the state without the consent of the owner is guilty of a misdemeanor.

North Carolina.— State *v.* Goulding, 131 N. C. 715, 42 S. E. 563.

Rhode Island.— State *v.* Tayler, 13 R. I. 541; State *v.* Sutton, 2 R. I. 434.

See 23 Cent. Dig. tit. "Fish," § 24.

Larceny.— A riparian owner, to protect his right to oyster beds in front of his land, is not required under the Texas act of March 8, 1879, to fence them or stake them off in order to render one guilty of larceny who takes oysters from the beds within a distance of one hundred yards from low-water mark along the front of such owner's shore. Holt *v.* Follett, 65 Tex. 550.

66. Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687 (holding that it is no defense under such a statute (Rev. St. c. 40, § 21) to have in one's possession dead lobsters less than the specified length, if the same lobsters were that length or longer when taken alive); Com. *v.* Young, 165 Mass. 396, 43 N. E. 118; Com. *v.* Savage, 155 Mass. 278, 29 N. E. 468; Com. *v.* Barber, 143 Mass. 560, 10 N. E. 330; People *v.* Allen, 20 Misc. (N. Y.) 120, 45 N. Y. Suppl. 74 (holding that Laws (1895), c. 974, making the possession of clams less than one inch thick an offense, does not apply to restaurant keepers, but only to catchers of clams); Thomson *v.* Burns, 18 Cox C. C. 49, 61 J. P. 84, 66 L. J. Q. B. 176, 76 L. T. Rep. N. S. 58. But see Tyler *v.* State, 93 Md. 309, 48 Atl. 840, 52 L. R. A. 100; Robertson *v.* Johnson, [1893] 1 Q. B. 129, 17 Cox C. C. 580, 57 J. P. 39, 62 L. J. M. C. 1, 67 L. T. Rep. N. S. 560, 5 Reports 108, 41 Wkly. Rep. 223, as to oysters imported from foreign oyster beds.

A common carrier, having short lobsters packed in barrels in its possession for the purpose of transporting them to market, without knowing or having reasonable cause to believe that they are short lobsters, is not liable to the penalty ordinarily attaching to one having possession of such lobsters. State *v.* Swett, 87 Me. 99, 32 Atl. 806, 47 Am. St. Rep. 306, 29 L. R. A. 714.

C. Repeal of Statutes. Whether or not a particular statute regulating fish and game is repealed by a later statute is of course governed by the general rules regulating the repeal of statutes in other cases.[67]

D. Licenses.[68] It is an offense under some statutes for any person excepting an owner of land[69] to hunt particular game or by particular methods, as by blinds or traps,[70] or to fish in certain waters,[71] by particular methods such as by nets, traps, etc.,[72] without obtaining a license therefor from the proper authorities.

67. For decisions as to whether or not a particular fish or game law was repealed by a later statute see the following cases:

Arkansas.— Lynch *v.* State, 69 Ark. 555, 64 S. W. 950; Sandels & H. Dig. § 3421.

California.— Heckman *v.* Swett, 107 Cal. 276, 40 Pac. 420, act of 1859 in respect to salmon fisheries on the Eel river.

Hawaii.— Matter of Fukunaga, 16 Hawaii 306, Pen. Laws, § 1460.

Maine.— Oliver *v.* Bailey, 85 Me. 161, 27 Atl. 90 (Laws (1885), c. 463, for the protection of bass in Winnegance creek, does not impliedly repeal the prohibitions of previous statutes on the right of fishing in that state); Thompson *v.* Lewis, 83 Me. 223, 22 Atl. 104 (Private & Sp. Laws (1867), c. 190, providing a penalty for taking smelts from Damariscotta river); Staples *v.* Peabody, 83 Me. 207, 22 Atl. 113 (St. (1887) c. 111, § 6); State *v.* Thompson, 70 Me. 196 (Act (1876), c. 67); State *v.* Cleland, 68 Me. 258 (Special Act of Jan. 24, 1876, conferring authority to erect fish weirs in tide waters below low-water mark); Bearce *v.* Fossett, 34 Me. 575 (the act of 1826, regulating the alewive fishery in Bristol, repealed all prior acts on the same subject, so far as operative in that town); Spear *v.* Robinson, 29 Me. 531 (Massachusetts act of March 6, 1802).

Maryland.— Willing *v.* Bozman, 52 Md. 44 (Act (1872), c. 241); Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654 (Code art. 71, §§ 17, 18); State *v.* Mister, 5 Md. 11 (Act (1833), c. 254).

Massachusetts.— Com. *v.* Manchester, 152 Mass. 230, 25 N. E. 113, 23 Am. St. Rep. 820, 9 L. R. A. 236, St. (1865) c. 212.

Michigan.— People *v.* Van Pelt, 130 Mich. 621, 90 N. W. 424 (Pub. Acts (1893), No. 196); People *v.* Kirsch, 67 Mich. 539, 35 N. W. 157 (Act No. 10, Laws of 1885).

New Hampshire.— Purinton *v.* Ladd, 58 N. H. 596, Act (1872), c. 55, prohibiting the catching of trout.

New Jersey.—State *v.* Shoemaker, 20 N. J. L. 153, act of Nov. 28, 1822.

Oregon.— State *v.* Sturgess, 10 Oreg. 58, the act of Oct. 25, 1880, for the protection of salmon, does not apply to the Columbia river, it being at the time of the passage of such act a local act especially applicable to this river, a repeal of which by implication is not to be presumed.

Pennsylvania.— Dunlap *v.* Com., 108 Pa. St. 607, act of May 16, 1878, providing for the protection of fish in the waters of Lake Erie, and bays, etc., adjacent thereto.

See 23 Cent. Dig. tit. "Fish," § 18.

68. License to plant and grow oysters see *supra*, II, B, 3, b.

69. "An owner" of land within the meaning of a statute permitting owners of farm lands to hunt game on their lands without procuring a resident license does not include a stock-holder in a corporation owning a tract of land used as a game preserve. Cummings *v.* People, 211 Ill. 392, 71 N. E. 1031.

70. Bannon *v.* Shekell, 94 Md. 738, 51 Atl. 836 (construing Code Pub. Laws, art. 2, §§ 253–259, providing for a license to locate blinds for shooting wild fowls on certain waters, and holding that this license creates no right to any precise location, but authorizes a location in any spot not prohibited by statute); Saunders *v.* Baldy, L. R. 1 Q. B. 87, 6 B. & S. 791, 12 Jur. N. S. 334, 35 L. J. M. C. 71, 13 L. T. Rep. N. S. 322, 14 Wkly. Rep. 177, 118 E. C. L. 791. See Stevens *v.* Copp, L. R. 4 Exch. 20, 38 L. J. Exch. 31, 19 L. T. Rep. N. S. 454, 17 Wkly. Rep. 166; Scarth *v.* Gardener, 5 C. & P. 38, 24 E. C. L. 442.

An unlicensed person may join in the sport with the person lawfully entitled to kill, if he merely joins in the sport, and is not himself a principal. Lewis *v.* Taylor, 16 East 49; Molton *v.* Rogers, 4 Esp. 215. But in an action against him he must give strict evidence that the person for whom he was acting was qualified to kill the game. Clarke *v.* Broughton, 3 Campb. 328.

Liability of servant of licensed person. Walker *v.* Mills, 3 B. & B. 1, 4 Moore C. P. 343; *Ex p.* Sylvester, 9 B. & C. 61, 7 L. J. M. C. O. S. 63, 4 M. & R. 5, 17 E. C. L. 37; Rex *v.* Taylor, 15 East 460; Rex *v.* Newman, Lofft 178, 5 T. R. 376.

Taking away game accidentally killed by an unlicensed person subjects him to the penalty. Molton *v.* Cheeseley, 1 Esp. 123.

71. Morgan *v.* Com., 98 Va. 812, 35 S. E. 448, construing Va. Acts (1897–1898), p. 864, requiring persons catching and taking fish in navigable waters to procure a license and pay a tax, and providing a penalty for violations thereof; and also holding that such statute is not *ex post facto* as to an indictment charging an offense thereunder, both before and after its enactment.

72. Josh *v.* Marshall, 33 N. Y. App. Div. 77, 53 N. Y. Suppl. 419 (construing Laws (1895), c. 974, §§ 150, 151); Morgan *v.* Com., 26 Gratt. (Va.) 992 (catching oysters with tongs); Gerhard *v.* Worrell, 20 Wash. 492, 55 Pac. 625 (construing Laws (1897), p. 218, § 7, providing for licenses to fish in Puget sound); State *v.* Crawford, 13 Wash. 633, 43 Pac. 892 (Laws (1893), p. 15); Stead *v.* Nicholas, [1901] 2 K. B. 163, 65 J. P. 484, 70 L. J. K. B. 653, 85 L. T. Rep. N. S. 23, 49 Wkly. Rep. 522; Lyne *v.* Leon-

Some statutes also require the licensee to perform certain acts in pursuance of his license before he can claim an exclusive right to hunt or fish at a particular spot, such as locating in the prescribed manner his place of fishing[73] or hunting.[74] It is also unlawful to deal in fish or game without a license under some statutes.[75] Persons engaged in packing or canning oysters may be required to take out a license and to pay a tax based upon the amount of oysters packed.[76]

E. Fish and Game Wardens and Other Officers. Most fish and game laws provide for the appointment of special commissioners, committees, wardens,

ard, L. R. 3 Q. B. 156, 9 B. & S. 65, 18 L. T. Rep. N. S. 55, 16 Wkly. Rep. 562; Short *v.* Bastard, 46 J. P. 580 (holding that the unlawful use of such a net is sufficient for a conviction under such a statute, and that it is immaterial whether prohibited fish were caught or intended to be caught); Hill *v.* George, 44 J. P. 424 (night lines); Lewis *v.* Arthur, 24 L. T. Rep. N. S. 66.

A license to fish with "a rod and line" is not a general license, enabling the holder to fish with more than one rod and line at the same time (Combridge *v.* Harrison, 59 J. P. 198, 64 L. J. M. C. 175, 15 Reports 327, 72 L. T. Rep. N. S. 592); nor does it include a night line (Williams *v.* Long, 57 J. P. 217).

A set-net license, under the Washington statute, is lost by substituting for it a location under an expired pound-net license, even though the owner did not know that the latter had expired. Gerhard *v.* Worrell, 20 Wash. 492, 55 Pac. 625.

Roving license.— A license to fish granted under Wash. Laws (1893), p. 15, constitutes a roving license to fish anywhere in the specified waters, with the limitation that the licensee shall keep a certain distance from other appliances. Walker *v.* Stone, 17 Wash. 578, 60 Pac. 488; Morris *v.* Graham, 16 Wash. 343, 47 Pac. 752, 58 Am. St. Rep. 33; State *v.* Crawford, 14 Wash. 373, 44 Pac. 876. An applicant under such statute is entitled to a license for one year from the date of his application. State *v.* Crawford, 14 Wash. 373, 44 Pac. 876.

A license to a corporation, a majority of the capital stock of which is held by nonresidents of the state, is not in violation of the constitutional provision forbidding the acquisition of lands in the state of a foreign corporation. Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

Assignment of license.— Under Wash. Laws (1897), p. 215, § 3, making it a misdemeanor to assign a fishing license without notice to the fish commissioner, a transfer without giving such notice confers no right on the assignee. Gerhard *v.* Worrell, 20 Wash. 492, 55 Pac. 625.

73. Fidalgo Island Canning Co. *v.* Womer, 29 Wash. 503, 69 Pac. 1121 (construing Laws (1899), pp. 194–197, § 4); Point Roberts Fishing Co. *v.* George, etc., Co., 28 Wash. 200, 68 Pac. 438; Elwood *v.* Dickinson, 26 Wash. 631, 67 Pac. 370 (construing Laws (1899), p. 203, § 9); Legoe *v.* Chicago Fishing Co., 24 Wash. 175, 64 Pac. 141.

Under the Washington statutes a valid fishing location cannot be made on ground already occupied by another under a valid location, and if such a location is invalid at the time it was attempted to be made, because of a prior location, it will not ripen into a valid location at the expiration of a prior license, nor by its abandonment (White Crest Canning Co. *v.* Sims, 30 Wash. 374, 70 Pac. 1003; Womer *v.* O'Brien, (Wash. 1905) 79 Pac. 474); but where a fishing location is abandoned the same territory is open to location by others (White Crest Canning Co. *v.* Sims, 30 Wash. 374, 70 Pac. 1003). The failure of a locator to construct his appliance during the fishing season covered by his license constitutes an abandonment (Legoe *v.* Chicago Fishing Co., 24 Wash. 175, 64 Pac. 141; Womer *v.* O'Brien, (Wash. 1905) 79 Pac. 474, holding, however, that a fishery location cannot be held to have been abandoned at any time prior to the expiration of the season merely because of the locator's failure to construct his appliances up to the time when the abandonment is claimed); but this does not disqualify him from relocating the same site a following season (De Mers *v.* Sandy Spit Fish Co., 24 Wash. 582, 64 Pac. 799; Legoe *v.* Chicago Fishing Co., *supra*). One licensee may enjoin a subsequent licensee from constructing his nets too near the former's appliances in violation of such statutes. Fidalgo Island Canning Co. *v.* Womer, 29 Wash. 503, 69 Pac. 1121; Walker *v.* Stone, 17 Wash. 578, 50 Pac. 488.

In a controversy over a fishing site alleged to have been located by both parties under the law forbidding any one person from operating more than three of such sites, an allegation that defendant operated more than three sites was insufficient to authorize the admission of evidence to show that any particular site was being unlawfully operated; an allegation of the particular location claimed to be unlawful being necessary to raise such issue. Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

74. Bannon *v.* Shekell, 94 Md. 738, 51 Atl. 836.

75. Bramble *v.* State, 88 Md. 683, 42 Atl. 222 (license to sell oysters on commission); Harnett *v.* Miles, 48 J. P. 455. See Shoolbred *v.* St. Pancras, 24 Q. B. D. 346, 54 J. P. 231, 59 L. J. M. C. 63, 62 L. T. Rep. N. S. 287, 38 Wkly. Rep. 399, as to disqualification of a person for obtaining a license to deal in game.

76. A license-tax on persons engaged in packing or canning oysters and making it a misdemeanor to fail to take out such license

or other officers, whose powers, duties, etc., are regulated thereby.[77] Such committees or officers are usually empowered to see that proper sluices and passageways for fish are maintained,[78] to remove obstructions to the passage of fish at certain seasons,[79] to grant licenses or privileges,[80] to seize nets, traps, or other appliances being used unlawfully,[81] and arrest the offender;[82] to take fish from public waters for the purpose of propagating or restocking other waters,[83] to institute actions or prosecutions for penalties for violations of the game laws,[84] to hear

or pay the tax applies to oysters caught in and shipped from another state. Applegarth *v.* State, 89 Md. 140, 42 Atl. 941.

77. *Massachusetts.*—Robinson *v.* Wareham, 2 Gray 315, holding, however, that it is no part of a fish committeeman's duty under St. (1838) c. 19, for which he is entitled to compensation, to watch and inspect the waters where fisheries exist, to prevent a violation of the regulations.

Michigan.— Portman *v.* State Bd. Fish Com'rs, 50 Mich. 258, 15 N. W. 106, holding the superintendent of fisheries removable at the pleasure of the board of fish commissioners.

North Carolina.— White *v.* Auditor, 126 N. C. 570, 36 S. E. 132.

Virginia.— Thomas *v.* Rowe, (1895) 22 S. E. 157, powers of oyster inspectors to collect back rents, etc.

Washington.— Halleck *v.* Davis, 22 Wash. 393, 60 Pac. 1116.

England.—Reg. *v.* Plymouth, [1896] 1 Q. B. 158, 65 L. J. Q. B. 258, 44 Wkly. Rep. 620.

Canada.— Venning *v.* Steadman, 9 Can. Sup. Ct. 206, holding, however, that an inspector of fisheries has no right to interfere with an exclusive right of fishery.

See 23 Cent. Dig. tit. "Fish," § 21; 24 Cent. Dig. tit. "Game," § 5.

Exercise of powers.— The powers given to a committee under such a statute must be exercised by a majority thereof. Stephenson *v.* Gooch, 7 Me. 152. One fish-warden cannot act unless it be shown that no others were appointed, or that, being appointed, they refused to act. Hancock County *v.* Eastern River Lock, etc., Co., 20 Me. 72.

Compensation to such committees or officers is regulated by the fish and game laws. Moore *v.* Wayne County, 90 Mich. 269, 51 N. W. 279; White *v.* Auditor, 126 N. C. 570, 36 S. E. 132. See Reg. *v.* Plymouth, [1896] 1 Q. B. 158, 65 L. J. Q. B. 258, 44 Wkly. Rep. 620, expenses.

Gamekeepers in England.— For matters relating to gamekeepers under the English law see Grant *v.* Hulton, 1 B. & Ald. 134; Bush *v.* Green, 4 Bing. N. Cas. 41, 3 Hodges 265, 1 Jur. 844, 7 L. J. C. P. 38, 5 Scott 289, 33 E. C. L. 586; Spurrier *v.* Vale, 1 Campb. 457, 10 East 413 (holding that bodies corporate could appoint gamekeepers); Reg. *v.* Price, 5 Cox C. C. 277; Ailesbury *v.* Pattison, Dougl. (3d ed.) 28; Vere *v.* Cawdor, 11 East 568, 11 Rev. Rep. 268; Reg. *v.* Wood, 1 F. & F. 470; Daddle *v.* Hickton, 17 L. T. Rep. N. S. 549, 16 Wkly. Rep. 372 (construing 1 & 2 Wm. IV, c. 32, § 13, as to right of gamekeeper to seize a gun used within the limits of the manor by a person not having a game certificate); Rushworth *v.* Craven, McClell. & Y. 417; Bird *v.* Dale, 1 Moore C. P. 290, 7 Taunt. 560, 2 E. C. L. 492 (power to seize game taken by an unqualified person); Rogers *v.* Carter, 2 Wils. C. P. 387.

78. Hancock County *v.* Eastern River Lock, etc., Co., 20 Me. 72; Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236. See Garnett *v.* Backhouse, L. R. 3 Q. B. 30, 8 B. & S. 490, 37 L. J. Q. B. 1, 17 L. T. Rep. N. S. 170, 16 Wkly. Rep. 201.

The location or sufficiency of such sluices or passageways is within the discretion of such committee or officers, and in the absence of fraud or corruption the determination thereof cannot be collaterally questioned. Fossett *v.* Bearce, 27 Me. 117; Briggs *v.* Murdock, 13 Pick. (Mass.) 305. But where injury results to an individual from an unnecessary and unreasonable location without any public benefit, he has a remedy by an action at law therefor. Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236.

A penalty is imposed under some statutes upon any person opposing such committee or officers in the discharge of their duties, although the committee or officer is guilty of an error of judgment oppressive to the person opposing. Fossett *v.* Bearce, 27 Me. 117.

79. Peables *v.* Hannaford, 18 Me. 106 (construing Sp. St. (1839) c. 557); Robinson *v.* Wareham, 2 Gray (Mass.) 315.

A statute authorizing a fish committee to enter upon lands of others and remove obstructions for the passage of fish up and down the stream at certain periods of the year does not authorize them to enter and remove obstructions prior to that period. Peables *v.* Hannaford, 18 Me. 106.

80. See Robinson *v.* Wareham, 2 Gray (Mass.) 315; Hopkins *v.* Shell Fisheries, 25 R. I. 570, 57 Atl. 372.

81. See *infra*, III, G.

82. Sheets *v.* Atherton, 62 Vt. 229, 19 Atl. 926. See State *v.* Houghton, 65 Vt. 328, 26 Atl. 112.

Arrest without a warrant is authorized under some statutes. Kane *v.* State, 70 Md. 546, 17 Atl. 557.

83. State *v.* Sears, 115 Iowa 28, 87 N. W. 735; State *v.* McDonald, 109 Wis. 506, 85 N. W. 502.

"Other waters" as used in such a statute means other public waters, and a warden has no authority to take or to empower others to take fish from public waters for private ponds. State *v.* Sears, 115 Iowa 28, 87 N. W. 735.

84. Roberts *v.* Hatch, 40 Hun (N. Y.) 53 (such action must be brought by the district attorney at the request of such officer); State

and determine contests as to fishing rights within their jurisdiction,[85] and to settle offenses against the fish and game laws without suit or prosecution.[86] Under some statutes a person acting as guide of inland fisheries and game is liable to a penalty unless he is registered and certified by the commissioners of such fisheries and game.[87]

F. Penalties — 1. In General. Penalties imposed for violations of the fish and game laws are regulated by such laws,[88] which must not violate constitutional provisions against excessive fines and punishment.[89] These statutes usually provide for a specified fine or imprisonment or both;[90] or for the seizure and sale of vessels or appliances used in violation of such laws.[91] Before a penalty can be recovered there must be a strict compliance with all the duties enjoined upon those claiming it.[92]

2. Who May Recover Penalties. Under some statutes an action or prosecution to recover a penalty for a violation of the fish and game laws may be brought by any common informer in his own name,[93] or by the district attorney at the instance of the fish and game warden or other officer or committee;[94] but under other

v. Houghton, 65 Vt. 328, 26 Atl. 112 (holding that under Rev. Laws, § 3871, as amended by various acts down to and including the acts of 1892, a fish-warden had no authority to begin a prosecution by complaint unless the offense was committed within the town for which he was appointed, or unless the respondent was arrested by him on view within the county of his appointment); Reg. *v.* Cubitt, 22 Q. B. D. 622, 16 Cox C. C. 618, 53 J. P. 470, 58 L. J. M. C. 132, 60 L. T. Rep. N. S. 638, 37 Wkly. Rep. 492.

85. Reg. *v.* Irish Fisheries Inspectors, Ir. R. 10 C. L. 213. See Garnett *v.* Backhouse, L. R. 3 Q. B. 699, 9 B. & S. 306, 37 L. J. Q. B. 228, 19 L. T. Rep. N. S. 145, 16 Wkly. Rep. 1203, as to appeal and costs from a decision of fish commissioners.

A fishery officer is ex officio a justice of the peace under some statutes. See O'Brien *v.* Miller, 29 N. Brunsw. 114.

86. State *v.* Hanna, 99 Me. 224, 58 Atl. 1061, holding also that under Me. Rev. St. c. 41, §§ 17, 61, it is not unlawful for the commissioner of sea and shore fisheries to advise, persuade, or urge an offender to settle; and he may even go to the extent of pointing out that the alternative will be a criminal prosecution; but that his warden has no authority to "settle" with an offender.

87. State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544.

88. See People *v.* Haagen, 139 Cal. 115, 72 Pac. 836; Donnell *v.* Joy, 85 Me. 118, 26 Atl. 1017 (fifty dollars for erecting a weir below low-water mark in front of another's shore or flats); Keene *v.* Gifford, 158 Mass. 120, 32 N. E. 946 (treble damages for taking another's oysters); Saunders *v.* Baldy, L. R. 1 Q. B. 87, 6 B. & S. 791, 12 Jur. N. S. 334, 35 L. J. M. C. 71, 13 L. T. Rep. N. S. 322, 14 Wkly. Rep. 177, 118 E. C. L. 791. And see cases cited *supra*, note 16 *et seq.*

89. See State *v.* De Lano, 80 Wis. 259, 49 N. W. 808. Five dollars for each short lobster taken or sold (Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812; State *v.* Lubee, 92 Me. 418, 45 Atl. 520), or each prairie chicken found in possession or under the control of a person during the close-season (McMahon *v.* State, (Nebr. 1904) 97 N. W. 1035) is not an excessive penalty.

90. People *v.* Haagen, 139 Cal. 115, 72 Pac. 836; People *v.* Tom Nop, 124 Cal. 150, 56 Pac. 786 (Pen. Code, § 636); Rollins *v.* Breed, 54 Hun (N. Y.) 485, 8 N. Y. Suppl. 48; State *v.* De Lano, 80 Wis. 259, 49 N. W. 808.

91. See *infra*, III, G.

92. Under a statute imposing a penalty for neglecting to make and keep open a sufficient and convenient passageway through a dam after due notice to do so, a notice to make the same "immediately" is not sufficient to support an action for the penalty. Hancock *v.* Eastern River Lock, etc., Co., 16 Me. 303.

93. State *v.* Decker, 46 Conn. 241 (by civil suit); Rollins *v.* Breed, 54 Hun (N. Y.) 485, 8 N. Y. Suppl. 48; Drew *v.* Hilliker, 56 Vt. 641. See Com. *v.* Look, 108 Mass. 452, indictment. But see Smith *v.* Look, 108 Mass. 139; Vinton *v.* Welsh, 9 Pick. (Mass.) 87.

A fish-warden may as a common informer prosecute for violation of the game laws, although the chosen freeholders of his county may not have determined to employ him so to do. Hoffman *v.* Peters, 51 N. J. L. 244, 17 Atl. 113.

Prosecution by a water bailiff without express authority of the board of conservators by whom he is employed see Anderson *v.* Hamlin, 25 Q. B. D. 221, 17 Cox C. C. 129, 54 J. P. 757, 59 L. J. M. C. 151, 63 L. T. Rep. N. S. 168 (overruled by section 13 of the Fisheries Act (1891); Pollock *v.* Moses, 17 Cox C. C. 737, 58 J. P. 727, 63 L. J. M. C. 116, 70 L. T. Rep. N. S. 378, 10 Reports 169.

94. Roberts *v.* Hatch, 40 Hun (N. Y.) 53, holding, however, that such a statute (N. Y. Laws (1880), c. 591, § 1, as amended by Laws (1883), c. 317) does not relate to criminal proceedings by indictment.

Venue.— An action to recover penalties for violation of the game laws may be brought in his own county by the district attorney of a county adjoining that in which such penalties were incurred. People *v.* Rouse, 15 N. Y.

statutes it can be instituted only by such officer or committee.[95] A violation which is merely a matter between the state and the guilty parties can be prosecuted by the state alone.[96]

3. DEFENSES. It is no defense to an action to recover a penalty under the fish and game laws that searches and seizures of forfeited property under such laws were not made in the manner prescribed thereby,[97] that defendant acted *bona fide* as gamekeeper under a person having no authority to appoint him,[98] or that there has been a criminal prosecution for the same offense.[99] But one penalty, however, can be recovered for the same offense,[1] and where several join in committing it a recovery and satisfaction against one of the offenders is a good bar to an action brought against the other;[2] but if they were acting severally, each on his own account, they would be severally liable for the penalty.[3]

4. REMEDIES.[4] The proper remedy for recovering penalties under the various fish and game laws is a *qui tam* action at the instance of an informer,[5] an action of debt,[6] a summary proceeding,[7] and in some jurisdictions by indictment[8] or complaint.[9]

Suppl. 414 [*distinguishing* People *v.* McDonald, 108 N. Y. 655, 15 N. E. 444 (*reversing* 44 Hun 592, 8 N. Y. St. 494)].

95. Fassett *v.* Geyer, 55 Me. 160, holding also that such an action cannot be maintained unless it appears that the persons prosecuting as the fish committee were duly sworn. See Reg. *v.* Cubitt, 22 Q. B. D. 622, 16 Cox C. C. 618, 53 J. P. 470, 58 L. J. M. C. 132, 60 L. T. Rep. N. S. 638, 37 Wkly. Rep. 492. But under Me. Rev. St. c. 41, §§ 17, 61, the commissioner of sea and shore fisheries may authorize one of his wardens to demand payment of a penalty incurred. State *v.* Hanna, 99 Me. 224, 58 Atl. 1061.

96. Clinton *v.* Buell, 55 Conn. 263, 11 Atl. 38; Jones *v.* Oemler, 110 Ga. 202, 35 S. E. 375 (forfeiture of oyster lease for failure to comply with the law as to the cultivation of territory); Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776 (penalty upon locators of fishing sites for failure to furnish sworn statements of the number and location of their traps).

97. Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812.

98. Calcraft *v.* Gibbs, 5 T. R. 19.

99. Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687; Rollins *v.* Breed, 54 Hun (N. Y.) 485, 8 N. Y. Suppl. 48; People *v.* Boatman, 40 Misc. (N. Y.) 27, 81 N. Y. Suppl. 195. But see Robison *v.* Swift, 69 Mich. 608, 37 N. W. 571, construing Howell Annot. St. § 2203.

1. Boutelle *v.* Nourse, 4 Mass. 431; Molton *v.* Cheeseley, 1 Esp. 123; Rex *v.* Lovet, 7 T. R. 152; Rex *v.* Bleasdale, 4 T. R. 809.

A judgment in an action by an individual bars an action by the fish and game officer for the same offense. People *v.* Robbins, 39 Hun (N. Y.) 137.

2. Boutelle *v.* Nourse, 4 Mass. 431.

3. Boutelle *v.* Nourse, 4 Mass. 431; McMahon *v.* State, (Nebr. 1904) 97 N. W. 1035.

4. **Jurisdictions of justices of the peace over actions for penalties** see JUSTICES OF THE PEACE.

5. Burnham *v.* Webster, 5 Mass. 266; Drew *v.* Hilliker, 56 Vt. 641.

Joinder.— A *qui tam* action may be maintained against one or more offenders without joining the rest. Burnham *v.* Webster, 5 Mass. 266.

6. State *v.* Hanna, 99 Me. 224, 58 Atl. 1061; Donnell *v.* Joy, 85 Me. 118, 26 Atl. 1017; Purinton *v.* Ladd, 58 N. H. 596.

7. Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 [*affirming* 13 N. Y. App. Div. 195, 43 N. Y. Suppl. 364], holding, however, that a statute providing for the summary seizure of any boat or vessel used by one person in interfering with oysters or other shell-fish belonging to another and for its seizure and sale, and the payment of the avails to the commissioner of fisheries, game, and forest, by an exclusive procedure before a justice of the peace with no provision for a jury trial, is unconstitutional. See Morris *v.* Duncan, [1899] 1 Q. B. 4, 62 J. P. 823, 68 L. J. Q. B. 49, 79 L. T. Rep. N. S. 379, 47 Wkly. Rep. 96, as to the time within which such proceeding should be had.

8. State *v.* Hanna, 99 Me. 224, 58 Atl. 1061. The penalty for catching fish in the prohibited season may be recovered by indictment (Com. *v.* Look, 108 Mass. 452; State *v.* Roberts, 59 N. H. 484), and the commissioners on inland fisheries need not be the prosecutors (Com. *v.* Look, *supra*).

Time.— The indictment, if a public prosecution, may be at any time within two years after the date of the offense. State *v.* Roberts, 59 N. H. 484.

9. State *v.* Hanna, 99 Me. 224, 58 Atl. 1061; State *v.* Thrasher, 79 Me. 17, 7 Atl. 814.

Indorsement of summons.—Where the complaint in an action to enforce a penalty for violation of the game law is served at the same time as the summons, it is not necessary to indorse a reference to the statute on the summons. People *v.* Bootman, 40 Misc. (N. Y.) 27, 81 N. Y. Suppl. 195.

Limitation.— Whether or not a penalty for killing a deer out of season is barred by the statute of limitations cannot be raised on a motion in arrest of judgment. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814.

5. Pleading. The declaration or complaint should charge the offense substantially in the terms of the statute imposing the penalty.[10] It must also show that the person seeking to maintain the action is clearly within the provision of the statute,[11] and must comply with the rules against duplicity.[12] But it need not allege to whom the penalty is to go.[13]

6. Evidence. Plaintiff or prosecutor must show every fact necessary to constitute the offense,[14] and which has been alleged.[15] But where possession of prohibited fish and game during the close-season is once shown, it is, under some statutes, *prima facie* proof of a violation of the statute, and casts upon the possessor the burden of showing that his possession is lawful.[16]

7. Verdict and Judgment. The verdict must be in accordance with the evidence[17] and allegations.[18] Under some statutes costs in favor of defendant in such actions must be awarded against the state.[19] The judgment for such penalty can be enforced by execution against the person of defendant.[20]

8. Disposition of Proceeds. It is usually provided that the penalties recovered shall be paid over to certain commissioners or officers,[21] and the proceeds thereof

10. State *v.* Geer, 61 Conn. 144, 22 Atl. 1012, 13 L. R. A. 804 [*affirmed* in 161 U. S. 519, 16 S. Ct. 600, 40 L. ed. 793]; Blydenburgh *v.* Miles, 39 Conn. 484; State *v.* Whitten, 90 Me. 53, 37 Atl. 331; Penobscot County *v.* Treat, 16 Me. 378; Chew *v.* Thompson, 9 N. J. L. 249.

An affidavit before a justice of the peace charging defendant with taking fish with a spear "on or about" a certain date in April is sufficient under a statute prohibiting the taking of fish with gig or spear at any time between March and December. Stuttsman *v.* State, 57 Ind. 119.

Intent must be directly alleged where it is the essence of the particular offense. Atwood *v.* Caswell, 19 Pick. (Mass.) 493.

11. Chew *v.* Thompson, 9 N. J. L. 249.

12. State *v.* Adams, 78 Me. 486, 7 Atl. 267; Purinton *v.* Ladd, 58 N. H. 596 (holding, however, that a declaration for the recovery of a penalty for the catching of twenty trout on the same day, from the same brook, is not bad for duplicity); Laxton *v.* Jefferies, 58 J. P. 318.

13. State *v.* Thrasher, 79 Me. 17, 7 Atl. 814; People *v.* Bootman, 40 Misc. (N. Y.) 27, 81 N. Y. Suppl. 195. See Com. *v.* McCurdy, 5 Mass. 324.

14. People *v.* Dunston, 84 N. Y. Suppl. 257, evidence insufficient to show illegal possession. In a complaint for taking "young" lobsters less than a specified length the law assumes that lobsters under that length are young, and the complainant is not obliged to prove that fact. Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687.

The guilt of defendant need not be proved beyond a reasonable doubt. Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812.

For form of instruction as to the degree of proof in an action to recover a penalty for having in possession short lobsters see Campbell *v.* Burns, 94 Me. 127, 46 Atl. 812.

15. Ackley *v.* Dennison, 22 Me. 168.

16. *Illinois.*— Merritt *v.* People, 169 Ill. 218, 48 N. E. 325 [*affirming* 68 Ill. App. 273].

Kentucky.— Com. *v.* Chase-Davidson Co., 22 Ky. L. Rep. 727, 58 S. W. 609.

Massachusetts.— Com. *v.* Savage, 155 Mass. 278, 29 N. E. 468; Com. *v.* Barber, 143 Mass. 560, 10 N. E. 330; Com. *v.* Hall, 128 Mass. 410, 35 Am. Rep. 387.

Michigan.— People *v.* O'Neil, 71 Mich. 325, 39 N. W. 1.

New York.—People *v.* Buffalo Fish Co., 164 N. Y. 93, 58 N. E. 24, 79 Am. St. Rep. 622, 52 L. R. A. 803 [*affirming* 30 Misc. 130, 62 N. Y. Suppl. 543]; People *v.* Gerber, 92 Hun 554, 36 N. Y. Suppl. 720; People *v.* Bootman, 40 Misc. 27, 81 N. Y. Suppl. 195.

Pennsylvania.— Com. *v.* Wilkinson, 139 Pa. St. 298, 21 Atl. 14.

17. People *v.* McNiel, 8 N. Y. Suppl. 371, verdict held contrary to evidence.

18. Thompson *v.* Smith, 79 Me. 160, 8 Atl. 687, holding, however, that where the writ or indictment alleges in one count the illegal possession of a definite number of lobsters, the verdict may be for any number less than the whole number alleged, and the penalties be proportionate with the finding.

19. Where a statute provides that all such penalties may be sued for and recovered in the name of the people, and that out of the money recovered shall be paid the expenses of the action for violating the game laws, such actions are for the benefit of the people against whom costs in favor of defendant must be awarded, and the bill of costs must be certified by the attorney-general as provided by statute. People *v.* Rosedale, 76 Hun (N. Y.) 112, 27 N. Y. Suppl. 825 [*affirmed* in 142 N. Y. 670, 37 N. E. 571 (*distinguishing* People *v.* Alden, 112 N. Y. 117, 19 N. E. 516)]. See State *v.* De Lano, 80 Wis. 259, 49 N. W. 808.

County.— Where costs are awarded to defendant, judgment must be rendered against the county in which the violation occurred, although the action is prosecuted in an adjoining county. People *v.* Smith, 20 N. Y. Suppl. 332.

20. Rollins *v.* Breed, 54 Hun (N. Y.) 485, 8 N. Y. Suppl. 48.

21. People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

A mandamus, however, may not be issued

be divided in specified proportions between the state, and the informer or officer securing the apprehension and conviction of the offender.[22]

G. Searches and Seizures. Under some statutes, nets, seines, and other appliances,[23] being used in violation of the fish and game laws, may by proper proceedings be seized and sold by the fish and game warden, or other proper officer, as may also the fish, game, furs, etc., unlawfully taken or possessed.[24] But if such officer exceeds or acts without proper authority in making the seizure, an action of trespass or in tort may be maintained against him by the injured party.[25]

on the relation of such a board to compel a justice of the peace to pay over fines collected by him, where the relator has an adequate remedy at law, the remedy provided by the statute. People *v.* Crennan, 141 N. Y. 239, 36 N. E. 187.

22. Com. *v.* Drain, 99 Ky. 162, 35 S. W. 269, 18 Ky. L. Rep. 50; Vinton *v.* Welsh, 9 Pick. (Mass.) 87; Roberts *v.* Hatch, 40 Hun (N. Y.) 53; People *v.* Smith, 20 N. Y. Suppl. 332.

23. *California.*— See Ieck *v.* Anderson, 57 Cal. 251, 40 Am. Rep. 115, holding Pen. Code, § 636, unconstitutional and void in so far as it provides for the forfeiture and destruction or sale of such nets without a judicial hearing.

Maine.— State *v.* Adams, 78 Me. 486, 7 Atl. 267.

New Jersey.— Weller *v.* Snover, 42 N. J. L. 341.

Vermont.— Sheets *v.* Atherton, 62 Vt. 229, 19 Atl. 926.

Wisconsin.— Bittenhaus *v.* Johnston, 92 Wis. 588, 66 N. W. 805, 32 L. R. A. 380.

United States.— Lawton *v.* Steele, 152 U. S. 133, 14 S. Ct. 499, 38 L. ed. 385 [*affirming* 119 N. Y. 226, 23 N. E. 878, 16 Am. St. Rep. 813, 7 L. R. A. 134 (*affirming* 6 N. Y. Suppl. 15)].

England.— Ruther *v.* Harris, 1 Ex. D. 97, 45 L. J. M. C. 103, 33 L. T. Rep. N. S. 825, holding that catching a fish is not a condition precedent to the forfeiture of a net used in violation of such a statute. Williams *v.* Blackwall, 2 H. & C. 33, 9 Jur. N. S. 579, 32 L. J. Exch. 174, 8 L. T. Rep. N. S. 252, 11 Wkly. Rep. 621.

Canada.— Mowat *v.* McFee, 5 Can. Sup. Ct. 66; Bayer *v.* Kaizer, 26 Nova Scotia 280.

See 23 Cent. Dig. tit. "Fish," § 31; 24 Cent. Dig. tit. "Game," § 10.

Pleading and proof.— Under a statute declaring a forfeiture of fishing nets found in certain waters without the owner's name attached thereto, it is sufficient to allege the use of a net unmarked, and ownership need not be proved. State *v.* Adams, 78 Me. 486, 7 Atl. 267.

A warden's destruction of a net or trap so seized can be questioned by the state only. Weller *v.* Snover, 42 N. J. L. 341.

24. Hornbeke *v.* White, (Colo. App. 1904) 76 Pac. 926; England *v.* Joannette, 23 Can. Sup. Ct. 415 (furs taken in violation of Quebec Rev. St. arts. 1405, 1409, may be seized by a gamekeeper without a search warrant, and brought before a justice of the peace for examination); Joannette *v.* Hudson Bay Co., 3 Quebec Q. B. 211 [*reversing* 4 Quebec Super. Ct. 127].

Game killed by Indians on their reservations when in possession of a common carrier for shipment to another state may be seized by the game warden under a statute prohibiting the shipment of game from the state. Selkirk *v.* Stephens, 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759.

Jurisdiction of a justice of the peace to declare a forfeiture of furs, etc., illegally taken and the proper course of procedure before him see England *v.* Joannette, 23 Can. Sup. Ct. 415; Joannette *v.* Hudson Bay Co., 3 Quebec Q. B. 211 [*reversing* 4 Quebec Super. Ct. 127].

The pendency of a libel against goods so seized is a bar to an action by the owner of the property seized for damages arising from such seizure. Williams *v.* Delano, 155 Mass. 10, 28 N. E. 1122.

Searches and seizures of game and appliances under 25 & 26 Vict. c. 114, § 2, see Lloyd *v.* Lloyd, 14 Q. B. D. 725, 15 Cox C. C. 767, 49 J. P. 630, 53 L. T. Rep. N. S. 536, 33 Wkly. Rep. 457 [*distinguishing* Turner *v.* Morgan, L. R. 10 C. P. 587, 44 L. J. M. C. 161, 33 L. T. Rep. N. S. 172, 23 Wkly. Rep. 659; Clarke *v.* Crowder, L. R. 4 C. P. 638, 38 L. J. M., C. 118, 17 Wkly. Rep. 857]; Reg. *v.* Spencer, 3 F. & F. 857.

25. Staples *v.* Peabody, 83 Me. 207, 22 Atl. 113 (holding that defendant in such case cannot justify his acts under a statute which has been repealed); James *v.* Wood, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448; Averill *v.* Chadwick, 153 Mass. 171, 26 N. E. 441 (holding that the fact that the possession of the person exposing game for sale is illegal does not prevent him from maintaining an action for their wrongful seizure); Neal *v.* Norse, 134 Mich. 186, 96 N. W. 14 (seizing and destroying nets under an invalid judgment).

Trespass may be maintained against a fish officer who seizes a net unlawfully placed, without instituting the legal proceedings required by statute (Russell *v.* Hanscomb, 15 Gray (Mass.) 166), who destroys a trap, which does not constitute a public nuisance (Boatwright *v.* Bookman, Rice (S. C.) 447), who seizes the fishing appliances of a riparian owner whilst in the exercise of his exclusive right of fishery (Bulbrook *v.* Goodere, 3 Burr. 1768; Venning *v.* Steadman, 9 Can. Sup. Ct. 206), or who improperly seizes a quantity of fish illegally caught (O'Brien *v.* Miller, 29 N. Brunsw. 114).

Liberating game unlawfully taken by an officer without a proper warrant interferes

A vessel engaged in illegal fishing may be searched and after proper proceedings be declared forfeited and destroyed or sold,[26] at any time after the illegal transaction,[27] although the owner is not implicated in the offense, and the vessel is so employed without his knowledge or consent.[28]

H. Criminal Prosecutions — 1. In General. Prosecutions for violation of fish and game laws must be in accord with the statutes prescribing the offenses.[29] The person or officer indicated by these statutes must institute the proceedings.[30] Where not indictable these offenses are usually triable before a magistrate as other misdemeanors,[31] and are sometimes rendered indictable by a refusal to pay the penalty assessed by him.[32] Parties concurring in a violation of statute may be prosecuted together.[33]

2. Indictment, Information, or Complaint.[34] A complaint or indictment in the

with no legal right or title of a person illegally holding it captive and gives him no right of action against the officer. James *v.* Wood, 82 Me. 173, 19 Atl. 160, 8 L. R. A. 448.

A deputy of game commissioners acting without a proper warrant or order from the court and seizing game unlawfully exposed for sale is liable as for a conversion. Averill *v.* Chadwick, 153 Mass. 171, 26 N. E. 441.

Proof.— One in lawful possession of skins for the purpose of tanning is not required to prove in an action to recover the same or their value from the game warden who took possession thereof that the animals from which such skins were taken were lawfully killed. Linden *v.* McCormack, 90 Minn. 337, 96 N. W. 785.

26. State *v.* Mister, 5 Md. 11; State *v.* Loper, 46 N. J. L. 321, 322 (seizure and sale of unlicensed boat used in planting and taking oysters); Haney *v.* Compton, 36 N. J. L. 507 (vessels unlawfully taking oysters); Colon *v.* Lisk, 153 N. Y. 188, 47 N. E. 302, 60 Am. St. Rep. 609 [*affirming* 13 N. Y. App. Div. 195, 43 N. Y. Suppl. 364] (vessel violating oyster laws); Boggs *v.* Com., 76 Va. 989. See The Ann, 8 Fed. 923, 5 Hughes 292.

Where, on a petition for the proceeds of sale of forfeited vessels, the issue is whether the petitioners owned the vessels at the time of the violation, the record of conviction is irrelevant. Com. *v.* Mister, 79 Va. 5.

Under a statute forfeiting merely the vessel employed in unlawfully dredging for oysters the state acquires no title to oysters found on such a vessel. McCandlish *v.* Com., 76 Va. 1002.

Forfeiture of foreign vessels fishing in Canadian waters in violation of Can. Rev. St. c. 94, see The Ship Frederick Gerring, Jr. *v.* Reg., 27 Can. Sup. Ct. 271 [*affirming* 5 Can. Exch. 164]; The Henry L. Phillips *v.* Reg., 25 Can. Sup. Ct. 691; The Grace, 4 Can. Exch. 283; The Franklin Schenke, 2 Stock. Vice-Adm. (N. Brunsw.) 169; The Samuel Gilbert, 2 Stock. Vice-Adm. (N. Brunsw.) 167.

Production of power.— A water bailiff or other officer having power to search boats, etc., used in illegal fishing must produce the instrument of his appointment before attempting to exercise his power. Barnacott *v.* Passmore, 19 Q. B. D. 75, 51 J. P. 821, 56 L. J. M. C. 99, 35 Wkly. Rep. 812; Cowler *v.* Jones, 54 J. P. 660. And see, generally, Searches and Seizures.

Appeal from a judgment of a justice condemning a vessel. State *v.* Mister, 5 Md. 11.

Forfeiture of vessels unlawfully fishing for seals, etc., see *supra*, II, H, 2.

27. Day *v.* Compton, 37 N. J. L. 514, even though not employed in an illegal act at the time.

28. Boggs *v.* Com., 76 Va. 989. But see The J. W. French, 13 Fed. 916, 5 Hughes 429.

29. Reg. *v.* Plows, 26 Ont. 339.

Cumulative remedies.— A special remedy by removal for obstruction of the passage of fish is merely cumulative to an indictment for nuisance. Com. *v.* Ruggles, 10 Mass. 391. And see State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414.

30. Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 72 N. W. 982; Hargreaves *v.* Hilliam, 58 J. P. 655 (holding that evidence of authority should be adduced); Reg. *v.* Turner, 58 J. P. 320.

Security for costs need not be given by a private prosecutor. State *v.* Lewis, 5 Ohio S. & C. Pl. Dec. 371, 5 Ohio N. P. 394.

31. State *v.* Sinnott, 89 Me. 41, 35 Atl. 1007; Com. *v.* Prescott, 151 Mass. 60, 23 N. E. 729, holding that the offense of taking smelts except with hook and line, which is punishable by a fine under the Pub. St. c. 91, § 58, may, under St. (1885) c. 322, be prosecuted by a complaint to a district court. And see State *v.* Meek, 112 Iowa 338, 84 N. W. 3, 84 Am. St. Rep. 342, 51 L. R. A. 414. But see Schroder *v.* Ehlers, 31 N. J. L. 44, holding that under the game laws non-residents cannot be convicted upon the view of a justice.

Where the circuit court has original jurisdiction, the indictment need not show that defendant was arraigned before a justice and elected to be tried by the circuit court. Jones *v.* State, 68 Md. 613, 13 Atl. 381.

32. Com. *v.* Boettcher, 10 Pa. Dist. 101, 24 Pa. Co. Ct. 456, 10 Kulp 155.

Conviction by a justice of the peace is a prerequisite to the jurisdiction of the court of quarter sessions. Com. *v.* Owens, 7 Montg. Co. Rep. (Pa.) 144; Com. *v.* Baylor, 5 L. T. N. S. (Pa.) 93.

33. Com. *v.* Weatherhead, 110 Mass. 175.

34. Indictments and informations generally see Indictments and Informations.

language of the statute is sufficient where it identifies the offense.[35] In case it does not, other incidents of time, place, and circumstance must be added.[36] Exceptions and provisos which form a part of the definition of the offense must be negatived.[37] Other exceptions, whether contained in the same or other statutes, are matters of defense which need not be anticipated.[38] The indictment or complaint must state all the essential elements of the offense as defined by the statute under which it is drawn.[39] It must as in case of other offenses be positive and

35. *Maine.*— State *v.* Whitten, 90 Me. 53, 37 Atl. 331, holding sufficient an indictment for transporting trout not in possession of owner.

Maryland.— Dickhaut *v.* State, 85 Md. 451, 37 Atl. 21, 60 Am. St. Rep. 332, 36 L. R. A. 765; Jones *v.* State, 68 Md. 613, 13 Atl. 381, holding additional averments descriptive of vessels engaged in oyster fishing unnecessary.

Massachusetts.— Com. *v.* Hodgkins, 170 Mass. 197, 49 N. E. 97 (holding that a complaint charging the possession of lobsters was sufficient to include dead lobsters); Com. *v.* Prescott, 151 Mass. 60, 23 N. E. 729; Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26.

New Jersey.— State *v.* American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127, holding it unnecessary to specify the kind of acid discharged into a lake.

Ohio.— State *v.* Owen, 4 Ohio S. & C. Pl. Dec. 163, 3 Ohio N. P. 181, holding an indictment in the language of the statute punishing the maintaining of a net within half a mile of the mouth of any creek flowing into Lake Erie insufficient.

Pennsylvania.— Werfel *v.* Com., 5 Binn. 65.

Rhode Island.— State *v.* Taylor, 13 R. I. 541, holding that an indictment for the wrongful taking and carrying away of oysters from a private oyster bed need not allege the ownership of such oysters.

Vermont.— State *v.* Smith, 61 Vt. 346, 17 Atl. 492, holding that an information based on the taking of fish prohibited by statute need not aver the destruction of the fish.

See 23 Cent. Dig. tit. "Fish," § 28.

Public statute need not be recited. Com. *v.* McCurdy, 5 Mass. 324.

36. Updegraff *v.* Com., 6 Serg. & R. (Pa.) 5, holding that an indictment charging defendant with the erection of divers fish-dams, etc., was too general, since each erection was a distinct offense, and the special manner of each should have been set forth with reasonable certainty, although the form, dimensions, and materials of which it was composed need not have been stated.

37. *Kentucky.*— Com. *v.* Bell, 30 S. W. 997, 17 Ky. L. Rep. 277, holding it necessary to aver that a net was not a "dip net."

Maine.— State *v.* Turnbull, 78 Me. 392, 6 Atl. 1, holding that a complaint must show that fishing was in prohibited waters.

New Jersey.—Jacobus *v.* Meskill, 56 N. J. L. 255, 28 Atl. 383.

Pennsylvania.— Com. *v.* Clauss, 5 Pa. Dist. 658.

Texas.— Holtzgraft *v.* State, 23 Tex. App. 404, 5 S. W. 117.

See 23 Cent. Dig. tit. "Fish," § 28.

Sufficiency of negation of size of seine. State *v.* Murray, 84 Me. 135, 24 Atl. 789.

38. Com. *v.* Drain, 99 Ky. 162, 35 S. W. 269, 18 Ky. L. Rep. 50; Com. *v.* Bell, 30 S. W. 997, 17 Ky. L. Rep. 277 (holding that it was not necessary to aver a seine was not a minnow seine); State *v.* Skolfield, 86 Me. 149, 29 Atl. 922 (holding it not necessary to negative that trout were taken for permitted purposes); Com. *v.* Richardson, 142 Mass. 71, 7 N. E. 26; State *v.* Eldredge, 71 Vt. 374, 45 Atl. 753; State *v.* Smith, 61 Vt. 346, 17 Atl. 492.

39. *Alabama.*— Underwood *v.* State, 19 Ala. 532.

California.— *In re* Asbil, 104 Cal. 205, 37 Pac. 863, that the evidence of sex had been removed from deer skins.

Georgia.— Harris *v.* State, 110 Ga. 887, 36 S. E. 232, that doves were killed at the place where baited.

Maryland.— State *v.* Insley, 64 Md. 28, 20 Atl. 1031 (that oysters carried without license were taken in waters of the state); Phipps *v.* State, 22 Md. 380, 85 Am. Dec. 654 (facts showing that an appropriated oyster bed was duly located).

Missouri.— State *v.* Gilmore, 141 Mo. 506, 42 S. W. 817 (indictment insufficient which alleged that a dam was constructed without a chute "not so situated that the main current of water cannot pass over" where the statute punished an opposite state of facts); State *v.* Griffin, 89 Mo. 49, 1 S. W. 87 (indictment insufficient which did not allege that the apron or chute of a dam was so arranged as not to allow the passage of fish each way when the stream was swollen beyond its ordinary size).

New Jersey.— State *v.* Corson, 65 N. J. L. 502, 47 Atl. 500 (that a lease of an oyster bed was made by the oyster commission in a prosecution for dredging on beds leased from the state); Polhamus *v.* State, 57 N. J. L. 348, 30 Atl. 480 (that an illegal taking of oysters was from waters to which the statute applied); State *v.* Post, 55 N. J. L. 264, 26 Atl. 683; State *v.* American Forcite Powder Mfg. Co., 50 N. J. L. 75, 11 Atl. 127.

New York.— People *v.* Lowndes, 130 N. Y. 455, 29 N. E. 751 [*reversing* 55 Hun 469, 8 N. Y. Suppl. 908], that a non-resident planted oysters for his own benefit or that of a non-resident employer.

Texas.— Taylor *v.* State, (Cr. App. 1900) 55 S. W. 832, that fish were dynamited in fresh water.

Virginia.— Morgan *v.* Com., 26 Gratt. 992.

Washington.— State *v.* Tabell, 10 Wash. 498, 39 Pac. 101.

See 23 Cent. Dig. tit. "Fish," § 28.

Allegations that an act was unlawful, the statute making it so, are unnecessary (State *v.* Skolfield, 86 Me. 149, 29 Atl. 922), espe-

direct,[40] and not in the alternative.[41] The time and place of the offense must be laid with the certainty necessary in other offenses,[42] and where the offense is of local character it must be proved as laid, although the description as to place is unnecessarily minute.[43] A specific allegation of the manner of commission of the offense[44] or of ownership[45] must be proved as laid. Separate offenses in the statute are properly alleged in separate counts.[46] A complaint or indictment is not duplicitous where the acts charged constitute but one offense,[47] or where acts tending to charge a separate offense may be rejected as surplusage.[48] Where the statute makes various acts enumerated in the alternative punishable, they may be charged conjunctively.[49]

3. Evidence.[50] The rules of evidence governing criminal prosecutions generally are applicable to prosecutions for violations of fish and game laws.[51]

cially where the act is laid "contrary to form of the statute" (State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979).

"Maliciously" is not an essential averment where malice is not made an element of the offense by the statute. State *v.* Tibbetts, 86 Me. 189, 29 Atl. 979.

40. Underwood *v.* State, 19 Ala. 532; *Ex p.* Peterson, 119 Cal. 578, 51 Pac. 859 (holding bad a complaint which, while alleging use of a gun of prohibited caliber, did not allege its use for killing game); State *v.* Dunning, 83 Me. 178, 22 Atl. 109 (holding an averment that defendant had in his possession certain lobsters "being less than ten and one-half inches long" was sufficient, although in a participial form, and holding also that an averment that he "did catch" certain lobsters showed they were alive when caught); State *v.* Trefethen, (1887) 8 Atl. 547; State *v.* Bennett, 79 Me. 55, 7 Atl. 903. But see People *v.* Haagen, 139 Cal. 115, 72 Pac. 836, holding the omission of the word "did" in a charge of having possession of salmon immaterial. *Compare* People *v.* Hannah, 92 Hun (N. Y.) 476, 37 N. Y. Suppl. 702, holding an averment of belief that certain undescribed offenses had been committed insufficient to confer jurisdiction, so that a witness could not be charged with contempt on refusal to testify.

41. Venturio *v.* State, 37 Tex. Cr. 653, 40 S. W. 974, holding that an information charging the catching of fish or terrapin or both fish and terrapin in a drag-seine or set net is fatally defective.

42. *Kansas.*— State *v.* Stunkle, 41 Kan. 456, 21 Pac. 675, holding sufficient a description of a dam as located at a certain mill in a certain county and state.

Maine.— State *v.* Cottle, 70 Me. 198, holding an averment of an attempt to take fish "in the Penobscot river between the Bucksport R. R. Bridge and the waterworks dam" insufficient to show that the act was in an unlawful place.

Michigan.—People *v.* Van Maren, 126 Mich. 103, 85 N. W. 240, holding that, although venue was laid in a certain township, the offense might be shown to have been committed anywhere in the county.

Mississippi.— Conrad *v.* State, 80 Miss. 229, 31 So. 709, holding it unnecessary to locate by headlands or otherwise the specified place of oyster dredging.

New Jersey.— State *v.* Nelson, 65 N. J. L. 500, 47 Atl. 500, holding that where a line was located as a matter of fact, it was not material that it was alleged to have been located by statute.

See 24 Cent. Dig. tit. "Game," § 28.

Reference to a preceding count may suffice as an averment of time and place. Jones *v.* State, 68 Md. 613, 13 Atl. 381.

43. Keoun *v.* State, 64 Ark. 231, 41 S. W. 808; State *v.* Weeks, 88 Mo. App. 263.

44. Gill *v.* State, (Tex. Cr. App. 1903) 76 S. W. 575, holding that where it was specifically charged that the offense was committed by exploding dynamite in the water, a conviction cannot be sustained in the absence of definite evidence that the substance exploded was dynamite.

45. Johnson *v.* State, 114 Ga. 790, 40 S. E. 807. And see Com. *v.* Weatherhead, 110 Mass. 175.

46. Com. *v.* Boettcher, 10 Pa. Dist. 101, 24 Pa. Co. Ct. 456, 10 Kulp 155.

47. State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544; State *v.* Dunning, 83 Me. 178, 22 Atl. 109, sustaining a charge that defendant caught and had in his possession certain lobsters, the offense being in not liberating the lobsters under a certain size.

48. State *v.* Thomas, 90 Me. 223, 38 Atl. 144; State *v.* Adams, 78 Me. 486, 7 Atl. 267.

The complaint may be sustained for the offense adequately charged. Com. *v.* Bell, 30 S. W. 997, 17 Ky. L. Rep. 277. And see State *v.* Whitten, 90 Me. 53, 37 Atl. 331, holding that an averment that a trout weighed "four and one-half" was not sufficient to aver any weight and that a fine would be imposed without any additional penalty to be assessed according to weight.

49. Keoun *v.* State, 64 Ark. 231, 41 S. W. 808, holding that under a statute making it unlawful for any person with intent to kill or paralyze any fish to deposit in any water any explosive material or stupefying liquid, or to take from any water any fish so stupefied or killed, an indictment is not bad for duplicity which charges that defendant put dynamite in a certain lake with intent to kill fish therein, and took from said waters fish that had been so killed.

50. Evidence in general see CRIMINAL LAW, 12 Cyc. 379.

51. State *v.* Poole, 93 Minn. 148, 100

4. TRIAL — a. Instructions.[52] The necessity and propriety of instructions are governed by the same rules as in other criminal prosecutions.[53]

b. Verdict and Findings.[54] In the absence of a necessity for special find-

N. W. 647 (holding that in a prosecution for having possession of wild ducks with intent to sell them, contrary to statute, where it appeared that a number of ducks were found in the possession of defendant while he was hauling them from a certain ice-house to a railway station, evidence that on a preceding evening he had driven a team to an adjacent lake, and there loaded a vehicle with a number of sacks, which were filled and tied up, and afterward taken to the ice-house in question and unloaded there, was competent); People *v.* Decker, 10 N. Y. Suppl. 676 (holding that the admission of expert testimony to show that defendant's rakes were such as would disturb planted oysters was not prejudicial to defendant when he himself admitted that his rakes, if overboard when he was sailing over the bed, would have disturbed the oysters).

Burden of proof.— The state in a prosecution for selling "a wild deer" during the prohibited season must show affirmatively that the animal was "wild." Crosby *v.* State, 121 Ga. 198, 48 S. E. 913. The burden is on the accused to show that his possession of a game bird out of season is consistent with a lawful taking. State *v.* Stone, 20 R. I. 559, 40 Atl. 499. But see State *v.* Lynch, 89 Me. 209, 36 Atl. 69, holding that possession of but one moose during the whole of one open season is not sufficient evidence of its illegal capture to throw the burden of explaining such possession on defendant.

Public statutes.— In a defense to a criminal prosecution for taking oysters from a place which has been designated to private parties, the only evidence that such place is a natural oyster bed, a grant of which would be invalid, is that it is embraced in the locations and descriptions contained in the statute enumerating the natural oyster beds under the jurisdiction of the state. State *v.* Nash, 62 Conn. 47, 25 Atl. 451.

Sufficiency of evidence.— See the following cases in which the sufficiency of evidence to establish particular offenses is considered.

Maine.— State *v.* Murray, 84 Me. 135, 24 Atl. 789, holding that evidence that a seine was large enough to take in six hundred or seven hundred barrels of fish at one haul is sufficient proof that it was of more than one hundred meshes, under an indictment for taking fish with such a net.

Massachusetts.— Com. *v.* Eliot, 146 Mass. 5, 15 N. E. 81 (abandonment of leased pond); Com. *v.* Pease, 137 Mass. 576 (seining for bluefish).

Minnesota.— State *v.* Poole, 93 Minn. 148, 100 N. W. 647.

New York.— People *v.* Tanner, 128 N. Y. 416, 28 N. E. 364 [*affirming* 14 N. Y. Suppl. 334] (holding that testimony by a number of witnesses that they had frequently fished in a designated creek for a long series of years, and that they had never caught any bass, or seen any that were caught therein, is sufficient to support a finding by the jury that such creek was not inhabited by bass, although a witness for the state testified that he had on one occasion caught black or Oswego bass in the creek); People *v.* Decker, 57 Hun 591, 10 N. Y. Suppl. 676 (unlawful disturbance of oysters of another); People *v.* Lowndes, 55 Hun 469, 8 N. Y. Suppl. 908 (holding that several grants from the state to a town and the testimony of witnesses that a bay was within the description of the grants was sufficient proof of the title of the town to such bay in an indictment for illegal planting of oysters therein).

England.— Hall *v.* Knox, 4 B. & S. 515, 33 L. J. M. C. 1, 9 L. T. Rep. N. S. 380, 12 Wkly. Rep. 103, 116 E. C. L. 515; Evans *v.* Botterill, 3 B. & S. 787, 10 Jur. N. S. 311, 33 L. J. M. C. 50, 8 L. T. Rep. N. S. 272, 11 Wkly. Rep. 621 (unlawfully going on land in pursuit of game); Brown *v.* Turner, 13 C. B. N. S. 485, 9 Jur. N. S. 850, 32 L. J. M. C. 106, 7 L. T. Rep. N. S. 681, 11 Wkly. Rep. 290 (unlawful possession of game); Vance *v.* Frost, 58 J. P. 398 (using fixed engine for catching salmon); Lawley *v.* Mericks, 51 J. P. 502 (aiding persons unknown, who unlawfully went on land in pursuit of game); Jones *v.* Dicker, 22 L. T. Rep. N. S. 95 (obtaining game by unlawfully going on land in search thereof); Rex *v.* Davis, 6 T. R. 177 (killing game with gun).

52. Instructions generally see CRIMINAL LAW, 12 Cyc. 611.

53. Com. *v.* Young, 165 Mass. 396, 43 N. E. 118 (holding that on trial of one for having in his possession lobsters less than ten and one-half inches in length, in violation of statute, it was proper to refuse to instruct that the possession of the lobsters showed no more than temporary custody of another's property, where the agreed facts would support a finding that they were in defendant's possession as owner); State *v.* Lee, 70 N. J. L. 368, 57 Atl. 142 [*affirmed* in (Err. & App. 1905) 59 Atl. 1118] (holding that when a defendant is on trial for doing certain physical acts with a certain purpose, and the acts charged point indubitably to that purpose, it is not reversible error for the trial judge, in charging the jury, to refer to proof of the acts as sufficient proof of guilt, without expressly referring to the purpose, there being no request or suggestion on behalf of defendant that the purpose should be more particularly mentioned).

Questions of fact, such as whether a defendant was in the business of guiding, must be left to the jury. State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544.

54. Verdict in general see CRIMINAL LAW, 12 Cyc. 686.

ings the verdict may be general.[55] Special findings are not conclusive unless responsive.[56]

5. PUNISHMENT. The punishment of violations of fish and game laws is prescribed by the statutes creating the offenses, although defendant may be committed until payment of a fine as in other prosecutions.[57]

6. REVIEW.[58] An appeal usually lies as from other summary convictions.[59] On an appeal from a conviction of unlawful possession of game it will not be determined whether a seizure of such game was lawful.[60]

FISHING-BANKS. A fishing ground of comparatively shoal water in the sea.[1]

FISHING BILL. A bill in which plaintiff shows no cause of action, and endeavors to compel defendant to disclose one in plaintiff's favor.[2] (See, generally, DISCOVERY; EQUITY.)

FISHING-PLACE. As defined by statute, the place or places where seines or nets have been usually thrown into the water to the place or places where they have been usually taken out, or from the place or places where they may be hereafter thrown into the water to the place or places where they may be taken out.[3]

FISSURE. A narrow opening made by the parting of any substance; a cleft.[4] (See DIP; and, generally, MINES AND MINERALS.)

FISSURE VEIN. In mining parlance, a longitudinal opening with a foreign substance in it.[5] (See, generally, MINES AND MINERALS.)

FIT. As an adjective, proper.[6] As a verb, to make suitable; furnishing a

55. Dean *v.* State, 98 Md. 80, 56 Atl. 481, holding that under the oyster law providing that a fine of twenty-five dollars shall be imposed for having in possession unmerchantable oysters, and in addition to that the sum of six cents per bushel for each additional one per cent of unmerchantable oysters, it is not necessary, in a prosecution under the law, for the jury to find the quantity of cargo nor the percentage of unmerchantable oysters it contains, a verdict of guilty being sufficiently certain.

56. State *v.* Gilmore, 141 Mo. 506, 42 S. W. 817, holding that for failure to construct fish chutes in a mill-dam, an answer by the jury to an interrogatory as to whether passage of fish was obstructed that there was "no injury to fish of passage," was not responsive and hence not conclusive on the question of obstruction.

57. Dean *v.* State, 98 Md. 80, 56 Atl. 481, holding that, although the oyster law provides merely for a fine for having in possession unmerchantable oysters, nevertheless, under Code Pub. Gen. Laws, art. 38, § 1, declaring that whenever any fine or penalty is imposed by any act of assembly for doing any forbidden act, the person shall be sentenced to the fine or penalty and costs, and in default of payment be committed to jail, etc., the court is authorized to sentence a person convicted of a violation of the oyster law to stand committed until the fine imposed is paid.

Payment and enforcement of fine see FINES, *ante*, p. 543.

58. Review in general see CRIMINAL LAW, 12 Cyc. 792.

59. Reg. *v.* Todd, 10 Nova Scotia 62 (holding that under the Dominion Fisheries Act an appeal lies to the supreme court); Gough *v.* Morton, 3 Nova Scotia 10 (holding that under the River Fisheries Act appeal must be to the sessions).

Certiorari will lie, although a remedy by appeal to the minister of marine and fisheries is provided for in the statute. *Ex p.* Kelly, 29 N. Brunsw. 271.

60. People *v.* Van Pelt, 130 Mich. 621, 90 N. W. 424.

1. Century Dict. [*quoted* in Parker *v.* Thompson, 21 Oreg. 523, 530, 28 Pac. 502].

2. Carroll *v.* Carroll, 11 Barb. (N. Y.) 293, 298.

3. Tinicum Fishing Co. *v.* Carter, 61 Pa. St. 21, 36, 100 Am. Dec. 597.

4. "As a fissure of a rock." Webster Dict. [*quoted* in L. E. Waterman Co. *v.* Forsyth, 121 Fed. 107, 108].

5. Crocker *v.* Manley, 164 Ill. 282, 290, 45 N. E. 577, 56 Am. St. Rep. 196 [*citing* Hughes Dict.].

6. Mostyn *v.* Lancaster, 23 Ch. D. 583, 610, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686 [*citing* Johnson Dict.].

"Fit and proper person" within a statute relative to the appointment of church wardens "means a fit and proper person resident within the parish." Reg. *v.* Cree, 57 J. P. 72, 67 L. T. Rep. N. S. 556, 557, per Bruce, J. See also Reg. *v.* Harding, 6 T. L. R. 53, 54; 1 & 2 Vict. c. 56, § 48.

"Fit for cultivation," used with reference to land, means that condition of the soil, in its natural condition, as will enable a farmer, bringing to the business a reasonable amount of skill, to raise, regularly and annually, by tillage, grain or other staple crops. Keeran *v.* Griffith, 34 Cal. 580, 581.

In connection with other words the word "fit" has often received judicial interpretation; as for example as used in the following phrases: "Fit and proper regulations" (see De Forest *v.* Redfield, 7 Fed. Cas. No. 3,746,

thing suitable for the use of another; to prepare; to furnish with things proper or necessary.[7] (See CONVENIENT; FITNESS.)

FIT FABRICANDO FABER. A maxim meaning "The law presumes that a workman becomes an expert by a long continued exercise of his particular vocation."[8] (See EXPERT.)

FITNESS. The quality or state of being fit; suitable, or adaptedness; serviceableness; use; utility;[9] the quality of being suitable and adapted to the performance of certain duties.[10] (See FIT.)

FIT OF MANIA. A temporary depression or aberration of the mind, which sometimes accompanies or follows intoxication, and is often accompanied by delusions, hallucinations, and illusions.[11] (See DEMENTIA; and, generally, INSANE PERSONS.)

FITTING. Anything used in fitting up, especially, in the plural, necessary fixtures or apparatus;[12] anything employed in fitting up permanently, used generally in the plural, in the sense of fixtures, tackle, apparatus, equipment.[13]

FIVE. Four and one added; one more than four.[14]

FIVE-TWENTY BONDS. A term applied to certain United States bonds from the fact that they were redeemable after five, but were not payable until twenty years after a given date.[15]

FIX. To make firm, stable, or fast; to set or place permanently; to fasten

4 Blatchf. 478, 483); "fit for distillation" (see U. S. *v.* Prussing, 27 Fed. Cas. No. 16,095, 2 Biss. 344); "fit for habitation" (see Faulkner *v.* Llewellin, 9 L. T. Rep. N. S. 251, 252, 11 Wkly. Rep. 1055); "fit for sale" (see 50 & 51 Vict. c. 15, § 4); "fit to be prosecuted" (see Farrer *v.* Lowe, 5 T. L. R. 234); "fit to be tried" (see Banks *v.* Hollingsworth, [1893] 1 Q. B. 442, 446, 447, 449, 57 J. P. 436, 62 L. J. Q. B. 239, 68 L. T. Rep. N. S. 477, 4 Reports 228, 41 Wkly. Rep. 225); "seem fit" (see Watson's Case, 9 A. & E. 731, 782, 36 E. C. L. 384); "think fit" (see Mostyn *v.* Lancaster, 23 Ch. D. 583, 610, 52 L. J. Ch. 848, 48 L. T. Rep. N. S. 715, 31 Wkly. Rep. 686; Baxendale *v.* Great Western R. Co., 14 C. B. 1, 25, 108 E. C. L. 1; Cherry *v.* Endean, 55 L. J. Q. B. 292, 294, 54 L. T. Rep. N. S. 763, 34 Wkly. Rep. 458).

7. Webster Dict. [*quoted* in Ware *v.* Gay, 11 Pick. (Mass.) 106, 109].

By being "fitted for college" we understand in this case is meant being prepared to take the academic course in an ordinary college, as that is the usual preparation for studying theology; and a collegiate education is such as is afforded by such a college. Shepard *v.* Shepard, 57 Conn. 24, 28, 17 Atl. 173.

"Fit up" rooms for city officers see Kramrath *v.* Albany, 53 Hun (N. Y.) 206, 209, 6 N. Y. Suppl. 54.

"Every way fitted for such voyage" see Summer *v.* Caswell, 20 Fed. 249, 251.

"Fitted out" in maritime language is a term sometimes used as the equivalent to "built." The Caroline, 5 Fed. Cas. No. 2,418, 1 Brock. 384, where the term is construed under a statute relating to a vessel fitted out for the slave trade. See also The St. Jago de Cuba, 9 Wheat. (U. S.) 409, 413, 6 L. ed. 122; Von Lingen *v.* Davidson, 1 Fed. 178, 187; U. S. *v.* Guinet, 26 Fed. Cas. No. 15,270, 1 Dall. 321, 328.

"Fitting up the premises" see Pratt *v.* Paine, 119 Mass. 439, 446.

8. Morgan Leg. Max.

9. People *v.* Knauber, 27 Misc. (N. Y.) 253, 255, 57 N. Y. Suppl. 782 [*citing* Century Dict.; American Encycl. Dict.], where the term is compared with "merit."

10. This, in some cases, obviously includes habits, industry, energy, ambition, tact, disposition, knowledge of human nature, discretion, shrewdness, suitable physical presence, etc., matters which require an examination of a very different character from that which may test the competency, excellence and worth of a candidate [for public office]. People *v.* Knauber, 27 Misc. (N. Y.) 253, 255, 57 N. Y. Suppl. 782 [*citing* American Encycl. Dict.]. See also Grand Junction Waterworks Co. *v.* Rodocanachi, [1904] 2 K. B. 230, 233.

11. Gunter *v.* State, 83 Ala. 96, 109, 3 So. 600.

Subject to "fainting fits" as used in an insurance policy see Shilling *v.* Accidental Death Ins. Co., 1 F. & F. 116, 121.

12. "As, the fittings of a church or study." Webster Dict. [*quoted* in Brown *v.* State, 116 Ga. 559, 560, 42 S. E. 795].

"Any meter . . . and any fittings for the gas" see Hughes *v.* Little, 3 T. L. R. 14, 15.

"Fittings for measuring the amount of the gas" or "fittings for the meter" see Gaslight, etc., Co. *v.* Hardy, 17 Q. B. D. 619, 51 J. P. 6, 56 L. J. Q. B. 168, 169, 55 L. T. Rep. N. S. 585, 35 Wkly. Rep. 50.

"Fittings" for waterworks defined see 34 & 35 Vict. c. 113, § 3.

13. Century Dict. [*quoted* in Brown *v.* State, 116 Ga. 559, 560, 42 S. E. 795, where the words a "certain lot of brass fittings" as used in an indictment charging a theft is construed].

14. Webster Int. Dict.

"Five burners" see Virginia City Gas Co. *v.* Virginia City, 3 Nev. 320, 321; O'Connor *v.* Towns, 1 Tex. 107, 109.

"Five days" see State *v.* Gasconade County Ct., 33 Mo. 102.

15. Morgan *v.* U. S., 113 U. S. 476, 497, 5 S. Ct. 588, 28 L. ed. 1044.

immovably;[16] to determine; to settle;[17] to settle permanently.[18] Sometimes used in the sense of "allow."[19] (See DETERMINE; ESTABLISH; FIXED.)

FIXED. Settled, established, firm.[20] In commercial paper, it means that the paper in which it is written shall be payable upon the exact date named for its maturity.[21] (See DETERMINED; ESTABLISH; FIX.)

FIXED DAMAGES. See DAMAGES.

16. Dougherty *v.* Austin, 94 Cal. 601, 625, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161 [*quoting* Webster Dict.] (distinguishing the term from "regulate"); Logansport, etc., Valley Gas. Co. *v.* Peru, 89 Fed. 185, 187.

17. Bunn *v.* Kingsbury County, 3 S. D. 87, 89, 52 N. W. 673.

18. Worcester Dict. [*quoted* in Huck *v.* Gaylord, 50 Tex. 578, 582].

19. Polk *v.* Minnehaha County, 5 Dak. 129, 37 N. W. 93, 94.

In connection with other words the word "fix" has often received judicial interpretation; as for example as used in the following phrases: "Fix and allow" (see Zimmermann *v.* Canfield, 42 Ohio St. 463, 468); "fix, determine, and regulate" (see Atlantic, etc., R. Co. *v.* U. S., 76 Fed. 186, 193; 14 Cyc. 237 note 17); "fix the compensation" (see Cricket *v.* State, 18 Ohio St. 9, 21); "'fix' the rule" (see Cricket *v.* State, 18 Ohio St. 9, 21).

"Fixing the amount" see Reg. *v.* Local Government Bd., 64 J. P. 516, 82 L. T. Rep. N. S. 385, 388.

20. San Francisco Pioneer Woolen Factory *v.* Brickwedel, 60 Cal. 166, 177.

In connection with other words the word "fixed" has often received judicial interpretation; as for example as used in the following phrases: "Fixed and adequate salaries" (see Sharpe *v.* Robertson, 5 Gratt. (Va.) 518, 638); "fixed and appointed the rate of tolls to be paid" (see Hungerford Market Co. *v.* City Steamboat Co., 3 E. & E. 365, 379, 7 Jur. N. S. 67, 30 L. J. Q. B. 25, 3 L. T. Rep. N. S. 732, 107 E. C. L. 365); "fixed and established by law" (see *In re* New York Mut. L. Ins. Co., 89 N. Y. 530, 533); "fixed and fastened" (see Metropolitan Counties Assur. Soc. *v.* Brown, 26 Beav. 454, 458, 5 Jur. N. S. 378, 28 L. J. Ch. 581, 7 Wkly. Rep. 303, 53 Eng. Reprint 973); "fixed belief of guilt" (see Curley *v.* Com., 84 Pa. St. 151, 156; Staup *v.* Com., 74 Pa. St. 458, 461); "fixed by the laws of the state or territory" (see Daggs *v.* Phœnix Nat. Bank, (Ariz. 1898) 53 Pac. 201, 204; Hinds *v.* Marmolejo, 60 Cal. 229, 231; Guild *v.* Deadwood First Nat. Bank, 4 S. D. 566, 572, 57 N. W. 499; Wolverton *v.* Spokane Exch. Nat. Bank, 11 Wash. 94, 97, 39 Pac. 247); "fixed engine" (see Gore *v.* English Fisheries, L. R. 6 Q. B. 561, 562, 40 L. J. Q. B. 252, 24 L. T. Rep. N. S. 702, 19 Wkly. Rep. 1083; Holford *v.* George, L. R. 3 Q. B. 639, 641, 37 L. J. Q. B. 185, 18 L. T. Rep. N. S. 817, 16 Wkly. Rep. 1204; Thomas *v.* Jones, 5 B. & S. 916, 919, 11 Jur. N. S. 306, 34 L. J. M. C. 45, 11 L. T. Rep. N. S. 450, 13 Wkly. Rep. 154, 117 E. C. L. 916; 28 & 29 Vict. c. 121, § 39; 24 & 25 Vict. c. 109, § 4; 15 Cyc. note 89); "fixed machinery" (see Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86, 88; Griggs *v.* Stone, 51 N. J. L. 549, 551, 18 Atl. 1094, 7 L. R. A. 48); "fixed and movable machinery, engine, lathes and tools" (see Lovewell *v.* Westchester F. Ins. Co., 124 Mass. 418, 419, 26 Am. Rep. 671); "fixed machinery for manufacturing purposes" (see Campbell *v.* John W. Taylor Mfg. Co., 62 N. J. Eq. 307, 311, 49 Atl. 1119); "fixed motive powers," "fixed power machinery" (see Topham *v.* Greenside Glazed Fire-Brick Co., 37 Ch. D. 281, 294, 57 L. J. Ch. 583, 58 L. T. Rep. N. S. 274, 36 Wkly. Rep. 464); "fixed penalties" (see Poughkeepsie *v.* King, 38 N. Y. App. Div. 610, 611, 57 N. Y. Suppl. 116); "fixed period" (see St. Aubyn *v.* St. Aubyn, 1 Dr. & Sm. 611, 614, 30 L. J. Ch. 917, 5 L. T. Rep. N. S. 519, 9 Wkly. Rep. 922; *Re* Maxwell, 1 Hem. & M. 610, 9 Jur. N. S. 350, 351, 32 L. J. Ch. 333, 7 L. T. Rep. N. S. 224, 11 Wkly. Rep. 480; Hartley *v.* Allen, 4 Jur. N. S. 500, 501, 27 L. J. Ch. 621, 6 Wkly. Rep. 407); "value of the chattels 'as fixed'" (see Wolff *v.* Moses, 26 Misc. (N. Y.) 500, 501, 57 N. Y. Suppl. 696); "when such salary is fixed by law" (see State *v.* Daggett, 28 Wash. 1, 8, 68 Pac. 340).

"A 'salary' is 'fixed' when it is at a stipulated rate for a defined period of time. A 'pay' or 'endowment' is 'fixed' when the amount of it is agreed upon and the service for which it is to be given is defined. A salary, pay, or emolument is fixed by law when the amount is named in a statute; and by regulation when it is named in a general order, promulgated under provisions of law, and applicable to a class or classes of persons." Hendrick *v.* U. S., 16 Ct. Cl. 88, 101. See also Dougherty *v.* Austin, 94 Cal. 601, 608, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161 [*citing* Evans *v.* Trenton, 24 N. J. L. 764, 766]; Cole *v.* Humphries, 78 Miss. 163, 165, 170, 28 So. 808.

"Fixed furniture" distinguished from "fixtures" see Birch *v.* Dawson, 2 A. & E. 37, 39, 29 E. C. L. 39; Birch *v.* Dawson, 13 L. J. K. B. 49, 50.

"Fixed time" does not necessarily mean a definite period — as for instance, one year, two years, or three years — but refers to a term of office which is established or settled, as contradistinguished from a term which depends upon the mere will or pleasure of the appointing power. People *v.* Loeffler, 175 Ill. 585, 603, 51 N. E. 785.

21. Steinau *v.* Moody, 100 Ga. 136, 138, 28 S. E. 30 (where it is said: "The word 'fixed' introduced into a commercial paper seems to have a well ascertained legal significance"); Cincinnati Fifth Nat. Bank *v.* Woolsey, 21 Misc. (N. Y.) 757, 760, 48 N. Y. Suppl. 148 [*citing* Durnford *v.* Patterson, 7 Mart. (La.) 460, 12 Am. Dec. 514].

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Taxation of, see TAXATION.

I. INTRODUCTION AND DEFINITION.

Tangible property is either real or personal.[1] The former is land; the latter is all other tangible property. The law of fixtures deals with property whose status as realty or personalty is indeterminate until the proof of certain facts and the application of certain rules of law. When the status is thus determined, tangible property must be either real or personal.[2] Fixtures then may be defined as tangible property whose status as realty or personalty is indeterminate. According as certain facts shall appear its status will become determinate and it will fall into one or the other category.[3]

1. **Distinction between real and personal property** in general see PROPERTY.

2. **As a general rule property cannot be real and personal** at the same time, although at the same time it may be real as to one person and personal as to another. Mott *v.* Palmer, 1 N. Y. 564; Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

3. See cases cited *passim* this article.

Other definitions are: "An article which was a chattel, but which by being physically annexed or affixed to the realty, became accessory to it, and part and parcel of it." Teaff *v.* Hewitt, 1 Ohio St. 511, 527, 59 Am. Dec. 634. And see Capen *v.* Peckham, 35 Conn. 88.

"Articles of a personal nature which have been affixed to land." Ferard Fixt. (2d Am. ed.) 2.

"Chattels of a personal nature which have been affixed to land." Grady Fixt. 1.

"Personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them." Hallen *v.* Runder, 1 C. M. & R. 266, 276, 3 L. J. Exch. 260, 3 Tyrw. 959, per Parke, B.

"Such movable articles or chattels personal as are fixed to the ground or soil, either directly or indirectly by being attached to a house or other building." Williams Pers. Prop. (15th ed.) 129.

Statutory definitions see Cal. Civ. Code, §§ 660, 661; Ida. Civ. Code, §§ 2348, 2349; La. Civ. Code, arts. 461–508; Mont. Civ. Code, §§ 1073–1079; N. D. Rev. Codes (1889), §§ 3269–3274; Okla. St. (1903) §§ 4020–4024, 4065–4183; S. D. Civ. Code, §§ 185–190. And see *infra*, XI.

The term is used with various significations, but it is always applied to articles of a personal nature which have been affixed to land. Ferard Fixt. (2d Am. ed.) 1; Grady Fixt. 1. "The name of fixtures is also sometimes applied to things expressly to denote that they cannot legally be removed; as where they have been annexed to a house, etc., and the party who has affixed them is not at liberty afterwards to sever and take them away. There is, however, another sense in which the term fixtures is very frequently used, and which it is thought expedient to adopt in the following treatise, viz: as denoting those personal chattels which have been annexed to land, and which may be afterwards severed and removed by the party who has annexed them, or his personal representative, against the will of the owner of the freehold." Ferard Fixt. (2d Am. ed.) 1, 2.

The status of personal chattels which have been annexed to the freehold but which are removable at the will of the person who annexed them is, after annexation, realty, the title to which is in the owner of the realty, and in place of his former interest in the chattel as a chattel the former owner has the right to remove, to effect which he has a license irrevocable until determined by different events. Thus in speaking of fixtures as between landlord and tenant, it has been said: "The right between landlord and tenant does not altogether depend upon this principle, that the articles continue in the state of chattels; many of these articles, though originally goods and chattels, yet when affixed by a tenant to the freehold, cease to be goods and chattels by becoming part of the freehold; and though it is in his power to reduce them to the state of goods and chattels again by severing them during his term, yet until they are severed, they are a part of the freehold. . . . And unless the lessee uses during the term his continuing privilege to sever them, he cannot afterwards do it." Lee *v.* Risdon, 2 Marsh. 495, 7 Taunt. 188, 191, 17 Rev. Rep. 484, 2 E. C. L. 320 [*followed* in Hallen *v.* Runder, 1 C. M. & R. 266, 3 L. J. Exch. 260, 3 Tyrw. 959, per Gibbs, C. J. See also Brown *v.* Baldwin, 121 Mo. 126, 25 S. W. 863; Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694; Sheen *v.* Rickie, 7 Dowl. P. C. 335, 3 Jur. 607, 8 L. J. Exch. 217, 5 M. & W. 175; Wiltshear *v.* Cottrell, 1 E. & B. 674, 22 L. J. Q. B. 177, 72 E. C. L. 674.

"A personal chattel does not become a fixture so as to be a part of the real estate, unless it be so affixed to the freehold as to be incapable of sever[a]nce from it without

II. ANNEXATION.

A. Tests in General. It is an ancient maxim of the common law that what is affixed to land becomes part of the land.[4] In the matter of "fixtures," so called, it is difficult to say with precision what degree of annexation is sufficient to work the change from personalty to realty. In some cases the courts have said as a matter of law that certain articles, although fastened to the realty, are not part of it,[5] while on the other hand articles may be so incorporated with the realty that the courts will say as a matter of law that they are fixtures;[6] but as physical annexation of a chattel alone is not always necessary to its becoming part of the realty, and as physical annexation alone does not necessarily make a chattel realty, but in either case other circumstances may combine to prevent the one or the other, it is believed that the true rule is that articles not otherwise attached to realty than by their own weight are *prima facie* personalty, and articles affixed to land in fact, although only slightly, are *prima facie* realty, and that the burden of proof is on the one contending that the former is realty or that the latter is personalty.[7] This principle has been extended in a few cases

violence and injury to the freehold; and, if it be so annexed, it is a fixture, whether the annexation be for use, for ornament or from mere caprice." Providence Gas Co. *v.* Thurber, 2 R. I. 15, 22, 55 Am. Dec. 621, per Greene, C. J.

"Tenants' fixtures" in its strict legal definition signifies those things which are fixed to the freehold of the demised premises, but which nevertheless the tenant is allowed to disannex and take away, provided that he seasonably exerts his right to do so. Wall *v.* Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64, per Bigelow, J. See also Climie *v.* Wood, L. R. 4 Exch. 328, 38 L. J. Exch. 223, 20 L. T. Rep. N. S. 1012.

The same person must own the land and the chattel in order that the latter shall become a fixture. Leonard *v.* Willard, 23 Quebec Super. Ct. 482.

4. "Quicquid plantatur solo solo cedit." See Broom Leg. Max. 401.

5. Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582 (gas fixtures); Durkee *v.* Powell, 75 N. Y. App. Div. 176, 77 N. Y. Suppl. 368 (window shades and screens and screen doors); Cosgrove *v.* Troescher, 62 N. Y. App. Div. 123, 70 N. Y. Suppl. 764 (carpets, gas-fixtures, ash-cans, and gas-ranges).

6. Barnes *v.* Burt, 38 Conn. 541 (a pump); Munroe *v.* Armstrong, 179 Mass. 165, 60 N. E. 475, plumbing annexed under a contract to put it in, made with the owner of the realty and without the right to remove.

7. *Alabama.*— Opelika Bank *v.* Kiser, 119 Ala. 194, 201, 24 So. 11 (where it is said: "Courts can not know otherwise than through the medium of evidence the particular facts necessary to convert this character of property, primarily personal, into fixtures, or parts of realty in connection with which it may be used. The burden of proving such facts, if from them they could derive benefit, rested on the complainants"); De Lacy *v.* Tillman, 83 Ala. 155, 3 So. 294 (holding that the burden of proof is on a purchaser of realty to show that an engine annexed only by weight is part of the realty); Tillman *v.* De Lacy, 80 Ala. 103; Powers *v.* Harris, 68 Ala. 409.

Connecticut.— Landon *v.* Platt, 34 Conn. 517.

Illinois.— Arnold *v.* Crowder, 81 Ill. 56, 25 Am. Rep. 260; Salter *v.* Sample, 71 Ill. 430; Meyers *v.* Schemp, 67 Ill. 469; Chatterton *v.* Saul, 16 Ill. 149; Dougherty *v.* Spencer, 23 Ill. App. 357.

Indiana.— Griffin *v.* Ransdell, 71 Ind. 440.

Iowa.— Johnson *v.* Mosher, 82 Iowa 29, 47 N. W. 996.

Maine.—Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940, holding that the onus of showing the requisites necessary to effect a merger of a chattel into realty is on the one claiming a merger.

Michigan.— Robertson *v.* Corsett, 39 Mich. 777.

Minnesota.— Crookston Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

New Jersey.— Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459.

New York.— Potter *v.* Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Goddard *v.* Gould, 14 Barb. 662; Smith *v.* Benson, 1 Hill 176.

Oklahoma.— Bridges *v.* Thomas, 8 Okla. 620, 58 Pac. 955, holding that *prima facie* a building is realty and not the subject of replevin until facts appear which show that it is personalty.

Pennsylvania.— Campbell *v.* O'Neill, 64 Pa. St. 290, holding that if articles *prima facie* are personal property the court will not say without evidence that they are fixtures.

England.— Holland *v.* Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. Rep. N. S. 709, 20 Wkly. Rep. 990; Lancaster *v.* Eve, 5 C. B. N. S. 717, 5 Jur. N. S. 683, 28 L. J. C. P. 235, 7 Wkly. Rep. 260, 94 E. C. L. 717; Hobson *v.* Gorringe, [1897] 1 Ch. 182, 66 L. J. Ch. 114, 75 L. T. Rep. N. S. 610, 45 Wkly Rep. 356.

so far as to include buildings erected on the land of another. Even in this case these additions have been held to be only *prima facie* part of the realty, the presumption being rebuttable by evidence of an agreement that they were to remain personalty.[8] The early theory was that physical annexation was essential to constitute a fixture.[9] This was the test and the sole test in the earlier cases, because in those cases the question was as to whether the fixture could be taken by distraint or whether severance had constituted waste.[10] Other and later authorities held that use or purpose or adaptability was the test, and that constructive annexation followed as a consequence. In these cases generally the question was not as to severability or as to waste, but whether the fixture passed with the land.[11] In a leading American case the conclusion was reached that there is no one test, but that whether a chattel has become part of the freehold requires the united application of the following elements: (1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold — this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made;[12] and this doctrine has been repeatedly accepted by succeeding authorities.[13] Still another view is that the manner and

Canada.— Haggert *v.* Brampton, 28 Can. Sup. Ct. 174; Stack *v.* T. Eaton Co., 4 Ont. L. Rep. 335; Burke *v.* Taylor, 46 U. C. Q. B. 371.

See 23 Cent. Dig. tit. "Fixtures," § 7 *et seq.*

A building and things fastened for use in it are *prima facie* real estate, yet many circumstances are likely to intervene by which the classification of these articles coming under the head of "fixtures" may become personal property. Bemis *v.* First Nat. Bank, 63 Ark. 625, 40 S. W. 127; Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680, 25 Pac. 688; Salter *v.* Sample, 71 Ill. 430; Dooley *v.* Crist, 25 Ill. 551; Smith *v.* Benson, 1 Hill (N. Y.) 176.

As between landlord and tenant.— "If the erection is of the character which the law usually denominates a fixture, and the question is between the tenant who erected it and the landlord, the onus, I take it, would be upon the tenant, to show the agreement between him and his landlord that it was not to be considered as a fixture." Brearley *v.* Cox, 24 N. J. L. 287, 290, per Potts, J. See also Talbot *v.* Cruger, 151 N. Y. 117, 45 N. E. 364. But *compare* Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452. That a house is a trade fixture rebuts the presumption that it is realty. Thompson Scenic R. Co. *v.* Young, 90 Md. 278, 44 Atl. 1024. Rights of landlord and tenant as to fixtures see *infra*, V, G, 2.

As between vendor and purchaser the general rule is that what is annexed to realty is part thereof unless the claimant can show that he is within some exception to the rule. King *v.* Johnson, 7 Gray (Mass.) 239. But *compare* Hunt *v.* Mullanphy, 1 Mo. 508, 14 Am. Dec. 300. Rights of vendor and purchaser as to fixtures see *infra*, V, D.

Intent.— It has been said a chattel will remain personalty, although annexed in fact, if there is doubt as to the intention. It is for the one who claims that it is realty to show by clear and positive acts, circumstances and evidence that it is changed from personalty to realty. Hill *v.* Wentworth, 28 Vt. 428. But *compare* Johnson *v.* Mosher, 82 Iowa 29, 47 N. W. 996. Intention as affecting character of property see *infra*, II, C.

8. Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195; Smith *v.* Benson, 1 Hill (N. Y.) 176.

Agreement as to fixtures see *infra*, III.

Rights as between landowner and stranger see *infra*, V, A.

9. Walker *v.* Sherman, 20 Wend. (N. Y.) 636; Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634; Amos & F. Fixt. 2.

Actual annexation see *infra*, II, B, 2.

Constructive annexation see *infra*, II, B, 3.

10. See 5 Bacon Abr. Waste (C) 6; 2 Bacon Abr. Distr. (B); 2 Rolle Abr. Waste (*Quel act serra wast; Choses annex al Franktenement*); 1 Rolle Abr. Distr. (H); 88 Viner Abr. 446, Waste (F); 9 Viner Abr. 140, Distr. (H) 44–46.

Distraint of fixtures see *infra*, IX, I.

Severance as waste see WASTE.

11. See for instance Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201; and cases cited *infra*, II, B, 3.

Adaptability of chattel to realty see *infra*, II, B, 2, f.

12. Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

13. *Arkansas.*— Bemis *v.* First Nat. Bank, 63 Ark. 625, 40 S. W. 127, 13 L. R. A. 680.

Illinois.— Hacker *v.* Munroe, 176 Ill. 384, 52 N. E. 12 [*affirming* 61 Ill. App. 420].

Indiana.— Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

extent of physical annexation is an uncertain and unsatisfactory criterion, and that special prominence should be given to the intention of the party making the annexation.[14] In referring to the elements of the test of what is a fixture some courts say that all should be united, that they should not be alternative but concurrent.[15] Again, alone or in connection with tests already referred to, we find the more general proposition affirmed that whether an article is a fixture or part of the realty is a question of fact to be determined from a consideration of all the facts and circumstances.[16] It is a mixed question of law and fact whether a chattel has become part of the realty.[17] It is submitted that from a consideration of the cases no more specific formula is possible. It is the effort to compress the tests of whether there has been such annexation as will change the status of the thing in question into a compact and specific formula that has rendered inevitable the contradictions in the decisions.[18] In view of the difficulties of discovering a gen-

Iowa.— Thompson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780.

Kansas.— Dodge City Water, etc., Co. *v.* Alfalfa Land, etc., Co., 64 Kan. 247, 67 Pac. 462.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

New Jersey.— Brearley *v.* Cox, 24 N. J. L. 287.

New York.— Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489; Fitzgerald *v.* Atlanta Home Ins. Co., 61 N. Y. App. Div. 350, 70 N. Y. Suppl. 552.

See 23 Cent. Dig. tit. "Fixtures," §§ 3, 4, 8 *et seq.*

14. Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940; Readfield Telephone, etc., Co. *v.* Cyr, 95 Me. 287, 49 Atl. 1047.

15. Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; Ottumwa Woolen Mill *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719; Hillebrand *v.* Nelson, 1 Nebr. (Unoff.) 783, 95 N. W. 1068; Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212; Knickerbocker Trust Co. *v.* Penn. Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459; Gunderson *v.* Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860.

16. *Connecticut.*— Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86; Capen *v.* Peckham, 35 Conn. 88.

Illinois.— Crerar *v.* Daniels, 209 Ill. 296, 70 N. E. 569 [*affirming* 109 Ill. App. 654].

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

New Jersey.— Holmes *v.* Standard Pub. Co., (Ch. 1903) 55 Atl. 1107.

Texas.— Copp *v.* Swift, (Civ. App. 1894) 26 S. W. 438.

England.— Leigh *v.* Taylor, [1902] A. C. 157, 71 L. J. Ch. 272, 86 L. T. Rep. N. S. 239, 50 Wkly. Rep. 623.

17. *Alabama.*— Nelson *v.* Howison, 122 Ala. 573, 25 So. 211; Capital City Ins. Co. *v.* Caldwell, 95 Ala. 77, 10 So. 355; Gresham *v.* Taylor, 51 Ala. 505.

Indiana.— McFarlane *v.* Foley, 27 Ind. App. 848, 60 N. E. 357, 87 Am. St. Rep. 264.

Massachusetts.—Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249.

Michigan.— Scudder *v.* Anderson, 54 Mich. 122, 19 N. W. 775.

Minnesota.— Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

Missouri.— Elliott *v.* Black, 45 Mo. 372; Grand Lodge of Masons *v.* Know, 27 Mo. 315; Goodin *v.* Elleardsville Hall Assoc., 5 Mo. App. 289.

Nebraska.— Insurance Co. of North America *v.* Buckstaff, 3 Nebr. (Unoff.) 632, 92 N. W. 755.

New Hampshire.— Kent *v.* Brown, 59 N. H. 236.

New Jersey.— Pope *v.* Skinkle, 45 N. J. L. 39; Van Keuren *v.* New Jersey Cent. R. Co., 38 N. J. L. 165.

New York.— Martin *v.* Cope, 28 N. Y. 180; Seobell *v.* Block, 82 Hun 223, 31 N. Y. Suppl. 975; Hovey *v.* Smith, 1 Barb. 372.

Pennsylvania.— Harmony Bldg. Assoc. *v.* Berger, 99 Pa. St. 320; Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452; Campbell *v.* O'Neill, 64 Pa. St. 290.

Virginia.— Tunis Lumber Co. *v.* R. G. Dennis Lumber Co., 97 Va. 682, 34 S. E. 613.

Washington.—Philadelphia Mortg., etc., Co. *v.* Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

United States.—Murray *v.* Bender, 125 Fed. 705, 60 C. C. A. 473, 63 L. R. A. 783; New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

Question for jury.— If the evidence is controverted as to annexation, whether a thing is affixed is for the jury. Leonard *v.* Stickney, 131 Mass. 541; Allen *v.* Mooney, 130 Mass. 155. See also *infra*, II, C, 1.

Question for court.— Whether a building is real or personal has been said to be a question of law. Bridges *v.* Thomas, 8 Okla. 620, 58 Pac. 955. And see Barnes *v.* Burt, 38 Conn. 541; Jennings *v.* Vahey, 183 Mass. 47, 66 N. E. 598, 97 Am. St. Rep. 409; Maguire *v.* Park, 140 Mass. 21, 1 N. E. 750.

Intention as question of fact or of mixed law and fact see *infra*, II, C, 1.

18. The efforts to formulate the test of what shall constitute annexation generally take the form given in Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634, or a variation

eral test of what is such an annexation as will change a chattel into realty, the simplest plan is to start with the proposition that whatever is attached to realty only by weight or juxtaposition is presumed to be personalty, and that whatever is attached to the realty in fact, although only slightly, is presumed to be realty,[19] and to inquire what facts may be shown to rebut these presumptions. These facts relate to two principal matters, viz., the act of annexation, and the parties concerned. The former concerns the degree of annexation,[20] the adaptability of the article to the realty,[21] and the intention with which the annexation was done.[22] The latter concerns the relation of the interested parties to the realty and to the chattel.[23]

B. Kinds — 1. In General. Annexation may be by the use of some material or device the effect of which is to secure the article immovably,[24] or if movable, to restrict motion within definite limits.[25] Such annexation is called actual, and may be by any material external to, or independent of, the article itself, as nails, cement, or chains, or by some device which is a substitute for such material.[26] The civil law allows movable property to be made immovable by destination.[27] Corresponding to this is the annexation by intention of the recent common law. Where such annexation is allowed it is sufficient that the owner intends to make the chattel a part of the realty. It is not necessary to use force; it is enough to exercise the will; if this is duly manifested the article is dedicated to the realty, and its status as personalty has ceased. These two methods of annexation are sometimes called actual and constructive annexation. The former is accomplished by some physical act, the latter by the mind alone; but it is obvious that in either case the article is annexed to the realty by the will of the owner; in the one case his will being manifested by the physical act, in the other by his power of restraint. The earlier common law dealt only with such physical act of annexation as was readily cognizable; such act must have so affixed the chattel that severance would impair it and the freehold.[28] It is not easy to draw the line between

on that form in which the elements are (1) actual annexation, (2) adaptability to the uses of the realty, and (3) intention to annex permanently, as in Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940. Sometimes a test is found in (1) the nature and character of the act by which the fixture is put in place, (2) the policy of the law, (3) the intention of those concerned, as in Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28. In the leading English case it is said that what constitutes an annexation sufficient to make the chattel part of the realty must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz, the degree of annexation and the object of annexation. Holland *v.* Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. Rep. N. S. 709, 20 Wkly. Rep. 990. This was somewhat qualified in Norton *v.* Dashwood, [1896] 2 Ch. 497, 65 L. J. Ch. 737, 75 L. T. Rep. N. S. 205, 44 Wkly. Rep. 680, where the elements were said to be (1) mode and extent of annexation, (2) whether for temporary or permanent improvement, and (3) effect of removal upon the freehold. This element of injury to the freehold on severance is included in McFarlane *v.* Foley, 27 Ind. App. 484, 60 N. E. 357; Cook *v.* Condon, 6 Kan. App. 574, 51 Pac. 587; Weathersby *v.* Sleeper, 42 Miss. 732; Richardson *v.* Borden, 42 Miss. 71, 2 Am. Rep. 595; Andrews *v.* Powers, 66 N. Y. App. Div. 216, 72 N. Y. Suppl. 597. In some of the foregoing cases these elements are said to show the intention with which the annexation is made and not to be tests of annexation itself.

19. See cases cited *supra*, note 7.

20. See *infra*, II, B.

21. See *infra*, II, B, 2, f.

22. See *infra*, II, C.

23. See *infra*, V.

24. Bedford-Bowling Green Stone Co. *v.* Oman, 115 Ky. 369, 73 S. W. 1038, 24 Ky. L. Rep. 2274 (railroad track); Towne *v.* Fiske, 127 Mass. 125, 34 Am. Rep. 353 (gas-fixture).

25. Titus *v.* Mabee, 25 Ill. 257 (railroad car on owner's road); Friedley *v.* Giddings, 119 Fed. 438 [*affirmed* in 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327] (main belt of engine).

26. See *infra*, II, B, 2.

27. Thus slaves are considered immovables by operation of law, and are annexed to the land of their owner. So also are cattle intended for cultivating land, and the implements of husbandry placed on land by the owner, for its service and improvement. See La. Civ. Code, arts. 463, 468.

28. *Connecticut.*— Swift *v.* Thompson, 9 Conn. 63, 21 Am. Dec. 718.

Georgia.— Wade *v.* Johnson, 25 Ga. 331.

Illinois.— Ellison *v.* Salem Coal, etc., Co., 43 Ill. App. 120.

Missouri.— Lacey *v.* Giboney, 36 Mo. 320, 88 Am. Dec. 145.

Nevada.— Brown *v.* Lillie, 6 Nev. 244.

actual and constructive annexation, but at their extremes the former is chiefly physical, the latter is chiefly mental.[29]

2. ACTUAL ANNEXATION — a. How Far Degree Is Important. To answer the test of actual annexation alone the degree of annexation is not important.[30] The importance of the degree of annexation is the light it throws on other facts in the case, all which are to be regarded in determining whether the status of the fixture is realty or personalty.[31] However, actual annexation may be carried to such an extent that the article may become so far incorporated with the realty as to be incapable of severance as a matter of law.[32]

b. Annexation by Weight. Mere weight is not sufficient to make a chattel part of the realty, although resting on a surface prepared for it;[33] but weight,

South Carolina.— Montague *v.* Dent, 10 Rich. 135, 67 Am. Dec. 572.

Vermont.— Hill *v.* Wentworth, 28 Vt. 428; Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353; Sturgis *v.* Warren, 11 Vt. 433.

See 23 Cent. Dig. tit. "Fixtures," § 8 *et seq.*

29. Whether or not a chattel is a fixture may, as determined by the practices and tastes of the present, be quite otherwise than in the time of early decisions on fixtures. Formerly when glass was a luxury it required litigation to decide whether it was a removable fixture. See Herlakenden's Case, 4 Coke 62*a*. To-day the construction of wooden mantels by machinery fitted for any house and kept in stock for sale to any one makes them more liable to be removable fixtures. Philadelphia Mortg., etc., Co. *v.* Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559. And see Oliver *v.* Lansing, 59 Nebr. 219, 80 N. W. 829; Leigh *v.* Taylor, [1902] A. C. 157, 71 L. J. Ch. 272, 86 L. T. Rep. N. S. 239, 50 Wkly. Rep. 623; Bishop *v.* Elliott, 11 Exch. 113, 1 Jur. N. S. 662, 24 L. J. Exch. 229, 3 Wkly. Rep. 454.

30. Atlantic Safe Deposit, etc., Co. *v.* Atlantic Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212.

31. Strickland *v.* Parker, 54 Me. 263; Atlantic Safe Deposit, etc., Co. *v.* Atlantic Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212. And see Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249; Guthrie *v.* Jones, 108 Mass. 191; Winslow *v.* Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368.

Slight annexation will be sufficient to make an article realty as between vendor and vendee or mortgagor and mortgagee. Bain *v.* Brand, 1 App. Cas. 762; Haggert *v.* Brampton, 28 Can. Sup. Ct. 174; Argles *v.* McMath, 26 Ont. 224; Stack *v.* T. Eaton Co., 4 Ont. L. Rep. 335.

32. Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459, 20 L. ed. 199.

33. *California.*—Pennybecker *v.* McDougal, 48 Cal. 160.

Colorado.—Royce *v.* Latshaw, 15 Colo. App. 420, 62 Pac. 627.

Connecticut.— Capen *v.* Peckham, 35 Conn. 88.

District of Columbia.— Robinson *v.* Wright, 2 MacArthur 54.

Hawaii.— Adams *v.* Kauwa, 6 Hawaii 280.

Illinois.— Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314; Cook *v.* Whiting, 16 Ill. 480.

Indiana.— Taffe *v.* Warnick, 3 Blackf. 111, 26 Am. Dec. 383.

Iowa.— Dubuque Cong. Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511.

Kansas.— Eaves *v.* Estes, 10 Kan. 314, 15 Am. Rep. 345.

Maine.— Blethen *v.* Towle, 40 Me. 310.

Maryland.— Thompson Scenic R. Co. *v.* Young, 90 Md. 278, 44 Atl. 1024; Carlin *v.* Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467.

Massachusetts.— O'Donnell *v.* Hitchcock, 118 Mass. 401; Pierce *v.* George, 108 Mass. 78, 11 Am. Rep. 310.

Minnesota.— Wolford *v.* Baxter, 33 Minn. 12, 21 N. W. 744, 53 Am. Rep. 1.

Nevada.— Brown *v.* Lillie, 6 Nev. 244.

New Jersey.— Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395.

New York.— Walker *v.* Sherman, 20 Wend. 636.

Washington.— Page *v.* Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924.

England.—Wansbrough *v.* Maton, 4 A. & E. 884, 2 H. & W. 37, 4 L. J. K. B. 154, 5 L. J. K. B. 150, 6 N. & M. 367, 31 E. C. L. 386; Rex *v.* Otley, 1 B. & Ad. 161, 9 L. J. M. C. O. S. 11, 20 E. C. L. 438; Horn *v.* Baker, 9 East 215, 9 Rev. Rep. 641; Wiltshear *v.* Cottrell, 1 E. & B. 674, 17 Jur. 758, 22 L. J. Q. B. 177, 72 E. C. L. 674; Ward's Case, 4 Leon. 241; Rex *v.* Londonthorpe, 6 T. R. 377.

See 23 Cent. Dig. tit. "Fixtures," § 8 *et seq.*

Weight does not alone rebut the presumption that the article is personal property if it is otherwise unattached. De Lacy *v.* Tillman, 83 Ala. 155, 3 So. 294; Tillman *v.* De Lacy, 80 Ala. 103.

Where a machine was so heavy as to require posts to support the floor below it, it was held annexed to the realty so as to pass by a mortgage of the realty, but not other heavy machines. Shepard *v.* Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431.

Soil removed from one part of land to another remains realty. Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Fertilizer Co., 82 N. Y. 476.

together with the fact that the structure was erected or added by the owner, may result in annexation where it would not if erected by a tenant or a stranger.[34]

c. Annexation to Gain Steadiness. A machine may be annexed to realty merely to keep it steady, as a mechanical necessity, if it is to be used at all, and not with reference to the realty. It is possible in such case that there is no intention on the part of the owner; the setting up of the machine in one way or another being due to the opinion of the expert employed. The English courts hold that annexing merely to keep a machine steady will make it subject to a mortgage of the realty.[35] Before the law was finally settled in England, the case of Hellawell v. Eastwood[36] was thought to sustain the view that annexation merely to steady a machine did not make it part of the realty. This case had some influence on American authorities, and as a general rule they agree that such annexation is not sufficient to make the article affixed a part of the realty, although the machine is connected with shafting by belts, if otherwise it is readily removable.[37]

d. Inclosing. The weight of authority seems to be that merely inclosing a

A stone quarried by a trespasser, sold to a landowner, and by him laid for a walk, is part of the realty. Jackson *v.* Walton, 28 Vt. 43.

34. Wiltshear *v.* Cottrell, 1 E. & B. 674, 17 Jur. 758, 22 L. J. Q. B. 177, 72 E. C. L. 674; Miles *v.* Ankatell, 25 Ont. App. 458 [*reversing* 29 Ont. 21]. In Phillips *v.* Grand River Farmers' Mut. F. Ins. Co., 46 U. C. Q. B. 334, where a building was erected by the mortgagor, the court were divided on this question.

Illustrations. — A heavy statue erected by the owner on his premises, being designed for permanent ornament, was held to be part of the realty and subject to a mortgage thereof (Snedeker *v.* Warring, 12 N. Y. 170. But *compare* Pfluger *v.* Carmichael, 54 N. Y. App. Div. 153, 66 N. Y. Suppl. 417), as were fire grates, part of a complete house (Monti *v.* Barnes, [1901] 1 K. B. 205, 70 L. J. K. B. 225, 83 L. T. Rep. N. S. 619, 49 Wkly. Rep. 147).

Weight with slight physical annexation may serve to make the fixture part of the realty. Green *v.* Chicago, etc., R. Co., 8 Kan. App. 611, 56 Pac. 136; Gunderson *v.* Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860; Bain *v.* Brand, 1 App. Cas. 762; Haggert *v.* Brampton, 28 Can. Sup. Ct. 174; Argles *v.* McMath, 26 Ont. 224; Stack *v.* T. Eaton Co., 4 One. L. Rep. 335.

35. Reynolds *v.* Ashby, [1903] 1 K. B. 87, 72 L. J. K. B. 51, 87 L. T. Rep. N. S. 640, 51 Wkly. Rep. 405; Longbottom *v.* Berry, L. R. 5 Q. B. 123, 10 B. & S. 852, 39 L. J. Q. B. 37, 22 L. T. Rep. N. S. 385; Hobson *v.* Gorringe, [1897] 1 Ch. 182, 66 L. J. Ch. 114, 75 L. T. Rep. N. S. 610, 45 Wkly. Rep. 356; Holland *v.* Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. Rep. N. S. 709, 20 Wkly. Rep. 990; Climie *v.* Wood, L. R. 4 Exch. 328, 38 L. J. Exch. 223, 20 L. T. Rep. N. S. 1012; Walmsley *v.* Milne, 7 C. B. N. S. 115, 6 Jur. N. S. 125, 29 L. J. C. P. 97, 1 L. T. Rep. N. S. 62, 8 Wkly. Rep. 138, 97 E. C. L. 115.

36. Hellawell *v.* Eastwood, 6 Exch. 295, 20 L. J. Exch. 154.

37. *Connecticut.*— Capen *v.* Peckham, 35 Conn. 88; Swift *v.* Thompson, 9 Conn. 63, 21 Am. Dec. 718.

Massachusetts.— Wentworth *v.* S. A. Woods Mach. Co., 163 Mass. 28, 39 N. E. 414; Cooper *v.* Johnson, 143 Mass. 108, 9 N. E. 33; Carpenter *v.* Walker, 140 Mass. 416, 5 N. E. 160; Hubbell *v.* East Cambridge Five Cents Sav. Bank, 132 Mass. 447, 43 Am. Rep. 446; McConnell *v.* Blood, 123 Mass. 47, 25 Am. Rep. 12.

New Jersey.— Crane Iron Works *v.* Wilkes, 64 N. J. L. 193, 45 Atl. 1033; Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry, 64 N. J. Eq. 140, 53 Atl. 212; Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459; Keeler *v.* Keeler, 31 N. J. Eq. 181; Blancke *v.* Rogers, 26 N. J. Eq. 563; Keve *v.* Paxton, 26 N. J. Eq. 107. But *compare* Lee *v.* Hubschmidt Bldg., etc., Co., 55 N. J. Eq. 623, 37 Atl. 769.

New York.— McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489 [*reversing* 50 How. Pr. 51]; Voorhees *v.* McGinnis, 48 N. Y. 278 [*reversing* 46 Barb. 242]; Murdock *v.* Gifford, 18 N. Y. 28 [*reversing* 20 Barb. 407].

Ohio.— Teaff *v.* Hewitt, 1 Ohio St. 511, 59 Am. Dec. 634.

Oregon.— Honeyman *v.* Thomas, 25 Oreg. 539, 36 Pac. 636.

Vermont.— Kendall *v.* Hathaway, 67 Vt. 122, 30 Atl. 859; Sweetzer *v.* Jones, 35 Vt. 317, 82 Am. Dec. 639; Harris *v.* Haynes, 34 Vt. 220; Bartlett *v.* Wood, 32 Vt. 372; Fullam *v.* Stearns, 30 Vt. 443; Hill *v.* Wentworth, 28 Vt. 428.

Washington.— Neufelder *v.* Third St., etc., R. Co., 23 Wash. 470, 63 Pac. 197, 83 Am. St. Rep. 831, 53 L. R. A. 600.

Canada.— Schreiber *v.* Malcolm, 8 Grant Ch. (U. C.) 433; McDonald *v.* Weeks, 8 Grant Ch. (U. C.) 297. The rule is otherwise in Manitoba, unless the machine is steadied merely by cleats. Sun L. Assur. Co. *v.* Taylor, 9 Manitoba 89. See Stack *v.* T. Eaton Co., 4 Ont. L. Rep. 335 (where shelving attached to a building merely to steady it was held to be part of the realty); McCausland *v.* McCallum, 3 Ont. 305 (where counters attached to a building for steadiness were held to be part of the realty).

chattel in a building, through the entrance to which the chattel can be removed only in pieces, or which will have to be destroyed, or in which an opening must be made before the chattel can be removed from the premises, or inclosing an article, as an iron safe, in brick or iron, does not necessarily amount to annexation, even between vendor and purchaser or mortgagor and mortgagee.[38]

e. Connection With Motive Power. That a machine is connected with the motive power by a belt does not of itself constitute annexation.[39]

f. Adaptability of Chattel to Realty. A chattel is adapted to the realty when it is fitted to promote the ends for which the realty is used.[40] Adaptability does not imply immovability. It is consistent with movability or immovability. It only requires localization in use.[41] The common law required actual attachment to work a change in status, although the article was adapted to the realty. That is the modern rule in several jurisdictions,[42] but in a number of jurisdictions

See 23 Cent. Dig. tit. "Fixtures, § 12. See also *infra*, V, E.

Contra.— Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719 (apparently on the theory of constructive annexation under the facts of the case); Langdon *v.* Buchanan, 62 N. H. 657; Cavis *v.* Beckford, 62 N. H. 229, 13 Am. St. Rep. 554.

Annexation with screws or the like to keep steady, combined with other motives, may make a machine a fixture. Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489 [*reversing* 50 How. Pr. 51].

38. *Iowa.*— Dostal *v.* McCaddon, 35 Iowa 318.

Massachusetts.— Carpenter *v.* Walker, 140 Mass. 416, 5 N. E. 160; Park *v.* Baker, 7 Allen 78, 83 Am. Dec. 668; Gale *v.* Ward, 14 Mass. 352, 7 Am. Dec. 223.

Michigan.— Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899.

Missouri.— Hunt *v.* Mullanphy, 1 Mo. 508, 14 Am. Dec. 300.

New York.— Sisson *v.* Hibbard, 75 N. Y. 542 [*affirming* 10 Hun 420]; Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537; Ford *v.* Cobb, 20 N. Y. 344; Duntz *v.* Granger Brewing Co., 41 Misc. 177, 83 N. Y. Suppl. 957.

Pennsylvania.— Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Lemar *v.* Miles, 4 Watts 330.

Texas.— Moody *v.* Aiken, 50 Tex. 65.

See 23 Cent. Dig. tit. "Fixtures," § 12, 13.

However, an engine used in a building, and which cannot be removed without taking down part of the building, is a fixture. Despatch Packet Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203; Fryatt *v.* Sullivan Co., 5 Hill (N. Y.) 116 [*affirmed* in 7 Hill 529]. So too are articles placed in the inclosing building with the intention to have them remain, and too large to remove through any existing opening. Equitable Trust Co. *v.* Christ, 47 Fed. 756. In Louisiana an inclosed safe is an immovable by destination. Folger *v.* Kenner, 24 La. Ann. 436.

39. *Massachusetts.*—Smith *v.* Whitney, 147 Mass. 479, 18 N. E. 229; Carpenter *v.* Walker, 140 Mass. 416, 5 N. E. 160; Holbrook *v.* Chamberlain, 116 Mass. 155, 17 Am. Rep. 146; Pierce *v.* George, 108 Mass. 78, 11 Am. Rep. 310; Gale *v.* Ward, 14 Mass. 352, 7 Am. Dec. 223.

Minnesota.— Shepard *v.* Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431.

New Jersey.— Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212; Rogers *v.* Brokaw, 25 N. J. Eq. 496.

New York.— Farrar *v.* Chauffetete, 5 Den. 527.

North Carolina.— Latham *v.* Blakely, 70 N. C. 368.

Ohio.— Hyman *v.* Gordon, Ohio Prob. 189.

Vermont.— Tobias *v.* Francis, 3 Vt. 425, 23 Am. Dec. 217.

See 23 Cent. Dig. tit. "Fixtures," §§ 12, 13.

On the other hand it has been held that the belt is part of the realty. Giddings *v.* Freedley, 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327 [*affirming* 119 Fed. 438].

40. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311 (a car on its track); Fitzgerald *v.* Atlantic Home Ins. Co., 61 N. Y. App. Div. 350, 70 N. Y. Suppl. 552 (casks and bottles in a brewery); New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229 (a sign on a place of business).

41. See cases cited *supra*, II, B, 2, f.

42. *Alabama.*— Rogers *v.* Prattville Mfg. Co., 81 Ala. 483, 1 So. 643, 60 Am. Rep. 171.

Kentucky.— Griffin *v.* Jansen, 39 S. W. 43, 19 Ky. L. Rep. 19.

Massachusetts.— Southbridge Sav. Bank *v.* Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; Hubbell *v.* East Cambridge Five Cents Sav. Bank, 132 Mass. 447, 43 Am. Rep. 446; Southbridge Sav. Bank *v.* Exeter Mach. Works, 127 Mass. 542; McConnell *v.* Blood, 123 Mass. 47, 25 Am. Rep. 12; Park *v.* Baker, 7 Allen 78, 83 Am. Dec. 668.

Minnesota.— Wolford *v.* Baxter, 33 Minn. 12, 27 N. W. 744, 53 Am. Rep. 1.

New Jersey.— Feder *v.* Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; Keeler *v.* Keeler, 31 N. J. Eq. 181; Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

adaptability without actual annexation is sufficient to occasion constructive annexation.[43] Adaptability with other circumstances may cause annexation; it is one of the circumstances to be regarded in determining whether what seems to be personalty is realty or *vice versa*.[44] Adaptability may be divided into general and special adaptability. The former applies to articles fitted for use on all realty devoted to like purposes. They usually can be bought in the market and are adapted to general use. The latter applies to articles specially designed and created for the realty where they are to be used. Some cases emphasize this distinction, according little or no weight to general adaptability, and much weight to special adaptability.[45]

3. Constructive Annexation — a. How Accomplished. Constructive annexation occurs: (1) Wherever actual annexation has ceased; (2) in some cases before actual annexation is made but is in fact intended; and (3) where no actual annexation is intended, but there is an intention to devote the chattel to the uses of the realty, and the chattel is indispensable to promote those uses.[46]

b. After Severance. It was decided in Wistow's case[47] that a millstone

Texas.— Cole *v.* Roach, 37 Tex. 413.

Vermont.— Peck *v.* Batchelder, 40 Vt. 233, 94 Am. Dec. 392; Harris *v.* Haynes, 34 Vt. 220.

Wisconsin.— Gunderson *v.* Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860.

See 23 Cent. Dig. tit. "Fixtures," § 8 *et seq.*

43. Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201, the leading case. This was a case of trover for a mill chain, dogs and bars, claimed under a deed conveying a sawmill with the privileges and appurtenances. The chain was in its appropriate place when the deed was delivered, and was attached by a hook to a piece of draft chain attached to the machinery. It was decided that the chain was an essential part of the sawmill and passed by the deed as part of the described premises. Succeeding cases added the idea of constructive annexation taken from Liford's Case, 11 Coke 46*b*, 50*b*. "And it is resolved in 14 Hen. 8, 25*b*, in Wistow's Case of Gray's Inn, that if a man has a horse-mill, and the miller takes the millstone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill, as if it had always been lying upon the other stone, and by consequence by the lease or conveyance of the mill it shall pass with it; so of doors, windows, rings, &c. The same law of keys; although they are distinct things." This was notably so in Pennsylvania. Pyle *v.* Pennock, 2 Watts & S. 390, 37 Am. Dec. 517; Voorhis *v.* Freeman, 2 Watts & S. 116, 37 Am. Dec. 490. It may be said of Farrar *v.* Stackpole, *supra*, that the chain would have passed by the deed irrespective of annexation, being within the contemplation of the parties, and that the millstone in Wistow's Case, *supra*, was realty temporarily severed, and that it has no application to the case of personalty not yet affixed. But the Pennsylvania decisions, *supra*, rest on the theory of annexation where a chattel is fitted for use on realty, and deny the necessity of physical annexation, if it is indispensable to completing the realty for the purpose for which it is used. See further as to the Pennsylvania rule *infra*, II, B, 3, d.

44. *Iowa.*— Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780.

Kentucky.— Hill *v.* Mundy, 89 Ky. 36, 11 S. W. 956, 11 Ky. L. Rep. 248, 4 L. R. A. 674.

Minnesota.— Farmers' L. & T. Co. *v.* Minneapolis Engine, etc., Works, 35 Minn. 543, 29 N. W. 349.

New York.— Potter *v.* Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Andrews *v.* Powers, 66 N. Y. App. Div. 216, 72 N. Y. Suppl. 597; New York Security, etc., Co. *v.* Saratoga Gas, etc., Light Co., 88 Hun 569, 34 N. Y. Suppl. 890 [*affirmed* in 157 N. Y. 689, 51 N. E. 1092]; Berliner *v.* Piqua Club Assoc., 32 Miss. 470, 66 N. Y. Suppl. 791.

Wisconsin.— Mueller *v.* Chicago, etc., R. Co., 111 Wis. 300, 87 N. W. 239; Gunderson *v.* Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860.

United States.— New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

See 23 Cent. Dig. tit. "Fixtures," § 8 *et seq.*

45. Oliver *v.* Lansing, 59 Nebr. 219, 80 N. W. 829; Penn Mut. L. Ins. Co. *v.* Semple, 38 N. J. Eq. 575; Blancke *v.* Rogers, 26 N. J. Eq. 563; Fitzgerald *v.* Atlanta Home Ins. Co., 61 N. Y. App. Div. 350, 70 N. Y. Suppl. 552; Murray *v.* Bender, 125 Fed. 705, 60 C. C. A. 473, 63 L. R. A. 783; Bender *v.* King, 111 Fed. 60; New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

On the other hand general adaptability, coupled with the fact that the articles were placed in the building by the owner to carry out the purposes for which the building was adapted and permanently to increase its value, has been held sufficient to make such articles fixtures. Knickerbocker Trust Co. *v.* Penn Cordage Co., (N. J. Err. & App. 1904) 58 Atl. 409 [*reversing* 62 N. J. Eq. 624, 50 Atl. 459].

46. See *infra*, II, B, 3, b, c, d, e.

47. 14 Hen. VIII, 25*b*. See Liford's Case, 11 Coke 50*b*; Place *v.* Fagg, 7 L. J. K. B.

removed to be repicked was still part of the realty. The owner of the realty has severed part of it, and having the option to determine the status of the part severed, it remains realty until he has exercised the option. In such case the burden of proof should be on the one claiming that the thing severed is personalty. Probably the proper use of the term "constructive annexation" is confined to this class of cases.[48] This kind of annexation is illustrated in several cases.[49]

c. Before Annexation in Fact. Following the analogy of constructive annexation after severance, but it is believed on a wrong theory, it has been held that the intention to devote a chattel to the uses of realty, accompanied with the act of bringing it on the realty, amounts to annexation.[50]

d. Parts of a Whole — (I) *Indispensable Parts.* Where realty is devoted to some purpose, articles placed upon it, when ready for use, if indispensable to effect that purpose, are part of the realty, although not physically attached.[51]

O. S. 195, 4 M. & R. 277, 280 note g, in both of which Wistow's case is translated.

48. Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

49. *Connecticut.*— Tolles *v.* Winton, 63 Conn. 440, 28 Atl. 542, engine disconnected from boiler in order to put another engine in use.

Illinois.— McLaughlin *v.* Johnson, 46 Ill. 163, rails of a fence temporarily removed.

Iowa.— Dubuque Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511, church bell in transit during a year from an old church to a new.

New Hampshire.— Burnside *v.* Twitchell, 43 N. H. 390 (saws removed from a mill for safe-keeping); Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780 (timbers removed from a mill while repairs to building were in progress).

New York.— Bishop *v.* Bishop, 11 N. Y. 123, 62 Am. Dec. 68, hop poles piled on the ground.

Canada.— Grant *v.* Wilson, 17 U. C. Q. B. 144, machinery taken out for repairs. In Alway *v.* Anderson, 5 U. C. Q. B. 34, there is a strong *dictum* to the effect that hop poles piled on the ground between seasons would be treated as chattels.

See 23 Cent. Dig. tit. "Fixtures," § 14.

Bricks made from land by the owner for sale and not to be used on the premises are movables and do not pass by a deed of the land. Key *v.* Woodfolk, 6 Rob. (La.) 424.

50. For illustrations see the following cases:

Alabama.— Thweat *v.* Stamps, 67 Ala. 96.

Illinois.— McLaughlin *v.* Johnson, 46 Ill. 163; Palmer *v.* Forbes, 23 Ill. 301.

Louisiana.— Woodruff *v.* Roberts, 4 La. Ann. 127; Nimmo *v.* Allen, 2 La. Ann. 451.

Vermont.— Hackett *v.* Amsden, 57 Vt. 432; Noble *v.* Sylvester, 42 Vt. 146; Ripley *v.* Paige, 12 Vt. 353.

West Virginia.— McFadden *v.* Crawford, 36 W. Va. 671, 15 S. E. 408, 32 Am. St. Rep. 894; Patton *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

Wisconsin.— Spruhen *v.* Stout, 52 Wis. 517, 9 N. W. 277; Cooper *v.* Cleghorn, 50 Wis. 113, 6 N. W. 491; Kruegen *v.* Pierce, 37 Wis. 269; Conklin *v.* Parsons, 2 Pinn. 264, 1 Chandl. 240.

See 23 Cent. Dig. tit. "Fixtures," § 14.

Contra.— Burnside *v.* Twitchell, 43 N. H. 390; Maxwell *v.* Willard, 1 Wkly. Notes Cas. (Pa.) 355; Cole *v.* Roach, 37 Tex. 413.

51. Stockwell *v.* Campbell, 39 Conn. 362, 12 Am. Rep. 393; Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86; Curran *v.* Smith, 37 Ill. App. 69 (holding that cars indispensable to the uses of a brick-yard are fixtures); Cooper *v.* Cleghorn, 1 Ky. L. Rep. 303; Patterson *v.* Delaware County, 70 Pa. St. 381 (holding that for purposes of taxation machinery necessary to a complete mill is realty); Christian *v.* Dripps, 28 Pa. St. 271; Pyle *v.* Pennock, 2 Watts & S. (Pa.) 390, 37 Am. Dec. 517; Voorhis *v.* Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490 (where the rule was said to be confined to questions between vendor and purchaser, heir and executor, and debtor and execution creditor, and between cotenants of the inheritance); Olympic Theatre's Case, 2 Browne (Pa.) 275. See, however, Winslow *v.* Bromich, 54 Kan. 300, 38 Pac. 275, 45 Am. St. Rep. 285 (where sugar wagons without which a sugar mill cannot be operated are held to be personalty); Dana *v.* Burke, 62 N. H. 627 (holding that the devise of a summer cottage does not include a boat used in connection therewith, not being essential to the cottage); Honeyman *v.* Thomas, 25 Oreg. 539, 36 Pac. 636 (where the rule was rejected); Sampson *v.* Graham, 96 Pa. St. 405 (holding that patterns used in a foundry, changeable in style and liable to be superseded, are not indispensable and part of the realty); Johnson *v.* Mehaffy, 43 Pa. St. 308, 82 Am. Dec. 568 (holding that articles not ready for use, although on the premises, are not within the rule).

Church organ, settees, and lighting apparatus.— An organ, resting in a recess, designed to complete the interior finish of a church, is a part of the realty, but not the unattached settees, although made to suit church needs, nor the apparatus for lighting the church. Chapman *v.* Union Mut. L. Ins. Co., 4 Ill. App. 29; Rogers *v.* Crow, 40 Mo. 91, 93 Am. Dec. 299.

Mining machinery.— In ejectment plaintiff may recover with the land all machinery, fast or loose, necessary in working a mine.

(II) *Parts of Complete Plant.* In some jurisdictions, if the realty is equipped with a complicated plant, some of which is so attached to the realty as to be part thereof and some not physically annexed, then on a transfer of the realty the entire plant is transferred, including the unattached parts, on the principle whereby an indispensable part of a machine is transferred.[52] In other jurisdictions where slight annexation does not alone make the articles annexed fixtures, on the same principle as in the foregoing cases, slightly attached articles, if part of an entire plant, designed to operate as a unit in producing some end, will pass with a transfer of the realty.[53]

C. Intention — 1. In General. The intention with which a chattel is placed upon or affixed to realty is one of the facts that may be looked to, in connection with the other circumstances, to aid in determining the status of what seems to be realty or personalty as the case may be.[54] Where there is a reasonable doubt from the manner of annexation whether the chattel has changed its status,[55] or

Morris' Appeal, 88 Pa. St. 368; Ege *v.* Kille, 84 Pa. St. 333; Hillard Live Stock Co. *v.* Amity Coal Co., 2 Lanc. L. Rev. (Pa.) 241.

Parts of a machine.— Essential parts of a machine ready for use partake of the status of the machine. Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249; *Ex p.* Astbury, L. R. 4 Ch. 630, 38 L. J. Bankr. 9, 20 L. T. Rep. N. S. 997, 17 Wkly. Rep. 997; Fisher *v.* Dixon, 12 Cl. & F. 312, 9 Jur. 883, 8 Eng. Reprint 1426. Duplicate parts are essential parts. Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. Eq. 452; Voorhis *v.* Freeman, 2 Watts & S. (Pa.) 116, 37 Am. Dec. 490; *Ex p.* Astbury, *supra.*

52. Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368 (crates for handling fruit and work tables included in a transfer of a fruit farm and canning establishment); Farmers' L. & T. Co. *v.* Minneapolis Engine, etc., Works, 35 Minn. 543, 29 N. W. 349; Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. Eq. 452; Canada Permanent Loan, etc., Co. *v.* Traders Bank, 29 Ont. 479. But see Shephard *v.* Blossom, 66 Minn. 421, 69 N. W. 221, 61 Am. St. Rep. 431; McCosh *v.* Barton, 2 Ont. L. Rep. 77 [*reversing* 1 Ont. L. Rep. 229], holding that the articles must be on the premises in order to pass.

53. *California.*— Fratt *v.* Whittier, 58 Cal. 126, 51 Am. Rep. 251.

Connecticut.— Tolles *v.* Winton, 63 Conn. 440, 28 Atl. 542; Capen *v.* Peckham, 35 Conn. 88.

Illinois.— Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166 [*affirming* 47 Ill. App. 118]; Otis *v.* May, 30 Ill. App. 581; Chapman *v.* Union Mut. L. Ins. Co., 4 Ill. App. 29, extending the principle to a church organ designed to complete the interior decoration of a church.

Iowa.— Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719.

Maine.— Pope *v.* Jackson, 65 Me. 162; Parsons *v.* Copeland, 38 Me. 537.

Maryland.— Schapen *v.* Bibb, 71 Md. 145, 17 Atl. 935 (cooking ranges and fire-place heaters in modern dwelling); Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

Massachusetts.— Turner *v.* Wentworth, 119 Mass. 459; Winslow *v.* Merchants' Ins. Co., 4 Metc. 306, 38 Am. Dec. 368.

Michigan.— Lyle *v.* Palmer, 42 Mich. 314, 3 N. W. 921.

Nevada.— Treadway *v.* Sharon, 7 Nev. 37.

New Jersey.— Temple Co. *v.* Penn Ins. Co., 69 N. J. L. 36, 54 Atl. 295; Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459; Feder *v.* Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628. See also Knickerbocker Trust Co. *v.* Penn Cordage Co., 65 N. J. Eq. 181, 55 Atl. 231 [*reversed* and *affirmed* in part in (Err. & App. 1904) 58 Atl. 409].

Vermont.— Sweetzer *v.* Jones, 35 Vt. 317, 82 Am. Dec. 639; Harris *v.* Haynes, 34 Vt. 220.

Virginia.— Shelton *v.* Ficklin, 32 Gratt. 727; Green *v.* Phillips, 26 Gratt. 752, 21 Am. Rep. 323.

Wisconsin.— Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22.

United States.— Hill *v.* Farmers, etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051; Giddings *v.* Freedley, 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327 [*affirming* 119 Fed. 438]; Equitable Trust Co. *v.* Christ, 47 Fed. 756.

See 23 Cent. Dig. tit. "Fixtures," § 14.

The descriptive words contained in the conveyance were given great weight in determining the foregoing cases and those cited *supra*, note 52. See also *infra*, V, E, 1.

Drawing the line at the belt.— In some of the foregoing cases it was urged that if the power is furnished from fixtures and is transmitted to shafting and then by belts to machines slightly or only by weight annexed, then the dividing line between realty and personalty is at the belt, but this view was not adopted (Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22), except in Canada (Haggert *v.* Brampton, 28 Can. Sup. Ct. 174; Sun L. Assur. Co. *v.* Taylor, 9 Manitoba 89; Canada Permanent Loan, etc., Co. *v.* Merchants' Bank, 3 Manitoba 285).

54. See cases cited *infra*, note 54 *et seq.*

55. Kelly *v.* Austin, 46 Ill. 156, 92 Am. Dec. 243; Crerar *v.* Daniels, 109 Ill. App. 654 [*affirmed* in 209 Ill. 296, 70 N. E. 569]; Chapman *v.* Union Mut. L. Ins. Co., 4 Ill.

where there are conflicting claims thereto,[56] the intention with which it was put in place is of importance. Indeed it is sometimes said that the intent of the party annexing an article to the freehold is the most important criterion of its character as a fixture, and other circumstances or facts are valuable chiefly as evidence of such intention.[57] This controlling intention is not the initial intention at the time of procuring the article in question,[58] nor that which exists while it is in transit to the realty on which it is to be placed,[59] nor the secret intention with which it is affixed,[60] but the intention which the law deduces from all the circumstances of the annexation.[61] The intention is said to be immaterial where the

App. 29; Eaves *v.* Estes, 10 Kan. 314, 15 Am. Rep. 345; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489.

56. See cases cited *infra*, this note. And see *infra*, V.

As between grantor and grantee see Hutchins *v.* Masterson, 46 Tex. 551, 26 Am. Rep. 286.

As between vendor and purchaser see Salter *v.* Sample, 71 Ill. 430; Smith *v.* Moore, 26 Ill. 392; Ellison *v.* Salem Coal, etc., Co., 43 Ill. App. 120; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22.

As between mortgagor and mortgagee see Arnold *v.* Crowder, 81 Ill. 56, 25 Am. Rep. 260; Otis *v.* May, 30 Ill. App. 581; Johnson *v.* Mosher, 82 Iowa 29, 47 N. W. 996; Southbridge Sav. Bank *v.* Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; Hill *v.* Farmers, etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051.

As between mortgagor's creditors and mortgagee see McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489.

As between conditional vendor or mortgagee of chattel and mortgagee of realty see Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166; Sword *v.* Low, 122 Ill. 487, 13 N. E. 826.

As between landowner and execution creditor see Roseville Alta Min. Co. *v.* Iowa Gulch Min. Co., 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 573.

As between tenant in common and cotenant claiming the annexation to be part of their land see Parsons *v.* Copeland, 38 Me. 537.

As between one building a house by mistake on land of another who claims the house see Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340.

57. *Georgia.*— Smith *v.* Odom, 63 Ga. 499.

Illinois.— Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725 [*reversing* 61 Ill. App. 168]; Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166 [*affirming* 47 Ill. App. 118]; Hewitt *v.* Watertown Steam Engine Co., 65 Ill. App. 153; Otis *v.* May, 30 Ill. App. 581; Jones *v.* Ramsey, 3 Ill. App. 303.

Indiana.— Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 65 Am. St. Rep. 340.

Iowa.— Ottumwa Woolen Mill Co. *v.* Hawley, 44 Iowa 57, 24 Am. Rep. 719.

Michigan.— Lake Superior Ship Canal, etc., Co. *v.* McCann, 86 Mich. 106, 48 N. W. 692; Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 890.

New Jersey.—Erdman *v.* Moore, 58 N. J. L. 445, 33 Atl. 958.

New York.— McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489; Potter *v.* Cromwell, 40 N. Y. 287, 100 Am. Dec. 485; Phœnix Mills *v.* Miller, 4 N. Y. St. 787.

Pennsylvania.— Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138, 19 Am. St. Rep. 598; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206, 19 Atl. 844.

See 23 Cent. Dig. tit. "Fixtures," § 3.

58. Carkin *v.* Babbitt, 58 N. H. 579.

59. Carkin *v.* Babbitt, 58 N. H. 579; Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

60. *Colorado.*— Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

Georgia.— Wright *v.* Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

Iowa.— Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780.

Maine.— Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940; Readfield Telephone, etc., Co. *v.* Cyr, 95 Me. 287, 49 Atl. 1047.

Massachusetts.— Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249.

New Jersey.— Lee *v.* Hubschmidt Bldg., etc., Co., 55 N. J. Eq. 623, 37 Atl. 769.

New York.— Snedeker *v.* Warring, 12 N. Y. 170; Cosgrove *v.* Troescher, 62 N. Y. App. Div. 123, 70 N. Y. Suppl. 764.

Pennsylvania.— Catasauqua Nat. Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694.

United States.—William Firth Co. *v.* South Carolina L. & T. Co., 122 Fed. 569, 59 C. C. A. 73.

See 23 Cent. Dig. tit. "Fixtures," § 3.

61. *Colorado.*—Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

Georgia.— Wright *v.* Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

Iowa.— Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

Kansas.— Dodge City Water, etc., Co. *v.* Alfalfa Land, etc., Co., 64 Kan. 247, 67 Pac. 462.

Maine.— Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940; Readfield Telephone, etc., Co. *v.* Cyr, 95 Me. 287, 49 Atl. 1047.

Massachusetts.— Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249.

Mississippi.— Tate *v.* Blackburne, 48 Miss. 1.

New Hampshire.— Carkin *v.* Babbitt, 58

annexation is such as to incorporate the chattel with the realty,[62] where severance will work an injury to the realty,[63] or where the fixtures are essential to the needs of the realty.[64] Intention is also said to be immaterial where the annexation is according to the usual practice of experts in such cases,[65] where actual annexation is required and constructive annexation is not recognized,[66] where there is a controlling agreement,[67] or where there is an estoppel.[68] The question of the intention with which the annexation is made is said to be one of fact or of mixed law and fact.[69]

2. With Relation to Permanency. If the annexation is not intended to be permanent the chattel will not be deemed a fixture. As it is sometimes expressed "it must be for the benefit of the inheritance."[70] The degree and mode of annexation may be looked at, and whether it is to make the chattel or the land more useful. Permanence does not imply that the annexation must be perpetual,[71] but that the article shall, if actually affixed, remain where fastened until worn out, or until the purposes of the realty are accomplished.[72] If a structure is made for a residence it generally is deemed part of the realty, although it has the appearance of being temporary and may be easily removed without injury to the freehold.[73] Where, however, the structure is affixed to the premises by a tem-

N. H. 579; Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780.

New Jersey.— Holmes *v.* Standard Pub. Co., (Ch. 1903) 55 Atl. 1107; Lee *v.* Hubschmidt Bldg., etc., Co., 55 N. J. Eq. 623, 37 Atl. 769.

New York.— Snedeker *v.* Warring, 12 N. Y. 170; Cosgrove *v.* Troescher, 62 N. Y. App. Div. 123, 70 N. Y. Suppl. 764.

Pennsylvania.— Catasauqua Nat. Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694.

Texas.— Jones *v.* Bull, 85 Tex. 136, 19 S. W. 1031.

United States.—William Firth Co. *v.* South Carolina L. & T. Co., 122 Fed. 569, 59 C. C. A. 73.

See 23 Cent. Dig. tit. "Fixtures," § 3.

Mere intention without acts is not effective. Tate *v.* Blackburne, 48 Miss. 1; Weathersby *v.* Sleeper, 42 Miss. 732; Carkin *v.* Babbitt, 58 N. H. 579; Woodman *v.* Pease, 17 N. H. 282; Johnson *v.* Mehaffey, 43 Pa. St. 308, 82 Am. Dec. 568; Hill *v.* Wentworth, 28 Vt. 428.

Parol declarations made by one party to the other have been admitted as tending to show intention. Linahan *v.* Barr, 41 Conn. 471; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22. And see Causey *v.* Empire Plaid Mills, 119 N. C. 180, 25 S. E. 863.

62. Wright *v.* Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669.

63. Tillman *v.* De Lacy, 80 Ala. 103; Sword *v.* Low, 122 Ill. 487, 13 N. E. 826; New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

64. New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

65. McDonald *v.* Weeks, 8 Grant Ch. (U. C.) 297.

66. Shepard *v.* Blossom, 66 Minn. 421, 69 N. E. 221, 61 Am. St. Rep. 431; Farmers' L. & T. Co. *v.* Minneapolis Engine, etc., Works, 35 Minn. 543, 29 N. W. 349; Treadway *v.* Sharon, 7 Nev. 37; Brown *v.* Lillie, 6 Nev. 244.

67. Lake Superior Ship Canal, etc., Co. *v.* McCann, 86 Mich. 106, 48 N. W. 692. And see *infra*, III.

68. Munroe *v.* Armstrong, 179 Mass. 165, 60 N. E. 475; Watson *v.* Watson Mfg. Co., 30 N. J. Eq. 483.

69. *Alabama.*— Tillman *v.* De Lacy, 80 Ala. 103.

Arkansas.— British, etc., Mortg. Co. *v.* Scott, 70 Ark. 230, 65 S. W. 936.

Georgia.— Smith *v.* Odom, 63 Ga. 499.

Missouri.— Goodin *v.* Elleardsville Hall Assoc., 5 Mo. App. 289.

Nebraska.— Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

Oregon.— Alberson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978.

Pennsylvania.— Vail *v.* Weaver, 132 Pa. St. 363, 19 Atl. 138, 19 Am. St. Rep. 598; Harrisburg Electric Light Co. *v.* Goodman, 129 Pa. St. 206, 19 Atl. 844; Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452.

Texas.— Copp *v.* Swift, (Civ. App. 1894) 26 S. W. 438.

See 23 Cent. Dig. tit. "Fixtures," § 3. See also *supra*, II, A.

70. Merritt *v.* Judd, 14 Cal. 59; Olympic Theatre's Case, 2 Browne (Pa.) 275; Lawton *v.* Salmon, 1 H. Bl. 259 note, 2 Rev. Rep. 764.

71. Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63; Feder *v.* Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628.

72. Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212; Speiden *v.* Parker, 46 N. J. Eq. 292, 19 Atl. 21; Rogers *v.* Brokaw, 25 N. J. Eq. 496.

The mere intention that furniture and loose tools shall remain on the premises where used until worn out will not make them fixtures. Hunt *v.* Bullock, 23 Ill. 320; Oliver *v.* Lansing, 59 Nebr. 219, 80 N. W. 829.

73. *Indiana.*— Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340.

porary occupant thereof or by a licensee it is deemed temporary in its purposes, and not part of the realty.[74]

3. PREPARATION OF THE FREEHOLD. Preparing an excavation in the soil, a recess in the wall of a house, or a place of deposit for a chattel shows an intention to annex it to the realty.[75]

4. PART OF ARCHITECTURAL DESIGN. Where the design of a house calls for a combination of articles with the realty in a harmonious scheme, the articles will be deemed part of the realty, although not actually annexed.[76]

III. AGREEMENTS.

A. Before Annexation. By agreement between the owner of personal property and the owner of realty, made before annexation, the personal property may be made to retain its status after annexation, or an enforceable right to remove it may be conferred upon the former owner of the personal property. The agreement may be by parol.[77] Such an agreement, or an intention that the chattel

Massachusetts.— Butler *v.* Page, 7 Metc. 40, 39 Am. Dec. 757.

Nebraska.— Freeman *v.* Lynch, 8 Nebr. 192.

New York.— Fisher *v.* Saffer, 1 E. D. Smith 611.

Oregon.— Doscher *v.* Blackiston, 7 Oreg. 143.

Vermont.— Leland *v.* Gassett, 17 Vt. 403.

Wisconsin.— Lipsky *v.* Borgmann, 52 Wis. 256, 9 N. W. 158, 38 Am. Rep. 735.

The same rule applies to annexations to a residence (Bainway *v.* Cobb, 99 Mass. 457) or a barn (Weston *v.* Weston, 102 Mass. 514). But *compare* Cole *v.* Roach, 37 Tex. 413.

74. *Michigan.*— Bewick *v.* Fletcher, 41 Mich. 625, 3 N. W. 162, 32 Am. Rep. 170, machinery for drilling a well.

Minnesota.— O'Donnell *v.* Burroughs, 55 Minn. 91, 56 N. W. 579, platform scales put on the land by a licensee.

New Jersey.— Randolph *v.* Gwynne, 7 N. J. Eq. 88, 51 Am. Dec. 265, engine to supplement the deficiencies of water-power.

Pennsylvania.— Meigs' Appeal, 62 Pa. St. 28, 1 Am. Rep. 372, barracks and hospitals erected during a war.

Virginia.— Andrews *v.* Auditor, 28 Gratt. 115, buildings for preparing stone for a public building.

See 23 Cent. Dig. tit. "Fixtures," § 3.

Consumption of material on land.— Machines used in brick-making may become permanent fixtures, although their use involves the destruction of the realty to which they are attached (Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63); and the same is true of machines used in operating a mine (Merritt *v.* Judd, 14 Cal. 59) or in lumbering (Treadway *v.* Sharon, 7 Nev. 37), if actually affixed. On the other hand the fact that the operation of the machine involves the destruction of the supply of material on the land has been commented on as indicating a temporary purpose. Hewitt *v.* General Electric Co., 61 Ill. App. 168; Burrill *v.* Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824; Weathersby *v.* Sleeper, 42 Miss. 732; Brown *v.* Lillie, 6 Nev. 244.

75. *Connecticut.*— Stockwell *v.* Campbell, 39 Conn. 362, 12 Am. Rep. 393 (furnaces); Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86.

Louisiana.— Mackie *v.* Smith, 5 La. Ann. 717, 52 Am. Dec. 615, niches for mirrors.

Massachusetts.— Weston *v.* Weston, 102 Mass. 514, tower for bell.

Minnesota.— O'Donnell *v.* Burroughs, 55 Minn. 91, 56 N. W. 579, platform scales.

Missouri.— Rogers *v.* Crow, 40 Mo. 91, 93 Am. Dec. 299, recess for organ.

See 23 Cent. Dig. tit. "Fixtures," §§ 4, 7, 8.

76. A church organ (Chapman *v.* Union Mut. L. Ins. Co., 4 Ill. App. 29), carvings and vases (D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382, 36 L. J. Ch. 107, 15 Wkly. Rep. 186. *Compare* Kimball *v.* Grand Lodge of Masons, 131 Mass. 59; Leigh *v.* Taylor, [1902] A. C. 157, 71 L. J. Ch. 272, 86 L. T. Rep. N. S. 239, 50 Wkly. Rep. 623), and mirrors (Mackie *v.* Smith, 5 La. Ann. 717, 52 Am. Dec. 615; New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229).

77. *Alabama.*— Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61 (although article is embedded in cement); Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749.

Georgia.— Smith *v.* Odom, 63 Ga. 499.

Illinois.— Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302 (fixture made personalty by exception in deed); Kaestner *v.* Day, 65 Ill. App. 623. *Compare* with case first cited Davis *v.* Eastham, 81 Ky. 116.

Kansas.— Marshall *v.* Bacheldor, 47 Kan. 442, 28 Pac. 168; Rush County *v.* Stubbs, 25 Kan. 322.

Maine.— Peaks *v.* Hutchinson, 96 Me. 530, 53 Atl. 38, 59 L. R. A. 279 (house on land of another); Tapley *v.* Smith, 18 Me. 12; Hilborne *v.* Brown, 12 Me. 162; Russell *v.* Richards, 10 Me. 429, 25 Am. Dec. 254. But see Rev. St. (1903) c. 75, § 32, requiring a recorded writing except as against the owner, his heirs, devisees, or persons with actual notice.

Massachusetts.— Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Hartwell *v.* Kelly, 117 Mass. 235; Ham *v.* Kendall, 111 Mass. 297.

Mississippi.— Winner *v.* Williams, 82 Miss. 669, 35 So. 308.

New Hampshire.— Dame *v.* Dame, 38 N. H.

shall remain personalty, may be implied from the circumstances under which the chattel is bought and affixed, as from a conditional sale, from a lease of a chattel, or from a chattel mortgage by the buyer to the seller, prior to and in some states subsequent to the annexation.[78]

429, 75 Am. Dec. 195; Haven *v.* Emery, 33 N. H. 66.

New York.— Tyson *v.* Post, 108 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409; Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537; Voorhees *v.* McGinnis, 48 N. Y. 278; Sayles *v.* National Water Purifying Co., 16 N. Y. Suppl. 555 [*affirmed* in 141 N. Y. 603, 36 N. E. 740].

Oregon.— Hershberger *v.* Johnson, 37 Oreg. 109, 60 Pac. 838; Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Pennsylvania.— Wick *v.* Bredin, 189 Pa. St. 83, 42 Atl. 17; Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209; Shell *v.* Haywood, 16 Pa. St. 523; Mitchell *v.* Freedley, 10 Pa. St. 198; Advance Coal Co. *v.* Miller, 4 Pa. Dist. 352, 7 Kulp 541.

Wisconsin.— Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603.

United States.— Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130, if detachable without injury to themselves or the realty.

See 23 Cent. Dig. tit. "Fixtures," § 5.

If the chattel has lost its identity after annexation, the agreement is not effective. Duffus *v.* Howard Furnace Co., 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925.

Landlord and tenant.— Prior to annexation either in writing or by parol the lessor or lessee may regulate the right to remove fixtures to be annexed, either enlarging or restraining the rights of either party.

California.— Gett *v.* McManus, 47 Cal. 56; Merritt *v.* Judd, 14 Cal. 59.

Indiana.— McCracken *v.* Hall, 7 Ind. 30.

Iowa.— A building erected by the tenant and removable only at the will of the lessor is a fixture. Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

Kansas.— Alexander *v.* Touhy, 13 Kan. 64.

Maine.— Adams *v.* Goddard, 48 Me. 212.

Massachusetts.— Hartwell *v.* Kelly, 117 Mass. 235.

New York.— As to admission of evidence of a parol agreement that fixtures might be removed made before a new lease was given see Stephens *v.* Ely, 14 N. Y. App. Div. 202, 43 N. Y. Suppl. 762.

Pennsylvania.— Wick *v.* Bredin, 189 Pa. St. 83, 42 Atl. 17; White's Appeal, 10 Pa. St. 252.

Vermont.— As between lessor and lessee the agreement may control the common-law right of removal. See Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092.

England.— Mansfield *v.* Blackburne, 6 Bing. N. Cas. 426, 10 L. J. C. P. 178, 8 Scott 720, 37 E. C. L. 699; Penry *v.* Brown, 2 Stark. 403, 3 E. C. L. 463; Naylor *v.* Collinge, 1 Taunt. 19.

See 23 Cent. Dig. tit. "Fixtures," §§ 5, 22.

78. *Alabama.*— Wood *v.* Holly Mfg. Co., 100 Ala. 326, 13 So. 948, 46 Am. St. Rep. 56, sale on trial.

California.— March *v.* McKoy, 56 Cal. 85, lease of engine.

Delaware.— Ott *v.* Specht, 8 Houst. 61, 12 Atl. 721; Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192, conditional sale.

Indiana.— Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Gordon *v.* Miller, 28 Ind. App. 612, 63 N. E. 774, chattel mortgage estops mortgagor to claim property as part of realty.

Kansas.— Marshall *v.* Bachelder, 47 Kan. 442, 28 Pac. 168; Eaves *v.* Estes, 10 Kan. 314, 15 Am. Rep. 345.

Massachusetts.— Jennings *v.* Vahey, 183 Mass. 47, 66 N. E. 598, 97 Am. St. Rep. 409 (conditional sale); Taft *v.* Stetson, 117 Mass. 471; Ham *v.* Kendall, 111 Mass. 297; Ashmun *v.* Williams, 8 Pick. 402; Wells *v.* Banister, 4 Mass. 514.

Michigan.— Schellenberg *v.* Detroit Heating, etc., Co., 130 Mich. 439, 90 N. W. 47, 97 Am. St. Rep. 489, 57 L. R. A. 632.

Minnesota.— Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491 (license to erect building); Warner *v.* Kenning, 25 Minn. 173.

Mississippi.— Duke *v.* Shackleford, 56 Miss. 552.

Missouri.— Brown *v.* Baldwin, 121 Mo. 126, 25 S. W. 863.

Nebraska.— Edwards, etc., Lumber Co. *v.* Rank, 57 Nebr. 323, 77 N. W. 765, 73 Am. St. Rep. 514; Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New York.— Sisson *v.* Hubbard, 75 N. Y. 542; Sheldon *v.* Edwards, 35 N. Y. 279; Ford *v.* Cobb, 20 N. Y. 344; Bernheimer *v.* Adams, 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93; New York Invest., etc., Co. *v.* Cosgrove, 47 N. Y. App. Div. 35, 35 N. Y. Suppl. 372 [*affirmed* in 167 N. Y. 601, 60 N. E. 1117]; Duntz *v.* Granger Brewing Co., 41 Misc. 177, 83 N. Y. Suppl. 957; Hirsch *v.* Graves Elevator Co., 24 Misc. 472, 53 N. Y. Suppl. 664.

Ohio.— Fortman *v.* Goepper, 14 Ohio St. 558.

Rhode Island.— Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621.

Texas.— San Antonio Brewing Assoc. *v.* Arctic Ice Mach. Mfg. Co., 81 Tex. 99, 16 S. W. 797; Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637.

Vermont.— Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353.

Canada.— Rose *v.* Hope, 22 U. C. C. P. 482 (hire and sale receipt); Waterous Engine Works Co. *v.* Henry, 1 Manitoba 36, 2 Manitoba 169.

See 23 Cent. Dig. tit. "Fixtures," § 5.

From mere consent to making the addition a prior agreement may be implied after annexation. Korbe *v.* Barbour, 130 Mass. 255 (conduct subsequent to the annexation is

B. After Annexation. After annexation which results in the article becoming part of the realty in fact, it is sometimes held that a parol agreement that the article shall remain or shall become personalty is not effective,[79] but there are also cases sustaining such subsequent parol agreements.[80]

C. Rights of Strangers — 1. In General. While as between parties to the agreement there seems to be no restriction on their power to control the status of personalty after annexation, provided that the degree of annexation does not go to the extent of complete incorporation with the realty, or result in loss of identity of the chattel,[81] it remains to consider how far these agreements may affect the rights of strangers, who, having interests in the realty, which admittedly are not affected thereby, claim the fixtures as part of the realty, and also as unaffected by the agreement. A number of elements may be involved in the determination of such controversies.[82]

evidence of a prior agreement); Morris *v.* French, 106 Mass. 326.

79. Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75 (unless there is actual severance); Fenlason *v.* Rackliff, 50 Me. 362; Gibbs *v.* Estey, 15 Gray (Mass.) 587; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476. *Compare* Madigan *v.* McCarthy, 108 Mass. 376, 11 Am. Rep. 371; *Ex p.* Ames, 1 Fed. Cas. No. 323, 1 Lowell 561.

A subsequent agreement satisfying the statute of frauds is effective. Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268.

80. Foster *v.* Mabe, 4 Ala. 402, 37 Am. Dec. 749; Hines *v.* Ament, 43 Mo. 298; Russell *v.* Meyer, 7 N. D. 335, 75 N. W. 262, 47 L. R. A. 637; Harlan *v.* Harlan, 20 Pa. St. 303. In Shell *v.* Haywood, 16 Pa. St. 523, there was an agreement written and subscribed, but in sustaining it no stress was laid on the writing, and parol evidence was also received.

A subsequent assent is equivalent to a prior agreement and relates back to the time of annexation. Fuller *v.* Tabor, 39 Me. 519.

81. See *supra*, III, A.

82. A typical occasion for controversy arises when the maker of a machine sells it on condition that the title shall not pass until the price is paid. It is attached by the conditional vendee to his realty, which is or becomes subject to a mortgage. It is admitted that this transaction, as between the parties, will prevent the machine becoming part of the realty, or at least preserve its status as personalty. The question is how far the mortgagee is affected. Similar questions occur when any one having interests in a chattel suffers it to be affixed to land of another, in which land a third party has or acquires interests, and the landowner having failed in some duty to the others they claim rights in the fixture which are antagonistic and must be adjusted. In this connection, as mortgagees of realty are frequently claimants of fixtures, reference should be made to the effect of a mortgage on the legal title to the realty. In some jurisdictions the legal title is in the mortgagee; in others the legal title is in the mortgagor, and the mortgagee has a mortgagee's lien to secure his loan (Union College *v.* Wheeler, 61 N. Y. 88; Farnsworth *v.* Western Union Tel. Co., 6 N. Y. Suppl. 735), and in others the mortgagee has the legal title so far as is necessary for him to enforce his right of possession (see Jones Real Mortg. c. 1). According as the mortgagor does or does not have the legal title, annexations made by him are to another's or to his own land, and the presumption that annexations to one's own land are permanent and become part of the realty will or will not arise. Again attention should be called to the effect of mortgages in which there is a stipulation that they shall include subsequent additions to the realty, and to the doctrine that such additions may be treated as additional security. Thus, as illustrating the effect of some of these features, where the legal title vests in the mortgagee, the mortgagor in possession is in most respects in the position of a tenant at will, but as to permanent improvements he is to be treated more like an owner, and such improvements inure to the benefit of the mortgagee (Butler *v.* Page, 7 Metc. (Mass.) 40; Winslow *v.* Merchants' Ins. Co., 4 Metc. (Mass.) 306, 38 Am. Dec. 368), and a subsequent agreement that the article annexed shall be treated as personalty will not affect the title of a purchaser without notice from the mortgagee (Smith Paper Co. *v.* Servin, 130 Mass. 511). On the other hand where title does not pass to the mortgagee the mortgagor may, without the concurrence of the mortgagee, make an effective agreement with a third person whereby chattels placed upon the realty remain personalty, even as against the mortgagee. Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491; Farnsworth *v.* Western Union Tel. Co., 6 N. Y. Suppl. 735. See also Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889, holding that the vendor of machinery retains his lien for the purchase-money as against the mortgagee of realty whereon the machinery was placed. So, where title remains in the mortgagor, he may grant a right of way to a railroad company, and the rails and other property of the railroad thereafter placed thereon will not become subject to a prior mortgage on the land. Skinner *v.* Ft. Wayne, etc., R. Co., 99 Fed. 465.

2. Where Stranger Assents to Agreement. It is agreed that, subject to exceptions to be stated later, if all parties interested in the chattel and land assent to the agreement, it will be given effect and the status of the chattel will be preserved.[83] Acts by the mortgagee or other claimant of the realty which induce the owner of the chattel to allow it to be annexed will amount to assent to the agreement or estop him from denying its effect.[84] Under some circumstances, in England, a mortgagee will be held to have licensed agreements of third parties, and in this case they will be given effect as if he had been a party, so long as the license is unrevoked.[85]

3. Purchasers With Notice. It is generally held that a vendee or mortgagee of the realty with notice of the agreement or the rights of third parties in the fixture takes subject thereto.[86]

4. Prior Mortgagees. If the mortgage of the realty is prior to the annexation, having parted with nothing on the faith of the fixture, the mortgagee is not a purchaser for value as regards it, and generally his rights are subject to those having interests in the fixture other than the mortgagor.[87] Contrary to the foregoing statement it is held in some states that it is not in the power of the mort-

83. *Indiana.* — Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33.

Maine.— Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14.

Massachusetts.— Thompson *v.* Vinton, 121 Mass. 139.

Nevada.— Prescott *v.* Wells, 3 Nev. 82.

New York.— McFadden *v.* Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446 (per Bradley, J.); Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537.

Texas.— Harkey *v.* Cain, 69 Tex. 146, 6 S. W. 637.

84. Brannon *v.* Vaughan, 66 Ark. 87, 48 S. W. 909; Watertown Steam Engine Co. *v.* Davis, 5 Houst. (Del.) 192; Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042.

The mortgagee may subsequently consent to the removal of the article. Bartholomew *v.* Hamilton, 105 Mass. 239.

85. Thus if the mortgagor in possession with the consent of the mortgagee leases the premises and the tenant annexes trade fixtures, the mortgagee will be presumed to have authorized the lease, and to have consented to the exercise by the tenant of the usual rights to sever such fixtures. Sanders *v.* Davis, 15 Q. B. D. 218, 54 L. J. Q. B. 576, 33 Wkly. Rep. 655. Again, if the mortgagor in possession makes an agreement with the owner of a chattel corresponding to our conditional sales and the like, the mortgagee is presumed to have licensed that agreement, and it is effective until entry by him. Gough *v.* Wood, [1894] 1 Q. B. 713, 63 L. J. Q. B. 564, 70 L. T. Rep. N. S. 297, 9 Reports 509, 42 Wkly. Rep. 469; Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273, 64 L. J. Ch. 523, 72 L. T. Rep. N. S. 703, 12 Reports 331, 43 Wkly. Rep. 567; Cumberland Union Banking Co. *v.* Maryport Hematite, etc., Co., [1892] 1 Ch. 415, 6 L. T. Rep. N. S. 108, 40 Wkly. Rep. 280; Nicholson *v.* Bank of New Zealand, 12 N. Zeal. 427. But being a right founded on a license only it is terminable by entry of the mortgagee. Reynolds *v.* Ashby, [1903] 1 K. B. 87, 72 L. J. K. B. 51, 87 L. T. Rep. N. S. 640, 51 Wkly. Rep. 405.

86. *Illinois.*— Sword *v.* Low, 122 Ill. 487, 13 N. E. 826.

Iowa.— Wilgus *v.* Gettings, 21 Iowa 177.

Maryland.— Northern Cent. R. Co. *v.* Canton Co., 30 Md. 347.

Massachusetts.—Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Hunt *v.* Bay State Iron Co., 97 Mass. 279.

Michigan.— Crippen *v.* Morrison, 13 Mich. 23, purchaser at foreclosure sale with notice of agreement made after the mortgage.

Minnesota.— Warner *v.* Kenning, 25 Minn. 173.

Missouri.— Priestly *v.* Johnson, 67 Mo. 632.

New Hampshire. — Haven *v.* Emery, 33 N. H. 66; Pierce *v.* Emery, 32 N. H. 484.

Pennsylvania.— Coleman *v.* Lewis, 27 Pa. St. 291.

United States.— McDonnell *v.* Burns, 83 Fed. 866, 28 C. C. A. 174; Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130.

Canada.— Close *v.* Belmont, 22 Grant Ch. (U. C.) 317; Butterworth *v.* Ketchum, 3 Ont. Wkly. Rep. 844.

87. *Alabama.*— Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61, tenant of the mortgagor given priority over a prior real mortgagee.

California.— Hendy *v.* Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Tibbetts *v.* Moore, 23 Cal. 208.

District of Columbia.— J. L. Mott Iron Works *v.* Middle States Loan, etc., Co., 17 App. Cas. 584.

Idaho.— Anderson *v.* Creamery Package Mfg. Co., 8 Ida. 200, 67 Pac. 493, 101 Am. St. Rep. 188, 56 L. R. A. 544.

Illinois.— Ellison *v.* Salem Coal, etc., Co., 43 Ill. App. 120.

Indiana.— Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Taylor *v.* Watkins, 62 Ind. 511; Yater *v.* Mullen, 24 Ind. 277.

Minnesota.— Northwestern Mut. L. Ins. Co. *v.* George, 77 Minn. 319, 79 N. W. 1028, 1064; Pioneer Sav., etc., Co. *v.* Fuller, 57 Minn. 60, 58 N. W. 831; Merchants' Nat. Bank *v.* Stan-

gagor, by any agreement made with a third person after the execution of the mortgage, to diminish the rights of the prior mortgagee in accessions to the realty. Such accessions are subject to the mortgage to the same extent that the realty is.[88]

5. Purchasers and Mortgagees Without Notice. In this case the owner of the chattel has allowed it to be annexed to the land of another, and a third party has acquired rights therein. We have seen that if he acquires these rights with notice he takes subject to the agreement.[89] It remains to inquire what are his rights if he acquires without notice. To answer this question it is essential to look at the initial transaction between the one claiming an interest in the chattel and the one annexing it to the land. Independent of any connection with the land, it is admitted that if A gives B the possession of a chattel, B cannot transfer A's legal rights, or extinguish them by a transfer of the possession, to C with or without notice, unless by some act or omission A is estopped from setting up his legal title. It also is true if B have a chattel in which A has only equitable rights, that, by a transfer of it to C for value without notice, A's equities will be extinguished. Unless there is something peculiar in the fact that the chattel is annexed to land, if B have two chattels of A's, one of which he sells to C, and the other of which he annexes to land which he sells to C, there is no reason why C should have greater rights in the former than in the latter. It is submitted that it is not because it is annexed to land, but because of the nature of A's rights that C takes the legal title or not, or subject to A's rights or not. If the agreement between A and B create legal rights in A, annexation does not destroy them between A and B, nor does a conveyance of the land to which the chattel is affixed destroy them. If A, however, has done or omitted to do something as to the chattel whereby C has been led to alter his position to his loss, because of A's act or omission, then A

ton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Nebraska.— Edwards, etc., Lumber Co. *v.* Rank, 57 Nebr. 323, 77 N. W. 765, 73 Am. St. Rep. 514; Arlington Mill, etc., Co. *v.* Yates, 57 Nebr. 286, 77 N. W. 677.

New Hampshire.— Langdon *v.* Buchan, 62 N. H. 657 (subject to the agreement fixture is subject to rights of mortgagee); Cochran *v.* Flint, 57 N. H. 514.

New Jersey.— Palmateer *v.* Robinson, 60 N. J. L. 433, 38 Atl. 957; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101 (if the title to the chattel remains in the conditional vendor, although it is affixed to realty subject to a mortgage which in terms includes after-acquired property, the fixture is not subject thereto, as it is not yet as regards the mortgagor "after-acquired property"); Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889.

New York.— Bernheimer *v.* Adams, 175 N. Y. 472, 67 N. E. 1080 [*affirming* 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93]; Duffus *v.* Howard Furnace Co., 8 N. Y. App. Div. 567, 40 N. Y. Suppl. 925.

Pennsylvania.— Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209.

Texas.— Willis *v.* Munger Improved Cotton Mach. Mfg. Co., 13 Tex. Civ. App. 677, 36 S. W. 1010.

Vermont.— Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042; Page *v.* Edwards, 64 Vt. 124, 23 Atl. 917; Buzzell *v.* Cummings, 61 Vt. 213, 18 Atl. 93; Davenport *v.* Shants, 43 Vt. 546.

Washington.— German Sav., etc., Soc. *v.* Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

West Virginia.— Huxthal *v.* Huxthal, 45 W. Va. 584, 32 S. E. 237, chattel mortgagee must pay damages caused by removal of the chattel.

A contract vendor of realty is like a prior mortgagee in respect of subsequent annexations. Hendy *v.* Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107. *Compare* Perkins *v.* Swank, 43 Miss. 349.

88. *Colorado.*— Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

Delaware.— Watertown Steam Engine Co. *v.* Davis, 5 Houst. 192.

Louisiana.— W. T. Adams Mach. Co. *v.* Newman, 107 La. 702, 32 So. 38.

Maine.— Ekstrom *v.* Hall, 90 Me. 186, 38 Atl. 106.

Massachusetts.— Thompson *v.* Vinton, 121 Mass. 139; Hunt *v.* Bay State Iron Co., 97 Mass. 279; Clary *v.* Owen, 15 Gray 522.

Pennsylvania.— Albert *v.* Uhrich, 180 Pa. St. 283, 36 Atl. 745.

Wisconsin.— Fuller-Warren Co. *v.* Harter, 110 Wis. 80, 85 N. W. 698, 84 Am. St. Rep. 867, 53 L. R. A. 603; Frankland *v.* Moulton, 5 Wis. 1.

A lease providing for forfeiture of term with fixtures and machinery in case of non-payment prevails as against a subsequent mortgage on the machinery. Church *v.* Lapham, 94 N. Y. App. Div. 550, 88 N. Y. Suppl. 222.

89. See *supra*, III, C, 3.

may be estopped from setting up his legal title. Where A has a legal title notice is immaterial, but estoppel is the important factor. On the other hand if the effect of the agreement is to give A only equitable rights after annexation then a conveyance of the land to one without notice will extinguish them. In other words legal rights in this case are extinguished by estoppel, and equitable by want of notice. The cases in general bear out these principles.[90] The rights

90. The legal title of one whose chattels are annexed to the land of another is not defeated merely by a sale or mortgage of the land, whether or not the purchaser has notice.

Alabama.— Adams Mach. Co. *v.* Interstate Bldg., etc., Assoc., 119 Ala. 97, 24 So. 857; Warren *v.* Liddell, 110 Ala. 232, 20 So. 89; Miller *v.* Griffin, 102 Ala. 610, 15 So. 238 (a chattel mortgagor cannot defeat the mortgage by attaching the chattel to land); Sumner *v.* Woods, 67 Ala. 139, 42 Am. Rep. 104.

Michigan.— Lansing Iron, etc., Works *v.* Wilbur, 111 Mich. 413, 69 N. W. 667. But see explanation of this case in Wickes *v.* Hill, 115 Mich. 333, 75 N. W. 375.

New Jersey.— Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418.

New York.— Tifft *v.* Horton, 53 N. Y. 377, 13 Am. Rep. 537; Ford *v.* Cobb, 20 N. Y. 344; Kerby *v.* Clapp, 15 N. Y. App. Div. 37, 44 N. Y. Suppl. 116; Duntz *v.* Granger Brewing Co., 41 Misc. 177, 83 N. Y. Suppl. 957; Schreyer *v.* Jordan, 27 Misc. 643, 58 N. Y. Suppl. 206.

Ohio.— Case Mfg. Co. *v.* Garven, 45 Ohio St. 289, 13 N. E. 493.

Pennsylvania.— Hill *v.* Sewald, 53 Pa. St. 271, 91 Am. Dec. 209.

South Carolina.— Sullivan *v.* Jones, 14 S. C. 362.

United States.— Case *v.* L'Oeble, 84 Fed. 582.

The owner of the realty must be a party to the agreement or it will not bind a purchaser or mortgagee. Jermyn *v.* Hunter, 93 N. Y. App. Div. 175, 87 N. Y. Suppl. 546; Andrews *v.* Powers, 66 N. Y. App. Div. 216, 72 N. Y. Suppl. 597; Chandler *v.* Hamell, 57 N. Y. App. Div. 305, 67 N. Y. Suppl. 1068.

A chattel mortgagee under such circumstances retains his lien as against a subsequent real mortgagee if the latter's security is not depreciated. General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; Hurxthal *v.* Hurxthal, 45 W. Va. 584, 32 S. E. 237. He must make good the depreciation caused by severing. Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418.

A prior mortgagee, who makes further advances after chattels under contract of conditional sale are placed on the premises, is in no better position than a subsequent purchaser. New York Invest., etc., Co. *v.* Cosgrove, 47 N. Y. App. Div. 35, 62 N. Y. Suppl. 372.

Estoppel.— The owner may lose his right, as against a subsequent purchaser without notice, by voluntarily permitting the chattel to be so attached as to become apparently a part of the freehold.

Illinois.— Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 166 [*affirming* 47 Ill. App. 118]; Kaestner *v.* Day, 65 Ill. App. 623.

Iowa.— Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780; Dostal *v.* McCadden, 35 Iowa 318.

Massachusetts.— Trask *v.* Little, 182 Mass. 8, 64 N. E. 206; Ridgeway Stove Co. *v.* Way, 141 Mass. 557, 6 N. E. 714; Southbridge Sav. Bank *v.* Stevens Tool Co., 130 Mass. 547; Southbridge Sav. Bank *v.* Exeter Mach. Works, 127 Mass. 542; Pierce *v.* George, 108 Mass. 78, 11 Am. Rep. 310.

Michigan.— Watson *v.* Alberts, 120 Mich. 508, 79 N. W. 1048; Knowlton *v.* Johnson, 37 Mich. 47.

New Hampshire.— Tibbetts *v.* Horne, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56.

New York.— Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476.

Oregon.— Landigan *v.* Mayer, 32 Oreg. 245, 51 Pac. 649, 67 Am. St. Rep. 521.

Rhode Island.— McCrillis *v.* Cole, 25 R. I. 156, 55 Atl. 196.

Texas.— Ice, etc., Co. *v.* Lone Star Engine, etc., Works, 15 Tex. Civ. App. 694, 41 S. W. 835.

Vermont.— Davenport *v.* Shants, 43 Vt. 546; Powers *v.* Dennison, 30 Vt. 752.

Instances of estoppel.—A conditional vendor was held estopped in spite of a clause in the agreement forbidding annexation, when the articles were such that they were likely to be annexed and were in fact annexed. Wickes *v.* Hill, 115 Mich. 333, 75 N. W. 375. The purchaser of a building loses his title if he permits it to remain until another purchases the land in ignorance of his rights. Moore *v.* Moran, 64 Nebr. 84, 89 N. W. 629. A husband was held estopped from claiming a boiler which he had placed on his wife's land, by joining the wife in a subsequent mortgage of the land. Albert *v.* Uhrich, 180 Pa. St. 283, 36 Atl. 745. Where the one claiming contract rights has failed to record the contract he is estopped. Rowland *v.* Anderson, 33 Kan. 264, 6 Pac. 255, 52 Am. Rep. 529.

Where the record of a chattel mortgage is not effective as regards the fixture, there should be a severance, or mortgage of the fixture as realty or notice, and default as to these prevents the agreement from being effective against a subsequent mortgage of the realty. Brennan *v.* Whitaker, 15 Ohio St. 446.

created by the agreement are subject to the limitation that the annexation must not be so complete as to cause the chattel to lose its identity or to be incapable of severance without great injury to the realty.[91]

D. Notice. In cases where the rights of claimants of fixtures depend upon notice to adverse claimants there is a considerable variety of opinion as to the effect of recording alone, as importing notice, much depending of course upon the language of statutes involved.[92] Possession of fixtures by one having legal

The rule in New York is qualified by Laws (1897), c. 418, § 112, requiring the conditional vendor of a chattel to file his contract of sale to make it effective against the real mortgagee.

Equities are extinguished by want of notice. *Alabama.*— Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75.

Connecticut.— Landon *v.* Platt, 34 Conn. 517; Burr *v.* Spencer, 26 Conn. 159, 68 Am. Dec. 379; Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

Kansas.— St. Louis, etc., R. Co. *v.* Beadle, (App. 1897) 50 Pac. 988.

Maine.— Fenlason *v.* Rackliff, 50 Me. 362.

Massachusetts.—Wentworth *v.* S. A. Woods Mach. Co., 163 Mass. 28, 39 N. E. 414, claimant responsible for the want of notice.

Missouri.— Union Cent. L. Ins. Co. *v.* Tillery, 152 Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480; Climer *v.* Wallace, 28 Mo. 556, 75 Am. Dec. 135.

Nebraska.— Moore *v.* Moran, 64 Nebr. 84, 89 N. W. 629.

Oregon.— Alberson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978; Muir *v.* Jones, 23 Oreg. 332, 31 Pac. 646, 19 L. R. A. 441.

Agreements between landlord and tenant regulating the right to remove fixtures are not binding on third parties without notice. Simpson Brick-Press Co. *v.* Wormley, 166 Ill. 383, 46 N. E. 976 [*affirming* 61 Ill. App. 460]. But see Hewitt *v.* General Electric Co., 164 Ill. 420, 45 N. E. 725 [*reversing* 61 Ill. App. 168]. In Roffey *v.* Henderson, 17 Q. B. 574, 16 Jur. 84, 21 L. J. Q. B. 49, 79 E. C. L. 574, a tenant quit the leased premises leaving severable fixtures. The landlord gave the tenant permission to leave them pending negotiations for the sale of them to the incoming tenant. The landlord leased the premises to the new tenant who had no notice of this agreement. He was allowed to retain the fixtures against the former tenant. Where a tenant built a fence in which he had rights by contract with his lessor, a purchaser of the premises, for value and with notice, takes subject to the tenant's rights. Jones *v.* Cooley, 106 Iowa 165, 76 N. W. 652. In Wisconsin the real mortgage passes title to the realty with the annexations irrespective of the agreement. Frankland *v.* Moulton, 5 Wis. 1.

In England.— While the English courts recognize the right of the owner of a chattel and the owner or occupant of realty to agree that the chattel shall be severable after annexation such agreement is not binding upon a mortgagee without notice. Hobson *v.* Gorringe, [1897] 1 Ch. 182, 66 L. J. Ch. 114, 75 L. T. Rep. N. S. 610, 45 Wkly. Rep. 356. But see Lyon *v.* London City, etc., Bank, [1903] 2 K. B. 135, 72 L. J. K. B. 465, 88 L. T. Rep. N. S. 392, 51 Wkly. Rep. 400.

The Canadian and New Zealand courts adopt the theory that legal rights created by the agreement are extinguished by estoppel and equitable by want of notice. McDonald *v.* Weeks, 8 Grant Ch. (U. C.) 297; Nicholson *v.* Bank of New Zealand, 12 N. Zeal. 427.

91. *Alabama.*— Warren *v.* Liddell, 110 Ala. 232, 20 So. 89.

District of Columbia.— J. L. Mott Iron Works *v.* Middle States Loan, etc., Co., 17 App. Cas. 584.

Indiana.— Binkley *v.* Forkner, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33; Taylor *v.* Watkins, 62 Ind. 511.

New Hampshire.— Langdon *v.* Buchanan, 62 N. H. 657; Cochran *v.* Flint, 57 N. H. 514.

New Jersey.— Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889.

New York.— Voorhees *v.* McGinnis, 48 N. Y. 278; Godard *v.* Gould, 14 Barb. 662.

Vermont.— Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042.

Washington.— German Sav., etc., Soc. *v.* Weber, 16 Wash. 95, 47 Pac. 224, 38 L. R. A. 267.

West Virginia.— Hurxthal *v.* Hurxthal, 45 W. Va. 584, 32 S. E. 237.

United States.— Porter *v.* Pittsburg Bessemer Steel Co., 122 U. S. 267, 7 S. Ct. 1206, 30 L. ed. 1210; Evans *v.* Kister, 92 Fed. 828, 35 C. C. A. 28.

If removal of the fixture will injure the realty the agreement cannot be set up. Brannon *v.* Vaughan, 66 Ark. 87, 48 S. W. 909.

92. See cases cited *infra*, this note.

Where the statute requires separate records of chattel and real mortgages, a mortgage of land and fixtures which are a unit in purpose recorded as a real-estate mortgage is valid as to creditors claiming the fixtures (*In re* Goldville Mfg. Co., 118 Fed. 892, 122 Fed. 569, 59 C. C. A. 73; Brodrick *v.* Kilpatrick, 82 Fed. 138. And see Webb Rec. Tit. § 252) and as against a subsequent mortgage recorded as a real and a chattel mortgage (Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry Co., 64 N. J. Eq. 140, 53 Atl. 212).

A mortgage of realty has priority over a chattel mortgage on fixtures annexed subsequently, and record of the chattel mortgage does not affect the purchaser at foreclosure sale under the real mortgage. Adams *v.* Beadle, 47 Iowa 439, 29 Am. Rep. 487.

To be effective against creditors a real mortgage including in its description loose

rights therein is sufficient notice to put a subsequent grantee or mortgagee upon his inquiry.[93] Sometimes the character of a fixture and manner of annexation is sufficient to put a purchaser on inquiry.[94]

IV. CUSTOM.

Custom or usage is sometimes appealed to as evidence of the intention with which a chattel has been affixed, or as affording a rule for regulating the right to sever a fixture. There are few cases from which any general principles can be deduced. Evidence of custom is not admissible to control the operation of law.[95] Where a lease is silent a custom for a tenant to remove fixtures will govern the parties,[96] or may be evidence from which to infer assent that a fixture shall be personalty.[97]

V. PARTIES.

A. Owner and Stranger — 1. DISSEIZORS AND TRESPASSERS. The general rule of law is that annexations in fact to realty are presumed to be the property of the owner of the realty, but that this presumption may be rebutted.[98] This is so when the erection is by one person on the land of another, with the latter's permission.[99] But where additions are made by one person on the land of another without previous permission, express or implied, in some cases it seems either that it is the property of the landowner by a rule of law or that the builder's actual intention is not allowed to prevail over that which the law deduces from

articles should be recorded as a chattel mortgage. Hillebrand *v.* Nelson, 1 Nebr. (Unoff.) 783, 95 N. W. 1068; Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395.

A chattel mortgage of fixtures recorded as a chattel mortgage is not notice to charge subsequent grantees or mortgagees of the realty.

Iowa.— Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347; Bringholff *v.* Munzenmaier, 20 Iowa 513.

Maine.— Trull *v.* Fuller, 28 Me. 545.

New Hampshire.— Tibbetts *v.* Horne, 65 N. H. 242, 23 Atl. 145, 23 Am. St. Rep. 31, 15 L. R. A. 56.

New York.— Ford *v.* Cobb, 20 N. Y. 344, point not discussed but case treated as one where there was no notice.

Ohio.— Case Mfg. Co. *v.* Garven, 45 Ohio St. 289, 13 N. E. 493; Brennan *v.* Whitaker, 15 Ohio St. 446.

Texas.— Ice, Light, etc., Co. *v.* Lone Star Engine, etc., Works, 15 Tex. Civ. App. 694, 41 S. W. 835.

Vermont.— Davenport *v.* Shants, 43 Vt. 546.

A chattel mortgage recorded before annexation is effective as against one whose rights in the realty accrued before such annexation and after the recording. Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125; Rowland *v.* West, 62 Hun (N. Y.) 583, 17 N. Y. Suppl. 330.

Chattel mortgage of machinery.— The record of a chattel mortgage will preserve its lien upon machinery of such a character as not to imply permanent annexation. Burrill *v.* Wilcox Lumber Co., 65 Mich. 571, 32 N. W. 824.

Record of a chattel mortgage among real-property mortgages is not sufficient under the recording acts. Deane *v.* Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292.

A lease which creates a lien on fixtures should be recorded as a chattel mortgage. Joliet First Nat. Bank *v.* Adam, 138 Ill. 483, 28 N. E. 955; Lake Superior Ship Canal, etc., Iron Co. *v.* McCann, 86 Mich. 106, 48 N. W. 692. *Compare* Fifield *v.* Farmers' Nat. Bank, 148 Ill. 163, 35 N. E. 802, 39 Am. St. Rep. 164.

93. Western Union Tel. Co. *v.* Burlington, etc., R. Co., 11 Fed. 1, 3 McCrary 130. But see Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675; Allen *v.* Gates, 73 Vt. 222, 50 Atl. 1092; Powers *v.* Dennison, 30 Vt. 752.

94. McAuliffe *v.* Mann, 37 Mich. 539.

95. Richardson *v.* Copeland, 6 Gray (Mass.) 536, 66 Am. Dec. 424; Christian *v.* Dripps, 28 Pa. St. 271. And see CUSTOMS AND USAGES, 12 Cyc. 1053. But *compare* Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374.

96. Keogh *v.* Daniell, 12 Wis. 163.

97. Choate *v.* Kimball, 56 Ark. 55, 19 S. W. 108. But see Thomas *v.* Davis, 76 Mo. 72, 43 Am. Rep. 756; Kahinu *v.* Aea, 6 Hawaii 68. See CUSTOMS AND USAGES, 12 Cyc. 1028.

98. See *supra*, II, A.

99. "The defendant contends that when one person erects a building on the lands of another, by the mere permission of the landowner, nothing further appearing, the building thereby becomes realty by presumption of law. But we think no such presumption arises. The case presented by these circumstances would be one for an inference of fact, not a conclusion of law." Pope *v.* Skinkle, 45 N. J. L. 39, 41.

the facts.[1] Thus the material affixed seems to belong to the owner of the land if the annexation is by a disseizor[2] or a trespasser[3] or by one under mistake.[4] The wrong-doer cannot set up his own wrong to overcome the presumption arising from annexation. The same rule applies where a tenant in common annexes chattels to the realty owned in common, if the annexation is without the consent of his cotenant,[5] and also in a few cases to annexations by a mortgagor to land subject to a mortgage.[6] Annexations made by railroad corporations without permission seem to be exceptions to the general rule.[7]

2. Licensees. Annexations made with the consent of the owner of the realty by a bare licensee or by one having mere consent are generally held to be removable or to remain the property of the one annexing. Permission to remove or an agreement that the title shall remain in the builder will be implied in the absence of any other facts tending to show a contrary intention;[8] but not if the

1. Wright *v.* Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669; Madigan *v.* McCarthy, 108 Mass. 376, 11 Am. Rep. 371; Murray *v.* Bender, 125 Fed. 705, 60 C. C. A. 473, 63 L. R. A. 783. See Benedict *v.* Benedict, 5 Day (Conn.) 464. Intention to remove at some future time cannot avail against the true owner. Huebschmann *v.* McHenry, 29 Wis. 655. See also the civil-law rule as applied in Louisiana. Poche *v.* Theriot, 23 La. Ann. 137; Baldwin *v.* Union Ins. Co., 2 Rob. (La.) 133.

2. Doscher *v.* Blackiston, 7 Oreg. 143; Rotan Grocery Co. *v.* Dowlin, (Tex. Civ. App. 1903) 77 S. W. 430; Huebschmann *v.* McHenry, 29 Wis. 655.

3. *Arizona.*— Prescott, etc., R. Co. *v.* Rees, 3 Ariz. 317, 28 Pac. 1134.

California.— McKiernan *v.* Hesse, 51 Cal. 594 (fixtures placed by a stranger on government land pass to the grantee of the government); U. S. *v.* Monterey County, 47 Cal. 515 (holding that in condemnation proceedings the government must pay for buildings erected on land on which it has entered without permission); Collins *v.* Bartlett, 44 Cal. 371.

Hawaii.—Apolo *v.* Kauo, 7 Hawaii 755.

Maine.— Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940; Sampson *v.* Alexander, 67 Me. 523; Bonney *v.* Foss, 62 Me. 248.

Massachusetts.— Sudbury First Parish *v.* Jones, 8 Cush. 184; Pierce *v.* Goddard, 22 Pick. 559, 33 Am. Dec. 764; Washburn *v.* Sproat, 16 Mass. 449.

Mississippi.— Emrich *v.* Ireland, 55 Miss. 390; Stillman *v.* Hamer, 7 How. 421.

Nevada.— Treadwell *v.* Sharon, 7 Nev. 37.

New York.— Thayer *v.* Wright, 4 Den. 180.

North Carolina.— Wentz *v.* Fincher, 34 N. C. 297, 55 Am. Dec. 416.

Pennsylvania.— Crest *v.* Jack, 3 Watts 238, 27 Am. Dec. 353.

United States.— Jacoby *v.* Johnson, 120 Fed. 487, 56 C. C. A. 637.

See 23 Cent. Dig. tit. "Fixtures," § 6.

4. Blair *v.* Worley, 2 Ill. 178; Seymour *v.* Watson, 5 Blackf. (Ind.) 555, 36 Am. Dec. 566; Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340; Burleston *v.* Teeple, 2 Greene (Iowa) 542 (fence on government land); Rotan Grocery Co. *v.* Dowlin, (Tex. Civ. App. 1903) 77 S. W. 430 (storehouse intended to remain permanently); Kimball *v.* Adams, 52 Wis. 554, 9 N. W. 170 (fence on land of another). *Contra*, as to fences on government land. Bingham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 59 Pac. 931.

A line fence placed by mistake on the land of one proprietor by an adjoining proprietor remains the property of the latter. Curtis *v.* Leasia, 78 Mich. 480, 44 N. W. 500.

5. Baldwin *v.* Breed, 16 Conn. 60; Aldrich *v.* Husband, 131 Mass. 480; Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353. And *compare* Gibson *v.* Vaughn, 2 Bailey (S. C.) 389, 23 Am. Dec. 143. The principle is applied where the owner of a majority of stock in a corporation annexed property to the realty of the corporation. Murray *v.* Bender, 125 Fed. 705, 60 C. C. A. 473, 63 L. R. A. 783. It is also applied to separate property invested in additions to community property which become community property and also to community property added to separate property and *vice versa* (Peck *v.* Brummagim, 31 Cal. 440, 89 Am. Dec. 195; Smith *v.* Smith, 12 Cal. 216, 73 Am. Dec. 533), and in the latter case the community estate must be reimbursed (Rice *v.* Rice, 21 Tex. 58). A guardian having built on land of his ward a permanent house it belongs to the ward. Copley *v.* O'Neil, 1 Lans. (N. Y.) 214. In Nahalelua *v.* Kaaahu, 10 Hawaii 662, a cotenant after partition sale was allowed compensation for improvements placed on the land under the belief that he was sole owner.

6. Wight *v.* Gay, 73 Me. 297; Guernsey *v.* Wilson, 134 Mass. 482; Cole *v.* Stewart, 11 Cush. (Mass.) 181; Butler *v.* Page, 7 Metc. (Mass.) 40, 39 Am. Dec. 757; Albert *v.* Uhrich, 180 Pa. St. 283, 16 Atl. 745.

7. St. Louis, etc., R. Co. *v.* Nyce, 61 Kan. 394, 59 Pac. 1040, 43 L. R. A. 241; Atchison, etc., R. Co. *v.* Morgan, 42 Kan. 23, 21 Pac. 809, 16 Am. St. Rep. 471, 4 L. R. A. 284; Justice *v.* Nesquehoning Valley R. Co., 87 Pa. St. 28. *Contra*, Meriam *v.* Brown, 128 Mass. 391.

8. *Alabama.*— Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

Connecticut.— Curtis *v.* Hoyt, 19 Conn. 154, 48 Am. Dec. 149. But *compare* Benedict *v.*

annexation is to land of one incapable of giving consent, as a minor child or a married woman.[9]

3. TORTIOUS ANNEXING OF CHATTEL OF THIRD PERSON. Where A tortiously annexes B's chattel to C's or to A's land it becomes the property of C or of A.[10]

4. ANNEXING TO ADJOINING LAND. The status of buildings or other structures placed by an owner or tenant of land on adjoining premises for use in connection with his land has been variously determined, physical connection with the main property being considered an important element.[11]

Benedict, 5 Day 464; Leland *v.* Gassett, 17 Vt. 403, in both of which cases the structure seems to have been intended to be permanent.

Illinois.— Chicago, etc., R. Co. *v.* Goodwin, 111 Ill. 273, 53 Am. Rep. 622, where a railroad track, laid by permission, was decided to be personalty.

Iowa.— Fischer *v.* Johnston, 106 Iowa 181, 76 N. W. 658 (agreement that fixture shall remain personalty implied from license); Corwin Dist. Tp. *v.* Morehead, 43 Iowa 466.

Maine.— Peaks *v.* Hutchinson, 96 Me. 530, 53 Atl. 38; Salley *v.* Robinson, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; Readfield Telephone, etc., Co. *v.* Cyr, 95 Me. 287, 49 Atl. 1047; Trask *v.* Ford, 39 Me. 437 (case of a dam which remained the property of the builder); Hilborne *v.* Brown, 12 Me. 162 (licensee's rights in a house protected against a grantee of the land); Russell *v.* Richards, 10 Me. 429, 25 Am. Dec. 254; Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 222. See Rev. St. (1903) c. 75, § 32.

Massachusetts.— Howard *v.* Fessenden, 14 Allen 124; Wells *v.* Banister, 4 Mass. 514.

Minnesota.— Northwestern Mut. L. Ins. Co. *v.* George, 77 Minn. 319, 79 N. W. 1028, 1064; Merchants' Nat. Bank *v.* Stanton, 55 Minn. 211, 56 N. W. 821, 43 Am. St. Rep. 491.

Missouri.— Brown *v.* Baldwin, 121 Mo. 126, 25 S. W. 863; Climer *v.* Wallace, 28 Mo. 556, 75 Am. Dec. 135, grantee of land without notice not affected by the consent.

New Jersey.— Holmes *v.* Standard Pub. Co., (Ch. 1903) 55 Atl. 1107; Pope *v.* Skinkle, 45 N. J. L. 39.

New York.— Dubois *v.* Kelly, 10 Barb. 496, building erected by licensee, after license was revoked by conveyance of the licensor's land, personalty as against the grantee without notice.

North Carolina.— Western North Carolina R. Co. *v.* Deal, 90 N. C. 110.

But see *contra*, Powers *v.* Dennison, 30 Vt. 752.

9. Adams *v.* Kauwa, 6 Hawaii 280 (land of married woman); Doak *v.* Wiswell, 38 Me. 569 (land of married woman, where, the legislature having removed the disability, it was held that arrangements between husband and wife fall within the general rule); Peaks *v.* Hutchinson, 96 Me. 530, 53 Atl. 38; Washburn *v.* Sproat, 16 Mass. 449 (land of wife); Copley *v.* O'Neil, 1 Lans. (N. Y.) 214 (land of a minor child).

10. Thus where A fraudulently obtained a machine from B and affixed it to C's land B loses title and cannot maintain trover for it against A. Woodruff, etc., Iron Works *v.* Adams, 37 Conn. 233. Where C attached B's house to C's land it was held that B could not recover it. Salter *v.* Semple, 71 Ill. 430. *Contra*, Central Branch R. Co. *v.* Fritz, 20 Kan. 430; Hamlin *v.* Parsons, 12 Minn. 108, 90 Am. Dec. 284. Where A wrongfully affixed B's railroad rails to C's land, intending the annexation to be temporary, and C removed the rails, it was held that they remained the property of A. Shoemaker *v.* Simpson, 16 Kan. 43. If A as agent affixes his individual property to land of B, for whom he is agent, it becomes part of B's land. Goddard *v.* Bolster, 6 Me. 427, 20 Am. Dec. 320. If A and B jointly own a chattel and it is affixed to B's land, with no agreement that it shall remain their joint property, it becomes the property of B. Quimby *v.* Straw, 71 N. H. 160, 51 Atl. 656. If A tortiously affixes B's chattel to A's land and sells the land to C, without notice, C will be entitled to the chattel. Fryatt *v.* Sullivan Co., 5 Hill (N. Y.) 116 [*affirmed* in 7 Hill 529]. If A tortiously takes B's stone and sells it to C, who affixes it to his land as a walk, it becomes part of C's land. Jackson *v.* Walton, 28 Vt. 43.

In all the foregoing cases it seems that the annexation should be substantial in order to divest the owner's title. Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353.

Unity of title rule.— In Michigan by what is called the unity of title rule, a chattel cannot become part of the realty unless it is annexed by one having ownership of both, or like interests in each. Thus A cannot affix B's chattel to A's land so as to make it realty, nor can A owning a chattel in severalty make it by annexation part of the realty in which he has an undivided interest, nor can a husband make his chattel part of realty owned by him and his wife. See Wickes *v.* Hill, 115 Mich. 333, 73 N. W. 375; Lansing Iron, etc., Works *v.* Wilbur, 111 Mich. 413, 69 N. W. 667; Lansing Iron, etc., Works *v.* Walker, 91 Mich. 409, 51 N. W. 1061, 30 Am. St. Rep. 488; Scudder *v.* Anderson, 54 Mich. 122, 19 N. W. 775; Robertson *v.* Corsett, 39 Mich. 777; Kerr *v.* Kingsbury, 39 Mich. 150, 33 Am. Rep. 362; Coleman *v.* Stearns Mfg. Co., 38 Mich. 38; Adams *v.* Lee, 31 Mich. 440. The unity of title rule is also adopted in Arkansas, Arizona, and Louisiana. Nigro *v.* Hatch, 2 Ariz. 144, 11 Pac. 177; Witherspoon *v.* Nickels, 27 Ark. 332; Hibernia Nat. Bank *v.* Sarah Planting, etc., Co., 107 La. 650, 31 So. 1031.

11. **A water-pipe** extending across adjoining land by license is a fixture and parcel

B. Heir and Personal Representative, Devisee and Executor. On the death of the owner of realty, testate or intestate, articles clearly affixed to the realty will devolve upon those entitled to the realty. Slight annexation seems to be sufficient.[12] The standards of removability of trade fixtures are not applicable to the heir.[13] The American courts in general apply the same rules as the English.[14]

of the house to which it is attached. Philbrick *v.* Ewing, 97 Mass. 133.

Electric apparatus on adjoining land by license for the use of a club-house passes by a sale of the latter. Berliner *v.* Piqua Club Assoc., 32 Misc. (N. Y.) 470, 66 N. Y. Suppl. 791.

A floating dry-dock in the Hudson river in front of and connected with a wharf of the owner is not an appurtenance of the land so as to subject the land to a mechanic's lien for its construction. Coddington *v.* Hudson County Dry Dock, etc., Co., 31 N. J. L. 477.

A hotel sign on a post placed on the curb line in front of the hotel passes with the sale of the hotel. Redlon *v.* Barker, 4 Kan. 445, 96 Am. Dec. 180.

Platform scales.— Platform scales in the street but with beams extending into an adjoining building are fixtures (Bliss *v.* Whitney, 9 Allen (Mass.) 114, 85 Am. Dec. 745), but not where disconnected from the building (Union Cent. L. Ins. Co. *v.* Taggart, 55 Minn. 95, 6 N. W. 579, 43 Am. St. Rep. 474). Track scales on railroad property are fixtures appurtenant to an elevator adjoining erected by license of the railroad company. McGorrisk *v.* Dwyer, 78 Iowa 279, 43 N. W. 215, 16 Am. St. Rep. 440, 5 L. R. A. 594. Platform scales extending a few inches into an adjoining lot belong to the lot in connection with which they are used. Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780.

A house built on a street but attached to a house on an abutting lot was treated as personalty when it had apparently always been so regarded by the parties. Foy *v.* Reddick, 31 Ind. 414.

A separate building erected by license on land not adjoining that of the owner but used in the same general business was held not appurtenant. Walton *v.* Wray, 54 Iowa 531, 6 N. W. 742.

A shop left by a tenant partly on his own land and partly on that of his former landlord was held to belong in part to each. Beers *v.* St. John, 16 Conn. 222.

A tenant erecting fixtures on land adjoining the leased premises may be estopped from denying his landlord's title thereto. Brownell *v.* Fuller, 60 Nebr. 558, 83 N. W. 669.

12. Henry's Case, 20 H. 7, 13 pl. 24; Anonymous, 21 H. 7, 26 pl. 4 [both cases cited in Gray Cas. Prop. 657–659]; Bain *v.* Brand, 1 App. Cas. 762; Herlakenden's Case, 4 Coke 62*a*; Squier *v.* Mayer, 2 Freem. Ch. 249, 22 Eng. Reprint 1189; Cave *v.* Cave, 2 Vern. Ch. 508, 23 Eng. Reprint 925. In Norton *v.* Dashwood, [1896] 2 Ch. 497, 65 L. J. Ch. 737, 75 L. T. Rep. N. S. 205, 44 Wkly. Rep. 680, tapestries were included in a devise of the realty. Inasmuch as cases involving the rights of heir and executor are among the most ancient as well as most modern in the law of fixtures, and as it is admitted that what is a fixture to-day would not necessarily have been one in early days, owing to changes in taste and habits, it is probably true that the contradictions in the decisions are due more to changes in standards than in the law.

13. Where the testator had affixed machinery for operating a coal-mine the court said: "The absolute owner of the land, for the purpose of better using that land, having erected upon and affixed to the freehold, and used, for the purpose of the beneficial enjoyment of the real property, certain machinery, the question is, is there any authority for saying, that, under these circumstances, the personal representative has a right to step in and lay bare the land, and to take away all the machinery necessary for the enjoyment of the land," and the court answered the question in the negative. Fisher *v.* Dixon, 12 Cl. & F. 312, 328, 9 Jur. 883, 8 Eng. Reprint 1426. See also Lawton *v.* Salmon, 1 H. Bl. 259 note, 2 Rev. Rep. 764. So also in Canada. McLaren *v.* Coombs, 16 Grant Ch. (U. C.) 587.

14. Fence rails in place are part of the realty, but rails taken from the fence and piled on the land pass to the personal representatives. Clark *v.* Burnside, 15 Ill. 62. But *compare* Bishop *v.* Bishop, 11 N. Y. 123, 62 Am. Dec. 68, holding that hop poles, piled between seasons on the land, pass to the heir.

A sawmill passes to the heir, although built by a third person on land of the ancestor. Kinsell *v.* Billings, 35 Iowa 154, as to which case see further 14 Cyc. 103 note 55. *Compare* Wiley *v.* Morris, 39 N. J. Eq. 97, construing a will.

A stove set in brick-work passes to the heir. Tuttle *v.* Robinson, 33 N. H. 104. But *compare* Crenshaw *v.* Crenshaw, 2 Hen. & M. (Va.) 22, a still not actually affixed goes to the executor.

Trade fixtures annexed by the testator, and not intended to be permanent, were given to the executor. McDavid *v.* Wood, 5 Heisk. (Tenn.) 95. *Compare* McKenna *v.* Hammond, 3 Hill (S. C.) 331, 30 Am. Dec. 366, holding that the running gear of a cotton-gin goes to the heir as necessary to the enjoyment of the inheritance.

A pleasure boat will not pass to a devisee of a summer cottage as an appurtenance. Dana *v.* Burke, 62 N. H. 627.

In New York the matter is largely regulated by statute. Buckley *v.* Buckley, 11 Barb. 43; Hovey *v.* Smith, 1 Barb. 372; House *v.* House, 10 Paige 158. See 2 Rev. St.

C. Grantor and Grantee — 1. In General. In controversies between the heir and the administrator, or the devisee and the executor, no rights of a purchaser for value present themselves and the decedent's intention may well control, or the heir or devisee may claim annexations unless proof be made against him. But in the case of grants the intention of the grantor is less material.[15] The intention now is to be sought in the terms of the deed, and the claimant of the fixture being a purchaser for value may rely upon the general rule that deeds are construed more favorably to the grantee, and the burden would seem to be upon the grantor to show that articles annexed to the premises conveyed did not pass by words of general description, unless expressly excepted. This seems to be the general principle, but in the interpretation of what is annexed there is no fixed standard. Articles annexed by the grantor for trade purposes are not removable by him according to the rule as to trade fixtures between landlord and tenant.[16] A deed or mortgage of realty, in the absence of a contrary intention, will carry all annexations, although not expressly referred to.[17] Slight or constructive annexation seems to be sufficient as between grantor and grantee.[18] The

24, § 6, and Code Civ. Proc. § 2712. See also Descent and Distribution, 14 Cyc. 103 note 55.

15. If, however, the annexation is after the giving of the deed, as by a mortgagor, then intention may be the prevailing element in determining whether the article annexed is part of the realty. See *infra*, V, E, 1.

16. Harkness *v.* Sears, 26 Ala. 493, 62 Am. Dec. 742; Tabor *v.* Robinson, 36 Barb. (N. Y.) 483; Miller *v.* Plumb, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456. Otherwise as to trade fixtures easily severable without injury to the freehold (Hancock *v.* Jordan, 7 Ala. 448, 42 Am. Dec. 600; Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353) and implements of trade not attached (Capen *v.* Packham, 35 Conn. 88; Griffin *v.* Jansen, 39 S. W. 43, 19 Ky. L. Rep. 19).

Furniture used in vendor's business, although attached to realty, does not pass. Cross *v.* Marston, 17 Vt. 533, 44 Am. Dec. 353.

17. *Alabama.*— Mitchell *v.* Billingsley, 17 Ala. 391.

Connecticut.— Isham *v.* Morgan, 9 Conn. 374, 23 Am. Dec. 361.

Massachusetts.— Winslow *v.* Merchants' Ins. Co., 4 Metc. 306, 38 Am. Dec. 368 (a deed in the usual terms, with no stipulation as to fixtures, will include as parcel: (1) All *de facto* additions, not equivocal in their nature; (2) articles doubtful in their nature which if added by the grantor or mortgagor are presumed to be permanent); Noble *v.* Bosworth, 19 Pick. 314.

New York.— Leonard *v.* Clough, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305 [*reversing* 14 N. Y. Suppl. 339].

North Carolina.— Bryan *v.* Lawrence, 50 N. C. 337.

Pennsylvania.— Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71.

See 23 Cent. Dig. tit. "Fixtures," §§ 44–55. See also *infra*, V, E, 1.

A grantee by an execution sale is within the rule.

Maine.— Trull *v.* Fuller, 28 Me. 545.

Massachusetts.— Goddard *v.* Chase, 7 Mass. 432.

New Hampshire.— Baker *v.* Davis, 19 N. H. 325.

Pennsylvania.— Oves *v.* Oglesby, 7 Watts 106.

United States.— Milwaukee, etc., R. Co. *v.* James, 6 Wall. 750, 18 L. ed. 854.

See 23 Cent. Dig. tit. "Fixtures," § 56.

A grantee by tax-sale, subject to redemption, is within the rule. Green *v.* Chicago, etc., R. Co., 8 Kan. App. 611, 56 Pac. 136.

18. *Alabama.*— Mitchell *v.* Billingsley, 17 Ala. 391.

Indiana.— Seymour *v.* Watson, 5 Blackf. 555, 36 Am. Dec. 556, rails laid in a fence.

Kansas.— Redlon *v.* Barker, 4 Kan. 445, 96 Am. Dec. 180.

Kentucky.— Hill *v.* Mundy, 89 Ky. 36, 11 S. W. 956, 11 Ky. L. Rep. 248, 4 L. R. A. 674.

Maine.— Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 201.

Massachusetts.— Weston *v.* Weston, 102 Mass. 514; Park *v.* Baker, 7 Allen 78, 83 Am. Dec. 668, mere adaptability, without attachment, is not enough.

Mississippi.— Tate *v.* Blackburne, 48 Miss. 1; Richardson *v.* Borden, 42 Miss. 71, 2 Am. Rep. 595.

Missouri.— Rogers *v.* Crow, 40 Mo. 91, 93 Am. Dec. 299; Cohen *v.* Kyler, 27 Mo. 122.

New Hampshire.— Cavis *v.* Beckford, 62 N. H. 229, 13 Am. St. Rep. 554; Burnside *v.* Twitchell, 43 N. H. 390.

New York.— Bishop *v.* Bishop, 11 N. Y. 123, 62 Am. Dec. 68 (hop poles piled on the premises between seasons); Goodrich *v.* Jones, 2 Hill 142 (fence rails piled on the premises. *Contra*, Harris *v.* Scovel, 85 Mich. 32, 48 N. W. 173).

North Carolina.— Bryan *v.* Lawrence, 50 N. C. 337, loose planks used for floor of ginhouse. But *compare* Noyes *v.* Terry, 1 Lans. (N. Y.) 219, in which it was held that loose scantling used to hang tobacco on did not pass.

Texas.— Cole *v.* Roach, 37 Tex. 413, wooden cistern on blocks.

sale of premises described as a house, a mill, a factory, a quarry, or the like is held to carry fixtures slightly annexed essential to complete property of such a description.[19] The grantor by his conduct may so deal with the fixture that it will pass by estoppel.[20]

2. Domestic Fixtures, Furniture, and Articles of Ornament. Articles added by the owner for the more convenient use of the realty, or for his greater enjoyment, or as furnishings or ornament are not such part of the realty as will pass by a deed, unless substantial additions and clearly intended to be permanent.[21]

England.— Colegrave *v.* Dias Santos, 2 B. & C. 76, 3 D. & R. 255, 1 L. J. K. B. O. S. 239, 9 E. C. L. 42; Hitchman *v.* Walton, 1 H. & H. 374, 8 L. J. Exch. 31, 4 M. & W. 409.

Canada.— Haggert *v.* Brampton, 28 Can. Sup. Ct. 174; Stack *v.* T. Eaton Co., 4 Ont. L. Rep. 335.

See 23 Cent. Dig. tit. "Fixtures," §§ 44–55.

"The general rule is, that anything of a personal nature, not fixed to the freehold, cannot be considered as an incident to the land, even as between vendor and vendee." Walker *v.* Sherman, 20 Wend. (N. Y.) 636, 638. See also Despatch Packets Line *v.* Bellamy Mfg. Co., 12 N. H. 205, 37 Am. Dec. 203.

In Washington machines or wood furnishings that can be bought ready made, although annexed in fact, do not pass by deed. Neufelder *v.* Third St., etc., R. Co., 23 Wash. 470, 63 Pac. 197, 83 Am. St. Rep. 831, 53 L. R. A. 600; Philadelphia Mortg., etc., Co. *v.* Miller, 20 Wash. 607, 56 Pac. 382, 72 Am. St. Rep. 138, 44 L. R. A. 559.

19. Baldwin *v.* Walker, 21 Conn. 168; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395; Williams' Appeal, (Pa. 1889) 16 Atl. 810; Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612.

20. Dutton *v.* Ensley, 21 Ind. App. 46, 51 N. E. 380, 69 Am. St. Rep. 340; Robertson *v.* Parrish, (Tex. Civ. App. 1897) 39 S. W. 646.

21. Wright *v.* Du Bignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669; Hunt *v.* Bullock, 23 Ill. 438; Leonard *v.* Stickney, 131 Mass. 541; Towne *v.* Fiske, 127 Mass. 125, 34 Am. Rep. 353.

Furniture.— In a conveyance of the fee the words "fixtures and fittings up" do not include the furniture of a house, although it is at the time let furnished to a tenant. Simmons *v.* Simmons, 6 Hare 352, 12 Jur. 8, 31 Eng. Ch. 352. As to such terms in a chattel mortgage see Chattel Mortgages, 6 Cyc. 1027 note 42.

Mirrors attached with screws and spikes and having painted frames corresponding with the walls of a house may be sold to one person and the house to another (Cranston *v.* Beck, 70 N. J. L. 145, 56 Atl. 121), but mirrors made part of the wall of a house are fixtures and not furniture (Ward *v.* Kilpatrick, 85 N. Y. 413, 39 Am. Rep. 674).

An electric annunciator in a hotel is a fixture. Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

Heating apparatus.— Gas-ranges connected to the realty by a gas-pipe and flue do not pass by a mortgage. Cosgrove *v.* Troeseher, 62 N. Y. App. Div. 123, 70 N. Y. Suppl. 764. Steam radiators are like gas-fixtures and not part of the realty. Catasauqua Nat. Bank *v.* North, 160 Pa. St. 303, 28 Atl. 694. *Compare* J. L. Mott Iron Works *v.* Middle States Loan, etc., Co., 17 App. Cas. (D. C.) 584. *Contra*, Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582. See also Pond, etc., Co. *v.* O'Connor, 70 Minn. 266, 73 N. W. 159, 248. Portable hot-air furnaces are furniture and not fixtures. Ridgeway Stove Co. *v.* Way, 141 Mass. 557, 6 N. E. 714; Towne *v.* Fiske, 127 Mass. 125, 34 Am. Rep. 353; Rahway Sav. Inst. *v.* Irving St. Baptist Church, 36 N. J. Eq. 61. *Contra*, Scottish American Ins. Co. *v.* Sexton, 26 Ont. 77 [*following* Stockwell *v.* Campbell, 39 Conn. 362, 39 Am. Rep. 393]. A furnace intended to be permanent is a fixture (Thielman *v.* Carr, 75 Ill. 385) and a steam boiler and appurtenances (Jermyn *v.* Hunter, 93 N. Y. App. Div. 175, 87 N. Y. Suppl. 546) and a stove in lieu of a fireplace (Folsom *v.* Moore, 19 Me. 252) and portable furnaces and cook stoves if so intended (Erdman *v.* Moore, 58 N. J. L. 445, 33 Atl. 958), but not if agreement prevents (Kerby *v.* Clapp, 15 N. Y. App. Div. 37, 44 N. Y. Suppl. 116).

Gas-fixtures and chandeliers are furniture and not fixtures.

Louisiana.— L'Hote *v.* Fulham, 51 La. Ann. 780, 25 So. 655.

Massachusetts.— Towne *v.* Fisk, 127 Mass. 125, 34 Am. Rep. 353.

Minnesota.— Capehart *v.* Foster, 61 Minn. 132, 63 N. W. 257, 52 Am. St. Rep. 582.

Missouri.— Rogers *v.* Crow, 40 Mo. 91, 93 Am. Dec. 299.

New York.— McKeage *v.* Hanover F. Ins. Co., 81 N. Y. 38, 37 Am. Rep. 471; Shaw *v.* Lenke, 1 Daly 487; Kirchman *v.* Lapp, 19 N. Y. Suppl. 831.

Pennsylvania.— Jarechi *v.* Philharmonic Soc., 79 Pa. St. 403, 21 Am. Rep. 78; Vaughen *v.* Haldeman, 33 Pa. St. 522, 75 Am. Dec. 622.

Canada.— Stack *v.* S. Eaton Co., 4 Ont. L. Rep. 335.

See 23 Cent. Dig. tit. "Fixtures," § 51.

Contra.— Fratt *v.* Whittier, 58 Cal. 126, 41 Am. Rep. 251, if in a hotel bargained to be sold "with improvements."

Chandeliers in a house are fixtures as regards a mechanic's lien. McFarlane *v.* Foley, 27 Ind. App. 848, 60 N. E. 357, 87 Am. St. Rep. 264.

Chandeliers in a theater are not fixtures as between a mortgagee of realty and a vendee of the fixtures. New York L. Ins. Co. *v.* Allison, 107 Fed. 179, 46 C. C. A. 229.

3. TREES IN A NURSERY. Trees in a nursery are part of the realty and pass by a deed or a mortgage thereof.[22]

D. Contract Vendor and Contract Vendee. One who enters on land under an agreement to purchase it and annexes fixtures is presumed to do so with the intention to make them permanent and part of the realty.[23] As a consequence such annexations belong to the owner of the realty if the contract vendee does not perform his contract, and must be left when he gives up possession of the premises;[24] but not if the contract vendor has given his consent to removal, or if he is himself in default in performing the contract to convey.[25] The rules between mortgagor and mortgagee, and not those between landlord and tenant, are applied to contract vendor and contract vendee.[26]

E. Mortgagor and Mortgagee — 1. IN GENERAL.[27] As regards what are

Chandeliers in a club-house are included in a mortgage of the realty. Berliner *v.* Piqua Club Assoc., 32 Misc. (N. Y.) 470, 66 N. Y. Suppl. 791.

Electric-light fixtures are included in a mortgage of a hotel. Canning *v.* Owen, 22 R. I. 624, 48 Atl. 1033, 84 Am. St. Rep. 855.

Gasometer and appliances for generating gas pass by a mortgage of the realty (Keeler *v.* Keeler, 31 N. J. Eq. 181) although severable by a tenant (Hays *v.* Doane, 11 N. J. Eq. 84).

22. *Colorado.*— Dubois *v.* Bowles, 30 Colo. 44, 69 Pac. 1067.

Connecticut.— Maples *v.* Millon, 31 Conn. 598.

Illinois.— Smith *v.* Price, 39 Ill. 28, 89 Am. Dec. 284.

Iowa.— Adams *v.* Beadle, 47 Iowa 439, 29 Am. Rep. 487.

New York.— Hamilton *v.* Austin, 36 Hun 138.

See 23 Cent. Dig. tit "Fixtures," §§ 34, 49.

But a mortgagor may sell such trees as are suitable for transplanting as long as he has a right to redeem. Adams *v.* Beadle, 47 Iowa 439, 29 Am. Rep. 487; Price *v.* Brayton, 19 Iowa 309; Miller *v.* Baker, 1 Metc. (Mass.) 27.

23. Salter *v.* Sample, 71 Ill. 430; Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332; Smith *v.* Moore, 26 Ill. 392 (excepting trade fixtures from the rule); Dooley *v.* Crist, 25 Ill. 551.

A subcontract vendee acquires no greater rights in this regard than the original contract vendee. Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800 [*affirming* 106 Ill. App. 190]; Leland *v.* Gassett, 17 Vt. 403.

This presumption may be rebutted by showing that the entry was merely for the purpose of investigating the property; as for testing its value for minerals. Alderson *v.* Elk Creek Min. Co., 39 Oreg. 552, 65 Pac. 978.

24. *Maine.*— Dustin *v.* Crosby, 75 Me. 75 [expressly *overruling* Pullen *v.* Bell, 40 Me. 314]; Lapham *v.* Norton, 71 Me. 83; Hinkley, etc., Iron Co. *v.* Black, 70 Me. 473, 35 Am. Rep. 346; Hemenway *v.* Cutler, 51 Me. 407.

Massachusetts.— Westgate *v.* Wixon, 128 Mass. 304; Poor *v.* Oakman, 104 Mass. 309; McLaughlin *v.* Nash, 14 Allen 136, 92 Am. Dec. 741; King *v.* Johnson, 7 Gray 239.

Missouri.— Hannibal, etc., R. Co. *v.* Crawford, 68 Mo. 80.

West Virginia.— Patton *v.* Moore, 16 W. Va. 428, 37 Am. Rep. 789.

Wisconsin.— Seatoff *v.* Anderson, 28 Wis. 212.

See 23 Cent. Dig. tit. "Fixtures," §§ 47-55.

Compare Church *v.* Lapham, 94 N. Y. App. Div. 550, 88 N. Y. Suppl. 222.

Vendee's attaching creditors or mortgagees. — The right of the contract vendor to fixtures put in by the contract vendee will prevail over that of the latter's attaching creditors (Markle *v.* Stackhouse, 65 Ark. 23, 44 S. W. 808) or that of the latter's chattel mortgagee (Perkins *v.* Swank, 43 Miss. 349).

25. Brannon *v.* Vaughan, 66 Ark. 87, 48 S. W. 909 (consent); Yater *v.* Mullen, 23 Ind. 562 (both features).

26. *Illinois.*— Smith *v.* Moore, 26 Ill. 392 [*reversing* 24 Ill. 512].

Maine.— Lapham *v.* Norton, 71 Me. 83; Hinkley, etc., Iron Co. *v.* Black, 70 Me. 473, 35 Am. Rep. 346.

Massachusetts.— Westgate *v.* Wixon, 128 Mass. 304; King *v.* Johnson, 7 Gray 239.

Michigan.— Harris *v.* Hackley, 127 Mich. 46, 86 N. W. 389.

Rhode Island.— McCrillis *v.* Cole, 25 R. I. 156, 55 Atl. 196.

See 23 Cent. Dig. tit. "Fixtures," §§ 47-55.

Character of tenancy.— Raymond *v.* White, 7 Cow. (N. Y.) 319 (where it is said the contract vendee in possession is a tenant at will or possibly from year to year); Alderson *v.* Elk Creek Gold Min. Co., 39 Oreg. 552, 65 Pac. 978 (where it is said that he is not a tenant, but a licensee with an interest, and may remove fixtures if put up for temporary purposes). See also Pomeroy *v.* Bell, 118 Cal. 635, 50 Pac. 683.

If the contract vendor is a mortgagee in effect it is important to decide whether he is a prior or subsequent mortgagee as regards annexations, for according as he is one or the other it would seem that he would be given greater or lesser rights. See Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; Hendy *v.* Dinkerhoff, 57 Cal. 3, 40 Am. Rep. 107; Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22. See *infra*, V, E.

27. As to mortgages see CHATTEL MORTGAGES, 6 Cyc. 985; and, generally, MORTGAGES.

fixtures substantially the same rules are said to prevail between mortgagor and mortgagee as between grantor and grantee,[28] and not the rule between landlord and tenant.[29] It would seem that this general rule, which is based on the theory of a mortgage conveying the absolute title subject to being defeated, should be qualified in jurisdictions where the interest of the mortgagee is that of one having only a lien or security for his title.[30] With this limitation it may be said that annexations to the realty become subject to the real mortgagee's rights in the realty,[31] whether affixed before the execution of the mortgage[32] or after.[33] This

28. As between grantor and grantee see *supra*, V, C.

In support of the text see the following cases:

Alabama.— Tillman *v.* De Lacy, 80 Ala. 103.

Georgia.— Cunningham *v.* Cureton, 96 Ga. 489, 23 S. E. 420.

New York.— Davidson *v.* Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. 892; Snedeker *v.* Warren, 12 N. Y. 170.

North Carolina.— Foote *v.* Gooch, 96 N. C. 265, 1 S. E. 525, 60 Am. Rep. 411.

Wisconsin.— Gunderson *v.* Swarthout, 104 Wis. 186, 80 N. W. 465, 76 Am. St. Rep. 860.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

Mortgage by lessee or contract vendee.— A lessee for years (Day *v.* Perkins, 2 Sandf. Ch. (N. Y.) 359), or a lessee of a perpetual lease (Davidson *v.* Westchester Gas Light Co., 99 N. Y. 558, 2 N. E. 892), who annexes fixtures to a leasehold, and a contract vendee of realty who annexes fixtures to a freehold (McFadden *v.* Allen, 134 N. Y. 489, 32 N. E. 21, 19 L. R. A. 446 [*affirming* 50 Hun 361, 3 N. Y. Suppl. 356]), and who mortgage their respective interests, are also subject to the rule stated in the text.

29. *Connecticut.*— Maples *v.* Millon, 31 Conn. 598.

Illinois.— Arnold *v.* Crowder, 81 Ill. 56, 25 Am. Rep. 260.

Maine.— Ekstrom *v.* Hall, 90 Me. 186, 38 Atl. 106.

Vermont.— Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042.

England.— Monti *v.* Barnes, [1901] 1 K. B. 205, 70 L. J. K. B. 225, 83 L. T. Rep. N. S. 619, 49 Wkly. Rep. 147; Longbottom *v.* Berry, L. R. 5 Q. B. 123, 10 B. & S. 852, 39 L. J. Q. B. 37, 22 L. T. Rep. N. S. 385; Holland *v.* Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. Rep. N. S. 709, 20 Wkly. Rep. 990; Climie *v.* Wood, L. R. 4 Exch. 328, 38 L. J. Exch. 223, 20 L. T. Rep. N. S. 1012; Fisher *v.* Dixon, 12 Cl. & F. 312, 9 Jur. 883, 8 Eng. Reprint 1426.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

30. See, generally, MORTGAGES.

31. *Alabama.*— Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75, mortgagee's interest superior to that of parol vendee of fixtures.

Minnesota.— Woodham *v.* Crookston First Nat. Bank, 48 Minn. 67, 50 N. W. 1015, 31 Am. St. Rep. 622; Hamlin *v.* Parsons, 12 Minn. 108, 90 Am. Dec. 284, lien continues on a house after removal to another lot.

New Jersey.— Feder *v.* Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628, mortgagee's interest superior to that of mortgagor's receiver.

New York.— New York Security, etc., Co. *v.* Saratoga Gas, etc., Light Co., 157 N. Y. 689, 51 N. E. 1092 [*affirming* 88 Hun 569, 34 N. Y. Suppl. 890], mortgagee's interest superior to that of judgment creditor of mortgagor as to fixtures attached after the mortgage was made.

England.—Walmsley *v.* Milne, 7 C. B. N. S. 115, 6 Jur. N. S. 125, 29 L. J. C. P. 97, 1 L. T. Rep. N. S. 62, 8 Wkly. Rep. 138, 9 E. C. L. 115; Mather *v.* Fraser, 2 Jur. N. S. 900, 2 Kay & J. 536, 25 L. J. Ch. 361, 4 Wkly. Rep. 387; Place *v.* Fagg, 7 L. J. K. B. O. S. 195, 4 M. & R. 277.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

By the English law a chattel is affixed so as to be subject to a mortgage of the realty, although fastened only to keep it steady and so as to admit of severance without injury to the freehold. See *supra*, II, B, 2, c.

32. Union Bank *v.* Emerson, 15 Mass. 159; Langdon *v.* Buchanan, 62 N. H. 657; Knickerbocker Trust Co. *v.* Penn Cordage Co., (N. J. Err. & App. 1904) 58 Atl. 409 [*affirming* in part and *reversing* in part 65 N. J. Eq. 181, 55 Atl. 231]; Atlantic Safe Deposit, etc., Co. *v.* Atlantic City Laundry, 64 N. J. Eq. 140, 53 Atl. 212; Knickerbocker Trust Co. *v.* Penn Cordage Co., 62 N. J. Eq. 624, 50 Atl. 459; Feder *v.* Van Winkle, 53 N. J. Eq. 370, 33 Atl. 399, 51 Am. St. Rep. 628; Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. Eq. 452; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489; Hathaway *v.* Orient Ins. Co., 11 N. Y. Suppl. 413; Sheffield Permanent Ben. Bldg. Soc. *v.* Harrison, 15 Q. B. D. 358, 54 L. J. Q. B. 15, 51 L. T. Rep. N. S. 649, 33 Wkly. Rep. 144.

33. *California.*— Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620; Sands *v.* Pfeiffer, 10 Cal. 258.

Illinois.— Arnold *v.* Crowder, 81 Ill. 56, 25 Am. Rep. 260.

Kansas.— Mutual Ben. L. Ins. Co. *v.* Huntington, 57 Kan. 744, 48 Pac. 19.

Louisiana.— New Orleans Canal, etc., Co. *v.* Leeds, 49 La. Ann. 123, 21 So. 168.

Maine.— Corliss *v.* McLagin, 29 Me. 115.

Maryland.— Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368; McKim *v.* Mason, 3 Md. Ch. 186.

Massachusetts.—Hopewell Mills *v.* Taunton Sav. Bank, 150 Mass. 519, 23 N. E. 327, 15 Am. St. Rep. 235, 6 L. R. A. 249.

rule applies to equitable mortgages[34] and to mortgages of a term by a leaseholder.[35] The test of the intention with which annexations by a mortgagor are made to realty should be the same as between grantor and grantee,[36] excepting that if the annexations are made after the giving of the mortgage, either in accordance with an understanding that the money loaned was to be applied to fixtures, or where the operation of the fixtures will impair the realty, intention would seem to be of paramount importance.[37] The mortgage need not mention the fixtures; they will be included in the general words of description of the freehold.[38] The mortgage of a "mill," "machine shop," "factory," or other structure by a term showing the purpose of the premises conveyed and not to describe or localize it seems to include what is necessary to a complete thing of the kind named.[39]

2. Partnership Interests. If the real mortgage is made by one who is or becomes a member of a firm which occupies the mortgaged premises and annexes chattels of the firm these are subject to the mortgage.[40]

Michigan.— Sturgis Nat. Bank *v.* Levanseler, 115 Mich. 372, 73 N. W. 399.

New Hampshire.— Burnside *v.* Twitchell, 43 N. H. 380; Pettengill *v.* Evans, 5 N. H. 54.

New Jersey.— Rogers *v.* Brokaw, 25 N. J. Eq. 496; Quinby *v.* Manhattan Cloth, etc., Co., 24 N. J. Eq. 260; Crane *v.* Brigham, 11 N. J. Eq. 29.

New York.— Bigler *v.* Newburgh Nat. Bank, 97 N. Y. 630 [*affirming* 26 Hun 520]; Snedeker *v.* Warring, 12 N. Y. 170; Bishop *v.* Bishop, 11 N. Y. 123, 62 Am. Dec. 68; New York Security, etc., Co. *v.* Saratoga Gas, etc., Light Co., 88 Hun 569, 34 N. Y. Suppl. 890; McFadden *v.* Allen, 50 Hun 361, 3 N. Y. Suppl. 356.

Pennsylvania.— Muehling *v.* Muehling, 181 Pa. St. 483, 37 Atl. 527, 59 Am. St. Rep. 674; Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71.

Vermont.— Sturgis *v.* Warren, 11 Vt. 433.

United States.— Hill *v.* Farmers, etc., Nat. Bank, 97 U. S. 450, 24 L. ed. 1051.

England.— Longbottom *v.* Berry, L. R. 5 Q. B. 123, 10 B. & S. 852, 39 L. J. Q. B. 37, 22 L. T. Rep. N. S. 385; Walmsley *v.* Milne, 7 C. B. N. S. 115, 6 Jur. N. S. 125, 29 L. J. C. P. 97, 8 Wkly. Rep. 138, 97 E. C. L. 115.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

34. Longbottom *v.* Berry, L. R. 5 Q. B. 123, 10 B. & S. 852, 39 L. J. Q. B. 37, 22 L. T. Rep. N. S. 385; *Ex p.* Barclay, 5 De G. M. & G. 403, 1 Jur. N. S. 1145, 25 L. J. Bankr. 1, 4 Wkly. Rep. 80, 54 Eng. Ch. 320, 43 Eng. Reprint 926; Colonial Bank of Australasia *v.* Riley, 22 Vict. L. Rep. 288.

35. See *infra*, V, E, 4.

36. See *supra*, V, E, 1.

37. *Colorado.*— Fisk *v.* People's Nat. Bank, 14 Colo. App. 21, 59 Pac. 63.

Florida.— Seedhouse *v.* Broward, 34 Fla. 509, 16 So. 425.

Georgia.— Cunningham *v.* Cureton, 96 Ga. 489, 23 S. E. 420.

Kentucky.— Clore *v.* Lambert, 78 Ky. 224.

Massachusetts.— Southbridge Sav. Bank *v.* Mason, 147 Mass. 500, 18 N. E. 406, 1 L. R. A. 350; Maguire *v.* Park, 140 Mass. 21, 1 N. E. 750.

North Carolina.— Foote *v.* Gooch, 96 N. C. 265, 1 S. E. 525, 60 Am. Rep. 411.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

38. Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 621; Mather *v.* Fraser, 2 Jur. N. S. 900, 2 Kay & J. 536, 25 L. J. Ch. 361, 4 Wkly. Rep. 387, the description was here aided by recitals. Inclusion of fixtures will be implied in a mortgage back to secure the purchase-money, where the sale embraced the fixtures. Langdon *v.* Buchanan, 62 N. H. 657; McRea *v.* Troy Cent. Nat. Bank, 66 N. Y. 489.

39. *Connecticut.*— Alvord Carriage Mfg. Co. *v.* Gleason, 36 Conn. 86.

Kansas.— Cook *v.* Condon, 6 Kan. App. 574, 51 Pac. 587.

Maine.— Pope *v.* Jackson, 65 Me. 162.

New Hampshire.— Lathrop *v.* Blake, 23 N. H. 46.

New Jersey.— Delaware, etc., R. Co. *v.* Oxford Iron Co., 36 N. J. Eq. 452; Potts *v.* New Jersey Arms, etc., Co., 17 N. J. Eq. 395.

Pennsylvania.— Hoskin *v.* Woodward, 45 Pa. St. 42.

England.— Place *v.* Fagg, 7 L. J. K. B. O. S. 195, 4 M. & R. 277.

See 23 Cent. Dig. tit. "Fixtures," §§ 47–55.

A mortgage of a lot of land "embracing the factory building used as a cotton mill" does not include loose machinery in the mill. Rogers *v.* Prattville Mfg. Co., 81 Ala. 483, 1 So. 643, 60 Am. Rep. 171.

As to the effect of agreements between the mortgagor and strangers for the preservation of the chattel character of fixtures see *supra*, III, C, 1, 2.

40. Thompson *v.* Vinton, 121 Mass. 139; Sanders *v.* Davis, 15 Q. B. D. 218, 54 L. J. Q. B. 576, 33 Wkly. Rep. 655; Cullwick *v.* Swindell, L. R. 3 Eq. 249, 36 L. J. Ch. 173, 15 Wkly. Rep. 216 [*distinguishing* Trappes *v.* Harter, 2 Cromp. & M. 153, 3 L. J. Exch. 24, 3 Tyrw. 604]; *Ex p.* Cotton, 6 Jur. 1045, 2 Mont. D. & De G. 725. *Contra*, Kelly *v.* Austin, 46 Ill. 156, 92 Am. Dec. 243 (structure obviously temporary); Robertson *v.* Corsett, 39 Mich. 777 [*explaining* the unity of title rule prevailing in Michigan and its relation to Trappes *v.* Harter, 2 Cromp. & M. 153, 3

3. Mortgages by Lessor. A tenant, whose lease is subsequent to a mortgage, has in general no greater right as against the mortgagee than would his lessor have if he had annexed the fixtures.[41] One who takes a mortgage subsequent to the lease stands in the same position as the lessor, and is not entitled to tenant's fixtures which the lessor could not claim.[42] These rules are modified where the rights of the tenant are fixed by agreement between him and his lessor.[43]

4. Mortgages by Lessee. A tenant may mortgage the leasehold and the mortgage will carry the tenant's interest in fixtures attached before or after the execution of the mortgage.[44] The mortgagee's interest is limited to the term, and does not entitle the mortgagee to remove fixtures unless given the power expressly,[45] otherwise his interest ceases with the term and he has no right to the proceeds of the fixtures.[46] A mortgage by the tenant of the fixtures apart from the leasehold may have the effect of giving them the status of personalty.[47]

F. Remainder-Man or Reversioner and Life-Tenant. After the death of a tenant for life who has annexed fixtures, or whose assignee or tenant has annexed fixtures, there arise questions as to the right to them by his personal representative, his legatee, and the reversioner or remainder-man. The decisions are not numerous, but as regards permanent improvements the life-tenant is treated as owner of the land; as regards trade fixtures and articles of convenience or ornament, as a tenant for years. The former go to the one entitled to the next estate in possession,[48] the latter to the personal representative or legatee of the tenant for life.[49]

L. J. Exch. 24, 3 Tyrw. 604]; Borland *v.* Hahn, 70 Hun (N. Y.) 597, 25 N. Y. Suppl. 131.

41. *Illinois.*— Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611, where the lease was made after foreclosure proceedings were commenced.

Indiana.— Hamilton *v.* Huntley, 78 Ind. 521, 41 Am. Rep. 593, where the fixtures were not removed during the term.

Maine.— Wight *v.* Gray, 73 Me. 297.

Massachusetts.— Lynde *v.* Rowe, 12 Allen 100.

Minnesota.— Pioneer Sav., etc., Co. *v.* Fuller, 57 Minn. 60, 58 N. W. 831.

Missouri.— Union Cent. L. Ins. Co. *v.* Tillery, 152 Mo. 421, 54 S. W. 220, 75 Am. St. Rep. 480.

Wisconsin.— Frankland *v.* Moulton, 5 Wis. 1.

See 23 Cent. Dig. tit. "Fixtures," §§ 32–41.

Contra.— Winner *v.* Williams, 82 Miss. 669, 35 So. 308 (where there was an express agreement as to the fixtures); Belvin *v.* Raleigh Paper Co., 123 N. C. 138, 31 S. E. 655; Paine *v.* McDowell, 71 Vt. 28, 41 Atl. 1042.

42. Jones *v.* Detroit Chair Co., 38 Mich. 92, 31 Am. Rep. 314; Globe Marble Mills Co. *v.* Quinn, 76 N. Y. 23, 32 Am. Rep. 259.

43. See *supra*, III, C, 2.

44. Commercial Bank *v.* Pritchard, 126 Cal. 600, 59 Pac. 130; Union Terminal Co. *v.* Wilmar, etc., R. Co., 116 Iowa 392, 90 N. W. 92; Gough *v.* Wood, [1894] 1 Q. B. 713, 63 L. J. Q. B. 564, 70 L. T. Rep. N. S. 297, 9 Reports 509, 42 Wkly. Rep. 469; Southport, etc., Banking Co. *v.* Thompson, 37 Ch. D. 64, 57 L. J. Ch. 114, 58 L. T. Rep. N. S. 143, 36 Wkly. Rep. 113; Meux *v.* Jacobs, L. R. 7 H. L. 481, 44 L. J. Ch. 481, 32 L. T. Rep. N. S. 171, 23 Wkly. Rep. 526; *Ex p.* Barclay, 5 De G. M. & G. 403, 1 Jur. N. S. 1145, 25 L. J. Bankr. 1, 4 Wkly. Rep. 80, 54 Eng. Ch. 320, 43 Eng. Reprint 926; Colonial Bank of Australasia *v.* Riley, 22 Vict. L. Rep. 288.

45. Southport, etc., Banking Co. *v.* Thompson, 37 Ch. D. 64, 57 L. J. Ch. 114, 58 L. T. Rep. N. S. 143, 36 Wkly. Rep. 113. For the right of a tenant mortgagor to stipulate for a conditional sale of a chattel to be affixed see Cumberland Union Banking Co. *v.* Maryport Hematite Iron, etc., Co., [1892] 1 Ch. 415, 66 L. T. Rep. N. S. 108, 40 Wkly. Rep. 280; Hobson *v.* Gorringe, [1897] 1 Ch. 182, 66 L. J. Ch. 114, 75 L. T. Rep. N. S. 610, 45 Wkly. Rep. 356.

46. Colonial Bank *v.* Riley, 22 Vict. L. R. 288. But the tenant cannot defeat the mortgagee's rights by a surrender of the term. London, etc., Loan, etc., Co. *v.* Drake, 6 C. B. N. S. 798, 5 Jur. N. S. 1407, 28 L. J. C. P. 297, 7 Wkly. Rep. 611, 95 E. C. L. 798. And see Conde *v.* Lee, 55 N. Y. App. Div. 401, 67 N. Y. Suppl. 157, where a chattel mortgage was given.

47. Bernheimer *v.* Adams, 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93. Such a mortgage will give the chattel mortgagee greater rights than the lessor whose lease provided that the premises should be surrendered with "improvements." Ames *v.* Trenton Brewing Co., 56 N. J. Eq. 309, 38 Atl. 858 [*affirmed* in 57 N. J. Eq. 347, 45 Atl. 1090].

48. Doak *v.* Wiswell, 38 Me. 569; Austin *v.* Stevens, 24 Me. 520; Glidden *v.* Barnett, 43 N. H. 306; Cannon *v.* Hare, 1 Tenn. Ch. 22.

49. Trade fixtures.— Overman *v.* Sasser, 107 N. C. 432, 12 S. E. 64, 10 L. R. A. 722; *In re* Hinds, 5 Whart. (Pa.) 138, 34 Am. Dec. 542; Lawton *v.* Lawton, 3 Atk. 13, 26 Eng. Reprint 811; Dudley *v.* Warde, Ambl. 113, 27 Eng. Reprint 73.

Articles of ornament, although firmly affixed but removable without structural injury. Leigh *v.* Taylor, [1902] A. C. 157, 71

An assignee or subtenant has the same rights to remove fixtures that the life-tenant has,[50] but the life-tenant by lease or agreement cannot bind the remainder-man as to the additions which, in the absence of contract, would not be removable.[51]

G. Landlord and Tenant — 1. In General. In this connection a tenant is one having a less interest in land than freehold. He usually is a tenant for years or from year to year. He may be a tenant at will, and there is no distinction between tenancies created by deed, writing, or parol.[52] Annexations by such a tenant are generally within the ancient rule that fixtures belong to the owner of the realty; in this case the reversioner or landlord.[53] There are four exceptions to this rule: Additions made by the tenant in aid of his trade, called "trade fixtures;"[54] additions for ornament or more convenient use of the premises;[55] additions made in pursuance of a contract with the landlord securing to the tenant the right to remove the fixtures;[56] and additions removable by statute.[57]

2. Trade Fixtures — a. What Are Trade Fixtures. There is no precise definition of a "trade fixture." In England it does not include additions by a farmer in aid of agriculture,[58] but this distinction does not exist in the United States.[59] Where additions to the realty are to the pecuniary advantage of the tenant they are probably "trade fixtures."[60]

b. Grounds of Tenant's Right to Remove. Besides being removable on grounds of public policy trade fixtures are also removable because, from the temporary nature of the tenure, they are not presumed to have been annexed with the intention to make them permanent additions to the realty.[61]

c. Limitations on Right to Remove. Apart from contract there are certain limitations on the right to remove a trade fixture, occasioned by the nature of the fixture, the degree of annexation, the effect of removal upon the freehold, whether it was added as a substitute for fixtures belonging to the landlord, or as compensation for the use of the premises, and finally, the time within which it

L. J. Ch. 272, 86 L. T. Rep. N. S. 239, 50 Wkly. Rep. 623 [*affirming* [1901] 1 Ch. 523, 70 L. J. Ch. 286, 84 L. T. Rep. N. S. 273, 49 Wkly. Rep. 455, *distinguishing* Norton *v.* Dashwood, [1896] 2 Ch. 497, 65 L. J. Ch. 737, 75 L. T. Rep. N. S. 205, 44 Wkly. Rep. 680, and *disapproving* D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382, 36 L. J. Ch. 107, 15 Wkly. Rep. 186].

50. White *v.* Arndt, 1 Whart. (Pa.) 91.

51. Denby *v.* Parse, 53 Ark. 526, 14 S. W. 899, 12 L. R. A. 87; Haflick *v.* Stober, 11 Ohio St. 482; White *v.* Arndt, 1 Whart. (Pa.) 90. And *compare* Stevens *v.* Rose, 69 Mich. 259, 37 N. W. 205. *Contra*, of railroad tracks, which are removable as against remainder-men on grounds of public policy. Charlestown, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17; Chicago, etc., R. Co. *v.* Goodwin, 111 Ill. 273, 53 Am. Rep. 622.

52. Bishop *v.* Elliott, 11 Exch. 113, 1 Jur. N. S. 662, 24 L. J. Exch. 229, 3 Wkly. Rep. 454. Where a tenant holding under one having no title and by a void lease made additions to the realty, on the lease being confirmed he was given the right to remove fixtures. Friedman *v.* Macy, 17 Cal. 226.

53. Elwes *v.* Maw, 3 East 38, 6 Rev. Rep. 523. 2 Smith Lead. Cas. (7th ed.) 162.

54. See *infra*, V, G, 2, a, b, c.

55. See *infra*, V, G, 3.

56. See *supra*, III, A, B.

57. See *infra*, XI, A.

58. Elwes *v.* Maw, 3 East 38, 6 Rev. Rep. 523, 2 Smith Lead. Cas. (7th ed.) 162. *Quære* if the proprietor of a skating rink is engaged in trade. Howell *v.* Listowell Rink, etc., Co., 13 Ont. 476. Glass houses erected by a nursery gardener are removable trade fixtures (Mears *v.* Callender, [1901] 2 Ch. 388, 65 J. P. 615, 70 L. J. Ch. 621, 84 L. T. Rep. N. S. 618, 49 Wkly. Rep. 584; Penton *v.* Robart, 2 East 88, 4 Esp. 33, 6 Rev. Rep. 376), as are trees and plants which form the stock in trade of nursery-men and market-gardeners, if removable without destroying them (Oakley *v.* Monck, L. R. 1 Exch. 159, 4 H. & C. 251, 12 Jur. N. S. 253, 35 L. J. Exch. 87, 14 L. T. Rep. N. S. 20, 14 Wkly. Rep. 406; Wyndham *v.* Way, 4 Taunt. 316, 13 Rev. Rep. 607).

59. Van Ness *v.* Pacard, 2 Pet. (U. S.) 137, 7 L. ed. 374. See also Harkness *v.* Sears, 26 Ala. 493, 62 Am. Dec. 742; Holmes *v.* Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Wing *v.* Gray, 36 Vt. 261.

60. Thus a bowling alley (Hanrahan *v.* O'Reilly, 102 Mass. 201) and a ball-room (Ombony *v.* Jones, 19 N. Y. 234) have been held trade fixtures. But *compare* Cowden *v.* St. John, 16 Iowa 590, where the court was equally divided as to whether a building erected for a store was a trade fixture.

61. McDavid *v.* Wood, 5 Heisk. (Tenn.) 95; Saunders *v.* Stallings, 5 Heisk. (Tenn.) 65; Boyd *v.* Douglass, 72 Vt. 449, 48 Atl. 638.

must be removed.[62] Where the annexation must be broken up to remove it, so that it is taken away as crude material rather than as pieces capable of being reassembled and used elsewhere, there seems to be a limitation on the right to remove trade fixtures.[63] Where the fixture is so incorporated with the realty as to show an intention to make it a permanent addition, or where to remove it will seriously injure the realty, it has been held that there is no right to remove trade fixtures.[64] Trade fixtures that are in substitution for essential parts of the leased premises and not additions thereto are not removable but are presumed to be permanent additions.[65] Trade fixtures annexed as a consideration for the lease or in lieu of rent are not removable by the tenant.[66]

62. As to the time of removal see *infra*, V, G, 4, a.

If the tenant is a trespasser by remaining beyond his term against the landlord's consent, he cannot remove trade fixtures. Dreiske *v.* People's Lumber Co., 107 Ill. App. 285.

63. *Massachusetts.*— Collamore *v.* Gillis, 149 Mass. 578, 22 N. E. 46, 14 Am. St. Rep. 460, 5 L. R. A. 150, brick oven not removable. But *compare* Smith *v.* Whitney, 147 Mass. 479, 19 N. E. 229 (holding a brick engine-house removable); Madigan *v.* McCarthy, 108 Mass. 376, 11 Am. Rep. 371 (a substantial house); Talbot *v.* Whipple, 14 Allen (Mass.) 177 (building not removable if it cannot be moved without great change in structure).

Michigan.— O'Brien *v.* Kusterer, 27 Mich. 289.

New Jersey.—Holmes *v.* Standard Pub. Co., (Ch. 1903) 55 Atl. 1107; Fortescue *v.* Bowler, 55 N. J. Eq. 741, 38 Atl. 445.

New York.— Fisher *v.* Saffer, 1 E. D. Smith 611.

Pennsylvania.— Kenney *v.* Matlack, 9 Pa. Cas. 437, 12 Atl. 589.

Texas.— Menger *v.* Ward, (Civ. App. 1894) 28 S. W. 821.

United States.— Kutter *v.* Smith, 2 Wall. 491, 17 L. ed. 830. But *compare* Van Ness *v.* Pacard, 2 Pet. 137, 7 L. ed. 374.

England.— "The common sense of mankind would determine that an engine is a very different thing from a house, although every stone, brick, tile and chimney pot might be removed; one, however, is the case of removal of materials, and the other of taking to pieces and restoring to their former state, actual portions of the engine." Whitehead *v.* Bennett, 27 L. J. Ch. 474, 475, 6 Wkly Rep. 351. See also Buckland *v.* Butterfield, 2 B. & B. 54, 4 Moore C. P. 440, 22 Rev. Rep. 649, 6 E. C. L. 35; Weller *v.* Everitt, 25 Vict. L. Rep. 683.

Canada.— Cartwright *v.* Herring, 3 Ont. Wkly. Rep. 511; Allan *v.* Rowe, 1 N. Brunsw. Eq. 41.

The rule seems to depend upon the distinction between removal of materials and pieces and to be based upon the idea that if the material was added brick by brick it became part of the realty by loss of identity and that the method of annexation shows an intention to make the fixture permanent. Where the identity is preserved and this intention is negatived there is a willingness to allow material and articles firmly incorporated to be removed if trade fixtures or if by agreement they remain personalty.

Illinois.— Baker *v.* McClurg, 198 Ill. 28, 64 N. E. 701, 92 Am. St. Rep. 261, 59 L. R. A. 131, brick oven.

Maryland.— Thompson Scenic R. Co. *v.* Young, 90 Md. 278, 44 Atl. 1024 (purpose rather than nature of article controls); Northern Cent. R. Co. *v.* Canton Co., 30 Md. 347.

Massachusetts.— Hanrahan *v.* O'Reilly, 102 Mass. 201, bowling alleys.

New York.— Livingston *v.* Sulzer, 19 Hun 375, ranges, boilers, plumbing, etc.

North Carolina.— Western North Carolina R. Co. *v.* Deal, 90 N. C. 110.

Ohio.— Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770, stone piers.

Pennsylvania.— Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95 (oil well casing, derrick, and machinery); White's Appeal, 10 Pa. St. 252.

Texas.— Wright *v.* Macdonnell, 88 Tex. 140, 30 S. W. 907.

United States.— Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 12 S. Ct. 188, 35 L. ed. 1055, railroad rails and switches.

64. *Arkansas.*— Brannon *v.* Vaughan, 66 Ark. 87, 48 S. W. 909.

Connecticut.— Capen *v.* Peckham, 35 Conn. 88.

Illinois.— Chase *v.* New York Insulated Wire Co., 57 Ill. App. 205.

Indiana.— Hedderich *v.* Smith, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509; Gordon *v.* Miller, 28 Ind. App. 612, 63 N. E. 774.

Minnesota.— Pond, etc., Co. *v.* O'Connor, 70 Minn. 266, 73 N. W. 159.

Nebraska.— Friedlander *v.* Rider, 30 Nebr. 783, 47 N. W. 83, 9 L. R. A. 700.

New York.— Fisher *v.* Saffer, 1 E. D. Smith 611.

Pennsylvania.— Tunis Lumber Co. *v.* R. G. Dennis Lumber Co., 97 Va. 682, 34 S. E. 613.

See 23 Cent. Dig. tit. "Fixtures," § 65.

65. Fletcher *v.* McMillan, 103 Mich. 494, 61 N. W. 791; Ashby *v.* Ashby, 59 N. J. Eq. 536, 46 Atl. 528; *Ex p.* Hemenway, 11 Fed. Cas. No. 6,346, 2 Lowell 496. See also Bovet *v.* Holzgraft, 5 Tex. Civ. App. 141, 23 S. W. 1014.

66. *California.*— Gett *v.* McManus, 47 Cal. 56.

Iowa.— Fletcher *v.* Kelly, 88 Iowa 475, 55 N. W. 474, 21 L. R. A. 347.

3. Useful and Ornamental Fixtures. Articles added to the premises by the tenant for the more convenient use of the premises, or for its ornamentation, are removable as in the case of trade fixtures.[67]

4. Removal of Fixtures — a. Time of Removal in General. During a term having a definite period a tenant may remove his furniture or his removable fixtures. After the term is ended he may remove his furniture, although he may commit a trespass in so doing.[68] With regard to fixtures the title to which is absolute in him, whether by agreement with others which is effective against the landlord, or whether by the landlord's agreement, it would seem that he has a like right, and that so long as he has the title to the fixtures he has the right to repossess himself of them until barred by the statute of limitations.[69] With regard to other fixtures as to which the title is in the owner of the realty with a right in the tenant to sever, or a title in the lessee to vest in the landlord if not severed, there are numerous decisions and *dicta* that the fixture must be removed before the expiration of the term.[70] According to the English courts "the rule to be collected from the several cases decided on this subject, seems to be this, that the tenant's right to remove fixtures continues during his original term, and during such further period of possession by him, as he holds the premises under a right still to consider himself as tenant."[71] This rule has been adopted in

New Jersey.— Deane *v.* Hutchinson, 40 N. J. Eq. 83, 2 Atl. 292.

New York.— Finkelmeier *v.* Bates, 92 N. Y. 172.

South Carolina.— Reid *v.* Kirk, 12 Rich. 54.

Vermont.— Boyd *v.* Douglass, 72 Vt. 449, 48 Atl. 638.

Virginia.— Tunis Lumber Co. *v.* R. G. Dennis Lumber Co., 97 Va. 682, 34 S. E. 613; Peirce *v.* Grice, 92 Va. 763, 24 S. E. 392.

67. Mears *v.* Callender, [1901] 2 Ch. 388, 65 J. P. 615, 70 L. J. Ch. 621, 84 L. T. Rep. N. S. 618, 49 Wkly. Rep. 584; Avery *v.* Cheslyn, 3 A. & E. 75, 1 H. & W. 283, 5 N. & M. 372, 30 E. C. L. 57; Beck *v.* Rebow, 1 P. Wms. 94, 24 Eng. Reprint 309. A water-closet and appurtenances put into a business office (Hayford *v.* Wentworth, 97 Me. 347, 54 Atl. 940); a fire frame set in bricks (Gaffield *v.* Hapgood, 17 Pick. (Mass.) 192, 28 Am. Dec. 290), gas-fixtures (Wall *v.* Hinds, 4 Gray (Mass.) 256, 64 Am. Dec. 64; Hays *v.* Doane, 11 N. J. Eq. 84; Lawrence *v.* Kemp, 1 Duer (N. Y.) 363), mirrors although put up securely (Guthrie *v.* Jones, 108 Mass. 191; Cranston *v.* Beck, 70 N. J. L. 145, 56 Atl. 121), a cider mill for the tenant's use (Holmes *v.* Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238), a portable furnace (Paine *v.* Coffin, 4 Ohio Dec. (Reprint) 351, 2 Clev. L. Rep. 1), and a stairway, coal-bin, and closets and shelves (Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452) are removable. Windows and glass set in windows were in early cases held removable, unless to remove them would expose the house to injury. See Herlakenden's Case, 4 Coke 62*a*; Poole's Case, 1 Salk. 368. *Compare* on this subject State *v.* Elliot, 11 N. H. 540; State *v.* Whitener, 93 N. C. 590. For a general discussion of the subject of what is an article of ornament see Leigh *v.* Taylor, [1902] A. C. 157, 71 L. J. Ch. 272, 86 L. T. Rep. N. S. 239, 50 Wkly. Rep. 623, where the question was as to the right to remove tapestries affixed by a life-tenant.

68. See, generally, Landlord and Tenant.

69. Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Chalifoux *v.* Potter, 113 Ala. 215, 21 So. 322 (at least for a reasonable time after termination of the lease); Holmes *v.* Tremper, 20 Johns. (N. Y.) 29, 11 Am. Dec. 238; Shellar *v.* Shivers, 171 Pa. St. 569, 33 Atl. 95. And see Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

70. *Illinois.*— Dreiske *v.* People's Lumber Co., 107 Ill. App. 285.

Maine.— Dingley *v.* Buffum, 57 Me. 381; Davis *v.* Buffum, 51 Me. 160; Stockwell *v.* Marks, 17 Me. 455, 35 Am. Dec. 266.

Massachusetts.— Bliss *v.* Whitney, 9 Allen 114, 85 Am. Dec. 745; Gaffield *v.* Hapgood, 17 Pick. 192.

New York.— Van Vleck *v.* White, 66 N. Y. App. Div. 14, 72 N. Y. Suppl. 1026, removal must be before landlord acquires right of possession.

Pennsylvania.— Overton *v.* Williston, 31 Pa. St. 155.

Wisconsin.— Josselyn *v.* McCabe, 46 Wis. 591, 1 N. W. 174.

United States.— Van Ness *v.* Pacard, 2 Pet. 137, 7 L. ed. 374.

England.— *Ex p.* Quincy, 1 Atk. 477, 26 Eng. Reprint 304; Lyde *v.* Russell, 1 B. & Ad. 394, 9 L. J. K. B. O. S. 26, 20 E. C. L. 532; Elwes *v.* Maw, 3 East 38, 6 Rev. Rep. 523; Anonymous, 21 H. 7, 26, p. 4; Henry's Case, 20 H. 7, 13 pl. 24 [both cases cited in Gray Cas. Prop. 657–659]; Poole's Case, 1 Salk. 368; Lee *v.* Risdon, 7 Taunt. 188, 17 Rev. Rep. 484, 2 E. C. L. 320, *dictum*.

See 23 Cent. Dig. tit. "Fixtures," § 63.

71. Weeton *v.* Woodcock, 10 L. J. Exch. 183, 184, 7 M. & W. 14, per Alderson, B. In support of the text see *Ex p.* Brook, 10

some of the American courts.[72] Where the term is for a definite period, but is terminated before its regular ending, without fault of the lessee, or if for an indefinite period, as at will, the tenant usually has a reasonable time thereafter in which to remove his fixtures.[73] If the tenant forfeits the lease for his own default, usually he loses the right to remove his fixtures;[74] but it has been held that the forfeiture vests the landlord with the premises but not with fixtures that remain personal in their nature and belong to the tenant, and that the tenant has a reasonable time in which to remove those.[75] If the tenant surrenders[76] or abandons the premises and the landlord takes possession[77] it bars the tenant's right to remove fixtures. But a surrender cannot prejudice the rights of innocent third parties.[78]

b. Effect of New Lease. A new lease implies the termination of a prior

Ch. D. 100, 48 L. J. Bankr. 22, 39 L. T. Rep. N. S. 458, 27 Wkly. Rep. 255; *Ex p.* Stephens, 7 Ch. D. 127, 47 L. J. Bankr. 22, 37 L. T. Rep. N. S. 613, 26 Wkly. Rep. 136; Minshall *v.* Lloyd, 1 Jur. 336, 6 L. J. Exch. 115, M. & H. 125, 2 M. & W. 460.

72. Merritt *v.* Judd, 14 Cal. 59; Lewis *v.* Ocean Nav., etc., Co., 125 N. Y. 341, 26 N. E. 301; Loughran *v.* Ross, 45 N. Y. 792, 6 Am. Rep. 173; Brown *v.* Reno Electric Light, etc., Co., 55 Fed. 229. See also Radey *v.* McCurdy, 209 Pa. St. 306, 58 Atl. 558, 103 Am. St. Rep. 1009, 67 L. R. A. 359.

73. Mason *v.* Fenn, 13 Ill. 525 (if delay is due to the landlord); Torrey *v.* Burnett, 38 N. J. L. 457, 20 Am. Rep. 421; Thorn *v.* Sutherland, 123 N. Y. 236, 25 N. E. 362 [*reversing* 4 N. Y. Suppl. 694]; Young *v.* Consolidated Implement Co., 23 Utah 586, 65 Pac. 720; Podlech *v.* Phelan, 13 Utah 333, 44 Pac. 828. Where the tenant was enjoined at suit of the landlord from removing fixtures he was given a reasonable time after the injunction was dissolved. Mason *v.* Fenn, 13 Ill. 525; Bircher *v.* Parker, 40 Mo. 118. So if the premises are taken by eminent domain. Schreiber *v.* Chicago, etc., R. Co., 115 Ill. 340, 3 N. E. 427. A tenant at will has a reasonable time, at least in states where he is not entitled to notice to quit. Sullivan *v.* Carberry, 67 Me. 531; Doty *v.* Gorham, 5 Pick. (Mass.) 487, 16 Am. Dec. 417; Whiting *v.* Brastow, 4 Pick. (Mass.) 310 and note 2 (2d ed); Ellis *v.* Paige, 1 Pick. (Mass.) 43; Loughran *v.* Ross, 45 N. Y. 792, 6 Am. Rep. 173. In Antoni *v.* Belknap, 102 Mass. 193, a tenant at sufferance was allowed the time necessary (two months) to remove two thousand tons of ice, the contents of a building, by a gradual sale to customers, before removing the building. An assignee of a lessee, as a chattel mortgagee, has the same time his assignor would have had. Bernheimer *v.* Adams, 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93 [*affirmed* in 175 N. Y. 472, 67 N. E. 1080]. But see White *v.* Arndt, 1 Whart. (Pa.) 91, where a lessee for years of a life-tenant was not allowed to remove fixtures after his lessor's death. A vendee of a lessee has the lessee's rights. Griffin *v.* Ransdell, 71 Ind. 440. What is a reasonable time is a question of fact for the jury. Berger *v.* Hoerner, 36 Ill. App. 360.

74. Whipley *v.* Dewey, 8 Cal. 36; Morey *v.* Hoyt, 62 Conn. 542, 26 Atl. 127, 19 L. R. A. 611; Davis *v.* Moss, 38 Pa. St. 346. After determination by bankruptcy his assignee has a reasonable time. Brown's Assignee *v.* Maxwell, 11 N. Zeal. 312.

75. Tenant was given nine months' time where this occasioned the landlord no prejudice. Updegraf *v.* Lesem, 15 Colo. App. 297, 62 Pac. 342; Union Terminal Co. *v.* Wilmar, etc., R. Co., 116 Iowa 392, 90 N. W. 92 (the lessee's receiver seems to have exercised the right three years after forfeiture); Wick *v.* Bredin, 189 Pa. St. 83, 42 Atl. 17. Disclaimer by the trustee in bankruptcy terminates the right to remove fixtures. *Ex p.* Brook, 10 Ch. D. 100, 48 L. J. Bankr. 22, 39 L. T. Rep. N. S. 458, 27 Wkly. Rep. 255; *Ex p.* Stephens, 7 Ch. D. 127, 47 L. J. Bankr. 22, 37 L. T. Rep. N. S. 613, 26 Wkly. Rep. 136. For effect of summary proceedings in New York under Code Civ. Proc. § 2253 see Van Vleck *v.* White, 66 N. Y. App. Div. 14, 72 N. Y. Suppl. 1026; Smusch *v.* Kohn, 22 Misc. 344, 49 N. Y. Suppl. 176.

76. *California.*— Security Loan, etc., Co. *v.* Willamette Steam Mills Lumbering, etc., Co., 99 Cal. 636, 34 Pac. 321.

Michigan.— Stokoe *v.* Upton, 40 Mich. 581, 29 Am. Rep. 560.

New York.— Breese *v.* Bange, 2 E. D. Smith 474.

Pennsylvania.— Thropp's Appeal, 70 Pa. St. 395.

Wisconsin.— Mueller *v.* Chicago, etc., R. Co., 111 Wis. 300, 87 N. W. 239.

England.— *Ex p.* Brook, 10 Ch. D. 100, 48 L. J. Bankr. 22, 39 L. T. Rep. N. S. 458, 27 Wkly. Rep. 255; Fitzherbert *v.* Shaw, 1 H. Bl. 258.

See 23 Cent. Dig. tit. "Fixtures," § 65.

77. Talbot *v.* Whipple, 14 Allen (Mass.) 177. Abandoning does not bar right to remove until landlord assumes possession. Conde *v.* Lee, 55 N. Y. App. Div. 401, 67 N. Y. Suppl. 157 [*affirmed* in 171 N. Y. 662, 64 N. E. 1119].

78. Conde *v.* Lee, 55 N. Y. App. Div. 401, 67 N. Y. Suppl. 157 [*affirmed* in 171 N. Y. 662, 64 N. E. 1119]; Duffus *v.* Bangs, 43 Hun (N. Y.) 52; London, etc., Loan, etc., Co. *v.* Drake, 6 C. B. N. S. 798, 5 Jur. N. S. 1407, 28 L. J. C. P. 297, 7 Wkly. Rep. 611,

tenancy. As the termination of a lease in general closes the tenant's right to remove fixtures[79] the question arises as to the effect of a new lease of the premises with the fixtures, which it is admitted the tenant cannot remove now unless the new lease continues the right to remove them. On principle his right does not continue. The new lease includes the premises and fixtures, the latter having become the property of the landlord, because his former conditional title has by the tenant's act become absolute, and because the tenant is estopped to deny his landlord's title.[80]

VI. SEVERANCE OF FIXTURES.

A. In General. As annexing personal property to land gives it *prima facie* the character of realty, so it would seem that separating from the realty would

95 E. C. L. 798. *Compare* Talbot *v.* Whipple, 14 Allen (Mass.) 177; Thropp's Appeal, 70 Pa. St. 395.

79. See *supra*, V, G, 4, a.

80. *California.*— Marks *v.* Ryan, 63 Cal. 107; Jungerman *v.* Bovee, 19 Cal. 355, where the covenant in the new lease was deemed controlling.

Illinois.— Chicago Sanitary Dist. *v.* Cook, 169 Ill. 184, 48 N. E. 461, 61 Am. St. Rep. 161, 39 L. R. A. 369 [*affirming* 67 Ill. App. 286]; Smyth *v.* Stoddard, 105 Ill. App. 510; Gauggel *v.* Ainley, 83 Ill. App. 582; Leman *v.* Best, 30 Ill. App. 323.

Indiana.—Hedderich *v.* Smith, 103 Ind. 203, 2 N. E. 315, 53 Am. Rep. 509.

Maryland.— Bauernschmidt Brewing Co. *v.* McColgan, 89 Md. 135, 42 Atl. 907 (new lease had a covenant to surrender premises with improvements); Carlin *v.* Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467.

Massachusetts.— Watriss *v.* Cambridge First Nat. Bank, 124 Mass. 571, 26 Am. Rep. 694 (although tenant's possession was continuous); Shepard *v.* Spaulding, 4 Metc. 416.

Missouri.—St. Louis *v.* Nelson, 108 Mo. App. 210, 83 S. W. 271, although both leases stipulated that the lessee might remove fixtures. Where the new lease is silent as to fixtures. Champ Spring Co. *v.* B. Roth Tool Co., 103 Mo. App. 103, 77 S. W. 344; Williams *v.* Lare, 62 Mo. App. 66.

New York.— Stephens *v.* Ely, 162 N. Y. 79, 56 N. E. 499 [*reversing* 14 N. Y. App. Div. 202, 43 N. Y. Suppl. 762]; Talbot *v.* Cruger, 151 N. Y. 117, 45 N. E. 364 [*affirming* 81 Hun 504, 30 N. Y. Suppl. 1011]; Scott *v.* Haverstraw Clay, etc., Co., 135 N. Y. 141, 31 N. E. 1102; Loughran *v.* Ross, 45 N. Y. 792 (although possession is continuous); Nieland *v.* Mahnken, 89 N. Y. App. Div. 463, 85 N. Y. Suppl. 809; Van Vleck *v.* White, 66 N. Y. App. Div. 14, 72 N. Y. Suppl. 1026 (new lease by lessee's trustee in bankruptcy); Abell *v.* Williams, 3 Daly 17.

Ohio.— Cook *v.* Scheid, 6 Ohio Dec. (Reprint) 867, 8 Am. L. Rec. 493.

Washington.— Spencer *v.* Commercial Co., 30 Wash. 520, 71 Pac. 53.

England.— *Ex p.* Brook, 10 Ch. D. 100, 48 L. J. Bankr. 22, 39 L. T. Rep. N. S. 458, 27 Wkly. Rep. 255; Thresher *v.* East London Water Works Co., 2 B. & C. 608, 9 E. C. L. 267; Sharp *v.* Milligan, 23 Beav. 419, 53 Eng. Reprint 165; Heap *v.* Barton, 12 C. B. 274, 16 Jur. 891, 21 L. J. C. P. 153, 74 E. C. L. 274; Fitzherbert *v.* Shaw, 1 H. Bl. 258; Orr *v.* Davis, 17 N. Zeal. L. R. 106; Harper *v.* Gaynor, 19 Vict. L. R. 675.

See 23 Cent. Dig. tit. "Fixtures," § 65.

The same result follows if at the expiration of a lease the tenant continues to occupy in a character inconsistent with that of tenant, as under an agreement to buy (Merritt *v.* Judd, 14 Cal. 59), or where a subtenant accepts a new lease of his lessor's landlord (McIver *v.* Estabrook, 134 Mass. 550).

Contrary rule.— In the following cases a contrary rule is adopted or by some modification of it the lessee is given the right to remove the fixtures: Where the new lease is in effect merely a continuation of the former tenancy (Royce *v.* Latshaw, 15 Colo. App. 420, 62 Pac. 627; Ross *v.* Campbell, 9 Colo. App. 38, 47 Pac. 465); where a firm being a lessee, and a member of the firm withdraws, and the new lease is to the remaining member and for the balance of the old term (Baker *v.* McClung, 198 Ill. 28, 64 N. E. 701, 92 Am. St. Rep. 261, 59 L. R. A. 131 [*affirming* 96 Ill. App. 165]); where the effect of the old and new lease is to work a constructive severance of the fixtures, and the new lease is of the premises without the fixtures, although possession is continuous (McCarthy *v.* Trumacher, 108 Iowa 284, 78 N. W. 1104; Keefe *v.* Furlong, 96 Wis. 219, 70 N. W. 1110); and where the landlord, before the new lease, sold the tenant the fixtures (O'Brien *v.* Mueller, 96 Md. 134, 53 Atl. 663). Taking a new lease is only *prima facie* evidence of a surrender of the title to the fixtures, and that this presumption may be rebutted by circumstances showing a contrary intention. Bernheimer *v.* Adams, 70 N. Y. App. Div. 114, 75 N. Y. Suppl. 93. The rule does not apply to ordinary movable fixtures that are more nearly furniture than realty and not useful to the next tenant unless in the same trade (Smusch *v.* Kohn, 22 Misc. (N. Y.) 344, 49 N. Y. Suppl. 176). In Texas the rule was doubted, but the question determined in favor of the tenant by construction of the language of the leases involved. Wright *v.* Macdonnell, 88 Tex. 140, 30 S. W. 907 [*reversing* (Civ. App. 1894) 27 S. W. 1024]. For cases directly repudiating the rule see Kerr *v.* Kingsbury,

give it *prima facie* the character of personalty, and that it does not necessarily follow that because separated it is personalty as a matter of law. Merely thinking that a fixture is personalty, or intending at some time in the future to separate it from the realty and restore it to the status of personalty, is not enough.[81] And as a secret intention not to affix a chattel will not prevail over the intention which the law deduces from acts,[82] so the intention as to severing a chattel is not a secret purpose, but an intention disclosed by "acts, words, and circumstances."[83] And as an intention to annex must in general relate to the time of annexation and not be an after-thought, so the intention to sever must relate to the time of actual or constructive disannexing.[84] Severing fixtures with the intent to restore them to the character of personalty may be actual or constructive. Actual severing to effect a change in status would seem to require intention coupled with physical separation. Thus moving soil from one place to another on the owner's land would not change its legal nature unless with such intention.[85]

B. Accidental Severance. Where the separation is caused by fire, wind, water, or other natural causes, the article severed remains realty until the owner has elected to treat it as personalty, although it is impossible to restore it to its former condition.[86]

C. Tortious Severance. When fixtures are wrongfully severed from the realty they become the personal property of the owner of the realty.[87]

D. Constructive Severance. After property has become realty it is said that it may become personalty by force of agreement of the parties in interest. The cases on the subject are not numerous. It is said that the mere giving of a chattel mortgage on a fixture works constructive severance and makes it personal

39 Mich. 150, 33 Am. Rep. 362; Radey *v.* McCurdy, 209 Pa. St. 306, 58 Atl. 558, 103 Am. St. Rep. 1009, 67 L. R. A. 359; Second Nat. Bank *v.* O. E. Merrill Co., 69 Wis. 501, 34 N. W. 514.

81. Lyle *v.* Palmer, 42 Mich. 314, 3 N. W. 921; Tate *v.* Blackburne, 48 Miss. 1; Bratton *v.* Clawson, 2 Strobh. (S. C.) 478, 3 Strobh. (S. C.) 127.

82. See *supra*, II, C, 1.

83. Dooley *v.* Crist, 25 Ill. 551; Tate *v.* Blackburne, 48 Miss. 1; Solomon *v.* Staiger, 65 N. J. L. 617, 48 Atl. 996.

84. Thus, to support a charge of maliciously injuring an engine described as the personal property of A, but which was a fixture, it is not enough to show by A "that he had in mind the removal of the engine." "The intention must relate either to the time of annexation or to some actual or constructive severance." People *v.* Jones, 120 Mich. 283, 284, 79 N. W. 177.

85. See Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476. Severing boards temporarily from a fence with no intent to make them personalty is not enough to prevent them passing by deed of land on which they are. Goodrich *v.* Jones, 2 Hill (N. Y.) 142. And *compare* Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694; Peck *v.* Batchelder, 40 Vt. 233, 94 Am. Dec. 392.

86. "What then is the criterion by which we are to determine whether that which was once a part of the realty has become personalty on being detached? Not capability of restoration to the former connexion with the freehold, as is contended, for the tree prostrated by the tempest is incapable of reannexation to the soil, and yet remains realty. The true rule would rather seem to be, that which was real shall continue real until the owner of the freehold shall by his election give it a different character." Rogers *v.* Gilinger, 30 Pa. St. 185, 188, 72 Am. Dec. 694, per Strong, J. In support of the text see Guernsey *v.* Phinizy, 113 Ga. 898, 39 S. E. 402, 84 Am. St. Rep. 270 (bricks in a fallen chimney pass to a vendee of the realty); Goddard *v.* Bolster, 6 Me. 427, 20 Am. Dec. 320 (millstones washed out of a mill by a flood cannot be seized by creditors of a former owner of the stones who had annexed them to the realty); Goodrich *v.* Jones, 2 Hill (N. Y.) 142 (fence materials detached from land pass by a deed of the land); Rogers *v.* Gilinger, 30 Pa. St. 185, 72 Am. Dec. 694 (material of a house blown down is realty). And see Leidy *v.* Proctor, 97 Pa. St. 486. A contrary view is held in Buckout *v.* Swift, 27 Cal. 433, 87 Am. Dec. 90, and seemingly so in Meyers *v.* Schemp, 67 Ill. 469; Thayer *v.* Rock, 13 Wend. (N. Y.) 53.

87. Leonard *v.* Stickney, 131 Mass. 541 (a grantor in possession of premises, after giving a deed that had vested title in the grantee, wrongfully removed fixtures; this was held to give the grantee an immediate right of action, although the time during which the grantor might occupy had not elapsed); Morgan *v.* Varick, 8 Wend. (N. Y.) 587; Mooers *v.* Wait, 3 Wend. (N. Y.) 104, 20 Am. Dec. 667; Farrant *v.* Thompson, 5 B. & Ald. 826, 7 E. C. L. 449, 2 D. & R. 1, 16 E. C. L. 61, 24 Rev. Rep. 571 (fixtures wrongfully severed by the tenant became the property of the reversioner, and on a sale by the tenant no property passed even during the term).

property.[88] It has also been held that fixtures may constructively be severed, provided the sale be in writing with the formalities of a conveyance of realty.[89] It has even been held that where a purchaser of realty, knowing that the owner considered window and door screens to be personal property, entered into a separate agreement for their purchase, they became stamped with that character.[90] The theory of the nature of real property would, however, seem to require actual severance before realty can become personalty.

E. Removal Within What Time. When one other than a tenant[91] has annexed fixtures under such circumstances that the title remains in him, he seems generally to have the same time for removal that any owner of property left on the premises of another under like circumstances would have. The presumption of a voluntary surrender applicable to a tenant who has quit does not seem to apply.[92]

F. Damage and Repair. Whether or not a fixture can be severed without damage to the freehold is an important circumstance bearing on the right to remove.[93] A remainder-man is entitled to damages for injuries to the walls in removing tapestries, but not to compensation for redecorating the walls.[94] A mortgagee of the realty is entitled to damages for severing fixtures subject to a chattel mortgage, or which a conditional vendor may retake.[95] A tenant is liable for damages to the freehold occasioned by removing fixtures.[96]

VII. SALE OF FIXTURES.

Whether a sale transfers a fixture or only a right to sever it depends upon the interest of the seller in the fixture and the intention of the parties. If the

88. Manwaring *v.* Jenison, 61 Mich. 117, 27 N. W. 899. In Massachusetts the mere giving of a chattel mortgage, without actual severance, will not as against a purchaser of the land disconnect it and give it the character of personalty. Madigan *v.* McCarthy, 108 Mass. 376, 11 Am. Rep. 371. See also Burk *v.* Hollis, 98 Mass. 55; Gibbs *v.* Estey, 15 Gray 587; *Ex p.* Ames, 1 Fed. Cas. No. 323, 1 Lowell 561. So also in Maine. Fenlason *v.* Rackliff, 50 Me. 362. But see Fuller *v.* Tabor, 39 Me. 519.

89. Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15, 87 Am. St. Rep. 75. An exception of a fixture in a deed of land works a severance. Badger *v.* Batavia Paper Mfg. Co., 70 Ill. 302; Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

90. Durkee *v.* Powell, 75 N. Y. App. Div. 176, 77 N. Y. Suppl. 368.

91. For rules in cases of landlord and tenant see *supra*, V, G, 4, a.

92. Thus licensees seem to be allowed a reasonable time after notice of the revocation of the license.

Illinois.— Sagar *v.* Eckert, 3 Ill. App. 412.

Maine.— Salley *v.* Robinson, 96 Me. 474, 52 Atl. 930, 90 Am. St. Rep. 410; Paine *v.* McGlinchy, 56 Me. 50.

Maryland.— Northern Cent. R. Co. *v.* Canton Co., 30 Md. 347. One by revocation of a license cannot deprive another of his property at mere whim.

Minnesota.— Ingalls *v.* St. Paul, etc., R. Co., 39 Minn. 479, 40 N. W. 524, 12 Am. St. Rep. 676.

Missouri.— Lowenberg *v.* Bernd, 47 Mo. 297; Goodman *v.* Hannibal, etc., R. Co., 45 Mo. 33, 100 Am. Dec. 336; Matson *v.* Calhoun, 44 Mo. 368; Hines *v.* Ament, 43 Mo. 298.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 73 Am. Dec. 195.

North Carolina.— Western North Carolina R. Co. *v.* Deal, 90 N. C. 110.

Vermont.— Preston *v.* Briggs, 16 Vt. 124.

See 23 Cent. Dig. tit. "Fixtures," § 63.

A vendee of a fixture is said to have no greater rights that a lessee in respect of the time for removal. Griffin *v.* Ransdell, 71 Ind. 440.

A mortgagee in possession after decree of redemption was allowed to remove structures severable without material injury to the land. Taylor *v.* Townsend, 8 Mass. 411, 5 Am. Dec. 107.

A railroad company having a right of way, which it abandoned, was held to retain title to stone piers it had erected, and removed them eleven years later. Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770.

93. Capen *v.* Peckham, 35 Conn. 88; Quinby *v.* Manhattan Cloth, etc., Co., 24 N. J. Eq. 260; Conde *v.* Lee, 55 N. Y. App. Div. 401, 67 N. Y. Suppl. 157 [*affirmed* in 171 N. Y. 662, 64 N. E. 1119]; Farrar *v.* Chauffetete, 5 Den. (N. Y.) 527.

94. *In re* De Falbe, [1901] 1 Ch. 523, 70 L. J. Ch. 286, 84 L. T. Rep. N. S. 273, 49 Wkly. Rep. 455.

95. Hudson Trust, etc., Inst. *v.* Carr-Curran Paper Mills Co., 58 N. J. Eq. 59, 43 Atl. 418; General Electric Co. *v.* Transit Equipment Co., 57 N. J. Eq. 460, 42 Atl. 101; Campbell *v.* Roddy, 44 N. J. Eq. 244, 14 Atl. 279, 6 Am. St. Rep. 889; Hurxthal *v.* Hurxthal, 45 W. Va. 584, 32 S. E. 237.

96. Seeger *v.* Pettit, 77 Pa. St. 437, 18 Am. Rep. 452. And see Cubbins *v.* Ayres, 4 Lea (Tenn.) 329.

sale is by a lessee and the title to the fixture is in the lessor subject to a right to sever, the vendee acquires only this right, and not the title until after it is severed. In England it is decided that such a sale is not within the statute of frauds, not being a sale of any interest in land or a sale of goods, and must take the form of a bargain and sale of them as fixtures.[97] It is generally held in America that a parol sale of fixtures, part of the realty, by the owner of the fixture, is within the statute and void, and that to be valid it must be with the formalities prescribed for the sale of real estate.[98] If by deed land is sold on which there is a fixture part thereof, a parol exception of the fixture is invalid. To be effective the exception must be according to the form requisite for the exception of other real estate.[99]

VIII. FIXTURES TAKEN BY EMINENT DOMAIN.

Until severed, fixtures that are part of the realty may be considered in estimating the value thereof if taken by eminent domain.[1]

IX. REMEDIES.

A. Injunction. An injunction will issue to stay the removal of a fixture where the right or the nature of the article is in dispute and the injury will be serious.[2]

97. Lee *v.* Gaskell, 1 Q. B. D. 700, 45 L. J. Q. B. 540, 34 L. T. Rep. N. S. 759, 24 Wkly. Rep. 824; Hallen *v.* Runder, 1 C. M. & R. 266, 3 L. J. Exch. 260, 3 Tyrw. 959. So also in the English colonies. Malmsbury, etc., Co. *v.* Tucker, 3 Vict. L. Rep. 213 (L); Oswald *v.* Whitman, 22 Nova Scotia 13.

98. *Alabama.*— Johnston *v.* Philadelphia Mortg., etc., Co., 129 Ala. 515, 30 So. 15.

Delaware.— Rice *v.* Adams, 4 Harr. 332.

Illinois.— Meyers *v.* Schemp, 67 Ill. 469.

Maine.— Trull *v.* Fuller, 28 Me. 545.

Massachusetts.— Noble *v.* Bosworth, 19 Pick. 314.

New Hampshire.— Dudley *v.* Foote, 63 N. H. 57, 56 Am. Rep. 489.

New York.— Leonard *v.* Clough, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305 [*reversing* 14 N. Y. Suppl. 339]; Thayer *v.* Rock, 13 Wend. 53.

North Carolina.— Horne *v.* Smith, 105 N. C. 322, 11 S. E. 373, 18 Am. St. Rep. 903.

Texas.— Hutchins *v.* Masterson, 46 Tex. 551, 26 Am. Rep. 286.

99. *District of Columbia.*— Towson *v.* Smith, 13 App. Cas. 48, parol exception of fixture in sale of leasehold is invalid.

Kentucky.— David *v.* Eastham, 81 Ky. 116.

Massachusetts.— Noble *v.* Bosworth, 19 Pick. 314.

Michigan.— Detroit, etc., R. Co. *v.* Forbes, 30 Mich. 165.

New York.— Leonard *v.* Clough, 133 N. Y. 292, 31 N. E. 93, 16 L. R. A. 305 [*reversing* 14 N. Y. Suppl. 339]; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476.

North Carolina.—Horne *v.* Smith, 105 N. C. 322, 11 S. E. 373, 18 Am. St. Rep. 903; Bond *v.* Coke, 71 N. C. 97.

The mere intention to sever, communicated to the vendee, is not effective if the deed contains no reservation. Minhinnick *v.* Jolly, 29 Ont. 238 [*affirmed* in 26 Ont. App. 42]. But see Noble *v.* Sylvester, 42 Vt. 146. There are cases to the contrary on the ground that the parol reservation is evidence of an intention to convert the fixture into personalty, which, being given effect, excludes the fixture from the deed. Frederick *v.* Devol, 15 Ind. 357; Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095; Noble *v.* Sylvester, 42 Vt. 146. See FRAUDS, STATUTE OF, *post*.

1. Williams *v.* Com., 168 Mass. 364, 47 N. E. 115; Allen *v.* Boston, 137 Mass. 319; Edmands *v.* Boston, 108 Mass. 535. If on leasehold the lessee is entitled to the value thereof. Livingston *v.* Sulzer, 19 Hun (N. Y.) 375. Although a fixture is the property of a tenant, if its natural character is land, its value must be so estimated in eminent domain proceedings. *In re* Park Com'rs, 1 N. Y. Suppl. 763. See, generally, EMINENT DOMAIN, 15 Cyc. 763.

2. Camp *v.* Charles Thacher Co., 75 Conn. 165, 52 Atl. 953; Manning *v.* Ogden, 70 Hun (N. Y.) 399, 24 N. Y. Suppl. 70; Hirsch *v.* Graves Elevator Co., 24 Misc. (N. Y.) 472, 53 N. Y. Suppl. 664, unless defendant gives bond.

Mortgagees.— An injunction will issue at the suit of the mortgagee against the mortgagor to prevent waste by severing fixtures, although annexed after the execution of the mortgage, if such severance will impair the security, and provided the other elements for equitable interference are shown.

California.— Pomeroy *v.* Bell, 118 Cal. 635, 50 Pac. 683 (contract vendor is in same position as a mortgagor); Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680; Laveson *v.* Standard Soap Co., 80 Cal. 245, 22 Pac. 184, 13 Am. St. Rep. 147.

Illinois.— Williams *v.* Chicago Exhibition Co., 188 Ill. 19, 58 N. E. 611.

Maryland.— Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368.

B. Intervention. Parties in interest where there is litigation as to fixtures are allowed to intervene in jurisdictions where intervention is recognized. Thus a mortgagee of realty may intervene where a vendor of a chattel is asking that fixtures may be sold to pay his claim,[3] or a conditional vendor of a chattel, where a purchaser of realty claims a fixture against the owner of the realty,[4] or a chattel mortgagee, where one claims under a mechanic's lien as against a mortgagee of the realty.[5]

C. Interpleader. Where there are adverse claimants of a fixture that has been severed and it or its proceeds are in the hands of a defendant who is uncertain to whom to account he may ask the claimants to interplead.[6]

D. Replevin. Fixtures, actually connected with the realty, and not personalty by agreement or the like, are not repleviable;[7] but if not part of the realty, although attached to it, may be replevied.[8] Fixtures that by agreement of parties retain the status of personalty, although seemingly realty, are repleviable.[9]

New Jersey.— Lee *v.* Hubschmidt Bldg., etc., Co., 55 N. J. Eq. 623, 37 Atl. 769.

New York.— Cahn *v.* Hewsey, 8 Misc. 384, 24 N. Y. Suppl. 1107, 31 Abb. N. Cas. 387.

If there is a complete remedy at law equity will not interfere for injury to fixtures. Franks *v.* Cravens, 6 W. Va. 185. And see, generally, INJUNCTIONS.

Insolvency of defendant need not be shown. Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22; Northrup *v.* Trask, 39 Wis. 515; Kimball *v.* Darling, 32 Wis. 675.

Vendors.—An injunction will issue in favor of a contract vendor of realty against his contract vendee who has annexed fixtures, is in default, and threatens to remove them. Pomeroy *v.* Bell, 118 Cal. 625, 50 Pac. 683; Miller *v.* Waddingham, 91 Cal. 377, 27 Pac. 750, 13 L. R. A. 680. The rights of the contract vendor resemble those of a mortgagee, excepting that in default of the contract vendor he is entitled to have his land, and with it what is affixed. His right is independent of insolvency of the contract vendee. Taylor *v.* Collins, 51 Wis. 123, 8 N. W. 22; Northrup *v.* Trask, 39 Wis. 515; Kimball *v.* Darling, 32 Wis. 675.

A landlord may have an injunction restraining a tenant from removing fixtures during the term (Dougherty *v.* Spencer, 23 Ill. App. 357) or at its termination (Carlin *v.* Ritter, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. Rep. 467; Holmes *v.* Standard Pub. Co., (N. J. Ch. 1903) 55 Atl. 1107; Fortescue *v.* Bowler, 55 N. J. Eq. 741, 38 Atl. 445) or which he has left upon the premises (Trask *v.* Little, 182 Mass. 8, 64 N. E. 206). A wrongful removal by the tenant is not a breach of a covenant of seizin in a deed by the landlord. See COVENANTS, 11 Cyc. 1109 note 12.

A purchaser at foreclosure sale may have an injunction against a chattel mortgagee wrongfully claiming fixtures, the removal of which would destroy the use of the property. Dudley *v.* Hurst, 67 Md. 44, 8 Atl. 901, 1 Am. St. Rep. 368. See, generally, INJUNCTIONS.

3. Swoop *v.* St. Martin, 110 La. 237, 34 So. 426.

4. Thomson *v.* Smith, 111 Iowa 718, 83 N. W. 789, 82 Am. St. Rep. 541, 50 L. R. A. 780.

5. Edwards, etc., Lumber Co. *v.* Rank, 57 Nebr. 323, 77 N. W. 765, 73 Am. St. Rep. 514.

6. See for illustrations Moore *v.* Smith, 24 Ill. 512, 26 Ill. 392; Green *v.* Chicago, etc., R. Co., 8 Kan. App. 611, 56 Pac. 136. See, generally, INTERPLEADER.

7. Camp *v.* Charles Thacher Co., 75 Conn. 165, 52 Atl. 953 (although capable of being detached); Simpson Brick-Press Co. *v.* Wormley, 166 Ill. 383, 46 N. E. 976 [*affirming* 61 Ill. App. 460]; Brown *v.* Wallis, 115 Mass. 156 (trade fixtures). But *compare* Brearley *v.* Cox, 24 N. J. L. 287; Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71.

8. As mirrors attached to the wall and essentially furniture (Cranston *v.* Beck, 70 N. J. L. 145, 56 Atl. 121); or buildings resting on blocks or shoes (Pennybecker *v.* McDougal, 48 Cal. 160; Page *v.* Urick, 31 Wash. 601, 72 Pac. 454, 96 Am. St. Rep. 924, in this case the building also rested in part by mistake on land of another); or where they have been severed from the realty, or if severed tortiously have been attached to realty (Salter *v.* Semple, 71 Ill. 430; Ogden *v.* Stock, 34 Ill. 522, 85 Am. Dec. 332; Reese *v.* Jared, 15 Ind. 142, 77 Am. Dec. 88, house wrongfully on land of one not a trespasser, and resting upon permanent foundations is not repleviable; Central Branch R. Co. *v.* Fritz, 20 Kan. 430, 21 Am. Rep. 175, house tortiously moved from plaintiff's land and resting on defendant's, on stone foundations; Green *v.* Chicago, etc., R. Co., 8 Kan. App. 611, 56 Pac. 136, lathe severed from realty; Cresson *v.* Stout, 17 Johns. (N. Y.) 116, 8 Am. Dec. 373; Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71; Huebschmann *v.* McHenry, 29 Wis. 655, in this case a house had been tortiously severed from plaintiff's land and annexed to defendant's. It was held that the building was repleviable on the ground that defendant could not divest plaintiff of his title by wrong. See Northrup *v.* Trask, 39 Wis. 515).

9. *Arkansas.*— Hensley *v.* Brodie, 16 Ark. 511.

Delaware.— Ott *v.* Specht, 8 Houst. 61, 12 Atl. 721.

Illinois.— Seiberling *v.* Miller, 207 Ill. 443, 69 N. E. 800, in this case the parties agreed

Replevin being an action to recover personal property, it is necessary to allege such facts that if proven will negative a presumption that the property claimed is realty.[10] Replevin for fixtures will not lie if the action would be made the means of litigating the title to realty.[11]

E. Trover. As in the case of replevin trover does not lie for a fixture, being part of realty, although a trade fixture.[12] But such an action will lie if the fixture be severed in fact,[13] or if by agreement or the nature of the annexation it still retains the status of personalty.[14] Whatever would constitute conversion of personal property in general will be conversion of a fixture after it is severed. A sale of the realty to which is a fixture belonging to a tenant is a conversion of it for which trover will lie.[15] Wrongfully excluding a person from a building in which are his fixtures, or excluding him rightfully and refusing him access to remove after demand, constitutes conversion.[16] Cutting down telegraph poles and leaving them and the wire beside the road is not conversion.[17] It is conversion for a landlord to threaten to get an injunction to restrain his tenant from moving his fixtures, and to forbid him to remove them, when they lawfully belong to the tenant.[18]

F. Trespass Quare Clausum Fregit. Trespass *quare clausum* lies by a grantee of real estate against a grantor for removing fixtures, although the fixtures are only in the constructive possession of the grantee.[19] It also lies by one cotenant against another for the wrongful removal and destruction or appropria-

that for purposes of the suit the property might be regarded as severed.

Iowa.— Corwin Dist. Tp. *v.* Moorehead, 43 Iowa 466.

Kansas.— Rush County *v.* Stubbs, 25 Kan. 322.

Massachusetts.— Hartwell *v.* Kelly, 117 Mass. 235.

See 23 Cent. Dig. tit. "Fixtures," § 70.

Code actions which are substitutes for replevin may be maintained under like circumstances. Myrick *v.* Bill, 3 Dak. 284, 17 N. W. 268; Brigham County Agricultural Assoc. *v.* Rogers, 7 Ida. 63, 57 Pac. 931.

10. Chatterton *v.* Saul, 16 Ill. 149; Bridges *v.* Thomas, 8 Okla. 620, 58 Pac. 955. But see Bearley *v.* Cox, 24 N. J. L. 287. In Ellsworth *v.* McDowell, 44 Nebr. 707, 62 N. W. 1082, it is said that the fixture must have been in plaintiff's possession at the time of defendant's taking.

11. Halleck *v.* Mixer, 16 Cal. 574. But see Harlan *v.* Harlan, 15 Pa. St. 507, 53 Am. Dec. 612; Powell *v.* Smith, 2 Watts (Pa.) 126.

12. Raddin *v.* Arnold, 116 Mass. 270; Guthrie *v.* Jones, 108 Mass. 191 (even if the landlord forbids and prevents the tenant from removing it); Temple Co. *v.* Penn Mut. L. Ins. Co., 69 N. J. L. 36, 54 Atl. 295.

13. Hawkins *v.* Hersey, 86 Me. 394, 30 Atl. 14; Westgate *v.* Wixon, 128 Mass. 304.

14. *Maine.*— Fifield *v.* Maine Cent. R. Co., 62 Me. 77 (a temporary railroad track); Pullen *v.* Bell, 40 Me. 314; Hilborne *v.* Brown, 12 Me. 162; Russell *v.* Richards, 10 Me. 429, 25 Am. Dec. 254, 11 Me. 371, 26 Am. Dec. 532; Osgood *v.* Howard, 6 Me. 452, 20 Am. Dec. 322.

Massachusetts.— Korbe *v.* Barbour, 130 Mass. 255; Doty *v.* Gorham, 5 Pick. 487, 16 Am. Dec. 417.

Minnesota.— In Stout *v.* Stoppel, 30 Minn. 56, 14 N. W. 268 [*approved* in Shapira *v.* Barney, 30 Minn. 59, 14 N. W. 270], where it is said that trover ought to be maintainable for fixtures by one having the right to remove as against one unlawfully preventing him, and that the common-law distinctions as to forms of action are not serviceable under the modern theory of practice.

New Hampshire.— Dame *v.* Dame, 38 N. H. 429, 75 Am. Dec. 195.

New Jersey.— Pope *v.* Shinkle, 45 N. J. L. 39.

New York.— Smith *v.* Benson, 1 Hill 176.

Ohio.— Wagner *v.* Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770.

Vermont.— Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

See 23 Cent. Dig. tit. "Fixtures," § 69.

15. Smyth *v.* Stoddard, 203 Ill. 424, 67 N. E. 980, 96 Am. St. Rep. 314; Bircher *v.* Parker, 43 Mo. 443; Burk *v.* Baxter, 3 Mo. 207.

16. Temple Co. *v.* Penn Mut. L. Ins. Co., 69 N. J. L. 36, 54 Atl. 295; Smusch *v.* Kohn, 22 Misc. (N. Y.) 344, 49 N. Y. Suppl. 176. It is not conversion for a landlord, after the expiration of the term, to refuse the tenant access, but it is during a term which the landlord wrongfully claims is ended. Watts *v.* Lehman, 107 Pa. St. 106; Darrah *v.* Baird, 101 Pa. St. 265. And see Straw *v.* Straw, 70 Vt. 240, 39 Atl. 1095.

17. American Union Tel. Co. *v.* Middleton, 80 N. Y. 408.

18. Vilas *v.* Mason, 25 Wis. 310.

19. Langhorn *v.* Buchanan, 62 N. H. 657; Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780. So by a purchaser at an execution sale against the debtor who removed fixtures after the sale. Goddard *v.* Chase, 7 Mass. 432.

tion to his sole use of the materials constituting a fixture and belonging to the common property.[20]

G. Trespass De Bonis Asportatis. There may be trespass *quare clausum* for breaking and entering, and if the act be not continuous, but interrupted so that the possession may vest in the landowner, there may also be trespass *de bonis asportatis* if the fixtures severed be carried away.[21]

H. Ejectment. If plaintiff recovers land in ejectment he is entitled to the fixtures.[22] If one tenant in common erects a house on or affixes machinery to the common property, the other if excluded therefrom may maintain ejectment.[23]

I. Distress. Things annexed to the freehold cannot be distrained, because they cannot be taken away without doing damage to the freehold;[24] nor can fixtures constructively annexed be distrained.[25] But if slightly attached in fact, removable by tenant, and capable of being restored, fixtures may be taken under a distress.[26]

J. Seizure and Sale on Execution.[27] Fixtures that have become part of the realty and the character of which is not affected by agreement, or by the right of removal being in one party and the title to the realty being in another, as a general rule, cannot be taken under a fieri facias.[28] Fixtures temporarily severed, but still part of the realty until the election of the owner of the realty, are within the rule.[29] But trade fixtures, removable by a tenant, although affixed to the realty,[30] and fixtures the status of which as personalty has been preserved

20. Symonds *v.* Harris, 51 Me. 14, 81 Am. Dec. 553; Maddox *v.* Goddard, 15 Me. 218, 33 Am. Dec. 604.

21. Barnes *v.* Burt, 38 Conn. 541; Wadleigh *v.* Janvrin, 41 N. H. 503, 77 Am. Dec. 780; American Union Tel. Co. *v.* Middleton, 80 N. Y. 408; Hackett *v.* Amsden, 57 Vt. 432. Defendant ran its cars against plaintiff's house, and he sued for trespass to personalty in Missouri. The house was in Nebraska. It was contended that the injury was to realty and that the action was local. But it appearing that the house was built by a licensee and was personalty the action was maintained. Gregg *v.* Union Pac. R. Co., 48 Mo. App. 494. Trespass for severing and carrying away fixtures see, generally, TRESPASS.

22. McMinn *v.* Mayes, 4 Cal. 209. In Pennsylvania he is entitled to all machinery, fast or loose, necessary to work the premises, as a mine. Ege *v.* Kille, 84 Pa. St. 333. See EJECTMENT, 15 Cyc. 16.

23. Hill *v.* Hill, 43 Pa. St. 521; Crest *v.* Jack, 3 Watts (Pa.) 238, 27 Am. Dec. 353.

24. Reynolds *v.* Shuler, 5 Cow. 323; Simpson *v.* Hartopp, Willes 512.

25. Liford's Case, 11 Coke 46*b*; Wistow's Case [*cited* in Place *v.* Fagg, 7 L. J. K. B. O. S. 195, 4 M. & R. 277, 280].

26. Furbush *v.* Chappell, 105 Pa. St. 187.

27. In this connection generally will be understood seizure and sale under a writ directing the officer to satisfy the judgment out of the debtor's goods and chattels.

28. *Delaware.*— Taylor *v.* Plunkett, 4 Pennew. 467, 56 Atl. 384.

Illinois.— Off *v.* Finkelstein, 200 Ill. 40, 65 N. E. 439 [*affirming* 100 Ill. App. 14]; Titus *v.* Ginheimer, 27 Ill. 462; Titus *v.* Mabee, 25 Ill. 257; Moore *v.* Cunningham, 23 Ill. 328.

Michigan.— McAuliffe *v.* Mann, 37 Mich. 539.

Pennsylvania.— Mitchell *v.* Freedley, 10 Pa. St. 198, in this case the owner of the fixture and of the realty agreed to the seizure and sale.

United States.— Friedly *v.* Giddings, 119 Fed. 438 [*affirmed* in 128 Fed. 355, 63 C. C. A. 85, 65 L. R. A. 327], in which case the officer had seized the main belt of a large marble mill under a writ of attachment, and not by a fieri facias under the practice in New England. But the principle is the same. The belt was part of the realty of the owner of the belt. It was held that it could not be taken under a writ of attachment.

England.— Winn *v.* Ingilby, 5 B. & Ald. 625, 1 D. & R. 247, 7 E. C. L. 341; Place *v.* Fagg, 7 L. J. K. B. O. S. 195, 4 M. & R. 277.

See 23 Cent. Dig. tit. "Fixtures," § 59. See also ATTACHMENT, 4 Cyc. 727 note 35.

29. *Illinois.*— Moore *v.* Cunningham, 23 Ill. 328.

Indiana.— Taffe *v.* Warnick, 3 Blackf. 111, 23 Am. Dec. 383.

Iowa.— Dubuque Cong. Soc. *v.* Fleming, 11 Iowa 533, 79 Am. Dec. 511.

Pennsylvania.— Voorhis *v.* Freeman, 2 Watts & S. 116, 37 Am. Dec. 490. And see Rogers *v.* Gillinger, 30 Pa. St. 185, 72 Am. Dec. 694.

Wisconsin.— Krueger *v.* Pierce, 37 Wis. 269, constructive annexation before annexation in fact.

England.— Liford's Case, 11 Coke 46*b*.

See 23 Cent. Dig. tit. "Fixtures," §§ 58, 59.

30. *California.*— McNally *v.* Connolly, 70 Cal. 3, 11 Pac. 320.

Indiana.— State *v.* Bonham, 18 Ind. 231.

Pennsylvania.— Kile *v.* Gilboner, 114 Pa. St. 381, 7 Atl. 154 (sheriff need not take actual possession but may sell the tenant's right, title, and interest); Heffner *v.* Lewis, 73 Pa. St. 302; Hey *v.* Bruner, 61 Pa. St.

by agreement or otherwise,[31] may be taken on execution. If the tenant had no right to remove the fixtures or has forfeited his right they may not be taken on execution. The right of the landlord is paramount.[32]

K. Legal Actions by Mortgagees. As legal remedies, such as trespass, trover, replevin, and the like, are founded upon possession and in a sense upon the legal title, it follows that whether the mortgagee can maintain such remedies depends upon the effect of the mortgage upon the legal title, and upon whether at the time of the injury he was in possession or had the right of possession. In those states where the legal title is in the mortgagee it generally is held that he may maintain legal actions for injuries to fixtures.[33] In those states where the mortgagee of real estate has only a lien thereon, until foreclosure of the mortgage he has not such a legal interest in the land and fixtures as will enable him to maintain legal actions for injuries to or for severing fixtures.[34]

X. CRIMINAL PROSECUTIONS.

Under some circumstances fixtures may be the subject of larceny,[35] and an indictment will sometimes lie for their malicious injury.[36]

XI. STATUTES.

A. In General. Legislation in the United States concerning fixtures is direct and indirect. Such legislation as expressly classifies and defines property, including fixtures, may be called direct. It is found in Louisiana, California, and other so-called code states,[37] and a few fragmentary enactments exist elsewhere.[38] A few states have special legislation for the purpose of taxation, as Rhode Island.[39] In a few there is a provision defining the right of tenants to remove

87; Church *v.* Griffith, 9 Pa. St. 117, 49 Am. Dec. 548; Lemar *v.* Mills, 4 Watts 330.

Tennessee.— Pillow *v.* Love, 5 Hayw. 109.

England.— Poole's Case, 1 Salk. 368.

Such fixtures are likewise subject to attachment see ATTACHMENT, 4 Cyc. 556 note 32.

31. Broaddus *v.* Smith, 121 Ala. 335, 26 So. 34, 77 Am. St. Rep. 61; Test *v.* Robinson, 20 Ind. 251; State *v.* Bonham, 18 Ind. 231; Fifield *v.* Maine Cent. R. Co., 62 Me. 77.

32. Friedlander *v.* Rider, 30 Nebr. 783, 47 N. W. 83, 9 L. R. A. 700. See EXECUTIONS, 17 Cyc. 945, 946.

33. *Alabama.*— Nelson *v.* Howison, 122 Ala. 573, 25 So. 211.

California.— Sands *v.* Pfeiffer, 10 Cal. 258, replevin by purchaser at foreclosure sale.

Connecticut.— McKelvey *v.* Crcevey, 72 Conn. 464, 45 Atl. 4, 77 Am. St. Rep. 321.

Illinois.— Ballou *v.* Jones, 37 Ill. 95, replevin.

Maine.— Smith *v.* Goodwin, 2 Me. 173, trespass *quare clausum*.

Massachusetts.— Gooding *v.* Shea, 103 Mass. 360, 4 Am. Rep. 563 (trespass *quare clausum* denied a mortgagee who was not in possession and did not have right of possession); Cole *v.* Stewart, 11 Cush. 181 (trespass *quare clausum*).

New York.— Reynolds *v.* Shuler, 5 Cow. 323 (trover by mortgagee in possession); Cresson *v.* Stone, 17 Johns. 116, 8 Am. Dec. 373 (replevin by mortgagee in possession).

Pennsylvania.— Roberts *v.* Dauphin Deposit Bank, 19 Pa. St. 71, trespass on the case against one severing fixtures.

England.— Holland *v.* Hodgson, L. R. 7 C. P. 328, 41 L. J. C. P. 146, 26 L. T. Rep. N. S. 709, 20 Wkly. Rep. 990.

See 23 Cent. Dig. tit. "Fixtures," §§ 68, 70.

34. Cooper *v.* David, 15 Conn. 556 (although in severing the fixtures the mortgagor designed to impair the security); Clark *v.* Reyburn, 1 Kan. 281; Moore *v.* Moran, 64 Nebr. 84, 89 N. W. 629 (replevin denied; the remedy is an injunction to stay waste); Triplett *v.* Parmalee, 16 Nebr. 649, 21 N. W. 403; Kircher *v.* Schalk, 39 N. J. L. 335 (mortgagor may not maintain replevin). See Turrell *v.* Jackson, 39 N. J. L. 329, holding that he may sue in trespass on the case.

In New York Van Pelt *v.* McGraw, 4 N. Y. 110, trespass on the case was held proper.

35. See, generally, LARCENY.

36. See, generally, MALICIOUS MISCHIEF.

37. See *supra*, I.

38. "Carpets and carpeting, stoves and funnels belonging thereto, are not real estate and do not pass by a deed thereof." Me. Rev. St. (1903) c. 75, § 1. In Rhode Island machinery, gas-fixtures, kettles, and vats in factories are real estate if they belong to the owner of the estate to which they are attached, and personal estate if they belong to some person other than such owner, and as such personal estate shall be considered in assigning dower and attachments, and in other cases except for taxation, when they are real estate if on property of the owner. R. I. Gen. Laws, c. 200, §§ 1, 2; c. 45, § 3.

39. R. I. Gen. St. c. 45, § 11.

fixtures.[40] A provision making the stealing or malicious injury of fixtures a crime is usual.[41] Such legislation as provides for recording conditional sales, leases, and mortgages of personal property may be called indirect. Originally intended to protect improvident buyers on the instalment plan, these statutes affect the rights of buyers of machinery and other articles to be affixed to realty and the real mortgagees. Unless these conditional sales are recorded they are not effective as against mortgagees or vendees of the realty in the absence of actual notice. These statutes resemble each other and it has seemed convenient to give a representative sample of one, with references to states having a like statute.[42]

B. Conditional Sales of Goods and Chattels. "Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by immediate delivery and continued possession of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency shall be void as against subsequent purchasers, pledgees, or mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof be filed as directed in this article." [43]

C. Tenants' Fixtures. "A tenant may remove from the demised premises at any time during the continuance of his term, anything affixed thereto for the purpose of trade, manufacture, ornament or domestic use, if the removal can be effected without injury to the premises, unless the thing done has, by the manner in which it is affixed, become an integral part of the premises." [44]

D. Attachment of Fixtures by Judicial Process. In a few states provision is made for the attachment of fixtures by judicial process by filing a description of the property attached in a specified office.[45]

FLAG. See EVIDENCE.[1]

FLAG CAPTAIN. A subordinate officer of a vessel who assumes the character and duties of captain only on special occasions.[2]

FLAGGING. One species of pavement, to wit, a paving with flat stone.[3] The

40. See *infra*, XI, C.

41. See, generally, LARCENY; MALICIOUS MISCHIEF.

42. See *infra*, XI, B.

43. N. Y. Laws (1897), c. 418, § 112. A similar provision is found in Ala. Civ. Code (1896), § 1017; Ariz. Rev. St. (1887) § 2365; Mills Annot. St. Colo. (1891) § 385; Conn. Gen. St. (1902) §§ 4864, 4865; Fla. Rev. St. (1892) §§ 1981, 1983; Ga. Code, §§ 1955*a*, 1959; Burns St. Ind. (1901) § 6638; McLean Code Iowa (1888), §§ 3093, 3094; Me. Rev. St. (1903) c. 113, § 5; Mass. Rev. Laws (1902), c. 198, §§ 11–13; Minn. St. (1894) §§ 4148–4153; Mo. Rev. St. (1899) §§ 3412, 3414; Nebr. Comp. St. c. 32, § 26; N. H. Pub. St. c. 140, §§ 23–26; N. J. Gen. St. p. 891; N. Y. Laws (1897), c. 418, § 112; N. C. Code, § 1275; Bates Annot. St. Ohio (4155); Okla. St. (1903) § 4179; R. I. Gen. Laws, c. 187, §§ 57, 58; Tenn. Laws (1899), c. 15; Sayles St. Tex. §§ 2549, 3327; Pollard Code Va. (1904) § 2462; Pierce Code Wash. § 6547; W. Va. Code (1899), c. 74, § 3; Wyo. Rev. St. (1899) § 2837.

44. Ida. Civ. Code, § 2385. A similar provision is found in Dak. Code, § 3206; Ga. Civ. Code, § 3120 (see Wright *v.* Dubignon, 114 Ga. 765, 40 S. E. 747, 57 L. R. A. 669, confined to trade fixtures); Mass. Rev. Laws (1902), c. 134, § 10 (confined to life-tenants, who also may dispose of their fixtures by will); Mont. Civ. Code, § 1406; N. D. Code, § 3492; Okla. Code, § 4183; S. D. Civ. Code, § 899.

45. Conn. Gen. St. (1902) § 831. There is also a provision in Connecticut for attaching electric fixtures of companies engaged in distributing electricity. Gen. St. § 832.

1. See 16 Cyc. 920.

2. Arfridson *v.* Ladd, 12 Mass. 173, 175.

3. It is a paving with flat stones, and is more peculiarly adapted and generally used in paving the sidewalks, or that part of the street set apart for the use of pedestrians, and perhaps it may be suitable in some cases for carriageways; but, wherever used, it is a pavement, and a relaying of flags is a paving of the portion of the street so reflagged. *In re* Phillips, 60 N. Y. 16, 21. See also 53 & 54 Vict. c. 54, § 4.

"Flagged," as used in an ordinance requiring the removal of snow from sidewalks except on streets which have not been "flagged," see New York *v.* Brown, 27 Misc. (N. Y.) 218, 220, 57 N. Y. Suppl. 742 [*citing* *In re* Garvey, 77 N. Y. 523].

term "flagging" has also been defined to be a pavement of flag stones.[4] (See, generally, Municipal Corporations.)

FLAGMAN. See Railroads.

FLANGE. An external or internal rib, or rim, for strength.[5]

FLANKING. In shipping, simply permitting a tow to float down stream with the current along the channel, without any assistance from the towboat, which in fact, instead of propelling the tow, controls its movements by reversing its engines and backing with such speed as will give to it the control of the tow without overcoming entirely the force of the current.[6]

FLASH CHECK. A check drawn upon a banker by a person who has no funds at the banker's, and knows that such is the case.[7] (See, generally, Commercial Paper.)

FLAT.[8] Shallow, or shoal water;[9] land covered by the water at high tide, and left bare at low.[10] As an adjective, having an even and horizontal surface, or nearly so, without marked prominences or depressions.[11] (See, generally, Navigable Waters; Public Lands; Waters.)

FLATTERY. An effort to influence another by use of false or excessive praise; insincere, complimentary language or conduct.[12]

FLAX.[13] The skin or fibrous part of the flax plant, when broken and cleaned by hatcheling or combing;[14] grain.[15]

FLAX-MILL. A mill or factory where flax is spun or linen manufactured.[16]

FLAXSEED. An article used as food for man and beast.[17] (See Flax; Flax-Mill.)

FLEECE. The coat of wool that covers a sheep, or that is shorn from a sheep at one time.[18]

FLEE FROM JUSTICE. To leave one's home or residence or known place of

4. Roanoke *v.* Harrison, (Va. 1894) 19 S. E. 179, 180.

5. Webster Int. Dict.

"Flange" or "safety" coupling see Freeberg *v.* St. Paul Plow-Works, 48 Minn. 99, 107, 50 N. W. 1026.

"Flange wheels" see Cottam *v.* Guest, 6 Q. B. D. 70, 73, 45 J. P. 95, 50 L. J. Q. B. 174, 29 Wkly. Rep. 305.

6. The George Shiras, 61 Fed. 300, 301, 9 C. C. A. 511.

7. Black L. Dict.

8. As part of a house see Hudson *v.* Cripps, [1896] 1 Ch. 265, 269, 60 J. P. 393, 65 L. J. Ch. 328, 73 L. T. Rep. N. S. 741, 44 Wkly. Rep. 200.

When used, as an adjective, in a statement that bonds are sold "flat," it means that they are sold for a price which includes accrued interest. Hemenway *v.* Hemenway, 134 Mass. 446, 448.

9. Stannard *v.* Hubbard, 34 Conn. 370, 376, where it is said: "This word itself is obviously one which may be used in different senses, but in this statute it is confined to some place or places within a river, cove, creek, or harbor where fish may be taken. It implies, therefore, that it must be a place more or less under water. It is frequently used by nautical men to distinguish it from the channel of a river or harbor, and in this sense, while it includes the idea of being under water, it is used as descriptive of a place not navigable with safety by ordinary vessels, on account of the shallowness of the water."

10. Jones *v.* Janney, 8 Watts & S. (Pa.) 436, 443, 42 Am. Dec. 309.

Compared with the terms "beach," "shore," and "strand" (see Doane *v.* Willcutt, 5 Gray (Mass.) 328, 335, 66 Am. Dec. 369), and with the word "shore" (see Storer *v.* Freeman, 5 Mass. 435, 439, 4 Am. Dec. 155).

11. Webster Int. Dict.

"Flat steel wire, or sheet steel in strips" see U. S. *v.* Wetherell, 65 Fed. 987, 13 C. C. A. 264. See, generally, Customs Duties.

12. Hall *v.* State, 134 Ala. 90, 119, 32 So. 750; Suther *v.* State, 118 Ala. 88, 93, 24 So. 43.

13. Flax, hemp, and jute, and manufactures thereof see 16 Cyc. 1123.

14. Webster Int. Dict.

15. State *v.* Cowdery, 79 Minn. 94, 99, 81 N. W. 750, 48 L. R. A. 92, as used in a statute relating to the storage of grain.

16. Webster Int. Dict.

"Flax factory" in an insurance policy see Aurora F. Ins. Co. *v.* Eddy, 55 Ill. 213, 221.

17. "After it [flaxseed] has been ground and the oil largely extracted, the residuum is the 'oil cake' known to commerce, which is largely if not exclusively used as food for cattle and other beasts, and is highly nutritious. This being so, flaxseed comes within, to an extent at least, the definition of grain given by Mr. Webster; that is, it is an article used as food for man and beast." Hewitt *v.* Watertown F. Ins. Co., 55 Iowa 323, 324, 7 N. W. 596, 39 Am. Rep. 174.

18. Century Dict.

Fleece of mortgaged sheep see 6 Cyc. note 52.

"Fleeces" as used in an exemption statute see Brackett *v.* Watkins, 21 Wend. (N. Y.) 68, 69; Hall *v.* Penney, 11 Wend. (N. Y.) 44, 45, 25 Am. Dec. 601.

abode, with intent to avoid detection or punishment for some public offense.[19] (See, generally, CRIMINAL LAW; EXTRADITION.)

FLEETING. Passing rapidly; hastening away; transient; not durable.[20]

FLEE TO THE WALL. See HOMICIDE.

FLEET PRISON. Formerly in England the prison of the court of chancery and of the court of common pleas.[21]

FLESH. A term which may include both live flesh and dead flesh.[22]

FLIGHT. The act of one under accusation, who evades the law by voluntarily withdrawing himself.[23] (Flight: As Ground For Divorce, see DIVORCE. Evidence of, see CRIMINAL LAW. See, generally, CRIMINAL LAW.)

FLOAT. In land-grant law, a term used to indicate a certain quantity out of a larger quantity of land;[24] a certificate authorizing the entry, by the holder, of a certain quantity of land.[25] In the lumber trade, two or more rafts attached together, prepared by proper fastenings and suitable arrangement to withstand the winds and waters.[26] In manufacturing, a defect caused by the warp not being woven into the cloth, and the weft passing underneath the warp instead of being woven into the warp.[27] (See, generally, LOGGING; PUBLIC LANDS.)

FLOATABLE STREAM. A stream used for floating logs, rafts, etc.[28] (See, generally, LOGGING; NAVIGABLE WATERS.)

FLOATING CHARGE. See CORPORATIONS.[29]

FLOATING DEBT. See FLOATING INDEBTEDNESS.

FLOATING DOMICILE. See DOMICILE.[30]

FLOATING ELEVATOR. A boat equipped with a grain elevator.[31]

FLOATING INDEBTEDNESS. As applied to municipal corporations, that mass of lawful and valid claims against the corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any taxation or other means of providing money to pay, particularly provided.[32] (See, generally, MUNICIPAL CORPORATIONS.)

FLOATING LOGS. See LOGGING.

FLOATING POLICY. See FIRE INSURANCE.

FLOATING SECURITY. A term applied to a species of debentures under

19. U. S. *v.* O'Brian, 27 Fed. Cas. No. 15,908, 3 Dill. 381, 383, construing a proviso in a statute that the bar or the limitation shall not "extend to any person or persons fleeing from justice." See also State *v.* Washburn, 48 Mo. 240, 241; *Ex p.* Swearingen, 13 S. C. 74, 76.

20. Century Dict.

Fleeting or evanescent.— In Fritz *v.* Hobson, 14 Ch. D. 542, 556, 49 L. J. Ch. 321, 42 L. T. Rep. N. S. 225, 28 Wkly. Rep. 459, Fry, J., in speaking of the expression, "lastly . . . the injury must be shewn to be of a substantial character, not fleeting or evanescent," said: "What is the meaning of those words, 'fleeting or evanescent'? It is not, perhaps, easy to answer the question, but it appears to me that nothing can be deemed to be fleeting or evanescent which results in substantial damage, and that the question, therefore, is to be answered not by time, but by the effects upon the plaintiff." See also Benjamin *v.* Storr, L. R. 9 C. P. 400, 407, 43 L. J. C. P. 162, 30 L. T. Rep. N. S. 362, 22 Wkly. Rep. 631.

21. Wade *v.* Wood, 1 C. B. 462, 463, 50 E. C. L. 462.

22. Com *v.* Horn, 2 Pa. Dist. 487, 488. 13 Pa. Co. Ct. 164, construing an act prohibiting the sale of unwholesome flesh, etc.

"Flesh gained" see Winch *v.* Baldwin, 68 Iowa 764, 768, 28 N. W. 62.

23. Black L. Dict.

24. Minneapolis, etc., R. Co. *v.* Duluth, etc., R. Co., 45 Minn. 104, 110, 47 N. W. 464.

25. Marks *v.* Dickson, 20 How. (U. S.) 501, 504, 15 L. ed. 1002.

26. Tome *v.* Four Cribs of Lumber, 24 Fed. Cas. No. 14,083, Taney 533.

27. Smith *v.* Walton, 3 C. P. D. 109, 110, 47 L. J. M. C. 45, 37 L. T. Rep. N. S. 437.

28. Black L. Dict. [*citing* Moore *v.* Sanborne, 2 Mich. 519, 524, 59 Am. Dec. 209].

29. See 10 Cyc. 1168.

30. See 14 Cyc. 841.

31. Budd *v.* New York, 143 U. S. 517, 529, 12 S. Ct. 468, 36 L. ed. 247, where the court said: "Floating elevators are primarily boats. Some are scows, and have to be towed from place to place, by steam tugs; but the majority are propellers."

A floating elevator, constructed from a canal boat upon which had been built an elevating apparatus for hoisting grain, is a ship or vessel. The Hezekiah Baldwin, 12 Fed. Cas. No. 6,449, 8 Ben. 556.

32. Huron *v.* Second Ward Sav. Bank, 86 Fed. 272, 276, 277, 30 C. C. A. 38, 49 L. R. A. 534 [*citing* People *v.* Wood, 71 N. Y. 371, 374]. See also State *v.* Faran, 24 Ohio St. 536, 541; German Ins. Co. *v.* Manning, 95 Fed. 597, 610; Mass. Pub. St. (1882) p. 1290.

"Floating debt" only includes the "unpaid, legally authorized obligations of the village." Cooke *v.* Saratoga Springs, 23 Hun (N. Y.) 55, 59.

which the company issuing the same is allowed to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders, or, a form of security which constitutes a charge, but gives a license to the company to carry on its business.[33] (See DEBENTURES.)

FLOGGING. Corporal punishment by stripes inflicted with a cat, or any punishment which in substance or effect amounts thereto.[34]

FLOOD. A great flow of water; a body of moving water; a body of water rising, swelling, and overflowing land not usually covered with water; an inundation; a great body or stream of any fluid or substance.[35] (Flood: In General, see WATERS. As Excuse For Delay — In Performance of Contract, see CONTRACTS; In Transportation, see CARRIERS. Damages Caused by, see BRIDGES; CARRIERS; WATERS. See also ACT OF GOD.)

FLOODING LANDS. See WATERS.

FLOOR. A section of a building between horizontal planes.[36] Also a term used metaphorically, in parliamentary practice, to denote the exclusive right to address the body in session.[37] (See BUILDING; FLAT.)

FLOOR-CLOTH CANVAS. A canvas used exclusively for the manufacture of floor oilcloth.[38]

FLORIDA WATER. A preparation used as a deodorant in a sick room, and as a remedial agent in alleviating pain and sick headache.[39]

FLOTATION. According to stock-exchange parlance, inviting subscriptions from the public for the purpose of launching a company;[40] the grouping of a certain number of claims to be formed in a company to be worked at a profit.[41]

FLOTSAM. A term applied to a ship which is sunk or otherwise perishes, and the goods float upon the sea,[42] or to goods that are found floating on the waves.[43] (Flotsam: Admiralty Jurisdiction, see ADMIRALTY. See also DERELICT; JETSAM; LIGAN; WRECK.)

FLOUR. The finely ground meal of wheat or any other grain.[44] It has been

33. Robson *v.* Smith, [1895] 2 Ch. 118, 124, 64 L. J. Ch. 457, 72 L. T. Rep. N. S. 559, 2 Manson 422, 13 Reports 529, 43 Wkly. Rep. 632 [*citing In re* Standard Mfg. Co., [1891] 1 Ch. 627, 641, 60 L. J. Ch. 292, 2 Meg. 418, 64 L. T. Rep. N. S. 487, 39 Wkly. Rep. 369]. See also Driver *v.* Broad, [1893] 1 Q. B. 744, 748, 63 L. J. Q. B. 12, 69 L. T. Rep. N. S. 169, 4 Reports 411, 41 Wkly. Rep. 483; Brunton *v.* Electrical Engineering Corp., [1892] 1 Ch. 434, 440, 61 L. J. Ch. 256, 65 L. T. Rep. N. S. 745 [*distinguishing In re* Horne, 29 Ch. D. 736, 54 L. J. Ch. 919, 53 L. T. Rep. N. S. 562]. And *compare* Governments Stock, etc., Invest. Co. *v.* Manila R. Co., [1897] A. C. 81, 89, 66 L. J. Ch. 102, 75 L. T. Rep. N. S. 553, 45 Wkly. Rep. 353; *In re* Opera, [1891] 3 Ch. 260, 263, 60 L. J. Ch. 839, 65 L. T. Rep. N. S. 371, 39 Wkly. Rep. 705; Edwards *v.* Standard Rolling Stock Syndicate, [1893] 1 Ch. 574, 575, 62 L. J. Ch. 605, 68 L. T. Rep. N. S. 194, 633, 3 Reports 226, 41 Wkly. Rep. 343.

34. U. S. *v.* Cutler, 25 Fed. Cas. No. 14,910, 1 Curt. 501.

35. Webster Dict. [*quoted* in Stover *v.* Insurance Co., 3 Phila. (Pa.) 38, 42, where it is said: "[Definitions] essentially differing from that of a storm or tempest"]. *Compare* Rothes *v.* Kirkcaldy, etc., Waterworks Com'rs, 7 App. Cas. 694, 704.

36. Lowell *v.* Strahan, 145 Mass. 1, 8, 12 N. E. 401, 1 Am. St. Rep. 422.

In factory parlance it seems that the word does not include the basement or the attic. New York Belting, etc., Co. *v.* Washington F. Ins. Co., 10 Bosw. (N. Y.) 428, 434.

37. Black L. Dict.

38. Arthur *v.* Cumming, 91 U. S. 362, 363, 23 L. ed. 438, distinguishing this term from "burlaps."

39. Tood *v.* State, 30 Tex. App. 667, 668, 18 S. W. 642, holding that Florida water is a drug or medicine within Cal. Pen. Code, arts. 186, 187.

40. Torva Exploring Syndicate *v.* Kelly, [1900] A. C. 612, 617, 69 L. J. P. C. 115, 83 L. T. Rep. N. S. 34, where it is said that "'flotation' . . . is complete when the public have responded and the capital is provided."

41. Torva Exploring Syndicate *v.* Kelly, [1900] A. C. 612, 617, 69 L. J. P. C. 115, 83 L. T. Rep. N. S. 34.

Under an amalgamation of two companies, meaning of this word see Gifford *v.* Willoughby, 15 T. L. R. 71.

42. Lacaze *v.* State, Add. (Pa.) 59, 64; Constable's Case, 5 Coke 105*b*, 106*b*; Termes de la Ley [*quoted* in Palmer *v.* Rouse, 3 H. & N. 505, 508, 27 L. J. Exch. 437, 6 Wkly. Rep. 674, per Pollock, C. B.].

43. Legge *v.* Boyd, 1 C. B. 92, 113, 9 Jur. 307, 14 L. J. C. P. 138, 50 E. C. L. 92. See also 1 Cyc. 822.

44. *In re* Keough, 42 Misc. (N. Y.) 387, 397, 86 N. Y. Suppl. 807.

Meal embraced within the term see Lashaway *v.* Tucker, 61 Hun (N. Y.) 6, 15 N. Y. Suppl. 490.

said that flour is the product from grain, both ground and bolted while meal is the pulverized grain ground but unbolted.[45]

FLOURING-MILL. In its most restricted sense, a mill used for grinding one kind of grain for food, to wit, wheat.[46]

FLOW. To rise, as the tide.[47]

FLOWING LANDS. A term which commonly imports raising and setting back water on another's land by a dam placed across a stream or water course which is the natural drain and outlet for surplus water on such land.[48] (See FLOW; and, generally, WATERS.)

FLUE. The pipe, tube, or passage for the conveyance of the products of combustion, flame, smoke, hot gases, heated air, etc.[49]

FLUE POCKET. As applied to a locomotive, a short flue which extends into a boiler for about six or eight inches behind the flue sheet, and is closed at the inner end.[50]

FLUID. Liquid or gaseous.[51]

FLUME. The passage or channel for the water that drives a mill wheel;[52] connecting links of a ditch over ravines and gulches.[53]

FLUMINA ET PORTUS PUBLICA SUNT, IDEOQUE JUS PISCANDI OMNIBUS COMMUNE EST. A maxim meaning "Rivers and ports are public; therefore the right of fishing there is common to all."[54]

FLUMINEÆ VOLUCRES. Water fowl.[55] (See, generally, ANIMALS.)

FLUSH. To cause to be full.[56]

FLUTES. Longitudinal parallel ruffles with round edges,[57] thus distinguishing "plaits" from "flutes."

FLYING SWITCH. A running switch;[58] a switch operated or effected in such a way, while a train is in motion, as to send different parts of the train (previously connected) along different lines;[59] a switch made by attaching to the car to be switched an engine, giving the car a sufficient impetus, and then detaching the engine, running it ahead out of the way, and allowing the car, with the impetus

Wheat not included within the meaning of the term see Salsbury *v.* Parsons, 36 Hun (N. Y.) 12, 17.

45. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450.

46. Washington Mut. Ins. Co. *v.* Merchants', etc., Mut. Ins. Co., 5 Ohio St. 450, 483, distinguishing "flouring-mill" from "grist-mill." See *supra*, p. 459, note 94.

"Flouring mill" may include the machinery necessary for the operation of the same, as well as the buildings. Cook *v.* Condon, 6 Kan. App. 574, 51 Pac. 587.

47. People *v.* Tibbetts, 19 N. Y. 523, 527 [*quoting* Worcester Dict.].

"Flowing the great ponds" see Bennett *v.* Kennebec Fibre Co., 87 Me. 162, 166, 32 Atl. 800.

"Flow of sewage" into a channel see Kirkheaton Dist. Local Bd. *v.* Ainley, [1892] 2 Q. B. 274, 283, 57 J. P. 36, 61 L. J. Q. B. 812, 67 L. T. Rep. N. S. 209, 41 Wkly. Rep. 99.

48. Call *v.* Middlesex County Com'rs, 2 Gray (Mass.) 232, 235.

As used in a special statute see Heard *v.* Middlesex Canal, 5 Metc. (Mass.) 81, 85.

Flowing lands about a dam see Isele *v.* Arlington Five Cents Sav. Bank, 135 Mass. 142, 143 [*citing* Fitch *v.* Seymour, 9 Metc. (Mass.) 462].

49. *In re* Whitney, 53 Fed. 235, 236.

50. Atchison, etc., R. Co. *v.* Howard, 49 Fed. 206, 207, 1 C. C. A. 229.

51. Century Dict. But *compare* Sickels *v.* Youngs, 22 Fed. Cas. No. 12,838, 3 Blatchf. 293, 302, where it is said: "No doubt the term 'fluid,' in its generic and technically scientific sense, includes air and the gases; but, in the sense in which it is used by the patentee, and in the connection in which it is found, it means a fluid that is tangible, that can be seen and handled, like water or oil, and with which a vessel can be filled."

52. Derrickson *v.* Edwards, 29 N. J. L. 468, 473, 80 Am. Dec. 220.

53. Ellison *v.* Jackson Water Co., 12 Cal. 542, 554.

54. Bouvier L. Dict. [*citing* Branch Princ.].

55. Keeble *v.* Hickeringill, 11 East 574, 577, 11 Rev. Rep. 273 note.

56. Webster Int. Dict.

Compared and distinguished from "slush" see Laycock *v.* Parker, 103 Wis. 161, 173, 79 N. W. 327.

57. Kursheedt Mfg. Co. *v.* Naday, 107 Fed. 488, 490, 46 C. C. A. 422.

58. Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 566, 26 S. W. 20.

59. Century Dict. [*quoted* in Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 566, 26 S. W. 20].

A flying switch is made by uncoupling the cars from the engine while in motion, and throwing the cars on to the side-track, by turning the switch, after the engine has passed it, upon the main track. Greenleaf *v.* Illinois Cent. R. Co., 29 Iowa 14, 39, 4 Am. Rep. 181. See also Brown *v.* New York Cent. R. Co., 32 N. Y. 597, 601, 88 Am. Dec. 353 note.

thus imparted, to run to the place desired.[60] (Flying Switch: Causing Injury — To Servant, see MASTER AND SERVANT; To Third Person, see RAILROADS.)

FLY-WHEEL. A wheel that equalizes its momentum; or accumulates power for a variable or intermitting resistance.[61]

FOAL-GETTER. A male horse able to do reasonable service in getting foals.[62]

F. O. B. An abbreviation for the words "free on board."[63] As applied to a sale of merchandise destined for shipment, a term used to indicate that it will be placed on a car or vessel free of expense to a purchaser or consignee.[64] (See, generally, SALES.)

FODDER. Food for horses or cattle.[65]

FŒMINÆ AB OMNIBUS OFFICIIS CIVILIBUS VEL PUBLICIS REMOTÆ SUNT. A maxim meaning "Women are excluded from all civil and public charges or offices."[66]

FŒMINÆ NON SUNT CAPACES DE PUBLICIS OFFICIIS. A maxim meaning "Women are not admissible to public offices."[67]

FŒNUS NAUTICUM. A high rate of interest paid on ship loans.[68] (See, generally, SHIPPING.)

FŒTICIDE. See ABORTION.

FOG. A generic term descriptive of all conditions of the atmosphere increasing the perils of navigation.[69] (Fog: Causing or Attending Collision, see COLLISION.)

60. Magner *v.* Truesdale, 53 Minn. 436, 437, 55 N. W. 607. See also Dooner *v.* Delaware, etc., Canal Co., 164 Pa. St. 17, 28, 30 Atl. 269; 2 Thompson Negl. (2d ed.) § 1695 [*quoted* in Chicago Junction R. Co. *v.* McGrath, 203 Ill. 511, 515, 68 N. E. 69].

"'Making flying switch' and 'kicking cars' are terms denoting very nearly the same thing. In the former, the engine may be in front, and, upon being disconnected, the rear cars may be run upon another track while still rolling. In 'kicking cars' the disconnected cars are given their impetus by a backward motion of the engine which does not follow them." Bradley *v.* Ohio River, etc., R. Co., 126 N. C. 735, 742, 36 S. E. 181.

61. Webster Dict. [*quoted* in American Road-Mach. Co. *v.* Pennock, etc., Co., 45 Fed. 252, 253], comparing this term with the term "momentum wheel."

62. McCorkell *v.* Karhoff, 90 Iowa 545, 547, 58 N. W. 913; Brown *v.* Doyle, 69 Minn. 543, 545, 72 N. W. 814; Watson *v.* Roode, 43 Nebr. 348, 354, 61 N. W. 625; Watson *v.* Roode, 30 Nebr. 264, 270, 46 N. W. 491.

63. Black L. Dict.

64. *Alabama.*— Capehart *v.* Furman Farm Implement Co., 103 Ala. 671, 674, 16 So. 627, 48 Am. St. Rep. 60; Sheffield Furnace Co. *v.* Hull Coal, etc., Co., 101 Ala. 446, 481, 14 So. 672.

California.— J. K. Armsby Co. *v.* Blum, 137 Cal. 552, 555, 70 Pac. 669.

Georgia.— Rose *v.* Weinberger, 108 Ga. 533, 535, 34 S. E. 28, 75 Am. St. Rep. 73 [*citing* Bouvier L. Dict.]; Branch *v.* Plamer, 65 Ga. 210, 213.

Illinois.— St. Louis Consol. Coal Co. *v.* Schneider, 163 Ill. 393, 397, 45 N. E. 126; Knapp Electrical Works *v.* New York Insulated Wire Co., 157 Ill. 456, 459, 42 N. E. 147.

New York.— Silberman *v.* Clark, 96 N. Y. 522, 523.

Rhode Island.— Hobart *v.* Littlefield, 13 R. I. 341, 346.

England.—See Inglis *v.* Stock, 10 App. Cas. 263, 266, 5 Aspin. 422, 54 L. J. Q. B. 582, 52 L. T. Rep. N. S. 821, 33 Wkly. Rep. 877; Berndtson *v.* Strang, L. R. 4 Eq. 481, 487, 36 L. J. Ch. 879, 16 L. T. Rep. N. S. 583, 15 Wkly. Rep. 1168; Brown *v.* Hare, 27 L. J. Exch. 372, 377.

"Delivery 'free on board' [as used in a contract for the delivery of goods] only means 'The price shall be that which we stipulate for, and you shall not have to pay for the waggons or carts necessary to carry the clay from the place where it is dug; we will bear all those charges and put it free on board the ship, the name of which you are to furnish.'" *Ex p.* Rosevear China Clay Co., 11 Ch. D. 560, 565, 48 L. J. Bankr. 100, 40 L. T. Rep. N. S. 730, 27 Wkly. Rep. 591.

Use of the term in evidence see 16 Cyc. 876 note 82.

When goods are sold in London, it means that the cost of shipping them falls on the seller, but the buyer is considered as the shipper. Cowas-Jee *v.* Thompson, 3 Moore Indian App. 422, 430, 18 Eng. Reprint 560, 5 Moore P. C. 165, 13 Eng. Reprint 454.

65. Black L. Dict.

As defined by statute, the term may include hay, or other substance commonly used for food of animals. St. 57 & 58 Vict. c. 57, § 59. *Compare* Clements *v.* Smith, 3 E. & E. 238, 243, 6 Jur. N. S. 1149, 30 L. J. M. C. 16, 3 L. T. Rep. N. S. 295, 9 Wkly. Rep. 53, 107 E. C. L. 238, where it is said: "Giving a fair and liberal construction to the words of the statute, I think that everything which is ultimately destined to be used as food for cattle is fodder for them, although it may not have gone through the final process which will make it such."

66. Bouvier L. Dict. [*citing* Dig. 50, 172].

67. Bouvier L. Dict. [*citing* Jenkins Cent. 237]. See also Nutt *v.* Mills, 2 Ld. Raym. 1014; Olive *v.* Ingram, 7 Mod. 263, 268, 2 Str. 1114; Rex *v.* Stubbs, 2 T. R. 395, 406, 1 Rev. Rep. 503.

68. English L. Dict.

69. "[Such as] mist or falling snow." Flint, etc., R. Co. *v.* Marine Ins. Co., 71 Fed. 210, 215. See also 7 Cyc. 341 note 33.

FOLDAGE. An allowance for the benefit to the land by the dung of sheep folded thereon.[70]

FOLD-COURSE. A term applicable to any sheep-walk or any right however derived of one person to take by his sheep the vesture from the land of another.[71]

FOLIO. A leaf of a book or manuscript;[72] a large size of book, the page being obtained by folding the sheet of paper once only in the binding.[73] In printing, the figure at the top or bottom of a page.[74] In old practice, a leaf or sheet of parchment or paper, containing a certain number of words.[75] In modern practice, a certain number of words, without reference to the paper or parchment on which they are written.[76] In English practice, in law proceedings seventy-two words, in chancery ninety words.[77] In conveyances, etc., seventy-two words, and in parliamentary proceedings ninety words.[78] As regulated by statutes, one hundred words or figures.[79] (See, generally, PLEADING.)

FOLLOW. To go or come after; to move behind in the same path or direction.[80] In the construction of statutes the word generally means next after, unless the context requires a different construction.[81]

FOLLOWING TRUST PROPERTY. See TRUSTS.

FONDLE. To treat with tenderness, to caress.[82]

FONDLING. A person or thing fondled or caressed; one treated with foolish or doting affection.[83]

FONDNESS. The quality or state of being fond.[84]

FONDS ET BIENS. A French term meaning goods and effects.[85]

70. *Re* Constable, 80 L. T. Rep. N. S. 164, 166, per Bruce, J. [*citing* Webb *v.* Plummer, 2 B. & Ald. 746, 21 Rev. Rep. 479].

71. Robinson *v.* Dunleep Singh, 11 Ch. D. 798, 806, 814, 48 L. J. Ch. 758, 39 L. T. Rep. N. S. 313, 27 Wkly. Rep. 21, where it is said: "It is a liberty, or right of feeding, of taking by particular animals, and by particular animals only, and to a particular amount only, the pasturage of something else, which something else remains entirely in the lord himself, and must do so from the very nature of the thing." See also Sharpe *v.* Bechenowe, 2 Lutw. 1249.

72. Burrill L. Dict.

73. Black L. Dict.

74. Wharton L. Lex.

75. Burrill L. Dict.

The term "folio" seems to have originated in the practice of writing a certain number of words on a sheet, which, becoming invariable, gave the name of the sheet or leaf (folio) to the number of words written upon it. Burrill L. Dict. [*citing* 3 Blackstone Comm. 323].

76. Burrill L. Dict.

77. Burrill L. Dict. [*citing* Wharton L. Lex.].

78. Wharton L. Lex.

79. Thornton *v.* Sturgis, 38 Mich. 639, 642; Hobe *v.* Swift, 58 Minn. 84, 88, 59 N. W. 831 (where it is said that the rule applies to the printing business as well as in the law); Bohan *v.* Ozaukee County, 88 Wis. 498, 500, 60 N. W. 702; Erwin *v.* U. S., 37 Fed. 470, 493, 2 L. R. A. 229; Ida. Pol. Code (1901), § 1780 (counting every three figures necessarily used as a word); Kan. Gen. St. (1901) § 3043 (where it is declared that two figures shall be counted as one word); Mich. Comp. Laws (1897), § 11239; Minn. Gen. St. (1894) § 255, subd. 4; N. J. Laws (1892), c. 677, § 11 (counting as a word each figure necessarily used); Utah Rev. St. (1898) § 1022; Ballinger Annot. Code & St. Wash. (1897) § 1612 (counting every two figures necessarily used as a word); Wis. Rev. St. (1898) § 2935; Wyo. Rev. St. (1899) § 4314 (where it is declared that four figures shall be counted as one word).

Numbering lines, folios, and pages see 3 Cyc. 138 notes 36, 39.

80. Webster Int. Dict. See also Hubbard *v.* Rowell, 51 Conn. 423, 426.

"Follow the event" as to costs see Parsons *v.* Tinling, 2 C. P. D. 119, 121, 46 L. J. C. P. 230, 35 L. T. Rep. N. S. 851, 25 Wkly. Rep. 255. See COSTS.

Follow in a disorderly manner see Reg. *v.* McKenzie, [1892] 2 Q. B. 519, 522. See also *Ex p.* Wilkins, 18 Cox C. C. 161, 162, 59 J. P. 294, 64 L. J. M. C. 221, 72 L. T. Rep. N. S. 567.

"Following and mocking" see 5 Cyc. 1025 note 10.

"Following an avocation" see Startling *v.* Supreme Council R. T. of T., 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709.

"Following any occupation" see Monahan *v.* Supreme Lodge O. of C. K., 88 Minn. 224, 92 N. W. 972.

81. Simpson *v.* Robert, 35 Ga. 180; Indianapolis *v.* Mansur, 15 Ind. 112, 114; Wilkinson *v.* State, 10 Ind. 372, 373. See, generally, STATUTES.

82. Gay *v.* State, 2 Tex. App. 127, 134 [*citing* Webster Dict.].

83. Gay *v.* State, 2 Tex. App. 127, 134 [*citing* Webster Dict.].

84. Webster Int. Dict.

"Fondness for women does not, *ex vi termini*, convey the meaning of lustful desire, and its unlawful gratification." Cauley *v.* State, 92 Ala. 71, 73, 9 So. 456.

85. Adams *v.* Akerlund, 168 Ill. 632, 633, 48 N. E. 454.

FOOD

By Robert Grattan *

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CROSS-REFERENCES

For Matters Relating to:

Adulteration, see Adulteration.

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*Author of "Bounties," 5 Cyc. 976; "Continuances in Civil Cases," 9 Cyc. 75; and joint author of "Damages," 13 Cyc. 1.

For Matters Relating to — (*continued*)
Constitutional Law, see CONSTITUTIONAL LAW.
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Food For Animal, see ANIMALS; CARRIERS.
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Intoxicating Liquor, see INTOXICATING LIQUORS.
Medicine, see DRUGGISTS.
Poison, see POISONS.

I. DEFINITION.

Food has been defined as "what is eaten for nourishment; whatever supplies nourishment to organic bodies; nutriment; aliment; victuals; provisions."[1]

II. STATUTORY REGULATIONS.

A. As to Manufacture, Sale, Etc. — 1. IN GENERAL. Statutory regulations on this subject for the protection of the public health are now quite general.[2]

1. Century Dict.
Other definitions are: "A substance that promotes the growth of animal or vegetable life." State *v.* Ohmer, 34 Mo. App. 115, 124.
"Every article used for food or drink by man." Webb *v.* Knight, 2 Q. B. D. 530, 535, 46 L. J. M. C. 264, 36 L. T. Rep. N. S. 791, 26 Wkly. Rep. 14.
Baking-powder has been held not to be food. James *v.* Jones, [1894] 1 Q. B. 304, 17 Cox C. C. 726, 58 J. P. 230, 63 L. J. M. C. 41, 70 L. T. Rep. N. S. 351, 10 Reports 410, 42 Wkly. Rep. 400.
Rye chop has been held not to be an article of food within the meaning of a law making it unlawful for any person "to buy up any provision or article of food coming to market." Botelor *v.* Washington, 3 Fed. Cas. No. 1,685, 2 Cranch C. C. 676.
Tobacco has been held not to be food. State *v.* Ohmer, 34 Mo. App. 115.

2. *Alabama.*— Cook *v.* State, 110 Ala. 40, 20 So. 360.
Colorado.— Haines *v.* People, 7 Colo. App. 467, 43 Pac. 1047.
Connecticut.— State *v.* Nussenholtz, 76 Conn. 92, 55 Atl. 589.
District of Columbia.— Prather *v.* U. S., 9 App. Cas. 82.
Illinois.— Huesing *v.* Rock Island, 128 Ill. 465, 21 N. E. 558, 15 Am. St. Rep. 129.
Indiana.— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Schmidt *v.* State, 78 Ind. 41; Moeschke *v.* State, 14 Ind. App. 393, 42 N. E. 1029; Brown *v.* State, 14 Ind. App. 24, 42 N. E. 244.
Maine.— State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.
Maryland.— Rasch *v.* State, 89 Md. 755, 43 Atl. 931; Fox *v.* State, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 193; Wright *v.* State, 88 Md. 436, 41 Atl. 795; Pierce *v.* State, 63 Md. 592.
Massachusetts.— Com. *v.* Mullen, 176 Mass. 132, 57 N. E. 331; Com. *v.* Kelly, 163 Mass. 169, 39 N. E. 776; Com. *v.* Byrnes, 158 Mass. 172, 33 N. E. 343; Com. *v.* Lutton, 157 Mass. 392, 32 N. E. 348; Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47; Com. *v.* Holt, 146 Mass. 38, 14 N. E. 930; Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Smith, 103 Mass. 444; Com. *v.* Raymond, 97 Mass. 567; Com. *v.* Nichols, 10 Allen 199; Com. *v.* Farren, 9 Allen 489; Com. *v.* McCarron, 2 Allen 157; Com. *v.* Flannelly, 15 Gray 195.
Michigan.— Bennett *v.* Carr, 134 Mich. 243, 96 N. W. 26; People *v.* Jennings, 132 Mich. 662, 94 N. W. 216; People *v.* Phillips, 131 Mich. 395, 91 N. W. 616; People *v.* Rotter, 131 Mich. 250, 91 N. W. 167; People *v.* Morse, 131 Mich. 68, 90 N. W. 673; People *v.* Skillman, 129 Mich. 618, 89 N. W. 330; People *v.* Snowberger, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449.
Minnesota.— State *v.* Rumberg, 86 Minn. 399, 90 N. W. 1055; State *v.* Hanson, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468; State *v.* Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 85 Am. St. Rep. 464, 54 L. R. A. 466; State *v.* Sherod, 80 Minn. 446, 83 N. W. 417, 81 Am. St. Rep. 268, 50 L. R. A. 660; State *v.* Nelson, 66 Minn. 166, 68 N. W. 1066, 61 Am. St. Rep. 399, 34 L. R. A. 318.
Missouri.— State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Falk, 38 Mo. App. 554; State *v.* Fayette, 17 Mo. App. 587.
New Hampshire.—State *v.* Collins, 70 N. H. 218, 45 Atl. 1080; State *v.* Ryan, 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629; State *v.* Ball, 70 N. H. 40, 46 Atl. 50; State *v.* Collins, 67 N. H. 540, 42 Atl. 51.
New Jersey.— McGuire *v.* Doscher, 65 N. J. L. 139, 46 Atl. 576; Feigen *v.* McGuire, 64 N. J. L. 152, 44 Atl. 972; Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77; Ammon *v.* Newton, 50 N. J. L. 543, 14 Atl. 610; Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 604; State *v.* Newton, 45 N. J. L. 469; Newton *v.* Connell, 9 N. J. L. J. 316.
New York.— Crossman *v.* Lurman, 171 N. Y. 329, 63 N. E. 1097, 98 Am. St. Rep. 599; People *v.* Biesecker, 169 N. Y. 53, 61 N. E. 990, 88 Am. St. Rep. 534, 57 L. R. A. 178; People *v.* West, 106 N. Y. 293, 12 N. E.

And these statutes have in their chief features followed the common law as interpreted by the decisions.[3]

2. SALE OF IMITATIONS. Very generally the sale of imitations of staple articles of food, such as oleomargarine,[4] or of unwholesome articles, such as adulterated

610, 60 Am. Rep. 452 [*affirming* 44 Hun 162]; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34 [*reversing* 35 Hun 528, 3 N. Y. Cr. 11]; Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314 [*reversing* 4 Laus. 17]; People *v.* Buell, 85 N. Y. App. Div. 141, 83 N. Y. Suppl. 143; People *v.* Timmerman, 79 N. Y. App. Div. 565, 80 N. Y. Suppl. 285; People *v.* Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Suppl. 470; People *v.* Sheriff, 78 N. Y. App. Div. 46, 79 N. Y. Suppl. 783; People *v.* Niagara Fruit Co., 75 N. Y. App. Div. 11, 77 N. Y. Suppl. 805; People *v.* Gilmor, 73 N. Y. App. Div. 483, 77 N. Y. Suppl. 273; People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570; People *v.* Windholz, 68 N. Y. App. Div. 552, 74 N. Y. Suppl. 241; People *v.* Hills, 64 N. Y. App. Div. 584, 72 N. Y. Suppl. 340; People *v.* Park, 60 N. Y. App. Div. 255, 69 N. Y. Suppl. 1120; People *v.* Hillman, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66; People *v.* Rickard, 48 N. Y. App. Div. 408, 63 N. Y. Suppl. 165; People *v.* Spees, 18 N. Y. App. Div. 617, 46 N. Y. Suppl. 995; People *v.* Fox, 4 N. Y. App. Div. 38, 38 N. Y. Suppl. 635; People *v.* Dold, 63 Hun 583, 18 N. Y. Suppl. 643; People *v.* Schaeffer, 41 Hun 23; People *v.* Kerin, 39 Hun 631; Dibble *v.* Hathaway, 11 Hun 571; People *v.* McDermott-Bunger Dairy Co., 38 Misc. 365, 77 N. Y. Suppl. 888; People *v.* Berwind, 38 Misc. 315, 77 N. Y. Suppl. 859; Waterbury *v.* Egan, 3 Misc. 355, 23 N. Y. Suppl. 115; People *v.* Fauerback, 5 Park. Cr. 311; Flander *v.* People, 4 Alb. L. J. 316.

Ohio.— State *v.* Capital City Dairy Co., 62 Ohio St. 123, 56 N. E. 651; State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163; Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429; Ransick *v.* State, 15 Ohio Cir. Ct. 371, 8 Ohio Cir. Dec. 306; Myer *v.* State, 10 Ohio Cir. Ct. 226, 6 Ohio Cir. Dec. 477; Bissman *v.* State, 9 Ohio Cir. Ct. 714, 6 Ohio Cir. Dec. 712; Williams *v.* McNeal, 7 Ohio Cir. Ct. 280, 4 Ohio Cir. Dec. 596; Heider *v.* State, 4 Ohio S. & C. Pl. Dec. 227; Strong *v.* State, 3 Ohio S. & C. Pl. Dec. 284, 2 Ohio N. P. 93; Hass *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248.

Oregon.— State *v.* Dunbar, 13 Oreg. 591, 11 Pac. 298, 57 Am. Rep. 33.

Pennsylvania.— Com. *v.* Kevin, 202 Pa. St. 23, 51 Atl. 594, 90 Am. St. Rep. 613; Com. *v.* Shirley, 152 Pa. St. 170, 25 Atl. 819; Com. *v.* Paul, 148 Pa. St. 559, 24 Atl. 78; Com. *v.* Weiss, 139 Pa. St. 247, 21 Atl. 10, 23 Am. St. Rep. 182, 11 L. R. A. 530; Com. *v.* Miller, 131 Pa. St. 118, 18 Atl. 938, 6 L. R. A. 633; Com. *v.* Leslie, 20 Pa. Super. Ct. 529; Com. *v.* Seiler, 20 Pa. Super. Ct. 260; Com. *v.* Kolb, 13 Pa. Super. Ct. 347; Com. *v.* Hendley, 7 Pa. Super. Ct. 356; Com. *v.* Horn, 2 Pa. Dist. 487, 13 Pa. Co. Ct. 164; Com. *v.* Callahan, 1 Pa. Dist. 437, 12 Pa. Co. Ct. 170; Com. *v.* Hough, 1 Pa. Dist. 51; Com. *v.* Brown, 20 Pa. Co. Ct. 139; Com. *v.* Schmidt, 13 Pa. Co. Ct. 28.

Rhode Island.— State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

Tennessee.— Hunter *v.* State, 1 Head 160 73 Am. Dec. 164.

Texas.— Marxen *v.* State, 44 Tex. Cr. 41, 68 S. W. 277; Teague *v.* State, 25 Tex. App. 577, 8 S. W. 667.

Washington.— Hathaway *v.* McDonald, 27 Wash. 659, 68 Pac. 376; State *v.* Henderson, 15 Wash. 598, 47 Pac. 19.

United States.—Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864; U. S. *v.* Dougherty, 101 Fed. 439; Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588; Armour Packing Co. *v.* Snyder, 84 Fed. 136; Friend *v.* Washington, 9 Fed. Cas. No. 5,121, 2 Cranch C. C. 19.

See 23 Cent. Dig. tit. "Food," § 1 *et seq.*

The Ohio act of May 16, 1894, defining oleomargarine as any substance, not pure butter, of not less than eighty per cent of butter fat, which substance is made as a substitute for butter, does not include butter made from pure milk without any adulteration, although it may be deficient in butter fats, as such act does not purport to regulate the sale or grade of butter. State *v.* Ransick, 62 Ohio St. 283, 56 N. E. 1024.

3. State *v.* Snyder, 44 Mo. App. 429; Goodrich *v.* People, 19 N. Y. 574 [*affirming* 3 Park. Cr. 622]; State *v.* Norton, 24 N. C. 40; State *v.* Smith, 10 N. C. 378, 14 Am. Dec. 594; Com. *v.* Horn, 2 Pa. Dist. 487, 13 Pa. Co. Ct. 164.

At common law.— The selling of unwholesome provisions or the mixture of poisonous ingredients in the food or drink of another to such an extent as to impair the health of any individual receiving them is punishable by indictment at common law (State *v.* Snyder, 44 Mo. App. 429; State *v.* Buckman, 8 N. H. 203, 29 Am. Dec. 646; State *v.* Smith, 10 N. C. 378, 14 Am. Dec. 594; Rex *v.* Dixon, 4 Campb. 12; King *v.* Southerton, 6 East 126), whether done through malice or a desire of gain merely (State *v.* Buckman, *supra*). A nuisance which merely affects an individual is not punishable by indictment at common law; the only remedy is by civil action, and then only in cases where there has been special damage. State *v.* Buckman, *supra*; Williams' Case 5 Coke 72*a*. See also NUISANCES.

4. Cook *v.* State, 110 Ala. 40, 20 So. 360; Com. *v.* Kelly, 163 Mass. 169, 39 N. E. 776; Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Ammon *v.* Newton, 50 N. J. L. 543, 14 Atl. 610; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am.

milk,[5] has been regulated by statute or prohibited entirely as the protection of the public health may require.

3. SALE OF HARMLESS SUBSTITUTES. However, the sale of harmless substitutes may be made lawful where the consumer is advised by color, label, or other device of the exact nature of the article which he proposes to buy.[6]

4. FURNISHING. It is not merely the act of selling which is designed to be prohibited. Furnishing such provisions in any manner, or causing such unwholesome matter to be used, constitutes the offense.[7]

5. WITHIN POLICE POWER. The limitation of the police power of a state in the matter of regulating the sale of food has been the subject of much earnest judicial inquiry;[8] and as a result it is now firmly established that a state or government may, in the exercise of its police power, prescribe reasonable rules and regulations on the subject,[9] and the courts have gone so far as to uphold statutes

Rep. 483; People *v.* Mahaney, 41 Hun (N. Y.) 26.

The proprietor of a restaurant who serves or uses for cooking oleomargarine made in imitation of butter produced from unadulterated milk or cream is liable to the penalty imposed by N. Y. Laws (1893), c. 338, §§ 26–28, without allegation or proof that the article was kept, used, or served as "butter" by said keeper or proprietor. People *v.* Berwind, 38 Misc. (N. Y.) 315, 77 N. Y. Suppl. 859.

5. Com. *v.* Farren, 9 Allen (Mass.) 489; State *v.* Newton, 45 N. J. L. 469; Com. *v.* Hough, 1 Pa. Dist. 51; State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344. See ADULTERATION, 1 Cyc. 939.

6. *Massachusetts.*— Com. *v.* Kelly, 163 Mass. 169, 39 N. E. 776; Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839; Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47.

Minnesota.— State *v.* Hanson, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468.

New Jersey.— Ammon *v.* Newton, 50 N. J. L. 543, 14 Atl. 610.

New York.— People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; Dibble *v.* Hathaway, 11 Hun 571.

Ohio.— Palmer *v.* State, 39 Ohio St. 236, 48 Am. Rep. 429.

Oregon.— State *v.* Dunbar, 13 Oreg. 591, 11 Pac. 298, 57 Am. Rep. 33.

See 23 Cent. Dig. tit. "Food," § 1 *et seq.*

Notice to public see *infra*, IV, A, 1, d.

7. State *v.* Buckman, 8 N. H. 203, 29 Am. Dec. 646.

The mere exposure of unwholesome food for sale will constitute the offense. State *v.* Snyder, 44 Mo. App. 429.

8. In State *v.* Addington, 77 Mo. 110, 117, the court said: "We may make the broad concession that a state cannot, under the disguise of the police power, overthrow the rights which the constitution guarantees; but notwithstanding this, it cannot be gainsaid that the legislature may do many things in the legitimate exercise of that and other powers, which, however unwise or injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative authority. It would be exceedingly difficult, if not impossible, to state, beforehand, what, in a number of cases, should be regarded as an assumption by the legislature of powers not warranted by the constitution. Each case, to a certain extent, must be determined by its own circumstances, the court, in every instance, regarding the act to be investigated as *prima facie* constitutional."

The Michigan pure food law of 1895 is not intended to prevent manufacturers of articles of food from improving the same, so long as no infringement of the law or spirit of the act defining adulteration takes place. People *v.* Jennings, 132 Mich. 662, 94 N. W. 216.

9. *Alabama.*— Cook *v.* State, 110 Ala. 40, 20 So. 360.

Iowa.— State *v.* Snow, 81 Iowa 642, 47 N. W. 777, 11 L. R. A. 355.

Maine.— State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

Maryland.— Wright *v.* State, 88 Md. 436, 41 Atl. 795; McAllister *v.* State, 72 Md. 390, 20 Atl. 143; Pierce *v.* State, 63 Md. 592.

Massachusetts.— Com. *v.* Evans, 132 Mass. 11.

Michigan.— People *v.* Rotter, 131 Mich. 250, 91 N. W. 167.

Minnesota.— State *v.* Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 85 Am. St. Rep. 464, 54 L. R. A. 466; State *v.* Horgan, 55 Minn. 183, 56 N. W. 688; State *v.* Aslesen, 50 Minn. 5, 52 N. W. 220, 36 Am. St. Rep. 620; Butler *v.* Chambers, 36 Minn. 69, 30 N. W. 308, 1 Am. St. Rep. 638.

Missouri.— State *v.* Layton, 160 Mo. 474, 61 S. W. 171, 83 Am. St. Rep. 487, 62 L. R. A. 163; State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Addington, 77 Mo. 110; Kansas City *v.* Cook, 38 Mo. App. 660.

Nebraska.—Beha *v.* State, (1903) 93 N. W. 155.

New Hampshire.— State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; State *v.* Campbell, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 419.

New Jersey.— *In re* Powell, 10 N. J. L. 25.

New York.— People *v.* Cipperly, 101 N. Y. 634, 4 N. E. 107 [*reversing* 37 Hun 319]; People *v.* Girard, 73 Hun 457, 26 N. Y. Suppl. 272 [*affirmed* in 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595]; People *v.* West, 44 Hun 162 [*affirmed* in 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452]; People *v.* McGann, 34

prohibiting the sale of substances imitative of food articles, although they may not be positively injurious to health.[10] The central idea of these statutes is the prevention of facilities for the manufacture and sale of spurious and unwholesome articles in imitation of genuine and pure articles of food whereby purchasers are deceived into buying that which they would not buy but for the deception. To this end such laws are sustained by the courts as being safely within the police power of the state.[11] Although it has been held that a statute

Hun 358; People *v.* Eddy, 12 N. Y. Suppl. 628.

Ohio.— State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; Weller *v.* State, 53 Ohio St. 77, 40 N. E. 1001.

Pennsylvania.— Com. *v.* Kevin, 202 Pa. St. 23, 51 Atl. 594, 90 Am. St. Rep. 613; Com. *v.* Paul, 148 Pa. St. 559, 24 Atl. 78; Powell *v.* Com., 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350; Walker *v.* Com., 8 Pa. Cas. 483, 11 Atl. 623; Com. *v.* Andrews, 24 Pa. Super. Ct. 571; Com. *v.* Seiler, 20 Pa. Super. Ct. 260; Com. *v.* Powell, 1 Pa. Co. Ct. 94.

United States.— Walker *v.* Pennsylvania, 127 U. S. 699, 8 S. Ct. 997, 32 L. ed. 261; Powell *v.* Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253 [*affirming* 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350]; Armour Packing Co. *v.* Snyder, 84 Fed. 136; *In re* Brosnahan, 18 Fed. 62, 4 McCrary 1.

See 23 Cent. Dig. tit. "Food," § 1; and COMMERCE, 7 Cyc. 434.

Patented article.— The fact that an article of food or drink is prepared by a process which is or has been protected by letters patent of the United States does not prevent it from coming within the operation of laws passed by a state in the exercise of its police powers. Arbuckle *v.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864.

Conflict of state and federal authority.— Where oleomargarine was furnished by the federal government to be served as food to the inmates of a national home for federal soldiers, the governor of such institution is not amenable to the laws of the state in which it is located, regulating the use and sale thereof, since the legislature of the state has no constitutional power to interfere with the internal management of federal institutions located within its limits. Ohio *v.* Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699 [*affirming* 87 Fed. 453, 31 C. C. A. 80].

Food containing preservative.— N. Y. Laws (1893), c. 338, §§ 27, 37, as amended by Laws (1899), c. 435, and Laws (1900), c. 534, prohibiting the sale of any butter or other dairy product containing a preservative, except in certain cases, cannot be sustained as a health regulation, since it does not purport to be a health law, but is apparently directed against fraudulent practices. People *v.* Biesecker, 33 Misc. (N. Y.) 35, 68 N. Y. Suppl. 134 [*affirmed* in 58 N. Y. App. Div. 391, 68 N. Y. Suppl. 1067]. Minn. Laws (1899), c. 257, entitled "An act to prevent the use of chemical agents, as preservatives in milk, cream, cheese and butter," prohibited such use in these four articles and also in any other dairy products. Laws (1901), c. 348, amended such act by the title, and provided that such chapter 257 should be amended to read, "An act to prevent the use of chemical agents as preservatives in milk, cream, cheese and butter, or food products of any nature whatever." Section 1 of chapter 257 was amended to punish any person selling "any milk, cream or food products of any nature whatever, butter, cheese or any other dairy products," to which any preservative had been added. These several sections have been held to cover only such articles of food as might be made from cream and milk, and not to prohibit the use of preservatives in meats. State *v.* Rumberg, 86 Minn. 399, 90 N. W. 1055.

Renovated butter.— It is not an improper exercise of the police power to require that renovated butter should be labeled, so as to distinguish it from creamery butter. Com. *v.* Seiler, 20 Pa. Super. Ct. 260.

10. State *v.* Addington, 77 Mo. 110 [*affirming* 12 Mo. App. 214]; People *v.* Girard, 73 Hun (N. Y.) 457, 26 N. Y. Suppl. 272 [*affirmed* in 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595]; Palmer *v.* State, 39 Ohio St. 236, 46 Am. Rep. 429; Com. *v.* Kolb, 13 Pa. Super. Ct. 347.

Pennsylvania act of June 26, 1895, providing that an article of food shall be deemed adulterated "if it contains any added substance or ingredient which is poisonous or injurious to the health," makes it an adulteration to add a substance which is poisonous or injurious in any quantity, although the quantity added is not enough to make the compound poisonous or injurious to health. Com. *v.* Kevin, 202 Pa. St. 23, 25, 51 Atl. 594, 90 Am. St. Rep. 613.

Arbitrary test.— In People *v.* Worden Grocer Co., 118 Mich. 604, 77 N. W. 315, it was held that the court has no power to declare void Mich. Pub. Acts (1897), No. 71, § 1, prohibiting the sale of vinegar below the standard therein specified, as beyond the police power of the state because an unreasonable and arbitrary test is prescribed by it, that being a matter exclusively for the legislature.

11. *Alabama.*— Cook *v.* State, 110 Ala. 40, 20 So. 360.

Maine.— State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

Massachusetts.— Com. *v.* Carter, 132 Mass. 12; Com. *v.* Evans, 132 Mass. 11.

Minnesota.— State *v.* Crescent Creamery Co., 83 Minn. 284, 86 N. W. 107, 85 Am. St. Rep. 464, 54 L. R. A. 466; State *v.* Sherod, 80 Minn. 446, 83 N. W. 417, 81 Am. St. Rep. 268, 50 L. R. A. 660.

which amounts to a prohibition of a legitimate article of commerce and a wholesome article of food is unconstitutional as an unwarranted interference with the natural rights of man and a violation of the privileges secured to him by the state and federal constitutions.[12] These statutes have been so construed on the princi-

Missouri.— State *v.* Addington, 77 Mo. 110 [*affirming* 12 Mo. App. 214].

New Hampshire.— State *v.* Collins, 70 N. H. 218, 45 Atl. 1080; State *v.* Ball, 70 N. H. 40, 46 Atl. 50; State *v.* Marshall, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51.

New Jersey.— Shivers *v.* Newton, 45 N. J. L. 469; *In re* Powell, 10 N. J. L. J. 25.

New York.— Crossman *v.* Lurman, 171 N. Y. 329, 63 N. E. 1097 [*affirming* 57 N. Y. App. Div. 393, 68 N. Y. Suppl. 311]; People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452 [*affirming* 44 Hun 162]; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; Polinsky *v.* People, 73 N. Y. 65 [*affirming* 11 Hun 390]; People *v.* Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Suppl. 470; People *v.* McGann, 34 Hun 358.

Ohio.— State *v.* Capital City Dairy Co., 62 Ohio St. 350, 57 N. E. 62, 57 L. R. A. 181; Walton *v.* Toledo, 23 Ohio Cir. Ct. 547; Holtgreive *v.* State, 5 Ohio S. & C. Pl. Dec. 166, 7 Ohio N. P. 389.

Pennsylvania.— Powell *v.* Com., 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350 [*affirmed* in 27 U. S. 678, 8 S. Ct. 992, 1257, 32 L. ed. 253]; Com. *v.* Diefenbacher, 14 Pa. Super. Ct. 264; Com. *v.* McCann, 14 Pa. Super. Ct. 221; Com. *v.* Powell, 1 Pa. Co. Ct. 94.

Rhode Island.— State *v.* Smyth, 14 R. I. 100, 51 Am. Rep. 344.

United States.— U. S. *v.* Dougherty, 101 Fed. 439.

The legislature has the right to affix the character of an adulterated production to milk falling below a certain standard, and prohibit the sale of such adulterated milk under the penalty of a criminal prosecution which would not be defeated by proof that the milk had not been actually adulterated after leaving the cow. People *v.* Beaman, 102 N. Y. App. Div. 151, 92 N. Y. Suppl. 295.

Manufacture in another state.— In State *v.* Collins, 67 N. H. 540, 42 Atl. 51, it was held that N. H. Pub. St. c. 127, §§ 19, 20, punishing as an offense a sale in the state of oleomargarine not of a pink color, are not in contravention of the federal constitution, as applied to a sale by the agent of a nonresident who manufactures it in another state, and ships it into the state.

Question of monopoly.—Md. Code Pub. Gen. Laws, art 27, §§ 88-91 (Acts (1888), c. 312), forbidding the sale of butter substitutes do not violate the Declaration of Rights, art. 41, declaring against monopolies, since they prohibit all sales, and hence there is no monopoly. Nor do they violate Md. Const. art. 4, § 2, nor Const. Amendm. 14, entitling the citizens of each state to all the privileges and immunities of citizens in the several states, since the object of this clause is to prevent discrimination by the several states against citizens of other states. Wright *v.* State, 88 Md. 436, 41 Atl. 795.

Part of statute unconstitutional.— The fact that one section of a statute requiring imitation butter to be marked in a certain manner is unconstitutional does not invalidate the other sections prohibiting the manufacture or sale of such substance. State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317.

12. People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34. See also 1 Dillon Mun. Corp. § 141 note 1.

In discussing the leading cases on this point, Judge Dillon says: "We cannot refrain from expressing our full concurrence in the views and conclusions of the Court of Appeals of New York in People *v.* Marx, *supra*. It will not escape observation that the Court of Appeals of New York and the Supreme Court of Pennsylvania reached opposite conclusions on a question relating so vitally to the natural, inalienable, and primordial rights of the citizen. The judgment of the Supreme Court of Pennsylvania sustaining the Act of 1885, was affirmed by the Supreme Court of the United States; and on like grounds, if the New York statute (which was in judgment in the case of People *v.* Marx, *supra*) had been before the Supreme Court of the United States, its validity would have been upheld, unless the Supreme Court had followed the judgment of the Court of Appeals. We have, at all events, that which is regarded as a fundamental right in New York considered not to be such in Pennsylvania. The Pennsylvania Act of 1885, under which Powell was convicted, makes the manufacture and sale of oleomargarine, though open and unconcealed, a crime. We cannot but express our regret that the Constitution of any of the States, or that of the United States, admits of a construction that it is competent for a State legislature to suppress (instead of regulating) under fine and imprisonment the business of manufacturing and selling a harmless, and even wholesome, article, if the legislature chooses to affirm, contrary to the fact, that the public health or public policy requires such suppression. The record of the conviction of Powell for selling without any deception a healthful and nutritious article of food makes one's blood tingle." 1 Dillon Mun. Corp. § 141.

N. Y. Laws (1893), c. 338, §§ 27, 37, as amended by Laws (1899), c. 435, and Laws (1900), c. 534, prohibiting the sale of any butter or other dairy product containing a preservative, except salt in butter and cheese, and spirituous liquors in cheese, and sugar in condensed milk, and prohibiting the sale of any preservative substances to be used in violation thereof, and providing a penalty

ple that there is no interference with any inherent right or privilege of the people to engage in the manufacture or sale of any wholesome product or compound, where there is no imitation, and the true character is openly designated.[13] A federal statute providing for the taxation of persons engaged in the manufacture or sale of designated articles does not authorize such manufacture or sale in a state where either is prohibited by law, or authorize any person to disregard regulations which a state may lawfully prescribe in reference to such articles.[14]

B. As to Inspection.[15] Laws for the inspection of food have been provided by statute in many states,[16] and the right of inspection thus provided is a very peremptory one, with which the inspector is invested for the purpose of enforcing the law.[17] In such cases the statute usually provides that a sample of the unwholesome food shall be reserved for evidence.[18] So too it is within the province of congress to provide for the sanitary inspection and the marking and branding of articles of food at the place of manufacture to the end that nothing shall be shipped from the factory which can in any way be injurious to the health of the consumer.[19]

C. As to Condemnation. It is within the police power of the state to condemn and destroy articles endangering the health of the community.[20]

III. MUNICIPAL ORDINANCES.

It is settled that a municipal ordinance regulating the sale and providing for the inspection of articles of food under a charter delegating such power is a

therefor, have been held unconstitutional, as a restriction on the general right to sell preservative substances. People *v.* Biesecker, 33 Misc. (N. Y.) 35, 68 N. Y. Suppl. 134 [*affirmed* in 58 N. Y. App. Div. 391, 68 N. Y. Suppl. 1067].

13. State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

Notice to public see *infra*, IV, A, 1, d.

14. People *v.* Meyer, 89 N. Y. App. Div. 185, 85 N. Y. Suppl. 834; Plumley *v.* Massachusetts, 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223.

15. Inspection for the prevention of fraud and for commercial purposes see, generally, INSPECTION.

Municipal ordinances relating to inspection see *infra*, III.

16. Com. *v.* Mullen, 176 Mass. 132, 57 N. E. 331; Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511; St. Louis *v.* Shands, 20 Mo. 149.

Under Mass. St. (1891) c. 58, as amended by St. (1896) c. 377, providing that inspectors of milk shall take samples of suspected imitation butter, and have the same analyzed, it is not necessary for such inspector to reserve and seal a portion of the sample, as required by St. (1884) c. 310, § 4, to sustain a prosecution for having in possession with intent to sell a certain compound in imitation of butter. Com. *v.* Ryberg, 177 Mass. 67, 58 N. E. 155.

By N. Y. Const. (1846) art. 5, § 8, which is still in force, it is provided that "all offices for the weighing, measuring, culling or inspecting of any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such offices shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interests of the state in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purpose hereafter." The reason and necessity for the adoption of this constitutional provision were discussed by Denio, J., in Tinkham *v.* Tapscott, 17 N. Y. 141, 147.

17. Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511.

Inspection beyond city limits.— Minn. Gen. Laws (1895), c. 203, authorizing cities to provide for the licensing and regulation of the sale of milk within their limits, authorizes a city to require that an applicant for license shall consent that the dairy herd from which he obtains milk may be inspected by the health commissioner of the city, although it is kept outside the city limits. State *v.* Nelson, 66 Minn. 166, 68 N. W. 1066, 61 Am. St. Rep. 399, 34 L. R. A. 318.

18. Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511.

19. U. S. *v.* Bohl, 125 Fed. 625.

20. Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783; Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3.

Renovated butter.— Wash. Laws (1899), c. 43, § 28, authorizing the seizure of any article or substance kept for sale in violation of the statute, construed in connection with section 30, prohibiting the sale or keeping for sale of renovated butter without its being marked in a certain designated manner authorizes the seizure of process butter. Hathaway *v.* McDonald, 27 Wash. 659, 68 Pac. 376, 91 Am. St. Rep. 889.

legitimate exercise of the police power of the state,[21] and an ordinance which requires the vendors of dairy products in a city to submit their dairies and dairy herds outside the city limits to inspection is not open to the objection that it is extraterritorial in its operation.[22] So too cities generally have power under their charters to license all lawful occupations carried on within their limits, but a city cannot by license authorize an unlawful traffic in food products or even a lawful traffic to be carried on in an unlawful manner.[23]

IV. VIOLATIONS OF STATUTES OR ORDINANCES.

A. Illegal Manufacture or Sale — 1. What Constitutes — a. In General. While there is some doubt[24] as to whether the manufacture or sale of articles of food which are not injurious to health is illegal under statutes prohibiting such manufacture or sale,[25] it is nevertheless firmly established that the sale of such articles so produced as to work a fraud on the public is illegal under statutes forbidding such sales.[26] Where a party is charged with the illegal sale of unwholesome food either through himself or his agent,[27] the question of guilt is to be determined by the terms of the statute under which he is indicted,[28] or the

21. State *v.* Nelson, 66 Minn. 166, 68 N. W. 1066, 61 Am. St. Rep. 399, 34 L. R. A. 318; St. Louis *v.* Shands, 20 Mo. 149; Walton *v.* Toledo, 23 Ohio Cir. Ct. 547; Norfolk *v.* Flynn, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771.

22. State *v.* Nelson, 66 Minn. 166, 68 N. W. 1066, 61 Am. St. Rep. 399, 34 L. R. A. 318; Norfolk *v.* Flynn, 101 Va. 473, 44 S. E. 717, 62 L. R. A. 771.

23. See Haines *v.* People, 7 Colo. App. 467, 43 Pac. 1047, holding that where a statute provides that before any person can sell oleomargarine he shall mark the packages in two conspicuous places in bold-faced English letters and prescribes a punishment for violation of the act, a city has no power to authorize the sale of oleomargarine in unmarked packages.

24. This doubt is due to the diversity of opinion as to whether such statutes constitute a legitimate exercise of the police power of the state. See *supra*, II, A, 5.

25. In People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34, it was held that a statute prohibiting the manufacture and sale as an article of food of any substitute for butter or cheese produced from pure unadulterated milk or cream, inasmuch as the prohibition was not limited to unwholesome or simulated substitutes but applied as well to the manufacture and sale of such as are wholesome and valuable, and were fairly and openly avowed in public, was unconstitutional and void, and that a conviction thereunder for the sale of oleomargarine, a wholesome substitute for butter, where it appeared that the true character of the article was avowed, was error. See also People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People *v.* Kerin, 39 Hun (N. Y.) 631. But in Pennsylvania a similar statute was upheld as constitutional. Powell *v.* Com., 114 Pa. St. 265, 7 Atl. 913, 60 Am. Rep. 350 [*affirmed* in 127 U. S. 678, 8 S. Ct. 992, 32 L. ed. 253]. See remarks of Judge Dillon, *supra*, p. 1089 note 12.

26. People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483. See *supra*, II, A, 3-5.

The intention of the legislature to be extracted from the Pennsylvania act of 1899 regulating the manufacture and sale of oleomargarine, is to prohibit the imitation of yellow butter by any admixture or addition to oleomargarine during or after manufacture; and the effect of the statute is that butter may be colored yellow, but oleomargarine may not be so colored. Com. *v.* Vandyke, 13 Pa. Super. Ct. 484.

The Michigan Pure Food Law of 1895 is not intended to prevent manufacturers of articles of food from improving the same so long as no infringement of the law or spirit of the act defining adulteration takes place. People *v.* Jennings, 132 Mich. 661, 94 N. Y. 216.

27. Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47; State *v.* Smith, 10 R. I. 258.

Sales by agent see *infra*, IV, D, A, 1, f.

On a prosecution under 88 Ohio Laws, p. 231, of an agent of a foreign wine house for selling adulterated wine within the state, it was held no defense that the agent did not know that the wine was adulterated. Myer *v.* State, 10 Ohio Cir. Ct. 226, 6 Ohio Cir. Dec. 477.

28. Com. *v.* Raymond, 97 Mass. 567; Com. *v.* Flannelly, 15 Gray (Mass.) 195; Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314 [*reversing* 4 Lans. 17]; People *v.* Fox, 4 N. Y. App. Div. 38, 38 N. Y. Suppl. 635; State *v.* Smith, 10 R. I. 258. The sale of several cans of impure and adulterated milk at one time and place and to one person constitutes but a single offense. People *v.* Buell, 85 N. Y. App. Div. 141, 83 N. Y. Suppl. 143.

N. Y. City San. Code, § 63, providing that no adulterated milk "shall be brought into, held, kept or offered for sale at any place in the city," does not prohibit the mere possession thereof. People *v.* Timmerman, 79 N. Y. App. Div. 565, 80 N. Y. Suppl. 285.

evidence of guilty knowledge and intent as proved at the trial in cases where these constitute an essential ingredient of the offense.[29]

b. Imitations of Staple Articles. Where the statute provides against the manufacture of compounds in imitation of well known articles of food, the gist of the offense consists in the imitation,[30] and the statutory prohibition is aimed at a designed and intentional imitation[31] and not at a mere resemblance of qualities inherent in the articles themselves and common to both.[32] It is not unlawful for a party to manufacture substances and sell them for what they purport to be;[33] and in order to convict it must be established that he intended to sell such substances for the natural product.[34]

c. Guilty Knowledge. Where the statute makes knowledge of the unwholesomeness or adulteration of the food an essential ingredient of the offense, it is necessary that such knowledge should appear,[35] and the court should so charge the jury.[36] On the other hand under some statutes a guilty knowledge is not the gist of the offense, and the seller takes upon himself the risk of knowing that the article offered is unwholesome or adulterated.[37]

The phrase "yellow butter," as used in Mich. Acts (1901), No. 22, making it an offense to sell or offer for sale oleomargarine colored in imitation of "yellow butter" made from pure milk or cream of the same, means any butter produced from pure milk or cream thereof having a "perceptible shade" of yellow. People *v.* Phillips, 131 Mich. 395, 91 N. W. 616.

29. People *v.* Laning, 40 N. Y. App. Div. 227, 57 N. Y. Suppl. 1057; People *v.* Mahaney, 41 Hun (N. Y.) 26; People *v.* Fulle, 1 N. Y. Cr. 172; Flander *v.* People, 4 Alb. L. J. 316; Haas *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248; State *v.* Dunbar, 13 Oreg. 591, 11 Pac. 298, 57 Am. Rep. 33.

The serving at a public restaurant of oleomargarine as a substitute for butter, which, although not eaten, is paid for as part of the meal and carried away by the customer, constitutes a sale thereof within the prohibition of the statute. Com. *v.* Miller, 131 Pa. St. 118, 18 Atl. 938, 6 L. R. A. 633. A public caterer who furnishes oleomargarine as part of a meal to his guests is subject to the penalties for the sale of oleomargarine provided for in the Pennsylvania act of May 21, 1885. Com. *v.* Handley, 7 Pa. Super. Ct. 356.

Honest mistake of fact.— In People *v.* Fulle, 1 N. Y. Cr. 172, defendant, a grocer, purchased in the open market an adulterated cream of tartar. He was told by the dealer that it was the best. He paid the highest price for it, and, believing it was pure and the best, sold it as an article of food. It was held that the sale was made by defendant under an honest mistake of fact which excused him. See also Haas *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248.

30. Waterbury *v.* Newton, 50 N. J. L. 545, 14 Atl. 609; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483 [*distinguishing* People *v.* Marx, 99 N. Y. 377, 2 N. E. 29, 52 Am. Rep. 34; *In re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636]; People *v.* Arensberg, 103 N. Y. 388, 8 N. E. 736, 57 Am. Rep. 741 [*reversing* 40 Hun 358]; People *v.* Niagara Fruit Co., 75 N. Y. App. Div. 11, 77 N. Y. Suppl. 805 [*affirmed* in 173 N. Y. 629, 66 N. E. 1114].

31. Where the ingredients are purposely so selected as to produce the resemblance designed to be prohibited, defendant cannot be excused on the ground that no ingredients were used, the sole function of which is coloration. State *v.* Armour Packing Co., 124 Iowa 323, 100 N. W. 59.

32. Bennett *v.* Carr, 134 Mich. 243, 96 N. W. 26; People *v.* Arensberg, 105 N. Y. 123, 11 N. E. 277, 59 Am. Rep. 483; People *v.* Meyer, 89 N. Y. App. Div. 185, 85 N. Y. Suppl. 834.

33. People *v.* Dold, 63 Hun (N. Y.) 583, 18 N. Y. Suppl. 643.

34. People *v.* Dold, 63 Hun (N. Y.) 583, 18 N. Y. Suppl. 643; People *v.* Kerin, 39 Hun (N. Y.) 631. See also People *v.* Fauerback, 5 Park. Cr. (N. Y.) 311.

35. Com. *v.* Raymond, 97 Mass. 567; Com. *v.* Flannelly, 15 Gray (Mass.) 195; State *v.* Snyder, 44 Mo. App. 429; Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314 [*reversing* 4 Lans. 17].

Under Tex. Pen Code, art. 392, making it unlawful knowingly to slaughter for food any diseased animal, or to sell the flesh of any animal slaughtered when diseased, unless defendant knew at the time of the sale that the meat was diseased, he cannot be convicted. Teague *v.* State, 25 Tex. App. 577, 8 S. W. 667.

36. State *v.* Snyder, 44 Mo. App. 429; Haas *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248.

It is error to charge that by "wilfully selling" is meant deliberately selling without regard to defendant's motive. State *v.* Nussenholtz, 76 Conn. 92, 55 Atl. 589.

37. *Indiana.*—Schmidt *v.* State, 78 Ind. 41.

Maine.— State *v.* Rogers, 95 Me. 94, 49 Atl. 564.

Massachusetts.— Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47; Com. *v.* Evans, 132 Mass. 11; Com. *v.* Nichols, 10 Allen 199; Com. *v.* Farren, 9 Allen 489.

Michigan.— People *v.* Worden Grocer Co.,

d. Notice to Public. In some states the sale of certain food stuffs has been authorized by statute, provided that they shall be so colored or labeled as to advise the consumer of their true nature.[38] These statutes have been strictly

118 Mich. 604, 77 N. W. 315; People *v.* Snowberger, 113 Mich. 86, 71 N. W. 497, 67 Am. St. Rep. 449.

New Hampshire.— State *v.* Ryan 70 N. H. 196, 46 Atl. 49, 85 Am. St. Rep. 629.

New Jersey.— Waterbury *v.* Newton, 50 N. J. L. 534, 14 Atl. 609; Newton *v.* Connell, 9 N. J. L. J. 316.

New York.— People *v.* Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Suppl. 470; People *v.* Hillman, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66, 15 N. Y. Cr. 394; People *v.* Meyer, 44 N. Y. App. Div. 1, 60 N. Y. Suppl. 415 [*citing* People *v.* Girard, 145 N. Y. 105, 39 N. E. 823, 45 Am. St. Rep. 595; People *v.* Kibler, 106 N. Y. 321, 12 N. E. 795]; People *v.* Mahaney, 41 Hun 26; People *v.* Schaeffer, 41 Hun 23.

Ohio.— State *v.* Rippeth, 71 Ohio St. 85, 72 N. E. 298; State *v.* Kelly, 54 Ohio St. 166, 43 N. E. 163; Myer *v.* State, 10 Ohio Cir. Ct. 226, 6 Ohio Cir. Dec. 477; Bissman *v.* State, 9 Ohio Cir. Ct. 714, 6 Ohio Cir. Dec. 712; Strong *v.* State, 3 Ohio S. & C. Pl. Dec. 284, 2 Ohio N. P. 93. *Compare* Haas *v.* State, 2 Ohio S. & C. Pl. Dec. 177, 1 Ohio N. P. 248.

Pennsylvania.— Com. *v.* Weiss, 139 Pa. St. 247, 21 Atl. 10, 23 Am. St. Rep. 182, 11 L. R. A. 530.

Rhode Island.— State *v.* Smith, 10 R. I. 258.

See 23 Cent. Dig. tit. "Food," § 12.

A dealer who puts into food a foreign substance containing matter injurious to health cannot defend on the ground that he did not know such substance contained any injurious matter. Lansing *v.* State, (Nebr. 1905) 102 N. W. 254.

False representations.— Under N. Y. Laws (1882), c. 246, § 1, punishing the sale of an article that is not butter, but which the seller represents to be butter, it is sufficient to prove the sale and false representation, and it is not necessary to further prove the seller's knowledge that his representation was false, or that he intended to deceive, since he subjects himself to liability by making a representation not known to be true. People *v.* Mahaney, 41 Hun (N. Y.) 26.

Inadvertence.— In Com. *v.* Gray, 150 Mass. 327, 329, 23 N. E. 47, the court said: "Where an act is forbidden by positive law except where certain precautions are observed, neither ignorance of them, nor the failure to observe them through inadvertence, affords an excuse, whether this is the ignorance or inadvertence of the person himself, or of his agent acting within the scope of the agency with which he has been intrusted."

38. Com. *v.* Russell, 162 Mass. 520, 39 N. E. 110; Com. *v.* Stewart, 159 Mass. 113, 34 N. E. 84; Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388; Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77.

Under Mass. St. (1891) c. 58, prohibiting the manufacture or sale or the offering or exposing for sale of any article which shall be in imitation of yellow butter produced from pure unadulterated milk or cream, but providing that nothing in the act shall be construed to prohibit the manufacture or sale of oleomargarine in a distinct form and in such manner as will advise the consumer of its real character free from coloration or ingredients that cause it to look like butter, is directed solely to products in imitation of yellow butter and does not apply to oleomargarine not made in imitation of butter. Com. *v.* Huntley, 156 Mass. 236, 30 N. E. 1127, 15 L. R. A. 839.

Under Mass. St. (1891) c. 412, which prohibits the selling from a vehicle on the public street of "oleomargarine, butterine, or any substance made in imitation or semblance of pure butter" without the sign therein provided for, has been held to apply to all kinds of oleomargarine whether designedly made to imitate butter or not. Com. *v.* Crane, 162 Mass. 506, 39 N. E. 187.

Under the Michigan statute forbidding the sale of cane syrup or beet syrup mixed with glucose, unless the package containing the same be distinctly branded "Glucose Mixture" or "Corn Syrup" with the name and percentage of each ingredient contained therein plainly stamped thereon. It was held that a sale of syrup made of ninety per cent pure corn syrup and ten per cent cane syrup, labeled "Victor Corn Syrup," and truthfully stating the ingredients composing it, is not in violation of the statute in that it is not branded "Glucose, ninety per cent. and Cane Syrup ten per cent." People *v.* Harris, 135 Mich. 136, 97 N. W. 402.

The Minnesota statute, providing that manufacturers of baking powders shall put on each can a label stating what ingredients are used, is constitutional and not an infringement upon private rights. State *v.* Sherod, 80 Minn. 446, 83 N. W. 417, 81 Am. St. Rep. 268, 50 L. R. A. 660.

Selling milk.— On a prosecution for selling milk not of standard quality, where defendant had the right to sell skimmed milk from duly marked vessels, an instruction that defendant would be liable unless the buyer had notice or knowledge that the milk was skimmed milk is error, where defendant sold the skimmed milk from marked vessels. Com. *v.* Smith, 149 Mass. 9, 20 N. E. 161.

Exposing oleomargarine for sale in its original package, marked on the top, side, and bottom as required by Mass. St. (1886) c. 317, § 1, but with the top removed so as to expose to view the contents, which are to be sold at retail in small quantities, is not a violation of the law. The statute does not say that under such circumstances the package shall be constantly kept covered. Com. *v.* Bean, 148 Mass. 172, 19 N. E. 163.

construed for the protection of the public,[39] and in some cases the courts have gone to the extreme in requiring actual notice to be brought home to the purchaser.[40]

e. Purpose of Sale. Since the entire object of the statutes prohibiting the sale of unwholesome and adulterated food stuffs is to protect the health of the public, it must generally appear that such article was sold as food;[41] and the mere possession of an adulterated article which is not exposed or offered for sale does not constitute an offense.[42] Nor is it an offense to sell a quantity of an article of adulterated food as a sample for the purpose of analysis upon demand made for that purpose by the proper officer.[43]

f. Sale by Agent. The question has frequently arisen whether a sale by an agent will constitute a violation of the statute on the part of the principal. While the possession or sale on the part of an agent or servant is not in itself sufficient for a conviction of the principal,[44] yet where such possession or sale is

Compare People *v.* Mack, 97 N. Y. App. Div. 474, 89 N. Y. Suppl. 1004.

39. State *v.* Ball, 70 N. H. 40, 46 Atl. 50.

Covered signs.— Hanging the placards on the inside of a covered wagon, having the front and rear ends open, is not a compliance with Mass. St. (1891) c. 412, § 4, which makes it unlawful to sell oleomargarine from a wagon, etc., without having on both sides of the vehicle a placard, "Licensed to Sell Oleomargarine." Com. *v.* Crane, 158 Mass. 218, 33 N. E. 388.

Knowledge of purchaser.— Under Mass. St. (1901) c. 58, § 1, prohibiting the manufacture or exposing for sale of any compound made from fat in imitation of yellow butter, but providing that oleomargarine may be sold "in a separate and distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter," the sale of oleomargarine containing coloring in imitation of butter is illegal, although the purchaser is advised of its real character. Com. *v.* Russell, 162 Mass. 520, 39 N. E. 110. So under the New Jersey act, providing that no person shall sell any oleomargarine or other imitation of butter, etc., at retail "unless he shall first inform the purchaser that the substance is not natural butter or cheese, but imitation," etc., and shall also at the time of sale "give to the purchaser a card or notice printed on which shall be the name of the substance sold and the name and address of the seller or vendor," the offense is committed by failure to give such card or notice, notwithstanding the purchaser is at the time of sale orally informed of the nature of the substance sold. Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77.

40. In Com. *v.* Stewart, 159 Mass. 113, 34 N. E. 84, under Mass. St. (1891) c. 412, § 5, which requires every person who furnishes to a guest in a restaurant or hotel oleomargarine or butterine instead of butter to notify him that the substance furnished is not butter, it has been held insufficient to put up in a restaurant conspicuous signs, reading "Butterine Used Only Here," and to print on the bill of fare "Only Fine Butterine Used Here," where it is shown that the guest to whom butterine was furnished instead of butter neither saw the signs nor read the bill of fare.

41. Schmidt *v.* State, 78 Ind. 41; State *v.* Fayette, 17 Mo. App. 587; Com. *v.* Madden, 153 Pa. St. 627, 25 Atl. 896; Com. *v.* Schollenberger, 153 Pa. St. 625, 25 Atl. 999; Com. *v.* Callahan, 1 Pa. Dist. 437, 12 Pa. Co. Ct. 170; Com. *v.* Schmidt, 13 Pa. Co. Ct. 28.

Article of merchandise.— Upon an indictment for selling unwholesome beef, it was held no error for the judge to refuse to charge the jury that if they find the beef was bought as an article of merchandise and not for domestic consumption they must acquit. People *v.* Parker, 38 N. Y. 85, 97 Am. Dec. 774.

42. People *v.* Timmerman, 79 N. Y. App. Div. 565, 80 N. Y. Suppl. 285 [*affirmed* in 179 N. Y. 550, 71 N. E. 1136].

Where, however, the statute forbids the possession or sale of certain food, the use to which defendant intended to devote the prohibited article is not an element of the offense. Com. *v.* Raymond, 97 Mass. 567.

In a prosecution for selling milk that did not bear the prescribed test, it is immaterial for what purpose defendant had the milk on hand. Weigand *v.* District of Columbia, 22 App. Cas. (D. C.) 559.

43. Lansing *v.* State, (Nebr. 1905) 102 N. W. 254.

44. State *v.* Smith, 10 R. I. 258.

Mich. Pub. Acts (1895), No. 193, providing that the taking of an order for future delivery of any of the articles covered by the act "shall be deemed a sale, within the meaning of the act" does not make an agent absolutely responsible for the acts of his principal in filling the orders taken by such agent, and an order by the agent which is filled by the principal as an entirety may be, under the act, a sale of impure food as to the principal, and yet not such as to the agent. People *v.* Morse, 131 Mich. 68, 90 N. W. 673.

Charge in complaint.— A conviction for a sale of adulterated milk is improper if the complaint charges a sale by a principal, and it was made by an agent. Heider *v.* State, 4 Ohio S. & C. Pl. Dec. 227.

connected with a regular business and within the scope of the agency the principal has always been held liable,[45] especially where the principal has in any way authorized the act.[46]

2. Recovery From Purchaser. Where a sale is made under circumstances directly prohibited by the statute, no recovery can be had by the seller against the purchaser;[47] but where there has been no direct violation of the terms of the statute a party will not be denied his right to relief.[48]

Consummation of sale.— Where a Philadelphia grocer who had a wholesale license to sell oleomargarine sent his soliciting agents into M county and took orders there, which were sent to a Philadelphia store and there accepted, and the goods shipped to the customer in his name, but in care of the agent, and taken by the agent from the railroad station and delivered to the customer, defendant cannot be convicted of selling oleomargarine in M county without a license, since the sale was consummated in Philadelphia. Com. *v.* Gardner, 16 Montg. Co. Rep. (Pa.) 171.

45. *District of Columbia.*— Prather *v.* U. S., 9 App. Cas. 82.

Massachusetts.— Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47.

Missouri.— State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317.

New Hampshire.— State *v.* Collins, 70 N. H. 218, 45 Atl. 1080.

New Jersey.— Newton *v.* Reed, 10 N. J. L. J. 175.

New York.— Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314.

Ohio.— Williams *v.* State, 25 Ohio Cir. Ct. 673.

Tennessee.— Hunter *v.* State, 1 Head 160, 73 Am. Dec. 164.

See 23 Cent. Dig. tit. "Food," § 13.

Local orders.— In State *v.* Newell, 140 Mo. 282, 41 S. W. 751, on the trial for the sale of a prohibited butter substitute, it appeared that defendant took local orders for it from individuals, and sent them to some manufacturer outside the state; that the orders were filled and marked for the several individuals, but were consigned together in care of defendant, who thereby secured a minimum freight rate; that the orders were filled at the local market price, but by an arrangement with defendant the manufacturer made out an account for each order to the person giving it, charging therein an account of the price to defendant, freight at the rate of single orders, and a charge for delivery by defendant, who received and forwarded the money. It was held that the sales were made by defendant. And to the same effect see Com. *v.* Leslie, 20 Pa. Super. Ct. 529.

Sale by traveling agent see Criminal Law, 12 Cyc. 237.

Sale in good faith.— A traveling salesman who in good faith takes an order for "pure pepper," which is filled by his principal with impure pepper, is not guilty of a violation of Mich. Pub. Acts (1895), No. 193, forbidding the sale of impure foods. People *v.* Morse, 131 Mich. 68, 90 N. W. 673. And to the same effect see Com. *v.* Richards, 16 Montg. Co. Rep. (Pa.) 176.

Partnership sale.— Where an unlawful sale is made by one member of a partnership, in the course of the partnership business, the partners are jointly liable to the penalty. Bayles *v.* Newton, 50 N. J. L. 549, 18 Atl. 77.

46. Verona Cent. Cheese Co. *v.* Murtaugh, 50 N. Y. 314.

Evidence of revocation of authority.— In Harvey *v.* Newton, 52 N. J. L. 369, 19 Atl. 793, which was a penal suit for the illegal sale of oleomargarine defendant claimed that the oleomargarine was not sold by his authority. The evidence showed that he said to his salesmen: "That butter is not suiting our customers, and we had better not sell any more." It was held that the salesman's authority was not revoked.

47. Smith *v.* Arnold, 106 Mass. 269 [*following* Hewes *v.* Platts, 12 Gray (Mass.) 143]; Miller *v.* Post, 1 Allen (Mass.) 434. See also Libby *v.* Downey, 5 Allen (Mass.) 299. See also Sales.

The doctrine is clear and well established that where a contract is made in a manner prohibited by a statute passed for the protection of a buyer, no action can be maintained upon it; and that, where the statute directs the mode in which the contract shall be made, not following the direction is equivalent to disobeying a prohibition. And, if the statute imposes a penalty upon the act done, this will make the contract void in like manner as if it were in terms prohibited, because a penalty implies a prohibition. Ritchie *v.* Boynton, 114 Mass. 431; Miller *v.* Post, 1 Allen (Mass.) 434 [*citing* Forster *v.* Taylor, 5 B. & Ad. 887, 27 E. C. L. 374; Little *v.* Poole, 9 B. & C. 192, 7 L. J. K. B. O. S. 158, 17 E. C. L. 93; Law *v.* Hodgson, 2 Campb. 147, 11 East 300, 10 Rev. Rep. 513; Cundell *v.* Dawson, 4 C. B. 375, 11 Jur. 634, 17 L. J. C. P. 311, 56 E. C. L. 375].

It is no defense, in an action for the price of oleomargarine, merely that the article was designed to take the place of butter, since the unlawful act declared under N. Y. Laws (1885), c. 183, is for selling an article in imitation or semblance, as well as one designed to take the place. Waterbury *v.* Egan, 3 Misc. (N. Y.) 355, 23 N. Y. Suppl. 115.

48. Ritchie *v.* Boynton, 114 Mass. 431.

Sale in another state.— The Pennsylvania act of May 21, 1885, declaring void contracts for the sale of oleomargarine, has no application to a sale and delivery of that material made in another state, and cannot

3. LIABILITY TO PERSON INJURED. Any one selling food for public consumption is civilly liable for any unwholesomeness or unsoundness in the article sold, which he knew of or might have known by ordinary prudence and care.[49]

4. ACTION FOR PENALTY[50] — a. In General. It is competent for the legislature to impose a civil as well as a criminal liability for the sale of unwholesome or adulterated food.[51] So also the legislature may without altering or impairing the criminal liability provide that in certain cases the additional civil liability shall not be enforced.[52]

b. Who May Sue. This civil liability, where the statute so directs, may be enforced by a civil action in the name of the person injured or defrauded;[53] although it is usually provided that the action shall be brought in the name of the people or state at the suit of a designated officer.[54]

c. Procedure. Except as controlled by the statute imposing the liability to the penalty,[55] the defenses which may be interposed,[56] the form and sufficiency of the

operate to prevent the recovery of the purchase-money therefor in the courts of Pennsylvania from a purchaser there, to whom the material was shipped, and who intended to resell the same in violation of the act of 1855. Braunn *v.* Keally, 146 Pa. St. 519, 23 Atl. 389, 28 Am. St. Rep. 811.

49. Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; Peckham *v.* Holman, 11 Pick. (Mass.) 484; Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; Hunter *v.* State, 1 Head (Tenn.) 160, 73 Am. Dec. 164.

Implied warranty.— In such case the dealer impliedly warrants that the food is fit for the purpose for which it is sold (Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139), and it is not necessary to allege any special damage resulting from its use (Peckham *v.* Holman, 11 Pick. (Mass.) 484). See, generally, SALES.

Contributory negligence.— In an action to recover for injuries from a piece of spoiled bacon sold by defendants, it was a question for the jury whether plaintiff was guilty of contributory negligence in eating the bacon after he had smelled peculiar odors arising from it when cooked. Craft *v.* Parker, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139.

So if one who holds himself out to the public as a caterer skilled in providing and preparing food for entertainments is employed as such by those who arrange for an entertainment to furnish food and drink for all who may attend, and if he undertakes to perform the service accordingly, he stands in such a relation of duty toward a person who lawfully attends the entertainment and partakes of the food furnished by him, as to be liable to an action of tort for negligence in furnishing unwholesome food whereby such person is injured. Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715. See, generally, NEGLIGENCE.

50. Penalties generally see PENALTIES.

51. People *v.* Beaman, 102 N. Y. App. Div. 151, 92 N. Y. Suppl. 295.

The New York Agricultural Law, providing that any person violating any of the provisions of the article shall forfeit the sum of not less than twenty-five dollars nor more than one hundred dollars for every violation contemplates the recovery of the penalty by civil and not criminal procedure. People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570.

52. People *v.* Beaman, 102 N. Y. App. Div. 151, 92 N. Y. Suppl. 295; People *v.* Salisbury, 2 N. Y. App. Div. 39, 37 N. Y. Suppl. 420.

When the law so provides, it has been held that the penalty may be enforced by indictment. Com. *v.* Luscomb, 130 Mass. 42.

53. Tabor *v.* Herrick, 54 Vt. 630.

54. People *v.* Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Suppl. 470; People *v.* Gilmor, 73 N. Y. App. Div. 483, 77 N. Y. Suppl. 273; People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570; People *v.* Laning, 40 N. Y. App. Div. 227, 57 N. Y. Suppl. 1057; People *v.* Salisbury, 2 N. Y. App. Div. 39, 37 N. Y. Suppl. 420; People *v.* Lamb, 85 Hun (N. Y.) 171, 32 N. Y. Suppl. 584; People *v.* McDermott-Bunger Dairy Co., 38 Misc. (N. Y.) 365, 77 N. Y. Suppl. 888; Com. *v.* Madden, 153 Pa. St. 627, 25 Atl. 896; Com. *v.* Shirley, 152 Pa. St. 170, 25 Atl. 819; Com. *v.* Davison, 11 Pa. Super. Ct. 130; Com. *v.* Callahan, 1 Pa. Dist. 437, 12 Pa. Co. Ct. 170; Com. *v.* Schmidt, 13 Pa. Co. Ct. 28. In State *v.* Newton, 51 N. J. L. 553, 19 Atl. 174 [*affirming* 50 N. J. L. 549, 18 Atl. 77], the action was brought by the state dairy commissioner for the benefit of the state.

55. See cases cited *infra,* note 56 and succeeding notes.

56. See, generally, PENALTIES.

Defense to action.— In a suit for a penalty for selling bread of insufficient weight under Washington (D. C.) by-laws of April 17, 1806, it was a good defense that the mayor or register failed to publish the price of flour in the last week of the month preceding the time that the penalty was alleged to have been incurred as required by said by-law. Friend *v.* Washington, 9 Fed. Cas. No. 5,121, 2 Cranch C. C. 19.

Use of old cans.— N. Y. Laws (1887), c. 401, as amended by Laws (1890), c. 25, imposing a penalty for the use of milk-cans without the consent of the owner's agent

pleadings,[57] the evidence,[58] the trial,[59] and the amount recoverable or forfeited[60] in such actions are governed by the rules relating to such matters in actions for penalties generally.

5. Criminal Prosecution[61]**— a. In General.** While some particular officer is usually designated by statute to prosecute offenders against the health regula-

does not apply to old, dilapidated, and battered cans employed for holding tar and oil. Bell *v.* Moen's Asphaltic Cement Co., 32 N. Y. App. Div. 362, 52 N. Y. Suppl. 1084.

57. See, generally, Penalties; Pleading.

Keeping and offering for sale adulterated vinegar.— A complaint in an action for a penalty for keeping and offering for sale adulterated vinegar alleging that between certain dates defendant manufactured for sale, kept and offered for sale adulterated vinegar which was made in imitation or semblance of cider vinegar, and that he manufactured, kept, and offered for sale as and for cider vinegar a vinegar or product which was not cider vinegar as defined by a statute is sufficient under a statute defining adulterated vinegar, prohibiting the sale thereof, and imposing a penalty for its violation. People *v.* Windholz, 92 N. Y. App. Div. 569, 86 N. Y. Suppl. 1015.

Sale of impure milk.— A complaint in an action to recover the penalty provided by the agricultural law for the sale of impure milk, etc., must if the particular offense intended to be proved is the bringing of skim milk to a full cream cheese factory, allege that the milk in question was milk from which the cream had been taken, and that the factory to which it was brought was a full cream cheese factory, or was not a skim cheese factory; but a complaint which merely alleges that defendant sold, supplied, and brought to be manufactured, to a cheese factory, impure and adulterated milk, although objectionable on the ground of generality of statement, sets out a cause of action within the statute, and it is error to dismiss such a complaint as insufficient before it has been made to appear that the particular cause of action intended to be proved is not sufficiently alleged. People *v.* Spees, 18 N. Y. App. Div. 617, 46 N. Y. Suppl. 995.

In an action for a penalty for selling oleomargarine as natural butter, the complaint must allege that the oleaginous substance sold was made from animal fats or animal and vegetable oils not the product of the dairy. People *v.* Laning, 40 N. Y. App. Div. 227, 57 N. Y. Suppl. 1057.

58. See, generally, Evidence; Penalties.

In an action for a penalty for selling adulterated milk, evidence of defendant and his wife that they had not tampered with the milk is incompetent, where the fairness of the samples shown to be adulterated or the analysis was not impugned. People *v.* Laesser, 79 N. Y. App. Div. 384, 79 N. Y. Suppl. 470.

Preponderance of evidence.— The jury may find against defendant on a preponderance of the evidence and need not be satisfied beyond a reasonable doubt that he has violated the statute, although the action is brought by the people, and other sections of the act provide that such violation shall be punishable as a misdemeanor. People *v.* Briggs, 114 N. Y. 56, 20 N. E. 820.

Under a New York statute relating to the selling of oleomargarine manufactured and kept for sale by defendants it was proved that defendants had it on hand and for sale at the time the action was brought. It was held that the evidence was sufficient to justify a conviction without proof that it was not manufactured or in process of manufacture when the act was passed, in the absence of any explanation on the part of defendants. People *v.* Briggs, 47 Hun (N. Y.) 266 [*affirmed* in 114 N. Y. 56, 20 N. E. 820].

59. See, generally, Penalties; Trial.

In an action for the penalty provided for the sale of oleomargarine by the act of May 21, 1885, as amended by the act of June 26, 1895, which, in its true nature and effect, is a proceeding for the punishment of a criminal offense, although in form an action of debt, it is still essential that the record shall contain a finding set forth in express terms, or to be implied with certainty, that a special act has been performed by defendant, and that it shall describe or define it in such a way as to individuate it, and show that it falls within the unlawful class of acts. Without this a judgment that the law has been violated goes for nothing. Com. *v.* Davison, 11 Pa. Super. Ct. 130.

60. See, generally, Damages; Penalties.

The fact that no provision is made as to who shall determine the amount of the sum to be forfeited does not prevent recovery, but the penalty may be enforced, at least as to the smaller sum mentioned in the statute. People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570.

Under the Pennsylvania statute of May 21, 1885, it has been held that one who sells a pound of oleomargarine from a larger quantity in his possession is not subject to a penalty of one hundred dollars for the intent to sell, a second penalty of one hundred dollars for exposing it for sale, a third penalty for the sale, a fourth for the intent to sell the remainder, and a fifth penalty for exposing such remainder for sale, since the sale embraces all that has gone before it, and leads up to it as necessary incidents, and constitutes but one complete offense. Com. *v.* Staving, 152 Pa. St. 176, 25 Atl. 822; Com. *v.* Roberts, 152 Pa. St. 174, 25 Atl. 820; Com. *v.* Shirley, 152 Pa. St. 170, 25 Atl. 819.

61. Criminal law generally see Criminal Law.

tions,[62] yet the duty of such officers is usually only directory and the enforcement of the law not dependent upon their discretion.[63]

b. Indictment, Information,[64] or Complaint[65]— (I) *In General.* Prosecutions for the illegal exposure or sale of unwholesome foods are usually begun by an indictment,[66] an information,[67] or a complaint in the nature of an indictment[68] for a criminal offense.

(II) *Allegations*— (A) *In General.* The allegations of the indictment or complaint in such cases are dependent not only upon the terms of the statute and the exact nature of the offense charged,[69] but also upon the nature of the proceeding under which a conviction is sought.[70]

(B) *Following Language of Statute.* In prosecutions for this offense, as in

62. Com. *v.* Mullen, 176 Mass. 132, 57 N. E. 331; Com. *v.* McDonnell, 157 Mass. 407, 32 N. E. 361. See also State *v.* Newton, 45 N. J. L. 469; Williams *v.* McNeal, 7 Ohio Cir. Ct. 280, 4 Ohio Cir. Dec. 596; and, generally, HEALTH.

63. Com. *v.* McDonnell, 157 Mass. 407, 32 N. E. 361.

Under the Indiana Pure Food Law affixing a penalty for the sale or having for sale adulterated foods, and providing that it shall be the duty of the state board of health to enforce the law of the state governing food and drug adulterations, it was held that such provisions did not exclude individuals from making complaint against one for the violation of the statute. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

64. **Indictment or information** generally see INDICTMENTS AND INFORMATIONS.

Forms of indictment see People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611; Goodrich *v.* People, 3 Park. Cr. (N. Y.) 622.

65. **Criminal complaint** generally see CRIMINAL LAW.

66. *Alabama.*— Cook *v.* State, 110 Ala. 40, 20 So. 360.

Maryland.— Rasch *v.* State, 89 Md. 755, 43 Atl. 931; Pierce *v.* State, 63 Md. 592.

Massachusetts.— Com. *v.* Nichols, 10 Allen 199; Com. *v.* Farren, 9 Allen 489; Com. *v.* Boynton, 12 Cush. 499.

Missouri.— State *v.* Bockstruck, 136 Mo. 335, 38 S. W. 317; State *v.* Falk, 38 Mo. App. 554.

New York.— People *v.* Burns, 53 Hun 274, 6 N. Y. Suppl. 611; People *v.* Harris, 4 Silv. Sup. 531, 7 N. Y. Suppl. 773; Goodrich *v.* People, 3 Park. Cr. 622.

United States.— U. S. *v.* Dougherty, 101 Fed. 439; Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588.

See 23 Cent. Dig. tit. "Food," § 21.

67. Moeschke *v.* State, 14 Ind. App. 393, 42 N. E. 1029; Brown *v.* State, 14 Ind. App. 24, 42 N. E. 244.

68. Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47; Com. *v.* McCarron, 2 Allen (Mass.) 157; Com. *v.* O'Donnell, 1 Allen (Mass.) 593; Com. *v.* Flannelly, 15 Gray (Mass.) 195; State *v.* Newton, 45 N. J. L. 469.

69. Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588. An affidavit charging a person with selling and delivering oleomargarine which when sold contained coloring matter, to wit, butter yellow, sufficiently charges a violation of the law, although it contains descriptive words which partially bring the substance sold within the statutory definition of oleomargarine. State *v.* Arata, 69 Ohio St. 211, 68 N. E. 1046.

Under Md. Code, art. 27, § 90, providing that any person who sells oleomargarine to a person who asks for butter shall be guilty of a fraud, an indictment charging such an offense need not allege that the oleomargarine was fraudulently sold. Fox *v.* State, 94 Md. 143, 50 Atl. 700, 89 Am. St. Rep. 419.

Under a statute requiring oleomargarine to be packed in packages "marked and branded as the commissioner of internal revenue shall prescribe," and imposing a penalty for packing the same "in any manner contrary to law," an indictment has been held good which charges defendant with packing oleomargarine "in packages not marked in accordance with the regulations of the commissioner," without regard to the kind of package used. U. S. *v.* Dougherty, 101 Fed. 439.

70. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

An affidavit for refusing to furnish, on demand, for analysis, "an article of food" included in the provisions of a certain act is bad for not saying what article of food was demanded, and should distinctly set forth what statute is violated. It is not enough to say that defendant refused to furnish for analysis a sample contrary to an act passed on a certain day. Margolius *v.* State, 4 Ohio S. & C. Pl. Dec. 354, 1 Ohio N. P. 264.

Special complaint.— Under the New Jersey statute, punishing the sale of milk under a certain standard, the complaint should be special, and not in the form of a complaint for selling milk which has been adulterated. State *v.* Newton, 45 N. J. L. 469.

Under the New York Agricultural Law, subjecting to a penalty persons selling as natural butter, produced from unadulterated milk or cream, any oleomargarine or other substance made in imitation of butter from animal fats or animal or vegetable oils not the product of the dairy, a complaint for the recovery of such penalty must show that the oleaginous substance sold was made from animal fats or animal or vegetable oils not the product of the dairy. People *v.* Laning, 40 N. Y. App. Div. 227, 57 N. Y. Suppl. 1057.

all others, an indictment which substantially follows the language of the statute will be held sufficient.[71]

(c) *Description of Accused.* Where the statute makes punishable a certain class of persons, such as dealers in a particular article, the indictment should allege that defendant was a dealer.[72]

(d) *Description of Purchaser.* The name of the person or persons to whom the food was sold, if such person or persons are known, should be alleged.[73]

(e) *Description of Article Sold.* It is unnecessary to set forth what rendered the food unwholesome.[74]

71. People *v.* West, 106 N. Y. 293, 12 N. E. 610, 60 Am. Rep. 452; People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611. See also Wilkins *v.* U. S., 96 Fed. 837, 37 C. C. A. 588. Under N. Y. Laws (1884), c. 202, punishing any persons selling, supplying, or bringing to be manufactured to any butter or cheese factory any milk diluted with water, it was held that an indictment alleging that defendant brought to a certain cheese factory, for the purpose of being manufactured into cheese and butter, a large quantity of milk diluted with water, and that such milk was delivered to a firm named, for the purpose and intent of cheating and defrauding the firm, sufficiently charged a crime, under the statute. People *v.* Harris, 54 Hun (N. Y.) 638, 7 N. Y. Suppl. 773.

An information charging that vanilla extract was colored to conceal its inferiority, and to make it appear of greater value than it really was, is sufficient to warrant the submission to the jury of the question whether the extract was inferior. People *v.* Hinshaw, 135 Mich. 378, 97 N. W. 758.

No precise form of words necessary.— An indictment for selling unwholesome provisions must charge that the article was sold for consumption as food for men; but this need not be charged in any precise form of words, and the allegation that the accused "sold to divers citizens five hundred pounds, of beef as good and wholesome beef and food" is sufficient. Goodrich *v.* People, 19 N. Y. 574 [*affirming* 3 Park. Cr. 622].

72. Com. *v.* O'Donnell, 1 Allen (Mass.) 593; Com. *v.* Flannelly, 15 Gray (Mass.) 195.

A complaint under Mass. Gen. St. c. 49, § 151, punishing dealers in milk who, being recorded in the books of the milk inspector as dealers, knowingly sell adulterated milk, made by "F, inspector of milk in the city of Boston," and alleging that defendant, being a dealer, and being recorded as such "in the books of said F," sold, etc., does not sufficiently allege that he was recorded in the books of the inspector as a dealer in milk, the words, "inspector of milk in the city of Boston," being merely *descriptio personæ.* Com. *v.* McCarron, 2 Allen (Mass.) 157.

Sale by agent.— A complaint under Ohio Rev. St. § 7468-13, providing a punishment for whoever, by himself or his servant or agent, or as servant or agent of any other person, sells milk from which the cream has been removed, charging a principal with an improper sale, is insufficient where the sale, if made at all, was made by an agent. Heider *v.* State, 4 Ohio S. & C. Pl. Dec. 227. See *supra*, IV, A, 1, f. A complaint for the violation of Mass. St. (1886) c. 317, § 1, requiring that in the sale at retail of any compound in imitation of butter "the seller or his agents" shall attach to each package a label of a specified character describing the article, need not allege that the sale with which defendant is charged was actually made by his agent, in order to let in proof of that fact. Com. *v.* Gray, 150 Mass. 327, 23 N. E. 47.

73. People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611.

Unknown persons.— Where an indictment for selling unwholesome provisions sets forth sales to persons to the jurors unknown the vendees need not be named. Goodrich *v.* People, 3 Park. Cr. (N. Y.) 622. An allegation in an indictment for the sale of diseased meat that the meat was sold to persons unknown to the grand jury is not authorized, unless the grand jury have made a careful investigation to learn the names of the purchasers. Marxen *v.* State, 44 Tex. Cr. 41, 68 S. W. 277. Since a prosecution for the sale of oleomargarine without notice to the purchasers, as required by 1 N. J. St. p. 1164, § 4, made triable, by section 10, before a justice of the peace, is a summary proceeding, a complaint failing to state the name of the purchaser or that he was unknown, or not ascertainable, is insufficient to support a conviction. Feigen *v.* McGuire, 64 N. J. L. 152, 44 Atl. 972.

Refusal to sell for analysis.— An affidavit that defendant refused to sell an article of food for analysis, which fails to state the name of the article, or of the party demanding its sale, and does not designate the act violated except by its date, is fatally defective. Margolius *v.* State, 4 Ohio S. & C. Pl. Dec. 354, 1 Ohio N. P. 264.

74. Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228; Goodrich *v.* People, 3 Park. Cr. (N. Y.) 622.

Under Ala. Acts (1894-1895), p. 777, § 1, it has been held that an indictment is not open to the objections of insufficient description, or that it does not charge an offense, where it charges a sale of the "article, product, or compound," and avers that it was made wholly or partly out of fat, oil, or oleaginous substance, or compound thereof," that it was not produced directly

(F) *Intent* — (1) In General. Whenever the intention of a party is necessary to constitute the offense, such intent must be alleged in every material part of the description where it so constitutes it.[75] The allegation of guilty knowledge in an indictment of this description depends upon the language and intention of the statute under which it is drawn.[76]

(2) For Food. It should be alleged that the deleterious article in question was sold as an article of food.[77]

(3) To Injure Health. An indictment for selling unwholesome food as good and wholesome food need not allege that defendant intended to injure the health of the persons who ate it or that it did injure their health.[78]

(III) *Duplicity.* The act of selling or exposing for sale are considered in law one offense,[79] and the mere fact that the offense is thus alleged in the indictment will not render it defective on the ground of duplicity.[80]

c. Evidence. The question of evidence in this class of cases usually arises upon the intent of defendant,[81] and his guilty knowledge at the time of the

and at the time of manufacture from unadulterated milk or cream from the same; and that such article, product, or compound was in imitation of yellow butter, produced from pure, unadulterated milk or cream from the same. Cook *v.* State, 110 Ala. 40, 20 So. 360.

75. Com. *v.* Boynton, 12 Cush. (Mass.) 499.

76. Thus where the mere fact of possession or sale is an offense no allegation of guilty knowledge is required. Lansing *v.* State, (Nebr. 1905) 102 N. W. 254. On the other hand, where guilty knowledge is one of the elements of the offense there must not only be an allegation to such effect (Moeschke *v.* State, 14 Ind. App. 393, 42 N. E. 1029), and such allegation must cover each element of the offense mentioned in the statute (Com. *v.* Boynton, 12 Cush. (Mass.) 499; State *v.* Falk, 38 Mo. App. 554).

Surplusage.— An averment in an indictment under Mass. St. (1864) c. 122, § 4, punishing the selling of adulterated milk, that defendant had knowledge that the milk was adulterated will be rejected as surplusage. Com. *v.* Farren, 9 Allen (Mass.) 489.

Under Mass. St. (1866) c. 253, § 1, which punishes knowingly selling or having in possession with intent to sell the meat of a calf killed when less than four weeks old, it was held that an indictment charging that defendant killed a calf, intending to sell its meat, "well knowing that said calf was less than four weeks old," was a sufficient allegation of defendant's knowledge. Com. *v.* Raymond, 97 Mass. 567.

Where an indictment charges the sale of unwholesome articles, it should not only charge that the sale was made knowingly, but should also aver that defendant knew at the time of the sale the corrupt and unwholesome condition of the article sold. Com. *v.* Boynton, 12 Cush. (Mass.) 499.

77. Lansing *v.* State, (Nebr. 1905) 102 N. W. 254, holding that the allegation that defendant sold milk "as and for pure milk, an article of food" is a sufficient allegation that it was sold as an article of food.

An affidavit charging the sale of impure milk under a statute regulating the sale of milk need not allege that milk is an article of food. State *v.* Smith, 69 Ohio St. 196, 68 N. E. 1044.

78. Goodrich *v.* People, 3 Park. Cr. (N. Y.) 622.

79. People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611.

80. Com. *v.* Nichols, 10 Allen (Mass.) 199; People *v.* Burns, 53 Hun (N. Y.) 274, 6 N. Y. Suppl. 611.

Under Mass. St. (1864) c. 122, § 4, punishing the selling, keeping, or offering for sale of adulterated milk, an indictment which charges that defendant sold a certain quantity of "adulterated milk, to which a large quantity, — that is to say, four quarts, — of water had been added" is not bad for duplicity. Com. *v.* Farren, 9 Allen (Mass.) 489.

Under N. Y. Laws (1884), c. 202, punishing any persons selling, supplying, or bringing to be manufactured to any butter or cheese manufactory any milk diluted with water, it was held that an indictment alleging that defendant, on the third and fourth of August, brought to a certain factory a large quantity of milk diluted with water, to be manufactured, etc., alleges but a single transaction, and charges but one offense, although two days are assigned for its commission. People *v.* Harris, 7 N. Y. Suppl. 773.

81. In Com. *v.* McDonnell, 157 Mass. 407, 32 N. E. 361; Com. *v.* Mills, 157 Mass. 405, 32 N. E. 360, which were criminal prosecutions for having in possession, with intent to sell, oleomargarine in a tub not marked as required by Mass. St. (1886) c. 317, § 1, it appeared that on the date of the alleged offense the tub was not exposed for sale, nor so situated that it could be seen by defendant's customers; that it was at the bottom of a large refrigerator in the basement of his store; that he purchased it in another state, and had not seen it since the date of its arrival; that he bought it with the intent to sell the oleomargarine at retail in his store, but that he did not intend to sell it or expose it for sale till the marks had been examined, and that if it was not marked in accordance with the law he intended to have it marked

sale.[82] The mere testimony of the accused that he had endeavored to comply with the law will not avail;[83] the evidence of intention is to be gathered from the acts performed.[84] While the ordinary rules of evidence and presumptions control as in other criminal prosecutions,[85] yet each case is to be decided by the particular facts as presented.[86]

before it was opened, it was held that a verdict of guilty was not warranted.

82. *Indiana.*— Isenhour *v.* State, 157 Ind. 517, 62 N. E. 40, 87 Am. St. Rep. 228.

Maine.— State *v.* Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

Michigan.— People *v.* Skillman, 129 Mich. 618, 89 N. W. 330.

New York.— People *v.* Hillman, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66.

Ohio.— State *v.* Haynes, 8 Ohio S. & C. Pl. Dec. 678, 7 Ohio N. P. 624.

See 23 Cent. Dig. tit. "Food," § 22.

83. People *v.* McDermott-Bunger Dairy Co., 38 Misc. (N. Y.) 365, 77 N. Y. Suppl. 888.

84. State *v.* Hanson, 84 Minn. 42, 86 N. W. 768, 54 L. R. A. 468; People *v.* McDermott-Bunger Dairy Co., 38 Misc. (N. Y.) 365, 77 N. Y. Suppl. 888.

Presumption arising from sale.— Upon an indictment for selling diseased meat without making it known to the buyer, it is sufficient for the state to prove that defendant knowingly sold such meat; the presumption arising from such proof being that the sale was unlawful, and it is incumbent upon the defendant to prove that he disclosed to the buyer the fact that the meat was unsound. Seibright *v.* State, 2 W. Va. 591.

85. See, generally, CRIMINAL LAW; EVIDENCE. Where, in a prosecution under the Pennsylvania act of July 7, 1885, punishing the sale of adulterated milk, defendant's witness and employee admitted that he had skimmed milk by defendant's direction and sold it from unmarked cans in violation of the act, the jury had the right to infer that the employee watered the milk by the same authority so as to constitute an adulteration within the meaning of the statute. Com. *v.* Hough, 1 Pa. Dist. 51.

Presumptive evidence of guilt under a statute punishing the sale of oleomargarine, etc., by any person representing the articles to be butter, and providing that the sale and representation shall be presumptive evidence of guilt, it was held that the presumption was not met by showing the absence of knowledge of the adulteration and of an intent to deceive, but only by controverting the prosecution's evidence showing the sale and false representation. People *v.* Mahaney, 41 Hun (N. Y.) 26.

Sample illegally obtained.— On the trial of a complaint for exposing for sale oleomargarine in imitation of butter, the fact that a sample of the oleomargarine was obtained from defendant in an illegal manner does not render such sample inadmissible as evidence. Com. *v.* Byrnes, 158 Mass. 172, 33 N. E. 343.

Discretion of court.— Where defendant is accused of having unlawfully sold adulterated mustard, it is discretionary with the justice to order the state to allow him to have an analysis thereof made by an individual chemist selected by him. Breckenridge *v.* State, 4 Ohio S. & C. Pl. Dec. 389, 3 Ohio N. P. 313.

86. Com. *v.* Rowell, 146 Mass. 128, 15 N. E. 154; Com. *v.* Smith, 143 Mass. 169, 9 N. E. 631; People *v.* Bremer, 69 N. Y. App. Div. 14, 74 N. Y. Suppl. 570; People *v.* Hills, 64 N. Y. App. Div. 584, 72 N. Y. Suppl. 340; People *v.* Park, 60 N. Y. App. Div. 255, 69 N. Y. Suppl. 1120; People *v.* Hillman, 58 N. Y. App. Div. 571, 69 N. Y. Suppl. 66, 15 N. Y. Cr. 394; Meyer *v.* State, 2 Ohio S. & C. Pl. Dec. 233, 1 Ohio N. P. 241. On an indictment under N. Y. Laws (1884), c. 202, § 1, which makes it a misdemeanor to sell or expose for sale any impure, unhealthy, or adulterated milk, defined by section 13 to be milk containing more than eighty-eight per cent of water, except (Laws (1885), c. 183) skimmed milk for use in the county in which it is produced, the evidence showed that defendant had several milk-cans in his store containing cream, pure milk, and skimmed milk, respectively. When the inspectors called on defendant he told them to step back where the milk was kept and help themselves. It did not appear from which can the milk analyzed by the inspectors was taken, or that defendant exposed for sale the milk analyzed as pure milk, or otherwise than as skimmed milk. Under such circumstances it was held that the evidence was not sufficient to sustain a conviction. People *v.* Thompson, 14 N. Y. Suppl. 819.

Meat partly diseased.— Where there is no evidence in a prosecution for the sale of diseased meat that the meat of a certain animal was diseased, and certain purchasers testify that it was good, the mere fact that the leg of the animal was broken, and a portion of the leg swollen when killed, which parts are not sold, is not sufficient to sustain conviction. Marxen *v.* State, 44 Tex. Cr. 41, 68 S. W. 277. Evidence that the effect of coal-tar dye in vanilla extract is to make the extract appear stronger and of greater value than it really is warrants the submission to the jury of the question whether extract containing such dye is inferior. People *v.* Hinshaw, 135 Mich. 378, 97 N. W. 758. There not having been incorporated in the Michigan Pure Food Act of 1895 (Pub. Laws (1895), p. 358, No. 193) any specific formula for the manufacture of lemon extract, it is proper to resort to the United States pharmacopœia formula to determine of what lemon extract consists. People *v.* Jennings, 132 Mich. 662, 94 N. W. 216.

Under Ala. Acts (1894–1895), p. 777, § 1, prohibiting the sale of imitation butter, but further providing that nothing in the act "shall be construed to prohibit the manu-

B. Inspection Laws. Under a law providing for the inspection of food[87] the sample required to be preserved must in all cases conform to the requirements of the statute.[88]

V. CONDEMNATION OF INJURIOUS ARTICLES.

While it is within the police power of a state to condemn and destroy articles endangering the health of a community,[89] yet there must appear some immediate necessity for the destruction,[90] and the owner should be allowed to be heard in defense of his property.[91]

FOOL. One who is destitute of reason or the common power of understanding; an idiot.[1] (See, generally, INSANE PERSONS.)

FOOLISHLY DRUNK. A term applied to a man under the influence of intoxicating liquor, when he acts like a fool.[2] (See, generally, DRUNKARDS.)

FOOT. A measure of length containing twelve inches or one-third of a yard;[3] the base, bottom, or foundation of anything; the end or termination.[4] (See END.)

FOOT-BOARD. Running board.[5] (Foot-board: Liability of Master For Absence or Defects in, see MASTER AND SERVANT.)

FOOTING. Firm position; established place; relative condition.[6] (See ESTABLISH; FIX; FIXED.)

facture, or sale of oleomargarine in such manner as will advise the consumer of its real character free from coloration or ingredient that causes it to look like butter by having it stamped with its true name," it was held that, in a prosecution for the sale of oleomargarine in violation of such statute, evidence was admissible to show that the oleomargarine sold was of the color of yellow butter. Cook *v.* State, 110 Ala. 40, 45, 20 So. 360.

Article not within terms of statute.— Under an indictment charging sale of a prohibited article evidence is admissible to show that the article defendant was charged with selling was not embraced within the terms of the statute defining the offense. Fox *v.* State, 89 Md. 381, 43 Atl. 775, 73 Am. St. Rep. 193.

87. See *supra*, II, B.

Municipal ordinances requiring inspection see *infra*, III.

88. Com. *v.* Lockhardt, 144 Mass. 132, 10 N. E. 511.

89. See *supra*, II, C.

90. Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783; Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3.

The oleomargarine law of Minnesota does not authorize the seizure and sale by officers of the state of an article made as a substitute for butter, except in connection with a prosecution for a violation of the statute. Armour Packing Co. *v.* Snyder, 84 Fed. 136.

91. Munn *v.* Corbin, 8 Colo. App. 113, 44 Pac. 783; Raymond *v.* Fish, 51 Conn. 80, 50 Am. Rep. 3. See also Salem *v.* Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650; Weil *v.* Ricord, 24 N. J. Eq. 169. In Munn *v.* Corbin, *supra*, it was held that it did not constitute notice to the owner of ice sought to be condemned by the health commissioners that, after the commission had condemned the ice and forbidden its sale, the owner was notified thereof, and cited to appear before the health commissioners, and show cause why he should not discontinue the business of selling ice, and why ice brought by him into the city should not be destroyed. Nor was it a sufficient hearing, upon the owner's appearance in response to such citation, that, on the owner's admitting that the ice came from a certain lake, that he sold it to his customers, and that it was the same ice that the city bacteriologist had examined and found dangerous to health, a judgment of seizure was entered, since the burden of proof was upon the party making the charge of impurity to establish his claim.

1. Webster Dict. [*quoted* in Crosswell *v.* people, 13 Mich. 427, 435, 87 Am. Dec. 774].

"Drunken fool" see Cawdry *v.* Highley, Cro. Car. 270.

2. Elkin *v.* Buschner, (Pa. 1888) 16 Atl. 102, 104.

3. Black L. Dict.

"Foot frontage rule" see Gronin *v.* Jersey City, 38 N. J. L. 410, 412; Donovan *v.* Oswego, 39 Misc. (N. Y.) 291, 293, 79 N. Y. Suppl. 562 [*citing* Matter of Klock, 30 N. Y. App. Div. 24, 29, 51 N. Y. Suppl. 897].

4. Black L. Dict.

"Foot of the mountain" see Williston *v.* Morse, 10 Metc. (Mass.) 17, 26.

"Foot or end" of a will see Hunt *v.* Hunt, L, R. 1 P. & D. 209.

"Signed at the foot" see Margary *v.* Robinson, 12 P. D. 8, 13, 51 J. P. 407, 56 L. J. P. & Adm. 42, 57 L. T. Rep. N. S. 281, 39 Wkly. Rep. 350; Sweetland *v.* Sweetland, 11 Jur. N. S. 182, 183, 34 L. J. P. & Adm. 42, 11 L. T. Rep. N. S. 749, 4 Swab. & Tr. 6, 13 Wkly. Rep. 504.

5. Hosic *v.* Chicago, etc., R. Co., 75 Iowa 683, 685, 37 N. W. 963, 9 Am. St. Rep. 518.

6. State *v.* Boyd, 31 Nebr. 682, 718, 48 N. W. 739, 51 N. W. 602.

FOOTMAN. A pedestrian or person walking on the sidewalk.[7]

FOOTPRINT. See CRIMINAL LAW.[8]

FOOT-RACE. A race run by a person on foot.[9] The term may refer to one person running alone against time.[10]

FOOTWAY. A term used merely to distinguish an ordinary passageway from a horse or carriage way.[11]

FOR.[12] As a conjunction, sometimes used as meaning "because."[13] As a preposition, the part of speech in which it most commonly appears, frequently used as meaning "as agent of," "in behalf of," or "in place of";[14] "by";[15] "designed to be or serve as";[16] "in consideration of";[17] "in favor of";[18] "in lieu of";[19] "on";[20] "on account of," "by reason of," or "because of";[21]

"'On the footing of' means 'on the same principle as.'" Wilding *v.* Sanderson, [1897] 2 Ch. 534, 548, 66 L. J. Ch. 684, 77 L. T. Rep. N. S. 57, 45 Wkly. Rep. 675.

7. Hence it does not mean a person riding a bicycle. Mercer *v.* Corbin, 117 Ind. 450, 454, 20 N. E. 132, 10 Am. St. Rep. 76, 3 L. R. A. 221.

8. See 12 Cyc. 393, 401; 6 Cyc. 232 note 73.

9. Century Dict.

10. Lynall *v.* Longbothom, 2 Wils. C. P. 36, 38.

11. Gerrish *v.* Shattuck, 132 Mass. 235, 238.

The context must govern the meaning of the term when used in a statute. Scales *v.* Pickering, 4 Bing. 448, 453, 6 L. J. C. P. O. S. 53, 1 M. & P. 195, 13 E. C. L. 582. See also Reg. *v.* Pratt, L. R. 3 Q. B. 64, 65, 37 L. J. M. C. 23, 16 Wkly. Rep. 146.

12. "The naked word 'for,' never could amount to a testament." Plumstead's Appeal, 4 Serg. & R. (Pa.) 545, 547.

Compared with and distinguished from "of."— While the word is sometimes used as synonymous with the word "of" (Slymer *v.* State, 62 Md. 237, 242; Snell *v.* Scott, 2 Mich. N. P. 108, 110), it has a broader meaning (Snell *v.* Scott, 2 Mich. N. P. 108, 110). The variation between the word "for" and the word "of" seems at first slight, but in the connection with which they are used in signatures of this kind the difference is substantial. Tucker Mfg. Co. *v.* Fairbanks, 98 Mass. 101, 105 [*quoted* in Donovan *v.* Welch, 11 N. D. 113, 118, 90 N. W. 262].

Distinguished from "in" see Bowen *v.* West, 10 Colo. App. 322, 50 Pac. 1085, 1086.

13. Century Dict. And see Glatz *v.* Thein, 47 Minn. 278, 279, 50 N. W. 127.

14. Century Dict. And see Childress *v.* Miller, 4 Ala. 447, 450; Magill *v.* Hinsdale, 6 Conn. 464*a*, 16 Am. Dec. 70; Northwestern Distilling Co. *v.* Brant, 69 Ill. 658, 660, 18 Am. Rep. 631; Wilburn *v.* Larkin, 3 Blackf. (Ind.) 55, 56; Lochrane *v.* Stewart, (Ky. 1887) 2 S. W. 903, 907; Hunter *v.* Miller, 6 B. Mon. (Ky.) 612, 623; Webb *v.* Burke, 5 B. Mon. (Ky.) 51, 54; Offutt *v.* Ayres, 7 T. B. Mon. (Ky.) 356; Page *v.* Wight, 14 Allen (Mass.) 182, 183; Rice *v.* Gove, 22 Pick. (Mass.) 158, 161, 33 Am. Dec. 724; Ballou *v.* Talbot, 16 Mass. 461, 8 Am. Dec. 146; Emerson *v.* Providence Hat Mfg. Co., 12 Mass. 237, 240, 7 Am. Dec. 66; McClure *v.* Herring, 70 Mo. 18, 20, 35 Am. Rep. 404; Martin *v.* Almond, 25 Mo. 313, 315; Wallace *v.* Helena Electric R. Co., 10 Mont. 24, 29, 24 Pac. 626, 25 Pac. 278; Hale *v.* Woods, 10 N. H. 470, 471, 34 Am. Dec. 176; Donovan *v.* Welch, 11 N. D. 113, 115, 90 N. W. 262; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 115, 50 Am. Dec. 108; West London Commercial Bank *v.* Kitson, 13 Q. B. D. 360, 362, 53 L. J. Q. B. 345, 50 L. T. Rep. N. S. 656, 32 Wkly. Rep. 757; Jenkins *v.* Hutchinson, 13 Q. B. 744, 13 Jur. 763, 18 L. J. Q. B. 274, 276, 66 E. C. L. 744; Gadd *v.* Houghton, 1 Ex. D. 357, 360, 46 L. J. Exch. 71, 35 L. T. Rep. N. S. 222, 24 Wkly. Rep. 975; Coxe *v.* Harden, 4 East 211, 219, 1 Smith K. B. 20, 7 Rev. Rep. 570; Wilks *v.* Back, 2 East 142, 6 Rev. Rep. 409; Tanner *v.* Christian, 4 E. & B. 591, 596, 1 Jur. N. S. 519, 24 L. J. Q. B. 91, 3 Wkly. Rep. 204, 82 E. C. L. 591; Ellis *v.* Marshall, 64 L. J. Q. B. 757, 758; Webster Dict. [*quoted* in Ready *v.* Sommer, 37 Wis. 265, 269]. *Compare* Barlow *v.* Lee Cong. Soc., 8 Allen (Mass.) 460, 463.

15. Meriden Silver Plate Co. *v.* Flory, 44 Ohio St. 430, 435, 7 N. E. 753.

16. Century Dict. And see Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.). 582, 586.

17. Century Dict. And see Gardiner *v.* Corson, 15 Mass. 500, 503; Cook *v.* Biddle, 2 Mich. 269, 274; King *v.* Merriman, 38 Minn. 47, 53, 35 N. W. 570; Duncan *v.* Franklin Tp., 43 N. J. Eq. 143, 10 Atl. 546; Erie County *v.* Jones, 119 N. Y. 339, 342, 23 N. E. 742; Norton *v.* Woodruff, 2 N. Y. 153, 156; Wood *v.* Beach, 7 Vt. 522, 527; Melville *v.* Mirror of Life Co., [1895] 2 Ch. 531, 536, 65 L. J. Ch. 41, 73 L. T. Rep. N. S. 334, 13 Reports 852.

18. Century Dict. And see Kreitz *v.* Behrensmeyer, 125 Ill. 141, 192, 17 N. E. 232, 8 Am. St. Rep. 349.

As the equivalent of "pro" see Cowper *v.* Andrewes, Hob. 54, 57 [*quoted* in Scarfe *v.* Morgan, 1 H. & H. 292, 295, 7 L. J. Exch. 324, 4 M. & W. 270; Chase *v.* Westmore, 2 Marsh. 346, 5 M. & S. 180, 187, 17 Rev. Rep. 301].

19. Century Dict. And see Steele *v.* Fisher, 1 Edw. (N. Y.) 435, 437; Texas, etc., R. Co. *v.* Marlor, 123 U. S. 687, 701, 8 S. Ct. 311, 31 L. ed. 303.

20. Doe *v.* Smith, 1 B. & B. 97, 113, 5 E. C. L. 525.

21. Century Dict. And see Stacy *v.* Portland Pub. Co., 68 Me. 279, 286; Cummer *v.* Butts, 40 Mich. 322, 324, 29 Am. Rep. 503;

"on charge of";[22] "to the extent, number, quantity, or amount of";[23] "with a view to the use, benefit, comfort, convenience, etc., of," and as thus employed, often expressing purpose or object.[24] When applied to time, the term ordinarily means "during,"[25] "throughout,"[26] or "during the continuance of";[27] and has also been defined with approval to mean the space of all time through which an action or state extends;[28] but it may mean "before" or "in front of."[29] Again this word is sometimes used as importing a condition precedent,[30] or as a word of limitation.[31] However, the sense in which the word is used

State *v.* Cornell, 54 Nebr. 647, 655, 75 N. W. 25; Strong *v.* Sun Mut. Ins. Co., 31 N. Y. 103, 105, 88 Am. Dec. 242.

22. Stacy *v.* Portland Pub. Co., 68 Me. 279, 286.

23. Century Dict. And see Drexel *v.* Pease, 133 N. Y. 129, 134, 30 N. E. 732; Farmers' Mut. F. Ins. Co. *v.* Moyer, 97 Pa. St. 441, 448.

"For all losses" see 10 Cyc. 681.

"For all other interests" see 1 Cyc. 853 note 89.

24. Century Dict. And see McLaughlin *v.* McCrory, 55 Ark. 442, 445, 18 S. W. 762, 29 Am. St. Rep. 56; Curtis *v.* Board of Education, 43 Kan. 138, 140, 23 Pac. 98; Atty.-Gen. *v.* Tarr, 148 Mass. 309, 314, 19 N. E. 358, 2 L. R. A. 87; Detroit Transp. Co. *v.* Detroit, 91 Mich. 382, 389, 51 N. W. 978; Pratt *v.* Miller, 23 Nebr. 496, 498, 37 N. W. 263; Keim *v.* O'Reilly, 54 N. J. Eq. 418, 34 Atl. 1073; Goebel *v.* Wolf, 113 N. Y. 405, 411, 21 N. E. 388, 10 Am. St. Rep. 464 note; Buchanan *v.* Baker, 54 Ohio St. 324, 327, 43 N. E. 330; Creekbaum *v.* Sohner, 1 Ohio S. & C. Pl. Dec. 257, 258, 1 Ohio N. P. 34; Wilkinson *v.* Chambers, 181 Pa. St. 437, 442, 37 Atl. 569; Smith's Estate, 144 Pa. St. 428, 440, 22 Atl. 916, 27 Am. St. Rep. 641; McVey *v.* Brendel, 144 Pa. St. 235, 244, 22 Atl. 912, 27 Am. St. Rep. 625, 13 L. R. A. 377; Oyster *v.* Knull, 137 Pa. St. 448, 449, 20 Atl. 624, 21 Am. St. Rep. 890; Plumstead's Appeal, 4 Serg. & R. (Pa.) 545, 547; Almy *v.* Daniels, 11 R. I. 250, 254; Shanks *v.* Lancaster, 5 Gratt. (Va.) 110, 115, 50 Am. Dec. 108; Com. *v.* Jennings, 3 Gratt. (Va.) 624; Canada Trust, etc., Co. *v.* Gauthier, [1904] A. C. 94, 101, 73 L. J. P. C. 5, 89 L. T. Rep. N. S. 453, 20 T. L. R. 15; Lyne *v.* Leonard, L. R. 3 Q. B. 156, 158, 9 B. & S. 65, 18 L. T. Rep. N. S. 55, 16 Wkly. Rep. 562; Huntingtower *v.* Gardiner, 1 B. & C. 297, 301, 2 D. & R. 450, 1 L. J. K. B. O. S. 120, 8 E. C. L. 128; Marshall *v.* Richardson, 16 Cox C. C. 614, 617, 53 J. P. 596, 58 L. J. M. C. 45, 60 L. T. Rep. N. S. 605; Reg. *v.* Tibble, 4 E. & B. 888, 899, 82 E. C. L. 888; Atty.-Gen. *v.* Sillem, 10 Jur. N. S. 393, 396, 33 L. J. Exch. 209, 10 L. T. Rep. N. S. 835; Abrams *v.* Winshup, 3 Russ. 350, 3 Eng. Ch. 350, 38 Eng. Reprint 607; Goodisson *v.* Nunn, 4 T. R. 761, 765.

25. *Georgia.*— Boyd *v.* McFarlin, 58 Ga. 208, 210.

Illinois.— Pearson *v.* Bradley, 48 Ill. 250, 252.

Kansas.— Northrop *v.* Cooper, 23 Kan. 432, 439; Whitaker *v.* Beach, 12 Kan. 492, 494; McCurdy *v.* Baker, 11 Kan. 111, 113.

Michigan.— Bacon *v.* Kennedy, 56 Mich. 329, 22 N. W. 824.

Minnesota.— Wilson *v.* Thompson, 26 Minn. 299, 300, 3 N. W. 699.

Nebraska.— State *v.* Cherry County, 58 Nebr. 734, 737, 79 N. W. 825; Leavitt *v.* Bell, 55 Nebr. 57, 65, 75 N. W. 524; State *v.* Cornell, 54 Nebr. 647, 655, 75 N. W. 25.

New York.— Market Nat. Bank *v.* Pacific Nat. Bank, 89 N. Y. 397, 399.

North Dakota.— Dever *v.* Cornwell, 10 N. D. 123, 130, 86 N. W. 227.

Pennsylvania.— Reynolds' Estate, 175 Pa. St. 257, 260, 34 Atl. 625.

South Dakota.— Iowa State Sav. Bank *v.* Jacobson, 8 S. D. 292, 300, 66 N. W. 453.

Vermont.— Lincoln *v.* Warren, 19 Vt. 170, 171.

United States.— Early *v.* Homans, 16 How. 610, 616, 14 L. ed. 1079; Wilson *v.* Northwestern Mut. L. Ins. Co., 65 Fed. 38, 39, 12 C. C. A. 505 [*citing* Century Dict.].

England.— Swinburne *v.* Milburn, 9 App. Cas. 844, 852, 54 L. J. Q. B. 6, 52 L. T. Rep. N. S. 222, 33 Wkly. Rep. 325.

Compare, however, Com. *v.* Jennings, 3 Gratt. (Va.) 624.

26. Dever *v.* Cornwell, 10 N. D. 123, 130, 86 N. W. 227; Finlayson *v.* Peterson, 5 N. D. 587, 588, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532.

27. Finlayson *v.* Peterson, 5 N. D. 587, 588, 67 N. W. 953, 57 Am. St. Rep. 584, 33 L. R. A. 532; Wilson *v.* Northwestern Mut. L. Ins. Co., 65 Fed. 38, 39, 12 C. C. A. 505 [*citing* Century Dict.]; Webster Dict. [*cited* in State *v.* Tucker, 32 Mo. App. 620, 621].

"For the future" see Watson *v.* Hemsworth Hospital, 14 Ves. Jr. 324, 339, 33 Eng. Reprint 546.

"For the present" see Lewis *v.* Worrell, 185 Mass. 572, 574, 71 N. E. 73.

"For the time being" see Timms *v.* Williams, 3 Q. B. 413, 422, 2 G. & D. 621, 6 Jur. 1012, 11 L. J. Q. B. 210, 43 E. C. L. 798; Graves *v.* Colby, 9 A. & E. 354, 370, 8 L. J. Q. B. 57, 1 P. & D. 235, 1 W. W. & H. 705, 36 E. C. L. 199; Rex *v.* Devonshire, 1 B. & C. 609, 620, 3 D. & R. 83, 25 Rev. Rep. 523, 8 E. C. L. 257; Rex *v.* Morris, 4 East 17, 28; Storm *v.* Stirling, 3 E. & B. 832, 842, 77 E. C. L. 832.

28. Webster Dict. [*quoted* in State *v.* Tucker, 32 Mo. App. 620, 621].

29. Wedgewood Dict. Eng. Etym. [*quoted* in Ready *v.* Sommer, 37 Wis. 265, 268].

30. Scarfe *v.* Morgan, 1 H. & H. 292, 295, 7 L. J. Exch. 324, 4 M. & W. 270; Cowper *v.* Andrewes, Hob. 54, 57 [*quoted* in Chase *v.* Westmore, 2 Marsh. 346, 5 M. & S. 180, 187, 17 Rev. Rep. 301].

31. See Coulson *v.* Alpaugh, 163 Ill. 298,

must often be determined from the context of the writing in which it appears.[32]

45 N. E. 216; Curtis *v.* Board of Education, 43 Kan. 138, 142, 23 Pac. 98; Atty.-Gen. *v.* Tarr, 148 Mass. 309, 19 N. E. 358, 2 L. R. A. 87; Mead *v.* McLaughlin, 42 Mo. 198, 201; Pratt *v.* Miller, 23 Nebr. 496, 498, 37 N. W. 263; Chautauqua Assembly *v.* Alling, 46 Hun (N. Y.) 582, 586; State *v.* Rives, 27 N. C. 297, 304; Wilkinson *v.* Chambers, 181 Pa. St. 437, 442, 37 Atl. 569; Derse *v.* Derse, 103 Wis. 113, 115, 79 N. W. 44.

32. See cases cited *infra*, this note.

"For account of" see Rolker *v.* Great Western Ins. Co., 4 Abb. Dec. (N. Y.) 76, 79, 3 Keyes 17; McKinstry *v.* Pearsall, 3 Johns. (N. Y.) 319, 320; Belmont First Nat. Bank *v.* Barnesville First Nat. Bank, 58 Ohio St. 207, 213, 50 N. E. 723, 65 Am. St. Rep. 748, 41 L. R. A. 584; Freiberg *v.* Stoddard, 161 Pa. St. 259, 260, 28 Atl. 1111; McDowall *v.* Boyd, 6 D. & L. 149, 152, 12 Jur. 990, 17 L. J. Q. B. 295, 2 Saund. & C. 298; Walton *v.* Maskell, 2 D. & L. 410, 414, 14 L. J. Exch. 54, 13 M. & W. 452; Kemp *v.* Watt, 15 M. & W. 672, 681; Treuttel *v.* Barandon, 8 Taunt. 100, 103, 4 E. C. L. 61.

"For benefit of" see Mitchell *v.* Turner, 117 Ga. 958, 960, 44 S. E. 17; Cragin *v.* Cragin, 66 Me. 517, 518, 22 Am. Rep. 588; Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346, 347, 351; Crain *v.* Wright, 114 N. Y. 307, 309, 2 N. E. 401.

"For collection" see Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383, 384; Foulks *v.* Falls, 91 Ind. 315, 319; Shenandoah Nat. Bank *v.* Marsh, 89 Iowa 273, 276, 56 N. W. 458, 28 Am. St. Rep. 381; Girard First Nat. Bank *v.* Craig, 3 Kan. App. 166, 42 Pac. 830, 832; Tyson *v.* Western Nat. Bank, 77 Md. 412, 417, 26 Atl. 520, 23 L. R. A. 161; Cecil Bank *v.* Farmers' Bank, 22 Md. 148, 154; Lowell Wire Fence Co. *v.* Sargent, 8 Allen (Mass.) 189, 192; Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263, 267; Rock County Nat. Bank *v.* Hollister, 21 Minn. 385, 386; Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604, 606; Robbins *v.* Austin, 42 Hun (N. Y.) 469, 470; Armour Packing Co. *v.* Davis, 118 N. C. 548, 554, 24 S. E. 365; Freiberg *v.* Stoddard, 161 Pa. St. 259, 28 Atl. 1111; Hackett *v.* Reynolds, 114 Pa. St. 328, 338, 6 Atl. 689; Clarion First Nat. Bank *v.* Gregg, 79 Pa. St. 384, 386; Bradstreet *v.* Everson, 72 Pa. St. 124, 133, 13 Am. Rep. 665; Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50, 56, 13 S. Ct. 533, 37 L. ed. 363; Goetz *v.* Kansas City Bank, 119 U. S. 551, 556, 7 S. Ct. 318, 30 L. ed. 515; White *v.* Miners Nat. Bank, 102 U. S. 658, 660, 26 L. ed. 250; Sweeny *v.* Easter, 1 Wall. (U. S.) 166, 173, 17 L. ed. 681; Metropolis Bank *v.* Jersey City First Nat. Bank, 19 Fed. 301, 302; Levi *v.* Missouri Nat. Bank, 15 Fed. Cas. No. 8,289, 5 Dill. 104; Clarke *v.* London, etc., Banking Co., [1897] 1 Q. B. 552, 554, 66 L. J. Q. B. 354, 76 L. T. Rep. N. S. 293, 45 Wkly. Rep. 383. See also BANKS AND BANKING; COMMERCIAL PAPER.

"For deposit" see Ditch *v.* Western Nat. Bank, 79 Md. 192, 201, 29 Atl. 72, 47 Am. St. Rep. 375, 23 L. R. A. 164. See BANKS AND BANKING; COMMERCIAL PAPER.

"For safe-keeping" see Wright *v.* Paine, 62 Ala. 340, 343, 34 Am. Rep. 24.

"For the purpose of" and similar phrases see Sumner *v.* State, 74 Ind. 52, 54; State *v.* Godfrey, 12 Me. 361, 367; Wyman *v.* Fabens, 111 Mass. 77, 81; Com. *v.* Raymond, 97 Mass. 567, 570; Bay State Mut. F. Ins. Co. *v.* Sawyer, 12 Cush. (Mass.) 64, 67; McClung *v.* St. Paul, 14 Minn. 420, 422; De Witt *v.* Elmira Transfer R. Co., 134 N. Y. 495, 499, 32 N. E. 42; New York *v.* Hamilton F. Ins. Co., 10 Bosw. (N. Y.) 537, 554; People *v.* Lane, 41 Misc. (N. Y.) 1, 2, 83 N. Y. Suppl. 606; State *v.* Narrows Island Club, 100 N. C. 477, 482, 5 S. E. 411, 6 Am. St. Rep. 618; State *v.* Rives, 27 N. C. 297, 304; Buffalo, etc., R. Co. *v.* Com., 120 Pa. St. 537, 543, 14 Atl. 443; Axer *v.* Bassett, 63 Tex. 545, 548; U. S. *v.* Whelpley, 125 Fed. 616, 619; Rex *v.* Ridgway, 5 B. & Ald. 527, 529, 1 D. & R. 132, 1 L. J. K. B. O. S. 53, 7 E. C. L. 289.

"For the use of" and similar phrases see Coulson *v.* Alpaugh, 163 Ill. 298, 300, 45 N. E. 216; Rackliff *v.* Rackliff, 96 Me. 261, 265, 52 Atl. 839; Ladd *v.* Patten, 66 Me. 97, 98; Whitridge *v.* Williams, 71 Md. 105, 109, 17 Atl. 938, 17 Am. St. Rep. 513; Stockbridge Iron Co. *v.* Hudson Iron Co., 107 Mass. 290, 324; Clark *v.* Maguire, 16 Mo. 302, 319; Sanborn *v.* Clough, 64 N. H. 315, 320, 10 Atl. 678; Wademan *v.* Albany, etc., R. Co., 51 N. Y. 568, 570; Terry *v.* Wiggins, 47 N. Y. 512, 515; Cricket *v.* State, 18 Ohio St. 9, 22; Calder *v.* Curry, 17 R. I. 610, 616, 24 Atl. 103; Potomac Steam-Boat Co. *v.* Upper Potomac Steam-Boat Co., 109 U. S. 672, 680, 3 S. Ct. 445, 27 L. ed. 1070; The Santo Domingo, 119 Fed. 386, 387; Lee *v.* Chillicothe Branch Ohio State Bank, 15 Fed. Cas. No. 8,187, 1 Biss. 325; Sigourney *v.* Lloyd, 8 B. & C. 622, 630, 7 L. J. K. B. O. S. 73, 15 E. C. L. 308; Roberts *v.* Spicer, 5 Madd. 491, 492; Bootle *v.* Blundell, 1 Meriv. 193, 225.

"For value received" see Moore *v.* McKenney, 83 Me. 80, 85, 21 Atl. 749, 23 Am. St. Rep. 753; Hall *v.* Knappenberger, 97 Mo. 509, 510, 11 S. W. 239, 10 Am. St. Rep. 337; Coursin *v.* Ledlie, 31 Pa. St. 506, 508; Raborg *v.* Peyton, 2 Wheat. (U. S.) 385, 387, 4 L. ed. 268. See COMMERCIAL PAPER.

"For want of issue" see Hertz *v.* Abrahams, 110 Ga. 707, 711, 36 S. E. 409, 50 L. R. A. 361; Miller's Estate, 145 Pa. St. 561, 565, 22 Atl. 1044; Kay *v.* Scates, 37 Pa. St. 31, 39, 78 Am. Dec. 399; Eichelberger *v.* Barnitz, 9 Watts (Pa.) 447, 450; Goodright *v.* Cornish, 4 Mod. 256, 258; Boehm *v.* Clarke, 9 Ves. Jr. 580, 32 Eng. Reprint 728.

"For want of prosecution" see Morange *v.* Meigs, 54 N. Y. 207, 209.

"For whom it may concern" and similar phrases see Newson *v.* Douglass, 7 Harr. & J.

FORAGE. Food of any kind for animals, especially for horses and cattle.[33]

FORBEAR. When unqualified by terms of restriction, in reference to a debt, in the popular sense, a term which is equivalent to "wait," without any adjunct whatever, and has regard to a general forbearance.[34] (See FORBEARANCE; and, generally, COMMERCIAL PAPER.)

FORBEARANCE. Refraining from claiming a right,[35] a delay in enforcing rights.[36] A term used in general jurisprudence in contradistinction to "act."[37] In the legal sense of the word, an engagement which ties up the hands of a creditor;[38] an act of the creditor depriving himself by something obligatory of the power to sue;[39] the giving day for the return of a loan, or more properly signifies the giving a further day, when the time originally agreed on is passed.[40] (Forbearance: As Consideration, see COMMERCIAL PAPER; CONTRACTS. As Discharge of Surety, see PRINCIPAL AND SURETY. Contract to Forbear, see CONTRACTS. To Sue Negotiable Instrument, see COMMERCIAL PAPER.)

FORCE.[41] Strength, vigor, might, energy, power, violence, validity, armament, necessity;[42] strength, active power, vigor, might, momentum, violence, virtue, efficacy, validity;[43] the definition nearest to the exact meaning of the word is violence; power exerted against will or consent.[44] (Force: As an Element — Of Crime, see ABDUCTION; AFFRAY; ASSAULT AND BATTERY; BREACH OF THE PEACE; BURGLARY; RAPE; ROBBERY; RIOT; TRESPASS; Of Forcible Entry and Detainer, see FORCIBLE ENTRY AND DETAINER. In Making an Arrest, see ARREST. In Levying an Execution, see EXECUTIONS. See also COERCION.)

FORCE AND ARMS. A phrase used in declarations of trespass and in indictments, but now unnecessary in declarations, to denote that the act complained of was done with violence.[45] (See, generally, INDICTMENTS AND INFORMATIONS.)

FORCED. Unnatural;[46] COMPELLED,[47] *q. v.*

(Md.) 417, 450, 16 Am. Dec. 317; Williams *v.* Ocean Ins. Co., 2 Metc. (Mass.) 303, 306; Armory *v.* Gilman, 2 Mass. 1, 12; Wise *v.* St. Louis Mar. Ins. Co., 23 Mo. 80, 84; De Bolle *v.* Pennsylvania Ins. Co., 4 Whart. (Pa.) 68, 74, 33 Am. Dec. 38; Buck *v.* Chesapeake Ins. Co., 1 Pet. (U. S.) 151, 160, 7 L. ed. 90, 148; The Sidney, 23 Fed. 88, 93.

33. Webster Int. Dict.

"Provisions and forage" construed under an exemption statute see Stephens *v.* Hobbs, 14 Tex. Civ. App. 148, 149, 36 S. W. 287.

Forage passes with the cattle it was to feed. See 6 Cyc. 1045 note 18.

34. Downing *v.* Funk, 5 Rawle (Pa.) 69, 73.

"Forbear and give further time" see King *v.* Upton, 4 Me. 387, 388, 16 Am. Dec. 266.

35. English L. Dict.

36. Cyclopedic L. Dict.

"Forbearance of his right" see Pillans *v.* Mierop, 3 Burr. 1663, 1673 [*quoted* in Jones *v.* Ashburnham, 4 East 455, 463, 1 Smith K. B. 188].

37. Black L. Dict.

38. See 9 Cyc. 319 note 70, 338; 2 Cyc. 461 note 9.

39. Reynolds *v.* Ward, 5 Wend. (N. Y.) 501, 504.

40. Henry *v.* Thompson, Minor (Ala.) 209, 232.

"The forbearance or giving time for the payment of a debt, is in substance a loan." Diercks *v.* Kennedy, 16 N. J. Eq. 210, 211 [*citing* Van Schaick *v.* Edwards, 2 Johns. Cas. (N. Y.) 355; Spurrier *v.* Mayoss, 4 Bro. Ch. 28, 30, 29 Eng. Reprint 761, 1 Ves. Jr. 527, 30 Eng. Reprint 472; Dewar *v.* Span, 3 T. R. 425].

"Forbearing to press for the immediate payment of the debt" see Oldershaw *v.* King, 2 H. & N. 517, 523, 3 Jur. N. S. 1152, 27 L. J. Exch. 120, 5 Wkly. Rep. 753.

"The terms 'interest' and 'forbearance' can not be predicated of any other than a loan of money, actual or presumed." Dry Dock Bank *v.* American L. Ins., etc., Co., 3 N. Y. 344, 355.

41. "Did compel and force" see Rex *v.* Lloyd, 1 C. & P. 301, 302, 12 E. C. L. 180.

"Forced out" of the company see Havana Press Drill Co. *v.* Ashurst, 148 Ill. 115, 137, 35 N. E. 873.

42. Worcester Dict. [*quoted* in State *v.* Blake, 39 Me. 322, 324].

Actual force is where strength is actually applied, or the means of applying it are at hand. Cyclopedic L. Dict.

Implied force is that which is implied by law from the commission of an unlawful act. Cyclopedic L. Dict.

43. Webster Dict. [*quoted* in State *v.* Blake, 39 Me. 322, 324, where it is said: "And because the word 'violently,' may have a meaning somewhat similar, by some of the definitions, to the words 'by force,' it does not follow, that the indiscriminate use of one for the other, in an indictment like the one before us, would be at all proper"].

44. Webster Dict. [*cited* in State *v.* Blake, 39 Me. 322, 324].

45. Black L. Dict. [*citing* 2 Chitty Pl. 846, 850]. See also 14 Cyc. 1095; 2 Cyc. 432.

46. English L. Dict.

47. See 8 Cyc. 401.

FORCED HEIR. See DESCENT AND DISTRIBUTION.[48]

FORCED SALE. A sale made at the time and in the manner prescribed by law, in virtue of an execution issued on a judgment already rendered by a court of competent jurisdiction; or, in other words, a sale which is made under the process of the court and in the mode prescribed by law.[49] (See, generally, EXECUTIONS; JUDICIAL SALES.)

FORCIBLE CONFINEMENT or **DETENTION.** Restraint or bondage.[50]

FORCIBLE DEFILEMENT. See ABDUCTION; RAPE.

48. See 16 Cyc. 779 note 35; 14 Cyc. 37.

49. Sampson *v.* Williamson, 6 Tex. 102, 110, 55 Am. Dec. 762. See also Patterson *v.* Taylor, 15 Fla. 336, 342; Macdonough *v.* Elam, 1 La. 489, 492, 20 Am. Dec. 284; Lanahan *v.* Sears, 102 U. S. 318, 321, 26 L. ed. 180; La. Civ. Code, arts. 2580, 2594, 2595.

"A 'forced sale' is not synonymous with a 'sale on execution'" and the term does not include "A foreclosure sale, whether under the power of sale contained in the mortgage or in pursuance of a decree." Peterson *v.* Hornblower, 33 Cal. 266, 276, 277 [*quoted* in Patterson *v.* Taylor, 15 Fla. 336, 343]. See also Chamberlain *v.* Lyell, 3 Mich. 448.

50. U. S. *v.* Gordon, 25 Fed. Cas. No. 15,231, 5 Blatchf. 18, 25, where it is said that the word does not necessarily imply physical or manual force.

FORCIBLE ENTRY AND DETAINER

By Alexander Stronach* and James A. Gwyn†

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† Author of "Estates," 16 Cyc. 595; "Ferries," 19 Cyc. 491; and joint Author of "Easements," 14 Cyc. 1134.

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By Purchaser at:
Execution Sale, see EXECUTIONS.
Foreclosure Sale, see MORTGAGES.
Judicial Sale, see JUDICIAL SALES.
For Recovery of:
Building After Removal From Office, see OFFICERS.
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Demised, see LANDLORD AND TENANT.
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Sold, see VENDOR AND PURCHASER.

For Matters Relating to — (*continued*)
Trespass on Realty, see TRESPASS.
Writ of:
Entry, see ENTRY, WRIT OF.
Right, see REAL ACTIONS.

I. DEFINITIONS.

A forcible entry or detainer consists in violently taking or keeping possession of lands or tenements, by means of threats, force, or arms, and without authority of law.[1]

II. FORCIBLE ENTRY, FORCIBLE DETAINER, AND UNLAWFUL DETAINER DISTINGUISHED.

While it is usual to treat forcible entry and detainer as one offense or ground of liability, yet it is recognized by the early English statutes,[2] and by many of those of the present time,[3] that forcible entry and forcible detainer are separate and distinct; a forcible entry being generally an entry upon another's possession by force or violence,[4] and a forcible detainer being generally a wrongful or unlawful entry, although without force, which has been followed by a detention with force and a strong hand.[5] Unlawful detainer is distinguished from forcible

1. Bouvier L. Dict. [*citing* 2 Bishop Cr. L. § 489; Comyns Dig.; Woodford Landl. & Ten. 973].

A forcible entry has also been defined as follows: "An entry made with violence, against the will of the lawful occupant, and without authority of law." Anderson L. Dict. 404 [*quoted* in Lewis *v.* State, 99 Ga. 692, 694, 26 S. E. 496, 59 Am. St. Rep. 255].

"An entry on another's real estate, or in some special circumstances on one's own, of a nature to be the subject of a personal occupation, made with such an array of force as to create terror in those who are present opposing." 2 Bishop Cr. L. § 489.

"An offense against the public peace, or private wrong, committed by violently taking possession of lands and tenements with menaces, force, and arms, against the will of those entitled to the possession, and without the authority of law." Black L. Dict. [*citing* 4 Blackstone Comm. 148; 4 Stephen Comm. 280].

"An offence against the public peace which is committed by violently taking or keeping possession of lands or tenements with menaces, force and arms, and without authority of law." Com. *v.* Prison Keeper, 1 Ashm. (Pa.) 140, 145 [*quoting* 4 Blackstone Comm. 148].

The Georgia code defines a forcible entry as "the violently taking possession of lands and tenements with menaces, force and arms, and without authority of law." Williams *v.* State, 120 Ga. 488, 489, 48 S. E. 149; Sewell *v.* State, 61 Ga. 496, 497.

The Kentucky civil code of practice defines a forcible entry as "an entry without the consent of the person having the actual possession." Young *v.* Milward, 109 Ky. 123, 129, 58 S. W. 592, 593, 22 Ky. L. Rep. 615, 627; Clark *v.* Langenbach, 130 Fed. 755, 759, 65 C. C. A. 181.

A forcible detainer is defined as "the offense of violently keeping possession of lands and tenements, with menaces, force, and arms, and without the authority of law." Black L. Dict. [*citing* 4 Blackstone Comm. 148; 4 Stephen Comm. 280].

2. See *infra*, III, A, 2.

3. See the statutes of the several states. See also Boyle *v.* Boyle, 121 Mass. 85; Saunders *v.* Robinson, 5 Metc. (Mass.) 343; Hoffman *v.* Harrington, 22 Mich. 52; Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676; Winterfield *v.* Stauss, 24 Wis. 394.

4. Boyle *v.* Boyle, 121 Mass. 85; Saunders *v.* Robinson, 5 Metc. (Mass.) 343; Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

5. Boyle *v.* Boyle, 121 Mass. 85; Mitchell *v.* Shanley, 15 Gray (Mass.) 319; Benedict *v.* Hart, 1 Cush. (Mass.) 487; Hoffman *v.* Harrington, 22 Mich. 52; Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676; Winterfield *v.* Stauss, 24 Wis. 394.

Unlawful holding by force constitutes forcible detainer. Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Brawley *v.* Risdon Iron Works, 38 Cal. 676; Shelby *v.* Houston, 38 Cal. 410; Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589; Preston *v.* Kehoe, 15 Cal. 315; Burdette *v.* Corgan, 27 Kan. 275; Davis *v.* Woodward, 19 Minn. 174; McCleary *v.* Crowley, 22 Mont. 245, 56 Pac. 227.

A lawful entry and unlawful detention by force, under some statutes, constitutes a forcible detainer.

Alabama.— Wright *v.* Lyle, 4 Ala. 112.

Arkansas.— Keller *v.* Henry, 24 Ark. 575.

California.— Dickinson *v.* Maguire, 9 Cal. 46.

Indiana.— Gipe *v.* Cummings, 116 Ind. 511, 19 N. E. 466; Barton *v.* Osborn, 6 Blackf. 145.

Nebraska.— Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101; Brown *v.* Feagins, 37

detainer in that the element of force is wanting. It is provided for either particularly under this distinct name or by general statutes as to forcible entry and detainer,[6] and is usually confined to cases where such relations as that of landlord and tenant,[7] vendor and purchaser,[8] or mortgagor and mortgagee[9] exist.

III. CRIMINAL LIABILITY.

A. Origin and Development — **1. At Common Law.** A forcible entry was an indictable offense at common law,[10] and this common-law liability is not abrogated or affected by statutes making the offense indictable,[11] or providing the injured party a remedy by a civil action or proceeding.[12] But since they furnish the injured party a more speedy and efficient remedy, they have caused the criminal proceeding to fall into disuse in many jurisdictions.[13] There is some conflict of authority as to whether a forcible detainer was indictable at common law.[14]

2. Under Early English Statutes. The first of the English statutes[15] provided

Nebr. 256, 55 N. W. 1048; Blaco *v.* Haller, 9 Nebr. 149, 1 N. W. 978.

Ohio.— Bridwell *v.* Barcroft, 2 Ohio Dec. (Reprint) 697, 4 West. L. Month. 617.

6. *Alabama.*— Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Bates *v.* Ridgeway, 48 Ala. 611; Dwine *v.* Brown, 35 Ala. 596; Snoddy *v.* Watt, 9 Ala. 609.

Arkansas.— Mason *v.* Delancy, 44 Ark. 444; Johnson *v.* West, 41 Ark. 535; Necklace *v.* West, 33 Ark. 682; Dortch *v.* Robinson, 31 Ark. 296; Halliburton *v.* Sumner, 27 Ark. 460; Smith *v.* Lafferry, 27 Ark. 46; Bradley *v.* Hume, 18 Ark. 284; Miller *v.* Turney, 13 Ark. 385.

California.— Pico *v.* Cuyas, 48 Cal. 639; Steinback *v.* Krone, 36 Cal. 303; Owen *v.* Doty, 27 Cal. 502; Henderson *v.* Allen, 23 Cal. 519.

Colorado.— Liss *v.* Wilcoxen, 2 Colo. 85.

Kansas.— Kellogg *v.* Lewis, 28 Kan. 535.

Mississippi.— McCorkle *v.* Yarrell, 55 Miss. 576.

Missouri.— Hannibal, etc., R. Co. *v.* Hill, 60 Mo. 281.

Virginia.— Olinger *v.* Shepherd, 12 Gratt. 462; Adams *v.* Martin, 8 Gratt. 107.

Wisconsin.— Carter *v.* Van Dorn, 36 Wis. 289; Winterfield *v.* Stauss, 24 Wis. 394; Jarvis *v.* Hamilton, 16 Wis. 574.

United States.— Sanders *v.* Thornton, 97 Fed. 863, 38 C. C. A. 508 [*affirming* 2 Indian Terr. 92, 48 S. W. 1015].

In Oklahoma unlawful detainer will not lie to remove an unsuccessful claimant from a tract of government land until the controversy between the parties is finally settled in the interior department. Hebeisen *v.* Hatchell, 12 Okla. 29, 69 Pac. 888.

7. See, generally, Landlord and Tenant.

8. See, generally, Vendor and Purchaser.

9. See, generally, Mortgages.

10. *District of Columbia.*— U. S. *v.* Griffin, 6 D. C. 53.

Kentucky.— Hunt *v.* Ballew, 9 B. Mon. 390.

Maine.— Harding's Case, 1 Me. 22.

Massachusetts.— Com. *v.* Shattuck, 4 Cush. 141.

Nevada.— *Ex p.* Webb, 24 Nev. 238, 51 Pac. 1027.

New Hampshire.— State *v.* Morgan, 59 N. H. 322.

New Jersey.— Cruiser *v.* State, 18 N. J. L. 206.

North Carolina.— State *v.* Jacobs, 94 N. C. 950; State *v.* Yarborough, 70 N. C. 250; State *v.* Tolever, 27 N. C. 452.

Pennsylvania.— Com. *v.* Toram, 2 Pars. Eq. Cas. 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296.

South Carolina.— State *v.* Jones, 14 S. C. 344.

England.— Rex *v.* Bake, 3 Burr. 1731.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 109.

11. Cruiser *v.* State, 18 N. J. L. 206; State *v.* Jones, 14 S. C. 344; Rex *v.* Bake, 3 Burr. 1731.

These statutes were construed as not abrogating the common law, but as merely providing additional legislation upon the subject. State *v.* Morgan, 59 N. H. 322.

12. Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Cruiser *v.* State, 18 N. J. L. 206; *Ex p.* Webb, 24 Nev. 238, 51 Pac. 1027; State *v.* Jones, 14 S. C. 344.

13. Com. *v.* Shattuck, 4 Cush. (Mass.) 141.

14. That a forcible detainer was indictable at common law see State *v.* Morgan, 59 N. H. 322; 2 Bishop Cr. L. § 494.

That a forcible detainer is not indictable at common law but only after 8 Hen. VI see Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296.

Where the entry is peaceable but unlawful the question is said to be in doubt. State *v.* Johnson, 18 N. C. 324. See also State *v.* Ward, 46 N. C. 290.

Where the entry is both peaceable and lawful, as where a person having a right of entry enters peaceably in the absence of the occupant, it is not indictable at common law to retain by force the possession thus acquired. Winn *v.* State, 55 Ark. 360, 18 S. W. 375; State *v.* Godsey, 35 N. C. 348; State *v.* Johnson, 18 N. C. 324; Com. *v.* Knarr, 135 Pa. St. 35, 19 Atl. 805. See also People *v.* Fields, 1 Lans. (N. Y.) 222.

15. St. 5 Rich. II, c. 8.

that there should be no entry except where an entry was given by law, and even then not with strong hand or multitude of people, and made the offense indictable.[16] This statute abrogated the old rule of the common law that a person entitled to possession might recover and maintain his possession by force if he used no more than was actually necessary for that purpose,[17] but is said to have had no further effect.[18] The second statute[19] provided for a summary conviction of offenders by magistrates on view.[20] The third statute[21] extended the remedy to cases where there was both a forcible entry and detainer and where there was peaceful entry followed by a forcible detainer,[22] and was the first legislation relating to forcible detainer.[23] This and two later statutes[24] provided also for a restitution of possession to the injured party.[25]

3. IN THE UNITED STATES. The English statutes making forcible entry and detainer indictable are in force in some of the states, either as a part of the common law of those states,[26] or by virtue of statutory provisions adopting certain portions of the English statute law,[27] while in others the original English statute has been substantially reënacted,[28] or there are other special statutes of similar character making the offense indictable.[29] The offense, however, is recognized as indictable as a common-law offense.[30]

B. Nature and Elements — 1. RELATES ONLY TO LANDS AND TENEMENTS. To constitute the offense of forcible entry and detainer the wrong done must be with regard to lands and tenements and not to personal property,[31] or to an

16. *District of Columbia.*— U. S. *v.* Griffin, 6 D. C. 53.
Maine.— Harding's Case, 1 Me. 22.
New Hampshire.— State *v.* Morgan, 59 N. H. 322.
Pennsylvania.— Com. *v.* Toram, 2 Pars. Eq. Cas. 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296.
South Carolina.— Burt *v.* State, 3 Brev. 413; State *v.* Speirin, 1 Brev. 119.

17. *District of Columbia.*— U. S. *v.* Griffin, 6 D. C. 53.
Maine.— Harding's Case, 1 Me. 22.
North Carolina.— Mosseller *v.* Deaver, 106 N. C. 494, 11 S. E. 529, 19 Am. St. Rep. 540, 8 L. R. A. 537.
Oklahoma.— Foust *v.* Territory, 8 Okla. 541, 58 Pac. 728.
Pennsylvania.— Com. *v.* Prison Keeper, 1 Ashm. 140.
Vermont.— Dustin *v.* Cowdry, 23 Vt. 631.
See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 109.

18. U. S. *v.* Griffin, 6 D. C. 53.

19. St. 15 Rich. II, c. 2.

20. See *infra*, III, D, 1.

21. St. 8 Hen. VI, c. 9.

22. State *v.* Morgan, 59 N. H. 322; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; 1 Hawkins P. C. c. 64, § 9.

23. Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296.

24. St. 31 Eliz. c. 11; St. 21 Jac. 1, c. 15.

25. See *infra*, III, D, 2, f.

26. U. S. *v.* Griffin, 6 D. C. 53; Torrence *v.* Com., 9 Pa. St. 184; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296.

27. State *v.* Huntington, 3 Brev. (S. C.) 111; State *v.* Speirin, 1 Brev. (S. C.) 119.

28. State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206; State *v.* Eason, 70 N. C. 88; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; Com. *v.* Prison Keeper, 1 Ashm. (Pa.) 140; Dustin *v.* Cowdry, 23 Vt. 631.

29. *Arkansas.*—Winn *v.* State, 55 Ark. 360, 18 S. W. 375.
Indiana.— Strong *v.* State, 105 Ind. 1, 4 N. E. 293; Brazee *v.* State, 9 Ind. App. 618, 37 N. E. 279.
Missouri.— State *v.* Smith, 66 Mo. App. 403; State *v.* Brinkerhoff, 44 Mo. App. 169.
New York.— People *v.* Farrell, 5 Silv. Sup. 23, 8 N. Y. Suppl. 230.
Oklahoma.— Foust *v.* Territory, 8 Okla. 541, 58 Pac. 728.
See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 191, 192.

30. *Kentucky.*— Hunt *v.* Ballew, 9 B. Mon. 390.
Maine.— Harding's Case, 1 Me. 22.
Massachusetts.— Com. *v.* Shattuck, 4 Cush. 141.
Nevada.— *Ex p.* Webb, 24 Nev. 238, 51 Pac. 1027.
New Jersey.— Cruiser *v.* State, 18 N. J. L. 206.
South Carolina.— State *v.* Jones, 14 S. C. 344.
See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 190.
In New Hampshire both the common law and the English statutes, which as modified by the statutes of that state were formerly in force (State *v.* Pearson, 2 N. H. 550. See also State *v.* Sawyer, 5 N. H. 398) were repealed by the act of 1842, and a forcible entry and detainer is not as such an indictable offense in that state (State *v.* Morgan, 59 N. H. 322).

31. State *v.* Brinkerhoff, 44 Mo. App. 169; State *v.* Jacobs, 94 N. C. 950.
Forcible entry differs from forcible trespass in that the latter strictly speaking applies to

incorporeal right, such as an easement which is not in possession and for which a writ of entry could not be maintained.[32]

2. Actual Entry Necessary. To constitute the offense of forcible entry an actual entry is necessary. An unsuccessful attempt to enter is not sufficient.[33]

3. Possession of Prosecutor. It is an essential element of the offense of forcible entry that at the time of the offense the premises shall be in the actual possession of him whose possession is charged to have been interfered with.[34] To constitute actual possession it is not necessary that the party be personally present on the premises at the time of the offense if he is in actual exercise of authority and control over the same.[35] He will be deemed to be present and in possession, although temporarily absent, if represented by a member of his family,[36] or by a tenant.[37] The possession must also be peaceable as distinguished from a mere scrambling possession.[38] An actual peaceable possession, however, is all that is essential to maintain the action.[39] It is immaterial whether or not such a possession is also rightful,[40] and it is not necessary that the prosecutor should have any legal title in the property.[41]

4. Force. To constitute a forcible entry there must be more force than amounts to a mere trespass.[42] The entry must be accompanied with some circum-

personal property, and the former to lands and tenements (State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State *v.* Davis, 109 N. C. 809, 13 S. W. 883, 14 L. R. A. 206; State *v.* Jacobs, 94 N. C. 950) but the distinction is not always observed (State *v.* Lawson, *supra*).

32. Rex *v.* Holmes, 1 Mod. 73; 1 Hawkins P. C. c. 64, § 31.

33. State *v.* Bryant, 103 N. C. 436, 9 S. E. 1.

34. State *v.* Bryant, 103 N. C. 436, 9 S. E. 1; Com. *v.* Lemmon, Add. (Pa.) 315; Com. *v.* Waddle, Add. (Pa.) 41.

What constitutes a possession.— Where the land is inclosed and in actual cultivation and the prosecutor resides near it and is in the habit of going to it daily he is in possession (State *v.* Bennett, 1 Harp. (S. C.) 503, 18 Am. Dec. 663); and where a man in any manner circumscribes a reasonable amount of land, settles on a part of it, and uses the residue as other men do he is in possession of the whole so as to maintain a prosecution for forcible entry on any part of it (Com. *v.* Robinson, Add. (Pa.) 14); but merely surveying the land and building cabins thereon and leaving them unfinished and empty is not such a possession as will support a prosecution for forcible entry and detainer (Com. *v.* Lemmon, Add. (Pa.) 315).

A bare custody as distinguished from a possession is not sufficient. State *v.* Curtis, 20 N. C. 363; Com. *v.* Prison Keeper, 1 Ashm. (Pa.) 140.

A widow whose dower has not been assigned cannot maintain a prosecution for a forcible entry upon lands of the husband of which she is not in actual possession. State *v.* Thompson, 130 N. C. 680, 41 S. E. 486.

35. State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206; State *v.* Bryant, 103 N. C. 436, 9 S. E. 1.

A man who leaves his dwelling for a temporary purpose only cannot be said to have left it so as to make the unlawful entry of a trespasser an entry in his absence. State *v.* Shepard, 82 N. C. 614; State *v.* Caldwell, 47 N. C. 468.

36. State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206; State *v.* Shepard, 82 N. C. 614; State *v.* Caldwell, 47 N. C. 468.

37. State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841.

38. Com. *v.* Conway, 1 Brewst. (Pa.) 509; Com. *v.* Housknecht, 1 Kulp (Pa.) 367; Com. *v.* Prison Keeper, 1 Ashm. (Pa.) 140.

A peaceable possession is one which is not contested or disputed; one which has been so long held that so far as the mere possession is concerned the holder of it has reason to feel secure. Com. *v.* Housknecht, 1 Kulp (Pa.) 367.

39. Swails *v.* State, 4 Ind. 516; People *v.* Leonard, 11 Johns. (N. Y.) 504.

40. Peelle *v.* State, 161 Ind. 378, 68 N. E. 682.

41. Swails *v.* State, 4 Ind. 516; People *v.* Leonard, 11 Johns. (N. Y.) 504.

Title necessary to authorize award of restitution see *infra*, III, D, 2, a, (III), f, (II).

42. *Colorado.*— Goshen *v.* People, 22 Colo. 270, 44 Pac. 503.

Georgia.— Lewis *v.* State, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255.

Massachusetts.— Com. *v.* Shattuck, 4 Cush. 141; Com. *v.* Dudley, 10 Mass. 403.

New York.— People *v.* Smith, 24 Barb. 16.

North Carolina.— State *v.* Leary, 136 N. C. 578, 48 S. E. 570; State *v.* Jacobs, 94 N. C. 950; State *v.* Lloyd, 85 N. C. 573; State *v.* Ross, 49 N. C. 315, 69 Am. Dec. 751.

Pennsylvania.— Thompson *v.* Com., 116 Pa. St. 155, 10 Atl. 138; Com. *v.* Housknecht, 1 Kulp 367; Com. *v.* Rees, 2 Brewst. 564.

Tennessee.— Temple *v.* State, 6 Baxt. 496.

England.— Rex *v.* Smyth, 5 C. & P. 201, 1 M. & Rob. 156, 24 E. C. L. 526.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 192.

A peaceable entry, although unlawful, if no force or violence is used in taking or maintaining the same, is a mere trespass (People

stances of violence either actual or threatened;[43] something amounting to a breach of the peace.[44] But it is not necessary that there be any act of great public violence or terror,[45] or an actual personal injury to the person in possession.[46] It is sufficient if the entry is accompanied with such a display of force or circumstances of violence or terror as to give the party in possession reasonable ground to believe that he must yield in order to avoid a personal injury,[47] or breach of the peace,[48] or that any resistance would be useless.[49] This terror may be caused by the party carrying with him such an unusual number of attendants or by arming himself in such a manner as plainly to intimate his design to back his pretensions by force; by actually threatening to kill, maim, or beat those who continue in possession; or by making use of expressions plainly implying a purpose of using force against those who make resistance;[50] and in such cases it is not necessary that the party in possession should make an actual forcible resistance.[51] The same circumstances of force, violence, or terror are essential to a forcible detainer as to a forcible entry.[52] There may be a forcible detainer, although the entry is peaceable;[53] but whoever retains a wrongful possession by keeping an unusual number of people or unusual weapons or threatening to do some bodily hurt to the former possessor if he dares to return is guilty of a forcible detainer, although no attempt is made to reënter.[54]

v. Smith, 24 Barb. (N. Y.) 16), even though it is against the consent of the occupant (Goshen *v.* People, 22 Colo. 270, 44 Pac. 503; Temple *v.* State, 6 Baxt. (Tenn.) 496).

43. *Massachusetts.*— Com. *v.* Shattuck, 4 Cush. 141.

Missouri.— State *v.* Richards, 15 Mo. App. 331.

New York.— People *v.* Smith, 24 Barb. 16.

North Carolina.— State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206.

Pennsylvania.— Thompson *v.* Com., 116 Pa. St. 155, 10 Atl. 138; Pennsylvania *v.* Robison, Add. 14; Respublica *v.* Devore, 1 Yeates 501.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 192.

To constitute the offense of forcible entry there must be either actual violence used or such demonstration of force as is calculated to intimidate or tend to a breach of the peace. State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206.

Under the Indiana statute the taking must be either with force or with menace and without authority of law. A conviction cannot be sustained where the evidence shows that the entry was peaceable and with the apparent consent of the parties interested. Brazee *v.* State, 9 Ind. App. 618, 37 N. E. 279.

44. State *v.* Jacobs, 94 N. C. 950; Com. *v.* Rees, 2 Brewst. (Pa.) 564; Com. *v.* Conway, 1 Brewst. (Pa.) 509; State *v.* Cargill, 2 Brev. (S. C.) 445; Rex. *v.* Bake, 3 Burr. 1731.

45. State *v.* Jacobs, 94 N. C. 950.

46. State *v.* Pollock, 26 N. C. 305, 42 Am. Dec. 140; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663.

47. State *v.* Jacobs, 94 N. C. 950; State *v.* Pollock, 26 N. C. 305, 42 Am. Dec. 140; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663; Reg. *v.* Smith, 43 U. C. Q. B. 369; 1 Hawkins P. C. c. 64, § 27.

An entry will be deemed to be forcible, although the act of entering is peaceable, if after making the entry the party entering forcibly ejects the party in possession (State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663), or on being ordered to leave refuses to do so and pursues the party in possession with threats of violence to his house (State *v.* Talbot, 97 N. C. 494, 2 S. E. 148), or where he enters surreptitiously and maintains his possession by force (Burt *v.* State, 3 Brev. (S. C.) 413).

48. State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844; State *v.* Davis, 109 N. C. 809, 13 S. E. 883, 14 L. R. A. 206.

49. Williams *v.* State, 120 Ga. 488, 48 S. E. 149; Lissner *v.* State, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389; Strong *v.* State, 105 Ind. 1, 4 N. E. 293.

50. State *v.* Jacobs, 94 N. C. 950; State *v.* Pollock, 26 N. C. 305, 42 Am. Dec. 140; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663; 1 Hawkins P. C. c. 64, § 27.

51. Williams *v.* State, 120 Ga. 488, 48 S. E. 149; Lissner *v.* State, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389.

52. Strong *v.* State, 105 Ind. 1, 4 N. E. 293; Com. *v.* Dudley, 10 Mass. 403; People *v.* Smith, 24 Barb. (N. Y.) 16; People *v.* Rickert, 8 Cow. (N. Y.) 226; 1 Hawkins P. C. c. 64, § 30.

A retention of a wrongful possession peaceably acquired where no force, threats, or violence is used to keep the owner out is a mere trespass. Com. *v.* Dudley, 10 Mass. 403; People *v.* Smith, 24 Barb. (N. Y.) 16.

Merely refusing to vacate on demand, there being no use of force, violence, or threats, is not sufficient to constitute the offense. State *v.* Cargill, 2 Brev. (S. C.) 445.

53. Com. *v.* Rogers, 1 Serg. & R. (Pa.) 124.

54. People *v.* Rickert, 8 Cow. (N. Y.) 226; 1 Hawkins P. C. c. 64, § 30.

5. Number of Persons Making Entry. The number of persons making the entry is of itself immaterial.[55] It is not necessary that the entry should be made by a multitude of people,[56] as a single person may commit the offense;[57] while on the other hand a large number of persons may actually enter upon land in possession of another under such circumstances that the entry will be no more than a simple trespass.[58]

6. Entry Under Judicial Process. The force involved in the offense of forcible entry is private force unlawfully exerted, and the public force of the state lawfully exercised cannot be the means of a wrongful entry.[59] An entry made with a lawful warrant executed in a lawful way by a lawful officer is not a forcible entry, although the affidavit on which the warrant was issued is false;[60] nor is a person guilty of forcible detainer for forcibly retaining possession of property which has been delivered to him and taken in good faith by virtue of a writ regular on its face and issued upon the judgment of a court of competent jurisdiction, although the writ may have been wrongfully issued;[61] but where a justice acting without any jurisdiction assists a person in forcibly ejecting another who is in possession it is a forcible entry on the part of both the justice and the person so entering.[62]

7. Breaking Into Buildings. It has been held that breaking into a dwelling-house is a forcible entry, although there is at the time no person in the house or on the premises;[63] but on the contrary it has been held that such an entry, if accompanied with no more violence than is incident to effecting the entry, is a mere trespass.[64] In the absence of circumstances amounting to a public breach of the peace it is not a forcible entry to break into an unoccupied dwelling or vacant premises.[65] So it is not a forcible entry to break into an outhouse,[66] or merely to take off the lock of a house and substitute another,[67] or after being admitted into a house to break open the door of a locked room.[68]

C. Who May Be Liable. Where a husband and wife are living apart from each other the wife may be prosecuted for forcibly entering upon the lands of the husband,[69] or the husband for forcibly entering upon the lands of the wife.[70] A landlord will be liable for entering in a forcible manner upon a tenant who holds over,[71] and a joint tenant or tenant in common will be liable for forcibly ejecting his cotenant.[72] Where the trustees of a church have in a regular meeting decided to close a building belonging to the church it is a forcible entry for any trustee who did not assent to such action,[73] or for the members of the congregation[74] to afterward forcibly break into such building; but a man who breaks into his own dwelling which is forcibly detained from him by one who has the bare custody of it is not liable for a forcible entry.[75] So it has been settled from an early period that all persons who accompany another for the

55. Rex *v.* Bake, 3 Burr. 1731.
56. Burt *v.* State, 3 Brev. (S. C.) 413.
57. State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663; 1 Hawkins P. C. c. 64, § 29.
The superior strength of a single person, combined with demonstrations of violence, has the same tendency to intimidate and to cause a breach of the peace as a large number of persons. State *v.* Caldwell, 47 N. C. 468.
58. Rex *v.* Bake, 3 Burr. 1731.
59. Sewell *v.* State, 61 Ga. 496.
60. Sewell *v.* State, 61 Ga. 496.
61. Vess *v.* State, 93 Ind. 211.
62. State *v.* Anders, 30 N. C. 15.
63. Com. *v.* Johnson, 3 Pa. Co. Ct. 641; 1 Hawkins P. C. c. 64, § 26. See also Rex *v.* Bathurst, Sayer 225.
64. Lewis *v.* State, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255.
65. Com. *v.* Leach, Add. (Pa.) 352.
66. Com. *v.* Rees, 2 Brewst. (Pa.) 564.
67. State *v.* Leary, 136 N. C. 578, 48 S. E. 570.
68. State *v.* Pridgen, 30 N. C. 84.
69. Rex *v.* Smyth, 5 C. & P. 201, 1 M. & Rob. 156, 24 E. C. L. 526.
70. Com. *v.* White, 18 Phila. (Pa.) 496.
71. Com. *v.* Kensey, 2 Pars. Eq. Cas. (Pa.) 401, 3 Pa. L. J. Rep. 233, 5 Pa. L. J. 119. See, generally, Landlord and Tenant.
72. 1 Hawkins P. C. c. 64, § 33. See also Com. *v.* Oliver, 2 Pars. Eq. Cas. (Pa.) 420.
73. Com. *v.* Oliver, 2 Pars. Eq. Cas. (Pa.) 420.
74. People *v.* Runkle, 9 Johns. (N. Y.) 147.
75. State *v.* Curtis, 20 N. C. 363; Com. *v.* Prison Keeper, 1 Ashm. (Pa.) 140; 1 Hawkins P. C. c. 64, § 32.

purpose of making a forcible entry are jointly liable whether they actually enter upon the premises or not.[76]

D. Prosecution and Punishment — 1. SUMMARY PROCEEDINGS. The second of the early English statutes[77] provided for a summary conviction for a forcible entry by a justice of the peace on view, the justice being authorized to go upon the premises, remove the force, and convict, fine, and imprison the wrong-doer.[78] This statute has been held to be in force in a few jurisdictions in this country,[79] but in most of the states it seems that the proceeding is unknown.[80] In proceedings under this statute there could be no award of restitution.[81]

2. PROCEEDINGS BY INDICTMENT — a. The Indictment[82] — (I) *IN GENERAL.* The indictment must allege sufficient facts to show upon its face the commission of an indictable offense,[83] and so must set out with clearness and certainty all the facts essential to constitute the offense charged.[84] It is sufficient if the offense is stated with such clearness that the jury may readily understand its nature, and defendant prepare his defense, and the court pronounce judgment according to the rights of the case.[85] If the indictment is under a statute it is sufficient if it follows the language of the statute,[86] unless the statute fails to define or set out the facts which constitute the offense.[87]

(II) *ALLEGATIONS AS TO FORCE.* The allegations of the indictment must be sufficient to show the use of that degree of force or violence which is essential to constitute the offense charged,[88] but no particular or technical form of words is necessary.[89] To allege that defendant entered with force and arms is insufficient,[90] that being the technical term employed to designate the force which the law ascribes to every common trespass,[91] but if other words are added which import actual violence the indictment is good.[92] Alleging the entry to have been unlawful and with strong hand is sufficient.[93] The words "with strong hand" mean something more than a mere trespass and are technically appropriate to designate the degree of force necessary to constitute the offense.[94] It is not necessary to

76. State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663; 1 Hawkins P. C. c. 64, § 22.

77. St. 15 Rich. II, c. 2.

78. Adams *v.* Horr, 6 D. C. 45; State *v.* Morgan, 59 N. H. 322; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; 1 Hawkins P. C. c. 64, § 7.

79. Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

In New York the statute was reënacted. People *v.* Anthony, 4 Johns. 198.

Where the English statutes are in force justices of the peace in this country have the same authority as the justices in England. State *v.* Huntington, 3 Brev. (S. C.) 111.

80. 2 Bishop Cr. L. § 493.

In North Carolina the distribution of judicial powers by Const. art. 4, is a virtual repeal of all laws giving justices of the peace jurisdiction in cases of forcible entry and detainer except for the purpose of binding over defendant to the superior court. State *v.* Yarborough, 70 N. C. 250.

81. Blythe *v.* Wright, 2 Ashm. (Pa.) 428; 1 Hawkins P. C. c. 64, § 9.

82. See, generally, INDICTMENTS AND INFORMATIONS.

83. State *v.* Eason, 70 N. C. 88; Rex *v.* Bake, 3 Burr. 1731; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

84. State *v.* Eason, 70 N. C. 88.

On an indictment for breaking into a house the indictment must allege either that the house was a dwelling-house or that the prosecutor or a member of his family was present. State *v.* Morgan, 60 N. C. 243.

85. Kersh *v.* State, 24 Ga. 191; People *v.* Farrel, 5 Silv. Sup. (N. Y.) 23, 8 N. Y. Suppl. 230.

86. People *v.* Farrel, 5 Silv. Sup. (N. Y.) 23, 8 N. Y. Suppl. 230.

87. State *v.* Smith, 66 Mo. App. 403.

88. State *v.* Leathers, 31 Ark. 44; Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17; Com. *v.* Taylor, 5 Binn. (Pa.) 277; Rex *v.* Bake, 3 Burr. 1731; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

89. Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

90. State *v.* Leathers, 31 Ark. 44; Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17; Com. *v.* Taylor, 5 Binn. (Pa.) 277; Rex *v.* Bake, 3 Burr. 1731; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

91. State *v.* Leathers, 31 Ark. 44; Com. *v.* Taylor, 5 Binn. (Pa.) 277; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

92. Harding's Case, 1 Me. 22; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

93. Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Cruiser *v.* State, 18 N. J. L. 206; State *v.* Whitfield, 30 N. C. 315; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

94. Com. *v.* Shattuck, 4 Cush. (Mass.) 141; State *v.* Whitfield, 30 N. C. 315; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

The words "with strong hand" should not

set out the particular facts constituting the force or violence used.[95] The same allegations as to force are necessary in an indictment for a forcible detainer as for a forcible entry,[96] but where the indictment charges a forcible detainer only, it is not necessary to allege whether the original entry was forcible or peaceable.[97]

(III) *ALLEGATIONS AS TO POSSESSION.* An indictment for a forcible entry must charge that the prosecutor was in the actual and peaceable possession of the premises at the time of the alleged offense,[98] but need not state that he was personally present.[99] Such possession, however, is all that need be alleged,[1] it being unnecessary to allege any title in prosecutor[2] or lack of title in defendant,[3] or to state who was the owner of the premises,[4] unless the indictment is brought under those statutes providing for restitution which require the prosecutor to have a certain estate or interest in the premises, in which case the indictment must allege such an estate or interest as to bring him within the provisions of the statute.[5] In forcible detainer the indictment must allege the prior possession of the prosecutor.[6]

(IV) *DESCRIPTION OF PREMISES.* The indictment must describe the premises where the alleged offense was committed with certainty[7] such as will inform defendant of the specific charge which he is to meet and enable the justice or

be omitted. Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17.

95. People *v.* Farrel, 5 Silv. Sup. (N. Y.) 23, 8 N. Y. Suppl. 230. *Contra*, State *v.* Smith, 66 Mo. App. 403.

96. Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17.

97. Fitz-Williams' Case, 2 Cro. Jac. 19.

98. Com. *v.* Orr, 5 Ky. L. Rep. 687; State *v.* Bryant, 103 N. C. 436, 9 S. E. 1.

Alleging the possession under a "whereas" does not render the indictment defective. Winn *v.* State, 55 Ark. 360, 18 S. W. 375.

An indictment which charges that the prosecutor "was then and there possessed of the house," etc., sufficiently shows that he was in possession at the time of the entry. Black *v.* State, 3 Yerg. (Tenn.) 588.

Alleging the possession to be in a married woman whose husband is alive and not living apart from her is fatal. In such cases the possession is in the husband and should be so alleged. Com. *v.* Kensey, 2 Pars. Eq. Cas. (Pa.) 401, 3 Pa. L. J. Rep. 233, 5 Pa. L. J. 119.

An allegation that the prosecutor "was seized" is not a sufficient allegation of actual possession. State *v.* Bryant, 103 N. C. 436, 9 S. E. 1.

99. Com. *v.* Orr, 5 Ky. L. Rep. 687; State *v.* Shepard, 82 N. C. 614; State *v.* Fort, 20 N. C. 332.

1. Harding's Case, 1 Me. 22; State *v.* Whitfield, 30 N. C. 315.

2. Harding's Case, 1 Me. 22; Reg. *v.* Child, 2 Cox C. C. 102.

3. State *v.* Whitfield, 30 N. C. 315.

4. Foust *v.* Territory, 8 Okla. 541, 58 Pac. 728.

5. People *v.* Nelson, 13 Johns. (N. Y.) 340; People *v.* King, 2 Cai. (N. Y.) 98; People *v.* Shaw, 1 Cai. (N. Y.) 125; State *v.* Butler, 1 N. C. 414; Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17; Vanpool *v.* Com., 13 Pa. St. 391; Torrence *v.* Com., 9 Pa. St. 184; Burd *v.* Com., 6 Serg. & R. (Pa.) 252; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; Rex *v.* Dormy, 1 Ld. Raym. 610; Reg. *v.* Taylor, 7 Mod. 123; Ley Roy *v.* March, 1 Sid. 101; Rex *v.* Wilson, 8 T. R. 357, 4 Rev. Rep. 694.

Under 8 Hen. VI, it was necessary to allege that the prosecutor was seized of an estate of freehold. People *v.* Nelson, 13 Johns. (N. Y.) 340; Vanpool *v.* Com., 13 Pa. St. 391; Reg. *v.* Taylor, 7 Mod. 123; 1 Hawkins P. C. c. 64, § 38.

Under 21 Jac. I, it was necessary to allege that the prosecutor was possessed of such an estate as to bring him within the provisions of that act. State *v.* Butler, 1 N. C. 414; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625; 1 Hawkins P. C. c. 64, § 38.

There need not be an express allegation that the prosecutor was seized of a freehold estate if there are other words in the indictment which sufficiently show that such was the case. Fitch *v.* Rempublicam, 3 Yeates (Pa.) 49.

Stating that the prosecutor was disseized necessarily implies a previous seizin (Com. *v.* Fitch, 4 Dall. (Pa.) 212, 1 L. ed. 805; 1 Hawkins P. C. 148), but the disseizin must be positively alleged (Rex *v.* Dormy, 1 Ld. Raym. 610).

Where the persons disseized are joint owners it must be so stated in the indictment. Respublica *v.* Sloane, 2 Yeates (Pa.) 229.

The indictment need not state when the prosecutor was seized of the premises. Respublica *v.* Shryber, 1 Dall. (Pa.) 68, 1 L. ed. 40.

An allegation that the prosecutor was seized is sufficient without specifying of what estate. Rex *v.* Dillon, 2 Chit. 314, 18 E. C. L. 653.

6. Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17.

7. Vanpool *v.* Com., 13 Pa. St. 391; McNair *v.* Rempublicam, 4 Yeates (Pa.) 326; State *v.* Walker, 2 Brev. (S. C.) 255; 1 Hawkins P. C. c. 64, § 37. See also Adams *v.* Horr, 6 D. C. 45.

sheriff to restore the injured party to possession;[8] but certainty to a reasonable extent is all that is necessary;[9] and it seems that some less degree of certainty may be permitted in cases where the prosecution is merely to punish defendant than where the prosecutor is also seeking to be restored to possession.[10] A material variance between description of the property as laid in the indictment and the evidence is fatal.[11]

(v) *Conclusion.* In jurisdictions where statutes making forcible entry and detainer indictable are in force, it is proper that the indictment should conclude against the form of the statute.[12] An indictment concluding against the form of the statute may be sustained if the facts charged constitute an offense either by statute or at common law,[13] and even where there is no statute these words may be regarded as surplusage and the indictment sustained if it is otherwise good as a common-law indictment.[14]

(vi) *Joinder of Offenses.* Both forcible entry and forcible detainer, although they may constitute different offenses, may be charged together in a single count of the indictment.[15] If the indictment contains charges that are distinct and grow out of different transactions the court will compel the state to elect or will quash,[16] but where it appears that the charges in the several counts relate to the same transaction, varied and modified merely to meet the probable proofs, the court cannot either quash or compel an election,[17] and if either count is good the indictment should be sustained as to that count.[18]

b. Evidence[19] — (i) *Admissibility* — (a) *In General.* Evidence of an assault upon the person of the party in possession is admissible to show the character of the entry,[20] and evidence that the party making the entry remained in possession is admissible to show that he made his entry complete, although he is not charged with a forcible detainer.[21] Tax receipts, while not alone evidence of actual possession, are admissible to strengthen other evidence of actual possession.[22]

8. Vanpool *v.* Com., 13 Pa. St. 391; State *v.* Walker, 2 Brev. (S. C.) 255; 1 Hawkins P. C. c. 64, § 38.

9. Torrence *v.* Com., 9 Pa. St. 184.

Descriptions held to be sufficient are as follows: "All that piece of land, containing twenty-six acres and one hundred and fifty perches, and the allowance of six per cent., it being a part of a large tract known as the Peter Jackson improvement, adjoining lands of Daniel Henderson on the east." Vanpool *v.* Com., 13 Pa. St. 391, 393. "About eight acres of meadow land, being in the west half of the northeast fourth of the northeast quarter of section 15, township 61, range 13, Knox county, Missouri." State *v.* Vansickle, 57 Mo. App. 611, 612. "A certain close of two acres of arable land, situate in Shirley township, in the county aforesaid, being part of a large tract of land adjoining lands of Andrew Dimond and Henry Hoshell." Dean *v.* Com., 3 Serg. & R. (Pa.) 418. "A certain tavern-stand, with the appurtenance, including about five acres of land adjacent thereto, situate at the Mount Pleasant and Union cross-roads, in E. township, A. county." Torrence *v.* Com., 9 Pa. St. 184.

A description which would be sufficient in ejectment has been held to be sufficient in forcible entry and detainer (Vanpool *v.* Com., 13 Pa. St. 391; Dean *v.* Com., 3 Serg. & R. (Pa.) 418), but it has also been held that there must be at least that degree of certainty (McNair *v.* Rempublicam, 4 Yeates (Pa.) 326).

The word "dwelling-house" embraces the land on which it stands and an allegation of its forcible detention sufficiently charges the detention of the land also. Endsley *v.* State, 76 Ind. 467.

10. See Peelle *v.* State, 161 Ind. 378, 68 N. E. 682, holding that in a case where restitution is not demanded the description "at the county of Starke and State of Indiana, . . . a certain dwelling-house and lands in said county situate" is sufficient.

11. Ball *v.* State, 26 Ind. 155.

12. U. S. *v.* Griffin, 6 D. C. 53.

13. Com. *v.* Shattuck, 4 Cush. (Mass.) 141.

14. Com. *v.* Shattuck, 4 Cush. (Mass.) 141; Cruiser *v.* State, 18 N. J. L. 206.

15. Lewis *v.* State, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255; Blackwell *v.* State, 74 Ga. 816.

16. See State *v.* Eason, 70 N. C. 88.

17. State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841; State *v.* Eason, 70 N. C. 88.

18. State *v.* Eason, 70 N. C. 88.

19. See, generally, Criminal Law, 12 Cyc. 379 *et seq.*

20. Higgins *v.* State, 7 Ind. 549, holding that such evidence cannot be excluded on the ground that the assault and battery is also a distinct offense.

21. Lissner *v.* State, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389.

22. Quinn *v.* Com., 7 Pa. Cas. 417, 11 Atl. 531.

Evidence that a civil action for the same offense is pending is irrevelant and inadmissible.[23]

(B) *Evidence of Title.* As the title to the premises is not in issue and cannot be tried, evidence of title is inadmissible,[24] and cannot be introduced either to justify the force[25] or to avoid restitution.[26]

(II) *Weight and Sufficiency.* To authorize a conviction for a forcible entry or a forcible detainer the evidence must establish each and every essential element of the offense charged,[27] and must establish the offense as alleged in the indictment.[28] The evidence must be sufficient to establish defendant's guilt beyond a reasonable doubt.[29]

c. Trial[30] — (I) *Questions of Law and Fact.* The question of possession is a mixed one of law and fact.[31] Whether, if there be evidence of possession, that evidence is true, is a question of fact for the jury; but whether, admitting the evidence to be true, the possession shown is of such a character as will be protected against a forcible entry is a question of law for the court.[32] In a prosecution for forcible detainer based upon alleged threats of violence, it is a question for the jury whether such was the import of the language used.[33]

(II) *Title Not Involved.* A prosecution for forcible entry and detainer does not involve any question of title,[34] and cannot be maintained or used as a means of trying title to the premises where the alleged force was committed,[35] or as a means of collateral attack upon proceedings in a civil action concerning the same.[36]

(III) *Plea of Former Acquittal.* A former acquittal may be pleaded in bar of a prosecution for forcible entry and detainer where it appears that it was the same transaction, but the plea is not available to one jointly indicted for the same offense in the second indictment who was not a party to the former prosecution.[37]

(IV) *Verdict.* Where both forcible entry and forcible detainer are charged in the same indictment, defendant may be acquitted of one and convicted of the other.[38] Where both offenses are charged in the same indictment if one be defectively set out but the other properly, defendant may be convicted of the one offense which is properly charged,[39] and in such cases a general verdict of guilty

23. Lewis *v.* State, 105 Ga. 657, 21 S. E. 576.

24. *Indiana.*— Higgins *v.* State, 7 Ind. 549.
New York.— People *v.* Rickert, 8 Cow. 226.
Pennsylvania.— Quinn *v.* Com., 7 Pa. Cas. 417, 11 Atl. 531.
South Carolina.— State *v.* Bennett, Harp. 503, 18 Am. Rep. 663.
England.— Reg. *v.* Childs, 2 Cox C. C. 102.
Canada.— Reg. *v.* Cokely, 13 U. C. Q. B. 521.

25. People *v.* Leonard, 11 Johns. (N. Y.) 504; Black *v.* State, 3 Yerg. (Tenn.) 588.

26. Respublica *v.* Shryber, 1 Dall. (Pa.) 68, 1 L. ed. 40. But see People *v.* Nelson, 13 Johns. (N. Y.) 340.

27. Com. *v.* Housknecht, 1 Kulp (Pa.) 367.

28. State *v.* Smith, 24 N. C. 127, holding that an indictment charging a forcible entry into the field of the prosecutrix, she being then and there present, cannot be sustained by evidence that defendant entered peaceably into the field and from there threw stones against the house, the owner being within the house.

29. Com. *v.* Housknecht, 1 Kulp (Pa.) 367.

30. See Criminal Law, 12 Cyc. 504 *et seq.*

31. People *v.* Fields, 52 Barb. (N. Y.) 198.

32. State *v.* Leach, Add. (Pa.) 352.

33. People *v.* Fields, 52 Barb. (N. Y.) 198; People *v.* Rickert, 8 Cow. (N. Y.) 226.

34. Vess *v.* State, 93 Ind. 211; People *v.* Leonard, 11 Johns. (N. Y.) 504; People *v.* Rickert, 8 Cow. (N. Y.) 226; Quinn *v.* Com., 7 Pa. Cas. 417, 11 Atl. 531; State *v.* Robison, Add. (Pa.) 14; Com. *v.* Kuntz, 2 Pa. L. J. Rep. 375, 4 Pa. L. J. 163; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663.

35. Peelle *v.* State, 161 Ind. 378, 68 N. E. 682; Vess *v.* State, 93 Ind. 211; People *v.* Godfrey, 1 Hall (N. Y.) 240; People *v.* Rikert, 8 Cow. (N. Y.) 226; State *v.* Thompson, 130 N. C. 680, 41 N. E. 486; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663.

36. Vess *v.* State, 93 Ind. 211.

37. State *v.* Lawson, 123 N. C. 740, 31 S. E. 667, 68 Am. St. Rep. 844.

38. Strong *v.* State, 105 Ind. 1, 4 N. E. 293; People *v.* Godfrey, 1 Hall (N. Y.) 240; People *v.* Rickert, 8 Cow. (N. Y.) 226; People *v.* Anthony, 4 Johns. (N. Y.) 198; Com. *v.* Rogers, 1 Serg. & R. (Pa.) 124.

39. Com. *v.* Rogers, 1 Serg. & R. (Pa.) 124.

will be sustained as given on the good count.[40] Where both counts are properly charged a general verdict of guilty is a verdict of guilty on both counts unless defendant demands a separate verdict on each count,[41] but if the evidence supports only one of such counts a general verdict of guilty cannot be sustained.[42]

d. Fine.[43] Where, on an appeal from proceedings before a justice, the case is tried *de novo* in a higher court, that court may impose any fine within the limits of the statute, although greater in amount than the justice had jurisdiction to impose.[44]

e. Damages and Costs. It is provided by the English statute[45] that if defendant pleads three years' possession in bar of restitution and the plea is decided against him he shall pay such costs and damages as the judges or justices shall assess,[46] but in no other case can damages be awarded in a criminal proceeding.[47] Where defendant is acquitted on the merits, costs cannot be taxed against the prosecutor unless the prosecution was frivolous or malicious.[48]

f. Restitution — (I) *RIGHT TO RESTITUTION.* In the absence of statute there can be no restitution of possession in a criminal proceeding for forcible entry and detainer,[49] and the early English statutes of 5 and 15 Rich. II contained no such provision.[50] This was remedied by two later statutes[51] which provided that the injured party might be restored to possession.[52] These statutes were construed as providing for a restitution only where the prosecutor was seized of an estate of freehold,[53] but by a later statute[54] the right was extended to tenants of lesser estates.[55] These statutes are in effect in some of the states.[56]

(II) *PROCEEDINGS TO PROCURE RESTITUTION.* Under the statutes authorizing an award of restitution a justice cannot proceed summarily, but only by way of an inquest and with the intervention of a jury,[57] and defendant must be given notice of the inquest and an opportunity to be heard.[58] Defendant may traverse the force found by the jury, and if he does so restitution cannot be awarded until the traverse is tried and found against him by another jury.[59] On

40. See State *v.* Ward, 46 N. C. 290.

41. State *v.* Robbins, 123 N. C. 730, 31 S. E. 669, 68 Am. St. Rep. 841.

42. State *v.* Ward, 46 N. C. 290.

43. See FINES, *ante*, p. 543.

44. Peelle *v.* State, 161 Ind. 378, 68 N. E. 683.

45. St. 31 Eliz. c. 11.

46. Com. *v.* Stoever, 1 Serg. & R. (Pa.) 480; 1 Hawkins P. C. c. 64, § 14. See also Dillon *v.* State, 4 Hayw. (Tenn.) 271.

47. Com. *v.* Stoever, 1 Serg. & R. (Pa.) 480.

In New York under the statute which is said to be substantially a transcript of 31 Eliz. c. 11, it has been held that no damages can be assessed other than those incurred in the nature of costs in the trial of the traverse. Fitch *v.* People, 16 Johns. 141.

48. Dillon *v.* State, 4 Hayw. (Tenn.) 271.

49. State *v.* Walker, 5 Sneed (Tenn.) 259.

At common law there could be no restitution of possession in a criminal proceeding. State *v.* Morgan, 59 N. H. 322.

50. Blythe *v.* Wright, 2 Ashm. (Pa.) 428; 1 Hawkins P. C. c. 64, § 9.

51. St. 8 Henry VI, c. 9; 31 Eliz. c. 11.

52. Roth *v.* State, 89 Md. 524, 43 Atl. 769; State *v.* Morgan, 59 N. H. 322; Vanpool *v.* Com., 13 Pa. St. 391; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; State *v.* Speirin, 1 Brev. (S. C.) 119; State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663; 1 Hawkins P. C. c. 64, §§ 10, 14.

53. Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625; 1 Hawkins P. C. c. 64, § 15.

54. St. 21 Jac. I, c. 15.

55. State *v.* Morgan, 59 N. H. 322; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; State *v.* Speirin, 1 Brev. (S. C.) 119; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625; 1 Hawkins P. C. c. 64, § 16.

56. Blythe *v.* Wright, 2 Ashm. (Pa.) 428; Com. *v.* Toram, 2 Pars. Eq. Cas. (Pa.) 411, 3 Pa. L. J. Rep. 346, 5 Pa. L. J. 296; State *v.* Dayley, 2 Nott & M. (S. C.) 121; State *v.* Speirin, 1 Brev. (S. C.) 119.

In New York these statutes were copied literally and reënacted. People *v.* Anthony, 4 Johns. 198.

57. Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

In Maryland under the code a jury is dispensed with and the justice may proceed alone. Roth *v.* State, 89 Md. 524, 43 Atl. 769.

58. State *v.* Stokes, 1 N. J. L. 392; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; Rex *v.* Wilson, 3 A. & E. 817, 30 E. C. L. 371; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625; 1 Hawkins P. C. c. 64, § 59.

59. Com. *v.* Stoever, 1 Serg. & R. (Pa.) 480; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; State *v.* Dayley, 2 Nott & M. (S. C.) 121;

an indictment there can be no award of restitution after conviction unless there was an allegation in the indictment as to the prosecutor's estate or interest in the premises,[60] and where the proceedings are before a justice there must be a finding in the inquest as to such estate or interest.[61] Under a writ of restitution the sheriff is only authorized to dispossess defendant against whom there has been judgment and sentence and those claiming under him, and cannot dispossess persons against whom an indictment is still pending.[62] An appeal from a conviction of forcible entry and detainer does not suspend the right of restitution.[63]

(III) *EFFECT OF THREE YEARS' POSSESSION.* The statutes providing for restitution excepted from their operation cases where defendant had been in quiet possession for three years prior to the indictment.[64] Where such possession is pleaded there can be no award of restitution until this question is tried.[65] The plea, however, is available only in bar of the award of restitution and not in bar of the prosecution.[66]

g. Re-Restitution. Where on appeal or certiorari an inquest or indictment is quashed the court may award a re-restitution to the party dispossessed by the prior proceedings,[67] but re-restitution cannot be demanded as a matter of right, and the court will not grant it unless it appears that the party asking it has a right to the possession.[68]

IV. CIVIL LIABILITY.

A. Nature and Elements — 1. IN GENERAL. While forcible entry and detainer as a civil proceeding is based upon and has by modern legislation been evolved from the English forcible entry and detainer which was a criminal proceeding merely,[69] yet the present statutes often contain such modification and additions[70] as to make it impossible to state any rules or principles which are

State *v.* Speirin, 1 Brev. (S. C.) 119; 1 Hawkins P. C. c. 64, § 57.

The traverse need not be in writing but may be made orally. People *v.* Anthony, 4 Johns. (N. Y.) 198.

60. State *v.* Butler, 1 N. C. 414; Com. *v.* Brown, 138 Pa. St. 447, 21 Atl. 17; Com. *v.* Knarr, 135 Pa. St. 35, 19 Atl. 805; Vanpool *v.* Com., 13 Pa. St. 391; Torrence *v.* Com., 9 Pa. St. 184; Burd *v.* Com., 6 Serg. & R. (Pa.) 252.

Necessary allegations see *supra*, III, D, 2, a, (III).

61. Reg. *v.* Bowser, 8 Dowl. P. C. 128, 1 W. W. & H. 345; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625.

62. Com. *v.* Gable, 1 Pennyp. (Pa.) 26.

Where there is a collusive transfer of possession from defendant to some third person after judgment the officer having the writ of restitution may eject such person and put the prosecutor in possession. State *v.* Gilbert, 2 Bay (S. C.) 355.

63. State *v.* Bennett, Harp. (S. C.) 503, 18 Am. Dec. 663.

64. State *v.* Morgan, 59 N. H. 322; State *v.* Speirin, 1 Brev. (S. C.) 119; 1 Hawkins P. C. c. 64, §§ 13, 14.

65. Com. *v.* Stoever, 1 Serg. & R. (Pa.) 480; State *v.* Speirin, 1 Brev. (S. C.) 119; 1 Hawkins P. C. c. 64, § 55.

66. State *v.* Covenhoven, 6 N. J. L. 396; Com. *v.* Robison, Add. (Pa.) 14.

67. People *v.* Shaw, 1 Cai. (N. Y.) 125; State *v.* Speirin, 1 Brev. (S. C.) 119; Rex *v.* Wilson, 3 A. & E. 817, 30 E. C. L. 371; Rex *v.* McKreavy, 5 U. C. Q. B. O. S. 625; 1 Hawkins P. C. c. 64, § 62.

68. Blythe *v.* Wright, 2 Ashm. (Pa.) 428; 1 Hawkins P. C. c. 64, § 64.

69. See the following cases:

Arkansas.— Thorn *v.* Reed, 1 Ark. 480.

California.— Dickinson *v.* Maguire, 9 Cal. 46.

Illinois.— French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 24 L. R. A. 717.

Maryland.— Clark *v.* Vannort, 78 Md. 216, 27 Atl. 982; Manning *v.* Brown, 47 Md. 506.

Vermont.— Dustin *v.* Cowdry, 23 Vt. 631.

The common law affords no civil remedy against a person who having a right enters forcibly, but the injured party must appeal to the statutory action of forcible entry and detainer. Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484. See also Krevet *v.* Meyer, 24 Mo. 107; Taunton *v.* Costar, 7 T. R. 431, 4 Rev. Rep. 481.

70. See the following cases:

Alabama.— Childress *v.* McGehee, Minor 131.

Arkansas.— Cannon *v.* Davies, 33 Ark. 56.

California.— Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Hemstreet *v.* Wassum, 49 Cal. 273; Norblett *v.* Farwell, 38 Cal. 155; Mecham *v.* McKay, 37 Cal. 154; McMinn *v.* Bliss, 31 Cal. 122; Owen *v.* Doty, 27 Cal. 502.

Colorado.— Brandenburg *v.* Heithman, 7 Colo. 323, 3 Pac. 577.

Florida.— Liddon *v.* Hodnett, 22 Fla. 271; Robinson *v.* Dupray, 14 Fla. 261.

Illinois.— Thomasson *v.* Wilson, 146 Ill.

always applicable. Generally speaking forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of plaintiff and the use of force by defendant.[71] Except in the very few instances

384, 34 N. E. 432 [*affirming* 46 Ill. App. 398]; Pensonean *v.* Heinrich, 54 Ill. 271; Jackson *v.* Warren, 32 Ill. 331; Robinson *v.* Crummer, 10 Ill. 218; Whitaker *v.* Gautier, 8 Ill. 443; Atkinson *v.* Lester, 2 Ill. 407.

Indiana.— Tibbetts *v.* O'Connell, 66 Ind. 171.

Maine.— Boston, etc., R. Co. *v.* Durgin, 67 Me. 263.

Massachusetts.— Page *v.* Dwight, 170 Mass. 29, 48 N. E. 850, 39 L. R. A. 418; Lawton *v.* Savage, 136 Mass. 111; Walker *v.* Thayer, 113 Mass. 36; Walker *v.* Sharpe, 14 Allen 43; Howard *v.* Merriam, 5 Cush. 563.

Montana.— Kennedy *v.* Dickie, 27 Mont. 70, 69 Pac. 672; Wells *v.* Darby, 13 Mont. 504, 34 Pac. 1092; Boardman *v.* Thompson, 3 Mont. 387.

New York.— O'Donnell *v.* McIntyre, 16 Abb. N. Cas. 84, construing a statute providing a summary remedy against squatters or intruders.

Ohio.— Yager *v.* Wilber, 8 Ohio 398.

Oklahoma.— Hackney *v.* McKee, 12 Okla. 401, 75 Pac. 535; Cope *v.* Braden, 11 Okla. 291, 67 Pac. 475.

Pennsylvania.— Kircher *v.* Gilmore, 7 Pa. Dist. 708.

Virginia.— Allen *v.* Gibson, 4 Rand. 468.

Washington.— Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556.

Statutes strictly construed.—Walker *v.* McGill, 40 Ark. 38; Dortch *v.* Robinson, 31 Ark. 296; McGuire *v.* Cook, 13 Ark. 448; Sumner *v.* Spencer, 9 Ark. 441; Thompson *v.* Smith, 28 Cal. 527; House *v.* Keiser, 8 Cal. 499; Leach *v.* Ritzke, 86 Ill. App. 483; Owen *v.* Monroe County Alliance, 77 Miss. 500, 27 So. 383.

71. *Alabama.*— Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Abrams *v.* Watson, 59 Ala. 524; Hamilton *v.* Adams, 15 Ala. 596, 50 Am. Dec. 150.

Colorado.— Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58.

Georgia.— Stuckey *v.* Carleton, 66 Ga. 215.

Illinois.— Jamison *v.* Graham, 57 Ill. 94; Robinson *v.* Crummer, 10 Ill. 218. See also Illinois, etc., R., etc., Co. *v.* Cobb, 68 Ill. 53.

Indiana.— Archey *v.* Knight, 61 Ind. 311.

Indian Territory.— Brown *v.* Woolsey, 2 Indian Terr. 329, 51 S. W. 965.

Iowa.— Settle *v.* Henson, Morr. 111.

Kentucky.— Hunt *v.* Wilson, 14 B. Mon. 44; Wall *v.* Nelson, 3 Litt. 395; Cuyler *v.* Estis, 64 S. W. 673, 23 Ky. L. Rep. 1063.

Minnesota.— Lobdell *v.* Keene, 85 Minn. 90, 88 N. W. 426.

Mississippi.— See Spears *v.* McKay, Walk. 265.

Missouri.— Keyser *v.* Rawlings, 22 Mo. 126; Stewart *v.* Miles, (App. 1904) 79 S. W. 988; Sitton *v.* Sapp, 62 Mo. App. 197; Meriwether *v.* Howe, 48 Mo. App. 148; Craig *v.* Donnelly, 28 Mo. App. 342. See also Eads *v.* Wooldridge, 27 Mo. 251.

Montana.— Kennedy *v.* Dickie, 27 Mont. 70, 69 Pac. 672; Boardman *v.* Thompson, 3 Mont. 387; Parks *v.* Barkley, 1 Mont. 514.

Nebraska.— Tarpenning *v.* King, 60 Nebr. 213, 82 N. W. 621.

Nevada.— Lachman *v.* Barnett, 18 Nev. 269, 3 Pac. 38.

New Mexico.— Romero *v.* Gozales, 3 N. M. 35, 1 Pac. 171.

New York.— Becher *v.* New York, 102 N. Y. App. Div. 269, 92 N. Y. Suppl. 460; Carter *v.* Newbold, 7 How. Pr. 166.

Ohio.— See Smith *v.* Findlay, 2 Handy 69, 12 Ohio Dec. (Reprint) 334.

Oregon.— Taylor *v.* Scott, 10 Oreg. 483.

Utah.— Brooks *v.* Warren, 5 Utah 118, 13 Pac. 175.

Virginia.— Mears *v.* Dexter, 86 Va. 828, 11 S. E. 538; Davis *v.* Mayo, 82 Va. 97.

Washington.— Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556.

West Virginia.— Duff *v.* Good, 24 W. Va. 682; Moore *v.* Douglass, 14 W. Va. 708.

United States.— Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

Distinguished from trespass.— Forcible entry may be maintained where trespass cannot; as for instance, against the owner of the land; who may defend himself against an action of trespass by the plea of *liberum tenementum*. The owner of the land, having the right of entry, will not commit a trespass by entering, although with force, unless he also commits a breach of the peace. The law will not give damages against him in an action of trespass *quare clausum fregit*, but will compel him to restore the possession in an action of forcible entry. Olinger *v.* Shepherd, 12 Gratt. (Va.) 462.

Not a matter of contract.—"An action of forcible entry and detainer, in no sense of the term, can be said to be a matter of contract. The idea of a contract, so far from entering into, or forming any part of, the action, is expressly excluded by the form and substance of the action. The party's right to recover is based upon the ground of wrong and injury done or accompanied with violence or force. It is an unlawful seizure, on the part of the defendant, of the possession of the freehold, or a wrongful detention of that possession." McLain *v.* Taylor, 4 Ark. 147, 149.

Motive for expulsion immaterial.— One in peaceable possession, if forcibly expelled from

in which there is special statutory authority for adjudicating title,[72] title is not involved and cannot be inquired into,[73] and generally the right to possession as

realty, may maintain forcible entry, and the motives of the party causing the expulsion are immaterial. Baker *v.* Hays, 28 Ill. 387.

Good faith of defendant not involved.— It has been decided that under the statutes of California and Washington regulating forcible entry and detainer the question of good or bad faith on the part of defendant in making an entry on another's possession is not to be inquired into as it does not affect his liability (Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Lasserot *v.* Gamble, (Cal. 1896) 46 Pac. 917; Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196; Voll *v.* Hollis, 60 Cal. 569; Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556. *Compare* Carteri *v.* Roberts, 140 Cal. 164, 73 Pac. 818), but under an earlier California statute it was held otherwise (Phenix Mill, etc., Co. *v.* Lawrence, 55 Cal. 143; Dennis *v.* Wood, 48 Cal. 361; Powell *v.* Lane, 45 Cal. 677; Townsend *v.* Little, 45 Cal. 673; Conroy *v.* Duane, 45 Cal. 597; Shelby *v.* Houston, 38 Cal. 410; Thompson *v.* Smith, 28 Cal. 521).

72. See Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25; Cushing *v.* Danforth, 76 Me. 114; Abbott *v.* Norton, 53 Me. 158.

73. *Alabama.*— Pugh *v.* Davis, 103 Ala. 316, 18 So. 8, 49 Am. St. Rep. 30; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Espella *v.* Gottschalk, 95 Ala. 254, 10 So. 755; Nicrosi *v.* Phillipi, 91 Ala. [illegible]9, 8 So. 561; Brown *v.* Beatty, 76 Ala. 250; Welden *v.* Schlosser, 74 Ala. 355; Houston *v.* Farris, 71 Ala. 570; Wray *v.* Taylor, 56 Ala. 188; Milner *v.* Wilson, 45 Ala. 478; Townsend *v.* Van Aspen, 38 Ala. 572; Dumas *v.* Hunter, 25 Ala. 711; Clark *v.* Stringfellow, 4 Ala. 353; Cunningham *v.* Green, 3 Ala. 127; Lecatt *v.* Stewart, 2 Stew. 474.

Arkansas.—Anderson *v.* Mills, 40 Ark. 192; Frank *v.* Hedrick, 18 Ark. 304; Bradley *v.* Hume, 18 Ark. 284; McGuire *v.* Cook, 13 Ark. 448.

California.— Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Yosemite Valley, etc., Grove *v.* Barnard, 98 Cal. 199, 32 Pac. 982; Baker *v.* Dickson, 62 Cal. 19; Voll *v.* Hollis, 60 Cal. 569; Conroy *v.* Duane, 45 Cal. 597; Mecham *v.* McKay, 37 Cal. 154; Mitchell *v.* Davis, 20 Cal. 45; McCauley *v.* Weller, 12 Cal. 500; Henderson *v.* Grewell, 8 Cal. 581. See also Ladd *v.* Stevenson, 1 Cal. 18. *Compare* Warburton *v.* Doble, 38 Cal. 619; Henderson *v.* Allen, 23 Cal. 519.

Colorado.— Kelly *v.* E. F. Hallack Lumber etc., Co., 22 Colo. 221, 43 Pac. 1003; Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Carico *v.* Kling, 11 Colo. App. 349, 53 Pac. 390; Kelley *v.* Andrew, 3 Colo. App. 122, 32 Pac. 175. See also Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

Connecticut.— Bliss *v.* Bange, 6 Conn. 78.

Florida.— Walls *v.* Endel, 17 Fla. 478; Mountain *v.* Roche, 13 Fla. 581.

Georgia.— Stuckey *v.* Carleton, 66 Ga. 215.

Illinois.— Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371 [*affirming* 84 Ill. App. 19]; Palmer *v.* Frank, 169 Ill. 90, 48 N. E. 426 [*affirming* 69 Ill. App. 472]; Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243 [*affirming* 45 Ill. App. 492]; Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432 [*affirming* 46 Ill. App. 398]; Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786 [*affirming* 34 Ill. App. 540]; Kratz *v.* Buck, 111 Ill. 40; Kepley *v.* Luke, 106 Ill. 395; Doty *v.* Burdick, 83 Ill. 473; Allen *v.* Tobias, 77 Ill. 169; Huftalin *v.* Misner, 70 Ill. 205; Smith *v.* Hollenback, 51 Ill. 223; Smith *v.* Hoag, 45 Ill. 250; McCartney *v.* McMullen, 38 Ill. 237; Shoudy *v.* School Directors, 32 Ill. 290; Brooks *v.* Bruin, 18 Ill. 539; Fitzgerald *v.* Quinn, 58 Ill. App. 598 [*reversed* on other grounds in 165 Ill. 354, 46 N. E. 287]; Pederson *v.* Cline, 27 Ill. App. 249; Knight *v.* Knight, 3 Ill. App. 206; Wheelan *v.* Fish, 2 Ill. App. 447.

Indiana.— Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271; Archey *v.* Knight, 61 Ind. 311.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Iowa.— Hall *v.* Jackson, 77 Iowa 201, 41 N. W. 620; Emsley *v.* Bennett, 37 Iowa 15; Stephens *v.* McCloy, 36 Iowa 659; Beezley *v.* Burgett, 15 Iowa 192; Bosworth *v.* Farrenholtz, 4 Greene 440; Lorimier *v.* Lewis, Morr. 253, 39 Am. Dec. 461; Settle *v.* Henson, Morr. 111.

Kansas.— Wideman *v.* Taylor, 63 Kan. 884, 65 Pac. 664; Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42; McClain *v.* Jones, 60 Kan. 639, 57 Pac. 500; Lyman *v.* Todd, 43 Kan. 70, 22 Pac. 1003; Conaway *v.* Gore, 27 Kan. 122.

Kentucky.— Taylor *v.* White, 1 T. B. Mon. 37; Brumfield *v.* Reynolds, 4 Bibb 388; Young *v.* Milward, 109 Ky. 123, 58 S. W. 592, 593, 22 Ky. L. Rep. 615, 627; Robinson *v.* Marshall, 78 S. W. 904, 25 Ky. L. Rep. 1785; Kirby *v.* Smith, 73 S. W. 749, 24 Ky. L. Rep. 2175; Cuyler *v.* Estis, 64 S. W. 637, 23 Ky. L. Rep. 1063; Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547.

Massachusetts.— Boyle *v.* Boyle, 121 Mass. 85; Pike *v.* Witt, 104 Mass. 595.

Michigan.— Foss *v.* Van Driele, 47 Mich. 201, 10 N. W. 199. See also Mulder *v.* Corlett, 54 Mich. 80, 19 N. W. 756.

Mississippi.— Cummings *v.* Kilpatrick, 23 Miss. 106; Loring *v.* Willis, 4 How. 383.

Missouri.— Miller *v.* Tillmann, 61 Mo. 316; Silvey *v.* Summer, 61 Mo. 253; Edwards *v.* Cary, 60 Mo. 572; May *v.* Luckett, 54 Mo. 437; Dilworth *v.* Fee, 52 Mo. 130; Lass *v.* Eislehen, 50 Mo. 122; Van Eman *v.* Walker, 47 Mo. 169; Harvie *v.* Turner, 46 Mo. 444; Smith *v.* Meyers, 45 Mo. 434; McCartney *v.* Alderson, 45 Mo. 35; Finney *v.* Cist, 34 Mo. 303, 84 Am. Dec. 82; Bell *v.* Cowan, 34 Mo. 251; Beeler *v.* Cardwell, 33 Mo. 84; Gibson *v.* Tong, 29 Mo. 133; Spalding *v.* Mayhall, 27 Mo. 377; Krevet *v.* Meyer, 24 Mo. 107; Keyser *v.* Rawlings, 22 Mo. 126; Warren *v.*

distinguished from the fact of actual possession is not in issue.[74] The matter of

Ritter, 11 Mo. 354; Stone *v.* Malot, 7 Mo. 158; Stewart *v.* Miles, (App. 1904) 79 S. W. 988; Rosenberger *v.* Wabash R. Co., 96 Mo. App. 504, 70 S. W. 395; Graham *v.* Conway, 91 Mo. App. 391; Berry *v.* Fortney, 81 Mo. App. 284; Tolbert *v.* Hendrick, 77 Mo. App. 272; Balch *v.* Myers, 65 Mo. App. 422; Pierce *v.* Rollins, 60 Mo. App. 497; Meriwether *v.* Howe, 48 Mo. App. 148; Gooch *v.* Hollan, 30 Mo. App. 450; Craig *v.* Donnelly, 28 Mo. App. 342; Krank *v.* Nichols, 6 Mo. App. 72.

Montana.—Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687; Boardman *v.* Thompson, 3 Mont. 387; Parks *v.* Barkley, 1 Mont. 514.

Nebraska.—Comstock *v.* Cole, 28 Nebr. 470, 44 N. W. 487; Malloy *v.* Malloy, 24 Nebr. 766, 40 N. W. 285; Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939; Worthington *v.* Woods, 22 Nebr. 230, 34 N. W. 368; Grohousky *v.* Long, 20 Nebr. 362, 30 N. W. 257; Dawson *v.* Dawson, 17 Nebr. 671, 24 N. W. 339; Streeter *v.* Rolph, 13 Nebr. 388, 14 N. W. 166; Pettit *v.* Black, 13 Nebr. 142, 12 N. W. 841; Leach *v.* Sutphen, 11 Nebr. 527, 10 N. W. 409; Myers *v.* Koenig, 5 Nebr. 419.

Nevada.— Lachman *v.* Barnett, 18 Nev. 269, 3 Pac. 38.

New Jersey.— Drake *v.* Newton, 23 N. J. L. 111; Mercereau *v.* Bergen, 15 N. J. L. 244, 29 Am. Dec. 684; Youngs *v.* Freeman, 15 N. J. L. 30; Allen *v.* Smith, 12 N. J. L. 199; Barnes *v.* Nicholson, 2 N. J. L. 326.

New Mexico.— Romero *v.* Gozales, 3 N. M. 35, 1 Pac. 171.

New York.— New York City Baptist Mission Soc. *v.* Potter, 20 Misc. 191, 44 N. Y. Suppl. 1051; Central Park Baptist Church *v.* Patterson, 9 Misc. 452, 30 N. Y. Suppl. 248, 24 N. Y. Civ. Proc. 79; O'Donnell *v.* McIntyre, 2 N. Y. St. 689; Kelly *v.* Sheehy, 60 How. Pr. 439; Carter *v.* Newbold, 7 How. Pr. 166.

Ohio.— See Smith *v.* Findlay, 2 Handy 70, 12 Ohio Dec. (Reprint) 334; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251; Mott *v.* Larick, 1 Ohio Dec. (Reprint) 211, 4 West. L. J. 128; Petsch *v.* Mowry, 1 Cinc. Super. Ct. 36. *Compare* Gladwell *v.* Hume, 18 Ohio Cir. Ct. 845, 9 Ohio Cir. Dec. 767.

Oklahoma.— Jones *v.* Seawell, 13 Okla. 711, 76 Pac. 154; Hackney *v.* McKee, 12 Okla. 401, 75 Pac. 535; McQuiston *v.* Walton, 12 Okla. 130, 69 Pac. 1048; Brown *v.* Hartshorn, 12 Okla. 121, 69 Pac. 1049; Dysart *v.* Enslow, 7 Okla. 386, 54 Pac. 550; Chisholm *v.* Weise, 5 Okla. 217, 47 Pac. 1086; Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337. *Compare* McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487.

Oregon.— Aiken *v.* Aiken, 12 Oreg. 203, 6 Pac. 682; Thompson *v.* Wolf, 6 Oreg. 308; Altree *v.* Moore, 1 Oreg. 350; Shortess *v.* Wirt, 1 Oreg. 90.

South Dakota.— Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Tennessee.— McGhee *v.* Grady, 12 Lea 89; Thomasson *v.* White, 6 Baxt. 148; Philips *v.* Sampson, 2 Head 429; White *v.* Suttle, 1 Swan 169; Davidson *v.* Phillips, 9 Yerg. 93, 30 Am. Dec. 393; Pettyjohn *v.* Akers, 6 Yerg. 448.

Texas.— Texas Land Co. *v.* Turman, 53 Tex. 619; Wyatt *v.* Monroe, 27 Tex. 268; Warren *v.* Kelly, 17 Tex. 544; Renfro *v.* Harris, 28 Tex. Civ. App. 58, 66 S. W. 460; Meyer *v.* O'Dell, 18 Tex. Civ. App. 210, 44 S. W. 545.

Vermont.— Dustin *v.* Cowdry, 23 Vt. 631.

Virginia.— Olinger *v.* Shepherd, 12 Gratt. 462. But see Corbett *v.* Nutt, 18 Gratt. 624.

West Virginia.— Hays *v.* Altizer, 24 W. Va. 505; Moore *v.* Douglass, 14 W. Va. 708.

Wisconsin.— Newton *v.* Leary, 64 Wis. 190, 25 N. W. 39; Winterfield *v.* Stauss, 24 Wis. 394; Gates *v.* Winslow, 1 Wis. 650; Bracken *v.* Preston, 1 Pinn. 365.

United States.— Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 31, 35.

The law forbids the forcible entry either with or without title, and it is immaterial whether the intruder is a mere trespasser or enters under a paramount title, or if he has the right to the possession, he must resort to the authority of the law to obtain it. Emerson *v.* Sturgeon, 59 Mo. 404; Dilworth *v.* Fee, 52 Mo. 130; Harris *v.* Turner, 46 Mo. 438; King *v.* St. Louis Gaslight Co., 34 Mo. 34, 84 Am. Dec. 68; Beeler *v.* Cardwell, 29 Mo. 72, 77 Am. Dec. 550; Spalding *v.* Mayhall, 27 Mo. 377; Stone *v.* Malot, 7 Mo. 158; Sitton *v.* Sapp, 62 Mo. App. 197.

Not a substitute for ejectment.— The purpose of the action of forcible entry and detainer is to give a speedy remedy to those whose possession of real property has been invaded, and not to take the place of the action of ejectment. Hodgkins *v.* Jordan, 29 Cal. 577; O'Neill *v.* Jones, 72 Minn. 446, 75 N. W. 701; Taylor *v.* Scott, 10 Oreg. 483. See also Brown *v.* Slater, 23 App. Cas. (D. C.) 51; Power *v.* Tazewells, 25 Gratt. (Va.) 786.

Effect of allegations as to title.— The question of title is not brought into such an action merely by an allegation that it is involved. Whether it is or not depends in the first instance upon the facts pleaded, and ultimately upon the evidence. Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

In Illinois, although the rule that title to land cannot be tried in an action of forcible detainer is recognized, yet to recover in such an action, under the act of Feb. 20, 1861, against one who remains in possession after his rights have been divested by judicial sale, plaintiff must show a valid judgment, execution, and deed. Johnson *v.* Bantock, 38 Ill. 111; Johnson *v.* Baker, 38 Ill. 98, 87 Am. Dec. 293.

74. *Alabama.*— Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Horsefield *v.* Adams, 10 Ala. 9.

right is foreign thereto,[75] and therefore, although one may have the title to realty and be justly entitled to the immediate possession thereof, yet if he enters by violence upon the actual possession of another who has no title or right whatever, he is liable to an action of forcible entry and detainer.[76] The right to possession may, however, be inquired into under the provisions of some of the statutes as to forcible entry and detainer and kindred actions.[77]

California.— Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Sanchez *v.* Loureyro, 46 Cal. 641; Mitchell *v.* Davis, 20 Cal. 45, 23 Cal. 381; McCauley *v.* Weller, 12 Cal. 500.

Iowa.— Cagwin *v.* Chicago, etc., R. Co., 114 Iowa 129, 86 N. W. 220; Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178; Emsley *v.* Bennett, 37 Iowa 15.

Kansas.— Conaway *v.* Gore, 27 Kan. 122.

Kentucky.— Tucker *v.* Phillips, 2 Metc. 416; Mason *v.* Bascom, 3 B. Mon. 269; Mattox *v.* Helm, 5 Litt. 185, 15 Am. Dec. 64; Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547.

Missouri.— Prewitt *v.* Burnett, 46 Mo. 372; Beeler *v.* Cardwell, 29 Mo. 72, 77 Am. Dec. 550, 33 Mo. 84; Stewart *v.* Miles, (App. 1904) 79 S. W. 988; Meriwether *v.* Howe, 48 Mo. App. 148; Craig *v.* Donnelly, 28 Mo. App. 342; Hyde *v.* Fraher, 25 Mo. App. 414.

Montana.— Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687; Boardman *v.* Thompson, 3 Mont. 387.

Nevada.— Lachman *v.* Barnett, 16 Nev. 154.

New Mexico.— Romero *v.* Gozales, 3 N. M. 35, 1 Pac. 171.

New York.— See People *v.* Field, 52 Barb. 198.

Tennessee.— Edwards *v.* Batts, 5 Yerg. 441.

Virginia.— Power *v.* Tazewells, 25 Gratt. 786. See also Fore *v.* Campbell, 83 Va. 808, 1 S. E. 180.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 31, 35.

75. Stewart *v.* Miles, (Mo. App. 1904) 79 S. W. 988; Sitton *v.* Sapp, 62 Mo. App. 197.

76. *Alabama.*—Hamilton *v.* Adams, 15 Ala. 596, 50 Am. Dec. 150.

California.— Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Canavan *v.* Gray, 64 Cal. 5, 27 Pac. 788; McCauley *v.* Weller, 12 Cal. 500.

Colorado.— Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612.

Connecticut.— Bliss *v.* Bange, 6 Conn. 78.

Florida.— Greeley *v.* Spratt, 19 Fla. 644.

Illinois.— Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Allen *v.* Eichorn, 77 Ill. 169.

Indiana.— Judy *v.* Citizen, 101 Ind. 18.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Iowa.— Emsley *v.* Bennett, 37 Iowa 15; Stephens *v.* McCloy, 36 Iowa 659.

Kansas.— Peyton *v.* Peyton, 34 Kan. 624, 9 Pac. 479; Campbell *v.* Coonradt, 22 Kan. 704.

Missouri.— Emerson *v.* Sturgeon, 59 Mo. 404; Dilworth *v.* Fee, 52 Mo. 130; Gooch *v.* Hollan, 30 Mo. App. 450.

Montana.— Parks *v.* Barkley, 1 Mont. 514.

Nebraska.— Tarpenning *v.* King, 60 Nebr. 213, 82 N. W. 621. See also Brown *v.* Feagins, 37 Nebr. 256, 55 N. W. 1048.

North Carolina.— See Moseller *v.* Deaver, 106 N. C. 494, 11 S. E. 529, 19 Am. St. Rep. 540, 8 L. R. A. 537.

Oklahoma.— Chisholm *v.* Weise, 5 Okla. 217, 47 Pac. 1086; Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

Tennessee.— Davidson *v.* Phillips, 9 Yerg. 93, 30 Am. Dec. 393.

Texas.— McRae *v.* White, (Civ. App. 1897) 42 S. W. 793.

Utah.— Marks *v.* Sullivan, 8 Utah 406, 32 Pac. 668, 20 L. R. A. 590.

Vermont.— Carpenter *v.* Barber, 44 Vt. 441; Dustin *v.* Cowdry, 23 Vt. 631.

West Virginia.— Moore *v.* Douglass, 14 W. Va. 708.

Wisconsin.— Eastman *v.* White, 3 Pinn. 180, 3 Chandl. 196.

United States.— Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

England.— Newton *v.* Harland, 9 Dowl. P. C. 16, 4 Jur. 992, 10 L. J. C. P. 11, 1 M. & G. 956, 1 Scott N. R. 474, 39 E. C. L. 1117; Beattie *v.* Mair, 10 L. R. Ir. 208.

Reason for rule.— The law forbids a forcible entry even by the person entitled to the immediate possession, for this reason among others that it necessarily tends to a breach of the peace. Brown *v.* Perry, 39 Cal. 23.

A **trespasser** may maintain this action against the owner himself. Clements *v.* Hays, 76 Ala. 280; Lorimer *v.* Lewis, Morr. (Iowa) 253, 39 Am. Dec. 461; Hunt *v.* Wilson, 14 B. Mon. (Ky.) 44; Craig *v.* Donnelly, 28 Mo. App. 342.

77. *Arkansas.*— Anderson *v.* Mills, 40 Ark. 192.

Illinois.— Roby *v.* Calumet, etc., Dock Co., 211 Ill. 173, 71 N. E. 822; Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371 [*affirming* 84 Ill. App. 19]; Thomasson *v.* Wilson, 146 Ill. 384, 34 N. E. 432 [*affirming* 46 Ill. App. 398]; Doty *v.* Burdick, 83 Ill. 473; Flocrsheim *v.* Baude, 110 Ill. App. 536; Davis *v.* Hinton, 29 Ill. App. 327.

Indiana.— Archey *v.* Knight, 61 Ind. 311.

Iowa.— Hall *v.* Jackson, 77 Iowa 201, 41 N. W. 620.

Michigan.— Hoffman *v.* Harrington, 22 Mich. 52.

Mississippi.— Spears *v.* McKay, Walk. 265.

Montana.— Kennedy *v.* Dickie, 27 Mont. 70, 69 Pac. 672.

Nebraska.— Leach *v.* Sutphen, 11 Nebr. 527, 10 N. W. 409.

Oklahoma.— Hackney *v.* McKee, 12 Okla. 401, 75 Pac. 535; Anderson *v.* Ferguson, 12

2. Possession — a. Necessity. An action of forcible entry and detainer is strictly possessory in its nature, and, unless otherwise expressly provided by statute, a person who has never been in possession of land cannot maintain the action to obtain possession. If he has any interest in the land, he must seek to establish it in some other form of action.[78] Generally speaking plaintiff in order to maintain this form of action must allege and prove that he was in peaceful and exclusive possession of the premises in controversy, and that he has been forcibly ousted or that possession was peaceably obtained and forcibly withheld by defendant.[79]

Okla. 307, 71 Pac. 225; Steele *v.* Noell, 12 Okla. 137, 69 Pac. 1077; Burns *v.* Noell, 12 Okla. 133, 69 Pac. 1076; McQuiston *v.* Walton, 12 Okla. 130, 69 Pac. 1048; Brown *v.* Hartshorn, 12 Okla. 121, 69 Pac. 1049; Cope *v.* Braden, 11 Okla. 291, 67 Pac. 475; Dysart *v.* Enslow, 7 Okla. 386, 54 Pac. 550; McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487; Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337.

Texas.— Texas Land Co. *v.* Turman, 53 Tex. 619; McRae *v.* White, (Civ. App. 1897) 42 S. W. 793.

Washington.—Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556.

In actions of unlawful detainer, the right to possession is involved.

Alabama.— Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Houston *v.* Farris, 71 Ala. 570.

Colorado.— Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411; Kelly *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 221, 43 Pac. 1003.

Florida.— Mountain *v.* Roche, 13 Fla. 581.

Kansas.— Kellogg *v.* Lewis, 28 Kan. 535.

Michigan.— McGuffie *v.* Carter, 42 Mich. 497, 4 N. W. 211.

Mississippi.— Cummings *v.* Kilpatrick, 23 Miss. 106.

Missouri.— Ferguson *v.* Lewis, 27 Mo. 249; Reed *v.* Bell, 26 Mo. 216.

Virginia.— Corbett *v.* Nutt, 18 Gratt. 624.

West Virginia.—Hays *v.* Altizer, 24 W. Va. 505.

78. *Alabama.*— Womack *v.* Powers, 50 Ala. 5.

Arkansas.— Necklace *v.* West, 33 Ark. 682.

Illinois.— Dudley *v.* Lee, 39 Ill. 339; Aurner *v.* Pierce, 106 Ill. App. 206; Kimmel *v.* Frazer, 49 Ill. App. 462.

Kentucky.— Lewis *v.* Stith, 2 Litt. 294.

Massachusetts.— Williams *v.* McGaffigan, 132 Mass. 122.

Mississippi.— Owen *v.* Monroe County Alliance, 77 Miss. 500, 27 So. 383.

Missouri.— Wood *v.* Dalton, 26 Mo. 581; Garrison *v.* Savignac, 25 Mo. 47, 67 Am. Dec. 448; Holland *v.* Reed, 11 Mo. 605; Hatfield *v.* Wallace, 7 Mo. 112; Sexton *v.* Hull, 45 Mo. App. 339.

Nebraska.— Haller *v.* Blaco, 14 Nebr. 195, 15 N. W. 348.

Tennessee.— Clay *v.* Sloan, 104 Tenn. 401, 58 S. W. 229.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 38.

A person whose occupancy of land is through his servants and who has never been in possession cannot maintain an action within the statute for an unlawful entry on the ground that it was made during his temporary absence. Hammel *v.* Zobelein, 51 Cal. 532.

Rule under special statutory provisions.— In Kansas, by express provision of the statute, one entitled to immediate possession, although he has never been in actual possession, may maintain an action for forcible entry and detainer against an occupant without color of title. Price *v.* Olds, 9 Kan. 66. In Illinois also it is provided by statute that a grantee of a grantor in possession may maintain this action to oust the grantor or his tenant when delivery of possession is refused. Muller *v.* Balke, 167 Ill. 150, 47 N. E. 355 [*affirming* 68 Ill. App. 587].

79. *Alabama.*— O'Donohue *v.* Holmes, 107 Ala. 489, 18 So. 263.

California.— Adams *v.* Helbing, 107 Cal. 298, 40 Pac. 422; Saulque *v.* Durralde, (1893) 33 Pac. 1090; McCormack *v.* Sheridan, 77 Cal. 253, 19 Pac. 419; Alemany *v.* Ortega, (1884) 4 Pac. 13; Laird *v.* Waterford, 50 Cal. 315; Conroy *v.* Duane, 45 Cal. 597; Mitchell *v.* Davis, 20 Cal. 45; House *v.* Keiser, 8 Cal. 499; Treat *v.* Stuart, 5 Cal. 113.

Connecticut.— Stiles *v.* Homer, 21 Conn. 507; Phelps *v.* Baldwin, 17 Conn. 209.

Illinois.— Fitzgerald *v.* Quinn, 165 Ill. 354, 46 N. E. 287 [*reversing* 58 Ill. App. 598]; Hoffman *v.* Reichert, 147 Ill. 274, 35 N. E. 527, 37 Am. St. Rep. 219; Dunstedter *v.* Dunstedter, 77 Ill. 580; Bussen *v.* Dickson, 97 Ill. App. 310.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Kentucky.— Quertemus *v.* Breckenridge, 5 Dana 125; Prewitt *v.* Durham, 5 T. B. Mon. 17; Moore *v.* Masie, 3 Litt. 296; McCracken *v.* Woodfork, 3 A. K. Marsh. 524; Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547; Cuyler *v.* Estis, 64 S. W. 673, 23 Ky. L. Rep. 1063; Louisville, etc., R. Co. *v.* Sparks, 14 Ky. L. Rep. 398.

Mississippi.— Owen *v.* Monroe County Alliance, 77 Miss. 500, 27 So. 383.

Missouri.— Armstrong *v.* Hendrick, 67 Mo. 542; De Graw *v.* Prior, 53 Mo. 313; May *v.* Luckett, 48 Mo. 472; Bell *v.* Cowan, 34 Mo. 251; Greenleaf *v.* Weakley, 39 Mo. App. 391; Keene *v.* Schnedler, 9 Mo. App. 597.

Montana.— Milligan *v.* Cuff, 14 Mont. 366, 37 Pac. 455.

New Jersey.— Funkhauser *v.* Colloty, 67 N. J. L. 132, 50 Atl. 580; Mairs *v.* Sparks, 5 N. J. L. 513.

b. Sufficiency — (i) *Actual or Constructive Possession.* Plaintiff must show that he was in actual peaceable possession of the premises prior to and at the time of defendant's alleged forcible entry. Mere constructive possession such as the law in many cases imputes to the owner of the legal title is not sufficient.[80] In some cases it is intimated and in others it is expressly declared that constructive possession may be sufficient; but an examination of these cases reveals that there was actual *pedis possessio* of some part of the premises in controversy under claim and color of title to the whole, which strictly and technically speaking is actual possession of the whole whether inclosed or not, or so much thereof at least as is not in the actual adverse possession of another.[81] But where the occupant is a mere intruder or trespasser, his possession for the purposes of this action must be confined to the land actually occupied. It is going a great way

New York.— Tischler *v.* Knick, 26 Misc. 738, 57 N. Y. Suppl. 3; Cain *v.* Flood, 14 N. Y. Suppl. 776, 21 N. Y. Civ. Proc. 116; O'Donnell *v.* McIntyre, 16 Abb. N. Cas. 84; Carter *v.* Newbold, 7 How. Pr. 167.

Tennessee.— Clay *v.* Sloan, 104 Tenn. 401, 58 S. W. 229; Kuhn *v.* Feiser, 3 Head 82; Beaty *v.* Jones, 1 Coldw. 482; Lane *v.* Marshall, Mart. & Y. 255.

West Virginia.— Raleigh County *v.* Ellison, 8 W. Va. 308.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 37.

80. *Alabama.*— Chessen *v.* Harrelson, 119 Ala. 435, 24 So. 716; Clements *v.* Hays, 76 Ala. 280; Brady *v.* Huff, 75 Ala. 80; Houston *v.* Farris, 71 Ala. 570; Womack *v.* Powers, 50 Ala. 5; Russell *v.* Desplous, 29 Ala. 308; Dumas *v.* Hunter, 25 Ala. 711; Singleton *v.* Finley, 1 Port. 144; Childress *v.* McGehee, Minor 131.

Arkansas.— Frank *v.* Hedrick, 18 Ark. 304; Bradley *v.* Hume, 18 Ark. 284; McGuire *v.* Cook, 13 Ark. 448.

California.— Conroy *v.* Duane, 45 Cal. 597; Barlow *v.* Burns, 40 Cal. 351; Warburton *v.* Doble, 38 Cal. 619; Cummins *v.* Scott, 23 Cal. 526; Mitchell *v.* Davis, 20 Cal. 45; House *v.* Keiser, 8 Cal. 499; Treat *v.* Stuart, 5 Cal. 133.

Colorado.— Wier *v.* Bradford, 1 Colo. 14.

Illinois.— Mann *v.* Brady, 67 Ill. 95; Thompson *v.* Sornberger, 59 Ill. 326; Spurck *v.* Forsyth, 40 Ill. 438; McCartney *v.* McMullen, 38 Ill. 237.

Kentucky.— Pogue *v.* McKee, 3 A. K. Marsh. 127; Stewart *v.* Wilson, 1 A. K. Marsh. 255; Cuyler *v.* Estis, 64 S. W. 673, 23 Ky. L. Rep. 1063; Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547.

Minnesota.— O'Neill *v.* Jones, 72 Minn. 446, 75 N. W. 701.

Missouri.— Moore *v.* Agee, 7 Mo. 289; Rochester *v.* Gate City Min. Co., 86 Mo. App. 447; Collier *v.* Green, 83 Mo. App. 166; Ford *v.* Fellows, 34 Mo. App. 630; Nelson *v.* Nelson. 30 Mo. App. 184.

Montana.— Milligan *v.* Cuff, 14 Mont. 366, 36 Pac. 455.

South Dakota.— Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Texas.— Gulledge *v.* White, 73 Tex. 498, 11 S. W. 527; Richardson *v.* Westmoreland, (App. 1892) 19 S. W. 432.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 37.

81. *Alabama.*— Bailey *v.* Blacksher Co., (1904) 37 So. 827; Black *v.* Tennessee Coal, etc., Co., 93 Ala. 109, 9 So. 537; Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483; Bohannon *v.* State, 73 Ala. 47; Stovall *v.* Fowler, 72 Ala. 77.

Colorado.— Jenkins *v.* Tynon, 1 Colo. App. 133, 27 Pac. 893.

Illinois.— Hardisty *v.* Glenn, 32 Ill. 62; Brooks *v.* Bruin, 18 Ill. 539.

Iowa.— Langworthy *v.* Myers, 4 Iowa 18.

Kentucky.— Boyce *v.* Blake, 2 Dana 127; Vanhorne *v.* Tilley, 1 T. B. Mon. 50; Wall *v.* Nelson, 3 Litt. 395; Howard *v.* Whitaker, 61 S. W. 355, 22 Ky. L. Rep. 1775.

Mississippi.— Seals *v.* Williams, 80 Miss. 234, 31 So. 707, 92 Am. St. Rep. 601.

Missouri.— Powell *v.* Davis, 54 Mo. 315; Prewitt *v.* Burnett, 46 Mo. 372; McCartney *v.* Alderson, 45 Mo. 35; Kennedy *v.* Prueitt, 24 Mo. App. 414.

Tennessee.— Mansfield *v.* Northcut, (Sup. 1904) 80 S. W. 437.

Virginia.— Fore *v.* Campbell, 82 Va. 808, 1 S. E. 108; Olinger *v.* Shepherd, 12 Gratt. 462.

West Virginia.— Duff *v.* Good, 24 W. Va. 682; Mitchell *v.* Carder, 21 W. Va. 277; Moore *v.* Douglass, 14 W. Va. 708.

Facts constituting actual or constructive possession.— Where plaintiff, in an action of forcible entry for the front of a town lot, proved that he had a small house in the rear of it, it was held to be sufficient to warrant the jury in finding an actual possession of the whole lot. O'Callaghan *v.* Booth, 6 Cal. 63. An entry on a tract of land, with an intention to take possession of the whole, by a person having a legal right thus to enter, will give a constructive possession of at least so much of the entire tract as was not actually inclosed by the person on whose possession the entry was made. Stith *v.* Jones, 7 Dana (Ky.) 433. An entry upon a tract of land while it is vacant, but designated by a marked boundary by a party who claims and intends to take possession of the tract, gives him a constructive possession in fact of the whole tract. Stith *v.* Jones, 7 Dana (Ky.) 433. Where one purchases and has his lines run, and takes possession only to the lines, although an error is made in not running the

to give him any standing at all in court, and no constructive advantage should be given him.[82]

(II) *ACTUAL RESIDENCE ON PREMISES NOT NECESSARY.* Actual *pedis possessio* or residence on the premises at the time of the forcible entry complained of is not essential to the maintenance of the action.[83] The possession to which this summary remedy applies is not confined to the *pedis possessio* or actual inclosure of the occupant. It applies to any possession which is sufficient to sustain an action of trespass,[84] and may apply in a case where trespass will not lie, as against the owner of land who may defend against an action of trespass by the plea of *liberum tenementum*.[85] The owner is not bound to be continually on his land either in person or by agent, or to station his servants there to keep intruders away. An entry coupled with such acts of ownership as clearly indicate his intention to take and hold permanent possession will be sufficient to enable him to maintain this form of action to repel an unlawful intrusion.[86]

(III) *INCLOSURE AND OTHER ACTS OF DOMINION.* A sufficient inclosure is of

lines far enough to include the quantity conveyed, he cannot, without a subsequent entry, maintain forcible entry against one who enters between the lines. Hoskins *v.* Cox, 2 B. Mon. (Ky.) 306.

Interference of grants.— A person claiming under a junior grant, interfering with an elder grant, cannot, by settling or entering upon his land outside of the interference, gain the possession of that which is included within the elder grant. Pogue *v.* McKee, 3 A. K. Marsh. (Ky.) 127. Where grants of land interfere, the entry of a party under the elder grant, with intent of taking possession of the whole grant, will give him a constructive possession of any land covered by the junior grant not in actual adverse possession. Wilson *v.* Stivers, 4 Dana (Ky.) 634. If one having the elder legal title enters upon land with the intention of taking possession to the boundary of his deed, he is in possession to that extent, although one be in possession outside of the interference. Grughler *v.* Wheeler, 12 B. Mon. (Ky.) 183.

Where a tract of land lies in two counties, there must be an entry in each county to give a possession of the whole. Consequently an entry upon land in one county and the occasional use of timber from the same survey extending into another county will not give such possession as to authorize the maintaining of a writ of forcible entry and detainer. Roberts *v.* Long, 12 B. Mon. (Ky.) 194.

82. *California.*— McCormick *v.* Sheridan, 77 Cal. 253, 19 Pac. 419; Ross *v.* Roadhouse, 36 Cal. 580; Cummins *v.* Scott, 20 Cal. 83; Preston *v.* Kehoe, 15 Cal. 315.

Illinois.— Whitaker *v.* Gautier, 8 Ill. 443.

Kentucky.— Stith *v.* Jones, 7 Dana 433.

Missouri.— Bradley *v.* West, 60 Mo. 33; Harris *v.* Turner, 46 Mo. 438; Packwood *v.* Thorp, 8 Mo. 636; Kincaid *v.* Logue, 7 Mo. 166; Kennedy *v.* Prueitt, 24 Mo. App. 414.

Texas.— Heironimus *v.* Duncan, 11 Tex. Civ. App. 610, 33 S. W. 287.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 7.

83. *California.*— Porter *v.* Murray, (1886) 12 Pac. 425.

Illinois.— Muller *v.* Balke, 167 Ill. 150, 47 N. E. 355; Coleman *v.* Billings, 89 Ill. 183; Spurck *v.* Forsyth, 40 Ill. 438.

Missouri.— Walser *v.* Graham, 60 Mo. App. 323.

New York.— People *v.* Field, 52 Barb. 198.

Tennessee.— Hopkins *v.* Calloway, 3 Sneed 11.

West Virginia.— Chancey *v.* Smith, 25 W. Va. 404, 52 Am. Rep. 217.

Whether the person in possession is present or absent at the time of the entry is immaterial. Ely *v.* Yore, 71 Cal. 130, 11 Pac. 868.

84. Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462; Duff *v.* Good, 24 W. Va. 682.

85. Clements *v.* Hays, 76 Ala. 280; Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133; Hyatt *v.* Wood, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462.

86. *Alabama.*— Ladd *v.* Dubroca, 45 Ala. 421.

California.— Lasserot *v.* Gamble, (1896) 46 Pac. 917; Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196; Gray *v.* Collins, 42 Cal. 152; Wilson *v.* Shackelford, 41 Cal. 630; Shelby *v.* Houston, 38 Cal. 410; Hussey *v.* McDermott, 23 Cal. 413.

Colorado.— Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58.

Iowa.— Langworthy *v.* Myers, 4 Iowa 18.

Kentucky.— Haley *v.* Palmer, 9 Dana 320.

Mississippi.— Wilson *v.* Pugh, 32 Miss. 196.

Missouri.— Bradley *v.* West, 60 Mo. 59; Miller *v.* Northup, 49 Mo. 397; Prewitt *v.* Burnett, 46 Mo. 372; McCartney *v.* Alderson, 45 Mo. 35; Bartlett *v.* Daper, 23 Mo. 407; Warren *v.* Ritter, 11 Mo. 354; Hoffstetter *v.* Blattner, 8 Mo. 276; Keen *v.* Schweigler, 70 Mo. App. 409; Hinniger *v.* Trax, 67 Mo. App. 521; Meriwether *v.* Howe, 48 Mo. App. 148; Willis *v.* Stevens, 24 Mo. App. 494.

Nebraska.— Galligher *v.* Connell, 35 Nebr. 517, 53 N. W. 383.

Oregon.— Taylor *v.* Scott, 10 Oreg. 483.

Texas.— Lewis *v.* Yoakum, (Civ. App. 1895) 32 S. W. 237.

itself a means of taking and holding actual possession of land without residence, cultivation, or other acts of dominion over it.[87] But fences are not the only means of taking possession. There may be an actual possession without fences or inclosures of any kind.[88] Such acts of ownership as are usually exercised by owners over land on which they do not reside are sufficient to warrant a finding of actual possession.[89]

West Virginia.— Mitchell *v.* Carder, 21 W. Va. 277.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 43 *et seq.*

Possession a mere sham.— The fact that plaintiff's possession was not taken in good faith for the purpose of occupation, but was a mere sham and pretense, will defeat an action of forcible entry. De Graw *v.* Prior, 60 Mo. 56; Buck *v.* Endicott, 103 Mo. App. 248, 77 S. W. 85.

87. Goodrich *v.* Van Landigham, 46 Cal. 601; Allen *v.* Tobias, 77 Ill. 169; King *v.* St. Louis Gaslight Co., 34 Mo. 34, 84 Am. Dec. 68; Winn *v.* McKennon, (Tex. Civ. App. 1897) 39 S. W. 965.

A natural barrier, such as a deep stream, a precipitous cliff, the shore of the ocean, and the like, will serve as a portion of an inclosure of land and render a fence unnecessary in order to constitute possession. Conroy *v.* Duane, 45 Cal. 597. To the same effect see Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371 [*affirming* 84 Ill. App. 19].

Removal of fence soon after erection.— On or about the day defendant began to use lots that had been vacant a long time as a stone yard, plaintiffs erected about them a fence, which was within forty-eight hours removed and another fence built by defendants. It was held that the building of the fence by plaintiffs was not such a possession as would support an action for forcible entry and detainer. Dyer *v.* Reitz, 14 Mo. App. 45.

88. McCormick *v.* Sheridan, 77 Cal. 253, 19 Pac. 419; Goodrich *v.* Van Landigham, 46 Cal. 601; Hassett *v.* Johnson, 48 Ill. 68; Geoghegan *v.* Turner, 82 S. W. 244, 26 Ky. L. Rep. 537; Howard *v.* Whitaker, 61 S. W. 355, 22 Ky. L. Rep. 1775. To constitute the peaceable and actual possession of agricultural land, it is not absolutely necessary that the land be inclosed, but if not inclosed, it must appear that plaintiff has exercised exclusive dominion and control over that portion of land of which defendant took possession. McCormick *v.* Sheridan, *supra.* Plaintiff may show an actual possession without the lot's being inclosed with a fence, as if another person by his permission was using the ground at the time of the alleged unlawful entry in piling wood and lumber on it in such a manner as would naturally apprise the public that he was in the actual clear and visible possession thereof, this would be the possession of plaintiff and would entitle him to maintain the action. Hassett *v.* Johnson, *supra.* It does not require actual *pedis possessio* in all cases to support the action of forcible entry and detainer. The actual possession may exist by proof of something short of an actual residence on the land or inclosing it by a fence, as in case of a wood lot uninclosed but used as an adjunct to a farm from which the latter is supplied with timber, wood, and rails. Pearson *v.* Herr, 53 Ill. 144.

A common inclosure of a number of fields owned by different parties and pastured in common will not destroy such an actual possession of either field as to defeat the action. Wylie *v.* Waddell, 52 Mo. App. 266.

89. Hubbard *v.* Kiddo, 87 Ill. 578; Langworthy *v.* Myers, 4 Iowa 18; Power *v.* Tazewells, 25 Gratt. (Va.) 786.

Illustrations of rule.— The possession by plaintiff of a lot immediately adjoining the lot on which he lived, and cultivated by him, and occupied by his stable, was held to be sufficient to enable him to maintain an action of forcible entry and detainer, although the exterior lines of the lot were not substantially fenced. Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589. Where the land is used in the same manner that owners of lands of a like character in the neighborhood commonly use them, the fact that it is not inclosed is immaterial. Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196. One in the possession of land using it for pasture is entitled to protection against intruders the same as though he resided upon the land, and any entry in his absence and against his will is regarded as forcible and in violation of the statute. Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371 [*affirming* 84 Ill. App. 19]. One who has gone into peaceable occupancy of land as a tenant, repaired fences, plowed, sown a crop, and nailed up doors and windows of the house, thereby exercising the usual acts of dominion and control, is in actual possession and may maintain unlawful detainer against an intruder, although he lives on an adjoining tract of land. Scott *v.* Allenbaugh, 50 Mo. App. 130. A survey by a claimant of a lot of land, the staking off of the corners and putting up of boards with the inscription "keep out" and piling lumber upon it, and the grading of it for building purposes, is such a possession of it as will enable him to maintain an action of forcible entry and detainer against an adverse claimant who suddenly interrupts the possession. St. Louis Agricultural, etc., Assoc. *v.* Reinecke, 21 Mo. App. 478.

Payment of taxes.— Mere payment of taxes does not show actual possession of the premises taxed. McCartney *v.* McMullen, 38 Ill. 237; Miller *v.* Northup, 49 Mo. 397. See also McCartney *v.* Alderson, 45 Mo. 35.

Cutting timber.— The mere entry upon land and cutting timber is not of itself sufficient possession to sustain the action of forcible

(IV) *POSSESSION WITHOUT RIGHT.* A bare possession without right, if unlawfully invaded by force, will be protected and restored,[90] even against the owner or lessee of the premises who is legally entitled to possession, if plaintiff was in actual possession at the time of the forcible ouster,[91] and it is no defense that his own possession originated in force.[92] Any peaceable possession is a legal possesssion as against a wrong-doer who forcibly ejects the occupant.[93]

(V) *SCRAMBLING OR INTERRUPTED POSSESSION.* The action for forcible entry and detainer cannot be maintained on a mere scrambling or interrupted possession. Plaintiff's prior possession must have been actual, peaceable, and exclusive.[94] It is very well settled that a mere trespasser upon land cannot

entry and detainer (Wilson *v.* Stivers, 4 Dana (Ky.) 634; Humphrey *v.* Jones, 3 T. B. Mon. (Ky.) 261; Powell *v.* Davis, 54 Mo. 215; Bell *v.* Cowan, 34 Mo. 251. See also Chessen *v.* Harrelson, 119 Ala. 435, 24 So. 716); but in connection with other circumstances, it may form a very material length in the chain of evidence (Powell *v.* Davis, *supra*).

Stock ranging over uninclosed lands is not evidence of such a possession of any specific portion of such lands in the owner of the stock as will enable him to maintain this action. Buel *v.* Frazier, 38 Cal. 693.

Plowing small portion of land.— In an action of forcible entry and detainer, proof that plaintiff entered upon the land and plowed a few furrows across a portion of it does not make out such a case of actual possession on his part as to warrant a verdict in his favor. Something more is necessary showing an intention to possess, accompanied by acts indicative of that purpose. Edwards *v.* Cary, 60 Mo. 572.

90. *Arkansas.*— Logan *v.* Lee, 53 Ark. 94, 13 S. W. 422; Johnson *v.* West, 41 Ark. 535; McGuire *v.* Cook, 13 Ark. 448.

Florida.— Greeley *v.* Spratt, 19 Fla. 644.

Illinois.— Pratt *v.* Stone, 10 Ill. App. 633.

Iowa.— Emsley *v.* Bennett, 37 Iowa 15.

Kentucky.— Chiles *v.* Stephens, 3 A. K. Marsh. 340.

Missouri.— Harris *v.* Turner, 46 Mo. 438; King *v.* St. Louis Gaslight Co., 34 Mo. 34, 81 Am. Dec. 68; Wamsganz *v.* Wolff, 86 Mo. App. 205; Crain *v.* Murry, 76 Mo. App. 548.

New York.— People *v.* Fields, 1 Lans. 222; People *v.* Carter, 29 Barb. 308; Cain *v.* Flood, 14 N. Y. Suppl. 776, 21 N. Y. Civ. Proc. 116 [*affirmed* on opinion below in 138 N. Y. 639, 34 N. E. 512]; Carter *v.* Newbold, 7 How. Pr. 166.

The fact that the land in controversy is a part of the public domain is no defense. Cunningham *v.* Green, 3 Ala. 127; Pettijohn *v.* Akers, 6 Yerg. (Tenn.) 448; Olinger *v.* Shepherd, 12 Gratt. (Va.) 462.

91. *California.*— Brown *v.* Perry, 38 Cal. 23.

Kansas.— Peyton *v.* Peyton, 34 Kan. 624, 9 Pac. 479; Burdette *v.* Corgan, 27 Kan. 275; Conaway *v.* Gore, 27 Kan. 122; Campbell *v.* Coonradt, 22 Kan. 704.

Missouri.— Wamsganz *v.* Wolff, 86 Mo. App. 205.

Nebraska.— Brown *v.* Feagins, 37 Nebr. 256, 55 N. W. 1048.

West Virginia.— Mitchell *v.* Carder, 21 W. Va. 277.

United States.— Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

92. Greeley *v.* Spratt, 19 Fla. 644; Cain *v.* Flood, 14 N. Y. Suppl. 776, 21 N. Y. Civ. Proc. 116 [*affirmed* in 138 N. Y. 639, 34 N. E. 512].

Duration of possession.— No time is fixed by law during which plaintiff's actual and peaceable possession must have continued. Cain *v.* Flood, 14 N. Y. Suppl. 776, 21 N. Y. Civ. Proc. 116 [*affirmed* in 138 N. Y. 639, 34 N. E. 512].

93. *Arkansas.*— Fowler *v.* Knight, 10 Ark. 43; Thorn *v.* Reed, 1 Ark. 480.

Kansas.— Campbell *v.* Coonradt, 22 Kan. 704.

Missouri.— Sitton *v.* Sapp, 62 Mo. App. 197.

Tennessee.— Pettyjohn *v.* Akers, 6 Yerg. 448.

Virginia.— Mears *v.* Dexter, 86 Va. 828, 11 S. E. 538; Fore *v.* Campbell, 82 Va. 808, 1 S. E. 180; Davis *v.* Mayo, 82 Va. 97; Power *v.* Tazewells, 25 Gratt. 786; Olinger *v.* Shepherd, 12 Gratt. 462.

Possession acquired by stealth.— Peaceful possession cannot be based on a nocturnal entry upon the premises used and improved at the time, and for several months previous under a claim of title with the intruder's knowledge. Newton *v.* Doyle, 38 Mich. 645.

94. *Alabama.*— Wray *v.* Taylor, 56 Ala. 188.

Arkansas.— Johnson *v.* West, 41 Ark. 535; Anderson *v.* Mills, 40 Ark. 192.

California.— Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339; Hoag *v.* Pierce, 28 Cal. 187; House *v.* Keiser, 8 Cal. 499.

Illinois.— Stevenson *v.* Morrissey, 22 Ill. App. 258.

Kansas.— Coonradt *v.* Campbell, 25 Kan. 227.

Mississippi.— Blake *v.* McCray, 65 Miss. 443, 4 So. 339; Benjamin *v.* Reach, 65 Miss. 347, 3 So. 657.

Missouri.— Keen *v.* Schweigler, 70 Mo. App. 409.

Pennsylvania.— Com. *v.* Prison Keeper, 1 Ashm. 140; Com. *v.* Conway, 1 Brewst. 509.

West Virginia.— Hays *v.* Altizer, 24 W. Va. 505.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 441.

maintain this action, although he may have been forcibly removed from the premises.[95]

(VI) *POSSESSION BY AGENT OR SERVANT.* One in possession of property by an agent or servant may maintain an action of forcible entry and detainer in his own name.[96] An agent in custody of property cannot, however, maintain the action in his own name, his possession being that of his principal.[97] But it has been held that where the owner of land permits another to occupy it and take care of it without any lease or agreement to pay rent, the occupant is a tenant at will and has such possession and interest as will enable him to maintain forcible entry and detainer in his own name.[98]

c. Abandonment. It is a good defense that plaintiff voluntarily abandoned the possession of the premises in controversy before the entry complained of. This, however, is a question of intention and not a question of time, except so far as the jury are entitled to consider lapse of time in connection with all the other facts and circumstances tending to show claim or non-claim on the part of plaintiff. It must be made to appear that he relinquished possession without any intention of returning or making further use of the premises.[99]

Where two parties are struggling for possession of unimproved lands, neither can maintain an action of forcible entry and detainer against the other, until he has acquired an actual possession which has ripened into peaceable occupation. Voll *v.* Butler, 49 Cal. 74.

Possession contested in court.— In order to maintain an action of forcible entry and detainer, actual and peaceable possession by plaintiff at the time of the entry complained of, although contested in court, is sufficient. This is not a scrambling possession, that being a struggle for possession on the land itself. Spiers *v.* Duane, 54 Cal. 176.

95. *Arkansas.*— Anderson *v.* Mills, 40 Ark. 192.

Illinois.— Cox *v.* Cunningham, 77 Ill. 545.

Indiana.— Berry *v.* Hubbard, 5 Ind. App. 401, 32 N. E. 331.

Kentucky.— Haley *v.* Palmer, 9 Dana 320.

Massachusetts.— Lawton *v.* Savage, 136 Mass. 111; Hodgkins *v.* Price, 132 Mass. 196.

Michigan.— Harrington *v.* Scott, 1 Mich. 17.

South Dakota.— Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

Utah.— Brooks *v.* Warren, 5 Utah 118, 13 Pac. 175.

Vermont.— Whittaker *v.* Perry, 38 Vt. 107.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 441.

Illustration.— Where a defendant was in the quiet and peaceful possession by his tenants of an estate and plaintiff had by force and in violation of the rights of those in possession gained a temporary foothold therein during the night from which he was ejected upon the arrival of the tenants in the morning, he had acquired no possession for the disturbance of which he was entitled to maintain the process of forcible entry. Hodgkins *v.* Price, 132 Mass. 196.

Reason for rule.— If those who are ejected by force may maintain this process to restore themselves to the possession of which they were wrongfully deprived, it would be absurd that those who have forcibly ejected them should when they are themselves ejected be able to use this process to restore themselves to a possession which they had wrongfully and forcibly gained. Lawton *v.* Savage, 136 Mass. 111.

96. *Arkansas.*— Logen *v.* Lee, 53 Ark. 94, 13 S. W. 422.

California.— Minturn *v.* Burr, 16 Cal. 107; Moore *v.* Goslin, 5 Cal. 266.

Colorado.— Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58.

Indiana.— Bell *v.* Longworth, 6 Ind. 273.

Kansas.— Burdette *v.* Corgan, 27 Kan. 275.

Kentucky.— Kercheval *v.* Ambler, 4 Dana 166.

Missouri.— De Graw *v.* Prior, 53 Mo. 313; Coolbaugh *v.* Porter, 33 Mo. App. 548.

Utah.— Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 50.

Where plaintiff's agent became tenant immediately upon taking possession for plaintiff, plaintiff may still maintain a warrant for forcible entry as to that portion not occupied by the agent as such tenant. Higginbotham *v.* Higginbotham, 10 B. Mon. (Ky.) 369.

The actual personal presence of the employer is not required to constitute possession in him. The employee's possession is that of the employer. Baker *v.* Dickson, 62 Cal. 19.

97. Mitchell *v.* Davis, 20 Cal. 45; Minturn *v.* Burr, 16 Cal. 107.

98. House *v.* Camp, 32 Ala. 541; Jones *v.* Shay, 50 Cal. 508; Emsley *v.* Bennett, 37 Iowa 15.

99. *California.*— Laird *v.* Waterford, 50 Cal. 315; Moon *v.* Rollins, 36 Cal. 333, 95 Am. Dec. 181; St. John *v.* Kidd, 26 Cal. 263; Richardson *v.* McNulty, 24 Cal. 339; Keane *v.* Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Waring *v.* Crow, 11 Cal. 366.

Illinois.— Knight *v.* Knight, 3 Ill. App. 206.

Kentucky.— McCracken *v.* Woodfork, 3 A. K. Marsh. 524.

3. Force — a. Necessity For Force — (1) *The General Rule.* Force, either actually applied or justly to be feared from the conduct of defendant, is essential to support an action for forcible entry and detainer.[1] This being true, if a person entitled to possession enters peaceably, he is not liable to this action;[2] and

Massachusetts.— Hodgkins *v.* Price, 132 Mass. 196.

Missouri.— De Graw *v.* Prior, 60 Mo. 56; Powell *v.* Davis, 54 Mo. 315; De Graw *v.* Prior, 53 Mo. 313.

Tennessee.— Hopkins *v.* Calloway, 3 Sneed 11.

West Virginia.— Mitchell *v.* Carder, 21 W. Va. 277.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 48, 49.

A mere temporary absence is not an abandonment, and the actual possession continues in the person so absent so as to enable him to maintain an action of forcible entry and detainer against those who take possession during such absence. Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196; Leroux *v.* Murdock, 51 Cal. 541; De Graw *v.* Prior, 53 Mo. 313; Lewis *v.* Yoakum, (Tex. Civ. App. 1895) 32 S. W. 237.

One's mere removal of his goods from the premises has been held not to constitute an abandonment of his possession, and if such possession be lawful, although only that of tenancy by sufferance, he may maintain an action of forcible entry against any party entering against his will. Knight *v.* Knight, 3 Ill. App. 206.

The fact that one's fence is swept away by high water does not of necessity cause him to lose his possession. If he does anything indicating his intention to hold possession it will be sufficient to give him actual possession. King *v.* St. Louis Gaslight Co., 34 Mo. 34, 81 Am. Dec. 68.

Disclaimer before entry.— A disclaimer by a tenant to persons who have made an unlawful entry on lands occupied by him will constitute a defense to an action of forcible entry and detainer brought by him. Dudley *v.* Lee, 39 Ill. 339. *Compare* Hardisty *v.* Glenn, 32 Ill. 62.

Abandonment caused by fear of violence.— Where the evidence showed that defendant was driven off premises by plaintiff, and that plaintiff afterward abandoned the same for fear of defendant's future behavior, and there was no showing that defendant ever returned to such premises, or had possession thereof when plaintiff brought suit for forcible entry and detainer, it was held that a demurrer to the evidence should have been sustained. Esch *v.* Hirning, 80 Mo. App. 570.

1. *Alabama.*— Walters *v.* Rogers, 9 Ala. 834; Botts *v.* Armstrong, 8 Port. 57.

Arkansas.— Towell *v.* Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53; Hall *v.* Trucks, 38 Ark. 257; Smith *v.* Lafferry, 27 Ark. 46; McGuire *v.* Cook, 13 Ark. 448 [*overruling* Fowler *v.* Knight, 10 Ark. 43].

California.— Buel *v.* Frazier, 38 Cal. 693; Moore *v.* Goslin, 5 Cal. 266; Frazier *v.* Hanlon, 5 Cal. 156.

Georgia.— Lott *v.* Peterson, 95 Ga. 516, 20 S. E. 275; Coker *v.* McKinney, 68 Ga. 289; Stuckey *v.* Carleton, 66 Ga. 215; Curry *v.* Hendry, 46 Ga. 631.

Indiana.— Archey *v.* Knight, 61 Ind. 311; O'Connell *v.* Gillespie, 17 Ind. 459.

Indian Territory.— Riley *v.* Catron, (1902) 69 S. W. 908.

Michigan.— Richter *v.* Cordes, 100 Mich. 278, 58 N. W. 1110; Appleton *v.* Bushkirk, 67 Mich. 407, 34 N. W. 708; Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645; Davis *v.* Ingersoll, 2 Dougl. 372; Latimer *v.* Woodward, 2 Dougl. 368.

Minnesota.— Davis *v.* Woodward, 19 Minn. 174.

Montana.— Parks *v.* Barkley, 1 Mont. 514.

Nevada.— Lachman *v.* Barnett, 18 Nev. 269, 3 Pac. 38. See also Peacock *v.* Leonard, 8 Nev. 84.

New Mexico.— Romero *v.* Gozales, 3 N. M. 35, 1 Pac. 171.

New York.— Pharis *v.* Gere, 110 N. Y. 336, 18 N. E. 135, 1 L. R. A. 270 (mere words insufficient to support action); Mullen *v.* Conyngham, 56 N. Y. Suppl. 196.

Ohio.— Yager *v.* Wilber, 8 Ohio 398.

Oregon.— Taylor *v.* Scott, 10 Oreg. 483.

England.— See Lows *v.* Telford, 1 App. Cas. 414, 13 Cox C. C. 226, 45 L. J. Exch. 613, 35 L. T. Rep. N. S. 69.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 6, 24.

Subsequent acts of force cannot convert a quiet, peaceable entry into a forcible entry. Schmidberger *v.* Bloner, 66 Hun (N. Y.) 527, 21 N. Y. Suppl. 481; Tischler *v.* Knick, 26 Misc. (N. Y.) 738, 57 N. Y. Suppl. 3.

2. *Arkansas.*— Towell *v.* Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53.

Georgia.— Clower *v.* Maynard, 112 Ga. 340, 37 S. E. 370; Harrell *v.* Holt, 76 Ga. 25.

Illinois.— Brooke *v.* O'Boyle, 27 Ill. App. 384.

Maryland.— Manning *v.* Brown, 47 Md. 506.

Michigan.— See Farmer *v.* Hunter, 45 Mich. 337, 7 N. W. 904.

New York.— Bliss *v.* Johnson, 73 N. Y. 529; Wood *v.* Phillips, 43 N. Y. 152.

Oregon.— Smith *v.* Reeder, 21 Oreg. 541, 28 Pac. 890, 15 L. R. A. 172.

Texas.— Heironimus *v.* Duncan, 11 Tex. Civ. App. 610, 33 S. W. 287.

Vermont.— Mussey *v.* Scott, 32 Vt. 82.

Rights after taking peaceable possession of part of premises.— If one who has the right to enter enters peaceably and unopposed and gains possession of a part of the premises, he may lawfully take possession of the residue if it can be done without a breach of the peace. Dyer *v.* Chick, 52 Me. 350; Mugford *v.* Richardson, 6 Allen (Mass.) 76, 83 Am. Dec. 617.

having gained possession peaceably, he may resist forcibly an attempt by the former occupant to retake possession.[3]

(II) *EXCEPTIONS TO RULE.* In some jurisdictions the rule is that to maintain forcible entry and detainer it is not necessary that actual force or violence be used in taking possession of the premises, but that any entry which is against the will of the occupant is a forcible entry;[4] in others, one is liable to an action of forcible entry and detainer who enters upon another's possession of realty, by fraud, strategy, or stealth,[5] or in the night-time, or during the temporary absence of the occupant.[6] So in one state it is sufficient to sustain the charge of forcible detainer that the person unlawfully in possession refused to vacate the premises on lawful notice so to do.[7]

b. Sufficiency of Force — (I) *IN GENERAL.* What constitutes force or personal violence sufficient to sustain this action must necessarily depend upon the terms of the statute under which a case is brought, and therefore the decisions are not entirely harmonious,[8] but the following are the general rules on the sub-

Peaceable entry and subsequent violence. — If a person who has a legal right of entry upon land which is in possession of a wrongdoer is allowed to enter peaceably through the outer door of a house upon such land, it is still illegal for him to turn out the wrongdoer with violence. Edwick *v.* Hawkes, 18 Ch. D. 199, 50 L. J. Ch. 577, 45 L. T. Rep. N. S. 168, 29 Wkly. Rep. 914.

3. Towell *v.* Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53; Marsh *v.* Bristol, 65 Mich. 378, 32 N. W. 645; Bliss *v.* Johnson, 73 N. Y. 529. See also Potter *v.* Mercer, 53 Cal. 667.

4. *Illinois.*— Hammond *v.* Doty, 184 Ill. 246, 56 N. E. 371 [*affirming* 84 Ill. App. 19]; Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243 [*affirming* 45 Ill. App. 492, and *overruling* Ft. Dearborn Lodge *v.* Klein, 115 Ill. 177, 3 N. E. 272, 56 Am. Rep. 133]; Doty *v.* Burdick, 83 Ill. 473; Smith *v.* Hoag, 45 Ill. 250; Croff *v.* Ballinger, 18 Ill. 200, 65 Am. Dec. 735; Atkinson *v.* Lester, 2 Ill. 407; Cross *v.* Campbell, 89 Ill. App. 489; Roberts *v.* McEwen, 81 Ill. App. 413; Coverdale *v.* Curry, 48 Ill. App. 213; Parrott *v.* Hodgson, 46 Ill. App. 230. See also Hoffman *v.* Reichert, 147 Ill. 274, 35 N. E. 527, 37 Am. St. Rep. 219 [*affirming* 31 Ill. App. 558]. But see Bloom *v.* Goodner, 1 Ill. 63, construing the Illinois act of 1819.

Kentucky.— In this state the rule is that one who enters upon land in the actual possession of another, without his consent, commits a forcible entry (Young *v.* Milward, 109 Ky. 123, 58 S. W. 592, 593, 22 Ky. L. Rep. 615, 627; Tucker *v.* Phillips, 2 Metc. 416; Davis *v.* Lee, 2 B. Mon. 300; Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. 38; Henry *v.* Clark, 4 Bibb 426; Brumfield *v.* Reynolds, 4 Bibb 388. See also Morris *v.* Bowles, 1 Dana 97; Sinclair *v.* Saunders, 3 J. J. Marsh. 303; Reed *v.* Rawson, 2 Litt. 189); but to constitute a forcible detainer there must be actual force with strong hand, unless the parties stand in the relation of landlord and tenant (Cammack *v.* Macy, 3 A. K. Marsh. 296).

Mississippi.— Seals *v.* Williams, 80 Miss. 234, 31 So. 707, 92 Am. St. Rep. 601; Parker *v.* Eason, 68 Miss. 290, 8 So. 844.

Missouri.— De Graw *v.* Prior, 53 Mo. 313; McCartney *v.* Auer, 50 Mo. 395; Spalding *v.* Mayhall, 27 Mo. 377; Wunsch *v.* Gretel, 26 Mo. 580; Krevet *v.* Meyer, 24 Mo. 107; Cathcart *v.* Walter, 14 Mo. 17; Warren *v.* Ritter, 11 Mo. 354; Tolbert *v.* Hendrick, 77 Mo. App. 272 (forcible entry need not be against the "expressed" will of plaintiff); Wylie *v.* Waddell, 52 Mo. App. 226; Oakes *v.* Aldridge, 46 Mo. App. 11. See also Stewart *v.* Miles, 80 Mo. App. 24; Holden Bldg., etc., Assoc. *v.* Wann, 43 Mo. App. 640.

Tennessee.— In this state it has been held that actual force is not necessary to support an action of forcible entry and detainer, but that the law implies force in every unauthorized entry upon premises of which another is in peaceable possession, and likewise in every unauthorized obstruction of peaceable possession. Cleage *v.* Hyden, 6 Heisk. 73; Gass *v.* Newman, 1 Head 136. See also Bird *v.* Fannon, 3 Head 12. But *compare* Hopkins *v.* Calloway, 3 Sneed 11; Greer *v.* Wroe, 1 Sneed 246; Farnsworth *v.* Fowler, 1 Swan 1, 55 Am. Dec. 718; White *v.* Suttle, 11 Humphr. 449; Turner *v.* Lumbrick, 1 Meigs 7; Childress *v.* Black, 9 Yerg. 317; Davidson *v.* Phillips, 9 Yerg. 93, 30 Am. Dec. 393.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 11.

5. See Emsley *v.* Bennett, 37 Iowa 15; Stephens *v.* McCloy, 36 Iowa 659; Parker *v.* Eason, 68 Miss. 290, 8 So. 844; McCorkle *v.* Yarrell, 55 Miss. 576; Torrey *v.* Berke, 11 S. D. 155, 76 N. W. 302.

6. See Carteri *v.* Roberts, 140 Cal. 164, 73 Pac. 818; Kerr *v.* O'Keefe, 138 Cal. 415, 71 Pac. 447; Randall *v.* Falkner, 41 Cal. 242; Treat *v.* Forsyth, 40 Cal. 484; Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556.

In Montana one who enters upon a mining claim in the temporary absence of the persons in possession is liable to this action. Wells *v.* Darby, 13 Mont. 504, 34 Pac. 1092.

7. Post *v.* Bohner, 23 Nebr. 257, 36 N. W. 508; Estabrook *v.* Hateroth, 22 Nebr. 281, 34 N. W. 634.

8. See the statutes of the various states. See also Mallon *v.* Moog, 121 Ala. 303, 25 So. 583 [*distinguishing* McGonegal *v.* Walker, 23 Ala. 361]; Welden *v.* Schlosser, 74 Ala. 355;

ject. Acts which constitute a mere trespass upon property will not support such an action.[9] To render an entry forcible it must be accompanied either by actual violence, or by circumstances tending to excite terror in the owner or other persons in possession, and to prevent them from maintaining their rights. There must be at least apparent violence or some unusual weapons, or the attendance of an unusual number of people; some menaces or other acts giving reasonable cause to fear that the person making the forcible entry will do some bodily harm to those in possession, if they do not give up the same.[10] The same circumstances

State Bank *v.* Taaffe, 76 Cal. 626, 18 Pac. 781; Brawley *v.* Risdon Iron Works, 38 Cal. 676; McCauley *v.* Weller, 12 Cal. 500; Ainsworth *v.* Barry, 35 Wis. 136.

9. *California.*— Castro *v.* Tewksbury, 69 Cal. 562, 11 Pac. 339; Merrill *v.* Forbes, 23 Cal. 379; Frazier *v.* Hanlon, 5 Cal. 156.

Connecticut.— Gray *v.* Finch, 23 Conn. 495.

Indiana.— Boxley *v.* Collins, 4 Blackf. 320.

Massachusetts.— Saunders *v.* Robinson, 5 Metc. 343.

New Jersey.— Berry *v.* Williams, 21 N. J. L. 423; Butts *v.* Voorhees, 13 N. J. L. 13, 22 Am. Dec. 489.

New York.— Wood *v.* Phillips, 43 N. Y. 152; Vallauri *v.* Loftus, 26 Misc. 760, 56 N. Y. Suppl. 1066; Tischler *v.* Knick, 26 Misc. 738, 57 N. Y. Suppl. 3; Willard *v.* Warren, 17 Wend. 257; Dudley *v.* Chanfrau, 2 Edm. Sel. Cas. 128.

Oregon.— Smith *v.* Reeder, 21 Oreg. 541, 28 Pac. 890, 15 L. R. A. 172.

Vermont.— Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

Wisconsin.— Jarvis *v.* Hamilton, 16 Wis. 574; Ferrall *v.* Lamar, 1 Wis. 8.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 7, 15.

Entry for purpose of cutting timber or grass.— An entry on land merely to cut timber (Rouse *v.* Dean, 9 Mo. 301. See also Grughler *v.* Wheeler, 12 B. Mon. (Ky.) 183), or to cut and take away the grass thereon (Merrill *v.* Forbes, 23 Cal. 379), does not constitute forcible entry and detainer.

10. *California.*—McMinn *v.* Bliss, 31 Cal. 122; Polack *v.* McGrath, 25 Cal. 54.

Colorado.— Goad *v.* Heckler, (App. 1904) 76 Pac. 542.

Florida.— Livingston *v.* Webster, 26 Fla. 325, 8 So. 442.

Georgia.— Griffin *v.* Griffin, 116 Ga. 754, 42 S. E. 1005; Brown *v.* McJunkin, 99 Ga. 91, 24 S. E. 855.

Indiana.— Bell *v.* Longworth, 6 Ind. 273.

Massachusetts.— Saunders *v.* Robinson, 5 Metc. 343.

Michigan.— Hoffman *v.* Harrington, 22 Mich. 52 [*explaining* Seitz *v.* Miles, 16 Mich. 456].

New Jersey.— Hendrickson *v.* Hendrickson, 12 N. J. L. 202.

New York.— Wood *v.* Phillips, 43 N. Y. 152; Willard *v.* Warren, 17 Wend. 257.

Oregon.— Smith *v.* Reeder, 21 Oreg. 541, 28 Pac. 890, 15 L. R. A. 172.

Vermont.— Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

Virginia.— See Pauley *v.* Chapman, 2 Rob. 235.

West Virginia.— Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," §§ 6, 25.

Illustrations.— A person accompanied by several others went upon land in the possession of another, and against his remonstrances proceeded to build a fence; and when the occupant placed himself over the post-holes, with intent to prevent the construction of the fence, laid violent hands upon him and forcibly removed him, it was held that this was a forcible entry. Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 989. One who with armed men enters upon land inclosed with a fence and in the possession of another, and commences the erection of a house, and refuses to deliver up peaceable possession on demand, but makes a show of force to retain it, is guilty of forcible entry and detainer. Watson *v.* Whitney, 23 Cal. 375.

Breaking into a dwelling or other building. — "The breaking into a dwelling house occupied by a person or a family, being of itself calculated to excite terror or the fear of personal violence, may" constitute a forcible entry (Shaw *v.* Hoffman, 25 Mich. 162. See also Scarlett *v.* Lamarque, 5 Cal. 63); but, unless by reason of special statutory provisions (Mallon *v.* Moog, 121 Ala. 303, 25 So. 583; Brawley *v.* Risdon Iron Works, 38 Cal. 676; Mason *v.* Powell, 38 N. J. L. 576; Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93, 30 Am. Dec. 393), it seems that one who breaks and enters into a dwelling-house which is even temporarily unoccupied is not liable (Griffin *v.* Griffin, 116 Ga. 754, 42 S. E. 1005. See also Smith *v.* Reeder, 21 Oreg. 541, 28 Pac. 890, 15 L. R. A. 172; Mussey *v.* Scott, 32 Vt. 82. But see Ainsworth *v.* Barry, 35 Wis. 136). The breaking the door of a barn or outhouse, or the tearing it down and removing it, and the taking and remaining in possession does not of itself, unaccompanied with any force toward any person, actual or threatened, or without creating in any way an apprehension of personal violence, constitute forcible entry or forcible detainer. Shaw *v.* Hoffman, *supra*; Willard *v.* Warren, 17 Wend. (N. Y.) 257. See also Bertram *v.* Bonham, 12 Nova Scotia 600. But see Steinlein *v.* Halstead, 42 Wis. 422. Entry into a building by means of keys (Livingston *v.* Webster, 26 Fla. 325, 8 So. 442 [*distinguishing* Greeley *v.* Spratt, 19 Fla. 644]. See also Willard *v.* Warren, *supra*), or by drawing a latch (Pike *v.* Witt, 104 Mass. 595. See also

of force or violence that amount to a forcible entry will also amount to a forcible detainer.[11]

(II) *THREATS.* When threats which might have reasonably induced a fear of personal violence are shown to have been made the action may be maintained.[12]

(III) *BREACH OF THE PEACE.* An entry made with such force or under such circumstances as tend to produce a breach of the peace will support this action,[13] and it has been held that there should be proof of such acts of violence as amount to a breach of the peace.[14]

(IV) *ASSAULT AND BATTERY.* To constitute a forcible entry and detainer, it is not necessary that the intruder should do such acts as would constitute an assault and battery.[15]

4. ABSENCE OF LEGAL AUTHORITY. The entry for which the law affords a redress is an entry by a person of his own wrong and by his own mere act without

Willard *v.* Warren, *supra*), or through an open door or window, or through a hole in the floor (Pike *v.* Witt, *supra*), is not a forcible entry.

The use of rough and vulgar language without force or acts calculated to put the occupant in fear does not constitute a forcible entry. Brooks *v.* Warren, 5 Utah 118, 13 Pac. 175.

Such a show of force as to make resistance useless is sufficient. Minor *v.* Duncan, 54 Ga. 516.

The mere surmise of a person that if he attempts to retain possession force will be used to prevent it is not enough to show a forcible detainer, but an attempt must be made to regain possession, and either force, or threats of force, used to resist it. Hodgkins *v.* Jordan, 29 Cal. 577.

A bare refusal to deliver possession when demanded is not such force as will support an action for forcible detainer. Matlock *v.* Thompson, 18 Ala. 600.

In New York an entry is forcible within the meaning of the statute, although no breach of peace is committed, where a large number of persons are associated together in the act of entry. It is against an entry under terrorizing conditions that the statute is aimed. Central Park Baptist Church *v.* Patterson, 9 Misc. 452, 30 N. Y. Suppl. 248.

11. *Alabama.*— McKeen *v.* Nelms, 9 Ala. 507.

California.— See Frazier *v.* Hanlon, 5 Cal. 156.

Connecticut.— Gray *v.* Finch, 23 Conn. 495.

Indiana.— See Evill *v.* Conwell, 2 Blackf. 133, 18 Am. Dec. 138.

Maryland.— Clark *v.* Vannort, 78 Md. 216, 27 Atl. 982.

Massachusetts.— Benedict *v.* Hart, 1 Cush. 487.

Vermont.— See Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

Wisconsin.— Steinlein *v.* Halstead, 42 Wis. 422; Winterfield *v.* Stauss, 24 Wis. 394.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 25.

12. *Alabama.*— Ladd *v.* Dubroca, 45 Ala. 421, threats communicated to plaintiff by others.

California.— Wilbur *v.* Cherry, 39 Cal. 660; Dickinson *v.* Maguire, 9 Cal. 46; O'Callaghan *v.* Booth, 6 Cal. 63; Frazier *v.* Hanlon, 5 Cal. 156.

Indian Territory.— Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

Massachusetts.— Benedict *v.* Hart, 1 Cush. 487; Saunders *v.* Robinson, 5 Metc. 343.

New Jersey.— Hildreth *v.* Camp, 41 N. J. L. 306; Mercereau *v.* Bergen, 15 N. J. L. 244, 29 Am. Dec. 684; Butts *v.* Voorhees, 13 N. J. L. 15, 22 Am. Dec. 489.

Tennessee.— Vanhook *v.* Story, 4 Humphr. 59.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 16.

Threats need not be in boisterous terms, those most to be dreaded are sometimes conveyed in the mildest tones and with the gentlest expressions. Mercereau *v.* Bergen, 15 N. J. L. 244, 29 Am. Dec. 684.

Threats that induce fear of a forcible entry and ouster, without threats of personal violence, are sufficient to show a forcible entry under Iowa Rev. St. p. 345, § 2. Harrow *v.* Baker, 2 Greene (Iowa) 201.

Statements not amounting to threats.— A finding of forcible detainer is not justified by evidence that the person holding possession of the premises detained declared that he would remain until put off by force or law (Hodgkins *v.* Jordan, 29 Cal. 577. See also Johnson *v.* West, 41 Ark. 535; Fogarty *v.* Kelly, 24 Cal. 317; Carter *v.* Anderson, 16 Daly (N. Y.) 437, 11 N. Y. Suppl. 823); or that "no one had a right to interfere, that he could put anybody out who went to interfere with him" (Tischler *v.* Knick, 26 Misc. (N. Y.) 738, 57 N. Y. Suppl. 3); nor does a statement that any one attempting to enter by force would be arrested amount to a threat tending to create a breach of the peace (Carter *v.* Anderson, *supra*).

13. Ely *v.* Yore, 71 Cal. 130, 11 Pac. 868; Brown *v.* Perry, 39 Cal. 23; McCauley *v.* Weller, 12 Cal. 500; Turner *v.* Lumbrick, Meigs (Tenn.) 7; Childress *v.* Black, 9 Yerg. (Tenn.) 317.

14. Harrington *v.* Scott, 1 Mich. 17. But *compare* Sheehy *v.* Flaherty, 8 Mont. 365, 20 Pac. 687; Central Park Baptist Church *v.* Patterson, 9 Misc. (N. Y.) 452, 30 N. Y. Suppl. 248.

15. Boxley *v.* Collins, 4 Blackf. (Ind.) 320; Holmes *v.* Holloway, 21 Tex. 658; War-

authority of law, and therefore this action cannot be maintained when one is put in possession by an officer of the law under and by the command of a court of competent jurisdiction.[16] Neither is the officer guilty of forcible entry if he acts in good faith under a writ of restitution.[17] But if the writ be void, one who enters under it is a mere intruder or trespasser.[18] In order to justify an entry under authority of a writ, the party claiming its protection must show a judgment as well as an execution.[19] If a person is dispossessed under and by virtue of a writ of possession issued on a judgment to which he is neither a party,[20] nor a privy,[21] or under a writ of restitution for different premises,[22] or where one is put in possession under a writ of possession against the execution of which an injunction has been granted, the party thus unlawfully dispossessed may maintain forcible entry and detainer to regain possession,[23] or, having regained possession, may show in defense that he was a stranger to the proceedings under which he was turned out.[24] For a person in peaceable possession before and at the time of the commencement of a suit to which he is not a party is not affected by the decree or subject to be dispossessed under a writ of assistance.[25]

B. Nature of Property as to Which Action Lies. Forcible entry and detainer cannot be maintained for the recovery of personalty, but it is maintainable only when the possession of real property is sought.[26]

C. Persons by Whom and Against Whom Action Maintainable — 1. By Whom — a. In General. Generally speaking this action may be maintained by

ren *v.* Kelly, 17 Tex. 544; Milner *v.* Maclean, 2 C. & P. 17, 12 E. C. L. 426.

16. *California.*— Janson *v.* Brooks, 29 Cal. 214; Kennedy *v.* Hamer, 19 Cal. 374.

Indiana.— Vess *v.* State, 93 Ind. 211.

Kentucky.— Davis *v.* Lee, 2 B. Mon. 300.

Oklahoma.— Frantz *v.* Saylor, 12 Okla. 282, 71 Pac. 217.

Tennessee.— Rook *v.* Godfrey, 105 Tenn. 534, 58 S. W. 850; Scott *v.* Newsom, 4 Sneed 457.

Texas.— Wyatt *v.* Monroe, 27 Tex. 268.

17. Janson *v.* Brooks, 29 Cal. 214; Link *v.* Harrington, 23 Mo. App. 429.

18. Stark *v.* Billings, 15 Fla. 318.

19. Stark *v.* Billings, 15 Fla. 318; Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382.

20. Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Martin *v.* Patchin, 4 Mo. App. 568; Laird *v.* Winters, 27 Tex. 440, 86 Am. Dec. 620. *Contra,* Janson *v.* Brooks, 29 Cal. 214; Scott *v.* Newsom, 4 Sneed (Tenn.) 457.

21. Chiles *v.* Stephens, 1 A. K. Marsh. (Ky.) 333.

22. Hubner *v.* Feige, 90 Ill. 208.

23. Farnsworth *v.* Fowler, 1 Swan (Tenn.) 1, 55 Am. Dec. 718.

24. Morrissey *v.* Stephenson, 86 Ill. 344; Kingsbury *v.* Perkins, 15 Ill. App. 240; Kercheval *v.* Ambler, 7 J. J. Marsh. (Ky.) 626, 23 Am. Dec. 446.

25. Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382; Sea Ins. Co. *v.* Stebbins, 8 Paige (N. Y.) 565; Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33; Frelinghuysen *v.* Colden, 4 Paige (N. Y.) 204. The party in peaceable possession of real estate cannot be lawfully dispossessed by a writ issued under judgment in a forcible entry and detainer suit brought against a few of his numerous employees engaged as common laborers, but not residing on the premises. Neither can his employees of the same or a higher grade, who are not sued, be dispossessed by such writ. Chamberlain *v.* Fox Coal, etc., Co., 92 Tenn. 13, 20 S. W. 345.

26. *Illinois.*— Hoffman *v.* Reichert, 31 Ill. App. 558 [*affirmed* in 147 Ill. 274, 35 N. E. 527, 37 Am. St. Rep. 219]; Kassing *v.* Keohane, 4 Ill. App. 460.

Maine.— Field *v.* Higgins, 35 Me. 339.

Massachusetts.— See Sacket *v.* Wheaton, 17 Pick. 103.

Missouri.— Harvie *v.* Turner, 46 Mo. 444.

New York.— Becher *v.* New York, 102 N. Y. App. Div. 269, 92 N. Y. Suppl. 460.

South Carolina.— De Laine *v.* Alderman, 31 S. C. 267, 9 S. E. 950.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 3.

Lands acquired by accretion.— A person in possession of lands abutting upon a stream may maintain an action for forcible entry and detainer against one who invades his possession of lands acquired by accretion. Griffin *v.* Kirk, 47 Ill. App. 258. See also Nauman *v.* Burch, 91 Ill. App. 48.

An oyster bed may be recovered in this action. Mears *v.* Dexter, 86 Va. 828, 11 S. E. 538; Power *v.* Tazewells, 25 Gratt (Va.) 786.

A railroad may be the subject-matter of this action. Iron Mountain, etc., R. Co. *v.* Johnson, 119 U. S. 608, 7 S. Ct. 339, 30 L. ed. 504.

Franchises are incorporeal hereditaments of an intangible nature, and are not embraced within the meaning of the term "lands or tenements," in statutes as to forcible entry and detainer. Gibbs *v.* Drew, 16 Fla. 147, 26 Am. Rep. 700. See also Rees *v.* Lawless, Litt. Sel. Cas. (Ky.) 184, 12 Am. Dec. 295.

Easements are not lands or tenements, and therefore not recoverable. Nelson *v.* Nelson,

him whose peaceable and exclusive possession of the premises in controversy has been forcibly disturbed.[27]

b. Purchasers. The matter is purely statutory, but as a rule where there has been a forcible or unlawful entry upon land the right to maintain an action of forcible entry and detainer therefor vests at once in the one whose possession is invaded, and this right must be exercised during his life in his own name and does not pass to his assignee or vendee.[28] Where this is the rule the words in the statute concerning forcible entry and detainer which give a right of action to the person entitled to the possession apply to cases brought for forcible detainer simply and not to those for forcible entry and detainer.[29] Where plaintiff conveys property *pendente lite* his recovery inures to the benefit of the vendee.[30]

c. Heirs, Devisees, and Personal Representatives. Where the possession of the ancestor was such that he might have maintained forcible entry and detainer, the action may be maintained by the heirs, for the title and right of the ancestor at once descend to and vest in them.[31] They have, however, no greater right than the ancestor if living would have had.[32] So too a devisee may maintain the action, for the will when probated relates back to the death of the testator and vests his possessory rights in the devisee.[33] By statute in some jurisdictions the personal representative may maintain the action where the right to possession and control of the decedent's real estate passes to him as an incident of administration,[34] but it has been held that he cannot maintain the action without statutory authority therefor.[35]

d. Licensees. A mere licensee cannot be deemed an occupant of real property in such a sense as to render a trespass upon his occupation, however violent, a forcible entry upon land.[36]

e. Owners of Easements. As a general rule an action of ejectment or of forcible entry and detainer will not lie to recover the possession of an easement or to be let into the use or occupation of a servitude.[37] But the reason which underlies this is that the party complaining has only a right in common with the public, or with some other person or persons to the use or occupation claimed.

30 Mo. App. 184. See also Rees *v.* Lawless, Litt. Sel. Cas. (Ky.) 184, 12 Am. Dec. 295; and *infra*, IV, C, 1, e.

27. See *supra*, IV, A, 2.

28. House *v.* Keiser, 8 Cal. 499; Dudley *v.* Lee, 39 Ill. 339; Yoder *v.* Easley, 2 Dana (Ky.) 245.

In Missouri it has been held that a person who acquires the right of possession of premises from one having lawful right to possession may maintain forcible entry and detainer. Kelly *v.* Clancy, 15 Mo. App. 519.

29. Dudley *v.* Lee, 39 Ill. 339. See also Swetitsch *v.* Waskow, 37 Ill. App. 153.

Demised premises.— The action of forcible detainer will lie in favor of the purchaser of the fee of demised premises from the landlord, as the grantee in such a case succeeds to all the rights of the landlord by operation of the conveyance. Fisher *v.* Smith, 48 Ill. 184.

30. Bell *v.* Bruhn, 30 Ill. App. 300. A cause of action for unlawful and forcible detainer by one entitled to the possession, in case of a transfer of the interests of plaintiff, continues in his grantee. Anderson *v.* Ferguson, 12 Okla. 307, 71 Pac. 225.

31. Kellum *v.* Balkum, 93 Ala. 317, 9 So. 463; Hightower *v.* Fitzpatrick, 42 Ala. 597; Yoder *v.* Easley, 2 Dana (Ky.) 245.

32. McCartney *v.* Alderson, 45 Mo. 35.

33. Brown *v.* Burdick, 25 Ohio St. 260.

34. *Alabama.*— Espalla *v.* Gottschalk, 95 Ala. 254, 10 So. 755; Spear *v.* Lomax, 42 Ala. 576.

California.— Knowles *v.* Murphy, 107 Cal. 107, 40 Pac. 111.

Florida.— Scott *v.* Lloyd, 16 Fla. 151.

Iowa.— Beezley *v.* Burgett, 15 Iowa 192.

Missouri.— Lass *v.* Eisleben, 50 Mo. 122.

West Virginia.— Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971.

35. Prewitt *v.* Durham, 5 T. B. Mon. (Ky.) 17; McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298.

36. Dunstedter *v.* Dunstedter, 77 Ill. 580; McHose *v.* South St. Louis F. Ins. Co., 4 Mo. App. 514; Becher *v.* New York, 102 N. Y. App. Div. 269, 92 N. Y. Suppl. 460; Allen *v.* England, 3 F. & F. 49. See also Deluise *v.* Long Island R. Co., 65 N. Y. App. Div. 487, 72 N. Y. Suppl. 988.

Illustration.— A miner, mining on lots under mining rules and regulations, having a mere license to go upon and mine the land, has no sufficient possession to maintain forcible entry and detainer. Lowe *v.* American Zinc, etc., Co., 89 Mo. App. 680; Rochester *v.* Gate City Min. Co., 86 Mo. App. 447.

37. See EASEMENTS, 14 Cyc. 1216.

Accordingly, where it is made to appear that the party complaining has the exclusive right to the enjoyment of an easement, forcible entry and detainer may be maintained.[38]

f. Lessees. The action of forcible entry and detainer is for the benefit of him whose possession is invaded. Consequently, where a wrongful entry has been made upon the premises in the possession of a tenant, he and not his landlord is the proper person to institute and maintain the action.[39] Thus a mere tenant at will may maintain the action.[40] But a lessee who has never been in possession of the premises cannot maintain the action,[41] and the abandonment of the premises by a tenant is a restoration of the occupancy of the landlord and places him in a position to maintain summary proceedings against a disseizor.[42]

g. Married Women. The wife, although she occupies premises jointly with her husband, is as a rule not a necessary party plaintiff to vindicate the possession,[43] even though she may have the legal title to the premises invaded.[44] It has been held, however, that an action brought by a wife for a forcible invasion of property in her possession should not be dismissed solely on the ground that the husband is the proper party to bring the action because she might hold possession

38. A toll-road company which was organized for the purpose of maintaining a road over which persons were permitted to ride or drive for toll, and at which a gate was kept for the protection of said company against intruders, and to prevent any one from going on the road without first paying the toll required, can maintain an action of forcible entry and detainer to recover possession of a part of its road which has been unlawfully inclosed and is unlawfully detained by defendant, and this is true even though the only interest which plaintiff has in the premises sued for is an easement. Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770. See also Tennessee, etc., R. Co. *v.* East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475, which was an action by the railroad company for the recovery of a right of way and road-bed.

39. *Alabama.*— McKeen *v.* Nelms, 9 Ala. 507. But see Lecatt *v.* Stewart, 2 Stew. 474.

Arkansas.— King *v.* Duncan, 62 Ark. 588, 37 S. W. 228.

California.— Hammel *v.* Zobelein, 51 Cal. 532; Polack *v.* Shafer, 46 Cal. 270; Treat *v.* Stuart, 5 Cal. 113.

Illinois.— Allen *v.* Webster, 56 Ill. 393; Hardisty *v.* Glenn, 32 Ill. 62; Norris *v.* Pierce, 47 Ill. App. 463.

Kentucky.— Quertemus *v.* Breckinridge, 5 Dana 125; Yoder *v.* Easley, 2 Dana 245; Trabue *v.* Talbot, 6 J. J. Marsh. 602.

Massachusetts.— Com. *v.* Bigelow, 3 Pick. 31.

Mississippi.— Hammel *v.* Atkinson, 82 Miss. 465, 34 So. 225.

Missouri.— McCartney *v.* Alderson, 45 Mo. 35, 49 Mo. 456, Burns *v.* Patrick, 27 Mo. 434; Reed *v.* Bell, 26 Mo. 216; Hyde *v.* Fraher, 25 Mo. App. 414.

New Jersey.— Mercereau *v.* Bergen, 15 N. J. L. 244, 29 Am. Dec. 684; Bennet *v.* Montgomery, 8 N. J. L. 48.

Tennessee.— Elliott *v.* Lawless, 6 Heisk. 123.

Texas.— Hays *v.* Porter, 27 Tex. 92.

West Virginia.—Guffy *v.* Hukill, 34 W. Va. 49, 11 S. E. 754, 26 Am. St. Rep. 901, 8 L. R. A. 759.

United States.— Pitman *v.* Davis, 19 Fed. Cas. No. 11,184*a*, Hempst. 29.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 65.

Effect of special covenants in lease.— A covenant in a lease of a hotel that the lessor may retain and occupy a room therein and board there is not a reservation of the room from the operation of the lease, and for forcible entry into this room the lessee alone can complain. Polack *v.* Shafer, 46 Cal. 270.

40. House *v.* Camp, 32 Ala. 541; McDonald *v.* Gayle, Minor (Ala.) 98; Jones *v.* Shay, 50 Cal. 508; Knight *v.* Knight, 3 Ill. App. 206.

41. Woodside *v.* Ridgeway, 126 Mass. 292.

42. Burdette *v.* Corgan, 26 Kan. 102; Krank *v.* Nichols, 6 Mo. App. 72.

Execution of writ prevented by injunction. — Where an officer serving a writ of possession had succeeded only in placing the tenant's goods in the land and was to eject the tenant when the sheriff arrived with an injunction staying the execution of the writ, and the tenant thereupon took up his abode in an outbuilding on the premises, such writ of possession was not executed before the service of the injunction, so as to deprive the tenant of possession and thereby deprive him of his right to maintain forcible entry and detainer against plaintiff in the writ of restitution. Farnsworth *v.* Fowler, 1 Swan (Tenn.) 1, 55 Am. Dec. 718.

43. State *v.* Henning, 26 Mo. App. 119.

A married woman cannot maintain an action for forcible entry and detainer when it appears that at the time of the acts complained of her husband was in actual possession of the premises in question. Funkhauser *v.* Colloty, 67 N. J. L. 132, 50 Atl. 580.

44. Gray *v.* Dryden, 79 Mo. 106.

of the land with her husband's consent.[45] And under some of the modern statutes, the wife may maintain this proceeding in her own name to recover possession of land belonging to her statutory separate estate.[46] So under a statute which empowers a wife who has been deserted by her husband to prosecute or defend actions in his name she may after such desertion maintain forcible entry and detainer in her husband's name against an intruder who ousts her from possession.[47] And a woman who together with her husband has received a deed of release from her coheirs for a tract of land in which they held a joint estate may maintain a warrant of forcible detainer without joining her children after her husband's death.[48]

h. Successful Claimant of Homestead Entry. Where adverse claimants reside on a tract of land which each claims as a homestead, the party held entitled to the homestead entry by the land-office may bring forcible entry and detainer against the unsuccessful claimant to obtain possession.[49] But until the contest is finally closed before the interior department and the land awarded to one or the other, an action of unlawful detainer will not lie in behalf of either.[50]

i. Municipal Corporations. Where a municipal corporation owns land of which it is in possession, it may maintain an action of forcible entry and detainer against any one who unlawfully intrudes thereon.[51]

j. Tenants in Common. There can be no doubt but that tenants in common of the whole estate may join in summary proceedings to recover its possession.[52] And it has repeatedly been held that one tenant in common may maintain the action against a stranger without joining his cotenants as plaintiffs.[53] And the same is true of a coparcener or joint tenant, because the possession of one is the possession of all, and as against a stranger to the title each is entitled to possession of the whole estate.[54] A joint tenant or tenant in common may maintain this action against a cotenant who has forcibly ejected him.[55] But in such case plaintiff cannot recover the exclusive possession of the premises. His right is to be reinstated in the common possession.[56]

2. Against Whom — a. In General. In case of forcible entry by the owner of the property an action of forcible entry and detainer may be maintained against

45. Bobb *v.* Taylor, 25 Mo. App. 583.

46. Hurst *v.* Thompson, 68 Ala. 560.

47. Davis *v.* Woodward, 19 Minn. 174.

48. Rogers *v.* Turley, 4 Bibb (Ky.) 355.

49. Burns *v.* Noell, 12 Okla. 133, 69 Pac. 1076; Cope *v.* Braden, 11 Okla. 291, 67 Pac. 475.

50. Hebeisen *v.* Hatchell, 12 Okla. 29, 69 Pac. 888; Commager *v.* Dicks, 1 Okla. 82, 28 Pac. 864.

51. Norfolk City *v.* Cooke, 27 Gratt. (Va.) 430. The Mississippi statute gives to the state and each county the right to bring all actions which individuals are entitled to in a given case, and it was held that this confers the right to maintain forcible entry and detainer. Crittenden *v.* Levenworth, 62 Miss. 32.

52. Moody *v.* Seaman, 46 Mich. 74, 8 N. W. 711.

53. Bowers *v.* Cherokee Bob, 45 Cal. 495; Mason *v.* Bascom, 3 B. Mon. (Ky.) 269; Compton *v.* Baker, 34 Mo. App. 133; Jones *v.* Phillips, 10 Heisk. (Tenn.) 562; Turner *v.* Lumbrick, Meigs (Tenn.) 7. Where two are in possession together as cotenants, and only one is turned out and the other still remains, his possession is for his cotenant as well as for himself, and the party causing the ejection obtains no possession. Bernecker *v.* Miller, 40 Mo. 473, 93 Am. Dec. 309.

54. Rabe *v.* Fyler, 10 Sm. & M. (Miss.) 440, 48 Am. Dec. 763; Allen *v.* Gibson, 4 Rand. (Va.) 468.

55. *Illinois.*— Jamison *v.* Graham, 57 Ill. 94; Mason *v.* Finch, 2 Ill. 495.

Kentucky.— Eads *v.* Rucker, 2 Dana 111; Taylor *v.* White, 1 T. B. Mon. 37.

Massachusetts.— Presbrey *v.* Presbrey, 13 Allen 281.

Mississippi.— Rabe *v.* Fyler, 10 Sm. & M. 440, 48 Am. Dec. 763.

New York.— Wood *v.* Phillips, 43 N. Y. 152.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 71.

Rule in California.— In Lick *v.* O'Donnell, 3 Cal. 59, 58 Am. Dec. 383, it was held that a tenant in common could not maintain an action of forcible entry and detainer against his cotenant, but must resort to a court of equity for a partition of the land in dispute. But under a more recent statute it has been held that the action may be maintained. Bowers *v.* Cherokee Bob, 45 Cal. 495.

56. Jamison *v.* Graham, 57 Ill. 94; Eads *v.* Rucker, 2 Dana (Ky.) 111; Presbrey *v.* Presbrey, 13 Allen (Mass.) 281; Lewis *v.* Oesterreicher, 47 Mo. App. 79.

him and that too, although he may be entitled to the immediate right to possession.[57] It is the person who makes the forcible entry who is liable in proceedings of this character.[58] An action of forcible entry and detainer may be maintained only against one in possession at the commencement of the action, not against one who does not in fact hold the land.[59] If it appears that plaintiff was in possession when the action was brought, defendant is entitled to judgment.[60] One who takes possession peaceably in good faith and in violation of no law is not liable to be turned out by summary proceedings,[61] especially where he entered under a *bona fide* claim of title,[62] even though his grantor may previously have entered by force.[63] But where one trespasser succeeds another in the possession of property and continues and consummates the original trespass without any claim of new title, he is liable in summary proceedings to recover possession.[64] A change of possession pending the suit does not affect plaintiff's right of recovery.[65]

b. Persons Procuring Forcible Entry. A person may be guilty of forcible entry who is not actually present and does not actively assist therein if it is done by one who acted at the time under his direction and procurement.[66] And one who is present and participates in forcible entry and continues to support and assist the party entering in remaining on the premises may properly be joined as a party defendant in forcible entry and detainer.[67]

c. Persons Occupying in Severalty. The courts of law will not take cognizance of several causes of action against different parties in the same suit. Accordingly two or more persons who hold in severalty different parts of the premises in controversy cannot be joined as co-defendants in an action of forcible entry and detainer.[68] However by special statute in some jurisdictions it is provided in certain cases that where the action is joint in its inception, and the tenancy is

57. See *supra*, IV, A, 1.

58. Clark *v.* Barker, 44 Ill. 349.

Under a special statute of Maine, forcible entry and detainer may be maintained against a disseizor who has not acquired any claim by possession and improvement (Folsom *v.* Clark, 72 Me. 44; John *v.* Sahattis, 69 Me. 473; Baker *v.* Cooper, 57 Me. 388; Dyer *v.* Chick, 52 Me. 350), but cannot be maintained against a disseizor who is entitled to betterments (Folsom *v.* Clark, 72 Me. 44).

59. Preston *v.* Kehoe, 10 Cal. 445; Preston *v.* Davis, 112 Ill. App. 636; Bowman *v.* Mehring, 34 Ill. App. 389; Hersey *v.* Westover, 11 Ill. App. 197; Eads *v.* Rutter, 2 Dana (Ky.) 111; David *v.* Hall, 8 Ky. L. Rep. 444; Armstrong *v.* Hendrick, 67 Mo. 542; Ball *v.* Cowan, 34 Mo. 251; Orrick *v.* St. Louis Public Schools, 32 Mo. 315; Loan *v.* Smith, 76 Mo. App. 510.

Against several defendants.— In an action of forcible entry and detainer against several defendants, where the evidence shows that only one defendant is in possession, it is error to enter judgment against all the defendants. Norris *v.* Pierce, 47 Ill. App. 463.

60. Hurst *v.* Dulany, 84 Va. 701, 5 S. E. 802.

61. Kennedy *v.* Hamer, 19 Cal. 374; Clark *v.* Barker, 44 Ill. 349; Brooks *v.* Bruin, 18 Ill. 539; Chicago, etc., R. Co. *v.* Vaughn, 99 Ill. App. 386; McCorkle *v.* Yarrell, 55 Miss. 576. Owners of the reversion cannot, after the death of the tenant by the curtesy, maintain unlawful detainer against his lessee. Wolfe *v.* Angevine, 57 Miss. 767. So where a person has been in actual possession of realty for over two years under an equitable claim of title, an action of forcible detainer cannot be maintained against him. Alderman *v.* Boeken, 25 Kan. 658. See also Gilmore *v.* Asbury, 64 Kan. 383, 67 Pac. 864.

62. Brooks *v.* Bruin, 18 Ill. 539.

63. Clark *v.* Barker, 44 Ill. 349.

64. Stark *v.* Barnes, 4 Cal. 412; Alexander *v.* Fowler, 6 Ky. L. Rep. 444. Where an Indian agent without authority forcibly ejects a tenant from the premises and places the landlord in possession, the landlord as well as the party ejecting the tenant is guilty of forcible entry. Quigley *v.* Stephens, 3 Indian Terr. 265, 54 S. W. 814.

65. Merrin *v.* Lewis, 90 Ill. 505; Lesher *v.* Sherwin, 86 Ill. 420; Daggitt *v.* Mensch, 41 Ill. App. 403 [*affirmed* in 141 Ill. 395, 31 N. E. 153]; Newman *v.* Mackin, 13 Sm. & M. (Miss.) 383. The rights of a plaintiff in forcible detainer cannot be affected by the fact that a railway company had, before the suit, surveyed a part of the premises, which part, after the suit was brought, had been condemned for a right of way. Lesher *v.* Sherwin, 86 Ill. 420.

66. Minturn *v.* Burr, 16 Cal. 107, 20 Cal. 48.

67. Blumenthal *v.* Waugh, 33 Mo. 181. And see Young *v.* Ringo, 1 Litt. (Ky.) 225.

Forcible entry and detainer will lie against an agent if guilty as well as against his principal. Bailey *v.* Bailey, 61 Me. 361.

68. Reynolds *v.* Thomas, 17 Ill. 207; Gould *v.* Hendrickson, 9 Ill. App. 171; Boylston *v.*

afterward severed all may be joined in one suit but the verdict and judgment should be several.[69]

d. Married Women. In case of a joint occupancy of premises by husband and wife, the husband is as a general rule the only proper party defendant. The wife, although she is a joint occupant, is not in legal contemplation in joint possession with her husband.[70] But a wife cannot be ousted from her own property in an action of forcible entry and detainer against her husband alone.[71] And where forcible entry and detainer is the joint act of both husband and wife, both are proper parties to an action to recover possession.[72]

e. Corporations. Forcible entry and detainer will lie against a private corporation, unless the act complained of was a voluntary wilful trespass on the part of its officers or servants.[73] So an action of unlawful detainer will lie against a municipal corporation.[74]

D. Notice to Quit and Demand For Possession — 1. Necessity. The necessity of a notice to quit or demand for possession as a condition precedent to an action for a forcible or unlawful detainer is ordinarily regulated by statutory provisions which vary in the different jurisdictions and also under the different statutes of the same jurisdiction.[75] Under some of the statutes it seems that a notice or demand is necessary in all cases of forcible detainer.[76] Under others it has been decided that it is not necessary where the relation of landlord and tenant does not exist between the parties,[77] or where the original entry was forcible[78] or

Valentine, 16 N. J. L. 346; Snedeker *v.* Quick, 12 N. J. L. 129; Kerr *v.* Phillips, 5 N. J. L. 818.

69. Gould *v.* Hendrickson, 9 Ill. App. 171.

70. Gray *v.* Dryden, 79 Mo. 106; Wilson *v.* Garaghty, 70 Mo. 517; Bledsoe *v.* Simms, 53 Mo. 305; State *v.* Henning, 25 Mo. App. 119.

In unlawful detainer by the husband's vendor to recover possession of the premises contracted for in his name but as trustee for the wife she is not a necessary party. Williamson *v.* Paxton, 18 Gratt. (Va.) 475.

In Tennessee it has been held that an action of forcible entry and detainer will lie against married women and persons under age. Skipwith *v.* Johnson, 5 Coldw. 454.

71. Cofoid *v.* Bishop, 11 Ill. App. 117.

Under the Virginia statute forcible entry and detainer may be maintained against a married woman in respect to her own property or when she is acting as sole trader, but in such case her husband must be joined as a nominal defendant. Farley *v.* Tillar, 81 Va. 275.

72. Porter *v.* Murray, (Cal. 1886) 12 Pac. 425; State *v.* Harvey, 3 N. H. 65.

Acts done under husband's advice.— A verdict against the husband alone will not be disturbed, although the active party in making the entry complained of was defendant's wife, where there was enough in proof to justify the conclusion that the husband had advised and consented to the proceeding if he had not expressly directed it. Bauerschmitz *v.* Bailey, 29 Ill. App. 295.

73. Where the relator was in possession of certain premises adjoining defendant's railroad, and certain of the employees of defendant, under the direction of its general superintendent, entered upon the premises and forcibly expelled the relator, threatening him with injury if he returned, and defendant immediately took and retained possession of the premises, it was held that the act was not a voluntary wilful trespass upon the part of the superintendent and his men, but an official act for the benefit of defendant. At least the act was fully ratified, and defendant was therefore liable. People *v.* New York Cent. R. Co., 51 N. Y. 623.

74. Rains *v.* Oshkosh, 14 Wis. 372. And see Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

Illustration.— Where a right in land dedicated for a street has been lost by a non-acceptance and non-user, an action of forcible entry and detainer will lie against a municipality for an unlawful and forcible entry into the same, and the withholding of the possession thereof from the person in adverse possession. Edwardsville *v.* Barnsback, 66 Ill. App. 381.

75. See the statutes of the different states, and the cases cited in the following notes.

76. Stuller *v.* Sparks, 51 Kan. 19, 31 Pac. 301; Nason *v.* Best, 17 Kan. 408; Heller *v.* Beal, 23 Ohio Cir. Ct. 540; Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

77. *Alabama.*— Wright *v.* Lyle, 4 Ala. 112; Grice *v.* Ferguson, 1 Stew. 36.

California.— Kilburn *v.* Ritchie, 2 Cal. 145, 56 Am. Dec. 326; Godwin *v.* Stebbins, 2 Cal. 103.

Illinois.— McGrath *v.* Miller, 61 Ill. App. 497.

New Jersey.— Crane *v.* Dod, 2 N. J. L. 340.

Texas.— Warren *v.* Kelly, 17 Tex. 544.

Washington.— Shannon *v.* Grandstaff, 11 Wash. 536, 40 Pac. 123.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 52.

78. Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612; Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786 [*affirming* 34 Ill. App. 540]. See also Farley *v.* Bay Shell Road Co., 125 Ala.

wrongful.[79] Under the statutes relating merely to unlawful detainer a notice or demand is ordinarily necessary,[80] some of the statutes making a failure or refusal to deliver possession after demand a constituent element of the offense.[81] Notice is also ordinarily required in cases where the relation of landlord and tenant exists between the parties,[82] or where the action is brought for the recovery of possession by a purchaser at an execution[83] or foreclosure sale.[84] Under the Tennessee statute no notice is necessary other than the warrant in the action.[85]

2. Form and Contents. Under some of the statutes the notice or demand must be in writing,[86] but unless so required a written notice is not necessary.[87] As to the form and contents of the notice or demand a substantial compliance with the statute is sufficient.[88] It must contain a description of the property sought to be recovered,[89] but it is only necessary that the description should be sufficient to identify the premises.[90] It must also appear who claims the premises and makes the demand therefor,[91] but this may be shown from the signature at the end and need not appear in the body of the notice or demand.[92] The demand need not specify any date at which the property must be given up.[93] The notice or demand may be signed by plaintiff's agent or attorney,[94] but must be signed in his representative capacity.[95] The name and address of defendant need not appear on the demand.[96] Errors in the statements of the demand or notice

184, 27 So. 770; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397.

79. Nauman *v.* Burch, 91 Ill. App. 48; Miller *v.* Drexel, 37 Ill. App. 462; Silvey *v.* Summer, 61 Mo. 253; De Graw *v.* Prior, 53 Mo. 313; Voigt *v.* Avery, 14 Mo. App. 48; Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

80. *Alabama.*— Farley *v.* Bay Shell Road Co., 125 Ala. 184, 27 So. 770; Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Littleton *v.* Clayton, 77 Ala. 571; Bates *v.* Ridgeway, 48 Ala. 611; Stinson *v.* Gosset, 4 Ala. 170.

California.— Tivnen *v.* Monahan, 76 Cal. 131, 18 Pac. 144; Brawley *v.* Risdon Iron Works, 38 Cal. 676; Mecham *v.* McKay, 37 Cal. 154.

Colorado.— Doss *v.* Craig, 1 Colo. 177. See also Farncomb *v.* Stern, 18 Colo. 279, 32 Pac. 612.

Missouri.— Hyde *v.* Goldsby, 25 Mo. App. 29.

Vermont.— See Foster *v.* Kelsey, 36 Vt. 199, 84 Am. Dec. 676.

Virginia.— Pettit *v.* Cowherd, 83 Va. 20, 1 S. E. 392; Williamson *v.* Paxton, 18 Gratt. 475.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 52.

81. Stinson *v.* Gosset, 4 Ala. 170; Tivnen *v.* Monahan, 76 Cal. 131, 18 Pac. 144; Brawley *v.* Risdon Iron Works, 38 Cal. 676; Hyde *v.* Goldsby, 25 Mo. App. 29.

An appearance before a justice does not waive any defect in the notice under such statutes. Seem *v.* McLees, 24 Ill. 192.

82. See, generally, Landlord and Tenant.

83. Dickason *v.* Dawson, 85 Ill. 53.

84. See, generally, Mortgages.

85. Mallory *v.* Hanaur Oil-Works, 86 Tenn. 598, 8 S. W. 396; Spillman *v.* Walt, 12 Heisk. (Tenn.) 574.

86. *Alabama.*— Bates *v.* Ridgeway, 48 Ala. 611; Dumas *v.* Hunter, 30 Ala. 75.

Colorado.— Doss *v.* Craig, 1 Colo. 177.

Illinois.— Seem *v.* McLees, 24 Ill. 192; Lehman *v.* Whittington, 8 Ill. App. 374.

Kansas.— Nason *v.* Best, 17 Kan. 408.

Missouri.— Hyde *v.* Goldsby, 25 Mo. App. 29.

Ohio.— Heller *v.* Beal, 23 Ohio Cir. Ct. 540.

Oklahoma.—Oklaboma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 53.

87. Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397.

88. Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

89. Grant *v.* Marshall, 12 Nebr. 488, 11 N. W. 743.

90. Farr *v.* Farr, 21 Ark. 573; Cummings *v.* Winters, 19 Nebr. 719, 28 N. W. 302; Seeley *v.* Adamson, 1 Okla. 78, 26 Pac. 1069.

A description of the land by numbers, as "the N. E. 1/4 of section 28, T. 7, R. 7," "the premises now occupied by you," is sufficient. Cummings *v.* Winters, 19 Nebr. 719, 28 N. W. 302.

Where there are several tracts of land, a description which is correct as to some of the tracts and incorrect as to others is sufficient to support the action for those tracts which are covered both by the complaint and the demand. Beach *v.* Heck, 54 Mo. App. 599.

An objection to a defect in the description of the premises cannot be made for the first time on appeal. Grant *v.* Marshall, 12 Nebr. 488, 11 N. W. 743.

91. Nason *v.* Best, 17 Kan. 408.

92. Conaway *v.* Gore, 22 Kan. 216; Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

93. Smith *v.* Soper, 12 Colo. App. 264, 55 Pac. 195; Carico *v.* Kling, 11 Colo. App. 349, 53 Pac. 390.

94. Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225; Samuels *v.* Greenspan, 9 Kan. App. 140, 58 Pac. 482; Post *v.* Bohner, 23 Nebr. 257, 36 N. W. 508.

95. Kennedy *v.* Hitchcock, 4 Port. (Ala.) 230.

96. Gardner *v.* Eberhart, 82 Ill. 316.

are not ground for reversal where defendant was not misled or prejudiced thereby.[97]

3. SERVICE. Where the statute specifically describes the manner in which the notice or demand shall be served its requirements must be strictly observed.[98] Under some of the statutes service must be made by leaving the copy with defendant,[99] or if he be absent, with some person over a certain age upon the premises;[1] and under such statutes it is not sufficient to read a copy to defendant[2] or to send a copy by mail.[3] The demand must be made upon the party who is in possession and detaining the possession,[4] but may be delivered by an agent or attorney instead of by plaintiff personally.[5] Under some of the statutes the notice or demand must be served a certain number of days before suit is instituted,[6] but the fact that a longer notice is given is immaterial and does not affect the jurisdiction of the court,[7] provided the action is commenced within a reasonable time thereafter.[8] When not so provided by statute, the time of the notice or demand is immaterial,[9] provided it be given before the suit is instituted[10] and after the particular entry complained of.[11]

E. Defenses, Set-Off, and Counter-Claim. Equitable defenses are not available in actions brought under the forcible entry and detainer statutes,[12] nor is matter in abatement only available as a defense.[13] So it is not a defense that the entry by defendant was made in good faith,[14] that plaintiff had leased the premises to one with whose right defendant does not connect himself,[15] that the premises had been leased for an immoral purpose,[16] that defendant has become bankrupt during the pendency of an appeal by him,[17] that plaintiff regained possession of the premises pending an appeal by defendant,[18] that a corporation plaintiff has so conducted its affairs as to subject it to a quo warranto by the state,[19] that defendant did not refuse to quit possession, if it appears that he holds over an unreasonable length of time after demand,[20] that defendant in com-

97. Miller *v.* Hall, 14 Colo. App. 367, 60 Pac. 194.

98. Hyde *v.* Goldsby, 25 Mo. App. 29, holding that the fact that the party to be notified has actual knowledge of such notice is immaterial.

99. *Colorado.*— Doss *v.* Craig, 1 Colo. 177.

Illinois.— Seem *v.* McLees, 24 Ill. 192; Lehman *v.* Whittington, 8 Ill. App. 374.

Kansas.— Stuller *v.* Sparks, 51 Kan. 19, 31 Pac. 301.

Missouri.— Hyde *v.* Goldsby, 25 Mo. App. 29.

Ohio.— Heller *v.* Beal, 23 Ohio Cir. Ct. 540.

1. Richardson *v.* Penny, 6 Okla. 328, 50 Pac. 231. See also Hinniger *v.* Trax, 67 Mo. App. 521.

2. Doss *v.* Craig, 1 Colo. 177; Seem *v.* McLees, 24 Ill. 192; Lehman *v.* Whittington, 8 Ill. App. 374.

3. Hyde *v.* Goldsby, 25 Mo. App. 29.

4. Brawley *v.* Risdon Iron Works, 38 Cal. 676; Wheelan *v.* Fish, 2 Ill. App. 447.

5. Eldridge *v.* Holway, 18 Ill. 445; Burns *v.* Noell, 12 Okla. 133, 69 Pac. 1076.

6. Stuller *v.* Sparks, 51 Kan. 19, 31 Pac. 301; Douglass *v.* Whitaker, 32 Kan. 381, 4 Pac. 874; Heller *v.* Beal, 23 Ohio Cir. Ct. 540; Greenamayer *v.* Coate, 12 Okla. 452, 72 Pac. 377; Burns *v.* Noell, 12 Okla. 133, 69 Pac. 1076.

7. Shuver *v.* Klinkenberg, 67 Iowa 544, 25 N. W. 770.

8. Douglass *v.* Whitaker, 32 Kan. 381, 4 Pac. 874, holding that if there is a long and unreasonable delay in instituting the suit a new notice must be given.

9. Doss *v.* Craig, 1 Colo. 177; Huftalin *v.* Misner, 70 Ill. 205.

A demand made one day before the complaint is filed is sufficient when not otherwise provided for by statute. Beauchamp *v.* Runnels, (Tex. Civ. App. 1904) 79 S. W. 1105.

10. Lehman *v.* Whittington, 8 Ill. App. 374.

11. Mecham *v.* McKay, 37 Cal. 154.

12. St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514 (the rule applied in respect of the defense that plaintiff was estopped to revoke the license under which defendant held the premises); Illinois Cent. R. Co. *v.* Baltimore, etc., Co., 23 Ill. App. 531; Home Mut. Bldg., etc., Assoc. *v.* Leonard, 77 Miss. 39, 25 So. 351; Carey *v.* Richards, 2 Ohio Dec. (Reprint) 630, 4 West. L. Month. 251; Brumbaugh *v.* Sperringer, 48 W. Va. 121, 35 S. E. 854.

13. Jones *v.* Overton, 4 Bibb (Ky.) 334.

14. Voll *v.* Hollis, 60 Cal. 569; Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556.

15. Yosemite Valley, etc., Grove *v.* Barnard, 98 Cal. 199, 33 Pac. 982.

16. King *v.* Wilson, 1 Nebr. (Unoff.) 93, 95 N. W. 494.

17. Lomax *v.* Spear, 51 Ala. 532.

18. Beck *v.* Glenn, 69 Ala. 121.

19. Home Mut. Bldg., etc., Assoc. *v.* Leonard, 77 Miss. 39, 25 So. 351.

20. Floyd *v.* Ricks, 11 Ark. 451.

mitting the acts complained of was acting in the capacity of agent and not in his own right,[21] or that plaintiff has been guilty of the same wrong toward defendant.[22] So under a statute making a year's possession immediately preceding the filing of the complaint a defense unless the estate in the premises be ended, an answer alleging that defendant had been in the quiet possession of the premises for more than a year before the filing of the complaint but which fails to allege that the estate therein is not ended presents no defense.[23] And the pendency of an action to quiet title by one who had merely been granted an equity of redemption and hence could not maintain the action cannot be pleaded in abatement of an action of unlawful detainer.[24] The pendency of a prior action is a defense in an action of forcible entry and detainer to the same extent as in any other action.[25] Under the statutes of some jurisdictions, defendant cannot in this class of actions file a set-off or counter-claim of any character.[26] And under some statutes no counter-claim can be pleaded in a justice's court except as a set-off for rent or damages in cases where judgment for rent or damages is claimed.[27]

F. Jurisdiction and Venue[28] — **1. Jurisdiction — a. What Courts Have Jurisdiction.** As a rule original jurisdiction of actions brought under the forcible entry and detainer statutes is given to courts of justices of the peace or to courts of like inferior and limited jurisdiction,[29] such as court commission-

21. Luling *v.* Sheppard, 112 Ala. 588, 21 So. 352.

22. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

23. Bellingham Bay, etc., Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928.

24. Miller *v.* Hall, 14 Colo. App. 367, 66 Pac. 194.

25. Bond *v.* White, 24 Kan. 45.

26. Warburton *v.* Doble, 38 Cal. 619; Mark *v.* Schumann Piano Co., 105 Ill. App. 490.

27. Vidger *v.* Nolin, 10 N. D. 353, 87 N. W. 593.

Damages resulting from wrongful eviction. — Defendant cannot counter-claim damages resulting from a wrongful eviction under the writ issued in an action of forcible entry and detainer but must resort to a separate action on the bond. Owens *v.* Swanton, 25 Wash. 112, 64 Pac. 921.

28. For appellate jurisdiction see *supra*, IV, N, 1, h.

29. *California.*— In California justices' courts have concurrent jurisdiction with the superior courts where the rental value of the property in controversy does not exceed twenty-five dollars a month and the whole amount of damages claimed does not exceed two hundred dollars. Code Civ. Proc. § 113.

Colorado.— Hamill *v.* Clear Creek County Bank, 22 Colo. 384, 45 Pac. 411.

Georgia.— Any one or more justices of the peace upon complaint made on oath may summon a jury of twelve men and proceed to try an action of forcible entry and detainer. Civ. Code, § 4823. Formerly a justice of the peace had no jurisdiction in such cases. *Ex p.* Putman, T. U. P. Charlt. 76.

Iowa.— Easton *v.* Fleming, 51 Iowa 305, 1 N. W. 624.

Kansas.— Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42.

Maine.— Larabee *v.* Brown, 38 Me. 482.

Maryland.— Roth *v.* State, 89 Md. 524, 43 Atl. 769.

Minnesota.— Stone *v.* Bassett, 4 Minn. 298. And see Hoffman *v.* Parsons, 27 Minn. 236, 6 N. W. 797, holding that a justice of the peace of a town in Ramsey county may properly, within his own town, issue a summons and entertain a proceeding in forcible entry and detainer, although the parties to the proceedings reside in the city of St. Paul, and the premises which are the subject of the proceedings are within the limits of such city.

Mississippi.— Ragan *v.* Harrell, 52 Miss. 818. And see Rabe *v.* Fyler, 18 Miss. 440, 48 Am. Dec. 763.

Nebraska.— Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101.

Nevada.— Hoopes *v.* Meyer, 1 Nev. 433; Armstrong *v.* Paul, 1 Nev. 134.

Oregon.— Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038.

Vermont.— In an action to get possession of land a single magistrate has jurisdiction. Barton *v.* Learned, 26 Vt. 192.

West Virginia.— Rathbone Oil Tract Co. *v.* Rauch, 5 W. Va. 79.

Wisconsin.— Savage *v.* Carney, 8 Wis. 162.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 82.

In North Carolina a justice of the peace has no jurisdiction of an action of forcible entry and detainer, since under the statutes of that state defendant may always raise a question of title in such cases and the justice could do nothing but dismiss the complaint. Perry *v.* Shepherd, 78 N. C. 83; Atlantic, etc., R. Co. *v.* Johnston, 70 N. C. 348, 509; State *v.* Yarborough, 70 N. C. 250.

Jury trial.— Under an early Pennsylvania statute which substantially reënacted previous statutes on the subject, it was held that a justice or justices might, upon a view of the force, make a record of the forcible holding, and fine and commit the offender, but he or they could not meddle with the

ers,[30] or probate courts,[31] county courts,[32] or municipal courts within the territorial limits of their respective municipalities;[33] and where this is so their powers and duties are defined by the particular statute respecting forcible entries and detainers and not by the statute defining and limiting the jurisdiction of such courts generally.[34] In some states this original jurisdiction of justices of the peace and like courts is exclusive.[35] But in others courts of general original jurisdiction have also original jurisdiction of these summary proceedings.[36] Thus it will be seen that in some localities these courts have both appellate and concurrent original jurisdiction in this class of cases.[37]

b. Necessity For Strict Compliance With Statute. The action of forcible entry and detainer or forcible detainer, being a special statutory proceeding, summary in its nature, and in derogation of the common law, it follows that the statute conferring jurisdiction must be strictly pursued in the method of procedure prescribed by it, or the jurisdiction will fail to attach, and the proceeding will be *coram non judice* and void.[38] So where jurisdiction to hear and determine forcible entry and detainer cases is conferred on courts of superior jurisdiction, they exercise a special, statutory, and extraordinary power and stand upon the same footing and are governed by the same rules as courts of limited and inferior jurisdiction. There is no presumption in favor of the record. It must appear that the statutory remedy was strictly pursued and the facts which give jurisdiction must appear affirmatively on the face of the record; otherwise the proceedings will be, not merely voidable, but absolutely void, as being *coram non judice*.[39]

possession without the intervention of a jury. Blythe *v.* Wright, 2 Ashm. 428.

If by virtue of special statutory provisions question of title may be adjudicated in actions brought under the forcible entry and detainer statutes an action involving title brought in a court without jurisdiction to try questions of title must be removed to a court which possesses jurisdiction. Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25; Cushing *v.* Danforth, 76 Me. 114; Abbott *v.* Norton, 53 Me. 158. And see Bridwell *v.* Barcroft, 2 Ohio Dec. (Reprint) 697, 4 West. L. Month. 617.

30. Hyndman *v.* Stowe, 9 Utah 23, 33 Pac. 227. The mere filing of a plea of title by defendant in summary proceedings before a circuit court commissioner to recover possession of real property does not oust such commissioner of jurisdiction, but he loses jurisdiction only when it appears that the question of title is necessarily involved. Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. 342.

31. Anderson *v.* Fergeson, 12 Okla. 307, 71 Pac. 225; McClung *v.* Penny, 11 Okla. 474, 69 Pac. 499.

32. Calderwood *v.* Peyser, 42 Cal. 110; Caulfield *v.* Stevens, 28 Cal. 118; State *v.* Gardner, 22 Fla. 14; Uhl *v.* Pence, 11 Nebr. 316, 9 N. W. 41; Blaco *v.* Haller, 9 Nebr. 149, 1 N. W. 978.

33. Woodside *v.* Wagg, 71 Me. 207; Larabee *v.* Brown, 38 Me. 482.

34. Savage *v.* Carney, 8 Wis. 162.

35. *Iowa.*— Easton *v.* Fleming, 51 Iowa 305, 1 N. W. 624.

Kansas.—Wideman *v.* Taylor, 63 Kan. 884, 65 Pac. 664; Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42.

Kentucky.— Johnson *v.* Erwine, 3 Metc. 251.

Missouri.— McQuoid *v.* Lamb, 19 Mo. App. 153.

Nebraska.— Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401.

Oklahoma.— McDonald *v.* Stiles, 7 Okla. 327, 54 Pac. 487.

Oregon.— Thompson *v.* Wolf, 6 Oreg. 308.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 82.

In Illinois the jurisdiction of the justices of the peace was formerly exclusive. Ginn *v.* Rogers, 9 Ill. 131.

36. Cal. Code Civ. Proc. § 76; Davis *v.* Hamilton, 53 Ill. App. 94; Hoopes *v.* Myer, 1 Nev. 433. But jurisdiction of these summary statutory proceedings does not belong to the superior courts by virtue of their general common-law jurisdiction. It requires something in the constitution or statutes to confer such jurisdiction. Townsend *v.* Brooks, 5 Cal. 52; Ginn *v.* Rogers, 9 Ill. 131.

In Arkansas circuit courts have jurisdiction in forcible entry and detainer. Sandel & H. Dig. (1894) § 3448; Halliburton *v.* Sumner, 27 Ark. 460. And it has been held that a statute conferring jurisdiction on justices of the peace is unconstitutional. McLain *v.* Taylor, 4 Ark. 147.

37. Davis *v.* Hamilton, 53 Ill. App. 94.

38. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Burns *v.* Nash, 23 Ill. App. 552.

The jurisdiction of a justice of the peace must affirmatively appear in an action of forcible entry and detainer. McQuoid *v.* Lamb, 19 Mo. App. 153.

39. Burns *v.* Nash, 23 Ill. App. 552.

A judgment entered by confession under a

e. Jurisdiction as Affected by Value of Property in Controversy. The jurisdiction of an action of forcible entry and detainer or of unlawful detainer is not affected by the value of the property, the possession of which is sought to be recovered.[40] And it has been held that in an action for forcible entry and detainer the jurisdiction of justices in the matter of damages is not limited to the amount specified as the limit of their jurisdiction in civil actions generally.[41]

d. Jurisdiction as Affected by Improper Allegations as to Title. Improper and unnecessary allegations as to title, whether made by plaintiff or defendant, do not deprive the court in which an action is properly brought of jurisdiction.[42]

2. VENUE. Where the territorial jurisdiction of a justice is coextensive with the county, he may try a case of forcible entry and detainer in any township in the county.[43]

G. Time to Sue and Limitations. Ordinarily the forcible entry and detainer statutes prescribe the time within which actions based on such statutes must be brought.[44] In actions of forcible entry and detainer an entry on unimproved land with intent to clear and fit it for cultivation is sufficient to put the statute of limitations in operation. An inclosure is unnecessary.[45] If a statute

power of attorney and *cognovit* in a forcible detainer suit is unauthorized by law and void. In such case the court acquires no jurisdiction of the person of defendant by the filing of the *cognovit* in pursuance of the warrant of attorney, and such a proceeding is in a court of record as irregular and unauthorized as it would be in a justice's court. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Burns *v.* Nash, 23 Ill. App. 552.

40. Kelly *v.* E. F. Hallack Lumber, etc., Co., 22 Colo. 221, 43 Pac. 1003. There is nothing in the suggestion that the jurisdiction conferred on justices of the peace by the legislature, in proceedings of unlawful detainer, is violative of the constitution. In such cases the value of the premises is totally immaterial. Beck *v.* Glenn, 69 Ala. 121.

41. Silvey *v.* Summer, 61 Mo. 253.

42. *Colorado.*— Kelley *v.* Andrew, 3 Colo. App. 122, 32 Pac. 175.

Indiana.— Bridges *v.* Branam, 133 Ind. 488, 33 N. E. 271.

Kansas.— Wideman *v.* Taylor, (Sup. 1901) 65 Pac. 664; Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42.

Missouri.— Graham *v.* Conway, 91 Mo. App. 391.

Nebraska.— Lipp *v.* Hunt, 25 Nebr. 91, 41 N. W. 143; Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368.

Ohio.— State *v.* Paul, 9 Ohio Dec. (Reprint) 226, 11 Cinc. L. Bul. 234.

Oklahoma.—McQuiston *v.* Walton, 12 Okla. 130, 69 Pac. 1048.

Oregon.— Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038.

South Dakota.— Chicago, etc., R. Co. *v.* Nield, 16 S. D. 370, 92 N. W. 1069.

Wisconsin.— Newton *v.* Leary, 64 Wis. 190, 25 N. W. 39.

43. Reynolds *v.* Larkins, 10 Colo. 126, 14 Pac. 114; Keim *v.* Daugherty, 8 Mo. 498.

The mayor of a municipality who is under the statute *ex officio* a justice of the peace within the territorial limits thereof is also a justice of the peace of the county within the meaning of the statute, and may participate as such in the trial of an action of unlawful detainer. Nickles *v.* Kendricks, 73 Miss. 711, 19 So. 582.

The concurrent jurisdiction over a river forming a common boundary is not believed to confer authority upon one state to bring forcible entry and ejectment for the recovery of land within the limits of the other. Cooley *v.* Golden, 52 Mo. App. 229.

44. For a construction of particular statutes see the following cases:

Alabama.— Wray *v.* Taylor, 56 Ala. 188.

Georgia.— De Lagal *v.* Wallace, 48 Ga. 408.

Maine.— Morton *v.* Thompson, 13 Me. 162.

Massachusetts.— Mitchell *v.* Shanley, 12 Gray 206.

Mississippi.— Loring *v.* Willis, 5 Miss. 383.

Missouri.— Miller *v.* Tillmann, 61 Mo. 316; Buck *v.* Endicott, 103 Mo. App. 248, 77 S. W. 85.

Montana.— Boardman *v.* Thompson, 3 Mont. 387.

Nebraska.— Weatherford *v.* Union Pac. R. Co., (1904) 98 N. W. 1089.

Tennessee.— Beaty *v.* Jones, 1 Coldw 482; Philips *v.* Sampson, 2 Head 429; Thompson *v.* Holt, 9 Humphr. 407.

Virginia.— Pettit *v.* Cowherd, 83 Va. 20, 1 S. E. 392; Kincheloe *v.* Tracewells, 11 Gratt. 587.

West Virginia.— Billingsley *v.* Stutler, 52 W. Va. 92, 43 S. E. 96.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 83.

Necessity for pleading statute.— The statute of limitations, if available as a defense to an action for a forcible entry and detainer, must be taken advantage of by plea, and is not good matter for demurrer to the complaint. Ferguson *v.* Carter, 40 Ala. 607.

45. Humphrey *v.* Jones, 3 T. B. Mon. (Ky.) 261.

Under the Oklahoma statute the right of action in a forcible entry and detainer case between adverse claimants of a homestead

provides that peaceable and uninterrupted possession with plaintiff's knowledge for a designated time shall be a bar, defendant cannot rely upon it unless plaintiff had knowledge of the adverse possession.[46] In unlawful detainer the statute commences to run not from the time of taking possession but from the time the possession becomes adverse.[47]

H. Process. The form and sufficiency of a summons or other process in an action for forcible entry and detainer depends largely upon statutory provisions, and as to these matters it has been decided that a summons is only required "to be sufficient on its face to show what is intended thereby";[48] that the complaint made and verified by plaintiff under oath may be looked to in aid of a warrant;[49] that if the summons contains the substance of the complaint so as to apprise defendant of the nature and extent of the claim, it is sufficient without reciting the complaint fully;[50] that a summons is not rendered defective by its omission to state that the place at which defendant is to appear is the usual place of holding the justice's court in the district;[51] and that a process is not bad because plaintiffs in describing their possession stated that they were possessed as executors.[52] A summons should describe the land in controversy with convenient certainty so as to enable the officer to deliver possession, but the description need not be so certain as in itself and alone to enable him to do so; if it can be rendered certain by extrinsic evidence it is sufficient.[53] Process must be made returnable within the time,[54] and to the term of court[55] provided by statute; and it must be served within the time,[56] and in the manner[57] prescribed by statute. Under a statute providing that when a summons in unlawful detainer is served

accrues when the contest is finally adjudicated in the land-office. Cope *v.* Braden, 11 Okla. 291, 67 Pac. 475.

46. Fultz *v.* Black, 3 Iowa 569.

47. Loring *v.* Willis, 5 Miss. 383.

Action by judgment creditor.— Three years is the statutory limitation of an action for the unlawful detainer of lands; yet when the action is brought by a judgment creditor or other person having a statutory right to redeem, whose offer to redeem has been refused, quiet possession for three years after the sale is not necessarily a bar, since the statute does not begin to run until the accrual of the plaintiff's cause of action by the tender and refusal. Posey *v.* Pressley, 60 Ala. 243.

48. Brumhaugh *v.* Sterringer, 48 W. Va. 121, 35 S. E. 854; Thorn *v.* Thorn, 47 W. Va. 4, 34 S. E. 759; Simpkins *v.* White, 43 W. Va. 125, 27 S. E. 361.

49. Kincheloe *v.* Tracewells, 11 Gratt. (Va.) 587.

50. Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3, construing Arkansas statute.

51. Brown *v.* Ashford, 56 Miss. 677.

52. Edmonds *v.* Morrill, Brayt. (Vt.) 20.

53. Billingsley *v.* Stutler, 52 W. Va. 92, 43 S. E. 96; Brumbaugh *v.* Sterringer, 48 W. Va. 121, 35 S. E. 854; Thorn *v.* Thorn, 47 W. Va. 4, 34 S. E. 759; Simpkins *v.* White, 43 W. Va. 125, 27 S. E. 361; Board of Education *v.* Crawford, 14 W. Va. 790; Hawkins *v.* Wilson, 1 W. Va. 117; Gorman *v.* Steed, 1 W. Va. 1.

Failure to state the town or county in which the land in question is situated makes a summons defective. Raleigh County *v.* Ellison, 8 W. Va. 308.

54. *Michigan.*— Sallee *v.* Ireland, 9 Mich. 154.

Missouri.— Westerhold *v.* Boese, 64 Mo. App. 280.

New Jersey.—Berry *v.* Williams, 21 N. J. L. 423. See also Pullen *v.* Boney, 4 N. J. L. 125.

Washington.— State *v.* Parker, 12 Wash. 685, 42 Pac. 113.

West Virginia.— Wheeling Gas Co. *v.* Wheeling, 7 W. Va. 22.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 91.

55. Watier *v.* Buth, 87 Minn. 205, 91 N. W. 756, 92 N. W. 331. See also Gorman *v.* Steed, 1 W. Va. 1.

56. Kent *v.* West, 50 Cal. 185; Shuver *v.* Klinkenberg, 67 Iowa 544, 25 N. W. 770; Sallee *v.* Ireland, 9 Mich. 154; Clements *v.* Clinton, Mart. & Y. (Tenn.) 198.

In Washington service of summons before the complaint is filed is good. McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 100; Security Sav., etc., Co. *v.* Hackett, 27 Wash. 247, 67 Pac. 607.

57. *Arkansas.*— Keller *v.* Henry, 24 Ark. 575.

Kentucky.— Swanson *v.* Smith, 77 S. W. 700, 25 Ky. L. Rep. 1260, under a statute authorizing substituted service of process by leaving a copy with a member of defendant's family over sixteen years of age, a notice of a writ of forcible entry is properly served by leaving a copy with defendant's wife who is at the time a member of his family, over sixteen years of age, defendant being absent and not found.

Minnesota.— Fallman *v.* Gilman, 1 Minn. 179, a summons served by reading the same in the presence of defendant is not duly served.

by a person other than the sheriff, it must be returned with an affidavit of service by such person, it is not necessary that it should appear that the party making the service did so at the request of plaintiff or his attorney.[58] Although the action of forcible entry and detainer may be confined by statute to the county in which the land is situated, yet process may issue to and be served in the county where defendant resides, although different from that where the land is located.[59] Where process issues against several persons charged with forcible entry and detainer, it is no legal objection to the service that it was not served on all of them,[60] and plaintiff may proceed against those upon whom process has been served.[61] When a defendant in an action for forcible entry and detainer appeals from a justice's court to a superior court, he is fully apprised of the nature of the action he is called upon to defend and cannot raise the question of the regularity of the citation on appeal.[62]

I. Pleadings — 1. Complaint — a. Necessity of Written Complaint. Unless dispensed with by statute a written complaint is necessary, although the proceedings are commenced before a justice of the peace.[63] A mere verbal complaint is insufficient,[64] and if no written complaint is filed the circuit court acquires no jurisdiction on appeal from the justice.[65]

b. Allegations — (i) *In General.* In suits brought under the statutes relating to forcible entry and detainer instituted in justices' courts great strictness in the complaint or affidavit is not required.[66] Nevertheless to give the court jurisdiction it is necessary that the complaint should embody such a statement of facts as brings the party clearly within some one of the class of cases for which the statutes provide a remedy,[67] as these proceedings are summary and contrary to the course of the common law.[68] The complaint must show enough on its face to give the court jurisdiction without resort to parol testimony.[69] It must show

New Jersey.—Miller *v.* Doolittle, 5 N. J. L. 845, service of summons "by leaving a copy fastened to the door of the house which is said to be in possession of defendant, as he was not therein" is not sufficient.

New York.— Forbes *v.* Glashan, 13 Johns. 158.

Oregon.— Belfils *v.* Flint, 15 Oreg. 158, 14 Pac. 295.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 91.

58. Block *v.* Kearney, (Cal. 1901) 64 Pac. 267.

59. Billings *v.* Chapin, 2 Ill. App. 555.

60. Dutton *v.* Tracy, 4 Conn. 79.

61. Harman *v.* Odell, 6 Gratt. (Va.) 207.

62. Irwin *v.* Davenport, 84 Tex. 512, 19 S. W. 692.

63. Stolberg *v.* Ohnmacht, 50 Ill. 442; Redfern *v.* Botham, 70 Ill. App. 253; Eckels *v.* Wolf, 55 Ill. App. 310; Abbott *v.* Kruse, 37 Ill. App. 549; Russell *v.* McConahey, Tapp. (Ohio) 204.

In Tennessee under the statute of 1842, a written complaint is not required either in the justice (Settle *v.* Settle, 10 Humphr. 504) or circuit court (Butcher *v.* Palmer, 1 Heisk. 431). It is within the discretion of the circuit judge whether or not there shall be pleadings in actions of forcible entry or detainer. White *v.* Suttle, 1 Swan 169.

64. Stolberg *v.* Ohnmacht, 50 Ill. 442.

65. Redfern *v.* Botham, 70 Ill. App. 253.

Forms of complaint held sufficient see the following cases:

Alabama.— Jonsen *v.* Nabring, 50 Ala. 392; Spear *v.* Lomax, 42 Ala. 576; Ferguson *v.* Carter, 40 Ala. 607; Huffaker *v.* Boring, 8 Ala. 87; Lecatt *v.* Stewart, 2 Stew. 474.

Illinois.— Wells *v.* Hogan, 1 Ill. 337; Martens *v.* Fields, 17 Ill. App. 483.

Michigan.— Bush *v.* Dunham, 4 Mich. 339.

Missouri.— Ish *v.* Chilton, 26 Mo. 256; Shantz *v.* Reynolds, 70 Mo. App. 668; Bradford *v.* Tilly, 65 Mo. App. 181; Meriwether *v.* Howe, 48 Mo. App. 148.

Nebraska.— Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507.

Recovery as for trespass.— Where a tenant, wrongfully and forcibly ejected from the demised premises seeks to recover treble damages, as allowed under Gen. St. (1878) c. 75, § 50, where a person is evicted from real property in a forcible manner if his complaint is insufficient to warrant a recovery under the statute, he may nevertheless recover as in an ordinary action of trespass if the facts warrant it. Bagley *v.* Sternberg, 34 Minn. 470, 26 N. W. 602.

66. Armour Packing Co. *v.* Howe, 68 Kan. 663, 75 Pac. 1014; Witte *v.* Quinn, 38 Mo. App. 681. And see O'Callaghan *v.* Booth, 6 Cal. 63; Moore *v.* Read, 1 Blackf. (Ind.) 177.

67. Haskins *v.* Haskins, 67 Ill. 446; Ballance *v.* Curtenius, 8 Ill. 449; Wells *v.* Hogan, 1 Ill. 337; Bush *v.* Dunham, 4 Mich. 339; Caswell *v.* Ward, 2 Dougl. (Mich.) 374.

68. Wells *v.* Hogan, 1 Ill. 337.

69. Treat *v.* Brent, 51 Me. 478. And see Boxley *v.* Collins, 4 Blackf. (Ind.) 320.

where the premises are situated,[70] and that they are within the territorial jurisdiction of the court in which the suit is instituted.[71] If action is instituted before a justice of the peace, the complaint must show that the premises were situated in the county in which he sits,[72] and in his precinct,[73] or that there is no justice in the precinct where the premises are situated.[74] A clerical mistake such as the omission of defendant's name in the complaint is not a jurisdictional defect and is not material where there is enough in the rest of the complaint to correct it.[75] The declaration or complaint need not deny the existence of possession by defendant for such a time as would bar the action.[76]

(II) *AVERMENTS IN COMPLIANCE WITH STATUTORY REQUIREMENTS.* A complaint which contains all the allegations required by a statute prescribing what it shall allege[77] or which follows a form prescribed by statute[78] is sufficient, and a complaint will be sufficient which follows a precedent furnished by a state form book notwithstanding it may appear defective if treated as a technical pleading, where it has long been adopted in practice and has received the sanction of the courts.[79] Notwithstanding the sufficiency of a complaint drawn in accordance with the statutory provisions, the complainant is not bound to avail himself of the benefits of those statutes, but is still at liberty to set out in full the particular facts to bring his case within the statutes. If, however, he elects to do this, he can omit no fact which is essential to his case or which is necessarily included in or implied by the general form of complaint indicated by statute.[80]

(III) *POSSESSION OF PLAINTIFF AT TIME OF ACTS COMPLAINED OF.* The general rule is that in an action for forcible entry and detainer the complaint must allege that plaintiff was in actual possession of the premises at the time of the alleged forcible entry.[81] In the case of public lands, it must be alleged that

70. Banks *v.* Murray, 5 N. J. L. 849; Murphy *v.* Lucas, 2 Ohio 255.

71. Boxley *v.* Collins, 4 Blackf. (Ind.) 320; Ephraim *v.* Garlick, 10 Kan. 280; McKinney *v.* Harral, 31 Mo. App. 41; Lasater *v.* Fant, (Tex. Civ. App. 1897) 43 S. W. 321.

Failure to show that the land is in the state renders the complaint insufficient and confers no jurisdiction. Tegler *v.* Mitchell, 46 Mo. App. 349.

72. Boxley *v.* Collins, 4 Blackf. (Ind.) 320; Johnson *v.* Fischer, 56 Mo. App. 552.

The county in which the land is situated is sufficiently described where the caption of the complaint is, "State of Indiana, Perry County," and in the body of the complaint the property is described as being "in said county." Hughes *v.* Windpfennig, 10 Ind. App. 122, 37 N. E. 432.

73. Lasater *v.* Fant, (Tex. Civ. App. 1897) 43 S. W. 321; Yarbrough *v.* Chamberlin, 1 Tex. App. Civ. Cas. § 1122.

If the action is cognizable before any justice of the county where the acts are committed, the complaint need not allege the property to have been in the city ward of the justice before whom the complaint was filed. Wishart *v.* Gerhart, 105 Mo. App. 112, 78 S. W. 1094.

74. Sanchez *v.* Candelaria, 5 N. M. 400, 23 Pac. 239.

75. Olson *v.* Muskegon Cir. Judge, 49 Mich. 85, 13 N. W. 369.

76. Ward *v.* Crane, 3 Blackf. (Ind.) 393.

77. *Illinois.*— Martens *v.* Fields, 17 Ill. App. 483.

Iowa.— Simons *v.* Marshall, 3 Greene 502; Shaw *v.* Gordon, 2 Greene 376.

Kansas.— Armour Packing Co. *v.* Howe, 68 Kan. 663, 75 Pac. 1014.

Michigan.— Gault *v.* Stormont, 51 Mich. 636, 17 N. W. 214; Bennett *v.* Robinson, 27 Mich. 26; Bryan *v.* Smith, 10 Mich. 229.

Mississippi.— Torrey *v.* Cook, 3 Sm. & M. 60.

Missouri.— Alexander *v.* Westcott, 37 Mo. 108.

Nebraska.— Moore *v.* Parker, 59 Nebr. 29, 80 N. W. 43; Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101; Locke *v.* Skow, 3 Nebr. (Unoff.) 299, 91 N. W. 572.

Wisconsin.— Jarvis *v.* Hamilton, 16 Wis. 574.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 108.

78. Ish *v.* Chilton, 26 Mo. 256; Shantz *v.* Reynolds, 70 Mo. App. 668; Bradford *v.* Tilly, 65 Mo. App. 181; Cabanne *v.* Spaulding, 14 Mo. App. 312.

79. Townley *v.* Rutan, 21 N. J. L. 674 [*affirming* 20 N. J. L. 604].

80. Bryan *v.* Smith, 10 Mich. 229.

81. *Alabama.*— Nicrosi *v.* Phillipi, 91 Ala. 299, 8 So. 561; Walters *v.* Rogers, 9 Ala. 834; Wright *v.* Mullens, 2 Stew. & P. 219; Childress *v.* McGehee, Minor 131.

Arkansas.— McGuire *v.* Cook, 13 Ark. 448. And see Frank *v.* Hedrick, 18 Ark. 304.

California.—Cummins *v.* Scott, 23 Cal. 526. *Contra,* Cronise *v.* Carghill, 4 Cal. 120.

Colorado.— Miller *v.* Sparks, 4 Colo. 303.

Connecticut.— Phelps *v.* Baldwin, 17 Conn. 209.

the entry was upon the constructive possession of plaintiff;[82] and under the statutes of one jurisdiction where the complaint is based on a forcible holding out of the premises it must allege that the premises were in the constructive possession of plaintiff at the time of the holding out.[83] The general allegation that plaintiff was in the actual peaceable possession of the premises at the time of the entry is a sufficient averment of actual possession. The evidentiary facts by which such allegations are to be proved need not be set out,[84] nor is it necessary to allege in terms that the possession was actual, if this fact sufficiently appears from other averments in the complaint.[85] On the other hand it is not sufficient to allege that plaintiff was lawfully entitled to possession,[86] that he was "seized" of the premises[87] or the owner thereof,[88] or was lawfully and peaceably possessed of a leasehold interest,[89] that plaintiff purchased the premises from the state "as an occupant,"[90] or that plaintiff was in possession on a particular day and that defendant at a subsequent day forcibly entered.[91] So inconsistent averments as to possession render the complaint bad.[92] The complaint need not state the precise time when plaintiff was possessed of the premises and if stated it may be rejected as surplusage.[93]

(IV) *RIGHT OF POSSESSION.* In actions of forcible entry and detainer no allegation as to plaintiff's right of possession is ordinarily necessary unless

Illinois.— Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230; Whitaker *v.* Gautier, 8 Ill. 443.

New Jersey.—Corlies *v.* Corlies, 17 N. J. L. 167.

New Mexico.— Gonzales *v.* Boren, 3 N. M. 204, 5 Pac. 336.

Texas.— Ochoa *v.* Garza, 1 Tex. App. Civ. Cas. § 939.

Washington.— McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 108.

Wisconsin.— Bracken *v.* Preston, 1 Pinn. 365.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 114.

82. Whitaker *v.* Gautier, 8 Ill. 443.

83. Lowman *v.* Sprague, 73 Hun (N. Y.) 408, 26 N. Y. Suppl. 568.

84. Holladay Coal Co. *v.* Kirker, 20 Utah 192, 57 Pac. 882.

Possession by wife.— A complaint alleging that plaintiff was in actual possession of the premises by his wife on the day of the entry is sufficient. Davis *v.* Woodward, 19 Minn. 174.

Inaccurate description of possession.— The fact that the complaint does not correctly describe the character of the possession (as for instance where an exclusive possession is alleged where plaintiff is not entitled to exclusive possession) is not necessarily fatal to a recovery. McHose *v.* South St. Louis F. Ins. Co., 4 Mo. App. 514.

Averment of ownership.— If the complaint is sufficient on its face, the fact that it alleged that plaintiff is the owner of the premises will be treated as merely descriptive of his right of possession and not as raising the question of title which cannot be determined in such action. McClung *v.* Penny, 11 Okla. 474, 69 Pac. 499.

85. More *v.* Del Valle, 28 Cal. 170; Waterbury *v.* Deckelmann, 50 N. Y. App. Div. 434, 64 N. Y. Suppl. 60.

Applications of rule.—The following allegations have been held sufficient to show actual possession: An allegation that defendants entered upon the land belonging to plaintiff and expelled him therefrom (Miller *v.* Sparks, 4 Colo. 303; Lee *v.* Stiles, 21 Conn. 500. But see Phelps *v.* Baldwin, 17 Conn. 209); an allegation that plaintiff was in "peaceable" possession (More *v.* Del Valle, 28 Cal. 170; Lewis *v.* Yoakum, (Tex. Civ. App. 1895) 32 S. W. 237. *Compare* Knowles *v.* Crocker Estate Co., 125 Cal. 264, 57 Pac. 998); and an allegation of seizin in fee in plaintiff and that defendant entered and disseized and put him out of the possession of the premises described (Cunningham *v.* Green, 3 Ala. 127).

86. McGuire *v.* Cook, 13 Ark. 448.

87. McGuire *v.* Cook, 13 Ark. 448, this does not necessarily imply possession.

88. Spurck *v.* Forsyth, 40 Ill. 438; McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 100.

89. Townsend *v.* Van Aspen, 38 Ala. 572.

90. Wright *v.* Mullens, 2 Stew. & P. (Ala.) 219, the term "occupancy" does not necessarily embrace possession.

91. Spurck *v.* Forsyth, 40 Ill. 438.

92. Dickinson *v.* Maguire, 9 Cal. 46; Schuster *v.* Gray, 8 Kan. App. 222, 55 Pac. 489, holding that a complaint which alleges that complainant is the owner and in possession of certain described premises and that defendant forcibly entered and detains a portion of said premises is defective because of the contradictory statements as to possession.

Averments as to possession held not contradictory.— A complaint alleging that on a certain day plaintiff was in possession of the land and that on that day "defendant wrongfully and without force by disseizin obtained possession of said premises, and has ever since held and continues to hold possession thereof wrongfully" is not objectionable as showing possession of plaintiff and defendant at the same time. Hinniger *v.* Trax, 67 Mo. App. 521.

93. Bliss *v.* Winston, 1 Ala. 344.

required by some special statutory provision. There are, however, statutes making such an allegation necessary.[94] Under some of these statutes it will be sufficient to allege generally that plaintiff is entitled to possession,[95] while others require the facts showing the right to possession to be set out,[96] and even in jurisdictions where it is unnecessary to set out the facts if the pleader assumes to do so they must be set forth fully and with precision.[97] In actions where plaintiff has only constructive possession it has been held that he must allege his right of possession and the facts on which this right is based.[98]

(v) *TITLE OF ESTATE.* Where the entry is with force and a strong hand, the complaint need not, in the absence of some statute requiring it, allege the title or estate of plaintiff in the premises.[99] Nevertheless if required by statute, the complaint must set out plaintiff's title,[1] and the nature of his estate in the premises.[2] In alleging plaintiff's estate the precise quantity thereof need not be stated.[3] The following allegations as to plaintiff's estate have been held sufficient: That plaintiff claims by virtue of a fee simple,[4] or has a "freehold in fee simple"[5] or an unexpired term of years,[6] or had "lawful and peaceable possession of the premises for the space of five years."[7] It has been held sufficient to allege that plaintiff was possessed as tenant for years of a leasehold estate not yet

94. Sumner *v.* Spencer, 9 Ark. 441; Bryan *v.* Smith, 10 Mich. 229; Bush *v.* Dunham, 4 Mich. 339; Emerson *v.* Emerson, (Tex. Civ. App. 1896) 35 S. W. 425. And see cases cited *infra,* note 95 *et seq.*

95. Bryan *v.* Smith, 10 Mich. 229; Bush *v.* Dunham, 4 Mich. 339; Pinney *v.* Fridley, 9 Minn. 34. And see Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123.

An allegation that the claimants are "owners of the premises" is sufficient without deraigning their title. Shannon *v.* Grindstaff, 11 Wash. 536, 40 Pac. 123. And see Pinney *v.* Fridley, 9 Minn. 34.

An allegation that plaintiff "became entitled to the possession" some months previous to the complaint is not sufficient to show an existing right to possession. Bryan *v.* Smith, 10 Mich. 229.

96. Sulledge *v.* White, 73 Tex. 498, 11 S. W. 527; Emerson *v.* Emerson, (Tex. Civ. App. 1896) 35 S. W. 425.

In an action of unlawful detainer, where plaintiff claimed under a decree in connection with a certificate of purchase, and the only allegation in the complaint concerning the nature or provisions of the decree was "that under and by virtue of being the owner of said certificate, and under the power and authority of the district court of said county, and the decree upon which said certificate of sale was issued, this plaintiff is entitled to the possession of said lode, with all appurtenances" is a conclusion of law. The provisions of the decree should have been set forth sufficiently for the court to judge of plaintiff's rights under it. Laffey *v.* Chapman, 9 Colo. 304, 12 Pac. 152.

An allegation of the legal conclusion that plaintiff has the right of possession is unnecessary where the complaint states the facts showing such right of possession. Miller *v.* Hall, 14 Colo. App. 367, 60 Pac. 194.

97. Pinney *v.* Fridley, 9 Minn. 34. Thus **in an action of forcible entry and detainer plaintiff instead of simply alleging that he was the owner and entitled to the possession** of the premises undertook to set out in detail the specific steps by which he claimed to have acquired title through a mortgage given by defendant as owner, and a foreclosure thereof by advertisement, but failed to state that the mortgage contained a power of sale under which foreclosure was made. It was held that the omission rendered the pleading bad and was not cured by an averment that the mortgage was "duly foreclosed" and by virtue of such foreclosure plaintiff was seized in fee simple. Pinney *v.* Fridley, *supra.*

98. Barnes *v.* Cox, 12 Utah 47, 41 Pac. 557, a case in which the premises in controversy were unsurveyed government lands.

99. *Illinois.*— Spurck *v.* Forsyth, 40 Ill. 438.

Oregon.— Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038.

Tennessee.— Rhodes *v.* Comer, 2 Sneed 40.

Utah.— Holladay Coal Co. *v.* Kirker, 20 Utah 192, 57 Pac. 882.

Wisconsin.— Eastman *v.* White, 3 Pinn. 180, 3 Chandl. 196.

1. Bracken *v.* Preston, 1 Pinn. (Wis.) 365.

Under the statutes of Washington, sections 1549–1551, inclusive, if plaintiff wishes to raise the issue of title he must file with the complaint an abstract of his title. If he does not defendant need not answer affirmatively on the subject of title. McGrew *v.* Lamb, 31 Wash. 485, 72 Pac. 100.

2. Wall *v.* Hunt, 9 N. J. L. 37; Banks *v.* Murray, 5 N. J. L. 849; Van Aulen *v.* Decker, 2 N. J. L. 108; Turner *v.* Lumbrick, Meigs (Tenn.) 7; Bracken *v.* Preston, 1 Pinn. (Wis.) 365. And see Walters *v.* Rogers, 9 Ala. 834.

3. Turner *v.* Lumbrick, Meigs (Tenn.) 7.

4. Ward *v.* Lewis, 1 Stew. (Ala.) 26.

5. Lecatt *v.* Stewart, 2 Stew. (Ala.) 474.

6. Mead *v.* Daniel, 2 Port. (Ala.) 86.

7. McRae *v.* Tillman, 6 Ala. 486, holding that this necessarily implies that the land was held by some tenure which by law entitled him to the possession.

ended,[8] or is a tenant at will.[9] On the other hand a statement that complainant had a legal right and estate to the premises is bad as amounting to a conclusion of law;[10] and an allegation that complainants were "tenants for years or lessors" of the premises is bad for uncertainty.[11] An allegation that petitioner "became entitled" and went into possession of the premises "by virtue of a certain arrangement with the lessee thereof,"[12] or that he was in the peaceable possession and occupancy of the premises and lawfully entitled to remain and continue in possession,[13] does not satisfy a statutory requirement that "the interest" of plaintiff in the premises shall be described.

(VI) *DESCRIPTION OF PREMISES* — (A) *Necessity of Description.* In all actions of forcible entry or detainer the complaint must contain a description of the premises[14] and no premises not described in the complaint can be recovered.[15]

(B) *Sufficiency of Description.* Any description by which the premises can be readily identified and located will be sufficient.[16] Reasonable and not absolute certainty of description is required.[17] Such certainty in description as apprises defendant of the premises which he is charged with entering and will guide in executing the writ of restitution is all that is requisite,[18] but at least this degree

8. Berry *v.* Williams, 21 N. J. L. 423. And see House *v.* Camp, 32 Ala. 541, holding that the averment that plaintiff "was lawfully possessed" of the premises "was in possession, and claimed said premises as tenant under one B. M. D., and had been in possession of said premises for the space of six months previous thereto" is a sufficient description of the complainant's estate.

9. McDonald *v.* Gayle, Minor (Ala.) 98.

10. People *v.* Field, 58 Barb. (N. Y.) 270.

11. Wall *v.* Hunt, 9 N. J. L. 37.

12. Potter *v.* New York Baptist Mission Soc., 23 Misc. (N. Y.) 671, 52 N. Y. Suppl. 294.

13. Schneider *v.* Leizman, 57 Hun (N. Y.) 561, 11 N. Y. Suppl. 434, 19 N. Y. Civ. Proc. 217.

14. *Alabama.*— Wright *v.* Lyle, 4 Ala. 112.

Illinois.— Beel *v.* Pierce, 11 Ill. 92; Gerlach *v.* Walsh, 41 Ill. App. 83; Burns *v.* Nash, 23 Ill. App. 552.

Minnesota.— Lewis *v.* Steele, 1 Minn. 88.

New Mexico.— Sanchez *v.* Luna, 1 N. M. 238.

Tennessee.— Settle *v.* Settle, 10 Humphr. 504.

Texas.— Lasater *v.* Fant, (Civ. App. 1897) 43 S. W. 321.

Utah.— Holladay Coal Co. *v.* Kirker, 20 Utah 192, 57 Pac. 282.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 115.

Where by statute no complaint is necessary, a description of the premises must be contained in the warrant. Settle *v.* Settle, 10 Humphr. (Tenn.) 504.

Following an erroneous description in a lease is not sufficient; the premises must be properly described. Gerlach *v.* Walsh, 41 Ill. App. 83.

15. Lamme *v.* Buse, 70 Mo. 463.

16. *California.*— Hernandez *v.* Simon, 4 Cal. 182.

Illinois.— Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786 [*affirming* 34 Ill. App. 540]; Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230.

Missouri.— Silvey *v.* Summer, 61 Mo. 253; Naylor *v.* Chinn, 82 Mo. App. 160.

New Jersey.— O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752; Pullen *v.* Boney, 4 N. J. L. 125.

Oklahoma.— Olds *v.* Conger, 1 Okla. 232, 32 Pac. 337.

Tennessee.— Ladd *v.* Riggle, 6 Heisk. 620.

Washington.— Squires *v.* Zumwalt, 12 Wash. 241, 40 Pac. 986.

West Virginia.— Moore *v.* Douglass, 14 W. Va. 708.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 115.

Instances of description held sufficient.— The following descriptions have been held sufficient: "A school-house in the 10th civil district of Union county, known as Miller's School-House" (Butcher *v.* Palmer, 1 Heisk. (Tenn.) 431); "a messuage, with the appurtenances, known as the South half of Section twenty" (Cunningham *v.* Green, 3 Ala. 127); "the premises enclosed by us, situate in the County of Cook, and State of Illinois, being the same on which you now reside, containing about one hundred acres more or less, and commonly called North Grove" (Atkinson *v.* Lester, 2 Ill. 407); "the hotel commonly called the 'Clinton House,' in Indianola, Shawnee county, together with all the rooms, houses, gardens, lots, etc., used in connection therewith" (Kykendall *v.* Clinton, 3 Kan. 85); and "a certain house and lot in the city of Wetumpka in said county, in that part of said city known as 'Miller's survey,' being known as the east half of lot number 21 in said survey, on which is a house recently occupied by Mrs. B. M. D." (House *v.* Camp, 32 Ala. 541). For further instances of description held sufficient see O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752; Pullen *v.* Boney, 4 N. J. L. 125; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620; Murat *v.* Micand, (Tex. Civ. App. 1894) 25 S. W. 312.

17. Moore *v.* Douglass, 14 W. Va. 708.

18. O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

of certainty is necessary.[19] The premises must be described with reasonable certainty.[20] Description of property located in a city by the number of the lot, its location and the manner in which it is used, is sufficient.[21] So a description of the premises by metes and bonnds is sufficient,[22] and it is not necessary in addition thereto to specify the land by statutory demarcation of section, township, and range.[23] It is not necessary, however, that the premises be described by metes and bounds if otherwise described with sufficient certainty.[24] A description of the land by section and subdivisions thereof, township, and range, the state and county being given, will be sufficient;[25] otherwise where the state and county are not designated.[26] If the property is otherwise distinctly described error in describing it by section, township, etc., will not vitiate the complaint.[27] Erroneous statements in the description may be rejected as surplusage if the remaining statements sufficiently identify the property.[28] It is not necessary to state the amount of land if it is otherwise described with reasonable certainty.[29] And an erroneous statement of the quantity of land may be rejected as surplusage where the description is otherwise accurate and complete.[30] When the other parts of

19. *Illinois.*— Preston *v.* Davis, 112 Ill. App. 636; Maltoney *v.* Shattuck, 15 Ill. App. 44. And see House *v.* Wilder, 47 Ill. 510.

Michigan.— Gardner *v.* Hickock, 102 Mich. 497, 60 N. W. 974; Clark *v.* Gage, 19 Mich. 507.

New Mexico.— Sanchez *v.* Luna, 1 N. M. 238.

Ohio.— Murphy *v.* Lucas, 2 Ohio 255.

Tennessee.— Clements *v.* Clinton, Mart. & Y. 198.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 115.

And see Wright *v.* Lyle, 4 Ala. 112; Lewis *v.* Steele, 1 Minn. 88.

The degree of certainty sufficient in a deed will not always be sufficient in a pleading. College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119. To the same effect see Clark *v.* Gage, 19 Mich. 507, holding that the precision required in a complaint in identifying the premises is to be measured by the rules of pleadings rather than by those which govern contracts.

Instances of description held insufficient.— The following descriptions have been held insufficient: "A certain messuage and parcel of land, with the appurtenances, containing thirty acres, be the same more or less, adjoining Thomas B. Watts and others in the said county of De Kalb" (Wright *v.* Lyle, 4 Ala. 112); "about one-fourth of an acre of land situated in . . . the northwest corner of section 25, township 12, range 1 west, being the same now occupied and held by defendant for toll-house and garden," giving county and state (College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119, 121); "the house and premises on Hennepin Island, so called, at the Falls of St. Anthony, in the county aforesaid, let to him by the complainants" (Lewis *v.* Steele, 1 Minn. 88, 89); "messuage, or dwelling house of the plaintiff" (Applegate *v.* Applegate, 16 N. J. L. 321); and "a range of lead ore and a strip or piece of land on each side running easterly and westerly across the land owned by certain persons in a particular section" (Cox *v.* Groshong, 1 Pinn. (Wis.) 307).

20. Schaumtœffel *v.* Belm, 77 Ill. 567; Burns *v.* Nash, 23 Ill. App. 552; Cox *v.* Groshong, 1 Pinn. (Wis.) 307.

21. Cairo, etc., R. Co. *v.* Wiggins Ferry Co., 82 Ill. 230. And see Townsend *v.* Van Aspen, 38 Ala. 572; House *v.* Camp, 32 Ala. 541.

22. Ward *v.* Lewis, 1 Stew. (Ala.) 26; Mead *v.* Daniel, 2 Port. (Ala.) 86; More *v.* Del Valle, 28 Cal. 170, holding further that failure to allege the state in which the land was situated did not vitiate the description; the county in which the land is situated being given and the suit being brought in that county.

23. Mead *v.* Daniel, 2 Port. (Ala.) 86.

24. Castro *v.* Gill, 5 Cal. 40; Tipton *v.* Swayne, 4 Mo. 98; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

25. Huffaker *v.* Boring, 8 Ala. 87.

A description of land as lots thirty-three and thirty-four in section twenty-six, township twenty-nine north, of range 1 west of the third principal meridian situated in the county of Marshall in the state of Illinois is insufficient, the section designated not being one that is ordinarily laid off in lots by a government survey. Preston *v.* Davis, 112 Ill. App. 636.

26. Johnson *v.* Fischer, 56 Mo. App. 552.

27. Rosenberger *v.* Wabash R. Co., 96 Mo. App. 504, 70 S. W. 395.

The introduction in a complaint of the name of a person when he did not sign the complaint or appear to have been in the possession of the premises is not objectionable; no harm arose to defendant by the mistake and the name can be rejected as surplusage. O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

28. Silvey *v.* Summer, 61 Mo. 253.

29. Allen *v.* Gibson, 4 Rand (Va.) 468; Moore *v.* Douglass, 14 W. Va. 708. See also College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119.

30. College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119.

the description are not sufficiently certain the quantity becomes essential in determining the identity of the land, although as an element in the description of land the statement of the quantity is the least reliable.[31] The premises may be described by reference in the complaint to an exhibit containing a description.[32] A description of the premises as part of a tract designated without specifying the part meant is insufficient.[33] Unnecessary prolixity of description does not vitiate the complaint, if the property can be readily identified therefrom.[34] And if the complaint states one cause of action in several counts the description of the premises in one count will be sufficient.[35]

(VII) *ENTRY AND DETAINER.* In actions for forcible entry and detainer, an allegation of entry by defendant on the premises in question is necessary.[36] It seems, however, that no such allegation is necessary where the action is based on a forcible detainer only.[37] According to some decisions, the allegation of time of entry by defendant is material and must be proved as laid, but the probable weight of authority is against this view.[38] In all actions brought under the forcible entry and detainer statutes it is necessary to allege a detention of the premises,[39] at the time of the institution of the action,[40] for in the absence of such detention the acts complained of would amount to no more than a trespass.[41] A complaint showing that defendant has been in possession of the property for over a year, but which does not show such possession to have been quiet, is not bad as showing a defense under a statute making quiet possession for a year by defendant a defense.[42]

(VIII) *FORCE.* Whether the cause of action is a forcible entry and detainer or a forcible detainer, an averment of force in the commission of the acts complained of is necessary;[43] and if the words of the statute descriptive of the acts are "unlawfully and by force" the omission of the word "unlawfully" in the complaint vitiates it.[44] It is not necessary to set out in the complaint the par-

31. College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119.

32. Steele *v.* Steele, 2 Tex. App. Civ. Cas. § 345.

33. Beel *v.* Pierce, 11 Ill. 92; Klingensmith *v.* Faulkner, 84 Ind. 331; Schuster *v.* Gray, 8 Kan. App. 222, 55 Pac. 489; Ochoa *v.* Garza, 1 Tex. App. Civ. Cas. § 939.

34. Bell *v.* Killcrease, 11 Ala. 685.

35. Porter *v.* Murray, (Cal. 1886) 12 Pac. 425.

36. See cases cited *supra*, page 1150, note 65.

Duplicity.— A complaint in unlawful and forcible entry and detainer alleging that defendant unlawfully turned plaintiff out of possession and unlawfully withheld the possession of a certain tenement from plaintiff is not bad for duplicity. Brown *v.* Ashford, 56 Miss. 677.

37. Lecatt *v.* Stewart, 2 Stew. (Ala.) 474.

38. See *infra*, IV, I, 5.

39. Barlow *v.* Burns, 40 Cal. 351; Tipton *v.* Swayne, 4 Mo. 98; Lasater *v.* Fant, (Tex. Civ. App. 1897) 43 S. W. 321; Barnes *v.* Cox, 12 Utah 47, 41 Pac. 557.

40. Champ Spring Co. *v.* B. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 505.

Detention of the premises at the time suit was commenced is sufficiently alleged in a complaint which sets forth that defendant refuses "to quit such possession, but continued to withhold the same from plaintiff." Rivereau *v.* St. Ament, 3 Greene (Iowa) 118.

41. See Tipton *v.* Swayne, 4 Mo. 98.

42. Kennedy *v.* Dickie, 27 Mont. 70, 69 Pac. 672.

43. *Arkansas.*— Sumner *v.* Spencer, 9 Ark. 441.

California.— McEvoy *v.* Igo, 27 Cal. 375. See also Barlow *v.* Burns, 40 Cal. 351.

Connecticut.— Bull *v.* Olcott, 2 Root 472.

Illinois.— Ballance *v.* Curtenius, 8 Ill. 449.

Montana.— Morse *v.* Boyde, 11 Mont. 247, 28 Pac. 260.

Wisconsin.— Cox *v.* Groshong, 1 Pinn. 307.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 117.

And see Ferguson *v.* Carter, 40 Ala. 607.

Rule in Missouri.— Rev. St. (1889) § 5089, makes him guilty of unlawful detainer who wrongfully and without force by disseizin shall obtain and keep possession of realty and shall fail to quit after written demand by the person having the legal right of possession. It was held that a complaint was sufficient which alleged that defendant unlawfully and without force by disseizin obtained possession and kept it after demand made in writing for its delivery. School Dist. No. 4 *v.* Holmes, 53 Mo. App. 487.

Determination of character of action.— When a complaint charges forcible entry "with a multitude of people" and a forcible and unlawful detainer in one count the forcible entry is the gist of the action; the averment of forcible detainer not being as an independent ground of relief but as a mere continuation or consequence of the first act. McMinn *v.* Bliss, 31 Cal. 122; Preston *v.* Kehoe, 15 Cal. 315.

44. Blaco *v.* Haller, 9 Nebr. 149, 1 N. W. 978.

ticular facts constituting a forcible entry or detainer.[45] It is in all cases sufficient to follow the language of the statute on which the complaint is based.[46]

(IX) *DAMAGES.* The complaint need not claim a specific sum as damages.[47] If it does neither the court nor the jury can find a sum in excess thereof.[48] If no demand for rent is set up in the complaint rent is not recoverable.[49] If the complaint contains proper averments as to damages sustained it need not ask for the treble damages authorized by statute. The court will on a recovery by plaintiff treble the damages, although treble damages were not asked.[50]

(X) *ALLEGATIONS WITH RESPECT TO PERSONALTY.* The complaint in forcible entry and detainer should not contain allegations respecting defendant's appropriation of personal property.[51]

(XI) *NOTICE TO QUIT AND DEMAND FOR POSSESSION.* The complaint must allege notice to quit and demand for possession when necessary to the cause of action,[52] or it will be fatally defective.[53] It need not be alleged that the notice to quit was in writing, although on the trial it must be proved to be so.[54] Nor

45. *Alabama.*— Ladd *v.* Dubroca, 45 Ala. 421; Ferguson *v.* Carter, 40 Ala. 607.

Georgia.— McAlpin *v.* Purse, 86 Ga. 271, 12 S. E. 412.

Minnesota.— Davis *v.* Woodward, 19 Minn. 174.

Nebraska.— Blackford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101.

Ohio.— Brown *v.* Burdick, 25 Ohio St. 260.

Oklahoma.— Greenameyer *v.* Coate, 12 Okla. 452, 72 Pac. 377; Richardson *v.* Pinny, 6 Okla. 328, 50 Pac. 231 [*overruling* Rice *v.* West, (1893) 33 Pac. 706].

Wisconsin.— Jarvis *v.* Hamilton, 16 Wis. 574.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 117.

Sufficient averments illustrated.— In actions of forcible entry and detainer the following averments have been held sufficient: That defendant entered with force and strong hand (Ward *v.* Lewis, 1 Stew. (Ala.) 26); that defendant forcibly entered and forcibly detained the premises (McAlpin *v.* Purse, 82 Ga. 271, 12 S. E. 412); that defendant "forcibly and unlawfully entered upon" and forcibly and unlawfully refuses to quit the premises (Townsend *v.* Van Aspen, 38 Ala. 572); and that "defendants unlawfully entered upon such land, and turned this plaintiff out of the possession thereof, by threats and menacing conduct, and ever since that time, said defendants have and still do hold the possession thereof, by threats of violence against this plaintiff" (Holland *v.* Green, 62 Cal. 67). In actions of forcible detainer, the following allegations have been held sufficient: That defendant "forcibly and unlawfully detains and keeps possession of the premises;" detaining and holding the same by such words, circumstances or actings as have a natural tendency to excite fear and apprehension of danger" (Matlock *v.* Thompson, 18 Ala. 600); that defendant "unlawfully and forcibly detained, and still doth detain from the undersigned, possession, etc., of the premises" (Brown *v.* Burdick, 25 Ohio St. 260); and under a special statute providing that every person is guilty of a forcible detainer who by force during the absence of the occupant of any real property unlawfully enters thereon and who after demand refuses for the period of three days to surrender possession to such former occupant a complaint alleging that plaintiff was in possession and that defendants during his absence entered on the premises, broke open the inclosures, and broke open the door of the dwelling-house, and entered therein and by force continued to occupy the premises and refused to peaceably surrender the possession thereof to plaintiff after due notice given is sufficient (Gore *v.* Altice, 33 Wash. 235, 74 Pac. 556).

46. *Alabama.*— Huffaker *v.* Boring, 8 Ala. 87; Ward *v.* Lewis, 1 Stew. 26.

California.— Holland *v.* Green, 62 Cal. 67.

Nebraska.— Blachford *v.* Frenzer, 44 Nebr. 829, 62 N. W. 1101.

Ohio.— Brown *v.* Burdick, 25 Ohio St. 260; Barto *v.* Abbe, 16 Ohio 408.

Oklahoma.— Greenameyer *v.* Coate, 12 Okla. 452, 72 Pac. 377; Richardson *v.* Penny, 6 Okla. 328, 50 Pac. 231.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 117.

47. Hixon *v.* Selders, 46 Mo. App. 275.

Value of rents and profits.— The complaint need not aver the value of the rents and profits, which may nevertheless be awarded as damages. Holmes *v.* Horber, 21 Cal. 55.

48. Feedler *v.* Schroeder, 59 Mo. 364; Moore *v.* Dixon, 50 Mo. 424; Coles *v.* Foley, 13 Mo. App. 249.

49. Johnson *v.* Tuggle, 27 Miss. 836.

50. Tewksbury *v.* O'Connell, 25 Cal. 262. But see Gaffney *v.* Magrath, 11 Wash. 456, 39 Pac. 973, which seems to be in conflict with this view.

51. Gillam *v.* Sigman, 29 Cal. 637.

52. Spear *v.* Lomax, 42 Ala. 576; Doss *v.* Craig, 1 Colo. 177; Andrae *v.* Heinritz, 19 Mo. 310; Barnes *v.* Cox, 12 Utah 47, 41 Pac. 557.

53. Barnes *v.* Cox, 12 Utah 47, 41 Pac. 557.

54. Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507, holding that the allegation "that plaintiffs served notice on the defendant describing said premises to defendant" is sufficient. But see Spear *v.* Lomax, 42 Ala.

is it necessary to allege the exact date at which the notice was given. It is sufficient to allege that subsequent to the unlawful entry while defendants were in possession and prior to the commencement of the action, the notice to surrender was given, and refused for a designated period after the notice was given.[55] It is also unnecessary to expressly state that the demand was made "by the plaintiff."[56] If no demand for possession is necessary the complaint need not allege a demand,[57] but an allegation of a demand when a demand is unnecessary will not vitiate the complaint.[58]

c. Joinder of Causes of Action. An action of forcible entry and detainer brought before a justice of the peace cannot be joined with a claim for damages growing out of the same transactions.[59] According to the weight of authority a cause of action based on a forcible entry and detainer and one based on an unlawful detainer cannot be joined in the same complaint,[60] the view being taken that these causes of action are wholly inconsistent with each other.[61] Where it appears on the face of a complaint setting up these two causes of action that the premises sought to be recovered are the same, a demurrer will lie.[62] When authorized by statute, causes of action for forcible entry and forcible detainer may be united in the same complaint,[63] but being distinct causes of action they must be separately stated in separate courts,[64] or the complaint will be bad on demurrer.[65] A statute requiring that in an action to recover distinct parcels of land the complaint shall allege separately the distinct causes of action as to each parcel does not make it necessary that the claims for damages for the wrongful entry and possession be separately stated, as such damages are not an independent cause of action.[66]

d. Amendments.[67] Amendments which do not change substantially the cause of action will ordinarily be permitted,[68] and when offered in time should be allowed as of course and without the imposition of terms.[69] The following have been held to be permissible amendments: Aiding the description of the property,[70] changing the date on which the forcible entry was alleged to be committed,[71] increasing the amount of damages,[72] showing that the land was situated in

576, holding that a complaint which fails to aver that a demand in writing to deliver the possession thereof to any one lawfully entitled thereto was made is defective.

55. Holladay Coal Co. *v.* Kirker, 20 Utah 192, 57 Pac. 882.

56. Spear *v.* Lomax, 42 Ala. 576.

57. McCleary *v.* Crowley, 22 Mont. 245, 56 Pac. 227.

58. Miller *v.* Sparks, 4 Colo. 303.

59. Ow *v.* Wickham, 38 Kan. 225, 16 Pac. 335.

60. McGuire *v.* Cook, 13 Ark. 448; Polack *v.* Shafer, 46 Cal. 270; Liddon *v.* Hodnett, 22 Fla. 271. *Contra*, Littleton *v.* Clayton, 77 Ala. 571.

61. McGuire *v.* Cook, 13 Ark. 448.

62. McGuire *v.* Cook, 13 Ark. 448.

63. Shelby *v.* Houston, 38 Cal. 410.

64. Shelby *v.* Houston, 38 Cal. 410; Valencia *v.* Couch, 32 Cal. 339, 91 Am. Dec. 589. *Compare* Kerr *v.* O'Keefe, 138 Cal. 415, 17 Pac. 447.

65. Valencia *v.* Couch, 22 Cal. 339, 91 Am. Dec. 589.

66. Chamberlain *v.* Mensing, 51 Fed. 669.

67. For amendments on appeal see *infra*, IV, N, 1, f.

68. Schuster *v.* Gray, 8 Kan. App. 222, 55 Pac. 489. See also Murry *v.* Harper, 3 Ala. 744.

In New Jersey no power has been conferred on justices to permit amendments in proceedings under the forcible entry and detainer statute (Krause *v.* Dayton, 51 N. J. L. 272, 17 Atl. 91; Waters *v.* Haynes, 49 N. J. L. 598, 9 Atl. 770; Wilson *v.* Bayley, 42 N. J. L. 132); and where the complaint is allowed to be amended so as to substantially change an allegation material to be charged and proved to justify a judgment for possession the judgment cannot be sustained (Waters *v.* Haynes, *supra*).

69. Brinkley *v.* Mooney, 9 Ark. 445, holding that where a demurrer for misjoinder of causes of action was sustained it was error to grant leave to amend only on the restoration of the personal property.

70. Schuster *v.* Gray, 8 Kan. App. 222, 55 Pac. 489; Evetts *v.* Johns, (Tex. Civ. App. 1903) 76 S. W. 778 [*overruling* Ochoa *v.* Garza, 1 Tex. App. Civ. Cas. § 939].

Setting out metes and bounds.— Where, in an action for forcible entry and unlawful detainer, the declaration described the premises as a certain portion of a certain section, township, and range, there was no departure in allowing an amendment setting out the metes and bounds. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

71. Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

72. Hixon *v.* Selders, 46 Mo. App. 275; Lucas *v.* Fallon, 40 Mo. App. 551; Elliott *v.*

the county in which suit was brought,[73] or in the precinct where suit was brought, where the complaint contains a sufficient description of the premises from which it could have been shown that they were in such precinct,[74] showing that plaintiff at the time of the entry was in peaceable possession,[75] correcting contradictory statements as to possession,[76] or verifying the complaint.[77]

e. Verification. Where the statutes require verification of the complaint, a non-compliance therewith renders the complaint fatally defective.[78] The verification must be made by the complainant in the absence of some special statutory provision authorizing verification by some other person.[79] A verification reciting that the complaint is "true in substance" is insufficient,[80] and so is a complaint verified by an agent "to the best of his knowledge, information, and belief."[81]

f. Filing. The question of filing complaints and the formalities in relation thereto is a matter of statutory regulation and no general principles can be stated in relation thereto.[82]

Abell, 39 Mo. App. 346. See also Champ Spring Co. *v.* B. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 506.

73. McKinney *v.* Harral, 36 Mo. App. 337.

74. McRae *v.* White, (Tex. Civ. App. 1897) 42 S. W. 793.

75. Hoffman *v.* Mann, 75 S. W. 219, 25 Ky. L. Rep. 255.

76. Schuster *v.* Gray, 8 Kan. App. 222, 55 Pac. 489.

77. Sanchez *v.* Luna, 1 N. M. 238.

78. Fletcher *v.* Keyte, 66 Mo. 285. And see Levy *v.* David, 24 R. I. 249, 52 Atl. 1080.

Verification of amendment.— A material amendment of the complaint must be verified unless permitted to be filed without objection. McGuire *v.* Cook, 13 Ark. 448. Where the complaint does not show the name of the person taking the oath an amendment may be allowed to show that plaintiff's attorney made the affidavit, and that his name was omitted by mistake. Johnson *v.* Tuggle, 27 Miss. 836.

Before whom oath made.— The complaint may be sworn to before any one qualified to administer an oath. Crow *v.* Borris, 15 Ga. 303.

In Illinois verification is unnecessary. Patterson *v.* Graham, 140 Ill. 531, 30 N. E. 460.

79. Levy *v.* David, 24 R. I. 249, 52 Atl. 1080.

Under special statutory provisions.— Verification by an agent setting forth that the facts are within his knowledge brings the case within a statute providing that when the pleading is verified by the attorney or any other person except a party he must set forth the reasons why it is not made by a party and is a proper verification. Newman *v.* Bird, 60 Cal. 372. By the statutes of Maine, if the complaint shows that the complainant lives in the county in which the estate lies it cannot be signed and sworn to by his agent and attorney unless it shows that "complainant is out of the state or sick" or for other reasons unable to appear in person before the court. Treat *v.* Bent, 51 Me. 478. Where a statute requires the complaint to be signed by the party aggrieved or his agent or attorney, and sworn to, a complaint signed "N. by W., his agent and attorney" and sworn to before a justice is a sufficient verification. Naylor *v.* Chinn, 82 Mo. App. 160. And see Bobb *v.* Taylor, 25 Mo. App. 583.

80. Wiltshire *v.* Triplett, 71 Mo. App. 332; Tegler *v.* Mitchell, 46 Mo. App. 349; Reilly *v.* Powell, 34 Mo. App. 431.

81. Miles *v.* Goffinet, 16 Mich. 472; Seitz *v.* Miles, 16 Mich. 456. And see People *v.* Whitney, 1 Thomps. & C. (N. Y.) 533, holding that a verification reciting that the complaint is true except as to matters stated on information is insufficient.

82. **Minute of time of exhibition.**— Under the Vermont statutes it is not necessary in a civil action for forcible entry and detainer that the magistrate issuing the process should enter on the complaint a minute of the time of its exhibition. Allen *v.* Ormsby, 1 Tyler (Vt.) 345.

Time of filing.— Under the North Dakota statutes, jurisdiction in forcible entry and detainer does not depend on the filing of a verified complaint before issuance of summons, but it is sufficient if the complaint is filed at or before the time defendant is required by the summons to appear and answer. Browne *v.* Haseltine, 9 S. D. 524, 70 N. W. 648.

With whom filed.— Filing a complaint in a proceeding for forcible entry and detainer with the clerk of the district court and the issuing of a warrant under his hand and the seal of that court is not a compliance with a statute requiring the complaint to be delivered to a court commissioner or a judge of the district court or a judge of probate and the proceedings are void. Summary proceedings to be valid must strictly follow the law which creates them. Tweed *v.* Guild, 2 Ariz. 207, 11 Pac. 753.

Entry on justice's docket.— Under a statute requiring the complaint, summons, and return and all proceedings to be entered on the justice's docket, the complaint need not be entered before the summons issues. It is sufficient if regarded merely after its filing. O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

2. Plea or Answer — a. Necessity For and Right to Answer. Statutes in some jurisdictions dispense with the necessity of written pleadings on the part of defendant in some instances,[83] and where this is the case the sustaining of a demurrer to an answer is harmless error.[84] In the absence of statutory provisions of this character, a plea or answer is necessary, and unless filed it is error to swear the jury to try the matter in difference between the parties because there is no issue.[85] So where a complaint is amended after demurrer has been sustained thereto, and an amended complaint is filed, defendant must plead to the complaint as amended.[86] Under a statute providing that defendant shall file with the clerk his written answer, demurrer, or demurrer and answer, defendant does not waive his right to answer by demurring without answer at the same time.[87]

b. Sufficiency. If the answer in forcible entry and detainer does not deny the material allegations of the complaint and no material new matter is set up, no issue is raised and plaintiff is entitled to judgment on the pleadings.[88] The plea of not guilty is a proper plea in an action of forcible entry and detainer,[89] and is sufficient to put plaintiff upon proof of every material allegation set up in his petition.[90] But new matter by way of excuse, justification, or avoidance, must be specially pleaded unless the necessity therefor is dispensed with by statute.[91] By the express provisions of some statutes, however, a general denial will be sufficient in all cases,[92] even in respect of matter of excuse, justification, or avoidance,[93] and where this is so error if any in striking out a valid special defense is harmless.[94] Where an entry by fraud and stealth is alleged an answer alleging an entry with plaintiff's consent is good.[95] A denial that defendant entered unlawfully admits the entry and tenders issue only on its unlawfulness.[96] An allegation in the answer of actual possession raises no question of title and an allegation of right to possession is a conclusion of law.[97] Where an abstract of title is set up in a paragraph of the complaint in compliance with a statutory requirement, defendant's failure to deny this paragraph does not admit its truth

83. Poffenberger *v.* Blackstone, 57 Ind. 288 (all defenses may be given in evidence without plea); Berryhill *v.* Healey, 89 Minn. 444, 95 N. W. 314 (under the statutes of Minnesota, the oral plea of not guilty is sufficient to put in issue the allegations of the complaint, but if it is desired to set up new matter by way of excuse, justification, or avoidance, such matter must be set up in the answer); Smith *v.* Finger, (Okla. 1905) 79 Pac. 759 (in Oklahoma in an action in the probate court defendant is not required to file any pleading); Simpkins *v.* White, 43 W. Va. 125, 27 S. E. 361 (holding that in unlawful detainer before a justice or on an appeal a verdict on full trial on the merits will not be set aside because there was no plea and issue; that the statute puts in the plea of not guilty).

84. Poffenberger *v.* Blackstone, 57 Ind. 288.

85. Raleigh County *v.* Ellison, 8 W. Va. 308.

86. Brockaway *v.* Thomas, 32 Ark. 311.

87. Manmus *v.* Hamblon, 38 Cal. 539.

88. More *v.* Del Valle, 28 Cal. 170. See also Lloyd *v.* Secord, 61 Minn. 448, 63 N. W. 1099, holding that where an answer admits the material allegations of the complaint and sets up no defense judgment on the pleadings is proper.

89. Raymond *v.* Bell, 18 Conn. 81; Dutton *v.* Tracy, 4 Conn. 79. See also Phelps *v.* Baldwin, 17 Conn. 309; Bull *v.* Olcott, 2 Root (Conn.) 472; McKinney *v.* Hartman, 4 Iowa 154, in which cases this plea was filed. But see Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225.

90. Sullivan *v.* Cary, 17 Cal. 80; McKinney *v.* Hartman, 4 Iowa 154.

91. Smith *v.* Finger, (Okla. 1905) 79 Pac. 759.

92. Henderson *v.* Allen, 23 Cal. 519; Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568.

93. Henderson *v.* Allen, 23 Cal. 519.

94. Oklahoma City *v.* Hill, 4 Okla. 521, 46 Pac. 568. See also Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432, holding that a special plea setting up that defendant had previously been in possession, that plaintiff's tenant had abandoned possession, and that defendant had made a peaceable reëntry is defective, as such matter may be shown under the general issue.

95. Oleson *v.* Hendrickson, 12 Iowa 222.

96. Leroux *v.* Murdock, 51 Cal. 541.

97. Parks *v.* Barkley, 1 Mont. 514.

Answer held to deny title.— Defendant's answer denied that plaintiff was the owner of the lands or entitled to the possession thereof and admitted that one of the parties through whom plaintiff claimed had received a patent for the lands from the United States but alleged the patent to be void and claimed the lands by virtue of a homestead entry and occupation. It was held that the answer was not one of confession and avoidance but a denial of plaintiff's title which placed upon plaintiff the burden of proving such title by competent proof. Roberts *v.* Center, 26 Wash. 435, 67 Pac. 151.

where the answer denies plaintiff's title or right to possession.[98] If the allegations in the complaint are stated conjunctively, an answer which denies them in that form does not raise an issue,[99] and any defense distinctly and separately stated must be an answer to the whole cause of action.[1] If plaintiff regains possession of the premises pending an appeal by defendant to a court of record this fact can only be taken advantage of by a plea *puis darrein continuance*.[2]

3. Reply. By virtue of statutory provisions in some jurisdictions it is not necessary in an action for unlawful detainer to reply to affirmative matter contained in the answer.[3]

4. Method of Raising Objections and Waiver. Objections for defects in the complaint should, it is apprehended, be taken advantage of by the methods ordinarily employed in reaching defects in complaints in any civil action.[4] All objections based on defects of form in a complaint are cured by going to trial without objection,[5] and by verdict,[6] and cannot be raised on appeal or error[7] or on return of the certiorari to the court to which the case is removed.[8] If the description of the premises is insufficient, the objection may be raised by demurrer.[9] Such objection is waived by going to trial.[10] Any defect in the description is cured by verdict,[11] and an objection based thereon cannot be raised for the first time on appeal.[12] Answering and going to trial on the merits waives an objection that the complaint is defective in failing to state where the premises are situated.[13] Where actual possession in plaintiff is defectively alleged the objection is sufficiently taken advantage of by special demurrer on the ground of uncertainty.[14] Objections based on defects of this character cannot be raised after verdict.[15] A defect in alleging the time of entry is waived by appearance and trial on the merits.[16] Informality in alleging a withholding of the premises by defendant at the commencement of the action is cured by verdict.[17] And so is an objection that the complaint contains no prayer for a judgment of ouster.[18] Objections for failure to describe plaintiff's interest in the premises is waived by general appearance and answer, and consent to a postponement of the case.[19] Objection

98. Roberts *v.* Center, 26 Wash. 435, 67 Pac. 151. Such answer necessarily denies the abstract which merely shows the chain of title under which plaintiff claims.

99. Burke *v.* Carruthers, 31 Cal. 467.

1. Mendelson *v.* Kitt, 92 N. Y. Suppl. 127, applying this rule to a case where an alleged separate defense was merely a conclusion following from the facts set forth in the first defense.

2. Lomax *v.* Spear, 51 Ala. 532.

3. Fife *v.* Olson, 5 Wash. 789, 32 Pac. 766.

4. In Illinois defects in the complaint may be reached by motion to quash. Doran *v.* Gillespie, 54 Ill. 366; Jackson *v.* Warren, 32 Ill. 331.

5. Matlock *v.* Thompson, 18 Ala. 600; Wright *v.* Lyle, 4 Ala. 112; Clay *v.* Clay, 7 Tex. 250.

6. Shaw *v.* Gordon, 2 Greene (Iowa) 376. And see Snoddy *v.* Watt, 9 Ala. 609.

7. Matlock *v.* Thompson, 18 Ala. 600; Wright *v.* Lyle, 4 Ala. 112; Leary *v.* Pattison, 66 Ill. 203.

8. Clay *v.* Clay, 7 Tex. 250.

9. College Corner, etc., Gravel Road Co. *v.* Moss, 92 Ind. 119.

10. Davis *v.* Goodman, 62 Ark. 262, 35 S. W. 231; Farr *v.* Farr, 21 Ark. 573; Armstrong *v.* Crilly, 152 Ill. 646, 38 N. E. 936 [*affirming* 51 Ill. App. 504]; Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786 [*affirming* 34 Ill. App. 540].

11. Payne *v.* Martin, 1 Stew. (Ala.) 407; Stone *v.* Halstead, 62 Mo. App. 136. See also Wright *v.* Lyle, 4 Ala. 112. But *compare* Snoddy *v.* Watt, 9 Ala. 609.

12. Hilliard *v.* Carr, 6 Ala. 557; Turk *v.* Elliott, 69 Ill. App. 451. And see *infra*, IV, N, 1, e.

13. Gibbens *v.* Thompson, 21 Minn. 398.

14. Knowles *v.* Crocker Estate Co., 125 Cal. 264, 57 Pac. 998.

15. Test *v.* Devers, 2 Blackf. (Ind.) 80.

16. O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752.

17. Cronise *v.* Carghill, 4 Cal. 120.

Failure to allege a wrongful detention of the premises at the commencement of the action is, according to one decision, waived when not objected to at the trial (Champ Spring Co. *v.* B. Roth Tool Co., 96 Mo. App. 518, 70 S. W. 506); but in another it is held that this defect cannot be cured by verdict (Phelps *v.* Baldwin, 17 Conn. 209).

18. Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225, holding that the objection should be taken by special demurrer.

19. Crane *v.* Van Derveer, 45 N. Y. App. Div. 139, 60 N. Y. Suppl. 1040.

Failure to renew objections on removal by certiorari.—A complaint in forcible entry and detainer, defective for failure to set out complainant's title or interest in the property, where such objection is made before the county judge and overruled but is not re-

or want of a jurat is waived by going to trial,[20] and objections for insufficient verification cannot be raised for the first time on appeal.[21] Such is also the rule with respect to objections based on the allowance of amendments.[22] Objections based on improper joinder of causes of action should be raised by demurrer[23] or by motion to strike or to amend the pleading. Improper joinder is not a ground for motion to dismiss the complaint.[24] Where a complaint is for an unlawful entry and forcible and unlawful detainer, and the summons is to answer for a forcible entry and detainer, the variance is cured by plea to the merits.[25] Where a cause goes to trial without any plea and defendant makes a full defense, he cannot set up the want of plea and issue thereon in the appellate court.[26] Where, in a forcible detainer suit, a counter-claim is interposed, no damages or rent being claimed, the right to object to the introduction of any evidence in support of such counter-claim is not waived by replying instead of demurring to the counter-claim.[27]

5. PLEADING AND PROOF. As in other actions, plaintiff in his evidence is confined to proof of the facts alleged in his complaint.[28] If the complaint alleges forcible entry only, there can be no recovery on proof making out a case of forcible detainer only.[29] And where there is no proof to sustain an allegation of actual possession by plaintiff, a judgment for defendant is proper.[30] As respects possession by defendant of the premises in controversy evidence that plaintiff was in possession of a very small portion will be deemed an immaterial variance.[31] Under a complaint charging defendant with obtaining possession by collusion with plaintiff's tenant, evidence negativing the averment of collusion is competent.[32] According to some decisions the allegation of time of the entry is material and the date must be proved as alleged.[33] But according to the weight of authority it is not necessary to prove the time of entry exactly as alleged.[34] So long as the proof shows an entry before filing complaint,[35] and that the entry was made within the period in which suits for forcible entry and detainer must be brought to avoid the bar of the statute of limitation, a variance between the time alleged and that proved is immaterial.[36] A variance in the pleading and proof as to the amount of land charged to be detained has been held immaterial and a recovery allowed of

newed in the general term where the case is brought by certiorari before traversing the inquisition, is cured by a verdict for the relator where the facts proven on the trial are such as to entitle him to protection under the statute. People *v.* Fields, 1 Lans. (N. Y.) 222.

20. Center *v.* Gibney, 71 Ill. 557.

21. Naylor *v.* Chinn, 82 Mo. App. 160.

22. Evetts *v.* Johns, (Tex. Civ. App. 1903) 76 S. W. 778.

23. Treat *v.* Forsyth, 40 Cal. 484; Liddon *v.* Hodnett, 22 Fla. 271.

24. Liddon *v.* Hodnett, 22 Fla. 271.

25. Grice *v.* Ferguson, 1 Stew. (Ala.) 36.

26. Bartley *v.* McKinney, 28 Gratt. (Va.) 750.

27. Vidger *v.* Nolin, 10 N. D. 353, 87 N. W. 593.

28. Caswell *v.* Ward, 2 Dougl. (Mich.) 374; Russell *v.* McCartney, 21 Mo. App. 544, holding that there is no reason for exempting actions of unlawful detainer from the rule that one's case must be put in the statement or petition as it exists in order to avoid a failure of proof.

29. Jordan *v.* Rouse, 46 N. C. 119.

30. Sarconi *v.* De Falo, 33 Misc. (N. Y.) 780, 67 N. Y. Suppl. 923.

31. Seeley *v.* Adamson, 1 Okla. 78, 26 Pac. 1069.

32. Smith *v.* Meyers, 45 Mo. 434, holding further that its competency is in no way affected by the fact of plaintiff's presence or absence when defendant obtained possession.

33. Hoffman *v.* Harrington, 25 Mich. 146. And see O'Hagan *v.* Crossman, 50 N. J. L. 516, 14 Atl. 752, holding that a complaint which gives the day and month of the entry without naming the year is defective.

34. *Alabama.*— Bliss *v.* Winston, 1 Ala. 344.

California.— Amador Gold Mine *v.* Amador Gold Mine, 114 Cal. 346, 46 Pac. 80.

Illinois.— Spurck *v.* Forsyth, 40 Ill. 438.

Missouri.— Warren *v.* Ritter, 11 Mo. 354.

Texas.— Irwin *v.* Davenport, 84 Tex. 512, 19 S. W. 692.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 131.

35. Bliss *v.* Winston, 1 Ala. 344.

36. Amador Gold Mine *v.* Amador Gold Mine, 114 Cal. 346, 46 Pac. 80. And see Warran *v.* Ritter, 11 Mo. 354.

Entry on different days.— If the entry is alleged to be on a particular day, it may be proved to have been on a different day or on several different days into different tenements. Bliss *v.* Winston, 1 Ala. 344.

so much as the jury found was detained.[37] A complaint charging that plaintiff was in possession of certain premises is not sustained by evidence that he was in possession of only a portion thereof, and a recovery is not authorized.[38] If the answer admits refusal to deliver possession pursuant to plaintiff's demand, plaintiff need not prove this fact.[39] Under a plea of not guilty, plaintiff must prove every fact necessary to entitle him to recover.[40] Under such plea defendant may show that he made a peaceable reëntry.[41] And under the code defendant may give in evidence all matters of excuse, justification, or avoidance, under the plea.[42] If suit is brought against defendants jointly, testimony is admissible to show that they occupied the tract in severalty.[43]

J. Evidence — 1. BURDEN OF PROOF AND PRESUMPTIONS. In order to sustain a recovery in behalf of plaintiff he must show that he had at the time of the alleged entry the actual possession of the premises described.[44] A mere constructive possession such as a fee-simple title draws to it is not sufficient,[45] but to prove actual possession it is not necessary to show that plaintiff resided on the premises.[46] Plaintiff must also show that defendant was in possession at the date of commencing the suit,[47] and that he (plaintiff) is entitled to possession.[48] He cannot rely on lack of right of possession in defendant,[49] but where right of possession at the time of suit brought is shown by plaintiff, he has made a *prima facie* case entitling him to recover and thereby casts on defendant the burden of disproving it,[50] the presumption being that one who is in the actual and peaceable possession of land is rightfully in possession.[51] In forcible entry and detainer plaintiff must show an entry[52] and a detention of the premises.[53] Wherever a demand for surrender of the premises is necessary, plaintiff must prove that a demand was made,[54] and that defendant refused to or neglected to surrender possession, and the latter fact is not to be presumed from the fact of defendant's possession before the demand.[55] If defendant seeks to justify his possession

37. Taylor *v.* White, 1 T. B. Mon. (Ky.) 37; Ball *v.* Lively, 2 J. J. Marsh. (Ky.) 181; Jarvis *v.* Hamilton, 19 Wis. 187.

38. House *v.* Wilder, 47 Ill. 510; Garner *v.* Bonham, 3 Indian Terr. 752, 49 S. W. 45.

Unsurveyed public land.— In an action for forcible entry and detainer of a part of the unsurveyed public domain, the complaint must contain an actual description of the land claimed, and if such description contains a greater area than that allowed by law to any person or association of persons, no presumption of lawful possession would exist and the complaint should be dismissed. Holladay Coal Co. *v.* Kirker, 20 Utah 192, 57 Pac. 882.

39. Ensley *v.* Page, 13 Colo. App. 452, 59 Pac. 225.

40. Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566.

41. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

42. Watson *v.* Whitney, 23 Cal. 375.

43. Springer *v.* Cooper, 11 Ill. App. 267.

44. Stiles *v.* Homer, 21 Conn. 507; Mann *v.* Brady, 67 Ill. 95; Thompson *v.* Sornberger, 59 Ill. 326; Rook *v.* Godfrey, 105 Tenn. 534, 58 S. W. 850; Jarvis *v.* Hamilton, 16 Wis. 574.

The estate which plaintiff has in the land must be shown in an action of forcible entry and detainer. Clements *v.* Clinton, Mart. & Y. (Tenn.) 198.

45. Thompson *v.* Sornberger, 59 Ill. 326; McCartney *v.* McMullen, 38 Ill. 237.

46. Jarvis *v.* Hamilton, 16 Wis. 574.

47. Bowman *v.* Mehring, 34 Ill. App. 389; Armstrong *v.* Hendrick, 67 Mo. 542; Tuttle *v.* Davis, 48 Mo. App. 9; Link *v.* Harrington, 23 Mo. App. 429.

Where part of defendants were not proved to be in possession a judgment for plaintiff cannot be sustained. Godard *v.* Lieberman, 18 Ill. App. 366.

48. Fitzgerald *v.* Quinn, 165 Ill. 354, 46 N. E. 287; McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555 [*affirming* 41 Ill. App. 567]; Maloney *v.* Shattuck, 15 Ill. App. 44; Wheelan *v.* Fish, 2 Ill. App. 447.

49. McIlwain *v.* Karstens, 152 Ill. 135, 38 N. E. 555 [*affirming* 41 Ill. App. 567].

50. Floersheim *v.* Baude, 110 Ill. App. 536.

51. Fitzgerald *v.* Quinn, 165 Ill. 354, 46 N. E. 287.

52. Preston *v.* Kehoe, 15 Cal. 315; Lewis *v.* State, 99 Ga. 692, 26 S. E. 496, 59 Am. St. Rep. 255; Bell *v.* Cowan, 34 Mo. 251.

53. Bell *v.* Cowan, 34 Mo. 251.

54. Hersey *v.* Westover, 11 Ill. App. 197; Lehman *v.* Whittington, 8 Ill. App. 374; Hinterberger *v.* Weindler, 2 Ill. App. 407; Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268; Smith *v.* Finger, (Okla. 1905) 79 Pac. 759.

No presumption of service of demand arises from the fact that such demand was admitted in evidence. Lehman *v.* Whittington, 8 Ill. App. 374.

55. Hersey *v.* Westover, 11 Ill. App. 197.

under the authority of some other person than plaintiff the burden is on him to prove the title of such person.[56]

2. ADMISSIBILITY — a. Title. Inasmuch as the question of title cannot be adjudicated in actions based on the statutes relating to forcible entry and detainer the general rule subject to some exceptions which will be hereafter considered[57] is that evidence of title either in plaintiff or defendant is not admissible.[58] The special object of the summary remedy of forcible entry and detainer is to keep the peace, not to determine rights of property.[59]

b. Possession. In forcible entry actions, evidence concerning the possession of the *locus in quo* must, to be relevant, be such as to connect the party asserting the same with the actual possession at the time of the alleged forcible entry.[60] On the question of plaintiff's possession of the premises at the time of the acts complained of it is competent to show that a third person had left personal property on the premises with plaintiff's permission,[61] that plaintiff had instructed his agent to take possession of the premises on the removal of his tenant,[62] and that plaintiff had entered upon the land and cut timber on it.[63] It is also competent to show a written agreement of a party to deliver peaceable possession to plaintiff,[64] the execution of a lease by plaintiff to a third person,[65] a preliminary injunction against defendant issued in a former suit between the same parties concerning the same property,[66] and a recovery in trespass by plaintiff for injuries to the land in controversy.[67] So declarations of a person in possession of land showing that he held in his own right and not as tenant or agent of another are admissible as evidence on the principle of *res gestæ*.[68] There is some conflict of authority

56. Hogan *v.* Harley, 8 Allen (Mass.) 525.

57. See *infra*, IV, J, 2, c, d.

58. *Alabama.*— O'Donohue *v.* Holmes, 107 Ala. 489, 18 So. 263; Dumas *v.* Hunter, 25 Ala. 711.

California. — Lasserot *v.* Gamble, (1896) 46 Pac. 917; Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196; Felton *v.* Millard, 81 Cal. 540, 21 Pac. 533, 22 Pac. 750; Bostwick *v.* Mahoney, 73 Cal. 238, 14 Pac. 832; Conroy *v.* Dunn, 45 Cal. 597.

Connecticut.— Dutton *v.* Tracy, 4 Conn. 79.

Illinois.— Phelps *v.* Randolph, 147 Ill. 335, 35 N. E. 243; Slate *v.* Eisenmeyer, 94 Ill. 96; Pearson *v.* Herr, 53 Ill. 144.

Kentucky.— Taylor *v.* White, 1 T. B. Mon. 37; Carpenter *v.* Shepherd, 4 Bibb 501; Smith *v.* Dedman, 4 Bibb 192; Bush *v.* Coomer, 69 S. W. 793, 24 Ky. L. Rep. 702; Terry *v.* Terry, 66 S. W. 1024, 23 Ky. L. Rep. 2242.

New Jersey.— Mercereau *v.* Bergen, 15 N. J. L. 244, 29 Am. Dec. 684.

West Virginia.— Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 137.

And see Gates *v.* Winslow, 1 Wis. 650.

Proof of an equitable title in the prosecutor is irrelevant and improper upon an inquisition of forcible entry and detainer. Mansfield *v.* Duvall, 2 Bibb (Ky.) 582.

Harmless error.— Where plaintiff has been in possession for the period required by statute to enable him to bring the action and the court refused to admit documents showing title in plaintiff as bearing on defendant's good faith, but received them to show that defendant's title had been transferred to plaintiff no injury could have been produced by their admission for that purpose as no finding was made on the subject of title. California Bank *v.* Taaffe, 76 Cal. 626, 18 Pac. 781.

59. Littell *v.* Grady, 38 Ark. 584.

60. Morgan *v.* Higgins, 37 Cal. 59.

61. Huffaker *v.* Boring, 8 Ala. 87.

62. Bibbey *v.* Thomas, 131 Ala. 350, 31 So. 432.

63. Powell *v.* Davis, 54 Mo. 315.

64. Huffaker *v.* Boring, 8 Ala. 87.

65. Gooch *v.* Hollan, 30 Mo. App. 450. And see Dutton *v.* Tracy, 4 Conn. 79, holding that a lease of a barn which it was admitted formerly stood on the land in question executed by plaintiff to one of defendants more than sixteen years before was admissible, although of little weight to show complainant's possession at the time.

66. Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

67. Moore *v.* Massie, 3 Litt. (Ky.) 296. And see Fearn *v.* Beirne, 129 Ala. 435, 29 So. 558, holding that, in an action of forcible entry and detainer, proceedings before a justice of the peace between the same parties in an action of forcible entry and detainer, and ejectment proceedings in the circuit court by one of defendants as executrix of a deceased purchaser of the property against tenants of plaintiff were properly admitted in evidence to show plaintiff's prior actual possession of the premises.

68. Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483. *Compare* McMullen *v.* Mayo, 8 Sm. & M. (Miss.) 298, holding that, in an action of forcible entry and detainer, it is not error to exclude the answer of a witness giving the statements of plaintiff when claiming to be in possession of the premises in controversy,

as to whether a deed of the premises to plaintiff is admissible to show possession of plaintiff.[69] To show the character of the possession relied on by plaintiff defendant may show that he had held prior possession and that plaintiff had taken possession by force during defendant's absence and sought to maintain it by force.[70] To show that plaintiff was not in possession at the time of the alleged injury defendant may introduce in evidence an agreement of plaintiff to quit possession.[71] He cannot, however, for the purpose of showing that plaintiff had only a scrambling possession, introduce evidence to show that during the whole period of plaintiff's possession third persons with whom defendant was not in privity were stopping near the demised premises awaiting an opportunity to take possession when they could do so without force.[72] To show possession by defendant at the time of the injury complained of he may introduce evidence that he had been in possession for two years under a lease at the time of the alleged forcible entry; that he had not surrendered possession but had leased the premises for the succeeding year,[73] or, to show a record of a judgment in defendant's favor in an action of trespass for injuries to the premises in question.[74] So the declaration of a person (since deceased) made at the time of such occupation that he held the house under defendant as a tenant is admissible,[75] and a witness may testify that he controlled the lands in controversy for defendant while he was absent during the war.[76] For the purpose of showing possession in himself, defendant may show that a former owner of the land in question under which he claimed title had been in undisputed possession at one time during his ownership and within a designated time before the commission of the acts complained of.[77] On the other hand a writ of possession issued in a former action between the same parties for the same lands awarding defendant possession of a portion of the premises is not admissible where the possession of such portion is not questioned.[78] So proof of payment of taxes on the property by defendant,[79] or payment of rent to the person from whom he claims to derive his claim of possession,[80] or that defendant had for two years past been in actual possession of a large tract of land which originally included the land in controversy, none of the tract mentioned being shown to be contiguous to the land in question,[81] is not admissible to show possession on the part of defendant. On an issue whether defendants forcibly entered a disputed strip of land between them and adjoining proprietors, evidence that an entry had been made prior to the alleged entry mentioned in the complaint, under an agreement to establish the line by a survey, is admissible on the question of who was in possession at the time of the alleged entry.[82]

c. Character or Extent of Possession. While the validity of titles cannot be tried in proceedings of the character under consideration, deeds or other evidences of title are admissible to show the character or extent of possession claimed.[83]

as the mere statements of plaintiff were not evidence in his own behalf.

69. That deed is admissible see Conroy *v.* Duane, 45 Cal. 597.

That deed is not admissible see Sanchez *v.* Loureyro, 46 Cal. 641; Lachman *v.* Barnett, 16 Nev. 154.

Possession by agent.— Where plaintiff introduced evidence tending to show possession by C at the time of the alleged forcible entry a deed of the premises from C to plaintiff dated one month prior to the entry has been held admissible to show that at the time of the entry the apparent possession by C was the possession of plaintiff. Morgan *v.* Higgins, 37 Cal. 59.

70. Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

71. Tolbert *v.* Hendricks, 77 Mo. App. 272.

72. Bowers *v.* Cherokee Bob, 45 Cal. 495.

73. Peddicord *v.* Kile, 83 Iowa 542, 49 N. W. 997.

74. Gray *v.* Finch, 23 Conn. 495.

75. Bliss *v.* Winston, 1 Ala. 344.

76. Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483.

77. Hale *v.* Wiggins, 33 Conn. 101.

78. Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818.

79. Bellingham Bay, etc., Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928.

80. St. Louis Agricultural, etc., Assoc. *v.* Reinecke, 21 Mo. App. 478.

81. Bellingham Bay, etc., Co. *v.* Strand, 1 Wash. 133, 23 Pac. 928.

82. Flint *v.* Lovdall, 122 Cal. 551, 55 Pac. 424.

83. *Alabama.*— Bailey *v.* Blacksher Co., (1904) 37 So. 827; Barefoot *v.* Wall, 108

And evidence of staking the claim is admissible to show the extent of plaintiff's possession in the same manner as a deed would be.[84]

d. Right of Possession. Although the question of title is not involved, plaintiff may introduce evidence of title in order to show his right of possession to the premises in controversy;[85] and it has also been held that the rule prohibiting any inquiry as to title does not prevent a defendant from showing the source of his claim and right to the possession of the premises.[86] In an action of forcible detainer by one claiming possession under a deed, defendant may show that the grantor was *non compos mentis*.[87] So a writ of possession in favor of defendant from a court of competent jurisdiction is admissible proof of the lawfulness of his possession without producing the whole record.[88]

e. Location of Premises. In unlawful entry and detainer the complaint on which the original writ was issued by the justice may be looked to by the court, in aid of the description of the premises contained in the writ.[89] An objection to

Ala. 327, 18 So. 823; Turnley *v.* Hanna, 82 Ala. 139, 2 So. 483.

California. — Murphy *v.* Snyder, 67 Cal. 451, 8 Pac. 2; Hoag *v.* Pierce, 28 Cal. 187; Mitchell *v.* Davis, 23 Cal. 381.

Colorado.— Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58; Jenkins *v.* Tynon, 1 Colo. App. 133, 27 Pac. 893.

Illinois.— Slate *v.* Eisenmeyer, 94 Ill. 96; Huftalin *v.* Misner, 70 Ill. 205; Pearson *v.* Herr, 53 Ill. 144; Smith *v.* Hoag, 45 Ill. 250; Brooks *v.* Bruin, 18 Ill. 539; Griffin *v.* Kirk, 47 Ill. App. 258; Ragor *v.* McKay, 44 Ill. App. 79; Bloomington *v.* Brophy, 32 Ill. App. 400.

Indian Territory.— Moore *v.* Girten, (1904) 82 S. W. 848; Hewlett *v.* Hyden, (1902) 69 S. W. 839.

Kentucky.— Taylor *v.* White, 1 T. B. Mon. 37; Carpenter *v.* Shepherd, 4 Bibb 501; Beauchamp *v.* Morris, 4 Bibb 312; Kirby *v.* Scott, 73 S. W. 749, 24 Ky. L. Rep. 2175; Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547.

Montana.—Boardman *v.* Thompson, 3 Mont. 387.

Tennessee.— McGhee *v.* Grady, 12 Lea 89; Philips *v.* Sampson, 2 Head 429; Settle *v.* Settle, 10 Humphr. 504.

West Virginia.—Bulkley *v.* Sims, 48 W. Va. 104, 35 S. E. 971.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 138.

The records of proceedings under which defendant secured title to the land on which the entry was made are admissible to show the extent of his possession. Dils *v.* Justice, 9 S. W. 290, 10 Ky. L. Rep. 547.

In an action for forcible detainer brought by a lessee, his lease is admissible in connection with his former possession to show the extent of his possession. Murphy *v.* Snyder, 67 Cal. 451, 8 Pac. 2.

The draft of a lease unexecuted by the lessor is not competent evidence in an action of forcible entry and detainer in behalf of plaintiff who is the lessee named therein and who has signed it to prove the extent of the land claimed by him. Roff *v.* Duance, 27 Cal. 565.

84. Boardman *v.* Thompson, 3 Mont. 387.

85. *Arkansas.*— Littell *v.* Grady, 38 Ark. 584.

California. — Murphy *v.* Snyder, 67 Cal. 451, 8 Pac. 2; Mitchell *v.* Davis, 23 Cal. 381.

Illinois.— Pearson *v.* Herr, 53 Ill. 144.

Indian Territory.— Hewlett *v.* Hyden, (1902) 69 S. W. 839; Brown *v.* Woolsey, 2 Indian Terr. 329, 51 S. W. 965.

Kansas.— Wideman *v.* Taylor, 63 Kan. 884, 65 Pac. 664; Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42; McClain *v.* Jones, 60 Kan. 639, 57 Pac. 500.

Michigan. — Gale *v.* Eckhart, 107 Mich. 465, 65 N. W. 274; Bennett *v.* Robinson, 27 Mich. 26.

Nebraska.— Moore *v.* Parker, 59 Nebr. 29, 80 N. W. 43; Connolly *v.* Giddings, 24 Nebr. 131, 37 N. W. 939; Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566; Smith *v.* Kaiser, 17 Nebr. 184, 22 N. W. 368.

Oklahoma.— Brown *v.* Hartshorn, 12 Okla. 121, 69 Pac. 1049.

Tennessee.— Dennis *v.* Rainey, 8 Baxt. 501.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 138.

And see Twiss *v.* Boehmer, 39 Oreg. 359, 69 Pac. 18.

86. Nicholson *v.* Walker, 4 Ill. App. 404; Conaway *v.* Gore, 27 Kan. 122; Galligher *v.* Connell, 23 Nebr. 391, 36 N. W. 566; Allison *v.* Casey, 4 Baxt. (Tenn.) 587. See also Potts *v.* Magnes, 17 Colo. 364, 30 Pac. 58. But see Carpenter *v.* Shepherd, 4 Bibb (Ky.) 501; Stone *v.* Malot, 7 Mo. 158.

Admissions by plaintiff that he leased the premises to defendant are admissible in an action of forcible entry and detainer. Cummings *v.* Winters, 19 Nebr. 719, 28 N. W. 302.

In forcible entry against a married woman, where the record of a judgment obtained against her husband and her expulsion from the premises thereunder was admitted over her objection, it was not error to admit testimony tending to show that she was in possession under a homestead right as widow of a former husband and independent of the right of the husband who was defendant in ejectment. Morrissey *v.* Stephenson, 86 Ill. 344.

87. Douglas *v.* Hartzell, 15 Ill. App. 251.

88. Thomasson *v.* White, 6 Baxt. (Tenn.) 148.

89. Moore *v.* Douglass, 14 W. Va. 708.

the introduction of any evidence in an action of forcible detainer which seeks to challenge the sufficiency of the description of the property sought to be recovered is properly overruled if the description as to a portion of the property is correct.[90]

f. Entry. In an action for forcible entry, evidence that defendant remained in possession of the premises is admissible to show that he made his entry complete, although he may not be charged with forcible detainer.[91] It is competent to show that plaintiff was arrested at defendant's instance for the purpose of getting him away from the premises so that defendant might enter and take possession.[92] Evidence to show good faith in an entry is not admissible, the question of good or bad faith not affecting the right of recovery.[93] Evidence that defendants had expended large sums of money in improvements upon the premises is not admissible on the issue whether there had been an unlawful entry.[94]

g. Force. Declarations of defendant's agent while taking possession are competent on the question of force,[95] and so are threats of bodily harm and the character of defendant for violence.[96] In actions for forcible entry evidence of force employed to maintain possession is not admissible to characterize by relation acts otherwise peaceable by which possession was previously obtained.[97] Records of other suits between other parties with respect to the property are *prima facie* irrelevant on the question of forcible entry.[98] Evidence that plaintiff's lessor had forcibly evicted defendant from the premises five days previous to defendant's forcible entry is not admissible in justification of the latter.[99]

h. Notice of Demand. By the weight of authority where the delivery of a written notice of demand is essential to maintain the action parol proof thereof is inadmissible without a prior notice to defendant to produce the original.[1] Service cannot be proved by an indorsement on the original paper either by an officer or by a private person whether sworn or not, but must be proved by a witness.[2] Where evidence of threats by defendant warning plaintiff to keep off the premises was admitted to show that defendant was holding by force and defendant had admitted that he had threatened plaintiff with a prosecution for trespass if he entered the premises such evidence was admissible as dispensing with other further proof of plaintiff of a demand for possession before bringing suit.[3]

i. Damages. Although evidence of injury committed by the disseizor to the freehold such as waste, etc., is incompetent as indicating plaintiff's damages, in an action of forcible entry and detainer, yet if such evidence be permitted to go to the jury, without objection or without a distinct motion, made during the progress of the trial, to exclude it from the jury it is not ground for an assignment of error.[4] So it has been held admissible to look to the title in view of the question of damages or rents to be recovered in an action brought by a mere intruder against the wrongful owner of the land or where the claimant by fraud induces another to take a lease or to enter under him upon a false representation as to his

90. Weatherford *v.* Union Pac. R. Co., (Nebr. 1904) 98 N. W. 1089.

91. Lissner *v.* State, 84 Ga. 669, 11 S. E. 500, 20 Am. St. Rep. 389.

92. Lasserot *v.* Gamble, (Cal. 1896) 46 Pac. 917.

93. Holland *v.* Green, 62 Cal. 67; Voll *v.* Hollis, 60 Cal. 569; Gore *v.* Altice, 33 Wash. 335, 74 Pac. 556. For rule under former statutory provision see Conroy *v.* Duane, 45 Cal. 597; Shelby *v.* Houston, 38 Cal. 410; Thompson *v.* Smith, 28 Cal. 527.

94. Lee *v.* Stiles, 21 Conn. 500.

95. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

96. Ladd *v.* Dubroca, 45 Ala. 421.

97. Hoffman *v.* Harrington, 22 Mich. 52.

98. Horsefield *v.* Adams, 10 Ala. 9, holding that in order to show relevancy, the privity or connection between the parties to the records and those before the courts should first be suggested or shown.

99. Roff *v.* Duane, 27 Cal. 565.

1. King *v.* Bolling, 77 Ala. 594; Littleton *v.* Clayton, 77 Ala. 571; Bates *v.* Ridgeway, 48 Ala. 611; Dumas *v.* Hunter, 30 Ala. 75. *Contra*, Heller *v.* Beal, 23 Ohio Cir. Ct. 540, holding that the rule that a prior notice to produce an instrument which is itself a notice applies to cases of this character.

2. Vennum *v.* Vennum, 56 Ill. 430.

3. Bibby *v.* Thomas, 131 Ala. 350, 31 So. 432.

4. White *v.* Suttle, 1 Swan (Tenn.) 169.

title. In such cases the title may be looked to upon the question whether the case made out constitutes in law a wrongful entry or detainer.[5]

j. Miscellaneous. Evidence that plaintiff had conveyed an interest in land to which he makes no claim is not admissible,[6] nor is evidence as to how the parties held and occupied other lands claimed by plaintiff in the neighborhood.[7] Where the right to recover is established outside of the complaint it is not reversible error to allow the complaint to be read in evidence as proof of plaintiff's right to recover.[8] Where the defense is that the entry was made after plaintiff's abandonment of the premises, evidence that it was originally taken by plaintiff's agent and so held is not admissible.[9] If one sues the owner of an adjoining lot for forcible entry and detainer of a narrow strip of ground between their lots, the title to which was in dispute, evidence as to the use of a fence erected thereon many years before is immaterial.[10] If a corporation brings an action of unlawful detainer against an ex-officer thereof for possession of a house allowed him as residence while in office, the books of the corporation are admissible to show the arrangement made between the parties.[11] The proceeding in forcible entry and detainer is merely possessory and the judgment thereon is not evidence in a subsequent action of trespass or ejectment.[12]

3. Weight and Sufficiency. Rules relating to the weight and sufficiency of evidence in actions based on the forcible entry and detainer statutes are the same as those in other civil actions.[13]

K. Damages. The right to recover damages in actions for forcible entry and detainer and kindred actions is, in many jurisdictions, expressly conferred by statutes containing various provisions as to the elements and amount thereof.[14]

5. Philips *v.* Sampson, 2 Head (Tenn.) 429.

6. Anderson *v.* Thomas, 2 Indian Terr. 79, 47 S. W. 301.

7. Balch *v.* Myers, 65 Mo. App. 422.

8. McGrath *v.* Miller, 61 Ill. App. 497.

9. Keyser *v.* Rawlings, 22 Mo. 126.

10. Delmonico Hotel Co. *v.* Smith, 112 Iowa 659, 84 N. W. 906.

11. Frazier *v.* Virginia Military Institute, 81 Va. 59.

12. Spears *v.* McKay, Walk. (Miss.) 265.

13. **To authorize recovery in action of forcible entry and detainer** the evidence was held to be sufficient in Greeley *v.* Spratt, 19 Fla. 644; Bussen *v.* Dickson, 97 Ill. App. 310; Harms *v.* Stier, 70 Ill. App. 213; Frank *v.* Palmer, 65 Ill. App. 124; Thull *v.* Allen, (Nebr. 1904) 101 N. W. 1024; Vanhook *v.* Story, 4 Humphr. (Tenn.) 59. See also Jarvis *v.* Hamilton, 19 Wis. 187. The evidence was held to be insufficient in Cummins *v.* Scott, 20 Cal. 83.

To show forcible detainer the evidence was held to be sufficient in Merrin *v.* Lewis, 90 Ill. 505.

To show unlawful detainer the evidence was held to be sufficient in McCartney *v.* Auer, 50 Mo. 395.

To show defendant's possession at time of commencement of suit the evidence was held to be sufficient in Ragor *v.* McKay, 44 Ill. App. 79; Tuttle *v.* Davis, 48 Mo. App. 9.

To show possession of defendant at time of demand and suit commenced the evidence was held to be insufficient in Preston *v.* Davis, 112 Ill. App. 636.

To show proper service of demand the evidence was held to be sufficient in Huftalin *v.* Misner, 70 Ill. 205; Campbell *v.* McFarland, 86 Ill. App. 467.

To show service of demand the evidence was held to be insufficient in Ball *v.* Peck, 43 Ill. 482.

To show plaintiff's possession at time of commencement of suit the evidence was held to be sufficient in Pensoneau *v.* Bertke, 82 Ill. 161; Huftalin *v.* Misner, 70 Ill. 205.

To show plaintiff's possession at time of entry the evidence was held to be insufficient in Hassett *v.* Johnson, 48 Ill. 68; Edwards *v.* Cary, 60 Mo. 572; Miller *v.* Northup, 49 Mo. 397; McCartney *v.* Alderson, 45 Mo. 35; Davidson *v.* Phillips, 9 Yerg. (Tenn.) 93, 30 Am. Dec. 393.

To show plaintiff's right of possession the evidence was held to be sufficient in Frank *v.* Palmer, 65 Ill. App. 124; Nicholson *v.* Walker, 4 Ill. App. 404. See also Conaway *v.* Gore, 27 Kan. 122.

14. For the construction of particular statutes see the following cases:

Alabama.— Belshaw *v.* Moses, 49 Ala. 283.

Arkansas.—Strong *v.* Whatley, 23 Ark. 76; Bradley *v.* Hume, 18 Ark. 284; Fowler *v.* Knight, 10 Ark. 43.

California.— Brawley *v.* Risdon Iron Works, 38 Cal. 676; Hicks *v.* Herring, 17 Cal. 566.

Florida.— McLean *v.* Spratt, 20 Fla. 515.

Indiana.— Pendergast *v.* McCaslin, 2 Ind. 87.

Louisiana.— Kemper *v.* Armstrong, 12 Mart. 296; Larche *v.* Jackson, 9 Mart. 408 [*approving* White *v.* Wells, 5 Mart. 652].

Missouri.— Sims *v.* Kelsay, 75 Mo. 68; Moore *v.* Dixon, 50 Mo. 424; Moston *v.* Stow, 91 Mo. App. 554.

While this is true, it nevertheless seems to be well settled that, in the absence

Montana.— McCleary *v.* Crowley, 22 Mont. 245, 56 Pac. 227.

Ohio.— Aubrey *v.* Almy, 4 Ohio St. 524.

Pennsylvania.— Schulte *v.* McCormick, 6 Phila. 313.

Tennessee.— Spillman *v.* Walt, 12 Heisk. 574; White *v.* Suttle, 1 Swan 169.

Texas.— Steele *v.* Steele, 2 Tex. App. Civ. Cas. § 345.

Washington.—Cutler *v.* Co-operative Brotherhood, 31 Wash. 680, 72 Pac. 464.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 141.

Rents and profits recoverable see the following cases:

Alabama.— Lykes *v.* Schwarz, 91 Ala. 461, 8 So. 71; Ullman *v.* Herzberg, 91 Ala. 458, 8 So. 408; Hurst *v.* Thompson, 68 Ala. 560; Spear *v.* Lomax, 42 Ala. 576, the value of the rent must be assessed by the jury and not by the court, unless it is otherwise expressly provided by statute.

California.— Mason *v.* Wolff, 40 Cal. 246; Warburton *v.* Doble, 38 Cal. 619; Caulfield *v.* Stevens, 28 Cal. 118; Roff *v.* Duane, 27 Cal. 565; Howard *v.* Valentine, 20 Cal. 282.

Mississippi.— Newman *v.* Mackin, 13 Sm. & M. 383.

Missouri.— Feedler *v.* Schroeder, 59 Mo. 364; Kingman *v.* Abington, 56 Mo. 46; Eads *v.* Wooldridge, 27 Mo. 251; Michau *v.* Walsh, 6 Mo. 346.

Tennessee.— Spillman *v.* Walt, 12 Heisk. 574.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 143.

Loss of crop as element of damage see Giddings *v.* '76 Land, etc., Co., 83 Cal. 96, 23 Pac. 196; Case *v.* Hall, 2 Indian Terr. 8, 46 S. W. 180.

Injury to plaintiff's business is not an element of damage. Wanborg *v.* Karst, 4 Mo. App. 563.

Damages for waste and injury committed upon the premises recoverable see Eads *v.* Wooldridge, 27 Mo. 251.

Damages for detention of the whole of a tract is not recoverable when the ouster of plaintiff is shown to be of a part only. Thompson *v.* Smith, 28 Cal. 527.

Rental value as measure of damages see the following cases:

California.— Taylor *v.* Terry, 71 Cal. 46, 11 Pac. 813.

Illinois.— Shunick *v.* Thompson, 25 Ill. App. 619.

Indian Territory.— Sanders *v.* Thornton, 2 Indian Terr. 92, 48 S. W. 1015.

Minnesota.— Noyes *v.* French Lumbering Co., 80 Minn. 397, 83 N. W. 385.

Missouri.— Windsor Hotel Co. *v.* Thatcher, 15 Mo. App. 588.

Texas.— McRae *v.* White, (Civ. App. 1897) 42 S. W. 793; Murat *v.* Micand, (Civ. App. 1894) 25 S. W. 312.

Value of the use and occupation of land as measure of damages see Hunt *v.* Hicks, 3 Indian Terr. 275, 54 S. W. 818; Noyes *v.* French Lumbering Co., 80 Minn. 397, 83 N. W. 385.

Double damages.— Labeaume *v.* Nelson, 34 Mo. 591; Keyser *v.* Rawlings, 22 Mo. 126; Walter *v.* Cathcart, 18 Mo. 256; Finley *v.* Magill, 57 Mo. App. 481; Kelly *v.* Clancy, 15 Mo. App. 519; Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973.

Treble damages.— *California.*— Rimmer *v.* Blasingame, 94 Cal. 139, 39 Pac. 857; Lee Chuck *v.* Quan Wo Chong, 91 Cal. 592, 28 Pac. 44; Iburg *v.* Fitch, 57 Cal. 189; Tewksbury *v.* O'Connell, 25 Cal. 262; Watson *v.* Whitney, 23 Cal. 375; Hart *v.* Moon, 6 Cal. 161; O'Callaghan *v.* Booth, 6 Cal. 63.

Colorado.— Wier *v.* Bradford, 1 Colo. 14.

Michigan.— Lane *v.* Ruhl, 103 Mich. 38, 61 N. W. 347; Newkirk *v.* Tracey, 61 Mich. 174, 27 N. W. 884; Hitchcock *v.* Pratt, 51 Mich. 263, 16 N. W. 639; Howser *v.* Melcher, 40 Mich. 185; Shaw *v.* Hoffman, 25 Mich. 162; Thayer *v.* Sherlock, 4 Mich. 173.

New York.— Bach *v.* New, 23 N. Y. App. Div. 548, 48 N. Y. Suppl. 777.

North Dakota.— Wegner *v.* Lubenow, 12 N. D. 95, 95 N. W. 442.

Utah.— Eccles *v.* Union Pac. Coal Co., 15 Utah 14, 48 Pac. 148.

England.— Cole *v.* Eagle, 8 B. & C. 409, 6 L. J. K. B. O. S. 369, 15 E. C. L. 204.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 150.

Punitive damages may be recovered when a forcible entry is wanton and malicious. Wamsganz *v.* Wolff, 86 Mo. App. 205.

Nominal damages.— When the owner enters on land forcibly and ejects a person who is in the actual possession, without title, the latter can, in an action of damages for forcible entry and detainer against the owner, recover only nominal damages. Mosseller *v.* Deaver, 106 N. C. 494, 11 S. E. 529, 19 Am. St. Rep. 540, 8 L. R. A. 537.

The general rule that damages to be recoverable must be the natural and proximate consequence of the acts complained of is applicable. Anderson *v.* Taylor, 56 Cal. 131, 38 Am. Rep. 52. See also Carlisle *v.* Callahan, 78 Ga. 320, 2 S. E. 751.

Recovery limited to amount claimed.— Where a specific sum is claimed for damages an award for a greater sum is erroneous. Balch *v.* Myers, 65 Mo. App. 422.

Waiver of damages.— Plaintiff may waive his right to recover damages. McKinney *v.* Harral, 36 Mo. App. 337.

For what time damages assessed.— In an action for unlawful detainer, damages should be assessed by the jury from the time of demand for possession, and not from the time defendant took possession of the premises. Finley *v.* Magill, 57 Mo. App. 481.

Separate action for damages.— Under some statutes damages for forcible entry and detainer are to be recovered in a separate action of trespass. Wier *v.* Bradford, 1 Colo. 14; Lane *v.* Ruhl, 103 Mich. 38, 61 N. W. 347;

of some statutory provision expressly authorizing it, damages cannot be recovered.[15]

L. Trial[16] — **1. In General.** Some of the statutes relating to trials for forcible entry and detainer before justices require that the justice shall enter upon his docket the evidence rejected or admitted over objection,[17] his reasons for admitting or rejected such evidence,[18] and the return of the sheriff to the venire.[19] In trials before a justice either party may demand a jury at any time before trial,[20] and may purge the jury as in a trial in the superior court.[21] The jury must be sworn, which must affirmatively appear from the record, and where the statute prescribes the form of oath to be administered the verdict cannot be sustained unless the jury was sworn as the statute directs.[22] The question of granting separate trials to several defendants is within the discretion of the trial judge.[23]

2. Questions of Law and Fact. What acts or circumstances will constitute possession is a question of law for the court,[24] but whether these circumstances exist and plaintiff was in actual possession at the time of the entry complained of is a question of fact for the jury.[25] It is also for the jury to decide whether a forcible entry was in fact made and who made it,[26] whether the person making it acted in his own behalf or as the representative of another,[27] and what degree of force or violence was used.[28] Where the only question is whether defendant's conceded prior possession had been abandoned before plaintiff's entry the question of the

Newkirk *v.* Tracey, 61 Mich. 174, 27 N. W. 884; Hitchcock *v.* Pratt, 51 Mich. 263, 16 N. W. 639; Howser *v.* Melcher, 49 Mich. 185; Shaw *v.* Hoffman, 25 Mich. 162; Thayer *v.* Sherlock, 4 Mich. 173.

15. *Arkansas.*— Poe *v.* Bradley, 44 Ark. 500; Walker *v.* McGill, 40 Ark. 38; Collins *v.* Karatopsky, 36 Ark. 316; Keller *v.* Henry, 24 Ark. 575.

California.— See Stark *v.* Barnes, 4 Cal. 412.

Connecticut.— Minor *v.* Knowles, 1 Root 142.

Illinois.— Robinson *v.* Crummer, 10 Ill. 218; Shunick *v.* Thompson, 25 Ill. App. 619; Gould *v.* Hendrickson, 9 Ill. App. 171. See also Brush *v.* Fowler, 36 Ill. 53, 85 Am. Dec. 382.

Texas.— Wilson *v.* Beauchamp, 1 Tex. App. Civ. Cas. 713.

England.— Beddall *v.* Maitland, 17 Ch. D. 174, 50 L. J. Ch. 401, 44 L. T. Rep. N. S. 248, 29 Wkly. Rep. 484. See also Newton *v.* Harland, 1 M. & G. 644, 1 Scott N. R. 474, 39 E. C. L. 952.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 141.

16. See, generally, Trial.

17. Mead *v.* Daniel, 2 Port. (Ala.) 86; Ward *v.* Lewis, 1 Stew. (Ala.) 26, holding that no other evidence need be entered.

18. Clark *v.* Stringfellow, 4 Ala. 353 (holding that the statute is directory only); Sauniere *v.* Wode, 18 N. J. L. 296; Snediker *v.* Quick, 13 N. J. L. 306 (holding that the requirement is imperative).

The present New Jersey statute does not contain this requirement. Wilson *v.* Bayley, 42 N. J. L. 132. See also Houghton *v.* Potter, 23 N. J. L. 338.

19. Prickett *v.* Prickett, 12 N. J. L. 186.

20. Miller *v.* Schmidt, 5 Ohio S. & C. Pl. Dec. 4, 3 Ohio N. P. 296; Hill *v.* Hollister, 8 Ohio Dec. (Reprint) 116, 5 Cinc. L. Bul. 757. See also Bonham *v.* Mills, 39 Ohio St. 534.

21. Holton *v.* Hendley, 75 Ga. 847.

22. Graham *v.* Busby, 34 Miss. 272; Holt *v.* Mills, 4 Sm. & M. (Miss.) 110.

If the record states that the jury was "duly sworn" it will be presumed that the statutory oath was administered. Wilson *v.* Pugh, 32 Miss. 196.

23. Levy *v.* David, 24 R. I. 249, 52 Atl. 1080.

24. Blanchard *v.* Pratt, 37 Ill. 243; De Graw *v.* Prior, 60 Mo. 56; Blackman *v.* Welsh, 44 Mo. 41.

25. Gray *v.* Finch, 23 Conn. 495; Boucher *v.* Williamson, 1 Dana (Ky.) 227; Chiles *v.* Stephens, 3 A. K. Marsh. (Ky.) 340; De Graw *v.* Prior, 60 Mo. 56; Blackman *v.* Welsh, 44 Mo. 41.

Where it depends upon the intention with which an entry is made by the owner upon a part of the premises as to whether such entry will give possession of the whole, this intention is a question of fact for the jury. Chiles *v.* Stephens, 3 A. K. Marsh. (Ky.) 340.

26. Donovan *v.* Chappell, 63 Mich. 685, 30 N. W. 329.

27. Donovan *v.* Chappell, 63 Mich. 685, 30 N. W. 329.

In an action against a military officer for taking private property for public uses, it is for the jury to say whether the officer had military authority under the United States and whether his acts in the premises were done in pursuance of such authority or were an abuse of power for private ends. Drehman *v.* Stifel, 41 Mo. 184, 97 Am. Dec. 268.

28. Berry *v.* Williams, 21 N. J. L. 423.

abandonment is one of fact for the jury.[29] Whether the notice or demand required by statute was given is a question of fact for the jury.[30]

3. INSTRUCTIONS[31]— a. In General. In actions for forcible entry and detainer the court should be careful in giving instructions to see that the propositions are expressed in such terms and with such qualifications as not to be liable to mislead the jury.[32] The court may instruct the jury hypothetically or upon a contingent state of facts in case they shall so find from the evidence,[33] but the instruction must not be so worded as to assume as established any facts which the jury must determine from the evidence,[34] or so as to cut off from the consideration of the jury any matter of defense set up by defendant in support of which evidence has been introduced.[35] An instruction is erroneous which puts the right of recovery upon the basis of a different act than the one charged,[36] or which in setting out what must be established to authorize a recovery omits any essential element of the offense.[37] Instructions as to a certain issue should be founded upon all the testimony on that issue and it is error to pick out a single fact and instruct the jury as to its probative force.[38] The different instructions must be consistent with each other, and instructions given on behalf of the respective parties should be made to harmonize by the court before they are given to the jury.[39] It is not error to refuse to give requested instructions which are covered by the general charge,[40] or which assume as undisputed a material question in issue,[41] or which relate to matters not to be determined by the jury;[42] but an entire failure to instruct upon any material point in issue if requested to do so is reversible error.[43]

b. Directing Verdict.[44] If the evidence is clear and without conflict, the court may instruct the jury peremptorily to find for plaintiff or defendant,[45] but not where the evidence is conflicting as to any material point in issue.[46]

4. VERDICT AND FINDINGS.[47] The verdict must be responsive to the issue,[48] and

29. Brown *v.* McCormick, 23 Mo. App. 181.

30. Knowles *v.* Ogletree, 96 Ala. 555, 12 So. 397; Beach *v.* Heck, 54 Mo. App. 599; Heller *v.* Beal, 23 Ohio Cir. Ct. 540.

31. See, generally, TRIAL.

32. Fogarty *v.* Kelly, 24 Cal. 317. See also Ross *v.* Roadhouse, 36 Cal. 580; Stiles *v.* Homer, 21 Conn. 507.

Explanation of terms.— The court should explain to the jury the meaning of legal terms used in the charge such as "color of title" (Blanchard *v.* Pratt, 37 Ill. 243) and "lawful possession" (Compton *v.* Baker, 34 Mo. App. 133).

33. Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38. See also Wall *v.* Goodenough, 16 Ill. 415.

34. Jamison *v.* Graham, 57 Ill. 94; Wall *v.* Goodenough, 16 Ill. 415.

35. Jamison *v.* Graham, 57 Ill. 94; Blanchard *v.* Pratt, 37 Ill. 243. See also Stiles *v.* Homer, 21 Conn. 507.

An instruction which puts the decision solely upon plaintiff's testimony without paying any regard to that submitted by defendant is erroneous. Brown *v.* McCormick, 23 Mo. App. 181.

36. Fogarty *v.* Kelly, 24 Cal. 317.

In an action for forcible entry and detainer an instruction which puts the decision upon the question of notice, which is material only in cases of unlawful detainer, is erroneous. Wade *v.* McMillen, 29 Mo. 18.

37. Towell *v.* Etter, 69 Ark. 34, 59 S. W. 1096, 63 S. W. 53 (where the instruction ignored the time of plaintiff's possession and the question of force in making the entry); Ross *v.* Broadhouse, 36 Cal. 580 (where the jury were instructed to find for plaintiff if they should find that he was in possession and forcibly ousted, omitting the words "by the defendant"); Gray *v.* Finch, 23 Conn. 495 (where the instruction authorized a recovery upon the basis of plaintiff's possession alone, disregarding the manner of defendant's entry).

38. Compton *v.* Baker, 34 Mo. App. 133. See also McCartney *v.* McMullen, 38 Ill. 237.

39. Harms *v.* Stier, 70 Ill. App. 213.

40. Stillman *v.* Palis, 134 Ill. 532, 25 N. E. 786 [*affirming* 34 Ill. App. 540]; McCartney *v.* McMullen, 38 Ill. 237; Riley *v.* Catron, (Indian Terr. 1902) 69 S. W. 908.

41. Galligher *v.* Cornell, 35 Nebr. 517, 53 N. W. 383.

42. Herndon *v.* Goff, 27 Ark. 334.

43. Snedeker *v.* Quick, 12 N. J. L. 129.

44. See, generally, TRIAL.

45. Herkimer *v.* Keeler, 109 Iowa 680, 81 N. W. 178; Renfro *v.* Harris, 28 Tex. Civ. App. 58, 66 S. W. 460, 795; Squires *v.* Zumwalt, 12 Wash. 241, 40 Pac. 986. *Compare* Oleson *v.* Hendrickson, 12 Iowa 222.

46. Riley *v.* Catron, (Indian Terr. 1902) 69 S. W. 908; Hewlett *v.* Hyden, (Indian Terr. 1902) 69 S. W. 839; Kiernan *v.* Linnehan, 151 Mass. 543, 24 N. E. 907; De Graw *v.* Prior, 53 Mo. 313; Gooch *v.* Hollan, 30 Mo. App. 450; Estabrook *v.* Hateroth, 27 Nebr. 794, 44 N. W. 29.

47. See, generally, TRIAL.

48. Wall *v.* Goodenough, 16 Ill. 415; Penny

must find upon every issue necessary to a recovery,[49] and must be sufficiently definite and certain to authorize the entry of judgment.[50] The verdict need not be in the exact words of the issue, but is sufficient if it contains the substance of the issue,[51] and merely formal defects may be corrected by the court,[52] or the court may permit the jury to amend the verdict in this respect.[53] The verdict may be either general or special,[54] and a general verdict in effect finds every essential fact necessary to authorize it.[55] If the verdict responds fully to the issue as made up, it is not necessary that it should find expressly as to any other fact.[56] A general verdict of "guilty"[57] or "not guilty"[58] or "guilty as alleged in the complaint"[59] is sufficient if responsive to the issue; but a verdict will be upheld, although in form neither "guilty" nor "not guilty," where it is full and intelligible so as to support the judgment.[60] Where the form of the verdict is prescribed by statute a substantial compliance with the statute is sufficient.[61] The verdict need not describe the premises other than by reference to the complaint,[62] and need not be signed by the jury,[63] except where the statute so provides.[64] In trials by the court without a jury special findings of fact are necessary under some of the statutes.[65] The court must find upon each material

v. Skirvin, 9 B. Mon. (Ky.) 238; McCleary *v.* Crowley, 22 Mont. 245, 56 Pac. 227.

Where only a forcible entry is charged a verdict finding defendant guilty of a forcible detainer cannot be sustained (Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549); and conversely where the issue is forcible detainer only, a verdict of guilty of forcible entry is erroneous (Sinclair *v.* Sanders, 3 J. J. Marsh. (Ky.) 303).

49. McCleary *v.* Crowley, 22 Mont. 245, 56 Pac. 227.

Where plaintiff must have a certain estate in the premises the verdict will not authorize a judgment of restitution unless it finds that he was possessed of such an estate as the statute requires. Grissett *v.* Smith, 61 N. C. 164.

In an action for forcible detainer a verdict which merely finds that defendant unlawfully detains possession of the premises but does not also find that the detention is by force is fatally defective. Bull *v.* Olcott, 2 Root (Conn.) 472; Boxley *v.* Collins, 4 Blackf. (Ind.) 320.

50. Diggs *v.* Porteus, (Cal. 1893) 33 Pac. 447.

Amount of damages.—A verdict which fails to state the aggregate amount of damages will be sustained if from the facts found the amount can be rendered certain by a simple calculation. Gibson *v.* Lewis, 27 Mo. 532.

51. Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

Where the fact in issue is the truth of an inquisition found before a justice of the peace, the verdict need not expressly find that the inquisition was true or not true, but a verdict finding defendant "guilty of the forcible detainer complained of" is under such circumstances sufficiently responsive to the issue. Lancaster *v.* Lancaster, 41 S. W. 34, 19 Ky. L. Rep. 577.

52. Gibson *v.* Lewis, 27 Mo. 532; Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

53. Forsythe *v.* Huey, 74 S. W. 1088, 25 Ky. L. Rep. 147.

54. Atchley *v.* Latham, 3 A. K. Marsh. (Ky.) 164; Williams *v.* McMillan, 18 Ohio 167; Murphy *v.* Lucas, 2 Ohio 255.

55. Gorman *v.* Steed, 1 W. Va. 1.

A general verdict must be applied to the complaint before the jury, and no inference is admissible that it applies to any other lands or offenses than those described in the complaint. Powers *v.* David, 6 Ala. 9.

56. Mann *v.* Bryant, 12 W. Va. 516.

In unlawful detainer a verdict that "We the jury find for the plaintiff the premises in the summons described" is in proper form and need not separately state the existence of the facts necessary to justify the verdict (Lawson *v.* Dalton, 18 W. Va. 766); and a verdict finding "that the defendant unlawfully withholds from the plaintiff the land in the summons described" is sufficient without stating that they were unlawfully withheld at the time the summons was issued (Franklin *v.* Geho, 30 W. Va. 27, 3 S. E. 168).

Where forcible entry and detainer is alleged in the complaint as one and the same injury a general verdict is good, and the jury need not make separate findings as to the forcible entry and the forcible detainer. Raymond *v.* Bell, 18 Conn. 81.

57. Smith *v.* Killeck, 10 Ill. 293.

58. Belcher *v.* Barrett, 4 Metc. (Ky.) 307.

59. Raymond *v.* Bell, 18 Conn. 81; Altree *v.* Moore, 1 Oreg. 350.

60. Case *v.* Hall, 2 Indian Terr. 8, 46 S. W. 180.

61. Murphy *v.* Lucas, 2 Ohio 255; Dengate *v.* Stirmell, 72 Wis. 168, 39 N. W. 374.

62. Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

A verdict in unlawful detainer that "We, the jury, find for the plaintiff for the premises sued for" is sufficient, as it has special reference to the description given in the complaint. Beck *v.* Glenn, 69 Ala. 121.

63. Ward *v.* Lewis, 1 Stew. (Ala.) 26.

64. Ward *v.* Crane, 3 Blackf. (Ind.) 393; Test *v.* Devers, 2 Blackf. (Ind.) 80.

65. Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45. See also Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N. W. 597.

issue,[66] but is not authorized to make findings as to any matters not in issue.[67] The failure to find upon an immaterial issue is not ground for reversal.[68]

M. Judgment — **1. Form and Sufficiency** — **a. In General.** A judgment will not be set aside or reversed because it is informal or slightly irregular, or because of mere surplusage in its recitals.[69] An entry made by a justice that "the court renders judgment according to the verdict" found by the jury by whom the case was tried is not such a judgment as the law requires.[70] A judgment which is materially variant from the verdict will not stand.[71]

b. Description of Land. The land should be described with certainty[72] sufficient to enable an officer with a writ to find it without resort to extraneous aid to the description.[73] A judgment is sufficient, if it is for the restitution of the property described in the complaint, where the complaint is for a specifically described portion of land.[74] A judgment which so describes the land that it cannot be identified as the land mentioned in the complaint is fatally defective for uncertainty.[75]

2. Judgment by Default or on Confession. It has been decided that under some of the statutes as to forcible entry and detainer a judgment by default[76] or on confession[77] is not authorized.

3. Extent of Award or Relief. In an action for forcible entry and detainer, when the finding is in favor of plaintiff, judgment should be for restitution of the premises sued for,[78] and for damages if they are expressly provided for by

66. Lee Chuck *v.* Quan Wo Chong, 91 Cal. 593, 28 Pac. 45.

If all the material facts are found it is not necessary that they should be found in all the various ways employed in setting out the cause of action (Porter *v.* Murray, (Cal. 1886) 12 Pac. 425), or that there should be a distinct finding as to a particular issue which is determined by the other findings made (Gaffney *v.* Megrath, 11 Wash. 456, 39 Pac. 973).

67. Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N. W. 597.

68. Amador Gold Mine *v.* Amador Gold Mine, 114 Cal. 346, 46 Pac. 80.

Where the complaint charges both a forcible entry and a forcible detainer the judgment will not be reversed if the findings of fact, although insufficient to support a judgment for forcible entry, are sufficient to support a judgment for forcible detainer. Adams *v.* Helbing, 107 Cal. 298, 40 Pac. 422.

69. Huffaker *v.* Boring, 8 Ala. 87; Payne *v.* Martin, 1 Stew. (Ala.) 407; McGrath *v.* Miller, 61 Ill. App. 497; Jones *v.* Phillips, 10 Heisk. (Tenn.) 562; Clay *v.* Clay, 7 Tex. 250.

70. Swift *v.* Cornes, 20 Wis. 397. See also Crane *v.* Dod, 2 N. J. L. 340.

71. Chapman *v.* Knowles, 34 Ill. App. 558; Fanning *v.* Northwestern Mut. L. Ins. Co., 6 Ill. App. 536, where the verdict found defendant guilty, except as to certain lands therein specified, and the judgment did not make the exception as broad as the verdict.

72. Norris *v.* Pierce, 47 Ill. App. 463; Gerlach *v.* Walsh, 41 Ill. App. 83; Naylor *v.* Chinn, 82 Mo. App. 160. See also Paul *v.* Silver, 16 Cal. 73.

Deeds and previous transactions between the parties to the action may be referred to in explanation of the description in the judgment. Pardue *v.* James, 74 Tex. 299, 12 S. W. 1.

73. Preston *v.* Davis, 112 Ill. App. 636.

74. Locke *v.* Skow, 3 Nebr. (Unoff.) 299, 91 N. W. 572. See also Townly *v.* Rutan, 20 N. J. L. 604.

75. Thiemann *v.* Meier, 25 Mo. App. 306. See also Berry *v.* Fortney, 81 Mo. App. 284.

76. Hennessey *v.* Pederson, 28 Minn. 461, 11 N. W. 63; Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

77. French *v.* Willer, 126 Ill. 611, 18 N. E. 811, 9 Am. St. Rep. 651, 2 L. R. A. 717; Paul *v.* Armstrong, 1 Nev. 82.

78. *Arkansas.*— Walker *v.* McGill, 40 Ark. 38.

Illinois.— Robinson *v.* Crummer, 10 Ill. 218.

Missouri.— Farwell *v.* Easton, 63 Mo. 446. See also Berry *v.* Fortney, 81 Mo. App. 284.

Montana.— See Missoula Electric Light Co. *v.* Morgan, 13 Mont. 394, 34 Pac. 488.

Nebraska.— Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N. W. 597.

New Jersey.— Funkhauser *v.* Colloty, 67 N. J. L. 132, 50 Atl. 580; Kerr *v.* Phillips, 5 N. J. L. 818; Waller *v.* Park, 3 N. J. L. 661.

New Mexico.— Romero *v.* Gozales, 3 N. M. 35, 1 Pac. 171.

United Staies.— See U. S. *v.* Browning, 24 Fed. Cas. No. 14,674, 1 Cranch C. C. 500.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 165.

The only judgment that can be pronounced in an action of forcible detainer is that plaintiff have restitution of the premises sued for, or that plaintiff's action be dismissed, and that defendant go without day. Stover *v.* Hazelbaker, 42 Nebr. 393, 60 N. W. 597.

A mere money judgment is erroneous. Farwell *v.* Easton, 63 Mo. 446.

statute, but not otherwise.[79] A judgment for possession at some time in the future is void, and a threatened enforcement of such judgment may be restrained by injunction.[80] The judgment should be confined to the land in controversy.[81] If plaintiff proves a right to a part only of the land, he is entitled to a verdict and judgment *pro tanto*.[82] Where plaintiff elects to give a bond and dispossess defendant at the commencement of the action, as he may do under some statutes,[83] if the action abates[84] or is dismissed[85] defendant is entitled to a judgment of restitution. A defendant in forcible entry, against whom judgment is rendered, which is afterward reversed, but who does not lose possession of the property under or through the judgment, is not entitled to be restored to possession as against third parties who have ousted him during the pendency of the action.[86]

4. Operation and Effect. A judgment in an action for forcible entry and detainer is conclusive as between the parties as to the matters put in issue, unless such judgment is reversed or modified by proceedings in error;[87] but such a judgment in no wise affects the title of the parties to the land in controversy,[88] and is therefore no bar to an action in relation to the title to the premises.[89] A judg-

Although the interest of plaintiff has been sold, pending the action, the judgment in his favor should be both for possession and for the rents. Spillman *v.* Walt, 12 Heisk. (Tenn.) 574.

Where possession of a part of the land was taken by defendant before commencement of the suit, and part afterward, plaintiff can recover only so much of the land as he was dispossessed of before the suit was brought. White *v.* Suttle, 11 Humphr. (Tenn.) 449.

Release of land improperly included in verdict.— Where the verdict of a jury in an action of unlawful detainer gave to plaintiff the land claimed in the summons, and judgment had been rendered accordingly, it was proper for the court, after plaintiff's counsel had released certain land included in the verdict which did not belong to plaintiff, to set aside the first judgment, and enter a second judgment for the land included in the verdict, less the part released. Bartley *v.* McKinney, 28 Gratt. (Va.) 750.

Where a portion of the machinery in a mill, called a "heater," had been detached, and another piece substituted for it, the portion so detached was considered not appurtenant to the premises so as to be embraced in a judgment in an action of forcible detainer for possession of the mill property. Smith *v.* People, 99 Ill. 445.

Judgment in action between joint tenants. — In forcible entry and detainer brought by one joint tenant, who has been disseized by actual force on the part of his cotenant, the judgment must be for the undivided interest. Eads *v.* Rucker, 2 Dana (Ky.) 111.

Restitution to defendant.— Where judgment is recovered by a plaintiff in an action of unlawful detainer before a justice, and under it a writ of possession issues, and defendant is turned out of possession, and then an appeal is granted, and before trial of the case plaintiff moves the dismissal of his action, and declares that he will not further prosecute it, the court, if asked, should award a writ of possession to restore possession of the land to defendant, and it is not error to refuse such dismissal except on condition that plaintiff make such restitution. The dismissal may be entered later. McCormick *v.* Short, 49 W. Va. 1, 37 S. E. 769.

In Illinois, whether the judgment and execution should be for the whole or only a part of the premises claimed, if either, is made by statute to depend, not on the extent of defendant's actual possession, but on that of plaintiff's right of possession. Hardin *v.* Sangamon County, 71 Ill. App. 103.

79. See *supra*, IV, K.

80. Maybin *v.* Fitzgerald, (Tex. Civ. App. 1898) 45 S. W. 611.

81. Cagwin *v.* Chicago, etc., R. Co., 114 Iowa 129, 86 N. W. 220.

82. Ball *v.* Lively, 2 J. J. Marsh. (Ky.) 181. See also Miller *v.* Turney, 13 Ark. 385.

83. See Richardson *v.* Harrell, 62 Ark. 469, 36 S. W. 573; Mitchell *v.* Gibson, 14 Ark. 224; Pyhos *v.* McLaughlin, 2 Indian Terr. 432, 51 S. W. 1075.

What bond covers.— Such a bond covers actual damages resulting from the dispossession, including the value of crops destroyed by plaintiff while in possession, but does not cover claims for malicious prosecution of the suit. Thompson *v.* Gatlin, 58 Fed. 534, 7 C. C. A. 351, construing Indian Territory statute.

84. Sumner *v.* Spencer, 9 Ark. 441.

85. Runyon *v.* Hale, 10 Ark. 476; Fleeman *v.* Horen, 8 Ark. 353.

86. Bowers *v.* Cherokee Bob, 46 Cal. 279.

87. Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999. See also Harvie *v.* Turner, 46 Mo. 444.

88. Harvie *v.* Turner, 46 Mo. 444; Graham *v.* Conway, 91 Mo. App. 391.

89. Mattox *v.* Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64; Swanson *v.* Smith, 77 S. W. 700, 25 Ky. L. Rep. 1260; Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999. See also Mitchell *v.* Hagood, 6 Cal. 148.

In a subsequent action of ejectment, a judgment of restitution in forcible entry and detainer for part of a tract of land, the whole of which defendant claims under the same title, is conclusive of the right of possession,

ment in an action of forcible entry and detainer against the husband is sufficient authority to put out any member of his family.[90]

5. Execution and Enforcement — a. In General. Although a form of writ of restitution is specially provided by statute, it must be modified to suit the appropriate judgment, where the claimant and defendant are cotenants or entitled to joint possession.[91] Where the names of the parties are properly set out in the complaint and bond, but wholly omitted from the writ pending a motion to quash the writ, its amendment should be permitted.[92] Statutes as to the time, manner, and other matters relating to the issuance and service of writs of restitution must be complied with.[93] In order to constitute a full execution of a writ, both defendant and his personal property must have been removed from the premises, and the real estate given to plaintiff, unless the removal of the personal property was in some way waived by defendant.[94] Where a plaintiff, in an action for forcible entry and detainer, recovers a judgment, and afterward obtains possession peaceably and without the aid of a writ of restitution, it is a complete satisfaction of the judgment, except the costs, and he cannot have a writ of restitution under it afterward.[95] Under a statute providing for an execution for restitution and for damages, rents, and costs, an execution may properly issue for rents and costs after restitution of the premises.[96]

b. Who May Be Dispossessed. A writ of restitution in proceedings for forcible entry and detainer will not authorize the officer to dispossess one who was not privy to defendant's forcible entry and detainer, and who is a stranger to the parties and the record. It only authorizes him to dispossess defendant and his privies.[97] A writ of restitution in an action of forcible entry and detainer will not necessarily be unavailing because the persons who were living upon the land at the institution of the suit were not made defendants. If they were the servants of the person who was made defendant they can be dispossessed under the writ; and the fact that defendant does not live in the county where the land lies does not alter the case.[98]

c. Void Judgment or Void or Voidable Writ. Where a justice of the peace issues a writ of restitution on a judgment in an action of forcible entry and detainer, which is void because based on a default, he and plaintiff who ordered it to be issued are liable for the damages arising from its execution.[99] Where a writ of restitution, issued upon a judgment in forcible detainer, describes the land as a part of a certain tract, but fails to state what part of it, it is void for uncertainty, and will not protect an officer in evicting another under it. And where a valid writ is executed in such manner as to show a wilful abuse of it, the officer and his assistants will be trespassers *ab initio*;[1] but a writ of restitution, voidable by reason of having been issued while a motion for a new trial in forcible entry and detainer was pending, constitutes absolute justification to the officer and plaintiff in the writ.[2]

d. Injunction Against Enforcement. A court of equity cannot interpose by

at the date of such entry, as to the whole tract. Bradley *v.* West, 68 Mo. 69.

90. Saunders *v.* Webber, 39 Cal. 287.

91. McHose *v.* South St. Louis F. Ins. Co., 4 Mo. App. 514.

92. Galbreath *v.* Mitchell, 32 Ark. 278.

93. See Funkhauser *v.* Colloty, 67 N. J. L. 132, 50 Atl. 580; Bode *v.* Mungavin, 4 Ohio S. & C. Pl. Dec. 270, 2 Ohio N. P. 269.

Premature issuance and service.— Where plaintiff in an action of forcible entry and detainer after having obtained judgment requested a deputy constable to secure process as soon as possible and put him in possession of the property, he will not be liable for the premature issuance of the writ, and its service in an unauthorized manner. Rosenfield *v.* Barnett, 26 Tex. Civ. App. 71, 64 S. W. 944.

94. Lee Chuck *v.* Quan Wo Chong, 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

95. Barnett *v.* Palmer, 79 Ill. App. 403.

96. Cabanne *v.* Spaulding, 14 Mo. App. 312.

97. Wallace *v.* Hall, 22 Kan. 271; Drum *v.* Holton, 1 Pinn. (Wis.) 456.

98. De Graw *v.* Prior, 68 Mo. 158.

99. Stacks *v.* Simmons, (Tex. Civ. App. 1900) 58 S. W. 958.

1. Haskins *v.* Haskins, 67 Ill. 446.

2. Rosenfield *v.* Barnett, 26 Tex. Civ. App. 71, 64 S. W. 944.

injunction to restrain a plaintiff who has obtained judgment on a writ of forcible entry and detainer from having restitution of the possession, notwithstanding he is insolvent, and defendant holds the undisputed legal title to the land;[3] but when a judgment rendered by a justice of the peace against defendant in an action of unlawful detainer is void, and the title to the land of which restitution is ordered is in litigation between the parties to the action, there is ground for equitable interference by injunction; and equity when it thus interferes will enjoin the enforcement of the judgment not only as to the land, but also as to the recovery of monthly rents and damages.[4] A successful plaintiff in forcible entry should not be restrained from having restitution because defendant has recovered judgment in ejectment for the premises.[5]

N. Review[6] — **1. Appeal or Error — a. Right of Review.** A writ of error, it is held, will lie to a judgment of a justice in forcible entry and detainer cases, in jurisdictions where all courts are courts of record.[7] The right of appeal is strictly of constitutional or statutory origin, and unless conferred by a provision of this character does not exist.[8] This right is sometimes conferred in actions based on the forcible entry and detainer statutes by statutes relating to appeals generally or by statutes relating specially to appeals in this class of actions.[9] This right, it has been held, is conferred by a general statute providing that any party to a judgment or decree may appeal therefrom,[10] but not by a constitutional provision giving the right of appeal "in all civil cases."[11] If the statute giving the right of appeal excepts from its operation judgments by default a party against whom there is a judgment by default is not entitled to an appeal, although he first moves to set aside the judgment and the motion is overruled.[12] Under the statutes of some states defendant in actions of forcible entry and detainer may on taking the prescribed oath appeal as a poor person.[13]

b. Appellate Jurisdiction. The courts to which causes originating in justices' courts may be removed by appeal or writ of error are designated by statute.[14]

3. Hamilton *v.* Adams, 15 Ala. 596, 50 Am. Dec. 150.

4. Jones *v.* Pharis, 59 Mo. App. 254.

5. Dedman *v.* Smith, 2 A. K. Marsh. (Ky.) 260.

6. For review by recordari see, generally, Justices of the Peace.

7. Hotchkiss *v.* Dalton, 46 Conn. 467; Dutton *v.* Tracy, 4 Conn. 79; Stuart *v.* Pierce, 1 Root (Conn. 75.

8. See Appeal and Error, 2 Cyc. 517.

9. **In Illinois** the statutes relating to forcible entry and detainer allow an appeal to any party aggrieved by the decision of the court to be taken to the same courts in the same manner and to be tried in the same way as appeals are taken and tried in other cases. Fay *v.* Seator, 88 Ill. App. 419.

In Michigan appeals in forcible entry and detainer are allowable in the same manner as on judgments rendered by justices of the peace. Bearse *v.* Aldrich, 40 Mich. 529.

In Maryland an appeal did not formerly lie in cases of forcible entry and detainer (Isaac *v.* Clarke, 9 Gill & J. 107); but at the present time the appropriate remedy of parties aggrieved by a judgment of a justice of the peace upon a proper complaint for forcible entry and detainer is by appeal to the circuit court (Roth *v.* State, 89 Md. 524, 43 Atl. 769).

In Nebraska no appeal would lie to the district court from a judgment in the justice's or county court in proceedings in forcible entry and detainer prior to Laws (1901), p. 484, c. 85 (Babby *v.* Musser, 64 Nebr. 175, 89 N. W. 742; Ettenheimer *v.* Wallman, 63 Nebr. 647, 88 N. W. 859; Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Moore *v.* Heltzel, 3 Nebr. (Unoff.) 10, 90 N. W. 645; Selleck *v.* Feeney, 2 Nebr. (Unoff.) 739, 89 N. W. 1003; Sullivan *v.* Haight, 2 Nebr. (Unoff.) 371, 96 N. W. 487; Adkins *v.* Andrews, 1 Nebr. (Unoff.) 810, 96 N. W. 228; Sullivan Transfer Co. *v.* Poska, 1 Nebr. (Unoff.) 600, 96 N. W. 163); until the enactment of that statute judgments in such actions could be reviewed alone by proceedings in error (Armstrong *v.* Mayer, 60 Nebr. 423, 83 N. W. 401; Dale *v.* Doddridge, 9 Nebr. 138, 1 N. W. 999).

10. Dechenbach *v.* Rima, (Oreg. 1904) 77 Pac. 391.

11. Adkins *v.* Andrews, 1 Nebr. (Unoff.) 810, 96 N. W. 228.

12. Ser *v.* Bobst, 8 Mo. 506, holding, however, that where in such case the appeal has been allowed by the justice the cause will not be dismissed from the docket of the circuit court if the judgment against appellant was improperly given.

13. Burns *v.* Haggard, 11 Heisk. (Tenn.) 122.

14. **In Colorado** appeals lie to the county court. Reynolds *v.* Larkins, 10 Colo. 126, 14 Pac. 114.

Where the justice had no jurisdiction, the court to which the case is removed acquires none,[15] and evidence cannot supply the defect.[16] So jurisdiction cannot be conferred by amendment and the appearance of the parties where the justice's jurisdiction does not appear.[17] Jurisdiction on appeal cannot be given by consent of the parties.[18] Statutes in a number of jurisdictions give the supreme court appellate jurisdiction in proceedings brought under the forcible entry and detainer statutes.[19] Thus in some jurisdictions an appeal lies from the judgment of the circuit court on an appeal from the judgment of a justice's court.[20] In others a writ of error lies,[21] and in others either an appeal or writ of error lies.[22] In some jurisdictions error[23] or appeal[24] lies to the court of appeals.[25] If the court to which the writ of error is sued out has no jurisdiction the supreme court acquires no jurisdiction to review the alleged error.[26]

c. What Judgments or Orders May Be Reviewed. Under the statutes of a number of jurisdictions an appeal lies only from a final judgment,[27] and under some statutes a judgment for less than a designated sum is not appealable.[28] An order of the circuit court setting aside a judgment of the justice for failure of appellant to appear at the trial is not appealable under a statute providing for an appeal on the granting of a motion for a new trial.[29] Under a statute providing that in proceedings to review the judgment or final order of the justice in forcible detainer proceedings a petition in error can be filed in the court of common pleas only by leave of such court, a refusal by the court of common pleas to allow a petition in error to be filed in such court is not reviewable on error, such refusal not being a judgment in the case pending in such court.[30]

d. Requisites of and Proceedings For Transfer of Cause.[31] It is not a prerequisite to an appeal that the losing party should ask for a new trial.[32] And in any event the appeal must be taken from the judgment and not from an order overruling a motion for a new trial.[33] The time for taking appeals from a justice's court

In Illinois and Maryland appeal lies to circuit courts. Davis *v.* Hamilton, 53 Ill. App. 94; Roth *v.* State, 89 Md. 524, 43 Atl. 769.

In Ohio a petition in error lies to the court of common pleas. Kelly *v.* Nichols, 10 Ohio St. 318.

In Wisconsin the municipal court of a county has appellate jurisdiction. Taylor *v.* De Camp, 68 Wis. 162, 31 N. W. 728.

15. Stolberg *v.* Ohnmacht, 50 Ill. 442; Abbott *v.* Kruse, 37 Ill. App. 549; Fletcher *v.* Keyte, 66 Mo. 285; Kennedy *v.* Prueitt, 24 Mo. App. 414; Gideon *v.* Hughes, 21 Mo. App. 528.

16. McKinney *v.* Harral, 31 Mo. App. 41.

17. McQuoid *v.* Lamb, 19 Mo. App. 153.

18. Babby *v.* Musser, 64 Nebr. 175, 89 N. W. 742; Ettenheimer *v.* Wallman, 63 Nebr. 647, 88 N. W. 859.

19. Pannill *v.* Coles, 81 Va. 380.

20. Barton *v.* Osborn, 6 Blackf. (Ind.) 145; Moore *v.* Read, 1 Blackf. (Ind.) 177.

In Colorado appeals are allowable to the supreme court where the judgment appealed from amounts exclusive of costs to one hundred dollars or relates to a franchise or freehold. Crane *v.* Farmer, 14 Colo. 294, 23 Pac. 455. Formerly an appeal did not lie, the remedy given being by writ of error. Brandenberg *v.* Reithman, 7 Colo. 323, 3 Pac. 577.

In Minnesota an appeal lies to the supreme court from the municipal court of Minneapolis (Boston Block Co. *v.* Buffington, 39 Minn. 385, 40 N. W. 361) or from the municipal court of Stilwater (Watier *v.* Buth, 87 Minn. 205, 91 N. W. 756, 92 N. W. 331) in actions of forcible entry and detainer.

21. Pannil *v.* Coles, 81 Va. 380.

22. Gill *v.* Jones, 57 Miss. 367.

23. Kepley *v.* Luke, 106 Ill. 395.

24. Emerson *v.* Emerson, (Tex. Civ. App. 1896) 35 S. W. 425.

25. **In Kansas** the jurisdiction of the court of appeals to review cases of forcible entry and detainer is limited to actions involving more than one hundred dollars in amount. Smith *v.* Benton, 7 Kan. App. 62, 51 Pac. 971.

26. Wideman *v.* Taylor, 63 Kan. 884, 65 Pac. 664; Armour Packing Co. *v.* Howe, 62 Kan. 587, 64 Pac. 42.

27. Gray *v.* Hurley, 28 Minn. 388, 10 N. W. 417; Yarbrough *v.* Jenkins, 3 Tex. App. Civ. Cas. § 464.

What amounts to final judgment.— A judgment of a justice dismissing an action of unlawful entry and detainer while it does not conclusively settle the rights of the parties is a final determination from which an appeal will lie. Gill *v.* Jones, 57 Miss. 367.

28. Yarbrough *v.* Jenkins, 3 Tex. App. Civ. Cas. § 464.

29. Schwoerer *v.* Christophel, 64 Mo. App. 81.

30. Rothwell *v.* Winterstein, 42 Ohio St. 249.

31. And see *infra*, IV, N, 2.

32. Henry *v.* Lansdown, 42 Mo. App. 431.

33. Hobart *v.* McNamara, 13 Mo. App. 578.

to an intermediate court, or from an intermediate court to a court of last resort is a matter solely of statutory regulation, and the investigator should in each case consult the statutes of his own jurisdiction.[34] If an affidavit is required as a basis for the allowance of an appeal, it must be filed within the time required by statute.[35] If the statute requires the justice's fees to be paid before he is required to send up the papers the fees must be tendered unconditionally.[36] It is the duty of appellant to cause the transcript of the justice's proceedings to be filed in the circuit court within the time required by statute.[37] And notice of the appeal should be speedily given after perfection of the appeal.[38] Under the statutes of one state, in the absence of a certificate of importance, no appeal can be entertained by the supreme court from the judgment of the appellate court where less than a designated amount is involved.[39]

e. Presentation and Reservation in Lower Court of Grounds For Review. The general rule that questions not raised in the trial court will not be noticed on appeal or error [40] applies as well in actions brought under the forcible entry and detainer statutes as in other actions.[41]

34. **In Missouri** an appeal from a judgment of a justice in unlawful detainer must be taken within six days if the court is in session. Hastings *v.* Hennessey, 52 Mo. App. 172; Carter *v.* Tindall, 28 Mo. App. 316; Hobart *v.* McNamara, 13 Mo. App. 578. An appeal taken six days after an order overruling a motion for new trial but more than six days after the rendition of the judgment will be dismissed. Hobart *v.* McNamara, 13 Mo. App. 578.

In Illinois the five days' clause as to appeals in forcible detainer cases only applies to appeals from a justice of the peace, and cases originally begun in a court of record and not to appeals from a court of record, where the case is tried in such court on appeal from a justice of the peace. Ehlert *v.* Security Deposit Co., 72 Ill. App. 59.

Premature appeal.— An appeal from an interlocutory order of the circuit court granting a writ of possession in a case of forcible entry and detainer before final judgment is entered is premature and will be dismissed. Carney *v.* Murphy, 2 Baxt. (Tenn.) 340.

Extending time of appeal.— The circuit court has power to hear an application to extend the time for appeal when the judge is satisfied that the party has been deprived of his appeal by causes beyond his control. The fact that a party is prevented by severe sickness from taking an appeal is sufficient cause to confer jurisdiction on the judge to exercise the power. Bearse *v.* Aldrich, 40 Mich. 529.

35. Robinson *v.* Walker, 45 Mo. 117.

Under the Missouri statutes the affidavit on appeal need not conform to the general provisions relating to affidavits for appeal from justices' courts, but is sufficient if it conforms to the statute specially relating to actions under the forcible entry and detainer statutes. Frick Co. *v.* Marshall, 86 Mo. App. 463. If the affidavit and recognizance are defective, appellant has a right to file sufficient ones within such time as will not delay the other party, this right being given by express statutory provision. Hamilton *v.* Jeffries, 15 Mo. 617.

36. People *v.* Harris, 9 Cal. 571, holding that an offer to pay the fees as soon as the appeal papers are ready to transmit to the court to which the appeal is taken is insufficient.

37. Robinson *v.* Walker, 45 Mo. 117; Bernicker *v.* Miller, 37 Mo. 498; Keim *v.* Daugherty, 8 Mo. 498; Bauer *v.* Cabanne, 11 Mo. App. 114.

If the transcript be filed by the justice on behalf of appellant this will be sufficient. It is not necessary that appellee should do so in his own proper person. Reynolds *v.* Lederer, 56 Mo. App. 511.

On failure of appellant to file the transcript appellee may produce the transcript and have the judgment affirmed. Keim *v.* Daugherty, 8 Mo. 498.

38. American Brass Mfg. Co. *v.* Phillippi, 103 Mo. App. 47, 77 S. W. 475, 765.

Construction of statutes relating to notice. — Rev. St. (1899) § 3370, providing that unlawful detainer appeals shall be returnable if the judgment is rendered in vacation of the circuit court to the first day of the next term thereof, but if rendered during term, within "six" days after rendition is not incompatible with section 4074, providing for "ten" days' notice of appeal from a justice's judgment; since section 3384 provides that if the transcript is filed in term-time the cause shall be set for some day during the term and thus the cause may be set ahead for trial so as to allow ten days' notice, if the appellee demands it. American Brass Mfg. Co. *v.* Phillippi, 103 Mo. App. 47, 77 S. W. 475, 765.

39. Seator *v.* Fay, 188 Ill. 507, 59 N. E. 235 [*affirming* 88 Ill. App. 419].

40. See APPEAL AND ERROR, 2 Cyc. 660 *et seq.*

41. Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262; Dorr *v.* McDonald, 43 Minn. 458, 45 N. W. 864.

Application of rule.— The rule has been applied in case of objections to the sufficiency of the description of the land in suit (Hilliard *v.* Carr, 6 Ala. 557; Davis *v.* Goodman, 62 Ark. 262, 35 S. W. 231; Farr *v.* Farr, 21 Ark. 573. And see Snoddy *v.* Watt, 9 Ala.

f. Amendments. On appeal from a justice's court to a court of intermediate jurisdiction, amendments if allowable are within the discretion of the court.[42] If the complaint was such that the justice acquired no jurisdiction, the court to which an appeal is taken acquires no jurisdiction and cannot permit an amendment.[43] Amendments which are equivalent to bringing a new action [44] or which materially change the issues will not be permitted.[45] Amendments as to description of the land in suit,[46] or increasing the amount of damages,[47] or showing that the land was situated in the county where suit was brought,[48] have been permitted. So it has been held that defendant has a right to file an amended answer, where the case is removed to an intermediate court.[49] Where the supreme court reverses a judgment because it was not shown that defendant was in possession of all the land described the circuit court on a remand of the cause may permit an amendment of the complaint so as to include only a part of the land therein described,[50] and may impose as a condition thereof payment of two thirds of the costs.[51]

g. Hearing and Determination of Case — (i) *In Intermediate Court.* Where a suit is removed from a justice's court by writ of error the case must be tried upon the record without a declaration or jury, and the justice has no right to enter upon his minutes other evidence than such as is made ground of exceptions.[52] It is not a material error that the record does not show that the issue was formed on the plea of not guilty entered by the court.[53] On appeal from a judgment of the justice his jurisdiction of the case will not be presumed where the transcript fails to show jurisdictional facts.[54] A review of his findings as being against the weight of the evidence is not permissible in the absence of some statute authorizing it.[55] If the appellant fails to appear, the judgment of affirmance authorized by statute is the only one which can be properly rendered.[56] In case the judgment is not in proper form for failure to describe the land it will be affirmed on the merits, but the cause will be remanded so that a proper judgment may be entered *nunc pro tunc*.[57] It is good ground for dismissal that the cause was dismissed by the justice for want of jurisdiction,[58] that the appeal was not taken within the time required by statute,[59] that there was undue delay in the prosecution of the appeal,[60] that it does not appear that a complaint was filed in

609), of objections to the form of notice to quit (Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507; Grant *v.* Marshall, 12 Nebr. 448, 11 N. W. 743), of an objection that the complaint alleges "possession" instead of "actual possession" (Minturn *v.* Burr, 16 Cal. 107), of an objection for want of jurat in the complaint (Center *v.* Gibney, 71 Ill. 557), and of an objection for defects in the summons of venire which the statutes require the justice to issue (Bell *v.* Killcrease, 11 Ala. 685).

42. Spurck *v.* Forsythe, 40 Ill. 438; Ballance *v.* Curtenius, 8 Ill. 449.

43. Kiphart *v.* Brennemen, 25 Ind. 152. And see Johnson *v.* Fischer, 56 Mo. App. 552, holding that Rev. St. (1889) § 6347, does not authorize the court of appeals to remand an action of unlawful detainer to enable plaintiff to amend his complaint so as to show a jurisdictional fact, since the statute relating to forcible entry and detainer is a separate and independent scheme complete in itself and does not authorize such amendment.

44. Kiphart *v.* Brennemen, 25 Ind. 152; Lasater *v.* Fant, (Tex. Civ. App. 1897) 43 S. W. 321.

45. Dicks *v.* Hatch, 10 Iowa 380.

46. Schworer *v.* Christophel, 72 Mo. App. 116.

47. Lucas *v.* Fallon, 40 Mo. App. 551.

48. McKinney *v.* Harral, 36 Mo. App. 337.

49. Henderson *v.* Allen, 23 Cal. 519.

50. Thompson *v.* Sornberger, 78 Ill. 353.

51. Thompson *v.* Sornberger, 78 Ill. 353.

52. Aldridge *v.* Hightower, 4 Port. (Ala.) 418.

53. Powers *v.* David, 6 Ala. 9, in which it was said that the statute which governs these proceedings expressly directs the justice of the peace, when defendant does not appear or appearing does not plead, to proceed in the same manner as if he had pleaded not guilty.

54. McQuoid *v.* Lamb, 19 Mo. App. 153.

55. State *v.* Wood, 22 Ohio St. 537; Heller *v.* Beal, 23 Ohio Cir. Ct. 540; State *v.* Harmeyer, 7 Ohio Dec. (Reprint) 509, 3 Cinc. L. Bul. 570.

56. Schwoerer *v.* Christophel, 64 Mo. App. 81.

57. Naylor *v.* Chinn, 82 Mo. App. 160.

58. Hughes *v.* Mount, 23 W. Va. 130.

59. Bernicker *v.* Miller, 37 Mo. 498; Hobart *v.* McNamara, 13 Mo. App. 578; Bauer *v.* Cabanne, 11 Mo. App. 114.

60. Panton *v.* Manley, 89 Ill. 458; Ameri-

the justice's court, and that such complaint is not brought into the court to which the appeal is taken or its loss accounted for.[61] On the other hand the fact that there is a defect in the summons is not a ground to dismiss such appeal,[62] and neither is the fact that only one of two defendants or one of two plaintiffs have appealed.[63] On affirmance the cause may be remanded to enable the justice to issue a writ of restitution,[64] and the court on dismissal of an appeal by defendant may award restitution.[65] In one jurisdiction it has been held that, on reversing the judgment on defendant's appeal, the court has power to order restitution to him of the premises,[66] and in another it has been held that on such appeal it is within the discretion of the court on reversing the judgment to grant or not to grant restitution to defendant.[67]

(II) *IN COURT OF LAST RESORT.* Where a case is tried and determined on a certain theory it must be so treated on appeal.[68] Where by statute the circuit court on reversing the judgment of the justice tries the case *de novo* it is permissible on appeal to the supreme court to assign errors in the record arising previous to the judgment.[69] The admission of evidence which could not have prejudiced appellant is no ground for reversal.[70] In the absence of a bill of exceptions the court will presume that the evidence authorized an assessment of special damages.[71] So if there is no bill of exceptions objections to the form of notice to quit cannot be considered on appeal.[72] Findings of fact on conflicting proofs will not be set aside on appeal,[73] and the judgment will not be disturbed on the ground that the property is not sufficiently described unless it affirmatively appears that the description will not serve to identify the property.[74] Error in rendering judgment for "damages" instead of "the value of the rent of the premises pending the appeal" is perhaps subject to correction in the court of last resort,[75] and it has been held that an erroneous entry of judgment for possession and damages where the verdict is for possession only may be corrected.[76] Where plaintiff obtains judgment and is put in possession and defendant on appeal or error succeeds in reversing the judgment he is entitled to be restored to possession,[77] and that too although plaintiff has rented the premises.[78]

h. Trial De Novo. In some jurisdictions where an appeal is taken from the

can Brass Mfg. Co. *v.* Phillippi, 103 Mo. App. 47, 77 S. W. 475, 765, holding that if appellant fails to prosecute his appeal with due diligence the court may in its discretion dismiss it on appellee's motion, at the first time at which it is returnable as well as at subsequent term.

61. Abbott *v.* Kruse, 37 Ill. App. 549.

62. Brown *v.* Ashford, 56 Miss. 677.

63. Gray *v.* Dryden, 79 Mo. 106.

64. Murry *v.* Harper, 3 Ala. 744. *Compare* Keim *v.* Daugherty, 8 Mo. 498, holding that where the judgment is affirmed a writ of restitution may issue from the circuit court.

65. Harlan *v.* Scott, 3 Ill. 65; Fish *v.* Toner, 40 Minn. 211, 41 N. W. 972. See also Smith *v.* People, 99 Ill. 445, in which it was held that where on appeal by defendant from a justice in forcible detainer, the circuit court dismisses the appeal, a judgment awarding a writ of possession if erroneous is not void, and is binding in all collateral proceedings until reversed.

66. Kennedy *v.* Hamer, 19 Cal. 374.

67. Towle *v.* Keith, 27 Wis. 268. In this case it appeared that plaintiff was entitled to the possession, although not entitled to recover it by that particular action, and that he had been previously dispossessed by defendant. The court under these circumstances refused to grant restitution to defendant.

68. Fearn *v.* Beirne, 129 Ala. 435, 29 So. 558.

69. Hilliard *v.* Carr, 6 Ala. 557.

70. Tivnen *v.* Monahan, 76 Cal. 131, 18 Pac. 144.

71. Powell *v.* Sturdevant, 85 Ala. 243, 4 So. 718.

72. Hitchcock *v.* McKinster, 21 Nebr. 148, 31 N. W. 507.

73. Paul *v.* Silver, 16 Cal. 73.

74. Warrenton *v.* Schowengerdt, 8 Mo. App. 572.

75. Powell *v.* Sturdevant, 85 Ala. 243, 4 So. 718.

76. Warrenton *v.* Schowengerdt, 8 Mo. App. 572.

77. Pico *v.* Cuyas, 48 Cal. 639. See also Lipp *v.* Hunt, 29 Nebr. 256, 45 N. W. 685, holding that where plaintiff obtains judgment and is put in possession, and on error to the supreme court the judgment is reversed and the cause remanded and no supersedeas bond is given, plaintiff in error on reversal of the judgment is entitled to be restored to possession. But see Bull *v.* Olcott, 2 Root (Conn.) 472; Bird *v.* Bird, 2 Root (Conn.) 411.

78. Pico *v.* Cuyas, 48 Cal. 639.

judgment of a justice in an action based on the statutes relating to forcible entry and detainer the trial is *de novo*.[79] On such trial no error made by the justice before whom the cause was originally tried can be taken advantage of.[80] The court should not inquire into irregularities of the proceedings before the justice.[81] Defendant cannot set up an equitable defense,[82] such as estoppel.[83] The jurisdiction of the court so trying the cause is appellate and only such questions as are within the jurisdiction of the justice can be determined.[84] Under some statutes it is not necessary to file new pleadings.[85] On trial in the district court on appeal from a justice where the question of title is in issue, and the action in effect one of ejectment, it is error to refuse defendant's offer to prove prior possession and title and to strike out similar evidence.[86]

2. CERTIORARI.[87] Certiorari lies to review proceedings in actions brought under the forcible entry and detainer statutes when authorized by statutory[88] or constitutional provisions,[89] and also where no other remedy is provided by statute, in which case it is the only remedy.[90] So under the statutes of some jurisdictions the remedy by certiorari is concurrent with that of appeal,[91] although the general rule is that certiorari is not an appropriate remedy if efficient relief can be obtained by resort to other available modes of redress or review.[92] An action of forcible entry and detainer may be removed to the proper court by certiorari notwithstanding there have been several mistrials before the justice before whom the cause is pending.[93] Where the remedy is appropriate, either party is entitled to a writ of certiorari,[94] in the absence of laches, but where a party has a remedy by appeal which he loses through his own neglect he will not be entitled to the writ.[95] Want of jurisdiction in the justice trying the case is a proper ground for allowance of a writ of certiorari,[96] as is also a refusal of the justice to grant an appeal and supersedeas upon tender of the statutory bond.[97] Questions relating to the court or judge having power to issue writs of certiorari are largely a matter

79. Reynolds *v.* Harris, 62 Ala. 415; Cunningham *v.* Bostwick, 7 Colo. App. 169, 43 Pac. 151; Rathbone Oil Tract Co. *v.* Rauch, 5 W. Va. 79; Vroman *v.* Dewey, 22 Wis. 323. And see cases cited in subsequent notes.

Time of trial.— Under a statute providing that an appeal in forcible entry cases may be tried at either a general or special term of the appellate (district) court by either party giving the other three days' notice thereof, and that a special venire for a jury in such cases may be ordered, and a statute providing that the judge of the district courts may appoint such special terms as may be necessary, but that issues of fact cannot be forced to trial at a special term, an appeal in a forcible entry case may be tried at a special term of the district court, although it involves an issue of fact. Hoffman *v.* Parsons, 27 Minn. 236, 6 N. W. 797.

80. St. Louis Agricultural, etc., Assoc. *v.* Reinecke, 21 Mo. App. 478.

81. Reynolds *v.* Harris, 62 Ala. 415.

The failure of the transcript of the proceedings before the justice of the peace to show the formal organization of the court on the return-day of the summons is not available to defendant on appeal to the circuit court where the cause is tried anew on its merits. Brown *v.* Ashford, 56 Miss. 677.

82. Grunewald *v.* Schaales, 17 Mo. App. 324. See also Finney *v.* Cist, 34 Mo. App. 303, 84 Am. Dec. 82; Ridgley *v.* Stillwell, 28 Mo. 400.

83. Willis *v.* Stevens, 24 Mo. App. 494.

84. Brown *v.* Hartshorn, 12 Okla. 121, 69 Pac. 1049.

85. McCue *v.* Lee, 16 Nebr. 575, 21 N. W. 1.

86. Murry *v.* Burris, 6 Dak. 170, 42 N. W. 25.

87. For questions relating to bonds see *infra*, IV, N, 3. And see, generally, for questions relating to CERTIORARI, 6 Cyc. 730 *et seq.*

88. Thorn *v.* Reed, 1 Ark. 480. And see Kincaid *v.* Mitchell, 6 Mo. 223; Mason *v.* Pennington, 53 Mo. App. 118.

89. McDonald *v.* Cousins, 23 Ga. 227; Taylor *v.* Gay, 20 Ga. 77.

90. Johnson *v.* Booge, 70 N. J. L. 193, 56 Atl. 238; Gaston *v.* Parker, 1 Tex. App. Civ. Cas. § 106. And see Parker *v.* Copland, 4 Mich. 528, where it was held that the proceeding to recover land under the statutes relating to forcible entry and detainer being summary and unknown to the common law, certiorari only lies to bring the cause to the supreme court.

91. Day *v.* Johnson, 4 Coldw. (Tenn.) 231.

92. See CERTIORARI, 6 Cyc. 742 *et seq.*

93. Kincaid *v.* Mitchell, 6 Mo. 223; Mason *v.* Pennington, 53 Mo. App. 118.

94. Day *v.* Johnson, 4 Coldw. (Tenn.) 231. And see Russell *v.* Wheeler, 21 Fed. Cas. No. 12,164*a*, Hempst. 3.

95. State *v.* Raum, 3 Mo. App. 589.

96. State *v.* Dennis, 43 N. J. L. 380; Kennedy *v.* Gorman, 14 Fed. Cas. No. 7,702, 4 Cranch C. C. 347.

97. *Ex p.* Grant, 53 Ala. 16.

of statutory regulation.[98] To authorize the issuance of the writ, it has been held sufficient for the petition to state the merits alone,[99] unless it is filed after the time allowed by statute has elapsed. In this case it must also show a sufficient cause for the delay and such as would entitle the petitioner to relief under the general rules of removal relating to such writs.[1] And ordinarily it is apprehended the petition should show some reason for not resorting to some other remedy if another remedy is available.[2] If a petition by defendant does not assert any right of possession to the premises a certiorari should not be granted.[3] If the petition for certiorari shows on its face that the judgment was for the right party the court will refuse the writ[4] and dismiss the petition, although the proceedings before the justices were informal and defective.[5] In cases of forcible entry and detainer brought up by certiorari the general rule is that errors must be assigned and the trial had on the record alone,[6] and only such errors can be reviewed as are called to the attention of the court by an assignment of error.[7] Under some statutes the only question which can be considered is whether the lower court had jurisdiction.[8] If there is any evidence on which the verdict could be based the court on certiorari will not interfere with it.[9] It is not an available objection that the process was issued by one justice and the case tried by another, their powers being coextensive.[10] In one jurisdiction it has been held that where judgment was ordered for plaintiff for the property alleged to be detained and was reversed on certiorari and judgment rendered against plaintiff for costs and the complaint substantially conformed to the statute the judgment should not merely have been reversed but should have been remanded for further proceedings.[11] In another it has been held that the act concerning forcible entries and detainers, providing for a removal by certiorari of proceedings under the act from the justice's court to the circuit court, does not enable the circuit

98. **In the District of Columbia** the circuit court has jurisdiction to issue a certiorari to a justice of the peace in a case of forcible entry and detainer. Holmead *v.* Smith, 12 Fed. Cas. No. 6,630, 5 Cranch C. C. 343; U. S. *v.* Donahoo, 25 Fed. Cas. No. 14,982, 1 Cranch C. C. 474.

In Virginia it has been held that in Alexander county a certiorari in a case of forcible entry and detainer made under the Virginia act of Dec. 3, 1792, page 151, may be issued by one judge in vacation. Holmead *v.* Smith, 12 Fed. Cas. No. 6,630, 5 Cranch C. C. 343; U. S. *v.* Browning, 24 Fed. Cas. No. 14,674, 1 Cranch C. C. 500.

In Tennessee a statute providing that two justices may grant a certiorari to remove the judgment and proceedings of a justice of the peace returnable to the circuit court of that county a writ of forcible entry and detainer and judgment thereon is the judgment proceedings of a justice of the peace within the statute. Earl *v.* Rice, 10 Yerg. 233.

99. Edwards *v.* Batts, 5 Yerg. (Tenn.) 441. See also Lane *v.* Marshall, Mart. & Y. (Tenn.) 255.

1. Rogers *v.* Wheaton, 88 Tenn. 665, 13 S. W. 689.

2. See CERTIORARI, 6 Cyc. 783.

In Tennessee it has been held that under the act of Feb. 9, 1870, chapter 84, petitions for certiorari in cases of forcible entry and detainer need not contain any reason for the failure to appeal. Elliott *v.* Lawless, 6 Heisk. 123.

3. Clark *v.* Hutton, 28 Tex. 123.

4. Harrell *v.* Holt, 76 Ga. 25.

5. Childress *v.* Black, 9 Yerg. (Tenn.) 446. See also Lane *v.* Marshall, Mart. & Y. (Tenn.) 255.

6. Perryman *v.* Burgster, 6 Port. (Ala.) 99; Dunham *v.* Carter, 2 Stew. (Ala.) 496. See also Bell *v.* Killcrease, 11 Ala. 685.

Errors of law.— The statute of Missouri prohibiting an appeal from a justice's judgment rendered thereunder, but providing for a removal of the proceedings to the circuit court by certiorari, there to be set aside for irregularity, does not enable the circuit court to correct errors of law of the justice but does enable it to set aside their proceedings for irregularities appearing on the record. Sholar *v.* Smith, 3 Mo. 416. For general rule relating to consideration of errors of law see CERTIORARI, 6 Cyc. 826 *et seq.*

Retrial of facts by jury.— Some statutes which provide for the removal by certiorari of cases of forcible entry and detainer from the cognizance of a justice of the peace to a circuit court authorizes that court to retry the facts by a jury. Lane *v.* Marshall, Mart. & Y. (Tenn.) 255.

In Wisconsin on removal to the district court by certiorari the court may decide upon errors of fact. Bracken *v.* Preston, 1 Pinn. 365.

7. Murray *v.* Williams, 8 Port. (Ala.) 47.

8. Parker *v.* Copland, 4 Mich. 528; Johnson *v.* Booge, 70 N. J. L. 193, 56 Atl. 238.

9. Berry *v.* Williams, 21 N. J. L. 423.

10. Perryman *v.* Burgster, 6 Port. (Ala.) 99.

11. Turnly *v.* Stinson, 1 Ala. 456.

court to remand the proceedings to the justice's court after setting them aside for irregularities.[12] So in one jurisdiction it has been held that on a writ of certiorari issued by an appellate court to review a judgment of a justice's court in an action of forcible entry and detainer the appellate court on reversing the judgment cannot grant a writ of restitution.[13] If a statute provides that on dismissal of certiorari the court shall enter judgment for the amount recovered in the inferior court with interest and costs the court has no power to render judgment for the damages assessed.[14]

3. Bonds on Appeal, Error, or Certiorari — a. Necessity. The statutes usually require the giving of bonds on appeal from[15] or certiorari to[16] the court in which an action under the forcible entry and detainer statutes is brought and in case of a non-compliance with the statute the appeal will be dismissed.[17] So if a defendant desires to have the appeal operate as a stay a supersedeas bond is also necessary,[18] unless as is the case in a number of jurisdictions the appeal-bond itself contains the requirements of a supersedeas bond and has the effect thereof.[19] If a statute provides that an appeal from a justice shall not be effectual unless a bond is given to secure payment of costs of appeal and such bond is not given the fact that another bond required by statute to authorize a stay of proceedings is given will not render the appeal effectual.[20] On an appeal from the circuit court to the supreme court an appeal-bond in a sum sufficient to cover the rent of the premises pending the litigation is not necessary where there is no statute requiring it.[21]

b. Requisites and Sufficiency. The bond must be in substantial compliance with the requirements of the statute under which it is given;[22] such a bond, however, will be sufficient.[23] A slight variance between the language of the bond and the language of the statute will not invalidate it,[24] although it is said to be the better practice in all cases for the undertaking to comply strictly with the language of the statute.[25] If the bond contains conditions not enumerated in the statute it will be void.[26] The bond should describe the action and the amount or substance of the recovery.[27] It need not designate any specific sum as a penalty

12. Sholar *v.* Smyth, 3 Mo. 416.

13. Newton *v.* Leary, 64 Wis. 190, 25 N. W. 39. But see Wright *v.* Hurt, 92 Ala. 591, 9 So. 386, holding that where plaintiff has been put in possession, the circuit court on reversing the judgment may order restoration of possession and issue a writ of restitution, although the statute does not specially provide for such writ.

14. Weigand *v.* Malatesta, 6 Coldw. (Tenn.) 362.

15. *Illinois.*— Kenny *v.* Jones, 37 Ill. App. 615.

Iowa.— Cuddelback *v.* Parks, 2 Greene 148.

Missouri.— Papin *v.* Buckingham, 33 Mo. 454; Hastings *v.* Hennessey, 52 Mo. App. 172.

Oregon.— Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038; Danvers *v.* Durkin, 14 Oreg. 37, 12 Pac. 60.

Tennessee.— Young *v.* Overton, 10 Heisk. 467.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 176.

16. Stewart *v.* Emory, Tapp. (Ohio) 100; Holmes *v.* Holloway, 21 Tex. 658.

17. Papin *v.* Buckingham, 33 Mo. 454; Young *v.* Overton, 10 Heisk. (Tenn.) 467.

18. Olmstead *v.* Thompson, 91 Ala. 130, 8 So. 755; Robbins *v.* Battle House Co., 74 Ala. 499; *Ex p.* Floyd, 40 Ala. 116. And see Waite *v.* Ward, 93 Ala. 271, 9 So. 227; Lykes *v.* Schwarz, 91 Ala. 461, 8 So. 71.

19. See the statutes of various states relating to forcible entry and detainer. And see Dutton *v.* Tracy, 4 Conn. 365.

20. Rudolph *v.* Herman, 2 S. D. 399, 50 N. W. 833.

21. Sherrill *v.* Madry, 6 Lea (Tenn.) 231.

22. *Illinois.*—Fairbank *v.* Streeter, 142 Ill. 226, 31 N. E. 494 [*reversing* 41 Ill. App. 434]; Wood *v.* Tucker, 66 Ill. 276; McKoy *v.* Allen, 36 Ill. 429.

Kansas.— Templeton *v.* Millis, 24 Kan. 381.

Maine.— Merril *v.* Hinckley, 49 Me. 40; Dennison *v.* Mason, 36 Me. 431.

Tennessee.— Ladd *v.* Riggle, 6 Heisk. 620.

Wisconsin.— Ferber *v.* Watry, 16 Wis. 143.

See 23 Cent. Dig. tit. "Forcible Entry and Detainer," § 176.

23. Zoller *v.* McDonald, 23 Cal. 136; Morrison *v.* Boggs, 44 Nebr. 248, 62 N. W. 473. And see Kennedy *v.* Hamer, 19 Cal. 374.

24. Shaw *v.* McIntier, 5 Allen (Mass.) 423.

25. Templeton *v.* Millis, 24 Kan. 381.

26. Tomlin *v.* Green, 39 Ill. 225; Dennison *v.* Mason, 36 Me. 431.

Omission in obligor's favor.— Where the recognizance does not require anything of defendants not required by statute and its omissions are in their favor they have no legal ground of objection to it. Shaw *v.* McIntier, 5 Allen (Mass.) 423.

27. McKoy *v.* Allen, 36 Ill. 429.

unless the statute so requires;[28] but where the statute requires the bond to be sufficient to secure rent, damages, and costs "fixed by the court," an appeal cannot be perfected by defendant by filing a bond without first having the amount thereof fixed by the justice.[29] If the bond is a supersedeas bond, or an appeal-bond which by force of the statutes operates as a stay, it is a usual requirement that it shall be conditioned on payment by defendant of all rents "adjudged against him;"[30] or of all rents accruing during the appeal,[31] or all rents becoming due, if any, from the commencement of the suit until the final termination thereof,[32] according as the statutes may provide; so the statutes also ordinarily require that the bond shall be conditioned for payment of costs and damages,[33] and a bond will be insufficient which omits a condition required by statute "that the appellant will not suffer waste to be committed."[34] An appeal-bond in an action of forcible entry and detainer must be executed by the party appealing. It cannot be executed by another person, although he is the landlord of plaintiff.[35]

c. Time of Filing. An appeal-bond must be filed within the time required by statute and the court has no power to extend the time therefor,[36] unless specially authorized by statute.[37] Under a statute providing that if the appeal-bond in a forcible entry and detainer suit is insufficient a new bond may be filed within such time as shall not delay the trial, the refusal to continue on the filing of a new appeal-bond is not erroneous.[38]

d. Approval of and Fixing Amount of Bond. The court in which the action is tried and not the appellate court is the proper court to approve the bond.[39] If an appeal-bond when presented to the justice is in proper form it is his duty to approve it,[40] but he should not approve a bond which is not in com-

28. Morrison *v.* Boggs, 44 Nebr. 248, 62 N. W. 473. But see Warner *v.* Howard, 121 Mass. 82, which seems to hold the contrary doctrine.

29. Fairbank *v.* Streeter, 142 Ill. 226, 31 N. E. 494 [*reversing* 41 Ill. App. 434].

30. Hastings *v.* Hennessey, 58 Mo. App. 205.

31. Ferber *v.* Watry, 16 Wis. 143.

32. Wood *v.* Tucker, 66 Ill. 276 (in which it was held that a bond conditioned for the payment of rents accrued, but failing to provide for rents to become due, is insufficient); McKoy *v.* Allen, 36 Ill. 429. And see Rucker *v.* Wheeler, 39 Ill. 436; Tomlin *v.* Green, 39 Ill. 225; Shaw *v.* McIntier, 5 Allen (Mass.) 423; Heiney *v.* Heiney, 43 Oreg. 577, 73 Pac. 1038; Danvers *v.* Durkin, 14 Oreg. 37, 12 Pac. 60; Young *v.* Overton, 10 Heisk. (Tenn.) 467; Ladd *v.* Riggle, 6 Heisk. (Tenn.) 620.

33. *California.*— See Zoller *v.* McDonald, 23 Cal. 136.

Kansas.—Templeton *v.* Millis, 24 Kan. 381.

Massachusetts.— Shaw *v.* McIntier, 5 Allen 423.

Missouri.— Hastings *v.* Hennessey, 58 Mo. App. 205.

Wisconsin.— Faber *v.* Watry, 16 Wis. 143.

Treble damages.— A statute requiring a bond conditioned to pay all rent and other damages justly accruing to plaintiff during the pendency of the appeal does not include the treble damages which plaintiff is authorized by another statute to recover. Chase *v.* Dearborn, 23 Wis. 443.

34. Templeton *v.* Millis, 24 Kan. 381.

35. Armson *v.* Forsyth, 40 Ill. 49. And see APPEAL AND ERROR, 2 Cyc. 826.

36. Hosher *v.* Hesterman, 51 Ill. App. 75; Kenny *v.* Jones, 37 Ill. App. 615. See also Hastings *v.* Hennessey, 52 Mo. App. 172. But see Stanislaus County *v.* Myers, 15 Cal. 33.

To what appeal statute applicable.— A statute providing that in cases of appeal the bond must be filed within five days after judgment applies only to appeals from judgments in the court in which the action is brought whether in the justice's or the circuit court, and not to appeals from judgments of the circuit court rendered on appeals from justices' courts. Davis *v.* Hamilton, 53 Ill. App. 94.

An appeal after the end of the term at which judgment is rendered is not authorized by a statute requiring the bond to be filed within five days from the date of the judgment, although such appeal be prayed for within five days from the date of the judgment. Ehlert *v.* Security Deposit Co., 72 Ill. App. 59.

37. Mills *v.* Wilson, 59 Minn. 107, 60 N. W. 1083, in which case it was held that a statute providing that no appeal allowed by a justice shall be dismissed for want of a proper bond if appellant, before the motion to dismiss is determined, executes such bond as he ought to have executed before the allowance of the appeal, applies to actions for forcible entry and detainer, and to appeals therefrom.

38. Frick Co. *v.* Marshall, 86 Mo. App. 463.

39. Getty *v.* Miller, 10 Colo. App. 331, 51 Pac. 166.

40. State *v.* Clark, 24 Nebr. 318, 38 N. W. 832.

pliance with the statutes.[41] The court in which the action is brought must fix the amount of the bond if this is required by statute, and not the court[42] or clerk of the court[43] to which the appeal is taken.

e. Amended and New Bonds. In the absence of some statute authorizing the amendment of appeal-bonds in actions based on the forcible entry and detainer statutes, a motion to amend an appeal-bond is addressed to the sound discretion of the court and its decision is not reviewable.[44] If the bond is void no amendment will be permitted,[45] and it has been held that a bond invalid for failure to comply with a statutory requirement that the amount of the bond be fixed by the justice has also been held not amendable.[46] If no motion is made to amend a defective appeal-bond when objected to the appeal will be dismissed.[47] The circuit court is not concluded by the amount of the appeal-bond fixed by the justice, but may require a bond in a larger sum to be filed and in default of compliance may dismiss the appeal.[48] The court cannot, however, exercise the power to require a new bond before commencement of the term to which the appeal is taken.[49] If the amount is fixed by statute and the amount of the bond required by the justice is less than that so fixed the court to which an appeal is taken may require defendant to increase his bond to that amount but no more,[50] and where the court requires a new bond which is excessive in amount and dismisses the appeal on failure to give it the judgment will be reversed.[51] Whether or not the new bond shall operate to supersede the original bond depends upon the character of the order.[52]

f. Operation and Effect of Supersedeas Bond. A supersedeas bond stays all proceedings in the action pending the appeal, preserves all rights of the parties, and if defendant is appellant secures to him the right to remain in possession of the premises pending the appeal.[53] After the necessary bond has been given the court has no further control over the matter and cannot withdraw its direction or discharge the order after it has been complied with and the appeal and stay have been perfected.[54]

g. Liability on Bonds and Enforcement. The sureties on appeal and supersedeas bonds are liable to the extent of the penalties therein provided for, but no further.[55] It has been held, however, that an entry of judgment against defendant and his sureties for damages not included in the bond can be objected to only by the sureties where such a judgment against defendant is expressly authorized by statute.[56] Sureties are liable on such bonds even though the parties giving

41. Templeton *v.* Millis, 24 Kan. 381.

42. Getty *v.* Miller, 10 Colo. App. 331, 51 Pac. 166.

43. Bowlby *v.* Robinson, 45 Ill. App. 531.

44. Harlan *v.* Scott, 3 Ill. 65.

45. Cuddelback *v.* Parks, 2 Greene (Iowa) 148. *Compare* Rabe *v.* Hamilton, 15 Cal. 31, holding that if the bond filed on an appeal from the justice in a suit for forcible entry is void or defective by accident, it may be corrected on terms deemed just by the court.

46. Fairbank *v.* Streeter, 142 Ill. 226, 31 N. E. 494.

47. Wood *v.* Tucker, 66 Ill. 276; McCoy *v.* Allen, 36 Ill. 429.

48. Wood *v.* Tucker, 66 Ill. 276; Rider *v.* Bagley, 47 Ill. 365. And see Walter *v.* McSherry, 21 Mo. 76; Skipwith *v.* Johnson, 5 Coldw. (Tenn.) 454.

49. Ryder *v.* Meyer, 66 Ill. 40.

50. Skipwith *v.* Johnson, 5 Coldw. (Tenn.) 454.

51. Lucas *v.* Fallon, 40 Mo. App. 551.

52. International Bank *v.* Poppers, 105 Ill. 491 [*affirming* 10 Ill. App. 531], holding that a bond executed under an order "to file a good and sufficient new and appeal bond" in a larger sum and with different securities operates as a discharge and extinguishment of the prior bond); Walter *v.* McSherry, 21 Mo. 76 (holding that a bond given under an order requiring a bond to be given "in addition to" one originally taken does not supersede the original bond).

53. Lobdell *v.* Keene, 85 Minn. 90, 88 N. W. 426.

54. Lee Chuck *v.* Quan Wo Chong, 81 Cal. 222, 22 Pac. 594, 15 Am. St. Rep. 50.

55. Waite *v.* Ward, 93 Ala. 271, 9 So. 227; Levine *v.* Lindenthall, 1 Tex. App. Civ. Cas. § 1149. Thus if the bond contains no clause for payment of rent, no recovery of rent can be had in a suit on the bond (Pitt *v.* Swearingen, 76 Ill. 250), and where a bond is given for rent that should accrue pending a writ of error brought by defendant the surety is not liable beyond the penalty of the bond, although the rent amounts to more (Kelly *v.* Nichols, 2 Ohio Dec. (Reprint) 363, 2 West. L. Month. 529).

56. Powell *v.* Sturdevant, 85 Ala. 243, 4 So. 718, in which case the court held that the sureties alone can complain of such judgment.

them are under disability and the liability of the latter on the bond questionable.[57] Failure to prosecute an appeal,[58] or the dismissal of certiorari proceedings,[59] constitutes a breach of the bond. And a judgment against a petitioner for certiorari is also a breach of a condition to prosecute with effect.[60] So it has been held that an appeal from a judgment of restitution before a justice is not prosecuted with effect within the meaning of an appeal-bond where the judgment of the justice is in effect affirmed.[61] Where defendant appeals from a judgment of restitution in the justice's court and files an appeal-bond and on an affirmance appeals to the supreme court and files a supersedeas bond and the judgment is affirmed in the supreme court, the liability of the sureties on the appeal-bond does not terminate until the restitution of the property.[62] Summary judgment cannot be rendered against sureties on supersedeas bonds or appeal-bonds containing the usual conditions of supersedeas bonds,[63] unless there is special statutory authorization therefor as is the case in some jurisdictions.[64] An action for the breach may be brought by the personal representative,[65] but not by an heir.[66] It is a good defense to an action on a supersedeas bond that plaintiff immediately after being put in possession was dispossessed under a writ against her in favor of others.[67] It is proper to show the value of the use and occupation of the property during the time it was withheld in order to ascertain plaintiff's loss and damage, where the bond is conditioned to pay all damages and loss sustained by plaintiff by reason of the withholding of the premises.[68] So it has been held that evidence as to the rental value of the premises is admissible notwithstanding the absence from the declaration of an averment of detention by defendant, the same being supplied by the plea of payment on his part, and the evidence showing his possession at the time in question.[69] Where, in an action on a bond given by defendant on appeal from a judgment for plaintiff before a justice in forcible entry, it appeared that plaintiff had recovered judgment against the sureties on the supersedeas bond given by defendant on appeal from the judgment of the district court affirming the judgment of the justice, the amount of such judgment which had been paid should be deducted from the amount of the recovery on the appeal-bond.[70]

O. Costs. As a general rule a successful plaintiff in an action for forcible entry and detainer is entitled to costs;[71] and where defendant prevails costs should be awarded in his favor.[72] It seems that in suit for unlawful detainer if, on demand by suit where there has been no previous demand, defendant offers to give up possession when served with process, on filing his plea, he will be entitled to costs.[73] A defendant in forcible entry and detainer is not liable for costs where it appears that the only possession had by plaintiff of the land in question

57. Skipwith *v.* Johnson, 5 Coldw. (Tenn.) 454.
58. Bernecker *v.* Miller, 44 Mo. 126.
59. Levine *v.* Lindenthall, 1 Tex. App. Civ. Cas. § 1149.
60. Hurt *v.* Dougherty, 3 Sneed (Tenn.) 418.
61. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627].
62. Penny *v.* Richardson, 12 Okla. 256, 71 Pac. 227.
63. Gray *v.* Dryden, 79 Mo. 106; Hulett *v.* Nugent, 71 Mo. 131; Powell *v.* Camp, 60 Mo. 569; Gunn *v.* Sinclair, 52 Mo. 327; Keary *v.* Baker, 33 Mo. 603. To the same effect see Crow *v.* Williams, 104 Mo. App. 451, 79 S. W. 183.
64. Giddens *v.* Bolling, 92 Ala. 586, 9 So. 274; Robbins *v.* Battle House Co., 74 Ala. 499.
65. Hurt *v.* Dougherty, 3 Sneed (Tenn.) 418, holding that the bond is not a covenant real running with the land.
66. Keegan *v.* O'Callaghan, 35 Ill. App. 142.
67. Evans *v.* Deming, 40 S. W. 676, 19 Ky. L. Rep. 405.
68. Rehm *v.* Halverson, 197 Ill. 378, 64 N. E. 388 [*affirming* 94 Ill. App. 627].
69. Barrett *v.* Lingle, 33 Ill. App. 91.
70. Penny *v.* Richardson, 12 Okla. 256, 71 Pac. 227.
71. Walker *v.* McGill, 40 Ark. 38; Keller *v.* Henry, 24 Ark. 575; Youngs *v.* Sunderland, 15 N. J. L. 32; Davison *v.* Schooley, 10 N. J. L. 145; Mairs *v.* Sparks, 5 N. J. L. 513; Crane *v.* Dod, 2 N. J. L. 340; Toal *v.* Clapp, 64 Wis. 223, 24 N. W. 876. And see COSTS, 11 Cyc. 85.
72. Chapman *v.* Knowles, 34 Ill. App. 558.
73. Rabe *v.* Fyler, 10 Sm. & M. (Miss.) 440, 48 Am. Dec. 763.

consisted of placing some lumber on it, which was removed by defendant.[74] The amount and items which are allowable as costs depend upon statutory provisions.[75] When the statute requires a bond for costs to be given when the action is brought, it will be dismissed for the want of such bond.[76] An undertaking for staying proceedings under a judgment in an action of forcible entry and detainer, and allowing defendant to retain possession of the property during the pendency of the appeal, is not such an undertaking as is required of the appellant as security for the payment of costs on appeal.[77]

P. Proceedings by Inquisition — 1. In General. Under the English statutes and similar statutes in force in some of the states, trials for forcible entry and detainer may be had by way of an inquisition before a justice.[78] The proceeding is purely statutory[79] and of a summary character,[80] and the provisions of the statutes must be strictly followed.[81]

2. Petition or Complaint. The proceedings are instituted by presenting to the justice a petition or complaint which must be in writing and on oath,[82] and must contain a description of the premises[83] and state the interest of the petitioner therein.[84]

3. Warrant. The justice upon receipt of the petition or complaint issues a warrant,[85] the object of which is to notify the accused of the charge to be inquired into.[86] The warrant states the cause of complaint,[87] and the scope of the inquiry is limited strictly by its allegations.[88] The warrant must show such a right or interest in complainant as to entitle him to maintain the proceeding under the statute,[89] and must allege that he was in the peaceable possession of the premises at the time of the entry[90] and that the entry or detainer complained of was forcible.[91] The description of the property in the warrant need be only a general description such as is sufficient to apprise defendant of the claim set up against him.[92]

74. Salinger *v.* Gunn, 61 Ark. 414, 33 S. W. 959.

75. See Dibell *v.* People, 22 Mich. 371; Youngs *v.* Sunderland, 15 N. J. L. 32; Davison *v.* Schooley, 10 N. J. L. 145; Mairs *v.* Sparks, 5 N. J. L. 513; Crane *v.* Dod, 2 N. J. L. 340; People *v.* Townsend, 6 How. Pr. (N. Y.) 178. And see Costs, 11 Cyc. 100.

76. Whittaker *v.* Perry, 37 Vt. 631.

77. Rudolph *v.* Herman, 2 S. D. 399, 50 N. W. 833.

78. See Adams *v.* Horr, 6 D. C. 40; Clark *v.* Vannort, 78 Md. 216, 27 Atl. 982; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; and the cases cited in the following notes.

Summary criminal proceedings before justices see *supra*, III, D, 1.

79. Adams *v.* Horr, 6 D. C. 40; People *v.* Smith, 24 Barb. (N. Y.) 16; Carter *v.* Newbold, 7 How. Pr. (N. Y.) 166.

80. Adams *v.* Horr, 6 D. C. 40; People *v.* Smith, 24 Barb. (N. Y.) 16; Griffin *v.* Griffin, 71 N. C. 304; Sherrill *v.* Nations, 23 N. C. 325.

81. Adams *v.* Horr, 6 D. C. 40; People *v.* Smith, 24 Barb. (N. Y.) 16; People *v.* Whitney, 1 Thomps. & C. (N. Y.) 533.

82. Labaree *v.* Brown, 38 Me. 482; People *v.* Whitney, 1 Thomps. & C. (N. Y.) 533; Mauterstock *v.* Williams, 42 Misc. (N. Y.) 402, 86 N. Y. Suppl. 804.

Verification before a commissioner of deeds is a legal verification of the petition. O'Callaghan *v.* Hennessy, 32 Misc. (N. Y.) 760, 65 N. Y. Suppl. 670.

83. Mauterstock *v.* Williams, 42 Misc. (N. Y.) 402, 86 N. Y. Suppl. 804.

84. Mauterstock *v.* Williams, 42 Misc. (N. Y.) 402, 86 N. Y. Suppl. 804; Dougherty *v.* McMillan, 25 Misc. (N. Y.) 782, 55 N. Y. Suppl. 616.

85. Labaree *v.* Brown, 38 Me. 482.

A summons instead of a warrant may be issued, and such a practice is to be commended in cases where an arrest is not essential to plaintiff's security. Riggs *v.* Sterling, 51 Mich. 157, 16 N. W. 320.

86. McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464.

87. Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549.

88. McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464; Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549; Crawford *v.* Rochester, 4 Bibb (Ky.) 203.

89. Taylor *v.* Monohan, 8 Bush (Ky.) 238; Powers *v.* Sutherland, 1 Duv. (Ky.) 151.

90. Hord *v.* Sartin, 80 S. W. 794, 26 Ky. L. Rep. 77; Hoffman *v.* Mann, 75 S. W. 219, 25 Ky. L. Rep. 255; Bailey *v.* Kelley, 38 S. W. 139, 18 Ky. L. Rep. 718.

91. Lewis *v.* Stith, 2 Litt. (Ky.) 294.

92. Smith *v.* White, 5 Dana (Ky.) 376; Moore *v.* Massie, 3 Litt. (Ky.) 296; Bush *v.* Coomer, 69 S. W. 793, 24 Ky. L. Rep. 702; Trent *v.* Colvin, 35 S. W. 914, 18 Ky. L. Rep. 173.

The county in which the land is situated should be stated in the warrant (Parker *v.* Ozment, 8 Ky. L. Rep. 525), but this is

It need not be stated in the warrant that the complaint upon which it was issued was made under oath.[93] Both forcible entry and forcible detainer may be charged in the same warrant,[94] or the accused may be charged in the alternative with forcible entry or detainer.[95] Where the form of the warrant is prescribed by statute it need not be strictly pursued, but a substantial compliance therewith is sufficient.[96] A defective warrant may be amended before trial by the justice,[97] or it may be amended in the circuit court upon the trial of the traverse, provided the amendment in no way changes the case as tried before the justice;[98] but no amendment will be allowed which introduces a new cause of action.[99] The warrant must be issued by the magistrate before whom the complaint was made,[1] and must be served in the manner[2] and within the time prescribed by statute.[3]

4. Conduct of Inquisition. Where the statute does not require that the inquisition shall be held upon the premises the justice may in his discretion hold it elsewhere.[4] The jury on the inquisition must be sworn, which must appear from the record.[5] Whether plaintiff was in actual possession and whether that possession was forcibly disturbed by the entry or detainer complained of are the only questions before the jury,[6] and they cannot try questions of title[7] or plaintiff's right of entry.[8] In a warrant for a forcible entry and detainer defendant may be convicted of either,[9] but if only one offense is charged he can be convicted only of that offense.[10] The finding of the jury must contain a definite description of the premises,[11] and must be signed by them if the statute so directs;[12] but verdicts on inquisitions are liberally construed; a technical precision and regularity is not required.[13] Before the justice can render judgment on the verdict defendant must be given notice of the finding and an opportunity to file a traverse,[14] and this must be shown by the record.[15] If after notice he declines to traverse,[16] or

only to show the jurisdiction of the justice and the omission does not render the description defective (Rowe *v.* Powell, 4 J. J. Marsh. (Ky.) 153; Bush *v.* Coomer, 69 S. W. 793, 24 Ky. L. Rep. 702).

93. Lithgow *v.* Moody, 35 Me. 214.

94. Cammack *v.* Macy, 3 A. K. Marsh. (Ky.) 296.

95. Rowe *v.* Powell, 4 J. J. Marsh. (Ky.) 153; Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38; Carpenter *v.* Shepherd, 4 Bibb (Ky.) 501.

96. Smith *v.* White, 5 Dana (Ky.) 376.

Substance rather than form should be regarded in such proceedings. McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464.

97. Bailey *v.* Kelley, 38 S. W. 139, 18 Ky. L. Rep. 718.

98. Hord *v.* Sartin, 80 S. W. 794, 26 Ky. L. Rep. 77; Hoffman *v.* Mann, 75 S. W. 219, 25 Ky. L. Rep. 255 (amendments to allege complainant's peaceable possession at time of entry); Forsythe *v.* Huey, 74 S. W. 1088, 25 Ky. L. Rep. 147 (amendment to give more definite description of the property); Parker *v.* Ozment, 8 Ky. L. Rep. 525 (amendment to show the county where the land was situated).

99. Powers *v.* Sutherland, 1 Duv. (Ky.) 151.

1. Labaree *v.* Brown, 38 Me. 482.

2. Lewis *v.* Outten, 2 Dana (Ky.) 92, holding that under the Kentucky statute personal service is necessary.

3. Humphrey *v.* Jones, 3 T. B. Mon. (Ky.) 261, holding that under the Kentucky statute the warrant must be executed and returned within thirty days.

4. Bloom *v.* Goodner, 1 Ill. 63.

5. Adams *v.* Horr, 6 D. C. 40.

6. Hunt *v.* Wilson, 14 B. Mon. (Ky.) 44; Smith *v.* Dedman, 4 Bibb (Ky.) 192.

7. Carter *v.* Newbold, 7 How. Pr. (N. Y.) 166.

8. Smith *v.* Dedman, 4 Bibb (Ky.) 192.

9. Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38.

10. McBrayer *v.* Wash, 6 J. J. Marsh. (Ky.) 464; Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549. See also Lord Proprietary *v.* Brown, 1 Harr. & M. (Md.) 428.

11. Holmead *v.* Smith, 12 Fed. Cas. No. 6,630, 5 Cranch C. C. 343.

12. Bloom *v.* Goodner, 1 Ill. 63.

13. Belcher *v.* Barrett, 4 Metc. (Ky.) 307; Case *v.* Roberts, 4 Dana (Ky.) 596; Pollard *v.* Otter, 4 Dana (Ky.) 516.

An alternative verdict finding defendant "guilty of the forcible entry or detainer complained of" will be construed as applying to whichever of the offenses is charged in the complaint (Breckinridge *v.* Quertemus, 4 Dana (Ky.) 493), or if both offenses are charged as a verdict of guilty of both (Case *v.* Roberts, 4 Dana (Ky.) 596).

A verdict that the jury "do not think or believe defendants guilty" is when liberally construed considered to be substantially a verdict of not guilty and will authorize a judgment in their favor. Pollard *v.* Otter, 4 Dana (Ky.) 516.

14. Adams *v.* Horr, 6 D. C. 40; Sherrill *v.* Nations, 23 N. C. 325; Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

15. Adams *v.* Horr, 6 D. C. 40.

16. Sherrill *v.* Nations, 23 N. C. 325.

neglects to do so within the time prescribed by statute,[17] the justice must render judgment on the verdict. The justice has no power to grant a new trial,[18] or to disturb the judgment after it has been entered.[19] It is not necessary that the justice should sign the inquisition.[20]

5. TRAVERSE AND PROCEEDINGS THEREON — a. In General. If the finding of the inquisition is against defendant he has a right to file a traverse,[21] which is in effect an appeal, differing from other appeals only in that it merely calls in question the finding of the jury and not a judgment.[22] Where the form of the traverse is prescribed by statute it is only necessary that the substance of the form given should be pursued.[23] And it is not necessary that the traverser should sign the traverse.[24] If defendant traverses the inquisition the justice must then summon another jury to try the traverse before him,[25] or must certify the proceedings to the circuit court.[26] In Kentucky the statute expressly requires that after a traverse is filed and bond given the proceedings must be transferred to the circuit court for the trial of the traverse.[27] The circuit court has no jurisdiction to retry the truth of an inquisition unless a traverse was filed,[28] which must have been filed before the justice,[29] and within the time limited by the statute.[30] On this traverse the traversee is required to join issue in the circuit court,[31] which he does by appearing in that court and stating to the jury that the finding of the jury on the inquisition is true.[32] The truth of the inquisition is there tried *de novo*,[33] and the trial is conducted in the same manner as the trial of any other issue in that court.[34] The only issue in the circuit court is the truth of the inquisition,[35] and no evidence is admissible except such as is relevant to this

17. Adams *v.* Horr, 6 D. C. 40; Burchett *v.* Blackburn, 4 Bush (Ky.) 553; Swanson *v.* Smith, 77 S. W. 700, 25 Ky. L. Rep. 1260.

18. Swanson *v.* Smith, 77 S. W. 700, 25 Ky. L. Rep. 1260.

19. Scaggs *v.* Fife, 6 Ky. L. Rep. 659.

20. Covenhoven *v.* Vantine, 1 N. J. L. 258.

21. Belcher *v.* Barrett, 4 Metc. (Ky.) 307; Blythe *v.* Wright, 2 Ashm. (Pa.) 428; U. S. *v.* Browning, 24 Fed. Cas. No. 14,674, 1 Cranch C. C. 500.

The rendition of a judgment by the justice is not necessary to authorize the filing of a traverse, as it is the finding of the jury which is traversed. Case *v.* Roberts, 4 Dana (Ky.) 596.

22. Powers *v.* Sutherland, 1 Duv. (Ky.) 151.

23. Jones *v.* Skiles, 1 A. K. Marsh. (Ky.) 54.

The form of the traverse prescribed by the Kentucky statute is that "plaintiff [or the defendant] saith that the inquisition retained in this cause is not true; wherefore," etc. Belcher *v.* Barrett, 4 Metc. (Ky.) 307.

24. Jones *v.* Skiles, 1 A. K. Marsh. (Ky.) 54.

25. Adams *v.* Horr, 6 D. C. 40; Sherrill *v.* Nations, 23 N. C. 325; Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

26. State *v.* Dillon, 3 Hayw. (Tenn.) 174, where it is said that in the absence of statute the justice may summon another jury, but that the general practice is to certify the proceedings to the circuit court.

27. Wayman *v.* Taylor, 1 Dana (Ky.) 527; Smith *v.* Dedman, 2 Bibb (Ky.) 575.

The failure of the justice to make his return of the proceedings to the circuit court within the time prescribed by statute does not prejudice the rights of the parties. Tennelly *v.* Ross, 14 Ky. L. Rep. 48.

Where the original warrant is lost, the magistrate may return a certified copy with his record of the proceedings. Logan *v.* Smith, 2 A. K. Marsh. (Ky.) 52.

28. Burchett *v.* Blackburn, 4 Bush (Ky.) 553; Neale *v.* Sheets, 5 Ky. L. Rep. 121, 127.

If a traverse bond was given it will be presumed in the absence of proof to the contrary that a traverse was filed with the justice (Wayman *v.* Taylor, 1 Dana (Ky.) 527), and in such cases if the traverse is not returned by the justice another traverse may be filed *nunc pro tunc* in the circuit court (Wayman *v.* Taylor, *supra*); but in the absence of a bond there is no presumption that a traverse was filed (Neale *v.* Sheets, *supra*), and although a bond was given if it is affirmatively shown that no traverse was filed before the justice it cannot be filed *nunc pro tunc* in the circuit court (Burchett *v.* Blackburn, 4 Bush (Ky.) 553).

29. Burchett *v.* Blackburn, 4 Bush (Ky.) 553.

30. Burchett *v.* Blackburn, 4 Bush (Ky.) 553.

The traverse must be filed within three days after the finding, and in computing this time the day of the finding must be included. Claxton *v.* Suter, 13 Ky. L. Rep. 973.

31. Belcher *v.* Barrett, 4 Metc. (Ky.) 307.

32. Mosler *v.* Tanner, 13 Ky. L. Rep. 636.

33. Neale *v.* Sheets, 5 Ky. L. Rep. 121, 127.

34. Belcher *v.* Barrett, 4 Metc. (Ky.) 307; Beauchamp *v.* Morris, 4 Bibb (Ky.) 312; Davis *v.* Lamb, 12 Ky. L. Rep. 685.

35. Belcher *v.* Barrett, 4 Metc. (Ky.) 307; Smith *v.* White, 5 Dana (Ky.) 376; Todd *v.* Bates, 3 Bibb (Ky.) 100.

issue.[36] On a traverse by defendant he is not required to prove his innocence but the burden of proof remains with plaintiff.[37] If the traverser fails on the calling of the case for trial to appear either by himself or counsel, the court may render judgment by default in favor of the traversee.[38]

b. Bond. The statutes in some cases provide that the party traversing the inquisition must give a bond,[39] which must be for the costs of the proceeding and all damages that may be caused to the traversee by the traverse in case it shall not be prosecuted with effect.[40] The bond must be taken by the justice and not by the judge of the circuit court before whom the traverse is tried.[41] If the bond is defective the traverser should be allowed to execute a new and sufficient bond within a reasonable time to be fixed by the court,[42] and if it misrecites the date of the inquisition the proceedings should not be dismissed but the traverser should be permitted to introduce evidence to identify the inquisition and reacknowledge the bond.[43] Upon filing the traverse bond the justice must stay all further proceedings on the inquisition and return the papers and proceedings or a transcript thereof to the circuit court.[44] The traverse bond reciting that the traverse has been filed estops the traverser to deny that he traversed the inquisition.[45] The circuit court cannot release a surety on the traverse bond for the purpose of making him a witness and take another bond.[46]

c. Waiver of Defects and Irregularities. The filing of the traverse puts in issue the truth of the inquisition and is a waiver of all defects and irregularities in the form of the inquisition[47] or in the warrant;[48] but it is not a waiver of defects of substance[49] such as affect the jurisdiction of the court,[50] or where the inquisition is so defective that no judgment could be rendered thereon by the justice.[51]

6. RESTITUTION. Restitution cannot be awarded unless the proceeding is brought under a statute expressly authorizing it,[52] but the statutes usually provide that the justice who holds the inquisition may restore the injured party to possession.[53] To authorize a judgment of restitution the verdict on the inquisition must find such an estate or interest in plaintiff as to bring him within the provisions of the statute.[54] If the inquisition is traversed, restitution cannot be

Where only one offense is found against defendant by the inquest, the trial on the traverse is limited to this offense notwithstanding both a forcible entry and a forcible detainer are charged in the warrant. Cammack *v.* Macy, 3 A. K. Marsh. (Ky.) 296.

No new cause of action can be introduced. Powers *v.* Sutherland, 1 Duv. (Ky.) 151.

The court should not dismiss as to one defendant on trial of the traverse as the trial thereby becomes different from that tried before the justice. Pearce *v.* Cooper, 9 Ky. L. Rep. 933.

36. Smith *v.* White, 5 Dana (Ky.) 376.

37. Beauchamp *v.* Morris, 4 Bibb (Ky.) 312.

38. Dibble *v.* Porter, 1 Duv. (Ky.) 190.

39. Alderson *v.* Trent, 79 Ky. 259, 2 Ky. L. Rep. 248; Smith *v.* Dedman, 2 Bibb (Ky.) 575; Neale *v.* Sheets, 5 Ky. L. Rep. 121, 127.

A bond executed by the security is sufficient, although not executed by the principal. Smith *v.* Turley, 3 Bibb (Ky.) 188.

40. Alderson *v.* Trent, 79 Ky. 259, 2 Ky. L. Rep. 248. See also Evans *v.* Cleaver, 29 S. W. 29, 16 Ky. L. Rep. 499.

41. See Jack *v.* Carneal, 2 A. K. Marsh. (Ky.) 518.

42. Alderson *v.* Trent, 79 Ky. 259, 2 Ky. L. Rep. 248; Marshall *v.* Mills, 10 Ky. L. Rep. 722.

43. Norton *v.* Sanders, 5 J. J. Marsh. (Ky.) 287; Wilson *v.* Sanders, 5 J. J. Marsh. (Ky.) 288.

44. Wayman *v.* Taylor, 1 Dana (Ky.) 527; Smith *v.* Dedman, 2 Bibb (Ky.) 575.

45. Wayman *v.* Taylor, 1 Dana (Ky.) 527.

46. Holeman *v.* Carneal, 2 A. K. Marsh. (Ky.) 602; Jack *v.* Carneal, 2 A. K. Marsh. (Ky.) 518.

47. Breckinridge *v.* Quertemus, 4 Dana (Ky.) 493; Swartzwelder *v.* U. S. Bank, 1 J. J. Marsh. (Ky.) 38; Barret *v.* Chitwood, 2 Bibb (Ky.) 431. See also Kirk *v.* Taylor, 8 B. Mon. (Ky.) 262.

48. Williamson *v.* Boucher, 7 J. J. Marsh. (Ky.) 252; Rowe *v.* Powell, 4 J. J. Marsh. (Ky.) 153; Carpenter *v.* Shepherd, 4 Bibb (Ky.) 501; Wolford *v.* McDowell, 14 Ky. L. Rep. 896.

49. Todd *v.* Bates, 3 Bibb (Ky.) 100; People *v.* Wilson, 13 How. Pr. (N. Y.) 446.

50. People *v.* Whitney, 1 Thomps. & C. (N. Y.) 533.

51. Todd *v.* Bates, 3 Bibb (Ky.) 100; Gayle *v.* Overton, 1 J. J. Marsh. (Ky.) 549.

52. Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

53. Mitchell *v.* Fleming, 25 N. C. 123.

54. Mitchell *v.* Fleming, 25 N. C. 123; Sherrill *v.* Nations, 23 N. C. 325. See also Watson *v.* Floral College, 47 N. C. 211.

awarded until the traverse is tried and determined against defendant by another jury.[55] Technical irregularities in the form of judgment for restitution entered on the trial of the traverse will not invalidate it if it conforms substantially to the statute,[56] and a clerical error in failing to provide for restitution in entering up the judgment may be corrected by the court at a subsequent term.[57]

7. APPEAL AND CERTIORARI.[58] In the absence of statute, summary proceedings before justices for forcible entry and detainer cannot be reviewed by appeal,[59] but may be reviewed by certiorari.[60] Certiorari will not lie until after the finding of the inquisition,[61] but the proceedings may be removed at any time thereafter.[62] The certiorari merely brings up the record for inspection and the facts found by the jury cannot be tried anew.[63] In a few jurisdictions an appeal from the inquisition is allowed by statute,[64] and where an appeal can be taken and on that appeal jurisdictional questions as well as those arising on the merits can be fully disposed of, a certiorari should not be allowed unless circumstances exist which show that failure of justice will result from denying it.[65] An appeal can be taken only after the entry of the judgment or final order of the justice.[66] An appeal will not lie from a judgment on a traverse in the superior court where the judgment is merely for damages and costs and there is no judgment for restitution,[67] and an order granting a new trial on a traverse is not appealable.[68]

V. SPECIAL PROCEEDINGS AGAINST INTRUDERS AND TRESPASSERS.

In Georgia and South Carolina there are special statutory proceedings for the ejection of intruders[69] or trespassers.[70] In Georgia, where the parties have made the required affidavits, the issue to be determined is not title but defendant's good faith in claiming the right to go upon the land. He need not show a title paramount to that of plaintiff,[71] although title has been held admissible as evidence of the right of possession.[72] Plaintiff's affidavit must be sufficiently certain in describing the land to enable the sheriff to identify the premises.[73] When

55. Blythe *v.* Wright, 2 Ashm. (Pa.) 428.

56. Wheatley *v.* Price, 3 J. J. Marsh. (Ky.) 167, 168, holding that a judgment that "it is considered by the court, that the traversee, have the benefit of the writ of restitution" is sufficient in form.

57. Norton *v.* Sanders, 7 J. J. Marsh. (Ky.) 12.

58. See APPEAL AND ERROR, 2 Cyc. 540; CERTIORARI, 6 Cyc. 738 *et seq.*

59. Griffin *v.* Griffin, 71 N. C. 304; Griffin *v.* Griffin, 61 N. C. 167; Sherrill *v.* Nations, 23 N. C. 325. See also Martin *v.* Richardson, 15 S. W. 248, 12 Ky. L. Rep. 804; Freeman *v.* Ogden, 17 Abb. Pr. (N. Y.) 326 note.

60. Griffin *v.* Griffin, 71 N. C. 304; Sherrill *v.* Nations, 23 N. C. 325; Holmead *v.* Smith, 12 Fed. Cas. No. 6,630, 5 Cranch C. C. 343. See also Freeman *v.* Ogden, 17 Abb. Pr. (N. Y.) 326 note. *Compare* McPherson *v.* Gallagan, 16 Fed. Cas. No. 8,922, 1 Hayw. & H. 394.

A bond for costs is not necessary on certiorari unless required by statute. Smith *v.* Williamson, 11 N. J. L. 315.

61. Haines *v.* Backus, 4 Wend. (N. Y.) 213.

62. People *v.* Covill, 20 Hun (N. Y.) 460, holding further that, although defendant has traversed the inquisition, it is not necessary to wait until proceedings on the traverse before the justice have been completed.

63. Griffin *v.* Griffin, 71 N. C. 304.

A traverse cannot be filed in the circuit court on certiorari to retry the findings of the jury on the inquisition. Sherrill *v.* Nations, 23 N. C. 325.

64. Farrell *v.* Taylor, 12 Mich. 113; Koster *v.* Van Schaick, 11 Daly (N. Y.) 205, 64 How. Pr. 100; Lewis *v.* Hoffman, 5 N. Y. Civ. Proc. 141.

Under the New York statute the appellant at the time of serving his notice of appeal must pay the costs of the proceeding. Lewis *v.* Hoffman, 5 N. Y. Civ. Proc. 141.

65. Farrell *v.* Taylor, 12 Mich. 113. See also Parker *v.* Copland, 4 Mich. 528.

66. Lewis *v.* Hoffman, 5 N. Y. Civ. Proc. 141.

67. Norton *v.* Sanders, 3 J. J. Marsh. (Ky.) 396.

68. People *v.* McManus, 47 N. Y. 661.

69. Ga. Civ. Code, § 4808.

70. S. C. Civ. Code, §§ 2972–2974.

71. Thompson *v.* Glover, 120 Ga. 440, 47 S. E. 935; Lane *v.* Williams, 114 Ga. 124, 39 S. E. 919; Coffey *v.* Pace, 106 Ga. 293, 32 S. E. 115; Thorpe *v.* Atwood, 100 Ga. 597, 28 S. E. 287; Durden *v.* Clack, 94 Ga. 278, 21 S. E. 521; Pratt *v.* Fountain, 73 Ga. 261; Nichols *v.* Chandler, 46 Ga. 479; Russel *v.* Chambers, 43 Ga. 478; McHan *v.* Stansell, 39 Ga. 197; Murdock *v.* Miller, 21 Ga. 368; Poulan *v.* Sellers, 20 Ga. 228. See also Baker *v.* Downing, 69 Ga. 746; Turner *v.* Barfield, 43 Ga. 267.

72. Poulan *v.* Sellers, 20 Ga. 228.

73. Orme *v.* King, 60 Ga. 523.

made, defendant must at once tender the sheriff the counter affidavit required by statute, or he will be turned out,[74] but it is not necessary for the counter affidavit to follow the statute literally.[75] In South Carolina it has been held that the proceeding may be instituted by the owner's agent and manager.[76] An affidavit showing that the land is situated in a certain county and in possession of a trespasser will give a magistrate of that county jurisdiction to serve notice on the trespasser to quit.[77] This notice need not designate the time within which a trespasser must quit, and if after the time limited by statute he refuses to quit, the magistrate shall then issue his warrant to a sheriff or constable requiring him to forthwith eject such trespasser.[78]

FORCIBLE MARRIAGE. See ABDUCTION.

FORCIBLE TRESPASS. See FORCIBLE ENTRY AND DETAINER; TRESPASS.

FOR COLLECTION. See FOR.

FOR COSTS AND DISBURSEMENTS. A term which signifies the statutory costs and disbursements taxable in favor of the prevailing party in a civil action.[1] (See, generally, COSTS.)

FOR DEPOSIT. See FOR.

FORE-AND-AFT TREE. A tree in a boundary line with chops on the sides indicating the direction of the line.[2] (See, generally, BOUNDARIES.)

FORECLOSURE. A process in chancery by which all further right existing in a mortgagor to redeem the estate is defeated and lost to him, and the estate becomes the absolute property of the mortgagee. The term is also loosely applied to any of the various methods, statutory or otherwise, known in different jurisdictions, of enforcing payment of the debt secured by a mortgage, by taking and selling the mortgaged estate. It is also applied to proceedings founded upon some other liens.[3] (Foreclosure: Of Chattel Mortgage, see CHATTEL MORTGAGES. Of Lien — In General, see LIENS; Agricultural, see AGRICULTURE; For Taxes, see TAXATION; Of Assessment For Improvements, see MUNICIPAL CORPORATIONS; Of Mechanics, see MECHANICS' LIENS; Of Purchaser at Tax-Sale, see TAXATION; Of Vendor, see VENDOR AND PURCHASER; On Corporate Property, see CORPORATIONS; On Logs or Lumber, see LOGGING; On Railroads, see RAILROADS. By Building Association, see BUILDING AND LOAN SOCIETIES. Of Mortgage, see BUILDING AND LOAN SOCIETIES; CHATTEL MORTGAGES; MORTGAGES. Of Pledge, see PLEDGES.)

FOREGOING. Preceding; going before, in time or place or in a series; antecedent.[4]

An attorney at law is not such an agent, without special appointment, as would authorize him to make the affidavit. Montgomery *v.* Walker, 41 Ga. 681.

A justice of the peace may administer the oath to the person making the affidavit to eject an intruder. Collins *v.* Rutherford, 38 Ga. 29.

74. Hass *v.* Gardner, 36 Ga. 477, holding further that defendant will not be allowed to tender a defective affidavit to retain possession under it and on a decision against him tender a sufficient affidavit to protect his possession. See also Cardin *v.* Standly, 20 Ga. 105, holding that these affidavits are not amendable.

By whom made.— A husband against whom a proceeding has been instituted as an intruder may make and tender to the sheriff a counter affidavit that he is in possession in right of his wife and as her agent, so as to make an issue for trial of the right of possession. Jackson *v.* Dickson, 73 Ga. 126.

A sheriff may administer the oath to the person making the counter affidavit. Simpson *v.* Wall, 41 Ga. 105.

75. Pratt *v.* Fountain, 73 Ga. 261; Paige *v.* Dodson, 46 Ga. 223.

76. Bradley *v.* Bell, 34 S. C. 107, 12 S. E. 1071.

77. Sires *v.* Moseley, 60 S. C. 504, 39 S. E. 7.

78. Sires *v.* Moseley, 60 S. C. 504, 39 S. E. 7.

1. Brown *v.* Fitcher, 91 Minn. 41, 43, 97 N. W. 416 [*citing* Hennepin County *v.* Wright County, 84 Minn. 267, 87 N. W. 846; Woolsey *v.* O'Brien, 23 Minn. 71].

2. Belding *v.* Hebard, 103 Fed. 532, 537, 43 C. C. A. 296.

3. Black L. Dict. [*citing* 2 Washburn Real Prop. 237].

4. Century Dict.

As used in a tariff act in *In re* Cruikshank, 54 Fed. 676, 677.

"Foregoing part of the assessment roll" see Colman *v.* Shattuck, 2 Hun (N. Y.) 497, 502.

FOREIGN. That which belongs to another; that which is strange;[5] belonging to another nation or country;[6] belonging to or subject to another jurisdiction;[7] that which is out of a certain state, country, county, liberty, manor, jurisdiction, &c.;[8] the correlative of "domestic."[9] As a general rule when used in relation to countries in a political sense, the term refers to the jurisdiction or government of the country.[10] The term is applicable not only to countries outside of the United States, but also to the different states within the United States, so far as their relation to each other is concerned.[11]

FOREIGN ACKNOWLEDGMENT. See ACKNOWLEDGMENTS.[12]

FOREIGN ADMINISTRATION. See EXECUTORS AND ADMINISTRATORS.[13]

FOREIGN ADMINISTRATOR. See EXECUTORS AND ADMINISTRATORS.

FOREIGN AFFIDAVIT. See AFFIDAVITS.[14]

FOREIGN ASSIGNMENT. See ASSIGNMENTS FOR BENEFIT OF CREDITORS.[15]

FOREIGN ATTACHMENT. A process by which the property (lying within the jurisdiction of the court) of an absent or non-resident debtor is seized, in order to compel his appearance, or to satisfy the judgment that may be rendered, so far as the property goes.[16] (See, generally, ATTACHMENT; GARNISHMENT.)

FOREIGN ATTORNEY. See CONTEMPT.[17]

FOREIGN BANK. See BANKS AND BANKING.[18]

FOREIGN BILL. A bill of exchange drawn or payable in a foreign country.[19] (See, generally, COMMERCIAL PAPER.)

FOREIGN BILLS or MONEY. Well known phrases significant and descriptive of bank bills duly issued by legally constituted and incorporated banking institutions.[20] (See, generally, COMMERCIAL PAPER.)

"The foregoing statement" on motion for a new trial see Sharon *v.* Sharon, 79 Cal. 633, 640, 22 Pac. 26, 131.

5. Cowell *v.* State, 16 Tex. App. 57, 61 [*citing* Cummins *v.* State, 12 Tex. App. 121; Bouvier L. Dict.].

6. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 37, 8 L. ed. 25; U. S. *v.* The Pilot, 50 Fed. 437, 439, 1 C. C. A. 523.

7. U. S. *v.* The Pilot, 50 Fed. 437, 439, 1 C. C. A. 523. And *compare* U. S. *v.* Rice, 4 Wheat. (U. S.) 246, 253, 4 L. ed. 562.

8. Sweet L. Dict.

9. Hart *v.* Willetts, 62 Pa. St. 15, 16.

Distinguished from "civil" see 7 Cyc. 151.

10. Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 37, 8 L. ed. 25.

11. Seaboard Air-Line R. Co. *v.* Phillips, 117 Ga. 98, 101, 43 S. E. 494. See also Phœnix Bank *v.* Hussey, 12 Pick. (Mass.) 483, 484; Halliday *v.* McDougall, 20 Wend. (N. Y.) 81, 84; Wells *v.* Whitehead, 15 Wend. (N. Y.) 527, 530 [*citing* Buckner *v.* Finley, 2 Pet. (U. S.) 586, 7 L. ed. 528]; Cape Fear Bank *v.* Stinemetz, 1 Hill (S. C.) 44, 45 [*citing* Duncan *v.* Course, 1 Mill (S. C.) 100]; Cowell *v.* State, 16 Tex. App. 57, 61; U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 54, 9 L. ed. 989.

"The different states of the United States are foreign to each other." Gillespie *v.* Hannahan, 4 McCord (S. C.) 503, 507. But *compare* King *v.* Parks, 19 Johns. (N. Y.) 375, 377. See also FOREIGN STATE.

That the local governments of the civilized tribes of Indians in Indian Territory are foreign governments see Cowell *v.* State, 16 Tex. App. 57, 61.

In connection with other words see the following phrases: "Foreign newspapers" (see 1 Vict. c. 36, § 47); "foreign parcels" (see 45 & 46 Vict. c. 74, § 17); "foreign parts" (see Wainright *v.* Bland, 3 Dowl. P. C. 653, 654, 1 Gale 103); "foreign refined rape oil" (see Nichol *v.* Godts, 10 Exch. 191, 193, 23 L. J. Exch. 314); "foreign spirits" (see 43 & 44 Vict. c. 24, § 3); "foreign statement" (see Mavro *v.* Ocean Mar. Ins. Co., L. R. 10 C. P. 414, 418, 2 Aspin. 590, 44 L. J. C. P. 229, 32 L. T. Rep. N. S. 743, 23 Wkly. Rep. 758; Hendricks *v.* Australasian Ins. Co., L. R. 9 C. P. 460, 466, 2 Aspin. 44, 43 L. J. C. P. 188, 30 L. T. Rep. N. S. 419, 22 Wkly. Rep. 947; Harris *v.* Scaramanga, L. R. 7 C. P. 481, 488, 1 Aspin. 339, 41 L. J. C. P. 170, 26 L. T. Rep. N. S. 797, 20 Wkly. Rep. 777; The Mary Thomas, [1894] P. 108, 123; 7 Aspin. 495, 63 L. J. Adm. 49, 71 L. T. Rep. N. S. 104; The Brigella, [1893] P. 189, 194, 7 Aspin. 337, 62 L. J. Adm. 81, 69 L. T. Rep. N. S. 834, 1 Reports 616); "foreign warrant" (see Reg. *v.* Ganz, 9 Q. B. D. 93, 106, 51 L. J. Q. B. 419, 46 L. T. Rep. N. S. 592; 33 & 34 Vict. c. 52, § 26); "foreign wine" (see Richards *v.* Banks, 52 J. P. 23, 58 L. T. Rep. N. S. 634, 637).

12. See 1 Cyc. 536, 539.

13. See 18 Cyc. 1222.

14. See 2 Cyc. 13.

15. See 4 Cyc. 159 note 49, 225, 242.

16. Black L. Dict.

In actions in personam, a foreign attachment is never employed as an original or independent process. It is auxiliary to a capias or monition to the debtor, and subserves only the end which an arrest or appearance of defendant by stipulation answered. Smith *v.* Miln, 22 Fed. Cas. No. 13,081; Abb. Adm. 373.

17. See 9 Cyc. 24 note 17.

18. See 5 Cyc. 435 note 39.

19. English L. Dict. See also 8 Cyc. 99 note 27; 7 Cyc. 527, 1055.

20. Gushee *v.* Eddy, 11 Gray (Mass.) 502,

FOREIGN BORN. See ALIENS.[21]

FOREIGN CHARITY. A charity established by one who is domiciled in a foreign state or country.[22] (See, generally, CHARITIES.)

FOREIGN COMMERCE. See COMMERCE.[23]

FOREIGN CONTRACT. See CONTRACTS.[24]

504, 71 Am. Dec. 728. See also 12 Cyc. 1145, 8 Cyc. 138 note 70, 140.

"**Foreign asset**" see Atty.-Gen. *v.* Sudeley, [1896] 1 Q. B. 354, 359 [*reversing* [1895] 2 Q. B. 526, 529, 64 L. J. Q. B. 753].

"**Foreign bonds**" see Hull *v.* Hill, 4 Ch. D. 97, 25 Wkly. Rep. 223.

Foreign coin see 12 Cyc. 1145.

"**Money or stock in the foreign funds**" see Ellis *v.* Eden, 23 Beav. 543, 547, 3 Jur. N. S. 950, 26 L. J. Ch. 533, 53 Eng. Reprint 213.

21. See 2 Cyc. 85.
22. English L. Dict.
23. See 7 Cyc. 415.
24. See 10 Cyc. 676 note 99; 9 Cyc. 666.

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* Author of "Commentaries on the Law of Private Corporations," "The Law of Negligence," "A Treatise on the Law of Trials," "Corporations," 10 Cyc. 1; etc., etc.
Judge Thompson died August 11, 1904. An announcement of his death and a brief summary of the life-work of this remarkable man appeared in 38 American Law Review 714.

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CROSS-REFERENCES*

For Matters Relating to:
Corporations Generally, see CORPORATIONS.
Insolvency, see CORPORATIONS.
Jurisdiction of Particular Courts, see COURTS; JUSTICES OF THE PEACE.
Liability of Shareholders:
On Subscriptions, see CORPORATIONS.
Under Statutes, see CORPORATIONS.
Limitation of Actions, see LIMITATIONS OF ACTIONS.
Power of Eminent Domain, see EMINENT DOMAIN.
Process Against, see PROCESS.
Proof of Corporate Existence, see CORPORATIONS.
Receivers, see CORPORATIONS; RECEIVERS.
Removal of Causes to Federal Courts, see REMOVAL OF CAUSES.
Right to Hold Vessels, see SHIPPING.
Security For Costs, see COSTS.
Taxation, see TAXATION.

I. STATUS AND POWERS IN GENERAL.

A. Definition and Status in General — 1. DEFINITION. The term "foreign corporation" is used indiscriminately in American books of the law to designate either a corporation created by or under the laws of another state of the American Union or a corporation created by or under the laws of a foreign country.[1]

1. Daly *v.* National L. Ins. Co., 64 Ind. 1; Boley *v.* Ohio L. Ins., etc., Co., 12 Ohio St. 139; Pembina Consol. Min., etc., Co. *v.* Com., 13 Wkly. Notes Cas. (Pa.) 521. See also Barrowcliffe *v.* La Caisse Generale, etc., 58 How. Pr. (N. Y.) 131; Terry *v.* Imperial F. Ins. Co., 23 Fed. Cas. No. 13,838, 3 Dill. 408; Janson *v.* Driefontein Consol. Mines, [1902] A. C. 484, 7 Com. Cas. 268, 71 L. J. K. B. 857, 87 L. T. Rep. N. S. 372, 51 Wkly. Rep. 142. The words "foreign corporations" in the Pennsylvania act of June 7, 1879, requiring the payment of a license-fee by such corporation applies equally to corporations organized in another state and to those organized in another country. Com. *v.* Arizona, etc., Co., 1 Dauph. Co. Rep. (Pa.) 306. See also Pembina Consol. Min., etc., Co. *v.* Com., 13 Wkly. Notes Cas. (Pa.) 521.

Defined by statute as "a corporation created by or under the laws of any other state, government or country," or one not incorporated or organized in this state." Daly *v.* National L. Ins. Co., 64 Ind. 1. See also N. Y. Code Civ. Proc. § 3343, subd. 18.

Federal corporations, including national banks, see *infra*, I, A, 4.

Territorial corporations see *infra*, I, A, 5.

"Alien" corporation.— A corporation created by or under the laws of a foreign country is an "alien" in any other country, although most or all of its members may be citizens or subjects of the latter country. Janson *v.* Driefontein Consol. Mines, [1902] A. C. 484, 7 Com. Cas. 268, 71 L. J. K. B. 857, 87 L. T. Rep. N. S. 372, 51 Wkly. Rep. 142. See ALIENS, 2 Cyc. 83 note 1.

Under the Washington constitution (art. 2,

* The references to the Century Digest which appear in this article are put in by the publishers and not by the author, in pursuance of a plan which applies to the whole work. The use of these references is not intended to imply any deficiency in any article in this work, but the intention is to furnish the reader with different groupings of the decisions in a condensed form.

It would perhaps have been better if the profession had fallen into the habit of designating the former as extra-state corporations and the latter as foreign corporations, or as alien corporations.

2. Status Determined by Place of Origin. Speaking generally, the status of a joint-stock corporation, whether extra-state, foreign, or domestic, is determined by the place of its origin, without reference to the residence of its shareholders.[2]

3. Foreign Corporations Made Domestic Corporations Quoad Hoc — a. Domestication For Purposes of Jurisdiction Over Them — (i) *In General.* A state may, by its legislation, impose upon foreign corporations, which seek to come within its limits to conduct their business, the conditions that they shall be subjected to the duties and obligations of domestic corporations, in short, that they shall be, when so acting within the territorial limits of the state, domestic corporations for the purposes of jurisdiction.[3]

(ii) *A Question of Legislative Intent.* The question whether the legis-

§ 33) prohibiting foreign corporations from acquiring land in the state and providing that for the purposes of such prohibition a corporation, a majority of whose stock is held by aliens, shall be deemed to be foreign, a corporation organized under the laws of the state, but a majority of whose stock is held by aliens, is a domestic corporation in all respects except as to the ownership of land. Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776.

In Canada a British corporation is foreign. Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117; McLeod *v.* Sandall, 26 N. Brunsw. 526; Phœnix Ins. Co. *v.* Kingston, 7 Ont. 343; *In re* North of Scotland Canadian Mortg. Co., 31 U. C. C. P. 552. And a corporation created by a provincial legislature is a foreign corporation in other provinces. Montreal Bank *v.* Bethune, 4 U. C. Q. B. O. S. 341; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313, 319. And of course a corporation created by one of the United States is a foreign corporation in Canada. Alaska Steamship Co. *v.* Macaulay, 7 Brit. Col. 338, within a statute requiring security for costs, although having an office and doing business in Canada.

A Scotch or Irish corporation, created by the Imperial Parliament, is a foreign corporation in England. Mackereth *v.* Glasgow, etc., R. Co., L. R. 8 Exch. 149, 42 L. J. Exch. 82, 28 L. T. Rep. N. S. 167, 21 Wkly. Rep. 339; Kilkenny, etc., R. Co. *v.* Feilden, 6 Exch. 81, 15 Jur. 191, 20 L. J. Exch. 141, 2 L. M. & P. 124, 6 R. & Can. Cas. 785; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313, 319.

"The locality of the forum of litigation determines whether a corporation is 'foreign' or not." Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313, 319.

2. See Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776; Reg. *v.* Arnaud, 9 Q. B. 806, 16 L. J. Q. B. 50, 58 E. C. L. 806; and other cases in the note preceding and in the notes following.

3. *Alabama.*— Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

Georgia.— Angier *v.* East Tennessee, etc., R. Co., 74 Ga. 634.

Illinois.— Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Bachmann *v.* Supreme Lodge K. & L. of H., 44 Ill. App. 188.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193, double incorporation.

Nebraska.— State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 44 N. W. 125, 2 L. R. A. 564.

New Jersey.— McGregor *v.* Erie R. Co., 35 N. J. L. 115.

New York.— People *v.* Lake Shore, etc., R. Co., 11 Hun 1.

North Carolina.— Layden *v.* Endowment Rank, K. P. of the World, 128 N. C. 546, 39 S. E. 47; Debnam *v.* Southern Bell, etc., Tel. Co., 126 N. C. 831, 36 S. E. 269.

Rhode Island.— Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233, consolidation.

West Virginia.— Goshorn *v.* Ohio County, 1 W. Va. 308.

United States.— Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 1230; Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83; Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. 65, 20 L. ed. 354; Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. ed. 130; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646; James *v.* St. Louis, etc., R. Co., 46 Fed. 47; Stout *v.* Sioux City, etc., R. Co., 8 Fed. 794, 3 McCrary 1; Uphoff *v.* Chicago, etc., R. Co., 5 Fed. 545; Blackburn *v.* Selma, etc., R. Co., 3 Fed. Cas. No. 1,467, 2 Flipp. 525; Pomeroy *v.* New York, etc., R. Co., 19 Fed. Cas. No. 11,261, 4 Blatchf. 120.

See 12 Cent. Dig. tit. "Corporations," § 2497 *et seq.*

Creation of new state.— Where a banking corporation created by the legislature of Virginia before the separation of West Virginia from Virginia had branches in West Virginia, it was held, after the separation, that the corporation was a domestic corporation of West Virginia, as well as of Virginia. Farmer's Bank *v.* Gettinger, 4 W. Va. 305. *Compare* Kanawha Coal Co. *v.* Kanawha, etc., Coal Co., 14 Fed. Cas. No. 7,606, 7 Blatchf. 391. And see Myers *v.* Manhattan Bank, 20 Ohio 283.

lature of a state has adopted and domesticated a corporation created by another state is in every case purely a question of legislative intent, to be determined upon the construction of the statutes of the state to which such act of adoption and domestication is sought to be imputed.[4]

(III) *To Be Determined by What Canons of Interpretation.* Upon the question of the canons of interpretation to be applied in such a case, it has been observed with reference to a railroad company: "To make such a company a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers."[5]

b. When Deemed to Have Been Made a Domestic Corporation — (I) *In General.* Although there will be, in many cases, great difficulty in determining whether a foreign corporation has been adopted and domesticated by the legislation of a state, yet certain conclusions stand out clearly.

(II) *Corporations of Different States Consolidated.* One is that where a corporation, for instance, a railroad company, created under the laws of a foreign state, or of different foreign states, consolidates with a corporation created under the laws of the domestic state, and the consolidation takes place under the domestic law, the domestic tribunals will treat the united company as a domestic corporation, and they become a domestic corporation in each state.[6]

(III) *Corporations Chartered by Concurrent Action of Two or More States.* Another is that a corporation chartered by the concurrent action of two or more states, with substantially the same powers, is regarded as a domestic corporation in each of those states, for the purposes of local jurisdiction, and the application of local police regulations.[7]

4. James *v.* St. Louis, etc., R. Co., 46 Fed. 47; Uphoff *v.* Chicago, etc., R. Co., 5 Fed. 545; Southern, etc., Tel. Co. *v.* New Orleans, etc., R. Co., 22 Fed. Cas. No. 13,185. And see Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

5. Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 296, 6 S. Ct. 1094, 30 L. ed. 83. See also Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16. And see *infra*, I, A, 3, c.

6. *Georgia.*— Angier *v.* East Tennessee, etc., R. Co., 74 Ga. 634.

Illinois.— Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615.

Maryland.— State *v.* Northern Cent. R. Co., 18 Md. 193.

Nebraska.— Trester *v.* Missouri Pac. R. Co., 33 Nebr. 171, 49 N. W. 1110; State *v.* Chicago, etc., R. Co., 25 Nebr. 165, 41 N. W. 128; State *v.* Missouri, etc., R. Co., 25 Nebr. 164, 41 N. W. 127; State *v.* Chicago, etc., R. Co., 25 Nebr. 156, 41 N. W. 125, 2 L. R. A. 564.

New York.— People *v.* Lake Shore, etc., R. Co., 11 Hun 1.

Rhode Island.— Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233.

United States.— Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; Graham *v.* Boston, etc., R. Co., 118 U. S. 161, 6 S. Ct. 1009, 30 L. ed. 196; Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. ed. 130; Winn *v.* Wabash R. Co., 118 Fed. 55; Central Trust Co. *v.* St. Louis, etc., R. Co., 41 Fed. 551; Colglazier *v.* Louisville, etc., R. Co., 22 Fed. 568; Burger *v.* Grand Rapids, etc., R. Co., 22 Fed. 561; Graham *v.* Boston, etc., R. Co., 14 Fed. 753; Nashua, etc., R. Corp. *v.* Boston, etc., R. Corp., 8 Fed. 458. But *compare* Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46.

See 12 Cent. Dig. tit. "Corporations," § 2500.

Consolidation of foreign with domestic corporation see CORPORATIONS, 10 Cyc. 293–296.

7. Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130. See Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572, for a consideration of the status of such a corporation. And see Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339; Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Newport, etc., Bridge Co. *v.* Woolley, 78 Ky. 523; Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317; Alabama, etc., Mfg. Co. *v.* Riverdale Cotton Mills, 127 Fed. 497, 62 C. C. A. 295; Missouri, etc., R. Co. *v.* Texas, etc., R. Co., 10 Fed. 497, 4 Woods 360. That the *ultra vires* acts of a foreign corporation, which is a creature of the laws of two different states, are not made valid by a confirmatory statute, enacted by the legislature in one only of such states see Fisk *v.* Chicago, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 378. There is also a theory to the effect that such corporation

(IV) *COMPLYING WITH STATUTE WHICH IN TERMS MAKES FOREIGN CORPORATION A DOMESTIC ONE.* Another is that a foreign corporation created in one state, by complying with a statute of another state which in terms makes it, by the fact of such compliance, a domestic corporation of such other state, becomes a domestic corporation of such state and not a mere licensee to do business therein.[8]

(V) *INSTANCE OF DOMESTICATION OF FOREIGN INSURANCE COMPANY.* An insurance corporation created in Alabama obtained an act from the legislature of Mississippi, authorizing it to establish one or more departments under the same name in that state, but not until citizens of that state had subscribed for one hundred thousand dollars' worth of capital stock, when it should be regarded as a home company, and have all the privileges of such companies. It was held that this act was not a mere license for the original corporation to do business in Mississippi, but created a new corporation.[9]

c. When Not Deemed to Have Been Made a Domestic Corporation — (I) *NOT BY MERE REGISTRATION OR APPOINTMENT OF AGENT, ETC., UNDER DOMESTIC STATUTE.* A foreign corporation is not necessarily domesticated by complying with a domestic statute requiring foreign corporations to register and to pay certain taxes, or to appoint a resident agent, or to submit to other prescribed conditions;[10] but it may have this effect if the domestic statute says so in terms.[11]

(II) *NOR BY RECEIVING GRANT OF SPECIAL OR PARTICULAR POWERS.* The mere fact of conferring special or particular powers, not amounting to general corporate powers, upon a foreign corporation, does not make it a domestic corporation, as, for instance, where a statute confers upon a society incorporated in another state the power of taking by gift, etc., and of holding and conveying any real and personal property for all the purposes of its incorporation.[12]

(III) *NOR BY BEING LICENSED TO DO PARTICULAR THINGS.* Nor does the mere licensing of a foreign corporation to do a particular thing within the domestic state or country, as to carry on its business therein upon complying with certain conditions,[13] or to own and use therein so much real and personal

is at once a domestic and a foreign corporation within each of the states creating it, a domestic corporation to the extent of its action under the government of the domestic state, and a foreign corporation as regards the other sources of its existence. State *v.* Northern Cent. R. Co., 18 Md. 193. See also CORPORATIONS, 10 Cyc. 170 *et seq.*

8. Layden *v.* Endowment Rank, K. P. of the World, 128 N. C. 546, 39 S. E. 47, holding that a fraternal corporation of the District of Columbia was thus domesticated in North Carolina. See also Russell *v.* St. Louis Southwestern R. Co., 71 Ark. 451, 75 S. W. 725; Debnam *v.* Southern Bell, etc., Tel. Co., 126 N. C. 831, 36 S. E. 269, 65 L. R. A. 915; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646.

Statute not complied with.— *In re* Halifax Sugar Ref. Co., 22 Nova Scotia 71.

Unauthorized compliance with statute by officer does not domesticate a foreign corporation. See *infra*, III, B, 2, b.

9. Grangers' L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325. *Compare* Liverpool, etc., Ins. Co. *v.* Board of Assessors, 44 La. Ann. 760, 11 So. 91, 16 L. R. A. 56; Robinson *v.* International L. Assur. Soc., 52 Barb. (N. Y.) 450, both holding that a foreign insurance company did not become a domestic corporation by appointing a local board of directors and establishing a general agency in another state.

10. *In re* Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct. 141, 42 Wkly. Notes Cas. (Pa.) 402, does not make it a foreign corporation within the meaning of a statute relating to the granting of licenses to foreign corporations to sell intoxicating liquors. See also Boyer *v.* Northern Pac. R. Co., 8 Ida. 74, 66 Pac. 826 (for purpose of venue of actions against it); Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251; Wilson *v.* Southern R. Co., 64 S. C. 162, 36 S. E. 701, 41 S. E. 971; Calvert *v.* Southern R. Co., 64 S. C. 139, 36 S. E. 750, 41 S. E. 963. And see *infra*, I, A, 3, c, (III).

11. See *supra*, I, A, 3, b, (IV).

12. Matter of Prime, 64 Hun (N. Y.) 50, 18 N. Y. Suppl. 603 [*affirmed* in 136 N. Y. 347, 32 N. E. 1091, 18 L. R. A. 713]. And see Goodloe *v.* Tennessee, etc., R. Co., 117 Fed. 348; and other cases under the subdivisions following.

13. *Colorado.*— Hook *v.* Hager, 3 Colo. 386.

Kentucky.— Illinois Cent. R. Co. *v.* Hobbs, 78 S. W. 1116, 25 Ky. L. Rep. 1899.

Massachusetts.— Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251.

property as may be necessary for carrying on its corporate business,[14] make it a domestic corporation. So a grant to a foreign corporation of a license to construct a railroad within the domestic state does not necessarily make it a domestic corporation,[15] although the state may at its election treat it as such for the purpose of imposing upon it reasonable police regulations.[16] Moreover, a foreign railroad corporation, by merely leasing and operating a domestic railroad, does not become a domestic corporation,[17] whether it operates it under a license from the domestic state, or by its mere tacit consent.[18] Instances where such adoption and domestication of railway companies have taken place may be discovered in the cases cited in the note.[19]

(IV) *Nor by Transferring Bulk of Property and Business to Domestic State* — (A) *In General.* A corporation does not lose its residence and citizenship in the state of its creation, from the mere fact that the bulk of its

Missouri.— Fielder *v.* Jessup, 24 Mo. App. 91.

New Jersey.— State *v.* Delaware, etc., R. Co., 30 N. J. L. 473.

New York.— Robinson *v.* International L. Assur. Soc., 52 Barb. 450.

Ohio.— Lander *v.* Burke, 65 Ohio St. 532, 63 N. E. 69.

South Carolina.— Wilson *v.* Southern R. Co., 64 S. C. 162, 36 S. E. 701, 41 S. E. 971; Calvert *v.* Southern R. Co., 64 S. C. 139, 36 S. E. 750, 41 S. E. 963.

Washington.— Daniel *v.* Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

West Virginia.— Savage *v.* People's Bldg., etc., Assoc., 45 W. Va. 275, 31 S. E. 991; Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73; Humphreys *v.* Newport News, etc., Co., 33 W. Va. 135, 10 S. E. 39.

United States.— Goodloe *v.* Tennessee, etc., R. Co., 117 Fed. 348; Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16; Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. 353; Antelope Co. *v.* Chicago, etc., R. Co., 16 Fed. 295, 4 McCrary 46; Copeland *v.* Memphis, etc., R. Co., 6 Fed. Cas. No. 3,209, 3 Woods 651.

See 12 Cent. Dig. tit. "Corporations," § 2497 *et seq.*

14. State *v.* Delaware, etc., R. Co., 30 N. J. L. 473; Lander *v.* Burke, 65 Ohio St. 532, 63 N. E. 69; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354.

15. Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492, 83 Am. Dec. 329; State *v.* Delaware, etc., R. Co., 30 N. J. L. 473; Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208; Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 1230; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Goodloe *v.* Tennessee, etc., R. Co., 117 Fed. 348; Morgan *v.* East Tennessee, etc., R. Co., 48 Fed. 705, 4 Woods 523; Chicago, etc., R. Co. *v.* Becker, 32 Fed. 849; Moore *v.* Chicago, etc., R. Co., 21 Fed. 817; Callahan *v.* Louisville, etc., R. Co., 11 Fed. 536; Copeland *v.* Memphis, etc., R. Co., 6 Fed. Cas. No. 3,209, 3 Woods 651; Southern, etc., Tel. Co. *v.* New Orleans, etc., R. Co., 22 Fed. Cas. No. 13,185. It has been held by a federal district judge that an act of the legislature of Georgia providing that a certain railroad company of that state should have the power to sell its road within that state to any railroad company of another state, which might, by the laws thereof, be authorized to purchase the same, and that such purchasing company should have all the rights of the selling company, did not, after the sale and purchase, make the purchasing company a corporation of the state of Georgia. Morgan *v.* East Tennessee, etc., R. Co., 48 Fed. 705, 4 Woods 523. But this may be doubted, in view of some of the holdings hereafter referred to. See *infra*, note 18.

16. McGregor *v.* Erie R. Co., 35 N. J. L. 115; Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391, 7 S. Ct. 1254, 30 L. ed. 1230 (not a domestication, but a mere license); Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 6 S. Ct. 1094, 30 L. ed. 83 (same conclusion); Stout *v.* Sioux City, etc., R. Co., 8 Fed. 794, 3 McCrary 1 (filing of articles in domestic state not a reincorporation or domestication). Where a corporation created in Maryland to build a railroad there afterward obtained a special charter in Delaware to extend its road into that state, but never entered that state, it was held that it did not become a Delaware corporation. Philadelphia, etc., R. Co. *v.* Kent County R. Co., 5 Houst. (Del.) 127.

17. Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208.

18. Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643. See also State *v.* Delaware, etc., R. Co., 30 N. J. L. 473; Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. 353. But *compare* for cases holding that corporations were domesticated McGregor *v.* Erie R. Co., 35 N. J. L. 115; Western, etc., R. Co. *v.* Roberson, 61 Fed. 592, 9 C. C. A. 646. And see Peters *v.* Boston, etc., R. Co., 114 Mass. 127.

19. Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130 (with which compare Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354); Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450, 24 L. ed. 752; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518; Uphoff *v.* Chicago, etc., R. Co., 5 Fed. 545; James *v.* St. Louis, etc., R. Co., 46 Fed. 47; Clark *v.* Barnard, 108 U. S. 436, 2 S. Ct. 878, 27 L. ed. 780.

property and business lies in another state;[20] nor gain a residence in such other state by the mere fact of purchasing and using property therein.[21]

(B) *Exception in Case of Corporations Nominally Created in Other States.* An exception to this rule has been declared in the case of what have been called "tramp" corporations,[22] that is to say, in case of corporations nominally created under the laws of another state, but whose offices and principal business are in the domestic state.[23] But it has been held that a corporation created for the purpose of owning, buying, leasing, selling, and operating railroad stock is not a foreign institution maintaining within the state a mere nominal existence, where its property is all maintained, used, and controlled within the state, and it has an office called its principal office within the state, where a considerable portion of its business is transacted, although its shareholders, directors, and officers are non-residents of the state.[24]

4. Corporations Created by Congress. A subdivision has been devoted to the consideration of this subject;[25] but attention may be called to a class of decisions which sustained the power of congress to create the former bank of the United States.[26] A corporation created by an act of congress with powers coextensive with the Union, assuming of course that in creating it congress acts within the scope of its powers, is not a foreign corporation within any state of the Union, any more than an act of congress is a foreign law within any state of the Union.[27] But where the corporation, which has been created by the act of congress, has been created in pursuance of the power exercised by congress as the legislature of a particular district or territory, as, for instance, the District of Columbia, and the corporation is not engaged in interstate commerce, but, we will suppose, is engaged in the business of insurance, which is not commerce,[28] then it may well be treated as a foreign corporation by one of the states, within which congress would have no power to create such a corporation, and make it a domestic corporation. For instance, under the statutes of Indiana, defining a foreign corporation to be a "corporation created by or under the laws of any other state, government, or country," or "one not incorporated or organized in this state," an insurance company chartered by congress within the District of Columbia is a foreign corporation in Indiana, and subject to the laws of that state regulating

20. Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. 353.

21. Crowley *v.* Panama R. Co., 30 Barb. (N. Y.) 99; International L. Assur. Co. *v.* Sweetland, 14 Abb. Pr. (N. Y.) 240. Thus it has been held that a foreign incorporation will not be held void as an evasion of the laws of the state in which all the corporators reside and in which is the principal place of business of the company, where there was no fraud or evasion of the law of the state of incorporation, and the certificate of incorporation was granted by the secretary of state with knowledge of the facts. Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854. *Compare supra*, I, E, 4.

22. See *supra*, I, E.

23. Thus, a mutual benefit society organized according to the provisions of a law of New Hampshire requiring that its location should be in a city of that state, but that an office should be established in Boston, Massachusetts, has its actual home in Massachusetts, where it is regarded as a corporation or an unincorporated association, where it has no assets, place of business, or officers resident in New Hampshire, and its only place of business, as well as its officers and members except the members of some subordinate lodges, are in Massachusetts; so that its funds held for the benefit of certificate holders should be distributed in the latter state, so far as possible, in an action to wind up its affairs. Garham *v.* Mutual Aid Soc., 161 Mass. 357, 37 N. E. 447.

24. North, etc., Rolling Stock Co. *v.* People, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462. *Compare infra*, I, E.

25. See Corporations, 10 Cyc. 167.

26. Magill *v.* Parsons, 4 Conn. 317; Com. *v.* Morrison, 2 A. K. Marsh. (Ky.) 75; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 6 L. ed. 204; McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 4 L. ed. 579; U. S. Bank *v.* Northumberland, 2 Fed. Cas. No. 931, 4 Wash. 108, 4 Conn. 333; U. S. Bank *v.* Roberts, 2 Fed. Cas. No. 934, 4 Conn. 323.

27. Thus, it has been held that a railroad company incorporated by an act of congress is not a foreign corporation within the meaning of a revenue statute of Pennsylvania; so that, although it does business in that state, it is not obliged to take out a license and pay the tax imposed on foreign corporations. Com. *v.* Texas, etc., R. Co., 98 Pa. St. 90. See also Matter of Cushing, 40 Misc. (N. Y.) 505, 82 N. Y. Suppl. 795.

28. See *infra*, I, D, 3, c, (IV).

foreign insurance companies.[29] A national banking association created under the act of congress is a domestic corporation in the state in which it is located and a foreign corporation in every other state.[30]

5. Territorial Corporations. A corporation created by or under an act of a territorial legislature is not a federal corporation but a corporation of the territory, and it has the status of a foreign corporation in every other state and territory.[31]

6. When Foreign Corporations Are Deemed "Persons." The rule that the word "person" in a statute or constitutional provision is to be construed as including a corporation when the provision can be applied as well to a corporation as to a natural person has been extended to foreign corporations.[32] They are "persons outside of this state," within the meaning of a statute of limitations which excepts from its operation cases where, at the time the cause of action accrues against any "person," he is outside of the state.[33] They are also "persons" within the meaning of a statute relating to taxation, unless a different intent is indicated in the statute.[34]

7. When the Word "Corporation" in Statutes Applies to Foreign Corporations. The answer to this must depend largely upon the subject-matter of the statute, its policy, and the context in which the word "corporation" is employed therein. Where the word "corporation" in a statute can be beneficially applied to a foreign as well as to a domestic corporation, there is no good reason why it

29. Daly *v.* National L. Ins. Co., 64 Ind. 1. And see Williams *v.* Criswell, 51 Miss. 817; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122. That a savings bank incorporated by congress in and for the District of Columbia may do business in Tennessee and that its depositors may proceed against it in Tennessee see Hadley *v.* Freedman's Sav., etc., Co., *supra*. The District of Columbia is a "state," within the meaning of the statute of Indiana making it unlawful for the agent of any insurance company "incorporated by any other state than the state of Indiana" to transact business in Indiana without first complying with the requirements of such statute. State *v.* Briggs, 116 Ind. 55, 18 N. E. 395. See also Corporations, 10 Cyc. 169.

30. Cooke *v.* State Nat. Bank, 52 N. Y. 96, 11 Am. Rep. 667 [*affirming* 50 Barb. 339, 1 Abb. Pr. N. S. 339]; Beckham *v.* Hague, 44 N. Y. App. Div. 146, 60 N. Y. Suppl. 767 [*reversing* 28 Misc. 753, 60 N. Y. Suppl. 213]; Matter of Cushing, 40 Misc. (N. Y.) 505, 82 N. Y. Suppl. 795 (holding that a national bank organized to do business in New York is a domestic, and not a foreign corporation, in that state); Northampton First Nat. Bank *v.* Doying, 11 N. Y. Civ. Proc. 61; National Park Bank *v.* Gunst, 1 Abb. N. Cas. (N. Y.) 292; Union Nat. Bank *v.* Miller, 15 Fed. 703; St. Louis Nat. Bank *v.* Allen, 5 Fed. 551, 2 McCrary 92; National Park Bank *v.* Nichols, 17 Fed. Cas. No. 10,048, 4 Biss. 315; Manufacturers' Nat. Bank *v.* Baack, 16 Fed. Cas. No. 9,052, 2 Abb. 232, 8 Blatchf. 137. See Corporations, 10 Cyc. 170. A national bank located in another state is a foreign corporation, within the meaning of N. Y. Code Civ. Proc. § 3343, subd. 18, declaring every corporation a foreign corporation except those created by state law, or by federal or colonial law, and located in the state. Beckham *v.* Hague, *supra*.

31. Adams Express Co. *v.* Denver, etc., R. Co., 16 Fed. 712, 4 McCrary 77. See Corporations, 10 Cyc. 169.

32. Eslava *v.* Ames Plow Co., 47 Ala. 384 (constitutional provision relating to suits); Pineville Public Graded Schools *v.* Bell County Coke, etc., Co., 96 Ky. 68, 27 S. W. 862, 16 Ky. L. Rep. 283; Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779 (statute giving lien to any person); Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393; Scharmann *v.* De Palo, 66 N. Y. App. Div. 29, 72 N. Y. Suppl. 1008 (statute relating to venue of actions); Hart *v.* Western Union Tel. Co., 11 Nova Scotia 535 (statute relating to interrogatories). See also Corporations, 10 Cyc. 149. That a foreign corporation is a person for many purposes in contemplation of law and especially for the purposes relating to the jurisdiction of the courts of the United States see U. S. *v.* Amedy, 11 Wheat. (U. S.) 392, 6 L. ed. 502; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274; Beaston *v.* Farmers Bank, 12 Pet. (U. S.) 102, 9 L. ed. 1017. See also Courts, 11 Cyc. 843.

Attachment and garnishment see *infra*, V, A, 1, e; V, B, 6, d.

33. Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 33, 393 [*overruling* Faulkner *v.* Delaware, etc., Canal Co., 1 Den. (N. Y.) 441]; Thompson *v.* Tioga R. Co., 36 Barb. (N. Y.) 79. So also under the Kansas statute. North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183. See, generally, Limitations of Actions.

34. Pineville Public Graded Schools *v.* Bell County Coke, etc., Co., 96 Ky. 68, 27 S. W. 862, 16 Ky. L. Rep. 283; British Commercial

should not be so applied; and no doubt there are statutes embodying this conclusion.[35] But the thread of no general principle can be traced through the decisions on this question of interpretation; and therefore the results of the cases will be stated in the note without comment.[36] On the other hand the word "corporation" used in statutes has been held not to apply to foreign corporations in the cases referred to in the note below.[37]

L. Ins. Co. *v.* State, 31 N. Y. 32, 1 Abb. Dec. 199, 1 Keyes 303, 18 Abb. Pr. 118, 28 How. Pr. 41. See, generally, TAXATION.

35. Thus by statute in Massachusetts (St. (1870) c. 194) the word "corporation," when employed in the general statutes, includes corporations established under the laws of other states, and having a usual place of business within that commonwealth, from which the implication was drawn that service of process might be had upon them in the manner provided in the case of domestic persons and corporations. National Bank of Commerce *v.* Huntington, 129 Mass. 444.

36. The word "corporation" employed in a statute has been held to include a foreign corporation in the following cases: In a statute forbidding the appointment to the board of directors of a banking corporation of a director of any other bank, or the copartner of a director, with the conclusion that it operates to disqualify directors of banking corporations created in other states. State *v.* Buchanan, Wright (Ohio) 233. In a statute providing that one may insure his life for the benefit of his wife and children to the extent of a policy represented by one hundred and fifty dollars in annual premiums, the balance to go to his personal representatives and creditors, with the conclusion that the statute applies as well to policies issued by foreign as to those issued by domestic companies. Cross *v.* Armstrong, 44 Ohio St. 613, 10 N. E. 160. In a statute relating to the manner of proving the acts of corporations by their records, verified by affidavit. Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169. In a statute prohibiting "corporations" from interposing the defense of usury. Southern L. Ins., etc., Co. *v.* Packer, 17 N. Y. 51. In a statute imposing restrictions upon insurance companies to forfeit their policies, although the statute of which it was amendatory received a different construction. Morris *v.* Penn Mut. L. Ins. Co., 120 Mass. 503. In a statute providing that all fire-insurance companies must attach to their policies a copy of the application for the insurance, and that if they fail to do so they shall be precluded from pleading and proving the application. Stanhilber *v.* Mutual Mill Ins. Co., 76 Wis. 285, 45 N. W. 221. In a statute requiring the filing of annual reports of financial condition. Fraser *v.* Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167. In a statute authorizing an action against directors or officers of a corporation to compel an accounting and payment to the corporation of any money or property which they have acquired themselves or transferred to others in violation of their duties; with the conclusion that a director of a foreign corporation having its principal office and doing business in the state may sue former directors for such accounting and restoration. Miller *v.* Quincy, 179 N. Y. 294, 72 N. E. 116 [*reversing* 88 N. Y. App. Div. 529, 85 N. Y. Suppl. 310]. In a statute relating to attachment and garnishment. St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; and *infra*, V, A, 1, e; V, B, 6, d. In a statute making officers and directors of corporations liable for its debts where they sign any certificate required by law knowing it to be false. Heard *v.* Pictorial Press, 182 Mass. 530, 65 N. E. 901. In a statute fixing the venue of actions against railroad companies. Mitchell *v.* Southern R. Co., 118 Ga. 845, 45 S. E. 703. See *infra*, V, B, 14. In a statute prescribing the effect of misrepresentations in the negotiation of a policy of insurance. Dolan *v.* Mutual Reserve Fund L. Assoc., 173 Mass. 197, 53 N. E. 398. See also Abraham *v.* Mutual Reserve Fund L. Assoc., 183 Mass. 116, 66 N. E. 605. In a statute prescribing the jurisdiction of justices of the peace in actions against corporations. McLean *v.* Prudential Ins. Co., 130 Mich. 591, 90 N. W. 405. In a statute prohibiting preference of creditors in case of insolvency. Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254. *Compare infra*, I, C, 2. In a statute providing for interrogatories to officers of corporations. Hart *v.* Western Union Tel. Co., 11 Nova Scotia 535.

37. The word "corporation" employed in a statute has been held not to include a foreign corporation in the following cases: In a statute requiring the payment of a subscription to the capital stock of a corporation to be made in cash, in property, or in services. Boyer *v.* Fenn, 18 Misc. (N. Y.) 607, 43 N. Y. Suppl. 506 [*affirmed* in 19 Misc. 128, 43 N. Y. Suppl. 533]. In a statute authorizing corporations created thereunder to take property by will where the will is executed more than two months before testator's death. *In re* Lampson, 161 N. Y. 511, 56 N. E. 9 [*affirming* 33 N. Y. App. Div. 49, 53 N. Y. Suppl. 531]. In a statute requiring every corporation now in existence to file a copy of its articles of incorporation in the office of the clerk of the county where its property is situated. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222. In a statute requiring every contract of a corporation, by which a liability exceeding one hundred dollars may be incurred, to be in writing, signed by some authorized officer, or under the corporate seal. Rumbough *v.* Southern Imp. Co., 106 N. C. 461, 11 S. E. 528. In a statute relating to and regulating the accumulation of a surplus, general or

B. General Powers in Absence of Prohibitions — 1. May Exercise Powers and Make and Take Contracts in Other States and Countries. Contracts of such artificial non-resident persons will undoubtedly be valid if (1) within the scope of the powers conferred upon the corporation by the law of the sovereignty which has created it, and where it dwells; and (2) if permitted by the law of the sovereignty within which the contract is made, or within which it is to be performed. Assuming, then, that it has the power so to do under its own charter or governing statute, it may be regarded, for practical purposes, a settled principle of law, that a corporation created in one state of the Union or in a foreign country may make and take contracts in another state or country except where prohibited by the laws of such other state or country.[38] In the absence of constitutional or statutory restrictions, it may be stated as a general rule that a foreign corpora-

guaranty fund, etc., by insurance companies. Wheeler *v.* Mutual Reserve Fund L. Assoc., 102 Ill. App. 48. In a statute regulating the rate of interest and excepting building and loan associations. New York Nat. Mut. Bldg., etc., Assoc. *v.* Pinkston, 79 Miss. 468, 30 So. 692, 31 So. 834; Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 30 So. 51, 84 Am. St. Rep. 657, 57 L. R. A. 800. In a statute declaring void every transfer or assignment by a corporation in contemplation of insolvency. Vanderpoel *v.* Gorman, 140 N. Y. 563, 35 N. E. 932, 37 Am. St. Rep. 601, 24 L. R. A. 548 [*reversing* 3 Misc. 57, 22 N. Y. Suppl. 541]; Worthington *v.* Pfister Bookbinding Co., 3 Misc. (N. Y.) 418, 23 N. Y. Suppl. 295. In a statute authorizing the levy of an execution on the stock of a corporation. Caffery *v.* Choctaw Coal, etc., Co., 95 Mo. App. 174, 68 S. W. 1049. In a statute prohibiting and invalidating conveyances, assignments, or transfers for the use, benefit, or security of moneyed corporations, unless made to the corporation directly. Wright *v.* Douglass, 10 Barb. (N. Y.) 97. See also *In re* Prime, 136 N. Y. 347, 32 N. E. 109, 18 L. R. A. 713 (statute granting particular powers or privileges to corporation, such as exemption from the collateral inheritance tax); Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022 (statute continuing the existence of corporations for the purpose of prosecuting and defending suits. *Compare infra*, V, A, 4; V, B, 17); Commercial Nat. Bank *v.* Corcoran, 6 Ont. 527 (act relating to banks and banking and warehouse receipts).

The act of congress (U. S. Rev. St. (1878) § 1889) prohibiting territorial legislatures from authorizing the organization of corporations except under general laws does not preclude a corporation organized under special charter granted by the legislature of a state from doing business in a territory. Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441. See *infra*, I, C, 4, c.

A statute relating to the sale of railroad bonds at such prices as the directors might choose to take was for obvious reasons restrained to domestic corporations only. McGregor *v.* Covington, etc., R. Co., 1 Disn. (Ohio) 509, 12 Ohio Dec. (Reprint) 763.

38. *Alabama.*— Hall *v.* Tanner, etc., Engine Co., 91 Ala. 363, 8 So. 348; Hitchcock *v.* U. S. Bank, 7 Ala. 386. And see Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013.

Arkansas.— Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622.

Delaware.— Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. 416, 1 Am. St. Rep. 150.

District of Columbia— Weymouth *v.* Washington, etc., R. Co., 1 MacArthur 19; Eastern Trust, etc., Co. *v.* Willis, 23 Wash. L. Rep. 417, foreign corporation may execute a trust created by a deed in the District of Columbia, in the absence of legislation in that District to the contrary.

Florida.— Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Georgia.— Wood Hydraulic Hose Min. Co. *v.* King, 45 Ga. 34; Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327.

Idaho.— Webster *v.* Oregon Short-Line R. Co., 6 Ida. 312, 55 Pac. 661.

Illinois.— People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Commercial Union Assur. Co. *v.* Scammon, 102 Ill. 46; Stevens *v.* Pratt, 101 Ill. 206; Washtenaw Bank *v.* Montgomery, 3 Ill. 422; Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 68 Ill. App. 666 [*affirmed* in 173 Ill. 439, 51 N. E. 55], corporation authorized by the state of its creation to accept and execute trust deeds may do so in Illinois by virtue of the general comity of states, in the absence of positive directions to the contrary.

Indiana.— MacMurray *v.* Sidwell, 155 Ind. 560, 58 N. E. 722, 80 Am. St. Rep. 255; Elston *v.* Piggott, 94 Ind. 14; Wright *v.* Bundy, 11 Ind. 398.

Iowa.— Dodge *v.* Council Bluffs, 57 Iowa 560, 10 N. W. 886.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 61 Pac. 337; Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596.

Kentucky.— Martin *v.* Mobile, etc., R. Co., 7 Bush 116; Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481; Bramlette *v.* Boyce, 4 Ky. L. Rep. 196.

Louisiana.— Life Assoc. of America *v.* Levy, 33 La. Ann. 1203; Frazier *v.* Willcox,

tion may exercise the same powers as are permitted to domestic corporations of like character,[39] if such powers are conferred upon it by its charter.[40]

2. May Establish Agencies and Do Business in Other States and Countries. Generally speaking, and always in the absence of restraints imposed by the domestic law, a corporation is at liberty to establish agencies in another state or country, to deal through its agents therein, and to have the benefit of its contracts and of the judicial remedies to enforce the same, to the same extent as a person or a domestic corporation might have within such state or country.[41]

4 Rob. 517; Williamson *v.* Smoot, 7 Mart. 31, 12 Am. Dec. 494.

Maryland.— Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196; Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476.

Massachusetts.— Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316; Hutchins *v.* New England Coal Min. Co., 4 Allen 580; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204.

Michigan.— Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Mississippi.— Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121; Williams *v.* Creswell, 51 Miss. 817.

Missouri.— Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; Connecticut Mut. Ins. Co. *v.* Albert, 39 Mo. 181; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

Montana.— Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; King *v.* National Min., etc., Co., 4 Mont. 1, 1 Pac. 727.

Nevada.— State *v.* McCullough, 3 Nev. 202.

New Jersey.— Moulin *v.* Trenton Mut. L., etc., Ins. Co., 25 N. J. L. 57.

New York.— U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729; Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309]; Merrick *v.* Van Santvoord, 34 N. Y. 208; Bard *v.* Poole, 12 N. Y. 495; Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer 648; Alward *v.* Holmes, 10 Abb. N. Cas. 96.

Ohio.— Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Ashland Bank *v.* Jones, 16 Ohio St. 145; Cincinnati Second Nat. Bank *v.* Lovell, 2 Cinc. Super. Ct. 397.

Pennsylvania.— Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Rhode Island.— Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639.

South Carolina.— Kerchner *v.* Gettys, 18 S. C. 521.

South Dakota.— Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. 419; Talmadge *v.* North American Coal, etc., Co., 3 Head 337; Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

Texas.— Less *v.* Ghio, 92 Tex. 651, 51 S. W. 502; Lytle *v.* Gustead, 4 Tex. Civ. App. 490, 23 S. W. 451.

West Virginia.— Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109.

United States.— Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. ed. 855; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277; Taylor *v.* Holmes, 14 Fed. 498; Knott *v.* Southern L. Ins. Co., 14 Fed. Cas. No. 7,894, 2 Woods 479.

England.— Bateman *v.* Service, 6 App. Cas. 386, 50 L. J. P. C. 41, 44 L. T. Rep. N. S. 436; Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151; Couquillard *v.* Hunter, 36 U. C. Q. B. 316; Howe Mach. Co. *v.* Walker, 35 U. C. Q. B. 37; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313; Washington County Mut. Ins. Co. *v.* Henderson, 6 U. C. C. P. 146; Birkbeck Invest. Security, etc., Co. *v.* Brabant, 8 Quebec Q. B. 311; Connecticut, etc., R. Co. *v.* Comstock, 1 Rev. Lég. 589.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2494, 2529.

A Canadian provincial corporation may contract outside of the province of its creation. Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313.

39. Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123; State *v.* Sherman, 22 Ohio St. 411; New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; and other cases cited in the preceding note. See also *infra*, I, C, 4, c.

40. See *infra*, I, B, 6.

41. *Arkansas.*— Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622.

District of Columbia.—Weymouth *v.* Washington, etc., R. Co., 1 MacArthur 19.

Florida.— Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Idaho.— Webster *v.* Oregon Short-Line R. Co., 6 Ida. 312, 55 Pac. 661.

Illinois.— People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295 (multiform insurance business may be carried on by a foreign corporation in a state where a domestic corporation is not authorized to do so, if there is no positive statutory prohibition); Santa Clara Female Academy

3. Incorporation Presumed to Be Valid. It will be presumed, in the absence of proof to the contrary, when the acts of a corporation done in another state are drawn in question, that the corporation was properly authorized in the state by which it was created.[42]

4. De Facto Corporate Existence Sufficient. And the rule which upholds the acts and contracts of *de facto* domestic corporations[43] operates to uphold the acts and contracts of *de facto* foreign corporations. The rightfulness of their incorporation is presumed until the contrary is made to appear; and it can only be made to appear in a proceeding by the state of their creation to oust them of their franchises, or by the state within which they attempt to exercise such franchises, to prevent them from so doing.[44] Failure by a corporation to pay its annual license-tax to the state in which it was incorporated, or other acts or

v. Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; Commercial Union Assur. Co. *v.* Scammon, 102 Ill. 46; Stevens *v.* Pratt, 101 Ill. 206.

Indiana.— MacMurray *v.* Sidwell, 155 Ind. 560, 58 N. E. 722, 80 Am. St. Rep. 255; Elston *v.* Piggott, 94 Ind. 14.

Iowa.— Dodge *v.* Council Bluffs, 57 Iowa 560, 10 N. W. 886.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 61 Pac. 337; Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, 10 Pac. 596.

Louisiana.— Life Assoc. of America *v.* Levy, 33 La. Ann. 1203.

Maryland.— Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196.

Massachusetts.— Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204.

Michigan.— Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Mississippi.— Williams *v.* Creswell, 51 Miss. 817.

Montana.— Garfield Min., etc., Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; King *v.* National Min., etc., Co., 4 Mont. 1, 1 Pac. 727.

New Jersey.— Moulin *v.* Trenton Mut. L., etc., Ins. Co., 25 N. J. L. 57.

New York.— U. S. Vinegar Co. *v.* Schlegel, 143 N. Y. 537, 38 N. E. 729 (unless it appears that it was formed for purposes illegal in the latter or in doing acts prohibited by its laws); Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309, 48 Alb. L. J. 447]; Merrick *v.* Van Santvoord, 34 N. Y. 208.

Ohio.— Cincinnati Second Nat. Bank *v.* Hall, 35 Ohio St. 158; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Cincinnati Second Nat. Bank *v.* Lovell, 2 Cinc. Super. Ct. 397.

Rhode Island.— Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639.

South Carolina.— Kerchner *v.* Gettys, 18 S. C. 521.

South Dakota.— Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Texas.— Lytle *v.* Custead, 4 Tex. Civ. App. 490, 23 S. W. 451.

West Virginia.— Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109.

United States.—Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277; Taylor *v.* Holmes, 14 Fed. 498; Knott *v.* Southern L. Ins. Co., 14 Fed. Cas. No. 7,894, 2 Woods 479.

England.— Bateman *v.* Service, 6 App. Cas. 386, 50 L. J. P. C. 41, 44 L. T. Rep. N. S. 436.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151; Coquillard *v.* Hunter, 36 U. C. Q. B. 316; Howe Mach. Co. *v.* Walker, 35 U. C. Q. B. 37.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2494, 2529.

42. Wood Hydraulic Hose Min. Co. *v.* King, 45 Ga. 34. And see Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656; Galveston Land, etc., Co. *v.* Perkins, (Tex. Civ. App. 1894) 26 S. W. 256.

Mode of proving existence of foreign corporations see Corporations, 10 Cyc. 243.

43. See Corporations, 10 Cyc. 251 *et seq.*

44. Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309, 48 Alb. L. J. 447]. And see the following cases:

Alabama.— Falls *v.* U. S. Savings Loan, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174.

Arkansas.— Gaines *v.* Mississippi Bank, 12 Ark. 769.

District of Columbia.— Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. 524.

Indiana.— See North Chicago Rolling Mill Co. *v.* Hyland, 94 Ind. 448.

Kentucky.— Cumberland Tel., etc., Co. *v.* Louisville Home Tel. Co., 114 Ky. 892, 72 S. W. 4, 24 Ky. L. Rep. 1676.

New York.— Toledo Bank *v.* International Bank, 21 N. Y. 542; People *v.* Caryl, 12 Wend. 547.

Utah.— Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690.

United States.— Moxie Nerve Food Co. *v.* Baumbach, 32 Fed. 205; Oregonian R. Co. *v.* Oregon R., etc., Co., 23 Fed. 232, 10 Sawy. 464.

omissions affording ground for legal proceedings to vacate its charter, will not *ipso facto* abrogate or annul its charter, so as to permit a defendant, sued by the corporation in another jurisdiction, to successfully contend that the corporation has no legal existence.[45]

5. Estoppel to Deny Corporate Existence. So also foreign corporations are within the general doctrine established in most states as applicable to domestic corporations,[46] that persons dealing and contracting with a body as a corporation on the one hand, and persons assuming to act as a corporation and contracting as such on the other hand, are estopped, in an action by or against the corporation to enforce contracts so entered into, to deny its corporate existence,[47] except where the corporation is such that its recognition would be contrary to the laws or public policy of the state.[48]

6. Limitation of Powers by Charter and General Laws of Domicile — a. In General. It is a settled principle that wherever a corporation goes for business it carries its charter with it, as that is the law of its existence, and the charter is the same abroad as at home. Whatever disabilities are thereby placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere.[49] A result of this principle is that, subject to the doctrine of estoppel hereafter referred to,[50] a corporation cannot exercise a particular power in another state or country than that of its creation, unless such power is expressly or impliedly conferred upon it by its charter or governing statute.[51] And the principle applies to provisions in the charter of a corporation prescribing the

45. Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. (D. C.) 524; Jones *v.* Tennessee Bank, 8 B. Mon. (Ky.) 122, 46 Am. Dec. 540. And see Corporations, 10 Cyc. 256 *et seq.*, 261, 1278.

46. See Corporations, 10 Cyc. 244 *et seq.*

47. *Alabama.*— Falls *v.* U. S. Savings Loan, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695.

Arkansas.— Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622.

Colorado.— Cripple Creek First Cong. Church *v.* Grand Rapids School-Furniture Co., 15 Colo. App. 46, 60 Pac. 948.

District of Columbia.— Ohio Nat. Bank *v.* Central Constr. Co., 17 App. Cas. 524.

Indiana.— Jones *v.* Cincinnati Type Foundry Co., 14 Ind. 89; Guaga Iron Co. *v.* Dawson, 4 Blackf. 202.

Kentucky.— Jones *v.* Tennessee Bank, 8 B. Mon. 122, 46 Am. Dec. 540; Galliopolis Bank *v.* Trimble, 6 B. Mon. 599.

New York.— Toledo Bank *v.* International Bank, 21 N. Y. 542; Williams *v.* Michigan Bank, 7 Wend. 539 [*affirming* 5 Wend. 478].

Texas.— See Alabama Bank *v.* Simonton, 2 Tex. 531.

Utah.— Liter *v.* Ozokerite Min. Co., 7 Utah 487, 27 Pac. 690; McCord, etc., Mercantile Co. *v.* Glenn, 6 Utah 139, 21 Pac. 500.

West Virginia.— Bona Aqua Imp. Co. *v.* Standard F. Ins. Co., 34 W. Va. 764, 12 S. E. 771; Singer Mfg. Co. *v.* Bennett, 28 W. Va. 16.

United States.— Oregonian R. Co. *v.* Oregon R., etc., Co., 23 Fed. 232, 10 Sawy. 464.

48. Empire Mills *v.* Alston Grocery Co., (Tex. App. 1891) 15 S. W. 505, 12 L. R. A. 366. And see Montgomery *v.* Forbes, 148 Mass. 249, 19 N. E. 342. See also *infra*, I, E.

49. Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020. And see American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 203, 209, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338, where it is said: "A corporation is a creature of the law. It is always subject to the law of its charter, or if it has no special charter, then to the incorporation laws of the state or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity of disability of a corporation in a given case regard must primarily be had to the laws of the state or sovereignty from which it has derived its franchises." See also Bockover *v.* Life Assoc. of America, 77 Va. 85.

50. See *infra*, I, B, 6, d, (II).

51. *Alabama.*—Morris *v.* Hall, 41 Ala. 510; Hitchcock *v.* U. S. Bank, 7 Ala. 386.

Colorado.—American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 203, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338.

Connecticut.— White *v.* Howard, 38 Conn. 342.

Dakota.— Tolman *v.* New Mexico, etc., Mica Co., 4 Dak. 4, 22 N. W. 505.

Delaware.— Baltimore, etc., Tel. Co. *v.* Delaware, etc., Tel., etc., Co., 7 Houst. 269, 31 Atl. 714, corporation limited by its charter to operations in the state of its creation.

Georgia.—American Colonization Soc. *v.* Gartrell, 23 Ga. 448.

Illinois.— Starkweather *v.* American Bible

mode in which, or the officers or agents by whom, it must contract or act.[52] So also as a general rule a corporation is subject in other jurisdictions to restrictions upon its powers imposed by the general laws of the state of its creation.[53]

Soc., 72 Ill. 50, 22 Am. Rep. 133; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Frye *v.* State Bank, 10 Ill. 332; Dubuque F. & M. Ins. Co. *v.* Oster, 74 Ill. App. 139; Bachmann *v.* Supreme Lodge K. & L. of H., 44 Ill. App. 188.

Louisiana.— State *v.* Southern Pac. Co., 52 La. Ann. 1822, 28 So. 372.

Maryland.— Fidelity Mut. L. Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130; Glenn *v.* Clabaugh, 65 Md. 65, 3 Atl. 902.

Michigan.— Supreme Lodge K. of H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826; Diamond Match Co. *v.* Register of Deeds, 51 Mich. 145, 16 N. W. 314; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243; Orr *v.* Lacey, 2 Dougl. 230.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129, insurance company cannot engage in banking business.

New York.— Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553; Hoyt *v.* Thompson, 19 N. Y. 207; O'Brien *v.* Chicago, etc., R. Co., 53 Barb. 568, 36 How. Pr. 24; Boyce *v.* St. Louis, 29 Barb. 650, 18 How. Pr. 125. And see McVity *v.* E. D. Albro Co., 90 N. Y. App. Div. 109, 86 N. Y. Suppl. 144.

Ohio.— Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134.

Rhode Island.— Pierce *v.* Crompton, 13 R. I. 312.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337.

Texas.— Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852; Manhattan L. Ins. Co. *v.* Fields, (Civ. App. 1894) 26 S. W. 280.

Utah.— Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74.

Virginia.— Bockover *v.* Life Assoc. of America, 77 Va. 85.

United States.— Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 3 S. Ct. 363, 27 L. ed. 1020; Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Seattle Gas, etc., Co. *v.* Citizens' Light, etc., Co., 123 Fed. 588.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151.

See 12 Cent. Dig. tit. "Corporations," §§ 2532, 2550, 2579.

Powers with respect to taking, holding, and alienating property see *infra*, II.

52. Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Diamond Match Co. *v.* Register of Deeds, 51 Mich. 145, 16 N. W. 314; Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337. Mo. Laws (1891), p. 75, providing that foreign corporations shall maintain an office in Missouri, where legal service may be had, and proper books kept, and shall not mortgage its property to the injury or exclusion of any one in the state, etc., did not validate a mortgage executed by a foreign corporation, which was void, because authorized at a meeting of its directors beyond the limits of the state under the laws of which it was organized, contrary to its charter. Union Nat. Bank *v.* State Nat. Bank, *supra*.

53. *Colorado.*— American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 203, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338.

Dakota.—Tolman *v.* New Mexico, etc., Mica Co., 4 Dak. 4, 22 N. W. 505, holding that an action could not be maintained against a foreign corporation for its breach of an executory contract to take from plaintiff shares of its own stock for a certain sum per share, where the contract was prohibited by the laws of the state of its creation.

Illinois.— Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Dubuque F. & M. Ins. Co. *v.* Oster, 74 Ill. App. 139, 148, statute regulating contracts of insurance.

Maryland.— Fidelity Mut. L. Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197 (statute as to misrepresentations in contracts of insurance); McKim *v.* Glenn, 66 Md. 479, 8 Atl. 130 (statute as transfer of stock and liability of shareholders binding on shareholders in other states); Glenn *v.* Clabaugh, 65 Md. 65, 3 Atl. 902 (liability of subscriber for stock).

Michigan.— Supreme Lodge K. of H. *v.* Nairn, 60 Mich. 44, 26 N. W. 826, laws as to beneficiaries under certificates of benefit associations.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244, liability of foreign railroad company.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560, general statute prohibiting meeting of and action by directors of corporations beyond the limits of the state.

Rhode Island.— Pierce *v.* Crompton, 13 R. I. 312.

Texas.— Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852 (statute of state of foreign railroad company prohibiting officers or employees of any such corporation from being interested in the business of transportation over its road); Manhattan L. Ins. Co. *v.* Fields, (Civ. App. 1894) 26 S. W. 280 (statutes regulating insurance companies).

See 12 Cent. Dig. tit. "Corporations," §§ 2532, 2550, 2579.

Winding up of insolvent corporation.— A statute of the state of a corporation's domicile providing for the winding up of insolvent corporations and distribution of their

b. Exceptions to the General Rule. To the general rule above stated there are exceptions in the case of charter or statutory restrictions in the state of the corporation's domicile which are not intended as restrictions on the powers of the corporation generally, but merely as a prohibition of particular acts or contracts within the state of domicile,[54] such, according to the weight of authority, as general laws prohibiting the taking of a greater rate of interest than the rate thereby prescribed,[55] or even a charter prohibition to this effect,[56] statutes regulating or prohibiting assignments for the benefit of creditors or preferences in contemplation of insolvency,[57] and the statute of wills.[58]

c. Imputing Notice of Charter and Laws of Domicile. Where a corporation goes into another state or country than that of its domicile and does business or

assets equitably among those entitled thereto has been held to follow the corporation into another state so as to affect persons there dealing with it, with the conclusion that where an insurance company of Missouri, which had done business and issued policies in Virginia, became insolvent, and, as authorized by a statute of Missouri there transferred all its assets to the state superintendent of insurance for the purpose of paying its debts and an equitable distribution of its surplus, the statute and transfer was operative in Virginia, and a Virginia policy-holder, being chargeable with notice of the statute and the powers of the corporation, could not attach debts due the company in Virginia, constituting part of the assets so transferred. Bockover *v.* Life Assoc. of America, 77 Va. 85. See also Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337.

Appointment of receiver for an insolvent corporation under a statute of the state of its domicile is recognized and given effect in another state. American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 203, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338. See, generally, RECEIVERS.

Substitution of new securities by foreign corporation.— That the Canadian parliament had authority to grant to an embarrassed railroad company within the Dominion the power to make an arrangement with its mortgage creditors for the substitution of a new security, and to provide that the arrangement should be binding on all the holders of obligations secured by the same mortgage when assented to by the majority, and that such statute and arrangement were binding on bondholders in the United States see Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. ed. 1020.

Legislation after making of contract.— A contract entered into by a foreign corporation, such as an insurance contract entered into by a foreign insurance company, is not affected by subsequent legislation of the state of its domicile. Provident Sav. L. Assur. Soc. *v.* Bailey, 80 S. W. 452, 25 Ky. L. Rep. 2251.

54. Hitchcock *v.* U. S. Bank, 7 Ala. 386, 431; White *v.* Howard, 38 Conn. 342; Bard *v.* Poole, 12 N. Y. 495; and other cases cited in the notes following.

55. *Alabama.*— Hitchcock *v.* U. S. Bank, 7 Ala. 386, 431.

Louisiana.— Frazier *v.* Willcox, 4 Rob. 517.

Mississippi.— Knox *v.* U. S. Bank, 26 Miss. 655.

Missouri.— Louisville Bank *v.* Young, 37 Mo. 398.

New York.— Bard *v.* Poole, 12 N. Y. 495.

United States.— U. S. Mortgage Co. *v.* Sperry, 24 Fed. 838.

56. Hitchcock *v.* U. S. Bank, 7 Ala. 386, 431, holding that a provision in the charter of a foreign banking corporation that it should not, within the state of its creation, take more than a certain rate of interest for its loans and discounts, did not follow it into Alabama, where by comity it was permitted to do business, and where a higher rate of interest was permitted by law. See to the same effect Knox *v.* U. S. Bank, 26 Miss. 655; Louisville Bank *v.* Young, 37 Mo. 398; and other cases in the note preceding.

Contra.— See Orr *v.* Lacey, 2 Dougl. (Mich.) 230.

57. Boehme *v.* Rall, 51 N. J. Eq. 541, 26 Atl. 832; Borton *v.* Brines-Chase Co., 175 Pa. St. 209, 34 Atl. 597; East Side Bank *v.* Columbus Tanning Co., 170 Pa. St. 1, 32 Atl. 539; Pairpont Mfg. Co. *v.* Philadelphia Optical, etc., Co., 161 Pa. St. 17, 28 Atl. 1003 (confession of judgment by New Jersey corporation to prefer creditors sustained in Pennsylvania, although it would have been invalid in New Jersey); Benevolent Order A. W. *v.* Sanders, 28 Wkly. Notes Cas. (Pa.) 321.

Contra.— But see Pierce *v.* Crompton, 13 R. I. 312, where an assignment for the benefit of creditors by a New York corporation in Rhode Island was held void because of a prohibitory New York statute.

Effect in state of domicile.— But it has been held in New York that a judgment confessed by a New York corporation in another state is governed by the laws of New York, and, if intended to prefer creditors in violation of such laws, will be declared void by the courts of New York, without regard to the laws of such other state. McQueen *v.* New, 87 Hun (N. Y.) 206, 33 N. Y. Suppl. 802 [*reversing* 10 Misc. 251, 30 N. Y. Suppl. 977].

58. White *v.* Howard, 38 Conn. 342, holding that the capacity of a foreign corporation to take land by devise must be determined by its charter and the laws of the state wherein the land is situated, and that the laws of the

makes contracts, persons there dealing with it are chargeable with notice of its charter and of restrictions thereby imposed upon it.[59] But it has been held that they are not chargeable with notice of restrictions upon its powers imposed by general laws of the state of domicile, and not imposed by its charter or governing statute, unless actual notice is proved.[60]

d. Effect of Ultra Vires and Illegal Acts or Contracts — (I) *In General.* In determining whether a particular contract of a foreign corporation is *ultra vires*, or illegal because of prohibition, and if so, its effect, the same principles and rules govern as in the case of domestic corporations.[61] Executory *ultra vires* contracts of a foreign corporation, and in some jurisdictions contracts executed on one side, cannot be enforced either by or against the corporation,[62] except in the case of negotiable paper in the hands of a *bona fide* holder, and in certain other exceptional cases.[63] Where a foreign corporation has, under its charter, general power to enter into a particular contract, and enters into such a contract without observing certain formalities prescribed by its charter or a general law, or for a purpose not authorized, the contract is enforceable against it, where the other party acts in good faith and without knowledge of the violation of its charter.[64]

(II) *Estoppel to Deny Corporate Powers.* So also foreign corporations, equally with domestic ones, are within the doctrine established in most jurisdictions that, subject to certain qualifications elsewhere shown,[65] both the corporation itself on the one hand, and the party contracting with it on the other hand, are estopped by their own contract or conduct from setting up, as a defense to an action to enforce the contract, that it was beyond the power of the corporation to make it, particularly while retaining the fruits or the benefits of the contract.[66]

foreign state will not be recognized as affecting the question. But see *infra*, II, A, 6, c.

59. Hoyt *v.* Thompson, 19 N. Y. 207; Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267; Bockover *v.* Life Assoc. of America, 77 Va. 85; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. ed. 1020; Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337. And see Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74. *Compare*, however, McVity *v.* E. D. Albro Co., 90 N. Y. App. Div. 109, 86 N. Y. Suppl. 144.

60. Hoyt *v.* Thompson, 19 N. Y. 207; Hoyt *v.* Shelden, 3 Bosw. (N. Y.) 267.

61. See Corporations, 10 Cyc. 1096 *et seq.*, 1146 *et seq.*

62. *Alabama.*— Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695.

Dakota.—Tolman *v.* New Mexico, etc., Mica Co., 4 Dak. 4, 22 N. W. 505, denying right of a person to maintain an action against a foreign corporation for breach of an *ultra vires* executory contract to take shares of its own stock from plaintiff.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560 (foreclosure of mortgage); Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129 (denying liability of surety on bond of agent of foreign insurance company for acts of agent in unlawful banking business).

New York.— Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 19 Am. St. Rep. 482, 9 L. R. A. 708; Hoyt *v.* Thompson, 19 N. Y. 207; Hoyt *v.* Shelden, 3 Bosw. 267.

Ohio.— Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134, denying foreclosure of mortgage to foreign corporation.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337, holding void a mortgage by a foreign corporation which was prohibited by its charter from mortgaging its property or giving any lien thereon.

Texas.— Rue *v.* Missouri Pac. R. Co., 74 Tex. 474, 8 S. W. 533, 15 Am. St. Rep. 852.

Utah.— Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74.

United States.— Life Assoc. of America *v.* Rundle, 103 U. S. 222, 26 L. ed. 337.

63. See Corporations, 10 Cyc. 1146 *et seq.* As against a *bona fide* holder of bonds of a foreign railroad corporation it cannot be shown that restrictions imposed by its charter upon the powers of the corporation to negotiate its bonds were violated. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553. See also Corporations, 10 Cyc. 1163.

Estoppel see *infra*, I, B, 6, d, (II).

64. Ellsworth *v.* St. Louis, etc., R. Co., 98 N. Y. 553; Germantown Farmers' Mut. Ins. Co. *v.* Dhein, 43 Wis. 420, 28 Am. Rep. 549. And see City F. Ins. Co. *v.* Carrugi, 41 Ga. 660. See also Corporations, 10 Cyc. 1148, 1149.

65. See Corporations, 10 Cyc. 1156 *et seq.*

66. *Alabama.*— See Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174.

Connecticut.— See Union Hardware Co. *v.* Plume, etc., Mfg. Co., 58 Conn. 219, 20 Atl. 455.

Georgia.— Ray *v.* Home, etc., Invest., etc., Co., 98 Ga. 122, 26 S. E. 56.

(III) *INJUNCTION.* Where a foreign corporation, in exercising powers not within its charter, as by laying gas mains in the streets of a city, although with the implied license of the public authorities, creates a public nuisance which will result in special and irreparable injury to a private party, such party may invoke its want of charter power as a ground for relief in equity by injunction.[67]

e. **Contracts Presumed to Be Within Their Charters.** Where the validity of a contract, made by a corporation in a state other than the state of its creation, is drawn in question, it will not be presumed, in the absence of proof, that there is any restriction in its charter, or in the laws of the state of its creation, prohibiting it from making such contracts in a foreign jurisdiction.[68] But it will be presumed that it acts under a general and not under a limited authority.[69]

C. Disabilities in Absence of Constitutional Protection — 1. CANNOT MIGRATE, BUT MUST DWELL IN PLACE OF CREATION. The following propositions are believed to be settled law: (1) That a corporation can exist only by force of the statute or other law of the state or country in which it is created; (2) that the laws of one state or country can, by their own vigor, have no extraterritorial force in another state or country, but are allowed to operate there only on the principle of comity; (3) that, as a corporation is a creature of the law of the state or country creating it, it cannot migrate into another state or country, establish its residence there, and exercise its franchises there, without the consent of the legislature of that other state or country, express or implied. This doctrine was conceded in a leading case, in the following language in the opinion of the court by Chief Justice Taney: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."[70] One result of this doctrine that a corporation cannot

Indiana.— Pancoast *v.* Travelers Ins. Co., 79 Ind. 172.

Mississippi.— Williams *v.* Bank of Commerce, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503.

New York.— Jemison *v.* Citizens' Sav. Bank, 122 N. Y. 135, 25 N. E. 264, 19 Am. St. Rep. 482, 9 L. R. A. 708; McVity *v.* E. D. Albro Co., 90 N. Y. App. Div. 109, 86 N. Y. Suppl. 144; Watts-Campbell Co. *v.* Yuengling, 51 Hun 302, 3 N. Y. Suppl. 869; Steam Nav. Co. *v.* Weed, 17 Barb. 378.

North Dakota.— Clarke *v.* Olson, 9 N. D. 364, 83 N. W. 519.

Ohio.— Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343.

67. Seattle Gas, etc., Co. *v.* Citizens' Light, etc., Co., 123 Fed. 588.

68. Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; Farmers' L. & T. Co. *v.* Harmony F. & M. Ins. Co., 51 Barb. (N. Y.) 33 [*affirmed* in 41 N. Y. 619]; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer (N. Y.) 648; Yeaton *v.* Eagle Oil, etc., Co., 4 Wash. 183, 29 Pac. 1051. See also McClure *v.* Manchester, etc., R. Co., 13 Gray (Mass.) 124, 74 Am. Dec. 624; Franzen *v.* Zimmer, 90 Hun (N. Y.) 103, 35 N. Y. Suppl. 612 (assignment for benefit of creditors); *In re* Rochester, etc., R. Co., 45 Hun (N. Y.) 126. That this is the rule in regard to domestic corporations see Chautauque County Bank *v.* Risley, 19 N. Y. 369, 75 Am. Dec. 347; Farmers' L. & T. Co. *v.* Clowes, 3 N. Y. 470.

69. New England Mut. L. Ins. Co. *v.* Hasbrook, 32 Ind. 447. Thus an agreement between a banking corporation located in Wisconsin and commission merchants in the city of New York, by which the former is to consign produce to the latter for sale on commission, against which drafts are to be drawn, and to keep drawees in funds to meet the same, in cases where consignments are not made, was not deemed necessarily illegal, in the absence of anything to show what powers were possessed by the bank, by virtue of its charter. Perkins *v.* Church, 31 Barb. (N. Y.) 84.

Unusual powers.— When a foreign insurance, banking, or other particular kind of corporation seeks to enforce a contract which is not ordinarily and necessarily within the powers of such a corporation, its authority to enter into such a contract will not be presumed, but must be alleged and proved. Frye *v.* State Bank, 10 Ill. 332; McIntire *v.* Preston, 10 Ill. 48, 48 Am. Dec. 321.

70. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 588, 10 L. ed. 274. To the same effect see the following cases:

Florida.— Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

Kansas.— Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245.

migrate, but must dwell in the place of its creation, is that a corporation, in so far as it can be regarded as a "citizen," "resident," or "inhabitant," as it may be for the purpose of jurisdiction of the federal courts and for many other purposes, is a citizen, resident, and inhabitant of the state or country by or under the laws of which it was created, and of that state or country only,[71] even though it may be doing business in another state or country and may have part or all of its property there.[72] As has been seen, however, this principle does not prevent a corporation from acting in another state or country with its express or implied consent.[73]

Maryland.— Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

Pennsylvania.— Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

Tennessee.— Lane *v.* West Tennessee Bank, 9 Heisk. 409.

Texas.— Chapman *v.* Hallwood Cash Register Co., 32 Tex. Civ. App. 76, 73 S. W. 969.

West Virginia.— Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

United States.— Ohio, etc., R. Co. *v.* Wheeler, 1 Black 286, 17 L. ed. 130; Day *v.* Newark India-Rubber Mfg. Co., 7 Fed. Cas. No. 3,685, 1 Blatchf. 628.

71. *Alabama.*— Georgia, etc., R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258; Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Granger's L., etc., Ins. Co. *v.* Kamper, 73 Ala. 325.

District of Columbia.— Barbour *v.* Paige Hotel Co., 2 App. Cas. 174; Lathrop *v.* Union Pac. R. Co., 1 MacArthur 234.

Georgia.— Union Branch R. Co. *v.* East Tennessee, etc., R. Co., 14 Ga. 327.

Illinois.— Quincy R. Bridge Co. *v.* Adams County, 88 Ill. 615; Racine, etc., R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331, 95 Am. Dec. 595; Hubbard *v.* U. S. Mortgage Co., 14 Ill. App. 40; Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

Indiana.— Western Union Tel. Co. *v.* Dickinson, 40 Ind. 444, 13 Am. Rep. 295.

Kentucky.— Gill *v.* Kentucky, etc., Gold, etc., Min. Co., 7 Bush 635.

Louisiana.— Duncan *v.* St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 So. 924.

Maine.— Chafee *v.* New York Fourth Nat. Bank, 71 Me. 514, 36 Am. Rep. 345.

Maryland.— Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 92 Am. Dec. 688.

Michigan.— Chicago, etc., R. Co. *v.* Auditor Gen., 53 Mich. 79, 18 N. W. 586.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

Missouri.— Herryford *v.* Ætna Ins. Co., 42 Mo. 148; St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

New Hampshire.— Horne *v.* Boston, etc., R. Co., 62 N. H. 454.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Fisk *v.* Chicago, etc., R. Co., 53 Barb. 472; Kranshaar *v.* New Haven Steamboat Co., 7 Rob. 356.

North Carolina.— Evans *v.* Monot, 57 N. C. 227.

Ohio.— Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

Oklahoma.— Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

Pennsylvania.— Allegheny County *v.* Cleveland, etc., R. Co., 51 Pa. St. 228, 88 Am. Dec. 579; Harley *v.* Charleston Steam-Packet Co., 2 Miles 249; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

Rhode Island.— Ireland *v.* Globe Milling, etc., Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429.

Tennessee.— Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; Lane *v.* West Tennessee Bank, 9 Heisk. 419.

Utah.— Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

West Virginia.— Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

United States.— Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802; *In re* Keasbey, etc., Co., 160 U. S. 221, 16 S. Ct. 273, 40 L. ed. 402; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915; National Steamship Co. *v.* Tugman, 106 U. S. 118, 1 S. Ct. 58, 27 L. ed. 87; Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. 65, 20 L. ed. 354; Filli *v.* Delaware, etc., R. Co., 37 Fed. 65.

England.— Reg. *v.* Arnaud, 9 Q. B. 806, 11 Jur. 279, 16 L. J. Q. B. 50, 58 E. C. L. 806.

See 12 Cent. Dig. tit. "Corporations," § 141 *et seq.* See also *supra*, I, A, 3; and CORPORATIONS, 10 Cyc. 150.

Citizenship, residence, etc., for the purposes of: Attachment and garnishment see *infra*, V, B, 6. Jurisdiction of federal courts see COURTS, 11 Cyc. 870; and, generally, REMOVAL OF CAUSES. Limitation of actions see, generally, LIMITATIONS OF ACTIONS. Taxation see, generally, TAXATION.

72. See the cases above cited.

Domestication see *supra*, I, A, 3.

73. See *supra*, I, B; and *infra*, I, C, 4.

2. ALL RIGHTS WHEN ACTING OUTSIDE JURISDICTION OF CREATION SUBJECT TO DOMESTIC LAW. Except so far as varied by recent judicial innovations, the doctrine declared in a leading case on the status of foreign corporations remains a principle of American constitutional law. Chief Justice Taney, in giving the opinion of the court, said: "Every power, however, of the description of which we are speaking, which a corporation exercises in another State, depends for its validity upon the laws of the sovereignty in which it is exercised; and a corporation can make no valid contract without their sanction, express or implied."[74] Beyond that, as he further pointed out, everything rests upon the mere comity of states and nations.[75] A corporation can claim no right to do business in another state except subject to the conditions imposed by its laws.[76] It has been well said that "a corporation which seeks, by its agents, to establish a domicile of business in a state other than that of its creation must take that domicile, as individuals are always understood to do, subject to the responsibilities and burdens imposed by the laws which it finds in force there."[77] It becomes amenable to the laws of the latter state and to the process of its courts, upon the same principle, and to the

74. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 589, 10 L. ed. 274; Dayton Coal, etc., Co. *v.* Barton, 183 U. S. 23, 22 S. Ct. 5, 46 L. ed. 61 [*affirming* 103 Tenn. 604, 53 S. W. 970]. And in support of this doctrine see the following cases:

Alabama.— Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

Florida.— Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Illinois.— Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529; Wheeler *v.* Mutual Reserve Fund L. Assoc., 102 Ill. App. 48.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Kentucky.— Gill *v.* Kentucky, etc., Gold, etc., Min. Co., 7 Bush 635; Phœnix Ins. Co. *v.* Com., 5 Bush 68, 96 Am. Dec. 331; Lathrop *v.* Scioto Commercial Bank, 8 Dana 114, 33 Am. Dec. 481; Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522; Atterberry *v.* Knox, 4 B. Mon. 90.

Louisiana.—State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

Massachusetts.— Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717.

Michigan.— Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227.

Nebraska.— State *v.* Fleming, (1903) 97 N. W. 1063.

New York.— People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 [*affirming* 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510]; People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380; Merrick *v.* Brainard, 38 Barb. 574; Milnor *v.* New York, etc., R. Co., 4 Daly 355.

North Carolina.— Columbia Exch. Bank *v.* Tiddy, 67 N. C. 169.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513.

Tennessee.— State *v.* Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893; Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122.

Utah.— Hiskey *v.* Pacific States Sav., etc., Co., 27 Utah 409, 76 Pac. 20.

Vermont.— Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

United States.— Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382; Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838; Clarke *v.* Central R., etc., Co., 50 Fed. 338, 15 L. R. A. 683.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2505 *et seq.*, 2528, 2529; and *infra*, I, C, 4; I, D, 1; II, A; III, A, B.

75. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274. And see *infra*, I, C, 4.

76. Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164. See also Wheeler *v.* Mutual Reserve Fund L. Assoc., 102 Ill. App. 48, holding that, where there is no statute prohibiting a corporation from doing business in a state other than that of its creation, it may make the law of the state of its creation applicable to contracts made by it; but, where the laws of the state in which it is doing business prohibit such corporation from making certain kinds of contracts, it can only act in accordance with such law. And see *infra*, III, A, B.

Shareholders' liability.— California shareholders in a Colorado corporation, whose charter specified that one of the purposes of the incorporation was to transact business in California, are deemed to have contracted with reference to the statute of the latter state imposing the same personal liability upon shareholders of foreign corporations doing business within the state as upon shareholders in domestic corporations, and they are bound thereby so far as the liability arises from business carried on by the corporation in California. Pinney *v.* Nelson, 183 U. S. 144, 22 S. Ct. 52, 46 L. ed. 125.

77. Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 153, 96 Am. Dec. 717 [*quoted* with

same extent as natural persons or domestic corporations.[78] It may be, however,

approval in Clark *v.* Main Shore Line R. Co., 81 Me. 477, 17 Atl. 497].

78. *Alabama.*— Falls *v.* U. S. Savings Loan, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174.

Florida.— Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Illinois.— Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 600; Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657.

Kentucky.— Atterberry *v.* Knox, 4 B. Mon. 90, statutes regulating banking.

Massachusetts.— Dolan *v.* Mutual Reserve Fund L. Assoc., 173 Mass. 197, 53 N. E. 398.

Mississippi.— Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss. 955, 30 So. 51, 84 Am. St. Rep. 657, 57 L. R. A. 800. Where, on attachment in a suit against an insolvent foreign corporation, a creditor shareholder interposing a claim contends that he is entitled to a preference under the laws of the state of the corporation's residence, he is not entitled thereto if his preference is not statutory, but based on the view of the law by the courts of that state. Lamb *v.* Russell, 81 Miss. 382, 32 So. 916.

Missouri.— Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; McDermott *v.* M. W. of A., 97 Mo. App. 636, 71 S. W. 833; Brassfield *v.* K. of M. of W., 92 Mo. App. 102.

Nebraska.— Anselme *v.* American Sav., etc., Assoc., 66 Nebr. 520, 92 N. W. 745; State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

New York.— Martine *v.* London International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529; Milnor *v.* New York, etc., R. Co., 4 Daly 355, foreign railroad company subject to laws preventing railroad companies from making contracts for the carriage of passengers or their baggage beyond the limits of their own road.

North Carolina.— Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841.

Pennsylvania.— American Clay Mfg. Co. *v.* New Jersey American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936; Land Title, etc., Co. *v.* Fulmer, 24 Pa. Super. Ct. 256.

Tennessee.— Dayton Coal, etc., Co. *v.* Barton, 103 Tenn. 604, 53 S. W. 970 [*affirmed* in 183 U. S. 23, 22 S. Ct. 5, 46 L. ed. 61], statute requiring redemption in cash of store orders, etc., issued by employers in payment of wages due to employees.

Texas.— Dakota Bldg., etc., Assoc. *v.* Griffin, 90 Tex. 480, 39 S. W. 656; Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254.

Utah.— Hiskey *v.* Pacific States Sav., etc., Co., 27 Utah 409, 76 Pac. 20.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630.

United States.— Riddle *v.* New York, etc., R. Co., 39 Fed. 290; Taylor *v.* Holmes, 14 Fed. 498.

See 12 Cent. Dig. tit. "Corporations," § 2529 *et seq.*

Laws against "trusts" and other combinations in restraint of trade apply to foreign corporations doing business in the state as well as to domestic corporations and citizens. Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657 (prosecution of agents of foreign insurance companies which have combined to control and increase the rates of insurance on property in the state, in violation of the anti-trust law); State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449 (ouster by quo warranto or injunction for violation of anti-trust law, in accordance with express statutory provision).

Contracts of insurance made by a foreign insurance company in a state in which it is permitted to do business are governed by the laws of such state on the subject, anything in the policies to the contrary notwithstanding. Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; Abraham *v.* Mutual Reserve Fund L. Assoc., 183 Mass. 116, 66 N. E. 605; Dolan *v.* Mutual Reserve Fund L. Assoc., 173 Mass. 197, 53 N. E. 398; Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Wall *v.* Equitable L. Assur. Soc., 32 Fed. 273. And see, generally, INSURANCE; LIFE INSURANCE, and like special titles.

Contracts of building and loan associations made in another state than that of their creation, but in which they are doing business, are governed by the laws of such state. Hiskey *v.* Pacific States Sav., etc., Co., 27 Utah 409, 76 Pac. 20. And see Equitable Bldg., etc., Assoc. *v.* King, (Fla. 1904) 37 So. 181. See also BUILDING AND LOAN SOCIETIES, 6 Cyc. 117.

Foreign mutual benefit associations are subject to the same rule. McDermott *v.* Modern Woodmen of America, 97 Mo. App. 636, 71 S. W. 833; Brassfield *v.* K. of M. of W., 92 Mo. App. 102. See, generally, MUTUAL BENEFIT INSURANCE.

Usury laws.— The statutes of the domestic state against usury generally apply to foreign corporations, although under their charter and the laws of the state of their creation they may be permitted to take a greater rate of interest than is allowed in the domestic state. Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; New York Nat. Mut. Bldg., etc., Assoc. *v.* Pinkston, 79 Miss. 468, 30 So. 692, 31 So. 834; Shannon *v.* Georgia State Bldg., etc., Assoc., 78 Miss.

that particular laws of the domestic state, even though in terms applicable to "corporations," are not to be construed as applicable to foreign corporations.[79]

3. Cannot Set Up Charters in Defense to Liability For Torts. If a foreign corporation is, through its agents or servants, guilty of a trespass or other wrong within the state where it has acquired a domicile for the purpose of carrying on business, it cannot escape the consequences of its illegal act by setting up its charter and existence under the foreign state or government.[80]

4. Cannot Exercise Corporate Franchises or Powers Except by Comity — a. In General. From the foregoing principles it must follow that a corporation created under the laws of one state or country cannot exercise any of the franchises or powers conferred upon it by its charter within the limits of another state or country, except by the comity of that other state or country, which comity is generally expressed by its legislature in statutes relating to the subject of foreign corporations.[81] The doctrine applies to the territories of the United

955, 30 So. 51, 84 Am. St. Rep. 657; Anselme *v.* American Sav., etc., Assoc., 66 Nebr. 520, 92 N. W. 745; Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Land Title, etc., Co. *v.* Fulmer, 24 Pa. Super. Ct. 256; Dakota Bldg., etc., Assoc. *v.* Griffin, 90 Tex. 480, 39 S. W. 656. But see Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123, holding that a contract made in Illinois by a foreign building and loan association, which it was authorized to make by the statute under which it was organized, was not usurious, where it would not have been so if made by Illinois building and loan associations, which are exempted from the operation of the usury laws, since in Illinois a foreign corporation is subjected by the statutes to the same penalties and restrictions only as domestic corporations of like character. See also Building and Loan Societies, 6 Cyc. 150; and, generally, Usury.

A stipulation in a contract by a foreign corporation doing business in another state than that of its domicile that the contract shall be governed by the laws of the state of its domicile is ineffectual to prevent the application to the contract of the laws of the state in which the corporation is doing business and in which the contract is made. Dolan *v.* Mutual Reserve Fund L. Assoc., 173 Mass. 197, 53 N. E. 398; Shannon *v.* Georgia State Bldg. Assoc., 78 Miss. 955, 30 So. 51, 84 Am. St. Rep. 657; Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Meroney *v.* Atlanta Bldg., etc., Assoc., 116 N. C. 882, 21 S. E. 924, 47 Am. St. Rep. 841; Dakota Bldg., etc., Assoc. *v.* Griffin, 90 Tex. 480, 39 S. W. 656. See Contracts, 9 Cyc. 664 *et seq.*

Use of name of domestic corporation see *infra*, I, F.

Power to hold land see *infra*, II, A.

Power to take by devise or bequest see *infra*, II, A, 6; II, C, 2.

Actions against foreign corporations see *infra*, V, B.

79. See *supra*, I, A, 7.

Insolvency, assignment for creditors, and preferences.— In some states it is held that the insolvency laws regulating insolvent corporations and prohibiting assignments for the benefit of creditors or preference of creditors in contemplation of insolvency apply to and prohibit such assignments or preferences by foreign corporations. Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254. In other cases such statutes have been held not to be intended to apply to foreign corporations. See *supra*, I, A, 7 note 37.

Effect of discharge in insolvency as against foreign corporation creditor.— In Massachusetts it has been held that a corporation of another state, having its main establishment in such other state, is not affected by a discharge in Massachusetts of a Massachusetts debtor, although the corporation has a place of business in the state and a license under Pub. St. c. 100, § 10, and has appointed the commissioner of corporations its agent or attorney for the service of process under St. (1884) c. 330, § 1, since this does not make the corporation a resident of the state, and the insolvency law does not make a discharge effective as against a non-resident of the state, even though he may be doing business therein. Bergner, etc., Brewing Co. *v.* Dreyfus, 172 Mass. 154, 51 N. E. 531, 70 Am. St. Rep. 251. See also Gleun *v.* Clabaugh, 65 Md. 65, 3 Atl. 902. And see, generally, Insolvency.

80. Austin *v.* New York, etc., R. Co., 25 N. J. L. 381; People *v.* New Jersey Cent. R. Co., 48 Barb. (N. Y.) 478, 33 How Pr. 407; Warren Mfg. Co. *v.* Etna Ins. Co., 29 Fed. Cas. No. 17,206, 2 Paine 501. See also Turner *v.* Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326. *Compare* Merrick *v.* Brainerd, 38 Barb. (N. Y.) 574.

81. *Illinois.*—Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 600.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657.

Kentucky.— Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522. See also Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32

States as well as to the states,[82] and to the District of Columbia, in and for which congress is the sole legislative power.[83]

b. This Comity Determined and Defined by Legislation. This comity, it has been well reasoned, is the comity of states, and not the comity of courts. In other words the power of determining whether, how far, with what modification, or on what conditions the laws of one state, or any rights dependent upon them, shall be recognized in another state, is a legislative power. This conclusion then is that the judiciary must be gnided in determining the question by the practice and policy adopted by the legislature.[84]

c. Extent of This Comity. This comity will generally be extended so as to allow the foreign corporation to exercise, within the domestic state, any powers with which it may be endowed by its own charter, unless repugnant to the policy of the domestic state or injurious to its citizens;[85] but when to allow its exercise

S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41.

Louisiana.— State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

Minnesota.— State *v.* Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Ohio.— State *v.* Western Union Mut. L. Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129; Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Oklahoma.— Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

United States.— Pembina Consol. Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Evansville, etc., Traction Co. *v.* Henderson Bridge Co., 132 Fed. 402; Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838; Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910. See also Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 46, 20 S. Ct. 518, 44 L. ed. 657 [*affirming* 19 Tex. Civ. App. 1, 44 S. W. 936].

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151; Halifax *v.* Jones, 28 Nova Scotia 452; Genessee Mut. Ins. Co. *v.* Westman, 8 U. C. Q. B. 487; Montreal Bank *v.* Bethune, 4 U. C. Q. B. O. S. 341; Birkbeck Invest. Security, etc., Co. *v.* Brabant, 8 Quebec Q. B. 311; Lambe *v.* Dewhurst, 16 Quebec Super. Ct. 326; Globe Mut. L. Ins. Co. *v.* Sun Mut. L. Ins. Co., 22 L. C. Jur. 38, 1 Montreal Leg. N. 139; Chaudière Gold Min. Co. *v.* Desbarats, 17 L. C. Jur. 275, 4 Rev. Lég. 645.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2528; and other cases in the preceding and following notes.

82. Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185; Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910. See *infra*, III, A.

83. Manning *v.* Chesapeake, etc., Telephone Co., 18 App. Cas. (D. C.) 191 [*reversed* on other grounds in 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144]. See *infra*, III, A.

84. Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243. See also Stevens *v.* Pratt, 101 Ill. 206; U. S. Fidelity, etc., Co. *v.* Linehan, (N. H. 1904), 58 Atl. 956; Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185; Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940; Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151.

85. *Alabama.*— Hitchcock *v.* U. S. Bank, 7 Ala. 386.

Illinois.— Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; Stevens *v.* Pratt, 101 Ill. 206. And see People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295.

Indiana.— MacMurray *v.* Sidwell, 155 Ind. 560, 58 N. E. 722, 80 Am. St. Rep. 255.

Iowa.— Tootle *v.* Singer, 118 Iowa 533, 88 N. W. 446.

Kansas.— Kansas City Bridge, etc., Co. *v.* Wyandotte County, 35 Kan. 557, 11 Pac. 360.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Louisiana.— State *v.* New Orleans Warehouse Co., 109 La. 64, 33 So. 81; Frazier *v.* Willcox, 4 Rob. 517.

Massachusetts.— Enterprise Brewing Co. *v.* Grime, 173 Mass. 252, 53 N. E. 855; Kennebec Co. *v.* Augusta Ins., etc., Co., 6 Gray 204. And see Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

Mississippi.— Williams *v.* Cresswell, 51 Miss. 817.

Missouri.— Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129.

Nebraska.— People's Bldg., etc., Assoc. *v.* Gilmore, 1 Nebr. (Unoff.) 181, 90 N. W. 108.

New Hampshire.— U. S. Fidelity, etc., Co. *v.* Linehan, (1904) 58 Atl. 956.

New York.—Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309]; Bard *v.* Poole, 12 N. Y. 495; Mumford *v.* American L. Ins., etc., Co., 4 N. Y. 463;

would be contrary to the laws or good policy or prejudicial to the interests of the state, the rule of comity ceases to be obligatory.[86] As a rule foreign corporations are by comity permitted to exercise the same powers as domestic corporations of like character.[87] Without attempting to enumerate in a single section all the cases to which this comity does not extend, it may be observed in the first place that it does not extend so far as to concede to foreign corporations the powers which their own charters do not permit them to exercise.[88] Nor so far as to per-

Alward *v.* Holmes, 10 Abb. N. Cas. 96; Stoney *v.* American L. Ins. Co., 11 Paige 635.

Ohio.— State *v.* Ætna L. Ins. Co., 69 Ohio St. 317, 69 N. E. 608; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; State *v.* Sherman, 22 Ohio St. 411.

Pennsylvania.— New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— Ohio L. Ins., etc., Co. *v.* Merchants' Ins., etc., Co., 11 Humphr. 1, 53 Am. Dec. 742.

Virginia.— Rees *v.* Conococheague Bank, 5 Rand. 326, 16 Am. Dec. 755; Marietta Bank *v.* Pindall, 2 Rand. 465.

West Virginia.— Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940; Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109.

United States.— American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888; Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Knott *v.* Southern L. Ins. Co., 14 Fed. Cas. No. 7,894, 2 Woods 479.

England.— Bateman *v.* Service, 6 App. Cas. 386, 50 L. J. P. C. 41, 44 L. T. Rep. N. S. 436; Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151; Connecticut, etc., R. Co. *v.* Comstock, 1 Rev. Lég. 589; Chicago Commercial Nat. Bank *v.* Corcoran, 6 Ont. 527; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313; Washington County Mut. Ins. Co. *v.* Henderson, 6 U. C. C. P. 146; Howe Mach. Co. *v.* Walker, 35 U. C. Q. B. 37, 53; Birkbeck Invest. Security, etc., Co. *v.* Brabant, 8 Quebec Q. B. 311.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2528, 2529, 2552, 2554. And see *supra*, I, B, 1, 2.

86. *Alabama.*— Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339.

Illinois.— Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236; Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Kansas.— Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245.

Michigan.— Seamans *v.* Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430; Diamond Match Co. *v.* Register of Deeds, 51 Mich. 145, 16 N. W. 314; People *v.* Howard, 50 Mich. 239, 15 N. W. 101; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Missouri.— Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129; Toomey *v.* Supreme Lodge K. of P. of W., 74 Mo. App. 507.

New Hampshire.—Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927.

New Jersey.— Hill *v.* Beach, 12 N. J. Eq. 31.

New York.— Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854; Merrick *v.* Brainard, 38 Barb. 574.

Ohio.— Myers *v.* Manhattan Bank, 20 Ohio 283.

Pennsylvania.— Van Steuben *v.* Central R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

Texas.— Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254; Chapman *v.* Hallwood Cash Register Co., 32 Tex. Civ. App. 76, 73 S. W. 969; Empire Mill *v.* Alston Grocery Co., 4 Tex. App. Civ. Cas. § 221, 15 S. W. 200, 505, 12 L. R. A. 366.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

United States.— Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683.

See 12 Cent. Dig. tit. "Corporations," §§ 2490, 2492, 2493.

Partial recognition.— The fact that a foreign corporation has a power under its charter not sanctioned by the laws of another state will not prevent it from doing in such other state other legitimate business also authorized by its charter and not contrary to the laws or policy of such other state. State *v.* New Orleans Warehouse Co., 109 La. 64, 33 So. 81.

87. Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123; and other cases in the notes preceding.

88. *Delaware.*— Baltimore, etc., Tel. Co. *v.* Delaware, etc., Tel., etc., Co., 7 Houst. 269, 31 Atl. 714.

Georgia.— American Colonization Soc. *v.* Gartrell, 23 Ga. 448.

Kansas.— Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245.

Michigan.— Diamond Match Co. *v.* Regis-

mit a foreign corporation to exercise powers within the state which a domestic corporation of the same kind is not permitted to exercise under the constitution, laws, or policy of the state.[89] But the mere fact that the legislature of a state has not authorized the creation of corporations for the same purposes as those of a foreign corporation, or that it allows corporations to be formed only by general law, does not operate as an implied exclusion of the latter.[90] Nor does the fact that the statutes of the state of the corporation's creation authorize a larger capitalization than is permitted by the statutes of the domestic state.[91]

5. Extent to Which Directors May Act in Other States. Even under the view that a corporation cannot migrate into another state and there acquire a

ter of Deeds, 51 Mich. 145, 16 N. W. 314; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Missouri.— Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 47 Am. Dec. 129, foreign insurance company cannot engage in banking business.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337.

United States.— Seattle Gas, etc., Co. *v.* Citizens' Light, etc., Co., 123 Fed. 588.

See 12 Cent. Dig. tit. "Corporations," § 2532; *supra*, I, B, 6; and *infra*, II, A, 5.

89. *Alabama.*— Falls *v.* U. S. Savings Loan, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174.

Florida.— Walters *v.* Whitlock, 9 Fla. 86, 76 Am. Dec. 607. And see Equitable Bldg., etc., Assoc. *v.* King, (1904) 37 So. 181.

Illinois.— Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; Rhodes *v.* Missouri Sav., etc., Co., 173 Ill. 621, 50 N. E. 998, 42 L. R. A. 93 [*reversing* 63 Ill. App. 77]; Pope *v.* Hanke, 155 Ill. 617, 40 N. E. 839, 28 L. R. A. 568; Stevens *v.* Pratt, 101 Ill. 206; U. S. Mortgage Co. *v.* Gross, 93 Ill. 483; U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236; Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632.

Massachusetts.— Faulkner *v.* Hyman, 142 Mass. 53, 6 N. E. 846.

Michigan.— People *v.* Howard, 50 Mich. 239, 15 N. W. 101. A statute authorizing corporations to be formed for the purpose of mining and providing that foreign corporations organized for the purposes contemplated by the statute may carry on business in the state and enjoy all the rights and privileges, and be subject to all the restrictions and liabilities of corporations existing under the statute, impliedly excludes a foreign corporation organized, not only for mining purposes, but also and principally for colonizing and general trading purposes, with power to organize other corporations, since it exists for purposes not contemplated by the statute. Isle Royale Land Corp. *v.* Secretary of State, 76 Mich. 162, 43 N. W. 14.

Missouri.— State *v.* Cook, 171 Mo. 348, 71 S. W. 829; Toomey *v.* Supreme Lodge K. of P. of W., 74 Mo. App. 507.

New Hampshire.— Fisher *v.* Lord, 63 N. H. 514, 3 Atl. 927; Hill *v.* Spear, 50 N. H. 253, 9 Am. Rep. 205.

New Jersey.— Coler *v.* Tacoma R., etc., Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786 [*reversing* 64 N. J. Eq. 117, 53 Atl. 680].

New York.— White *v.* Howard, 46 N. Y. 144.

Oklahoma.— Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

Pennsylvania.— Van Steuben *v.* New Jersey Cent. R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577.

Texas.— Fowler *v.* Bell, 90 Tex. 150, 37 S. W. 1058, 59 Am. St. Rep. 788, 39 L. R. A. 254; Empire Mills *v.* Allston Grocery Co., 4 Tex. App. Civ. Cas. § 221, 15 S. W. 200, 505, 12 L. R. A. 366.

Utah.— Hiskey *v.* Pacific States Sav., etc., Co., 27 Utah 409, 76 Pac. 20.

United States.— Clarke *v.* Georgia Cent. R., etc., Co., 50 Fed. 338, 15 L. R. A. 683.

See 12 Cent. Dig. tit. "Corporations," § 2492 *et seq.*

90. *Illinois.*— People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Stevens *v.* Pratt, 101 Ill. 206.

Massachusetts.— Employers' Liability Assur. Corp. *v.* Merrill, 155 Mass. 404, 29 N. E. 529.

New Hampshire.— U. S. Fidelity, etc., Co. *v.* Linehan, (1904) 58 Atl. 956, 957, where the court said: "In the absence of express legislation against the exercise of the privilege by such corporations, it is generally held that they acquire the right by comity, or that legislative silence upon the subject is equivalent to permission. . . . A state policy may be as thoroughly established in this way as by positive enactment. If the Legislature does not see fit to prohibit a foreign corporation from carrying its business here, when it is not repugnant to common-law principles, it, in effect, declares the public policy of the state to be favorable to its engaging in business here. The presumption of legislative intention, founded upon the doctrine of comity, affords ample evidence in support of that conclusion."

Ohio.—State *v.* Ætna L. Ins. Co., 69 Ohio St. 317, 69 N. E. 608.

United States.— Cowell *v.* Colorado Springs Co., 100 U. S. 55, 60, 25 L. ed. 547, exclusion not inferred from the fact that the legislature "has made no provision for the formation of similar corporations, or allows corporations to be formed only by general law." See also Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441, referred to *supra*, I, A, 7 note 37.

91. MacMurray *v.* Sidwell, 155 Ind. 560, 563, 58 N. E. 722, 80 Am. St. Rep. 255, where it is said: "It is the nature and not

residence, it is no objection to the validity of corporate acts that they are done in another state, or authorized at a meeting of directors held in another state, where the acts so done or authorized are not repugnant to the laws or policy of the other state within which they are done or authorized.[92] Thus the directors of a railroad corporation chartered in Vermont have power to vote at a meeting held out of the state to confer authority upon an agent to transfer its real estate.[93] And we have seen that meetings for the election of directors,[94] and for the performance of other constituent acts,[95] may under some theories be held outside of the limits of the state creating the corporation. Nor is there any objection to the validity of the ordinary contracts of a corporation, grounded on the place where they are entered into,[96] and the directors of a railroad company accordingly may make contracts out of the state of its incorporation, although the corporation itself cannot migrate.[97] However, meeting of and action by directors beyond the limits of the state of the corporation's creation may be expressly prohibited by its charter or the general laws of such state, and such a prohibition will be recognized and given effect in other states.[98]

D. Constitutional Protection — 1. Not Entitled to Privileges and Immunities of Citizens of the Several States. From what has preceded it must be concluded that a corporation is not a "citizen," within the meaning of that clause of the federal constitution which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, or the clause in the fourteenth amendment providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.[99] Therefore these clauses do not affect the rule that a corporation created by one state can exercise none of the functions or privileges conferred by its charter in any other state of the Union, except by the comity and consent of the latter.[1] A contrary construction of the constitutional provision under consideration often

the size of a business that determines its legality."

92. Smith *v.* Alvord, 63 Barb. (N. Y.) 415. See also Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619.

93. Arms *v.* Conant, 36 Vt. 744.

94. See Corporations, 10 Cyc. 320.

95. *Compare* Corporations, 10 Cyc. 320, 769.

96. Wright *v.* Bundy, 11 Ind. 398. See also Duke *v.* Taylor, 37 Fla. 64, 19 So. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; Miller *v.* Ewer, 27 Me. 509, 46 Am. Dec. 619.

97. Wright *v.* Bundy, 11 Ind. 398.

98. Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560. See *supra*, I, B, 6.

99. U. S. Const. art. 4, § 2; Amendm. 14, § 1.

1. *Alabama.*—Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

Delaware.—Caldwell *v.* Armour, 1 Pennew. 545, 43 Atl. 517; Baltimore, etc., Tel. Co. *v.* Delaware, etc., Tel., etc., Co., 7 Houst. 269, 31 Atl. 714.

Illinois.— Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683; Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana.— Elston *v.* Piggott, 94 Ind. 14; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Kentucky.— Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284; Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41; Phœnix Ins. Co. *v.* Com., 5 Bush 68, 96 Am. Dec. 331; Com. *v.* Mobile, etc., R. Co., 64 S. W. 451, 23 Ky. L. Rep. 784, 54 L. R. A. 916; Woodward *v.* Com., 7 S. W. 613, 9 Ky. L. Rep. 670.

Louisiana.— State *v.* Fosdick, 21 La. Ann. 434; State *v.* Lathrop, 10 La. Ann. 398.

Michigan.— Pollock *v.* German F. Ins. Co., 132 Mich. 225, 93 N. W. 436; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; Home Ins. Co. *v.* Davis, 29 Mich. 238; People *v.* Judge Jackson Cir. Ct., 21 Mich. 577, 4 Am. Rep. 504. See also Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227.

New Jersey.— Tatem *v.* Wright, 23 N. J. L. 429.

New York.— People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380.

North Carolina.— Columbia Exch. Bank *v.* Tiddy, 67 N. C. 169. And see Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— *In re* Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct. 141, 42 Wkly. Notes Cas. 402. And see Matthews *v.* Re-

would, it has been pointed out, operate to confer upon citizens of other states combining themselves into corporations greater privileges than are enjoyed by the citizens of the domestic state, and deprive the state of all control over the extent of corporate franchises, proper to be granted, within its limits.

2. Whether Entitled to "Equal Protection of the Laws" of States Within Which They Are Permitted to Do Business. The fourteenth amendment to the constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The present judicial construction of the clause under consideration is that it does not prohibit a state from imposing such conditions upon foreign corporations as it may choose, as a prerequisite to their admission within its limits.[2] It may for instance impose upon foreign insurance companies doing business within the state a tax of two dollars upon every one hundred dollars of premiums received by such companies, although no such tax is imposed on domestic companies; nor is this a violation of the principle that taxation must be uniform.[3] So it may impose a tax on the

formed Presb. Church Theological Seminary, 2 Brewst. 541.

Vermont.— Cook *v.* Howland, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Virginia.— Slaughter *v.* Com., 13 Gratt. 767.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940; Morse *v.* Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136.

United States.— Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552; Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Kidd *v.* Pearson, 128 U. S. 1, 9 S. Ct. 6, 32 L. ed. 346; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342; Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5, 26 L. ed. 643; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357. See also New York Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365; Hartford F. Ins. Co. *v.* Perkins, 135 Fed. 502; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277; Lamb *v.* Lamb, 14 Fed. Cas. No. 8,018, 6 Biss. 420.

See 12 Cent. Dig. tit. "Corporations," § 2505 *et seq.* And see *supra*, I, C, 4; *infra*, III, A, and cases there cited. See also Constitutional Law, 8 Cyc. 1037, 1043.

Right to contest constitutionality of statute.— Since a foreign corporation is entitled to do business in a state only by comity and under such terms and conditions as the state may see fit to enforce, it is not entitled to contest the constitutionality of a state statute imposing terms upon which it may do business within the state; and therefore whether a statute prohibiting insurance companies from combining to establish rates, etc., and providing for the revocation of the license of a foreign company failing to comply therewith is unconstitutional as to domestic corporations, and therefore void *in toto*, cannot be determined in a suit by a foreign company to enjoin the state authorities from enforcing its provisions. Hartford F. Ins. Co. *v.* Perkins, 125 Fed. 502. But it has been held that while foreign insurance companies can enter a state to do business only by permission of the state, and subject to such regulations and conditions as it may see fit to impose, yet, where they have complied with all such conditions, and under license from the state have expended money in establishing agencies and in advertising and building up a business, they have the right to challenge the validity of statutes subsequently enacted which affect their business and interests equally with those of domestic companies. Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816.

Estoppel to attack statute as unconstitutional see Constitutional Law, 8 Cyc. 793.

2. Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650. See also Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 L. ed. 394; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342. And see Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53; and the other cases cited *supra*, I, D, 1, note 1. See also Constitutional Law, 8 Cyc. 1058. But while a state may prescribe the terms on which foreign corporations may enter to do business, when such a corporation is permitted to enter the validity of its contracts with citizens of the state must be determined by the rules which apply to the same contracts between citizens and domestic corporations. Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753.

3. Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529. And see *infra*, III, B, 1. A decision of the supreme court of California goes to the length of holding that after a foreign corporation has been admitted to do business in that state, it is incompetent for the legislature to impose a tax upon it, which is not imposed upon domestic corporations of a like character. The court regard it as violative of a provision of the constitution of

amount of capital employed by a foreign manufacturing corporation within the state which sends its goods into the state for sale, although domestic corporations which are wholly engaged in manufacturing similar goods within the state are exempt from taxation, where the statute creating the exemption from taxation makes no discrimination between foreign and domestic corporations.[4] But a corporation not created by or under the laws of a state, or not doing business in that state under conditions that subject it to process from the courts of that state, is within the meaning of the constitutional provision that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[5]

3. Protection When Engaged in Interstate or Foreign Commerce[6]— a. Statement of Federal Doctrine. The constitution of the United States provides that "the congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the Indian tribes."[7] The present construction of this provision is that the power thus conferred upon congress is exclusive to the extent that, by conferring it upon congress, the constitution prohibits it to the states, in so far as the power relates to matters of general or national concern, such as require uniformity of regulation; but that, in so far as it relates to matters of local concern, the states may impose regulations, so long as congress declines to act.[8] It is also the settled construction of this provision that interstate commerce carried on by corporations is entitled to the same protection against state exactions as when carried on by individuals.[9] Although congress has exercised the power in a very few instances, this construction involves the further conclusion that the non-exercise by congress of the power is tantamount to the declaration that, in any given particular, except in matters of local concern only, commerce among the several states shall be free.[10]

b. What State Restrictions Are Invalid. Under the operation of this doctrine a ferry-boat plying between two states cannot be compelled to procure a certificate from the secretary of one of such states and to pay a license-tax for the privilege of so navigating, nor be subjected to a statute of one of such states, providing that no foreign corporation shall maintain any action in the state without obtaining a receipt for such license-fee, so as to bar an action on a policy of fire insurance on the boat; since the license-fees imposed by such statutes cannot be imposed upon the transportation of persons or property over interstate

the state. San Francisco *v.* Liverpool, etc., Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425. However this may be, it is clear that it violates no principle of the federal constitution, as the supreme court of California seems to suppose.

4. New York *v.* Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 L. ed. 323.

5. Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432.

6. See also Commerce, 7 Cyc. 407.

7. U. S. Const. art. 1, § 8, cl. 2.

8. Philadelphia, etc., Mail Steamship Co. *v.* Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Mobile County *v.* Kimball, 102 U. S. 691, 26 L. ed. 238; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Henderson *v.* Wickham, 92 U. S. 259, 23 L. ed. 543; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 279, 21 L. ed. 146; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 20 L. ed. 449; Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 18 L. ed. 745; Cooley *v.* Philadelphia, 12 How. (U. S.) 299, 13 L. ed. 996; Passenger Cases, 7 How. (U. S.) 283, 12 L. ed. 702; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678. See also Commerce, 7 Cyc. 422.

9. Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; and other cases in the notes preceding and following.

10. Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Wabash, etc., R. Co. *v.* Illinois, 118 U. S. 557, 7 S. Ct. 4, 30 L. ed. 244; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Walling *v.* Michigan, 116 U. S. 446, 6 S. Ct. 454, 29 L. ed. 691; Brown *v.* Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257; Mobile *v.* Kimball, 102 U. S. 691, 26 L. ed. 238; Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146; Passenger Cases, 7 How. (U. S.) 283, 462, 12 L. ed. 702 (per Mr. Justice Grier); Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 122, 6 L. ed. 23 (per Mr. Justice Johnson). And see Commerce, 7 Cyc. 420.

waters without interfering with the exclusive constitutional right of congress to regulate interstate commerce.[11] A corporation which has no domicile within the state of the forum, but which is entirely non-resident, cannot, for the same reason, be disabled from enforcing contracts for the sale of its goods made with citizens of the domestic state and shipped across the interstate boundary.[12] It may not be compelled to file a copy of its articles of incorporation with the secretary of the domestic state in order to maintain an action for the price of goods which it has sold within such state, either through its traveling salesmen or otherwise, where it has established no place of business within such state.[13] Many other illustrations might be given.[14]

c. **What Is Interstate or Foreign Commerce** — (i) *Transporation.* In the first place it is to be observed that interstate or foreign transportation is interstate or foreign commerce, within the meaning of the commerce clause of the federal constitution.[15] Interstate or foreign transportation, within the meaning of this principle, takes place whenever freight is taken up within the limits of a state and set down within the limits of another state or foreign country; or whenever freight is taken up within the limits of another state or foreign country and set down within the limits of the domestic state.[16] Transportation, however, which is wholly within the limits of a state is not interstate commerce, and such business by a foreign corporation may be taxed, prohibited, or regulated, notwithstanding the corporation is also engaged in interstate or foreign commerce.[17]

(ii) *Telegraphic and Telephonic Communication.* Telegraphic and telephonic communications between different states or between a state and a foreign country are interstate commerce within the same principle, and as such are directly within the power of regulation conferred upon congress, and free from the control of state regulations, except such as are strictly of a police character.[18]

11. Savage *v.* Atlanta Home Ins. Co., 55 N. Y. App. Div. 20, 66 N. Y. Suppl. 1105.

12. Henderson Woolen Mills *v.* Edwards, 84 Mo. App. 448; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804. See *infra*, I, D, 3, c, (III).

13. Maxwell *v.* Edens, 65 Mo. App. 439. Substantially to the same effect see Lewis *v.* W. R. Irby Cigar, etc., Co., (Tex. Civ. App. 1898) 45 S. W. 476; C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum, (Tex. Civ. App. 1898) 45 S. W. 333. See also *infra*, I, D, 3, c, (III).

14. See the cases cited in the notes preceding and following. And see *infra*, III, E, 6.

15. Com. *v.* Smith, 92 Ky. 38, 17 S. W. 187, 13 Ky. L. Rep. 362, 36 Am. St. Rep. 578; Erie R. Co. *v.* State, 31 N. J. L. 531, 86 Am. Dec. 226; Savage *v.* Atlanta Home Ins. Co., 55 N. Y. App. Div. 20, 66 N. Y. Suppl. 1105; Texas, etc., R. Co. *v.* Davis, 93 Tex. 378, 55 S. W. 562 [*reversing* (Civ. App. 1899) 54 S. W. 381]; De Witt *v.* Berger Mfg. Co., (Tex. Civ. App. 1904) 81 S. W. 334; Crutcher *v.* Kentucky, 141 U. S. 47, 11 S. Ct. 851, 35 L. ed. 649; McCall *v.* California, 136 U. S. 104, 10 S. Ct. 881, 34 L. ed. 392; Lyng *v.* Michigan, 135 U. S. 161, 10 S. Ct. 725, 34 L. ed. 150; Bowman *v.* Chicago, etc., R. Co., 125 U. S. 465, 8 S. Ct. 689, 31 L. ed. 700; Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 S. Ct. 635, 29 L. ed. 785; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 S. Ct. 826, 29 L. ed. 158; Indiana *v.* American Express Co., 13 Fed. Cas. No. 7,021, 7 Biss. 227. See also St. Clair County *v.* Interstate Land, etc., Co., 192 U. S. 454, 24 S. Ct. 300, 48 L. ed. 518 (ferries); and COMMERCE, 7 Cyc. 407.

16. Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146; and other cases in the preceding note. See also COMMERCE, 7 Cyc. 407.

17. Alabama Great Southern R. Co. *v.* Bessemer, 113 Ala. 668, 21 So. 64; Erie R. Co. *v.* State, 31 N. J. L. 531, 86 Am. Dec. 226; New York *v.* Knight, 192 U. S. 21, 24 S. Ct. 202, 48 L. ed. 325; Osborne *v.* Florida, 164 U. S. 650, 17 S. Ct. 214, 41 L. ed. 586; Philadelphia, etc., R. Co. *v.* Pennsylvania, 15 Wall. (U. S.) 232, 21 L. ed. 146. See also COMMERCE, 7 Cyc. 407.

18. Leloup *v.* Mobile Port, 127 U. S. 640, 8 S. Ct. 1380, 32 L. ed. 311. See also Com. *v.* Smith, 92 Ky. 38, 17 S. W. 187, 13 Ky. L. Rep. 362, 36 Am. St. Rep. 578; Postal Tel. Cable Co. *v.* Adams, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229. Therefore the act of congress of July 24, 1866, in so far as it declares that the erection of telegraphic lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraphic company of one state shall not, after accepting them, be excluded by another state from prosecuting its business within her jurisdiction, is a legitimate regulation by congress of commercial intercourse among the states, and is also appropriate

But this is not true of telegraphic or telephonic communication wholly within the limits of a state, and this may be taxed, prohibited, or regulated, notwithstanding the corporations affected are also engaged in interstate or foreign commerce.[19]

(III) *SALES AND SHIPMENTS OF GOODS.* Sales of goods by a corporation situated without a state, to a resident of the state, even though made through traveling salesmen or agents sent into the state, to be shipped to him into the state, belong to the operations of interstate commerce, and are consequently not subject to a prohibition of the state constitution or statute against foreign corporations doing business within the state without having an agent or place of business therein, or otherwise subject to prohibition or regulation by the state.[20] The

legislation to execute the powers of congress over the postal service. Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1, 24 L. ed. 708. For the same reason a state cannot lay a tax on the interstate business of a telegraph company, especially if such company has accepted the provisions of the act of congress of 1866 so as to become an agent of the government of the United States, which would make state laws unconstitutional, in so far as they impose a tax upon messages sent in the service of the government. Western Union Tel. Co. *v.* Texas, 105 U. S. 460, 26 L. ed. 1067. See also COMMERCE, 7 Cyc. 407.

19. *Mississippi.*— Postal Tel. Cable Co. *v.* Adams, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476.

Montana.— State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394, 71 Pac. 311.

Nebraska.— Western Union Tel. Co. *v.* Fremont, 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698.

Virginia.— Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125, 43 S. E. 207.

United States.— Postal Tel. Cable Co. *v.* Charleston, 153 U. S. 692, 14 S. Ct. 1094, 38 L. ed. 871; Ratterman *v.* Western Union Tel. Co., 127 U. S. 411, 8 S. Ct. 1127, 32 L. ed. 229.

See also COMMERCE, 7 Cyc. 407.

20. *Alabama.*—Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918; Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

Arkansas.— Gunn *v.* White Sewing Mach. Co., 57 Ark. 24, 20 S. W. 591, 38 Am. St. Rep. 223, 18 L. R. A. 206.

Colorado.— Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311.

Iowa.— Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026.

Michigan.— Coit *v.* Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819. See also Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117.

Missouri.— Henderson Woolen Mills *v.* Edwards, 84 Mo. App. 448; Maxwell *v.* Edens, 65 Mo. App. 439.

Montana.— Zion Co-operative Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915; McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367.

New York.— People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542.

North Carolina.— Wrought Iron Range Co. *v.* Campen, 135 N. C. 506, 47 S. E. 658.

Pennsylvania.—Mearshon *v.* Pottsville Lumber Co., 187 Pa. St. 12, 40 Atl. 1019, 67 Am. St. Rep. 560; Blakeslee Mfg. Co. *v.* Hilton, 5 Pa. Super. Ct. 184.

Texas.— Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Gale Mfg. Co. *v.* Finkelstein, 22 Tex. Civ. App. 241, 54 S. W. 619; Pasteur Vaccine Co. *v.* Burkey, 22 Tex. Civ. App. 232, 54 S. W. 804; Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425; Lewis *v.* W. R. Irby Cigar, etc., Co., (Civ. App. 1898) 45 S. W. 476; C. B. Cones, etc., Mfg. Co. *v.* Rosenbaum, (Civ. App. 1898) 45 S. W. 333; Bateman *v.* Western Star Milling Co., 1 Tex. Civ. App. 90, 20 S. W. 931.

United States.— Caldwell *v.* North Carolina, 187 U. S. 622, 23 S. Ct. 229, 47 L. ed. 336; Brennan *v.* Titusville, 153 U. S. 289, 14 S. Ct. 829, 38 L. ed. 719; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637; Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694; Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137; Wagner *v.* Meakin, 92 Fed. 76, 33 C. C. A. 577 (although the business is done by the foreign corporation through the agency of a local firm existing in the domestic state); Kessler *v.* Perilloux, 127 Fed. 1011. And see Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; Davis, etc., Bldg., etc., Assoc. *v.* Dix, 64 Fed. 406.

See also COMMERCE, 7 Cyc. 407.

Contract with a corporation to canvass other states for the sale of its goods.— So does a contract by which a resident of a state agrees with a foreign corporation to canvass certain territory within the state for the sale of its manufactured productions, the corporation agreeing to sell the same to him on credit, and taking a bond from him to secure payment for such sales. Such a contract is therefore unaffected by a state statute prohibiting business within the state by foreign corporations which have not complied with certain regulations, such as filing a certificate and designating an agent upon whom process may be served. Gunn *v.* White Sewing Mach. Co., 57 Ark. 24, 20 S. W. 591, 38 Am. St. Rep. 223, 18 L. R. A. 206.

Contract for erection of plant.— A contract between citizens of one state and a corporation of another state for the erection of a

same is true of purchases of goods within a state by a foreign corporation, where the goods are to be shipped to the corporation in another state.[21] The interstate commerce clause, however, has no application to business done wholly within a state, or where a foreign corporation maintains a resident agent in the state to solicit orders for the purchase of goods and to deliver goods to purchasers.[22]

(IV) *Insurance.* The business of insurance, as ordinarily conducted, is not commerce; and an insurance company of one state, having an agency by which it conducts the insurance business in another state, is not engaged in commerce between the states; so that restrictions imposed in the state to which it has migrated with respect to its admission into such state, or the manner of conducting its business therein, or even with respect to the kind of contracts of insurance which it may make therein, are not inhibited by that clause of the federal constitution which confers upon congress power to regulate commerce among the states.[23]

(V) *Loans and Mortgages.* The lending of money by a foreign corporation to a citizen or a domestic corporation and taking of a mortgage to secure the loan is not interstate commerce, and such business may be taxed, prohibited, or regulated by the state.[24]

4. Obligation of Contracts and Vested Rights. The prohibition in the constitution of the United States against state laws impairing the obligation of contracts does not prevent a state, after it has merely licensed or permitted a foreign corporation to do business within its limits, from either revoking the license and excluding the corporation altogether, or imposing new conditions or restrictions upon its right to continue business, for the mere license is not a contract between the state and the corporation, within the meaning of the constitution.[25] Nor is a

single plant is a transaction of interstate commerce, and not a doing of business in the state where the plant is to be erected, within a statute requiring a foreign corporation to register its charter before doing business therein. Davis, etc., Bldg., etc., Co. *v.* Caigle, (Tenn. Ch. App. 1899) 53 S. W. 240.

21. McNaughton *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367, holding that a corporation of another state which sent its agent into the state of Montana to solicit and buy wool to be consigned to its warehouses in other states was engaged in interstate commerce.

22. *Kansas.*— John Dere Plow Co. *v.* Wyland, 69 Kan. 255, 76 Pac. 863; State *v.* American Book Co., 65 Kan. 847, 69 Pac. 563.

Kentucky.— Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284; Com. *v.* Parlin, etc., Co., 80 S. W. 791, 26 Ky. L. Rep. 58.

Michigan.— Muskegon *v.* Zeeryp, 134 Mich. 181, 96 N. W. 502. And see Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Missouri.— Fay Fruit Co. *v.* McKinney, 103 Mo. App. 304, 77 S. W. 160.

New York.— People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

United States.— Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328; Oakland Sugar Mill Co. *v.* Fred W. W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93.

23. Nutting *v.* Massachusetts, 183 U. S. 553, 22 S. Ct. 238, 46 L. ed. 324; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342; Germania F. Ins. Co. *v.* Francis, 11 Wall. (U. S.) 210, 20 L. ed. 77; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. (U. S.) 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357. Many state decisions may be cited which merely illustrate these doctrines. See for instance Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236; State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 4 So. 504; People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380; List *v.* Com., 118 Pa. St. 322, 12 Atl. 277. And see *infra*, III, C, 2. See also Commerce, 7 Cyc. 418.

24. Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141.

25. *Kansas.*— State *v.* American Book Co., 65 Kan. 847, 69 Pac. 563.

Michigan.— Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552].

Nebraska.— State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

Ohio.— Ætna Standard Iron, etc., Co. *v.* Taylor, 4 Ohio S. & C. Pl. Dec. 180, 3 Ohio N. P. 152.

Pennsylvania.— Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533.

South Carolina.— Sandel *v.* Atlanta L. Ins. Co., 53 S. C. 241, 31 S. E. 230.

United States.— Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825; Niagara F. Ins. Co.

statute excluding or imposing conditions upon a foreign corporation necessarily unconstitutional as impairing the obligation of contracts between the corporation and shareholders or third persons.[26] And clearly a state may forfeit a license which it has granted to a foreign corporation because of its violation of the statute under which the license was granted and which expressly provides for such forfeiture.[27] But where a foreign corporation has been expressly or impliedly licensed to do business and make contracts or acquire property in a state, the state cannot afterward prevent enforcement of the contracts so made, either by or against the corporation, or otherwise impair the obligation thereof, or deprive the corporation of its vested rights in the property so acquired.[28] And if there is not merely a license, but a grant or contract between a state and a foreign corporation, on the faith of which the corporation has expended money and begun operations, such contract cannot be impaired by subsequent legislation.[29]

5. Corporations in Employ of United States Government. Where a railroad, telegraph, or other corporation is in the employ of the federal government, although it may be a state corporation, a state cannot altogether exclude it or impose conditions upon its doing business, and thus interfere with its operations as the agent of the government;[30] but this doctrine does not prevent a state from taxing property which such a corporation has within its limits.[31]

E. Status of Migratory or "Tramp" Corporations — 1. Meaning of This Term. The case now to be considered is the case where the citizens of one state go into another state for the purpose of organizing a corporation under favorable

v. Cornell, 110 Fed. 816; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

See also *infra*, III, P; and Constitutional Law, 8 Cyc. 938.

26. Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872; Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192; Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328, holding that a state may prohibit continuance of business therein by a foreign corporation even though such business is being done in pursuance of a contract previously entered into by the corporation.

See also Constitutional Law, 8 Cyc. 990.

27. Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 46, 20 S. Ct. 518, 44 L. ed. 657 [*affirming* 19 Tex. Civ. App. 1, 44 S. W. 936].

28. American Bldg., etc., Co. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493; Bedford *v.* Eastern Bldg., etc., Assoc., 181 U. S. 227, 21 S. Ct. 597, 45 L. ed. 834 [*modifying* 88 Fed. 7, and *disapproving* New York Nat. Bldg., etc., Assoc. *v.* Cannon, 99 Tenn. 344, 41 S. W. 1054] (holding that a contract of subscription to the stock of a foreign building and loan association, which had been duly licensed to do business in Tennessee, created vested contract rights which could not be impaired by subsequent legislation); Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816. And see Cumberland Tel., etc., Co. *v.* Louisville Home Telephone Co., 114 Ky. 892, 72 S. W. 4, 24 Ky. L. Rep. 1676. See also Constitutional Law, 8 Cyc. 894 *et seq.*, 929 *et seq.*, 989 *et seq.*

Merely changing the remedy does not impair the obligation of contracts. Johnston *v.* Mutual Reserve Fund L. Ins. Co., 43 Misc. (N. Y.) 251, 87 N. Y. Suppl. 438, holding that N. C. Laws (1890), p. 175, c. 54, § 62, by substituting the insurance commissioner in place of the secretary of state as the person to be served with process in actions against foreign insurance companies, merely changes the remedy, and so does not impair the obligation of contracts as respects policies previously issued. See Constitutional Law, 8 Cyc. 998 *et seq.*

29. Com. *v.* Mobile, etc., R. Co., 64 S. W. 451, 23 Ky. L. Rep. 784, 54 L. R. A. 916, distinguishing between a mere license and a grant or contract, and holding that where a foreign railroad corporation prior to the act of 1856 was empowered by act of the legislature to extend its road into Kentucky, and given all the rights and privileges given to it by the state which created it, and made subject to all the restrictions prescribed by that state for its government, and the road was constructed and put into operation in Kentucky on the faith of that act, the legislature had no power thereafter to require the corporation, as a condition of its right to operate its road in Kentucky, to become a corporation, citizen, and resident of Kentucky; and to the extent that St. § 841, attempts to require it to do so, that statute impairs the obligation of a contract, and therefore violates the federal constitution. See also Constitutional Law, 8 Cyc. 990.

30. Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Thomson *v.* Union Pac. R. Co., 9 Wall. (U. S.) 579, 19 L. ed. 792; New Orleans, etc., Packet Co. *v.* James, 32 Fed. 21; Stockton *v.* Baltimore, etc., R. Co., 32 Fed. 9. And see People *v.* Wemple, 131 N. Y. 64, 70, 29 N. E. 1002, 27 Am. St. Rep. 542.

31. Thomson *v.* Union Pac. R. Co., 9 Wall. (U. S.) 579, 19 L. ed. 792. And see, generally, Taxation.

statutes, without the intention of carrying on any business — we will say, to state the strongest case — in the state of their own residence. This practice has become so odious that the corporations thus created have been designated by the use of an odious term, that of "tramp" corporations.

2. Such Corporations "Citizens" of State Creating Them. The interpretation of the federal constitution and judiciary act has resulted in the doctrine that such corporations are conclusively presumed to be citizens of the state within whose limits they are created, although not one of their members may have ever been within that state, and although no exertion has been made by them to become citizens of that state other than to pay a fee to a lawyer in that state for drawing up articles of incorporation and procuring them to be filed and recorded,[32] thus enabling the federal courts to seize jurisdiction of ordinary actions between citizens of the same state contrary to the intent and meaning of the constitution and the federal judiciary act, and to defraud the state courts out of a portion of their rightful jurisdiction over their own citizens.

3. Recognition of Such Corporations by State Courts. The hospitality of the courts of some of the states has been such that they have recognized as valid the existence of corporations formed by the act of their own citizens in going into another state and procuring themselves to be incorporated there for the purpose of doing business as a corporation within the state of their residence or elsewhere.[33] But such corporations have not always been recognized in the states of the residence of their members.[34]

4. Corporations Formed in Foreign State by Citizens Thereof to Do Business in Domestic State — a. In General. Another species of corporation is presented by cases where the citizens of one state organize themselves into a corporation

32. 1 Thompson Corp. § 12. And see Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081; St. Louis, etc., R. Co. *v.* James, 161 U. S. 545, 16 S. Ct. 621, 40 L. ed. 802; Shaw *v.* Quincy Min. Co., 145 U. S. 444, 12 S. Ct. 935, 36 L. ed. 768; Muller *v.* Dows, 94 U. S. 444, 24 L. ed. 207; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270, 20 L. ed. 571; Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286, 17 L. ed. 130; Marshall *v.* Baltimore, etc., R. Co., 16 How. (U. S.) 314, 14 L. ed. 953; Louisville, etc., R. Co. *v.* Leston, 2 How. (U. S.) 497, 11 L. ed. 353; U. S. Bank *v.* Deveaux, 5 Cranch (U. S.) 61, 3 L. ed. 38; Hatch *v.* Chicago, etc., R. Co., 11 Fed. Cas. No. 6,204, 6 Blatchf. 105; Minot *v.* Philadelphia, etc., R. Co., 17 Fed. Cas. No. 9,645, 2 Abb. 323, 7 Phila. (Pa.) 555. See also *supra*, I, C, 1; and Corporations, 10 Cyc. 150; Courts, 11 Cyc. 870.

In the state courts see the following cases:

Louisiana.— Duncan *v.* St. Louis, etc., R. Co., 49 La. Ann. 1700, 22 So. 924.

Maine.— Hobbs *v.* Manhattan Ins. Co., 56 Me. 417, 96 Am. Dec. 472.

Missouri.— St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

New Hampshire.— Horne *v.* Boston, etc., R. Co., 62 N. H. 454.

New York.— Stevens *v.* Phœnix Ins. Co., 41 N. Y. 149; Fisk *v.* Chicago, etc., R. Co., 53 Barb. 472; Kranshaar *v.* New Haven Steamboat Co., 7 Rob. 356.

Utah.— Wilson *v.* Triumph Consol. Min. Co., 19 Utah 66, 56 Pac. 300, 75 Am. St. Rep. 718.

West Virginia.— Rece *v.* Newport News, etc., R. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

See also Corporations, 10 Cyc. 150; Courts, 11 Cyc. 870.

33. Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854 [*affirming* 16 Daly 337, 11 N. Y. Suppl. 83]; Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484, 28 Atl. 973, 49 Am. St. Rep. 784, 23 L. R. A. 639, both holding that a foreign corporation will not be denied recognition by the courts of a state merely because composed exclusively of its own citizens. See also Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622; Cumberland Tel., etc., Co. *v.* Louisville Home Telephone Co., 114 Ky. 892, 72 S. W. 4, 24 Ky. L. Rep. 1676; State *v.* Cook, 181 Mo. 596, 80 S. W. 929; Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing*, but on other points, 72 Hun 18, 25 N. Y. Suppl. 309].

34. Thus in a notable case in Massachusetts it appeared that a citizen of Massachusetts who had formerly been engaged in business in that state went to New Hampshire, and there, with the nominal coöperation of four "dummies," reorganized his business as a New Hampshire corporation. He went through certain forms prescribed by the New Hampshire statutes, and, as he supposed, did everything necessary and proper to establish, in a legal manner, a corporation called the "Forbes Woolen Mills." All the stock was issued to George Forbes, who paid fifty per cent of the capital stock in cash and supplies, and he was elected president and treasurer. No manufacturing was done in New Hampshire, nor was any business done there except

under the laws of their own state for the purpose of doing business exclusively within another state.[35] Here the mere fact that it was not intended by the corporators that the corporation should do any business within the state under whose laws it was organized will not of itself be a sufficient ground for expelling it from the state into which it migrates, or for holding its members liable in that state as partners, there being no actual intent to evade the laws of the state within which it settles.[36]

b. Decisions Denouncing Such Corporations. But other courts have taken the view that, irrespective of the residence or citizenship of its members, the organization under the law of one state, of a corporation for the purpose of doing business exclusively in another state, is a fraud upon the laws of the latter state, and that such persons will not be deemed possessed of any of the immunities of a corporation in the latter state, but will be liable for their undertakings as partners.[37] The supreme court of Kansas has held, on the soundest grounds, that where a company was incorporated under the laws of Pennsylvania with the power of doing business anywhere "except in the state of Pennsylvania," it could not do business in Kansas; since there was no rule of comity which would allow one state to spawn corporations, and send them forth into other states to do business there which it would not permit them to do within its own boundaries.[38]

the holding of corporate meetings, and possibly the sale, now and then, of a bill of goods in the ordinary course of business, the principal place of business being at East Brookfield, in Massachusetts, where woolen goods were manufactured and sent to commission houses in New York. In an action against Forbes individually, for a debt contracted in such business, after a finding by the jury that there had been no intention to carry on the actual business of the pretended corporation in New Hampshire, and that Forbes did not in good faith intend to organize a corporation, although he believed that the organization was technically valid in law, the trial judge ruled that Forbes was personally liable, and this judgment was affirmed in the supreme judicial court. The court, among other things, said: "Here there was no corporation. It was just the same as if the defendant had done nothing at all in the way of establishing a corporation, but had conducted his business under the name of the Forbes Woolen Mills, calling it a corporation. The business was his personal business, which he transacted under that name. Montgomery *v.* Forbes, 148 Mass. 249, 253, 19 N. E. 342. See also Taylor *v.* Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362; Cleaton *v.* Emery, 49 Mo. App. 345; and *infra*, IV, L. And see an article on this subject by Mr. George A. O. Ernst, 25 Am. L. Rev. 352.

35. Of this an example is the Southern Pacific Company chartered by the legislature of Kentucky with the power of owning and operating railroads wherever it may choose except in the state of Kentucky. It has no property in the state of Kentucky, and merely keeps up the form of maintaining an office and a clerk within that state, by which device it is enabled, under the unfaithful interpretation of the federal constitution and judiciary act already referred to, to litigate every controversy where the value exceeds two thousand dollars, between itself and the inhabitants of the states through which its roads run, in the courts of the United States.

36. This the writer takes to be the result of the following cases: Merrick *v.* Van Santvoord, 34 N. Y. 208; Cincinnati Second Nat. Bank *v.* Lovell, 2 Cinc. Super. Ct. 397. See also State *v.* Topeka Water Co., 61 Kan. 547, 60 Pac. 337; Cumberland Tel., etc., Co. *v.* Louisville Home Telephone Co., 114 Ky. 892, 72 S. W. 4, 24 Ky. L. Rep. 1676; State *v.* Cook, 181 Mo. 596, 80 S. W. 929.

37. Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245; Hill *v.* Beach, 12 N. J. Eq. 31. See also Taylor *v.* Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362; and *supra*, I, E, 3. Somewhat analogous is a decision of the supreme court of New Jersey to the effect that a fire-insurance company cannot be established in Jersey City under a charter of such a company located in Trenton; that such an organization in Jersey City is a fraud upon the statute, is outside of the charter, and creates no corporation *de jure* or *de facto*; so that, if such an organization assumes to write policies, its directors are personally liable thereon. Wonderly *v.* Booth, 36 N. J. L. 250. Similarly, it was early held in Michigan that where a bank is located in one county by its charter, and it assumes to establish an agency in another county, where it receives deposits and buys and sells exchange, it thereby violates its charter. People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282. But the decision was rendered at a time when the business of banking was an exclusive privilege, jealously guarded by the mistaken policy of the law; and it is doubtful whether it expresses the law as understood in our day. See Kruse *v.* Dusenbury, 1 N. Y. City Ct. Suppl. 87; Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552.

38. Land Grant R., etc., Co. *v.* Coffey County, 6 Kan. 245. *Compare* State *v.* Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

5. Corporations Having No Powers in State or Country of Creation. And in a late case in Oklahoma, involving the status of a corporation created in one state or territory to do business exclusively in another, it was held that it is indispensable that a corporation seeking to invoke the doctrine of comity must first be possessed of some right, power, or privilege in the state or country of its creation, and unless it has, not only existence, but also some right or power there, it cannot be awarded any in a foreign state or country.[39]

F. Foreign Corporation Coming Into State and Doing Business Under Same Name as Domestic Corporation. Statutes exist prohibiting foreign corporations from doing business within the domestic state under names similar to those possessed by domestic corporations;[40] and without the aid of any statute a corporation will be protected in its exclusive right to the use of its name, as a trade name, by an injunction in equity.[41] A foreign corporation which has assumed the name of an older domestic corporation, which it could not obtain if incorporated in the state, will be enjoined from the use of it, although it has complied with the registration laws, and has thereby received a certificate to do business in the state.[42] On the other hand a court of equity will not, at the suit of a corporation created in another state, enjoin a corporation of the state of the forum from the use of its corporate name, adopted prior to the organization of the complainant company. A foreign corporation cannot thus contest the right of a domestic corporation to the name given to it by the state creating it.[43]

G. Provisions Subjecting Foreign Corporations to Same Liabilities and Restrictions as Domestic Corporations. Constitutional provisions and statutes exist in some of the states providing, in various language, that foreign corporations shall be subject to all the liabilities, restrictions, and duties that are or may be imposed upon domestic corporations of the like kind and character.[44] The purpose of such a constitutional provision or statute has been declared to be "to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law."[45] It is also observed, concerning

39. Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185, holding therefore that a corporation formed by citizens of Oklahoma Territory and of Kansas in and under the laws of Kansas, for the purpose of owning, buying, selling, leasing, renting, exchanging, and improving lands, town lots, and other real estate and buildings and improvements thereon, in Oklahoma Territory, without any rights or powers in Kansas, except to maintain an office, would not be recognized, and could not acquire title to land, in Oklahoma.

40. See International Trust Co. *v.* International L. & T. Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 758, where such a statute was construed and applied.

41. See Farmers' L. & T. Co. *v.* Farmers' L. & T. Co., 1 N. Y. Suppl. 44, 21 Abb. N. Cas. 104; and Corporations, 10 Cyc. 151.

42. American Clay Mfg. Co. *v.* American Clay Mfg. Co., 198 Pa. St. 189, 47 Atl. 936. See also Corporations, 10 Cyc. 152.

43. Hazleton Boiler Co. *v.* Hazleton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339 [*affirming* 40 Ill. App. 430]. Circumstances under which a foreign corporation was not entitled to a preliminary injunction against a domestic corporation, incorporating by mistake under the same name after the foreign corporation had come into the state to do business. American Tartar Co. *v.* American Tartar Co., 57 N. Y. App. Div. 411, 68 N. Y. Suppl. 236. See also Corporations, 10 Cyc. 152 *et seq.*

44. See for instance Ill. Rev. St. (1874) p. 290, § 26; W. Va. Code, c. 54, § 30.

45. Stevens *v.* Pratt, 101 Ill. 206, 217 [*reaffirmed* in Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776]. See also Barnes *v.* Suddard, 117 Ill. 237, 7 N. E. 477; Martin *v.* Ohio Stove Co., 78 Ill. App. 105; Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 68 Ill. App. 666; Granite State Provident Assoc. *v.* Lloyd, 48 Ill. App. 429 [*affirmed* in 145 Ill. 620, 34 N. E. 142] (holding that the statute applies irrespective of contrary provisions in the corporation's charter or by-laws); Archer *v.* Baltimore Bldg., etc., Assoc., 45 W. Va. 37, 30 S. E. 241 (places foreign building associations, legally doing business in the state, in possession of the same rights, powers, and privileges, and makes them subject to the same restrictions and liabilities as domestic corporations of like character). And see Iron Silver Min. Co. *v.* Cowie, 31 Colo. 450, 72 Pac. 1067 (holding that the Colorado statute prevents a foreign mining corporation in that state from prolonging its existence in the state beyond the term allowed by law to domestic corporations); Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing*

this statute, that "by declaring that foreign corporations shall have no other or greater powers, there is a direct implication that they shall have equal powers with domestic corporations of like character."[46] The meaning is that a foreign corporation, on complying with the terms of the domestic statute containing such a provision, acquires the same rights respecting its contracts as domestic corporations of like character have, whether it would have the same rights under the rule of comity or not; and that it can exercise no greater powers in the state than domestic corporations can.[47] A provision of a state constitution that no foreign corporation shall be allowed to exercise or enjoy within the state greater rights or privileges than those possessed or enjoyed by corporations of similar character created under the laws of the state is merely an inhibition against the granting of greater rights or privileges to foreign corporations, and does not affect the validity of laws governing domestic corporations, although they cannot be applied to foreign corporations.[48]

H. Interference With Internal Management of Foreign Corporations — **1. General Rule.** The general rule is that the courts of one state will not interfere in controversies relating merely to the internal management of the affairs of foreign corporations, or in other words, will not undertake to exercise visitorial powers over them.[49] A suit to regulate or interfere with the internal affairs of a

51 Ill. App. 204]; State *v.* Cook, 171 Mo. 348, 71 S. W. 829 (foreign corporation can transact such business only as a domestic corporation of like character is authorized to transact); Coler *v.* Tacoma R., etc., Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786 [*reversing* 64 N. J. Eq. 117, 53 Atl. 680] (construing Wash. Const. art. 12, § 7, and applying it to a New Jersey corporation doing business in Washington, so as to incapacitate such corporation from acquiring and holding stock of another corporation); London, etc., Bank *v.* Aronstein, 117 Fed. 601, 54 C. C. A. 663 (construing the constitution of California as rendering transfers of shares issued by a British corporation in that state subject to the law of that state).

A shareholder's liability for calls made on the stock of a foreign corporation in accordance with the statute under which the corporation was organized, although the shareholder may be a citizen of the domestic state, is not affected by a statute providing that foreign corporations doing business in the state shall be subject to the liabilities, restrictions, and duties imposed upon domestic corporations, and shall have no other or greater powers. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204].

46. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 384, 6 N. E. 183, 56 Am. Rep. 776. See also Freie *v.* No. 4 Fidelity Bldg., etc., Union, 166 Ill. 128, 46 N. E. 784, 57 Am. St. Rep. 123.

47. Floyd *v.* National Loan, etc., Co., 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536, a foreign corporation, coming into West Virginia to transact business, must conform to the local law, if there be any, regulating similar domestic corporations; and its contract, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a similar domestic corporation is authorized to make; or the domestic state courts cannot enforce, or permit the enforcement of, its performance.

48. Butte First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131.

49. *District of Columbia.*— Clark *v.* Mutual Reserve Fund L. Assoc., 14 App. Cas. 154, 43 L. R. A. 390.

Illinois.— Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 600.

Louisiana.—State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309, unless it acquires complete jurisdiction and is able to enforce its determination with complete justice.

Maryland.— Condon *v.* Mutual Reserve Fund L. Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; North State Copper, etc., Min. Co. *v.* Field, 64 Md. 151, 153, 20 Atl. 1039 (where it was said: "Our courts possess no visitorial power over them, and can enforce no forfeiture of charter for violation of law, or removal of officers for misconduct; nor can they exercise authority over the corporate functions, the by-laws, nor the relations between the corporation and its members, arising out of, and depending upon, the law of its creation. These powers belong only to the state which created the corporation"); Wilkins *v.* Thorne, 60 Md. 253.

Massachusetts.— Kimball *v.* St. Louis, etc., R. Co., 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250; Pierce *v.* Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Kansas, etc., Constr. Co. *v.* Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439; Smith *v.* New York Mut. L. Ins. Co., 14 Allen 336.

Minnesota.— Guilford *v.* Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407.

New Jersey.— Gregory *v.* New York, etc., R. Co., 40 N. J. Eq. 38.

New York.— Matter of Rappleye, 43 N. Y.

foreign corporation is not authorized by a statute which provides for the appointment by a foreign corporation of an agent upon whom process may be served, as a condition precedent to its right to do business in the state, and a statute providing that a resident of the state may bring an action against a foreign corporation on any cause of action.[50]

2. Instances Under the Foregoing Rule. For instance a shareholder cannot, it has been held, appeal to a domestic court to compel a foreign corporation to pay such dividends as may, on an accounting, appear to be proper.[51] So the complaint of a shareholder that he has been deprived of his rights as a shareholder by being excluded from his right to vote at a shareholders' meeting, and seeking to be reinstated as a member of the foreign corporation, is an action which will not be entertained.[52] Upon the same ground, relief has been refused to shareholders of a foreign corporation to restrain the company from paying a stock dividend;[53] to appoint a general receiver of the assets of the corporation or a receiver of assets not within the state of the forum;[54] to compel the corporation to divide its assets among its shareholders;[55] to dissolve it;[56] to enjoin or cancel an unauthorized issue of new stock;[57] to set aside contracts made by the corporation on the ground that they are unwise and reckless and depreciate or render valueless the stock of complainants;[58] to enjoin assessments by a mutual life-insurance company as excessive and fraudulently made for the purpose of causing

App. Div. 84, 59 N. Y. Suppl. 338 [appeal *dismissed* in 161 N. Y. 615, 55 N. E. 1100]; O'Brien *v.* Chicago, etc., R. Co., 53 Barb. 568; Howell *v.* Chicago, etc., R. Co., 51 Barb. 378; Lewisohn *v.* Anaconda Copper Min. Co., 26 Misc. 613, 56 N. Y. Suppl. 807; Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836; Day *v.* U. S. Car Spring Co., 2 Duer 608; Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. N. S. 332; Way *v.* Keyport, etc., Steamboat Co., 16 Abb. Pr. 320 note.

North Carolina.— Howard *v.* Mutual Reserve Fund L. Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

Pennsylvania.— Madden *v.* Penn Electric Light Co., 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534; Morris *v.* Stevens, 6 Phila. 488; Harley *v.* Welsh, 16 Montg. Co. Rep. 13.

Rhode Island.— Stafford *v.* American Mills Co., 13 R. I. 310.

Virginia.— Taylor *v.* Mutual Reserve Fund L. Assoc., 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

Wisconsin.— Northwestern Iron Co. *v.* Central Trust Co., 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

United States.— Sidway *v.* Missouri Land, etc., Co., 101 Fed. 481 (will not undertake to exercise visitorial power over foreign corporation, or to wind up its business and distribute its property; will not appoint a receiver on petition of resident shareholder who complains of the internal management of the corporation); Republican Mountain Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776; Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775.

See 12 Cent. Dig. tit. "Corporations," § 2571. And see *infra*, V, B, 10.

50. Howard *v.* Mutual Reserve Fund L. Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853.

51. Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. 236, 4 N. Y. Suppl. 836.

52. North State Copper, etc., Min. Co. *v.* Field, 64 Md. 151, 20 Atl. 1039.

53. Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378.

54. *Illinois.*— Bradbury *v.* Waukegan, etc., Min. Co., 113 Ill. App. 600.

Maryland.— Wilkins *v.* Thorne, 60 Md. 253.

New York.— Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Day *v.* U. S. Car Spring Co., 2 Duer 608.

Rhode Island.— Stafford *v.* American Mills Co., 13 R. I. 310.

United States.— Sidway *v.* Missouri Land, etc., Co., 101 Fed. 481; Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775.

Compare infra, I, H, 3 text and note 69. And see, generally, Receivers.

55. Redmond *v.* Enfield Mfg. Co., 13 Abb. Pr. N. S. (N. Y.) 332. And see Wilkins *v.* Thorne, 60 Md. 253; Sidway *v.* Missouri Land, etc., Co., 101 Fed. 481.

56. *Alabama.*—Georgia Importing, etc., Co. *v.* Locke, 50 Ala. 332.

Georgia.— Dodge *v.* Pyrolusite Manganese Co., 69 Ga. 665.

Maryland.— Wilkins *v.* Thorne, 60 Md. 253.

Massachusetts.— See Andrews *v.* Moen, 162 Mass. 294, 297, 38 N. E. 505.

New York.— Day *v.* U. S. Car Spring Co., 2 Duer 608.

United States.— Sidway *v.* Missouri Land, etc., Co., 101 Fed. 481; Leary *v.* Columbia River, etc., Nav. Co., 82 Fed. 775; Republican Montana Silver Mines *v.* Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776 [*reversing* 55 Fed. 7].

57. O'Brien *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 568.

58. Madden *v.* Penn Electric Co., 181 Pa. St. 617, 37 Atl. 817, 38 L. R. A. 638.

a lapse of complainant's policy;[59] to restore the rights of a policy-holder in a foreign life-insurance company after forfeiture of his policy for non-payment of premiums;[60] to enjoin an issue of bonds;[61] or to control an election of officers.[62]

3. Cases in Which the Rule Does Not Apply. The rule above stated does not apply so as to prevent a court from granting relief against a foreign corporation, at the suit either of a shareholder or member or of a creditor, where it has jurisdiction of the parties and of the subject-matter, and the suit does not involve a mere regulation of the internal affairs of the corporation.[63] Upon the question what acts of a foreign corporation are within this rule, and what without it, the distinction has been taken that where the act affects one solely in his capacity as a member, he must seek redress of his grievance in the courts of the state or country creating the corporation; but where the act affects his individual rights, he may demand redress of any tribunal where jurisdiction may properly be acquired.[64] The court may, at the instance of a shareholder, compel a foreign corporation by mandamus to permit him to inspect and make copies of the books, papers, and other documents of the corporation, where they are in the custody of an officer of the corporation within the state,[65] but not otherwise.[66] And it may, at the suit of a resident shareholder or creditor, as the case may be, against the corporation and its officers within the jurisdiction, compel an accounting for and restoration of funds or property wrongfully taken or withheld from the corporation,[67] and enjoin or grant other relief in the case of *ultra vires* or fraudulent acts.[68] And in many cases it has been held that a court of equity will, in a

59. Clark *v.* Mutual Reserve Fund L. Assoc., 14 App. Cas. (D. C.) 154, 43 L. R. A. 390; Condon *v.* Mutual Reserve Fund L. Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; Howard *v.* Mutual Reserve Fund L. Assoc., 125 N. C. 49, 34 S. E. 199, 45 L. R. A. 853; Taylor *v.* Mutual Reserve Fund L. Assoc., 97 Va. 60, 33 S. E. 385, 45 L. R. A. 621.

60. Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336.

61. Kimball *v.* St. Louis, etc., R. Co., 157 Mass. 7, 31 N. E. 697, 34 Am. St. Rep. 250.

62. Harley *v.* Welsh, 16 Montg. Co. Rep. (Pa.) 13.

63. North State Copper, etc., Min. Co. *v.* Field, 64 Md. 151, 20 Atl. 1039; Richardson *v.* Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; Merritt *v.* Copper Crown Co., 36 Nova Scotia 383, 34 Nova Scotia 416. See *infra*, V, B, 10.

64. North State Copper, etc., Min. Co. *v.* Field, 64 Md. 151, 20 Atl. 1039. See also Fawcett *v.* Supreme Sitting O. of I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; Condon *v.* Mutual Reserve Fund L. Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; Winchurgh *v.* U. S. Steam, etc., R. Advertising Co., 173 Mass. 60, 53 N. E. 145, 73 Am. St. Rep. 261 (suit by a shareholder to compel the personal representative of the former president of a foreign corporation to make good to it the amount of alleged misappropriations of corporate property by him while in office); Pierce *v.* Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433 (suit by the holder of a tontine policy in a foreign life-insurance company for an accounting); Guilford *v.* Western Union Tel. Co., 59 Minn. 332, 61 N. W. 324, 50 Am. St. Rep. 407 (suit to compel issue of a new or duplicate certificate of stock in place of one which has been lost or destroyed).

65. Swift *v.* State, 7 Houst. (Del.) 338, 32 Atl. 143, 40 Am. St. Rep. 127; Richardson *v.* Swift, 7 Houst. (Del.) 137, 30 Atl. 781; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; State *v.* Farmer, 7 Ohio Cir. Ct. 429, 4 Ohio Cir. Dec. 664; Merritt *v.* Copper Crown Co., 36 Nova Scotia 383, 34 Nova Scotia 416. See also Corporations, 10 Cyc. 961.

Under statutes regulating foreign corporations see *infra*, III, N.

66. Matter of Rappleye, 43 N. Y. App. Div. 84, 59 N. Y. Suppl. 338 [appeal *dismissed* in 161 N. Y. 615, 55 N. E. 1100]; Mitchell *v.* Northern Security Oil, etc., Co., 44 Misc. (N. Y.) 514, 90 N. Y. Suppl. 60 [*affirmed* in 99 N. Y. App. Div. 624, 91 N. Y. Suppl. 1104]. Such relief will not be granted where the corporation fails to keep its books within the state as required by law and there is no officer or agent of the corporation, having the custody or control of such books, within the reach of the process of the courts. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

67. Richardson *v.* Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; Miller *v.* Quincy, 179 N. Y. 294, 72 N. E. 116 [*reversing* 88 N. Y. App. Div. 529, 85 N. Y. Suppl. 310] (under N. Y. Code Civ. Proc. §§ 1781, 1782); Ernst *v.* Rutherford, etc., Gas. Co., 38 N. Y. App. Div. 388, 56 N. Y. Suppl. 403. See also Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403. See also *infra*, V, B, 10.

68. Richardson *v.* Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400; Jacobs *v.* Mexican Sugar Refining Co., 104 N. Y. App.

proper case, at the suit of a shareholder or creditor of a foreign corporation, appoint a receiver and decree distribution of its assets within the state.[69]

4. Courts Will Settle Ordinary Questions Depending Upon Construction of Foreign Charters. The courts of the domestic state will — and this is a matter of every-day practice — settle questions of right depending upon foreign charters, which do not involve the mere internal government of foreign corporations. They will, for example, where the question becomes material, inquire whether a corporation created by the laws of another state has transcended its charter powers.[70] In construing a foreign charter, they will in general follow the decisions of the state creating the foreign corporation;[71] although this rule has been denied where the question related to the devolution of title to land in the domestic state.[72]

5. Statutory Regulations. The legislature of a state, like the courts, has no power to regulate the internal affairs of a foreign corporation.[73] But statutes of a state merely imposing conditions precedent to the right of foreign corporations to do business within the state, or merely regulating the conduct of their business therein, are not open to the objection that they constitute a regulation of the internal affairs of such corporations.[74]

Div. 242, 93 N. Y. Suppl. 776 [*affirming* 45 Misc. 180, 91 N. Y. Suppl. 902] (under N. Y. Code Civ. Proc. § 1780); Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Ernst *v.* Rutherford, etc., Gas Co., 38 N. Y. App. Div. 388, 56 N. Y. Suppl. 403; Ives *v.* Smith, 3 N. Y. Suppl. 645 [*affirmed* in 55 Hun 606, 8 N. Y. Suppl. 46] (enjoining directors of railroad company from constructing a branch railroad); Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513 (enjoining the use of proceeds of an issue of stock alleged to be illegal and void and appointing a receiver of such proceeds). See also MacGinniss *v.* Amalgamated Copper Co., 45 Misc. (N. Y.) 106, 91 N. Y. Suppl. 591. It has been held, but the decision seems untenable, that the fact that a foreign corporation doing business within the state threatens to issue preferred stock thereby unlawfully injuring plaintiff's property rights does not present an issue determinable by the laws of the forum, which will be presumed to be the same as that of the foreign state. Ernst *v.* Elmira Municipal Imp. Co., 24 Misc. (N. Y.) 583, 54 N. Y. Suppl. 116. See also *infra*, V, B, 10.

69. *California.*— *In re* Castle Dome Min., etc., Co., (1888) 18 Pac. 794.

Connecticut.— Fawcett *v.* Supreme Sitting O. of I. H., 64 Conn. 170, 29 Atl. 614, 24 L. R. A. 815.

Illinois.— Holbrook *v.* Ford, 153 Ill. 633, 39 N. E. 1091, 46 Am. St. Rep. 917, 27 L. R. A. 324 (even where a receiver has been appointed in the state in which corporation was created); Patterson *v.* Lynde, 112 Ill. 196.

Indiana.— Security Sav., etc., Assoc. *v.* Moore, 151 Ind. 174, 50 N. E. 869.

Maryland.— Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

Massachusetts.— Buswell *v.* Supreme Sitting O. of I. H., 161 Mass. 224, 36 N. E. 1065, 23 L. R. A. 846.

New Jersey.—Irwin *v.* Granite State Provident Assoc., 56 N. J. Eq. 244, 38 Atl. 680; New York Nat. Trust Co. *v.* Miller, 33 N. J. Eq. 155.

New York.— Hallenborg *v.* Greene, 66 N. Y. App. Div. 590, 73 N. Y. Suppl. 403; Mosher *v.* Supreme Sitting O. of I. H., 88 Hun 394, 34 N. Y. Suppl. 816; Redmond *v.* Hoge, 3 Hun 171; Fisk *v.* Chicago, etc., R. Co., 53 Barb. 513; Phœnix Foundry, etc., Co. *v.* North River Constr. Co., 6 N. Y. Civ. Proc. 106; Patten *v.* Accessory Transit Co., 4 Abb. Pr. 139; De Bemer *v.* Drew, 39 How. Pr. 466; Barclay *v.* Talman, 4 Edw. 123. *Compare* Burgoyne *v.* Eastern, etc., R. Co., 19 N. Y. Civ. Proc. 384, 13 N. Y. Suppl. 537.

Tennessee.— Leipold *v.* Marony, 7 Lea 128; Smith *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 502 [*affirmed* in 6 Lea 564].

Wisconsin.— See Northwestern Iron Co. *v.* Central Trust Co., 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

United States.— See Taylor *v.* Life Assoc. of America, 13 Fed. 493.

Canada.— See Douglas *v.* Atlantic Mut. L. Ins. Co., 25 Grant Ch. (U. C.) 379.

See 12 Cent. Dig. tit. "Corporations," § 2664 *et seq.* *Compare supra*, I, H, 2, text and note 54. And see, generally, Receivers.

70. See the learned opinion of Mr. President King in Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180, 226 [*citing* Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370].

71. See *supra*, I, B, 6.

72. Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650. See *infra*, II, A, 5, b.

73. Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Williams *v.* Gaylord, 102 Fed. 372, 42 C. C. A. 401 [*affirmed* in 186 U. S. 157, 22 S. Ct. 798, 46 L. ed. 1102].

74. Williams *v.* Gaylord, 186 U. S. 157, 22 S. Ct. 798, 46 L. ed. 1102 [*affirming* 102 Fed. 372, 42 C. C. A. 401], holding that a statutory requirement of the consent of the shareholders of a foreign corporation as a pre-

II. POWER OF FOREIGN CORPORATIONS RELATING TO PROPERTY.

A. Power to Acquire and Hold Land — 1. GENERAL STATEMENT OF DOCTRINE. It is impossible to state in a paragraph any rule upon this subject applicable in all the states of the Union; but the following is believed to be the doctrine which obtains in most of the states: (1) That a corporation created under the laws of one state of the Union may acquire and hold land in another state,[75] when it

requisite to the sale of the land owned by it within the state has reference to the conduct of its business within the state and is not a regulation of its internal affairs.

75. *Alabama.*— See Columbus *v.* Rodgers, 10 Ala. 37.

Illinois.— Barnes *v.* Suddard, 117 Ill. 237, 7 N. E. 477; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776 [*limiting* Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632]; Columbus Buggy Co. *v.* Graves, 108 Ill. 459; U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236; Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

Indiana.— Elston *v.* Piggott, 94 Ind. 14; Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Maryland.— Day *v.* Postal Tel. Co., 66 Md. 354, 7 Atl. 608.

Michigan.— Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243; Ives *v.* Lansingburgh Bank, 12 Mich. 361.

Mississippi.— Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121.

Missouri.— Missouri Lead Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746.

Montana.— Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386.

New Hampshire.— Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

New Mexico.— See Potter *v.* Rio Arriba Land, etc., Co., 4 N. M. 322, 17 Pac. 609.

New York.— Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309].

North Carolina.— Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124.

Ohio.— Hanna *v.* International Petroleum Co., 23 Ohio St. 622; American Bible Soc. *v.* Marshall, 15 Ohio St. 537; Cincinnati Second Nat. Bank *v.* Lovell, 2 Cinc. Super. Ct. 397.

Oklahoma.— See Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

Pennsylvania.— Baltimore, etc., Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13. See also Thompson *v.* Swoope, 24 Pa. St. 474.

Tennessee.— Louisville Property Co. *v.* Nashville, (Sup. 1905) 84 S. W. 810.

Texas.— Lakeview Land Co. *v.* San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766; Wilson *v.* Peace, (Civ. App. 1905) 85 S. W. 31. See also Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987.

Utah.— Tarpey *v.* Deseret Salt Co., 5 Utah 494, 17 Pac. 631.

Vermont.— Claremont Bridge *v.* Royce, 42 Vt. 730; Page *v.* Heineberg, 40 Vt. 81, 94 Am. Dec. 378; State *v.* Boston, etc., R. Co., 25 Vt. 433.

Virginia.— Goldsberry *v.* Carter, 100 Va. 438, 41 S. E. 858.

Washington.— Realty Co. *v.* Appolonis, 5 Wash. 437, 32 Pac. 219.

West Virginia.— University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

United States.— American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888; Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; New Hampshire Land Co. *v.* Tilton, 19 Fed. 73; Northern Transp. Co. *v.* Chicago, 18 Fed. Cas. No. 10,324, 7 Biss. 45 [*affirmed* in 99 U. S. 635, 25 L. ed. 336]; New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111. See also Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133; Reorganized Church of Jesus Christ, etc. *v.* Church of Christ, 60 Fed. 937; St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627; Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1; Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234.

See 12 Cent. Dig. tit. "Corporations," § 2576 *et seq.*

Power to buy in property at execution or foreclosure sale.— The power of a corporation to sue for the collection of its just debts, or the enforcement of its other rights (see *infra*, V, A), might be ineffectual in many cases, unless the power were conceded to it, which is possessed by ordinary plaintiffs, of bidding and buying in property sold under executions sued out upon judgments in its favor; and accordingly this power has been judicially conceded (Columbus Buggy Co. *v.* Graves, 108 Ill. 459; Elston *v.* Piggott, 94 Ind. 14). So, the power, conceded to a foreign corporation, of lending its money upon a mortgage security (Pancoast *v.* Travelers' Ins. Co., 79 Ind. 172; *infra*, II, A, 7), carries with it by necessary implication, a concession of the power to foreclose the mortgage, and to protect its rights by becoming the purchaser at the judicial sale which takes place in the foreclosure proceedings (Elston *v.* Piggott, 94 Ind. 14; *infra*, II, A, 7).

might so acquire and hold land in the state of its creation,[76] unless (a) the local statute law prohibits it from so doing,[77] or (b) what is more vague and indeterminate, the local courts declare it to be against the public policy of the state to allow it do so.[78]

2. Doctrine That Power Can Be Questioned Only by the State — a. In General. (2) But in either of these last cases there is a countervailing principle, constantly applied by the courts, which is this: That in actions between the foreign corporation and private suitors, or between other private parties, in which the power of the corporation so to acquire and hold real estate is challenged, the courts will hold it to be a question between the state in its political capacity and the foreign corporation or those claiming under it, and, if the state does not interfere to escheat the land to its own uses, will allow the title to be good.[79]

b. Assent of State of Situs Presumed. Stated in another way, the doctrine is that the right of a corporation to purchase and hold lands in another state depends upon the assent or permission of such other state, express or implied.[80] But such is the general law of comity which prevails among the states composing the American Union, that the presumption will be judicially indulged in, that a corporation created by one state, if not forbidden by its charter or governing statute, may exercise the powers thereby granted within the other states of the Union, including the power of acquiring land unless prohibited therefrom, either in their legislative enactments, or by their public policy, which public policy is to be discovered in the general course of their legislation or the settled adjudications of their highest courts.[81] Where a corporation organized in one state of the Union assumes to exercise power within the limits of another state, the assent of such other state will be presumed, in the absence of expressions to the contrary in its statutes or settled adjudications, so long as the state itself refuses to interfere by a direct proceeding in the nature of quo warranto brought by its attorney-general, or otherwise, to escheat the land so acquired by the corporation, or otherwise to oust it from the exercise of the power.[82]

76. See *infra*, II, A, 3, 5.

77. See *infra*, II, A, 9.

78. See *infra*, II, A, 4.

79. *Alabama.*— Long *v.* Georgia Pac. R. Co., 91 Ala. 519, 8 So. 706, 24 Am. St. Rep. 931.

Georgia.— American Mortg. Co. *v.* Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529.

Illinois.— Barnes *v.* Suddard, 117 Ill. 237, 4 N. E. 477. See also Hamsher *v.* Hamsher, 132 Ill. 273, 23 N. E. 1123, 8 L. R. A. 556; Alexander *v.* Tolleston Club, 110 Ill. 65.

Iowa.— McKinley-Lanning L. & T. Co. *v.* Gordon, 113 Iowa 481, 85 N. W. 816; Chicago, etc., R. Co. *v.* Lewis, 53 Iowa 101, 4 N. W. 842.

Kansas.— Omnium Invest. Co. *v.* North American Trust Co., 65 Kan. 50, 68 Pac. 1089.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873. See also Hanlon *v.* Union Pac. R. Co., 40 Nebr. 52, 58 N. W. 590; Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386.

New York.— Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322.

Pennsylvania.—Leazure *v.* Hillegas, 7 Serg. & R. 313. See also Leasure *v.* Union Mut. L. Ins. Co., 91 Pa. St. 491; Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208.

Tennessee.— Louisville Property Co. *v.* Nashville, (Sup. 1905) 84 S. W. 810.

Texas.— See Galveston Land, etc., Co. *v.* Perkins, (Civ. App. 1894) 26 S. W. 256.

United States.— Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382; Hickory Farm Oil Co. *v.* Buffalo, etc., R. Co., 32 Fed. 22. See also Seymour *v.* Slide, etc., Gold Mines, 153 U. S. 523, 14 S. Ct. 847, 38 L. ed. 807; Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

See 12 Cent. Dig. tit. "Corporations," § 2580.

80. Runyan *v.* Coster, 14 Pet. (U. S.) 122, 10 L. ed. 382.

81. American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888.

82. *Georgia.*— American Mortg. Co. *v.* Tennille, 87 Ga. 28, 13 S. E. 158, 12 L. R. A. 529.

Illinois.— Barnes *v.* Suddard, 117 Ill. 237, 242, 7 N. E. 477.

Iowa.— McKinley-Lanning L. & T. Co. *v.* Gordon, 113 Iowa 481, 85 N. W. 816.

Kansas.— Omnium Invest. Co. *v.* North American Trust Co., 65 Kan. 50, 68 Pac. 1089, the state alone can insist upon a forfeiture denounced by statute.

c. Analogy Between This Doctrine and Rule as to Holding of Land by Aliens. It has been observed that the right of a foreign corporation to take and hold land, without explicit license from the state within whose boundaries such land lies, rests on the same footing as the right of an alien so to take and hold land. If an alien attempts to acquire and hold land, his estate is subject to forfeiture by the state; yet, until some act is done by the state to divest the title out of the alien and vest it in itself, it remains in the alien, who may convey it and make a good title to a purchaser. In other words, the settled doctrine is that an alien may acquire a transmissible title which is not divested until office found.[83]

d. Qualification of This Rule. It has been held, however, that the doctrine above stated does not apply where no title has ever vested in the corporation, but it is seeking to acquire title — that, while a foreign corporation, acting in excess of its conferred authority, may be questioned as to its authority only by the state, yet where, in an action by a foreign corporation, there is an attempt to acquire title to property vested in an individual, such individual may deny its corporate capacity as a defense to its right of recovery.[84]

3. Must Have Power to Acquire and Hold Land in State of Creation. Where the foreign corporation cannot take and hold real estate under the same circumstances in the state of its creation, it has been held that it cannot do so in another state.[85] It would seem that this is merely a question of public policy, and it has

Mississippi.— Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121.

Nebraska.— Myers *v.* McGavock, 39 Nebr. 843, 58 N. W. 522, 42 Am. St. Rep. 627 (title to land acquired by a foreign railway company in the face of a prohibitory statute valid as against everyone but the state); Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

New York.— Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309], power cannot be questioned by a party dealing with the foreign corporation on the ground that such dealing is an excess of the powers granted to it by the laws under which it is incorporated.

Texas.— Schwab Clothing Co. *v.* Claunch, (Civ. App. 1895) 29 S. W. 922; Galveston Land, etc., Co. *v.* Perkins, (Civ. App. 1894) 26 S. W. 256, question cannot be raised in an action of trespass to try title brought by a foreign corporation where it has the capacity to hold land, and defendant has no connection with the person by whom such land is conveyed to it.

United States.— Runyan *v.* Coster, 14 Pet. 122, 10 L. ed. 382. See also Seymour *v.* Slide, etc., Gold Mines, 153 U. S. 523, 14 S. Ct. 847, 38 L. ed. 807 (the state is the one to challenge the act; it does not lie in the mouth of the agent of the corporation to raise the question); Hickory Farm Oil Co. *v.* Buffalo, etc., R. Co., 32 Fed. 22.

See 12 Cent. Dig. tit. "Corporations," § 2580.

Domestic corporations.— This is the well-known doctrine which is applied in cases where the power of domestic corporations to purchase, hold, and transmit land has been challenged. Alexander *v.* Tolleston Club, 110 Ill. 65; Hough *v.* Cook County Land Co., 73 Ill. 23, 24 Am. Rep. 230; Baker *v.* Neff, 73 Ind. 68; Hayword *v.* Davidson, 41 Ind. 212; Leazure *v.* Hillegas, 7 Serg & R. (Pa.) 313; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188. See Corporations, 10 Cyc. 1133.

83. See Fairfax *v.* Hunter, 7 Cranch (U. S.) 603, 3 L. ed. 453, where this doctrine is fully expounded. And *compare* Leazure *v.* Hillegas, 7 Serg. & R. (Pa.) 313, where the court points out the analogy between this doctrine, so far as it relates to alien individuals, and the same doctrine so far as it relates to alien or foreign corporations. It should be added that such interventions by the state are almost unknown in this country. The only one which the writer recalls was Com. *v.* New York, etc., R. Co., 114 Pa. St. 340, 7 Atl. 756. But on a subsequent appeal in the same case this decision was reconsidered and overruled. Com. *v.* New York, etc., R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634. See also Aliens, 2 Cyc. 90.

84. Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

Contra.—Omnium Invest. Co. *v.* North American Trust Co., 65 Kan. 50, 68 Pac. 1089, holding that where the agent of a foreign corporation wrongfully took title to real estate in his own name and conveyed the same without consideration to another, with knowledge of the wrong, the corporation could sue to compel the grantee to convey to it, notwithstanding a statute incapacitating the corporation to hold land and providing for forfeiture in proceedings by the state and distribution of the proceeds to the persons entitled.

85. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337. See also Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243. And see *supra*, I, C, 4, c.

been so treated;[86] but in a recent Oklahoma case it was held, aside from any question of policy, that a corporation seeking to invoke the doctrine of comity must be possessed, not only of existence, but also of some right or power in the state of its creation, and therefore that a corporation created in Kansas for the sole purpose of acquiring, owning, and dealing with real estate in Oklahoma could not acquire and hold land in Oklahoma.[87] Other cases are apparently to the contrary.[88]

4. DECISIONS CONSIDERING THE QUESTION AS ONE OF PUBLIC POLICY — a. General Affirmation of the Power. Where the question of the power of foreign corporations to acquire, hold, and transmit land has been considered by the state courts on the footing of public policy, their answers have generally been in affirmation of the power. Most of the courts, in the absence of express restriction, have found nothing in the public policy of their states opposed to the conclusion that a corporation, empowered by its charter to own real estate for a particular purpose, may purchase and hold such real estate within the state of the forum.[89] Contrary to a decision in Illinois hereafter referred to,[90] other courts concede the power of foreign corporations to hold lands in the state of the forum, or in a state other than that of their creation, even where such corporations are organized for the purpose of dealing in land, and are known as "land companies."[91] But a disposition may be discovered in recent legislation to exclude from the privilege of holding land foreign corporations organized for the mere purpose of speculating in land.[92]

b. Notable Exception in Illinois. To the above statement a notable exception

86. See *infra*, II, A, 4.

87. Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185.

88. See Missouri Lead Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746; Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Hanna *v.* International Petroleum Co., 23 Ohio St. 622; Cincinnati Second Nat. Bank *v.* Lovell, 2 Cinc. Super. Ct. 397; Cowell *v.* Colorado Springs Co., 100 U. S. 55, 25 L. ed. 547; New Hampshire Land Co. *v.* Tilton, 19 Fed. 73. And see *infra*, II, A, 4, a.

89. *Georgia.*— Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17, right to acquire title by purchase conceded, although it could not be acquired under the power of eminent domain.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Michigan.— Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Mississippi.— Taylor *v.* Alliance Trust Co., 71 Miss. 694, 15 So. 121.

Missouri.— Missouri Lead Min., etc., Co. *v.* Reinhard, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746, mining lands.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

Nevada.— Whitman Gold, etc., Min. Co. *v.* Baker, 3 Nev. 386, mining lands.

New Hampshire.— Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381.

New York.— Bard *v.* Poole, 12 N. Y. 495.

North Carolina.— Barcello *v.* Hapgood, 118 N. C. 712, 24 S. E. 124, corporation formed for the purpose of mining and milling gold and other minerals.

Vermont.— State *v.* Boston, etc., R. Co., 25 Vt. 433.

United States.— Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234 (insurance company investing assets in mortgages); New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111.

See 12 Cent. Dig. tit. "Corporations," § 2576 *et seq.*; and *supra*, II, A, 1.

In Canada it seems that foreign corporations cannot acquire or hold land in the absence of express legislative authority. Young *v.* Milne, 28 N. Brunsw. 186; Chaudière Coal Min. Co. *v.* Desbarats, 13 L. C. Jur. 182, 15 L. C. Jur. 44, 4 Rev. Lég. 645, 17 L. C. Jur. 275. *Compare Ex p.* New Vancouver Coal Min., etc., Co., 9 Brit. Col. 571 [*reversing* 2 Brit. Col. 8].

90. Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632. See *infra*, II, A, 4, b.

91. Lancaster *v.* Amsterdam Imp. Co., 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322 [*reversing* 72 Hun 18, 25 N. Y. Suppl. 309] (not prevented by the statutes or public policy of the state of New York from transacting business in that state); New Hampshire Land Co. *v.* Tilton, 19 Fed. 73.

92. Thus the statute of the state of Washington was amended by the legislature of that state in 1889 so as to add the provision that no foreign corporation hereafter organized for the purpose of dealing in real estate, by buying and selling the same as a part of its business, shall be permitted to transact said business in this state. Wash. Laws (1889–1890), c. 9, § 1, amending Wash Code, § 2479. This does not apply to a foreign corporation organized before the passage of the act. Realty Co. *v.* Appolonio, 5 Wash. 437, 32 Pac. 219.

was made in the state of Illinois in the year 1873, under peculiar political conditions,[93] the supreme court of that state holding that a title to land in the state of Illinois acquired from a foreign corporation known as a "land company," was of no validity, and would not support ejectment.[94] This was followed by another decision of the same court holding that a corporation of another state appointed to act as trustee under the will of a deceased citizen of that state could not hold the real estate of the testator situated in Illinois.[95] But the same court held in a later case that an educational institution incorporated in Wisconsin, and authorized to hold real estate, was competent to take a devise of real estate situated in Illinois. The court regarded the question as one to be decided in accordance with the public policy of the state as made manifest by its legislation, and then, by examination of numerous acts of the legislature, concluded that the legislation of the state was not adverse to corporations organized for educational purposes, but on the contrary, gave them a hospitable reception and placed them upon an equal footing with domestic corporations.[96]

5. Power Limited by Charter or Governing Statute of Corporation — a. In General. All the preceding cases either state in terms or proceed upon the assumption that a corporation has no power to acquire, hold, or convey lands situated in another state, unless the power is, either in express terms or by necessary implication, conferred on it by its own charter or governing statute. In all these cases two sources of power are to be considered: (1) The charter or governing statute of the foreign corporation; and (2) the restrictions imposed by the local law. If the first source of power fails, the other need not be considered, but there is an end of the question.[97]

b. Construction According to Lex Rei Sitæ. Applying the well-known principle that a statute or other instrument relating to the title to land is construed according to the law of the *situs*, it has been held that when the question arises whether a foreign corporation has the power to acquire real estate, the decision of the highest court of the state in which the foreign corporation exists will not be conclusive as to its power under its charter, but it will be for the courts of the state in which the land is situated to construe the charter and to determine whether, under it, such a power exists; in which case a holding of the highest court of the state creating the corporation, in affirmation of the power, will be persuasive authority merely.[98]

93. These conditions are described in 6 Thompson Corp. § 7914.

94. Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632, Scott and Sheldon, JJ., dissenting.

95. U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236, McAllister and Sheldon, JJ., dissenting.

96. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776 [*distinguishing* U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236; Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Carroll *v.* East St. Louis, 67 Ill. 568, 16 Am. Rep. 632]. Later decisions, influenced by an act of the legislature of that state (Ill. Rev. St. (1874) c. 32, § 26), place foreign corporations on the same footing as domestic corporations with respect to the power to take and hold real estate, and accord to them the power to hold so much as may be necessary for the transaction of their business within the state. Barnes *v.* Suddard, 117 Ill. 237, 7 N. E. 477; Stevens *v.* Pratt, 101 Ill. 206.

97. *Illinois.*— Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Metropolitan Bank *v.* Godfrey, 23 Ill. 579; Frye *v.* State Bank, 10 Ill. 332.

Michigan.— Diamond Match Co. *v.* Register of Deeds, 51 Mich. 145, 16 N. W. 314; Thompson *v.* Waters, 25 Mich. 214, 12 Am. Rep. 243.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560.

New York.— Boyce *v.* St. Louis, 29 Barb. 650.

Pennsylvania. — See Kentucky Bank *v.* Schuylkill Bank, 1 Pars. Eq. Cas. 180.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337.

Canada.— Young *v.* Milne, 28 N. Brunsw. 186.

See also *supra*, I, B, 6.

Powers of corporations generally as to ownership of land see Corporations, 10 Cyc. 1122 *et seq.*

Questioning power collaterally see Corporations, 10 Cyc. 1133 *et seq.*

98. Boyce *v.* St. Louis, 29 Barb. (N. Y.) 650. See also Union Nat. Bank *v.* State Nat.

c. Presumption. When the question arises as to whether a foreign corporation has power under its charter or governing statute to take and hold lands, it will be presumed that the power exists in the absence of proof to the contrary,[99] unless the nature and purposes of the corporation are such that it would not ordinarily have such power.[1]

6. Power to Take and Hold Land by Devise — a. Such Power Generally Affirmed. The power of a foreign corporation to take and hold land by devise, and generally the validity of a devise of land to a foreign corporation, is governed by the foregoing principles. According to the prevailing American doctrine, in the absence of local legislation to the contrary, of which legislation there are few traces, a testator may devise lands situated in one state to a corporation existing in another state.[2]

b. Exceptions to the Rule. But a foreign corporation cannot take by devise contrary to the statute of wills of the domestic state,[3] or contrary to the legislation or public policy of such state prohibiting such corporations from taking or holding land, or legislation imposing conditions which are not complied with.[4] Nor will a devise to a foreign corporation be good where it has no power, under its charter or governing statute, to take such a devise in the state of its creation.[5]

c. Effect of Statute of Wills of Foreign State. In some of the cases it has been held that the statute of wills of the state of a corporation's domicile prohibiting devises to corporations does not operate outside of the state so as to incapacitate the corporation from taking by devise in another state, where it has power under its charter to take and hold land, and the statute of wills of such other state allows devises to corporations.[6] Other cases are to the contrary.[7]

d. Effect of Want of Power, and the Doctrine of Equitable Conversion. If, by reason of a want of power in its charter or governing statute, or by reason of a prohibition in the local law, the foreign corporation has no power to take a devise of lands, the title does not vest at all in the corporation; nor can a court

Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; White *v.* Howard, 46 N. Y. 144.

99. Alward *v.* Holmes, 10 Abb. N. Cas. (N. Y.) 96; Tarpey *v.* Deseret Salt Co., 5 Utah 494, 17 Pac. 631. And see *supra*, I, B, 6, e. To the contrary see Young *v.* Milne, 28 N. Brunsw. 186.

1. See Frye *v.* State Bank, 10 Ill. 332, 335.

2. *Connecticut.*— White *v.* Howard, 38 Conn. 342.

Illinois.— Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166; Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 128, 33 Am. Dec. 481.

Ohio.— American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

Pennsylvania.— Thompson *v.* Swoope, 24 Pa. St. 474. *Compare* Frazier *v.* St. Luke's Church, 10 Pa. Co. Ct. 53.

West Virginia.— University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

United States.— See American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888.

3. White *v.* Howard, 46 N. Y. 144; Fraser *v.* McNaughton, 58 Hun (N. Y.) 30, 11 N. Y. Suppl. 384 [*reversed* on other grounds in 124 N. Y. 479, 26 N. E. 1034]; Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269.

4. Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166; Kerr *v.* Dougherty, 79 N. Y. 327; Levy *v.* Levy, 33 N. Y. 97; Frazier *v.* St. Luke's Church, 10 Pa. Co. Ct. 53.

5. *Connecticut.*— White *v.* Howard, 38 Conn. 342.

Illinois.— Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133.

New York.— Boyce *v.* St. Louis, 29 Barb. 650.

Ohio.— American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

Texas.— House of Mercy *v.* Davidson, 90 Tex. 529, 39 S. W. 924.

See *supra*, I, B, 6; II, A, 5.

Effect of foreign statute of wills see *infra*, II, A, 6, c.

General power to acquire real estate, conferred upon a corporation by its charter, is broad enough to enable it to take by devise. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776. Express authority to take by "devise" is not necessary; power to hold and purchase is sufficient. American Bible Soc. *v.* Marshall, 15 Ohio St. 537.

Power of corporations generally to take by devise see Corporations, 10 Cyc. 1127.

6. White *v.* Howard, 38 Conn. 342; American Bible Soc. *v.* Marshall, 15 Ohio St. 537; Thompson *v.* Swoope, 24 Pa. St. 474. See also Crum *v.* Bliss, 47 Conn. 592.

7. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133. See also House

of equity so apply the doctrine of equitable conversion as to convert the land devised to it into money and turn over to the foreign corporation such money; but the land will descend to the heirs of the testator according to the law of the state in which it is situated.[8] Where, however, a will so directs or authorizes a sale of real estate by the executor as to create an equitable conversion of the same into personalty and gives the proceeds to a foreign corporation, it is a bequest of personalty and valid, notwithstanding the corporation cannot take by devise.[9]

7. Power to Take and Foreclose Mortgages. The power to take mortgages of real estate as a security for debts due and to foreclose the same is generally conceded by the American courts to corporations created under the laws of other states.[10] This power has been conceded to corporations created under the laws of other states with the power, under their charters, to loan money on mortgages[11] to foreign corporations having demands against domestic citizens upon which actions can be maintained in the domestic forum;[12] and to foreign corporations taking such mortgages by way of additional security for debts lawfully contracted within the domestic jurisdiction, although their charter may not have authorized the taking of such security upon an original investment.[13] And it has been held that the mortgagor is estopped from setting up a want of power in the foreign corporation to invest its money upon mortgages in the domestic jurisdic-

of Mercy *v.* Davidson, 90 Tex. 529, 39 S. W. 924.

8. Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; White *v.* Howard, 46 N. Y. 144; Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269; House of Mercy *v.* Davidson, 90 Tex. 529, 39 S. W. 924. But see Frazier *v.* St. Luke's Church, 10 Pa. Co. Ct. 53.

9. Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362; Fraser *v.* United Presb. Church, 124 N. Y. 479, 26 N. E. 1034 [*reversing* 58 Hun 30, 11 N. Y. Suppl. 384]; Draper *v.* Harvard College, 57 How. Pr. (N. Y.) 269. See *infra*, II, C, 2; and Corporations, 10 Cyc. 1130.

10. *Alabama.*— Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427.

Illinois.— Commercial Union Assur. Co. *v.* Scammon, 102 Ill. 46; Stevens *v.* Pratt, 101 Ill. 206.

Indiana.— Pancoast *v.* Travelers Ins. Co., 79 Ind. 172. See also Elston *v.* Piggott, 94 Ind. 14.

Kentucky.— Lathrop *v.* Commercial Bank, 8 Dana 114, 33 Am. Dec. 481.

Louisiana.— Frazier *v.* Wilcox, 4 Rob. 517.

Massachusetts.— American Mut. L. Ins. Co. *v.* Owen, 15 Gray 491.

Minnesota.— Lebanon Sav. Bank *v.* Hollenbeck, 29 Minn. 322, 13 N. W. 145.

Mississippi.— Williams *v.* Creswell, 51 Miss. 817.

Missouri.—Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; Long *v.* Long, 79 Mo. 644; Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181.

Nebraska.— Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873.

New Jersey.— National Trust Co. *v.* Murphy, 30 N. J. Eq. 408.

New York.— Bard *v.* Poole, 12 N. Y. 495; Silver Lake Bank *v.* North, 4 Johns. Ch. 370.

Pennsylvania.— Leasure *v.* Union Mut. L. Ins. Co., 91 Pa. St. 491.

Tennessee.— Pioneer Sav., etc., Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112.

Wisconsin.— Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387.

United States.— Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1. See also Cæsar *v.* Cappell, 83 Fed. 403; Hards *v.* Connecticut Mut. L. Ins. Co., 11 Fed. Cas. No. 6,055, 8 Biss. 234; New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111.

See 12 Cent. Dig. tit. "Corporations," § 2582.

So in Canada.— Birkbeck Invest. Security, etc., Co. *v.* Brabant, 8 Quebec Q. B. 311, Province of Quebec.

11. Farmers' L. & T. Co. *v.* McKinney, 8 Fed. Cas. No. 4,667, 6 McLean 1. A foreign "mortgage company," created for the sole business of lending money on mortgages, might lend its money in Illinois on mortgages, though the laws of Illinois did not provide for the formation of such companies. Nor was this conclusion changed by the language of the incorporation law of that state of 1872, that "corporations may be formed, . . . for any lawful purpose, except banking, insurance, real estate brokerage, the operation of railroads, and the business of loaning money." This statute refers only to the formation of domestic corporations, and was held not to indicate a policy on the part of the legislature to exclude foreign corporations from the state which were organized for the prosecution of business for which domestic corporations could not be permitted. Stevens *v.* Pratt, 101 Ill. 206.

12. American Mut. L. Ins. Co. *v.* Owen, 15 Gray (Mass.) 491.

13. National Trust Co. *v.* Murphy, 30 N. J. Eq. 408.

tion;[14] and, what is equivalent to the last holding, that only the state can set up such a want of power.[15] Of course a state may prohibit a foreign corporation from taking and foreclosing mortgages on land within its limits, or impose conditions precedent to its right to do so;[16] and the power of foreign corporations in this as in other respects is limited by their charter or governing statute.[17] In most states, however, one who borrows money from a foreign corporation, or otherwise incurs a debt to it, and gives a mortgage as security, cannot defend a suit to foreclose on the ground that the transaction was *ultra vires*.[18]

8. Power to Take Lease or License. A foreign corporation has the same power and right as a domestic corporation to take a lease of land,[19] or a license with respect to land,[20] subject to limitations in its charter or governing statute,[21] and provided the transaction is not in violation of the statutes or public policy of the domestic state.[22]

9. Constitutional and Statutory Restriction or Prohibition. Statutes have been enacted in some of the states restraining or prohibiting the power of corporations to hold land within such states. Other statutes impose conditions upon the right of foreign corporations to hold property or to do business in the state.[23] Some of these statutes which have received judicial exposition are referred to in the note below.[24] Where a statute prohibits a foreign corporation from acquiring and holding land, it will not be permitted to circumvent and evade the statute by

14. Pancoast *v.* Travelers Ins. Co., 79 Ind. 172.

15. Carlow *v.* Aultman, 28 Nebr. 672, 44 N. W. 873. See to the same effect St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188.

Validating prior mortgages.— A statute validating mortgages previously taken by a foreign corporation is not in conflict with the clause of the constitution of the United States forbidding a state to deprive any person of property without due process of law. Gross *v.* U. S. Mortgage Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. ed. 795. See *infra*, IV, I.

16. See *supra*, II, A, 9; and *infra*, III, IV.

What transactions are within the statutes see *infra*, III, E *et seq.*

Effect of non-compliance with statutes see *infra*, IV.

17. Frye *v.* State Bank, 10 Ill. 332; Curtis *v.* Hutchinson, 1 Ohio Dec. (Reprint) 471, 10 West. L. J. 134.

Power of corporations generally see Corporations, 10 Cyc. 1127.

18. Pancoast *v.* Travelers Ins. Co., 79 Ind. 172; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; St. Louis Union Nat. Bank *v.* Matthews, 98 U. S. 621, 25 L. ed. 188. See also *supra*, I, B, 6, d, (II).

19. *New Jersey.*—Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505 (holding that under a statute authorizing a domestic canal company to lease to "any person or persons, or corporation," the lease could be made to a foreign corporation which had been recognized by the legislature and which had a preëxisting capacity to accept the lease); Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130.

Ohio.— Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343, oil-land lease.

Pennsylvania.— Grant *v.* Henry Clay Coal Co., 80 Pa. St. 208 (lease of coal-mines); Baltimore, etc., Steamboat Co. *v.* McCutcheon, 13 Pa. St. 13 (lease of office in which to transact business).

United States.— Blodgett *v.* Lanyan Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Northern Transp. Co. *v.* Chicago, 18 Fed. Cas. No. 10,324, 7 Biss. 45 [*affirmed* in 99 U. S. 635, 25 L. ed. 336], lease of premises by transportation company for purposes of its business.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151, sustaining, on the ground of comity, a contract by which a Canadian railroad company leased to a New York telegraph company the exclusive right for ninety-nine years to construct and operate a line of telegraph over its road. Gwynne, J., dissented.

20. See Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776, holding that a license to fish in the waters of the state, and to locate and occupy a fishing site, does not constitute ownership of land, within Const. art. 2, § 33, forbidding the acquisition of lands in the state by foreign corporations.

21. See the cases cited in the preceding note; and *supra*, II, A, 4; *infra*, II, A, 9.

22. Van Steuben *v.* Central R. Co., 178 Pa. St. 367, 35 Atl. 992, 34 L. R. A. 577 (lease to foreign railroad company held void); Chapman *v.* Pittsburgh, etc., R. Co., 18 W. Va. 184 (lease of railroad). *Compare* Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151.

23. See *infra*, III.

Effect of such statutes see, in addition to the following note, *infra*, IV, J.

24. *Kansas.*— Laws (1891), c. 3, construed in Omnium Invest. Co. *v.* North American Trust Co., 65 Kan. 50, 68 Pac. 1089, with the conclusion that where an agent of a corporation wrongfully took title to real estate in his own name, and conveyed the same without consideration to another, with knowledge of the wrong, the corporation could sue to compel the grantee to convey to it; also that

any scheme or device whatever, as, for example, by taking and holding through a trustee.[25] But it has been held that a statute prohibiting such a corporation from holding land does not prohibit it from acquiring and holding a majority of the stock of a domestic corporation owning land and thereby controlling the same.[26]

10. Power of Eminent Domain. A foreign corporation cannot acquire land by condemnation proceedings under the power of eminent domain unless authorized to do so by the laws of the domestic state, but such power may be conferred upon it in the absence of constitutional provision to the contrary.[27]

it is the duty of the county attorney of the county within which the land is situated to enforce the forfeiture denounced by the statute by an action in the name of the state.

Missouri.— Const. art. 2, § 8, providing that no religious corporation can be established in the state except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and seminaries, construed in Reorganized Church of Jesus Christ, etc., *v.* Church of Christ, 60 Fed. 937, with the conclusion that it does not prevent a foreign religious corporation from holding real estate within the state.

Pennsylvania.— The act of April 26, 1855 (Pamphl. Laws (1855), p. 329, § 5), construed in Com. *v.* New York, etc., R. Co., 114 Pa. St. 340, 7 Atl. 756, with the conclusion that land acquired in violation of the statute might be escheated to the state. But this decision was overruled in Com. *v.* New York, etc., R. Co., 132 Pa. St. 591, 19 Atl. 291, 7 L. R. A. 634. See also White *v.* Ryan, 15 Pa. Co. Ct. 170.

Tennessee.— The act of March 26, 1891, prohibiting the acquisition of property by a foreign corporation not complying with the provisions of the act, construed with the conclusion that the statute does not prevent such a corporation, lawfully doing business in the state, from making a valid conveyance of property which it may have acquired. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116. Under Acts (1895), c. 81, § 1, providing that a foreign corporation desiring to own property or carry on business in the state shall first file with the secretary of state a copy of its charter; and section 2, making it unlawful for such corporation to do business in the state until it has complied with section 1, it was held that a purchase of real estate by a foreign corporation which had not at that time complied with the statute was not unlawful, it not being the doing of business, and hence the failure to observe the statute before the purchase was no bar to a recovery by the corporation for damage to the land from the change of grade of a street. Louisville Property Co. *v.* Nashville, (Tenn. Sup. 1905) 84 S. W. 810.

Texas.— Rev. St. arts. 745, 746, prohibiting foreign corporations from doing business in the state without procuring a permit to do so, construed with the conclusion that this does not prevent a foreign corporation from acquiring and holding real estate or personal property in Texas, since this is not the transaction of business within the meaning of the statute. Lakeview Land Co. *v.* San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766. See also Wilson *v.* Peace, (Civ. App. 1905) 85 S. W. 31; Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987.

Virginia.— Code, § 1105, making officers, agents, and employees of foreign corporations liable for their debts where such corporations do business in the state without complying with the provisions of Code, § 1104, requiring the establishment of an office, the filing of its charter, and the appointment of an agent, does not apply to a contract made out of the state by which title to land in the state is acquired. Goldberry *v.* Carter, 100 Va. 438, 41 S. E. 858.

Washington.— Const. art. 2, § 33, forbidding the acquisition of lands in the state by foreign corporations, construed in Hastings *v.* Anacortes Packing Co., 29 Wash. 224, 69 Pac. 776, with the conclusion that a license to fish in the waters of the state, and to locate and occupy a fishing site, does not constitute ownership of lands within the meaning of the provision. The Washington statute (Laws (1889–1890), p. 288), prohibiting foreign corporations from carrying on the "business of buying and selling land, and dealing in real estate, and carrying on a brokerage business therein," by its express terms is limited to foreign corporations organized after the passage of the act. Realty Co. *v.* Appolonio, 5 Wash. 437, 32 Pac. 219.

Prohibition of condemnation of land.— The Arkansas constitutional provision prohibiting a foreign railroad corporation from securing lands for the use of its road by condemnation or appropriation does not prohibit such a corporation from acquiring such lands by agreement with the owner. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. 627. And see Charleston, etc., R. Co. *v.* Hughes, 105 Ga. 1, 30 S. E. 972, 70 Am. St. Rep. 17.

25. Com. *v.* New York, etc., R. Co., 114 Pa. St. 340, 7 Atl. 756. See also *infra*, III, O; and Corporations, 10 Cyc. 1131.

26. Com. *v.* New York, etc., R. Co., 132 Pa. St. 591, 607, 19 Atl. 291, 7 L. R. A. 634 (where it is said: "It must not be forgotten, however, that controlling real estate, by means of the ownership of a majority of the stock of such corporation, is a very different matter from holding the title to such real estate"); White *v.* Ryan, 15 Pa. Co. Ct. 170.

27. See Eminent Domain, 15 Cyc. 573.

B. Power to Alienate or Encumber Lands — 1. Such Power Everywhere Conceded. Foreign corporations have the same power to alienate or to mortgage or otherwise encumber their property that domestic corporations or natural persons would have,[28] subject to any limitations as to their powers or the mode of exercising them in their charter or governing statute;[29] although the legislature of the state in which the lands are situated may, and sometimes does, restrain the exercise of the power, when to allow its exercise will prejudice the rights of its own citizens as creditors of the corporation.[30]

2. What Law Governs as to Mode of Conveyance. In respect of the mode in which the conveyance or mortgage is made, the local law governs; although the question whether the directors have received power from the shareholders to authorize the mortgage, and other questions as to the mode of exercising the corporate powers, must be determined by reference to the charter, governing statute, or by-laws of the corporation.[31]

C. Power to Acquire, Hold, and Transfer Personal Property — 1. In General. It is everywhere conceded that a foreign corporation has the same power and right as a domestic corporation to acquire, hold, and transfer personal property in other states than that of its creation,[32] subject to limitations in its

28. *Massachusetts.*— Saltmarsh *v.* Spaulding, 147 Mass. 227, 17 N. E. 316, mortgage. See Peters *v.* Boston, etc., R. Co., 114 Mass. 127, lease.

Missouri.— Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560, mortgage.

Nevada.— Bassett *v.* Monte Christo Gold, etc., Min. Co., 15 Nev. 293, mortgage.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337, mortgagee.

Texas.— Wilson *v.* Peace, (Civ. App. 1905) 85 S. W. 31, lease and assignment of rent not doing business in state.

Utah.— Tarpey *v.* Deseret Salt Co., 5 Utah 494, 17 Pac. 631, conveyance.

United States.— American Waterworks Co. *v.* Farmers' L. & T. Co., 73 Fed. 956, 20 C. C. A. 133 (mortgage); Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116 (sale and conveyance).

See 12 Cent. Dig. tit. Corporations, § 2576 *et seq.*

29. Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560; Talmadge *v.* North American Coal, etc., Co., 3 Head (Tenn.) 337. See *supra*, I, B, 6.

Power of corporations generally to alienate or mortgage property see Corporations, 10 Cyc. 1138, 1182.

30. A decision of one of the state courts of *nisi prius* in Colorado has been quoted to the proposition that a foreign corporation cannot encumber its property situated in Colorado, under the Colorado Corporation Law, section 260, to the exclusion of claims asserted by citizens of the state, even though they are not recorded and were unknown to parties advancing money on mortgage of the corporate property, who acted with due diligence. Holland Trust Co. *v.* Taos Valley Co., 11 R. & Corp. L. J. 74. A state statute, declaring it unlawful for any foreign corporation to own or acquire property in the state, or do any business there, without first filing a copy of its charter in the office of the secretary of state, and an abstract thereof in each county in which it desires to do business (Tenn. Act, March 26, 1891), does not take it out of the power of a railroad company previously owning property, and authorized to do business in the state, to make a valid sale of all such property, without first complying with the provisions of the statute. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

31. Saltmarsh *v.* Spaulding, 147 Mass. 224, 17 N. E. 316; Union Nat. Bank *v.* State Nat. Bank, 155 Mo. 95, 55 S. W. 989, 78 Am. St. Rep. 560. For instance it has been held in Massachusetts that a statute of that state, providing that a corporation shall not convey or mortgage its real estate, or give a lease therefor for more than a year, unless authorized by a vote of the shareholders at a meeting called for the purpose, does not apply to foreign corporations, nor invalidate a mortgage made by a New Hampshire corporation of its lands situated in Massachusetts, where there has been no such vote of the shareholders. Saltmarsh *v.* Spaulding, *supra*. So the question whether such a mortgage was void by reason of the fact that the meeting of the directors at which it was authorized had been held, not in New Hampshire, the state of the domicile of the corporation, but in Massachusetts, the state of the *situs* of the land, was determined, with reference to the laws of New Hampshire and the by-laws of the corporation, in favor of the validity of the mortgage. See also Union Nat. Bank *v.* State Nat. Bank, *supra*.

32. Lakeview Land Co. *v.* San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Commercial Nat. Bank *v.* Corcoran, 6 Ont. 527. See also *supra*, I, B; I, C, 4, c, and the many cases there cited.

Power of corporations generally see Corporations, 10 Cyc. 1139.

Power of foreign corporations to own vessels see, generally, Shipping.

charter or governing statute,[33] and to the restrictions or prohibitions, if any, in the laws of the domestic state.[34]

2. Power to Take Bequest. Subject to charter or statutory restrictions, if any,[35] a foreign corporation has the same power as a domestic corporation to take a bequest of personal property.[36] In some states restrictions are imposed by statute upon the power of a testator to make bequests to charitable or other corporations;[37] but it has been held that a statute of the state of a corporation's creation imposing such restrictions does not operate extraterritorially, so as to affect bequests to the corporation in other states in which there is no such statute,[38] or so as to affect a bequest by a resident of another state.[39]

D. Power to Act as Executor, Administrator, Guardian, or Trustee. If authorized by its charter,[40] and not prohibited by the laws or public policy of the domestic state,[41] a foreign corporation may to the same extent as a domestic

33. See *supra*, I, B, 6.

34. See *supra*, I, C, 4; and *infra*, III; IV.

35. See *infra*, note 37; and *supra*, I, B, 6; I, C, 4; II, A, 5, 6.

36. *Connecticut.*— Crum *v.* Bliss, 47 Conn. 592.

Maryland.— Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362; Brown *v.* Thompkins, 49 Md. 423; Vansant *v.* Roberts, 3 Md. 119.

Massachusetts.— Healy *v.* Reed, 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766; Burbank *v.* Whitney, 24 Pick. 146, 35 Am. Dec. 312.

Michigan.— *In re* Tickno, 13 Mich. 44.

New York.— *In re* Huss, 126 N. Y. 537, 27 N. E. 784, 12 L. R. A. 620; Fraser *v.* United Presb. Church, 124 N. Y. 479, 26 N. E. 1034 [*reversing* 58 Hun 30, 11 N. Y. Suppl. 384]; Hollis *v.* Drew Theological Seminary, 95 N. Y. 166; Chamberlain *v.* Chamberlain, 43 N. Y. 424; Sherwood *v.* American Bible Soc., 4 Abb. Dec. 227, 1 Keyes 561; Draper *v.* Harvard College, 57 How. Pr. 269. See also *In re* Lampson, 161 N. Y. 511, 56 N. E. 9 [*affirming* 33 N. Y. App. Div. 49, 53 N. Y. Suppl. 531].

Pennsylvania.— See Thompson *v.* Swoope, 24 Pa. St. 474.

Virginia.—Presbyterian Church *v.* Guthrie, 86 Va. 125, 10 S. E. 318, 6 L. R. A. 321; Roy *v.* Rowzie, 25 Gratt. 599.

West Virginia.— Lewisburg University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410; Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302.

See 12 Cent. Dig. tit. "Corporations," § 2577.

Bequests to charitable corporations see Charities, 6 Cyc. 895 *et seq.*

37. See Methodist Episcopal Church Extension *v.* Smith, 56 Md. 362; Kerr *v.* Dougherty, 79 N. Y. 327. See also Charities, 6 Cyc. 895; and, generally, Wills.

In New York the membership corporations law (Laws (1895), c. 559), by excepting from its schedule of repealed statutes Acts (1848), c. 319, § 6, authorizing corporations created thereunder to take property by will, if executed more than two months before the testator's death, did not incorporate such section in the act of 1895, so as to make it of general application; and hence the limitation therein contained applies merely to corporations created under the act of 1848, and not to foreign corporations. *In re* Lampson, 161 N. Y. 511, 56 N. E. 9 [*affirming* 33 N. Y. App. Div. 49, 53 N. Y. Suppl. 531].

Equitable conversion.— The fact that a corporation cannot take by devise does not prevent it from taking under a will where there is an equitable conversion of the real estate into personalty. See *supra*, II, A, 6, d.

38. Crum *v.* Bliss, 47 Conn. 592. *Compare supra*, II, A, 6, c.

39. Healy *v.* Reed, 153 Mass. 197, 26 N. E. 404, 10 L. R. A. 766. But see Kerr *v.* Dougherty, 79 N. Y. 327.

40. Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776; Glaser *v.* Priest, 29 Mo. App. 1. See also *supra*, I, B, 6; II, A, 5.

Power of corporations generally see Corporations, 10 Cyc. 1125, 1140–1142.

41. Farmers' L. & T. Co. *v.* Smith, 74 Conn. 625, 51 Atl. 609 (holding that under the Corporation Act of 1901, § 51, forbidding foreign corporations from engaging in any kind of business which is not permitted to domestic corporations organized under its provisions, and section 2, declaring that no trust company can be formed under the act, a foreign trust company could not be appointed as an executor in Connecticut); Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666] (foreign trust company in deed of trust by railroad company must comply with statute regulating foreign corporations before it can act as trustee with active duties to perform); Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166 (holding that a foreign corporation to which land had been devised as executor and trustee, with certain powers with respect thereto, was doing business in the state in exercising such powers, and must comply with the statute regulating the doing of business in the state by foreign corporations); U. S. Trust Co. *v.* Lee, 73 Ill. 142, 24 Am. Rep. 236 (denying the power or right of a foreign trust company, appointed trustee under a will, to hold real estate in trust in Illinois, as being contrary to the policy of that state); Starkweather *v.* American Bible Soc., 72 Ill. 50, 22 Am. Rep. 133; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412; American L. & T. Co. *v.* East, etc., R.

corporation take and hold real or personal property in trust, and act as trustee, executor, administrator, or guardian, etc.[42]

III. STATE LAWS IMPOSING CONDITIONS, RESTRICTIONS, AND REGULATIONS.

A. Validity of Such Laws in General. It may be stated, as a general proposition, that, as a state has the power entirely to exclude from its limits a foreign corporation,[43] so it has the power, subject to constitutional limitations,[44] of prescribing the terms upon which alone it may be permitted to do business within its limits, and of imposing any restrictions which it may see fit.[45] "It

Co., 37 Fed. 242; Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146.

42. *Connecticut.*— Crum *v.* Bliss, 47 Conn. 592.

Delaware.— Fidelity Ins., etc., Co. *v.* Niven, 5 Houst. 416, 1 Am. St. Rep. 150, executor or administrator.

Illinois.— Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369 [*affirming* 84 Ill. App. 84] (foreign trust company as trustee in deed of trust to secure bonds); Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666] (the same); Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166 (foreign corporation as executor and trustee under will); Santa Clara Female Academy *v.* Sullivan, 116 Ill. 375, 6 N. E. 183, 56 Am. Rep. 776 (educational corporation).

Missouri.— Glaser *v.* Priest, 29 Mo. App. 1, foreign trust company may act as committee of estate of person adjudged to be a habitual drunkard.

Ohio.— American Bible Soc. *v.* Marshall, 15 Ohio St. 537, may take a devise in trust for charitable purposes.

Texas.— See Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987.

Virginia.— Roy *v.* Rowzie, 25 Gratt. 599, charitable bequest.

West Virginia.— Lewisburg University *v.* Tucker, 31 W. Va. 621, 8 S. E. 410 (charitable bequest); Wilson *v.* Perry, 29 W. Va. 169, 1 S. E. 302 (charitable devise or bequest).

United States.— American, etc., Christian Union *v.* Yount, 101 U. S. 352, 25 L. ed. 888 (charitable devise); Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412 (deed of trust to trust company); American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242 (same); Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 27 Fed. 146 (same).

Charitable corporations see CHARITIES, 6 Cyc. 895.

Devise or bequest see *supra*, II, A, 6; II, C, 2.

43. See *supra*, I, C, 4.

44. See *supra*, I, D; and *infra*, III.

45. *Alabama.*— State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141; Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238; Nelms *v.* Edinburg-American Mortg. Co., 92 Ala. 157, 9 So. 141; Farrior *v.* New England Mortg. Sec. Co., 88 Ala. 275, 7 So. 200; Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339.

Arkansas.— Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

District of Columbia.— Manning *v.* Chesapeake, etc., Telephone Co., 18 App. Cas. 191 [*reversed* on other grounds in 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144].

Georgia.— Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

Idaho.— Smith *v.* Alberta, etc., Express, etc., Co., (1903) 74 Pac. 1071.

Illinois.— Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683; Western Union Tel. Co. *v.* Lieb, 76 Ill. 172; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana.— State *v.* Briggs, 116 Ind. 55, 18 N. E. 395; State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; Phenix Ins. Co. *v.* Burdett, 112 Ind. 204, 13 N. E. 705; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236; U. S. Express Co. *v.* Lucas, 36 Ind. 361.

Iowa.— Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; Green *v.* Equitable Mut. L., etc., Assoc., 105 Iowa 628, 75 N. W. 635; Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Kentucky.— Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284; Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41; Phœnix Ins. Co. *v.* Com., 5 Bush 68, 96 Am. Dec. 331; Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

Louisiana.— State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309; State *v.* Fosdick, 21 La. Ann. 434; State *v.* Lathrop, 10 La. Ann. 398.

Maryland.— Talbott *v.* New York Fidelity, etc., Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584.

Massachusetts.— Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717.

Michigan.— Pollock *v.* German F. Ins. Co., 132 Mich. 225, 93 N. W. 436; Isle Royale Land Corp. *v.* Secretary of State, 76 Mich. 162, 43 N. W. 14; Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; People *v.* Howard, 50 Mich. 239, 15 N. W. 101;

has been repeatedly held, and there seems to be no conflict of authority, that corporations of one state have no right to exercise their franchises in another state except upon the assent of such other state, and upon such terms as may be imposed by the state where their business is to be done. The conditions imposed may be reasonable or unreasonable; they are absolutely within the discretion of

Home Ins. Co. *v.* Davis, 29 Mich. 238; People *v.* Judge Jackson Cir. Ct., 21 Mich. 577, 4 Am. Rep. 504.

Minnesota.— Tolerton, etc., Co. *v.* Barck, 84 Minn. 497, 88 N. W. 19; State *v.* Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

Mississippi.— Postal Tel. Cable Co. *v.* Adams, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476.

Missouri.— Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552]; Ehrhardt *v.* Robertson, 78 Mo. App. 404.

Montana.— State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394, 71 Pac. 311.

Nebraska.—State *v.* Insurance Co. of North America, (1904) 99 N. W. 36 [*reversed* on other grounds on rehearing in (1904) 100 N. W. 405]; State *v.* Fleming, (1903) 97 N. W. 1063; State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey.— Tatem *v.* Wright, 23 N. J. L. 429. See also Coler *v.* Tacoma R., etc., Co., 65 N. J. Eq. 347, 54 Atl. 413, 103 Am. St. Rep. 786 [*reversing* 64 N. J. Eq. 117, 53 Atl. 680].

New York.— People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 [*affirming* 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510]; People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542 [*affirming* 61 Hun 83, 15 N. Y. Suppl. 446]; People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53; Columbia Exch. Bank *v.* Tiddy, 67 N. C. 169.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Oregon.— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

Pennsylvania.— Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533; Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724; List *v.* Com., 118 Pa. St. 322, 12 Atl. 277; Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513; Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Matthews *v.* Reformed Presb. Church Theological Seminary, 2 Brewst. 541.

South Carolina.— Sandel *v.* Atlanta L. Ins. Co., 53 S. C. 241, 31 S. E. 230; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941; Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; State *v.* Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

Texas.— English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169; Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936; Huffman *v.* Western Mortg., etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570; Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

Vermont.— Cook *v.* Howland, 74 Vt. 393, 52 Atl. 973, 93 Am. St. Rep. 912, 59 L. R. A. 338; Granite State Mut. Aid Assoc. *v.* Porter, 58 Vt. 581, 3 Atl. 545; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Virginia.— Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125, 43 S. E. 207; Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630; Slaughter *v.* Com., 13 Gratt. 767.

Wisconsin.— Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904; Morse *v.* Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580; Milwaukee Fire Dept. *v.* Helfenstein, 16 Wis. 136; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

United States.— Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 20 S. Ct. 518, 44 L. ed. 657; Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Hooper *v.* California, 155 U. S. 648, 15 S. Ct. 207, 39 L. ed. 297 (state has the right to prohibit her citizen from contracting within her jurisdiction, either in his own behalf or through an agent, with a foreign corporation which has not acquired the privilege of engaging in business therein); Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342; Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365; Ducat *v.* Chicago, 10 Wall. 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. ed. 451; Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711; Oregonian R. Co. *v.* Oregon R., etc., Co., 27 Fed. 277; *In re* Comstock, 6 Fed. Cas. No. 3,078, 3 Sawy. 218; Lamb *v.* Lamb, 14 Fed. Cas. No. 8,018, 6 Biss. 420; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Canada.— Canadian Pac. R. Co. *v.* Western Union Tel. Co., 17 Can. Sup. Ct. 151; Halifax *v.* Jones, 28 Nova Scotia 452; Lambe *v.* Dewhurst, 16 Quebec Super. Ct. 326; Globe Mut. L. Ins. Co. *v.* Sun Mut. L. Ins. Co., 22 L. C. Jur. 38, 1 Montreal Leg. N. 139.

See 12 Cent. Dig. tit. "Corporations," § 2505 *et seq.*; and *supra*, I, C, 4.

the legislature."[46] Such terms or restrictions may be imposed by the states with respect to corporations created by congress as the local legislature of the District of Columbia,[47] by congress as such local legislature with respect to corporations created by the states or other foreign corporations,[48] and by congress or the territorial legislatures with respect to state and other foreign corporations in the territories.[49] A federal court, it has been held, has no power to compel the admission of a foreign corporation which has not complied with the laws of the state imposing conditions precedent to the right to do business therein.[50]

B. Particular Conditions, Restrictions, and Regulations — 1. License-Fees or Taxes. There is no prohibition in the federal constitution which operates to restrain the legislature of a state from exacting from foreign corporations, as a condition precedent to their being admitted to do business within the state, license-fees or taxes, even where they are not imposed upon similar domestic corporations, and in most jurisdictions there are statutes imposing such fees or taxes.[51] It is competent for the legislature in imposing a tax upon a foreign

46. Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474. And see to the same effect Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552]; Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904; Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

47. State *v.* Briggs, 116 Ind. 55, 18 N. E. 395; Daly *v.* U. S. National L. Ins. Co., 64 Ind. 1. See *supra*, I, A, 4.

48. Manning *v.* Chesapeake, etc., Telephone Co., 18 App. Cas. 191 [*reversed* on other grounds in 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144]. See also *supra*, I, A, 4.

49. Ammons *v.* Brunswick-Balke Collender Co., (Indian Terr. 1904) 82 S. W. 937; Myatt *v.* Ponca City Land, etc., Co., 14 Okla. 189, 78 Pac. 185; Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910.

50. Evansville, etc., Traction Co. *v.* Henderson Bridge Co., 132 Fed. 402, federal court in Kentucky cannot compel a Kentucky corporation to permit an Indiana railroad company, which has not complied with the Kentucky statute requiring incorporation in the state by filing its articles of incorporation, to connect with and use its tracks over a bridge across the Ohio river, to enable such foreign corporation to do business in Kentucky.

51. *Alabama.*— Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238.

Georgia.— Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

Illinois.— Home Ins. Co. *v.* Swigert, 104 Ill. 653; Walker *v.* Springfield, 94 Ill. 364; Western Union Tel. Co. *v.* Lieb, 76 Ill. 172; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana.— State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574.

Iowa.— Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548.

Kansas.— Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Kentucky.— Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41; Phœnix Ins. Co. *v.* Com., 5 Bush 68, 96 Am. Dec. 331; Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

Louisiana.— State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 4 So. 504; State *v.* Fosdick, 21 La. Ann. 434; State *v.* Lathrop, 10 La. Ann. 398.

Massachusetts.— Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488.

Michigan.— Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Mississippi.— Postal Tel. Cable Co. *v.* Adams, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476.

Montana.— State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394, 71 Pac. 311.

Nebraska.—State *v.* Insurance Co. of North America, (1904) 99 N. W. 36, 100 N. W. 405; State *v.* Fleming, (1903) 97 N. W. 1063.

New Jersey.— Tatem *v.* Wright, 23 N. J. L. 429. But see Erie R. Co. *v.* State, 31 N. J. L. 531, 86 Am. Dec. 226.

New York.— People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542; People *v.* Equitable Trust Co., 96 N. Y. 387; People *v.* Miller, 90 N. Y. App. Div. 560, 86 N. Y. Suppl. 386.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Pennsylvania.— Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724; Com. *v.* Standard Oil Co., 101 Pa. St. 119; Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513.

Tennessee.— State *v.* Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

Virginia.— Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125, 43 S. E. 207; Slaughter *v.* Com., 13 Gratt. 767. And see American Surety Co. *v.* Com., 102 Va. 841, 47 S. E. 994, construing Va. Const. art. 12, § 156*a*, and Code (1897), § 1104, as amended by Acts

corporation doing business in the state, as upon the receipts of the business carried on in the state, to require that it be paid by the resident agent of the corporation, and this liability on default by him may be enforced by suit.[52] The statutes imposing a license-fee or tax upon foreign corporations do not apply of course to a foreign corporation which owns no property and does no business in the state, and some statutes expressly require that the corporation, to be subject to their provisions, shall employ some part of its capital within the state.[53]

2. Filing Charter, Articles, or Certificate of Incorporation — a. In General. Statutes exist in many of the states requiring any foreign corporation, seeking to do business within the state, to file a copy of its charter, certificate of incorporation, or articles of association, by whatever name called, with the secretary of state or some other officer, before doing any business in the state.[54] Such statutes

(1902–1904), p. 360, and by Act, May 15, 1903.

United States.— Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650; Home Ins. Co. *v.* Augusta, 93 U. S. 116, 23 L. ed. 825; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. 566, 19 L. ed. 1029; Ducat *v.* Chicago, 10 Wall. 410, 19 L. ed. 972; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

Canada.— Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117; McLeod *v.* Sandall, 26 N. Brunsw. 526; Halifax *v.* Jones, 28 Nova Scotia 452; Lambe *v.* Dewhurst, 16 Quebec Super. Ct. 326.

See 12 Cent. Dig. tit. "Corporations," § 2508.

Recovery of fee paid under protest.—A foreign corporation which has paid a franchise fee under protest in order to obtain the filing of its articles of association and the privilege of doing business in the state cannot recover the money back, although a part of its business is done by traveling agents, selling its products. Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119. *Compare supra*, I, D, 3, c; *infra*, III, B, 1.

52. State *v.* Sloss, 83 Ala. 93, 3 So. 745. See also Lawless *v.* Sullivan, 3 Can. Sup. Ct. 117; McLeod *v.* Sandall, 26 N. Brunsw. 526; Halifax *v.* Jones, 28 Nova Scotia 452.

53. See the cases cited in the preceding note. And see, generally, Taxation.

What constitutes "doing business" in the state see *infra*, III, E *et seq.*

In New York the statute (Laws (1896), c. 908, as amended by Laws (1901), c. 558) imposes upon foreign corporations doing business in the state a license-fee and franchise tax to be computed upon the basis of the capital stock employed by the corporation within the state; and under this statute a foreign corporation is not liable to the license-fee or tax unless it is doing business in the state and its capital or some portion thereof is employed within the state. People *v.* Roberts, 154 N. Y. 1, 47 N. E. 974 [*reversing* 90 Hun 474, 35 N. Y. Suppl. 968]. See People *v.* Miller, 90 N. Y. App. Div. 560, 86 N. Y. Suppl. 386; People *v.* Miller, 90 N. Y. App. Div. 545, 85 N. Y. Suppl. 849.

In Pennsylvania the statute (Act May 8, 1901, Pub. Laws 150) imposes upon foreign corporations whose principal office or chief place of business is located in the commonwealth, or which have any part of their capital employed wholly within the commonwealth, a bonus of one third of one per cent upon the amount of their capital employed or to be employed wholly within the commonwealth. This statute affects those foreign corporations only, which, after the passage of the act, locate their chief place of business or employ some part of their capital wholly within the commonwealth. Com. *v.* Danville Bessemer Co., 207 Pa. St. 302, 56 Atl. 871.

54. As to the construction and application of such statutes see the following cases:

California.— Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398; South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222.

Indiana.— American Ins. Co. *v.* Butler, 70 Ind. 1.

Iowa.— State *v.* Chicago, etc., R. Co., 80 Iowa 586, 46 N. W. 741.

Michigan.— Hoskins *v.* Rochester Sav., etc., Assoc., 133 Mich. 505, 95 N. W. 566.

Minnesota.— State *v.* Sioux City, etc., R. Co., 43 Minn. 17, 44 N. W. 1032.

Montana.— Manhattan Trust Co. *v.* Davis, 23 Mont. 273, 58 Pac. 718; State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004.

Nebraska.— Holt *v.* Rust-Owen Lumber Co., 2 Nebr. (Unoff.) 170, 96 N. W. 613.

Nevada.— Evans *v.* Lee, 11 Nev. 194.

Pennsylvania.— Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533.

South Carolina.— State *v.* Tompkins, 48 S. C. 49, 25 S. E. 982.

Tennessee.— Nichols, etc., Co. *v.* Loyd, 111 Tenn. 145, 76 S. W. 911; U. S. Saving, etc., Co. *v.* Miller, (Ch. App. 1897) 47 S. W. 17.

Texas.— Huffman *v.* Western Mortg., etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

Washington.— Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

United States.— Hammer *v.* Garfield Min., etc., Co., 130 U. S. 291, 9 S. Ct. 548, 32 L. ed. 964 (authentication of copy under Montana statute); Black *v.* Caldwell, 83 Fed. 880 (Montana statute).

impose reasonable requirements as a condition precedent to the right of the foreign corporation to do business within the domestic state or territory, and are generally held to be valid.[55]

b. A Mode of Domesticating Foreign Corporations. This is one of the modes adopted by some of the states for domesticating foreign corporations.[56] A foreign corporation cannot in general be domesticated without its consent. It cannot, for instance, be compelled to become a domestic corporation of another state by the act of its general counsel in filing its charter and by-laws with the secretary of such other state, without its knowledge or consent, his authority being limited to prosecuting and defending suits specially intrusted to him, and to the payment of taxes and license-fees, where it promptly disavows his acts and notifies the secretary of such other state, and demands the return of the papers deposited with him.[57]

c. Penalties and Disabilities For Failure to Comply With Statute. Some of the statutes under consideration not only impose penalties[58] upon the foreign corporation or its agent neglecting to comply with their provisions, but also declare that all their acts and contracts made within the state during the period of their default shall be void.[59]

d. Evidentiary Character of Certificate Filed by Corporation. It has been held that a certificate filed by a foreign corporation in the office of the secretary of state, which was a declaration of its existence as a foreign corporation, although not the strongest possible evidence of that fact, was not for that reason secondary evidence, as it did not presuppose greater evidence, but was competent as primary evidence of an admission by the corporation.[60]

3. Appointment of Agent Upon Whom Process May Be Served. A foreign corporation may be and very generally is required by the legislature of a state within which it seeks to do business to appoint a resident agent, upon whom all process may be served in suits against such corporation, and to execute and file a power of attorney in due form to that end;[61] and in default of which it will not

Non-compliance caused by act or omission of officer of domestic state.— Where a foreign corporation prior to making a contract in the state has substantially complied with the restrictive statute by obtaining a certificate of authority to do business from the state auditor, having first furnished him, as required by the statute, with a statement showing, among other things, its act of incorporation, and has filed such certificate, with a certified copy of the statement in the clerk's office of the proper county, its contracts are not rendered invalid or unenforceable because the certified copy of the statement so filed, by reason of the auditor's omission, is defective in not containing, as required by the statute, a copy of the act of incorporation filed with the auditor, since the defect is due to the auditor's act, and not to any omission of the corporation or its agents. American Ins. Co. *v.* Butler, 70 Ind. 1.

55. Rio Grande Western R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995 (holding that without complying with such a condition a mining corporation chartered in another state cannot engage in its business of mining in Utah or acquire any water-rights under the laws of that state); Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910. See also Ehrhardt *v.* Robertson, 78 Mo. App. 404; State *v.* Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893; and other cases in the preceding note.

56. See *supra*, I, A, 3, b, (IV). Under the Iowa statute relating to railroad companies, and providing that such a company, organized under the laws of another state, owning and operating a line of road within the state of Iowa, "shall have and possess all the powers, franchises, rights, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the laws of this state, including the right to sue, and the liability to be sued, the same as railroads organized under the laws of this state," it was held that in the absence of evidence that a foreign railroad company had complied with the statute, it was not entitled to personal service of notice of a proceeding to establish a road across its track. Even if domestic corporations were entitled to such notice, the foreign corporation could not claim the right of a domestic corporation without showing compliance with the statute. State *v.* Chicago, etc., R. Co., 80 Iowa 586, 46 N. W. 741.

57. New York Mut. Reserve Fund L. Assoc. *v.* Thompson, 125 N. C. 435, 34 S. E. 537.

58. See *infra*, III, K; IV, M.

59. See *infra*, IV, B, 2.

60. Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691, 21 Ky. L. Rep. 1483.

61. As to the validity, construction, and effect of such statutes see the following cases:

Alabama.— Hanchey *v.* Southern Home Bldg., etc., Assoc., 140 Ala. 245, 37 So. 272; McLeod *v.* American Freehold Land Mortg. Co., 100 Ala. 496, 14 So. 409; McCall

be permitted to do business within the state, and any contracts which it assumes to make within the state may be voidable at least in the absence of circumstances of estoppel.[62] Many of the states have thought the matter of sufficient importance to embody in their constitutions provisions requiring foreign corporations doing business within the state to keep a known place of business and authorized resident agents therein.[63] And statutes have been enacted in affirmation of these constitutional provisions.[64] These constitutional provisions, being prohibitory, are generally held to be self-enforcing;[65] but the provision of the constitution of Arkansas was held not to be self-executing, and not operative until made effectual by an act of the legislature.[66] The agent appointed by a foreign corporation

v. American Freehold Land Mortg. Co., 99 Ala. 427, 12 So. 806; Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141; New England Mortg. Security Co. *v.* Ingram, 91 Ala. 337, 9 So. 140 (sufficiency of compliance with statute); Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90.

Arkansas.— Mullins *v.* Central Coal, etc., Co., (1904) 84 S. W. 477; St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

California.— Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398, act of March 8, 1901 (St. (1901) p. 108, c. 93), imposing penalty for failure to file articles of incorporation, does not repeal act of March 17, 1899 (St. (1899) p. 111, c. 94), prohibiting maintenance or defense of action until designation of agent upon whom process may be served.

Colorado.— Utley *v.* Clark-Gardiner Lode Min. Co., 4 Colo. 369.

Georgia.— Equity Life Assoc. *v.* Gammon, 119 Ga. 271, 46 S. E. 100.

Idaho.— Smith *v.* Alberta, etc., Exploration Co., (1903) 74 Pac. 1071.

Indiana.— Morrow *v.* U. S. Mortgage Co., 96 Ind. 21.

Iowa.— Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635; Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678; Gross *v.* Nichols, 72 Iowa 239, 33 N. W. 653.

Kentucky.— Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284.

Massachusetts.— Gibson *v.* Manufacturers' Ins. Co., 144 Mass. 81, 10 N. E. 729.

Minnesota.— Magoffin *v.* Mutual Reserve Fund Life Assoc., 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699; Tolerton, etc., Co. *v.* Barck, 84 Minn. 497, 88 N. W. 19.

Missouri.— Ehrhardt *v.* Robertson, 78 Mo. App. 404.

Montana.— State *v.* Rotwitt, 17 Mont. 41, 41 Pac. 1004.

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667, statute applies to all corporations doing business in the state, and is not limited to those having property in the state.

Ohio.— Eureka Ins. Co. *v.* Parks, 1 Cinc. Super. Ct. 574.

Oregon.— British Columbia Bank *v.* Page, 6 Oreg. 431.

Pennsylvania.— Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

Tennessee.— Peters *v.* Neely, 16 Lea 275.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

United States.— Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Goodwin *v.* Colorado Mortg., etc., Co., 110 U. S. 1, 3 S. Ct. 473, 28 L. ed. 47; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Youmans *v.* Minnesota Title Ins., etc., Co., 67 Fed. 282; *In re* Comstock, 6 Fed. Cas. No. 3,078, 3 Sawy. 218; French *v.* Lafayette Ins. Co., 9 Fed. Cas. No. 5,102, 5 McLean 461 [*affirmed* in 18 How. 404, 15 L. ed. 451]; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Canada.— Globe Mut. L. Ins. Co. *v.* Sun Mut. L. Ins. Co., 22 L. C. Jur. 38, 1 Montreal Leg. N. 139.

See 12 Cent. Dig. tit. "Corporations," §§ 2513–2516.

Service of process in actions against foreign corporations see *infra*, V, B, 4; and, generally, PROCESS.

Revocation of appointment of agent see *infra*, V, B, 11; and, generally, PROCESS.

62. See *infra*, IV.

63. See Ala. Const. (1875) art. 14, § 4; Ark. Const. (1872) art. 12, § 11; Colo. Const. (1876) art. 15, § 10; Ida. Const. (1889) art. 11, § 10; Mont. Const. (1889) art. 15, § 11; Pa. Const. (1874) art. 16, § 5.

64. See for instance Ala. Acts (1886–1887), p. 102, § 60.

65. New England Mortg. Security Co. *v.* Ingram, 91 Ala. 337, 9 So. 140; Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Craddock *v.* American Freehold Land Mortg. Co., 88 Ala. 281, 7 So. 196; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695; Beard *v.* Union, etc., Pub. Co., 71 Ala. 60; American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Smith *v.* Alberta, etc., Exploration Co., (Ida. 1903) 74 Pac. 1071; Booth *v.* Weigand, (Utah 1904) 79 Pac. 570.

66. Sherwood *v.* Wilkins, 65 Ark. 312, 45 S. W. 988.

need not be invested with any of the contractual powers which the corporation is permitted to exercise, but it is sufficient if he is authorized to accept and receive service of process.[67] In some jurisdictions foreign corporations are required to file a stipulation authorizing the service of process in any action against it on the state commissioner of insurance (in the case of insurance companies) or some other public officer;[68] or it is provided that if a foreign corporation doing business in the state does not appoint an officer or agent to receive service of process, then process may be served on some designated public officer.[69]

4. Maintenance and Designation of Place of Business. In some states, by constitutional or statutory provision, foreign corporations are required, in addition to appointing a resident agent upon whom process may be served, to maintain and designate one or more known[70] places of business within the state.[71] Such a statute is complied with by designating the town, the city, or the other known place where the agent of the corporation may be found, without designating the particular store, building, or office where he may be found.[72]

5. Filing by Agent of Evidence of Authority. So much difficulty in proving the authority of agents of foreign corporations has arisen, and so many frauds upon domestic citizens have been perpetrated by such bodies by denying the authority of those who have acted in their behalf, that some of the states have enacted statutes providing, in substance, that the agents of foreign corporations, before entering upon their business as such, shall file evidence of their authority with the clerks of the counties within which they propose to do business.[73] A sensible construction placed upon such a statute was that it did not apply to a manager engaged in appointing other agents to do the business of the company.[74]

6. Taking Out License, Permit, or Certificate — a. In General. Another class of statutes requires foreign corporations, before doing business in the state, to take out a license, permit, or certificate from the secretary of state, commissioner of insurance, or other designated officer, upon the payment of a prescribed fee, usually called a franchise tax, or performance of other prescribed conditions; and a foreign corporation cannot lawfully do business in the state without a compliance with such statute.[75]

67. McCall *v.* American Freehold Land Mortg. Co., 99 Ala. 427, 12 So. 806; Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141.

68. Magoffin *v.* Mutual Reserve Fund L. Assoc., 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699; Johnston *v.* Mutual Reserve L. Ins. Co., 45 Misc. (N. Y.) 316, 90 N. Y. Suppl. 539 [*affirming* 87 N. Y. Suppl. 438, and *affirmed* in 104 N. Y. App. Div. 544, 550, 629, 93 N. Y. Suppl. 1048, 1052, 1062] (construing the North Carolina statute); Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Moore *v.* Mutual Reserve Fund Life Assoc., 129 N. C. 31, 39 S. E. 637; Biggs *v.* Mutual Reserve Fund Life Assoc., 128 N. C. 5, 37 S. E. 955. See also *infra*, V, B, 4, c; V, B, 9.

Revocation of authority see *infra*, V, B, 11.

69. Such statutes are constitutional. Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Davis *v.* Kansas, etc., Coal Co., 129 Fed. 149, Arkansas statute. See also *infra*, V, B, 9; and, generally, Process.

70. See New England Mortgage Security Co. *v.* Ingram, 91 Ala. 337, 9 So. 140.

71. McLeod *v.* American Freehold Land Mortg. Co., 100 Ala. 496, 14 So. 409; Falls *v.* U. S. Savings, etc., Co., 97 Ala. 417, 13 So. 25, 38 Am. St. Rep. 194, 24 L. R. A. 174; New England Mortg. Security Co. *v.* Ingram, 91 Ala. 337, 9 So. 140 (sufficiency of compliance with requirement); Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55; American Union Tel. Co. *v.* Western Union Tel. Co., 67 Ala. 26, 42 Am. Rep. 90; Smith *v.* Alberta, etc., Exploration Co., (Ida. 1903) 74 Pac. 1071; Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 Ky. 45, 23 Ky. L. Rep. 2284.

72. Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013 (designation of the city of Mobile sufficient, without naming a particular place in that city); McLeod *v.* American Freehold Land Mortg. Co., 100 Ala. 496, 14 So. 409.

73. See for instance Ind. Rev. St. (1881) §§ 3022, 3023; also Wash. Code, § 2481, which contains very minute provisions on this subject.

74. Morgan *v.* White, 101 Ind. 413.

75. As to the validity and construction of such statutes see the following cases:

California.— Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836.

Michigan.— Moline Plow Co. *v.* Wilkinson, 105 Mich. 57, 62 N. W. 1119.

Missouri.— American Ins. Co. *v.* Smith, 19 Mo. App. 627.

New York.— Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl.

b. Evidentiary Character of Certificate or License. Under a statute providing that, if the secretary of state, commissioner of insurance, or other officer is satisfied that a foreign corporation has complied with the requirements of the laws entitling it to do business in the state, he shall issue a certificate or license stating such compliance, the certificate or license is sufficient to establish *prima facie* the authority of a corporation holding it to do business in the state.[76]

7. Filing Statements of Financial Condition, Amount of Capital, Etc. Some of these statutes, in addition to other requirements, prescribe that the foreign corporation shall file an annual report of its financial condition, in default of which its directors will become personally liable for its debts.[77] And in some states, before a foreign corporation, or corporation of a particular kind, can do business in the state, it is required to file a statement showing the amount of capital employed in its business or other facts as to its capital or assets and liabilities.[78]

8. Deposit of Securities, Etc. Many other statutes require that foreign corporations in order to obtain a license to do business shall deposit with the treasurer or other officer of the state securities of a given amount and description, for the protection of citizens of the state who may do business with the corporation. Such statutes are usually enacted with respect to foreign insurance companies for the protection of domestic citizens who may become their policyholders, but they sometimes apply also to other corporations, and they are valid.[79] It has been held that for a foreign saving association to make such a deposit in order to obtain the right to do business within the state is not *ultra vires*.[80]

347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110]; Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325.

Oregon.— Washington Nat. Bldg., etc., Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793, 58 L. R. A. 816.

Texas.— English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169; Huffman *v.* Western Mortg., etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

West Virginia.— Virginia Acc. Ins. Co. *v.* Dawson, 53 W. Va. 619, 46 S. E. 51.

Mandamus to obtain license, etc., see *infra*, III, Q.

76. Washington Nat. Bldg., etc., Assoc. *v.* Stanley, 38 Oreg. 319, 63 Pac. 489, 84 Am. St. Rep. 793, 58 L. R. A. 816. And see Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836; American Ins. Co. *v.* Smith, 19 Mo. App. 627. But see Washington County Mut. Ins. Co. *v.* Chamberlain, 16 Gray (Mass.) 165.

77. Mills Annot. St. Colo. § 491 (construed with respect of the date of filing, in Fraser *v.* Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167); Mont. Comp. Laws, §§ 142, 144 (construed in Manhattan Trust Co. *v.* Davis, 23 Mont. 273, 58 Pac. 718, holding that the statute is complied with by filing the same with the recorder of the county where its principal office for doing business within the state is located, and that filings need not be made in every county where it may transact any item of business).

78. See U. S. Express Co. *v.* Lucas, 36 Ind. 361; Barney *v.* Daniels, 32 Ind. 19 (both holding that the amount of capital employed and to be stated was the entire amount employed and not merely the amount employed in the state); Heard *v.* Pictorial Press, 182 Mass. 530, 65 N. E. 901 (amount of capital, amount paid in, and assets and liabilities); Washington County Mut. Ins. Co. *v.* Hastings, 2 Allen (Mass.) 398 (statement required of insurance company); Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376.

Personal liability of officers and agents see *infra*, IV, L.

79. Goldsmith *v.* Home Ins. Co., 62 Ga. 379. See also List *v.* Com., 118 Pa. St. 322, 12 Atl. 277; State *v.* Ætna L. Ins. Co., 69 Ohio St. 317, 69 N. E. 608; Sandel *v.* Atlanta L. Ins. Co., 53 S. C. 241, 31 S. E. 230; Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559; Paul *v.* Virginia, 8 Wall. (U. S.) 168, 19 L. ed. 357.

80. Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203; 73 N. W. 793, 39 L. R. A. 559. Failure of the corporation to comply with the statutory provisions of the state of its domicile in making such deposit does not render the deposit void, compliance with such provisions having been intended as a matter of local administration merely, and not as a condition precedent to the right to make it. Lewis *v.* American Sav., etc., Assoc., *supra*. The legislature may require the agents of foreign insurance companies, when losses occur, to retain moneys of such corporations coming into their possession until the losses are adjusted, or to abide the event of a suit. Phenix Ins. Co. *v.* Burdett, 112 Ind. 204, 13 N. E. 705. And a foreign building and loan association may be required to make a special deposit for the exclusive benefit of domestic creditors and shareholders in case of its insolvency. People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 [*affirming* 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510]; Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 N. W. 793, 39 L. R. A. 559.

9. Showing as to Assets and Subscription and Payment of Capital Stock. There are also statutes in some states requiring foreign corporations, before being entitled to do business, to show that a certain per cent of their authorized capital stock has been subscribed and paid in,[81] or to show that, in addition to their required capital, they have assets equal to their outstanding liabilities, etc.[82]

10. Prohibiting Removal of Causes or Resort to Federal Courts. A state statute cannot constitutionally prohibit a foreign corporation from removing to a federal court, as authorized by the act of congress, an action brought against it in a state court, or to require an agreement by it that it will not resort to the federal courts;[83] nor can it render an agent of a foreign corporation or the corporation itself liable civilly or criminally for violation thereof.[84] But since a state has an absolute right, without regard to its motive, to exclude a foreign corporation, a state officer cannot be compelled by mandamus to issue a permit or license to a foreign corporation to do business in the state, or be enjoined from canceling or revoking a permit or license, on the ground that the exclusion of the corporation is unconstitutional because of its refusal to comply with such an unconstitutional statute.[85]

11. Other Provisions. In some states there are other provisions than those above enumerated affecting the business of foreign corporations.[86] A state may require, and in some instances has required, the consent of the shareholders of a foreign corporation to the sale or encumbrance of its property in the state or other acts or contracts therein.[87] And in a number of states, in addition to statutory or constitutional provisions prescribing particular conditions precedent to the right of foreign corporations to do business in the state, there is a general provision to the effect that no corporation organized outside of the state shall be allowed to transact business in the state on more favorable conditions than are prescribed by law for domestic corporations; thus placing them under all regulations or restrictions imposed by law upon the latter.[88]

C. Restrictions, Etc., Considered With Reference to Particular Corporations — 1. In General. The constitutional and statutory provisions impos-

Power of directors.— A foreign building and loan association's directors empowered "to enter into such contracts and agreements as they may deem for the best interests of its affairs" have power to deposit securities with the state treasurer, as required by statute, before business can be done in the state. Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

Estopped to set up that deposit was ultra vires.— Clarke *v.* Olson, 9 N. D. 364, 83 N. W. 519; Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

A receiver appointed in the state is entitled to retain and sell or collect the securities, and apply the proceeds to the redemption in full of all shares held by residents of the state and the performance and discharge of all the association's contracts and obligations to members and persons residing therein, the residue if any to be turned over to the foreign receiver. Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559.

81. See English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169.

82. Bankers' L. Ins. Co. *v.* Fleetwood, 76 Vt. 297, 57 Atl. 239.

83. Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 13 S. Ct. 44, 36 L. ed. 942; Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915; Doyle *v.* New York Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; New York Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445, 22 L. ed. 365 [*reversing* 30 Wis. 496, 11 Am. Rep. 580]. See to the same effect Com. *v.* Jellico Coal Co., 97 Ky. 246, 30 S. W. 611, 17 Ky. L. Rep. 109; Com. *v.* East Tennessee Coal Co., 97 Ky. 238, 30 S. W. 608, 17 Ky. L. Rep. 139; Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208; Hartford Railway Pass. Assur. Co. *v.* Pierce, 27 Ohio St. 155 [*overruling* New York L. Ins. Co. *v.* Best, 23 Ohio St. 105]; Texas Land, etc., Co. *v.* Worsham, 76 Tex. 556, 13 S. W. 384; State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692. *Contra*, Goodrel *v.* Kreichbaum, 70 Iowa 362, 30 N. W. 872; Home Ins. Co. *v.* Davis, 29 Mich. 238. See also Courts, 11 Cyc. 845.

84. Com. *v.* Jellico Coal Co., 97 Ky. 246, 30 S. W. 611, 17 Ky. L. Rep. 109; Barron *v.* Burnside, 121 U. S. 186, 7 S. Ct. 931, 30 L. ed. 915.

85. State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692; Doyle *v.* New York Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148.

86. See the statutes of the various states.

87. Williams *v.* Gaylord, 186 U. S. 157, 22 S. Ct. 798, 46 L. ed. 1102 [*affirming* 102 Fed. 372, 42 C. C. A. 401].

88. See London, etc., Bank *v.* Aronstein, 117 Fed. 601, 54 C. C. A. 663, constitution of

ing conditions or restrictions upon or regulating foreign corporations sometimes apply in terms to foreign corporations of a particular kind only, and sometimes apply to foreign corporations generally, or are general and except corporations of a particular kind.[89] In this subdivision we will consider such provisions with reference to particular corporations.[90] As a rule, where foreign corporations of a particular kind are governed by special regulations, the general law pertaining to foreign corporations is not applicable to them.[91]

2. Insurance Companies — a. In General. The business of insurance is not commerce, and a policy of insurance written by a corporation existing in one state upon property existing in another state, or upon the life of a resident of another state, is not interstate commerce.[92] It follows from this that it is competent for any state to impose such restrictions upon foreign insurance companies seeking to do business within its limits as may to its legislature seem necessary or desirable, and that if foreign insurance companies cannot do business under the restrictions, or comply with the conditions, they must keep out.[93]

California. See also *supra*, I, G, where such provisions are treated.

89. See the cases specifically cited in the notes following.

Corporations for improving live stock, cultivating farms, etc.— A foreign corporation for pecuniary profit, whose business is the purchase, cultivation, and sale of nursery stock, including trees, vines, flowers, seeds, etc., the purchase, holding, etc., of land necessary for such business, etc., is not within the exception of Minn. Laws (1899), pp. 68, 71, cc. 69, 70, imposing certain conditions upon every foreign corporation for pecuniary profit, but excepting corporations "for the purpose of raising and improving live stock, cultivating and improving farms, garden or horticultural lands, growing sugar beets or any corporation for the purpose of canning fruits or vegetables." Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101.

90. **Application of statutes to corporations already doing business** see *infra*, III, J, 1.

91. Rhem *v.* German Ins., etc., Inst., 125 Ind. 135, 25 N. E. 173; Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

92. See *supra*, I, D, 3, c, (IV).

93. *Alabama.*— Noble *v.* Mitchell, 100 Ala. 519, 14 So. 581, 25 L. R. A. 238.

Georgia.— Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

Illinois.—People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Germania Ins. Co. *v.* Swigert, 128 Ill. 237, 21 N. E. 530, 4 L. R. A. 473; Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683; Home Ins. Co. *v.* Swigert, 104 Ill. 653; Ducat *v.* Chicago, 48 Ill. 172, 95 Am. Dec. 529.

Indiana.— State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; Phenix Ins. Co. *v.* Burdett, 112 Ind. 204, 13 N. E. 705; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236.

Iowa.— Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; State *v.* New York Fidelity, etc., Co., 77 Iowa 648, 42 N. W. 509.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Kentucky.— Phœnix Ins. Co. *v.* Com., 5 Bush 68, 96 Am. Dec. 331; Com. *v.* Milton, 12 B. Mon. 212, 54 Am. Dec. 522.

Louisiana.— State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 4 So. 504; State *v.* Fosdick, 21 La. Ann. 434.

Maryland.— Talbott *v.* New York Fidelity, etc., Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584.

Massachusetts.— Gibson *v.* Manufacturers' Ins. Co., 144 Mass. 81, 10 N. E. 729; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray 376.

Michigan.— Hartford F. Ins. Co. *v.* Raymond, 70 Mich. 485, 38 N. W. 474; People *v.* Howard, 50 Mich. 239, 15 N. W. 101; Home Ins. Co. *v.* Davis, 29 Mich. 238.

Minnesota.— State *v.* New York Fidelity, etc., Co., 39 Minn. 538, 41 N. W. 108.

Missouri.— Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey.— Tatem *v.* Wright, 23 N. J. L. 429.

New York.— People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380.

North Dakota.— State *v.* Carey, 2 N. D. 36, 49 N. W. 164.

Ohio.— State *v.* New York Fidelity, etc., Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611.

Pennsylvania.— List *v.* Com., 118 Pa. St. 322, 12 Atl. 277; Germania L. Ins. Co. *v.* Com., 85 Pa. St. 513; Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

South Carolina.— Sandel *v.* Atlanta L. Ins. Co., 53 S. C. 241, 31 S. E. 230.

Tennessee.—Dugger *v.* Mechanics', etc., Ins. Co., 95 Tenn. 245, 32 S. W. 5, 28 L. R. A. 796; State *v.* Phœnix Ins. Co., 92 Tenn. 420, 21 S. W. 893.

Vermont.— Granite State Mut. Aid Assoc. *v.* Porter, 58 Vt. 581, 3 Atl. 545; Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630; Slaughter *v.* Com., 13 Gratt. 767.

b. Impairment of Rights by Subsequent Statutes. But it has been held that where a foreign insurance company has complied with all the conditions demanded by the existing state law, and has received a license to carry on its business in the state, and, under such license, has expended money in establishing agencies and in advertising and building up a business, it has acquired the same right to challenge the validity of statutes subsequently enacted impairing its business which a domestic corporation might possess.[94]

c. Minute Regulations of Insurance Companies. In some of the states the business of life insurance is minutely regulated by statute, and foreign insurance companies are not permitted to do business within the state without complying with the statutes.[95] Such is the case in Ohio. It has been held in that state that a company organized under the laws of Pennsylvania for the purpose of "insuring lives on the plan of assessment upon surviving members," without any limitation, does not come within the class of life-insurance companies provided for in section 3630 of the Revised Statutes of Ohio, which section does not embrace companies insuring the lives of members for the benefit of others than their families and heirs. A mandamus would not therefore be granted against the superintendent of insurance to compel the registration of such a foreign insurance company.[96]

d. Application of Statutes to Mutual Benefit Societies. The question has arisen in several cases, whether benevolent orders, or mutual benefit societies, which combine with social features the feature of mutual life and health insurance, are life-insurance companies within the meaning of statutes subjecting foreign insurance companies to local supervision.[97] A mutual aid association of the state of Ohio is not a foreign insurance company within the meaning of a Pennsylvania statute,[98] and is not liable to the penalty imposed by that act on foreign insurance companies for transacting business within the state without authority of law, but is within the exception of another statute[99] which divests the control of the insurance commissioner over beneficial associations.[1] A foreign

Wisconsin.— State *v.* Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271; Stanhilber *v.* Mutual Mill, etc., Ins. Co., 76 Wis. 285, 45 N. W. 221; State *v.* U. S. Mutual Acc. Assoc., 67 Wis. 624, 31 N. W. 229; State *v.* Doyle, 40 Wis. 175, 22 Am. Rep. 692; Morse *v.* Home Ins. Co., 30 Wis. 496, 11 Am. Rep. 580; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

United States.— Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Orient Ins. Co. *v.* Daggs, 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552; Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342; Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; New York Home Ins. Co. *v.* Morse, 20 Wall. 445, 22 L. ed. 365; Liverpool, etc., L., etc., Ins. Co. *v.* Oliver, 10 Wall. 566, 19 L. ed. 1029; Paul *v.* Virginia, 8 Wall. 168, 19 L. ed. 357; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

See 12 Cent. Dig. tit. "Corporations," § 2505 *et seq.* And see, generally, INSURANCE.

94. Niagara F. Ins. Co. *v.* Cornell, 110 Fed. 816.

95. See the cases cited *supra*, note 93.

96. State *v.* Moore, 38 Ohio St. 7 [*reaffirmed* in 39 Ohio St. 486, in respect of a New York insurance company].

97. See Sims *v.* Com., 114 Ky. 827 24 Ky. L. Rep. 1591, 71 S. W. 929, holding that under Ky. St. § 641, declaring that the words "insurance company" or "insurance corporation" shall include any association carrying on in any manner the business of insurance, except societies which secure members through the lodge system exclusively, and employ no agents, except in the work of local subordinate lodges, a corporation which issues certificates of membership, amounting to a contract of life insurance, obtaining members through employed agents, and without their being attached to a lodge to become insured, is, although it be an assessment or co-operative insurance company, as defined by section 664, within section 633, subjecting to penalty an agent of a foreign insurance company who solicits insurance for it without first procuring a license.

98. Penn. Act, April 4, 1873.

99. Penn. Act, May 1, 1876, § 54.

1. Com. *v.* National Mut. Aid Assoc., 94 Pa. St. 481.

So in Ohio it was held that associations of persons incorporated under the act of April 20, 1872 (69 Ohio Laws 82), for the purpose of mutual protection and relief of its members and for the payment of stipulated sums of money to the families or heirs of deceased members, are not subject to the laws of that state relating to life-insurance companies. State *v.* Mutual Protection Assoc., 26 Ohio St. 19.

So in Missouri there are a number of decisions upon the question whether societies of this kind are subject to the insurance laws

mutual benefit association having no "legal reserve," but merely an "emergency fund," with a reservation, in its benefit certificates, of a power to raise or lower the specified rates of assessment, has been held to be an association providing insurance "upon the assessment plan," and as such entitled to do business under the laws of Wisconsin upon complying therewith; and a peremptory mandamus was accordingly granted by the supreme court of that state to the commissioner of insurance, to compel him to grant a license to such a company.[2]

3. BANKING COMPANIES. A state may impose any conditions, restrictions, or regulations it may see fit upon the right of foreign banking corporations to carry on their business within its limits.[3] In the days of state banks of issue and of what was called "wild cat" and "red dog" money, statutes were sometimes enacted prohibiting the dealing in bank-bills issued by foreign banking corporations. The taxing clause of the National Banking Act has rendered the decisions construing these statutes obsolete, and hence they will not be examined except in so far as they refer to commercial paper other than circulating bank-notes, issued by foreign banking companies. Such a statute has been held not to avoid a promissory note executed in another state, and payable there, although the parties

of the state. It was held that where one of the main objects of a corporation was to aid the families of its deceased members, the payment of a small stipend to the helpless children of a deceased member was not a violation of a provision of the charter against carrying on the business of insurance. Barbaro *v.* Occidental Grove No. 16, 4 Mo. App. 429. But where the main object of the corporation was to do business of insurance, and it had salaried officers, and paid commissions upon risks obtained in the course of its business, it was held that it could not evade the insurance laws by calling itself a benevolent society, and obtain a charter as such. State *v.* Citizens' Ben. Assoc., 6 Mo. App. 163. Similarly see State *v.* Merchants' Exch. Mut. Benev. Soc., 72 Mo. 146; State *v.* Brawner, 15 Mo. App. 597. *Compare* State *v.* Central St. Louis Masonic Hall Assoc., 14 Mo. App. 597.

Under statutes of Vermont (Vt. Rev. Laws, § 3607, as amended by Vt. Acts (1884), No. 45), a mutual or coöperative insurance association not organized under the laws of that state is not entitled to a license to transact business therein, unless it has assets to the amount of one hundred thousand dollars, and so much more as may be necessary to balance its liabilities, such liabilities to be computed and such assets to be invested as provided by the statute. Granite State Mut. Aid Assoc. *v.* Porter, 58 Vt. 581, 3 Atl. 545.

Corporation of District of Columbia.—That a corporation created by an act of congress "in the District of Columbia," with power to exercise all the powers incidental to "fraternal and benevolent corporations" within that district, has no inherent power to do business in a state in violation of its statutes see Layden *v.* Endowment Rank, K. P. of W., 128 N. C. 546, 39 S. E. 47.

2. State *v.* Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271.

3. Newberry Bank *v.* Stegall, 41 Miss. 142; Louisiana Bank *v.* Young, 37 Mo. 398; Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301; Bowman *v.* Cecil Bank, 3 Grant (Pa.) 33. And see *supra*, I, C, 4; III, A; and BANKS AND BANKING, 5 Cyc. 490.

What is a "banking corporation."—A foreign corporation making loans upon mortgages of real estate and pledges of its own stock is not a "banking corporation" within the meaning of a restrictive statute. Pacific Bldg. Co. *v.* Hill, 40 Oreg. 280, 67 Pac. 103.

That an express company doing a banking business is not within the meaning of such statutes see Wells *v.* Northern Pac. R. Co., 23 Fed. 469, 10 Sawy. 441.

What is a "banking" or "loan and investment" business, within the meaning of the Massachusetts act of 1889, chapter 452, prohibiting a foreign corporation from engaging in the banking or loan and investment business under a name similar to that of a domestic corporation see International Trust Co. *v.* International L. & T. Co., 153 Mass. 271, 26 N. E. 693, 10 L. R. A. 578.

Construction of Missouri statute excluding foreign banking and loan associations from that state see Ferguson *v.* Soden, 111 Mo. 208, 19 S. W. 727, 33 Am. St. Rep. 512; Long *v.* Long, 79 Mo. 644; Louisiana Bank *v.* Young, 37 Mo. 398; Connecticut Mut. L. Ins. Co. *v.* Albert, 39 Mo. 181.

Construction of early New York statutes against foreign banking corporations.—That the statute prohibited lending money upon a mortgage under the designation of the business of banking see Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370. That an agreement to redeem notes issued in violation of the statute was void see De Groot *v.* Van Duzer, 20 Wend. (N. Y.) 390 [*reversing* 17 Wend. 170]. What statutes prohibiting foreign corporations from keeping an office of discount and deposit within the state did not prohibit a single loan see Suydam *v.* Morris Canal, etc., Co., 6 Hill (N. Y.) 217 [*affirming* 5 Hill 491 note]. That it was a violation of the statute for an agent of a foreign banking company to attend, from time to time, at a place in New York to receive deposits and discount notes see Taylor *v.* Bruen, 2 Barb. Ch. (N. Y.) 301. That a national bank was within the prohibition

knew that the note was to be indorsed and used in the state containing the prohibitory legislation.[4]

4. Guaranty and Surety Companies. So also, in the case of foreign guaranty and surety companies, they may be admitted, excluded, or regulated as to the legislature may seem best.[5] A constitutional provision that the exercise of police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the state, is not violated by a statute authorizing a foreign, as well as a domestic guaranty company, to become surety upon bonds required to be furnished by law.[6]

5. Trust Companies. In like manner, a state may admit, exclude, or regulate foreign trust companies seeking to do business within its limits.[7] A foreign corporation which accepts and acts as trustee under a trust deed executed by a railway company, entitling the trustee in a special contingency to enter into and take possession of the railroad and all the property mortgaged, and to manage, maintain, and operate the railroad by such agents and managers as the trustee may appoint, and to collect and receive all moneys and revenues arising from such management, and to apply the same to the expenses arising in the performance of the trust, including a reasonable compensation for its services, and next to the maintenance, management, and operation of the railroad, including payment of taxes, assessments, etc., and next to the payment *pro rata* of the interest due and in default of the bonds secured thereby, has been held to be within the Illinois statute requiring any corporation "accepting and executing trusts" to file a list and brief description of the trusts held by the company.[8]

6. Manufacturing and Mercantile Companies — a. In General. It has repeatedly been held that a state may altogether exclude foreign manufacturing and mercantile corporations, or impose upon them such terms or restrictions as it may see fit as a condition precedent to their right to do business within its limits,[9] except that it cannot prevent or interfere with transactions constituting interstate or foreign commerce.[10]

b. Corporations Vending Patented Articles. But it has been held that exclusive rights guaranteed to inventors by the government of the United States in pursuance of acts of congress passed in conformity with the constitution cannot be impaired by the legislation of the states; and therefore that a statute imposing conditions and restrictions upon foreign corporations entering a state to do busi-

of the statute see Fairhaven Nat. Bank *v.* Phœnix Warehousing Co., 6 Hun (N. Y.) 71.

4. Merchants' Bank *v.* Spaulding, 9 N. Y. 53.

5. Gutzeil *v.* Pennie, 95 Cal. 598, 30 Pac. 836. And see *supra*, I, C, 4; III, A; and, generally, Principal and Surety. In Indiana foreign surety companies are governed by a special statute (Burns Rev. St. (1901) §§ 5480–5494), and the general law pertaining to foreign corporations is not applicable to them. Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

6. Standard Cotton Seed Oil Co. *v.* Matheson, 48 La. Ann. 1321, 20 So. 713. And see, generally, Principal and Surety.

7. Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369; Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55; Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166; American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242. See also *supra*, I, C, 4; III, A; and Banks and Banking, 5 Cyc. 612.

8. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 68 Ill. App. 666.

9. *Kentucky.*—Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284.

Louisiana.— State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459.

Minnesota.— Tolerton, etc., Co. *v.* Barck, 84 Minn. 497, 87 N. W. 19.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53.

Oregon.— Singer Mfg. Co. *v.* Graham, 8 Oreg. 17, 34 Am. Rep. 572.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Texas.— Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936 [*affirmed* in 177 U. S. 28, 20 S. Ct. 518, 44 L. ed. 657].

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

Wisconsin.— Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904.

United States.— Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838.

And see the other cases cited *supra*, I, C, 4, a; I, D, 3, c, (III); III, A.

10. See *supra*, I, D, 3, c, (III).

ness is inoperative with respect to foreign corporations engaged exclusively in the manufacture and sale of articles covered by letters patent of the United States.[11] The rule does not apply, however, to transactions not connected with the manufacture, use, or sale of the patented article.[12]

7. Railroad and Other Transportation Companies. Railroad, express, and ferry companies, and other corporations engaged in the transportation of goods or passengers, are also subject to restriction or regulation by other states than those of their creation in which they may seek to do business,[13] subject to the rule that a state cannot interfere with interstate or foreign commerce.[14]

8. Telegraph and Telephone Companies. The same is true of telegraph and telephone companies,[15] subject to the same qualification.[16]

9. Other Corporations. And so in the case of any other kind of foreign corporation, such as mining companies,[17] mortgage loan and investment companies,[18] building and loan associations,[19] exploration and reclamation companies,[20] land companies,[21] construction companies,[22] and the like.[23]

D. Retaliatory Statutes and Statutes of Reciprocity — 1. In General. In a number of states statutes against foreign corporations, known as "retaliatory" statutes, or as statutes of "reciprocity," have been enacted. Roughly stated, they provide that whatever restrictions, penalties, etc., are imposed by the laws of another country or state upon corporations of the domestic state doing business in such other country or state shall be imposed upon corporations of such other country or state within the domestic state.[24]

11. Shook *v.* Singer Mfg. Co., 61 Ind. 520; Walter A. Wood Mowing, etc., Mach. Co. *v.* Caldwell, 54 Ind. 270, 23 Am. Rep. 641; Grover, etc., Sewing Mach. Co. *v.* Butler, 53 Ind. 454, 21 Am. Rep. 200. *Compare*, however, Toledo Agricultural Works *v.* Work, 70 Ind. 253. And see, generally, Patents.

12. Domestic Sewing Mach. Co. *v.* Hatfield, 58 Ind. 187, holding therefore that plaintiff, a foreign corporation which had not complied with the statute, could not maintain an action on a note executed to it by defendant, the consideration of which was the transfer by plaintiff to defendant of a note taken by defendant, as the agent of plaintiff, for a patented article manufactured by plaintiff for sale, and duly assigned by him to plaintiff; since the consideration of the note in suit was the note transferred, and not the patented article sold.

13. Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339; U. S. Express Co. *v.* Lucas, 36 Ind. 361; Com. *v.* New York, etc., R. Co., 129 Pa. St. 463, 18 Atl. 412, 15 Am. St. Rep. 724. See also *supra*, I, C, 4; I, D, 3, c, (II); III, A; and, generally, Railroads.

14. See *supra*, I, D, 3, c, (I).

15. *District of Columbia.*— Manning *v.* Chesapeake, etc., Telephone Co., 18 App. Cas. 191 [*reversed* on other grounds in 186 U. S. 238, 22 S. Ct. 881, 46 L. ed. 1144].

Illinois.— Western Union Tel. Co. *v.* Lieb, 76 Ill. 172.

Mississippi.— Postal Tel. Cable Co. *v.* Adams, 71 Miss. 555, 14 So. 36, 42 Am. St. Rep. 476.

Montana.— State *v.* Rocky Mountain, etc., Tel. Co., 27 Mont. 394, 71 Pac. 311.

Ohio.— Western Union Tel. Co. *v.* Mayer, 28 Ohio St. 521.

Virginia.— Postal Tel. Cable Co. *v.* Norfolk, 101 Va. 125, 43 S. E. 207.

And see *supra*, I, C, 4; I, D, 3, c, (II); III, A; and, generally, Telegraphs and Telephones.

16. See *supra*, I, D, 3, c, (II).

17. *Arkansas.*— Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

Massachusetts.— Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717.

Michigan.— Isle Royale Land Corp. *v.* Secretary of State, 76 Mich. 162, 43 N. W. 14.

Utah.— Rio Grande R. Co. *v.* Telluride Power Transmission Co., 23 Utah 22, 63 Pac. 995.

And see *supra*, I, C, 4; II; III, A; and, generally, Mines and Minerals.

18. Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169. See also *supra*, I, C, 4; I, D, 3, c, (V); III, A.

19. Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41. See also *supra*, I, C, 4; III, A; *infra*, IV, B, 2, g, (IV); and Building and Loan Societies, 6 Cyc. 123.

20. Smith *v.* Alberta, etc., Exploration Co., (Ida. 1903) 74 Pac. 1071.

21. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. And see *supra*, II.

22. Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533.

23. See Matthews *v.* Reformed Presb. Church Theological Seminary, 2 Brewst. (Pa.) 541.

24. The following, from the statute books of Ohio, may also be cited as an example: "When by the laws of any other state or

2. CONSTITUTIONALITY.[25] The constitutionality of these statutes has been upheld against the objection that they involve the passing of laws which are to take effect upon the contingency of certain legislation in other states;[26] since it is competent for the legislature of a state, in its providence, to enact statutes which become operative only upon the happening of the contingencies named therein; and although the statute may long remain dormant, yet it springs into life and becomes completely operative, as an expression of the legislative will, as soon as the contingency arises.[27] Such statutes are also upheld against the objection that they violate constitutional provisions against unequal taxation.[28]

nation, any taxes, fines, penalties, license fees, deposits of money, or of [securities], certificates or other obligations or prohibitions are imposed on insurance companies of this state, doing business in such state or nation, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state or nation, doing business within this state, and upon their agents here." Ohio Rev. St. § 282. See State *v.* New York Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611. In a proceeding by quo warranto in Ohio to oust an insurance company, organized under the laws of Michigan from doing business on the assessment plan in Ohio, it appeared that the laws of Michigan did not permit Ohio companies to do business within that state on the same plan, and judgment of ouster was accordingly entered. State *v.* Western Union Mut. L. Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129. So, it has been held under the Ohio statute (Ohio Rev. St. § 3630*e*), as amended by a later act (Ohio Act, April 18, 1883; 80 Ohio Laws 180), that the insurance commissioner of Ohio cannot be compelled by mandamus to issue his certificate of authority to do business in that state to a corporation organized under the laws of New York to insure lives on the assessment plan, where it appears that, by the laws of New York, Ohio companies, organized to do business contemplated in section 3630 of the Revised Statutes of that state, are not entitled as of right to a certificate of authority to do business therein. State *v.* Moore, 39 Ohio St. 486.

In other states see the following cases:

Alabama.— Clark *v.* Mobile, 67 Ala. 217.

California.— Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076.

Georgia.— Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

Illinois.— People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295; Germania Ins. Co. *v.* Swigert, 128 Ill. 237, 21 N. E. 530, 4 L. R. A. 473 (the statute becomes operative upon the enactment of the law by the other state); Home Ins. Co. *v.* Swigert, 104 Ill. 653.

Indiana.— Blackmer *v.* Royal Ins. Co., 115 Ind. 291, 17 N. E. 580; State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574.

Iowa.— State *v.* New York Fidelity, etc., Co., 77 Iowa 648, 42 N. W. 509.

Kansas.— Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Maryland.— Talbott *v.* New York Fidelity, etc., Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584.

Minnesota.— State *v.* New York Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

Nebraska.—State *v.* Insurance Co. of North America, (1904) 100 N. W. 405.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey.—Wolf *v.* Lancaster, 70 N. J. L. 201, 56 Atl. 172.

New York.— People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380; Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71 [*affirmed* without opinion in 133 N. Y. 619, 30 N. E. 1146].

United States.— Philadelphia Fire Assoc. *v.* New York, 119 U. S. 110, 7 S. Ct. 108, 30 L. ed. 342 (New York statute); Butte First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131 (Montana constitution).

Effect as to domestic corporations.— Such a constitutional provision is not designed to limit the powers of the legislature when dealing with corporations created by its own will and act. Miles *v.* Woodward, 115 Cal. 308, 46 Pac. 1076; Butte First Nat. Bank *v.* Weidenbeck, 97 Fed. 896, 38 C. C. A. 131.

25. See also *supra*, I, D.

26. *Illinois.*— Home Ins. Co. *v.* Swigert, 104 Ill. 653.

Indiana.— State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574.

Kansas.— Phœnix Ins. Co. *v.* Welch, 29 Kan. 672.

Maryland.— Talbott *v.* New York Fidelity, etc., Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584.

New York.— People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380.

Contra.— Clark *v.* Mobile, 67 Ala. 217.

27. Home Ins. Co. *v.* Swigert, 104 Ill. 653; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672. Nor is it a valid objection to such a statute that it may lie dormant for many years until life has been infused into it by the legislature of another state in enacting a statute which creates the contingency upon which it is to take effect; nor does this involve the abdication of the legislature of the state enacting such a statute, of the legislative functions, and a surrender of them to the legislature of a foreign state. Home Ins. Co. *v.* Swigert, *supra* [*denying* Clark *v.* Mobile, 67 Ala. 217].

28. Blackmer *v.* Home Ins. Co., 115 Ind. 596, 17 N. E. 583; Blackmer *v.* Royal Ins.

3. Construction and Application of Such Statutes — a. In General. In the construction of these statutes a distinction has been taken between them and statutes of reciprocity, in that while the statutes of reciprocity are to be liberally construed, these statutes of retaliation are to be strictly construed; and it has been said that a statute of the latter kind is "not applied to a case that does not fairly fall within its letter."[29] It is merely another way of stating this principle to say that retaliatory statutes will not be enforced against a foreign corporation on the ground of alleged restrictions in the statutes of the state which created it, unless it is clearly proved that those statutes would have the restrictive effect which is claimed.[30] Upon this principle of strict construction, it has been held that a judgment of ouster, in a proceeding by quo warranto against a foreign corporation which has complied with the laws of Minnesota, will not be granted, as a measure of retaliation, upon the ground that the laws of the state where it was created would exclude corporations of Minnesota from doing business there, unless it is clearly apparent that such is the effect of the foreign law.[31] Under a statute imposing upon corporations of another state the same penalties that may be imposed by such other state upon corporations of the domestic state, a foreign corporation which has not complied with the statutes of such domestic state cannot maintain an action on a contract therein, where such is the rule in the state of the corporation's creation with respect to foreign corporations.[32]

Co., 115 Ind. 291, 17 N. E. 580; State *v.* Insurance Co. of North America, 115 Ind. 257, 17 N. E. 574; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672, 678 (where Judge Brewer said: "The legislature may classify for the purpose of taxation or license, and when the classification is in its nature not arbitrary, but just and fair, there can be no constitutional objection to it. . . . Here foreign insurance corporations are classified by the states from which they come, and, when we consider the purposes of such classification, it cannot be held that there is anything arbitrary or unjust therein. But doubtless this charge is not to be considered as within the constitutional restrictions as to taxation, but rather in the nature of a license or condition of entering this state and transacting business within its limits"); People *v.* Philadelphia Fire Assoc., 92 N. Y. 311, 44 Am. Rep. 380. See also Goldsmith *v.* Home Ins. Co., 62 Ga. 379. *Contra*, Clark *v.* Mobile, 67 Ala. 217. A statute is valid which provides for a general rate of taxation to be paid by insurance companies, but which makes an exception in the case where any foreign state imposes upon insurance companies of the domestic state, doing business therein, a higher rate of taxation than is imposed by such general statute, in which case the domestic state will, by way of retaliation, impose the higher rate of taxation. When the contingency happens, the higher rate of taxation is to be imposed by the proper taxing officer of the state, and taxes collected from the foreign corporation upon the basis of such higher rate cannot be recovered back in an action against the taxing officer. Home Ins. Co. *v.* Swigert, 104 Ill. 653. Nor is a statute which lays a uniform rate of taxation upon foreign insurance companies, except those organized in a state which imposes a higher rate of taxation upon similar corporations organized in the domestic state, and which provides that, in respect of the corporations of such foreign state, the same rate of taxation shall be imposed which such state imposes upon the corporations of the domestic state, unconstitutional on the ground that it imposes different rates of taxation upon different corporations of the same class, and thereby violates the constitutional mandate that taxes shall be uniform. It is not, for instance, in violation of a constitutional provision (Ill. Const. art. 9, § 1) which empowers the legislature to lay certain taxes "in such manner as it shall, from time to time, direct by general law, uniform as to the class upon which it operates." Home Ins. Co. *v.* Swigert, *supra*.

29. State *v.* New York Fidelity, etc., Ins. Co., 49 Ohio St. 440, 444, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611. In respect of the difference between a reciprocal and a retaliatory statute, the statute hereinbefore quoted (see *supra*, note 24) was held to be a statute of the latter kind, the court saying: "Reciprocity expresses the act of an interchange of favors between persons or nations; retaliation, that of returning evil for evil, or disfavors for disfavors. Accurately speaking, we reciprocate favors and retaliate disfavors. This then is a retaliatory statute. It treats the companies of other states as Ohio companies are treated in those states; but the moment it is made to appear that Ohio companies are not treated with the same favor in another state, that companies of that state are treated in Ohio, a case is made for the application of its provisions, and retaliation follows as a result." State *v.* New York Fidelity, etc., Ins. Co., *supra*. See also Talbott *v.* New York Fidelity, etc., Co., 74 Md. 536, 22 Atl. 395, 13 L. R. A. 584.

30. People *v.* New York Fidelity, etc., Co., 153 Ill. 25, 38 N. E. 752, 26 L. R. A. 295.

31. State *v.* New York Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

32. Wolf *v.* Lancaster, 70 N. J. L. 201, 56 Atl. 172.

b. Condition of Law of Foreign State Must Be Judicially Ascertained. The foregoing statement implies that when it is sought to enforce a retaliatory statute, the condition of the law of the foreign state, against whose citizen it is sought to enforce it, must be ascertained by an inquiry in court either by the judge or by a jury; although this involves the incongruity of the statute being in force or not in force according to the ascertainment of a fact *in pais*.[33]

c. What Must Appear to Give Effect to Such a Statute. Upon the same principle, it has been held that to make a case for the application of such statutes it must be made to appear that a company has been formed in the domestic state to do substantially the same kind and line of business as the foreign corporation which it is sought to oust of the exercise of its franchises within the domestic state, and that such domestic corporation would, by the laws of the foreign state, be precluded from transacting the same business therein, or be subjected to burdens not imposed by the laws of the domestic state on such foreign corporation.[34] So it is held in other courts that the contingency which renders these retaliatory statutes operative arises when the laws of another state impose the additional burdens and conditions upon corporations of the state enacting the statute, and it is not delayed until some corporation of the domestic state is actually subjected to such burdens and conditions,[35] or actually establishes an agency there.[36]

E. What Constitutes a Doing, Transacting, or Carrying on of Business — 1. Introductory Statement. Many of the constitutional provisions and statutes under consideration prohibit foreign corporations from doing or carrying on business within the state unless they have previously complied with the conditions therein named, so that the statute or constitution does not apply unless the corporation engages in business within the state;[37] and the question constantly arises under them, what constitutes a doing, transacting, or carrying on of business, within their meaning.

2. Statutory Definition. A definition, in an act relating to the service of

33. See the cases in the preceding notes.

34. State *v.* New York Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611.

35. Phœnix Ins. Co. *v.* Welch, 29 Kan. 672. Where the retaliatory statute provided that, "when, by the laws of any other state, any taxes, fines, penalties, licenses, fees, deposits of moneys or of securities, or other obligations or prohibitions, are imposed or would be imposed, on insurance companies of this state, doing, or that might seek to do, business in such other state, or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions, of whatever kind, shall be imposed upon all insurance companies of such other state, doing business within this state, or upon their agents here" (Iowa Code, § 1154), it was held that an insurance company organized in the state of New York, with power to make several different kinds of insurance, could not do business in Iowa, and would be ousted of its privilege of so doing by quo warranto, where it appeared that an Iowa company would not be permitted, in New York, to make more than one line of insurance; and this although no Iowa company may have attempted to make more than one line of insurance in the state of New York. "It is not important nor necessary," said the court, "to the existence of the law here that an Iowa company should go to New York to test the sincerity of the people in the enforcement of her law; nor is such a step necessary to the enforcement of the law in this state. A spirit of comity between the states should induce a belief that their laws are made in good faith, and for observance. The sting of the adder may be necessary in some cases, to avoid encroachments, but such necessity is not the result of a law or rule of action." State *v.* New York Fidelity, etc., Co., 77 Iowa 648, 653, 42 N. W. 509. That the New York statutory provision that where any other state shall impose any obligation on New York corporations doing business in such other state, the like obligations are imposed on similar corporations of such other state transacting business in New York, applies only to obligations, and not to prohibitions or limitations upon the powers of such corporations, such as a denial of the right to insure persons over sixty years old see Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71 [*affirmed*, without opinion, in 133 N. Y. 619, 30 N. E. 1146].

36. State *v.* Insurance Co. of North America, (Nebr. 1904) 100 N. W. 405, 99 N. W. 36.

37. See Thomas *v.* Remington Paper Co., 67 Kan. 599, 73 Pac. 909; and other cases cited in the notes following.

Question for the jury whether a corporation had engaged in business within the state. Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93.

process,[38] of what shall be considered as doing business within the state by a foreign corporation, will not control as to what is doing business within the state under a statute forbidding foreign corporations to do business within the state until they shall have filed their charters in every county where they intend to do business, under a statutory penalty.[39]

3. Isolated Transactions — a. General Rule. The general conclusion of the courts is that isolated transactions, commercial or otherwise, taking place between a foreign corporation domiciled in one state and citizens of another state, are not a doing or carrying on of business by the foreign corporation within the latter state, even, according to the weight of authority, where the transaction is of such a character as to constitute a part of the ordinary business of the corporation.[40]

b. Illustrations of Isolated Transactions. For a foreign publishing company to canvass for subscribers to a newspaper or other publication;[41] for a foreign corporation to make a single sale or contract for a sale of goods to a domestic citizen,[42] and take a mortgage on land in the state to secure payment of the

38. See *infra*, V, B, 4; and, generally, Process.

39. Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7.

40. *Alabama.*— Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; Beard *v.* Union, etc., Pub. Co., 71 Ala. 60.

Arkansas.— Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505; Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563.

Colorado.— Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740; Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Illinois.— Schillinger Bros. Co. *v.* Henderson Brewing Co., 107 Ill. App. 335; Galveston City R. Co *v.* Hook, 40 Ill. App. 547.

Indian Territory.— Ammons *v.* Brunswick-Balke Collender Co., (1904) 82 S. W. 937.

Iowa.— Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026.

Kansas.— Sigel-Campion Live-stock Commission Co. *v.* Haston, 68 Kan. 749, 75 Pac. 1028. But *compare* John Deere Plow Co. *v.* Wyland, 69 Kan. 255, 76 Pac. 863.

Missouri.— Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496.

New Jersey.— Delaware, etc., Canal Co. *v.* Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538; Henry *v.* Simanton, 64 N. J. Eq. 572, 54 Atl. 153. And see Alleghany Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724.

New York.— Penn Collieries Co. *v.* McKeever, 93 N. Y. App. Div. 303, 87 N. Y. Suppl. 869; National Knitting Co. *v.* Bronner, 20 Misc. 125, 45 N. Y. Suppl. 714.

Oregon.— Commercial Bank *v.* Sherman, 28 Oreg. 573, 43 Pac. 658, 52 Am. St. Rep. 811.

Pennsylvania.— Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533; Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553 [*affirmed* in 5 Pa. Super. Ct. 184]. And see Alleghany Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724, so stating the law to be in Pennsylvania, and following it as to a contract made in that state.

Tennessee.— Milan Milling, etc., Co. *v.* Gorten, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135; Davis, etc., Bldg., etc., Co. *v.* Caigle, (Ch. App. 1899) 53 S. W. 240. And see Louisville Property Co. *v.* Nashville, (Sup. 1905) 84 S. W. 810.

Texas.— See Wilson *v.* Peace, (Civ. App. 1905) 85 S. W. 31.

Washington.— Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680.

Wisconsin.— Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137; Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93; Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910; Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593.

See 12 Cent. Dig. tit. "Corporations," § 2520 *et seq.*; and other cases in the notes following.

41. Beard *v.* Union, etc., Pub. Co., 71 Ala. 60; Crocker *v.* Muller, 40 Misc. (N. Y.) 685, 83 N. Y. Suppl. 189.

42. *Alabama.*— See Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

Arkansas.—See Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505.

Colorado.— Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Indian Territory.— Ammons *v.* Brunswick-Balke Collender Co., (1904) 82 S. W. 937.

New Jersey.— Delaware, etc., Canal Co. *v.* Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538, single sale of coal on credit, the debt being guaranteed by a third person.

New York.— Penn Collieries Co. *v.* McKeever, 93 N. Y. App. Div. 303, 87 N. Y. Suppl. 869.

Pennsylvania.— Wile, etc., Co. *v.* Onsel, 1 Pa. Dist. 187, 10 Pa. Co. Ct. 659.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137.

See also *infra*, III, E, 6; III, G; III, H, 2.

price;[43] or to make a purchase of real estate and hold or lease the same, etc.;[44] for a foreign fire-insurance company to bring an action against a domestic railway company to recover damages for the loss of goods by fire;[45] for a corporation to make an agreement to lend money on the security of a mortgage upon land within the domestic state when the agreement was made in another state;[46] or to take a single mortgage for a past indebtedness for goods sold at the domicile of the foreign corporation;[47] for a foreign corporation to take or make a single purchase of negotiable promissory notes or bonds secured by a mortgage or deed of trust on land in the state;[48] for the president of a foreign corporation, while temporarily within the domestic state upon his private business, to send a telegram offering to receive a proposition relating to the business of his company;[49] for a foreign insurance company to take security for debts due to it from residents of the state;[50] for the agent of such a company to perform the single act of examining a house within the domestic state with a view to its insurance;[51] for a domestic citizen to take an application for a policy in a foreign insurance company, and to forward it to the home office of such company;[52] for the unlicensed agent of a foreign insurance company to adjust a loss of property insured by such company within the domestic state;[53] for an insurance company, domiciled in one state, to issue a policy upon property situated in another state;[54] for a foreign insurance company or other foreign corporation to take subscriptions to its capital stock within the domestic state;[55] for a foreign corporation, upon the passage of such a restrictive statute, to sell its property within the state;[56] for a foreign corporation to hold a single corporate meeting within the state for convenience, with the conclusion that a subscriber to its capital stock cannot defeat an action to recover upon his subscription upon that ground;[57] for a foreign corporation owning mining land in a territory whose statute law contains such a prohibition, to make a single contract by which it employs and agrees to pay a second party to exploit and develop the property[58] — all these acts have been held, under statutes and under conditions more or less similar, not to be a doing, transacting, or carrying on of business within the domestic state, in violation of such statutory prohibitions. Other cases are referred to in the note below.[59]

c. Contrary View. In some of the cases, contrary to the above view, at least

43. Ammons *v.* Brunswick-Balke Collender Co., (Indian Terr. 1904) 82 S. W. 937.

44. Louisville Property Co. *v.* Nashville, (Tenn. Sup. 1905) 84 S. W. 810 (purchase of real estate not doing business); Wilson *v.* Peace, (Tex. Civ. App. 1905) 85 S. W. 31 (ownership of land by a foreign corporation, leasing the same on shares, and assignment of rent, not doing business). See also *infra*, IV, J.

45. St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43.

46. Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563. See also Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601. See also *infra*, III, H, 4.

47. Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505. See also Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; and *infra*, III, H, 2.

48. Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740; Commercial Bank *v.* Sherman, 28 Oreg. 573, 43 Pac. 658, 52 Am. St. Rep. 811; Keene Guaranty Sav. Bank *v.* Lawrence, 32 Wash. 572, 73 Pac. 680; Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593.

49. Galveston City R. Co. *v.* Hook, 40 Ill. App. 547.

50. Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387. See also *infra*, III, H, 3.

51. Jackson *v.* State, 50 Ala. 141.

52. Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329. See *infra*, III, H, 3.

53. People *v.* Gilbert, 44 Hun (N. Y.) 522.

54. Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643. See also Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537. And see *infra*, III, H, 3.

55. Bartlett *v.* Chouteau Ins. Co., 18 Kan. 369; Galena Min., etc., Co. *v.* Frazier, 20 Pa. Super. Ct. 394; Payson *v.* Withers, 19 Fed. Cas. No. 10,864, 5 Biss. 269. See also Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404. *Contra*, Williams *v.* Scullin, 59 Mo. App. 30. And see *infra*, III, E, 8, text and note 84.

56. Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116.

57. Wildwood Pavilion Co. *v.* Hamilton, 15 Pa. Super. Ct. 389.

58. Empire Milling, etc., Co. *v.* Tombstone Milling, etc., Co., 100 Fed. 910.

59. Other illustrations are where a foreign corporation takes notes in the state for goods sold or a debt otherwise contracted in another state, and sues thereon in the state (Creteau

where the constitutional and statutory provision is against doing "any" business in the state without complying with the specified conditions, it has been held that the doing of a single act of business, if it be in the exercise of the regular business of the corporation, is as much prohibited as the doing of a hundred such acts, and is just as much opposed to the policy of the constitution and statute, which is to protect the domestic citizens against the fraud and imposition of insolvent and unreliable corporations, and to place them in an attitude to be reached by legal process in the domestic courts, in the event of any existing necessity to bring suit against them to vindicate a legal right, or to contest the validity of any contract made by or with them. The making of a single loan secured by mortgage, by a corporation which has not complied with the conditions, has therefore been held to be within the prohibition, in such a sense that an action to foreclose the mortgage cannot be maintained in the domestic courts.[60] And the same is true, according to this view, of any other isolated contract in the course of a foreign corporation's ordinary business.[61]

4. Statutes Aimed at Entering State by Agents and Carrying on General Business. These prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents, and engaging in the general prosecution of their ordinary business therein, and they do not apply therefore to acts not constituting any part of their ordinary business.[62] Thus a statute prohibiting

v. Foote, etc., Glass Co., 40 N. Y. App. Div. 215, 57 N. Y. Suppl. 1103; Tallapoosa Lumber Co. *v.* Holbert, 5 N. Y. App. Div. 559, 39 N. Y. Suppl. 432; Fuller, etc., Mfg. Co. *v.* Foster, 4 Dak. 329, 30 N. W. 166. See *infra*, III, H, 2); or makes a purchase of cattle or goods in the state (Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026. See also McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367); or purchases crude oil in the state having it shipped to and refined in other states (Com. *v.* Standard Oil Co., 101 Pa. St. 119); or hires an employee for its business out of the state (Schillinger Bros. Co. *v.* Henderson Brewing Co., 107 Ill. App. 335); where a foreign insurance company takes from citizens of the state security for payment of losses not incurred in the state (Hope Mut. L. Ins. Co. *v.* Perkins, 38 N. Y. 404); where a foreign corporation files a mechanic's lien for materials sold by it in another state and shipped by it into the state (Matter of Simonds Furnace Co., 30 Misc. (N. Y.) 209, 61 N. Y. Suppl. 974); or where it takes a note in compromise of a claim against a domestic corporation or citizen (Creteau *v.* Foote, etc., Glass Co., 40 N. Y. App. Div. 215, 57 N. Y. Suppl. 1103).

Appointment of agents.— Under a statute providing that agents of a foreign corporation, before entering upon their business as such, shall file evidence of their authority, the appointment of agents to do its business is not the doing of any business by the corporation. Morgan *v.* White, 101 Ind. 413.

60. Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200. See also State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141; Dundee Mortg., etc., Invest. Co. *v.* Nixon, 95 Ala. 318, 10 So. 311; Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141; Ginn *v.* New England Mortg. Security Co., 92 Ala. 135, 8 So. 388; Chattanooga Nat. Bldg., etc., Assoc. *v.* Denson, 189 U. S. 408, 23 S. Ct. 630, 47 L. ed. 870, under the Alabama constitution and statute. *Compare* Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751, where the mortgage was executed and the bonds issued were also executed and made payable in another state. In Farrior *v.* New England Mortg. Security Co., 33 Ala. 275, 278, 7 So. 200, the court distinguished same cases wherein a single act of business was held not to be within the prohibition, on the ground that the prohibition of the constitution or statute was against the "carrying on" of business, whereas the prohibition in the Alabama constitution was against doing "any" business, the court saying: "The phrase, 'doing any business,' is more comprehensive in meaning than the carrying on, or engaging in business generally, which involves the idea of continuance, or the repetition of like acts."

61. John Deere Plow Co. *v.* Wyland, 69 Kan. 255, 76 Pac. 863, sale of goods.

62. *Alabama.*— Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136; Beard *v.* Union, etc., Pub. Co., 71 Ala. 60.

Colorado.— Colorado Iron Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433.

Illinois.— Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204]; Smith *v.* Iron Hall Local Branch No. 714, 77 Ill. App. 469; Galveston City R. Co. *v.* Hook, 40 Ill. App. 547.

Kansas.— John Deere Plow Co. *v.* Wyland, 69 Kan. 255, 76 Pac. 863; State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411; Sigel-Campion Livestock Commission Co. *v.* Haston, 68 Kan. 749, 75 Pac. 1028.

Missouri.— Hogan *v.* St. Louis, 176 Mo. 149, 75 S. W. 604.

New York.— People *v.* Wemple, 131 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542 (hold-

an insurance company from doing business in the state without complying with prescribed conditions contemplates the business of insurance and does not apply to a loan of money on mortgage by a foreign insurance company.[63] Negotiations of a foreign corporation with the public authorities, resulting in a contract and bond to supply the public schools with text-books, is preliminary to but does not constitute the doing of business in the state.[64] The same is true of the mere entering into a contract by a foreign corporation with a city for street lighting or other public work.[65] And the rule applies where a foreign corporation employs or has an agent in the state, or both an office and an agent, for convenience, but all its business is done outside of the state,[66] and in other like cases.[67] Furthermore, the statutes refer to the business for which the corporation was organized and not to its doings with its own members.[68]

5. Sale or Purchase of Goods Through Local Agents, Brokers, Factors, or Commission Merchants. With respect to this question there is a possible distinction between the act of a foreign corporation in shipping its goods to a commission merchant, factor, broker, or other agent in a state having such a restrictive statute, to be sold by him and the sales to be accounted for, to the corporation, the property in the goods to remain in the corporation until sold, and the case where a local broker or commission merchant solicits orders on behalf of local customers for the goods of a foreign corporation, which orders are filled by the corporation very much as they would be filled by it if the order came directly to it from the customer. If the commission merchant or other agent to whom the goods are consigned acts as the agent of the foreign corporation in effecting sales of them,

ing it sufficient if the foreign corporation conducts a substantial part of its business in the state); Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* without opinion in 173 N. Y. 633, 66 N. E. 1106].

Pennsylvania.— Galena Min., etc., Co. *v.* Frazier, 20 Pa. Super. Ct. 394.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 21 L. ed. 1137; Honeyman *v.* Colorado Fuel, etc., Co., 133 Fed. 96; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93; Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593; American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242.

See 12 Cent. Dig. tit. "Corporations," § 2520 *et seq.* And see other cases cited *supra*, III, E, 3, a, b.

63. Smith *v.* Iron Hall Local Branch No. 714, 77 Ill. App. 469. And see the other insurance corporation cases referred to *supra*, III, E, 3, b.

64. State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411.

65. Hogan *v.* St. Louis, 176 Mo. 149, 75 S. W. 604. But to the effect that a foreign corporation which has not complied with the Pennsylvania act of April 22, 1874, forbidding such corporations to do business in the state until such compliance will not be allowed to compete for the furnishing of state supplies see Office Specialty Mfg. Co. *v.* Fenton Metallic Mfg. Co., 1 Pa. Dist. 576.

66. Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 600 (mining company doing no mining or smelting business in the state, but having an office in the state for convenience and use of the secretary and treasurer of the company, although stock certificates were issued from the office, books kept, and directors' meetings held there); Penn Collieries Co. *v.* McKeever, 93 N. Y. App. Div. 303, 87 N. Y. Suppl. 869 (foreign corporation having an agent in the state, who maintains an office for his own convenience, and does not have exclusive control of the business in the state, keeps no books or bank-account, and makes no contracts for sale of goods, but reports everything to the home office, and who usually makes sales to persons outside of the state); People *v.* Miller, 90 N. Y. App. Div. 545, 85 N. Y. Suppl. 849; Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* without opinion in 173 N. Y. 633, 66 N. E. 1106]; Commercial Wood, etc., Co. *v.* Northampton Portland Cement Co., 41 Misc. 242, 84 N. Y. Suppl. 38 [*affirmed* in 87 N. Y. App. Div. 633, 84 N. Y. Suppl. 1121].

67. Commercial Wood, etc., Co. *v.* Northampton Portland Cement Co., 41 Misc. (N. Y.) 242, 84 N. Y. Suppl. 38 [*affirmed* in 87 N. Y. App. Div. 633, 84 N. Y. Suppl. 1121] (making of a contract in New York for employment of an agent by foreign manufacturing company, where no sales are made or other business done there); Honeyman *v.* Colorado Fuel, etc., Co., 133 Fed. 96 (foreign corporation having an office in New York for transfers of stock only, and carrying on its business outside the state, although its directors have met in the state, as permitted by a by-law, at the office of one of their number, and it keeps a bank-account there).

68. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204], calls upon stock and actions to collect the same.

under an agreement that all goods, so long as unsold, remain the property of the corporation, and that the proceeds of the sales also become the exclusive property of the corporation, then manifestly the corporation has established an agency within the state for the sale of its goods and is doing business within the state within the meaning of such a statute.[69] And so where the foreign corporation appoints a local agent within the prohibiting state and consigns its goods to him in carload lots, for sale on commission.[70] But where an agent is employed by a foreign corporation in a state having such a restrictive statute, to solicit orders and make estimates of material to be furnished therefor, receiving payment by way of commissions on orders sent by him to the corporation, or otherwise, such orders being subject to acceptance by the corporation, and being filled by direct shipment from the home office to the customer, the corporation is not deemed to be doing business within the restricting state, within the meaning of such a statutory prohibition.[71] The same has been held with respect to sales of goods shipped by a foreign corporation into the domestic state, to be there sold on commission.[72] Purchasing of goods within a state by a foreign corporation through an agent resident therein, the goods to be shipped to the corporation out of the state, has been held to be a doing of business in the state.[73]

6. Sale or Purchase of Goods Through Traveling Agents or Drummers. Statutes of the kind under consideration have no application to the case where a corporation sends into the restricting state its traveling agent who solicits orders for its goods and forwards them, subject to approval, to the home office, the orders being afterward filled by shipments to the customer.[74] Such an application

Subscriptions to stock see *supra*, III, E, 3, b, text and note 55.

69. *Kansas.*— John Deere Plow Co. *v.* Wyland, 69 Kan. 255, 76 Pac. 863.

Kentucky.— Com. *v.* Parlin, etc., Co., 80 S. W. 791, 26 Ky. L. Rep. 58.

Michigan.— Muskegon *v.* Zeeryp, 134 Mich. 181, 96 N. W. 502.

Missouri.— Fay Fruit Co. *v.* McKinney, 103 Mo. App. 304, 77 S. W. 160.

New York.— People *v.* Wemple, 181 N. Y. 64, 29 N. E. 1002, 27 Am. St. Rep. 542.

Pennsylvania.—Milsom Rendering, etc., Co. *v.* Kelly, 10 Pa. Super. Ct. 565; Nonantum Worsted Co., 3 Pa. Dist. 428, 15 Pa. Co. Ct. 125.

United States.— U. S. Rubber Co. *v.* Butler Bros. Rubber Co., 132 Fed. 398.

Canada.— Lambe *v.* Dewhurst, 16 Quebec Super. Ct. 326.

70. Milsom Rendering, etc., Co. *v.* Kelly, 10 Pa. Super. Ct. 565.

71. Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* without opinion in 173 N. Y. 633, 66 N. E. 1106]. See also Harvard Co. *v.* Wicht, 99 N. Y. App. Div. 507, 91 N. Y. Suppl. 48; Penn Collieries Co. *v.* McKeever, 93 N. Y. App. Div. 303, 87 N. Y. Suppl. 869; American Contractor Pub. Co. *v.* Bagge, 91 N. Y. Suppl. 73 (agent soliciting advertisements to be published in a magazine in another state); Crocker *v.* Miller, 40 Misc. (N. Y.) 685, 83 N. Y. Suppl. 189; Waller *v.* Rothfield, 36 Misc. (N. Y.) 177, 73 N. Y. Suppl. 141; Bertha Zinc, etc., Co. *v.* Clute, 7 Misc. (N. Y.) 123, 27 N. Y. Suppl. 342; *In re* Hovey, 198 Pa. St. 385, 48 Atl. 311 [*affirming* 9 Pa. Dist. 183]; Macdougall *v.* Schofield Woolen Co., 16 Quebec Super. Ct. 411. See also *infra*, III, H, 2.

72. Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425. A broker in San Francisco, at his own solicitation, was furnished prices by a machinery manufacturing corporation of Illinois, and occasionally made a sale of articles made by it, to be delivered on board cars at the factory, adding to the price given him a commission for himself. The company declined to appoint him an agent, and paid him nothing. It was held that such transactions did not constitute a doing of business by the corporation in California, nor make such broker its business agent in that state, within the meaning of Cal. Code Civ. Proc. § 411; so that service of monition upon him in a suit in admiralty would give the court no jurisdiction of the corporation. Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128. See also for analogy, the question being that of venue in an action against a domestic corporation, International Cotton Seed Oil Co. *v.* Wheelock, 124 Ala. 367, 27 So. 517.

73. Chicago Mill, etc., Co. *v.* Sims, 101 Mo. App. 569, 74 S. W. 128, purchase of lumber and timber by foreign manufacturing company. But see *infra*, III, E, 6, text and note 76.

74. *Alabama.*— Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

Arkansas.— Gunn *v.* White Sewing Mach. Co., 57 Ark. 24, 20 S. W. 591, 38 Am. St. Rep. 223, 18 L. R. A. 206.

District of Columbia.— Beitzell *v.* District of Columbia, 21 App. Cas. 49.

Illinois.— Havens, etc., Co. *v.* Diamond, 93

of the statute would be inadmissible in so far as state statutes are concerned, because, so applied, it would have the effect of imposing a restraint upon commerce between the states or with foreign countries.[75] The same rule applies to the purchase of goods by an agent to be shipped out of the restricting state.[76]

7. Foreign Corporation Acting as Trustee. A foreign trust company is not doing business in the state, within the meaning of a statute by acting as trustee in a mortgage or deed of trust by a domestic railway company or other corporation, and bringing suit to foreclose the same, without taking possession of the property or attempting to operate it under the powers in the deed.[77] And so it is of a corporation maintaining, as trustee under a will, an action merely to establish its title or reduce to possession property situated in the state.[78] But it is otherwise where a foreign trust company seeks to exercise active powers under the trust deed or other instrument,[79] as in the case where a foreign corporation accepts the appointment of trustee in a railway mortgage or deed of trust, to be executed

Ill. App. 557; March-Davis Cycle Mfg. Co. *v.* Strobridge Lithographing Co., 79 Ill. App. 683.

Michigan.— M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117; Coit *v.* Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819.

Minnesota.— Rock Island Plow Co. *v.* Peterson, 93 Minn. 356, 101 N. W. 616, although the corporation maintained an agency in the state for storage of goods and delivery to purchasers.

Missouri.— Maxwell *v.* Edens, 65 Mo. App. 439.

New York.— Droege *v.* Ahrens, etc., Mfg. Co., 163 N. Y. 466, 57 N. E. 747; Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* without opinion in 173 N. Y. 633, 66 N. E. 1106]; Tallapoosa Lumber Co. *v.* Holbert, 5 N. Y. App. Div. 559, 39 N. Y. Suppl. 432; Jones *v.* Keeler, 40 Misc. 221, 81 N. Y. Suppl. 648; National Knitting Co. *v.* Bronner, 20 Misc. 125, 45 N. Y. Suppl. 714; American Broom, etc., Brush Co. *v.* Addickes, 19 Misc. 36, 42 N. Y. Suppl. 871; Murphy Varnish Co. *v.* Connell, 10 Misc. 553, 32 N. Y. Suppl. 492.

Ohio.—Toledo Commercial Co. *v.* Glen Mfg. Co., 55 Ohio St. 217, 45 N. E. 197.

Pennsylvania.— Wolff Dryer Co. *v.* Bigler, 192 Pa. St. 466, 43 Atl. 1092 (where the foreign corporation has no office or place of business within the restricting state, and no part of its capital is invested there, and the goods are shipped either directly from its factory or upon its orders given to other manufacturers); Mearshon *v.* Pottsville Lumber Co., 187 Pa. St. 12, 40 Atl. 1019, 67 Am. St. Rep. 560. *Compare In re* Gould Mfg. Co., 3 Pa. Dist. 606, 14 Pa. Co. Ct. 179, which seems not to have been well decided.

United States.—Boardman *v.* S. S. McClure Co., 123 Fed. 614 (soliciting advertisements for periodical); Wagner *v.* Meakin, 92 Fed. 76, 33 C. C. A. 577; Davis, etc., Bldg., etc., Co. *v.* Dix, 64 Fed. 406.

Where a foreign corporation keeps in a state a general agent, who has an office the rent of which is paid by the corporation, and ships goods into the state consigned to itself, and the agent, having applications for goods, takes the purchaser to the railway yards, exhibits the goods, sells them as they stand in the car, collects the price, and remits to the corporation, the corporation is not within a proviso in a statute excluding foreign corporations, which excepts from its operation drummers or traveling salesmen soliciting business for foreign corporations which are entirely non-resident. Fay Fruit Co. *v.* McKinney, 103 Mo. App. 304, 77 S. W. 160.

75. See *supra*, I, D, 3, c, (III).

76. McNaughton Co. *v.* McGirl, 20 Mont. 124, 49 Pac. 651, 63 Am. St. Rep. 610, 38 L. R. A. 367, holding that a statute prohibiting foreign corporations from doing business in a state did not apply where a foreign corporation sent its agent into the restricting state to buy or solicit the consignment of wool to its warehouses in other states. See also Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433. But see *supra*, III, E, 5, text and note 73.

77. Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369 [*affirming* 84 Ill. App. 84]; American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242.

78. Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987. Provided of course the laws of the domestic state do not prohibit such corporations, or corporations generally, from acquiring and holding real estate, or from taking real estate by devise or in trust. See *supra*, II, A; II, D.

79. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666]. See Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 166, holding that a foreign corporation appointed trustee and executor under a will was doing business in the state within the meaning of a statute by receiving land in the state by devise, with power to sell and dispose of the same, and with power to lease it and to collect the rents and profits therefrom, and by the assertion in the state of ownership of such land, assuming to sell and convey it, and bringing suit in the courts of the state in respect to such land and such alleged ownership, and for the enforcement of contracts in regard to the same.

within a state having a restrictive statute, certifies and delivers bonds to the extent of more than seven millions of dollars, renders bills to the railroad company for certifying the bonds and accepting the deed of trust, exercises constant supervision over the application of the bonds as issued, and, under the terms of the deed of trust, must assume the management of the road in a certain event.[80]

8. Various Other Transactions Held to Be a Doing of Business. Various other transactions have been held to constitute a "doing of business," within the meaning of such statutes, such, for example, as lending money to a resident of the restricting state and taking his notes and a mortgage upon lands situated in such state to secure the debt;[81] a contract with a resident of the restricting state for the delivery and storage of ice at designated places in a city of such state, without regard to the source of supply or place of manufacture;[82] shipping goods into the restricting state before procuring contracts or orders for their sale, for the purpose of obtaining advantage of a cheap freight rate, and afterward selling a portion of them in such state;[83] subscribing to the stocks of a foreign corporation not registered as required by the local law at a meeting held within the restricting state;[84] establishing in a particular city more than one branch store, separately organized so as to do business as independent houses, and filing a statement giving the name of one agent and one place of business;[85] operating within the restricting state as a member of a partnership composed of corporations;[86] for a foreign railroad company to enter into a traffic arrangement with a local company, so as to establish through lines within the restricting state, under an agreement containing many details;[87] and the like.[88]

80. Farmers' L. & T. Co. *v.* Lake St. El. R. Co., 173 Ill. 439, 51 N. E. 55 [*affirming* 68 Ill. App. 666]. See also Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412 (mortgage, however, not void); and *supra*, III, C, 5.

81. State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141. And see *supra*, III, E, 3, c. But see *supra*, III, E, 3, c; *infra*, III, H, 4.

82. West Jersey Ice Mfg. Co. *v.* Armour, 12 Pa. Super. Ct. 443.

83. Western Paper Bag Co. *v.* Johnson, (Tex. Civ. App. 1896) 38 S. W. 364.

84. Wildwood Pavilion Co. *v.* Hamilton, 7 Pa. Dist. 747, 22 Pa. Co. Ct. 68, 43 Wkly. Notes Cas. 303. But see *supra*, III, E, 3, b, text and note 55.

85. National Wall Paper Co.'s Appeal, 15 Pa. Super. Ct. 407, cannot enforce a lien for materials furnished.

86. Bishop *v.* American Preservers Co., 51 Ill. App. 417; Com. *v.* Standard Oil Co., 101 Pa. St. 119.

87. Buie *v.* Chicago, etc., R. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861.

88. Other illustrations of doing business in the state are where the president, secretary, and treasurer of a foreign silver mining company had their offices in New York city, and its directors held its meetings there, and all its dividends were paid there, and where, while most of its business was done in Utah, where its mine was, and in Chicago, where its ore was refined, its silver bullion was all sent to New York and sold there, the proceeds being deposited and some portion loaned and other portions paid out for the company's purposes in that city (People *v.* Horn Silver Min. Co., 105 N. Y. 76, 11 N. E. 155; Horn Silver Min. Co. *v.* New York, 143 U. S. 305, 12 S. Ct. 403, 36 L. ed. 164); where a foreign corporation held interests in ordinary partnerships doing business in the state (Com. *v.* Standard Oil Co., 101 Pa. St. 119); where a New Jersey ferry company operating boats plying to and fro across the Delaware river leased a slip or wharf in Pennsylvania at which its boats touched to permit the reception and disembarking of passengers and freight (Com. *v.* Gloucester Ferry Co., 98 Pa. St. 105); where a foreign corporation constructed an electric railway in the state for six months, employing nearly all of its capital therein (Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533); where a foreign corporation took subscriptions toward a fund for building a butter factory in the state, it appearing that the building erected was of considerable size, that the material was purchased in the state, that the workmen on it were residents of the state, that there was no restriction as to where the machinery and equipments should be bought, and that the subscription was not to be paid until the building was finished (Chicago Bldg., etc., Co. *v.* Myton, 24 Pa. Super. Ct. 16); and where a foreign corporation entered into a contract by which it was to have the management of the manufacturing in a factory within the state, and was to assist in the operation of such factory and keep it supplied with a superintendent (Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328).

Canada.— See Halifax *v.* Jones, 28 Nova Scotia 452, holding that the Mississippi Dominion Steamship Co., a British corporation, having its head office and chief place of busi-

9. Various Other Transactions Held Not to Be a Doing of Business. On the other hand the following transactions have been held not to be the doing of business within the state enacting such a restricting statute: For a company organized for the purpose of mining coal and manufacturing coke and selling the same, after having ceased its mining and manufacturing before the passage of the restrictive act, to continue to own and rent its coal lands situated within the restricting state, for agricultural purposes;[89] for a foreign corporation to purchase shares of the stock of a domestic corporation domiciled in a state having such a restrictive statute and voting upon the same for directors at a corporate meeting;[90] for a foreign corporation to enter into an executory agreement for the future construction of a street railway in the restricting state;[91] and the like.[92]

F. Statutes Do Not Restrain General Freedom of Contract. From the foregoing it may be concluded that such prohibitions do not restrain foreign corporations from exercising the general right to make contracts within the domestic states. In other words, the mere fact that a foreign corporation without complying with such a statute makes a contract with a domestic citizen, or takes a contract from him, is not unlawful, but the contract may be enforced in a judicial proceeding.[93]

G. Statutes Not Allowed to Restrict Interstate or Foreign Commerce. Nor are they allowed to restrict the ordinary operations of commerce, although conducted by corporations, across the boundary lines of the states of the Union or between the states and a foreign country; because, to give them this effect, would bring them into conflict with the settled interpretation put upon the commerce clause of the federal constitution.[94] Therefore a foreign corporation may advertise its goods, take orders for them, make contracts of sale, and ship its goods to customers within a state having such a statutory restraint or prohibition without complying with such statute.[95] The same is true of course of other

ness in England, did business at Halifax, within the meaning of a statute requiring payment of a license-fee, where its agents in Halifax continuously advertised themselves as its agent, and received freight money and sold tickets, being paid a commission therefor, and its steamers carried freight between Liverpool and Halifax and other ports in America.

89. Missouri Coal, etc., Co. *v.* Ladd, 160 Mo. 435, 61 S. W. 191.

90. Shepp *v.* Schuylkill Valley Traction Co., 17 Montg. Co. Rep. (Pa.) 52. See also Com. *v.* Standard Oil Co., 101 Pa. St. 119.

91. Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., St. R. Co., 7 North. Co. Rep. (Pa.) 193. And see *supra*, III, E, 4, text and notes 64, 65. But *compare supra*, III, E, 8, text and note 88.

92. See Sullivan *v.* Sullivan Timber Co., 103 Ala. 371, 15 So. 941, 25 L. R. A. 543 (care by a foreign corporation, through its agent, of unused property, and payment of taxes thereon); Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496 (purchase by a foreign corporation, which had become the holder in trust of a claim against a domestic citizen, of real estate sold by an administrator of the latter for the payment of debts); New York, etc., Constr. Co. *v.* Winton, 208 Pa. St. 467, 57 Atl. 955 (foreign corporation chartered for the purpose of constructing railroads, and of mining and transporting coal and other minerals, not doing business in the state in lending money to a resident of the state to enable him to develop his coal lands, and taking a mortgage on coal lands to secure repayment, although under an agreement for repayment in coal at a certain rate for each ton delivered); Com. *v.* Standard Oil Co., 101 Pa. St. 119 (holding that a foreign corporation was not doing business within a state in holding shares in domestic corporations and limited partnerships doing business therein); Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940 (foreign corporation passively continuing to hold a previously existing and valid lien or title, and commencement and prosecution of a suit to enforce the same); Earle *v.* Chesapeake, etc., R. Co., 127 Fed. 235 (traffic arrangement between foreign and domestic railroad companies, and operations thereunder).

93. Keating Implement, etc., Co. *v.* Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417. See also State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411; and other cases cited under the preceding and the following subdivisions.

94. See *supra*, I, D, 3.

95. *Michigan.*— Coit *v.* Sutton, 102 Mich. 324, 60 N. W. 690, 25 L. R. A. 819.

Montana.— Zion Co-operative, etc., Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915.

Ohio.— General Electric Co. *v.* Lima Electric R. Co., 6 Ohio S. & C. Pl. Dec. 186, 4 Ohio N. P. 167.

Pennsylvania.— Blakeslee Mfg. Co. *v.* Hil-

transactions involving interstate or foreign commerce, as has been explained in another connection.[96]

H. Statutes Do Not Generally Apply to Contracts Made Outside the State — 1. In General. Such statutes are not generally allowed to operate so as to impose any restraint upon the making and taking of contracts the *situs* of which is outside the state enacting the statute; and this for two reasons: (1) To allow them to have such an operation would give them an extraterritorial effect beyond the limits of the principle of interstate comity; and (2) it would also, in most cases, interfere with the operations of interstate commerce.[97]

ton, 5 Pa. Super. Ct. 184, 18 Pa. Co. Ct. 553.

Texas.— Texas, etc., R. Co. *v.* Davis, 93 Tex. 378, 55 S. W. 562 [*reversing* (Civ. App. 1899) 54 S. W. 381] (contract for interstate shipment of cattle); Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; De Witt *v.* Berger Mfg. Co., (Civ. App. 1904) 81 S. W. 334; Hallwood Cash Register Co. *v.* Berry, (Civ. App. 1904) 80 S. W. 857; Lane, etc., Co. *v.* City Electric Light, etc., Co., 31 Tex. Civ. App. 449, 72 S. W. 425.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137; Kessler *v.* Perilloux, 127 Fed. 1011; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93; Wagner *v.* Meakin, 92 Fed. 76, 33 C. C. A. 577, commerce with England.

See also *supra*, I, D, 3, c, (III); III, E, 5, 6; and *infra*, III, H, 2.

96. State *v.* Rocky Mountain Bell Telephone Co., 27 Mont. 394, 71 Pac. 311; and other cases cited *supra*, I, D, 3.

97. *Alabama.*— Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Jackson *v.* State, 50 Ala. 141.

Arkansas.— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

Colorado.— Kephart *v.* People, 28 Colo. 73, 62 Pac. 946 (foreign corporation may purchase at its own domicile the warrants of another state, and may maintain actions thereon); Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740 (purchase outside the state of negotiable bonds or notes secured by mortgage on land in the state not a transaction of business within the state).

Dakota.— Fuller, etc., Mfg. Co. *v.* Foster, 4 Dak. 329, 30 N. W. 166.

Illinois.— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223].

Iowa.— Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026.

Louisiana.— American Freehold Land-Mortg. Co. *v.* Pierce, 49 La. Ann. 390, 21 So. 972; Scottish-American Mortg. Co. *v.* Ogden, 49 La. Ann. 8, 21 So. 116; Reeves *v.* Harper, 43 La. Ann. 516, 9 So. 104.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769, foreign corporation engaged in dealing with citizens of other states in reference to property situated outside the restricting state.

New Jersey.— Slaytor-Jennings Co. *v.* Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247; MacMillan Co. *v.* Stewart, 69 N. J. L. 212, 54 Atl. 240 [*affirmed* in 69 N. J. L. 676, 56 Atl. 1132].

New York.— Novelty Mfg. Co. *v.* Connell, 88 Hun 254, 34 N. Y. Suppl. 717; American Contractor Publishing Co. *v.* Bagge, 91 N. Y. Suppl. 73 (corporation publishing a magazine in Illinois may by agent solicit orders for advertisement in New York, the orders to be forwarded to Illinois for acceptance, and the advertisement appearing in the magazine); Box Board, etc., Co. *v.* Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Suppl. 836; Mallon *v.* Rothschild, 38 Misc. 8, 76 N. Y. Suppl. 710 (contract evidenced by letter dated in restricting state and addressed to a foreign corporation in another state); O'Reilly, etc., Co. *v.* Greene, 17 Misc. 302, 40 N. Y. Suppl. 360 [*affirmed* in 18 Misc. 423, 41 N. Y. Suppl. 1065].

Pennsylvania.— See Kilgore *v.* Smith, 122 Pa. St. 48, 15 Atl. 698, holding that where a Maryland corporation was organized to act as a general agent of its members in the sale of canned goods produced by them, and employed no capital in Pennsylvania, but entered into a contract with members who were citizens of Pennsylvania, by which they were to can their fruit and hold it subject to the company's order, the company was not transacting business in Pennsylvania.

Tennessee.— Neal *v.* New Orleans Loan, etc., Assoc., 100 Tenn. 607, 46 S. W. 755; Norton *v.* Union Bank, etc., Co., (Ch. App. 1898) 46 S. W. 544; T. W. Kimball Co. *v.* First Nat. Bank, 1 Tenn. Ch. App. 505.

Texas.— Lakeview Land Co. *v.* San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766 (purchase outside of the state of real or personal property in the state); Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22 (purchase in another state of a bond and mortgage issued by a Texas corporation).

Virginia.— Goldberry *v.* Carter, 100 Va. 438, 41 S. E. 858, contract made out of the state by which title to land in the state is acquired.

United States.— Bamberger *v.* Schoolfield, 160 U. S. 149, 16 S. Ct. 225, 40 L. ed. 374 (foreign corporation discounting notes sent to it from the restricting state); Boardman *v.* S. S. McClure Co., 123 Fed. 614 (foreign publishing company circulating its periodicals by mail and sending its employees into other states to solicit advertisements); Sullivan *v.* Sheehan, 89 Fed. 247; Eastern

2. Sales of Goods. The most familiar illustration of the preceding doctrine arises in the case where goods are sold by a foreign corporation in the state of its own domicile, or in some state other than the state having the restrictive statute, and are shipped into the restricting state and there delivered to its customer, whether the sale be made by correspondence, or through local agents or traveling salesmen. Here the transaction is valid, although the foreign corporation has not complied with the prohibitory statute.[98]

3. Insurance — a. Contracts the Situs of Which Is the Domicile of the Company. Here, as in other cases,[99] the distinction is between the case where the company procures a risk within the foreign state by its own affirmative action, or where it allows some broker to procure a risk for it for his own pecuniary gain,

Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7; Aultman, etc., Co. *v.* Holder, 68 Fed. 467; Davis, etc., Bldg., etc., Co. *v.* Dix, 64 Fed. 406. See also Cæsar *v.* Capell, 83 Fed. 403. And see U. S. *v.* American Bell Telephone Co., 29 Fed. 17, holding that transactions such as those of the American Bell Telephone Company with licensee corporations of Ohio, at its place of business in Boston and not elsewhere, was not a carrying on of business by it in Ohio.

Effect of stipulations as to what law shall govern contract see *infra*, IV, K, 4.

98. *Alabama.*— Ware *v.* Hamilton Brown Shoe Co., 92 Ala. 145, 9 So. 136.

Arkansas.— Florsheim Bros. Dry-Goods Co. *v.* Lester, 60 Ark. 120, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505.

Colorado.— Colorado Iron Works *v.* Sierre Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433; Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667.

Dakota.— Fuller, etc., Mfg. Co. *v.* Foster, 4 Dak. 329, 30 N. W. 166.

Illinois.— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223].

Michigan.— M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117.

Minnesota.— Rock Island Plow Co. *v.* Peterson, 93 Minn. 356, 101 N. W. 616.

Missouri.— Pierce Steam Heating Co. *v.* Siegle Gas Fixture Co., 60 Mo. App. 148.

Montana.— Zion Co-operative Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915.

New Jersey.— Slaytor-Jennings Co. *v.* Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247; Delaware, etc., Canal Co. *v.* Mahlenbrock, 63 N. J. L. 281, 43 Atl. 978, 45 L. R. A. 538, may sell a load of merchandise on an order sent by mail from the restricting state.

New York.— Harvard Co. *v.* Wicht, 99 N. Y. App. Div. 507, 91 N. Y. Suppl. 58; Penn Collieries Co. *v.* McKeever, 93 N. Y. App. Div. 303, 87 N. Y. Suppl. 869; People *v.* Miller, 90 N. Y. App. Div. 545, 85 N. Y. Suppl. 849; Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* in 173 N. Y. 633, 66 N. E. 1106]; Vaughn Mach. Co. *v.* Lighthouse, 64 N. Y. App. Div. 138, 71 N. Y. Suppl. 799; Aiken *v.* Haskins, 48 N. Y. App. Div. 638, 63 N. Y. Suppl. 1104 [*affirming* 27 Misc. 629, 59 N. Y. Suppl. 486] (presumption that contract was made and completed in foreign state); Shelby Steel-Tube Co. *v.* Burgess Gun Co., 8 N. Y. App. Div. 444, 40 N. Y. Suppl. 871; Novelty Mfg. Co. *v.* Connell, 88 Hun 254, 34 N. Y. Suppl. 717; Crocker *v.* Muller, 40 Misc. 685, 83 N. Y. Suppl. 189 (foreign publishing corporation); Jones *v.* Keeler, 40 Misc. 221, 81 N. Y. Suppl. 648; Matter of Simonds Furnace Co., 30 Misc. 209, 61 N. Y. Suppl. 974; National Knitting Co. *v.* Bronner, 20 Misc. 125, 45 N. Y. Suppl. 714.

Ohio.— Toledo Commercial Co. *v.* Glen Mfg. Co., 11 Ohio Cir. Ct. 153, 5 Ohio Cir. Dec. 131.

Pennsylvania.— New Jersey Steel-Tube Co. *v.* Riehl, 9 Pa. Super. Ct. 220; Wile, etc., Co. *v.* Onsel, 1 Pa. Dist. 187, 10 Pa. Co. Ct. 659; Blakeslee Mfg. Co. *v.* Hilton, 18 Pa. Co. Ct. 553, 5 Pa. Super. Ct. 184.

Tennessee.— Milan Milling, etc., Co. *v.* Gorton, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135 (foreign corporation contracting to furnish milling machinery and place it in a mill without having any office or agency in the state); Jung Brewing Co. *v.* Levisy, (Ch. App. 1896) 37 S. W. 889.

Texas.— Miller *v.* Goodman, 91 Tex. 41, 40 S. W. 718; De Witt *v.* Berger Mfg. Co., (Civ. App. 1904) 81 S. W. 334; Hallwood Cash Register Co. *v.* Berry, (Civ. App. 1904) 80 S. W. 857; Allen *v.* Tyson-Jones Buggy Co., 91 Tex. 22, 40 S. W. 393, 714; Gale Mfg. Co. *v.* Fickelstein, 22 Tex. Civ. App. 241, 54 S. W. 619; Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425; Brin *v.* Wachusetts Shirt Co., (Civ. App. 1897) 43 S. W. 295; H. Zuberbier Co. *v.* Harris, (Civ. App. 1896) 35 S. W. 403.

United States.— Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727, 5 S. Ct. 739, 28 L. ed. 1137; Wagner *v.* Meakin, 92 Fed. 76, 33 C. C. A. 577 (British corporation selling goods to residents of the restricting state, and drawing foreign bills of exchange addressed to the purchasers, which are accepted by them, is not doing business within such state); Aultman, etc., Co. *v.* Holder, 68 Fed. 467.

Sales through local agents, brokers, factors, or commission merchants see *supra*, III, E, 5.

Sales through traveling agents or drummers see *supra*, III, E, 6.

99. See *supra*, III, H, 1, 2.

and the case where a resident of a foreign state, of his own mere volition, solicits the writing of a policy upon his life or property. In such a case the *situs* of the contract is the state of the residence of the insurance company, and not the state of the residence of the insured.[1] But, without reference to the theoretical question of the *situs* of the contract, it has been reasonably concluded that a restrictive statute against foreign insurance companies, such as those under consideration, was not designed to prevent the citizens of the state from going out of the state to procure insurance on their property, if they should see fit, but was designed merely to prevent irresponsible and insolvent insurance companies from invading the state with their solicitors and defrauding its citizens.[2] On the other hand, for a foreign corporation to come into the domestic state, where there is such a restrictive statute, and to take out a fire-insurance policy on its plant and material

1. *Alabama.*— Jackson *v.* State, 50 Ala. 141, holding also that a single act of examining a house in the state by an agent of a foreign insurance company having his office in another state, with a view to its insurance, is not sufficient to bring him within the statute, although a personal canvassing of the state for applications might be sufficient.

Arkansas.— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712; St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43, presumption that contract was not made in violation of the statute.

Colorado.— Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537.

Louisiana.— State *v.* Williams, 46 La. Ann. 922, 15 So. 290; New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781.

Michigan.— Clay F. & M. Ins. Co. *v.* Huron State, etc., Mfg. Co., 31 Mich. 346.

New Hampshire.— Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622.

New Jersey.— Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

New York.— Hyde *v.* Goodnow, 3 N. Y. 266; Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* in 173 N. Y. 633, 66 N. E. 1106]; Huntley *v.* Merrill, 32 Barb. 626; People *v.* Imlay, 20 Barb. 68.

Oregon.— Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329, holding that the taking of an application for life insurance by an agent in Washington territory and forwarding it to the insurance company in Kansas, where it was accepted and where a policy was issued thereon, was not doing business in said territory, but that subsequently taking a note for an instalment of the premium on such policy when it became due and transmitting it to the company was doing business.

Vermont.— Baker *v.* Spaulding, 71 Vt. 169, 42 Atl. 982.

Wisconsin.— Seamans *v.* Knapp-Stout, etc., Co., 89 Wis. 171, 61 N. W. 757, 46 Am. St. Rep. 825, 27 L. R. A. 362.

United States.— Allgeyer *v.* Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832 [*reversing* 48 La. Ann. 104, 18 So. 904]; Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643; Lamb *v.* Bowser, 14 Fed. Cas. No. 8,009, 7 Biss. 372 [*affirming* 14 Fed. Cas. No. 8,008, 7 Biss. 315]. See Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

Contra.— In Pennsylvania it has been held, contrary to the decisions in other states, that a contract of insurance on property in that state with a foreign insurance company, irrespective of where the contract is made, is illegal as an attempt to do business in violation of the statute of that state. Swing *v.* Munson, 191 Pa. St. 582, 43 Atl. 342, 71 Am. St. Rep. 772, 58 L. R. A. 223; Commonwealth Mut. F. Ins. Co. *v.* Sharpless, 12 Pa. Super Ct. 333. So also in Wisconsin. Rose *v.* Kimberly, etc., Co., 89 Wis. 545, 62 N. W. 526, 46 Am. St. Rep. 855, 27 L. R. A. 556 [*distinguishing* Seamans *v.* Knapp-Stout, etc., Co., 89 Wis. 171, 61 N. W. 757, 46 Am. St. Rep. 825, 27 L. R. A. 362]. See also, under the Iowa statute, Hartman *v.* Hollowell, (Iowa 1905) 102 N. W. 524. It was conceded in a New Jersey case that it might be competent for the state, by its legislation, to invalidate, in its own courts, an insurance contract, made in good faith in another state, on property located within the domestic state; but it was reasoned that it would be so contrary to the comity which should be observed between the states, that such an intention would not be imputed to the legislature, in the absence of language which would bear no other interpretation. Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

Situs of contract see *infra*, IV, K, 2.

2. Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346. So in effect is Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33. But it is not a sound conclusion, as held in the federal case next cited, or in accordance with the weight of authority, that where the foreign insurance company has an agency in another state, and has not complied with the restrictive statutes of such other state, and its agent in that state has received an application and premium note, and transmitted them to the home office, where they have been accepted, and a policy has been written out and returned, this policy is valid, although the agent within

through brokers in such state, is not a doing of business within such state within the meaning of the statute.[3]

b. Establishing Agency and Doing Business Within the State. The distinction lies between writing a single policy on property situated within another state, and procuring risks through an agency established there. This is doing business within the latter state in violation of the statute.[4]

c. Withdrawing From State, But Collecting Premiums and Paying Losses. A foreign insurance company which assumes to withdraw from a state in which it has been issuing policies, and thereafter refuses to take any new risks or issue any new policies therein, but continues to collect premiums on its outstanding policies and to pay losses arising thereunder, has been held to be still doing business within the state within the meaning of a statute respecting service of process upon an agent.[5]

4. Loans and Mortgages. On the same principle statutes of the kind under consideration do not operate to prohibit loans made by foreign building and loan associations to domestic citizens, where the contract is made and is to be performed in the state of the domicile of the association.[6] But where a foreign building and loan association establishes an agency within the state enacting the restrictive statute, for the purpose of securing applications for its loans, or, it has been held, sends an agent into the state to solicit applications for loans, then it is deemed to be doing business within the state, within the meaning of such a statute.[7] The transactions of what are called mortgage loan companies and of the like corporations rest on substantially the same grounds, with respect to this question, as the transactions of building and loan associations. It has been held that a mortgage loan company, which makes its securities payable at a designated agency in another state, which pays them there, which appoints a trustee resident

the foreign state has not complied with its statutes. Lamb *v.* Bowser, 14 Fed. Cas. No. 8,008, 7 Biss. 315 [*affirmed* in 14 Fed. Cas. No. 8,009, 7 Biss. 372].

3. Cummer Lumber Co. *v.* Associated Manufacturers' Mut. F. Ins. Corp., 67 N. Y. App. Div. 151, 73 N. Y. Suppl. 668 [*affirmed* in 173 N. Y. 633, 66 N. E. 1106]. On the other hand, it has been held, but with doubtful propriety, that a contract of insurance upon property within the state containing the restrictive statute, made with a foreign insurance company, is an attempt to do business, and is hence within the prohibition of the state no matter where the contract was made. Commonwealth Mut. F. Ins. Co. *v.* Sharpless, 12 Pa. Super. Ct. 333.

4. *Massachusetts.*— Roche *v.* Ladd, 1 Allen 436.

Missouri.— Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552].

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123.

Oregon.— Hackeny *v.* Leary, 12 Oreg. 40, 7 Pac. 329.

Pennsylvania.— See Com. *v.* Long, 1 Pa. Co. Ct. 190.

United States.— Berry *v.* Knights Templars, etc., Life Indemnity Co., 46 Fed. 439; Wall *v.* Equitable L. Assur. Soc., 32 Fed. 273; Northwestern Mut. L. Ins. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17; Lamb *v.* Lamb, 14 Fed. Cas. No. 8,018, 6 Biss. 420.

Canada.— See Jones *v.* Taylor, 15 N. Brunsw. 391.

Provision in contract as to situs.— It can make no difference in the application of the rule that the policy and the application therefor provide that the contract contained therein shall be construed according to the laws of the state of the company's domicile and that "the place of the contract is expressly agreed" to be in such other state. Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305. See *infra*, IV, K, 4.

5. Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569 [*affirming* 99 Tenn. 322, 42 S. W. 145, 44 L. R. A. 442]. But see Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259.

6. *Alabama.*— American Bldg., Loan, etc., Assoc. *v.* Haley, 132 Ala. 135, 31 So. 88.

New Jersey.— Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (Ch. 1899) 42 Atl. 284.

North Dakota.— U. S. Savings, etc., Co. *v.* Shain, 8 N. D. 136, 77 N. W. 1006.

Pennsylvania.— People's Bldg., etc., Assoc. *v.* Berlin, 201 Pa. St. 1, 50 Atl. 308, 88 Am. St. Rep. 764 [*reversing* 15 Pa. Super. Ct. 393].

Tennessee.— Neal *v.* New Orleans Loan, etc., Assoc., 100 Tenn. 607, 46 S. W. 755; Norton *v.* Union Bank, etc., Co., (Ch. App. 1898) 46 S. W. 544.

United States.— Sullivan *v.* Sheehan, 89 Fed. 247; Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7.

7. People's Bldg., etc., Assoc. *v.* Markley, 27 Ind. App. 128, 60 N. E. 1013; U. S. Sav-

in such other state to receive and hold its securities in trust for the payment of its obligations made payable there, and which deposits its securities with the trustee for such purpose is doing business in such other state, and is hence amenable to suit there by the service of summons on its president or other managing officer, casually found in the state.[8] It is otherwise, however, where the loans are made in another state on applications sent to the company.[9]

I. Assignments For Creditors, Confessions of Judgment, Prosecution and Defense of Suits, Settling Accounts, Etc. The doing of matters of which the ordinary business of a foreign corporation does not consist, but which it does in the exercise of its general rights for the purposes of its safety, or in order to do justice to its creditors, or to comply with some other provision of the local law, are not the "doing of business" within a state, within the meaning of statutes like those under consideration; but under a sound interpretation of such statutes, the doing of business consists only of carrying on the operations of its trade for the making of profit.[10] It is accordingly held that there is no doing of business in the state, within the meaning of such statutes, where foreign corporations make an assignment of their property for the benefit of their creditors,[11] or confess a judgment in favor of a particular creditor,[12] or where they merely commence and prosecute or defend suits in the state.[13] It has also been held that

ings, etc., Co. *v.* Miller, (Tenn. Ch. App. 1897) 47 S. W. 17; Chattanooga Nat. Bldg., etc., Assoc. *v.* Denson, 189 U. S. 408, 23 S. Ct. 630, 47 L. ed. 870 [*affirming* 107 Fed. 777, 46 C. C. A. 634].

8. J. B. Watkins Land Mortg. Co. *v.* Elliott, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385. See also State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141; Dundee Mortg., etc., Invest. Co. *v.* Nixon, 95 Ala. 318, 10 So. 311; Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141; Ginn *v.* New England Mortg. Security Co., 92 Ala. 135, 8 So. 388; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; U. S. Savings, etc., Co. *v.* Miller, (Tenn. Ch. App. 1897) 47 S. W. 17.

9. Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563; American Freehold Land Mortg. Co. *v.* Pierce, 49 La. Ann. 390, 21 So. 972; Scottish-American Mortg. Co. *v.* Ogden, 49 La. Ann. 8, 21 So. 116; Reeves *v.* Harper, 43 La. Ann. 516, 9 So. 104; Norton *v.* Union Bank, etc., Co., (Tenn. Ch. App. 1898) 46 S. W. 544; British, etc., Mortg. Co. *v.* Winchell, 62 Ark. 160, 34 S. W. 891. An agreement in a trust deed to a foreign corporation, made in Louisiana, that it and notes secured thereby should be construed and governed by the laws of Arkansas, is not an admission or agreement that the making of the contract evidenced by such deed and notes was a doing of business in Arkansas, within the statute imposing conditions upon foreign corporations in order that their contracts made in the course of such business may be binding on citizens of Arkansas who are parties thereto. British, etc., Mortg. Co. *v.* Winchell, *supra*.

10. See *supra*, III, E, 4.

11. Zucker *v.* Froment, 5 Pa. Dist. 579.

12. East Side Bank *v.* Columbus Tanning Co., 15 Pa. Co. Ct. 357 [*affirmed* in 170 Pa. St. 1, 32 Atl. 539].

13. *Alabama.*— Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013; Sullivan *v.* Sullivan Timber Co., 103 Ala. 371, 15 So. 941, 25 L. R. A. 543; McCall *v.* American Freehold Land Mortg. Co., 99 Ala. 427, 12 So. 806 (foreclosure of mortgage); Cook *v.* Rome Brick Co., 98 Ala. 409, 12 So. 918 (suit to declare and enforce a mechanic's lien); Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283 (action of detinue); Nelms *v.* Edinburg-American Land Mortg. Co., 92 Ala. 157, 9 So. 141; Ginn *v.* New England Mortg. Security Co., 92 Ala. 135, 8 So. 388; Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601 (suit to foreclose mortgage taken as security for a debt); Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427 (foreclosure of mortgage).

Arkansas.— Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87 (action in relation to land); St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83 (action by foreign insurance company, which had paid a loss, to recover damages from a railroad company for negligence in causing the fire); White River Lumber Co. *v.* Southwestern Imp. Assoc., 55 Ark. 625, 18 S. W. 1055 (action to enforce contract not made in the state); St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43 (action by foreign insurance company, which had paid a loss under a contract of insurance not made in the state, to recover damages from a railroad company which negligently caused the fire).

Colorado.— Kephart *v.* People, 28 Colo. 73, 62 Pac. 946 (mandamus to enforce collection of state warrants purchased by foreign corporation at its place of business outside the state); Miller *v.* Williams, 27 Colo. 34,

a foreign corporation does not do business in the state by merely filing a mechanic's

59 Pac. 740 (suit to enforce obligations purchased outside the state); Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Tabor *v.* Goss, etc., Mfg. Co., 11 Colo. 419, 18 Pac. 537 (action by foreign corporation to recover loss under a contract of insurance); Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369 (action for trespass); Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667 (filing of a petition in intervention by a foreign corporation).

Dakota.— Fuller, etc., Mfg. Co. *v.* Foster, 4 Dak. 329, 30 N. W. 166 (action on notes received for goods sold outside the state); American Button-Hole Over-Seaming, etc., Mach. Co. *v.* Moore, 2 Dak. 280, 8 N. W. 131 (action on contract made outside the state).

Illinois.— Richardson *v.* U. S. Mortgage, etc., Co., 194 Ill. 259, 62 N. E. 606 [*affirming* 89 Ill. App. 670] (foreclosure of mortgage executed before enactment of statute); John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223] (action for the price of goods); Morse *v.* Holland Trust Co., 184 Ill. 255, 56 N. E. 369 [*affirming* 84 Ill. App. 84] (suit by foreign trust company to foreclose a deed of trust executed to it); Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* on other grounds 51 Ill. App. 204] (action by foreign corporation to recover the amount of calls made upon its stock).

Indiana.— Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753 (action by foreign building and loan association to foreclose mortgage taken under contract made before enactment of the restrictive statute); Smith *v.* Little, 67 Ind. 549 (action of replevin); U. S. Express Co. *v.* Lucas, 36 Ind. 361 (action against agent to recover money received in the course of his agency to the use of the company).

Iowa.— Ware Cattle Co. *v.* Anderson, 107 Iowa 231, 77 N. W. 1026, action by foreign corporation against a non-resident for damages under a contract executed and to be performed, except as to the delivery of the property, in another state.

Michigan.— M. I. Wilcox Cordage, etc., Co. *v.* Mosher, 114 Mich. 64, 72 N. W. 117, action by foreign corporation to enforce individual liability of directors of domestic corporation for failure to file annual report.

Missouri.— Missouri Coal, etc., Min. Co. *v.* Ladd, 160 Mo. 435, 61 S. W. 191 (action on attachment bond); Henderson Woolen Mills *v.* Edwards, 84 Mo. App. 448 (action for price of goods sold outside and shipped into the state); Maxwell *v.* Edens, 65 Mo. App. 439 (action for price of goods sold through traveling salesman and shipped into the state).

Montana.— Zion Co-operative Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915; Powder River Cattle Co. *v.* Custer County, 9 Mont. 145, 22 Pac. 383, action to recover taxes paid under protest.

Nebraska.— Holt *v.* Rust-Owen Lumber Co., 2 Nebr. (Unoff.) 170, 96 N. W. 613.

New Hampshire.— Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622, action on premium note given as consideration for a contract of insurance upon property in the state, where the contract was made and is to be performed at the company's domicile out of the state.

New Jersey.— M. B. Faxon Co. *v.* Lovett, 60 N. J. L. 128, 36 Atl. 692 (action on contracts made in the state prior to the enactment of the restrictive statute or on contracts made outside the state since its enactment); Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (Ch. 1899) 42 Atl. 284 (bill by foreign building and loan association to foreclose a mortgage on land in the state where the bond and mortgage were made and are to be performed at the company's domicile outside the state). And see Slaytor-Jennings Co. *v.* Specialty Paper Box Co., 69 N. J. L. 214, 54 Atl. 247; MacMillan Co. *v.* Stewart, 69 N. J. L. 212, 54 Atl. 240 [*affirmed* in 69 N. J. L. 676, 56 Atl. 1132].

New Mexico.— Probst *v.* Domestic Missions, 3 N. M. 237, 5 Pac. 702, action to protect estate in land acquired prior to enactment of the restrictive statute.

New York.— Bard *v.* Poole, 12 N. Y. 495 (action to foreclose a valid mortgage); Citizens' State Bank *v.* Cowles, 89 N. Y. App. Div. 281, 86 N. Y. Suppl. 38 [*affirming* 39 Misc. 571, 80 N. Y. Suppl. 598]; Creteau *v.* Foote, etc., Glass Co., 40 N. Y. App. Div. 215, 57 N. Y. Suppl. 1103 (action on a note received in compromise of a claim against a domestic corporation or citizen); Tallapoosa Lumber Co. *v.* Holbert, 5 N. Y. App. Div. 559, 39 N. Y. Suppl. 432 (action on note for goods sold by a traveling salesman); Joseph Schlitz Brewing Co. *v.* Ester, 86 Hun 22, 33 N. Y. Suppl. 143 [*affirmed* without opinion in 157 N. Y. 714, 53 N. E. 1126] (action to set aside fraudulent transfers and conveyances); Aiken *v.* Haskins, 27 Misc. 629, 59 N. Y. Suppl. 486 [*affirmed* without opinion in 48 N. Y. App. Div. 638, 63 N. Y. Suppl. 1104] (action for goods sold in another state); American Broom, etc., Co. *v.* Addickes, 19 Misc. 36, 42 N. Y. Suppl. 871 (action for price of goods sold by traveling salesman); O'Reilly, etc., Co. *v.* Greene, 17 Misc. 302, 40 N. Y. Suppl. 360 (action on contract entered into outside the state, or in the state, but before the enactment of a restrictive statute); American Typefounders Co. *v.* Conner, 6 Misc. 391, 26 N. Y. Suppl. 742 (action of replevin).

North Dakota.— National Cash Register Co. *v.* Wilson, 9 N. D. 112, 87 N. W. 285 (action of claim and delivery to recover possession of property); Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203.

Pennsylvania.— *In re* Hovey, 198 Pa. St.

lien,[14] adjusting and terminating an account,[15] taking a mortgage to secure a debt,[16] purchasing property at a judicial sale, or a sale by an administrator, etc., in order to collect a claim,[17] and the like.[18]

J. Retroactive Effect of Such Statutes — 1. In General. Statutes excluding or imposing conditions or restrictions upon foreign corporations have been held to apply to corporations doing business in the state at the time of their passage as well as to those subsequently coming into the state, even though they use the words "seeking to do business" in the state;[19] and such construction of a statute does not render it unconstitutional.[20] But where such a statute, after enacting that a failure to comply with the stated conditions should subject the foreign corporation to a fine, declared, in addition, that "on and after the going into effect of this act," no foreign corporation which shall fail to comply with the act can maintain any suit in any of the courts of this state, it was held that the act took effect only on causes of actions and demands arising after its passage, and did not prevent the foreign corporation from enforcing a mortgage executed to it prior to its enactment.[21] So a similar statute in other states has been held

385, 48 Atl. 311 (action by foreign corporation to recover from the estate of a commission merchant, who has guaranteed his sales, the amount of sales made by him within the state to purchasers who have failed to pay); Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct. 527 (action to recover personal property).

Rhode Island.— Garratt Ford Co. *v.* Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 78 Am. St. Rep. 852, 38 L. R. A. 545, action for the price of goods. And see MacLeod *v.* Putnam, 24 R. I. 500, 53 Atl. 867.

South Dakota.— Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109, action on promissory notes.

Tennessee.— Turcott *v.* Yazoo, etc., R. Co., 101 Tenn. 102, 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768, may plead and rely upon the defense of the statute of limitations.

Texas.— Security Co. *v.* Panhandle Nat. Bank, 93 Tex. 575, 57 S. W. 22 (enforcing bond and mortgage purchased in another state); Texas Land, etc., Co. *v.* Worsham, 76 Tex. 556, 13 S. W. 384 (suit to enjoin sale of land under an order of court); Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987; Middlebrook *v.* David Bradley Mfg. Co., (Civ. App. 1894) 27 S. W. 169 (action on notes executed before enactment of restrictive statute); American Starch Co. *v.* Bateman, (Civ. App. 1893) 22 S. W. 771 (action on note given for goods sold outside the state and shipped into the state); Reed *v.* Walker, 2 Tex. Civ. App. 92, 21 S. W. 687 (action for price of goods sold outside the state and shipped into the state).

Utah.— George R. Barse Live-Stock Co. *v.* Range Valley Cattle Co., 16 Utah 59, 50 Pac. 630, action to compel a transfer of shares of stock.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 97 Wis. 940, 120 Wis. 281; Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387, enforcing a bond and mortgage.

United States.— American L. & T. Co. *v.* East, etc., R Co., 37 Fed. 242 (foreclosure of mortgage); Orange Nat. Bank *v.* Traver, 7 Fed. 146, 7 Sawy. 210 (action on note purchased).

See 12 Cent. Dig. tit. "Corporations," §§ 2527, 2544, 2564.

Express statutory provisions exist in some states prohibiting the maintenance or defense of suits by foreign corporations until they have complied with prescribed conditions. See *supra*, IV, B, 5; IV, H.

14. Matter of Simonds Furnace Co., 30 Misc. (N. Y.) 209, 61 N. Y. Suppl. 974.

15. New Jersey Street Tube Co. *v.* Riehl, 9 Pa. Super. Ct. 220. See also Creteau *v.* Foote, etc., Glass Co., 40 N. Y. App. Div. 215, 57 N. Y. Suppl. 1103.

16. Boulware *v.* Davis, 90 Ala. 207, 8 So. 84, 9 L. R. A. 601; Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Sunney South Lumber Co. *v.* A. J. Neimeyer Lumber Co., 63 Ark. 268, 38 S. W. 902; Florsheim Bros. Dry Goods Co. *v.* Lester, 60 Ark. 120, 29 S. W. 34, 46 Am. St. Rep. 162, 27 L. R. A. 505; Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387; Gilchrist *v.* Helena, etc., R. Co., 47 Fed. 593. See also *supra*, III, H, 4.

17. Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496, holding that a statute prohibiting foreign corporations from transacting business within the state until they have established a place of business where process may be served, etc., does not prohibit a foreign corporation, which in the course of its business in its own state has become the holder in trust of a claim against a citizen of Missouri, from purchasing real estate sold by an administrator of the latter for the payment of debts. See also *supra*, II, A, 1, text and note 75.

18. See *supra*, III, E, 3, b.

19. State *v.* American Book Co., 65 Kan. 847, 69 Pac. 563; Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. (Va.) 630; Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328. And see *supra*, I, D, 4; *infra*, III, P.

20. See *supra*, I, D, 4.

21. Richardson *v.* U. S. Mortgage, etc., Co.,

not to apply to the contracts of foreign corporations made before its passage.[22] So, under a statute requiring foreign corporations to procure a certificate of authority to do business within the state, and providing that no such corporation, doing business in the state, shall do business after a specified date without having procured such certificate, but that any lawful contract previously made by it may be performed and enforced within the state subsequently to such date, such a corporation may maintain an action after the date named in the statute on a contract and notes made while it had a right to carry on business in the state without such certificate.[23] From these and other decisions it may be concluded that the mere collection of a debt due to a foreign corporation on a contract made before the passage of such a retroactive statute is not affected by the statute, since to give it such an effect would impair the obligation of the contract.[24]

2. Effect Upon Continuing Contracts Already Entered Into. Aside from any question as to constitutionality, these statutes, unless their language requires a different construction, are generally held to be prospective only, so as not to apply to a continuing contract previously entered into between the foreign corporation and a domestic citizen.[25] On the contrary, it has been held that it is no defense to the prosecution by the state of a foreign corporation for carrying on business in the state without filing the statement required by a statute that the corporation filed the required statement before delivering the goods which it had sold, since the execution of the contract of sale constituted the carrying on of busi-

194 Ill. 259, 62 N. E. 606 [*affirming* 89 Ill. App. 670].

22. Standard Sewing Mach. Co. *v.* Frame, 2 Pennew. (Del.) 430, 48 Atl. 188. So, in Tennessee, where the contract was completed when the retroactive statute went into effect, it is enforceable. U. S. Savings, etc., Assoc. *v.* Miller, (Tenn. Ch. App. 1897) 47 S. W. 17. See also M. B. Faxon Co. *v.* Lovett Co., 60 N. J. L. 128, 36 Atl. 692.

23. Providence Steam, etc., Co. *v.* Connell, 86 Hun (N. Y.) 319, 33 N. Y. Suppl. 482. It has been held, however, that a foreign corporation cannot, under this statute, maintain an action to foreclose a mechanic's lien for work done and materials furnished by it upon a building, where it has not procured the statutory certificate, and that the procurement of the certificate after the work has been done, and before the commencement of the action, will not enable the corporation to maintain the action. Neuchatel Asphalt Co. *v.* New York, 9 Misc. (N. Y.) 376, 30 N. Y. Suppl. 252. To the contrary see O'Reilly, etc., Co. *v.* Greene, 17 Misc. (N. Y.) 302, 40 N. Y. Suppl. 360 [*affirmed* in 18 Misc. 423, 41 N. Y. Suppl. 1056], holding that contracts entered into prior to the enactment of the statute are not subject to its provisions.

24. *Arkansas.*— Sidway *v.* Harris, 66 Ark. 387, 50 S. W. 1002; St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43.

Delaware.— Standard Sewing Mach. Co. *v.* Frame, 2 Pennew. 430, 48 Atl. 188.

Illinois.— Richardson *v.* U. S. Mortgage, etc., Co., 194 Ill. 259, 62 N. E. 606 [*affirming* 89 Ill. App. 670].

Indiana.— National Home Bldg., etc., Assoc. *v.* Black, 153 Ind. 701, 55 N. E. 743; Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753.

Minnesota.— Keystone Mfg. Co. *v.* Howe, 89 Minn. 256, 94 N. W. 723.

Nebraska.— American Bldg., etc., Assoc. *v.* Rainbolt, 48 Nebr. 434, 67 N. W. 493.

New Jersey.— M. B. Faxon Co. *v.* Lovett Co., 60 N. J. L. 128, 36 Atl. 692.

New York.— Atlantic Constr. Co. *v.* Kreusler, 40 N. Y. App. Div. 268, 57 N. Y. Suppl. 983; Providence Steam, etc., Co. *v.* Connell, 86 Hun 319, 33 N. Y. Suppl. 482; O'Reilly, etc., Co. *v.* Greene, 17 Misc. 302, 40 N. Y. Suppl. 360.

Rhode Island.— MacLeod *v.* G. P. Putnam's Sons, 24 R. I. 500, 53 Atl. 867.

Tennessee.— Pioneer, etc., Co. *v.* Cannon, 96 Tenn. 599, 36 S. W. 386, 54 Am. St. Rep. 858, 33 L. R. A. 112; W. W. Kimball Co. *v.* First Nat. Bank, 1 Tenn. Ch. App. 505.

Texas.— Whitley *v.* General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 859; Middlebrook *v.* David Bradley Mfg. Co., (Tex. Civ. App. 1894) 27 S. W. 169.

Wisconsin.— Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940.

United States.— Bedford *v.* Eastern Bldg., etc., Assoc., 181 U. S. 227, 21 S. Ct. 597, 45 L. ed. 834.

See also *supra*, I, D, 4.

Penalty for continuing business.— That the failure of a foreign insurance corporation already doing business in a state to comply with such a statute will render it liable to the penalty imposed by the act for continuing to do business, at the suit of one holding a policy issued before passage of the act, was held in Sandel *v.* Atlanta Mut. L. Ins. Co., 53 S. C. 241, 31 S. E. 230.

25. National Home Bldg., etc., Assoc. *v.* Black, 153 Ind. 701, 55 N. E. 743; Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753. See also W. W. Kimball Co. *v.* First Nat. Bank, 1 Tenn. Ch. App. 505. *Compare supra*, I, D, 4.

ness within the state.[26] In line with this doctrine is a holding to the effect that a statute which provides that a foreign corporation doing business in the state without first complying therewith cannot maintain an action on any contract or demand growing out of such unlawful business, a compliance after the making of such contract, or after the commencement of an action thereon, will not remove the bar of the statute and enable the action to proceed.[27] But it is to be kept in mind that this is not the doctrine of all the courts.[28]

K. Enforcing Statutes by Penalties Against Agents. Where it is competent for the legislature of a state to forbid the doing of a certain act on the part of a corporation, it can enforce its laws by imposing a penalty on the agents of the corporation who commit the act.[29]

L. Protection and Discrimination in Favor of Domestic Creditors or Shareholders — 1. In General. A state may, subject to constitutional limitations, enact statutes for the protection of domestic creditors of foreign corporations doing business in the state;[30] but it cannot constitutionally discriminate in favor of domestic creditors as against creditors who are citizens of other states, with respect to distribution of the assets of a foreign corporation within the state, or otherwise.[31] A state, however, may require a foreign corporation seeking to

26. Knoxville Nursery Co. *v.* Com., 108 Ky. 6, 55 S. W. 691, 21 Ky. L. Rep. 1483.

Defense in action by corporation for breach. — Where a state statute prohibited any foreign corporation from transacting any business in the state without first complying with its requirements as to filing a copy of its charter, etc., and further provided that any contract made by such a corporation affecting its personal liability or relating to property in the state before compliance should be wholly void on its behalf, but enforceable against it, and after the enactment of such statute, but before it went into effect by its terms, a foreign corporation entered into an executory contract to be performed within the state, it was held that the statute, on taking effect, became applicable to anything done or to be done under the contract by such corporation thereafter, and constituted a defense to an action by the corporation for a breach of the contract by the other party by refusing to continue operations under it, such corporation having failed to comply with the requirements of the statute. Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838. And see Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328.

27. G. Heileman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441. This is the doctrine in Pennsylvania. Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., R. Co., 204 Pa. St. 22, 53 Atl. 533. The fact that the foreign corporation registers after the work is completed and before suit brought will not give it a right of action to enforce such contract. People's Bldg., etc., Assoc. *v.* Berlin, 15 Pa. Super. Ct. 393, the fact that the foreign building association did file with the secretary of the commonwealth, subsequently to the creation of a mortgage, the statement required by the act, does not validate the transaction.

28. See *infra*, IV, B, 5. *Compare* Atlantic Constr. Co. *v.* Kreusler, 40 N. Y. App. Div. 268, 57 N. Y. Suppl. 983, holding that under N. Y. Laws (1892), c. 687, § 15, a lawful contract made prior to the enactment of the statute may be subsequently enforced by the corporation within the state, although it also declares that no foreign stock corporation doing business in the state without such certificate shall maintain an action in the state upon any contract made by it therein until it has procured such certificate.

29. Woodson *v.* State, 69 Ark. 521, 65 S. W. 465; Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683. See *infra*, IV, M.

30. People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 [*affirming* 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510]; Sully *v.* American Nat. Bank, 178 U. S. 289, 20 S. Ct. 935, 44 L. ed. 1072.

31. Blake *v.* McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. ed. 432 (holding that a statute providing that domestic creditors of a foreign corporation doing business in the state should have priority in the distribution of the assets of such corporation over all simple contract creditors, being residents of any other country or countries, was unconstitutional in so far as creditors residing in other states were concerned, being in violation of U. S. Const. art. 4, § 2, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; but sustaining the statute as against a creditor who was a foreign corporation); Maynard *v.* Granite State Provident Assoc., 92 Fed. 435, 34 C. C. A. 438. See also McClung *v.* Embreeville Freehold, etc., Co., 103 Tenn. 399, 52 S. W. 1001 [petition for mandamus denied in 175 U. S. 114, 20 S. Ct. 42, 44 L. ed. 94]. *Compare* Sully *v.* American Nat. Bank, 178 U. S. 289, 20 S. Ct. 935, 44 L. ed. 1072. And see CONSTITUTIONAL LAW, 8 Cyc. 1049.

Construction of statute. — The statute of South Carolina (21 St. at L. p. 409), declaring the terms on which foreign corporations may do business and own property in that state, and providing that a court of compe-

do business therein to make a deposit in trust for the protection and benefit of its citizens as against non-resident creditors and shareholders.[32]

2. Prohibition Against Mortgaging Property to Injury of Domestic Citizens. Statutes have been enacted providing that no foreign corporation shall mortgage or encumber its property to the injury or exclusion of any citizen of the state. Under such a statute it has been held that a foreign corporation cannot encumber its property to the exclusion of demands of the citizens of the state, although such demands are not of record and are unknown to the parties advancing money on the mortgage of the corporate property, and although such parties have acted with due diligence.[33] Upon the question what is an "injury" to a citizen of the state, within the meaning of such a statute, it has been held that a mortgage executed by a foreign corporation to secure notes given to a citizen of the state and to non-residents respectively is not an injury to the domestic citizen.[34]

M. Selling Intoxicating Liquors. A foreign corporation permitted by its own charter to sell intoxicating liquors may be licensed to transact such business in Massachusetts.[35]

N. Inspection of Books and Records. As has been shown, where a foreign corporation fails to keep its books within the state, as required by the constitution, and there is no officer having control of such books within the reach of the process of the state, a mandamus will not issue commanding inspection; but where there are books within the state, in the custody of an agent of such corporation, it may be compelled to allow a shareholder, whether resident or non-resident, to inspect the same and make copies.[36] This subject is very commonly regulated by statute.[37] Under the applicatory statute of New York a shareholder of a foreign corporation which has a transfer agent in the state for the transaction of business in the state, but which does not keep therein the stock-book required by law, is entitled to inspect the books kept by the transfer agent, and by the register of transfers of stock, containing some or most of the information which would be shown by the stock-book if kept; since the books may be

tent jurisdiction may take possession of, wind up, administer, and marshal the assets of a foreign corporation within the state, the same as with respect to domestic corporations, for the protection of citizens of the state who are shareholders or creditors of such foreign corporation, as in the case of resident legatees and creditors of deceased persons whose domicile was at their decease outside the state, in respect to assets within the state, is construed, referring to Blake *v.* McClung, *supra*, as not giving to resident creditors of a foreign corporation the right to appropriate its assets in the state to the exclusion of foreign creditors. Wilson *v.* Keels, 54 S. C. 545, 32 S. E. 702, 71 Am. St. Rep. 816.

32. People *v.* Granite State Provident Assoc., 161 N. Y. 492, 55 N. E. 1053 [*affirming* 41 N. Y. App. Div. 257, 58 N. Y. Suppl. 510] (holding that the New York statute requiring a foreign corporation wishing to transact business in the state to deposit a certain fund and providing that on the appointment of a receiver of the corporation in the state the deposit should be paid to him to be distributed among the resident creditors and shareholders, creates a trust in such fund for the benefit of such residents and is not unconstitutional); Lewis *v.* American Sav., etc., Assoc., 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559 (foreign building and loan association depositing securities in trust for the protection of domestic members). See also *supra*, III, B, 8.

33. Holland Trust Co. *v.* Taos Valley Co., 11 R. & Corp. L. J. 74.

34. Brittle Silver Co. *v.* Rust, 10 Colo. App. 463, 51 Pac. 526.

35. Enterprise Brewing Co. *v.* Grimes, 173 Mass. 252, 53 N. E. 855, holding that the statutes do not prohibit such sales to domestic corporations, although they are prohibited from distilling or manufacturing such liquors. That it was not the intent of the Pennsylvania act of 1891 to license foreign corporations to engage in the sale of liquors within the state see *In re* Peter Schoenhofen Brewing Co., 8 Pa. Super. Ct. 141, 42 Wkly. Notes Cas. (Pa.) 402.

36. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. See *supra*, I, H, 3, text and note 65.

37. Under the New York statute (Laws (1892), c. 688, § 53, as amended by Laws (1897), c. 384, § 3), requiring foreign corporations having an office for the transaction of business in the state to keep a stock-book open for shareholders' inspection during business hours, a corporation which maintains in the state an office or agency for the transfer of stock is maintaining an office for the transaction of business, and it may be compelled by mandamus to deposit and exhibit its stock-book at such office. People *v.* Montreal, etc., Copper Co., 40 Misc. 282, 81

considered as books kept by the corporation.[38] The shareholder may also inspect any papers officially kept by the secretary and treasurer of the corporation, in its New York office, from which he can obtain similar information.[39] The statute above referred to gives a penalty against the officer refusing the inspection, of two hundred and fifty dollars "for any refusal" to be recovered by the person to whom such refusal was made.[40] Under this statute the shareholder may recover the prescribed penalty for each day during which his right of inspection is denied.[41] Interest will not be allowed on the penalties recovered.[42] The officers of the corporation as well as the corporation itself are subject to the statutory penalty, although no duty to disclose the books is expressly imposed on the officers by the statute.[43]

O. Devices to Evade Statutes. The courts have several times had to deal with ingenious devices invented to evade the requirements of these statutes. One of these was to procure a domestic charter; but this ingenious scheme did not work, because there was no proof that the corporation had ever organized or acted in any way under the domestic charter, and the contract which it sought to enforce purported, on its face, to be executed in its favor as a foreign corporation.[44] Another, which turned out to be equally futile, sought to make a good mortgage for the benefit of a foreign corporation not authorized to do business in the state, by giving it to a trustee who was a resident of the state.[45] Another sought to evade the effect of a statute providing that all contracts entered into by foreign corporations without the payment of a prescribed franchise fee should be wholly void, by the device of having all the shareholders of the corporation execute the contract by acting together as individuals; but it was held that this would not work, because what the law forbade the corporation to do all its members could not do for it.[46]

N. Y. Suppl. 974. Refusal to permit a shareholder to inspect the stock-book of a foreign corporation is sufficiently established where it is shown that he has made repeated demands for inspection and that those in charge of the office have for a month met such demands with evasive answer. People *v.* Montreal, etc., Copper Co., *supra*.

38. People *v.* Knickerbocker Trust Co., 38 Misc. (N. Y.) 446, 77 N. Y. Suppl. 1000.

39. People *v.* Knickerbocker Trust Co., 38 Misc. (N. Y.) 446, 77 N. Y. Suppl. 1000.

40. In an action to recover such a penalty, the secretary of the corporation testified that he told plaintiff that the corporation had an office at the place alleged in plaintiff's complaint, and that the books were there; that the company had no other office, and that all the business was transacted there, which testimony was corroborated by defendant's attorney. It was held that, although the company had no considerable amount of business to transact, the evidence was sufficient to show that the company had an office in the state for such business, within the meaning of the statute. Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 73 N. Y. Suppl. 69. In an action under the statute to recover the penalty for violation thereof, the complaint is fatally defective if it does not bring defendant within the statute by alleging that it was a stock corporation, and that it was not a moneyed or railroad corporation. Seydel *v.* Corporation Liquidating Co., 46 Misc. (N. Y.) 576, 92 N. Y. Suppl. 225. A demand to show the stock-book made at three-fifteen o'clock in the afternoon, while the officer on whom it was made was still in his office and at a time when he made the excuse that he was too busy to produce the book, was deemed to have been made "during the usual hours of transacting business," within the meaning of the statute. Cox *v.* Island Min. Co., *supra*.

41. Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 73 N. Y. Suppl. 69.

42. Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 73 N. Y. Suppl. 69.

43. Cox *v.* Island Min. Co., 65 N. Y. App. Div. 508, 73 N. Y. Suppl. 69.

Construction of New York Act (1842), c. 165, requiring foreign corporations keeping a transfer agent in New York to exhibit a transfer-book and list of shareholders to shareholders at all reasonable hours. Ervin *v.* Oregon R., etc., Co., 22 Hun (N. Y.) 566; People *v.* Lake Shore, etc., R. Co., 11 Hun (N. Y.) 1; People *v.* Paton, 5 N. Y. St. 313; Kennedy *v.* Chicago, etc., R. Co., 14 Abb. N. Cas. (N. Y.) 326; Phillips *v.* Germania Mills, 20 Abb. N. Cas. (N. Y.) 381. That a demand for an inspection of the stock-book is not sufficient as a demand for an inspection of the transfer-book see Kennedy *v.* Chicago, etc., R. Co., 14 Abb. N. Cas. (N. Y.) 326.

44. Illinois Bldg., etc., Assoc. *v.* Walker, (Tenn. Ch. App. 1897) 42 S. W. 191.

45. Myers Mfg. Co. *v.* Wetzel, (Tenn. Ch. App. 1896) 35 S. W. 896. See also *supra*, II, A, 9 text and notes 25 and 26.

46. Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147.

P. Revocation of License or Permit. Subject to the qualification that a state cannot pass laws impairing the obligation of contracts[47] and other constitutional limitations,[48] a state which has licensed a foreign corporation to do business within its limits may revoke such license at any time, or may authorize such revocation by the secretary of state, commissioner of insurance, or other public officer.[49]

Q. Mandamus to Compel Filing of Charter, Etc., or Issue of License, Etc. If the secretary of state, superintendent of insurance, or other proper officer, refuses to file the charter, certificate of incorporation, articles of incorporation, etc., in compliance with the statute regulating the business of foreign corporations within the state, or to issue a certificate or permit to do business, when a foreign corporation is entitled thereto, then, according to the weight of judicial opinion, the foreign corporation may have a writ of mandamus compelling him to do so;[50] but not where the corporation is organized for purposes not contemplated by the statute and consequently is not included within the statutory license,[51] or where it has not complied with the statute.[52] Nor will the writ lie where the statute gives the superintendent of insurance, secretary of state, or other officer, discretionary power in the matter, so that his determination is final.[53]

47. See *supra*, I, D, 4; III, J, 1.

48. See *supra*, I, D.

49. *Illinois.*— North American Ins. Co. *v.* Yates, 214 Ill. 272, 73 N. E. 423, revocation of insurance company's license by superintendent of insurance.

Kansas.— State *v.* American Book Co., 65 Kan. 847, 69 Pac. 563.

Michigan.— American Ins. Co. *v.* Stoy, 41 Mich. 385, 1 N. W. 877, revocation of license of foreign insurance company by commissioner of insurance because of unsoundness of financial condition.

Missouri.— Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552]; McCutcheon *v.* Rivers, 68 Mo. 122, revocation of foreign insurance company's license by superintendent of insurance.

Nebraska.— State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449, revocation for violation of anti-trust law.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941, violation of anti-trust law.

Texas.—Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936 [*affirmed* in 177 U. S. 28, 20 S. Ct. 518, 44 L. ed. 657], violation of anti-trust law.

Wisconsin.— Travelers' Ins. Co. *v.* Tricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557, for failure to pay license fees.

See also *supra*, I, D, 4; III, J, 1.

50. *Kansas.*—Kansas Home Ins. Co. *v.* Wilder, 43 Kan. 731, 23 Pac. 1061, to superintendent of insurance.

Kentucky.— Metropolitan L. Ins. Co. *v.* Darenkamp, 66 S. W. 1125, 23 Ky. L. Rep. 2249.

Michigan.— Isle Royale Land Corp. *v.* Secretary of State, 76 Mich. 162, 43 N. W. 14 (to secretary of state); *In re* Franchise Fee Law, 6 Detroit Leg. N. No. 6, although its power, capitalization, and term of existence exceeded that permitted a domestic corporation chartered for similar purposes.

Nebraska.— State *v.* Benton, 25 Nebr. 756, 41 N. W. 953, to the auditor of public accounts, but holding that the writ will not be issued unless it is clear that there is a wilful disregard of duty on his part.

New Hampshire.— U. S. Fidelity, etc., Co. *v.* Linehan, (1904) 58 Atl. 956.

Ohio.— State *v.* Reinmund, 45 Ohio St. 214, 13 N. E. 30, mandamus to insurance superintendent granted.

Texas.— Beattie *v.* Hardy, 93 Tex. 131, 53 S. W. 685, mandamus to secretary of state granted.

Washington.— State *v.* Jenkins, 22 Wash. 494, 61 Pac. 141.

West Virginia.— Virginia Acc. Ins. Co. *v.* Dawson, 53 W. Va. 619, 46 S. E. 51.

Wisconsin.— State *v.* Root, 83 Wis. 667, 54 N. W. 33, 19 L. R. A. 271, mandamus to commissioner of insurance granted. *Compare* State *v.* Giljohann, 111 Wis. 377, 87 N. W. 245.

51. Isle Royale Land Corp. *v.* Secretary of State, 76 Mich. 162, 43 N. W. 14. See also *In re* Filing Articles of Incorporation, 6 Detroit Leg. N. No. 11 (opinion of the attorney-general of Michigan, holding that foreign corporations are entitled to have their articles of association filed in the office of the secretary of state, although they have not paid in the percentage of their capital stock required of Michigan corporations, where they have been duly and legally organized under the laws of the state from which they originated, and were organized for purposes for which, under the laws of Michigan, the citizens of that state may incorporate); State *v.* Jenkins, 22 Wash. 494, 61 Pac. 141 (period for which such license is granted begins on July 1, and not on the creation of the corporation or the beginning of the calendar year, and mandamus will not lie to compel the issue of such license for a calendar year).

52. English, etc., Mortg., etc., Co. *v.* Hardy, 93 Tex. 289, 55 S. W. 169, where the corporation did not show that fifty per cent of its authorized capital stock had been subscribed as required by the statute.

53. Dwelling-House Ins. Co. *v.* Wilder, 40

R. Injunction Against Revocation of License or Permit. If the secretary of state, superintendent of insurance, or other officer attempts to revoke the license or permit of a foreign corporation which has fully complied with the laws of the state and is entitled to do business therein, the corporation may maintain a suit to enjoin his threatened action.[54]

S. Proceedings to Oust or Exclude Corporations — 1. Quo Warranto. A foreign corporation exercising its franchises within a state, in contravention of the constitution or laws of such state, or without authority therefrom or thereunder, may be ousted from such exercise of its franchises and privileges by a proceeding in the nature of an information for a writ of quo warranto.[55] It may, for example, be ousted for violating the statute law of the state against monopolistic combinations called trusts;[56] and it cannot set up as a defense to the proceeding that it is not bound by the acts of its agents because they involve a criminal responsibility in addition to civil liability.[57] In such a case the judgment of ouster may properly provide that it shall not so operate as to interfere with the right of the foreign corporation in dealing in matters of interstate commerce; since the statute against monopolies does not undertake in any way to regulate or prohibit the transactions of interstate commerce.[58] In such a case it is not essential that there should have been an antecedent conviction in a court of law, in order to the maintenance of quo warranto proceedings or a bill to restrain a foreign corporation from doing business in the state, where the penalties imposed by the statute are independent.[59] Where the ground of the proceeding by the state is that the foreign corporation is exercising its franchises and privileges within the state without authority of law, the corporation cannot set up as a defense a license from an officer of the state, since that may have been issued without authority of law.[60] Where a foreign corporation had failed to qualify itself under the domestic statutes to exercise its corporate functions in the domestic state, under an honest belief that it was not necessary to do so because of the relation which the foreign corporation sustained to a domestic corporation, an unconditional judgment of ouster was not granted.[61]

Kan. 561, 20 Pac. 265 (mandamus to insurance superintendent denied); Provident Sav. L. Assur. Soc. *v.* Cutting, 181 Mass. 261, 63 N. E. 433, 92 Am. St. Rep. 415 (the same); Matter of Hartford L., etc., Ins. Co., 63 How. Pr. (N. Y.) 54 (the same); State *v.* Carey, 2 N. D. 36, 49 N. W. 164 (reversing a judgment issuing a writ of mandamus to the insurance commissioner). See also Vorys *v.* State, 67 Ohio St. 15, 65 N. E. 150.

54. Equitable L. Assur. Soc. *v.* Host, (Wis. 1905) 102 N. W. 579. But a foreign corporation cannot maintain a suit against a state officer to restrain a revocation of its license to do business within the state because of its failure to pay the statutory license-fees, on the ground that the statute of limitations would bar an action to collect the fees. Travelers' Ins. Co. *v.* Fricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557.

55. *Iowa.*— State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121; State *v.* New York Fidelity, etc., Co., 77 Iowa 648, 42 N. W. 509.

Minnesota.— State *v.* New York Fidelity, etc., Ins. Co., 39 Minn. 538, 41 N. W. 108.

Nebraska.— State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449.

Ohio.— State *v.* Ætna L. Ins. Co., 69 Ohio St. 317, 69 N. E. 608; State *v.* New York Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611; State *v.* Western Union Mut. L. Ins. Co., 47 Ohio St. 167, 24 N. E. 392, 8 L. R. A. 129.

Tennessee.— State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

Texas.— Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

56. State *v.* Standard Oil Co., 61 Nebr. 28, 84 N. W. 413, 87 Am. St. Rep. 449; State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941 (since this penalty may be enforced by a prohibitory injunction); Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

57. Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

58. Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

59. State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

60. State *v.* New York Fidelity, etc., Ins. Co., 49 Ohio St. 440, 31 N. E. 658, 34 Am. St. Rep. 573, 16 L. R. A. 611, license to foreign insurance company issued by the superintendent of insurance.

61. State *v.* Omaha, etc., R., etc., Co., 91 Iowa 517, 60 N. W. 121.

2. Injunction.[62] A foreign corporation which assumes to enter the domestic state and establish itself and do business there, without complying with the conditions imposed by its statute law, presents the case of a continuing public nuisance which may be restrained by an injunction.[63] Such an injunction will not be granted upon slight evidence of special injury, at the instance of a rival foreign corporation which has complied with such laws.[64] The resident agent of the foreign corporation is a proper if not a necessary party to such a bill, although the only personal remedy provided by the statute against the agent is a criminal prosecution.[65] Where a foreign corporation has complied with the law and received permission to do business in the state, it cannot be enjoined at the suit of the state from performing contracts made before such permission was obtained.[66]

IV. Consequences of Violating Constitutional or Statutory Conditions or Restrictions.

A. Introductory Statement. There is some actual conflict in the decisions as to the effect of failure of a foreign corporation to comply with constitutional or statutory provisions imposing conditions or restrictions upon the right to do business in a state;[67] but more frequently the decisions are only apparently in conflict because of a difference in the language of the statutory or constitutional provisions on which they are based.[68] Some questions which might properly be also classified under this subdivision have already been considered.[69] Before going more specifically into the question as to the effect of failure of a foreign corporation to comply with constitutional or statutory restrictions or conditions, it may be stated that such compliance will be presumed in the absence of evidence to the contrary,[70] and that an action by a foreign corporation will not be dismissed because of failure to comply technically with the statute, where there has been a substantial and honest compliance as far as possible.[71] Failure of a foreign corporation to obtain a license or certificate before doing business in the state, as required by a statute providing as a penalty that it shall not maintain an action in the state on a contract made therein before procuring such license or certificate, does not make it a trespasser in using a highway in the state, so as to affect the questions of negligence and contributory negligence in an action against it for damages caused by a collision between its vehicle and that of plaintiff.[72]

B. Right of Foreign Corporations to Enforce Contracts — 1. In General. Upon the question whether the failure of a foreign corporation to comply with restrictive statutes, such as those under consideration, before undertaking to do business in the domestic state, will render its contracts, made with the citizens of that state, void or voidable, the decisions are in a state of irreconcilable contradiction.[73]

2. Contracts Void and Unenforceable — a. In General. A numerous class of holdings are to the effect that where a statute of a state provides that foreign

62. **Suit by private individuals** see *infra*, IV, O.

63. North American Ins. Co. *v.* Yates, 214 Ill. 272, 73 N. E. 423; State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941 (a chancery court in Tennessee has jurisdiction to entertain a bill to restrain a foreign corporation from doing business in the state); Waters-Pierce Oil Co. *v.* State, 19 Tex. Civ. App. 1, 44 S. W. 936.

64. Employers' Liability Assur. Corp. *v.* Employers' Liability Ins. Co., 61 Hun (N. Y.) 552, 16 N. Y. Suppl. 397.

65. State *v.* Schlitz Brewing Co., 104 Tenn. 715, 59 S. W. 1033, 78 Am. St. Rep. 941.

66. State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411.

67. *Compare infra*, IV, B; IV, C.

68. See and *compare infra*, IV, B, 2–6.

69. **Construction and application of restrictions** generally see *supra*, III.

Retroactive effect of statutes see *infra*, III, J.

70. **Presumptions** see *infra*, A, 3, f.

71. Jordan *v.* Western Union Tel. Co., 69 Kan. 140, 76 Pac. 396. See also American Ins. Co. *v.* Butler, 70 Ind. 1; De Camp *v.* Warren Mortg. Co., 65 Kan. 860, 70 Pac. 581.

72. Bischoff *v.* Automobile Touring Co., 97 N. Y. App. Div. 17, 89 N. Y. Suppl. 594.

73. See for example Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Kindel *v.* Beck, etc., Lithographing

corporations shall not do business within the state except upon compliance with certain conditions, and such a corporation does business in the state in violation of the statute, and, through the business so done, a contract accrues to it which would otherwise be enforceable in the courts of the state, the corporation cannot, because of the statutory prohibition, maintain an action upon such contract in the courts of the state.[74] This is true in some jurisdictions, even where the statute imposes a specific penalty upon the corporation or its agents for doing

Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Columbus Ins. Co. *v.* Walsh, 18 Mo. 229.

74. *Alabama.*— Hanchey *v.* Southern Home Bldg., etc., Assoc., 140 Ala. 245, 37 So. 272; Christian *v.* American Freehold Land Mortg. Co., 89 Ala. 198, 7 So. 427; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200 [*distinguishing* Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695]; Dudley *v.* Collier, 87 Ala. 433, 6 So. 304, 13 Am. St. Rep. 55.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369, 372, *per* Elbert, J.

Illinois.— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626. And see Pennsylvania L. Ins., etc., Co. *v.* Bauerle, 143 Ill. 459, 33 N. E. 156; Central Mfg. Co. *v.* Briggs, 106 Ill. App. 417.

Indiana.— Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236; Union Cent. L. Ins. Co. *v.* Thomas, 46 Ind. 44; Hoffman *v.* Banks, 41 Ind. 1. See also Cassaday *v.* American Ins. Co., 72 Ind. 95; Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520.

Kentucky.— Franklin Ins. Co. *v.* Louisville, etc., Packet Co., 9 Bush 590.

Massachusetts.— Reliance Mut. Ins. Co. *v.* Sawyer, 160 Mass. 413, 36 N. E. 59; Washington County Mut. Ins. Co. *v.* Hastings, 2 Allen 398; Williams *v.* Cheney, 8 Gray 206; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray 376; Jones *v.* Smith, 3 Gray 500. See also National Mut. F. Ins. Co. *v.* Pursell, 10 Allen 231.

Michigan.— Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147; Seamans *v.* Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430. See also Hoskins *v.* Rochester Sav., etc., Assoc., 133 Mich. 505, 95 N. W. 566.

Minnesota.—Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; G. Heileman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441; Seamans *v.* Christian Bros. Mill Co., 66 Minn. 205, 68 N. W. 1065. And see Keystone Mfg. Co. *v.* Howe, 89 Minn. 256, 94 N. W. 723.

Missouri.— Ehrhardt *v.* Robertson, 78 Mo. App. 404; Williams *v.* Scullin, 59 Mo. App. 30.

Montana.— Kent, etc., Co. *v.* Tuttle, 20 Mont. 203, 50 Pac. 559. *Compare* Western Loan, etc., Co. *v.* Silver Bow Abstract Co., (1904) 78 Pac. 774, temporary expiration of license.

Nebraska.— Pioneer Sav., etc., Co. *v.* Mostert, 62 Nebr. 812, 87 N. W. 1059; Pioneer Sav., etc., Co. *v.* Eyer, 62 Nebr. 810, 87 N. W. 1058; Commonwealth Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922, 83 Am. St. Rep. 545; Barbor *v.* Boehm, 21 Nebr. 450, 32 N. W. 221.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123.

New Jersey.—Stewart *v.* Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436.

New York.— Charles Roome Parmele Co. *v.* Haas, 67 N. Y. App. Div. 457, 73 N. Y. Suppl. 986 [*reversed* on other grounds in 171 N. Y. 579, 63 N. E. 440]; Fairhaven Nat. Bank *v.* Phœnix Warehousing Co., 6 Hun 71; South Amboy Terra Cotta Co. *v.* Poerschke, 45 Misc. 358, 90 N. Y. Suppl. 333; Neuchatel Asphalt Co. *v.* New York, 9 Misc. 376, 30 N. Y. Suppl. 252; New Hope Delaware Bridge Co. *v.* Poughkeepsie Silk Co., 25 Wend. 648; Pennington *v.* Townsend, 7 Wend. 276.

North Carolina.— Commonwealth Mut. F. Ins. Co. *v.* Edwards, 124 N. C. 116, 32 S. E. 404.

Oregon.— Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329; British Columbia Bank *v.* Page, 6 Oreg. 431.

Pennsylvania.— Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533; Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552; Thorne *v.* Travelers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89; Chicago Bldg., etc., Co. *v.* Myton, 24 Pa. Super. Ct. 16; Commonwealth Mut. F. Ins. Co. *v.* Sharpless, 12 Pa. Super. Ct. 333 (holding that a decree of the court in Massachusetts finding the insured defendants liable for certain assessments would not be enforced, since such contract was illegal); Wildwood Pavilion Co. *v.* Hamilton, 7 Pa. Dist. 747, 22 Pa. Co. Ct. 68; Western Massachusetts Mut. F. Ins. Co. *v.* Girard Point Storage Co., 19 Pa. Co. Ct. 113; *In re* Office Specialty, etc., Mfg. Co., 12 Pa. Co. Ct. 44. Such was held to be the law in Pennsylvania in the following New Jersey cases: Wolf *v.* Lancaster, 70 N. J. L. 201, 56 Atl. 172; Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724. As to these cases see *infra*, IV, B, 2, i, j.

Tennessee.—Harris *v.* Columbia Water, etc., Co., 108 Tenn. 245, 67 S. W. 811; Gilmer *v.* U. S. Savings, etc., Co., 103 Tenn. 272, 52 S. W. 851; New York Bldg., etc., Assoc. *v.* Cannon, 99 Tenn. 344, 41 S. W. 1054; Cary-Lombard Lumber Co. *v.* Thomas, 92 Tenn. 587, 22 S. W. 743; Massillon First Nat. Bank *v.* Coughron, (Ch. App. 1899) 52 S. W. 1112; Illinois Bldg., etc., Assoc. *v.* Walker, (Ch. App. 1897) 42 S. W. 191 (in the absence of a curative statute); Myers Mfg. Co. *v.* Wetzel, (Ch. App. 1896) 35 S. W. 896; Cumberland Land Co. *v.* Canter Lumber Co., (Ch. App. 1895) 35 S. W. 886.

Texas.— Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954; Huffman *v.*

business in the state in violation of its provisions.[75] According to this doctrine one who is sued by a foreign corporation on a contract entered into by it without having complied with the statute is not estopped to set up such non-compliance as a defense.[76] Sometimes the statute applies in terms to contracts of a foreign corporation with citizens only, and does not render void or unenforceable contracts between foreign corporations and persons who are not citizens of the state.[77]

b. Especially Where No Specific Penalty Is Prescribed. The above conclusion is regarded as clear in some jurisdictions where the prohibition of the statute is not accompanied with any specific penalty; since in such cases this is the only effective way by which the prohibition can be enforced.[78]

Western Mortg., etc., Co., 13 Tex. Civ. App. 169, 36 S. W. 306.

Utah.— Booth & Co. *v.* Weigand, (1904) 79 Pac. 570.

Vermont.— Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Wisconsin.— Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904; Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

United States.— Diamond Glue Co. *v.* U. S. Glue Co., 187 U. S. 611, 23 S. Ct. 206, 47 L. ed. 328; U. S. Rubber Co. *v.* Butler Bros. Shoe Co., 132 Fed. 398; Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838 (this rule governs equally with or without express terms in the statute declaring the invalidity); Electric News, etc., Co. *v.* Perry, 75 Fed. 898; McCanna, etc., Co. *v.* Citizens' Trust, etc., Co., 74 Fed. 597; Northwestern Mut. L. Ins. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17; *In re* Comstock, 6 Fed. Cas. No. 3,078, 3 Sawy. 218; Lamb *v.* Lamb, 14 Fed. Cas. No. 8,018, 6 Biss. 420; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Canada.— Jones *v.* Taylor, 15 N. Brunsw. 391; Allison *v.* Robinson, 15 N. Brunsw. 103; India Rubber Co. *v.* Hibbard, 6 U. C. C. P. 77 (holding that a foreign corporation could not sue for goods bargained and sold on a contract made in Upper Canada, but that it could sue for goods sold and delivered); Montreal Bank *v.* Bethune, 4 U. C. Q. B. O. S. 341 (holding that a foreign banking corporation could not sue upon promissory notes received and discounted by it in the course of banking business in the province, although it might maintain an action for money had and received to its use against the person for whom such notes were discounted and to whom money was advanced on them).

See 12 Cent. Dig. tit. "Corporations," § 2536 *et seq.*

Evasion of statute see *supra*, III, O.

Doctrine that such a contract is void even when questioned collaterally.— One court has held that the contracts of foreign corporations which have not complied with the conditions of the domestic state prescribing the terms on which they may come into the state and do business are void even when questioned collaterally. Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520. But this seems to be a plain aberration.

Non-compliance with the statute not due to any omission of the corporation, but to the act or omission of the officers of the domestic state, does not render the corporation's contracts unenforceable. American Ins. Co. *v.* Butler, 70 Ind. 1. See *supra*, III, B, 2, a, text and note 54.

New contract after compliance with law.— It has been held that where a mortgage taken by a foreign corporation is void because at the time it was taken the corporation had not complied with the statute so as to be qualified to do business in the state, a subsequent mortgage, taken after the corporation has qualified to do business in the state, for the secret purpose of validating the first, but on pretense of making concessions to the mortgagor, is likewise void, as being without consideration and obtained under a false pretense. Gilmer *v.* U. S. Sav., etc., Co., 103 Tenn. 272, 52 S. W. 851.

Temporary expiration of its license after a foreign corporation has entered into a contract and before commencement of an action thereon will not defeat the action. Western Loan, etc., Co. *v.* Silver Bow Abstract Co., (Mont. 1904) 78 Pac. 774, where a foreign corporation was licensed to do business in the state at the time it contracted with defendant for the preparation of an abstract, and also at the time a mortgage taken on the faith of the abstract was foreclosed and at the time an action was brought to recover damages sustained by reason of an omission in the abstract, but there was a short period in the meantime during which its license had expired and remained unrenewed.

75. *Alabama.*— Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55.

Illinois.— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Indiana.— Cassaday *v.* American Ins. Co., 72 Ind. 95; Hoffman *v.* Banks, 41 Ind. 1.

New York.— Pennington *v.* Townsend, 7 Wend. 276.

Pennsylvania.— Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

Tennessee.— Cary-Lombard Lumber Co. *v.* Thomas, 92 Tenn. 587, 22 S. W. 743.

Wisconsin.—Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

Contra.— See *infra*, IV, B, 3, d.

76. *In re* Comstock, 6 Fed. Cas. No. 3,078, 3 Sawy. 218. *Contra*, see *infra*, IV, A, 3, e.

77. St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83.

78. British Columbia Bank *v.* Page, 6 Oreg. 431. Some cases are to the contrary. See *infra*, IV, B, 3, a.

c. Contracts Expressly Declared Void or Unenforceable. If, as is sometimes the case, the statute expressly declares that all contracts of a foreign corporation in violation thereof shall be void, or that no action shall be maintained thereon, then of course there is no doubt as to the intention of the legislature and there can be no recovery thereon by the corporation.[79]

d. Recovery by Other Party of What He Has Advanced Under Contract. One court has held that, where a life-insurance company, created and existing under the laws of another state, has assumed to do business and write policies upon lives within the state of the forum, one whose life has been thus insured by it may, a year and a half after accepting the policy, elect to treat the contract as void and maintain an action to recover back the cash premium paid thereon, and this without any abatement representing the value accruing to the beneficiary in the policy in that he was lawfully insured during the period named.[80]

e. Defense by Other Party So Far as Contract Is Unexecuted on His Part. Another class of cases is to the effect that contracts made under the circumstances which we have under consideration are voidable at the election of the domestic citizen in such a sense that he can elect to treat the contract as void whenever an action is brought against him by the foreign corporation to enforce it, and that he can successfully defend against such an action by merely pleading and proving the failure of the foreign corporation, prior to making the contract with him, to comply with the laws of the state entitling it to do business therein.[81]

f. Contracts Void, Although Individuals Are Joined With the Corporation. Contracts entered into with foreign corporations doing business in the domestic state in violation of such a restrictive statute are void, although individuals are joined with the corporation as copartners.[82]

g. Illustrations of This Doctrine — (i) *IN GENERAL.* The cases in which the courts have applied this doctrine that contracts of foreign corporations in violation of the constitutional or statutory provisions under consideration are void and

79. *Illinois.*— Central Mfg. Co. *v.* Briggs, 106 Ill. App. 417.

Michigan.— Hoskins *v.* Rochester Sav., etc., Assoc., 133 Mich. 505, 95 N. W. 566; Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147.

Missouri.— Louisville Bank *v.* Young, 37 Mo. 398.

Rhode Island.— See MacLeod *v.* Putnam, 24 R. I. 500, 53 Atl. 867.

Wisconsin.— Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904, holding that a statute (Wis. St. (1898) § 1770*b*, as amended by Laws (1899), c. 351), providing that contracts made by a foreign corporation before it complies with the statute "shall be wholly void on its behalf, but shall be enforceable against it," means that such contracts shall be void absolutely on its behalf, and not merely voidable at the option of the other party.

United States.— Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93.

See also *supra*, IV, B, 2, a; and *infra*, IV, B, 5.

Statute merely suspending remedy see *infra*, IV, B, 5, a.

80. Union Cent. L. Ins. Co. *v.* Thomas, 46 Ind. 44.

81. Franklin Ins. Co. *v.* Louisville, etc., Packet Co., 9 Bush (Ky.) 590; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray (Mass.) 376; Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33; Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838. And see the cases cited *supra*, IV, B, 2, a. See also *infra*, IV, B, 5, b. The governing principle of the text is more or less discussed in the following cases: Hyde *v.* Goodnow, 3 N. Y. 266; Huntley *v.* Merrill, 32 Barb. (N. Y.) 626; People *v.* Imlay, 20 Barb. (N. Y.) 68. There is an analogous decision to the effect that a foreign corporation keeping an office in New York, of discount and deposit, when prohibited by statute to do so, cannot maintain an action for money loaned on a note or other security taken on such loan, or on a count for money lent. New Hope Delaware Bridge Co. *v.* Poughkeepsie Silk Co., 25 Wend. (N. Y.) 648. Another decision is to the effect that a statute providing that if a foreign corporation do any act forbidden by the laws of the state to be done by a home corporation "it shall not be authorized to maintain any action founded on such act," merely debars it from maintaining any action on a contract prohibited to domestic corporations, but leaves the contract good for other purposes. Wright *v.* Douglass, 10 Barb. (N. Y.) 97, 105.

82. Harris *v.* Columbia Water, etc., Co., 108 Tenn. 245, 67 S. W. 811; Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904, both holding that a partnership composed of two individuals and a foreign corporation which has not registered its charter in the state as required by a statute or otherwise failed to comply with the local

not enforceable by the corporation cover all executory contracts without regard to the subject-matter. For example, foreign corporations have, under this doctrine, been denied the right to recover for the price of goods sold or for breach of a contract of sale,[83] for the furnishing of material and labor and construction of an electric railway,[84] upon a subscription to a fund for building a butter factory,[85] or a subscription to stock,[86] and the like.[87]

(II) *Premium Notes, Etc., of Insurance Companies.* A large number of these cases hold that foreign insurance companies, which have not complied with such local statutes, cannot maintain actions against domestic citizens upon what are called premium notes, that is to say, upon notes given for the settlement, in whole or in part, of amounts agreed to be paid for insurance, fire or life; or on notes given by the members of mutual insurance companies to make up the joint fund upon which they do business, whereby their members stand as the insurers of each other, and other like contracts.[88]

(III) *Recovery by Insurance Companies of Assessments From Members.* On the same ground it has been held that a foreign insurance company, not having complied with such a domestic statute, cannot recover an assessment made against a member who is a citizen of the domestic state.[89]

law cannot enforce a contract by the firm made and to be performed in the state.

83. *Illinois.*— Central Mfg. Co. *v.* Briggs, 106 Ill. App. 417.

Minnesota.— Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; G. Heileman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441.

Montana.— Kent, etc., Co. *v.* Tuttle, 20 Mont. 203, 50 Pac. 559.

Utah.— Booth *v.* Weigand, (1904) 79 Pac. 570.

United States.— U. S. Rubber Co. *v.* Butler Bros. Shoe Co., 132 Fed. 398; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93.

Canada.— Union India-Rubber Co. *v.* Hibbard, 6 U. C. C. P. 77.

And see other cases cited *supra*, IV, B, 2, a.

84. Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533, although the contract was fully performed on the part of the foreign corporation.

85. Chicago Bldg., etc., Co. *v.* Myton, 24 Pa. Super. Ct. 16.

86. Williams *v.* Scullin, 59 Mo. App. 30. But *compare supra*, III, E, 3, b, text and note 55.

87. See the cases cited *supra*, IV, B, 2, a.

88. *Illinois.*— Cincinnati Mut. Health Assur. Co. *v.* Rosenthal, 55 Ill. 85, 8 Am. Rep. 626.

Indiana.— Cassaday *v.* American Ins. Co., 72 Ind. 95; Farmers', etc., Ins. Co. *v.* Harrah, 47 Ind. 236; Hoffman *v.* Banks, 41 Ind. 1.

Kentucky.— Franklin Ins. Co. *v.* Louisville, etc., Packet Co., 9 Bush 590.

Massachusetts.— Reliance Mut. Ins. Co. *v.* Sawyer, 160 Mass. 413, 36 N. E. 59; Washington County Mut. Ins. Co. *v.* Hastings, 2 Allen 398; Williams *v.* Cheney, 8 Gray 206; Washington County Mut. Ins. Co. *v.* Dawes, 6 Gray 376; Jones *v.* Smith, 3 Gray 500.

Michigan.— Seamans *v.* Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 450.

Minnesota.— Seamans *v.* Christian Bros. Mill Co., 66 Minn. 205, 68 N. W. 1065.

Nebraska.— Commonwealth Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922; Barbor *v.* Boehm, 21 Nebr. 450, 32 N. W. 221.

New Hampshire.— Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123 [*distinguished* in Union Ins. Co. *v.* Smart, *infra*, and *overruled*, it is believed, in subsequent cases]. In Haverhill Ins. Co. *v.* Prescott, *supra*, a Massachusetts corporation failed to comply with a New Hampshire statute imposing the same burdens upon corporations organized under the laws of another state as should be imposed, within that state, upon New Hampshire corporations seeking to do business there — in other words, a retaliatory statute; and it was held that it could not recover on a premium note. *Contra*, under a later statute. Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622; Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61; Union Ins. Co. *v.* Smart, 60 N. H. 458.

New Jersey.— Columbia F. Ins. Co. *v.* Kinyon, 37 N. J. L. 33.

Oregon.— Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329.

Pennsylvania.— Western Massachusetts Mut. F. Ins. Co. *v.* Girard Point Storage Co., 19 Pa. Co. Ct. 113.

Vermont.— Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

Wisconsin.— Ætna Ins. Co. *v.* Harvey, 11 Wis. 394.

United States.— Lamb *v.* Lamb, 14 Fed. Cas. No. 8,018, 6 Biss. 420.

Canada.— Jones *v.* Taylor, 15 N. Brunsw. 391; Allison *v.* Robinson, 15 N. Brunsw. 103.

See 12 Cent. Dig. tit. "Corporations," § 2536 *et seq.*

Contra.— See *infra*, IV, B, 3, b.

89. Commonwealth Mut. F. Ins. Co. *v.* Hayden, 60 Nebr. 636, 83 N. W. 922; Stewart *v.* Northampton Mut. Live Stock Ins. Co., 38 N. J. L. 436; Commonwealth Mut. F. Ins. Co. *v.* Edwards, 124 N. C. 116, 32 S. E. 404. To the contrary see *infra*, IV, B, 3, b.

(iv) *Loans and Mortgages.* Another class of decisions illustrating the proposition[90] that the domestic citizen may treat such contracts as void when he is sued by the foreign corporation thereon is found in cases where foreign corporations, including foreign building and loan associations and mortgage loan companies, without having so complied with domestic statutes as to entitle them to do business within the domestic state, have loaned money to citizens of such state upon mortgages of their property situated therein, or where foreign corporations have sold goods to them on credit and taken security in the form of such mortgages, in which cases these decisions allow the domestic citizen, when an action is brought by the foreign corporation against him to foreclose the mortgage, to set up as a defense the fact that the contract was void because the corporation had not complied with the statute.[91] It has also been held that where a citizen has given a foreign corporation a bond and mortgage which are void because of the corporation's failure to comply with the statute, he may maintain a bill in equity to cancel the same.[92]

h. Compliance With Statute After Making of Contract. Where a contract entered into by a foreign corporation is void and unenforceable by the corporation, either by express provision of the statute or under the construction placed upon it by the courts in the particular jurisdiction, because of the corporation's failure to comply with the statutory requirements before entering into the contract, its subsequent compliance with the statute will not enable it to maintain an action thereon.[93] The rule is otherwise, however, under statutes merely suspending the remedy of the corporation on contracts until it complies therewith, or merely prohibiting actions on contracts before such compliance.[94]

i. Enforcing Contracts in Other States. It has been held that where a foreign corporation enters into a contract in a state in violation of its statutes, and the contract is void and unenforceable by the corporation in that state, the courts of another state will not enforce the same.[95] But it has been held that this rule does not apply where the statutes of the state in which the contract was made do not

90. See *supra*, IV, B, 2, a.

91. *Alabama.*— Hanchey *v.* Southern Home Bldg., etc., Assoc., 140 Ala. 245, 37 So. 272; Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200.

Michigan.— Hoskins *v.* Rochester Sav., etc., Assoc., 133 Mich. 505, 95 N. W. 566.

Nebraska.— Pioneer Sav., etc., Assoc. *v.* Mostert, 62 Nebr. 812, 87 N. W. 1059; Pioneer Sav., etc., Assoc. *v.* Eyer, 62 Nebr. 810, 87 N. W. 1058; Henni *v.* Fidelity Bldg., etc., Assoc., 61 Nebr. 744, 86 N. W. 475, 87 Am. St. Rep. 519, although it is stipulated that the contract shall be governed by the laws of the state of the corporation's creation and residence. On this point see *infra*, IV, K, 4.

Tennessee.— New York Nat. Bldg., etc., Assoc. *v.* Cannon, 99 Tenn. 344, 41 S. W. 1054. See also Gilmer *v.* U. S. Savings, etc., Co., 103 Tenn. 272, 52 S. W. 851.

United States.— Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Contra.— See *infra*, IV, B, 3, c.

Neither judgment creditors nor purchasers at an execution sale have any interest to complain in an action by an unauthorized foreign corporation to enforce its lien that the taking of mortgaged land by such corporation renders it amenable to Wis. Rev. St. (1898) § 1770b, providing that no foreign corporation which has not complied with certain requirements shall transact business in the state, since neither judgment creditors nor purchasers at an execution sale have a present right to possession. Chicago Title, etc., Co. *v.* Bashford, 120 Wis. 281, 97 N. W. 940.

Objection cannot be raised after foreclosure see *infra*, IV, D.

Contracts made outside the state are not within the rule see *supra*, III, H, 4.

Whether isolated transactions are within the statute see *supra*, III, E, 3.

92. Hanchey *v.* Southern Home Bldg., etc., Assoc., 140 Ala. 245, 37 So. 272.

93. G. Heilman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441; South Amboy Terra Cotta Co. *v.* Poerschke, 45 Misc. (N. Y.) 358, 90 N. Y. Suppl. 333; Delaware River Quarry, etc., Co. *v.* Bethlehem, etc., Pass. R. Co., 204 Pa. St. 22, 53 Atl. 533.

94. See *infra*, IV, B, 5, a.

95. Ford *v.* Buckeye State Ins. Co., 6 Bush (Ky.) 133, 99 Am. Dec. 663 (contract made by an Ohio corporation in Indiana without compliance with the statutes, and action thereon brought in Kentucky); Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724 (contract made by a foreign corporation in Pennsylvania without compliance with its laws, and action brought thereon in New Jersey).

make the contract void, but merely deny the corporation the right to maintain an action thereon, since the provision that a foreign corporation, not having complied with the laws of the state, cannot sue therein, has no extraterritorial operation, and the doctrine of comity does not require recognition of such provision in another state.[96] In determining the application and effect of the statutes of a state on a contract made therein by a foreign corporation, the construction placed upon the statutes by the courts of such state will be followed by the courts of other states.[97]

j. Effect of Retaliatory Statute. Where, in addition to a statute requiring a foreign corporation to procure a certificate or permit before doing business in the state, there is a retaliatory provision[98] that when another state imposes any greater penalties on corporations of the state enacting the statute than the laws of such state impose upon corporations of such other state, the same penalties shall be imposed upon corporations of such other state doing business in the enacting state, a contract of a foreign corporation in the enacting state, without procuring a certificate or permit, is void and unenforceable by it, where such a contract by a foreign corporation in the state of the corporation's domicile, without compliance with the laws thereof, would, under the decisions of such state, be void and unenforceable.[99]

3. Contracts Not Void or Unenforceable — a. In General. Contrary to the foregoing, there is a numerous class of decisions to the effect that the failure of a foreign corporation to comply with the domestic statutes prescribing the conditions upon which it shall be permitted to do business within the state does not render its contracts made therein void and non-enforceable, or prevent it from maintaining an action against the domestic citizen thereon.[1] Sometimes the

96. Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724, holding that a foreign corporation could maintain an action in New Jersey on a contract made by it in New York without having procured the certificate required by N. Y. Laws (1892), p. 1805, c. 687, § 15, providing that no foreign corporation shall do business in New York without first having obtained the certificate required by the act, and that no foreign corporation doing business in the state shall maintain any action on a contract made in the state, unless prior to the making thereof it shall have procured such a certificate. The court held that the only penalty prescribed by the act is a denial of the right to maintain an action thereon in that state, which does not attach to the contract so as to deprive it of a suable quality in another state.

97. Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724. As the Pennsylvania courts have held that isolated acts of business by a foreign corporation within the state are not doing business within the state in violation of law, such ruling will be followed by the courts of New Jersey as to contracts made in Pennsylvania. Allegheny Co. *v.* Allen, *supra*.

98. See *supra*, III, D.

99. Wolf *v.* Lancaster, 70 N. J. L. 201, 56 Atl. 172.

1. *Alabama.*— Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695 [*overruled* by subsequent decisions in that state]. See *supra*, note 74.

Arkansas.— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

Colorado.—Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Rockford Ins. Co. *v.* Rogers, 9 Colo. App. 121, 47 Pac. 848.

Idaho.— Vermont L. & T. Co. *v.* Hoffman, 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509, mere revenue law.

Indiana.— See *infra*, page 1298 note 13.

Kansas.— Hamilton *v.* Reeves, 69 Kan. 844, 76 Pac. 418; State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411.

Kentucky.— Hallam *v.* Ashford, 70 S. W. 197, 24 Ky. L. Rep. 870.

Massachusetts.— Enterprise Brewing Co. *v.* Grimes, 173 Mass. 252, 53 N. E. 855; Rodgers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

Minnesota.— Tollerton, etc., Co. *v.* Barck, 84 Minn. 497, 88 N. W. 19, under Laws (1895), c. 332, since changed by Laws (1899), c. 69. See *supra*, IV, B, 2, a, note 74; *infra*, IV, B, 5, b, note 15.

Missouri.— Clark *v.* Middleton, 19 Mo. 53; Columbus Ins. Co. *v.* Walsh, 18 Mo. 229. See also Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638.

Montana.— Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; King *v.* National Mining, etc., Co., 4 Mont. 1, 1 Pac. 727. *Contra*, under later statute. See Kent, etc., Co. *v.* Tuttle, 20 Mont. 203, 50 Pac. 559.

New Hampshire.— Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622; Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61; Union Ins. Co. *v.* Smart, 60 N. H. 458

statute contains an express provision to the effect that failure of a foreign corporation to comply with its provisions shall not render its contracts void.[2]

b. Insurance Contracts. This construction has been placed in some states, contrary to the rule in some of the other states, upon statutes imposing restrictions and conditions upon the right of foreign insurance companies to do business therein.[3] If a foreign insurance company writes a policy upon the life of a domestic citizen before complying with the provisions of such a statute, the assured cannot make that the ground of refusal to pay premiums; but if the policy contains the usual provision of forfeiture for non-payment of premiums it will lapse by reason of such non-payment, although the company may not have complied with the statute. In other words, if the policy remains in force at all, it remains in force according to its terms; it is not valid in so far as it operates against the company, while at the same time void in so far as it imposes a burden upon the assured or the beneficiary.[4] Under a statute declaring that contracts of insurance made by a foreign company which has not complied with the statutory conditions shall be valid, but imposing a fine on the agent of such company, the foreign insurance company may maintain an action to recover assessments made under the provisions of its policy, although it has not complied with the local law.[5]

c. Loans and Mortgages. In like manner it has been held in some states that a note or bond of a foreign corporation secured by a mortgage or deed of trust

[*distinguishing* Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123].

New Mexico.— See Union Trust Co. *v.* Atchison, etc., R. Co., 8 N. M. 327, 43 Pac. 701.

North Dakota.— National Cash Register Co. *v.* Wilson, 9 N. D. 112, 81 N. W. 285; Red River Lumber Co. *v.* Children of Israel, 7 N. D. 46, 73 N. W. 203; U. S. Savings, etc., Co. *v.* Spain, 8 N. D. 136, 77 N. W. 1006; Washburn Mill Co. *v.* Bartlett, 3 N. D. 138, 54 N. W. 544.

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Rhode Island.— Garratt Ford Co. *v.* Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 78 Am. St. Rep. 852, 38 L. R. A. 545.

South Dakota.— Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109; Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706, 4 S. D. 237, 55 S. W. 931.

Washington.— Rathbone *v.* Frost, 9 Wash. 162, 37 Pac. 298; La France Fire-Engine Co. *v.* Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Whitman Agricultural Co. *v.* Strand, 8 Wash. 647, 36 Pac. 682; Edison General Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315; Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

West Virginia.— Toledo Tie, etc., Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317; Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116 (Tennessee statute); Jarvis-Conklin Mortg. Trust Co. *v.* Willhoit, 84 Fed. 514 (Tennessee statute); American L. & T. Co. *v.* East, etc., R. Co., 37 Fed. 242 (under Alabama statute, *following* Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695, since *overruled* by later Alabama cases); Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123 (Arkansas statute); The Manistee, 16 Fed. Cas. No. 9,027, 5 Biss. 381; Northwestern Mut. L. Ins. Co. *v.* Overholt, 18 Fed. Cas. No. 10,338, 4 Dill. 287.

See 12 Cent. Dig. tit. "Corporations," § 2537 *et seq.*

Contra.— See *supra*, IV, B, 2, a.

Contracts consummated in another state.— The mere fact that the agents through whom negotiations for the loan of money from a corporation in another state were carried on were illegally doing business there because the corporation for whom they acted had not filed its charter, as required by statute, cannot affect the validity of the contract finally consummated in another state, where it was valid. Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7. See *supra*, III, H.

2. Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580; Commonwealth Mut. F. Ins. Co. *v.* Place, 21 R. I. 248, 43 Atl. 68.

3. State Mut. F. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712; Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; Clark *v.* Middleton, 19 Mo. 53; Columbus Ins. Co. *v.* Walsh, 18 Mo. 229; Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638; Connecticut River Mut. F. Ins. Co. *v.* Way, 62 N. H. 622; Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61; Union Ins. Co. *v.* Smart, 60 N. H. 458 [*distinguishing* Haverhill Ins. Co. *v.* Prescott, 42 N. H. 547, 80 Am. Dec. 123]; Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67. *Contra*, see *supra*, IV, B, 2, g, (II), (III).

4. Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67, the court holding, *arguendo*, in compliance with the doctrine of the text, that the policy is not voidable by either party.

5. Commonwealth Mut. F. Ins. Co. *v.* Place, 21 R. I. 248, 43 Atl. 68.

conveying land in the domestic jurisdiction may be enforced therein, although the foreign corporation may not have complied with the statutes of the domestic state prescribing the terms on which it may do business therein.[6] So it has been held of a chattel mortgage.[7]

d. Rule Where Statute Prescribes a Distinct Penalty. Some of the decisions cited in the preceding sections have been influenced by the consideration that the statute imposes a distinct penalty upon the foreign corporation or upon its agents, or both, for doing business within the state in violation of the statutory restrictions; and the courts have reasoned in such cases that it was the intention of the legislature that the penal or criminal sanction should afford the only remedy for the violation of the statute and that it did not intend that a violation of the statute should operate to avoid contracts made before its conditions were complied with.[8] Where the prohibitory statute also annexes a penalty, there is more room for doubt; but even in the latter case many courts take the view that the corporation will not be allowed to make its own violation of the law the ground of an action in the courts of the sovereignty whose law it has violated, so as to maintain an action upon the contract.[9]

e. Doctrine That Other Party Is Estopped. In some states the courts have held, contrary to the doctrine hereinbefore stated, that where a person enters into a contract with a foreign corporation, and receives the benefit of such contract, he is estopped to set up the fact that the corporation had not complied with a statute of the state imposing conditions upon its right to do business therein, for the purpose of avoiding liability on the contract.[10]

6. Vermont L. & T. Co. *v.* Hoffman, 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509; U. S. Savings, etc., Co. *v.* Shain, 8 N. D. 136, 77 N. W. 1006; Jarvis-Conklin Mortg. Trust Co. *v.* Willhoit, 84 Fed. 514 (Tennessee statute); Northwestern Mut. L. Ins. Co. *v.* Overholt, 18 Fed. Cas. No. 10,338, 4 Dill. 287 (Colorado statute). *Contra*, see *supra*, IV, B, 2, g, (IV).

A mere revenue law requiring payment of a license-fee does not render void or unenforceable loans and mortgages without payment thereof. Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013; Vermont L. & T. Co. *v.* Hoffman, 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509.

7. Hamilton *v.* Reeves, 69 Kan. 844, 76 Pac. 418.

8. *Alabama.*— Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695 [*overruled*, however, by later cases, for which see *supra*, IV, B, 2, a].

Arkansas.— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

Colorado.— Kindel *v.* Beck, etc., Lithographing Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Helvetia Swiss F. Ins. Co. *v.* Edward P. Allis Co., 11 Colo. App. 264, 53 Pac. 242; Rockford Ins. Co. *v.* Rogers, 9 Colo. App. 121, 47 Pac. 848.

Idaho.— Vermont L. & T. Co. *v.* Hoffman, 5 Ida. 376, 49 Pac. 314, 95 Am. St. Rep. 186, 37 L. R. A. 509.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

Massachusetts.— Rogers *v.* Simmons, 155 Mass. 259, 29 N. E. 580.

Missouri.— Columbus Ins. Co. *v.* Walsh, 18 Mo. 229.

Montana.— Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53, 8 Pac. 153; King *v.* National Mining, etc., Co., 4 Mont. 1, 1 Pac. 727.

New Hampshire.— Connecticut River Mut. F. Ins. Co. *v.* Whipple, 61 N. H. 61; Union Ins. Co. *v.* Smart, 60 N. H. 458.

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Rhode Island.—Commonwealth Mut. F. Ins. Co. *v.* Place, 21 R. I. 248, 43 Atl. 68; Garratt Ford Co. *v.* Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 78 Am. St. Rep. 852, 38 L. R. A. 545.

Washington.— La France Fire-Engine Co. *v.* Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Edison General Electric Co. *v.* Canadian Pac. Nav. Co., 8 Wash. 370, 36 Pac. 260, 40 Am. St. Rep. 910, 24 L. R. A. 315; Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

West Virginia.— Toledo Tie, etc., Co. *v.* Thomas, 33 W. Va. 566, 11 S. E. 37, 25 Am. St. Rep. 925.

United States.— Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317 (Colorado statute); Chattanooga, etc., R. Co. *v.* Evans, 66 Fed. 809, 14 C. C. A. 116 (Tennessee statute); Jarvis-Conklin Mortg. Trust Co. *v.* Willhoit, 84 Fed. 514 (Tennessee statute); Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123 (Arkansas statute); The Manistee, 16 Fed. Cas. No. 9,027, 5 Biss. 381 (Illinois statute); Northwestern Mut. L. Ins. Co. *v.* Overholt, 18 Fed. Cas. No. 10,338, 4 Dill. 287 (Colorado statute).

See 12 Cent. Dig. tit. "Corporations," § 2537.

9. See *supra*, IV, B, 2, a, text and note 75.

10. *Alabama.*— Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695 [*overruled*

4. Contracts Voidable, But Not Void. Another doctrine is that a non-compliance of a foreign corporation with statutes prescribing the terms on which it may enter the state and do business renders its contracts, made with domestic citizens during its default, voidable at the election of the other contracting party, but not wholly void.[11]

5. Statutes Prohibiting Maintenance of Action[12] — a. Statutes Merely Suspending Remedy of Corporation. The shocking immorality involved in the proposition that a citizen should be judicially encouraged to repudiate his contract, fairly made, with a foreign corporation, and to keep the fruits of such contract while repudiating the obligation on his part — to keep the goods but not to pay for them — has led some of the legislatures and courts to find a way out by adopting the rule that the failure of a foreign corporation to comply with statutes imposing conditions upon which it may enter the state and do business does not operate to render its contracts, made with inhabitants of the state, wholly void, but merely operates to suspend the remedy of the foreign corporation in the courts of the state upon such contracts, until it shall have complied with the statutory conditions.[13] Under this rule, until such compliance, any action by the

by later decisions, for which see *supra*, page 1290 note 74.

Kentucky.— Hallam *v.* Ashford, 70 S. W. 197, 24 Ky. L. Rep. 870; Johnson *v.* Mason Lodge No. 33, I. O. O. F., 106 Ky. 838, 51 S. W. 620, 21 Ky. L. Rep. 493.

North Dakota.—Washburn Mill Co. *v.* Bartlett, 3 N. D. 138, 54 N. W. 544.

Pennsylvania.— Kilgore *v.* Smith, 122 Pa. St. 48, 15 Atl. 698; Holmes Co. *v.* Barnard, 15 Wkly. Notes Cas. 110.

South Dakota.— Wright *v.* Lee, 2 S. D. 596, 51 N. W. 706.

Washington.— Rathbone *v.* Frost, 9 Wash. 162, 37 Pac. 298; La France Fire-Engine Co. *v.* Mt. Vernon, 9 Wash. 142, 37 Pac. 287, 38 Pac. 80, 43 Am. St. Rep. 827; Dearborn Foundry Co. *v.* Augustine, 5 Wash. 67, 31 Pac. 327.

United States.— Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 68 Fed. 412, Illinois.

See also Pancoast *v.* Travelers Ins. Co., 79 Ind. 172.

See 12 Cent. Dig. tit. "Corporations," § 2561.

Contra.— See *supra*, IV, B, 2, a.

11. Ames *v.* Kruzner, 1 Alaska 598 (contract voidable only and can only be avoided by rescission and return of the consideration); Miller *v.* Gates, 22 Mont. 305, 56 Pac. 356; Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446, although the statute says that contracts made during such default shall be "void and invalid" as to the corporation. *Contra*, under a Wisconsin statute declaring that contracts made by a foreign corporation before compliance therewith "shall be wholly void on its behalf, but shall be enforceable against it." Ashland Lumber Co. *v.* Detroit Salt Co., 114 Wis. 66, 89 N. W. 904.

12. See also *infra*, IV, H.

Maintenance of suits not "doing business" in state see *supra*, III, I, text and note 13.

Statutes prohibiting actions have no extraterritorial operation see *supra*, IV, B, 2, i.

Statutes do not operate retroactively see *supra*, III, J.

13. *Arkansas.*— Under a statute prohibiting foreign corporations from doing business without filing a copy of their charter and designating an agent, and providing that any corporation failing to comply with the act shall be subject to fine and shall not maintain any suit in the state. Buffalo Zinc, etc., Co. *v.* Crump, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87, compliance with statute after commencement of suit begun before passage of act held sufficient. See also Sutherland-Innes Co. *v.* Chaney, (1904) 80 S. W. 152, holding that under Acts (1899), p. 20, § 4, providing that foreign corporations which had before its passage engaged in business in the state might within ninety days after its passage file a copy of their articles, etc., in which event all their contracts made before the act went into effect should be as valid as if the articles, etc., had been previously filed, a foreign corporation which had entered into a contract prior to the passage of the act might sue thereon after its passage on filing its articles, etc., although such filing was not done within ninety days after passage of the act.

Indiana.— Under a statute prohibiting foreign corporations from doing business without compliance with conditions precedent, and providing that they shall not enforce in any court of the state any contracts made by their agents until the statute has been complied with. Security Sav., etc., Assoc. *v.* Elbert, 153 Ind. 198, 54 N. E. 753 (compliance with the statute at any time before suit brought thereon renders contract enforceable); Maine Guarantee Co. *v.* Cox, 146 Ind. 107, 42 N. E. 915, 44 N. E. 932; Phenix Ins. Co. *v.* Pennsylvania R. Co., 134 Ind. 215, 33 N. E. 970, 20 L. R. A. 405; Elston *v.* Piggott, 94 Ind. 14; Singer Mfg. Co. *v.* Effinger, 79 Ind. 264; American Ins. Co. *v.* Wellman, 69 Ind. 413; Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; Johnson *v.* State, 65 Ind. 204; Singer Mfg. Co. *v.* Brown, 64 Ind. 548; Daly *v.* U. S. National L. Ins. Co., 64 Ind. 1; American Ins. Co. *v.* Pettijohn, 62 Ind. 382; Domestic

foreign corporation to enforce the contract is prematurely brought, but is not barred; so that an answer setting up the non-compliance of the foreign corporation with the statute would be an answer in the nature of a plea in abatement,

Sewing Mach. Co. *v.* Hatfield, 58 Ind. 187; Walter A. Wood Mowing, etc., Mach. Co. *v.* Caldwell, 54 Ind. 270, 23 Am. Rep. 641; North Mercer Natural Gas Co. *v.* Smith, 27 Ind. App. 472, 61 N. E. 10.

Kansas.— Under a statute providing that no action shall be maintained or recovery had in any of the courts of the state by any corporation doing business in the state without first obtaining the certificate of the secretary of state that the statements provided for in the statute have been properly made. Hamilton *v.* Reeves, 69 Kan. 844, 76 Pac. 418; State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411; Swift *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; Thomas *v.* Remington Paper Co., 67 Kan. 599, 73 Pac. 909; De Camp *v.* Warren Mortg. Co., 65 Kan. 860, 70 Pac. 581.

Massachusetts.— Under a statute requiring a foreign insurance company to appoint an agent, etc., before doing business in the state, but expressly declaring that if insurance is made without complying with the statute the contract shall be valid, and further declaring that any such company neglecting to appoint an agent as required by the statute shall not recover any premium or assessment made by it until the statute is complied with. National Mut. F. Ins. Co. *v.* Pursell, 10 Allen 231.

Missouri.— Under a statute providing that a foreign corporation failing to comply therewith shall not maintain any suit in any courts of the state. Carson-Rand Co. *v.* Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, compliance with a statute after beginning the action, and before motion to dismiss for non-compliance held sufficient. The above case was thus construed and followed by the St. Louis court of appeals in F. E. Creelman Lumber Co. *v.* De Lisle, 107 Mo. App. 615, 82 S. W. 205; and Chicago Mill, etc., Co. *v.* Sims, 101 Mo. App. 569, 74 S. W. 128. On the other hand the Kansas City court of appeals, distinguishing Carson-Rand Co. *v.* Stern, *supra*, held that contracts made without complying with the statute were void. Ehrhardt *v.* Robertson, 78 Mo. App. 404.

New York.— Under statute (Laws (1892), c. 687, § 15) prohibiting a foreign corporation from doing business without procuring a certificate from the secretary of state that it has complied with all requirements of law, and providing that no corporation doing business in the state without such certificate "shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate." Neuchatel Asphalt Co. *v.* New York, 155 N. Y. 373, 49 N. E. 1043 [*affirming* 12 Misc. 26, 33 N. Y. Suppl. 64, which *modified* 9 Misc. 376, 30 N. Y. Suppl. 252] (contract made and mechanic's lien filed without having complied with statute not void, but remedy merely suspended, and may be enforced by action after having procured certificate); Dunbarton Flax Spinning Co. *v.* Greenwich, etc., R. Co., 87 N. Y. App. Div. 21, 83 N. Y. Suppl. 1054; Lewis Pub. Co. *v.* Lenz, 86 N. Y. App. Div. 451, 83 N. Y. Suppl. 841; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110]; Davis Provision Co. *v.* Fowler, 20 N. Y. App. Div. 626, 47 N. Y. Suppl. 205 [*affirmed* without opinion in 163 N. Y. 580, 57 N. E. 1108]; Lewis Pub. Co. *v.* Palmer, 84 N. Y. Suppl. 141. See also Providence Steam, etc., Co. *v.* Connell, 86 Hun 319, 33 N. Y. Suppl. 482. The act of this state of 1895 (Laws (1895), c. 240), requiring a foreign corporation not only to procure the certificate, but also a receipt for a license-fee, and providing that in event of failure to procure the same "no suit shall be maintained or recovery had" by such corporation, was superseded by the act of 1896 (Laws (1896), c. 908), providing that no action may be maintained or recovery had by a foreign corporation unless the license receipt be procured within thirteen months from the beginning of business in the state (as to which see *infra*, IV, B, 5, b), and the effect of failure to procure the certificate was left by the act of 1896 to be governed by the act of 1892 first above referred to. J. R. Alsing Co. *v.* New England Quartz, etc., Co., *supra*. The law has been changed in this respect in New York by the later act of 1901, which is referred to *infra*, IV, B, 5, b, note 15.

Washington.— Under a statute authorizing foreign corporations to sue and be sued and to do business in the state in the same manner and to the same extent as domestic corporations, but providing that such corporations shall file a copy of their articles of incorporation and a written appointment of an agent. Huttig Bros. Mfg. Co. *v.* Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, compliance with statute after filing of notice of material-man's lien and before commencement of suit was held sufficient.

United States.— Blodgett *v.* Lanyon Zinc. Co., 120 Fed. 893, 58 C. C. A. 79 (under the Kansas statute above referred to); Goddard *v.* Crefield Mills, 75 Fed. 818, 21 C. C. A. 530 [*affirming* 69 Fed. 141] (under the New York statute above referred to, and holding that procuring the certificate after the making of a contract and before suit thereon is sufficient); Simplex Dairy Co. *v.* Cole, 86 Fed. 739 (to same effect under the New York statute); Sullivan *v.* Beck, 79 Fed. 200 (under the Indiana statute above referred to). See also under the Tennessee statute Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7; Cæsar *v.* Cappell, 83 Fed. 403.

See 12 Cent. Dig. tit. "Corporations," § 2542.

and judgment upon it in favor of defendant would operate merely to abate the suit.[14]

b. Statutes Barring Remedy of Corporation. Other statutes imposing conditions to be complied with by foreign corporations before doing business in the state, and in terms prohibiting the maintenance of actions by corporations which have not complied with the conditions, do not merely suspend the remedy of the corporation until such compliance, but bar any action by a foreign corporation upon a contract made by it in the state before it has complied with the statute, so that compliance therewith after making the contract will not enable it to sue thereon.[15] It has been held that such a statutory requirement or restriction, providing that no corporation can maintain an action in any court of the state upon any demand, whether arising out of contract or tort, unless at the time when the contract was made or the tort committed it had filed its articles of incorporation as provided by another clause of the statute, creates a condition precedent to the right of the foreign corporation to maintain any action in the state growing out of its transaction of business within the state, the performance of which condition must be averred and proved by the foreign corporation in order to maintain a standing in court.[16]

c. Effect Upon Executory Contracts Entered Into and Partly Performed Prior to Enactment. After the enactment of such a restrictive statute providing

14. Walter A. Wood Mowing, etc., Mach. Co. *v.* Caldwell, 54 Ind. 270, 23 Am. Rep. 641; and other cases in the preceding note.

Pleading see *infra*, V, A, 3.

Foreclosure of mortgage.— Under a doctrine prevailing in Indiana, whereby the failure of the foreign corporation to comply with the domestic statute merely operates to suspend its remedy until such compliance, a plea in abatement is properly sustained to an action to foreclose a mortgage taken by the corporation without such compliance. People's Bldg., etc., Assoc. *v.* Markley, 27 Ind. App. 128 60 N. E. 1013; and other cases cited *supra*, note 13.

15. *Illinois.*— Under a statute requiring foreign corporations to comply with certain conditions before doing business in the state, and providing that no corporation which shall fail to comply therewith shall maintain any suit or action, legal or equitable, in any of the courts of the state upon any demand, whether arising out of contract or tort. J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51 [*affirming* 86 Ill. App. 76]; Union Cloak, etc., Co. *v.* Carpenter, 102 Ill. App. 339.

Minnesota.— Under a statute like that of Illinois referred to above. Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; G. Heileman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441.

New York.— Under a statute (Laws (1892), c. 687, § 15, as amended by Laws (1901), c. 538, p. 1327) providing that no foreign corporation shall maintain any action on any contract made in the state unless, before making the same, it shall have procured a certificate from the secretary of state. Welsbach Co. *v.* Norwich Gas, etc., Co., 96 N. Y. App. Div. 52, 89 N. Y. Suppl. 284 (procuring certificate after making contract and before commencement of suit not sufficient); South Amboy Terra Cotta Co. *v.* Poerschke, 45 Misc. 358, 90 N. Y. Suppl. 333. *Compare* Dunbarton Flax Spinning Co. *v.* Greenwich, etc., R. Co., 87 N. Y. App. Div. 21, 83 N. Y. Suppl. 1054. As to the contrary rule under the act of 1892 see *supra*, IV, B, 5, a, note 13. So under the act of 1896 (Laws (1896), c. 908, § 181), which superseded Laws (1895), c. 240 (J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110]), and which provide that no action shall be maintained or recovery had in any courts of the state by a foreign corporation without procuring a receipt for the license imposed by the act within thirteen months after beginning business in the state (see Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325; Stern *v.* Childs, 26 Misc. 419, 56 N. Y. Suppl. 192, not enough to show that corporation was doing business merely at time of trial).

Rhode Island.— See MacLeod *v.* G. P. Putnam's Sons, 24 R. I. 500, 53 Atl. 867, under statute prohibiting any foreign corporation from carrying on business within the state or enforcing any contract made in the state, unless it shall have complied with the statute; but holding that the statute does not apply to contracts made before its enactment.

Texas.— Under a statute imposing conditions and providing that no such corporation can maintain any suit or action, either legal or equitable, in any of the courts of the state upon any demand, whether arising out of contract or tort, "unless at the time such contract was made or tort committed" the corporation had complied with the statute. Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954; Western Paper Bag Co. *v.* Johnson, (Civ. App. 1896) 38 S. W. 364.

16. Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954. See also on this question of pleading, *infra*, V, A, 3.

that any contract made by a foreign corporation affecting its personal liability or relating to property in the state before its compliance with the statute should be wholly void on its behalf, but enforceable against it, but before it went into effect by its terms, a foreign corporation entered into an executory contract to be performed within the state enacting the statute. It was held that the statute, on taking effect, became applicable to everything done or to be done under the contract by the corporation thereafter; consequently that the other contracting party might refuse to continue further operations under the contract, and might defend an action by the corporation for its breach of the contract, on the ground of the corporation not having complied with the statute.[17]

d. Action by Corporation Upon Contract Assigned to It. It has been held that a statute prohibiting actions on contracts made by foreign corporations until they shall have procured from the secretary of state a certificate authorizing them to do business within the state does not disable a foreign corporation from maintaining an action on a contract made between other parties and assigned to it.[18]

e. Actions Upon Contracts Made Without the State. The fact that a foreign corporation doing business in a state without obtaining the certificate required by a statute of such state, which statute prohibits the maintenance of an action on a contract made within the state by such corporation, will not prevent it from maintaining an action on a contract made without the state.[19]

6. Actions in Federal Courts. When a foreign corporation brings an action in a federal court on a contract entered into in the state, and the contract is illegal and void under the construction placed upon the state statute by the highest court of the state, such construction will be followed by the federal court, and the action cannot be maintained.[20] Where, however, the contract is not void, but the statute merely prohibits the foreign corporation from maintaining an action thereon in any court of the state, it has been held that the corporation may nevertheless maintain an action in the federal courts, since a federal court will not refuse to enforce a valid contract, harmless in itself, which is non-enforceable in the state courts merely on account of non-compliance with the state administrative regulations.[21]

C. Right of Domestic Party to Enforce Contracts Against Corporation — 1. In General. It is almost universally held that where a foreign corporation comes into a state and enters into a contract with a domestic citizen without having complied with the laws of the state imposing conditions precedent to its right to do business therein, it cannot set up its non-compliance with the law to defeat an action against it on the contract, even though it could not enforce the contract itself, and although the statute imposes a penalty upon it for doing business in violation of the prohibition.[22] The object of the statutes is to protect

Action for torts see *infra*, IV, E.

17. Diamond Glue Co. *v.* U. S. Glue Co., 103 Fed. 838. See *supra*, III, J, 2.

18. O'Reilly, etc., Co. *v.* Greene, 18 Misc. (N. Y.) 423, 41 N. Y. Suppl. 1056 [*affirming* 17 Misc. 302, 40 N. Y. Suppl. 360], where the contract was made outside the state.

19. Havens *v.* Diamond, 93 Ill. App. 557; Thomas *v.* Remington Paper Co., 67 Kan. 599, 73 Pac. 909; MacMillan Co. *v.* Stewart, 69 N. J. L. 212, 54 Atl. 240 [*affirmed* in 69 N. J. L. 676, 56 Atl. 1132]; M. B. Faxon Co. *v.* Lovett Co., 60 N. J. L. 128, 36 Atl. 692; American Broom, etc., Co. *v.* Addickes, 19 Misc. (N. Y.) 36, 42 N. Y. Suppl. 871. See also *supra*, III, H.

In Canada see Union India-Rubber Co. *v.* Hibbard, 6 U. C. C. P. 77.

20. Cæsar *v.* Cappell, 83 Fed. 403, holding, however, that while federal courts follow the construction of a state statute by the courts of a state, they are not required to adopt a construction based on implications from the language of a judicial opinion, nor bound by the construction of a state statute by the courts of the state as applied to contracts entered into before such construction was adopted.

21. Blodgett *v.* Lanyan Zinc Co., 120 Fed. 893, 58 C. C. A. 79; Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7; Cæsar *v.* Cappell, 83 Fed. 403; Sullivan *v.* Beck, 79 Fed. 200. And see Courts, 16 Cyc. 633.

22. *Alabama.*— Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

Arkansas.— Minneapolis F. & M. Ins. Co. *v.* Norman, (1905) 85 S. W. 229.

Illinois.— Watertown F. Ins. Co. *v.* Rust, 141 Ill. 85, 30 N. E. 772 [*affirming* 40 Ill. App. 119].

domestic citizens doing business with such corporations, and they are not to be construed, in the absence of clear provision to such effect, as rendering contracts void as against such citizens.[23] To so construe them would render them instruments of fraud and oppression to those for whose protection they are intended.[24] It is not intended to devolve upon persons dealing with such corporations the duty and risk of ascertaining whether the statute has been complied with.[25]

2. ESTOPPEL OF CORPORATION TO SET UP ITS VIOLATION OF THE LAW. Otherwise stated, the doctrine, as laid down in many of the cases, is that if the state does not intervene and if the party for whose protection the statute was enacted does not rescind it, the corporation is estopped thus to set up its own violation of the law in avoidance of its contracts.[26]

3. INSURANCE CONTRACTS. In accordance with this doctrine, it has repeatedly been held that where a foreign insurance company enters the domestic jurisdiction, and there does business by writing policies upon the property or lives of domestic citizens in violation of a restrictive statute, it will not be allowed to defend on this ground, when an action is brought against it to recover the amount assured in the policy.[27]

Indiana.— Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236.

New York.— Marshall *v.* Reading F. Ins. Co., 78 Hun 83, 29 N. Y. Suppl. 334.

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667.

Ohio.— Union Mut., etc., L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Pennsylvania.— Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520.

United States.— Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. 27; Ehrman *v.* Teutonic Ins. Co., 1 Fed. 471, 1 McCrary 123; The Manistee, 16 Fed. Cas. No. 9,027, 5 Biss. 381.

Contra, under the Massachusetts insurance act of 1887. Abraham *v.* Mutual Reserve Fund Life Assoc., 183 Mass. 116, 66 N. E. 605; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528.

23. Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; The Manistee, 16 Fed. Cas. No. 9,027, 5 Biss. 382; and other cases in the preceding note.

24. Marshall *v.* Reading F. Ins. Co., 78 Hun (N. Y.) 83, 29 N. Y. Suppl. 334; Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

25. Union Mut. Ins. Co. *v.* McMillen, 24 Ohio St. 67; Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37. See also Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552.

26. *Alabama.*— Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

Arkansas.— Minneapolis F. & M. Ins. Co. *v.* Norman, (1905) 85 S. W. 229.

Illinois.— Watertown F. Ins. Co. *v.* Rust, 141 Ill. 85, 30 N. E. 772 [*affirming* 40 Ill. App. 119].

Iowa.— Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678.

Kansas.— Germania F. Ins. Co. *v.* Curran, 8 Kan. 9.

Michigan.— Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

Minnesota.—Ganser *v.* Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

Mississippi.— Williams *v.* Bank of Commerce, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503.

Nevada.— Evans *v.* Lee, 11 Nev. 194.

New York.— Marshall *v.* Reading F. Ins. Co., 78 Hun 83, 29 N. Y. Suppl. 334. And see Franzen *v.* Zimmer, 90 Hun 103, 35 N. Y. Suppl. 612.

Pennsylvania.— Hoge *v.* Dwelling-House Ins. Co., 138 Pa. St. 66, 20 Atl. 939; Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520; Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37.

United States.— Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. 27; Berry *v.* Knights Templars', etc., Life Indemnity Co., 46 Fed. 439; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123. And see Sparks *v.* National Masonic Acc. Assoc., 73 Fed. 277.

27. *Alabama.*— Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

Illinois.— Watertown F. Ins. Co. *v.* Rust, 141 Ill. 85, 30 N. E. 772 [*affirming* 40 Ill. App. 119].

Indiana.— Behler *v.* German Mut. F. Ins. Co., 68 Ind. 347; New England F. & M. Ins. Co. *v.* Robinson, 25 Ind. 536. The case of Rising Sun Ins. Co. *v.* Slaughter, 20 Ind. 520, was to the contrary, but it has been overruled. See Walter A. Wood Mowing, etc., Mach. Co. *v.* Caldwell, 64 Ind. 270, 23 Am. Rep. 641.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236. And see Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678.

Kansas.— Germania F. Ins. Co. *v.* Curran, 8 Kan. 9.

Massachusetts.— Hartford Live Stock Ins. Co. *v.* Matthews, 102 Mass. 221. *Contra,* under the insurance act of 1887. Abraham

4. Loans and Mortgages. The rule has also been applied to foreign corporations borrowing money and giving mortgages to secure the same. Although a note or bond and mortgage or trust deed given by a foreign corporation to secure a loan may have been in violation of a statute requiring such corporations to comply with certain conditions precedent to entitle them to do business in the state, it cannot repudiate the contract without restoring the consideration; and therefore it cannot set up its violation of the law to defeat an action by the mortgagee to recover the money and foreclose the mortgage or trust deed.[28]

5. Liability on Bond Given by Foreign Corporation. If a foreign corporation enters a state and gives a bond with sureties, without complying with the statutes relating to foreign corporations, both the corporation and the sureties are estopped to set up the non-compliance with the law to escape liability on the bond.[29] The same principle applies where a foreign surety company, without complying with the local statutes, becomes surety on a judicial or other bond.[30]

6. Non-Compliance With Statute Does Not Defeat Jurisdiction. The fact that a foreign corporation has not obtained a permit to do business, required by the Texas statute, does not affect the jurisdiction of the courts to entertain a suit against it, although it might prevent it from maintaining a suit.[31]

D. Executed Contracts Unaffected by Statutes. The doctrine that a contract entered into by a foreign corporation without having complied with the statute prescribing conditions precedent to its right to do business in a state is void or voidable, and cannot be enforced by the corporation, does not affect the rights of either party under a contract which has been fully executed or prevent the corporation from maintaining or defending actions to protect such rights.[32] This is true, for example, of property rights under mortgages to foreign corporations which have been foreclosed.[33] The rule has also been applied to a note given

v. Mutual Reserve Fund Life Assoc., 183 Mass. 116, 66 N. E. 605; Claflin *v.* U. S. Credit System Co., 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528.

Michigan.— Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

Minnesota.—Ganser *v.* Fireman's Fund Ins. Co., 34 Minn. 372, 25 N. W. 943.

New York.— Marshall *v.* Reading F. Ins. Co., 78 Hun 83, 29 N. Y. Suppl. 334.

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667.

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Pennsylvania.— Hoge *v.* Dwelling-House Ins. Co., 138 Pa. St. 66, 20 Atl. 939; Watertown F. Ins. Co. *v.* Simons, 96 Pa. St. 520; Swan *v.* Watertown F. Ins. Co., 96 Pa. St. 37.

United States.— Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. 27; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123; The Manistee, 16 Fed. Cas. No. 9,027, 5 Biss. 381.

28. Williams *v.* Bank of Commerce, 71 Miss. 858, 16 So. 238, 42 Am. St. Rep. 503.

29. Minneapolis F. & M. Ins. Co. *v.* Norman, (Ark. 1905) 85 S. W. 229, foreign insurance company and sureties on its bond estopped to set up its non-compliance with the law in action on policy.

30. Barricklow *v.* Stewart, 31 Ind. App. 446, 68 N. E. 316, failure of foreign surety company to comply with statute does not invalidate an executor's bond on which it is surety, or affect its liability thereon.

31. Home Forum Ben. Order *v.* Jones, 20 Tex. Civ. App. 68, 48 S. W. 219. See also *infra*, V, B, 4.

32. Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Diefenbach *v.* Vaughan, 116 Ala. 150, 23 So. 88; Russell *v.* Jones, 101 Ala. 261, 13 So. 145; Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695. And see Long *v.* Georgia Pac. R. Co., 91 Ala. 519, 8 So. 706, 24 Am. St. Rep. 931.

33. Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695. Thus where a foreign corporation has made a loan on note or bond and mortgage or deed of trust, or taken the same to secure a debt, without having complied with the restrictive statute, so that it could not enforce the mortgage or deed of trust by suit if the defense were made by the other party, yet, if the mortgage has been foreclosed by suit, without such defense being interposed, or by a sale under a power therein, and the land purchased by the corporation or another, the mortgagee or his grantee cannot sue to cancel the mortgage or recover the land, or defend a suit by the corporation or other purchaser to recover the same, on the ground that the transaction was void or voidable by reason of the corporation's failure to comply with the statute. Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751; Kindred *v.* New England Mortg. Security Co., 116 Ala. 192, 23 So. 56; Diefenbach *v.* Vaughan, 116 Ala. 150, 23 So. 88; Shahan *v.* Tethero, 114 Ala. 404, 21 So. 951; Gamble *v.* Caldwell, 98 Ala. 577, 12 So. 424; Craddock *v.* American Free-

for money advanced to pay an insurance premium to a foreign insurance company.[34]

E. Effect With Respect to Actions For Tort. Unless the statute says so in express terms, as some of the statutes do, the non-compliance by a foreign corporation with the terms and conditions upon which the domestic law allows it to enter the state and do business, will not preclude it, or any one claiming through it, from maintaining an action which is purely *ex delicto*.[35] And a statute imposing conditions precedent to the right of a foreign corporation

hold Land Mortg. Co., 88 Ala. 281, 7 So. 196; Sherwood *v.* Alvis, 83 Ala. 115, 3 So. 307, 3 Am. St. Rep. 695.

Chattel mortgage.— So in the case of a chattel mortgage to a foreign corporation, after the mortgage has been foreclosed by a sale, under the power contained in the mortgage, the purchaser's title is good, and will be protected notwithstanding the corporation had not complied with the statute. Mobile Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751.

Decree of foreclosure, without sale, res adjudicata.— And even though there has been no sale under a decree of foreclosure, the objection cannot be raised for the first time after the decree, for the validity of the mortgage and the right to foreclose the same is then *res adjudicata* as between the parties and all in privity with them. Black *v.* Caldwell, 83 Fed. 880; Semple *v.* British Columbia Bank, 21 Fed. Cas. No. 12,659, 5 Sawy. 88.

Purchase by corporation.—The fact that the corporation mortgagee itself becomes the purchaser does not change the rule, except that where the sale is under a power in the mortgage, and the mortgagee becomes the purchaser at his own sale, not being authorized by the terms of the mortgage, the mortgagor has a right of election, to be exercised within a reasonable time, either to ratify or to disaffirm the sale. Diefenbach *v.* Vaughan, 116 Ala. 150, 23 So. 88; American Freehold Land Mortg. Co. *v.* Sewell, 92 Ala. 163, 9 So. 143, 13 L. R. A. 299; McCall *v.* Mash, 89 Ala. 487, 7 So. 770, 18 Am. St. Rep. 145; Craddock *v.* American Freehold Land Mortg. Co., 88 Ala. 281, 7 So. 196.

34. In Russell *v.* Jones, 101 Ala. 261, 13 So. 145, applying this principle as to executed contracts, it was held that in an action on notes given by defendant to plaintiff, who was the agent of a foreign insurance company, for money which plaintiff had advanced for defendant for the payment of his premiums to the insurance company, it was no defense that the company had not complied with the statutory provisions relative to the doing of business in the state by foreign corporations.

35. *Alabama.*—Boulden *v.* Estey Organ Co., 92 Ala. 182, 9 So. 283, detinue.

Arkansas.— St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 60 Ark. 325, 30 S. W. 350, 28 L. R. A. 83 (action may be maintained by an insurance company subrogated to the rights of a foreign corporation for negligently setting fire to its property within the state); St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43 (to the same effect).

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369, trespass.

Indiana.— Smith *v.* Little, 67 Ind. 549, replevin.

New Mexico.—Probst *v.* Domestic Missions, 3 N. M. 237, 5 Pac. 702, ejectment or trespass.

New York.— American Typefounders Co. *v.* Conner, 6 Misc. 391, 26 N. Y. Suppl. 742, holding that a foreign corporation could maintain an action of replevin without complying with a statute which merely provided that corporations not complying therewith could not sue "on any contract made by it" in the state.

North Dakota.— National Cash Register Co. *v.* Wilson, 9 N. D. 112, 81 N. W. 285.

Pennsylvania.— Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct. 527, may sue to recover personal property.

Tennessee.— Louisville Property Co. *v.* Nashville, (Sup. 1905) 84 S. W. 810, recovery of damages from change of grade of street.

United States.— Delaware, etc., Tel., etc., Co. *v.* Pennsauken Tp., 116 Fed. 910, New Jersey.

Contra under particular statutes.— Central Mfg. Co. *v.* Briggs, 106 Ill. App. 417; Union Cloak, etc., Co. *v.* Carpenter, 102 Ill. App. 339; Vickers *v.* Buck's Stove, etc., Co., (Kan. Sup. 1905) 79 Pac. 160; Parmele Co. *v.* Haas, 67 N. Y. App. Div. 457, 73 N. Y. Suppl 986 [*reversed* on a question of pleading in 171 N. Y. 579, 64 N. E. 440] (holding that a foreign corporation could not maintain an action for conversion, and obtain an order of arrest, without having complied with a statute which provided that "no action should be maintained or recovery had" in any of the courts of the state without having complied therewith); Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381 [*reversed* on other grounds in 93 Tex. 378, 55 S. W. 562] (where the statute expressly provided that a foreign corporation not having complied therewith could not maintain "any suit or action, . . . upon any demand, whether arising out of contract or tort"); Keating Implement, etc., Co. *v.* Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417 (statute does not apply, however, to foreign corporation while engaged in interstate commerce). But see Mansur, etc., Implement Co. *v.* Beer, 19 Tex. Civ. App. 311, 45 S. W. 972, holding that the statute above referred to did not prevent a foreign corporation from maintaining an action for property owned by it in the

to do business in the state and prohibiting a corporation which has not complied therewith from maintaining an action on any contract made in the state, has no application to an action against such a corporation for tort.[36]

F. Effect With Respect to Assignees or Transferees of Corporation — 1. In General. It has been held that where a foreign corporation cannot maintain an action to enforce a non-negotiable chose in action, because of its failure to comply with the local statutes in relation to foreign corporations, one to whom it assigns the same cannot maintain an action, "as the assignee of a chose in action stands exactly in the shoes of his assignor."[37] But this rule does not apply where a person himself enters into contracts in pursuance of rights acquired by contract between him and a foreign corporation.[38]

2. Negotiable Instruments. A different rule has been applied to negotiable instruments. As in case of other *ultra vires* contracts,[39] the promissory notes or other written obligations given by foreign corporations which have not complied with the conditions of the local law are, in most jurisdictions, if negotiable, good in the hands of *bona fide* holders for value.[40] The rule does not apply, however, in those jurisdictions in which contracts made by foreign corporations which have not complied with the laws are void or unenforceable by them, unless the holder of the instrument occupies the position of a *bona fide* holder for value.[41]

G. Effect With Respect to Agents and Their Sureties[42] — 1. Actions by Corporation — a. On Bond of Agent. Some of the cases hold that where a foreign corporation enters a state by means of its agent and does business there,

state, where there was nothing to indicate that the subject-matter grew out of the business in which it was engaged. See also the statutes referred to *supra*, IV, B, 5, b, text and note 15.

A judgment for tort is not a "contract" within the meaning of a statute providing that a foreign corporation shall not enforce any contract made in the state unless it shall have complied with the conditions prescribed by the statute. MacLeod *v.* Putnam, 24 R. I. 500, 53 Atl. 867.

Maintenance of suits not "doing business" in the state see *supra*, III, I, text and note 13.

36. Bischoff *v.* Automobile Touring Co., 97 N. Y. App. Div. 17, 89 N. Y. Suppl. 594, holding that failure of a foreign corporation to obtain a certificate authorizing it to do business in the state, as required by N. Y. Laws (1901), c. 538, § 15, which provides as a penalty that it shall not maintain an action in the state on a contract made in the state prior to its procuring such a certificate, does not make it a trespasser in using a highway in the state, so as to affect the questions of negligence in an action against it for collision between its vehicle and that of plaintiff.

37. Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381 [*affirmed* as to this point, but *reversed* on other points in 93 Tex. 378, 55 S. W. 562]. See to the same effect Kinney *v.* Reid Ice Cream Co., 57 N. Y. App. Div. 206, 68 N. Y. Suppl. 325.

38. Nicoll *v.* Clark, 13 Misc. (N. Y.) 128, 34 N. Y. Suppl. 159. In this case a foreign corporation which was engaged in preparing a book for publication and securing contracts and subscriptions for advertising space therein assigned to plaintiff the right to conduct, publish, and issue such book and make all contracts in relation thereto in its name. Subsequently plaintiff's soliciting agent made the contract in question with defendants, for advertising in said book, in the name of said corporation. In an action on said contract it was held that plaintiff did not sue as assignee of such contract, but upon the contract as made by himself, and that it was not necessary to allege or prove that the corporation had filed a certificate.

39. See Corporations, 10 Cyc. 1163.

40. Zink *v.* Dick, 1 Ind. App. 269, 27 N. E. 622; Roche *v.* Ladd, 1 Allen (Mass.) 436; Jones *v.* Smith, 3 Gray (Mass.) 500; Williams *v.* Cheney, 3 Gray (Mass.) 215, 8 Gray 206; National Bank of Commerce *v.* Pick, (N. D. 1904) 99 N. W. 63; Hamilton *v.* Fowler, 99 Fed. 18, 40 C. C. A. 47 (under Tennessee statute); Hartford City Bank *v.* Press Co., 56 Fed. 260 (under Pennsylvania statute). *Contra*, Ehrhardt *v.* Robertson, 78 Mo. App. 404; Massillon First Nat. Bank *v.* Coughron, (Tenn. Ch. App. 1899) 52 S. W. 1112.

41. Williams *v.* Cheney, 8 Gray (Mass.) 206. Upon the question who is a *bona fide* holder for value, it has been held proper to charge a jury that if the indorsee of a premium note given to a foreign insurance company which has not complied with the laws of the state, knew, or had reasonable cause to know, when he took the note, that the company had not complied with such laws, he could not recover; and the fact that such indorsee was a director, the treasurer, and one of the executive committee of the foreign insurance company, was sufficient evidence that he had reasonable cause to know such fact. Williams *v.* Cheney, *supra*.

42. Personal liability of agents on contracts see *infra*, IV, L.

in violation of restrictive statutes such as those under consideration, it cannot maintain an action against its agent or his sureties upon a bond given by him to the corporation to secure the faithful fulfilment of his duties, for the reason that, the doing of the business by the agent being expressly prohibited by the local statute, no recovery can be had without proving that both the plaintiff and the defendants have violated the law.[43] Other cases are to the contrary.[44]

b. For Money or Property Received by Agent. It has been held, even by courts which deny the right of a foreign corporation to maintain an action on the bond of an agent, where it has been doing business in violation of the law,[45] that its failure to comply with the law is no defense in an action by it against the agent to recover money or property received by him to its use,[46] on the ground that "the agent is estopped to dispute the title of his principal to the money which he has received for him."[47] Under some statutes, however, the rule is otherwise.[48]

Penalties against agents and criminal liability see *infra*, IV, M.

43. *Indiana.*— U. S. Express Co. *v.* Lucas, 36 Ind. 361; Barney *v.* Daniels, 32 Ind. 19; Daniels *v.* Barney, 22 Ind. 207.

Maine.— See Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

Pennsylvania.— Mutual Ben. L. Ins. Co. *v.* Bales, 92 Pa. St. 352; Thorne *v.* Travellers' Ins. Co., 80 Pa. St. 15, 21 Am. Rep. 89.

United States.— McCanna, etc., Co. *v.* Citizens' Trust, etc., Co., 76 Fed. 420, 24 C. C. A. 11, 35 L. R. A. 236 [*affirming* 74 Fed. 597] (Pennsylvania statute); U. S. Life Ins. Co. *v.* Adams, 28 Fed. Cas. No. 16,792, 7 Biss. 30, holding, however, that the bond was legal because the statute had been sufficiently complied with.

Canada.—See Washington County Mut. Ins. Co. *v.* Henderson, 6 U. C. C. P. 146, where the action was maintained the contracts of insurance made by the company under which the agent received money for its use having been made, for all that appeared, outside the Province.

Interstate commerce.— This rule cannot apply of course to transactions which constitute interstate commerce. Gunn *v.* White Sewing Mach. Co., 57 Ark. 24, 20 S. W. 591, 38 Am. St. Rep. 223, 18 L. R. A. 206, holding that where a resident of a state contracted with a foreign corporation to canvass certain territory for the sale of its goods which the corporation agreed to sell to him on credit, a bond given to secure payment to the corporation of any sum that might become due under the contract constituted a part of the interstate commerce carried on by the sale of the goods could not be affected by a statute of the state regulating the doing of business therein by foreign corporations. See *supra*, I, D, 3.

Expiration of license.— For an action on the bond of an agent of a foreign insurance company, where the question was whether the agent acted without a license, and the case was determined on the theory that his license would be presumed where it was not shown to have expired see Scottish Commercial Ins. Co. *v.* Plummer, 70 Me. 540.

44. Rockford Ins. Co. *v.* Rogers, 9 Colo. App. 121, 47 Pac. 848 (agent and sureties estopped); Washington County Ins. Co. *v.* Colton, 26 Conn. 42 (statute merely directory, and furthermore agent and sureties estopped); Manhattan Ins. Co. *v.* Ellis, 32 Ohio St. 388. See also Palatine Ins. Co. *v.* Crittenden, 18 Mont. 413, 45 Pac. 555, where, however, the action was sustained on the ground that the statute (Comp. St. div. 5, c. 24, and act March 8, 1893) did not require a foreign fire-insurance company to file with the secretary of state and county recorder the papers designated in the statute as a condition precedent to doing business in Montana.

45. U. S. Express Co. *v.* Lucas, 36 Ind. 361. And see *supra*, IV, E *et seq.*

46. Rockford Ins. Co. *v.* Rogers, 9 Colo. App. 121, 47 Pac. 848; U. S. Trust Co. *v.* Lucas, 36 Ind. 361; Daniels *v.* Barney, 22 Ind. 207; Penn. Mut. L. Ins. Co. *v.* Bradley, 21 N. Y. Suppl. 876 [*affirmed* without opinion in 142 N. Y. 660, 37 N. E. 569]; *In re* Hovey, 198 Pa. St. 385, 48 Atl. 311.

Commission merchants.— Even if sales by a regularly licensed commission merchant of goods consigned to him by a foreign corporation be considered unlawful sales by it because of its failure to comply with the local statute prescribing conditions under which it may do business in the state, such illegality cannot be set up by the commission merchant in an action by the corporation against him to recover money received by him on such sales. *In re* Hovey, 198 Pa. St. 385, 48 Atl. 311.

47. U. S. Express Co. *v.* Lucas, 36 Ind. 361, 369.

48. People's Mut. Ben. Soc. *v.* Lester, 105 Mich. 716, 63 N. W. 977, holding that a foreign mutual benefit society could not maintain an action to recover from an agent moneys collected by him, under an arrangement with its officers, on assessments by it, where the moneys were collected in the course of the conduct of business in violation of a statute (Howell St. § 8136) which provided that when any act should be forbidden to be done by any corporation without express authority of law, and such act should be done by a foreign corporation, it should not be authorized to maintain any action founded

c. On Note Given by Agent. The rule stated above would seem to apply so as to prevent an agent from setting up that the corporation was doing business in violation of the statute to defeat an action by it on a note given for money or property received by him for the corporation.[49] There is a decision, however, which is apparently to the contrary.[50]

2. Actions by Agent — a. In His Own Name on Behalf of Corporation. A non-compliance on the part of a foreign corporation with a statute imposing the terms and conditions under which it may enter the state to do business will prevent its agent from prosecuting in his own name an action in its behalf which the corporation itself would not be allowed to prosecute, for example, an action to recover damages for an injury done to the property of the foreign corporation while it was in the agent's possession.[51]

b. Recovery of Commission or Other Compensation. It has been held that an agent who does business within a state for a foreign corporation, which is there in violation of the laws of the state, cannot maintain an action against a citizen of the state to recover his commission for a loan of money procured for such citizen from the corporation.[52] And it would seem to be equally clear on well settled principles that he cannot maintain an action against the corporation for commissions or other compensation arising out of his illegal conduct of its business in the state.[53]

3. Embezzlement or Larceny by Agent. In a criminal prosecution for embezzlement or larceny by the agent of a foreign corporation it is no defense that the agent or corporation had not complied with the statute imposing conditions upon the right of such corporations to do business in the state, and that the money or property embezzled or stolen was received by the agent in the transaction of an unlawful business.[54] Statutes relating to embezzlement, however, may be so restricted in terms as to exclude embezzlement by agents of foreign corporations.[55]

H. Effect as to Maintenance and Defense of Actions Generally. This question has already been considered in some of its phases.[56] In addition to what has been elsewhere said, it is to be remarked that statutes sometimes expressly provide that a foreign corporation which has failed to comply with conditions thereby prescribed shall not maintain any action or proceeding in any of the courts of the state;[57] and sometimes there is a prohibition against the defense of

upon such act, or upon any liability or obligation, express or implied, "arising out of" or made or entered into in consideration of such act.

49. See *supra*, IV, G, 1, b, and cases there cited.

50. Domestic Sewing Mach. Co. *v.* Hatfield, 58 Ind. 187, where an agent, in the course of business for a foreign corporation without compliance with the local statute, took notes payable to himself for goods sold by him, and in consideration of such notes, which were retained by him, executed his own note to the corporation, and it was held that the corporation could not maintain an action on the latter note without complying with the statute.

51. Texas, etc., R. Co. *v.* Davis, (Tex. Civ. App. 1899) 54 S. W. 381 [*reversed* on other points in 93 Tex. 378, 55 S. W. 562]. See also Jones *v.* Taylor, 15 N. Brunsw. 391; Allison *v.* Robinson, 15 N. Brunsw. 103, actions by agent of insurance company on premium notes.

52. Dudley *v.* Collier, 87 Ala. 431, 6 So. 304, 13 Am. St. Rep. 55.

53. Dudley *v.* Collier, 87 Ala. 431, 6 So. 55, 13 Am. St. Rep. 55; Stebbins *v.* Leowolf, 3 Cush. (Mass.) 137; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979. And see Contracts, 9 Cyc. 548; and, generally, Principal and Agent.

54. State *v.* Tumey, 81 Ind. 559; People *v.* Hawkins, 106 Mich. 479, 64 N. W. 736; State *v.* O'Brien, 94 Tenn. 79, 28 S. W. 311, 26 L. R. A. 252; State *v.* Hopkins, 56 Vt. 250. See Embezzlement, 15 Cyc. 508; and, generally, Larceny.

55. Cory *v.* State, 55 Ga. 236.

56. **Maintenance or defense of suit not the doing of business** see *supra*, III, I.

Statutes prohibiting actions on contracts see *supra*, IV, B, 5.

Statutes prohibiting actions for tort see *supra*, IV, E.

57. *California.*— Keystone Driller Co. *v.* San Francisco Super. Ct., 138 Cal. 738, 72 Pac. 398, prohibition will lie to prevent superior court from proceeding upon the voluntary petition in insolvency by a foreign corporation which has not complied with the statute.

any action or proceeding.[58] But it has been held that a statute merely prohibiting the commencement, maintenance, or prosecution of an action does not prevent a foreign corporation which has not complied with the statute from defending a suit brought against it,[59] interposing and recovering upon a counter-claim arising out of the transaction in suit,[60] or prosecuting an appeal or writ of error from a judgment recovered against it.[61] And, as we have seen, a state statute merely denying the right to sue in the state courts cannot prevent suits in the federal courts.[62]

I. Legislature May Validate Contracts. It has been held competent for the legislature, by a retrospective statute, to validate contracts made between domestic citizens and foreign corporations in violation of a previous prohibitory statute; since such curative legislation does not have the effect of divesting vested rights, or of impairing the obligation of contracts, but merely of preventing men, upon reasons which concern the state alone, from repudiating the honest engagements into which they have entered.[63]

J. Power to Acquire, Hold, and Transmit Title to Property. On a principle already considered,[64] a foreign corporation can acquire such a title to

Illinois.— J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51 [*affirming* 86 Ill. App. 76] (cannot levy attachment); Union Cloak, etc., Co. *v.* Carpenter, 102 Ill. App. 339.

Kansas.— State *v.* American Book Co., 69 Kan. 1, 76 Pac. 411; Thomas *v.* Remington Paper Co., 67 Kan. 599, 73 Pac. 909, must be shown that corporation in question is one doing business in the state. See also Vickers *v.* Buck's Stove, etc., Co., (Sup. 1905) 79 Pac. 160, action to set aside fraudulent conveyance.

Minnesota.— On any demand growing out of unlawful business. Sherman Nursery Co. *v.* Aughenbaugh, 93 Minn. 201, 100 N. W. 1101; G. Heilman Brewing Co. *v.* Peimeisl, 85 Minn. 121, 88 N. W. 441.

Missouri.— Carson-Rand Co. *v.* Stern, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420; Chicago Mill, etc., Co. *v.* Sims, 101 Mo. App. 569, 74 S. W. 128.

New York.— Welsbach Co. *v.* Norwich Gas, etc., Co., 96 N. Y. App. Div. 52, 89 N. Y. Suppl. 284; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110]; South Amboy Terra Cotta Co. *v.* Poerschke, 45 Misc. 358, 90 N. Y. Suppl. 333. And see *supra*, IV, B, 5, a, b, notes 13, 15.

South Dakota.— Bradley *v.* Armstrong, 9 S. D. 267, 68 N. W. 733, cannot levy attachment.

Texas.— Keating Implement, etc., Co. *v.* Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417, but statute does not apply to foreign corporation while engaged in interstate commerce.

And see the statutes referred to *supra*, IV, B, 5, a, b, notes 13, 15.

Attachment by foreign corporation see *infra*, V, A, —.

58. See Cal. Act March 17, 1899 (St. (1899) p. 111). Cal. Civ. Code, § 299, providing that no corporation now in existence or hereafter formed shall maintain or defend any action in relation to its property until it has filed a copy of the articles of its incorporation with the clerk of the county in which its office is located, etc., does not apply to foreign corporations. South Yuba Water, etc., Co. *v.* Rosa, 80 Cal. 333, 22 Pac. 222.

59. Swift *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; J. R. Alsing Co. *v.* New England Quartz, etc., Co., 66 N. Y. App. Div. 473, 476, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110] (defendant foreign corporation may "litigate any question arising out of the transaction that has been made the basis of the plaintiff's complaint"); Blodgett *v.* Lanyon Zinc Co., 120 Fed. 893, 58 C. C. A. 79 (Kansas statute).

60. J. R. Alsing Co. *v.* New England Quartz etc., Co., 66 N. Y. App. Div. 473, 73 N. Y. Suppl. 347 [*affirmed* in 174 N. Y. 536, 66 N. E. 1110], under the New York act of 1892, providing that a foreign corporation which has not obtained a certificate of authority to do business in the state "shall not maintain any action" on any contract made by it in the state.

61. Swift *v.* Platte, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635.

62. See *supra*, IV, B, 6.

63. U. S. Mortgage Co. *v.* Gross, 93 Ill. 483 (loans and mortgages); Mutual Ben. L. Ins. Co. *v.* Winne, 20 Mont. 20, 49 Pac. 446 (all acts and contracts); Guarantee, etc., Co. *v.* Jones, 103 Tenn. 245, 58 S. W. 219; Butler *v.* U. S. Building, etc., Assoc., 97 Tenn. 679, 37 S. W. 385 (mortgages); Skillern *v.* Continental Ins. Co., (Tenn. Ch. App. 1897) 42 S. W. 180 (holding that a foreign corporation which has executed a note within the state without complying with the conditions of the local statute, may, within the time allowed by a curative statute, avail itself of the benefit of such statute, notwithstanding that the statute was passed pending a litigation over the note); Gross *v.* U. S. Mortgage Co., 108 U. S. 477, 2 S. Ct. 940, 27 L. ed. 795 [*affirming* 93 Ill. 483, *supra*, this note]; Cæsar *v.* Capell, 83 Fed. 403. See also Sutherland-Innes Co. *v.* Chaney, (Ark. 1904) 80 S. W. 152.

64. See *supra*, II, A.

land as it can transmit to a third party, although it has failed to comply with a constitutional prohibition or statute of the state prescribing the terms upon which it can do business within the state, so long as the state does not intervene.[65] Further than this, it is generally held that acquiring the title to real or personal property, and holding or transmitting the same, without more, is not the doing or transacting of business within the meaning of the statutes imposing conditions or restrictions upon foreign corporations, and is not prohibited by such statutes.[66]

K. Situs of Contracts For Purpose of Application of Statutes — **1. Where Delivered and Accepted.** The better view seems to be that the *situs* of a contract for the purpose of determining the application of the statutes excluding or imposing conditions or restrictions upon foreign corporations[67] is not the place where it is formally written, but the place where it is delivered and accepted.[68]

2. Insurance Policies — a. When in State in Which Policy Is Delivered and Accepted. The *situs* of an insurance policy for this purpose is often held to be in the state in which it is delivered and accepted.[69] This is especially true, where, as is generally the case with such policies, the policy by its own terms is not to be valid until it is countersigned by the local agent within the state where it is delivered.[70] The rule is the same, although there is no local agent who can rightfully sign it and deliver it, by reason of the fact that the foreign insurance company has not complied with the conditions of the local statutes which entitle it to do business within the domestic state.[71]

65. Fritts *v.* Palmer, 132 U. S. 282, 10 S. Ct. 93, 33 L. ed. 317. Under a statute of Pennsylvania which forbids a foreign corporation "to acquire and hold" real estate, a deed of conveyance of land to such a foreign corporation passes a title which the corporation may hold subject to the right of escheat in the commonwealth, its title being merely defeasible at the election of the state like that of an alien. Hickory Farm Oil Co. *v.* Buffalo, etc., R. Co., 32 Fed. 22. And see *supra*, II, A, 2.

66. *Missouri.*— Meddis *v.* Kenney, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496, purchase of real estate at an administrator's sale by a foreign corporation which, in the course of its business in its home state, had become the holder in trust of a claim against the decedent.

Pennsylvania.— Julius King Optical Co. *v.* Royal Ins. Co., 24 Pa. Super. Ct. 527, ownership and recovery of personal property.

Tennessee.— Louisville Property Co. *v.* Nashville, (1905) 84 S. W. 810, purchase, ownership, and lease of real estate on shares, and assignment of rent.

Texas.— Lakeview Land Co. *v.* San Antonio Traction Co., 95 Tex. 252, 66 S. W. 766 (purchase of real estate made outside the state); Eskridge *v.* Louisville Trust Co., 29 Tex. Civ. App. 571, 69 S. W. 987 (trespass to try title by foreign corporation as trustee under will, merely to reduce property to possession).

Virginia.— Goldsberry *v.* Carter, 100 Va. 438, 41 S. E. 858, acquiring title to land by contract made out of the state.

In Canada a foreign corporation cannot acquire land without permission of the crown or legislature; and it has been held that if a foreign corporation purchases land without such permission it cannot maintain an action against the vendor for damages. Chaudières Gold Min. Co. *v.* Desbarats, 17 L. C. Jur. 275, 4 Rev. Lég. 645.

67. See *supra*, III, H.

68. Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308.

69. *Maryland.*— Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258.

Massachusetts.— Thwing *v.* Great Western Ins. Co., 111 Mass. 93; Roche *v.* Ladd, 1 Allen 436; Heebner *v.* Eagle Ins. Co., 10 Gray 131, 69 Am. Dec. 308.

Michigan.— Seamans *v.* Temple Co., 105 Mich. 400, 63 N. W. 408, 55 Am. St. Rep. 457, 28 L. R. A. 430.

Missouri.— Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Daggs *v.* Orient Ins. Co., 136 Mo. 382, 38 S. W. 85, 58 Am. St. Rep. 638, 35 L. R. A. 227 [*affirmed* in 172 U. S. 557, 19 S. Ct. 281, 43 L. ed. 552].

North Carolina.— Commonwealth Mut. F. Ins. Co. *v.* Edwards, 124 N. C. 116, 32 S. E. 404.

Oregon.— Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329.

Wisconsin.— Rose *v.* Kimberly, etc., Co., 89 Wis. 545, 62 N. W. 526, 46 Am. St. Rep. 855, 27 L. R. A. 556.

United States.— Berry *v.* Knights Templars', etc., Life Indemnity Co., 46 Fed. 439; Wall *v.* Equitable L. Assur. Soc., 32 Fed. 273; Northwestern Mut. L. Ins. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17.

See also *supra*, III, H, 3.

70. Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258; Heebner *v.* Eagle Ins. Co., 10 Gray (Mass.) 131, 69 Am. Dec. 308; Daniels *v.* Hudson River F. Ins. Co., 12 Cush. (Mass.) 416, 59 Am. Dec. 192.

71. Thwing *v.* Great Western Ins. Co., 111 Mass. 93, where the premium note was also signed by the assured in Massachusetts.

b. When at Office of Corporation Issuing Policy. It has been held, however, that where the agent of a foreign insurance company through whom the insurance is effected has no larger authority from the company than to receive and transmit to the home office applications for insurance, and to receive from that office and deliver the insurance policies which are issued and transmitted in pursuance of such applications, then the *situs* of the policy is in the state of the home office, and it is held to take effect as a contract as soon as it is signed by the proper officers at the home office and put in the mail for transmission; for from that moment it becomes a binding and irrevocable contract between the parties; and inasmuch as the acceptance of the application, the signing, issuing, and mailing of the policy, all take place within the state of the home office, the *situs* of the contract is deemed to be in that state, and not in the state of the agent to whom it is transmitted for delivery.[72] The same rule has been held to apply where the policy, instead of being sent to the assured directly by mail, is sent to the company's agent at the domicile of the assured to be by him delivered to the assured.[73] Whether the last proposition is sound must depend upon the predicate that the authority of the agent, when the policy is received by him from the home office, is limited to a delivery of it to the insured. Where, under similar circumstances, by the terms of the policy itself it is not to be valid unless countersigned by the local agent, and where it is so countersigned and delivered by him, the *situs* of the contract, according to the view taken in some states, is the state within which it is so countersigned and delivered.[74]

3. Loans and Mortgages. The *situs* of a loan by a foreign corporation and a note or bond and mortgage given to secure the same is, for the purpose of determining the application of restrictive statutes, in the state of the corporation's domicile, where the contract is made there, through the mails or otherwise, and is to be performed there, although the borrower and mortgagor is a resident of another state and the land covered by the mortgage is there situated.[75] Accord-

72. *Alabama.*— Jackson *v.* State, 50 Ala. 141.

Arkansas.— State Mut. F. Ins. Assoc. *v.* Brinkley Stave, etc., Co., 61 Ark. 1, 31 S. W. 157, 54 Am. St. Rep. 191, 29 L. R. A. 712.

Louisiana.— See State *v.* Williams, 46 La. Ann. 922, 15 So. 290; New Orleans *v.* Rhenish Westphalian Lloyds, 31 La. Ann. 781.

Michigan.— Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346.

New York.— Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258; Hyde *v.* Goodnow, 3 N. Y. 266; Huntley *v.* Merrill, 32 Barb. 626; People *v.* Imlay, 20 Barb. 68.

Oregon.— Hacheny *v.* Leary, 12 Oreg. 40, 7 Pac. 329.

South Carolina.— Where a citizen of South Carolina made, in that state, an application for membership in a Maryland mutual assessment life-insurance association, and the rules of the association required proof of death and assessments to be made in Maryland, it was held that the contract was to be performed in Maryland, and that, the corporation having neither office, officer, nor property in South Carolina, a suit for breach of contract could not be maintained against it in South Carolina. Rodgers *v.* Baltimore Mut. Endowment Assessment Assoc., 17 S. C. 406.

Vermont.— Baker *v.* Spaulding, 71 Vt. 169, 42 Atl. 982.

Wisconsin.— Seamans *v.* Knapp-Stout, 89 Wis. 171, 61 N. W. 757, 46 Am. St. Rep. 825, 27 L. R. A. 362.

United States.— Allgeyer *v.* Louisiana, 165 U. S. 578, 17 S. Ct. 427, 41 L. ed. 832; Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Marine Ins. Co. *v.* St. Louis, etc., R. Co., 41 Fed. 643; Lamb *v.* Bowser, 14 Fed. Cas. No. 8,009, 7 Biss. 372 [*affirming* 14 Fed. Cas. No. 8,008, 7 Biss. 315].

Canada.—See Washington County Mut. Ins. Co. *v.* Henderson, 6 U. C. C. P. 146.

73. Western *v.* Genesee Mut. Ins. Co., 12 N. Y. 258; Huntley *v.* Merrill, 32 Barb. (N. Y.) 626; Clarke *v.* Union F. Ins. Co., 10 Ont. Pr. 313; Washington County Mut. Ins. Co. *v.* Henderson, 6 U. C. C. P. 146.

74. See *supra*, IV, K, 2, a.

75. *Alabama.*— Electric Lighting Co. *v.* Rust, 117 Ala. 680, 23 So. 751.

Arkansas.— Scruggs *v.* Scottish Mortg. Co., 54 Ark. 566, 16 S. W. 563.

New Jersey.— Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (Ch. 1899) 42 Atl. 284.

North Dakota.— U. S. Savings, etc., Co. *v.* Shain, 8 N. D. 136, 77 N. W. 1006.

Pennsylvania.— People's Bldg., etc., Assoc. *v.* Berlin, 201 Pa. St. 1, 50 Atl. 308, 88 Am. St. Rep. 764 [*reversing* 15 Pa. Super. Ct. 393], even though the contract was made through an agent in Pennsylvania.

Tennessee.— Neal *v.* New Orleans Loan, etc., Assoc., 100 Tenn. 607, 46 S. W. 755.

United States.— Eastern Bldg., etc., Assoc. *v.* Bedford, 88 Fed. 7.

See also *supra*, III, H, 4.

ing to the better opinion, however, the *situs* is in the state where the land is situated where the contract is solicited by and made through a local agent of the corporation there who is engaged in the business of procuring applications for loans in the state and forwarding them to the corporation.[76]

4. Effect of Stipulation in Contract. Where a foreign corporation enters into a contract in a state under whose laws it is void or unenforceable because of the corporation's failure to comply with statutory conditions precedent to the right to do business therein, or because of a statute wholly excluding such corporation, the contract cannot be rendered valid or enforceable by a stipulation therein that it shall be governed by the laws of the state of the corporation's domicile.[77]

L. Personal Liability of Officers, Agents, or Shareholders on Contracts. In the absence of a statute, the mere fact that a foreign corporation has engaged in business and entered into a contract, without complying with the local statutes imposing conditions upon the right of such corporations to do business in the state, does not render the directors and shareholders liable as partners on the contract, when the laws of the state are not such as to prevent recognition of the existence of the corporation, but the remedy in such case is against the corporation.[78] It is otherwise, however, where the laws or public policy of the state are such that the existence of the corporation cannot be recognized.[79] And where a person assumes to act as agent for a foreign corporation doing business in a state without complying with the local statute, and enters into a contract on behalf of the corporation with a domestic citizen, and incurs a debt to him, he is personally liable, at least if the citizen is ignorant of the non-compliance with the statute.[80] In some states the statute expressly makes the officers and agents of foreign corporations personally liable for their debts where such corporations do business in the state without complying with the statutory requirements,[81] or where they fail

76. Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; People's Bldg., etc., Assoc. *v.* Markley, 27 Ind. App. 128, 60 N. E. 1013; J. B. Watkins Land Mortg. Co. *v.* Elliott, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385; U. S. Savings, etc., Co. *v.* Miller, (Tenn. Ch. App. 1897) 47 S. W. 17. But see People's Bldg., etc., Assoc. *v.* Berlin, 201 Pa. St. 1, 50 Atl. 308, 88 Am. St. Rep. 764 [*reversing* 15 Pa. Super. Ct. 393].

77. Henni *v.* Fidelity Bldg., etc., Assoc., 61 Nebr. 744, 86 N. W. 475, 87 Am. St. Rep. 519. To the contrary see U. S. Savings, etc., Co. *v.* Shain, 8 N. D. 136, 77 N. W. 1006. See also *supra*, III, H, 1.

78. Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622; Merrick *v.* Van Santvoord, 34 N. Y. 208; Bond *v.* Stoughton, 26 Pa. Super. Ct. 483.

79. Taylor *v.* Branham, 35 Fla. 297, 17 So. 552, 48 Am. St. Rep. 249, 39 L. R. A. 362 (holding that a corporation created by and under the laws of Tennessee could not come to Florida and exercise corporate functions there without being incorporated under the laws of Florida, and where it attempted to do so, its liabilities, contracted in Florida, rested upon its members or shareholders as partners, and they could be there sued as such); Montgomery *v.* Forbes, 148 Mass. 249, 19 N. E. 342 (as to which see *supra*, I, E, 3, note 34); Hill *v.* Beach, 12 N. J. Eq. 31. And see *supra*, I, E, 3, 4.

80. Lasher *v.* Stimson, 145 Pa. St. 30, 23 Atl. 552, holding also (1) that a domestic citizen is under no duty to ascertain whether a foreign corporation for whom one assumes to act as agent has complied with the statute, so as to be entitled to do business in the state; and (2) that the fact that the statute provides that an agent of a foreign corporation, who transacts business for it in violation of the statute shall be liable to fine and imprisonment, does not exclude such agent's personal liability to persons with whom he contracts on behalf of the corporation, the liability so imposed being, not in lieu of, but in addition to his common-law liability.

81. *Iowa.*— Hartman *v.* Hollowell, (1905) 102 N. W. 524, one who requests a property-owner to permit him to secure a policy through a foreign insurance agency, and who does so, is an agent within Code, § 1749, providing that any one soliciting insurance or procuring application therefor shall be held to be a soliciting agent of the company.

Minnesota.— Webster *v.* Ferguson, (1905) 102 N. W. 213, an insurance agent within the intent of the statute (Laws (1895), c. 175, § 87), is one who assumes to act for or on behalf of any company not authorized to do business in the state, and it is not necessary that he be appointed as a representative of such company, or that he be the authorized agent of a duly licensed company; but a party is not liable upon the contract in respect to which he assumed to act, by request, unless the insured was deceived by his conduct, having reasonable ground for belief

to file reports, etc., as required by the statute, or file a certificate or report known to be false.[82]

M. Penalties Against Corporations and Their Agents, and Criminal Liability. In many states the statutes excluding foreign corporations or prescribing conditions upon their right to do business therein impose a specific penalty upon a corporation or its agent, or both, for violation of its provisions.[83]

that the companies involved in the transaction were duly authorized by the state.

Tennessee.— Morton *v.* Hart, 88 Tenn. 427, 12 S. W. 1026.

Texas.— Price *v.* Garvin, (Civ. App. 1902) 69 S. W. 985, holding that the procuring for the insured of an insurance policy from a foreign corporation not authorized to do business in the state, the transmission of the premium therefor, less commission, to an insurance broker in another state, the delivery of the policy to the insured, and an unpaid loss by fire occurring while the policy was in force, render the person so acting liable under a statute providing that any person who in any way acts as an agent for an unauthorized insurance company shall be personally liable for any loss caused by a policy in such company in respect to which he so acted as agent.

Virginia.— Goldsberry *v.* Carter, 100 Va. 438, 41 S. E. 858, holding that Code, § 1105, making officers, agents, and employees of foreign corporations liable for their debts where they do business in the state without complying with section 1104, requiring establishment of an office, filing of charter, and appointment of agent, does not apply to a contract made out of a state by which title to land in the state is acquired.

United States.— Rothschild *v.* Adler-Weinberger Steamship Co., 130 Fed. 866, 65 C. C. A. 350 [*reversing* 123 Fed. 145], holding, however, that the Pennsylvania statute (Act May 1, 1876, Pub. Laws 66, § 48), making the agent of any foreign insurance company not complying with the laws of the state personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on behalf of the company, applies only to contracts of insurance on property in the state.

Estoppel to deny agency.— Persons issuing policies of insurance on behalf of a foreign insurance company, and afterward issuing slips or permits to be attached thereto, in which they describe themselves as "agents," are estopped to deny their agency when it is sought to hold them personally liable as agents under a statute. Adler-Weinberger Steamship Co. *v.* Rothschild, 123 Fed. 145 [*reversed* on other grounds in 130 Fed. 866, 65 C. C. A. 350].

Exemplary damages allowed.—Price *v.* Garvin, (Tex. Civ. App. 1902) 69 S. W. 985.

Issuing policies and delivering them to citizens is doing business in the state, within the meaning of statutes imposing personal liability upon agents. Hartman *v.* Hollowell, (Iowa 1905) 102 N. W. 524; Seamans *v.* Zimmerman, 91 Iowa 363, 59 N. W. 290.

What constitutes business see *supra*, III, E, *et seq.*

Personal liability of agent of foreign insurance company not authorized or insolvent see Hartman *v.* Hollowell, (Iowa 1905) 102 N. W. 524; Lumbermen's Mut. Ins. Co. *v.* Kansas City, etc., R. Co., 149 Mo. 165, 50 S. W. 281; McCutcheon *v.* Rivers, 68 Mo. 122 (liability to return premium); Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638; Landusky *v.* Beirne, 80 N. Y. App. Div. 272, 80 N. Y. Suppl. 238; Burges *v.* Jackson, 18 N. Y. App. Div. 296, 40 N. Y. Suppl. 326 [*affirmed* in 162 N. Y. 632, 57 N. E. 1105]; Morton *v.* Hart, 88 Tenn. 427, 12 S. W. 1026. See, generally, INSURANCE. No presumption of the insolvency of a foreign insurance company arises from the fact that it has not been authorized to do business in the state. Jones *v.* Horn, 104 Mo. App. 705, 78 S. W. 638.

82. Fraser *v.* Mines Leasing Co., 16 Colo. App. 444, 66 Pac. 167 (personal liability of directors for failure to file annual report, it being held in this case that they were not liable because the filing of the report was in compliance with the statute); Heard *v.* Pictorial Press, 182 Mass. 530, 65 N. E. 901 (holding that the certificate of capital and assets and liabilities required by Rev. Laws, c. 126, §§ 13, 14, to be filed by foreign corporations, was a certificate required by law, within the meaning of Rev. Laws, c. 110, § 58, making certain officers of corporations personally liable for signing any certificate required by law, knowing it to be false, and also passing upon the questions whether the certificate in question was false and whether the officers knew that it was).

83. *Alabama.*— See State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141.

Arkansas.— See Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

Illinois.— Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657.

Kentucky.— Com. *v.* Read Phosphate Co., 113 Ky. 32, 67 S. W. 45, 23 Ky. L. Rep. 2284 (holding that in an action by the commonwealth against a foreign corporation to recover a penalty imposed for engaging in business without complying with the statute, it was a question for the jury under the evidence whether defendant had engaged in business in the state, and also that, on it being shown that defendant had done so, the burden was upon it to show that it had complied with the statute); Com. *v.* Parlin, etc., Co., 80 S. W. 791, 26 Ky. L. Rep. 58. Under Ky. St. § 576, providing for the punishment of every corporation doing business in the state which shall fail to have its corporate name

In some states violation of the statute by an agent is made a misdemeanor and he is rendered liable to fine or imprisonment, or both.[84] Prosecution of a person for acting as agent of a foreign corporation without taking out the license required by statute is not barred by the subsequent taking out of such license.[85] To render the agent liable the act of agency must be done within the state,[86] but it is not necessary that the contracts made through his agency shall be made within the state.[87] Penal provisions of statutes relating to foreign corporations and their agents are to be strictly construed, and their penal intent must be shown in clear and unambiguous words.[88]

N. Effect of Non-Compliance With Statute on Existence of Corporation. From what has been said in the preceding sections as to the effect of a foreign corporation's failure to comply with the statutes of a state requiring it to file a copy of its charter or articles of incorporation or imposing other conditions precedent to its right to do business therein, it is obvious that such

painted or printed "on its principal place or places of business," an indictment charging that defendant corporation failed and refused to have its corporate name painted or printed on its principal place of business in the city of M is not sufficient. Standard Oil Co. *v.* Com., 62 S. W. 897, 23 Ky. L. Rep. 302. As to instructions and evidence on a prosecution of the Associated Press for violation of Ky. St. § 571, declaring it unlawful for any foreign corporation to carry on business in the state without having filed a statement designating its office and its agent thereat upon whom process may be served, see Associated Press *v.* Com., 60 S. W. 295, 523, 867, 22 Ky. L. Rep. 1229, 1369.

Missouri.— State *v.* New York L. Ins. Co., 81 Mo. 89; State *v.* Stewart, 47 Mo. 382, mode of enforcing penalty against agent.

Montana.— Hershfield *v.* Rocky Mountain Bell Telephone Co., 12 Mont. 102, 29 Pac. 883; King *v.* National Mining, etc., Co., 4 Mont. 1, 1 Pac. 727.

Pennsylvania.— Com. *v.* Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247; Com. *v.* Biddle, 139 Pa. St. 605, 21 Atl. 134, 11 L. R. A. 561; Com. *v.* Hammer, 11 Pa. Super. Ct. 138.

United States.— Rothschild *v.* Adler-Weinberger Steamship Co., 130 Fed. 866, 65 C. C. A. 350 [*reversing* 123 Fed. 145] (Pennsylvania statute); Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. 239, 55 C. C. A. 93 (whether a foreign corporation has been engaged in transacting or carrying on business in the state, so as to be subject to the penalty imposed by statute, is one of fact for the jury, unless the evidence is undisputed, and but one inference can be drawn from it).

See also *supra*, III, K.

Excessive verdict (eight thousand dollars) in an action against a corporation for doing business for a short period without complying with the statute. Finlay Brewing Co. *v.* People, 111 Ill. App. 200.

Penalty imposed on agents and not on corporations.— State *v.* New York L. Ins. Co., 81 Mo. 89; State *v.* Charter Oak L. Ins. Co., 9 Mo. App. 364.

Proof as to agency.— Under such a statute it has been held that testimony of an alleged agent of a foreign corporation that he was or was not such agent is a conclusion of the witness and should amount to nothing with the jury unless borne out by the evidence; and the fact that a borrower from a foreign corporation executes a contract constituting a person his agent to procure the loan does not preclude the state from showing that such person really acted as agent for the corporation. State *v.* Bristol Sav. Bank, 108 Ala. 3, 18 So. 533, 54 Am. St. Rep. 141.

84. *Alabama.*— Collier *v.* Davis, 94 Ala. 456, 10 So. 86; Elsberry *v.* State, 52 Ala. 8, holding that the superintendent or other person conducting the business of a foreign corporation, although he does none on his own account but acts simply as the servant of the corporation, may be convicted under such a statute where neither he nor the corporation takes out a license.

Arkansas.— Woodson *v.* State, 69 Ark. 521, 65 S. W. 465.

Illinois.— Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683, holding that defendant was acting as the agent of a foreign insurance company and not as the agent of the assured.

Indiana.— State *v.* Briggs, 116 Ind. 55, 18 N. E. 395, holding that the District of Columbia was a "state," within the meaning of such a statute.

Iowa.— Hartman *v.* Hollowell, (1905) 102 N. W. 524.

Kansas.— State *v.* Phipps, 50 Kan. 609, 31 Pac. 1097, 34 Am. St. Rep. 152, 18 L. R. A. 657, violation of anti-trust statute by local agents of foreign insurance companies.

Missouri.— State *v.* Stewart, 47 Mo. 382.

85. Elsberry *v.* State, 52 Ala. 8.

86. Collier *v.* Davis, 94 Ala. 456, 10 So. 86; Jackson *v.* State, 50 Ala. 141; People *v.* Imlay, 20 Barb. (N. Y.) 68.

87. Pierce *v.* People, 106 Ill. 11, 46 Am. Rep. 683.

The interstate commerce clause in the federal constitution may protect an agent of a foreign corporation. See *supra*, I, D, 3.

88. Com. *v.* Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247; Com. *v.* Biddle, 139 Pa. St. 605, 21 Atl. 134, 11 L. R. A. 561; Com. *v.* Hammer, 11 Pa. Super. Ct. 138; Rothschild *v.* Adler-Weinberger Steamship Co., 130 Fed. 866, 65 C. C. A. 350 [*reversing* 123 Fed. 145].

non-compliance does not in any way affect the validity of the existence of a foreign corporation, and so it has been held.[89]

O. Right of Private Individuals to Enjoin Corporation. As a general proposition a private individual cannot sue to enjoin acts within the state by a foreign corporation on the ground that it has not complied with statutory conditions precedent to the right to do business within the state, but the proceedings to exclude it must be instituted by the attorney-general or other proper officer on behalf of the state.[90] But where the acts of a foreign corporation not authorized under the laws of the state infringe the private rights of an individual (or private corporation) or constitute a public nuisance causing him special damage, he may maintain a suit for an injunction.[91]

V. ACTIONS BY AND AGAINST FOREIGN CORPORATIONS.

A. Actions by Foreign Corporations[92] — **1. Power to Sue in General — a. Rule Stated.** It may be laid down as a general principle that whenever a foreign corporation has, within the domestic jurisdiction, the power to become the obligee in a given contract or to acquire or own real or personal property, it has the same right of action, at law and in equity, to enforce performance of such contract or recover damages for its breach, or to recover possession of such property or prevent or recover for injuries thereto, which is afforded by the laws of such state to domestic persons or corporations.[93]

89. Rough *v.* Breitung, 117 Mich. 48, 75 N. W. 147, holding therefore that a contract by the shareholders of a foreign corporation individually, for sale of the corporate property in Michigan, could not be sustained on the ground that there was no corporation, but merely an association of individuals, because of failure of the corporation to comply with the local statute. See also Boyington *v.* Van Etten, 62 Ark. 63, 35 S. W. 622, shareholders and officers not liable as partners.

90. See *supra*, III, S. See also MacGinniss *v.* Boston, etc., Consol. Copper, etc., Mining Co., 29 Mont. 428, 75 Pac. 89; Williams *v.* Hintermeister, 26 Fed. 889.

91. Smith *v.* Alberta, etc., Exploration, etc., Co., (Ida. 1903) 74 Pac. 1071 (special damage from construction of works by foreign corporation not authorized to do business in the state); Seattle Gas, etc., Co. *v.* Citizens' Light, etc., Co., 123 Fed. 588 (suit by gas company having franchise from city to enjoin rival foreign corporation not authorized to do business in the state from interfering with complainant's mains and service pipes by laying mains and pipes). See, generally, NUISANCES. It was held, under a statute containing such provisions, that a domestic citizen could not maintain an action against a foreign corporation, on behalf of himself and others similarly situated, to enjoin it from erecting certain telephone poles in a city, on the ground of its failure to comply with the statute, unless otherwise the petition showed a right to an injunction. Hershfield *v.* Rocky Mountain Bell Telephone Co., 12 Mont. 102, 29 Pac. 883. The decision does not seem to be sound. Although the municipal authorities had authorized the establishment of the telephone service, yet, as defendant corporation had no right to enter the state for the purpose of doing business, its occupation of the public streets was unlawful, and was therefore a nuisance; and consequently any abutting landowner damaged thereby ought to have been allowed an injunction to restrain the same.

92. **Mandamus or injunction against state officer** see *supra*, III, Q, R.

Proof of existence of foreign corporation see CORPORATIONS, 10 Cyc. 243.

93. *Alabama.*— Georgia Importing, etc., Co. *v.* Locke, 50 Ala. 332; Eslava *v.* Ames Plow Co., 47 Ala. 384; Lucas *v.* State Bank, 2 Stew. 147.

Arkansas.— St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43.

Colorado.— Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

Illinois.— John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794; Washtenaw Bank *v.* Montgomery, 3 Ill. 422; Bishop *v.* American Preservers' Co., 51 Ill. App. 417; Jewelers' Mercantile Agency *v.* Douglass, 35 Ill. App. 627.

Indiana.— Smith *v.* Little, 67 Ind. 549; Guaga Iron Co. *v.* Dawson, 4 Blackf. 202.

Kentucky.— Galliopolis Bank *v.* Trimble, 6 B. Mon. 599, 604; Taylor *v.* Illinois Bank, 7 T. B. Mon. 576; Pendleton *v.* Commonwealth Bank, 1 T. B. Mon. 171.

Louisiana.— Frazier *v.* Willcox, 4 Rob. 517; Williamson *v.* Smoot, 7 Mart. 31, 12 Am. Dec. 494.

Maine.— Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227.

Maryland.— Lycoming F. Ins. Co. *v.* Langley, 62 Md. 196; Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476; McKim *v.* Odom, 3 Bland 407.

Massachusetts.— British American Land Co. *v.* Ames, 6 Metc. 391; Portsmouth Livery Co. *v.* Watson, 10 Mass. 91.

Michigan.— Emerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182.

b. Right to Sue Rests Upon Comity of State of Forum. The right of a corporation to sue in the courts of another state or country is not an absolute right but rests upon the comity of states.[94] Under the operation of this principle of comity a corporation created in one state can sue in the courts of another state the same as a domestic corporation can, unless prohibited by the legislation of the state in which it attempts to sue.[95]

c. Right to Sue Subject to Restraints of Local Law — (I) *In General.* This doctrine is often roughly expressed in the proposition that a corporation created by the laws of one state may maintain an action in another state or country, unless restrained from so doing by the local laws of such other state or country.[96] As we have seen statutes exist in many states, if not in all, expressly imposing restric-

Minnesota.— Northwestern Mut. L. Ins. Co. *v.* Stone, 36 Minn. 108, 31 N. W. 54, holding that commencement of a suit in the federal court by a foreign corporation, forbidden by statute, did not affect its right to maintain the action in a state court after discontinuing the action in the federal court.

Mississippi.— Williams *v.* Creswell, 51 Miss. 817; Hines *v.* North Carolina, 10 Sm. & M. 529.

Missouri.— Edwardsville Bank *v.* Simpson, 1 Mo. 184. And see St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

New Hampshire.— Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381. See also Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574; Libbey *v.* Hodgdon, 9 N. H. 394.

New Jersey.— Mechanics' Bank *v.* Godwin, 14 N. J. L. 439; Manhattan, etc., Sav., etc., Assoc. *v.* Massarelli, (Ch. 1899) 42 Atl. 284.

New York.— New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer 648; Williams *v.* Michigan Bank, 7 Wend. 539; New Jersey Protection, etc., Bank *v.* Thorp, 6 Cow. 46; Silver Lake Bank *v.* North, 4 Johns. Ch. 370. See also Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153; Mutual Ben. L. Ins. Co. *v.* Davis, 12 N. Y. 569; Gorton Steamer Co. *v.* Spofford, 5 N. Y. Civ. Proc. 116; Fisher *v.* World Mut. L. Ins. Co., 47 How. Pr. 451; Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. 1.

North Dakota.— National Cash Register Co. *v.* Wilson, 9 N. D. 112, 81 N. W. 285.

Ohio.— Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469; Mohr, etc., Distilling Co. *v.* Lamar Ins. Co., 7 Cinc. L. Bul. 341.

Pennsylvania.— Leasure *v.* Union Mut. L. Ins. Co., 91 Pa. St. 491; Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 173; Stewart *v.* U. S. Insurance Co., 9 Watts 126.

Rhode Island.— Garrett Ford Co. *v.* Vermont Mfg. Co., 20 R. I. 187, 37 Atl. 948, 78 Am. St. Rep. 852, 38 L. R. A. 545.

South Carolina.— Cape Fear Bank *v.* Stinemetz, 1 Hill 44. And see Cone Export, etc., Co. *v.* Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289.

South Dakota.— Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109.

Tennessee.— Talmadge *v.* North American Coal, etc., Co., 3 Head 337; Union Bank *v.* U. S. Bank, 4 Humphr. 369.

Texas.— Texas Land, etc., Co. *v.* Worsham, 76 Tex. 556, 13 S. W. 384; Alabama Bank *v.* Simonton, 2 Tex. 531. And see Middlebrook *v.* David Bradley Mfg. Co., (Civ. App. 1894) 27 S. W. 169.

Vermont.— Day *v.* Essex County Bank, 13 Vt. 97. And see State *v.* Boston, etc., R. Co., 25 Vt. 433.

Virginia.— Taylor *v.* Alexandria Bank, 5 Leigh 471; Rees *v.* Conococheague Bank, 5 Rand. 326, 16 Am. Dec. 755; Marietta Bank *v.* Pindall, 2 Rand. 465. And see Freeman's Bank *v.* Ruckman, 16 Gratt. 126.

Wisconsin.— Connecticut Mut. L. Ins. Co. *v.* Cross, 18 Wis. 109. And see Charter Oak L. Ins. Co. *v.* Sawyer, 44 Wis. 387.

United States.— Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. ed. 855; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Orange Nat. Bank *v.* Traver, 7 Fed. 146, 7 Sawy. 210; Clarke *v.* New Jersey Steam Nav. Co., 5 Fed. Cas. No. 2,859, 1 Story 531; Commercial Ins. Co. *v.* The C. D. Jr., 13 Fed Cas. No. 7,051, 1 Woods 72; New York Dry Dock *v.* Hicks, 18 Fed. Cas. No. 10,204, 5 McLean 111; Society for Propagation, etc. *v.* Wheeler, 22 Fed. Cas. No. 13,156, 2 Gall. 105.

England.— Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532, 2 Str. 807

Canada.— Connecticut, etc., R. Co. *v.* Comstock, 1 Rev. Lég. 589; Palmer *v.* Ocean Mar. Ins. Co., 29 N. Brunsw. 501; Howe Mach. Co. *v.* Walker, 35 U. C. Q. B. 37, 53.

See 12 Cent. Dig. tit. "Corporations," § 2563 *et seq.*

94. National Telephone Mfg. Co. *v.* Du Bois, 165 Mass. 117, 42 N. E. 510, 52 Am. St. Rep. 503, 30 L. R. A. 628, courts of equity are not open to a foreign corporation as a matter of strict right, but as matter of comity. See *supra*, I, C. 4.

95. Schmitt *v.* Mahoney, 60 Nebr. 20, 82 N. W. 99; Cone Export, etc., Co. *v.* Poole, 41 S. C. 70, 19 S. E. 203, 24 L. R. A. 289; Bishop *v.* American Preservers Co., 51 Ill. App. 417 (has the right to sue for the property it owns, although it is abusing the privilege it enjoys of doing business in the state); Colonial, etc., Mortg. Co. *v.* Catlin (Kan. App. 1899) 57 Pac. 140; Alliance Trust Co. *v.* Wilson, (Kan. App. 1899) 59 Pac. 177. See *supra*, I, C, 4.

96. Edwardsville Bank *v.* Simpson, 1 Mo. 184; U. S. Bank *v.* Deveaux, 5 Cranch (U. S.).

tions upon the right of foreign corporations to sue;[97] but the mere commencement or prosecution of suits is not doing business in a state within the meaning of a restrictive statute.[98]

(II) *Actions in Federal Courts.* As we have seen, when a foreign corporation brings an action in a federal court, state statutes and the construction placed upon them by the state courts will be followed in determining whether the corporation has any right of action; but state statutes merely prohibiting or imposing restrictions upon the right of a foreign corporation to maintain an action in the state courts cannot prevent it from suing in the federal courts, where it has a cause of action.[99]

d. May Sue in Corporate Name. This is very old law; and the meaning is that a foreign corporation, having the right of action against a resident of the domestic forum, is allowed to sue and recover judgment thereon in its corporate name. Thus, the Dutch West India Company was allowed to sue in its corporate name in the English king's bench for money which had been borrowed from them at Amsterdam, and which was payable in bank there, and to recover judgment for the same.[1]

e. Special Statutory or Other Remedies. When a foreign corporation has a good cause of action in a state, it is entitled, in the absence of express restriction or exclusion, not only to the right to resort to the ordinary remedies by actions at law or in equity, but also, by comity, to the same right as domestic corporations to resort to special statutory or other remedies, such as attachment,[2] mandamus,[3] mechanics' liens,[4] and the like.[5]

2. For What Causes of Action — a. In General. The principle being conceded that a foreign corporation may sue for the redress of injuries in the domestic jurisdiction, it must follow, in the absence of statutory restraints, that it may sue upon any cause of action for which a domestic person or corporation might sue.[6] For example, it may maintain an action at law or in equity to collect a debt due to it or enforce performance or recover damages for breach of a contract entered into without the state, or lawfully within the state;[7] and it may maintain an

61, 3 L. ed. 38; Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532, 2 Str. 807; Dutch West India Co. *v.* Van Moyses, 2 Ld. Raym. 1535 note, 1 Str. 612.

97. See *supra*, III; IV, B, 5; IV, E; IV, H.

98. See *supra*, III, I, text and note 13.

99. See *supra*, IV, B, 6.

1. Dutch West India Co. *v.* Van Moyses, 2 Ld. Raym. 1535 note, 1 Str. 612; Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532, 2 Str. 807. And see the other cases cited *supra*, V, A, 1, a.

2. *Illinois.*— Givens *v.* Merchants' Nat. Bank, 85 Ill. 442.

Kansas.— Payne *v.* Kansas City First Nat. Bank, 16 Kan. 147.

Michigan.— Eldorado State Bank *v.* Maxson, 123 Mich. 250, 82 N. W. 31, 81 Am. St. Rep. 196.

New York.— Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. 1.

Pennsylvania.— H. B. Claflin Co. *v.* Weiss, 16 Pa. Co. Ct. 247; John Ray Clark Co. *v.* Toby Valley Supply Co., 14 Pa. Co. Ct. 344.

South Dakota.— Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109.

Tennessee.— Union Bank *v.* U. S. Bank, 4 Humphr. 369. See also Douglas *v.* Bank of Commerce, 97 Tenn. 133, 36 S. W. 874; Commercial Nat. Bank *v.* Motherwell Iron, etc., Co., 95 Tenn. 172, 31 S. W. 1002, 29 L. R. A. 164.

Compare Attachment, 4 Cyc. 406.

Failure of a foreign corporation to comply with the statute of the state imposing conditions precedent to its right to maintain actions therein will prevent it from maintaining proceedings by attachment. J. Walter Thompson Co. *v.* Whitehed, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; Bradley *v.* Armstrong, 9 S. D. 267, 68 N. W. 733. See *supra*, IV, B, 5; IV, H.

3. See *supra*, III, Q.

4. Chapman *v.* Brewer, 43 Nebr. 890, 62 N. W. 320, 47 Am. St. Rep. 779. See, generally, Mechanics' Liens.

5. A foreign corporation may in a proper case resort to contempt proceedings to enforce rights. See Latimer *v.* Barmore, 81 Mich. 592, 46 N. W. 1, where, however, the right of a foreign corporation to institute proceedings for contempt to enforce a civil remedy was denied, under the Michigan statute, because the corporation had neither been served with process in the suit nor voluntarily entered its appearance therein. *Compare* Contempt, 9 Cyc. 35.

6. Georgia Importing, etc., Co. *v.* Locke, 50 Ala. 332; Silver Lake Bank *v.* North, 4 Johns. Ch. (N. Y.) 370; Henriques *v.* Dutch West India Co., 2 Ld. Raym. 1532, 2 Str. 807; and other cases cited *supra*, V, A, 1, a.

7. *Alabama.*— Lucas *v.* Georgia Bank, 2 Stew. 147.

action for any tort committed against it,[8] such as an action for libel,[9] trespass,[10] or conversion.[11] It may maintain an action for damages by a municipal corporation to its telegraph and telephone poles standing within the limits of the municipality, even though the local statute prohibits foreign corporations from doing business in the state until they shall have complied with certain prescribed conditions.[12] In like manner it may maintain an action to recover real or personal property, such as writ of entry or ejectment,[13] or replevin,[14] or forcible entry and detainer to recover possession of real estate from a tenant unlawfully holding over, it being no defense that the corporation holds the premises in violation of law;[15] and it may intervene in attachment proceedings for the purpose of protecting its right to the property attached.[16] So also it may maintain a suit in equity for an injunction for the protection of its rights;[17] and generally it is entitled to whatever remedy is accorded to a domestic creditor for the collection of a debt due for goods sold and delivered, with priority of payment according to the priority of its execution, although it may have no office in the state of the forum where service can be had upon it.[18]

b. Cases to Which Comity Does Not Extend. This comity extends so far that a foreign corporation can prosecute its rights of action therein in the same manner and as freely as a citizen of the state, or other suitors under similar circumstances; but it cannot be allowed to maintain in such courts actions or

Illinois.— Washtenaw Bank *v.* Montgomery, 3 Ill. 422.

Indiana.— Guaga Iron Co. *v.* Dawson, 4 Blackf. 202.

Louisiana.— Frazier *v.* Willcox, 4 Rob. 517.

Maine.— Savage Mfg. Co. *v.* Armstrong, 17 Me. 34, 35 Am. Dec. 227.

Maryland.— Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476.

Massachusetts.— British American Land Co. *v.* Ames, 6 Metc. 391.

Missouri.— Edwardsville Bank *v.* Simpson, 1 Mo. 184.

New York.— Diamond Match Co. *v.* Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; Williams *v.* Michigan Bank, 7 Wend. 539; Silver Lake Bank *v.* North, 4 Johns. Ch. 370.

Ohio.— Lewis *v.* Kentucky Bank, 12 Ohio 132, 40 Am. Dec. 469.

South Carolina.— Cape Fear Bank *v.* Stinemetz, 1 Hill 44.

United States.— Tombigbee R. Co. *v.* Kneeland, 4 How. 16, 11 L. ed. 855; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274.

Canada.— Connecticut, etc., R. Co. *v.* Comstock, 1 Rev. Lég. 589; Palmer *v.* Ocean Mar. Ins. Co., 29 N. Brunsw. 501; Howe Mach. Co. *v.* Walker, 35 U. C. Q. B. 37, 53.

And see the other cases cited *supra*, V, A, 1, a. See also *supra*, I, B, C; III; IV.

Subscriptions to stock.— A foreign corporation may maintain an action to recover calls made upon subscriptions to its capital stock, where the calls have properly been made in the state of its creation. Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, 40 N. E. 462, 45 Am. St. Rep. 124, 27 L. R. A. 313 [*reversing* 51 Ill. App. 204]; Wellersburg, etc., Plank Road Co. *v.* Young, 12 Md. 476; Anglo-American Land, etc., Co. *v.* Dyer, 181 Mass. 593, 64 N. E. 416, 92 Am. St. Rep. 437; Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194 [*affirming* 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 (*affirming* 33 Misc. 50, 68 N. Y. Suppl. 141)]. But *compare* Parkhurst *v.* Mexican Southeastern R. Co., 102 Ill. App. 507. See also CORPORATIONS, 10 Cyc. 510.

8. Jewelers' Mercantile Agency *v.* Douglass, 35 Ill. App. 627; and other cases in the notes following.

9. Jewelers' Mercantile Agency *v.* Douglass, 35 Ill. App. 627.

10. Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369; Delaware, etc., Tel., etc., Co. *v.* Pensauken Tp., 116 Fed. 910. See also *supra*, II.

11. Portsmouth Livery Co. *v.* Watson, 10 Mass. 91; Emerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182.

12. Delaware, etc., Tel., etc., Co. *v.* Pensauken Tp., 116 Fed. 910.

13. Lumbard *v.* Aldrich, 8 N. H. 31, 28 Am. Dec. 381. See also *supra*, II, A.

14. Bishop *v.* American Preservers Co., 51 Ill. App. 417; Smith *v.* Little, 67 Ind. 549; American Typefounders Co. *v.* Conner, 6 Misc. (N. Y.) 391, 26 N. Y. Suppl. 742; National Cash Register Co. *v.* Wilson, 9 N. D. 112, 81 N. W. 285. See also *supra*, II, C.

15. Frick Co. *v.* Marshall, 86 Mo. App. 463.

16. Williamson *v.* Smoot, 7 Mart. (La.) 31, 12 Am. Dec. 494. See also Gates Iron Works *v.* Cohen, 7 Colo. App. 341, 43 Pac. 667, holding also that intervention by a foreign corporation in attachment proceedings was not doing business in the state, within the meaning of a restrictive statute. See *supra*, III, I.

17. John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223]; Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153 [*reversing* 22 Hun 568].

18. John Spry Lumber Co. *v.* Chappell, 184 Ill. 539, 56 N. E. 794 [*affirming* 85 Ill. App. 223]; Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153 [*reversing* 22 Hun 568].

proceedings denied to residents of the state or other suitors in its courts.[19] It cannot in Delaware upon the rule of comity demand a writ of mandamus until the state has in some manner recognized its corporate existence and powers.[20]

3. Pleading and Evidence in Actions by Foreign Corporations — a. In General. In this connection those questions only will be considered which are peculiar to actions by foreign corporations, other questions of pleading or evidence, although arising in such actions, being treated under other titles.[21]

b. Allegation of Corporate Existence. It is believed that the rules obtaining in many jurisdictions, elsewhere considered, which dispense entirely with the allegation that plaintiff or defendant is a corporation or which permit that allegation to be made in the most general language, without pleading the charter or incorporating statute, or explaining how it came to be a corporation,[22] apply to foreign as well as to domestic corporations.[23]

c. Allegation and Proof of Compliance or Non-Compliance With Local Laws — (I) *In General.* Whether it is necessary for a corporation plaintiff to allege compliance with statutory requirements will depend upon the language of the statute, and upon the view which is taken in the particular jurisdiction upon the question whether the non-compliance with it operates of itself to cut off a right of action on the part of the corporation; and upon the further question whether compliance with the statute is in the nature of a condition precedent to such right of action.[24] In some states the view has been taken that a foreign corporation cannot maintain an action upon a contract made within the domestic state, without alleging and proving that it has complied with the laws of such state imposing the doing of certain acts, such as having a duly constituted agent and known place of business in the state, etc., as the condition upon which alone it is permitted to do business within the state; the language of the statute or its judicial construction being such that a compliance with it is a condition precedent to the right to maintain an action in the courts of the state, so that, as in the case of other conditions precedent, compliance with it must be averred and proved by plaintiff.[25] In these states it will not be sufficient for the corporation to allege, in general terms, that it has complied with the laws of the state authorizing a

19. State *v.* Green Lake County, 98 Wis. 143, 73 N. W. 788. See also *supra*, I, C, 4, and cases there cited.

20. Baltimore, etc., Tel. Co. *v.* Delaware, etc., Tel., etc., Co., 7 Houst. (Del.) 269, 31 Atl. 714.

21. See Corporations, 10 Cyc. 1; and, generally, Pleading, and cross-references under that title.

22. Questions of pleading relating to corporate existence see Corporations, 10 Cyc. 1347 *et seq.*

Proof of existence of foreign corporation see Corporations, 10 Cyc. 243.

23. For instance, a foreign corporation, suing in the courts of Ohio, is not required to set out in its petition the terms of its charter, showing its capacity to maintain the action. Smith *v.* Weed Sewing Mach. Co., 26 Ohio St. 562. So, it has been held, in Indiana, in the case of a corporation formed by the concurrent legislation of two states, that it is not necessary, to enable such a corporation, when suing, to put in evidence its act of incorporation granted by the legislature of the foreign state, that it should have pleaded such statute, since to require this would lead to great prolixity in pleading. Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283. *Compare*, however, Connecticut Bank *v.* Smith, 9 Abb. Pr. (N. Y.) 168. Statements not an exception to a petition under the Texas system of pleading which did not raise the question whether plaintiff was a corporation having the capacity to sue as such. Lasater *v.* Purcell Mill, etc., Co., 22 Tex. Civ. App. 33, 54 S. W. 425. See also Corporations, 10 Cyc. 1347 *et seq.*

24. See *supra*, IV, B, 5.

25. *Alabama.*—Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200.

New York.— Welshach Co. *v.* Norwich Gas, etc., Co., 96 N. Y. App. Div. 52, 89 N. Y. Suppl. 284 [*affirmed* in 180 N. Y. 533, 72 N. E. 1152].

Pennsylvania.— West Jersey Ice Mfg. Co. *v.* Armour, 12 Pa. Super. Ct. 443.

Texas.— Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954; Chapman *v.* Hallwood Cash Register Co., 32 Tex. Civ. App. 76, 73 S. W. 969; Peters *v.* Anheuser-Busch Brewing Co., (Civ. App. 1900) 55 S. W. 516; Southern Bldg., etc., Assoc. *v.* Skinner, (Civ. App. 1897) 42 S. W. 320.

Vermont.— Lycoming F. Ins. Co. *v.* Wright, 55 Vt. 526.

foreign corporation to do business therein, because that is merely stating a conclusion of law; but it must aver that it has done the acts which the statute requires, stating what it has done.[26] It must appear that the corporation had complied with the law at the time the contract was made, where this is necessary to enable it to sue thereon, and not merely at the time the suit was commenced.[27] Compliance with the statute need not be alleged where the complaint does not show that the corporation was doing business in the state or that the contract was made in the state.[28]

(II) *When Non-Compliance With Local Law Is Matter of Defense*— (A) *In General.* In other jurisdictions it is held that a foreign corporation, in order to maintain an action arising out of transactions in the state, does not have to allege its compliance with the statute imposing conditions precedent to the right to do business in the state, or to sue therein, but that non-compliance therewith in a matter of defense to be pleaded in bar or in abatement, according to the construction placed upon the statute in a particular jurisdiction.[29]

(B) *How Such Defense Is Pleaded.* In Indiana and some of the other states, in order to make this defense available, it must be set up by a plea in abatement, in compliance with the construction of the statute and rules of practice in the particular jurisdiction.[30] But in other jurisdictions the plea is in

26. Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201.

27. Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201, holding, because of the principle that pleadings are construed most strongly against the pleader, that an allegation in the bill to foreclose a mortgage, that plaintiff "has" complied with the laws, etc., is insufficient, as this may have reference to the time of filing the bill and not to the time at which the contract was made.

28. St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43; National L., etc., Co. *v.* Gifford, 90 Minn. 358, 96 N. W. 919; Mallon *v.* Rothschild, 38 Misc. (N. Y.) 8, 76 N. Y. Suppl. 710.

29. *Arkansas.*— White River Lumber Co. *v.* Southwestern Imp. Assoc., 55 Ark. 625, 18 S. W. 1055; St. Louis, etc., R. Co. *v.* Philadelphia F. Assoc., 55 Ark. 163, 18 S. W. 43.

Dakota.— American Button-Hole Over-Seaming, etc., Mach. Co. *v.* Moore, 2 Dak. 280, 8 N. W. 131.

Delaware.— Standard Sewing-Mach. Co. *v.* Frame, 2 Pennew. 430, 48 Atl. 188.

Indiana.— Sprague *v.* Cutler, etc., Lumber Co., 106 Ind. 242, 6 N. E. 335; Cassaday *v.* American Ins. Co., 72 Ind. 95; North Mercer Natural Gas Co. *v.* Smith, 27 Ind. App. 472, 61 N. E. 10. And see the cases cited *supra*, IV, B, 5, a.

Iowa.— McKinley-Lanning L. & T. Co. *v.* Gordon, 113 Iowa 481, 85 N. W. 816.

Michigan.— American Ins. Co. *v.* Cutler, 36 Mich. 261.

Minnesota.— Lehigh Valley Coal Co. *v.* Gilmore, 93 Minn. 432, 101 N. W. 796.

Missouri.— American Ins. Co. *v.* Smith, 73 Mo. 368; State *v.* Hudson, 86 Mo. App. 591; Parlin, etc., Co. *v.* Boatman, 84 Mo. App. 67.

Montana.— Zion Co-operative Mercantile Assoc. *v.* Mayo, 22 Mont. 100, 55 Pac. 915.

Nebraska.— Northern Assur. Co. *v.* Borgelt, (1903) 93 N. W. 226.

New Jersey.— Allegheny Co. *v.* Allen, 69 N. J. L. 270, 55 Atl. 724.

New York.— Charles Roome Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440 [*reversing* 67 N. Y. App. Div. 457, 73 N. Y. Suppl. 986]; Fuller *v.* Schrenk, 58 N. Y. App. Div. 222, 68 N. Y. Suppl. 781 [*affirmed* in 171 N. Y. 671, 64 N. E. 1126]; St. George Vineyard Co. *v.* Fritz, 48 N. Y. App. Div. 233, 62 N. Y. Suppl. 775; Lehigh, etc., R. Co. *v.* American Bonding, etc., Co., 40 Misc. 698, 83 N. Y. Suppl. 191; Mallon *v.* Rothschild, 38 Misc. 8, 76 N. Y. Suppl. 710; O'Reilly *v.* Greene, 18 Misc. 423, 41 N. Y. Suppl. 1056. *Compare* Welshach Co. *v.* Norwich Gas, etc., Co., 96 N. Y. App. Div. 52, 89 N. Y. Suppl. 284 [*affirmed* in 180 N. Y. 533, 72 N. E. 1152].

Texas.— Lea *v.* Union Cent. L. Ins. Co., 17 Tex. Civ. App. 451, 43 S. W. 927 (holding that it is not necessary under Texas statutes for a life-insurance corporation to plead and prove that it has a permit from the secretary of state to do business in the state); Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743 [*affirmed* in 91 Tex. 41, 40 S. W. 718].

30. Stone *v.* Chesapeake, etc., Invest. Co., 15 App. Cas. (D. C.) 585; Singer Mfg. Co. *v.* Brown, 64 Ind. 548; Daly *v.* National L. Ins. Co., 64 Ind. 1; North Mercer Natural Gas Co. *v.* Smith, 27 Ind. App. 472, 61 N. E. 10; Brady *v.* Palmer, 19 Ohio Cir. Ct. 687, 10 Ohio Cir. Dec. 27, by a special plea in abatement, in which defendant must allege that the corporation has a place of business in the state, that it is doing business in the state, that it does not come within any of the exceptions provided for in the statute, and that it has not complied with the requirements thereof. Under this rule an answer defending on this ground, which merely alleges that the agent of plaintiff corporation failed to comply with the requirements of the statute, is insufficient. It is necessary

bar.[31] This defensive pleading, by whatever name called, must set up distinctly that plaintiff is a corporation of the kind or class named in the restrictive statute, or the plea will be demurrable.[32] A general plea denying its right to maintain an action within the state is not sufficient.[33] Under any system of pleading the defense must be clearly raised by affirmation of facts which, if proved, bring plaintiff within the operation of the statute prohibiting it from maintaining the action.[34] A variance in the name of the foreign state under which plaintiff was incorporated is immaterial.[35]

(c) *When Such Defense May Be Raised by Demurrer.* If the bill, declaration, or complaint, by whatever name called, shows on its face that plaintiff foreign corporation was transacting such business within the state as required it to file a statement with the secretary of state designating a known place of business, or to comply with other statutory conditions precedent, without showing that it has complied with the statute in this respect, the defense that it has not complied with the law may be raised by demurrer in those states where the corporation is

to allege that it had failed to comply with such provisions, at or prior to the commencement of the action. Singer Mfg. Co. *v.* Brown, *supra.* In an action by a foreign corporation, to render evidence of its failure to comply with the law as to duties of foreign corporations doing business in the state available, it must be shown by a plea in abatement under oath in an answer, which must precede an answer in bar. North Mercer Natural Gas Co. *v.* Smith, *supra.* And see the other cases cited *supra,* IV, B, 5, a.

Where the action is to quiet title to land.— In Indiana where an action is brought by a foreign corporation to quiet title to land, which title is denied merely, a certificate of the clerk of the court of the county wherein such land is situated, stating that such corporation has not filed a certificate authorizing it to do business in such county as a foreign corporation or otherwise, is not admissible in evidence, since such failure does not invalidate the contracts of foreign corporations made within the state. North Mercer Natural Gas Co. *v.* Smith, 27 Ind. App. 472, 61 N. E. 10.

31. Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369. See the cases cited *supra,* IV, B, 5, b.

32. Stone *v.* Chesapeake, etc., Invest. Co., 15 App. Cas. (D. C.) 585.

33. American Refrigerator Transit Co. *v.* Adams, 28 Colo. 119, 63 Pac. 410, failure to file articles and pay fees.

34. McKinley-Lanning L. & T. Co. *v.* Gordon, 113 Iowa 481, 85 N. W. 816, holding that in an action by a foreign corporation on a note and mortgage which plaintiff alleges that it received in part payment for land sold to defendant, an affirmation by defendant that plaintiff was not the owner of the note and mortgage did not raise the issue of the right of plaintiff to hold land under the laws of the state. And where a complaint alleged that plaintiff was a foreign corporation, to which defendant answered that he had no knowledge or information sufficient to form a belief, but did not affirmatively set out that plaintiff had not complied with a statute requiring foreign corporations to obtain a certificate of authority to do business in the state, it was held that plaintiff could recover without showing that fact. International Soc. *v.* Dennis, 76 N. Y. App. Div. 327, 78 N. Y. Suppl. 497. So in an action by a foreign corporation to recover assessments on stock, an affidavit of defense was held insufficient where it averred that plaintiff maintained an office in Philadelphia, where its business was carried on and where the assessment was made, that all the business relative to the issue of stock was conducted in Pennsylvania, and that plaintiff had not complied with the local law, as the affidavit should state when the business was conducted at the office referred to and what was the character of the business. Galena Min., etc., Co. *v.* Frazier, 20 Pa. Super. Ct. 394. And a specification of a defense in that plaintiff corporation had not complied with the provisions of Va. Code (1904), § 1104, prescribing the conditions upon which foreign corporations may do business within the state, was held defective where it did not specify the particular in which plaintiff had failed to comply with the statutory requirements. Worrell *v.* Kinnear Mfg. Co., 103 Va. 719, 49 S. E. 988. A plea to a hill for the foreclosure of a mortgage which avers that the mortgage contract was made in Tennessee, that the mortgagee was a foreign corporation which had not complied with the requirements of the statutes to entitle it to do business in the state, that it had opened an office in the state for the purpose of making loans and securing the same by mortgages of lands in the state, and had been, and then was, doing "an extensive loan and mortgage business" throughout the state, does not sufficiently plead facts showing that the making of the contract in suit was not an isolated transaction, or that the corporation was "carrying on business" or "attempting to do business" in the state, within the prohibition of the statutes. Cæsar *v.* Capell, 83 Fed. 403. See also Keating Implement, etc., Co. *v.* Favorite Carriage Co., 12 Tex. Civ. App. 666, 35 S. W. 417.

35. Miller *v.* Williams, 27 Colo. 34, 59 Pac. 740.

required to allege compliance with the statute.[36] But if the bill, declaration, or complaint does not show this, a demurrer will not lie on the ground that there is no allegation of compliance with the statute.[37] In those states in which the corporation is not required to plead compliance with the statute, a bill, declaration, or complaint is demurrable if it affirmatively appears therefrom that it has been doing business in the state and has not complied with the statute;[38] but if this does not affirmatively appear the defense must be raised by plea or answer and cannot be raised by demurrer.[39] In Kentucky the fact that a foreign corporation, suing for the price of goods sold, had not complied with the local statute so as to entitle it to do business within the state is not ground of special demurrer, although the fact appears by affidavit.[40]

(III) *Defense Waived If Not Raised by Demurrer or Answer.* Where the objection that a plaintiff foreign corporation has not complied with the local statute so as to be entitled to do business in the state is not taken either by demurrer or answer, it is waived; it cannot be raised for the first time on appeal.[41]

d. Pleading Statutes Invalidating Contracts. Where there is a statute voiding the contracts of foreign corporations which have failed to comply with certain statutory conditions precedent before doing business within the domestic state,[42] if such a corporation sues to enforce a contract, and this statutory defense is set up, the answer by which it is set up must show that the contract was made within the domestic state,[43] or it will be bad on demurrer.[44] The rule of pleading is the same where the broker of a foreign corporation sues a citizen to recover commis-

36. Christian *v.* American Freehold Land, etc., Co., 89 Ala. 198, 7 So. 427; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200. And see *supra*, V, A, 3, c, (I). A bill in equity in a court of Alabama by a foreign corporation to foreclose a mortgage, which merely avers that the complainant "has complied with the laws of the State of Alabama, which authorize a foreign corporation to do business in this State," is considered as averring that the company had a duly constituted agent and known place of business in that state only at the time when the suit was commenced, and not at the time when the money was loaned or the mortgage taken, upon the principle that doubtful averments are to be taken most strongly against the pleader. It is therefore not an averment that the corporation had a duly constituted agent and known place of business at the time when the transaction took place, as required by the constitution and statute; and for that reason such a bill is demurrable. Mullens *v.* American Freehold Land Mortg. Co., *supra*; Farrior *v.* New England Mortg. Security Co., *supra*.

37. American Bldg., etc., Assoc. *v.* Haley, 132 Ala. 135, 31 So. 88; Henderson *v.* J. B. Brown Co., 125 Ala. 566, 28 So. 79; Eslava *v.* New York Nat. Bldg., etc., Assoc., 121 Ala. 480, 25 So. 1013; Christian *v.* American Freehold Land Mortg. Co., 89 Ala. 198, 7 So. 427; Mullens *v.* American Freehold Land Mortg. Co., 88 Ala. 280, 7 So. 201; Farrior *v.* New England Mortg. Security Co., 88 Ala. 275, 7 So. 200; St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43; National L. & T. Co. *v.* Gibbard, 90 Minn. 358, 96 N. W. 919. Under any system of pleading, the declaration or complaint of the foreign corporation will not be demurrable by reason of its failing to show compliance with the statute of the forum, unless it also shows that the *situs* of the contract was made within the state, that is to say, that the mortgage or other obligation which is the foundation of the action, or the transaction giving rise to it, occurred within the state. American Bldg., etc., Assoc. *v.* Haley, *supra*; and other cases cited *supra*, this note.

38. Northern Assur. Co. *v.* Borgelt, (Nebr. 1903) 93 N. W. 226; Charles Roome Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440 [*reversing* 67 N. Y. App. Div. 457, 73 N. Y. Suppl. 986], must be raised by demurrer in such case under N. Y. Code, § 488. And see *supra*, V, A, 3, c, (II), (A).

39. American Hand-Sewed Shoe Co. *v.* O'Rourke, 23 Mont. 530, 59 Pac. 910; Northern Assur. Co. *v.* Borgelt, (Nebr. 1903) 93 N. W. 226; Charles Roome Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440 [*reversing* 67 N. Y. App. Div. 457, 73 N. Y. Suppl. 986]; O'Reilly, etc., Co. *v.* Greene, 18 Misc. (N. Y.) 423, 41 N. Y. Suppl. 1056.

40. Aultman, etc., Co. *v.* Mead, 109 Ky. 583, 60 S. W. 294, 22 Ky. L. Rep. 1189.

41. Charles Roome Parmele Co. *v.* Haas, 171 N. Y. 579, 64 N. E. 440 [*reversing* 67 N. Y. App. Div. 457, 73 N. Y. Suppl. 986]. And see St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43.

42. See *supra*, IV, B, 2.

43. Situs of contracts with reference to such statutes see *supra*, III, H; IV, K.

44. Finch *v.* Travelers' Ins. Co., 87 Ind. 302.

sions on a loan which he has negotiated for defendant with the foreign corporation.[45]

e. Plea in Abatement in Action For Tort. As the restrictive statutes under consideration do not in general prevent foreign corporations from suing for torts,[46] it is quite easy to conclude that such a defense cannot be set up by a plea in abatement to an action by a foreign corporation for a trespass or other tort.[47]

f. Presumptions and Burden of Proof. In some jurisdictions, as we have seen, a plaintiff foreign corporation is required to affirmatively allege and prove that it has complied with the local statutes so as to be entitled to maintain the action, and such compliance will not be presumed.[48] In other jurisdictions such compliance will be presumed, in the absence of anything to show the contrary, unless an issue on the question is properly raised by defendant.[49] When an issue is raised as to such compliance, the burden of proof is on the corporation in some states,[50] while in other states it is on defendant.[51] When a foreign corporation sues on a contract, and there is nothing to show where or when it was made, it will be presumed that it was lawfully made; for instance, that it was made out of the state, or before enactment of the statute, or after compliance therewith, such a compliance being shown.[52]

4. Effect of Dissolution or Appointment of Receiver. In the absence of a statute a foreign corporation cannot commence or continue an action after it has been dissolved by expiration of its charter or otherwise in the state of its creation.[53] The appointment of a receiver *pendente lite* in a circuit court of the United States in another state does not disable a foreign corporation from suing in its own name in a court of the state of New York, provided the other conditions exist which enable it so to sue.[54] But if a receiver over a corporation has been appointed in the state wherein it was created, with an injunction upon its officers from continuing its business or using its corporate name for any purpose, then an officer of

45. Collier *v.* Davis, 94 Ala. 456, 10 So. 86.

46. See *supra*, IV, E.

47. Utley *v.* Clark-Gardner Lode Min. Co., 4 Colo. 369.

48. Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954. See also *supra*, V, A, 3, c, (I), and cases there cited.

49. Sprague *v.* Cutler, etc., Lumber Co., 106 Ind. 242, 6 N. E. 335; Cassaday *v.* American Ins. Co., 72 Ind. 95; Lehigh Valley Coal Co. *v.* Gilmore, 93 Minn. 432, 101 N. W. 796; American Ins. Co. *v.* Smith, 73 Mo. 368; Johnston *v.* Mutual Reserve L. Ins. Co., 45 Misc. (N. Y.) 316, 90 N. Y. Suppl. 539. And see *supra*, V, A, 3, c, (II), (A).

50. See Com. *v.* Read Phosphate Co., 67 S. W. 45, 23 Ky. L. Rep. 2284; Washington County Mut. Ins. Co. *v.* Chamberlain, 16 Gray (Mass.) 165; Taber *v.* Interstate Bldg., etc., Assoc., 91 Tex. 92, 40 S. W. 954. *Compare* Miller *v.* Goodman, 15 Tex. Civ. App. 244, 40 S. W. 743 [*affirmed* in 91 Tex. 41, 40 S. W. 718].

51. See Osborne *v.* Shilling, 68 Kan. 808, 74 Pac. 609; Coppedge *v.* M. K. Goetz Brewing Co., 67 Kan. 851, 73 Pac. 908; Northup *v.* A. G. Wills Lumber Co., 65 Kan. 769, 70 Pac. 879.

52. Ames *v.* Kruzner, 1 Alaska 598; St. Louis, etc., R. Co. *v.* Philadelphia Fire Assoc., 55 Ark. 163, 18 S. W. 43. See *supra*, III, H, J.

53. Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599. See also Corporations, 10 Cyc. 1314 *et seq.* The rule, however, may be changed by statute. Farmers' Bank *v.* Ely, 2 N. Y. Leg. Obs. 274; Stetson *v.* New Orleans City Bank, 2 Ohio St. 167, 12 Ohio St. 577. In some states it has been held that the dissolution of a foreign corporation by the expiration of its statutory term of existence will not operate to prevent it from maintaining an action upon a debt or demand due to it, where, by the laws of the state wherein it exists its corporate life is continued for the purpose of maintaining actions. O'Reilly *v.* Greene, 18 Misc. (N. Y.) 423, 41 N. Y. Suppl. 1056 [*affirming* 17 Misc. 302, 40 N. Y. Suppl. 360]. See also *infra*, V, B, 17. But where an action has abated because of the expiration of the corporation's charter, it will not be revived by a subsequent statute of the state of its creation, authorizing the trustees of its property to maintain actions to enforce its rights. Galliopolis Bank *v.* Trimble, 6 B. Mon. (Ky.) 599. Mass. Rev. Laws, c. 109, § 53, providing that every corporation whose corporate existence is terminated shall nevertheless be continued as a body corporate for three years for the purpose of prosecuting suits does not apply to foreign corporations. Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356.

Effect of dissolution on actions against foreign corporations see *infra*, V, B, 17.

54. Sigua Iron Co. *v.* Brown, 171 N. Y. 488, 64 N. E. 194 [*affirming* 58 N. Y. App. Div. 436, 69 N. Y. Suppl. 295 (*affirming* 33 Misc. 50, 68 N. Y. Suppl. 141)].

the corporation will not be allowed to prosecute a writ of error in the name and behalf of the corporation against the objection of the receiver so appointed.[55]

B. Actions Against Foreign Corporations[56]**— 1. Early Doctrine That They Could Not Be Sued In Personam — a. Statement of This Doctrine.** The early juridical conception was that a corporation could not migrate, but must dwell in the place of its creation;[57] from which premise the conclusion logically followed that it could not get over the boundaries of the state creating it, into another state, in such a sense as to be there served with a summons in a civil action; in other words, that an action *in personam* prosecuted by a summons would not lie against a foreign corporation.[58] The gross injustice of this doctrine led to the rule that business corporations can migrate and can acquire domiciles in states or countries other than those of their origin, in which domiciles they are suable both in respect to their contracts and their torts.[59] As already seen, the rule that foreign corporations cannot be sued *in personam* has been generally rooted up by statutes imposing upon them, as a condition precedent of their right to do business within the state, the necessity of establishing a permanent agent in the state, and of empowering him to receive service of process in actions therein.[60]

b. Express Legislative Sanction Necessary. Where this doctrine has a foothold, it logically follows that, in order to sustain such an action, there must be a statute authorizing it.[61] That it is within the power of the legislature of a state to enact such a statute in respect of foreign corporations coming within the limits of the state to do business has been affirmed,[62] and has never been seriously doubted; although the effect of such a judgment as evidence in the courts of other jurisdictions rests upon a different footing. Indeed, an assumption of jurisdiction in this respect has taken place in most of the states, generally through affirmative legislative action, extending the process of the state over foreign corporations coming within its limits.[63]

55. American Water Works Co. *v.* Farmers' L. & T. Co., 20 Colo. 213, 37 Pac. 269, 46 Am. St. Rep. 285, 25 L. R. A. 338.

56. Process against foreign corporations see, generally, Process.

57. Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274.

58. This was the law of Massachusetts as late as 1834 (Peckham *v.* Haverhill North Parish, 16 Pick. (Mass.) 274); the law of Connecticut as late as 1841 (Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301); was seemingly the law of New York in 1819 (McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, *dictum* by Spencer, C. J.), and seems to have been, in a qualified sense, the law of that state as late as 1859 (Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159), and of New Jersey as late as 1853 (Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222), and of Minnesota as late as 1865 (Sullivan *v.* La Crosse, etc., Steam Packet Co., 10 Minn. 386). Although some of the shareholders of the foreign corporation resided in the domestic state, and although service of summons was had upon its secretary while temporarily there, yet this would not support an action against it *in personam*. Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301.

59. Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660. And *compare* Iron Age Pub. Co. *v.* Western Union Tel. Co., 83 Ala. 498, 3 So. 449, 3 Am. St. Rep. 758; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421; March *v.* Eastern R. Co., 40 N. H. 548, 579, 77 Am. Dec. 732; Libbey *v.* Hodgdon, 9 N. H. 394. See also *infra*, V, B, 4.

60. See *supra*, III, B, 6; *infra*, V, B, 4, 9.

61. Barnett *v.* Chicago, etc., R. Co., 4 Hun (N. Y.) 114, 6 Thomps. & C. 358; Lathrop *v.* Union Pac. R. Co., 1 MacArthur (D. C.) 234. And see Coolidge *v.* American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Suppl. 318.

62. Barnett *v.* Chicago, etc., R. Co., 4 Hun (N. Y.) 114, 6 Thomps. & C. 359. Further as to the jurisdiction of the courts of New York over foreign corporations doing business within the limits of the state see Redmond *v.* Hoge, 3 Hun (N. Y.) 171, 5 Thomps. & C. 386.

63. Thus, in 1877, the courts of Missouri could not acquire by summons jurisdiction of an action against a foreign corporation whose chief office was not within the state of Missouri, but the process could only be by attachment. Hill *v.* Wheeler, etc., Mfg. Co., 4 Mo. App. 595. But this rule has been changed by statute in that state, as we shall presently see. See *infra*, V, B, 9, c.

How under the English law. — Down to the year 1885 the opinion was expressed by the lord chief justice of England that there was no case in which it was held that a foreign corporation could be sued in that country. Nutter *v.* Messageries Maritimes, 54 L. J. Q. B. 527. It is true that, prior to that time,

2. Modern Doctrine as to Residence of Corporations For Purposes of Jurisdiction — a. In General. It is also clear that, within the limits of the state which grants the charter, a corporation may have a special constructive residence in more places than one, so as to be charged with taxes and dues, and be subjected to the local jurisdiction where its officers and agencies are actually present in the exercise of its franchises and in carrying on its business; and the local residence of a corporation is not necessarily confined to the locality of its principal office or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done.[64] This doctrine is said to be in general confined to the territorial limits of the state from which the corporation derives its charter; but it is also said that the effect of particular statutes may be such as to make a corporation, although chartered abroad, a resident of the state, not only for the purpose of suing and being sued by ordinary process or by attachment, but for all the purposes of ownership of personal property and of taxation, if the same be actually situated within the prescribed limits.[65]

b. Illustration in Case of Railroad Companies. One of the simplest and probably the best established illustrations of this principle is found in the case where a railroad company, created under the laws of one state, enters another state, and builds a part of its railroad there by permission or recognition of the legislature of the latter state, in which case, whether such permission or recognition is held to have the effect of making it a domestic corporation in the latter state, or of leaving it a foreign corporation, merely licensed in the latter state, it is perfectly well settled that it is subject to be sued in the latter state by residents thereof upon any cause of action arising therein. The license granted to the corporation, expressly or impliedly, to enter the other state and to exercise what have sometimes been called prerogative franchises therein, has justly been

there were *dicta* tending to the contrary conclusion. Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383 (per Blackburn, J.); Westman *v.* Aktiebvlaget, 1 Ex. D. 237, 240, 45 L. J. Exch. 327, 24 Wkly. Rep. 405 (per Bramwell, B.); Palmer *v.* Gould's Mfg. Co., [1884] W. N. 63 (per Field, J.). The very stress of justice has operated to change this rule in that country. Under statutory authorization, the judges in that country have made a rule to the effect that if a foreign corporation carries on business in a definite way in England, then it is suable there, and can be served there, if service can be affected upon any person who sufficiently answers the description of a "head officer" in charge of its business within the jurisdiction (Order IX, rule 8); and another rule that a foreign corporation can, in certain cases, be served out of the jurisdiction with the writ, or notice of the writ, in the same way as a natural person. The English court of appeal finally decided, in two notable cases, that whenever a foreign corporation comes into England, and establishes a permanent branch or agency there for the purpose of carrying on its business, it may be sued in the courts of England by a process served upon the manager of that branch or agency, in like manner as though it were a domestic corporation. Haggin *v.* Comptoir d'Escompte, 23 Q. B. D. 519, 58 L. J. Q. B. 508, 61 L. T. Rep. N. S. 748, 37 Wkly. Rep. 703; Haggin *v.* Comptoir d'Escompte, 23 Ch. D. 519, 58 L. J. Q. B. 508, 61 L. T. Rep. N. S. 748, 37 Wkly. Rep. 703 [*approving* Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383; Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753]. See also *Re* Burland, 60 L. T. Rep. N. S. 586, where leave was granted to serve a writ out of the jurisdiction upon a Scotch company, having branches in England. *Compare* Watkins *v.* Scottish Imperial Ins. Co., 23 Q. B. D. 285, 58 L. J. Q. B. 495, 60 L. T. Rep. N. S. 639, 37 Wkly. Rep. 670; Jones *v.* Scottish Acc. Ins. Co., 17 Q. B. D. 421, 55 L. J. Q. B. 415, 55 L. T. Rep. N. S. 218. As to service of process upon foreign partnerships having branches in England see Western Nat. Bank *v.* Percz, [1891] 1 Q. B. 304, 60 L. J. Q. B. 272, 64 L. T. Rep. N. S. 543, 39 Wkly. Rep. 245; Lysaght *v.* Clark, [1891] 1 Q. B. 552, 64 L. T. Rep. N. S. 776; Shepherd *v.* Hirsch, 45 Ch. D. 231, 59 L. J. Ch. 819, 63 L. T. Rep. N. S. 335, 38 Wkly. Rep. 745. And see, generally, Process.

64. St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580 [*citing* Glaize *v.* South Carolina R. Co., 1 Strobh. (S. C.) 70; Cromwell *v.* Charleston Ins., etc., Co., 2 Rich. (S. C.) 512. The case of St. Louis *v.* Wiggins Ferry Co., *supra*, is *overruled*, not on the above theory, but on the application of it, in 11 Wall. (U. S.) 423, 20 L. ed. 192.

65. St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580.

held to carry with it, by necessary implication, a liability to be so sued by residents of the latter state.[66]

3. Cannot Be Sued In Personam in a State Where Not Found. The principle of jurisprudence remains that a corporation cannot, any more than a natural person, be sued in an action *in personam* in a state within whose limits it has never been found.[67] In such a case if a court assumes jurisdiction and a personal judgment is rendered against the corporation, it is void for want of jurisdiction,

66. Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254. *Compare* Goshorn *v.* Ohio County, 1 W. Va. 308; Baltimore, etc., R. Co. *v.* Marshall County Sup'rs, 3 W. Va. 319. The Baltimore & Ohio Railroad Company, originally chartered by the legislature of Maryland, extended its railroad into the state of Virginia with the consent of the legislature of that state, and into the District of Columbia, with the consent of congress. It thereby became suable as garnishee under the attachment laws of Virginia (Baltimore, etc., R. Co. *v.* Gallahue, *supra*), and in the District of Columbia, for an injury happening to a passenger upon its railroad in the state of Virginia, without reference to the question of the residence of plaintiff, the court holding that the company was an inhabitant of the District of Columbia, and that it was found within that District, when the writ was served upon it. Baltimore, etc., R. Co. *v.* Harris, *supra*.

67. *California.*— Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270; Eureka Mercantile Co. *v.* California Ins. Co., 130 Cal. 153, 62 Pac. 393.

Connecticut.— Middlebrooks *v.* Springfield F. Ins. Co., 14 Conn. 301.

District of Columbia.— Ambler *v.* Archer, 1 App. Cas. 94; Lathrop *v.* Union Pac. R. Co., 1 MacArthur 234.

Illinois.— Midland Pac. R. Co. *v.* McDermid, 91 Ill. 170; Schillinger Bros. Co. *v.* Henderson Brewing Co., 107 Ill. App. 335; Steele *v.* Schaffer, 107 Ill. App. 320.

Massachusetts.— Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 42 Am. St. Rep. 418, 23 L. R. A. 863; Peckham *v.* Haverhill North Parish, 16 Pick. 274.

Michigan.— Newell *v.* Great Western R. Co., 19 Mich. 336.

Minnesota.— State *v.* Ramsey County Dist. Ct., 26 Minn. 233, 2 N. W. 698.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

Missouri.— Latimer *v.* Union Pac. R. Co., 43 Mo. 105, 97 Am. Dec. 378; Jordan *v.* Chicago, etc., R. Co., 105 Mo. App. 446, 79 S. W. 1155; Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321.

New Hampshire.— See Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

New Jersey.— Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15; Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57; Puster *v.* Parker Mercantile Co., (Ch. 1904) 59 Atl. 232, may raise objection by preliminary plea to jurisdiction asking judgment of court on whether it should answer bill.

New Mexico.— Territory *v.* Baker, (1904) 78 Pac. 624 [*affirmed* in 196 U. S. 432, 25 S. Ct. 375, 49 L. ed. 540].

New York.— McQueen *v.* Middletown Mfg. Co., 16 Johns. 5.

Ohio.— Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164.

Oregon.— Aldrich *v.* Anchor Coal, etc., Co., 24 Oreg. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

Pennsylvania.— Phillips *v.* Burlington Library Co., 141 Pa. St. 462, 21 Atl. 640, 23 Am. St. Rep. 304; Nash *v.* Evangelical Lutheran Church, 1 Miles 78; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

Washington.— Rich *v.* Chicago, etc., R. Co., 34 Wash. 14, 74 Pac. 1008.

United States.— Caledonian Coal Co. *v.* Baker, 196 U. S. 432, 25 S. Ct. 375, 49 L. ed. 540; Conley *v.* Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. ed. 1113 [*affirming* 110 Fed. 730]; Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964; Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Fitzgerald, etc., Constr. Co. *v.* Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 L. ed. 608; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Jackson *v.* Delaware River Amusement Co., 131 Fed. 134; Martin *v.* New Trinidad Lake Asphalt Co., 130 Fed. 394; Greenleaf *v.* Railway Postal Clerks Nat. Assoc., 130 Fed. 209; Louden Machinery Co. *v.* American Malleable Iron Co., 127 Fed. 1008; Earle *v.* Chesapeake, etc., R. Co., 127 Fed. 235; Strain *v.* Chicago Portrait Co., 126 Fed. 831; Central Grain, etc., Exch. *v.* Chicago Bd. of Trade, 125 Fed. 463, 60 C. C. A. 299; Boardman *v.* S. S. McClure Co., 123 Fed. 614; Scott *v.* Stockholders' Oil Co., 122 Fed. 835, Rust *v.* United Waterworks Co., 70 Fed. 129, 17 C. C. A. 16; U. S. Graphite Co. *v.* Pacific Graphite Co., 68 Fed. 442; Hazletine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. 850; Reifsnider *v.* American Imp. Pub. Co., 45 Fed. 433; Bentlif *v.* London, etc., Finance Corp., 44 Fed. 667; Clews *v.* Woodstock Iron Co., 44 Fed. 31; St. Louis Wire-Mill Co. *v.* Consolidated Barb-Wire Co., 32 Fed. 802.

Canada.— See Murphy *v.* Phœnix Bridge

and the corporation, when sued upon such judgment in the state of its creation or elsewhere, is not prevented from attacking it on this ground by the constitutional provision and act of congress requiring that full faith and credit shall be given in each state to the duly authenticated records and judicial proceedings of other states.[68]

4. Exceptions to This Rule — a. In General. But from what has preceded and from what will follow, it will be seen that there are three leading exceptions to the above rule, and that a corporation can be sued in another state or country in the following cases:

b. Migrating Into State of Forum and Establishing Agency There — (I) *In General.* It may be so sued when it has established an agency for the prosecution of its business in such other state or country, and in many instances, by force of statute, as hereafter seen, by service on subordinate agents. In other words, a corporation, like a natural person, is suable *in personam* in any state into which it migrates and settles, and in which service of process can be lawfully had upon it under the governing statutes.[69] In short, the modern doctrine

Co., 18 Ont. Pr. 460, 495; Macdougall *v.* Schofield Woolen Co., 16 Quebec Super. Ct. 411.

See 12 Cent. Dig. tit. "Corporations," § 2595 *et seq.* And see, generally, Process.

68. St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222. And see Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 42 Am. St. Rep. 418, 23 L. R. A. 863; Latimer *v.* Union Pac. R. Co., 43 Mo. 105, 97 Am. Dec. 378; Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Co., 103 Mo. App. 94, 77 S. W. 321; Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222, 25 N. J. L. 57; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964; Mexican Cent. R. Co. *v.* Pinkney, 149 U. S. 194, 13 S. Ct. 859, 37 L. ed. 699; Good Hope Co. *v.* Railway Barb Fencing Co., 22 Fed. 635, 23 Blatchf. 43. See, generally, Judgments. *Compare infra*, V, B, 4, b, (I), text and note 72.

69. *Alabama.*— Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344; Western Union Tel. Co. *v.* Pleasants, 46 Ala. 641.

Alaska.— American Gold Min. Co. *v.* Giant Powder Co., 1 Alaska 664.

Arkansas.— American Casualty Co. *v.* Lea, 56 Ark. 539, 20 S. W. 416.

California.— Lawrence *v.* Ballou, 50 Cal. 258.

Colorado.— Colorado Iron-Works *v.* Sierra Grande Min. Co., 15 Colo. 499, 25 Pac. 325, 22 Am. St. Rep. 433.

District of Columbia.— Weymouth *v.* Washington, etc., R. Co., 1 MacArthur 19.

Georgia.— Reeves *v.* Southern R. Co., 121 Ga. 561, 49 S. E. 674; Watson *v.* Richmond, etc., R. Co., 91 Ga. 222, 18 S. E. 306; Selma, etc., R. Co. *v.* Tyson, 48 Ga. 351; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Illinois.— Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317; Bradbury *v.* Waukegan, etc., Min., etc., Co., 113 Ill. App. 600; Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

Indiana.— Modern Woodmen of America *v.* Noyes, 158 Ind. 503, 64 N. E. 21.

Iowa.— Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678.

Kansas.— See North Missouri R. Co. *v.* Akers, 4 Kan. 453.

Kentucky.— Boyd Commission Co. *v.* Coates, 69 S. W. 1090, 24 Ky. L. Rep. 730.

Louisiana — Payne *v.* East Union Lumber Co., 109 La. 706, 33 So. 739; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309. See also Milwaukee Trust Co. *v.* Germania Ins. Co., 106 La. 669, 31 So. 298.

Massachusetts.— Ryer *v.* Odd Fellows' Fraternal Acc. Assoc. of America, 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288; Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318; National Bank of Commerce *v.* Huntington, 129 Mass. 444; Atty.-Gen. *v.* Bay State Min. Co., 99 Mass. 148, 96 Am. Dec. 717; Rhodes *v.* Salem Turnpike, etc., Bridge Co., 98 Mass. 95.

Michigan.— Emerson *v.* McCormick Harvesting Mach. Co., 51 Mich. 5, 16 N. W. 182.

Mississippi.— New Orleans, etc., R. Co. *v.* Wallace, 50 Miss. 244.

Missouri.— McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457; Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75.

Nebraska.— Tremont, etc., R. Co. *v.* New York, etc., R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Council Bluffs Canning Co. *v.* Omaha Tin Ware Mfg. Co., 49 Nebr. 537, 68 N. W. 929; Klopp *v.* Creston City Guarantee Water Works Co., 34 Nebr. 808, 52 N. W. 819, 33 Am. St. Rep. 666.

New Hampshire.— Libbey *v.* Hodgdon, 9 N. H. 394.

New Jersey.— Capen *v.* Pacific Mut. Ins. Co., 25 N. J. L. 67, 44 Am. Dec. 412; Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222. See also State *v.* Pennsylvania R. Co., 42 N. J. L. 490; National Condensed Milk Co. *v.* Brandenburgh, 40 N. J. L. 111.

New York.— Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513; People *v.* Knickerbocker Trust Co., 38 Misc. 446, 77 N. Y. Suppl. 1000.

North Carolina.— Clinard *v.* White, 129 N. C. 250, 39 S. E. 960; Shields *v.* Union Cent. L. Ins. Co., 119 N. C. 380, 25 S. E. 951.

North Dakota.— Brown *v.* Chicago, etc., R.

both in England and America is believed to be that which was clearly enunciated and reasoned by Lord St. Leonards,[70] that a trading corporation is personally present for the purpose of jurisdiction wherever it has established a place of trade.[71] In such cases a judgment against it *in personam* will have the same conclusive effect, and will be evidence against it in the courts of every other state or country.[72]

(II) *Distinction Between Migrating Into State and Having Officer or Agent Accidentally There.* The distinction is clearly this: If the foreign corporation confines its operations to the state within which it was created, it cannot be sued in a state where it has no office and transacts no business, by serving process on its president or other officer or agent when accidentally present within such state. Such officer or agent does not represent the corporation, or carry with him his official or representative character into a state where the cor-

Co., 12 N. D. 61, 95 N. W. 153, 102 Am. St. Rep. 564.

Pennsylvania.— Werron *v.* Metropolitan L. Ins. Co., 166 Pa. St. 112, 30 Atl. 1008; Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724; Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 173. See also Hagerman *v.* Empire Slate Co., 97 Pa. St. 534.

Tennessee.— Chicago, etc., R. Co. *v.* Walker, 9 Lea 475.

Texas.— Buie *v.* Chicago, etc., R. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861 (foreign railroad company doing business through local company); Westinghouse Electric Mfg. Co. *v.* Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

Vermont.— Osborne *v.* Shawmut Ins. Co., 51 Vt. 278; Day *v.* Essex County Bank, 13 Vt. 97.

Virginia.— Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. 655, 65 Am. Dec. 254.

West Virginia.— Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314.

Wisconsin.— State *v.* U. S. Mutual Acc. Assoc., 67 Wis. 624, 31 N. W. 229.

United States.— Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Barrow Steamship Co. *v.* Kane, 170 U. S. 100, 18 S. Ct. 526, 42 L. ed. 964; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; *Ex p.* Schollenberger, 96 U. S. 369, 24 L. ed. 853; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. 65, 20 L. ed. 354; Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. ed. 451; New Haven Pulp, etc., Co. *v.* Downington Mfg. Co., 130 Fed. 605; Smith *v.* Empire State Idaho Min., etc., Co., 127 Fed. 462; Barnes *v.* Western Union Tel. Co., 120 Fed. 550; American Cotton Co. *v.* Beasley, 116 Fed. 256, 53 C. C. A. 446; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77; Van Dresser *v.* Oregon R., etc., Co., 48 Fed. 202; Riddle *v.* New York, etc., R. Co., 39 Fed. 290; Knapp, etc., Co. *v.* National Mut. F. Ins. Co., 30 Fed. 607; Williams *v.* Hintermeister, 26 Fed. 889; Lung Chung *v.* Northern Pac. R. Co., 19 Fed. 254, 10 Sawy. 17; Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 13 Fed. 358, 21 Blatchf. 109; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123; Hayden *v.* Androscoggin Mills, 1 Fed. 93.

England.— Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383; Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 Wkly. Rep. 597, 10 Eng. Reprint 961.

Canada.— Crotty *v.* Oregon, etc., R. Co., 3 Manitoba 182; Reynolds *v.* Gallihar Gold Min. Co., 19 Nova Scotia 466; Murphy *v.* Phœnix Bridge Co., 18 Ont. Pr. 460, 495; Plummer *v.* Lake Superior Native Copper Co., 10 Ont. Pr. 527; Wilson *v.* Ætna L. Assur. Co., 8 Ont. Pr. 131; New York Cent. Sleeping Car Co. *v.* Donovan, 4 Montreal Q. B. 392.

See 12 Cent. Dig. tit. "Corporations," § 2595 *et seq.* And see, generally, Process.

70. Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416, 24 L. J. Ch. 620, 3 Wkly. Rep. 597, 10 Eng. Reprint 961. *Compare* National Bank of Commerce *v.* Huntington, 129 Mass. 444, where these observations are cited as law.

71. Hayden *v.* Androscoggin Mills, 1 Fed. 93, where a corporation established in the state of Maine, and doing business in Boston, was sued in the latter place in a court of the United States, and the jurisdiction was upheld.

This was also decided in England in the case of Newby *v.* Von Oppen, L. R. 7 Q. B. 293, 41 L. J. Q. B. 148, 26 L. T. Rep. N. S. 164, 20 Wkly. Rep. 383, where the Colt Patent Arms Company, an American corporation, had established a house in London for the sale of its manufactures. See also Haggin *v.* Comptoir D'Escompte, 23 Q. B. D. 519, 58 L. J. Q. B. 508, 61 L. T. Rep. N. S. 748, 37 Wkly. Rep. 703; Lhoneux *v.* Hong Kong, etc., Banking Corp., 33 Ch. D. 446, 55 L. J. Ch. 758, 54 L. T. Rep. N. S. 863, 34 Wkly. Rep. 753. But in another English case it was held that the ticket office of a railroad company was not such a place of trade as to give jurisdiction; and the court said that the question is one of fact in each case. Mackereth *v.* Glasgow, etc., R. Co., L. R. 8 Exch. 149, 42 L. J. Exch. 82, 28 L. T. Rep. N. S. 167, 21 Wkly. Rep. 339.

72. St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222. See also City F. Ins. Co. *v.* Carrugi, 41 Ga. 660; Reyer *v.* Odd Fellows' Fraternal Acc. Assoc., 157 Mass. 367, 32 N. E. 469, 34 Am. St. Rep. 288; Moulin *v.* Trenton Mut. L., etc., Ins. Co., 25 N. J. L. 57; Woodward *v.* Mutual Reserve L. Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519 [*reversing* 82 N. Y. App. Div. 324, 82 N. Y. Suppl. 908]; Lafayette Ins. Co. *v.*

poration has done no business and has not established any office.[73] But when a foreign corporation sends its officers and agents into another state, and does business there, it is liable to be brought into the courts of such state by a service of process upon such officers, so acting for it, and a judgment founded upon such service will be good everywhere.[74]

(III) *MUST DO BUSINESS WITHIN THE STATE AND BE SERVED BY AN APPROPRIATE AGENT.* This conducts us very nearly to the governing principle — a principle which has been thrown into the clearest light by an opinion of the supreme court of the United States written by Mr. Justice Field. That principle is twofold: (1) That the foreign corporation must have entered the domestic state for the purpose of carrying on its business there; and (2) that process must have been served upon an agent sustaining such a relation to it that notice to the agent might well be deemed notice to the principal, without a violation of the principles of natural justice.[75]

French, 18 How. (U. S.) 404, 15 L. ed. 451. And see, generally, JUDGMENTS. *Compare supra*, V, B, 3, text and note 68.

73. *Illinois.*— Schillinger Bros. Co. *v.* Henderson Brewing Co., 107 Ill. App. 335, officer temporarily in state for purpose of hiring engineer.

Michigan.—Newell *v.* Great Western R. Co., 19 Mich. 336.

Minnesota.— State *v.* Ramsey County Dist. Ct., 26 Minn. 233, 2 N. W. 698.

Missouri.— Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Oil Co., 103 Mo. App. 94, 77 S. W. 321.

New Jersey.— Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222; Puster *v.* Parker Mercantile Co., (Eq. 1904) 59 Atl. 232.

New Mexico.— Territory *v.* Baker, (1904) 78 Pac. 624 [*affirmed* in 196 U. S. 432, 25 S. Ct. 375, 49 L. ed. 540].

Oregon.— Aldrich *v.* Anchor Coal., etc., Co., 24 Oreg. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

Pennsylvania.— Phillips *v.* Burlington Library Co., 141 Pa. St. 462, 21 Atl. 640, 23 Am. St. Rep. 304; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

United States.— Conley *v.* Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. ed. 1113 [*affirming* 110 Fed. 730] (services on resident directors of foreign corporation not doing business in the state); Goldey *v.* Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. ed. 517; St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222; Jackson *v.* Delaware River Amusement Co., 131 Fed. 134; Martin *v.* New Trinidad Lake Asphalt Co., 130 Fed. 394; Louden Machinery Co. *v.* American Malleable Iron Co., 127 Fed. 1008; Earl *v.* Chesapeake, etc., R. Co., 127 Fed. 235; Hammond Cent. Grain, etc., Exch. *v.* Chicago Bd. of Trade, 125 Fed. 463, 60 C. C. A. 299; Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128; Mecke *v.* Valley Town Mineral Co., 89 Fed. 114; Bentlif *v.* London, etc., Finance Corp., 44 Fed. 667; Clews *v.* Woodstock Iron Co., 44 Fed. 31; Good Hope Co. *v.* Railway Barb Fencing Co., 22 Fed. 635, 23 Blatchf. 43. But see New Haven Pulp, etc., Co. *v.* Downingtown Mfg. Co., 130 Fed. 605.

But see to the contrary Payne *v.* East Union Lumber Co., 109 La. 706, 33 So. 739; Gravely *v.* Southern Ice Mach. Co., 47 La. Ann. 389, 16 So. 866; Pope *v.* Terre Haute Car, etc., Co., 87 N. Y. 137; Hiller *v.* Burlington, etc., R. Co., 70 N. Y. 223; Jester *v.* Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447.

See 12 Cent. Dig. tit. "Corporations," § 2595 *et seq.*; and other cases cited *supra*, V, B, 3; and *infra*, V, B, 4, b, (III).

74. Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222; and other cases cited *supra*, V, B, 4, b, (I).

75. St. Clair *v.* Cox, 106 U. S. 350, 1 S. Ct. 354, 27 L. ed. 222. See also Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15, 17. *Compare* Moulin *v.* Trenton Mut. L., etc., Ins. Co., 24 N. J. L. 222.

For other cases see the following:

Alaska.— American Gold Min. Co. *v.* Giant Powder Co., 1 Alaska 664.

Illinois.—Italian-Swiss Agricultural Colony *v.* Pease, 194 Ill. 98, 62 N. E. 317 [*affirming* 96 Ill. App. 45]; Schillinger Bros. Co. *v.* Henderson Brewing Co., 107 Ill. App. 335.

Indiana.— Rehm *v.* German Ins., etc., Inst., 125 Ind. 135, 25 N. E. 173.

Iowa.— Niagara Ins. Co. *v.* Rodecker, 47 Iowa 162.

Massachusetts.— Rothrock *v.* Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 42 Am. St. Rep. 418, 23 L. R. A. 863.

Missouri.— Walter A. Zelnicker Supply Co. *v.* Mississippi Cotton Co., 103 Mo. App. 94, 77 S. W. 321.

New Jersey.—Roake *v.* Pennsylvania R. Co., 70 N. J. L. 494, 57 Atl. 160; Puster *v.* Parker Mercantile Co., (Ch. 1904) 59 Atl. 232.

Ohio.— Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164.

Oregon.— Aldrich *v.* Anchor Coal, etc., Co., 24 Oreg. 32, 32 Pac. 756, 41 Am. St. Rep. 831.

Pennsylvania.— Phillips *v.* Burlington Library Co., 141 Pa. St. 462, 21 Atl. 640, 23 Am. St. Rep. 304; Virginia Bank *v.* Adams, 1 Pars. Eq. Cas. 534.

Washington.—Rich *v.* Chicago, etc., R. Co., 34 Wash. 14, 74 Pac. 1008.

United States.—Conley *v.* Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. ed. 1113 [*affirming* 110 Fed. 730]; Connecticut

(iv) *Jurisdiction as Depending Upon Amount or Kind of Business Within the State.* It has been held that a foreign corporation which has done no business within the domestic state beyond negotiating a mortgage on its property, and having the bonds thereby secured listed upon a stock exchange, is not engaged in business within the state in such a sense that jurisdiction over it is acquired by service of summons upon its president while temporarily within the state for those purposes;[76] and on the other hand,[77] that service may be made on a corporation having an office in the same state where a substantial portion of its business is transacted, by a person designated as its agent in charge of a particular department of its business, by serving process upon such agent.[78]

c. **Agreement With State of Forum That It May Be Sued There.** A corporation may also be sued in another state into which it thus migrates for the purposes of its business, when it has agreed with such state that it may be sued therein, and that process may be served upon it by service upon an officer or agent appointed and empowered by it, or one designated by the state.[79] And such agreement is to be implied, according to the statute of the state providing for

Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569; Jackson *v.* Delaware River Amusement Co., 131 Fed. 134; Martin *v.* New Trinidad Lake Asphalt Co., 130 Fed. 394; Greenleaf *v.* National Assoc., 130 Fed. 209; Louden Machinery Co. *v.* American Malleable Iron Co., 127 Fed. 1008; Earle *v.* Chesapeake, etc., R. Co., 127 Fed. 235; Strain *v.* Chicago Portrait Co., 126 Fed. 831; Hammond Cent. Grain, etc., Exch. *v.* Chicago Bd. of Trade, 125 Fed. 463, 60 C. C. A. 299; Audenreid *v.* East Coast Milling Co., 124 Fed. 697 (whether foreign corporation doing business in state where served with process a question for the jury); New Haven Pulp, etc., Co. *v.* Downingtown Mfg. Co., 130 Fed. 605; Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259; Boardman *v.* S. S. McClure Co., 123 Fed. 614; Scott *v.* Stockholders' Oil Co., 122 Fed. 835; Cady *v.* Associated Colonies, 119 Fed. 420; Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128; Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129; Mecke *v.* Valley Town Mineral Co., 89 Fed. 114; Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743; Gottschalk Co. *v.* Illinois Distilling, etc., Co., 50 Fed. 681.

Canada.— Murphy *v.* Phœnix Bridge Co., 18 Ont. Pr. 460, 495.

But see to the contrary Payne *v.* East Union Lumber Co., 109 La. 706, 33 So. 739; Jester *v.* Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447.

76. Clews *v.* Woodstock Iron Co., 44 Fed. 31.

77. Under N. Y. Code Civ. Proc. § 432. See *infra*, V, B, 9, d.

78. Tuchband *v.* Chicago, etc., R. Co., 115 N. Y. 437.

79. *Alabama.*— Equitable L. Assur. Soc. *v.* Vogel, 76 Ala. 441, 52 Am. Rep. 344.

Georgia.— Equity L. Assoc *v.* Gammon, 119 Ga. 271, 46 S. E. 100; City F. Ins. Co. *v.* Carrugi, 41 Ga. 660.

Indiana.— See Rehm *v.* German Ins., etc., Inst., 125 Ind. 135, 25 N. E. 173; Old Wayne Mut. L. Assoc. *v.* Flynn, (App. 1903) 66 N. E. 57.

Iowa.— Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678.

Kentucky.— Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 23 Ky. L. Rep. 1564, 99 Am. St. Rep. 295.

Louisiana.— Milwaukee Trust Co. *v.* Germania Ins. Co., 106 La. 669, 31 So. 298; State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

Minnesota.— Magoffin *v.* Mutual Reserve Fund L. Assoc., 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699.

New York.— Woodward *v.* Mutual Reserve L. Ins. Co., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519 [*reversing* 84 N. Y. App. Div. 324, 82 N. Y. Suppl. 908] (North Carolina statute); Gibbs *v.* Queen Ins. Co., 63 N. Y. 114, 20 Am. Rep. 513; Hunter *v.* Mutual Reserve L. Ins. Co., 97 N. Y. App. Div. 222, 89 N. Y. Suppl. 849 (North Carolina statute); Johnston *v.* Mutual Reserve L. Ins. Co., 45 Misc. 316, 90 N. Y. Suppl. 539 [*affirming* 43 Misc. 251, 87 N. Y. Suppl. 438, and *affirmed* in 104 N. Y. App. Div. 544, 550, 629, 93 N. Y. Suppl. 1048, 1052, 1062].

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Mutual Reserve Fund Life Assoc. *v.* Scott, 136 N. C. 157, 48 S. E. 581; Moore *v.* Mutual Reserve Fund Life Assoc., 129 N. C. 31, 39 S. E. 637; Biggs *v.* Mutual Reserve Fund Life Assoc., 128 N. C. 5, 37 S. E. 955.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630.

West Virginia.— Webster Wagon Co. *v.* Home Ins. Co., 27 W. Va. 314.

United States.— Mutual Reserve Fund Life Assoc. *v.* Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. ed. 987 [*affirming* 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717]; Davis *v.* Kansas, etc., Coal Co., 129 Fed. 149; Equitable L. Assur. Soc. *v.* Fowler, 125 Fed. 88; Collier *v.* Mutual Reserve Fund Life Assoc., 119 Fed. 617; Sparks *v.* National Masonic Acc. Assoc., 73 Fed. 277; Diamond Plate Glass Co. *v.* Minneapolis Mut. F. Ins. Co., 55 Fed. 27; Knapp *v.* National Mut. F. Ins. Co., 30 Fed. 607; Ehrman *v.* Teutonia Ins. Co., 1 Fed. 471, 1 McCrary 123.

such suits and service of process, if the corporation has gone into the state and engaged in the transaction of business there.[80]

d. Agreement With Opposite Party to Contract That It May Be Sued There. So also when a corporation has agreed with the opposite party to the contract that an action may be brought against it to enforce the contract in a state or country other than that of its particular domicile, it may be sued in such other state or country.[81] In such cases it creates by contract, and for the purposes of the particular contract, an artificial domicile different from that ascribed by the law, under the operation of the principle *modus et conventio vincunt legem*.[82] The opinion has been recognized,[83] and acted upon, that a foreign corporation may, by a stipulation in a contract with a private person, subject itself to the jurisdiction of the courts of England for the purpose of an action to enforce the contract.[84]

5. Proceedings In Rem. The fact that a foreign corporation is not found within a state so that it cannot be served with process therein for the purpose of recovering a judgment *in personam* against it does not prevent proceedings *in rem* affecting property in the state which it may own or in which it may be interested, and such a proceeding may be maintained and service of process had upon the corporation by publication or by notice given to it without the state.[85] This

See 12 Cent. Dig. tit. "Corporations," § 2595 *et seq.*

Revocation of consent see *infra*, V, B, 11.

Process against foreign corporations see, generally, Process.

80. Sparks *v.* National Masonic Acc. Assoc., 100 Iowa 458, 69 N. W. 678 (cannot question validity of process on ground of its failure to file authority for public officer to accept service); and other cases in the preceding note.

81. Phelps *v.* Mutual Reserve Fund Life Assoc., 112 Fed. 453, 50 C. C. A. 339, 61 L. R. A. 717 [*affirmed* in 190 U. S. 147, 23 S. Ct. 707, 47 L. ed. 987]. See, generally, Process.

82. That the existence of a foreign corporation is a question of fact for a jury see Lindauer *v.* Delaware Mut. Safety Ins. Co., 13 Ark. 461. Analogous rule that a foreign law is a question of fact see 1 Thompson Tr. § 1054.

83. By Mr. Justice North in Société Industrialle, etc. *v.* Companhia Portugueza, etc., [1889] W. N. 32.

84. Tharsis Sulphur, etc., Co. *v.* Société des Métaux, 58 L. J. Q. B. 435, 60 L. T. Rep. N. S. 924, 38 Wkly. Rep. 79. The case was this: The Tharsis Copper Company entered into a contract with the Société des Métaux. The contract contained a clause that, for the purposes thereof, the Société submitted to the jurisdiction of the high court in England and elected a domicile in England, and it was further agreed that a certain firm in Threadneedle street, or any member thereof for the time being, should be the Société's agents upon whom service of any writ or process should be effected, and, being so effected, should be good against the Société. The Tharsis Company instituted an action against the Société in respect of a matter arising out of the contract, and effected service upon the firm in Threadneedle street in the manner so provided by the contract. It was held by Lord Coleridge and Mr. Justice Field that the service was good.

85. People's Nat. Bank *v.* Cleveland, 117 Ga. 908, 44 S. E. 20 (holding, in a suit to remove a cloud on the title of shares of stock in a domestic corporation held by a foreign corporation, the latter could be served by publication under Civ. Code, § 4976, providing that, in suits to remove a cloud from title to property in the state to which a non-resident claims title, such non-resident may be served by publication); State *v.* Chicago, etc., R. Co., 80 Iowa 586, 46 N. W. 741 (holding that where a foreign corporation operating a railroad in the state has failed to file a copy of its articles of incorporation as required by statute, a highway may be established across its right of way after service upon it by publication as authorized by statute); Buck *v.* Massie, 109 La. 776, 33 So. 767 (a foreign corporation, which is a mortgage debtor, may be proceeded against, and the mortgage foreclosed, *via executiva*, by appointing an attorney to the absentee); Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574 (where notice is given outside the state to a foreign corporation, as provided by Pub. St. (1901) c. 219, § 9, the courts have jurisdiction to the extent of controlling the disposition of its property in the state). See also Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318, holding that letters patent belonging to a foreign corporation, with a usual place of business in Massachusetts, and duly served with process, might be reached in equity by a creditor who was an inhabitant of Massachusetts and whose debt was the result of a contract made and to be performed there.

"Property within the state."— If a domestic corporation wrongfully obtains possession of the property of a foreign corporation and subsequently transfers it to a non-resident in furtherance of a scheme of fraud, the right of action of the owners to recover damages

as we shall presently see at some length, is true of attachment or garnishment proceedings.[86]

6. Remedies Available Against Foreign Corporations — a. Same as Against Domestic Corporations. When the statutes of the domestic state impose upon foreign corporations coming within the state and having usual places of business therein, the general statutes relating to domestic corporations, the same remedies which are available to domestic citizens against domestic corporations are available against them, and they may be sued in the domestic state in like manner as domestic corporations may.[87]

b. Discovery of Evidence and Production of Books. A foreign corporation, if thus within reach of process, may be ordered to produce its books on a bill of discovery, even though such books are abroad.[88]

c. Specific Performance of Contracts. Where jurisdiction *in personam* has been obtained over a foreign corporation by process duly served, the court has power, if the pleadings and evidence warrant it, to proceed against it by a decree for specific performance.[89]

d. Attachment and Garnishment — (i) *Attachment* — (a) *In General.* The legislature of a state may constitutionally either subject foreign corporations to attachment when they have property in the state,[90] or exempt them from attachment, as has sometimes been done.[91] In some jurisdictions the statute in express terms subjects them to attachment;[92] and even when this is not the case they are generally held, in the absence of express restriction or exemption,[93] to be within the statutes authorizing attachment against non-residents.[94] They are subject to

therefor is property within the state. King *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

86. See *infra*, V, B, 6, d.

87. National Bank of Commerce *v.* Huntington, 129 Mass. 444.

88. Robertson *v.* St. John City R. Co., Truem. Eq. Cas. (N. Brunsw.) 462. *Compare supra*, I, H, 3; III, N.

89. Shafer *v.* O'Brien, 31 W. Va. 601, 8 S. E. 298.

90. Coosa River Steamboat Co. *v.* Barclay, 30 Ala. 120 (and may render them subject to attachment for a debt contracted prior to enactment of the statute, as the statute merely enlarges the remedy); Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491.

91. Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75; Puerrung *v.* Carter-Crume Co., 16 Ohio Cir. Ct. 629, 9 Ohio Cir. Dec. 411. See *infra*, this subdivision, notes 93, 95.

92. *Georgia.*— South Carolina R. Co. *v.* Peoples' Sav. Inst., 64 Ga. 18; Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194; Wilson *v.* Danforth, 47 Ga. 676.

Illinois.— City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

Michigan.— Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106; Michigan Dairy Co. *v.* Runnels, 96 Mich. 109, 55 N. W. 617.

New Jersey.— Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206; Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436.

New York.— Wright *v.* Douglass, 2 N. Y. 373; Dunlop *v.* Paterson F. Ins. Co., 12 Hun 627; Bates *v.* New Orleans, etc., R. Co., 13 How. Pr. 516; Bennett *v.* Hartford F. Ins. Co., 19 Wend. 46.

North Carolina.— Cooper *v.* Adel Security Co., 122 N. C. 463, 30 S. E. 348.

Ohio.— Platt, etc., Refining Co. *v.* Smith, 10 Ohio Dec. (Reprint) 424, 21 Cinc. L. Bul. 122.

Pennsylvania.— Pain's Pyro-Spectacle Co. *v.* Lincoln Park, etc., Co., 5 Pa. Dist. 474; Harley *v.* Charleston Steam-Packet Co., 2 Miles 249.

South Carolina.— Chitty *v.* Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944.

Washington.— Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

See 12 Cent. Dig. tit. "Corporations," § 2628 *et seq.*

Conversion of stock.— An attachment will issue against a foreign corporation for the conversion of its own stock. Condouris *v.* Imperial Turkish Tobacco, etc., Co., 3 Misc. (N. Y.) 66, 22 N. Y. Suppl. 695.

Actions arising upon contract.— Some of the statutes limit the right to attachment against foreign corporations, on the ground that it is a foreign corporation, to debts or demands arising upon contract. See Northern Nat. Bank *v.* Maumee Rolling Mill Co., 2 Ohio S. & C. Pl. Dec. 67, holding that an action by a creditor of an insolvent foreign corporation under a statute to enforce the liability of a shareholder for the debts of a corporation is an action upon a demand arising upon contract, within the meaning of such a statute.

93. Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206; and other cases cited *infra*, this subdivision, note 95.

94. *Alabama.*— See Planters', etc., Bank *v.* Andrews, 8 Port. 404.

Connecticut.— Knox *v.* Protection Ins. Co., 9 Conn. 430, 25 Am. Dec. 33.

District of Columbia.— Barbour *v.* Paige Hotel Co., 2 App. Cas. 174.

attachment, in the absence of statutory exemption,[95] even though they may be doing business in the state and their officers reside there, and even though they have complied with the law relating to foreign corporations, as by appointing an agent to receive service of process; for this does not make them any the less non-residents.[96] It is otherwise, however, where the corporation has become domesticated under a statute of the state,[97] and in the case of a corporation or corporations created by consolidation of a foreign with a domestic corporation,[98] or by the concurrent legislation of the foreign and the domestic state.[99]

(B) *By Non-Resident Creditors.* An attachment will lie against the property

Georgia.— Pyrolusite Manganese Co. *v.* Ward, 73 Ga. 491; Wilson *v.* Danforth, 47 Ga. 676 (a statute expressly authorizing attachment against corporations doing business in the state does not prevent attachment against one not doing business in the state, under the statute authorizing attachment against non-residents); South Carolina R. Co. *v.* McDonald, 5 Ga. 531.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Voss *v.* Evans Marble Co., 101 Ill. App. 373; Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 77 Ill. App. 59 [*affirmed* as to this point in 181 Ill. 582, 54 N. E. 987]; Wabash R. Co. *v.* Dougan, 41 Ill. App. 543.

Louisiana.—Martin *v.* Mobile Branch Bank, 14 La. 415. See also Hazard *v.* Agricultural Bank, 11 Rob. 326.

Maryland.— Haddon *v.* Linville, 86 Md. 210, 38 Atl. 900.

Massachusetts.— Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488; Ocean Ins. Co. *v.* Portsmouth Mar. R. Co., 3 Metc. 420.

Minnesota.— Broome *v.* Galena, etc., Packet Co., 9 Minn. 239.

Missouri.— Middough *v.* St. Joseph, etc., R. Co., 51 Mo. 520; St. Louis Perpetual Ins. Co. *v.* Cohen, 9 Mo. 421.

New Hampshire.— Libbey *v.* Hodgdon, 9 N. H. 394.

Pennsylvania.— Bushel *v.* Commonwealth Ins. Co., 15 Serg. & R. 173; Beal *v.* Toby Valley Supply Co., 13 Pa. Co. Ct. 273; Harley *v.* Charleston Steam-Packet Co., 2 Miles 249; Mechanics' Nat. Bank *v.* Miners' Bank, 13 Wkly. Notes Cas. 515.

Tennessee.— Union Bank *v.* U. S. Bank, 4 Humphr. 369. See also Hadley *v.* Freedman's Sav., etc., Co., 2 Tenn. Ch. 122.

Virginia.— Cowardin *v.* Universal L. Ins. Co., 32 Gratt. 445; U. S. Bank *v.* Merchants' Bank, 1 Rob. 573.

West Virginia.— Hall *v.* Virginia Bank, 14 W. Va. 584.

United States.— Société Fonciere et Agricole Des Etats Unis *v.* Milliken, 135 U. S. 304, 10 S. Ct. 823, 34 L. ed. 208.

Canada.— See Pacaud *v.* Tourigny, 10 Quebec 54; Osgood *v.* Steele, 16 L. C. Jur. 141.

See 12 Cent. Dig. tit. "Corporations," § 2628 *et seq.*

Contra.— Vogle *v.* New Granada Canal, etc., Co., 1 Houst. (Del.) 294; Stickney *v.* Missouri Bank, 1 Ohio Dec. (Reprint) 80, 1 West. L. J. 563; McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, where the different sections of the attachment law being construed *in pari materia* it was held that the law was applicable to natural persons only. It cannot be said, however, that these cases are essentially in direct conflict, for, as is pointed out in the above case of South Carolina R. Co. *v.* McDonald, 5 Ga. 531, which discusses the case of McQueen *v.* Middletown Mfg. Co., 16 Johns. (N. Y.) 5, the statutes are in some respects entirely different.

95. *Kentucky.*— Martin *v.* Mobile, etc., R. Co., 7 Bush 116, where the legislature of Kentucky in admitting an Alabama railroad company had granted it all the privileges, rights, and immunities conferred upon it by the Alabama act of incorporation.

Maryland.— Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258; Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595.

Missouri.—Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75.

New Jersey.— Phillipsburgh Bank *v.* Lackawanna R. Co., 27 N. J. L. 206, what is "recognition" of a foreign corporation by the state within the meaning of an exempting statute.

Ohio.— Puerring *v.* Carter-Crume Co., 16 Ohio Cir. Ct. 629, 9 Ohio Cir. Dec. 411.

96. *District of Columbia.*— Barbour *v.* Paige Hotel Co., 2 App. Cas. 174, although exclusively engaged in business in the district, having been organized for that purpose, and having its secretary and treasurer there.

Georgia.— South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 18.

Illinois.— Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124; Voss *v.* Evans Marble Co., 101 Ill. App. 373.

Pennsylvania.— Pain's Pyro-Spectacle Co. *v.* Lincoln Park, etc., Co., 5 Pa. Dist. 474; Beal *v.* Toby Valley Supply Co., 2 Pa. Dist. 671, 13 Pa. Co. Ct. 273; Pierce *v.* McLaughlin Electric Co., 28 Wkly. Notes Cas. 311. See also Chase *v.* New York Ninth Nat. Bank, 56 Pa. St. 355.

Virginia.— Cowardin *v.* Universal L. Ins. Co., 32 Gratt. 445.

Leasing a railroad within the state will not exempt a foreign railroad corporation from liability to attachment as a non-resident. Breed *v.* Mitchell, 48 Ga. 533.

97. See Martin *v.* Mobile, etc., R. Co., 7 Bush (Ky.) 116; Robb *v.* Chicago, etc., R. Co., 47 Mo. 540; Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75. See *supra*, I, A, 3.

98. Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233. See *supra*, I, A, 3, b. (II).

99. Holland *v.* Mobile, etc., R. Co., 16 Lea (Tenn.) 414. See *supra*, I, A, 3, b, (III).

of a foreign corporation at the suit of a non-resident individual or corporation,[1] unless there is some statutory provision or restriction to the contrary.[2]

(c) *Property Subject to Attachment.*[3] As a general rule an attachment may reach any property of a foreign corporation which is within the state of the forum;[4] but it cannot reach or affect property that is not within the state.[5] A creditor of a foreign corporation may attach a debt due to it from a resident corporation or individual,[6] and the rule extends to unpaid balances due from resident subscribers to the stock of a foreign corporation.[7] As a rule a debt due by a foreign corporation to a non-resident or another foreign corporation has no *situs* in the state and cannot be reached by a creditor of the latter;[8] even though the debtor foreign corporation has an office and is doing business in the domestic state;[9] but the rule does not apply where the debtor foreign corporation not only has an office and is doing business in the domestic state but the debt was incurred in the course of its business within the state.[10] Although the general rule is that money *in custodia legis* is not the subject of an attachment,[11] it does not apply where money is deposited by a foreign corporation under an order of court to meet the debt which the attachment represents.[12] Bonds of a foreign corporation doing business in the state, deposited with the state treasurer as required by statute, are held in trust and cannot be attached, even after the corporation has ceased to do business in the state, but they must be delivered to the corporation.[13]

(d) *Insolvency, Injunction, Appointment of Receiver, Etc.* The fact that a foreign corporation has been declared insolvent and restrained from further business by the courts of its domicile will not preclude the right to an attachment against it.[14] A statute requiring a general assignment for the benefit of creditors

1. John Ray Clark Co. *v.* Toby Valley Supply Co., 14 Pa. Co. Ct. 344; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192; Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40. See ATTACHMENT, 4 Cyc. 406.

2. As in the case of statutes restricting the right of non-residents to sue foreign corporations to cases in which the cause of action arose within the state. Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258; Coolidge *v.* American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Suppl. 318; Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821; Straus *v.* Chicago Glycerine Co., 46 Hun (N. Y.) 216; Oliver *v.* Walter Heywood Chair Mfg. Co., 10 N. Y. Suppl. 771; Western Bank *v.* Columbus City Bank, 7 How. Pr. (N. Y.) 238; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192. See ATTACHMENT, 4 Cyc. 406. And see *infra*, V, B, 8.

3. See also ATTACHMENT, 4 Cyc. 554.

4. Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194; India Rubber Co. *v.* Katz, 65 N. Y. App. Div. 349, 72 N. Y. Suppl. 658 (money deposited with the city chamberlain by a foreign corporation as security for a debt from it to another foreign corporation subject to attachment by a resident creditor of the latter corporation); Chitty *v.* Pennsylvania R. Co., 62 S. C. 526, 40 S. E. 944 (attachment of the cars of a foreign railroad company).

5. Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194.

6. Hazard *v.* Agricultural Bank, 11 Rob. (La.) 326; India Rubber Co. *v.* Katz, 65 N. Y. App. Div. 349, 72 N. Y. Suppl. 658; Fenton *v.* Lumberman's Bank, Clarke (N. Y.) 286; Crosby *v.* Lumberman's Bank, Clarke (N. Y.) 234; Cooper *v.* Adel Security Co., 122 N. C. 463, 30 S. E. 348. In the absence of a statute an attachment against a foreign corporation levied upon choses in action does not authorize the sheriff to sell the same under an execution issued upon a judgment rendered upon the attachment, the remedy being by creditors' bill; but the rule is otherwise in some jurisdictions under the statute. Crosby *v.* Lumberman's Bank, *supra*.

7. Cooper *v.* Adel Security Co., 122 N. C. 463, 30 S. E. 348.

8. Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118; Carr *v.* Corcoran, 44 N. Y. App. Div. 97, 60 N. Y. Suppl. 763; Straus *v.* Chicago Glycerine Co., 46 Hun (N. Y.) 216 [*affirmed* in 108 N. Y. 654, 15 N. E. 444].

9. Douglass. *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118 (where the transaction out of which the debt arose occurred in New York, which was the domicile of the debtor foreign corporation and its creditors, and the debt was attached by a creditor of the latter in Massachusetts where the corporation had an agency); Straus *v.* Chicago Glycerine Co., 46 Hun (N. Y.) 216 [*affirmed* in 108 N. Y. 654, 15 N. E. 444] (where the debt sought to be attached arose from a transaction out of the state).

10. India Rubber Co. *v.* Katz, 65 N. Y. App. Div. 349, 72 N. Y. Suppl. 658.

11. See ATTACHMENT, 4 Cyc. 569.

12. India Rubber Co. *v.* Katz, 65 N. Y. App. Div. 349, 72 N. Y. Suppl. 658.

13. Rollo *v.* Andes Ins. Co., 23 Gratt. (Va.) 509, 14 Am. Rep. 147.

14. City Ins. Co. *v.* Commercial Bank, 68 Ill. 348.

by an insolvent to be made for the benefit of all his creditors, or the execution of such an assignment, does not preclude a citizen, and *a fortiori* it does not preclude a non-resident, from attaching the property of a corporation of the state either in the state or in another state.[15] And the appointment of a receiver for an insolvent corporation in the state of its domicile does not prevent attachment of property of the corporation in other states,[16] although, by comity, the courts of the foreign state will sometimes recognize the rights and title of the receiver as against an attachment.[17]

(E) *Lien.*[18] The lien of the attachment is not affected by the subsequent appointment of a receiver or trustee for the corporation either in the state of its domicile, or in the domestic state,[19] or by subsequent relinquishment of its rights in the attached property by the corporation.[20]

(F) *Procedure.* The procedure in attachment proceedings against foreign corporations is governed by the statutes in the various states relating to attachment generally, and in some jurisdictions by special provisions relating to attachment against foreign corporations and corporations generally.[21] The complaint and affidavit or other moving papers in the proceedings must show, as required by the statute, that defendant is a foreign corporation,[22] and they must show all other facts necessary to entitle plaintiff to an attachment.[23] It is also

15. Schindelholz *v.* Cullum, 55 Fed. 885; 5 C. C. A. 293.

16. Hadden *v.* Linville, 86 Md. 210, 38 Atl. 900; Dunlop *v.* Paterson F. Ins. Co., 12 Hun (N. Y.) 627; Schindelholz *v.* Cullum, 55 Fed. 885, 5 C. C. A. 293. See, generally, RECEIVERS.

17. *Connecticut.*— See Pond *v.* Cooke, 45 Conn. 126, 29 Am. Rep. 668, holding that where a receiver of an insolvent manufacturing company appointed by a court in New Jersey, where it was located, took possession of its assets, and, for the purpose of completing a bridge which it had contracted to build in Connecticut, purchased iron with funds of the estate and sent it into Connecticut, the iron was not subject to attachment in Connecticut by a creditor residing there.

New Jersey.— Merchants' Nat. Bank *v.* Pennsylvania Steel Co., 57 N. J. L. 336, 30 Atl. 545, holding that an attachment by a non-resident of the assets within the state of a non-resident insolvent corporation in the possession of a non-resident receiver of the corporation could not be maintained.

Ohio.— Rice *v.* Farnham, 4 Ohio S. & C. Pl. Dec. 217, holding that where a foreign corporation begins proceedings for appointment of a receiver on the ground of insolvency and makes a deed of its property to a receiver appointed, a resident creditor who appears and files his claim in that court will be estopped from afterward attaching other property in the state belonging to the company.

Pennsylvania.— Hintermeister *v.* Ithaca Organ, etc., Co., 3 Kulp 490, holding that foreign attachment would not lie in Pennsylvania against the assets of a New York corporation which was dissolved and placed in the hands of a receiver before the writ issued, where plaintiff was a member of the corporation and a resident of New York, and knew the status of the corporation, and had been restrained by the court which decreed dissolution of the corporation from interfering with its assets.

Virginia.— See Bockover *v.* Life Assoc. of America, 77 Va. 85, holding that where, under a statute of Missouri and decree of a Missouri court, all the assets of a Missouri corporation doing business in Virginia were vested in a person as trustee for the benefit of its creditors, all of the company's assets were validly vested in him as trustee of an express trust, and that debts due the company in Virginia could not be attached by a Virginia policyholder.

Canada.— See Salter *v.* St. Lawrence Lumber Co., 28 Nova Scotia 335; Boyd *v.* Dominion Cold Storage Co., 17 Ont. Pr. 545.

See, generally, RECEIVERS.

18. See ATTACHMENT, 4 Cyc. 622.

19. South Carolina R. Co. *v.* People's Sav. Inst., 64 Ga. 18; Minchin *v.* Paterson Second Nat. Bank, 36 N. J. Eq. 436; Dunlop *v.* Paterson F. Ins. Co., 12 Hun (N. Y.) 627; Fenton *v.* Lumberman's Bank, Clarke (N. Y.) 286; Powis *v.* Quebec Bank, 2 Quebec Q. B. 566 [*affirming* 3 Quebec Super. Ct. 122].

20. Wright *v.* Douglass, 2 N. Y. 373.

21. See ATTACHMENT, 4 Cyc. 368.

22. Shanks *v.* Magnolia Metal Co., 89 Hun (N. Y.) 486, 35 N. Y. Suppl. 385, holding insufficient statements that defendant "held and holds itself out to be a foreign corporation," and that it "is or holds itself out to be a foreign corporation." See also Steele *v.* R. M. Gilmour Mfg. Co., 77 N. Y. App. Div. 199, 78 N. Y. Suppl. 1078 (showing that defendant was a foreign corporation held sufficient); Box Board, etc., Co. *v.* Vincennes Paper Co., 45 Misc. (N. Y.) 1, 90 N. Y. Suppl. 836 (to same effect).

23. Delafield *v.* J. K. Armsby Co., 58 N. Y. App. Div. 432, 68 N. Y. Suppl. 998, 62 N. Y. App. Div. 262, 71 N. Y. Suppl. 14; Sawyer Lumber Co. *v.* Bussell, 84 Hun (N. Y.) 114, 31 N. Y. Suppl. 1107. The moving papers must show that plaintiff is a resident, or the existence of the facts required by the statute to authorize suit against a foreign corporation by a non-resident, or that the cause of action

essential that the writ and other process shall be served in the manner prescribed by the statute.[24]

(G) *Attachment in Federal Courts.* Federal courts have jurisdiction under act of congress [25] to issue attachment according to the form and manner of procedure of the state where the court sits, provided defendant is found within the district, so that jurisdiction of the person can be obtained by service of process, or voluntarily appears, but not otherwise; and this law governs attachment in the federal courts against foreign corporations.[26] The property of foreign corporations when found within their local jurisdiction is subject to attachment in the district courts of the United States acting as courts of admiralty.[27]

(II) *GARNISHMENT* — (A) *In General.* A foreign corporation cannot be summoned as garnishee or trustee in the absence of a statute, even though it may be doing business in the state.[28] It may be so summoned and held under statutes, however, if the court can and does acquire personal jurisdiction over it, and if it also has jurisdiction of the *res* — the property or debt garnished [29] — but not otherwise, jurisdiction in both respects being essential.[30] It follows that a foreign corporation cannot be summoned as garnishee or trustee under any circumstances, where it is not doing business in the state in such manner that it may be personally served with process under the statute, the mere casual presence of an officer or agent in the state being insufficient.[31] Nor can it be so summoned or held,

arose within the state, etc., or the attachment will be invalid, and will be quashed on motion. Coolidge *v.* American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Suppl. 318; Ladenburg *v.* Commercial Bank, 87 Hun (N. Y.) 269, 33 N. Y. Suppl. 821 [*reversing* 32 N. Y. Suppl. 873, 24 N. Y. Civ. Proc. 234]; Foster *v.* Electric Heat Regulator Co., 16 Misc. (N. Y.) 147, 37 N. Y. Suppl. 1063; Seiser Bros. Co. *v.* Potter Produce Co., 30 N. Y. Suppl. 294, 23 N. Y. Civ. Proc. 348; Oliver *v.* Walter Heywood Chair Mfg. Co., 10 N. Y. Suppl. 771; Western Bank *v.* City Bank, 7 How. Pr. (N. Y.) 238; Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192. See *supra*, V, B, 6, d, (II). N. Y. Laws (1896), p. 856, c. 908 (Tax Law, § 181), requiring foreign corporations to pay a license tax, does not prohibit the maintenance of an action by the assignee of a foreign corporation, and therefore an application for attachment by such assignee need not allege such compliance. Box Board, etc., Co. *v.* Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Suppl. 836. And an application for an attachment in an action on a contract by a foreign corporation or its assignee which does not show that the contract was made within the state need not aver that the certificate required by N. Y. Laws (1892), c. 687, § 15, was obtained. Lukens Iron, etc., Co. *v.* Payne, 13 N. Y. App. Div. 11, 43 N. Y. Suppl. 376; Box Board, etc., Co. *v.* Vincennes Paper Co., *supra*.

24. Davidson *v.* Fox, 120 Mich. 385, 79 N. W. 1106; Wright *v.* Douglass, 2 N. Y. 373 [*reversing* 3 Barb. 554]; Wright *v.* Douglass, 7 N. Y. 564 [*reversing* 10 Barb. 97]; Bates *v.* New Orleans, etc., R. Co., 13 How. Pr. (N. Y.) 516; Kieley *v.* Central Complete Combustion Mfg. Co., 13 Misc. (N. Y.) 85, 34 N. Y. Suppl. 106; Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40 (personal service of summons and complaint on defendant outside the state sufficient); Jennings *v.* Rocky Bar Gold Min. Co., 29 Wash. 726, 70 Pac. 136.

25. U. S. Rev. St. (1878) § 915 [U. S. Comp. St. (1901) p. 687].

26. Harland *v.* United Lines Tel. Co., 40 Fed. 308, 6 L. R. A. 252; Boston Electric Co. *v.* Electric Gas-Lighting Co., 23 Fed. 838; Dormitzer *v.* Illinois, etc., Bridge Co., 6 Fed. 217; Day *v.* Newark India-Rubber Mfg. Co., 7 Fed. Cas. No. 3,685, 1 Blatchf. 628.

Jurisdiction of federal courts see ATTACHMENT, 4 Cyc. 460.

Construction of state statutes by federal courts see ATTACHMENT, 4 Cyc. 402.

27. Clarke *v.* New Jersey Steam Nav. Co., 5 Fed. Cas. No. 2,859, 1 Story 531. See ADMIRALTY, 1 Cyc. 797.

28. Larkin *v.* Wilson, 106 Mass. 120; Gold *v.* Housatonic R. Co., 1 Gray (Mass.) 424; Danforth *v.* Penny, 3 Metc. (Mass.) 564; Milwaukee Bridge, etc., Works *v.* Wayne County Cir. Judge, 73 Mich. 155, 41 N. W. 215; Taft *v.* Mills, 5 R. I. 393; Ranney *v.* Morrow, 16 N. Brunsw. 270.

29. See the cases cited *infra*, this subdivision, notes 32–38.

30. Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286; Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178, and other cases cited in the notes following. And see, generally, GARNISHMENT.

31. *Georgia.*— Schmidlapp *v.* La Confiance Ins. Co., 71 Ga. 246.

Maine.— Columbus Ins. Co. *v.* Eaton, 35 Me. 391.

Michigan.— Milwaukee Bridge, etc., Works *v.* Wayne County Cir. Judge, 73 Mich. 155, 41 N. W. 215; Ettelsohn *v.* Fireman's Fund Ins. Co., 64 Mich. 331, 31 N. W. 201.

New York.— Willet *v.* Equitable Ins. Co., 10 Abb. Pr. 193.

Ohio.— Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164.

even where it is doing business in the state and may be served with process, unless the *situs* of the property or debt is, at least in contemplation of law, within the state, so that the court has jurisdiction of the *res*.[32] But, by statute, it may be so summoned and held where it may be legally served with process in the state, and where the *res* is within the jurisdiction of the court,[33] as where it has tangible property or money within the state belonging to the principal defendant, whether he is a resident or a non-resident,[34] or where it owes a debt contracted and payable within the state, whether to a resident or a non-resident.[35] There is an irreconcilable conflict of opinion as to whether a foreign corporation, although doing business in the state so that it may be personally served with process, can be garnished to reach a debt which is due from it to a non-resident person or corporation, where the debt is not payable within the state, some of the cases holding that it cannot because the *situs* of the debt is not within the state,[36] while other cases hold the

Pennsylvania.— Liblong *v.* Kansas F. Ins. Co., 82 Pa. St. 413; Dawson *v.* Campbell, 2 Miles 170.

Rhode Island.— Taft *v.* Mills, 5 R. I. 393.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

32. *Alabama.*— Louisville, etc., R. Co. *v.* Steiner, 128 Ala. 353, 30 So. 741; Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286.

Rhode Island.— Taft *v.* Mills, 5 R. I. 393.

Vermont.— Craig *v.* Gunn, 67 Vt. 92, 30 Atl. 860, 27 L. R. A. 511.

West Virginia.— Pennsylvania R. Co. *v.* Rogers, 52 W. Va. 450, 44 S. E. 300, 62 L. R. A. 178.

United States.— Reimers *v.* Seatco Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364.

See also *infra*, text and note 36; and, generally, GARNISHMENT.

33. *Georgia.*— Selma, etc., R. Co. *v.* Tyson, 48 Ga. 351.

Illinois.— Wabash R. Co. *v.* Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Mineral Point R. Co. *v.* Keep, 22 Ill. 9, 74 Am. Dec. 124.

Iowa.— Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343.

Kansas.—Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497.

Maine.— Cousens *v.* Lovejoy, 81 Me. 467, 17 Atl. 495.

Maryland.— Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595.

Massachusetts.— National Bank of Commerce *v.* Huntington, 129 Mass. 444; Ocean Ins. Co. *v.* Portsmouth Mar. R. Co., 3 Metc. 420.

Michigan.— Detroit First Nat. Bank *v.* Burch, 80 Mich. 242, 45 N. W. 93.

Minnesota.— Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

Missouri.— McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214.

New Hampshire.— Libbey *v.* Hodgdon, 9 N. H. 394.

New Jersey.—National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

Ohio.— Pennsylvania R. Co. *v.* Peoples, 31 Ohio St. 537; Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164.

Pennsylvania.— Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724; Barr *v.* King, 96 Pa. St. 485; Fithian *v.* New York, etc., R. Co., 31 Pa. St. 114; Jones *v.* New York, etc., R. Co., 1 Grant 457; Datz *v.* Chambers, 3 Pa. Dist. 353.

Rhode Island.— Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297, 21 Atl. 538.

Vermont.— Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821.

Washington.—Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

Wisconsin.— Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

United States.— Mooney *v.* Buford, etc., Mfg. Co., 72 Fed. 32, 18 C. C. A. 421; Rainey *v.* Maas, 51 Fed. 580.

See 12 Cent. Dig. tit. "Corporations," §§ 2630, 2638.

34. Cousens *v.* Lovejoy, 81 Me. 467, 17 Atl. 495. And see, generally, GARNISHMENT.

35. Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297, 21 Atl. 538; Weed Sewing Mach. Co. *v.* Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Brauser *v.* New England F. Ins. Co., 21 Wis. 506; Rainey *v.* Maas, 51 Fed. 580. And see, generally, GARNISHMENT.

36. *Alabama.*— Louisville, etc., R. Co. *v.* Steiner, 128 Ala. 353, 30 So. 741; Alabama Great Southern R. Co. *v.* Chumley, 92 Ala. 317, 9 So. 286; Louisville, etc., R. Co. *v.* Dooley, 78 Ala. 524.

Colorado.— Everett *v.* Connecticut Mut. L. Ins. Co., 4 Colo. App. 509, 36 Pac. 616.

Georgia.— Wells *v.* East Tennessee, etc., R. Co., 74 Ga. 548; Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194.

Kansas.— Missouri Pac. R. Co. *v.* Sharitt, 43 Kan. 375, 23 Pac. 430, 19 Am. St. Rep. 143, 8 L. R. A. 385, 389 [*distinguishing* Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497].

Michigan.— Drake *v.* Lake Shore, etc., R. Co., 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382.

Minnesota.— Swedish-American Nat. Bank *v.* Bleecker, 72 Minn. 383, 75 N. W. 740, 71 Am. St. Rep. 492, 42 L. R. A. 283.

Missouri.— Fielder *v.* Jessup, 24 Mo. App. 91.

contrary.[37] This question of *situs*, which relates to non-resident garnishees generally, will be elsewhere treated at length.[38] The fact that a foreign corporation is exempt from process of garnishment under the laws of its home state will not exempt it from such process when doing business in another state.[39] Where foreign corporations of different states are consolidated under the statutes of those states, or where a corporation or corporations are created by concurrent legislation in several states, they are regarded, as we have seen, as having a residence in each state, and they are therefore liable to be summoned as domestic corporations as garnishees in either state.[40] And so it has been held of a corporation created by the federal government.[41]

(B) *Procedure.* In garnishment proceedings jurisdiction must appear upon the papers themselves or the proceedings will be a nullity.[42] The writ and notice must be served upon the corporation and the principal defendant in the manner prescribed by the statutes.[43] When the principal defendant is a non-resident notice of the proceedings may be served upon him by publication.[44] Disclosure or answer by the garnishee may be made by its general agent within the state.[45]

Nebraska.— Wright *v.* Chicago, etc., R. Co., 19 Nebr. 175, 27 N. W. 90, 56 Am. Rep. 747.

New York.— Douglass *v.* Phœnix Ins. Co., 138 N. Y. 209, 33 N. E. 938, 34 Am. St. Rep. 448, 20 L. R. A. 118.

Vermont.— Craig *v.* Gunn, 67 Vt. 92, 30 Atl. 860, 27 L. R. A. 511; Towle *v.* Wilder, 57 Vt. 622.

Wisconsin.— Renier *v.* Hurlbut, 81 Wis. 24, 50 N. W. 783, 29 Am. St. Rep. 850, 14 L. R. A. 562.

United States.—Reimers *v.* Seatco Mfg. Co., 70 Fed. 573, 17 C. C. A. 228, 30 L. R. A. 364.

Canada.— See Lundy *v.* Dickson, 6 Can. L. J. O. S. 92.

See 12 Cent. Dig. tit. "Corporations," § 2635.

37. *Illinois.*— Wabash R. Co. *v.* Dougan, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; Hannibal, etc., R. Co. *v.* Crane, 102 Ill. 249, 40 Am. Rep. 581; Missouri Pac. R. Co. *v.* Flannigan, 47 Ill. App. 322; Glover *v.* Wells, 40 Ill. App. 350; Roche *v.* Rhode Island Ins. Assoc., 2 Ill. App. 360.

Iowa.— German Bank *v.* American F. Ins. Co., 83 Iowa 491, 50 N. W. 53, 32 Am. St. Rep. 316; Mooney *v.* Union Pac. R. Co., 60 Iowa 346, 14 N. W. 343.

Kansas.—Burlington, etc., R. Co. *v.* Thompson, 31 Kan. 180, 1 Pac. 622, 47 Am. Rep. 497. But see *supra*, note 36.

Minnesota.— Harvey *v.* Great Northern R. Co., 50 Minn. 405, 52 N. W. 905, 17 L. R. A. 84.

Missouri.— Wyeth Hardware, etc., Co. *v.* Lang, 127 Mo. 242, 29 S. W. 1010, 48 Am. St. Rep. 626, 27 L. R. A. 651.

New Jersey.—National F. Ins. Co. *v.* Chambers, 53 N. J. Eq. 468, 32 Atl. 663.

Pennsylvania.— Fithian *v.* New York, etc., R. Co., 31 Pa. St. 114; Jones *v.* New York, etc., R. Co., 1 Grant 457; Datz *v.* Chambers, 14 Pa. Co. Ct. 643; Darlington *v.* Rogers, 13 Phila. 102.

Rhode Island.— Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297, 21 Atl. 538.

Washington.— Neufelder *v.* German American Ins. Co., 6 Wash. 336, 33 Pac. 879, 36 Am. St. Rep. 166, 22 L. R. A. 287; Dittenhœfer *v.* Cœur d'Alene Clothing Co., 4 Wash. 519, 30 Pac. 660.

United States.— Mooney *v.* Buford, etc., Mfg. Co., 72 Fed. 32, 18 C. C. A. 421.

38. See, generally, GARNISHMENT.

39. Detroit First Nat. Bank *v.* Burch, 80 Mich. 242, 45 N. W. 93.

40. Smith *v.* Boston, etc., R. Co., 33 N. H. 337; Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; Holland *v.* Mobile, etc., R. Co., 16 Lea (Tenn.) 414; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254. But see Wells *v.* East Tennessee, etc., R. Co., 74 Ga. 548.

41. Losee *v.* McCarty, 5 Utah 528, 17 Pac. 452.

42. Milwaukee Bridge, etc., Works *v.* Wayne County Cir. Judge, 73 Mich. 155, 41 N. W. 215. See, generally, GARNISHMENT.

43. As to necessity and sufficiency of service or notice see the following cases:

Iowa.— Upton Mfg. Co. *v.* Stewart, 61 Iowa 209, 16 N. W. 84.

Michigan.— Shafer Iron Co. *v.* Iron Cir. Judge, 88 Mich. 464, 50 N. W. 389; Detroit First Nat. Bank *v.* Burch, 80 Mich. 242, 45 N. W. 93; Milwaukee Bridge, etc., Works *v.* Wayne County Cir. Judge, 73 Mich. 155, 41 N. W. 215; Hebel *v.* Amazon Ins. Co., 33 Mich. 400.

Missouri.— McAllister *v.* Pennsylvania Ins. Co., 28 Mo. 214.

New Jersey.— Elizabethtown Sav. Inst. *v.* Gerber, 35 N. J. Eq. 153.

Ohio.— Riter-Conley Mfg. Co. *v.* Mzik, 23 Ohio Cir. Ct. 164.

Pennsylvania.— Kennedy *v.* Agricultural Ins. Co., 165 Pa. St. 179, 30 Atl. 724; Liblong *v.* Kansas F. Ins. Co., 82 Pa. St. 413; Dawson *v.* Campbell, 2 Miles 170; Smith, etc., Co. *v.* Morse Wool Scouring Co., 10 Pa. Co. Ct. 624.

Rhode Island.— Moshassuck Felt Mill *v.* Blanding, 17 R. I. 297, 21 Atl. 538.

See 12 Cent. Dig. tit. "Corporations," § 2631 *et seq.*; and, generally, GARNISHMENT.

44. Broome *v.* Galena, etc., Packet Co., 9 Minn. 239. And see, generally, GARNISHMENT; PROCESS.

45. Lorman *v.* Phœnix Ins. Co., 33 Mich. 65. See, generally, GARNISHMENT.

(III) *ATTACHMENT OR GARNISHMENT OF SHARES OF STOCK.* It has generally been held that for the purpose of attachment or garnishment of shares of stock in a corporation, their *situs* is the domicile of the corporation, and they cannot be reached by such process in another state, even though the debtor shareholder is a resident of such other state and the certificates of stock are found therein; and even though the corporation may be doing business and be subject to process in such other state.[46] In some cases, however, the contrary has been held where the certificates were in the state,[47] or where the corporation had become domesticated under the laws of the state.[48]

7. SUABLE UPON WHAT CAUSES OF ACTION — a. Causes of Action Arising Within Jurisdiction of Forum. The general rule, where it is not changed by statute, is believed to be that foreign corporations are suable in the domestic tribunals upon any cause of action arising within the domestic jurisdiction;[49] and this is so, although the foreign corporation may have been unlawfully transacting business within the state, since it cannot set up its own wrong in order to defeat the action.[50] It has been held that a provision in a contract made by a corporation in another state than that of its creation, with a resident thereof, that all actions against the corporation shall be brought in the state of its creation, is void as opposed to the policy of the domestic state as indicated by a statute requiring such corporations to consent to actions and service of process therein against them.[51]

b. Not Upon Causes of Action Arising Upon Foreign Contracts. The courts of some of the states restrain the right of action *in personam* by residents of the state against foreign corporations, even where the cause of action arises *ex contractu*, to cases where the contract was made within the state by an agent of the corporation there doing business, conceding at the same time that if the foreign corporation has property situated within the domestic jurisdiction, against which its creditor is entitled to proceed, a road will be open to him in the form of a proceeding *in rem* as by attachment or garnishment.[52]

Personal examination of agent see Shafer Iron Co. *v.* Iron Cir. Judge, 88 Mich. 464, 50 N. W. 389.

46. *Connecticut.*— Tweedy *v.* Bogart, 56 Conn. 419, 15 Atl. 374; Winslow *v.* Fletcher, 53 Conn. 390, 4 Atl. 250, 55 Am. Rep. 122.

Illinois.— Reid Ice Cream Co. *v.* Stephens, 62 Ill. App. 334.

Indiana.— Smith *v.* Downey, 8 Ind. App. 179, 34 N. E. 823, 35 N. E. 563, 52 Am. St. Rep. 467.

Kentucky.— New Jersey Sheep, etc., Co. *v.* Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677, 20 Ky. L. Rep. 565.

Maryland.— Morton *v.* Grafflin, 68 Md. 545, 13 Atl. 341, 15 Atl. 298.

Missouri.— Armour Bros. Banking Co. *v.* St. Louis Nat. Bank, 113 Mo. 12, 20 S. W. 690, 35 Am. St. Rep. 691.

New York.— Plimpton *v.* Bigelow, 93 N. Y. 592.

Pennsylvania.— Christmas *v.* Biddle, 13 Pa. St. 223.

Rhode Island.— Ireland *v.* Globe Milling, etc., Co., 19 R. I. 180, 32 Atl. 921, 61 Am. St. Rep. 756, 29 L. R. A. 429.

Tennessee.— Moore *v.* Gennett, 2 Tenn. Ch. 375.

United States.— Pinney *v.* Nevills, 86 Fed. 97.

See 12 Cent. Dig. tit. "Corporations," § 2636.

47. Puget Sound Nat. Bank *v.* Mather, 60 Minn. 362, 62 N. W. 396 (holding certificates of stock in a foreign corporation held within the state subject to garnishment as "personal property"); Simpson *v.* Jersey City Contracting Co., 165 N. Y. 193, 58 N. E. 896, 55 L. R. A. 796 [*affirming* 47 N. Y. App. Div. 17, 61 N. Y. Suppl. 1033] (where the certificates were attached within the state, Landon and O'Brien, JJ., dissenting).

48. Young *v.* South Tredegar Iron Co., 85 Tenn. 189, 2 S. W. 202, 4 Am. St. Rep. 752, holding shares of a non-resident in a foreign corporation subject to attachment in Tennessee, where the corporation had become domesticated by compliance with the Tennessee statute.

49. Council Bluffs Canning Co. *v.* Omaha Tinware Mfg. Co., 49 Nebr. 537, 68 N. W. 929; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer (N. Y.) 648. And see the cases cited *supra*, V, B, 4; and *infra*, V, B, 9.

50. Dixon *v.* O. R. C. of A., 49 Fed. 910. See also *supra*, V, B, 4, c.

In Louisiana, where a foreign corporation has established an office in the state and designated an agent upon whom process may be served, service on such agent gives jurisdiction to determine a case against the corporation, irrespective of citizenship or the subject-matter. State *v.* North American Land, etc., Co., 106 La. 621, 31 So. 172, 87 Am. St. Rep. 309.

51. Field *v.* Eastern Bldg., etc., Assoc., 117 Iowa 185, 90 N. W. 717, foreign building and loan association.

52. Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194. See also Rehm *v.* German Ins., etc., Inst., 125 Ind. 135, 25 N. E. 173.

c. Statute Permitting Suit "For Any Cause of Action." But where, as in the state of New York, there is a statute providing that foreign corporations may be sued by residents "for any cause of action," then, so far as mere jurisdiction — the mere power to proceed to judgment — is concerned, a foreign corporation may be sued by a resident whenever it is domiciled or found within the domestic jurisdiction in such a manner that process may be lawfully served upon it in an action *in personam*.[53]

d. Actions For Torts — (I) *TORTS COMMITTED WITHIN STATE OF FORUM.* A foreign corporation is suable for torts committed in the domestic state, either in the state or the federal courts, if found within the state in such a sense that process may lawfully be served upon it under the laws of the state,[54] but not otherwise.[55]

(II) *TORTS COMMITTED IN FOREIGN STATES.* Although judicial opinion upon this question has not been uniform, yet the weight of authority, in the absence of statutes enlarging in this respect the jurisdiction of the domestic tribunals, is that a foreign corporation cannot be sued in the domestic tribunals, even though it may be doing business and may have appointed an agent in the state to receive service of process, for torts committed in a foreign state.[56] Nor does this rule

53. Palmer *v.* Phœnix Mut. L. Ins. Co., 84 N. Y. 63; New York Floating Derrick Co. *v.* New Jersey Oil Co., 3 Duer (N. Y.) 648. For instance, under such a statute, a suit may be brought by a resident executor upon a policy issued by a corporation existing in another state, upon the life of his testator, who died in the foreign state, where letters testamentary were issued in such state and also in the domestic state. Palmer *v.* Phœnix Mut. L. Ins. Co., *supra*. See also as to the construction of N. Y. Code Civ. Proc. § 1780, Prouty *v.* Michigan Southern, etc., R. Co., 1 Hun (N. Y.) 655; Atlantic, etc., Tel. Co. *v.* Baltimore, etc., R. Co., 46 N. Y. Super. Ct. 377; and *infra*, V, B, 8, c, (I).

By a statute of Maryland, which is a transcript of the former statute of New York, suits against foreign corporations exercising franchises in that state may be brought in any of the courts of that state, "by a resident of this State for any cause of action; and by a plaintiff, not a resident of this State, when the cause of action has arisen, or the subject of the action shall be situated in this State." Md. Act (1868), c. 471, § 211. It has been decided that, to bring a case within the first clause of this statute, the liability sought to be enforced must be a direct liability of the corporation to the resident plaintiff, and that a resident plaintiff in an attachment against a non-resident debtor, cannot, under the second clause, subject the corporation to the process of garnishment in a Maryland court, to attach a debt due by the corporation to the non-resident debtor, on a contract which is made, and the subject-matter of which is situated in another state. Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595. See also Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366, 33 Am. Rep. 258.

In Wisconsin see Brauser *v.* New England F. Ins. Co., 21 Wis. 506.

54. Reeves *v.* Southern R. Co., 121 Ga. 561, 49 S. E. 674; Turner *v.* Phœnix Ins. Co., 55 Mich. 236, 21 N. W. 326 (malicious prosecution); Emerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182 (action by one foreign corporation against another); Austin *v.* New York, etc., R. Co., 25 N. J. L. 381; People *v.* New Jersey Cent. R. Co., 48 Barb. (N. Y.) 478; Southern R. Co. *v.* Mayes, 113 Fed. 84, 51 C. C. A. 70; Gray *v.* Taper Sleeve Pulley Works, 16 Fed. 436. A foreign corporation is suable for damages for an injury caused by an explosion of gasoline by reason of its failure to notify purchasers within the state of the forum of its dangerous character, and cannot escape such liability by selecting an ignorant agent to conduct its business there. Waters Pierce Oil Co. *v.* Davis, 24 Tex. Civ. App. 508, 60 S. W. 453.

55. Strain *v.* Chicago Portrait Co., 126 Fed. 831, action for malicious prosecution not maintainable in Missouri against a foreign corporation having no office or agency in the state; by service of process on one who merely solicits orders for goods, which orders are sent to the company to be filled, and who receives a commission on such orders.

56. Central R., etc., Co. *v.* Carr, 76 Ala. 388, 52 Am. Rep. 339; Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 16 N. Y. Civ. Proc. 255, 2 L. R. A. 636; Olson *v.* Buffalo Hump Min. Co., 130 Fed. 1017. Thus it is held in Alabama that a passenger injured in his person while traveling in Georgia, on a railroad incorporated only in Georgia, although extending into and doing business in Alabama, cannot maintain an action therefor in Alabama. The court proceed upon the view that such an action cannot be maintained, in the absence of a statute in Alabama giving such a right of action, and the statutes of that state are not construed as giving it. Central R., etc., Co. *v.* Carr, *supra*.

Contra.— Reeves *v.* Southern R. Co., 121 Ga. 561, 49 S. E. 674; Watson *v.* Richmond, etc., R. Co., 91 Ga. 222, 18 S. E. 306; Buie *v.* Chicago, etc., R. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861; Smith *v.* Empire State-Idaho Min., etc., Co., 127 Fed. 462; Denver,

appear to deny to the citizens of another state the privileges and immunities of citizens of the several states, within the meaning of the constitution of the United States.[57] The rule that the courts of one state will not maintain an action against a foreign corporation on a cause of action for a tort arising in the state in which it was incorporated, the laws of which with reference to such cause of action are materially different from those of the forum, does not apply where such foreign corporation is so associated with a domestic corporation as to make both jointly liable.[58]

8. Actions by Non-Residents and Other Foreign Corporations — a. In General. There is no principle of constitutional law which obliges the courts of a state to open their doors to actions brought by non-residents against foreign corporations.[59] A constitutional provision reciting that "all courts shall be public, and every person, for any injury that he may receive in his lands, goods, person, or reputation, shall have remedy by due course of law and justice" does not give a right of action to non-residents against foreign corporations, but is intended to secure to residents of the state access to its courts for the redress of injuries.[60] The provisions of a statute,[61] making discriminations, in respect of the right of action against foreign corporations, between domestic persons and corporations and non-resident persons and corporations, is not unconstitutional as denying to the citizens of each state all the privileges and immunities of citizens of the several states, because the statute makes no discrimination between citizens, but only between residents and non-residents.[62]

b. Cannot Sue Foreign Corporations Upon Foreign Contracts — (I) *In General.* In the absence of statutes otherwise providing, many of the courts have held that actions cannot be maintained by non-resident persons or corporations against foreign corporations upon contracts made and to be performed outside of the state of the forum, although the foreign corporation has an agent within the state, upon whom process may be served in actions *in personam*.[63] Statutes which prescribe the terms upon which foreign corporations may be permitted to do business within the domestic state, and which, among other conditions, make them amenable to the judicial process of the state, and require them to empower an agent within the state to receive service of process, are not construed as authorizing such actions, unless they say so in terms.[64] The question of jurisdic-

etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

57. Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 16 N. Y. Civ. Proc. 255, 2 L. R. A. 636.

58. Houston, etc., R. Co. *v.* Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062. See also Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574; Buie *v.* Chicago, etc., R. Co., 95 Tex. 51, 65 S. W. 27, 55 L. R. A. 861.

59. See the cases in the notes following. But see Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

60. Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192.

61. N. Y. Code Civ. Proc. § 1780.

62. Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19 N. E. 625, 16 N. Y. Civ. Proc. 255, 2 L. R. A. 636. The court cited in support of this theory Haney *v.* Marshall, 9 Md. 194; Campbell *v.* Morris, 3 Harr. & M. (Md.) 535; Lemmon *v.* People, 20 N. Y. 562; Adams *v.* Penn Bank, 35 Hun (N. Y.) 393; Frost *v.* Brisbin, 19 Wend. (N. Y.) 11, 32 Am. Dec. 423; Bowman *v.* Lewis, 101 U. S. 22, 25 L. ed. 989; McCready *v.* Virginia, 94 U. S. 391, 24 L. ed. 248; Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 23 L. ed. 806. The same was held in Duquesne Club *v.* Penn Bank, 35 Hun (N. Y.) 390.

63. Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336; Sawyer *v.* North American L. Ins. Co., 46 Vt. 697. Nearly to the same effect see Camden Rolling Mill Co. *v.* Swede Iron Co., 32 N. J. L. 15. But see *contra*, Johnston *v.* Trade Ins. Co., 132 Mass. 432.

64. Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336; Sawyer *v.* North American L. Ins. Co., 46 Vt. 697. *Contra*, Johnston *v.* Trade Ins. Co., 132 Mass. 432. Nor does a statutory provision that process may be served on the agent of a foreign corporation "with like effect as if the company existed in this state," accompanied by the stipulation that such service "shall be of the same force and validity as if served on said company," operate to transfer to the tribunals of the domestic state any power which would not be acquired by the mere fact of actual service, or waiver of service, upon defendant; nor obliterate the fact, nor change the consequences which result from the fact, of the non-resident character of defendant, so as to give the domestic tribu-

tion in such a case relates not merely to jurisdiction over the person of defendant, but also jurisdiction over the subject-matter of the suit; and it is for the reason that the domestic tribunals have no jurisdiction over the subject-matter of the suit in such a case that plaintiff is repelled.[65]

(II) *CONTRARY VIEW.* Contrary to the foregoing, there are holdings to the effect that when a corporation comes within the state for the purpose of doing business, and appoints an attorney or agent on whom process against it may be served with like effect as if it existed in the state, it may be sued by non-residents upon contracts made outside of the state, in like manner as a natural person may be sued.[66]

c. **Rule Under Particular Statutes** — (I) *NEW YORK.* By section 427 of the former code of procedure of New York, an action against a foreign corporation might be brought in the courts of that state: (1) By a resident of that state for any cause of action; (2) by a plaintiff, not a resident of that state, when the cause of action arose, or when the subject of the action was situated within that state.[67] The present code of civil procedure of New York provides that a foreign corporation may be sued by a resident of the state or by a domestic corporation for any cause of action, and that it may be sued by a foreign corporation or by a non-resident: "(1) Where the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof; (2) where it is brought to recover real property situated within the state, or a chattel which is replevied within the state; (3) where the cause of action arose within the state, except when the object of the action is to affect the title to real property situated without the state."[68] The construction of this statute is that it excludes jurisdiction in actions by non-residents against foreign corporations which do not fall within its terms.[69] A non-resident plaintiff cannot therefore maintain an action in the courts of New York against a foreign corporation for a cause of action arising outside the limits of that state.[70] The right of action must be local

nals jurisdiction over causes of action against it. Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336. *Contra,* Johnston *v.* Trade Ins. Co., 132 Mass. 432.

65. Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336, 339 [*citing* Bissell *v.* Briggs, 9 Mass. 462, 6 Am. Dec. 88; Story Confl. L. § 586].

66. Johnston *v.* Trade Ins. Co., 132 Mass. 432 [*overruling* it seems Smith *v.* New York Mut. L. Ins. Co., 14 Allen (Mass.) 336]; Western Union Tel. Co. *v.* Clark, 14 Tex. Civ. App. 563, 38 S. W. 225. See also Guilford Granite Co. *v.* Harrison Granite Co., 23 App. Cas. (D. C.) 1; Reeves *v.* Southern R. Co., 121 Ga. 561, 49 S. E. 674; Emmerson *v.* McCormick Mach. Co., 51 Mich. 5, 16 N. W. 182; Bank of Commerce *v.* Rutland, etc., R. Co., 10 How. Pr. (N. Y.) 1; Pech Mfg. Co. *v.* Groves, 6 S. D. 504, 62 N. W. 109; Union Bank *v.* U. S. Bank, 4 Humphr. (Tenn.) 369; Western Union Tel. Co. *v.* Shaw, (Tex. Civ. App. 1903) 77 S. W. 433; Hunter *v.* Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

67. Under this statute the courts of New York would not entertain jurisdiction of an action respecting lands situated in another state, between two corporations, both chartered in such other state. Cumberland Coal, etc., Co. *v.* Hoffman Steam Coal Co., 30 Barb. (N. Y.) 159. Nor would they entertain an action claiming equitable relief on behalf of a foreign corporation brought in the name of its shareholders against another foreign corporation, joining as defendant a corporation formed under the laws of New York, and several individuals who did not appear to be residents of New York, so as to entitle them to maintain an action against a foreign corporation for any cause under the first clause of the statute — it not appearing that the cause of action arose, or that the subject of it was situated within the state of New York. House *v.* Cooper, 30 Barb. (N. Y.) 157.

68. N. Y. Code Civ. Proc. § 1780.

Time of making motion to dismiss.—Where the complaint in an action against a foreign corporation alleges that plaintiff is a resident, and the answer denies it, and defendant proves that plaintiff is a non-resident, a motion at the close of plaintiff's case to dismiss for want of jurisdiction is made in time. Day *v.* Sun Ins. Co., 40 N. Y. App. Div. 305, 57 N. Y. Suppl. 1033 [*affirmed* in 167 N. Y. 543, 60 N. E. 1110].

69. Ervin *v.* Oregon R., etc., Co., 62 How. Pr. (N. Y.) 490 [*affirmed* in 28 Hun 269]; Galt *v.* Providence Sav. Bank, 18 Abb. N. Cas. (N. Y.) 431.

70. Anglo-American Provision Co. *v.* Davis Provision Co., 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608 [*affirming* 50 N. Y. App. Div. 273, 63 N. Y. Suppl. 987]; Robinson *v.* Oceanic Steam Nav. Co., 112 N. Y. 315, 19

with reference to the state; hence a judgment recovered by one foreign corporation against another in the state of their domicile cannot be regarded, when sued upon within the state, as a cause of action arising therein.[71] Other decisions under this statute are given below.[72]

(II) *OTHER STATES.* So, under a provision of the code of South Carolina

N. E. 625, 16 N. Y. Civ. Proc. 255, 2 L. R. A. 636; Harper *v.* Smith, 93 N. Y. App. Div. 608, 87 N. Y. Suppl. 516 (no jurisdiction of action by a non-resident against a foreign corporation to restrain it from receiving or recognizing as valid any vote by a third person until the ownership of the stock has been vested in the plaintiff and the third person jointly, and then only as they mutually agree); Coolidge *v.* American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Suppl. 318; Day *v.* Sun Ins. Co., 40 N. Y. App. Div. 305, 57 N. Y. Suppl. 1033 [*affirmed* in 167 N. Y. 543, 60 N. E. 1110]; Rosenblatt *v.* Jersey Novelty Co., 45 Misc. (N. Y.) 59, 90 N. Y. Suppl. 816; Galt *v.* Provident Sav. Bank, 18 Abb. N. Cas. (N. Y.) 431.

Presumption.— A contract made by one foreign corporation with another must be presumed, in the absence of anything to show the contrary, to have been made in the domicile of one or the other, and not in New York, so as to confer jurisdiction on the courts of that state of an action for a breach thereof. Snow *v.* Snow-Church Surety Co., 80 N. Y. App. Div. 40, 80 N. Y. Suppl. 512.

Pleading see *infra*, V, B, 15.

71. Anglo-American Provision Co. *v.* Davis Provision Co., 169 N. Y. 506, 62 N. E. 587, 88 Am. St. Rep. 608 [*affirming* 50 N. Y. App. Div. 273, 63 N. Y. Suppl. 987].

72. Under the statute the right of action depends upon residence, and not upon citizenship. Adams *v.* Penn Bank, 35 Hun (N. Y.) 393. A cause of action against a foreign corporation selling agricultural implements within the domestic state upon a guaranty made by such corporation is, it seems, a cause of action arising within the state, within the meaning of the statute. Childs *v.* Harris Mfg. Co., 104 N. Y. 477, 11 N. E. 50. According to decisions of some of the subordinate courts of New York actions do not lie under this statute by non-residents against corporations, in the following cases: To recover for the use of teams hired without the state, although they were used within the state (Perry *v.* Erie Transfer Co., 19 N. Y. Suppl. 239); upon a contract made in New Jersey to furnish a New Jersey corporation with teams and horses for trucking to be done in New York (Perry *v.* Erie Transfer Co., 1 Misc. (N. Y.) 208, 20 N. Y. Suppl. 891); for an injury by a maritime collision by the joint owners of a vessel, part of whom are non-residents, against a foreign corporation (Brooks *v.* Mexican Constr. Co., 49 N. Y. Super. Ct. 234, 50 N. Y. Super. Ct. 281); to recover damages for personal injuries received without the state (Crowley *v.* Royal Exch. Shipping Co., 2 N. Y. Civ. Proc. 174). The courts have held, on the other hand, that actions lie under this statute against foreign corporations in respect of business transacted within the state (Bradley Fertilizer Co. *v.* South Pub. Co., 1 Misc. (N. Y.) 512, 21 N. Y. Suppl. 472); upon an insurance policy issued by a foreign corporation to a resident who died within the state (Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71); between two foreign corporations to recover shares of stock on the ground of the validity of a transfer made within the domestic state (Toronto Gen. Trust Co. *v.* Chicago, etc., R. Co., 32 Hun (N. Y.) 190); for breach of a contract between a non-resident and a foreign corporation occurring within the state, no matter where the contract was made (Rosenblatt *v.* Jersey Novelty Co., 45 Misc. (N. Y.) 59, 90 N. Y. Suppl. 816); for breach of a contract by which one foreign corporation deposited money with another foreign corporation within the state, and the latter promised to return it, with interest, on demand (Munger Vehicle Tire Co. *v.* Rubber Goods Mfg. Co., 39 Misc. (N. Y.) 817, 81 N. Y. Suppl. 302). Where two foreign corporations entered into an agreement, by one clause of which in case of differences between them, they were to appoint an arbitrator in New York, the supreme court of New York had jurisdiction of an action by one of them to restrain a proceeding for arbitration thereunder. Direct U. S. Cable Co. *v.* Dominion Tel. Co., 84 N. Y. 153 [*reversing* 22 Hun 568]. Where some of the plaintiffs were residents, and others non-residents, it was held that the action might be dismissed as to the non-residents, and proceed as to the residents. Ervin *v.* Oregon R., etc., Co., 28 Hun (N. Y.) 269 [*affirming* 62 How. Pr. 490]. Where a national bank, organized in Louisiana, purchased a draft drawn on bankers in the city of New York, payable to the order of such national bank, which draft was duly presented in New York, and payment refused, and was protested for non-payment, and due notice given thereof, it was held that the cause of action arose within the state of New York for the purpose of sustaining the jurisdiction of a court of that state, of an action by the national bank to attach the funds in New York belonging to the bank drawing the draft. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367, 38 Am. Rep. 518. In a case recently decided a contract between a non-resident and a foreign corporation, to act as superintendent of agencies with headquarters within the state of New York, and to receive payment for his services in commissions, was held to create a cause of action for such commissions which "arose within the state," within the meaning of the statute. Strawn *v.* Edward J. Brandt-Dent Co., 71 N. Y. App. Div. 234, 75 N. Y. Suppl. 698 [*affirmed* in 175 N. Y. 463, 67 N. E. 1090].

which is a transcript of that of the former code of New York, an action can be brought against a foreign corporation by a resident of the state for any cause of action, but by a non-resident only when the cause of action shall have arisen within the state, or when the subject of it is situated within the state.[73] Such a statute, or a similar one, also exists in other states.[74]

9. Statutes Creating or Extending Right of Action Against Foreign Corporations — a. In General. The progress of statutory changes creating or extending the right of action against foreign corporations may be traced in the legislation of many jurisdictions as follows.[75]

b. Massachusetts. The operation of such statutes is clearly exhibited by a case in Massachusetts, in which state, as we have seen,[76] the early conception was that an action *in personam* could not be prosecuted against a foreign corporation. Here, under the operation of a statute requiring such a corporation, in order to be entitled to do business within the commonwealth, to appoint, in writing, the commissioner of corporations as its attorney, upon whom process against it might be served, jurisdiction *in personam* against it may be acquired, and a personal judgment may be rendered against it, valid in other jurisdictions as well as in Massachusetts.[77]

c. Missouri. Under decisions of the supreme court of that state, a foreign corporation was regarded as having been domesticated where it had its chief office or place of business within the state, and was suable there by service of summons on its ordinary agent, in like manner as a domestic corporation. Where, however, its chief office or place of business was not in Missouri, then it was necessary to proceed against it as a non-resident by attachment;[78] and if its chief place of business was not in Missouri, and it was nevertheless proceeded against by summons only, the action would be dismissed for want of jurisdiction.[79] But in the general statutory revision which took place in that state in 1879, the law was so changed as to allow service of summons on foreign corporations having no office or place of business within that state, upon any officer, agent, or

73. Central R., etc., Co. *v.* Georgia Constr., etc., Co., 32 S. C. 319, 11 S. E. 192. In that state an attachment is merely a provisional remedy in aid of an action, and can only issue where an action has been commenced. Therefore, where an action fails for want of jurisdiction, an attachment issued in aid of it fails with it. See *supra*, V, B, 6, d, (I), (B). But where the cause of action arose partly within the state of South Carolina, and partly within another state, consisting of work done upon a railroad situated partly within that state and partly within another state, it was held that the cause of action arose within the state, for the purpose of satisfying the statute and sustaining an attachment. Central R., etc., Co. *v.* Georgia Constr., etc., Co., *supra*. The above statute does not conflict with a constitutional provision (S. C. Const. art. 1, § 15), that all courts shall be public, and that any person, for any injury that he may receive in his lands, goods, person, etc., shall have remedy by due process of law. Central R., etc., Co. *v.* Georgia Constr., etc., Co., *supra*. Nor does it violate that provision of the constitution of the United States (art. 4, § 2) securing to the citizens of each state all the privileges and immunities of citizens of the several states; nor does it impair the obligation of contracts within the meaning of the same instrument (art. 1, § 10). Central R., etc., Co. *v.* Georgia Constr., etc., Co., *supra*.

74. It is so, for example, in Maryland. Fidelity Mut. L. Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197 (holding that under such a statute an action could be maintained in Maryland on a policy of life insurance issued by a Pennsylvania company to a resident of Virginia, where the application for the insurance, the examination of the applicant, and the delivery of the policy all took place in Maryland, and at the time and place of the delivery the payment necessary to give it validity was made to the agent of the company authorized to receive it); Cromwell *v.* Royal Canadian Ins. Co., 49 Md. 366; Myer *v.* Liverpool, etc., Ins. Co., 40 Md. 595. So in North Carolina. See Bryan *v.* Western Union Tel. Co., 133 N. C. 603, 45 S. E. 938.

75. See also the cases cited *supra*, V, B, 4. Service of process against foreign corporations see, generally, Process.

76. See *supra*, V, B, 1.

77. Wilson *v.* Martin-Wilson Automatic Fire Alarm Co., 149 Mass. 24, 20 N. E. 318.

78. Baile *v.* Equitable F. Ins. Co., 68 Mo. 617; Middough *v.* St. Joseph, etc., R. Co., 51 Mo. 520; Robb *v.* Chicago, etc., R. Co., 47 Mo. 540; St. Louis *v.* Wiggins Ferry Co., 40 Mo. 580; Farnsworth *v.* Terre Haute, etc., R. Co., 29 Mo. 75.

79. Baile *v.* Equitable F. Ins. Co., 68 Mo. 617; Middough *v.* St. Joseph, etc., R. Co., 51 Mo. 520.

employee, in any county where such service might be obtained.[80] The general construction of these statutes is that service of summons upon a non-resident corporation, having an office or doing business in Missouri in the manner therein provided, has the effect of personal service, and gives the court jurisdiction to enter a general judgment.[81]

d. New York. The statutes of this state have changed the original doctrine that an action *in personam* would not lie against a foreign corporation, by enacting that an action against a foreign corporation may be maintained by a resident of the state for any cause of action,[82] and by a non-resident in certain cases;[83] and by describing particularly how process shall be served.[84]

e. Texas. So in Texas the statute expressly provides for actions against foreign corporations and provides for service of process upon the president, vice-president, secretary, treasurer, or general manager, or upon any local agent within the state.[85]

f. Other States. Statutes providing for actions against foreign corporations doing business or found within the state and prescribing the mode of acquiring jurisdiction have also been enacted in most of the other states of the Union.[86]

80. Mo. Rev. St. (1879) § 3489; Mo. Rev. St. (1889) § 2017; Mo. Rev. St. (1899) § 570.

81. McNichol *v.* U. S. Mercantile Reporting Agency, 74 Mo. 457 [*reversing* 9 Mo. App. 599]. *Compare* Newcomb *v.* New York Cent., etc., R. Co., 182 Mo. 687, 81 S. W. 1069; Strain *v.* Chicago Portrait Co., 126 Fed. 831. The effect of this statute has been practically to domesticate non-resident corporations which have an office or agent within the state, so far as legal procedure is concerned. Such a corporation may therefore be proceeded against by garnishment, although such might not have been the case prior to the change of the statute. When so proceeded against before a justice of the peace, the non-resident corporation must take an appeal within ten days of the judgment, as required by the statute, or its appeal will be dismissed, although if it could be regarded as a non-resident it would have twenty days within which to appeal. Crutsinger *v.* Missouri Pac. R. Co., 82 Mo. 64; Harding *v.* Chicago, etc., R. Co., 80 Mo. 659. See also Slavens *v.* South Pac. R. Co., 51 Mo. 308.

82. N. Y. Code Civ. Proc. § 1781. Upon this statutory ground, the courts of that state have jurisdiction, considered as rightful power, to proceed in an action brought by domestic shareholders of a foreign corporation to enjoin threatened breaches of trust on the part of the directors (Ives *v.* Smith, 3 N. Y. Suppl. 645); although it will not be proper or expedient to exercise such jurisdiction in all cases, owing to the difficulty of doing complete justice. It has been held in that state that, to enable a shareholder, suing as such, to maintain an action against a foreign corporation, it is not necessary that his stock should be registered. Ervin *v.* Oregon R., etc., Co., 62 How. Pr. (N. Y.) 490.

83. See *supra*, V, B, 8, c, (I).

84. N. Y. Code Civ. Proc. § 432. See, generally, PROCESS.

85. Tex. Rev. St. (1895) art. 1223. See Western Cottage Piano, etc., Co. *v.* Anderson, 97 Tex. 432, 79 S. W. 516 [*reversing* (Civ. App. 1903) 76 S. W. 945] ("any local agent" means an agent at a given place or within a designated district, and does not include one who is an agent for the state); El Paso, etc., R. Co. *v.* Kelly, (Civ. App. 1904) 83 S. W. 855 [*reversed* on other grounds in (Sup. 1905) 87 S. W. 660] (general manager need not be local agent); Bankers' Union *v.* Nabors, (Civ. App. 1904) 31 S. W. 91; Westinghouse Electric Mfg. Co. *v.* Troell, 30 Tex. Civ. App. 200, 70 S. W. 324.

86. As to the construction and effect of the statutes in particular jurisdictions see the following cases:

Arkansas.— Mullins *v.* Central Coal, etc., Co., (1904) 84 S. W. 477.

California.— Willey *v.* Benedict Co., 145 Cal. 601, 79 Pac. 270; Doe *v.* Springfield Boiler, etc., Co., 104 Fed. 684, 44 C. C. A. 128; Denver, etc., R. Co. *v.* Roller, 100 Fed. 738, 41 C. C. A. 22, 49 L. R. A. 77.

Georgia.— Barnes *v.* Western Union Tel. Co., 120 Fed. 550.

Illinois.— Wall *v.* Chesapeake, etc., R. Co., 95 Fed. 398, 37 C. C. A. 129.

Indiana.— M. W. of A. *v.* Noyes, 158 Ind. 503, 64 N. E. 21; Old Wayne Mut. L. Assoc. *v.* Flynn, (App. 1903) 66 N. E. 57.

Kentucky.— Nelson *v.* Rehkopf, 75 S. W. 203, 25 Ky. L. Rep. 352; Boyd Commission Co. *v.* Coates, 69 S. W. 1090, 24 Ky. L. Rep. 730.

Louisiana.— American Cotton Co. *v.* Beasley, 116 Fed. 256, 53 C. C. A. 446.

Maine.— Hazeltine *v.* Mississippi Valley F. Ins. Co., 55 Fed. 743.

Maryland.— Gottschalk Co. *v.* Distilling, etc., Co., 50 Fed. 681.

Minnesota.— Boardman *v.* S. S. McClure Co., 123 Fed. 614.

Nebraska.— Fremont, etc., R. Co. *v.* New York, etc., R. Co., 66 Nebr. 159, 92 N. W. 131, 59 L. R. A. 939; Council Bluffs Canning Co. *v.* Omaha Tinware Mfg. Co., 49 Nebr. 537, 68 N. W. 929.

g. Canada. Such statutes have also been enacted in Canada.[87]

10. Actions by Shareholders to Redress Grievances in Corporate Management — a. General Doctrine. This question has already been considered to some extent.[88] As a general rule, actions brought by shareholders, generally in equity, to restrain or redress frauds or breaches of trust committed by the directors or officers of the corporation, or by a majority of its shareholders in the management of its business and property,[89] can only be brought in the courts of the state under whose laws the corporation was created.[90]

b. Exceptions to Rule — (I) *Where All Officers of Corporation Reside in State of Forum and All Its Property Is There.* Exceptions to this rule have been declared as follows: In the first place, where all the officers of a foreign corporation reside in the state of the forum, and all its property is situated in such state, the shareholders may maintain an action there to enjoin the officers from embarking the funds and property of the corporation in a business which is *ultra vires*, and they are not confined to their remedy, through the action of the attorney-general in the courts of the state under whose laws the corporation was created; and the directors of such foreign corporation, residing within the state of the forum, may be required in such action to account for corporate property which they have wrongfully appropriated; although the management of the internal affairs of a foreign corporation will be usually left to the courts of the state of its incorporation.[91]

(II) *Injunctions and Auxiliary Process.* Another exception is that injunctions and auxiliary process may be had in courts of other states than that in which the corporation has been created.[92]

(III) *Redress of Wrongful Transfer of Shares Within State of Forum.* Another exception is to the effect that where an unlawful transfer of the shares of stock of a foreign corporation is made within the domestic state, through an agency there maintained by the corporation for the transfer of its shares, the wrongful act is committed within the domestic state, so that it may be redressed, under the statutory provision in relation to actions against foreign corporations by non-residents elsewhere considered,[93] giving the courts of the domestic state jurisdiction of actions by non-residents against foreign corpora-

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Copland *v.* American De Forest Wireless Tel. Co., 136 N. C. 11, 48 S. E. 501; Williams *v.* Iron Belt Bldg., etc., Assoc., 131 N. C. 267, 42 S. E. 607; Jester *v.* Baltimore Steam Packet Co., 131 N. C. 54, 42 S. E. 447; Clinard *v.* White, 129 N. C. 250, 39 S. E. 960. See also, construing North Carolina statute, Johnston *v.* Mutual Reserve Fund L. Ins. Assoc., 43 Misc. (N. Y.) 251, 87 N. Y. Suppl. 438 [*affirmed* in 90 N. Y. Suppl. 539].

North Dakota.— Brown *v.* Chicago, etc., R. Co., 12 N. D. 61, 95 N. W. 153.

Virginia.— New River Mineral Co. *v.* Seeley, 120 Fed. 193, 56 C. C. A. 505.

Washington.—Smith *v.* Empire State-Idaho Min., etc., Co., 127 Fed. 462.

87. Crotty *v.* Oregon, etc., R. Co., 3 Manitoba 182; Hudson Bay Co. *v.* Pugsley, 27 N. Brunsw. 15.

88. See *supra*, I, H.

89. As to such actions see Corporations, 10 Cyc. 963 *et seq.*

90. Wilkins *v.* Thorne, 60 Md. 253; New Haven Horse Nail Co. *v.* Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Smith *v.* Mutual L. Ins. Co., 14 Allen (Mass.) 336; Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679; Madden *v.* Penn Electric Light Co., 199 Pa. St. 454, 49 Atl. 296. *Compare* Halsey *v.* McLean, 12 Allen (Mass.) 438, 90 Am. Dec. 157. See also *supra*, I, H. This rule rests partly on the consideration that it is impossible to conduct proceedings of this nature without making the corporation defendant and to this end it is necessary to have service of process on the corporation (Wilkins *v.* Thorne, 60 Md. 253; *supra*, V, B, 3; and Corporations, 10 Cyc. 995); although other considerations of policy and expediency have been brought forward in support of it.

91. Richardson *v.* Clinton Wall Trunk Mfg. Co., 181 Mass. 580, 64 N. E. 400, where all the officers except the clerk resided in the state of the forum. It has also been held that shareholders of a foreign corporation whose franchise has been practically abandoned by those possessing control over it may maintain an action in the courts of this state for the recovery of property of the corporation found within this jurisdiction. Kidd *v.* New Hampshire Traction Co., 72 N. H. 273, 56 Atl. 465, 66 L. R. A. 574.

92. Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

93. See *supra*, V, B, 8, c.

tions, where the transaction which is the subject of the action happened within the state.[94]

(IV) *Specific Performance of Contract to Issue Shares or Bonds.* Still another exception has been declared, to the effect that an action by a resident shareholder of a foreign corporation to obtain a specific performance of a contract of another foreign corporation, to issue stock to the former corporation or its shareholders, pursuant to an agreement for the consolidation of the two corporations, is within the jurisdiction of the courts of the domestic state.[95] On the contrary, it has been held that a foreign corporation cannot maintain a suit in equity in Massachusetts against a foreign corporation and a citizen of that commonwealth, to enforce specific performance of a covenant in a contract for the delivery of bonds and certificates of stock in payment of work to be performed by plaintiff corporation in a foreign state, and to restrain by injunction the citizen of Massachusetts from disposing, in that state, of shares of stock and bonds of the foreign corporation alleged to have been delivered to him in violation of plaintiff's rights, although the foreign corporation has an office in Massachusetts for the transfer of shares of its capital stock, and has appeared by attorney in the suit.[96]

(V) *Restraining Transfer of Property Within the State to Monopolistic Trust.* A bill in equity has been maintained in Illinois, by a resident shareholder of a foreign corporation, to enjoin it from transferring its real estate situated in Illinois to a corporation organized for the purpose of procuring possession of competing manufacturing plants, under an agreement that the seller will not engage in the business carried on by the corporation for a term of years, thus creating a monopoly contrary to the laws of Illinois; it appearing that the result of carrying out such an agreement would be to reduce the value of the shares owned by the complainant and to create such a monopoly as would be ground for prohibiting the foreign corporation from doing business in the state under its statute relating to monopolistic trusts.[97]

11. Actions Against Foreign Corporations Which Have Withdrawn From State of Forum or Revoked Agent's Authority. A foreign corporation which has gone into another state and done business and incurred liabilities there, cannot, by withdrawing from such state, or by returning to the state of its own domicile, escape responsibility for the obligations thus incurred; but it may be sued to enforce such obligations in a court of the state where they were incurred, provided service of process can be had upon it in the mode prescribed by statute.[98] Under some statutes it is held that where a foreign corporation comes into a state and does business, complying with the law by appointing an agent for the service of process or agreeing, expressly or impliedly, that in actions against it arising out of its business in the state process may be served on the public officer designated by statute, it cannot prevent actions against it arising out of its business in the state by withdrawing therefrom and attempting to revoke the authority to receive service of process conferred upon such agent or public officer; the appointment of the agent, for such purpose being irrevocable.[99] Under other statutes there are

94. Toronto General Trust Co. *v.* Chicago, etc., R. Co., 32 Hun (N. Y.) 190.

95. Babcock *v.* Schuylkill, etc., R. Co., 9 N. Y. Suppl. 845.

96. Kansas, etc., Constr. Co. *v.* Topeka, etc., R. Co., 135 Mass. 34, 46 Am. Rep. 439.

97. Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738.

98. Augusta Nat. Bank *v.* Southern Porcelain Mfg. Co., 55 Ga. 36. *Compare* Bawknight *v.* Liverpool, etc., Ins. Co., 55 Ga. 194; McCord Lumber Co. *v.* Doyle, 97 Fed. 22, 38 C. C. A. 34.

99. *Georgia.*— Equity L. Assoc. *v.* Gammon, 119 Ga. 271, 46 S. E. 100, the power of the commissioner of insurance to appoint successors to the agent originally named by a foreign insurance company, and their authority to acknowledge and receive service of process, continue so long as there is any necessity to sue the company for breach of contracts made in the state.

Kentucky.— Germania Ins. Co. *v.* Ashby, 112 Ky. 303, 65 S. W. 611, 99 Am. St. Rep. 295, 23 Ky. L. Rep. 1564; Home Benefit Soc. *v.* Muehl, 109 Ky. 479, 59 S. W. 520, 22 Ky. L. Rep. 1378.

decisions to the contrary.[1] And where a foreign corporation, after appointing an agent to receive service of process, appoints another in his stead, as authorized by statute, process must be afterward served on the latter.[2]

12. Actions Against Foreign Corporations After Their License Has Been Revoked. The cancellation by a public officer under statutory authority, of the license to do business within the state granted to a foreign corporation after it has consented, as required by statute, that service of process upon a particular officer of the state in any action brought in the state should be a valid service upon the company, does not render such service, after the cancellation, insufficient to bring the company into a court of the state as a party defendant to a suit brought by a citizen upon a cause of action which arose out of transactions between the parties while the corporation was carrying on business in the state under the license.[3]

Maryland.— Ben Franklin Ins. Co. *v.* Gillett, 54 Md. 212, holding that, where a Pennsylvania insurance company had an agency in Maryland, and, while so doing business in Maryland, and through its Maryland agency, made a contract of insurance upon property situated in Virginia, and afterward withdrew its agency from the state of Maryland, the holder of the policy in Virginia could nevertheless maintain an action thereon in the courts of Maryland.

Minnesota.— Magoffin *v.* Mutual Reserve Fund L. Assoc., 87 Minn. 260, 91 N. W. 1115, 94 Am. St. Rep. 699, the stipulation which a foreign insurance company is required by statute to make and file with the insurance commissioner before doing business in the state, authorizing the service of process in any action against it on such officer, is irrevocable for any cause as to any outstanding liabilities growing out of any policies made in the state while the stipulation or any renewal thereof was in force.

New York.— Woodward *v.* Mutual Reserve Fund L. Assoc., 178 N. Y. 485, 71 N. E. 10, 102 Am. St. Rep. 519 [*reversing* 84 N. Y. App. Div. 324, 82 N. Y. Suppl. 908]; Hunter *v.* Mutual Reserve L. Assoc., 97 N. Y. App. Div. 222, 89 N. Y. Suppl. 849; Birch *v.* Mutual Reserve L. Assoc., 91 N. Y. App. Div. 384, 86 N. Y. Suppl. 872; Johnston *v.* Mutual Reserve L. Assoc., 45 Misc. 316, 90 N. Y. Suppl. 539 [*affirming* 87 N. Y. Suppl. 438, and *affirmed* in 93 N. Y. Suppl. 1048, 1052, 1062], all construing and applying the statute of North Carolina.

North Carolina.— Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667; Moore *v.* Mutual Reserve Fund L. Assoc., 129 N. C. 31, 39 S. E. 637.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630.

United States.— Mutual Reserve Fund L. Assoc. *v.* Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. ed. 987 [*affirming* 112 Fed. 453, 50 C. C. A. 339] (Kentucky statute); Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569 (Tennessee statute); Davis *v.* Kansas, etc., Coal Co., 129 Fed. 149 (Arkansas statute); Collier *v.* Mutual Reserve Fund L. Assoc., 119 Fed. 617 (Arkansas statute).

1. Forrest *v.* Pittsburgh Bridge Co., 116 Fed. 357, 53 C. C. A. 577, holding that the statute of Illinois (Act July 1, 1897, as amended in 1899) requiring every foreign corporation doing business in the state to file a certificate with the secretary of state showing the name and address of its agent on whom service of process may be made, contained no provision requiring such corporation to give notice of its withdrawal from the state, and, in the absence of legislation on the subject, after a corporation has in fact withdrawn and is no longer represented by the designated agent, jurisdiction over it cannot be obtained by service upon him. See also Territory *v.* Baker, (N. M. 1904) 78 Pac. 624 [*affirmed* in 196 U. S. 432, 25 S. Ct. 375, 49 L. ed. 540] (holding that where it appeared that a railroad company, before the time of an attempted service of process upon its president while he was passing through the territory of New Mexico as a sojourner and not in connection with any business of the company, the company had disposed of all its franchises and property, except some lands acquired by foreclosure within the territory, that its directors held their meetings in New York, that its president had his office in Chicago, and that its land commissioner had his office in Topeka, Kansas, the president was not found within the territory, within the act of congress of July 2, 1890, chapter 647 (U. S. Comp. St. (1901) p. 3200), providing for suit in the circuit court in the district in which defendant resides or is found); Conley *v.* Mathieson Alkali Works, 190 U. S. 406, 23 S. Ct. 728, 47 L. ed. 1113 [*affirming* 110 Fed. 730] (holding that service of summons in New York on resident directors of a foreign corporation, not officially representing the corporation, was insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business within the state and had designated no agent upon whom service could be made). See also Frawley *v.* Pennsylvania Casualty Co., 124 Fed. 259, Wisconsin statute.

2. Mullins *v.* Central Coal, etc., Co., (Ark. 1904) 84 S. W. 477.

3. Mutual Reserve Fund L. Assoc. *v.* Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. ed. 987 [*affirming* 112 Fed. 453, 50 C. C. A. 339], under Ky. St. (1899) § 631, relating to for-

13. Actions Against Corporations Created by Concurrent Legislation of Several States. Such corporations are suable as domestic corporations within each of the states by whose legislation their corporate existence within that state has been created;[4] but for the purposes of federal jurisdiction it remains a citizen of the state by which it was originally created, notwithstanding it may have been also incorporated in other states.[5]

14. Local Venue of Actions Against Foreign Corporations. This is almost entirely the subject of statutory regulation, and the manifest tendency is discovered in the statutes to facilitate such actions.[6] Under statutes of Ohio a life-insurance company is suable in the county of the death of the insured and summons is properly served on an agent in another county.[7] In Idaho foreign corporations are, for the purposes of jurisdiction, non-residents of the state, and may be sued in the district court in any county in the state designated in plaintiff's complaint.[8] In West Virginia a foreign corporation doing business in the state, having no principal office or chief officer residing therein, may be sued in any county wherein it does business, where the cause of action arose out of the state, if process can be legally served in such county.[9] In Texas a corporation waives its plea of privilege under the statute to be sued in the county where it has an agent, by appearing and moving to quash the citation and agreeing on a continuance.[10]

15. Pleadings in Actions Against Foreign Corporations. It seems that, in an action against a foreign corporation, it is necessary to allege under the laws of what state defendant is incorporated;[11] although the contrary has been held in one state.[12] If the charter powers or franchises of a corporation are made the foundation of the action against it, the same must be specially pleaded in the petition or complaint; and the name of the state by which, and the substantial terms in which the charter powers or franchises were granted, should be made to appear in the petition or complaint.[13] If the complaint alleges that defendant is a foreign corporation, giving its name, and if this allegation is expressly admitted by the answer, and if the answer is signed by counsel as "defendant's attorney," and if the verification of the answer is made by an affiant, as "an officer of defendant corporation," this sufficiently establishes the identity of the corporation to dispense with proof of the same.[14] Other cases relating to the question

eign insurance companies, and authorizing service of process on the insurance commissioner. This decision in effect overrules Swann *v.* Mut. Reserve Fund Assoc., 100 Fed. 922, where the contrary was decided under the same statute.

4. Georgia, etc., R. Co. *v.* Stollenwerck, 122 Ala. 539, 25 So. 258 (when sued in either may not plead its non-residence); Mobile, etc., R. Co. *v.* Barnhill, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655, 65 Am. Dec. 254; Memphis, etc., R. Co. *v.* Alabama, 107 U. S. 581, 2 S. Ct. 432, 27 L. ed. 518.

5. Louisville, etc., R. Co. *v.* Louisville Trust Co., 174 U. S. 552, 19 S. Ct. 817, 43 L. ed. 1081 [*affirming* in part and *reversing* in part 75 Fed. 433, 22 C. C. A. 378 (*reversing* 69 Fed. 431)]. See also Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65, 20 L. ed. 354 (railroad incorporated in Maryland extended by an act of congress into the District of Columbia, suable in that district for an injury done to a passenger on its cars in Virginia). *Compare* Goshorn *v.* Ohio County, 1 W. Va. 308; Baltimore, etc., R. Co. *v.* Marshall County, 3 W. Va. 319.

6. Hocker *v.* Western Union Tel. Co., (Fla. 1903) 34 So. 901, any county in which the company has an agent or other representative.

Venue in actions against foreign corporations see, generally, VENUE.

7. Householder *v.* Kansas Mut. L. Assoc., 8 Ohio S. & C. Pl. Dec. 321, 6 Ohio N. P. 520.

8. Boyer *v.* Northern Pac. R. Co., 8 Ida. 74, 66 Pac. 826.

9. Empire Coal, etc., Co. *v.* Hull Coal, etc., Co., 51 W. Va. 474, 41 S. E. 917. See also Quesenberry *v.* People's Bldg., etc., Assoc., 44 W. Va. 512, 30 S. E. 73, foreign building association suable in the county where it may be found or where it may have estate or debts due to it.

10. Houston, etc., R. Co. *v.* Granberry, 16 Tex. Civ. App. 391, 40 S. W. 1062.

11. Clegg *v.* Chicago Newspaper Union, 8 N. Y. Civ. Proc. 401; Brady *v.* National Supply Co., 64 Ohio St. 267, 60 N. E. 218.

12. Machen *v.* Western Union Tel. Co., 63 S. C. 363, 41 S. E. 448.

13. Brady *v.* National Supply Co., 64 Ohio St. 267, 60 N. E. 218.

14. De Maio *v.* Standard Oil Co., 68 N. Y. App. Div. 167, 74 N. Y. Suppl. 165.

of pleading in actions against foreign corporations are referred to in the note below.[15]

16. Actions For Dissolution and Winding Up of Foreign Corporations. These must in general be prosecuted in the state of the incorporation, and under the laws of such state; and creditors and shareholders of such a corporation, without regard to their residence, impliedly agree that such shall be the jurisdiction.[16] The local creditors, after obtaining satisfaction out of any fund deposited by the foreign corporation within the state for their security, can only participate in the general distribution of the assets of the corporation, to the extent of the unpaid balances of their claims.[17] And they are only entitled to participate in the general distribution of the corporate assets to the extent of equalizing their dividends with those of domestic creditors, and are not entitled to share in such distribution if the dividend received from the foreign state exceeds the dividend paid on the general distribution.[18]

15. **Complaint, declaration, petition, or bill.** — The complaint in an action against a foreign corporation must allege the facts necessary to show jurisdiction, as, under the New York statute (see *supra*, V, B, 8, c, (I)), that plaintiff is a resident, or, if a nonresident, that the cause of action arose within the state, etc. Coolidge *v.* American Realty Co., 91 N. Y. App. Div. 14, 86 N. Y. Suppl. 318; Snow *v.* Snow-Church Surety Co., 80 N. Y. App. Div. 40, 80 N. Y. Suppl. 512; Rosenblatt *v.* Jersey Novelty Co., 45 Misc. (N. Y.) 59, 90 N. Y. Suppl. 816. And see *supra*, V, B, 6, d, (I), (F), text and note 23. But see Herbert *v.* Montana Diamond Co., 81 N. Y. App. Div. 212, 80 N. Y. Suppl. 717 (sustaining, as against a demurrer, a complaint by the assignee of a claim against a foreign corporation arising out of the state, although it did not show that he was a resident); MacGinnis *v.* Amalgamated Copper Co., 45 Misc. (N. Y.) 106, 91 N. Y. Suppl. 591. As to the sufficiency of the allegations as to defendant corporations having an office or agent in the state or county see Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405. In an action against a foreign corporation on a contract made by it while doing business in the state, it is not necessary that the complaint shall allege compliance on the part of defendant with the local statutes, so as to be entitled to do business in the state, particularly where the corporation cannot set up its noncompliance as a defense. Germania F. Ins. Co. *v.* Curran, 8 Kan. 9; Clay F. & M. Ins. Co. *v.* Huron Salt, etc., Mfg. Co., 31 Mich. 346. See *supra*, IV, C. A petition in an action against a foreign corporation, averring that defendant is a corporation doing business in the state, and has a local agent representing it in the county where the suit is filed, is sufficient to confer jurisdiction over it, although it is not alleged that such corporation has obtained a permit to do business in the state. Home Forum Ben. Order *v.* Jones, 20 Tex. Civ. App. 68, 48 S. W. 219. In an action on a policy of insurance issued by a foreign company, it is not necessary to state in the declaration how it was incorporated, or that it had power to enter into the contract, or to sue and be sued. Gerow *v.* Providence Washington Ins. Co., 26 N. Brunsw. 142. The complaint need not show that defendant corporation has filed a stipulation, as required by statute authorizing process against it to be served on a particular officer or agent, as its compliance with the law will be presumed. Old Wayne Mut. Life Assoc. *v.* Flynn, (Ind. App. 1903) 66 N. E. 57.

Plea or answer.— Where a personal judgment or decree is sought against a foreign corporation it is entitled to present the question of jurisdiction by plea. Groel *v.* United Electric Co., (N. J. Ch. 1904) 59 Atl. 640. As to the sufficiency of a plea to the jurisdiction see Groel *v.* United Electric Co., *supra*. An allegation in a special plea to the jurisdiction, or to the venue, that defendant corporation had a local agent in another county than the one in which it is sued sufficiently shows that it is doing business within the state, within the meaning of a statute relating to jurisdiction of actions against foreign corporations. St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126, 13 S. W. 853. Voluntary appearance and plea to the merits waives objection to jurisdiction. St. Louis, etc., R. Co. *v.* Whitley, 77 Tex. 126, 13 S. W. 853. See, generally, Pleading. As to pleading the defense of *ultra vires* and the foreign statute under which defendant was incorporated see Mason *v.* Standard Distilling, etc., Co., 85 N. Y. App. Div. 520, 83 N. Y. Suppl. 343. As to sufficiency of the answer of a defendant foreign corporation, verified by its attorney and denying any knowledge or information sufficient to form a belief, etc., see American Audit Co. *v.* Industrial Federation of America, 84 N. Y. App. Div. 304, 82 N. Y. Suppl. 642.

Plea in abatement see Scott *v.* Stockholders' Oil Co., 129 Fed. 615.

16. Bank Com'rs *v.* Granite State Provident Assoc., 70 N. H. 557, 49 Atl. 124. See *supra*, I, H, 2, text and note 56; and Corporations, 10 Cyc. 1304 *et seq.*

17. Bank Com'rs *v.* Granite State Provident Assoc., 70 N. H. 557, 49 Atl. 124.

18. Bank Com'rs *v.* Granite State Provident Assoc., 70 N. H. 557, 49 Atl. 124. That the courts of one state may render judgment upon a judgment note executed within another state by a foreign corporation, and dis-

17. Effect of Dissolution of Foreign Corporation on Actions Against It. In the absence of a statute an action cannot be commenced or continued against a foreign corporation after it has been dissolved by expiration of its charter, judgment of a competent court of its domicile, or otherwise;[19] but this rule has been changed in some states by statute.[20] In some cases it has been held that a statute of the state of the forum continuing the existence of dissolved corporations for a prescribed period from the date of their dissolution, for the purpose of prosecuting or defending suits, etc., has no application to foreign corporations.[21] And it has been held that a statute of the state of the domicile of a corporation, making its directors and managers trustees for the purpose of winding up its affairs, is not operative outside such state for the purpose of continuing actions against it; since the mode of continuing actions against foreign corporations is a matter of practice governed by the law of the forum.[22]

FOREIGN COURT. See Courts.[1]
FOREIGN DIVORCE. See Divorce.[2]

tribute corporate property within their jurisdiction levied on therein, in accordance with the *lex fori* see Youngstown First Nat. Bank *v.* McKinney, 16 Ohio Cir. Ct. 80, 9 Ohio Cir. Dec. 1.

19. *Alabama.*— Fitts *v.* National Life Assoc., 130 Ala. 413, 30 So. 374.

Massachusetts.— Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022, 102 Am. St. Rep. 356; Remington *v.* Samana Bay Co., 140 Mass. 494, 5 N. E. 292.

New York.—Sturges *v.* Vanderbilt, 73 N. Y. 384; Matter of Stewart, 39 Misc. 275, 79 N. Y. Suppl. 525, 40 Misc. 32, 81 N. Y. Suppl. 209.

Pennsylvania.— Farmers', etc., Bank *v.* Little, 8 Watts & S. 207, 42 Am. Dec. 393.

United States.— Mumma *v.* Potomac Co., 8 Pet. 284, 8 L. ed. 281; Marion Phosphate Co. *v.* Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252.

See also Corporations, 10 Cyc. 1316 *et seq.*

After the dissolution of a foreign corporation an action pending against it cannot be continued against its directors. Wamsley *v.* H. L. Horton Co., 17 Misc. (N. Y.) 327, 39 N. Y. Suppl. 963. And where, pending an action against a foreign corporation, it ceases to exist by reason of a judgment of a competent court in the state of its domicile, plaintiff in such action cannot take supplementary proceedings on a judgment subsequently recovered against it in the state, and examine a third party as to property of the corporation alleged to be in his hands. Matter of Stewart, 39 Misc. (N. Y.) 275, 79 N. Y. Suppl. 525, 40 Misc. (N. Y.) 32, 81 N. Y. Suppl. 209. It has been held, however, that a judgment rendered in a foreign state, dissolving a corporation domiciled there, does not *ipso facto* operate to oust the jurisdiction of another state over a pending action against the corporation; but until the fact of the judgment of dissolution is brought to the attention of the court wherein such action is pending, and until steps are taken to enforce it there, the status of the corporation is not changed there, nor are the remedies of creditors in that state against the corporation taken away. Hammond *v.* National Life Assoc., 58 N. Y. App. Div. 453, 69 N. Y. Suppl. 585 [*affirming* 31 Misc. 182, 65 N. Y. Suppl. 407].

20. Life Association of America *v.* Fassett, 102 Ill. 315; Sturges *v.* Vanderbilt, 73 N. Y. 384; McCullough *v.* Norwood, 36 N. Y. Super. Ct. 180; Stetson *v.* New Orleans City Bank, 2 Ohio St. 167, 12 Ohio St. 577; Illinois State Bank *v.* Corwith, 6 Wis. 551.

21. Fitts *v.* National Life Assoc., 130 Ala. 413, 30 So. 374; Olds *v.* City Trust, etc., Co., 185 Mass. 500, 70 N. E. 1022; Wamsley *v.* H. L. Horton Co., 17 Misc. (N. Y.) 327, 39 N. Y. Suppl. 963; Marion Phosphate Co. *v.* Perry, 74 Fed. 425, 20 C. C. A. 490, 33 L. R. A. 252, construing the Florida statute. But *compare* Life Association of America *v.* Fassett, 102 Ill. 315; Stetson *v.* New Orleans City Bank, 2 Ohio St. 167, 12 Ohio St. 577. In a late New York case it was held that while a statute of another state, continuing dissolved insurance and other corporations for a certain period for the purpose of prosecuting suits by or against them, may render valid and effective a judgment obtained in such state against a corporation of New York after its dissolution there, so far as its property within such other state where it had been doing business is concerned, the courts of New York are not required by comity to give, and will not give to such foreign judgment the effect of reaching the corporate assets held by a receiver in New York as a fund for distribution, after the dissolution of the corporation there, when the receiver has not been made a party to the foreign suit so as to be bound by the judgment therein. Nelson *v.* Adriatic F. Ins. Co., 148 N. Y. 34, 42 N. E. 515.

22. Sturges *v.* Vanderbilt, 73 N. Y. 384; Wamsley *v.* H. L. Horton Co., 17 Misc. (N. Y.) 327, 39 N. Y. Suppl. 963.

1. See also 2 Cyc. 276.

"British court in a foreign country" see 53 & 54 Vict. c. 37, § 16.

2. See 14 Cyc. 936, 814.

FOREIGN DOCUMENT. See EVIDENCE.[3]

FOREIGN DOMICILE. See DOMICILE.

FOREIGN DOMINION. A country which at some time formed a part of the dominions of a foreign state or potentate, but which by conquest or cession has become a part of the dominions of the crown of England.[4]

FOREIGNER. In general sense, a term applied to a person or thing belonging to another nation or country.[5] (See, generally, ALIENS; AMBASSADORS AND CONSULS; CITIZENS.)

FOREIGN EXCHANGE. See COMMERCIAL PAPER.[6]

FOREIGN EXECUTOR. See EXECUTORS AND ADMINISTRATORS.[7]

FOREIGN FACTOR. See FACTORS AND BROKERS.

FOREIGN FORUM. See CORPORATIONS.[8]

FOREIGN GOODS. Goods imported from a foreign country.[9]

FOREIGN GOVERNMENT. See FOREIGN STATE.

FOREIGN GUARDIANSHIP. See GUARDIAN AND WARD.

FOREIGN INSURANCE. See INSURANCE, and the Insurance Titles.[10]

FOREIGN JUDGMENT. See JUDGMENTS.[11]

FOREIGN JURISDICTION. Any jurisdiction foreign to that of the forum.[12]

FOREIGN JURY. See JURIES.

FOREIGN KINGDOM. A kingdom which is under the dominion of a foreign prince.[13] (See FOREIGN STATE.)

FOREIGN LAW. The law of a foreign country, or of a sister state.[14] (See, generally, EVIDENCE; STATUTES.)

FOREIGN LOTTERY.[15] See GAMING.

FOREIGN MAIL. See POST-OFFICE.[16]

FOREIGN MARKET. A term applied to a market located in a foreign country.[17]

FOREIGN MINISTER. See AMBASSADORS AND CONSULS.

FOREIGN MISSIONS. A term used in contradistinction to home missions, and applicable to all missions located or conducted in a country which is foreign to that where the home organization is established.[18] (See RELIGIOUS SOCIETIES.)

FOREIGN MONEY. See FOREIGN BILLS.

FOREIGN NAVIGATION. A term applicable to ships when passing to or from a foreign country.[19]

FOREIGN NOTE. See COMMERCIAL PAPER.[20]

3. See 17 Cyc. 360.

4. *Ex p.* Brown, 5 B. & S. 280, 290, 10 Jur. N. S. 945, 10 L. T. Rep. N. S. 458, 12 Wkly. Rep. 821, 117 E. C. L. 280.

5. Cherokee Nation *v.* Gerogia, 5 Pet. (U. S.) 1, 56 L. ed. 25. See also 4 Cyc. 406; 2 Cyc. 5.

6. See 7 Cyc. 527.

7. See also 8 Cyc. 72 note 29, 81 note 99; 7 Cyc. 786 note 91.

8. See 10 Cyc. 671.

9. Hart *v.* Willetts, 62 Pa. St. 15, 16, the common meaning of the term in its application to goods.

"Foreign as distinguished from home merchandise" see Mansion House Assoc. *v.* London, etc., R. Co., [1895] 1 Q. B. 927, 934, 72 L. T. Rep. N. S. 507, 64 L. J. Ch. 529, 9 R. & Can. Tr. Cas. 20.

10. See also 8 Cyc. 1113 note 61.

11. See also 10 Cyc. 676; 9 Cyc. 121 note 61.

12. Black L. Dict. See also 10 Cyc. 1329, 9 Cyc. 118 note 46.

13. King *v.* Parks, 19 Johns. (N. Y.) 375, 376.

14. Black L. Dict. See also 17 Cyc. 492; 10 Cyc. 671, 1330; 9 Cyc. 406; 8 Cyc. 182; 7 Cyc. 632.

15. "Foreign lottery see Macnee *v.* Persian Invest Corp., 44 Ch. D. 306, 312, 59 L. J. Ch. 695, 62 L. T. Rep. N. S. 894, 38 Wkly. Rep. 596.

16. See also 7 Cyc. 1088.

17. Shuster *v.* Ash, 11 Serg. & R. (Pa.) 90, 91.

Foreign distinguished from home market see Shoemaker *v.* Lansing, 17 Wend. (N. Y.) 327, 328.

18. Bruere *v.* Cook, 63 N. J, Eq. 624, 52 Atl. 1001. See also American Bible Soc. *v.* Wetmore, 17 Conn. 181, 186 ("The Foreign Mission Society"); Howard *v.* American Peace Soc., 49 Me. 288, 299 ("Congregational Foreign Missionary Society"); Button *v.* American Tract Soc., 23 Vt. 336, 348 ("The American Home Mission Tract Society for our western missions").

19. N. D. Rev. Codes (1899), § 3470; Okla. Rev. St. (1903) § 4166; S. D. Civ. Code (1903), § 387, where the term is defined in connection with "domestic navigation."

20. See 8 Cyc. 140, 148 note 49.

FOREIGN PATENT. See PATENTS.

FOREIGN PAUPER.[21] See PAUPERS.

FOREIGN PLACE. A port or place exclusively within the sovereignty of a foreign nation.[22]

FOREIGN PLEA. A plea showing some other court in which the matter should be tried.[23] (See, generally, PLEADING.)

FOREIGN PORT. A port within the dominions of a foreign sovereign, and without the dominions of the United States;[24] a port or place without the United States;[25] some spot within the territory of a foreign nation.[26] The term is also used to include all maritime ports other than those of the state where the vessel belongs.[27]

FOREIGN POST-OFFICE.[28] See POST-OFFICE.

FOREIGN RECEIVERSHIP. See RECEIVERS.

FOREIGN SOCIETY. See FOREIGN CORPORATIONS.

FOREIGN SOVEREIGN. See ABATEMENT AND REVIVAL.[29]

FOREIGN STATE. A foreign country or nation;[30] for all legal purposes the term embraces a neighboring state.[31]

FOREIGN STATUTE. See FOREIGN LAW.

FOREIGN SUBJECT.[32] See ALIENS.

FOREIGN TICKET. A ticket purchased beyond the limits of the state, and from the agents of some connecting railway in another state.[33] (See, generally, CARRIERS.)

FOREIGN TRADE.[34] The exportation and importation of goods or the exchange of the commodities of different countries.[35] (See DOMESTIC TRADE.)

21. "**Foreign paupers**" see Opinion of Justices, 1 Metc. (Mass.) 572, 578.

22. The Eliza, 8 Fed. Cas. No. 4,346, 2 Gall. 4, 7.

23. English L. Dict. See also Mazyck *v.* Coil, 3 Rich. (S. C.) 235, 237.

24. U. S. *v.* Hayward, 26 Fed. Cas. No. 15,336, 2 Gall. 485, 501. See also Chatham Overseers of Poor *v.* Overseers of Poor, 19 Johns. (N. Y.) 56, 57 [*quoted* in King *v.* Parks, 19 Johns. (N. Y.) 375, 376].

"**Any foreign port**" see The John Martin, 13 Fed. Cas. No. 7,357, 2 Abb. 172, 179.

"**For any foreign port or place**" see The Adventure, 1 Fed. Cas. No. 93, 1 Brock. 235, 239; The Eliza, 8 Fed. Cas. No. 4,346, 2 Gall. 4, 7.

25. King *v.* Parks, 19 Johns. (N. Y.) 375, 377.

26. The Adventure, 1 Fed. Cas. No. 93, 1 Brock. 235, 239, 240.

27. Cole *v.* White, 26 Wend. (N. Y.) 511, 517; State Tonnage Tax Cases, 12 Wall. (U. S.) 204, 212, 20 L. ed. 370; Hazlehurst *v.* The Lulu, 10 Wall. (U. S.) 192, 200, 19 L. ed. 906; The Albany, 1 Fed. Cas. No. 131, 4 Dill. 439, 444 [*citing* Burke *v.* The M. P. Rich, 4 Fed. Cas. No. 2,161, 1 Cliff. 308].

"By the civil law, and the laws of France, all ports where the owner does not reside are treated as foreign." The William and Emmeline, 29 Fed. Cas. No. 17,687, Blatchf. & H. 66, 72 [*citing* 2 Emergon 424, 436, 437; 2 Valin 10, 11].

28. "**Foreign postage**" see 11 Vict. c. 36.

29. See 2 Cyc. 113; 1 Cyc. 119 note 72.

30. Black L. Dict.

Foreign country or state see 17 Cyc. 247; 9 Cyc. 515; 8 Cyc. 45 note 56; 7 Cyc. 415, 413 note 6, 133; 1 Cyc. 83.

"**Foreign nations**" see Brackett *v.* Norton, 4 Conn. 517, 521, 10 Am. Dec. 179; Allen *v.* Watson, 2 Hill (S. C.) 319, 320; Owings *v.* Hull, 9 Pet. (U. S.) 607, 625, 9 L. ed. 246.

"**Foreign possession**" see San Paulo R. Co. *v.* Carter, [1896] A. C. 31, 43, 60 J. P. 84, 452, 65 L. J. Q. B. 161, 73 L. T. Rep. N. S. 538, 44 Wkly. Rep. 336; London Bank *v.* Apthorpe, [1891] 2 Q. B. 378, 382, 56 J. P. 86, 60 L. J. Q. B. 653, 65 L. T. Rep. N. S. 601, 39 Wkly. Rep. 564.

31. Gillespie *v.* Hannahan, 4 McCord (S. C.) 503, 507. See also Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1, 17, 8 L. ed. 25; 36 & 37 Vict. c. 88, § 2; 36 & 37 Vict. c. 59, § 2; 33 & 34 Vict. c. 90, § 30; 13 & 14 Vict. c. 88, § 1.

"**We do not regard the Government of the United States a foreign Government.** It is true, it is a Government independent of the State Government, moving in a different sphere from that of the State Government, and with a different class of powers, distinct but not antagonistical, and operating upon and within the circle of its powers, supreme over the same constituents." Gilmer *v.* Lime Point, 18 Cal. 229, 255. See also Cadett *v.* Earle, 46 L. J. Ch. 798, 799.

Foreign county see 11 Cyc. 611.

32. "**Foreign subject**" see Karrahoo *v.* Adams, 14 Fed. Cas. No. 7,614, 1 Dill. 344, 347.

33. Humphries *v.* Illinois Cent. R. Co., 70 Miss. 453, 456, 12 So. 155.

34. **Distinguished from "coastwise" trade** in U. S. *v.* Patten, 27 Fed. Cas. No. 16,007, Holmes 421, 424.

35. *In re* Roofing, etc., Contractors' Assoc., 9 Pa. Dist. 569, 570. See also Russell *v.* U. S., 21 Fed. Cas. No. 12,164, 15 Blatchf.

FOREIGN VESSEL. A vessel owned by residents in, or sailing under the flag of, a foreign nation.[36] (Foreign Vessel: Admiralty Jurisdiction Over, see ADMIRALTY.[37] Regulation of, see SHIPPING.)

FOREIGN VOYAGE. A voyage to some port or place within the territory of a foreign nation;[38] a voyage intended to some place within the limits or jurisdiction of a foreign country, or at least without the territorial jurisdiction of the United States.[39]

FOREIGN WILL. See WILLS.[40]

FOREIGN WITNESS. See WITNESSES.[41]

FOREMAN. See MASTER AND SERVANT.

FOREMAN OF JURY. See GRAND JURIES; JURIES.

FORESAID. A term used in Scotch law as "aforesaid" is in English, and sometimes, in a plural form, "foresaids."[42] (See AFORESAID.)

FORESEEN. A term less broad than "contemplated."[43]

FORESHORE. That part of the land adjacent to the sea which is alternately covered and left dry by the ordinary flow of the tides.[44] (See, generally, BOUNDARIES; NAVIGABLE WATERS. See also FLAT.)

FOREST. See WOODS AND FORESTS.

FORESTALLING. See MONOPOLIES.

FOREST COURT. A court held for the enforcement of the forest laws.[45] (See COURT OF ATTACHMENTS; COURT OF REGARDS; COURT OF SWEINMOTE; and, generally, COURTS.)

FOREVER.[46] Ever;[47] through eternity; through endless ages; eternally.[48] The term is sometimes used as the equivalent of permanently.[49] (See ALWAYS; EVER.)

26, 28; U. S. *v.* Patten, 27 Fed. Cas. No. 16,007, Holmes 421, 423.

36. Black L. Dict.

"Foreign ship" see 41 & 42 Vict. c. 73, § 7.

"Vessel of a foreign state" see 36 & 37 Vict. c. 88, § 2.

37. See 7 Cyc. 323; 1 Cyc. 818.

38. Taber *v.* U. S., 23 Fed. Cas. No. 13,722, 1 Story 7, 8, where it is said: "'Foreign voyage' is used [in the statute under consideration] in contradistinction to fishing voyage, and whaling voyage, expressing the clear sense of the legislature, that a fishing voyage or a whaling voyage is not 'a foreign voyage.'"

39. The Lark, 14 Fed. Cas. No. 8,090, 1 Gall. 55, 57. See also The Ocean Spray, 18 Fed. Cas. No. 10,412, 4 Sawy. 105, 109; The Three Brothers, 23 Fed. Cas. No. 14,009, 1 Gall. 142, 143.

40. See also 18 Cyc. 1226.

41. See also 9 Cyc. 142 note 77.

42. Cyclopedic L. Dict. [*citing* 1 Pitcairn Cr. Tr. pt. 1, p. 107].

"These 'foresaid' boundaries" see Lord Advocate *v.* Wemyss, [1900] A. C. 48, 70.

43. See 8 Cyc. 1145 note 68.

44. Black L. Dict.

45. Bouvier L. Dict. See also Reg. *v.* Conyers, 8 Q. B. 981, 999, 10 Jur. 899, 15 L. J. Q. B. 300, 55 E. C. L. 981.

46. Distinguished from "always" see 2 Cyc. 258.

Distinguished from "heirs and assigns" in Dennis *v.* Wilson, 107 Mass. 591, 593 [*citing* Sedgwick *v.* Laflin, 10 Allen (Mass.) 430; Buffum *v.* Hutchinson, 1 Allen (Mass.) 58; Curtis *v.* Gardner, 13 Metc. (Mass.) 547; 4 Blackstone Comm. 107; 2 Preston Estates].

"It is the natural adjunct of a fee simple, and inconsistent with an estate tail; which, in the nature of it, is not supposed to last for ever, but to be revertible to him from whom it came." Hall *v.* Vandegrift, 3 Binn. (Pa.) 374, 390.

47. See 16 Cyc. 818.

48. Webster Int. Dict.

49. Sawyer *v.* Arnold, 1 La. Ann. 315, 316.

In connection with other words the word "forever" has often received judicial interpretation; as for example as used in the following phrases: "Absolutely and forever" (see Fenton *v.* Fenton, 35 Misc. (N. Y.) 479, 485, 71 N. Y. Suppl. 1083); "forever after" (see Farley *v.* Craig, 11 N. J. L. 262, 264); "forever hereafter restricted" (see Landell *v.* Hamilton, 175 Pa. St. 327, 333, 34 Atl. 663, 34 L. R. A. 227); "from date hereof forever" (see Williams *v.* Woodard, 2 Wend. (N. Y.) 487, 492); "his heirs and assigns forever" (see Ewan *v.* Cox, 9 N. J. L. 10, 12; Toman *v.* Dunlop, 18 Pa. St. 72, 76; Mifflin *v.* Neal, 6 Serg. & R. (Pa.) 460, 461); "his heirs lawfully begotten forever" (see Ewan *v.* Cox, 9 N. J. L. 10, 15); "remain forever afterward the county seat" (see Casey *v.* Harned, 5 Iowa 1, 7); "the lower tenement in above said house forever" (see McNally *v.* McNally, 23 R. I. 180, 49 Atl. 699); "to the right heirs of Walter Read and Mary his wife for ever" (see Wright *v.* Vernon, 2 Drew. 439, 458); "trees and timber standing and growing on the close forever" (see Clap *v.* Draper, 4 Mass. 266, 267, 3 Am. Dec. 215); "upon trust for the right heirs . . . for ever" (see Vernon *v.* Wright, 7 H. L. Cas. 35, 45, 11 Eng. Reprint 15).

FORFEIT.[50] As a noun, that which is forfeited or lost by neglect of duty;[51] something lost by the commission of a crime; something paid for the expiation of the crime;[52] or in other words, a fine,[53] a mulct;[54] a penalty;[55] a forfeiture;[56] that which is or may be taken from one in requital of a misdeed committed — that which is lost, or the right to which is alienated by a crime, offence, neglect of duty, or breach of contract;[57] not merely that which is actually taken from a man by reason of some breach of condition, but also that which becomes liable to be so taken.[58] As an adjective, in its usual and common meaning, lost, by omission or negligence or misconduct;[59] liable to penal seizure; alienated by a crime, lost either as to right or possession by breach of conditions.[60] As a verb, to lose, and this is also its legal meaning;[61] to lose by some breach of condition, to lose by some offense;[62] to do away or lose, to do or put away a property or right, to alienate or lose (by misdeed or transgression);[63] and the term is frequently construed as meaning "to pay."[64] (See, generally, FORFEITURES.)

50. Derivation.—"From the French '*fors*,' 'out of,' '*faire*,' 'to do, or cause to be out of,' away from, and consequently '*transgredi*,' to transgress or do amiss, misdo, and also '*rem suam amittere*,' (*sc. ex delicto*) to do away or lose his property (*sc.* for some crime)." Commercial Bank *v.* Cotton, 17 U. C. C. P. 447, 455 [*quoting* Johnson Dict.].

The meaning of the word, has to be determined by the connection in which it is used. —When used in civil proceedings and in connection with the enforcement of civil rights, it contemplates an ordinary civil judgment, which need not even be penal in its character. But, when used in a criminal law to denote a punishment for a statutory crime, the meaning of the word is equivalent to fine. *Ex p.* Alexander, 39 Mo. App. 108, 109 [*citing* Com. *v.* Avery, 14 Bush (Ky.) 625, 29 Am. Rep. 429; State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532; Edwards *v.* Brown, 67 Mo. 377; Greene County *v.* Wilhite, 29 Mo. App. 459; State *v.* Sellner, 17 Mo. App. 39].

51. Webster Dict. [*quoted* in State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 432, 38 Am. Dec. 319].

52. *In re* Levy, 30 Ch. D. 119, 124, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895 [*quoting* Johnson L. Dict., and *quoted* in King *v.* Gardner, 25 Nova Scotia 48, 52].

53. Com. *v.* Avery, 14 Bush (Ky.) 625, 629, 29 Am. Rep. 429; State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 432, 38 Am. Dec. 319 [*citing* Webster Dict.]; Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302, 304; *In re* Levy, 30 Ch. D. 119, 124, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895.

54. State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 432, 38 Am. Dec. 319; Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302, 304; *In re* Levy, 30 Ch. D. 119, 124, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895.

55. Salter *v.* Ralph, 15 Abb. Pr. (N. Y.) 273, 276; Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302, 304 [*citing* Worcester Dict.]; King *v.* Gardner, 25 Nova Scotia 48, 52 [*quoting* Webster Dict.].

"The term forfeit, in common parlance, strongly implies penalty, and such appears to be the import ascribed to it by lexicographers of the highest respectability, in giving with precision and accuracy, the meaning of our language." State *v.* Baltimore, etc., R. Co., 12 Gill & J. (Md.) 399, 432, 38 Am. Dec. 319.

56. Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302, 304 [*citing* Worcester Dict.].

57. Webster Dict. [*quoted* in King *v.* Gardner, 25 Nova Scotia 48, 52].

58. *In re* Levy, 30 Ch. D. 119, 125, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895, where it is said that "forfeited" as used in a statute "is contrasted with the words 'vested in any other person.'"

59. Nolander *v.* Burns, 48 Minn. 13, 17, 50 N. W. 1016, where the word is considered in connection with "surrender" as used in a statute, and is distinguished from "forfeitable."

60. *In re* Levy, 30 Ch. D. 119, 124, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895 [*quoting* Johnson Dict.].

61. Eakin *v.* Scott, 70 Tex. 442, 445, 7 S. W. 777 [*quoted* in Wright *v.* Dobie, 3 Tex. Civ. App. 194, 196, 22 S. W. 66].

62. Taylor *v.* The Marcella, 23 Fed. Cas. No. 13,797, 1 Woods 302 [*citing* Worcester Dict.]; *In re* Levy, 30 Ch. D. 119, 124, 54 L. J. Ch. 968, 53 L. T. Rep. N. S. 200, 33 Wkly. Rep. 895 [*quoting* Johnson Dict.] (where it is said: "And he [Johnson] gives certain illustrations, as usual, in his dictionary, and this is one: 'A father cannot alien the power he has over his child; he may perhaps to some degree forfeit it, but cannot transfer it.— Locke.' There 'forfeit' is contrasted with 'alien or transfer.'"

63. Commercial Bank *v.* Cotton, 17 U. C. C. P. 447, 455 [*quoting* Richardson Dict.].

64. Streeper *v.* Williams, 48 Pa. St. 450, 456.

"Forfeit" as a verb construed in connection with other words see Day *v.* Frank, 127 Mass. 497, 498; Knapp *v.* Malthy, 13 Wend. (N. Y.) 587, 588; Jackson *v.* Baker, 2 Edw. (N. Y.) 471, 473; U. S. *v.* Spring Valley Distillery, 25 Fed. Cas. No. 14,963, 11 Blatchf. 255, 267; Fletcher *v.* Dyche, 2 T. R. 32, 36, 1 Rev. Rep. 414 [*cited* in Tayloe *v.* Sandiford, 7 Wheat. (U. S.) 13, 18, 5 L. ed. 384].

"Forfeited" construed in connection with other words see Walter *v.* Smith, 5 B. & Ald. 439, 442, 1 D. & R. 1, 7 E. C. L. 242; *In re* Darnley, 1 How. St. Tr. 915, 927.

FORFEITURES

By Ernst H. Wells*

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CROSS-REFERENCES

For Matters Relating to:
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Customs Laws, see Customs Duties.
Embargo Laws, see War.
Gaming Laws, see Gaming.
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Non-Intercourse Laws, see War.

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* Author of "Contribution," 9 Cyc. 792; "Court Commissioners," 11 Cyc. 622; "Disorderly Houses," 14 Cyc. 479; "Drunkards," 14 Cyc. 1089; "Dueling," 14 Cyc. 1111; "Escrows," 16 Cyc. 560; "Exemptions," 18 Cyc. 1369; and joint author of "Factors and Brokers," *ante*, p. 109.

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Franchise, see CANALS; COLLEGES AND UNIVERSITIES; CORPORATIONS; FRANCHISES.
Grant, see PUBLIC LANDS.
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Insurance, see INSURANCE, and the Particular Insurance Titles.
Lease, see LANDLORD AND TENANT; MINES AND MINERALS.
Legacy, see WILLS.
License, see LICENSES.
Office, see OFFICERS.
Recognizance, see BAIL; BREACH OF THE PEACE.
Right of Inheritance, see DESCENT AND DISTRIBUTION.
Stock, see BUILDING AND LOAN SOCIETIES; CORPORATIONS.
Ticket, see CARRIERS.
Vessel, see NEUTRALITY LAWS.
Wages, see SEAMEN.
Water-Rights, see WATERS.
Penalty, see PENALTIES.
Relief Against Forfeiture in Equity, see EQUITY.
Searches and Seizures, see SEARCHES AND SEIZURES.
Statute Against Imprisonment For Debt, see EXECUTIONS.

I. DEFINITION.

Forfeiture, as the term is used in this article, is the divestiture of specific property without compensation in consequence of some default or act forbidden by law.[1]

II. COMMON-LAW AND STATUTORY IN REM FORFEITURES.[2]

A. Distinguished and Compared. In many cases of forfeiture for a felony committed at common law, forfeiture did not strictly speaking attach *in rem*; but it was a part or at least a consequence of the judgment or conviction, and

1. See Union Glass Co. *v.* New Castle First Nat. Bank, 10 Pa. Co. Ct. 565, 572.

2. Vesting of title under common-law and statutory forfeiture see *infra*, VII.

Distinguished from "escheat" see 2 Blackstone Comm. 251. See also ESCHEAT, 16 Cyc. 549, note 1, where it is said escheat is to the lord, but forfeiture is to the crown.

therefore no right to the goods and chattels of a felon could be acquired by the crown from the mere commission of the offense, but the right attached only by the conviction of the offender. In the contemplation of the common law the offender's right was not divested until the conviction.[3] But this doctrine never was applied to seizures and forfeitures created by statute *in rem*, cognizable on the revenue side of the exchequer. The thing was there primarily considered as the offender, or rather the offense was attached primarily to the thing, and this, whether the offense be *malum prohibitum* or *malum in se*.[4]

B. Owner's Knowledge or Consent. It therefore follows that when the thing is inculpated under an *in rem* statutory provision it may be forfeited, although the act which caused the forfeiture was not done by or with the consent or knowledge of the owner.[5] There are circumstances, however, where the thing may be inculpated according to the letter of the statute, but where the courts refuse to enforce a forfeiture, as being contrary to the spirit and meaning of the statute.[6]

III. GROUNDS OF AND PROPERTY SUBJECT TO FORFEITURE.

By the early law[7] lands and tenements were forfeited to the crown for treason. For petit treason and felony all personal estates and real property and the profits of freehold estates during life were forfeited absolutely, and after death all the offender's lands and tenements in fee simple (but not those in fee tail[8]) were forfeited for a short period of time. Goods and chattels were also forfeited for the higher kinds of offenses, as high treason, or misprision of treason, petit treason, felonies of all sorts, etc.[9] Lands were forfeited only upon attainder but goods and chattels were forfeited by conviction.[10] In some of the American colonies a forfeiture of land might be had upon conviction of a felony,[11] and during the American Revolution statutes were passed by the colonies by which persons loyal to the king forfeited their estates, real and personal.[12]

IV. EXTENT.

A person cannot forfeit a greater estate or right in property inculpated than he himself had.[13]

3. The Palmyra, 12 Wheat. (U. S.) 1, 6 L. ed. 531.

4. The Palmyra, 12 Wheat. (U. S.) 1, 14, 6 L. ed. 531.

5. Dobbins *v.* U. S., 96 U. S. 395, 24 L. ed. 637, where the owner of a distillery and other property leased them for the purpose of a distillery and the unlawful acts were committed by the lessee.

6. Trueman *v.* 403 Quarter Casks Gunpowder, Thach. Cr. Cas. (Mass.) 14 (holding that under a statute which provided that gunpowder which any person should have or possess "within two hundred yards of any wharf, or any part of the shore on the main land" should be forfeited, gunpowder in a boat driven within the limit by the violence of wind and waves and without the fault and negligence of the person in custody is not subject to forfeiture; and holding further that the same circumstances will excuse the omission to display a red flag as required by the regulations of the fire-wards under the statute); Peisch *v.* Ware, 4 Cranch (U. S.) 347, 2 L. ed. 643 (where a cargo of wine and spirits which was landed from a disabled vessel by salvors was not forfeited, although the letter of the revenue laws was held to have been violated).

7. At the present time the grounds of forfeiture prescribed by the statutes of the United States and of the separate states and the different kinds of property made subject to forfeiture are too numerous and various to receive consideration. See the federal statutes, and the statutes of the several states.

By act July 17, 1862, congress authorized the confiscation of the property of those who had taken part in the Civil war against the federal government. See Bigelow *v.* Forrest, 9 Wall. (U. S.) 339, 19 L. ed. 696.

8. Estates tail were first made subject to forfeiture for treason by 26 Hen. VIII, c. 13. 2 Blackstone Comm. 117.

9. 4 Blackstone Comm. 384–387. See also 2 Blackstone Comm. 421.

10. 2 Blackstone Comm. 387.

11. Thomas *v.* Hamilton, 1 Harr. & M. (Md.) 190, where the grantee of land was convicted in Virginia of a felony and the land in Maryland was forfeited to the lord proprietary.

12. See Jackson *v.* Stokes, 3 Johns. (N. Y.) 151; Borland *v.* Dean, 3 Fed. Cas. No. 1,660, 4 Mason 174.

13. Borland *v.* Dean, 3 Fed. Cas. No. 1,660, 4 Mason 174.

V. STATUTORY PROVISIONS.

A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation.[14] An act of congress which provides for a forfeiture, and a joint resolution of the same date explaining the act and defining its operation, must be construed together.[15] It is an established rule that where an action for the recovery of a penalty or a proceeding to enforce a forfeiture prescribed in a legislative act is pending at the time of the repeal of the act or is instituted after the repeal, such repeal is a bar to the action or proceeding, in the absence of a saving clause in the repealing act.[16] A statute which prescribes

Under the act of July 17, 1862, by which congress authorized the confiscation of property of those who had taken part in the Civil war against the federal government, and under the joint resolution of the same date, all that could be forfeited was a life-interest in the property of the person for whose offense it had been seized. Bigelow *v.* Forrest, 9 Wall. (U. S.) 339, 19 L. ed. 696. See also Szymanski *v.* Zunts, 20 Fed. 361, where the court said that the effect of the statute as modified by the joint resolution of the same date was to take from the offender and owner by a decree of condemnation all his estate, leaving him only the naked capacity to transmit to his heirs, devisees, or legatees; or in other words property condemned under the statute ceased by the decree to belong to the estate of the offender, save for the single purpose of designating in whom it may vest upon his death.

14. Trueman *v.* 403 Quarter Casks Gunpowder, Thach Cr. Cas. (Mass.) 14. Furthermore the courts will always give such a construction to statutes providing for forfeitures as will be consistent with justice and the dictates of natural reason, although contrary to the strict letter of the law; and therefore the strict letter of the law will not be enforced against persons who could not possibly be informed of its enactment, although there be no proviso in the statute to that effect. Ham *v.* McClaws, 1 Bay (S. C.) 93. A statute which provides that "if any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, with the consent of the party affected, be applied to any judgment pronounced after the new law takes effect" applies to a forfeiture in a civil as well as in a criminal case. Mosby *v.* St. Louis Mut. Ins. Co., 31 Gratt. (Va.) 629, 634, where the court said: "The language used is general enough to embrace both civil and criminal cases. If it had been the intention of the legislature to confine the provision to criminal cases alone, it would not have used the words 'the party affected' thereby, but the word 'accused,' or some similar word indicating a criminal offence."

A statute which makes any discrimination by a railroad in its charges for freight a penal offense and provides, without any other penalty for the first offense, for the forfeiture of all its franchises for any wilful violation of the act, is opposed to the spirit of a constitutional provision that all penalties shall be proportioned to the nature of the offense, and is a violation of the spirit of the very clause of the constitution under which the act is formed and which requires the legislature to pass laws to prevent unjust discrimination and extortion by railroad corporations and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises. Chicago, etc., R. Co. *v.* People, 67 Ill. 11, 27, 16 Am. Rep. 99, where the court said: "Would it not be better to enforce the law by a series of considerable and increasing fines, before imposing the final penalty of forfeiture? A law admitting of but one penalty, and that of the harshest possible character, will necessarily be subjected by the courts to close criticism and a strict construction."

Under a constitutional provision that no conviction of a crime shall work a "forfeiture of estate," no man's property can be forfeited as a punishment for crime, and no man can be deprived of the use of his property unless it be necessary in order to abate an existing nuisance. Miller *v.* State, 3 Ohio St. 475.

Under a statute providing for the forfeiture of gunpowder under certain conditions and for the regulation by the fire-wards of the transportation and receipt of gunpowder within a city, the fire-wards have no authority to create a cause of forfeiture not authorized by the act. Trueman *v.* 403 Quarter Casks Gunpowder, Thach. Cr. Cas. (Mass.) 14.

Under a statute which makes void conveyances and imposes forfeitures upon him who buys and upon him who sells land when the seller is ousted of the possession, a person or corporation is not ousted of possession within the meaning of the statute when its lessee is in possession. Emerson *v.* Goodwin, 9 Conn. 422.

15. Bigelow *v.* Forrest, 9 Wall. (U. S.) 339, 19 L. ed. 696.

16. Governor *v.* Howard, 5 N. C. 465; U. S. *v.* Six Fermenting Tubs, 27 Fed. Cas. No. 16,296, 1 Abb. 268. See U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178.

But by the express provision of U. S. Rev. St. § 13, the repeal of a statute does not release any penalty, forfeiture, or liability incurred unless the repealing act so provides.

generally as to the forfeiture of the property is not void because it omits to provide for the mode of disposal of the property after its forfeiture.[17]

VI. ENFORCEMENT.

A. Necessity of Judicial Determination. There can be no forfeiture of property unless the forfeiture be judicially determined.[18] A statute or ordinance which allows the seizure and confiscation of a person's property by ministerial officers without inquiry before a court or an opportunity of being heard in his own defense is a violation of the elementary principles of law and the constitution.[19]

B. Seizure[20] **— 1. RIGHT OF.** To justify an officer in making a seizure, there must be reasonable ground to believe that some offense has been committed.[21]

2. BY WHOM MADE. It is a general rule that any person may seize any property forfeited to the use of the government, either by the municipal law, or by the law of prize, for the purpose of enforcing the forfeiture.[22]

C. Action — 1. JURISDICTION.[23] To institute and perfect a proceeding *in rem* in the United States courts to enforce a forfeiture, it is necessary that the thing inculpated should be actually[24] or constructively within the reach of the court.[25] A seizure is necessary,[26] for it is the preliminary seizure of the property that brings it within the reach of legal process.[27] The place of seizure when made determines as to what court takes jurisdiction.[28]

2. FORM OF ACTION AND METHOD OF PROCEDURE.[29] It has been said that, if no form of prosecution or of action to enforce a forfeiture imposed by statute has been prescribed, debt will lie when the action is brought by an individual;[30] or if

U. S. *v.* Keokuk, etc., Bridge Co., 45 Fed. 178.

17. State *v.* Rum, etc., 51 N. H. 373, 374.

18. Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; Gallager *v.* Wooster, 4 Ky. L. Rep. 256; Wilkinson *v.* Cook, 44 Miss. 367; Rosebaugh *v.* Saffin, 10 Ohio 31; Cotter *v.* Doty, 5 Ohio 393.

The common-law rule that the crown cannot take forfeited lands, except on office found, applies to the state, and unless clearly repealed is binding on the judiciary. Robinson *v.* Huff, 3 Litt. (Ky.) 37.

Notice should be given to the owner of the property seized of proceedings to determine the forfeiture. Jones *v.* Mason, 12 Ark. 687; Gallager *v.* Wooster, 4 Ky. L. Rep. 256.

Where the forfeiture is to a private person, the necessity that it shall be judicially granted to him is all the more apparent. Gear *v.* Bullerdick, 34 Ill. 74.

After a default, there must be some hearing before a decree of forfeiture upon a libel *in rem*. This may be by merely examining the libel and the return of the marshal and evidence that the owners had actual notice and had wilfully made default, having knowledge of material facts. U. S. *v.* Lion, 26 Fed. Cas. No. 15,607, 1 Sprague 399.

19. Darst *v.* People, 51 Ill. 286, 2 Am. Rep. 301; Varden *v.* Mount, 78 Ky. 86, 39 Am. Rep. 208; Cotter *v.* Doty, 5 Ohio 393.

20. **Necessity of seizure** see *infra*, VI, C, 1.

Searches and seizures generally see SEARCHES AND SEIZURES.

21. U. S. *v.* Cook, 25 Fed. Cas. No. 14,852, 1 Sprague 213.

22. It depends upon the government itself, whether it will act upon the seizure. If it adopts the acts of the party and proceeds to enforce the forfeiture by legal process this is a sufficient recognition and confirmation of the seizure, and is of equal validity in law with an original authority given to the party to make the seizure. The confirmation acts retroactively and is equivalent to a command. The Caledonian, 4 Wheat. (U. S.) 100, 4 L. ed. 523. See Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381.

Waiver of officer's right to seize as informant see Shewell *v.* Gun-powder, 1 Browne (Pa.) 116.

23. **Whether United States district court proceeds in admiralty or at common law** see *infra*, VI, C, 2.

24. **It is actually within the court's possession** when it is submitted to the process of the court; it is constructively within the court's possession when by a seizure it is held to ascertain and enforce a right of forfeiture which can alone be decided by judicial decree *in rem*. The Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734.

25. The Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734.

26. The Silver Spring, 22 Fed. Cas. No. 12,858, 1 Sprague 551.

27. Dobbins *v.* U. S., 96 U. S. 395, 24 L. ed. 637.

28. The Ann, 9 Cranch (U. S.) 289, 3 L. ed. 734. See The Bolina, 3 Fed. Cas. No. 1,608, 1 Gall. 75.

29. **Limitations.**— Ala. St. (1807) § 49, limiting the institution of a prosecution for any fine or forfeiture incurred under a penal statute, applies to civil as well as criminal prosecutions. Johnson *v.* Hughes, 1 Stew. 263. See, generally, LIMITATIONS OF ACTIONS.

30. See Vaughan *v.* Thompson, 15 Ill. 39.

the government should be the party plaintiff, an information will lie, upon common-law principles.[31]

3. DEFENSES. If a person sets up the defense of *vis major*, he must make out the *vis major* so as to leave no doubt of his innocence.[32] If defendant seeks to avail himself of a defense granted him by a law passed subsequent to the incurring of the forfeiture, he must take it subject to such terms and conditions as the legislature, at the time when it passed this beneficial law, or at any future time, might please to prescribe.[33]

4. PARTIES. In an action by an informer to recover damages and forfeitures for collecting false claims from the United States treasury, the informer represents the United States both in the suit itself and in all suits and proceedings in aid of execution or to enforce judgment and is entitled to control the same.[34] In admiralty in prize cases it is irregular for an informer to blend in the libel the right of the United States and of the informer in the manner of a *qui tam* action at common law.[35]

5. PLEADING — a. The Libel or Information.[36] There are no substantial distinctions between the proper structure of and rules governing libels of information and informations for municipal forfeitures.[37] A libel or information must contain a substantial statement of the offense,[38] pleaded without vagueness or uncertainty.[39] Technical nicety and precision such as are required in an indictment are not necessary to a libel[40] or to an information,[41] yet the allegations must be sufficiently specific to enable the claimant to traverse them and to let the court

Debt, generally, see DEBT, ACTION OF.

31. See The Bolina, 3 Fed. Cas. No. 1,608, 1 Gall. 75.

Under the judicial system of the United States, the district courts sit as courts of common law when seizure has been made on land under the revenue laws and the trial of issues of fact must be by jury. But if the seizure has been on the navigable waters of the United States, the courts proceed as courts of admiralty and the trial of fact is by the court. The Sarah, 8 Wheat. (U. S.) 391, 5 L. ed. 644.

32. The Struggle *v.* U. S., 9 Cranch (U. S.) 71, 3 L. ed. 660. See also The Short Staple, 22 Fed. Cas. No. 12,813, 1 Gall. 104 [*reversed* in 9 Cranch 55, 3 L. ed. 655].

Circumstances sometimes outweigh positive testimony in such cases. The Struggle *v.* U. S., 9 Cranch (U. S.) 71, 3 L. ed. 660.

33. U. S. *v.* Hall, 26 Fed. Cas. No. 15,285, 3 Wash. 336 [*affirmed* in 6 Cranch 171, 3 L. ed. 189].

34. Bush *v.* U. S., 13 Fed. 625, 8 Sawy. 322, under U. S. Rev. St. (1878) §§ 3490–3493.

35. The Emulous, 8 Fed. Cas. No. 4,479, 1 Gall. 563, holding that the irregularity cannot, however, affect the nature of the proceedings or oust the jurisdiction of the court. If the informer cannot legally take any interest, the United States have still a right, if their title is otherwise well founded, to claim a condemnation.

36. An "**information**" in forfeiture proceedings in a correct and technical use is a proceeding against property liable to seizure and condemnation where the seizure was on land and the proceedings fell on the exchequer side of the court. As in a declaration the causes of action are set out in a distinct count, subject to all the rules which govern such rules of pleading. U. S. *v.* Twenty-five Barrels Alcohol, 28 Fed. Cas. No. 16,562. See, generally, PLEADING.

A "**libel of information**" differs from an information in that the seizure is on water and the case therefore falls on the instance side of the court. U. S. *v.* Twenty-Five Barrels Alcohol, 28 Fed. Cas. No. 16,562.

A libel pure is a matter in admiralty and falls necessarily either on the instance side or the prize side of the court, as the case may be. U. S. *v.* Twenty-Five Barrels Alcohol, 28 Fed. Cas. No. 16,562. See, generally, ADMIRALTY.

37. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

On the exchequer side of the court they are not criminal proceedings. They are *civiliter, non-criminaliter*. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

Amendments.— Informations by United States attorneys may be amended after pleas filed, and the amendments may then be of substance, and may be made even by a judge in chambers; but amendments can be made in the appellate court only when the suits are on the admiralty side of the court. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

38. The Caroline *v.* U. S., 7 Cranch (U. S.) 496, 3 L. ed. 417; The Hoppet *v.* U. S., 7 Cranch (U. S.) 389, 3 L. ed. 389.

39. The Mary Ann, 8 Wheat. (U. S.) 380, 5 L. ed. 641.

40. The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23.

41. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

see that if proved a violation of the law exists.[42] In general it is sufficient if the offense be described or charged in the words of the statute defining the offense.[43] It is not essential to aver the manner or agency by which the property was arrested, unless it be in prize cases.[44] An information need not show that the case was not within the exemption of a proviso of the statute, for this is matter of defense.[45] In the federal courts a libel must allege that the property has been seized, for the seizure is necessary to give the court jurisdiction, and therefore the objection to a libel on this ground may be made after the filing of a plea.[46] An information for a statutory forfeiture should conclude "against the form of the statute," or at least refer to some subsisting statute authorizing the forfeiture.[47]

b. Defendant's Pleadings. No form of general issue[48] is allowable to a libel, information, or libel of information, under the rules of the federal courts; but each article therein should be specially met by a distinct article in the answer, admitting or controverting its allegations, or admitting part, and controverting part, as the case may be.[49] A plea of no forfeiture is like a plea of not guilty to an indictment and puts in issue all the material allegations of the libel of information.[50] If an information *in rem* be on the exchequer side of the court, a demurrer, not a motion to quash, is the proper mode of reaching technical or substantial defects.[51] If a libel in admiralty fails to state the grounds of forfeiture relied upon in distinct allegations, as required by admiralty rules,[52] the remedy of the claimant is by motion to make it more definite.[53] The conclusion in the answer to a libel, information, or libel of information should not be to the country, but a simple prayer for restitution.[54]

6. Issues, Proof, and Variance. Substantial defects in the allegations are not cured by proof of facts which ought to have been alleged, for the decree must be according to the allegations as well as proof.[55]

42. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

43. The Mary Ann, 8 Wheat. (U. S.) 380, 5 L. ed. 641; The Samuel, 1 Wheat. (U. S.) 9, 4 L. ed. 23; U. S. *v.* Arms and Ammunitions, 24 Fed. Cas. No. 14,466*a*; U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

A general averment, however, that the statute has been violated is not sufficient. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

If, however, the wording of the statute be general, embracing a whole class of individual subjects, but must necessarily be construed so as to embrace only a subdivision of that class, the allegation must conform to the sense and meaning of the legislature. The Mary Ann, 8 Wheat. (U. S.) 380, 5 L. ed. 641.

44. U. S. *v.* Arms and Ammunitions, 24 Fed. Cas. No. 14,466*a*.

45. The Mary Merritt, 16 Fed. Cas. No. 9,222, 2 Biss. 381 [*reversing* 26 Fed. Cas. No. 15,733, and *affirmed* in 17 Wall. 582, 21 L. ed. 682].

46. The Silver Spring, 22 Fed. Cas. No. 12,858, 1 Sprague 551. See Gelston *v.* Hoyt, 3 Wheat. (U. S.) 246, 4 L. ed. 381 [*affirming* 13 Johns. (N. Y.) 139]. See *supra*, VI, C, 1.

47. The Nancy, 17 Fed. Cas. No. 10,008, 1 Gall. 66.

Merely concluding "against the form of a statute" will not cure a defect of averments that are material to show that a forfeiture has accrued. The Nancy, 17 Fed. Cas. No. 10,008, 1 Gall. 66.

48. If the general issue can be pleaded, it puts the truth of the libel at issue both as to the liability of the thing to forfeiture and to the guilt of the claimant. Barnicoat *v.* Six Quarter Casks Gunpowder, Thach. Cr. Cas. (Mass.) 596.

49. U. S. *v.* Twenty-Five Barrels Alcohol, 28 Fed. Cas. No. 16,562.

When informations are on the exchequer side of the court in cases of seizure under the internal revenue acts, general denials or "issues" are permissible. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

50. The Silver Spring, 22 Fed. Cas. No. 12,858, 1 Sprague 551.

51. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

52. Adm. Rules Nos. 22, 23.

53. *In re* Eighteen Thousand Gallons Distilled Spirits, 8 Fed. Cas. No. 4,317, 5 Ben. 4.

54. U. S. *v.* Twenty-Five Barrels Alcohol, 28 Fed. Cas. No. 16,562.

Verification of answer see U. S. *v.* Twenty-Five Barrels Alcohol, 28 Fed. Cas. No. 16,562.

55. The Caroline *v.* U. S., 7 Cranch (U. S.) 496, 3 L. ed. 417; The Hoppet *v.* U. S., 7 Cranch (U. S.) 389, 3 L. ed. 380.

A general verdict for the condemnation of goods mentioned in the information is supported, if any one of several counts is good,

7. Verdict. In informations on penal statutes for forfeitures against several charged with malfeasance, on not guilty pleaded, the jury may convict some of defendants of the whole or of part of the offense charged and may acquit others.[56]

8. Judgment, Execution, and Disposition of Proceeds.[57] In a prosecution for an offense against a statute which enacts a fine, and also a forfeiture of the utensils by which the offense is committed, on conviction, the judgment ought to be for the utensils, not for their value.[58] The fact that a good defense existed against a decree of condemnation, but which was not pleaded before decree, will not avoid the decree.[59] Before execution can be awarded on a judgment of forfeiture, when scire facias has sued out, there must be service, or a return of two *nihils*, unless defendant voluntarily appears.[60] If there be a change of venue in a criminal case from one county to another and a forfeiture be adjudicated, it belongs to the county where the offense was committed and the indictment found.[61]

VII. Operation and Effect.

When forfeiture accrues at common law, nothing vests in the government until some legal step shall be taken for the assertion of the rights, and then for many purposes the doctrine of relation[62] vests the title as of the time of the commission of the offense.[63] If, however, a forfeiture is provided for by statute, it is said that the rule of the common law does not apply, and the thing forfeited may vest either immediately or on performance of some particular act, as shall be the will of the legislature.[64] If the forfeiture is declared by statute in absolute terms, not in the alternative,[65] it is held by the great weight of authority that the forfeiture takes place at the time the prohibited act is committed and the owner is divested of title *eo instanti*, the forfeiture operating as a statutory transfer of title to the government.[66] In spite of these authorities it seems that

where there was no motion that the government should elect on which it claimed a verdict. Friedenstein *v.* U. S., 125 U. S. 224, 8 S. Ct. 838, 31 L. ed. 736.

56. See Hill *v.* Davis, 4 Mass. 137, assigning as a reason for this that the malfeasance in an information is several as well as joint and each defendant incurs a forfeiture in proportion to his offense.

57. Rights of informer see *infra*, IX.

Costs.— That there can be no judgment for costs against the owner unless forfeiture of his goods is had. See U. S. *v.* One Hundred and Fifty Head Cattle, 3 Ariz. 134, 77 Pac. 489. If verdict be not guilty and that thing was kept contrary to law, the claimant having pleaded the general issue, there is no liability for costs notwithstanding the thing be decreed forfeit. Barnicoat *v.* Six Quarter Casks Gunpowder, Thach. Cr. Cas. (Mass.) 596.

That moiety of proceeds of a vessel must be distributed by court see The Glamorgan, 10 Fed. Cas. No. 5,472 [*affirmed* in 25 Fed. Cas. No. 15,214].

58. Boles *v.* Lynde, 1 Root (Conn.) 195.

59. Griswold *v.* Connolly, 11 Fed. Cas. No. 5,833, 1 Woods 193.

60. Lytle *v.* People, 47 Ill. 422.

61. Washington County *v.* State, 43 Ark. 267.

62. Under the old law the forfeiture of land had relation to the time of the fact committed so as to avoid all subsequent sales and encumbrances; but the forfeiture of goods and chattels had no relation backward and therefore only those which a man had at the time of conviction could be forfeited. 4 Blackstone Comm. 387. See *supra*, III.

63. See Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; U. S. *v.* Grundy, 3 Cranch (U. S.) 337, 2 L. ed. 459.

64. Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; U. S. *v.* Grundy, 3 Cranch (U. S.) 337, 2 L. ed. 459.

65. If the statute prescribes forfeiture in the alternative, as of the property itself or its value (Caldwell *v.* U. S., 8 How. (U. S.) 366, 12 L. ed. 1115; The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354), or if there is more than one remedy provided by statute and the government has an election to proceed for the forfeiture or in some other way not involving a forfeiture (U. S. *v.* Sixty-Four Barrels Distilled Spirits, 27 Fed. Cas. No. 16,306, 3 Cliff. 308), as for instance against the person himself who committed the forbidden act (U. S. *v.* The Reindeer, 27 Fed. Cas. No. 16,144, 2 Cliff. 57 [*affirmed* in 2 Wall. 383, 17 L. ed. 911]), no title vests until the election is made, and meanwhile an innocent person may acquire a title which cannot be impaired by the subsequent action of the government (The Mary Celeste, *supra*).

66. Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365, 13 Am. Rep. 181; Fontaine *v.* Phœnix Ins. Co., 11 Johns. (N. Y.) 293; The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354; U. S. *v.* Distillery, etc., 25 Fed. Cas. No. 14,964 (holding that the acceptance of a bond to answer a judgment against the claimants to the property forfeited does not

the rule as above expressed is not strictly correct; in the vast number of instances the statute does not operate *suo motu*, but on the contrary becomes inoperative, and the title of the wrong-doer remains unaffected unless the government chooses to enforce the forfeiture; when, however, the government has once consummated its title by taking the proper steps, the title vests absolutely and for all purposes by relation to the time of the commission of the prohibited act, and the wrong-doer's title is divested from that time;[67] and the usual rule that the doctrine of relation, being a mere fiction of law, will be resorted to only for the purposes of justice, never where it will work an injustice, does not apply, for a purchaser who *bona fide* buys the thing after the commission of the forbidden act gets no title or right as against the government.[68] A warranty given by the offender after the commission of the forbidden act has no effect upon the thing if it is subsequently decreed to be forfeited.[69] If the statute which provides for the forfeiture authorizes the proper officer to seize the thing named,[70] or if a

reinvest the title in them); U. S. *v.* Fifty-Six Barrels Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93; U. S. *v.* One Copper Still, 27 Fed. Cas. No. 15,928, 8 Biss. 270; U. S. *v.* The Reindeer, 27 Fed. Cas. No. 16,144, 2 Cliff. 57 [*affirmed* in 2 Wall. 383, 17 L. ed. 911]; U. S. *v.* Sixty-Four Barrels Distilled Spirits, 27 Fed. Cas. No. 16,306, 3 Cliff. 308; U. S. *v.* Stevenson, 27 Fed. Cas. No. 16,396, 3 Ben. 119; U. S. *v.* Twenty-One Barrels High Wines, 28 Fed. Cas. No. 16,567. See Bennett *v.* American Art Union, 5 Sandf. (N. Y.) 614.

No distinction exists in this respect between the operation of a statute which declares that for a specified offense the property designated shall be forfeited, and one which declares that the offender shall forfeit the property (U. S. *v.* Fifty-Six Barrels Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93), or a statute which declares that upon the commission of a certain act the property involved shall be "liable to forfeiture" (The Mary Celeste, 16 Fed. Cas. No. 9,902, 2 Lowell 354, holding that the word "liable" in this connection does not mean that the property does not vest until seizure, but only that the government may not discover the liability, or may not choose to prosecute).

67. See Bulkly *v.* Orms, Brayt. (Vt.) 124; U. S. *v.* Sixty-Four Barrels Distilled Spirits, 27 Fed. Cas. No. 16,306, 3 Cliff. 308 [*citing* U. S. *v.* Fifty-Six Barrels Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93; The Florenzo, 9 Fed. Cas. No. 4,886, Blatchf. & H. 52]. See also Clark *v.* Protection Ins. Co., 5 Fed. Cas. No. 2,832, 1 Story 109, where Story, J., said: "The case of The Mars, 16 Fed. Cas. No. 9,106, 1 Gall. 192, in this Court, as to this point, has never, to my knowledge, been doubted or denied. . . . [*reversed* in 8 Cranch 417, 3 L. ed. 609]. In short, I have been long accustomed to lay it up as an elementary axiom that, in all cases of forfeiture of personal chattels, the property of the owner is not devested, until there is an actual seizure thereof by or for the use of the government." Judicial determination of the forfeiture necessary see *supra*, VI, A.

Forfeiture under the Navigation Act (12 Car. 2, c. 18) divests property, although the officer does not proceed to condemnation. Wilkins *v.* Despard, 5 T. R. 112, 2 Rev. Rep. 559.

68. U. S. *v.* The Mars, 8 Cranch 417, 3 L. ed. 609 [*reversing* 16 Fed. Cas. No. 9,106, 1 Gall. 192] (under the act of June 28, 1809); U. S. *v.* Nineteen Hundred Sixty Bags Coffee, 8 Cranch 398, 3 L. ed. 602; U. S. *v.* Fifty-Six Barrels Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93; U. S. *v.* Forty-Six Casks California Grape Brandy, 25 Fed. Cas. No. 15,135; U. S. *v.* Sixty-Four Barrels Distilled Spirits, 27 Fed. Cas. No. 16,306, 3 Cliff. 308. *Compare* U. S. *v.* One Hundred Barrels Distilled Spirits, 14 Wall. (U. S.) 44, 20 L. ed. 815 [*reversing* 27 Fed. Cas. No. 15,948, 2 Abb. 305, 1 Dill. 49]. *Contra*, The Kate Heron, 14 Fed. Cas. No. 7,619, 6 Sawy. 106, under U. S. Rev. St. § 4189.

If the purchase has been made under a full knowledge of the facts, or of such facts as were sufficient to put the party on inquiry, of course the purchaser would not be entitled to any consideration. The Ploughboy, 19 Fed. Cas. No. 11,230, 1 Gall. 41.

If goods thus bought are mixed bona fide with other property, free from forfeiture, so that they can no longer be identified, the courts in enforcing the forfeiture cannot make any division of the aggregate between the claimant and the government; and if this by reason of the admixture necessitates the delivery of the other the unfortunate purchaser must bear the loss. U. S. *v.* Fifty-Six Barrels Whiskey, 25 Fed. Cas. No. 15,095, 1 Abb. 93.

In favor of the mechanics' liens of those who furnished the material and machines by which the property has been built up and made more valuable, a modification of this rigid rule has been allowed but without the court's having passed judgment as to their legal title, and solely on the plea "that no great injustice could result therefrom to the government, whilst a refusal to apply a part of the fund to the payment thereof might result in the greatest injustice." U. S. *v.* Distillery, etc., 25 Fed. Cas. No. 14,964.

69. Szymanski *v.* Zunts, 20 Fed. 361.

70. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

right to sue for the violation of the statute be given to any one,[71] title does not vest *ipso facto* by the prohibited act being done, but relates only to the time of seizure[72] or to adjudging of the forfeiture in a suit begun,[73] unless it be specially provided by statute that the forfeiture be instantaneous upon the commission of the forbidden act.[74] A satisfaction of a judgment in forfeiture is not a bar to an action for a penalty for a breach of the law by means of the same piece of property, and the forfeiture and the penalty may be claimed by the same person where the causes and circumstances giving rise to the forfeiture and to the penalty are independent.[75] A decree condemning as forfeited an estate for the life of the owner does not immediately cast the entire beneficial estate in the property upon his children, so as to make them, while he is still living, his heirs.[76] The fact that all of a person's property was forfeited to the state and confiscated for its benefit does not relieve a prior owner from liability for his antecedent contracts with citizens of the state.[77]

VIII. TITLE OF PURCHASER AT SALE UNDER DECREE.

Whoever sets up title under a condemnation is bound to show that the court had jurisdiction of the cause; and that the sentence has been rightly pronounced, upon the application of parties competent to ask it.[78]

IX. RIGHTS AND REMEDIES OF INFORMERS.[79]

The information given must not be based upon mere suspicions or rumors,[80] but must be of such a nature as to conduce to a condemnation.[81] It is not necessary that the information should be so full as to result, independently of other evidence, in condemnation,[82] or so full as the evidence in the case would authorize. It is sufficient if it induces a prosecution.[83] The right of the informer to his share in the proceeds of a forfeiture is determined by the laws and regulations in force at the time his right vests,[84] and cannot be affected by subsequent regulations.[85] Neither the consent of the informer that the thing seized should be sent from the district of the seizure to another district,[86] nor his disavowal of having instituted suit,[87] nor even his misconduct in conniving with the person informed against to defraud the government of the fund of the seizure,[88] constitutes a waiver of or will defeat the informer's right to his share of the forfeiture.

71. New York Fire Dept. *v.* Kip, 10 Wend. (N. Y.) 266.

72. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

73. New York Fire Dept. *v.* Kip, 10 Wend. (N. Y.) 266.

74. U. S. *v.* Three Hundred and Ninety-Six Barrels Distilled Spirits, 28 Fed. Cas. No. 16,503.

75. Town *v.* Lamphere, 34 Vt. 365.

76. Pike *v.* Wassell, 19 Fed. Cas. No. 11,164, 2 Dill. 555 [*reversed* on other grounds in 94 U. S. 711, 24 L. ed. 307].

77. Marks *v.* Johnson, Kirby (Conn.) 228.

78. La Nereyda, 8 Wheat. (U. S.) 108, 5 L. ed. 574.

79. An "informer" may generally be said to be one who gives the first information in consequence of which a seizure is made and a forfeiture consummated. See Bradley *v.* U. S., 12 Ct. Cl. 578. As used in U. S. Rev. St. § 5294, the term includes plaintiff in a popular action or a person suing for a penalty given by statute to any person suing for same. Pollock *v.* The Laura, 5 Fed. 133.

80. Bradley *v.* U. S., 12 Ct. Cl. 578.

81. Brewster *v.* Gelston, 11 Johns. (N. Y.) 390.

Property must be seized "in pursuance of information given." Westcot *v.* Bradford, 29 Fed. Cas. No. 17,429, 4 Wash. 492.

82. Brewster *v.* Gelston, 11 Johns. (N. Y.) 390.

83. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

84. *In re* Eight Barrels Distilled Spirits, 8 Fed. Cas. No. 4,316, 1 Ben. 472; *In re* Twenty-Five Thousand Gallons Distilled Spirits, 24 Fed. Cas. No. 14,282, 1 Ben. 367 [*affirmed* in 28 Fed. Cas. No. 16,564].

85. *In re* Eight Barrels Distilled Spirits, 8 Fed. Cas. No. 4,316, 1 Ben. 472.

86. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

87. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

88. Westcot *v.* Bradford, 29 Fed. Cas. No. 17,429, 4 Wash. 492.

It is not necessary that an informer should make his claim to part of the forfeiture at the time of giving the information,[89] or that he should afterward take part in the prosecution.[90] Officers of a revenue cutter who furnished information were allowed to join in an action of assumpsit against the collector for their share of a forfeiture under the Non-Intercourse Act of 1809.[91] An informer's share in the registry of the court should be decreed to be paid directly to the persons beneficially interested and entitled to hold it.[92] If the proceeds of a condemnation are brought into an admiralty court, the court may decree an informer his proportion, before it is paid over to the collector.[93]

X. REMISSION.

The officer's[94] power of remission is limited by the law which gives him the power.[95] If the officer remits the forfeiture pursuant to his statutory authority the cause of forfeiture is released.[96] At common law the crown could not remit a forfeiture so as to affect legal rights properly vested in third persons.[97] At the present time, if the rights of individuals in the thing forfeited have not vested, an officer of the government to whom is given by statute the general power to remit forfeitures may, when he exercises power, remit the individuals' interests

89. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

90. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,406, 3 Wash. 464.

91. Sawyer *v.* Steele, 21 Fed. Cas. No. 12,407, 4 Wash. 227, holding also that it was unnecessary that their commissions should be given in evidence, for it was sufficient for them to show that they acted on board as officers.

92. U. S. *v.* Stockwell, 27 Fed. Cas. No. 16,406, 1 Hask. 447.

An agreement between informers to divide the informers' share equally is valid, and should be regarded by the court in distributing it. U. S. *v.* Stockwell, 27 Fed. Cas. No. 16,406, 1 Hask. 447.

Percentage on gross proceeds after payment out of the fund of the costs of the proceedings see U. S. *v.* Seven Large Fermenting Tubs, 27 Fed. Cas. No. 16,254.

93. Westcot *v.* Bradford, 29 Fed. Cas. No. 17,429, 4 Wash. 492.

After the money has been paid over to the collector, the court cannot, on its admiralty side, decree in favor of the informer against the collector *in personam* or against money of his in court arising from some source other than the admiralty proceeding. A suit at common law is the informer's remedy. Westcot *v.* Bradford, 29 Fed. Cas. No. 17,429, 4 Wash. 492.

94. **The power of the secretary of the treasury** is wholly distinct from the constitutional pardoning power of the president, and its object is to afford relief, where the courts are obliged to inflict the penalty. U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209 [*affirmed* in 10 Wheat. 246, 6 L. ed. 314].

95. He cannot interpose any limitation or condition beyond that which the law has expressed. The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

A state legislature has been held to have the power to relieve from a forfeiture after judgment, even where the forfeiture is going to a county of the state. Conner *v.* Bent, 1 Mo. 235.

Partial remission.—If the statute directs an officer to remit all forfeitures within the statute upon certain conditions, he cannot make a partial remission. The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

The federal district court in a case of extreme hardship remitted a forfeiture under the act of March 2, 1807, which prohibited the importation of negroes after Jan. 1, 1808. U. S. *v.* The Kitty, 26 Fed. Cas. No. 15,537, Bee 252, where the law was passed sometime after the vessel sailed from this country.

The person therefore who sets up a pardon by the officer to purge away a forfeiture must show that the pardon is within the powers granted the officer. This does not mean that everything is to be proved to have been done with the precision and accuracy of special pleading, or that a rigid adherence to forms is to be exacted. But there must be a substantial compliance with the requisites of the law; and if, after every reasonable allowance, this cannot be found, the pardon must be adjudged to be inoperative. The Margaretta, 16 Fed. Cas. No. 9,072, 2 Gall. 515.

96. Murray *v.* Beck, 17 Fed. Cas. No. 9,957, 2 Cranch C. C. 677.

Fulfilment of conditions imposed in a warrant remitting forfeiture is equivalent to satisfaction of the cause of action which constituted the ground of seizure. Murray *v.* Beck, 17 Fed. Cas. No. 9,957, 2 Cranch C. C. 677.

Were this not the legal effect of the remission, the claimant would receive back his property subject to another proceeding for forfeiture for the same cause — "a conclusion too unreasonable to merit discussion." Murray *v.* Beck, 17 Fed. Cas. No. 9,957, 2 Cranch C. C. 677.

97. Kirk *v.* Lewis, 9 Fed. 645, 4 Woods 100.

This rule is in conformity with the maxim "*Non poterit rex gratiam facere, cum injuria*

as well as the interest of the government.[98] It has been held that an individual's interest is not vested and therefore can be remitted after suit brought and before judgment[99]—in fact at any time before the individual's interest has been determined by the court.[1]

FORGE. As a noun, an establishment, or mechanical contrivance by which iron is made or manufactured from ore.[1] As a verb, to make in the likeness of something else,[2] to fabricate by false imitation.[3] (See ALTERATIONS OF INSTRUMENTS; COUNTERFEITING; FORGERY.)

FORGED. Counterfeited;[4] a term which includes false making, counterfeiting, and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature of a party or witness, and the placing or connecting together, with intent to defraud, different parts of several genuine instruments.[5] (See FORGE.)

et damno aliorum." See U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209.

98. The Laura, 8 Fed. 612, 19 Blatchf. 562 [*affirmed* in 114 U. S. 411, 5 S. Ct. 881, 29 L. ed. 147]; Pollock *v.* The Laura, 5 Fed. 133; U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209 [*affirmed* in 10 Wheat. 246, 6 L. ed. 314].

99. U. S. *v.* Lancaster, 26 Fed. Cas. No. 15,557, 4 Wash. 64; U. S. *v.* Twenty-Five Thousand Gallons Distilled Spirits, 28 Fed. Cas. No. 16,564.

1. Pollock *v.* The Laura, 5 Fed. 133; Brown *v.* U. S., 4 Fed. Cas. No. 2,032, 1 Woolw. 198, McCahon (Kan.) 229, holding that until the order is made for distribution or for payment to the informer or into the treasury of the United States of the proceeds of the property forfeited no vested right has attached which prevents a restoration of the proceeds to the person whose property was confiscated.

A judgment or decree of condemnation does not vest the right of individuals (customs officers) so as to secure them against the power of remission. U. S. *v.* Morris, 26 Fed. Cas. No. 15,816, 1 Paine 209 [*affirmed* in 10 Wheat. 246, 6 L. ed. 314].

1. Rogers *v.* Danforth, 9 N. J. Eq. 289, 296.

2. Webster Dict. [*quoted* in State *v.* McKenzie, 42 Me. 392, 394].

3. Specifically in law, to so make a false instrument in the similitude of an instrument by which one person could be obligated to another for the purpose of fraud or deceit. Century Dict. [*quoted* in People *v.* Mitchell, 92 Cal. 590, 592, 28 Pac. 597].

The term "**forge**" in law indicates a fraudulent purpose in making the paper. Haskins *v.* Ralston, 69 Mich. 63, 67, 37 N. W. 45, 13 Am. St. Rep. 376.

4. State *v.* Willson, 28 Minn. 52, 54, 9 N. W. 28; Mann *v.* People, 15 Hun (N. Y.) 155, 165.

5. State *v.* Greenwood, 76 Minn. 211, 213, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632, as used in Minn. Gen. St. (1894) § 6701, and in N. Y. Pen. Code (1903), § 520.

Forged authority see 6 Cyc. 1005 note 25.

"**Forged bill**" is a bill to which the signatures of the officers of the bank whence it purports to have been issued are forged or otherwise falsely affixed. Kirby *v.* Ohio, 1 Ohio St. 185, 187. See also 7 Cyc. 961 note 57.

Forged indorsement see 10 Cyc. 625, 628 note 15, 629; 8 Cyc. 66 note 67; 7 Cyc. 647 note 22, 783 note 73, 811 note 51, 1034.

Forged instrument see 7 Cyc. 1041, 1042.

Forged note see 8 Cyc. 113 note 17, 148 note 59, 237 note 37; 7 Cyc. 906 note 14, 917 note 59, 1012 note 40; 6 Cyc. 293 note 36.

Forged order see 9 Cyc. 861 note 23; 6 Cyc. 472 note 51.

Forged paper see 7 Cyc. 533 note 2.

Forged power of attorney see 10 Cyc. 625.

Forged signature see 7 Cyc. 1064 note 8.

FORGERY

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Counterfeiting, see COUNTERFEITING.
Forged Instrument:
As Color of Title, see ADVERSE POSSESSION.
Cancellation of, see CANCELLATION OF INSTRUMENTS.
Forged Paper:
Civil Liability With Respect to, see COMMERCIAL PAPER.
Paying, Discounting, Etc., see BANKS AND BANKING.
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Forgery:
Acquittal of as Bar to Prosecution For Similar Offense, see CRIMINAL LAW.
As Defense to Action on Bill or Note, see COMMERCIAL PAPER.
Conspiracy to Commit, see CONSPIRACY.
Extradition For, see EXTRADITION (INTERNATIONAL).
General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Forgery is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[1]

II. STATUTORY PROVISIONS.

A. Effect on Common Law. The offense of forgery is now defined in many states by statute. In such case the statute does not repeal the common law,[2] but

1. 2 Bishop Cr. L. § 523; Rembert *v.* State, 53 Ala. 467, 468, 25 Am. Rep. 639; Smith *v.* State, 29 Fla. 408, 423, 10 So. 894; State *v.* Thompson, 19 Iowa 299, 303.

Other definitions are: "The false making of an instrument, which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons." Jones' Case, 2 East P. C. 991, 1 Leach C. C. 36.

"The false making of any written instrument, for the purpose of fraud or deceit." State *v.* Phelps, 11 Vt. 116, 120, 34 Am. Dec. 672.

"The fraudulent making or alteration of a written instrument to the prejudice of the rights of another." Com. *v.* Chandler, Thach. Cr. Cas. (Mass.) 187; Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 161; Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 37; Reg. *v.* Blackstone, 4 Manitoba 296, 299.

"The fraudulent making of a false writing, which, if genuine, would apparently be of some legal efficacy." State *v.* Rose, 70 Minn. 403, 410, 73 N. W. 177.

False pretenses distinguished.— Where the false pretense made use of to obtain money or property is a written instrument, the resulting crime is sometimes forgery or the uttering of a forged instrument, and sometimes obtaining property by false pretense. If the instrument used is false in itself and is one which if genuine would create some right or liability, obtaining property on the faith of it is forgery or the uttering of a forged instrument as the case may be (People *v.* Peacock, 6 Cow. (N. Y.) 72; Mathews *v.* State, 33 Tex. 102; Witherspoon *v.* State, (Tex. Cr. App. 1896) 37 S. W. 433; Hirschfield *v.* State, 11 Tex. App. 207); but if the instrument is not in itself a false instrument but only false by reason of the use made of it (Hoge *v.* Chicago First Nat. Bank, 18 Ill. App. 501; Reg. *v.* Martin, 5 Q. B. D. 34, 14 Cox C. C. 375, 44 J. P. 74, 49 L. J. M. C. 11, 41 L. T. Rep. N. S. 531, 28 Wkly. Rep. 232; Reg. *v.* Smith, 8 Cox C. C. 32, Dears. & B. 566, 4 Jur. N. S. 1003, 27 L. J. M. C. 225, 6 Wkly. Rep. 495), or if it is one which if genuine would not be of any legal validity (State *v.* Henn, 39 Minn. 464, 40 N. W. 564; State *v.* Stewart, 9 N. D. 409, 83 N. W. 869; Tyler *v.* State, 2 Humphr. (Tenn.) 37, 36 Am. Dec. 293; Com. *v.* Quann, 2 Va. Cas. 89), its use to obtain property is the crime of obtaining property by false pretense.

2. *Maine.*— State *v.* Kimball, 50 Me. 409.
Massachusetts.— Com. *v.* Dunleay, 157

merely prescribes a different punishment, in the cases enumerated in it, from that provided by the common law.[3]

B. Construction. In some cases the statute is very broad in its terms, and covers any writing which can be used to defraud;[4] but where the language of the statute is less comprehensive it is essential to a conviction thereunder that the instrument be of the character designated by the statute,[5] although such language

Mass. 386, 32 N. E. 356; Com. *v.* Hinds, 101 Mass. 209; Com *v.* Ayer, 3 Cush. 150.

South Carolina.— State *v.* Jones, 1 McMull. 236, 36 Am. Dec. 257.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.— U. S. *v.* McCarthy, 26 Fed. Cas. No. 15,656, 4 Cranch C. C. 304.

See 23 Cent. Dig. tit. "Forgery," §§ 2, 3.

3. State *v.* Kimball, 50 Me. 409. And see *infra*, XVI, E.

4. *Arkansas.*— Arnold *v.* State, 71 Ark. 367, 74 S. W. 513.

California.— People *v.* Turner, 113 Cal. 278, 45 Pac. 331.

Connecticut.— State *v.* Cooper, 5 Day 250.

Georgia.— Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Billups *v.* State, 88 Ga. 27, 13 S. E. 830.

Mississippi.—France *v.* State, 83 Miss. 281, 35 So. 313.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

Pennsylvania.— Com. *v.* Compton, 7 Lack. Leg. N. 108, 14 York Leg. Rec. 195.

Tennessee.— Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760.

Texas.— Dooley *v.* State, 21 Tex. App. 549, 2 S. W. 884; Fonville *v.* State, 17 Tex. App. 368; Costley *v.* State, 14 Tex. App. 156.

England.— Jones' Case, 2 East P. C. 991, 1 Leach C. C. 366.

5. *California.*— *In re* Corryell, 22 Cal. 178.

New York.— People *v.* Underhill, 142 N. Y. 38, 36 N. E. 1049 [*reversing* 75 Hun 329, 26 N. Y. Suppl. 1030]; People *v.* Mann, 75 N. Y. 484, 31 Am. Rep. 482; People *v.* Peck, 67 Hun 560, 22 N. Y. Suppl. 576; People *v.* Cady, 6 Hill 490 [*affirming* 15 Hun 155].

Pennsylvania.— Com. *v.* Beamish, 81 Pa. St. 389.

Texas.— Huckaby *v.* State, (Cr. App. 1904) 78 S. W. 942; Rogers *v.* State, 8 Tex. App. 401.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.— Cross *v.* North Carolina, 132 U. S. 131, 10 S. Ct. 47, 33 L. ed. 287 [*affirming* 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53]; Neall *v.* U. S., 118 Fed. 699, 56 C. C. A. 31; U. S. *v.* Glasener, 81 Fed. 566; U. S. *v.* Albert, 45 Fed. 552; U. S. *v.* Barnhart, 33 Fed. 459, 13 Sawy. 126; U. S. *v.* Reese, 27 Fed. Cas. No. 16,138, 4 Sawy. 629 [*reversed* on another point in 9 Wall. 13, 19 L. ed. 541].

England.— Reg. *v.* Pringle, 9 C. & P. 408, 2 Moody C. C. 127, 38 E. C. L. 243; Rex *v.* Arscott, 6 C. & P. 408, 25 E. C. L. 499.

The rule stated in the text has been applied in respect of prosecutions under statutes making it an offense to forge the following instruments: Promissory notes (Corbett *v.* State, 24 Ga. 287; People *v.* Parker, 114 Mich. 442, 72 N. W. 250; Rex *v.* Wilcocks, 2 Russ. C. & M. 905); undertakings for the payment of money (Reg. *v.* West, 2 C. & K. 496, 2 Cox C. C. 437, 1 Den. C. C. 258, 61 E. C. L. 496; Clark *v.* Newsam, 1 Exch. 131, 16 L. J. Exch. 296, 5 R. & Can. Cas. 69; Reg. *v.* Mitchell, 2 F. & F. 44); bills of exchange (State *v.* Murphy, 46 La. Ann. 415, 14 So. 920; Reg. *v.* Harper, 7 Q. B. D. 78, 14 Cox C. C. 574, 50 L. J. M. C. 90, 44 L. T. Rep. N. S. 615, 29 Wkly. Rep. 743); warrants, orders, or requests (Horton *v.* State, 53 Ala. 488; People *v.* Smith, 112 Mich. 192, 70 N. W. 466, 67 Am. St. Rep. 392; People *v.* Thompson, 2 Johns. Cas. (N. Y.) 342; Dobbs' Case, 6 City Hall Rec. (N. Y.) 61; State *v.* Leak, 80 N. C. 403; State *v.* Lamb, 65 N. C. 419; Walton *v.* State, 6 Yerg. (Tenn.) 377; U. S. *v.* Green, 26 Fed. Cas. No. 15,255, 2 Cranch C. C. 520; Reg. *v.* Thorn, C. & M. 206, 2 Moody C. C. 210, 41 E. C. L. 116; Reg. *v.* Ellis, 4 Cox C. C. 258; Clinch's Case, 2 East P. C. 938, 1 Leach C. C. 540; Ellor's Case, 2 East P. C. 937, 1 Leach C. C. 323; Williams' Case, 2 East P. C. 937, 1 Leach C. C. 114; Rex *v.* Mitchell, 2 East P. C. 936; Reg. *v.* Mitchell, 2 F. & F. 44; Reg. *v.* Pilling, 1 F. & F. 324; Reg. *v.* Reopelle, 20 U. C. Q. B. 260); bonds (State *v.* Briggs, 34 Vt. 501); deeds (Reg. *v.* Morton, L. R. 2 C. C. 22, 12 Cox C. C. 456, 42 L. J. M. C. 58, 28 L. T. Rep. N. S. 452, 21 Wkly. Rep. 629); acquittances or receipts (Com. *v.* Lawless, 101 Mass. 32; People *v.* Hoag, 2 Park. Cr. (N. Y.) 36; State *v.* Foster, 3 McCord (S. C.) 442; Reg. *v.* French, L. R. 1 C. C. 217, 11 Cox C. C. 472, 39 L. J. M. C. 58, 21 L. T. Rep. N. S. 726, 18 Wkly. Rep. 354; Reg. *v.* Cooper, 2 C. & K. 586, 61 E. C. L. 586; Reg. *v.* West, 2 C. & K. 496, 2 Cox C. C. 437, 1 Den. C. C. 258, 61 E. C. L. 496; Reg. *v.* Gooden, 11 Cox C. C. 672; Reg. *v.* Parker, 2 Cox C. C. 274; Clarke *v.* Newsam, 1 Exch. 131, 16 L. J. Exch. 296, 5 R. & Can. Cas. 69; Rex *v.* Harvey, R. & R. 169); certificates (Maddox *v.* State, 87 Ga. 429, 13 S. E. 559; State *v.* Rhine, 84 Iowa 169, 50 N. W. 676); records (Downing *v.* Brown, 3 Colo. 571; State *v.* Floyd, Houst. Cr. Cas. (Del.) 110; Harrington *v.* State, 54 Miss. 490; Smith *v.* State, 18 Ohio St. 420; State *v.* Bronson, 1 Ohio Dec. (Reprint) 31, 1 West. L. J. 222; Whalley *v.* Tongue, 29 Oreg. 48, 43 Pac. 717); process of court (Reg. *v.* Castle, 7 Cox C. C. 375, Dears. & B. 363, 3 Jur. N. S. 1308, 27 L. J. M. C. 70, 6 Wkly. Rep. 83).

The words "warrant" or "order" in 7

is not to be so strictly construed as to exclude instruments not technically of the kind described.[6] An incomplete instrument is not within the statutes.[7] Where the words "other instrument" or "other writing" follow an enumeration of specific instruments, they are limited to instruments of the class mentioned in the

Geo. II, c. 22, were synonymous. Rex *v.* Mitchell, 2 East P. C. 936.

6. State *v.* Neale, 1 Ohio Dec. (Reprint) 153, 2 West. L. J. 570; Gibson's Case, 2 East P. C. 899, 1 Leach C. C. 61.

The rule stated in the text has been applied in prosecutions under statutes making it an offense to forge the following instruments: Bills of exchange (McIntosh's Case, 2 East P. C. 942, 956, 2 Leach C. C. 883; Rex *v.* Chisholm, R. & R. 220)—a check is a bill of exchange (Hawthorn *v.* State, 56 Md. 530; State *v.* Coyle, 41 Wis. 267. *Contra*, Townsend *v.* State, 92 Ga. 732, 19 S. E. 55); drafts (State *v.* Brett, 16 Mont. 360, 40 Pac. 873); checks (State *v.* Vincent, 91 Mo. 662, 4 S. W. 430); promissory notes (Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; Com. *v.* Riley, Thach. Cr. Cas. (Mass.) 67; Com. *v.* Hensley, 2 Va. Cas. 149; Reg. *v.* McDonald, 12 U. C. Q. B. 543); bonds (Bishop *v.* State, 55 Md. 138); orders, warrants, undertakings, or requests for money (People *v.* McGlade, 139 Cal. 66, 72 Pac. 600; People *v.* Bibby, 91 Cal. 470, 27 Pac. 781; Smith *v.* State, 29 Fla. 408, 10 So. 894; People *v.* Howell, 4 Johns. (N. Y.) 296; People *v.* Krummer, 4 Park. Cr. (N. Y.) 217; State *v.* Nevins, 23 Vt. 519; U. S. *v.* Brown, 24 Fed. Cas. No. 14,658, 3 Cranch C. C. 268; Reg. *v.* Chambers, L. R. 1 C. C. 341, 12 Cox C. C. 109, 41 L. J. M. C. 15, 25 L. T. Rep. N. S. 507, 20 Wkly. Rep. 103; Reg. *v.* Stone, 2 C. & K. 364, 1 Den. C. C. 181, 61 E. C. L. 364; Reg. *v.* Carter, 1 C. & K. 741, 1 Cox C. C. 170, 1 Den. C. C. 65, 47 E. C. L. 741; Reg. *v* Taylor, 1 C. & K. 213, 47 E. C. L. 213; Reg. *v.* Vanderstein, 10 Cox C. C. 177, 16 Ir. C. L. 574; Reg. *v.* Joyce, 10 Cox C. C. 100, 11 Jur. N. S. 472, L. & C. 576, 34 L. J. M. C. 168, 12 L. T. Rep. N. S. 351, 13 Wkly. Rep. 662; Reg. *v.* Lonsdale, 2 Cox C. C. 222; Reg. *v.* Ferguson, 1 Cox C. C. 241; Reg. *v.* Raake, 8 C. & P. 626, 2 Moody C. C. 66, 34 E. C. L. 928; Reg. *v.* Reed, 8 C. & P. 623, 2 Lewin C. C. 185, 34 E. C. L. 927; Willoughby's Case, 2 East P. C. 944; Rex *v.* Shepherd, 2 East P. C. 944, 1 Leach C. C. 226; Rex *v.* Bamfield, 1 Moody C. C. 416; Reg. *v.* Anderson, 2 M. & Rob. 469; Reg. *v.* Tuke, 17 U. C. Q. B. 296); orders, drafts, or requests for goods (People *v.* Palmer, 127 Mich. 383, 86 N. W. 831; People *v.* Phillips, 118 Mich. 699, 77 N. W. 245, 74 Am. St. Rep. 436; State *v.* Brett, 16 Mont. 360, 40 Pac. 673; People *v.* Shaw, 5 Johns. (N. Y.) 236; U. S. *v.* Brown, 24 Fed. Cas. No. 14,658, 3 Cranch C. C. 268; U. S. *v.* Book, 24 Fed. Cas. No. 14,624, 2 Cranch C. C. 294; Reg. *v.* Turberville, 4 Cox C. C. 13; Rex *v.* Thomas, 7 C. & P. 851, 2 Moody C. C. 16, 32 E. C. L. 906; Rex *v.* Evans, 5 C. & P. 553, 24 E. C. L. 704; Jones' Case, 2 East P. C. 941, 1 Leach C. C. 53); deeds (Paige *v.* People, 3 Abb. Dec. (N. Y.) 439, 6 Park. Cr. 683; People *v.* Flanders, 18 Johns. (N. Y.) 164; Rex *v.* Fauntleroy, 2 Bing. 413, 9 E. C. L. 638, 1 C. & P. 421, 12 E. C. L. 247, 1 Moody C. C. 52, 10 Moore C. P. 1; Reg. *v.* Pringle, Moody C. C. 127); a mortgage is a deed (People *v.* Caton, 25 Mich. 388); so is a chattel mortgage (People *v.* Watkins, 106 Mich. 437, 64 N. W. 324); so is a discharge of a mortgage (Meserve *v.* Com., 137 Mass. 109); power of attorney (Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2); acquittance, discharge, or receipt (Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Com. *v.* Talbot, 2 Allen (Mass.) 161; Com. *v.* Ladd, 15 Mass. 526; State *v.* Shelters, 51 Vt. 102, 31 Am. Rep. 679; Reg. *v.* Smith, 9 Cox C. C. 162, 8 Jur. N. S. 572, L. & C. 168, 31 L. J. M. C. 154, 6 L. T. Rep. N. S. 300, 10 Wkly. Rep. 583; Reg. *v.* Fitch, 9 Cox C. C. 160, 8 Jur. N. S. 624, L. & C. 159, 6 L. T. Rep. N. S. 256, 10 Wkly. Rep. 489; Reg. *v.* Meigh, 7 Cox C. C. 401; Reg. *v.* Fitchie, 7 Cox C. C. 257, Dears. & B. 175, 3 Jur. N. S. 419, 26 L. J. M. C. 90, 4 Wkly. Rep. 505; Reg. *v.* Pries, 6 Cox C. C. 165; Reg. *v.* Johnston, 5 Cox C. C. 133; Reg. *v.* Hill, 2 Cox C. C. 246; Reg. *v.* Vaughan, 8 C. & P. 276, 34 E. C. L. 732; Rex *v.* Rice, 6 C. & P. 634, 25 E. C. L. 613; Hunter's Case, 2 East P. C. 977, 2 Leach C. C. 624; Harrison's Case, 2 East P. C. 926, 988, 1 Leach C. C. 180; Reg. *v.* Carson, 14 U. C. C. P. 309); certificates (Atkinson *v.* Reding, 5 Blackf. (Ind.) 39; Meserve *v.* Com., 137 Mass. 109; State *v.* Grant, 74 Mo. 33); records (State *v.* Henning, 158 Ind. 196, 63 N. E. 207; Turbeville *v.* State, 56 Miss. 793; People *v.* Peck, 67 Hun (N. Y.) 560, 22 N. Y. Suppl. 576 [*affirmed* in 138 N. Y. 386, 34 N. E. 347, 20 L. R. A. 381]; Ream *v.* Com., 3 Serg. & R. (Pa.) 207); documents (Com. *v.* Cullen, 13 Phila. (Pa.) 442; U. S. *v.* Schoyer, 27 Fed. Cas. No. 16,232*a*); instruments (State *v.* Lee, 32 Kan. 360, 4 Pac. 653; State *v.* Fenly, 18 Mo. 445; Com. *v.* Phipps, 16 Phila. (Pa.) 457; State *v.* Bullock, 54 S. C. 300, 32 S. E. 424; Alexander *v.* State, 28 Tex. App. 186, 12 S. W. 595; Reg. *v.* Riley, [1896] 1 Q. B. 309, 18 Cox C. C. 285, 60 J. P. 519, 65 L. J. M. C. 74, 74 L. T. Rep. N. S. 254, 44 Wkly. Rep. 318. Indorsement upon the back of a post-office warrant is a part of the instrument. U. S. *v.* Jolly, 37 Fed. 108.

Negotiability of instrument.— To authorize a conviction under a statute making it an offense to forge a promissory note it is not necessary that the note forged be negotiable. Rex *v.* Box, R. & R. 223, 6 Taunt. 325.

7. Wade's Case, 2 City Hall Rec. (N. Y.) 46; Rex *v.* Cullen, 5 C. & P. 116, 1 Moody C. C. 300, 24 E. C. L. 481; Lyon's Case, 2

section,[8] unless the wording of the statute is so broad as to indicate that the rule of *ejusdem generis* does not apply.[9] Where the sections of a statute are conflicting, the one prescribing the lightest punishment is at least valid;[10] and where a statute is passed between the time of forging an instrument and the uttering of it, a conviction may be had for the latter, if within the statute, although not for the former.[11] Where a statute contains typographical errors the court will give effect to the statute according to its true meaning if this be apparent from the context.[12]

III. ELEMENTS OF OFFENSE.

A. In General. To constitute the crime of forgery it is essential that three things should exist: (1) There must be a false making or other alteration of some instrument in writing;[13] (2) there must be a fraudulent intent;[14] and (3) the instrument must be apparently capable of effecting a fraud.[15]

B. Making or Alteration of Instrument — 1. In General. The first element[16] of the offense of forgery is the false making or alteration of some instrument in writing.[17] The forgery may consist in making the entire instrument,[18] or in altering an existing one.[19]

2. Making Entire Instrument — a. Writing Over a Genuine Signature. Where a person procures the signature of another upon a blank paper, and, without authority from the latter, writes a promissory note or other apparently valid instrument above it, he is guilty of forgery.[20] And the rule is the same where an agent, having the genuine signature of his principal with instructions to write an instrument in a certain way, disobeys his instructions.[21] Nor does it make any difference that the signature is printed, if the instrument, when completed, possesses an apparent validity.[22]

b. Improper Exercise of Authority. Although a person is authorized to sign the name of another to certain documents, yet if he signs such name to a false document it is forgery.[23] An officer, public or private, who is authorized to issue certain instruments in his official capacity is guilty of forgery if he issues a false document, although signed with his own name.[24] But one who executes

East P. C. 933, 2 Leach C. C. 597; Reg. *v.* Butterwick, 2 M. & Rob. 196; Reg. *v.* Cormack, 21 Ont. 213.

8. People *v.* Chretien, 137 Cal. 450, 70 Pac. 305; Shirk *v.* People, 121 Ill. 61, 11 N. E. 888; State *v.* Heaton, 17 Wash. 310, 49 Pac. 493; U. S. *v.* Barney, 24 Fed. Cas. No. 14,524, 5 Blatchf. 294; U. S. *v.* Wilson, 28 Fed. Cas. No. 16,732.

9. Berrisford *v.* State, 66 Ga. 53; Com. *v.* Brown, 10 Phila. (Pa.) 184; U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,572, 13 Blatchf. 211.

10. Barfield *v.* State, 29 Ga. 127, 74 Am. Dec. 49.

11. Rex *v.* Reeves, 2 Leach C. C. 932.

12. Bostick *v.* State, 34 Ala. 266.

13. Clark Cr. L. § 118. See *infra*, III, B.

14. Clark Cr. L. § 118. See *infra*, III, C.

15. Clark Cr. L. § 118. See *infra*, III, D.

16. See *supra*, I.

17. Clark Cr. L. § 119; Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.

Painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not forgery. Reg. *v.* Closs, 7 Cox C. C. 494, Dears. & B. 460, 3 Jur. N. S. 1309, 27 L. J. M. C. 54, 6 Wkly. Rep. 109.

18. See *infra*, III, B, 2.

19. See *infra*, III, B, 3.

20. Wilson *v.* South Park Com'rs, 70 Ill. 46; Caulkins *v.* Whisler, 29 Iowa 495, 4 Am. Rep. 236; People *v.* Drayton, 41 N. Y. App. Div. 40, 58 N. Y. Suppl. 439; Martine's Case, 6 City Hall Rec. (N. Y.) 27; Flower *v.* Shaw, 2 C. & K. 703, 61 E. C. L. 703.

21. *Delaware.*— State *v.* Pratt, 3 Pennew. 264, 51 Atl. 604.

Missouri.— State *v.* Kroeger, 47 Mo. 552.

New York.— People *v.* Dickie, 62 Hun 400, 17 N. Y. Suppl. 51.

Pennsylvania.— Com. *v.* Pioso, 17 Pa. Super. Ct. 45.

Texas.— Hooper *v.* State, 30 Tex. App. 412, 17 S. W. 1066, 28 Am. St. Rep. 926.

England.— Flower *v.* Shaw, 2 C. & K. 703, 61 E. C. L. 703; Reg. *v.* Wilson, 2 C. & K. 527, 2 Cox C. C. 426, 1 Den. C. C. 284, 17 L. J. M. C. 82, 61 E. C. L. 527; Reg. *v.* Bateman, 1 Cox C. C. 186; Rex *v.* Hart, 7 C. & P. 652, 1 Moody C. C. 486, 32 E. C. L. 805.

See 23 Cent. Dig. tit. "Forgery," § 17.

22. U. S. *v.* Schoyer, 27 Fed. Cas. No. 16,232*a*.

23. Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738.

24. Com. *v.* Wilson, 89 Ky. 157, 12 S. W. 264, 11 Ky. L. Rep. 375, 25 Am. St. Rep. 528; People *v.* Filkin, 176 N. Y. 548, 68 N. E.

an instrument purporting on its face to be executed by him as agent of a principal therein named, when in fact he has no authority from such principal to execute said instrument, is not guilty of forgery, as the instrument is nothing different from what it purports to be, the act being a false pretense.[25]

c. Use of Maker's Own Name. If a person signs his own name, or an assumed name which he has been accustomed to use, and represents that it is the signature of another person bearing the same name he is guilty of forgery.[26]

d. Obtaining Signature by Fraud. Forging may be committed by deceitfully and fraudulently obtaining the signature of a party to an instrument which he has no intention to sign.[27]

3. Alteration of Existing Instrument — a. In General. Alteration of an existing instrument with intent to defraud is forgery;[28] and this is so, although the one making the alteration is jointly liable upon the instrument.[29] Nor is it requisite that the instrument should be a valid one, as it is forgery to alter a document which the party himself has previously forged.[30] Alteration may be accomplished by adding something to the instrument, by removing something therefrom, or by a combination of these two.[31]

1120 [*affirming* 83 N. Y. App. Div. 589, 82 N. Y. Suppl. 15]; People *v.* Underhill, 142 N. Y. 38, 36 N. E. 1049 [*reversing* 75 Hun 329, 26 N. Y. Suppl. 1030]; People *v.* Graham, Sheld. (N. Y.) 151; *Ex p.* Hibbs, 26 Fed. 421.

A public officer is guilty of forgery if, after filling up bonds, attesting them in his own name, and negotiating them in accordance with the authority bestowed upon him, he appropriates the proceeds to his own use. Com. *v.* Work, 3 Pittsb. (Pa.) 493.

25. *California.*— People *v.* Bendit, 111 Cal. 274, 43 Pac. 901, 52 Am. St. Rep. 186, 31 L. R. A. 831.

Louisiana.— State *v.* Taylor, 46 La. Ann. 1332, 16 So. 190, 49 Am. St. Rep. 351, 25 L. R. A. 591.

Minnesota.— State *v.* Willson, 28 Minn. 52, 9 N. W. 28.

New York.— Mann *v.* People, 15 Hun 155; Matter of Heilbonn, 1 Park. Cr. 429.

United States.— *In re* Tully, 20 Fed. 812.

England.— Reg. *v.* Inder, 2 C. & K. 635, 1 Den. C. C. 325, 61 E. C. L. 635; Reg. *v.* White, 2 C. & K. 404, 2 Cox C. C. 210, 1 Den. C. C. 208, 61 E. C. L. 404; Rex *v.* Arscott, 6 C. & P. 408, 25 E. C. L. 499.

See 23 Cent. Dig. tit. "Forgery," § 7.

Signing fictitious firm-name.— The rule of false averment of agency applies where the name of a fictitious firm is signed, the writer representing that he is a member of such firm. Com. *v.* Baldwin, 11 Gray (Mass.) 197, 71 Am. Dec. 703.

Where, however, the purported agency does not appear from the signature itself, the person signing the name of another without authority is guilty of forgery, although he says at the time of signing that he is an agent merely. *In re* Phipps, 8 Ont. App. 77.

26. Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; Barfield *v.* State, 29 Ga. 127, 74 Am. Dec. 49; People *v.* Peacock, 6 Cow. (N. Y.) 72; U. S. *v.* Long, 30 Fed. 678; Rex *v.* Webb, Bayl. Bills 432; Mead *v.* Young, 4 T. R. 28, 2 Rev. Rep. 314.

27. Clay *v.* Schwab, 1 Mich. N. P. 168.

28. State *v.* Brett, 16 Mont. 360, 40 Pac. 873; State *v.* Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689; U. S. *v.* Osgood, 27 Fed. Cas. No. 15,971*a*; U. S. *v.* Wood, 28 Fed. Cas. No. 16,753, 2 Cranch C. C. 164; *In re* Jarrard, 4 Ont. 265 [*affirmed* in 20 Can. L. J. 145].

The making of any part of a genuine note, which may give it a greater currency, is forgery; therefore, if a note is made payable at a country banker's or at his banker's in London, who fails, it is forgery to alter the name of that London banker to the name of another London banker, with whom the maker makes his other notes payable after the failure of the first. Rex *v.* Treble, 2 Taunt. 328, R. & R. 164.

Transposing stamps.— It was the duty of a clerk in the stamp office to cut off the corners of parchments which bore the blue paper stamps allowed for as spoiled by the commissioners of stamps and to put the blue paper stamps and the small pieces of parchment so cut off, and which were glued to them, into the fire, without separating them. Instead of doing this, he separated a blue paper stamp from the small piece of parchment to which it had been glued and glued it to a new skin of parchment in which the words "This indenture" had been written. The jury found that he had no fraudulent intent when he cut the stamp from the skin of parchment, but that he had when he separated the blue paper stamp from the small piece of parchment; and that he then intended to apply the stamp to a parchment intended to be used as an indenture. It was held that this was forgery. Rex *v.* Smith, 5 C. & P. 107, 1 Moody C. C. 314, 24 E. C. L. 476.

Cutting apart seven bank-bills with intent to piece them together, so as to make eight, is not an alteration, although making the eight might be. Com. *v.* Hayward, 10 Mass. 34.

29. Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673.

30. Kinder's Case, 2 East P. C. 855.

31. See *infra*, III, B, 3, b, c, d.

b. By Addition. Any addition to an instrument so as to give it a different meaning is forgery.[32] Likewise adding the name of another without authority to an instrument which bears genuine signatures,[33] the addition of an address to the name of a party with intent to make him appear to be a different existing person,[34] or affixing a seal to a genuine signature to a document which is invalid without a seal is forgery.[35]

c. By Subtraction. Erasing words from an instrument[36] or severing a portion thereof[37] so that its effect is changed is forgery.

d. By Substitution. Any change made in the name of a place,[38] in the date,[39] amount,[40] the name of a party to,[41] or in the subject-matter[42] of, an instrument with intent to prejudice the rights of another is sufficient to constitute the offense.

e. Immaterial Alterations. In order that an alteration may constitute forgery it is essential that it be material.[43] Adding the name of a witness which is not required and which does not affect the validity of the instrument,[44] the addition of a figure in the margin, the body remaining unchanged,[45] or a change

32. Gordon *v.* Com., 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744; U. S. *v.* Osgood, 27 Fed. Cas. No. 15,971*a*.

A fraudulent alteration of a genuine receipt by the person to whom it was given in such manner as to make it appear that the moneys receipted for were to be applied in payment of the notes of a third person is forgery. State *v.* Woodered, 20 Iowa 541.

To attach a jurat to an affidavit previously made out, but not sworn to, on which a writ has been issued, is a criminal alteration. Matthews *v.* Reid, 94 Ga. 461, 19 S. E. 247.

33. Reg. *v.* Chambers, L. R. 1 C. C. 341, 12 Cox C. C. 109, 41 L. J. M. C. 15, 25 L. T. Rep. N. S. 507, 20 Wkly. Rep. 103; Reg. *v.* Asplin, 12 Cox C. C. 391; Reg. *v.* Lee, 3 Cox C. C. 80; Reg. *v.* Richards, 1 Cox C. C. 62; Reg. *v.* Pike, 3 Jur. 27, 2 Moody C. C. 70.

34. Reg. *v.* Blenkinsop, 2 C. & K. 531, 2 Cox C. C. 420, 1 Den. C. C. 276, 17 L. J. M. C. 62, 61 E. C. L. 531.

35. Reg. *v.* Collins, 1 Cox C. C. 57.

36. Garner *v.* State, 5 Lea (Tenn.) 213.

Expunging, by a certain liquor, a notification of payment of part of the contents of a bank-bill, written on the face of it, would sustain an indictment on 8 & 9 Wm. III, c. 20, § 36, for erasing an indorsement on such bill. Rex *v.* Bigg, 2 East P. C. 882, 3 P. Wms. 419.

37. State *v.* Stratton, 27 Iowa 420, 1 Am. Rep. 282; Reg. *v.* Bowen, 1 C. & K. 501, 1 Cox C. C. 88, 1 Den. C. C. 22, 47 E. C. L. 501.

Detaching from a due-bill a credit subsequently entered thereon is not forgery, as the credit is no part of the due-bill, and is of no legal effect. State *v.* Millner, 131 Mo. 432, 33 S. W. 15.

Severing the indorsement from a promissory note leaving the note entire is a misdemeanor and not a forgery. State *v.* McLeran, 1 Aik. (Vt.) 311.

38. Com. *v.* Mycall, 2 Mass. 136; State *v.* Robinson, 16 N. J. L. 507.

39. Allen *v.* State, 79 Ala. 34; State *v.* Kattlemann, 35 Mo. 105; Owen *v.* Brown, 70 Vt. 521, 41 Atl. 1025.

40. *Kentucky.*— Com. *v.* Hide, 94 Ky. 517, 23 S. W. 195, 15 Ky. L. Rep. 264.

Mississippi.— Wilson *v.* State, (1892) 12 So. 332.

South Carolina.— State *v.* Waters, 3 Brev. 507.

Washington.— White *v.* Territory, 1 Wash. 279, 24 Pac. 447.

Wisconsin.— Lawless *v.* State, 114 Wis. 189, 89 N. W. 891.

England.— Reg. *v.* Walters, C. & M. 588, 41 E. C. L. 320; Reg. *v.* Vaughan, 8 C. & P. 276, 34 E. C. L. 732; Teague's Case, 2 East P. C. 979, R. & R. 33.

Canada.— Hamilton Bank *v.* Imperial Bank, 27 Ont. App. 590; Reg. *v.* Bail, 7 Ont. 228.

See 23 Cent. Dig. tit. "Forgery," § 24.

Forging bank-note.— Changing the figure two into the figure five in a bank-note is a forgery thereof. Dawson's Case, 2 East P. C. 978, 1 Str. 19. So the altering a banker's one-pound note by substituting the word "ten" for the word "one" is a forgery, although it thereby purports to be a note for ten "pound" and not "pounds." Rex *v.* Post, R. & R. 75.

41. State *v.* Higgins, 60 Minn. 1, 61 N. W. 816, 51 Am. St. Rep. 490, 27 L. R. A. 74; Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673.

42. State *v.* Floyd, 5 Strobh. (S. C.) 58, 53 Am. Dec. 689; State *v.* Donovan, 75 Vt. 308, 55 Atl. 611; Reg. *v.* Wilson, 8 Cox C. C. 25, Dears. & B. 558, 4 Jur. N. S. 670, 27 L. J. M. C. 230, 6 Wkly. Rep. 503; Rex *v.* Atkinson, 7 C. & P. 669, 32 E. C. L. 813; Rex *v.* Birkett, R. & R. 188.

43. Turnipseed *v.* State, (Fla. 1903) 33 So. 851; Bittings *v.* State, 56 Ind. 101; State *v.* Dorrance, 86 Iowa 428, 53 N. W. 281.

44. State *v.* Gherkin, 29 N. C. 206. But the addition of a name as a witness, where witnesses are required, is not an immaterial alteration, although but two witnesses are required, and there are two witnesses without the added name. Reg. *v.* Asplin, 12 Cox C. C. 391.

45. Jackson *v.* State, 72 Ga. 28. *Compare* Com. *v.* Hide, 94 Ky. 517, 23 S. W. 195, 15 Ky. L. Rep. 264, where the figure "3" was

in a memorandum upon the back of an instrument, the legal effect of the instrument not being varied,[46] is immaterial.

C. Intent to Defraud — 1. In General. The second essential element[47] in the crime of forgery is that the act must have been committed with fraudulent intent;[48] hence a person who in good faith[49] or in ignorance of the effect of his act[50] makes or alters an instrument is not guilty of the offense. An interlineation of words in a document to make it conform to the understanding of the parties at the time of its execution[51] is not forgery; nor is making or altering an instrument with the honest belief in authority to do so.[52] *A fortiori* one who possesses authority, express or implied, cannot be guilty,[53] although the person giving the authority knows nothing about the execution of the instrument.[54] The intent to defraud is not limited to obtaining money or property; it is sufficient if the

wrongfully inserted between the dollar mark and the figures "70" in the upper margin of a check, making it appear to be for $3.70 instead of $.70. This was regarded as a material alteration, although the body of the check was unaltered. It was in a prominent part, and the written amount required closer observation.

46. State *v.* Hendry, 156 Ind. 392, 59 N. E. 1041, 54 L. R. A. 794; State *v.* Thornburg, 28 N. C. 79, 44 Am. Dec. 67. And see State *v.* Davis, 53 Iowa 252, 5 N. W. 149, holding that the alteration of an indorsement of money received, made upon the back of a promissory note and not signed, does not constitute forgery, unless it is shown that the indorsement was intended as a receipt for the benefit of the maker of the note; the presumption otherwise being that it was only a memorandum made by the payee for his own convenience.

47. See *supra*, I.

48. *Alabama.*— Agee *v.* State, 113 Ala. 52, 21 So. 207.

California.— People *v.* Turner, 113 Cal. 278, 45 Pac. 331.

Colorado.— Cohen *v.* People, 7 Colo. 274, 3 Pac. 385.

Iowa.— State *v.* Pierce, 8 Iowa 231.

Massachusetts.— Com. *v.* Henry, 118 Mass. 460.

Minnesota.— State *v.* Bjornaas, 88 Minn. 301, 92 N. W. 980.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354; State *v.* Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. Rep. 681; State *v.* Jackson, 89 Mo. 561, 1 S. W. 760; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

New Jersey.— State *v.* Redstrake, 39 N. J. L. 365.

New York.— People *v.* Wiman, 85 Hun 320, 32 N. Y. Suppl. 1037 [*affirmed* in 148 N. Y. 29, 42 N. E. 408].

North Carolina.— State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756; State *v.* Wolf, 122 N. C. 1079, 29 S. E. 841.

Ohio.— Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.

Pennsylvania.— Com. *v.* Connolly, 11 Pa. Co. Ct. 414; Com. *v.* Stone, 6 Lack. Leg. N. 241; Com. *v.* Bargar, 2 L. T. N. S. 37.

England.— Reg. *v.* Allday, 8 C. & P. 136, 34 E. C. L. 652.

See 23 Cent. Dig. tit. "Forgery," § 4.

Limitation of rule.— It is not necessary that a false entry in or an alteration of a public record, made in violation of a statute, should be with fraudulent intent. People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45; Reg. *v.* Asplin, 12 Cox C. C. 391.

49. People *v.* Devon, (Cal. 1885) 8 Pac. 93; Kotter *v.* People, 150 Ill. 441, 37 N. E. 932.

50. Montgomery *v.* State, 12 Tex. App. 323.

51. Pauli *v.* Com., 89 Pa. St. 432.

52. Com. *v.* Whitney, Thach. Cr. Cas. (Mass.) 588; People *v.* Loew, 64 Hun (N. Y.) 639, 19 N. Y. Suppl. 360, 8 N. Y. Cr. 370; Parmelee *v.* People, 8 Hun (N. Y.) 623; Jones *v.* State, (Tex. Cr. App. 1902) 69 S. W. 143; McCay *v.* State, 32 Tex. Cr. 233, 22 S. W. 974; Sweet *v.* State, 28 Tex. App. 223, 12 S. W. 590; Reg. *v.* Parish, 8 C. & P. 94, 34 E. C. L. 628; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583.

53. People *v.* Reinitz, 6 N. Y. Suppl. 672, 7 N. Y. Cr. 71; State *v.* Lurch, 12 Oreg. 95, 6 Pac. 405; Reg. *v.* Hartshorn, 6 Cox C. C. 395; Reg. *v.* Parish, 8 C. & P. 94, 34 E. C. L. 628; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583.

This principle extends to partnerships, and, as each partner has implied authority to sign the firm-name, one of them cannot be guilty of forgery in using the firm-name however fraudulent his act may be. People *v.* Wiman, 85 Hun (N. Y.) 320, 32 N. Y. Suppl. 1037 [*affirmed* in 148 N. Y. 29, 42 N. E. 408]; Com. *v.* Brown, 10 Phila. (Pa.) 184.

Where an officer of a corporation is given authority to make checks, but by a subsequent verbal agreement a certain fund is not to be drawn against except by consent of a stock-holder who has countersigned checks in blank, such agreement being in contravention of the by-laws of the corporation, the officer is not guilty of forgery in filling up one of the blank checks without the consent of the stock-holder. People *v.* Mershon, 43 N. Y. App. Div. 541, 60 N. Y. Suppl. 115, 14 N. Y. Cr. 286.

It seems that a person having authority may be guilty of forgery if with intent to defraud he assumes to be the principal. Reg. *v.* Gould, 20 U. C. C. P. 154.

54. Com. *v.* Stone, 6 Lack. Leg. N. (Pa.) 241.

forged instrument is to the prejudice of the rights of some person.[55] Nor is it requisite that the expected advantage should accrue to the guilty person.[56] The intent to defraud cannot be overcome by the fact that the forgery was not successful, and that no one has been prejudiced;[57] nor by the fact that the person committing the forgery intended to take up the forged instrument,[58] or has actually paid it.[59] It is no defense that the person apparently made liable upon the forged instrument is indebted to the person who committed the forgery, and that the latter intended to devote the money obtained by means of the instrument to the payment of the debt;[60] nor that the person committing the forgery has given guaranties to the person to whom he has passed the instrument.[61] Likewise criminal intent in forging an instrument to be used as evidence cannot be negatived by proof that the claim to be supported by such evidence is a just one.[62] It is no defense that the person committing the forgery was actuated by a laudable purpose;[63] nor that he expected that the person whose name he used would pay the instrument rather than there should be a criminal prosecution;[64] nor that the consideration for the instrument was illegal.[65] The intent to defraud is not absent because defendant requested the person to whom the forged instruments were passed to place them in his safe.[66] So it has been held that the intent to defraud is not absent merely because defendant said at the time the instruments were passed that the person whose name was signed had not actually

55. State *v.* Boasso, 38 La. Ann. 202; State *v.* Kimball, 50 Me. 409; Phelps *v.* People, 72 N. Y. 365 [*affirming* 6 Hun 428].

56. State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; Reg. *v.* Ion, 6 Cox C. C. 1, 2 Den. C. C. 475, 16 Jur. 746, 21 L. J. M. C. 166.

57. *Alabama.*— Denson *v.* State, 122 Ala. 100, 26 So. 119.

Colorado.— Dunn *v.* People, 4 Colo. 126.

Florida.— Hawkins *v.* State, 28 Fla. 363, 9 So. 652.

Iowa.— State *v.* McMackin, 70 Iowa 281, 30 N. W. 635; State *v.* Pierce, 8 Iowa 231.

Massachusetts.— Com. *v.* Ladd, 15 Mass. 526.

New Jersey.— State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

North Carolina.— State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

Oregon.— State *v.* Lurch, 12 Oreg. 99, 6 Pac. 408.

South Carolina.— State *v.* Washington, 1 Bay 120, 1 Am. Dec. 601.

Tennessee.— Hale *v.* State, 1 Coldw. 167, 78 Am. Dec. 488.

Texas.— Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523; Green *v.* State, 36 Tex. Cr. 109, 35 S. W. 971; Crawford *v.* State, 31 Tex. Cr. 51, 19 S. W. 766; Keeler *v.* State, 15 Tex. App. 111.

England.— Rex *v.* Ward, 2 East P. C. 861.

Canada.— *In re* Hall, 3 Ont. 331 [*affirmed* in 8 Ont. App. 31].

See 23 Cent. Dig. tit. "Forgery," § 49.

58. Com. *v.* Henry, 118 Mass. 460; People *v.* Weaver, 81 N. Y. App. Div. 567, 81 N. Y. Suppl. 519, 17 N. Y. Cr. 291; Reg. *v.* Geach, 9 C. & P. 499, 38 E. C. L. 294; Reg. *v.* Beard, 8 C. & P. 143, 34 E. C. L. 656; Reg. *v.* Parish, 8 C. & P. 94, 34 E. C. L. 628; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583.

59. Brown *v.* People, 8 Hun (N. Y.) 562 [*affirmed* in 72 N. Y. 571, 28 Am. Rep. 183]; Reg. *v.* Geach, 9 C. & P. 499.

60. *Alabama.*— Curtis *v.* State, 118 Ala. 125, 24 So. 111; Bush *v.* State, 77 Ala. 83.

Arkansas.— Claiborne *v.* State, 51 Ark. 88, 9 S. W. 851.

Texas.— Plemons *v.* State, 44 Tex. Cr. 555, 72 S. W. 854.

Vermont.— State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

England.— Flower *v.* Shaw, 2 C. & K. 703, 61 E. C. L. 703; Reg. *v.* Wilson, 2 C. & K. 527, 2 Cox C. C. 426, 1 Den. C. C. 284, 17 L. J. M. C. 82, 61 E. C. L. 527; Wright's Case, 1 Lewin C. C. 135. *Compare* Reg. *v.* Bradford, 2 F. & F. 859, holding that where an employee exhibited a forged receipt intending to obtain credit for the amount apparently paid by him, an intent to defraud was negatived by the fact that the employer was actually indebted to the employee.

61. Rex *v.* James, 7 C. & P. 553, 32 E. C. L. 755.

62. State *v.* Wooderd, 20 Iowa 541; State *v.* Kimball, 50 Me. 409.

63. The use of fictitious paper in an attempt to supply the wasted resources of a bank whose affairs are in a disastrous condition is not justifiable. State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

64. Reg. *v.* Beard, 8 C. & P. 143, 34 E. C. L. 656; Reg. *v.* Parish, 8 C. & P. 94, 34 E. C. L. 628; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583.

65. In Dunn *v.* People, 4 Colo. 126, the consideration for a forged check was illicit intercourse and cigars and liquors sold without license. The liquors and cigars at least were property, and could constitute the subject-matter of lawful trade, and the intent to defraud could exist notwithstanding the seller had no license.

66. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

signed them, he having represented that the signature had been made by such person's son.[67]

2. PERSON DEFRAUDED. While an intent to defraud is essential, it is not necessary that there should be an intent to defraud any particular person,[68] but there must at all events be a possibility of some person being defrauded.[69] A corporation,[70] a state,[71] the United States,[72] and the estate of a decedent[73] are each regarded as a person; and where the forged instrument is passed to a servant acting as such, the master is the person defrauded.[74] Where a society is the person defrauded, it is no objection that defendant is a member thereof.[75]

3. WHEN INTENT TO DEFRAUD INSUFFICIENT. While there can be no forgery without a fraudulent intent, it does not follow that every intent to defraud, although coupled with a written instrument, is forgery.[76] Procuring the execution,[77] or the acceptance[78] of a document by a misrepresentation as to its contents, or the ratification of an alteration in an instrument by a misstatement of facts,[79] is not forgery. So if a person presents a false claim against the govern-

67. People *v.* Walker, 140 Cal. 153, 73 Pac. 831.

68. *Kentucky.*— Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 803; Linville *v.* Com., 7 Ky. L. Rep. 43.

Massachusetts.— Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620.

Nebraska.— Morearty *v.* State, 46 Nebr. 652, 65 N. W. 784; Roush *v.* State, 34 Nebr. 325, 51 N. W. 755.

New York.— People *v.* D'Argencour, 32 Hun 178 [*affirmed* in 95 N. Y. 624].

Pennsylvania.— McClure *v.* Com., 86 Pa. St. 353; Com. *v.* Stone, 6 Lack. Leg. N. 241.

Texas.— Riley *v.* State, (Cr. App. 1898) 44 S. W. 498; Green *v.* State, 36 Tex. Cr. 109, 35 S. W. 971.

England.— Reg. *v.* Marcus, 2 C. & K. 356, 61 E. C. L. 356; Reg. *v.* Nash, 2 Den. C. C. 448, 16 Jur. 553, 21 L. J. M. C. 147; Reg. *v.* Trenfield, 1 F. & F. 43. *Contra*, Reg. *v.* Hodgson, 7 Cox C. C. 122, Dears. & B. 3, 2 Jur. N. S. 453, 25 L. J. M. C. 78, 4 Wkly. Rep. 509.

Canada.— Reg. *v.* Weir, 9 Quebec Q. B. 253, 3 Can. Cr. Cas. 499.

See 23 Cent. Dig. tit. "Forgery," § 4.

Contra.— Williams *v.* State, 51 Ga. 535; Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.

69. State *v.* Givens, 5 Ala. 747; Com. *v.* Henry, 118 Mass. 460; People *v.* Wiman, 85 Hun (N. Y.) 320, 32 N. Y. Suppl. 1037 [*affirmed* in 148 N. Y. 29, 42 N. E. 408]; Reg. *v.* Marcus, 2 C. & K. 356, 61 E. C. L. 356; Reg. *v.* Hodgson, 7 Cox C. C. 122, Dears. & B. 3, 2 Jur. N. S. 453, 25 L. J. M. C. 78, 4 Wkly. Rep. 509; Reg. *v.* Nash, 2 Den. C. C. 448, 16 Jur. 553, 21 L. J. M. C. 147.

Where signatures have been forged to national bank-notes, it is no defense that under the act of July 28, 1892, 27 U. S. St. at L. 322 [U. S. Comp. St. (1901) p. 3491], such notes are redeemable, as nevertheless someone must be defrauded by the act. Logan *v.* U. S., 123 Fed. 291, 59 C. C. A. 476.

Forged deposition to procure divorce.— On the trial of an indictment for making and uttering a forged deposition to procure a divorce by the respondent from his wife, a requested instruction that respondent could commit no fraud upon his wife is properly refused. State *v.* Kimball, 50 Me. 409.

Where the intent was to defraud a society of which the wife of the prisoner was a member, an objection that the prisoner thereby became a part owner and could not be made criminally liable for defrauding his coöwners is untenable. Reg. *v.* Moody, 9 Cox C. C. 166, 8 Jur. N. S. 574, L. & C. 173, 31 L. J. M. C. 156, 6 L. T. Rep. N. S. 301, 10 Wkly. Rep. 585.

70. State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

71. Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Martin *v.* State, 24 Tex. 61.

72. U. S. *v.* Morris, 26 Fed. Cas. No. 15,813, 16 Blatchf. 133.

73. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; Billings *v.* State, 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 57 Am. Rep. 77; Chahoon *v.* Com., 20 Gratt. (Va.) 733.

74. State *v.* Samuels, 144 Mo. 68, 45 S. W. 1088.

75. Reg. *v.* Smith, 9 Cox C. C. 162, 8 Jur. N. S. 572, L. & C. 168, 31 L. J. M. C. 154, 6 L. T. Rep. N. S. 300, 10 Wkly. Rep. 583.

76. People *v.* Loew, 19 N. Y. Suppl. 360, 8 N. Y. Cr. 370; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

77. Wells *v.* State, 89 Ga. 788, 15 S. E. 679; Com. *v.* Sankey, 22 Pa. St. 390, 60 Am. Dec. 91; Hill *v.* State, 1 Yerg. (Tenn.) 76, 24 Am. Dec. 441; Reg. *v.* Chadwick, 2 M. & Rob. 545; Reg. *v.* Collins, 2 M. & Rob. 461. In State *v.* Shurtliff, 18 Me. 368, where the grantee of real estate, after the grantor had read the draft of the deed, fraudulently substituted another draft which included more land than was covered in the original draft, the grantor executing the substituted draft, the court applied the rule of procuring the forgery of an instrument by an innocent agent, and the act of the grantee was forgery.

78. Dallas *v.* Com., 40 S. W. 456, 19 Ky. L. Rep. 289.

79. State *v.* Flanders, 38 N. H. 324.

ment, which results in the issuance to him of an order, it is not forgery;[80] nor is the indorsement in his own name of a check received by one as the result of his false pretenses.[81] So making or procuring to be made a writing genuine in itself, but containing false statements, is not within a statute providing a punishment for falsely making or procuring to be falsely made a writing, etc.[82] The receipt and collection of an order for a larger amount than the payee knows to be due him is not forgery;[83] nor is the fraudulent indorsement of genuine negotiable instruments, in which the interest of the holder has ceased;[84] nor the uttering of a bill with a genuine indorsement under the pretense of being the indorser.[85] Likewise the indorsement by a person in his own name of an order payable to one bearing a similar name, and the payment to him of such order without noticing the difference in names, does not constitute forgery;[86] nor does a false assertion of authority to receive a debt.[87] Drawing a bill for the purpose of fraud, by one who knows that it will be dishonored,[88] although accepted,[89] is no forgery, even if the name signed be fictitious, credit being given entirely to the party signing.[90] If a mortgagor at the time of making a mortgage owns the property mentioned therein, and intends it to be covered thereby, he is not guilty of forgery, whatever steps he may subsequently take in regard to such property.[91]

D. Efficacy of Instrument to Defraud.[92] The third element[93] of forgery is that the writing shall possess some apparent legal efficacy, because otherwise it would have no tendency to defraud;[94] or in other words the writing must be

80. State *v.* Corfield, 46 Kan. 207, 26 Pac. 498; U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

81. Hoge *v.* Chicago First Nat. Bank, 18 Ill. App. 501.

82. U. S. *v.* Cameron, 3 Dak. 132, 13 N. W. 561; U. S. *v.* Moore, 60 Fed. 738; U. S. *v.* Wentworth, 11 Fed. 52, in which it was said that the offense committed is forgery.

83. Bell *v.* State, 21 Tex. App. 270, 17 S. W. 155.

84. *In re* Sherman, 19 Ont. 315.

85. Hevey's Case, 2 East P. C. 856, 1 Leach C. C. 229, R. & R. 407 note.

86. Rex *v.* Story, R. & R. 60.

87. Reg. *v.* Myott, 6 Cox C. C. 406.

88. Harrison *v.* State, (Ark. 1904) 78 S. W. 763; Aickles' Case, 2 East P. C. 968, 1 Leach C. C. 438.

89. Rex *v.* Webb, 3 B. & B. 228, 6 Moore C. P. 447 note, R. & R. 405, 7 E. C. L. 700.

90. Reg. *v.* Martin, 5 Q. B. D. 34, 14 Cox C. C. 375, 44 J. P. 74, 49 L. J. M. C. 11, 41 L. T. Rep. N. S. 531, 28 Wkly. Rep. 232; Reg. *v.* Whyte, 5 Cox C. C. 290; Rex *v.* Bontien, R. & R. 194. However, if a person assumes and is accustomed to use a name not his own, and also represents that he is the son of another bearing the same name as the one assumed, he is guilty of forgery if he draws a bill of exchange in his assumed name, and passes it to one believing that he is dealing with a genuine son of the alleged parent. Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Antedating deed with fraudulent intent.— A deed really executed by the parties between whom it purports to be made, but antedated with intent fraudulently to defeat a prior deed, is a forgery. Reg. *v.* Ritson, L. R. 1 C. C. 200, 11 Cox C. C. 352, 39 L. J. M. C. 10, 21 L. T. Rep. N. S. 437, 18 Wkly. Rep. 73.

91. Beal *v.* State, 138 Ala. 94, 35 So. 58.

92. What writings are subjects of forgery see *infra*, IV.

93. See *supra*, I.

94. *Alabama.*— Burden *v.* State, 120 Ala. 388, 25 So. 190, 74 Am. St. Rep. 37.

California.— People *v.* Tomlinson, 35 Cal. 503.

Florida.— West *v.* State, (1903) 33 So. 854; King *v.* State, 43 Fla. 211, 31 So. 254.

Indiana.— Reed *v.* State, 28 Ind. 396.

Iowa.— State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454.

Kentucky.— Colson *v.* Com., 110 Ky. 233, 61 S. W. 46, 22 Ky. L. Rep. 1674.

Louisiana.— State *v.* Anderson, 30 La. Ann. 557.

Maine.— State *v.* Kimball, 50 Me. 409; Ames' Case, 2 Me. 365.

Mississippi.— Cox *v.* State, 66 Miss. 14, 5 So. 618.

Montana.— State *v.* Evans, 15 Mont. 539, 39 Pac. 850, 48 Am. St. Rep. 701, 28 L. R. A. 127.

New York.— People *v.* Cady, 6 Hill 490.

Ohio.— Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.

Tennessee.— State *v.* Corley, 4 Baxt. 410; State *v.* Smith, 8 Yerg. 150.

Texas.— Howell *v.* State, 37 Tex. 591.

Vermont.— State *v.* Briggs, 34 Vt. 501.

Virginia.— Gordon *v.* Com., 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744.

England.— Reg. *v.* Turberville, 4 Cox C. C. 13; Reg. *v.* Rouse, 4 Cox C. C. 7; Reg. *v.* Egan, 1 Cox C. C. 29.

Alteration before signature.— An alteration made in an instrument after it has been signed by one party, but before it has been

one which if genuine might injure another. This proposition is so obvious that the mere statement thereof proves it.[95]

IV. WHAT WRITINGS ARE SUBJECTS OF FORGERY.

A. In General — 1. Introductory Statement. Forgery may be committed of any writing which if genuine would operate as the foundation of another man's liability,[96] or the evidence of his right.[97] It is sufficient if the instrument forged, supposing it to be genuine, might have been prejudicial.[98] There need not be an exact resemblance between a false instrument and the instrument for which it is intended to pass;[99] nor is it requisite that the writing should bear any resemblance to that of the person whose writing it purports to be.[1] And it is no defense that there was no attempt at concealment, and that only a careless person could have been deceived.[2]

2. Void Instruments. As already shown it is an element of the offense of forgery that the writing alleged to be forged shall possess some apparent legal efficacy.[3] Consequently an instrument void on its face,[4] because meaningless,[5] indefinite,[6] or expressing no consideration,[7] or lacking a payee,[8] a signature,[9] a

signed by all, is not forgery. Gaertner *v.* Heyl, 179 Pa. St. 391, 36 Atl. 146; Johnson *v.* State, 40 Tex. Cr. 605, 51 S. W. 382, 76 Am. St. Rep. 742.

95. People *v.* Tomlinson, 35 Cal. 503.

96. 3 Greenleaf Ev. § 103. See also the following cases:

Indiana.— Shannon *v.* State, 10 Ind. 407, 10 N. E. 87.

Maine.— State *v.* Kimball, 50 Me. 409; Ames' Case, 2 Me. 365.

Maryland.— Arnold *v.* Cost, 3 Gill & J. 219, 22 Am. Dec. 302.

Massachusetts.— Com. *v.* Ray, 3 Gray 441.

England.— Rex *v.* Ward, 2 Ld. Raym. 1461.

97. 3 Greenleaf Ev. § 103; Shannon *v.* State, 109 Ind. 407, 10 N. E. 87.

98. Arnold *v.* Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302.

99. Reg. *v.* Mahony, 6 Cox C. C. 487; Elliott's Case, 2 East P. C. 951, 1 Leach C. C. 175, 179.

1. *Kentucky.*— Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 802.

Louisiana.— State *v.* Gryder, 44 La. Ann. 962, 11 So. 573, 32 Am. St. Rep. 358.

Massachusetts.— Com. *v.* Stephenson, 11 Cush. 481, 59 Am. Dec. 154.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

New York.— Phelps *v.* People, 6 Hun 428 [*affirmed* in 72 N. Y. 365]; Dobb's Case, 6 City Hall Rec. 61.

North Carolina.— State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

South Carolina.— State *v.* Bullock, 54 S. C. 300, 32 S. E. 424.

West Virginia.— State *v.* Poindexter, 23 W. Va. 805.

England.— Reg. *v.* Mahony, 6 Cox C. C. 487.

See 23 Cent. Dig. tit. "Forgery," § 27.

2. *Indiana.*— Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; Lemasters *v.* State, 95 Ind. 367.

Kentucky.— Com. *v.* Hide, 94 Ky. 517, 23 S. W. 195, 15 Ky. L. Rep. 264.

Louisiana.— State *v.* Ford, 38 La. Ann. 797; State *v.* Dennett, 19 La. Ann. 395.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

New Jersey.— Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673.

Pennsylvania.— Com. *v.* Biles, 3 Phila. 350.

Wisconsin.— Lawless *v.* State, 114 Wis. 189, 89 N. W. 891.

See 23 Cent. Dig. tit. "Forgery," § 40.

3. See *supra*, III, D.

4. *Alabama.*— Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639.

Idaho.— People *v.* Heed, 1 Ida. 531.

Illinois.— Brown *v.* People, 86 Ill. 239, 29 Am. Rep. 25.

Iowa.— State *v.* Pierce, 8 Iowa 231.

Maine.— Abbott *v.* Rose, 62 Me. 194, 16 Am. Rep. 427.

Missouri.— State *v.* Leonard, 171 Mo. 622, 71 S. W. 1017, 94 Am. St. Rep. 798.

New York.—People *v.* Harrison, 8 Barb. 560; People *v.* Galloway, 17 Wend. 540; People *v.* Shall, 9 Cow. 778.

Texas.— Henderson *v.* State, 14 Tex. 503.

England.— Moffat's Case, 2 East P. C. 954, 1 Leach C. C. 431.

See 23 Cent. Dig. tit. "Forgery," § 30.

5. Carberry *v.* State, 11 Ohio St. 410; Terry *v.* Com., 87 Va. 672, 13 S. E. 104.

6. Henderson *v.* State, 120 Ala. 360, 25 So. 236; People *v.* Farrington, 14 Johns. (N. Y.) 348.

7. People *v.* Shall, 9 Cow. (N. Y.) 778.

8. Williams *v.* State, 51 Ga. 535; Fielder *v.* Marshall, 9 C. B. N. S. 606, 7 Jur. N. S. 777, 30 L. J. C. P. 158, 3 L. T. Rep. N. S. 858, 99 E. C. L. 606; Reg. *v.* Denny, 1 Cox C. C. 178; Reynolds *v.* Peto, 11 Exch. 418, 9 Exch. 410; Reg. *v.* Hawkes, 2 Moody C. C. 60; Rex *v.* Randall, R. & R. 145; Rex *v.* Richards, R. & R. 144; Rex *v.* Ravenscroft, R. & R. 120.

9. State *v.* Monnier, 8 Minn. 212; Anderson *v.* State, 20 Tex. App. 595; Reg. *v.* Mopsey, 11 Cox C. C. 143; Rex *v.* Pateman, R. & R. 338.

seal,[10] or sufficient witnesses[11] cannot be the subject of forgery. So forgery cannot be predicated of an unacknowledged deed,[12] unless the deed possesses a validity without such acknowledgment;[13] nor of the acknowledgment itself if invalid;[14] nor of an instrument which should be proven under oath, but which is not.[15] Instruments issued by a public officer which are not properly signed,[16] or upon which a pecuniary obligation cannot be based, are not the subjects of forgery.[17] However, an instrument which is valid in part may be the subject of forgery.[18]

3. Non-Enforceable Contracts. Contracts which upon their face are voidable only, or to which the defense would be personal merely, are subjects of forgery. Such are usurious notes,[19] instruments purporting to have been made on Sunday,[20] or notes barred by limitation.[21] So a contract prohibited by law may be the subject of forgery,[22] and this it has been held is true whether the contract is merely voidable,[23] or is absolutely void.[24]

4. Instruments No Longer in Force. An instrument which has accomplished its purpose, and has been returned to the party who originally issued it, is in legal acceptation no instrument, and an alteration therein is not forgery.[25]

5. Instruments Not Conforming to Statutes. An instrument which is not executed in strict conformity with the requirements of a statute may be the subject of forgery.[26] Likewise it is no defense that the amount called for in the false

Where an instrument requires the signatures of more than one person, it is not the subject of forgery if it bears fewer than the required number. State *v.* Jones, 1 Bay (S. C.) 207; Reg. *v.* Turpin, 2 C. & K. 820, 61 E. C. L. 820.

10. Cunningham *v.* People, 4 Hun (N. Y.) 455; Rex *v.* Rushworth, R. & R. 235, 1 Stark. 396.

If the instrument is valid without a seal, it is a subject of forgery. State *v.* Tobie, 141 Mo. 547, 42 S. W. 1076; Com. *v.* Misner, Add. (Pa.) 44.

11. Pearson *v.* Com., 78 S. W. 1128, 25 Ky. L. Rep. 1866; Wall's Case, 2 East P. C. 953.

12. Roode *v.* State, 5 Nebr. 174, 25 Am. Rep. 475; People *v.* Harrison, 8 Barb. (N. Y.) 560; Johnson *v.* State, 40 Tex. Cr. 605, 51 S. W. 382, 76 Am. St. Rep. 742.

13. State *v.* Tobie, 141 Mo. 547, 42 S. W. 1076; Lassiter *v.* State, 35 Tex. Cr. 540, 34 S. W. 751.

14. People *v.* Harrison, 8 Barb. (N. Y.) 560; Faulkner's Case, 3 City Hall Rec. (N. Y.) 65.

15. Pearson *v.* Com., 78 S. W. 1128, 25 Ky. L. Rep. 1866.

16. Conner's Case, 3 City Hall Rec. (N. Y.) 59; State *v.* Ryan, 9 N. D. 419, 83 N. W. 865.

17. *Colorado.*— Raymond *v.* People, 2 Colo. App. 329, 30 Pac. 504.

Idaho.— People *v.* Heed, 1 Ida. 531.

Oklahoma.— Territory *v.* Delana, 3 Okla. 573, 41 Pac. 618.

Texas.— Munoz *v.* State, (Cr. App. 1899) 50 S. W. 949.

England.— Moffat's Case, 2 East P. C. 954, 1 Leach C. C. 431; Rex *v.* Rushworth, R. & R. 235, 1 Stark. 396.

See 23 Cent. Dig. tit. "Forgery," § 30.

18. People *v.* Munroe, (Cal. 1893) 33 Pac. 776.

19. People *v.* Wheeler, 47 Hun (N. Y.) 484; People *v.* Fadner, 10 Abb. N. Cas. (N. Y.) 462.

20. State *v.* Sherwood, 90 Iowa 550, 58 N. W. 911, 48 Am. St. Rep. 461; Van Sickle *v.* People, 29 Mich. 61.

21. State *v.* Dunn, 23 Oreg. 562, 32 Pac. 621, 37 Am. St. Rep. 704.

22. Nelson *v.* State, 82 Ala. 44, 2 So. 463; Van Horne *v.* State, 5 Ark. 349; People *v.* James, 110 Cal. 155, 42 Pac. 479; People *v.* Munroe, 100 Cal. 664, 35 Pac. 326, 33 Pac. 776, 38 Am. St. Rep. 323, 24 L. R. A. 33; Reg. *v.* Stainer, L. R. 1 C. C. 230, 39 L. J. M. C. 54, 21 L. T. Rep. N. S. 758, 18 Wkly. Rep. 439; Reg. *v.* Dodd, 18 L. T. Rep. N. S. 89.

23. Nelson *v.* State, 82 Ala. 44, 2 So. 463.

24. People *v.* Munroe, 100 Cal. 664, 35 Pac. 326, 38 Am. St. Rep. 323, 24 L. R. A. 33, a distinction being made between instruments which are *nudum pactum* and those which are merely void on the ground that they are against public policy or *ultra vires*.

25. People *v.* Fitch, 1 Wend. (N. Y.) 198, 19 Am. Dec. 477; Brittain *v.* Bank of London, 3 F. & F. 465, 8 L. T. Rep. N. S. 382, 11 Wkly. Rep. 569.

Under special statutory provisions.— Under a statute the insertion of words in an instrument which has been satisfied may be a crime. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

26. *California.*— People *v.* Bibby, 91 Cal. 470, 27 Pac. 781.

Florida.— King *v.* State, 43 Fla. 211, 31 So. 254.

Missouri.— State *v.* Tompkins, 71 Mo. 613.

England.— Reg. *v.* McConnell, 1 C. & K. 371, 2 Moody C. C. 298, 47 E. C. L. 371; McIntosh's Case, 2 East P. C. 942, 2 Leach C. C. 883; Gade's Case, 2 East P. C. 874, 2 Leach C. C. 732; Rex *v.* Lyon, R. & R. 190.

Canada.— Reg. *v.* Hovey, 8 Ont. Pr. 345.

See 23 Cent. Dig. tit. "Forgery," § 29.

writing is in excess of that which is legally allowable,[27] nor that the instrument does not bear a revenue stamp.[28] Process of court, although irregularly issued,[29] or a nullity,[30] is the subject of forgery.

6. Instruments Invalid From Extrinsic Facts. An instrument cannot be said to be incapable of effecting fraud because by extraneous evidence it can be shown to be of no validity. Such instruments are nevertheless subjects of forgery.[31] Hence it is immaterial that the name signed is that of a person under legal disability,[32] or dead,[33] or that the name is fictitious.[34] It is also immaterial that the purported grantor in a false deed had no interest in the land described

Instances.— Where a false warrant or order is not signed in the customary manner, it is sufficient if, under the statute, either method would be legal (Claiborne *v.* State, 51 Ark. 88, 9 S. W. 851; Crain *v.* State, 45 Ark. 450; Langdale *v.* People, 100 Ill. 263); and in making a certificate, it is enough if the statute is substantially complied with (People *v.* Filkin, 83 N. Y. App. Div. 589, 82 N. Y. Suppl. 15). The fact that a certificate was uttered after the repeal of a law, but purporting to have been issued for a bounty earned while the law was in force, does not deprive it of validity on its face so as to prevent it from being the subject of forgery. People *v.* Filkin, 176 N. Y. 548, 68 N. E. 1120 [*affirming* 83 N. Y. App Div. 589, 82 N. Y. Suppl. 15].

27. State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454; State *v.* Eades, 68 Mo. 150, 30 Am. Rep. 780; State *v.* Brett, 16 Mont. 360, 40 Pac. 873.

28. *Alabama.*— Williams *v.* State, 126 Ala. 50, 28 So. 632.

Illinois.— Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Iowa.— State *v.* Shields, 112 Iowa 27, 83 N. W. 807.

Maryland.— Laird *v.* State, 61 Md. 309.

Minnesota.— State *v.* Mott, 16 Minn. 472, 10 Am. Rep. 152.

New Hampshire.— State *v.* Young, 47 N. H. 402.

North Carolina.— State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756.

Tennessee.— State *v.* Haynes, 6 Coldw. 550.

Texas.— Horton *v.* State, 32 Tex. 79; King *v.* State, 42 Tex. Cr. 108, 57 S. W. 840, 96 Am. St. Rep. 792; Hanks *v.* State, (Cr. App. 1899) 54 S. W. 587; Thomas *v.* State, 40 Tex. Cr. 562, 51 S. W. 242, 76 Am. St. Rep. 740, 46 L. R. A. 454.

Wisconsin.— State *v.* Hill, 30 Wis. 416 [*overruling* John *v.* State, 23 Wis. 504].

England.— Rex *v.* Reculist, 2 East P. C. 956, 2 Leach C. C. 703; Morton's Case, 2 East P. C. 955; Rex *v.* Hawkeswood, 2 T. R. 606 note *c*.

See 23 Cent. Dig. tit. "Forgery," § 43.

Contra.— People *v.* Frank, 28 Cal. 507.

29. Rex *v.* Collier, 5 C. & P. 160, 24 E. C. L. 504.

30. Fawcett's Case, 2 East P. C. 862.

31. *California.*— People *v.* McGlade, 139 Cal. 66, 72 Pac. 600; People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

Iowa.— State *v.* Pierce, 8 Iowa 231.

Kansas.— State *v.* Hilton, 35 Kan. 338, 11 Pac. 164.

Ohio.— Bowles *v.* State, 37 Ohio St. 35.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

Virginia.— Com. *v.* Linton, 2 Va. Cas. 476.

England.— Rex *v.* Froud, 1 B. & B. 300, 3 Moore C. P. 645, 7 Price 609, R. & R. 389, 5 E. C. L. 647; Reg. *v.* Clarkson, 1 Cox C. C. 110; McIntosh's Case, 2 East P. C. 942, 956, 2 Leach C. C. 883; Reg. *v.* Pike, 3 Jur. 27, 2 Moody C. C. 70.

See 23 Cent. Dig. tit. "Forgery," § 31.

32. Wilcoxson *v.* State, 60 Ga. 184; People *v.* Krummer, 4 Park. Cr. (N. Y.) 217; Heath's Case, 2 City Hall Rec. (N. Y.) 54; King *v.* State, 42 Tex. Cr. 108, 57 S. W. 840, 96 Am. St. Rep. 792; Brewer *v.* State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

33. Brewer *v.* State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

34. *Alabama.*— Williams *v.* State, 126 Ala. 50, 28 So. 632; Thompson *v.* State, 49 Ala. 16; State *v.* Givens, 5 Ala. 747.

California.— People *v.* Nishiyama, 135 Cal. 299, 67 Pac. 776; People *v.* Elliott, 90 Cal. 586, 27 Pac. 433.

Georgia.— Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Louisiana.— State *v.* Hahn, 38 La. Ann. 169.

Massachusetts.— Com. *v.* Chandler, Thach. Cr. Cas. 187.

Michigan.— People *v.* Warner, 104 Mich. 337, 62 N. W. 405.

Montana.— State *v.* Vineyard, 16 Mont. 138, 40 Pac. 173.

Nebraska.— Randolph *v.* State, 65 Nebr. 520, 91 N. W. 356.

New York.— Gotobed's Case, 6 City Hall Rec. 25; Riley's Case, 5 City Hall Rec. 87; Grant's Case, 3 City Hall Rec. 142.

Oregon.— State *v.* Wheeler, 20 Oreg. 192, 25 Pac. 394, 23 Am. St. Rep. 119, 10 L. R. A. 779.

Pennsylvania.— Com. *v.* Bachop, 2 Pa. Super. Ct. 294.

Texas.— Hanks *v.* State, (Cr. App. 1899) 54 S. W. 587; Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523; Davis *v.* State, 37 Tex. Cr. 218, 39 S. W. 296; Hocker *v.* State, 34 Tex. Cr. 359, 30 S. W. 783, 53 Am. St. Rep. 716; Brewer *v.* State, 32 Tex. Cr. 74, 22 S. W. 41, 40 Am. St. Rep. 760.

United States.— Logan *v.* U. S., 123 Fed. 291, 59 C. C. A. 476.

England.— Reg. *v.* Rogers, 8 C. & P. 629,

therein,[35] or that a person to whom an order is addressed had no money or goods of the purported drawer in his possession.[36]

7. IMPERFECT AND INCOMPLETE INSTRUMENTS. To be the subject of forgery it is not necessary that an instrument be perfect;[37] it is sufficient if it is in accordance with the accustomed dealings between the parties.[38] The omission of the date,[39] of the name of the payee[40] or the name of a drawee,[41] of the amount,[42] or of the dollar mark[43] does not invalidate the instrument, these facts being shown by extrinsic evidence. The signature is not required to be at the end;[44] and it may be given by initials.[45] The omission of the mark, where the signature purports to be by mark, is not fatal.[46] Nor is an incomplete description in a deed, where there is enough to identify the land.[47] A paper is not invalid on its face because

34 E. C. L. 930; Reg. *v.* Avery, 8 C. & P. 596, 34 E. C. L. 911; Bolland's Case, 2 East P. C. 958, 1 Leach C. C. 83; Wilks' Case, 2 East P. C. 957; Rex *v.* Taylor, 2 East P. C. 690, 1 Leach C. C. 215; Rex *v.* Peacock, R. & R. 207; Rex *v.* Francis, R. & R. 156.

Canada.— *In re* Lazier, 30 Ont. 419 [*affirmed* in 26 Ont. App. 260]; *Re* Murphy, 26 Ont. 163 [*affirmed* in 22 Ont. App. 386].

See 23 Cent. Dig. tit. "Forgery," § 26.

Where an assumed name is used with intent to defraud, it makes no difference that the prisoner's real name would have carried as much credit. Adkins *v.* State, 41 Tex. Cr. 577, 56 S. W. 63; Taft's Case, 2 East P. C. 959, 1 Leach C. C. 172; Rex *v.* Whiley, R. & R. 67; Rex *v.* Marshall, R. & R. 56.

35. West *v.* State, 22 N. J. L. 212; Henderson *v.* State, 14 Tex. 503.

36. *Alabama.*— Thompson *v.* State, 49 Ala. 16.

California.— People *v.* Way, 10 Cal. 336.

Georgia.— Hoskins *v.* State, 11 Ga. 92.

Massachusetts.— Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763; Com. *v.* Kepper, 114 Mass. 278; Com. *v.* Fisher, 17 Mass. 46.

New York.— People *v.* Krummer, 4 Park. Cr. 217.

United States.— U. S. *v.* Bates, 24 Fed. Cas. No. 14,542, 2 Cranch C. C. 1.

England.— Reg. *v.* Vivian, 1 C. & K. 719, Den. C. C. 35, 47 E. C. L. 719; Rex *v.* Lockett, 2 East P. C. 940, 1 Leach C. C. 94.

See 23 Cent. Dig. tit. "Forgery," § 38.

37. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Garmire *v.* State, 104 Ind. 444, 4 N. E. 54.

38. *Alabama.*— Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639.

Louisiana.— State *v.* Stephen, 45 La. Ann. 702, 12 So. 883; State *v.* Wingard, 40 La. Ann. 733, 5 So. 54.

New York.— Grant's Case, 3 City Hall Rec. 142.

Pennsylvania.— Com. *v.* Phipps, 16 Phila. 457.

South Carolina.— State *v.* Holly, 2 Bay 262; State *v.* Holley, 1 Brev. 35.

See 23 Cent. Dig. tit. "Forgery," § 28.

39. Thomas *v.* State, 59 Ga. 784; Dixon *v.* State, (Tex. Cr. App. 1889) 26 S. W. 500.

40. *Georgia.*— Burke *v.* State, 66 Ga. 157; Johnson *v.* State, 62 Ga. 299; Thomas *v.* State, 59 Ga. 784.

Indiana.— Harding *v.* State, 54 Ind. 359.

Iowa.— State *v.* Bauman, 52 Iowa 68, 2 N. W. 956.

Massachusetts.— Com. *v.* Paulus, 11 Gray 305.

Michigan.—People *v.* Brigham, 2 Mich. 550.

See 23 Cent. Dig. tit. "Forgery," § 35.

41. *Indiana.*— Powers *v.* State, 87 Ind. 97.

Iowa.— State *v.* Bauman, 52 Iowa 68, 2 N. W. 956.

Louisiana.— State *v.* Morgan, 35 La. Ann. 293.

Minnesota.— State *v.* Curtis, 39 Minn. 357, 40 N. W. 263.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

Nebraska.— Morearty *v.* State, 46 Nebr. 652, 65 N. W. 784.

New York.— Noakes *v.* People, 25 N. Y. 380 [*affirming* 5 Park. Cr. 291].

Tennessee.— Peete *v.* State, 2 Lea 513.

Texas.— Dixon *v.* State, (Cr. App. 1889) 26 S. W. 500.

England.— Reg. *v.* Snelling, 2 C. L. R. 114, 6 Cox C. C. 230, Dears. C. C. 219, 17 Jur. 1012, 23 L. J. M. C. 8, 2 Wkly. Rep. 54; Reg. *v.* Rogers, 9 C. & P. 41, 38 E. C. L. 36; Reg. *v.* Pulbrook, 9 C. & P. 37, 38 E. C. L. 34; Rex *v.* Carney, 1 Moody C. C. 351.

Canada.— Reg. *v.* Parker, 15 U. C. C. P. 15.

See 23 Cent. Dig. tit. "Forgery," § 35.

Application of rule.— An instrument with a place of date, and addressed to the "First National Bank," cannot be said not to create a pecuniary obligation because it purported to be drawn on any First National Bank. Albert *v.* State, (Tex. Cr. App. 1903) 72 S. W. 846.

A voucher addressed "To County Treasurer" is not invalid, where there is no uncertainty as to which county treasurer is meant. Kennedy *v.* State, 33 Tex. Cr. 183, 26 S. W. 78.

42. Wright *v.* State, 79 Ala. 262.

43. State *v.* Keeter, 80 N. C. 472.

44. Lampkin *v.* State, 105 Ala. 1, 16 So. 575; State *v.* Ferguson, 35 La. Ann. 1042; Elkins *v.* State, 35 Tex. Cr. 207, 32 S. W. 1047; Crawford *v.* State, 31 Tex. Cr. 51, 19 S. W. 766.

45. Davis *v.* State, (Tex. Cr. App. 1902) 69 S. W. 73.

46. Lemasters *v.* State, 95 Ind. 367.

47. U. S. *v.* McKinley, 127 Fed. 166.

certain steps have to be taken to give it complete legal effect, and those successive steps have not been taken;[48] nor is it any defense, where the instrument forms one of a chain of false instruments, that the connected parts, taken together, show such a discrepancy as would cause a failure of the fraudulent purpose.[49]

8. INSTRUMENTS AWKWARDLY OR UNSKILFULLY DRAWN. An instrument is not unmeaning because ungrammatical,[50] or because of a transposition of words therein.[51] The misspelling of words[52] or names,[53] or the signing of a wrong christian name,[54] or by mark,[55] is no defense to a prosecution for forgery.

B. Particular Instruments — 1. NOTES, CHECKS, BONDS, OR RECEIPTS. Instruments showing a legal liability on the part of the party whose name is purported to be signed thereto to pay a sum of money are subjects of forgery;[56] but it is otherwise as to an instrument not payable in money, nor to the bearer on demand, and which the maker only promised to take in payment.[57] Where a promissory note is, after being indorsed by the payee, altered by the maker and discounted by him, it is a forgery of the note, and not of the indorsement.[58] Checks are subjects of forgery,[59] although post-dated.[60] So a receipt is the subject of forgery,[61] provided it would operate as the foundation of another's lia-

A forged transfer of land, although a blank be left for the name of the transferee, is within the purview of Laws (1876), § 3, p. 59, which declares that, to warrant a conviction for forgery of a land title, it shall only be necessary to prove that the person charged took any step. Phillips *v.* State, 6 Tex. App. 364.

48. *Kentucky.*— Com. *v.* Wilson, 89 Ky. 157, 12 S. W. 264, 11 Ky. L. Rep. 375, 25 Am. St. Rep. 528.

Massachusetts.— Com. *v.* Costello, 120 Mass. 358.

Oregon.— State *v.* Gee, 28 Oreg. 100, 42 Pac. 7.

Tennessee.— Foute *v.* State, 15 Lea 712.

Texas.— Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370; Fonville *v.* State, 17 Tex. App. 368; Costley *v.* State, 14 Tex. App. 156.

See 23 Cent. Dig. tit. "Forgery," § 32.

49. State *v.* Hilton, 35 Kan. 338, 11 Pac. 164.

50. Bland *v.* People, 4 Ill. 364; Perkins *v.* Com., 7 Gratt. (Va.) 651, 56 Am. Dec. 123.

51. Butler *v.* State, 22 Ala. 43; Reg. *v.* Boreham, 2 Cox C. C. 189.

52. Stewart *v.* State, 113 Ind. 505, 16 N. E. 186; Plemons *v.* State, 44 Tex. Cr. 555, 72 S. W. 854; Hendricks *v.* State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Williams *v.* State, 24 Tex. App. 342, 6 S. W. 531.

53. *California.*— People *v.* Alden, 113 Cal. 264, 45 Pac. 327.

Indiana.— Rudicel *v.* State, 111 Ind. 595, 13 N. E. 114.

New York.— Grant's Case, 3 City Hall. Rec. 142.

North Carolina.— State *v.* Covington, 94 N. C. 913, 55 Am. Rep. 650.

Pennsylvania.— Com. *v.* Misner, Add. 44.

Tennessee.— Peete *v.* State, 2 Lea 513.

Texas.— Davis *v.* State, 34 Tex. Cr. 117, 29 S. W. 478; Rollins *v.* State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. Rep. 659.

United States.— White *v.* Van Horn, 159 U. S. 1, 15 S. Ct. 1027, 40 L. ed. 55.

54. Rex *v.* Fitzgerald, 2 East P. C. 953, 1 Leach C. C. 20.

55. Dunn's Case, 2 East P. C. 962, 1 Leach C. C. 57.

56. People *v.* Finch, 5 Johns. (N. Y.) 237; Com. *v.* Searle, 2 Binn. (Pa.) 332, 4 Am. Dec. 446; Davis *v.* State, (Tex. Cr. App. 1902) 69 S. W. 73; Daud *v.* State, 34 Tex. Cr. 460, 31 S. W. 376.

57. Rex *v.* Burke, R. & R. 369.

58. Reg. *v.* Craig, 7 U. C. C. P. 239.

59. Crofts *v.* People, 3 Ill. 442.

60. Reg. *v.* Taylor, 1 C. & K. 213, 47 E. C. L. 213.

61. *Alabama.*— Allen *v.* State, 79 Ala. 34.

Iowa.— State *v.* Wooderd, 20 Iowa 541.

Louisiana.— State *v.* Smith, 46 La. Ann. 1433, 16 So. 372.

Massachusetts.— Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Com. *v.* Talbot, 2 Allen 161; Com. *v.* Ladd, 15 Mass. 526.

New Jersey.— State *v.* Jones, 9 N. J. L. 357, 17 Am. Dec. 483.

Ohio.— Kegg *v.* State, 10 Ohio 75.

Pennsylvania.— Com. *v.* Phipps, 10 Phila. 457.

Tennessee.— Snell *v.* State, 2 Humphr. 347 [*overruling dictum* in Rice *v.* State, 1 Yerg. 432].

Texas.— Fonville *v.* State, 17 Tex. App. 368.

Virginia.— Gordon *v.* Com., 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744.

England.— Reg. *v.* Griffiths, 7 Cox C. C. 501, Dears. & B. 548, 4 Jur. N. S. 442, 27 L. J. M. C. 205, 6 Wkly. Rep. 472. *Compare* Reg. *v.* Sargent, 10 Cox C. C. 161.

See 23 Cent. Dig. tit. "Forgery," § 9.

Words importing receipt.— The words "paid Sadler" written upon a bill for goods rendered by a tradesman by the name of Sadler, import a receipt of the money by Sadler, and are not merely a memorandum that the bill has been paid by the person who wrote the words. Reg. *v.* Houseman, 8 C. & P. 180, 34 E. C. L. 678.

bility [62] or be prejudicial to his rights if genuine.[63] Bonds are also subjects of forgery.[64]

2. Orders, Demands, Warrants, or Requests. Orders, demands, warrants, or requests for money,[65] or for goods,[66] or for the purpose of procuring a prisoner's discharge,[67] are subjects of forgery, even though in the form of a telegram.[68]

3. Deeds, Mortgages, or Wills. A deed of land is the subject of forgery.[69] Mortgages of land [70] or of chattels [71] are also subjects of forgery; and this is true, although the forgery consists in additions thereto after having been made a public record.[72] So the discharge of a mortgage is the subject of forgery.[73] A will is the subject of forgery, although the purported testator is living,[74] or non-existent.[75]

4. Records or Account-Books. It is held that making an alteration [76] or a false

A forgery of a receipt for a note is not indictable under a statute making it forgery to fabricate receipts for money or goods, although it would be indictable at common law. State *v.* Foster, 3 McCord (S. C.) 442.

62. State *v.* Monnier, 8 Minn. 212. Where one who has been given a receipt by an express company for charges paid by him on goods shipped by him for another increases the amount named in the receipt, no liability is thus fixed either on the express company or the person in whose behalf the goods were shipped and the receipt is not the subject of forgery. Com. *v.* Butler, 37 S. W. 840, 18 Ky. L. Rep. 614.

63. Com. *v.* Shissler, 9 Phila. (Pa.) 587.

64. Crayton *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1046; Costley *v.* State, 14 Tex. App. 156; Reg. *v.* Barber, 1 C. & K. 434, 47 E. C. L. 434.

65. *Alabama.*— Williams *v.* State, 61 Ala. 33; Jones *v.* State, 50 Ala. 161.

Connecticut.— State *v.* Cooper, 5 Day 250.

Florida.— Smith *v.* State, 29 Fla. 408, 10 So. 894.

Illinois.— Crofts *v.* People, 3 Ill. 442.

Kansas.— State *v.* Lee, 32 Kan. 360, 4 Pac. 653.

Louisiana.— State *v.* Jefferson, 39 La. Ann. 331, 1 So. 669.

Mississippi.— Pagaud *v.* State, 5 Sm. & M. 491.

Missouri.— State *v.* Fenly, 18 Mo. 445.

New York.— People *v.* Krummer, Sheld. 549, 4 Park. 217.

Texas.— Plemons *v.* State, 44 Tex. Cr. 555, 72 S. W. 854.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201; State *v.* Nevins, 23 Vt. 519.

United States.— U. S. *v.* Carter, 25 Fed. Cas. No. 14,739, 2 Cranch C. C. 243; U. S. *v.* Green, 26 Fed. Cas. No. 15,255, 2 Cranch C. C. 520.

See 23 Cent. Dig. tit. "Forgery," § 12.

66. *Alabama.*— Hobbs *v.* State, 75 Ala. 1; Allen *v.* State, 74 Ala. 557.

Indiana.— Stewart *v.* State, 113 Ind. 505, 16 N. E. 186.

Louisiana.— State *v.* Outs, 30 La. Ann. 1155.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

Nebraska.— Hickson *v.* State, 61 Nebr. 763, 86 N. W. 509, 54 L. R. A. 327.

New York.— Harris *v.* People, 9 Barb. 664; People *v.* Shaw, 5 Johns. 236.

North Carolina.— State *v.* Leak, 80 N. C. 403.

Texas.— Reddick *v.* State, 31 Tex. Cr. 587, 21 S. W. 684; Hendricks *v.* State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463; Rollins *v.* State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. Rep. 659.

United States.— U. S. *v.* Book, 24 Fed. Cas. No. 14,624, 2 Cranch C. C. 294.

See 23 Cent. Dig. tit. "Forgery," § 13.

What is an order for goods.— "Please let the lad have a bat, and I will answer for the money," is a request for the delivery of goods, and is not the less so because it may also be an undertaking for the payment of money. Reg. *v.* White, 9 C. & P. 282, 38 E. C. L. 173.

67. Rex *v.* Harris, 6 C. & P. 129, 1 Moody C. C. 393, 25 E. C. L. 356.

68. Reg. *v.* Stewart, 25 U. C. C. P. 440.

69. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; People *v.* Flanders, 18 Johns. (N. Y.) 164.

70. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; People *v.* Caton, 25 Mich. 388; *In re* Cooper, 20 Ch. D. 611, 51 L. J. Ch. 862, 47 L. T. Rep. N. S. 89, 30 Wkly. Rep. 648.

71. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

72. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

73. Meserve *v.* Com., 137 Mass. 109.

74. Coogan's Case, 2 East P. C. 1001, 1 Leach C. C. 449; Rex *v.* Sterling, 2 East P. C. 950, 1 Leach C. C. 99. *Compare* Huckaby *v.* State, (Tex. Cr. App. 1904) 78 S. W. 942, holding that under Pen. Code (1895), art. 530, a will during the lifetime of the purported testator is not a "pecuniary obligation," nor an instrument which would "have transferred or in any manner have affected" property, and hence is not subject to forgery.

75. Reg. *v.* Avery, 8 C. & P. 596, 34 E. C. L. 911.

76. *In re* Jarrard, 4 Ont. 265 [*affirmed* in 20 Can. L. J. 145].

Alteration of an assessment roll.— A statute which makes it a forgery to fraudulently alter an entry in any book of accounts kept in a public office applies to a city assessment roll. Turbeville *v.* State, 56 Miss. 793. But

entry[77] in a public record with intent to deceive is forgery; and it is no defense that it is done to make it correspond with the facts as they ought to be, but which are apparently otherwise.[78] Likewise making a false entry[79] in or an alteration[80] of the private accounts of another, although by the one who made the original entries, is forgery.[81] But it is otherwise as to an alteration by a man of his own account-book[82] unless such account has been settled and signed.[83]

5. CERTIFICATES. Making a false certificate is forgery.[84]

6. LETTERS OR STATEMENTS. Letters requesting money,[85] statements as to the rights of property,[86] and letters of recommendation,[87] are subjects of forgery; but it is otherwise as to letters of introduction,[88] or letters or statements whose design is not to deprive of property.[89]

7. INDORSEMENTS, GUARANTIES, OR ACCEPTANCES. It is well settled that making a false indorsement of the name of the payee of an instrument,[90] or of one of the

it has been held that an assessment roll is not the subject of forgery under the consolidated statutes of Canada. Reg. *v.* Preston, 21 U. C. Q. B. 86.

What are not public records.— A tax duplicate is not a record or other authentic matter of a public nature within the statutes relating to forgery. Smith *v.* State, 18 Ohio St. 420.

The records of a justice of the peace are not records of a court of record in the true import and legal significance of that term, and a forgery of such a record by a justice of the peace is not within the provision of the statute which makes the forging of the record of a court of record an indictable offense (State *v.* Floyd, Houst. Cr. Cas. (Del.) 110); nor is a court-house and jail warrant drawn by the clerk of the board of supervisors on the county treasurer (Harrington *v.* State, 54 Miss. 490).

77. People *v.* Phelps, 49 How. Pr. (N. Y.) 462 [*affirmed* in 6 Hun 428 (*affirmed* in 72 N. Y. 365)]; *Re* Hall, 9 Ont. Pr. 373 [*affirmed* in 3 Ont. 331 (*affirmed* in 8 Ont. App. 31)].

Making a false duplicate of taxes is an offense. Com. *v.* Beamish, 81 Pa. St. 389.

78. People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45; Reg. *v.* Asplin, 12 Cox C. C. 391.

79. Phelps *v.* People, 6 Hun (N. Y.) 428 [*affirmed* in 72 N. Y. 365]; Biles *v.* Com., 32 Pa. St. 529, 75 Am. Dec. 568 [*affirming* 3 Phila. 350]; Com. *v.* Huntzinger, 35 Pittsb. Leg. J. (Pa.) 364; *In re* Tully, 20 Fed. 812.

80. Biles *v.* Com., 32 Pa. St. 529, 75 Am. Dec. 568 [*affirming* 3 Phila. 350].

81. Com. *v.* Biles, 3 Phila. (Pa.) 350. *Contra, In re* Windsor, 6 B. & S. 522, 10 Cox C. C. 118, 11 Jur. N. S. 807; 34 L. J. M. C. 163, 12 L. T. Rep. N. S. 307, 13 Wkly. Rep. 653, 118 E. C. L. 522; Reg. *v.* Blackstone, 4 Manitoba 296.

82. State *v.* Young, 46 N. H. 266, 88 Am. Dec. 212.

83. Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.

84. *Iowa.*— State *v.* Johnson, 26 Iowa 407, 96 Am. Dec. 158.

Kentucky.— Com. *v.* Howard, 12 S. W. 265, 11 Ky. L. Rep. 378.

Louisiana.— State *v.* Boasso, 38 La. Ann. 202.

New York.— People *v.* Brie, 43 Hun 317, 4 N. Y. St. 752.

South Carolina.— State *v.* Bullock, 54 S. C. 300, 32 S. E. 424.

United States.— U. S. *v.* Schoyer, 27 Fed. Cas. No. 16,232*a*.

England.— Reg. *v.* Toshack, 4 Cox C. C. 38, 1 Den. C. C. 492, 13 Jur. 1011, T. & M. 207; Reg. *v.* Mitchell, 2 F. & F. 44.

See 23 Cent. Dig. tit. "Forgery," § 15.

A school-teacher's certificate is within the prohibition of a statute against forging any certificate, order, or allowance by a competent court or officer or any license or authority authorized by any statute. State *v.* Grant, 74 Mo. 33.

A witness' certificate payable by the state may be forged. Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738.

Certificate of acknowledgment.— An indictment will not lie for forging a certificate of acknowledgment to a deed where the certificate did not state that the grantor acknowledged the execution of the conveyance. People *v.* Harrison, 8 Barb. (N. Y.) 560.

85. Mitchell *v.* State, 56 Ga. 171; People *v.* Krummer, Sheld. (N. Y.) 549, 4 Park. Cr. 217.

86. Dixon *v.* State, 81 Ala. 61, 1 So. 69.

87. Ames' Case, 2 Me. 365; Arnold *v.* Cost, 3 Gill & J. (Md.) 219, 22 Am. Dec. 302; Reg. *v.* Moah, 7 Cox C. C. 503, Dears. & B. 550, 4 Jur. N. S. 464, 27 L. J. M. C. 204, 6 Wkly. Rep. 470; Reg. *v.* Toshack, 4 Cox C. C. 38, 1 Den. C. C. 492, 13 Jur. 1011, T. & M. 207. *Contra,* Com. *v.* Chandler, Thach. Cr. Cas. (Mass.) 187.

88. Waterman *v.* People, 67 Ill. 91; Foulkes *v.* Com., 2 Rob. (Va.) 836.

89. People *v.* Wong Sam, 117 Cal. 29, 48 Pac. 972; Jackson *v.* Weisiger, 2 B. Mon. (Ky.) 214; Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386; State *v.* Ward, 7 Baxt. (Tenn.) 76.

90. *Iowa.*— State *v.* Pierce, 8 Iowa 231.

Ohio.— Poage *v.* State, 3 Ohio St. 229; Cosner *v.* State, 24 Ohio Cir. Ct. 734.

Pennsylvania.— Com. *v.* Misner, Add. 44.

Washington.— State *v.* Barkuloo, 18 Wash. 52, 50 Pac. 577.

United States.— De Lemos *v.* U. S., 91 Fed. 497, 33 C. C. A. 655.

payees,[91] or of the maker, if payable to the maker's order,[92] is forgery, although additional steps must be taken before the transfer of the instrument is complete;[93] but where such indorsement was made before the instrument is signed, and hence of no validity, it is not forgery.[94] Likewise it is forgery to falsely indorse the name of a third party,[95] unless such indorsement is represented to be that of the payee, and it is not the same name;[96] but the alteration of an unsigned indorsement of money received, made on the back of a promissory note, unless intended as a receipt for the benefit of the maker, is not forgery.[97] A guaranty is also a subject of forgery.[98] And so is an acceptance of an order.[99]

8. Miscellaneous Instruments. Railroad tickets[1] or passes,[2] theater tickets,[3] and accident insurance tickets[4] are subjects of forgery. A contract is a subject of forgery,[5] and so is a power of attorney.[6] A copy is not the subject of forgery,[7] unless, in the event of the supposed loss of the original, it is offered as being correct.[8] So labels and trade-marks are not the subject of forgery.[9] And to constitute forgery of a seal, the instrument to which the seal is appended must be regular in form and apparently legal.[10]

V. Degrees of Forgery.

Statutes frequently divide the different acts which constitute forgery into degrees, placing them according to their apparent seriousness, and providing different punishments for each.[11] The fact that the accused might have been

England.— Reg. *v.* Roberts, 7 Cox C. C. 422, 7 Ir. C. L. 325.

See 23 Cent. Dig. tit. "Forgery," § 11.

91. Reg. *v.* Winterbottom, 2 C. & K. 37, 1 Den. C. C. 41, 61 E. C. L. 37.

92. Com. *v.* Welch, 148 Mass. 296, 19 N. E. 357.

93. Bishop *v.* State, 55 Md. 138.

94. Reg. *v.* McFee, 13 Ont. 8.

95. *Indiana.*— State *v.* Crawford, 2 Ind. 23.

New York.—People *v.* Wheeler, 47 Hun 484.

Virginia.— Powell *v.* Com., 11 Gratt. 822.

Washington.— State *v.* Wright, 9 Wash. 96, 37 Pac. 313.

Wyoming.— Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746.

England.— Reg. *v.* Parke, 1 Cox C. C. 4; Taft's Case, 2 East P. C. 959, 1 Leach C. C. 172; Rex *v.* Marshall, R. & R. 56.

See 23 Cent. Dig. tit. "Forgery," § 11.

96. Drake *v.* State, 19 Ohio St. 211.

97. State *v.* Davis, 53 Iowa 252, 5 N. W. 149.

98. *Alabama.*— Hobbs *v.* State, 75 Ala. 1.

California.— People *v.* Munroe, (1893) 33 Pac. 776.

Tennessee.— State *v.* Humphreys, 10 Humphr. 442.

Texas.— Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523.

England.— Reg. *v.* Harper, 7 Q. B. D. 78, 14 Cox C. C. 574, 50 L. J. M. C. 90, 44 L. T. Rep. N. S. 615, 29 Wkly. Rep. 743; Reg. *v.* Coelho, 9 Cox C. C. 8; Reg. *v.* Wardell, 3 F. & F. 82.

99. Com. *v.* Ayer, 3 Cush. (Mass.) 150; Reg. *v.* Rogers, 8 C. & P. 629, 34 E. C. L. 930. But it seems that an acceptance written upon a blank which is afterward filled up would not be a forgery of the acceptance. Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903.

1. Com. *v.* Ray, 3 Gray (Mass.) 441.

2. State *v.* Weaver, 94 N. C. 836, 55 Am. Rep. 647; Reg. *v.* Boult, 2 C. & K. 604, 61 E. C. L. 604.

3. *In re* Benson, 34 Fed. 649.

4. People *v.* Graham, Sheld. (N. Y.) 151.

5. People *v.* Stork, 133 Cal. 371, 65 Pac. 822.

6. Lewis' Case, 2 East P. C. 957.

7. Com. *v.* Brewer, 113 Ky. 217, 67 S. W. 994, 24 Ky. L. Rep. 72.

8. Upfold *v.* Leit, 5 Esp. 100.

9. White *v.* Wagar, 185 Ill. 195, 57 N. E. 26, 50 L. R. A. 60 [*affirming* 83 Ill. App. 592]; Reg. *v.* Smith, 8 Cox C. C. 32, Dears. & B. 566, 4 Jur. N. S. 1003, 27 L. J. M. C. 225, 6 Wkly. Rep. 495.

10. Fadner *v.* People, 33 Hun (N. Y.) 240.

11. See cases cited *infra*, this note.

Forgery in the first degree.— Under provisions of the several state statutes the following have been held forgeries in the first degree: Forgery of a real-estate mortgage (State *v.* Moore, 86 Minn. 418, 90 N. W. 786); forgery of a certificate purporting to have been issued by lawful authority as evidence of any debt or liability (People *v.* Filkin, 176 N. Y. 548, 68 N. E. 1120 [*affirming* 83 N. Y. App. Div. 589, 82 N. Y. Suppl. 15]); the erasure of certain letters in an instrument so as to give it a contrary meaning [this is an alteration of the instrument and cannot be treated as a partial obliteration thereof which would be of a lower degree] (State *v.* Kidd, 89 Iowa 54, 56 N. W. 263); and forgery of a check upon an incorporated bank or banking company (Benson *v.* State, 124 Ala. 92, 27 So. 1).

Forgery in second degree.— Forgery of a check where the drawee is not an incorporated bank (Benson *v.* State, 124 Ala. 92, 27 So. 1); forgery of a receipt (Allen *v.* State, 79

convicted of forgery under a statute defining forgery in a lower degree does not prevent his conviction under a statute defining forgery in a higher degree.[12]

VI. UTTERING OF FORGED INSTRUMENT.

A. In General. Uttering is offering a forged instrument, knowing it to be such, whether such offer is accepted or not, with a representation, by words or actions, that it is genuine, and with an intent to defraud;[13] and it is a public offense.[14] While the making of a forged instrument and the uttering it by the same person as one transaction constitute but one offense,[15] one may be guilty of uttering an instrument forged by another,[16] but to constitute the offense it is essential that the person uttering the forged instrument have actual knowledge of its falsity.[17] It is not sufficient that a person uttering an instrument has reasonable cause to believe it was forged.[18] So there must be an intent to defraud.[19] The uttering of an instrument which is not a forgery is not within the definition;[20] yet the uttering of a false instrument, with intent to defraud, is an offense, although there was lack of evil intent in the person who fabricated

Ala. 34), forgery of an order for goods (Allen *v.* State, 74 Ala. 557; Anderson *v.* State, 65 Ala. 553), additions to a chattel mortgage (State *v.* Adamson, 43 Minn. 196, 45 N. W. 152), and forgery of a contract of purchase (People *v.* Henries, 9 N. Y. Suppl. 862) are forgeries in the second degree.

Forgery in third and fourth degree.— In Alabama any forgery which does not amount to forgery in the first or second degree is in the third degree. Murphy *v.* State, 118 Ala. 137, 23 So. 719. In Missouri making a promissory note for one hundred and twenty-five dollars, and signing it with a fictitious name, is forgery in the third degree. State *v.* Jackson, 90 Mo. 156, 2 S. W. 128. And possession of, buying, or receiving an instrument to be forged is forgery in the fourth degree. State *v.* Mills, 146 Mo. 195, 47 S. W. 938.

12. State *v.* Mills, 146 Mo. 195, 47 S. W. 938.

13. *Iowa.*— State *v.* Sherwood, 90 Iowa 550, 58 N. W. 911, 48 Am. St. Rep. 461; State *v.* Calkins, 73 Iowa 128, 34 N. W. 777.

Louisiana.— State *v.* Hahn, 38 La. Ann. 169.

Michigan.— People *v.* Caton, 25 Mich. 388.

Missouri.— State *v.* Phillips, 78 Mo. 49; State *v.* Horner, 48 Mo. 520.

Nebraska.— Smith *v.* State, 20 Nebr. 284, 29 N. W. 923, 57 Am. Rep. 832; Folden *v.* State, 13 Nebr. 328, 14 N. W. 412.

South Carolina.—State *v.* Holly, 2 Bay 262.

Virginia.— Sands *v.* Com., 20 Gratt. 800.

Wyoming.— Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

See 23 Cent. Dig. tit. "Forgery," §§ 6, 51, 52.

Instrument payable outside of country.— It is no defense that the forged instrument purports to be drawn and payable outside of the country. Rex *v.* Kirkwood, 1 Moody C. C. 311.

14. *Iowa.*— State *v.* Bigelow, 101 Iowa 430, 70 N. W. 600.

Kentucky.— Whitten *v.* Com., 1 Ky. L. Rep. 121.

Minnesota.— State *v.* Wills, 70 Minn. 403, 73 N. W. 177.

Texas.— Brooks *v.* State, (Cr. App. 1903) 75 S. W. 507.

Washington.— State *v.* Harding, 20 Wash. 556, 56 Pac. 399, 929.

United States.— De Lemos *v.* U. S., 91 Fed. 497, 33 C. C. A. 655.

England.— Reg. *v.* Sharman, 6 Cox C. C. 312, Dears. C. C. 285, 18 Jur. 157, 23 L. J. M. C. 51, 2 Wkly. Rep. 227.

15. State *v.* Klugherz, 91 Minn. 406, 98 N. W. 99.

16. Lockard *v.* Com., 87 Ky. 201, 8 S. W. 266, 10 Ky. L. Rep. 102; State *v.* Boasso, 38 La. Ann. 202; State *v.* Allen, 116 Mo. 548, 22 S. W. 792; Leslie *v.* State, (Tex. Cr. App. 1898) 47 S. W. 367.

Under the old common law uttering a forged instrument by one who did not fabricate it was no offense unless some fraud was actually perpetrated. Reg. *v.* Boult, 2 C. & K. 604, 61 E. C. L. 604.

17. *Arkansas.*—Elsey *v.* State, 47 Ark. 572, 2 S. W. 337.

California.— People *v.* Smith, 103 Cal. 563, 37 Pac. 516; People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

Georgia.— Stephens *v.* State, 56 Ga. 604.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342.

Pennsylvania.— Com. *v.* Hall, 23 Pa. Super. Ct. 104.

Virginia.— Sands *v.* Com., 20 Gratt. 800.

See 23 Cent. Dig. tit. "Forgery," § 6.

18. Carver *v.* People, 39 Mich. 786.

19. *Arkansas.*— Elsey *v.* State, 47 Ark. 572, 2 S. W. 237.

Georgia.— Stevens *v.* State, 56 Ga. 604.

Mississippi.— Gates *v.* State, 71 Miss. 874, 16 So. 342.

Virginia.— Sands *v.* Com., 20 Gratt. 800.

England.— Reg. *v.* Hodgson, 7 Cox C. C. 122, Dears. & B. 3, 2 Jur. N. S. 453, 25 L. J. M. C. 78, 4 Wkly. Rep. 509; Rex *v.* Harris, 7 C. & P. 429, 32 E. C. L. 691.

See 23 Cent. Dig. tit. "Forgery," § 6. And see *supra*, III.

20. Bittings *v.* State, 56 Ind. 101, holding that an indictment cannot be predicated

it;[21] uttering, like forgery,[22] may be through an innocent agent;[23] but mere delivery to an agent, whether innocent or not, with intent to have a forged instrument passed as genuine, is not an uttering so long as the agent has not parted with the possession.[24]

B. Specific Instances of Uttering. Passing an instrument, although not indorsed, is an uttering;[25] and so is presenting an instrument for payment,[26] or pledging it.[27] Collecting money on a forged instrument is an uttering whether or not it is produced at the time payments are received.[28] Exhibiting to the county treasurer a forged license to teach as evidence of a right to receive compensation is an uttering.[29] Presenting a forged document for record,[30] or taking any step in a judicial proceeding thereon,[31] is an uttering; obtaining credit by means of false receipts is an uttering, although the person exhibiting them refuses to part with the possession thereof out of his hand.[32] So also is a representation that a party to a genuine instrument is some other person.[33] Showing an instrument with an intent of raising a false idea of the substance of the person exhibiting it is not an uttering,[34] nor is leaving a forged instrument sealed up, with the person to whom it has been shown, that he might take charge of it, as being too valuable to be carried about.[35] Where a son makes notes payable to his father, and forges his father's indorsement thereon, and both the holder and the father subsequently acquire knowledge of the forgery, the placing by the holder of such notes in the bank where they are payable, with directions to present for payment and give notice of protest, which is done, is not uttering with intent to defraud, the object of the holder being to compel the father to save his son.[36]

upon the uttering of an instrument altered in an immaterial part.

21. *Ex p.* Finley, 66 Cal. 262, 5 Pac. 222; *In re* Toulouse Lautrec, 102 Fed. 878, 43 C. C. A. 42.

22. See *supra*, IX.

23. *Missouri.*— State *v.* Patterson, (1892) 20 S. W. 9.

New York.— Paige *v.* People, 3 Abb. Dec. 439, 6 Park. Cr. 683.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507.

Texas.— Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680.

United States.— U. S. *v.* Carter, 25 Fed. Cas. No. 14,739, 2 Cranch C. C. 243.

England.— Reg. *v.* Fitchie, 7 Cox C. C. 257, Dears. & B. 175, 3 Jur. N. S. 419, 26 L. J. M. C. 90, 4 Wkly. Rep. 505.

See 23 Cent. Dig. tit. "Forgery," § 52.

24. People *v.* Compton, 123 Cal. 403, 56 Pac. 44; Reg. *v.* Heywood, 2 C. & K. 352, 61 E. C. L. 352.

25. *California.*— People *v.* Ah Woo, 28 Cal. 205.

Georgia.— Brazil *v.* State, 117 Ga. 32, 43 S. E. 460.

Nebraska.— Smith *v.* State, 20 Nebr. 284, 29 N. W. 923, 57 Am. Rep. 832.

Wisconsin.—Lawless *v.* State, 114 Wis. 189, 89 N. W. 891.

Wyoming.— Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

England.— Rex *v.* Wicks, R. & R. 111.

26. People *v.* Brigham, 2 Mich. 550; State *v.* Page, Smith (N. H.) 149; U. S. *v.* Long, 30 Fed. 678; Reg. *v.* McConnell, 1 C. & K. 371, 2 Moody C. C. 298, 47 E. C. L. 371; Rex *v.* Arscott, 6 C. & P. 408, 25 E. C. L. 499.

27. Thurmond *v.* State, 25 Tex. App. 366, 8 S. W. 473; Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903; Rex *v.* Birkett, R. & R. 64.

28. Perkins *v.* People, 27 Mich. 386.

29. Arnold *v.* State, 71 Ark. 367, 74 S. W. 513.

30. *Alabama.*— Espalla *v.* State, 108 Ala. 38, 19 So. 82.

California.— People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276.

District of Columbia.— U. S. *v.* Brooks, 3 MacArthur 315.

Michigan.— People *v.* Swetland, 77 Mich. 53, 43 N. W. 779; Perkins *v.* People, 27 Mich. 386.

New York.— Paige *v.* People, 3 Abb. Dec. 439, 6 Park. Cr. 683.

See 23 Cent. Dig. tit. "Forgery," § 53.

31. Folden *v.* State, 13 Nebr. 328, 14 N. W. 412; Paige *v.* People, 3 Abb. Dec. (N. Y.) 439, 6 Park. Cr. 683; Corbett *v.* State, 5 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 79; Chahoon *v.* Com., 20 Gratt. (Va.) 733.

32. Reg. *v.* Radford, 1 C. & K. 707, 1 Cox C. C. 168, 1 Den. C. C. 59, 47 E. C. L. 707; Reg. *v.* Moody, 9 Cox C. C. 166, 8 Jur. N. S. 574, L. & C. 173, 31 L. J. M. C. 156, 6 L. T. Rep. N. S. 301, 10 Wkly. Rep. 585; Reg. *v.* Smith, 9 Cox C. C. 162, 8 Jur. N. S. 572, L. & C. 168, 31 L. J. M. C. 154, 6 L. T. Rep. N. S. 300, 10 Wkly. Rep. 583; Reg. *v.* Ion, 6 Cox C. C. 1, 2 Den. C. C. 475, 16 Jur. 746, 21 L. J. M. C. 166; Thomas' Case, 2 East P. C. 934, 2 Leach C. C. 877.

33. Reg. *v.* Nisbett, 6 Cox C. C. 320.

34. Rex *v.* Shukard, R. & R. 150.

35. Rex *v.* Shukard, R. & R. 150.

36. State *v.* Redstrake, 39 N. J. L. 365.

VII. POSSESSION OF FORGED INSTRUMENT.

A person may be convicted of forgery by having possession of a forged instrument with intent to defraud, although never uttered by him.[37]

VIII. DISPOSING OF AND PUTTING AWAY FORGED BANK-NOTES.

The intent to defraud a bank constitutes the offense of feloniously disposing of and putting away forged bank-notes.[38] Giving to a confederate a forged bank-note that he may utter it is a disposing and putting away thereof.[39]

IX. PERSONS LIABLE.

To render one liable for forgery it is not essential that the instrument on which the prosecution is based should have been made or altered by defendant himself. He will be guilty of the offense if with fraudulent intent he procures this to be done by another,[40] or after procuring it to be done utters or publishes it;[41] and it is immaterial that the person making or altering the instrument is innocent of any fraudulent intent.[42] It is necessary, however, to constitute the offense that the writing should have been done in defendant's presence.[43] So one who procures another to utter a forged instrument is as culpable as if he had perpetrated the act himself.[44] And one is also guilty of forgery where he procures another to sign the latter's own name, which the former thereafter represents to be that of a third person.[45] It is an elementary proposition of law that all who act together with a common design are principals.[46] The degree of aid

37. State *v.* Hathhorn, 166 Mo. 229, 65 S. W. 756; Rex *v.* Crocker, 2 B. & P. N. R. 97, 2 Leach C. C. 987, R. & R. 97. And see Rex *v.* Rowley, R. & R. 82.

38. Rex *v.* Holden, R. & R. 115, 2 Taunt. 334.

The offense is complete, although the person to whom the notes were disposed of was an agent of the bank to detect utterers and applied to the person to purchase forged notes and had them delivered to him as forged notes for the purpose of disposing of them. Rex *v.* Holden, R. & R. 115, 2 Taunt. 334.

39. Rex *v.* Palmer, 1 B. & P. N. R. 96, 2 Leach C. C. 978, R. & R. 72.

40. *Illinois.*— Langdon *v.* People, 133 Ill. 382, 24 N. E. 382.

Kentucky.— Hughes *v.* Com., 89 Ky. 227, 12 S. W. 269, 11 Ky. L. Rep. 424.

Massachusetts.— Com. *v.* Stevens, 10 Mass. 181.

Missouri.— State *v.* Rucker, 93 Mo. 88, 5 S. W. 609.

Virginia.— Chahoon *v.* Com., 20 Gratt. 733.

See 23 Cent. Dig. tit. "Forgery," § 19.

It is not indispensable to show that the name forged is in defendant's own writing. Holdsworth *v.* Com., 6 Ky. L. Rep. 591.

41. Koch *v.* State, 115 Ala. 99, 22 So. 471; Elmore *v.* State, 92 Ala. 51, 9 So. 600; Gooden *v.* State, 55 Ala. 178; Territory *v.* Barth, 2 Ariz. 319, 15 Pac. 673. It is not essential to the conviction of one charged with unlawfully having in his possession a fictitious and counterfeit check, knowing it to be forged, and with feloniously attempting to utter and pass it, to show that he personally affixed the fictitious name to the check. State *v.* Allen, 116 Mo. 548, 22 S. W. 792.

42. Gregory *v.* State, 26 Ohio St. 510, 20 Am. Rep. 774.

Liability as principal.— Where one was present, knowing of and assenting to the commission of a forgery, of which he was to derive the benefit, he is liable as a principal. Com. *v.* Stevens, 10 Mass. 181. So if defendant keeps a position near the person uttering forged instruments, and receives the proceeds thereof. Com. *v.* Clune, 162 Mass. 206, 38 N. E. 435; Mason *v.* State, 31 Tex. Cr. 306, 20 S. W. 564.

43. Com. *v.* Clubb, 17 S. W. 281, 13 Ky. L. Rep. 416.

44. Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249; Mason *v.* State, 31 Tex. Cr. 306, 20 S. W. 564; Reg. *v.* Vanderstein, 10 Cox C. C. 177, 16 Ir. C. L. 574.

45. *California.*— People *v.* Rushing, 130 Cal. 449, 62 Pac. 742, 80 Am. St. Rep. 141.

Iowa.— State *v.* Farrell, 82 Iowa 553, 48 N. W. 940.

Massachusetts.— Com. *v.* Foster, 114 Mass. 311, 19 Am. Rep. 353.

Texas.— Peel *v.* State, 35 Tex. Cr. 308, 33 S. W. 541, 60 Am. St. Rep. 49.

England.— Reg. *v.* Mahony, 6 Cox C. C. 487; Reg. *v.* Mitchell, 1 Den. C. C. 282 note; Parkes' Case, 2 East P. C. 963, 992, 2 Leach C. C. 775; Reg. *v.* Epps, 4 F. & F. 81.

See 23 Cent. Dig. tit. "Forgery," § 19.

46. See CRIMINAL LAW, 12 Cyc. 70; and cases cited *infra*, this note.

When the offense is committed by the perpetration of different parts which constitute one entire whole, it is not necessary that the offenders should be together, but any act done by either in pursuance of the common design inculpates all. *Ex p.* Rogers, 10 Tex. App.

or assistance given in the forgery of papers with the intent to defraud has been held to be unimportant.[47]

X. JURISDICTION.[48]

Where defendant is prosecuted under the laws of the United States he must be tried in the district where the offense was committed,[49] but where certain acts constitute forgery under the laws of the state the jurisdiction of the state courts thereof is not ousted by the fact that the same acts are also an offense under the laws of the United States.[50]

XI. VENUE.[51]

If a forgery is completed in one county defendant may be prosecuted in that county, and it is immaterial where the first step may have been taken.[52] Jurisdiction is in the county in which defendant utters a forged instrument notwithstanding he may have forged the instrument in another county,[53] and where an instrument is caused to be set in circulation abroad with intent to have it presented where the forger resides, he can be convicted of uttering it at the latter place.[54] The weight of authority[55] is to the effect that the offense is not complete until the instrument comes to the hands of the person to whom it is sent and that the proper place of trial is the county to which it is sent.[56] Where a writing is forged, presented to, and paid by an agent of the person apparently liable

655, 38 Am. Rep. 654; Heard *v.* State, 9 Tex. App. 1; Rex *v.* Bingley, R. & R. 332.

47. U. S. *v.* Osgood, 26 Fed. Cas. No. 15,971*a*.

48. Jurisdiction of local courts.— Although the offense charged consists in bringing suit on a forged instrument in the county and circuit courts, yet when both courts are within the limits of the city and defendant lives there, the city court of the city may try the offense, since it is committed within its jurisdiction. Sands *v.* Com., 20 Gratt. (Va.) 800; Chahoon *v.* Com., 20 Gratt. (Va.) 733. By special statutory provisions in Texas relating to forgery of land titles and the constitutionality of which has been affirmed, one who has forged title to lands within the state may be prosecuted in the county where the land is situated, although the act of forging the title was consummated in another state. Hanks *v.* State, 13 Tex. App. 289. And under a statute providing that indictments for land forgeries may be presented by the grand jury of Travis county or in the county where the offense was committed an indictment presented to the district court of Travis county charging an offense committed in another county gives jurisdiction to such court notwithstanding the laws which in general control the venue in criminal actions. Francis *v.* State, 7 Tex. App. 501. The quarter sessions which has jurisdiction of offenses attended with a breach of the peace has no jurisdiction to try the offense of forgery, which is not an offense of that character. Reg. *v.* McDonald, 31 U. C. Q. B. 337. A prisoner charged with forgery cannot be brought before a judge of the court of the queen's bench under the Speedy Trials Act. Reg. *v.* Scott, 3 Manitoba 448. See also CRIMINAL LAW, 12 Cyc. 200 *et seq.*

49. U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464.

50. Com. *v.* Luberg, 94 Pa. St. 85. See also State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53, holding that the fact that one who has forged bonds makes false entry thereof in the books of a national bank, which latter act constitutes an offense under the laws of the United States, does not oust the jurisdiction of a state court of the offense of forging the bonds.

51. Venue in criminal proceedings see CRIMINAL LAW, 12 Cyc. 229 *et seq.*

52. Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249.

In England, under 11 Geo. IV and 1 Wm. IV, c. 66, § 24, forgery may be alleged to have been committed in the county where the prisoner is in custody. Reg. *v.* Smythies, 2 C. & K. 878, 4 Cox C. C. 94, 1 Den. C. C. 498, 13 Jur. 1334, 19 L. J. M. C. 31, T. & M. 190, 61 E. C. L. 878; Rex *v.* James, 7 C. & P. 553, 32 E. C. L. 755.

53. McGuire *v.* State, 37 Ala. 161.

54. Reg. *v.* Taylor, 4 F. & F. 511.

55. Some decisions hold that the offense of uttering forged paper is complete where the forged instrument is mailed, and that jurisdiction is in the courts of the county where the mailing takes place. U. S. *v.* Plympton, 27 Fed. Cas. No. 16,058, 4 Cranch C. C. 309; U. S. *v.* Wright, 28 Fed. Cas. No. 16,773, 2 Cranch C. C. 296; Rex *v.* Perkin, 2 Lewin C. C. 150.

56. *Alabama.*— Bishop *v.* State, 30 Ala. 34.

Montana.— State *v.* Hudson, 13 Mont. 112, 32 Pac. 413, 19 L. R. A. 775.

New York.— People *v.* Rathbun, 21 Wend. 509.

Ohio.— Lindsey *v.* State, 38 Ohio St. 507.

Tennessee.— Foute *v.* State, 15 Lea 712.

Texas.— Jessup *v.* State, 44 Tex. Cr. 83, 68 S. W. 988.

See 23 Cent. Dig. tit. "Forgery," § 59.

thereon, the offense is consummated, although the agent sends the instrument to another state and obtains credit from his principal there, he having authority to make payments, and not acting as agent for defendant.[57]

XII. PRELIMINARY PROCEEDINGS.[58]

A mere clerical error in a warrant will not vitiate it;[59] nor need it aver an intent to defraud.[60] Where the offense charged is uttering a forged promissory note, and the warrant imports knowledge of the forged character of the paper, the warrant is not void.[61] If a person is examined and committed for trial for forgery and the indictment contains counts for uttering and publishing, the court should quash such counts;[62] and a person cannot be convicted on an information for forgery when the complaint on which he was examined only charged him with uttering the forgery.[63] If the examining court thinks the prisoner guilty, it should remand him without discriminating as to the grade of the offense, or designating the mode in which it had been committed.[64]

XIII. INDICTMENT OR INFORMATION.[65]

A. The Allegations — 1. Prosecutions For Forgery — a. In General. An indictment is sufficient in general if it includes the essential ingredients of the offense,[66] although inartificially drawn.[67] It is commonly held that the omission of the specific word "feloniously,"[68] "falsely,"[69] or "knowingly" is not

Compare Com. *v.* Fagan, 2 Pa. Dist. 401, 12 Pa. Co. Ct. 613.

Under special statutory provisions.— Under Code Cr. Proc. art. 206, the offense of forgery or uttering a forged instrument may be prosecuted in any county where the instrument was forged or used, or passed or attempted to be used or passed; and where an instrument purported to be executed in one county but was passed in the county of the prosecution, the venue was sufficiently established in the latter. Hocker *v.* State, 34 Tex. Cr. 359, 30 S. W. 783; Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680.

57. *In re* Carr, 28 Kan. 1. And see Thulemeyer *v.* State, 34 Tex. Cr. 619, 31 S. W. 659.

58. **Preliminary proceedings** see CRIMINAL LAW, 12 Cyc. 290 *et seq.*

59. People *v.* Foote, 93 Mich. 38, 52 N. W. 1036.

60. Haskins *v.* Ralston, 69 Mich. 63, 37 N. W. 45, 13 Am. St. Rep. 376; Bogart *v.* Com., 10 Leigh (Va.) 693.

61. Anderson *v.* Wilson, 25 Ont. 91.

62. Mowbray *v.* Com., 11 Leigh (Va.) 643.

63. People *v.* McMillen, 52 Mich. 627, 18 N. W. 390.

64. Huffman *v.* Com., 6 Rand. (Va.) 685.

65. **Indictment or information** see, generally, INDICTMENTS AND INFORMATIONS.

For forms of indictments and informations see the following cases:

Alabama.— Agee *v.* State, 113 Ala. 52, 21 So. 207; Jones *v.* State, 50 Ala. 161.

Indiana.— Sharley *v.* State, 54 Ind. 168.

Iowa.— State *v.* Stuart, 61 Iowa 203, 16 N. W. 91.

Minnesota.— State *v.* Greenwood, 76 Minn. 207, 78 N. W. 1044, 1117, 76 Minn. 211, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632.

Missouri.— State *v.* Fenly, 18 Mo. 445.

New York.— Rosekrans *v.* People, 3 Hun 287, 5 Thomps. & C. 467; Holmes *v.* People, 15 Abb. Pr. 154.

North Carolina.— State *v.* Walker, 4 N. C. 661.

Tennessee.— Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760.

Texas.— Roberts *v.* State, (Cr. App. 1899) 53 S. W. 864.

Wyoming.— Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

England.— Rex *v.* Brewer, 6 C. & P. 363, 25 E. C. L. 476.

66. Hughes *v.* Com., 89 Ky. 227, 12 S. W. 269, 11 Ky. L. Rep. 424; Holdsworth *v.* Com., 6 Ky. L. Rep. 591. See also Matter of Van Orden, 32 Misc. (N. Y.) 215, 65 N. Y. Suppl. 720, 15 N. Y. Cr. 79.

67. Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46. An information is not insufficient because it charges the forgery of a certain name to a check, instead of forgery of the check itself. People *v.* King, 125 Cal. 369, 58 Pac. 19.

68. Cohen *v.* People, 7 Colo. 274, 3 Pac. 385; Com. *v.* Lemon, 37 S. W. 61, 18 Ky. L. Rep. 480 (in both of which cases the indictment followed the language of the statutes, which did not use the word "feloniously"); State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550. *Contra,* State *v.* Flint, 33 La. Ann. 1288.

Felonious intent.— If an indictment charges the forging as having been feloniously done, it is not necessary to aver that the intent was felonious. State *v.* Tobie, 141 Mo. 547, 42 S. W. 1076.

69. *California.*—People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

Colorado.— Cohen *v.* People, 7 Colo. 274, 3 Pac. 385.

material.[70] Ordinarily it is apprehended the indictment should allege the time of the commission of the offense,[71] unless this is made unnecessary by statute.[72] An allegation that the offense is *contra formam statuti* may be rejected as surplusage where there is nothing in the indictment to show that the offense was against any statute.[73] If the separate parts of an indictment are insufficient no additional strength is gained by taking them as a whole.[74]

b. Charging Statutory Offenses. It is a general rule that if an indictment is based upon a statute, it is sufficient if it follows the wording thereof.[75] The rule, however, is subject to the qualification that unless the words of the statute of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, an indictment charging the offense in the language of the statute will be insufficient,[76] and the fact that the statute in question read in the light of the common law and of other statutes on the like matter enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.[77] An indictment based upon a statute in order to be sufficient must set forth all the facts which are by the statute made ingredients of the offense.[78] Words of a statute which are descriptive of an offense, a part of the statutory definition, cannot be omitted from any indictment based thereon without fatally vitiating such indictment,[79] although it is otherwise as to the omission of general words describing, not the offense, but the writings of which forgery may be committed.[80] So if one word is substituted for another the indictment is bad,[81] unless such word has a meaning similar to the one used in the statute.[82] Where a statute uses words in the alternative, it is not necessary that such words should be used in the con-

Florida.— Turnipseed *v.* State, (1903) 33 So. 851.

Indiana.— State *v.* Dark, 8 Blackf. 526.

Nevada.— State *v.* McKiernan, 17 Nev. 224, 30 Pac. 831.

70. Morris *v.* State, 17 Tex. App. 660; Reg. *v.* Bowen, 1 C. & K. 501, 1 Cox C. C. 88, 1 Den. C. C. 22, 47 E. C. L. 501.

71. See, generally, INDICTMENTS AND INFORMATIONS.

72. McGuire *v.* State, 37 Ala. 161.

73. Reg. *v.* Carson, 14 U. C. C. P. 309.

74. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

75. State *v.* Foster, 30 Kan. 365, 2 Pac. 628; Eldridge *v.* Com., 54 S. W. 7, 21 Ky. L. Rep. 1088; State *v.* Stephen, 45 La. Ann. 702, 12 So. 883; State *v.* Gardiner, 23 N. C. 27. And see U. S. *v.* Britton, 107 U. S. 655, 2 S. Ct. 512, 27 L. ed. 520.

76. U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135. And see State *v.* Foster, 30 Kan. 365, 2 Pac. 628.

77. U. S. *v.* Carll, 105 U. S. 611, 26 L. ed. 1135.

78. *Georgia.*— McCombs *v.* State, 109 Ga. 500, 34 S. E. 1023; Johnson *v.* State, 109 Ga. 268, 34 S. E. 573; Moore *v.* State, 33 Ga. 225.

Kentucky.— Com. *v.* Lee, 37 S. W. 72, 18 Ky. L. Rep. 484.

Michigan.— People *v.* Stewart, 4 Mich. 655.

Minnesota.— State *v.* Cody, 65 Minn. 121, 67 N. W. 798; Benson *v.* State, 5 Minn. 19.

Missouri.— State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

New Hampshire.— State *v.* Horan, 64 N. H. 548, 15 Atl. 20.

North Carolina.— State *v.* Britt, 14 N. C. 122.

Wisconsin.— Snow *v.* State, 14 Wis. 479.

England.— Rex *v.* Donnelly, 1 Moody C. C. 438.

Illustrations.— In an indictment for forging a check on a bank under a statute making it a crime to forge any "note or check or draft upon a bank or the certificate of deposit of money therein of any bank or company authorized by law of the United States or any state of the United States or any foreign government" an averment that the bank upon which the check was forged was authorized by the law of the United States or of some state or foreign government is essential. Com. *v.* Lee, 37 S. W. 72, 18 Ky. L. Rep. 484. So where an indictment for forging an order for goods is based on a statute making it an offense to forge an order for money or other thing of value, the indictment will be fatally defective if it fails to allege that the thing for which the order was forged was of value. McCombs *v.* State, 109 Ga. 500, 34 S. E. 1023; Johnson *v.* State, 109 Ga. 268, 34 S. E. 573.

79. State *v.* Hesseltine, 130 Mo. 468, 32 S. W. 983; People *v.* Wilber, 4 Park. Cr. (N. Y.) 19.

80. Powell *v.* Com., 11 Gratt. (Va.) 822.

81. Harrington *v.* State, 54 Miss. 490, holding that the use of the word "willingly" in the indictment instead of the word "wittingly" found in the statute renders the indictment fatally defective.

82. People *v.* Terrill, 133 Cal. 120, 65 Pac. 303; Com. *v.* Phipps, 16 Phila. (Pa.) 457; Rex *v.* Elsworth, 2 East P. C. 986.

junctive form in the indictment.[83] An indictment which has been based upon, but is defective under, one statute, may be good under another statute.[84]

c. Particular Averments — (I) *As to Making.* The making of the false instrument is sufficiently averred by charging that it was "forged."[85] The word "forged" implies false making to the full extent as if it were expressed,[86] and it is not necessary to set out the particular acts of which it consisted.[87] If defendant has altered a genuine instrument, he may be charged with the forgery of the entire instrument;[88] and if he has procured another to do the act,[89] or has aided therein,[90] he may be charged with doing the act himself. If he is charged with procuring[91] or aiding[92] the forgery, it is not necessary to set forth whom he procured or aided. An indictment is insufficient which only charges an intention to forge,[93] or which does not charge that the making or alteration was without authority.[94]

(II) *As to Alteration* — (A) *In General.* Where the alteration of a genuine instrument is charged, the indictment must clearly set forth the alteration alleged,[95] with the proper averments showing the alteration of a material part thereof;[96] and if the instrument is one given by defendant, the alteration must be charged to have been made after such instrument was circulated;[97] and the instrument as altered must then be set out in words and figures.[98] If the alteration consists in the insertion of words, their position must be distinctly set forth,[99] otherwise they will be presumed to have been placed after the signature, in which case they could deceive no one.[1] If the indictment relates to more than

83. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

84. State *v.* Houseal, 2 Brev. (S. C.) 219.

85. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597; King *v.* State, 43 Fla. 211, 31 So. 254; State *v.* Greenwood, 76 Minn. 211, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632; Webb *v.* State, 39 Tex. Cr. 534, 47 S. W. 356; Cagle *v.* State, 39 Tex. Cr. 109, 44 S. W. 1097. *Contra,* Com. *v.* Williams, 13 Bush (Ky.) 267; Stowers *v.* Com., 12 Bush (Ky.) 342; Com. *v.* Martin, 1 Ky. L. Rep. 279.

Use of word as determining statute under which indictment drawn. — Where an information alleges the specific acts constituting an offense under a statute imposing a penalty for the commission of such acts the mere fact that the word "forgery" is used in the information does not make the charge one under another statute defining forgery and not including the acts mentioned in the first-named statute. People *v.* Eppinger, 105 Cal. 361, 38 Pac. 538.

Designating an offense as "forgery," if inaccurate, is immaterial if the offense is sufficiently charged. Aiken *v.* State, 90 Ga. 452, 16 S. E. 206.

86. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

87. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; State *v.* Wingard, 40 La. Ann. 733, 5 So. 54; People *v.* Van Alstine, 57 Mich. 69, 23 N. W. 594; State *v.* Greenwood, 76 Minn. 211, 78 N. W. 1042, 1117, 77 Am. St. Rep. 632.

88. *California.* — People *v.* Brotherton, 47 Cal. 388.

Delaware. — State *v.* Marvels, 2 Harr. 527.

Iowa. — State *v.* Maxwell, 47 Iowa 454.

Maine. — State *v.* Flye, 26 Me. 312.

Massachusetts. — Com. *v.* Boutwell, 129 Mass. 124; Com. *v.* Butterick, 100 Mass. 12; Com. *v.* Woods, 10 Gray 477.

Missouri. — State *v.* Eaton, 166 Mo. 575, 66 S. W. 539.

North Carolina. — State *v.* Weaver, 35 N. C. 491; State *v.* Gardiner, 23 N. C. 27.

Canada. — Reg. *v.* Deegan, 6 Manitoba 81.

89. Eldridge *v.* Com., 54 S. W. 7, 21 Ky. L. Rep. 1088; State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201. See *infra,* IX.

90. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201. See *infra,* IX.

91. Huffman *v.* Com., 6 Rand. (Va.) 685.

92. Huffman *v.* Com., 6 Rand. (Va.) 685; Com. *v.* Ervin, 2 Va. Cas. 337.

93. Hicken *v.* State, 96 Ga. 759, 22 S. E. 297.

94. Com. *v.* Bowman, 95 Ky. 40, 27 S. W. 816, 16 Ky. L. Rep. 222.

95. Kahn *v.* State, 58 Ind. 168; Bittings *v.* State, 56 Ind. 101; State *v.* Riebe, 27 Minn. 315, 7 N. W. 262; State *v.* Fisher, 58 Mo. 256; State *v.* Knippa, 29 Tex. 295.

96. *Indiana.* — Kahn *v.* State, 58 Ind. 168; Bittings *v.* State, 56 Ind. 101.

Kansas. — State *v.* McNaspy, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756.

Louisiana. — State *v.* Means, 47 La. Ann. 1535, 18 So. 514.

Missouri. — State *v.* Fisher, 58 Mo. 256.

Texas. — State *v.* Knippa, 29 Tex. 295.

See 23 Cent. Dig. tit. "Forgery," § 84.

97. State *v.* Greenlee, 12 N. C. 523.

98. State *v.* McNaspy, 58 Kan. 691, 50 Pac. 895, 38 L. R. A. 756; State *v.* Bryant, 17 N. H. 323; Franklin *v.* State, (Tex. Cr. App. 1904) 78 S. W. 934.

99. State *v.* Bryant, 17 N. H. 323; Overly *v.* State, 34 Tex. Cr. 500, 31 S. W. 377.

1. Com. *v.* McKee, Add. (Pa.) 33.

one instrument, only one of which is alleged to have been altered, the particular instrument altered must be designated.[2] An allegation of the substitution of three letters in a word is supported by evidence of the substitution of only two of them.[3] If the forgery consists of an erasure, the technical term "forge or counterfeit" must be used.[4]

(B) *Of Records.* Indictments for making false entries in records are sufficient if the offense is plainly and substantially set forth.[5] The particular entries altered or falsely made must be set out,[6] although a copy of the record need not be given, nor is it necessary to state that the record was in the custody of defendant.[7]

(III) *As to Intent to Defraud* — (A) *In General.* An indictment must allege an intent to defraud,[8] unless the necessity of making the allegation is obviated by statute,[9] and where both forgery and uttering are charged, but the uttering only is alleged to have been with intent to defraud, the omission of such an allegation as to the forgery is fatal.[10] It is unnecessary, however, to mention the manner in which the fraud was effected, or was intended to be effected,[11] or to allege that the instrument was presented as genuine.[12]

(B) *Designation of Person Defrauded.* Where the rule is not affected by statute an indictment which fails to charge the name of the person intended to be defrauded, or that the name is unknown to the grand jury, is bad,[13] and the

2. State *v.* Millner, 131 Mo. 432, 33 S. W. 15.

3. State *v.* Rowley, Brayt. (Vt.) 76.

4. U. S. *v.* Watkins, 28 Fed. Cas. No. 16,649, 3 Cranch C. C. 441.

5. State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454; Phelps *v.* People, 6 Hun (N. Y.) 428 [*affirmed* in 72 N. Y. 365]; McConnell *v.* Kennedy, 29 S. C. 180, 7 S. E. 76.

6. People *v.* Palmer, 53 Cal. 615; Harrington *v.* State, 54 Miss. 490.

7. People *v.* O'Brien, 96 Cal. 171, 31 Pac. 45.

8. *California.*— People *v.* Elphis, (1903) 72 Pac. 838; People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

Delaware.— State *v.* Hegeman, 2 Pennew. 143, 44 Atl. 623.

Georgia.— Gibson *v.* State, 79 Ga. 344, 5 S. E. 76; Phillips *v.* State, 17 Ga. 459.

Mississippi.— Harrington *v.* State, 54 Miss. 490.

New Jersey.— West *v.* State, 22 N. J. L. 212.

England.— Reg. *v.* Powner, 12 Cox C. C. 235.

Canada.— Reg. *v.* Weir, 9 Quebec Q. B. 253, 3 Can. Cr. Cas. 499.

See 23 Cent. Dig. tit. "Forgery," § 62.

Allegation held sufficient.— A charge that the instrument was wilfully and feloniously forged and presented to another and money received in exchange therefor sufficiently charges criminal intent. Matter of Van Orden, 32 Misc. (N. Y.) 215, 65 N. Y. Suppl. 720, 15 N. Y. Cr. 79.

9. Watson *v.* State, 78 Ga. 349; Phillips *v.* State, 17 Ga. 459; Reg. *v.* Carson, 14 U. C. C. P. 309. Under Mo. Rev. St. (1889) §§ 3633, 3634, in regard to selling falsely made drafts, it is unnecessary to allege that the selling was with felonious intent. State *v.* Taylor, 117 Mo. 181, 22 S. W. 1103.

10. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597. But where an indictment charges that defendant did alter and forge a public record with intent to defraud, setting out the record as it was both before and after the alteration, it is unnecessary to repeat that the record so altered was made with intent to defraud. State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454.

11. *Kentucky.*— Jackson *v.* Com., 34 S. W. 14, 17 Ky. L. Rep. 1197.

New Jersey.— West *v.* State, 22 N. J. L. 212.

Pennsylvania.— Com. *v.* Bachop, 2 Pa. Super. Ct. 294.

Tennessee.— Snell *v.* State, 2 Humphr. 347.

England.— Rex *v.* Powell, 2 East P. C. 976, 1 Leach C. C. 77, 2 W. Bl. 787; Rex *v.* Goate, 1 Ld. Raym. 737.

Canada.— Reg. *v.* Weir, 9 Quebec Q. B. 253, 3 Can. Cr. Cas. 499.

See 23 Cent. Dig. tit. "Forgery," § 62.

12. Com. *v.* Ladd, 15 Mass. 526.

13. *Kansas.*— State *v.* Gavigan, 36 Kan. 322, 13 Pac. 554.

Kentucky.— Huff *v.* Com., 42 S. W. 907, 19 Ky. L. Rep. 1064; Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 803.

Mississippi.— Cunningham *v.* State, 49 Miss. 685.

Rhode Island.— State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

United States.— U. S. *v.* Larned, 26 Fed. Cas. No. 15,566, 4 Cranch C. C. 335; U. S. *v.* Noble, 27 Fed. Cas. No. 15,895, 5 Cranch C. C. 371.

See 23 Cent. Dig. tit. "Forgery," § 62.

Allegation held sufficient.— A count which states that the prisoner did forge a promissory note on which was an indorsement, setting it out, with intent to defraud a person named, sufficiently charges that the note and not the indorsement was that by which the prisoner intended to defraud. The words "with intent" apply to the verb of which

christian name must be given, or an allegation made that it is unknown;[14] but such charge may be made indirectly,[15] and a description to a common intent, of the person intended to be defrauded, is sufficient.[16] If the indictment charges a statutory offense, and follows the language of the statute, an allegation of an intent to defraud any particular person is unnecessary.[17] In some states, by statute, an allegation to this effect is no longer necessary in any case,[18] although if made the indictment is nevertheless valid.[19] There are usually two persons who may be defrauded, the one whose name is forged and the one to whom the forged instrument is uttered, and the intent may be laid to defraud either of them,[20] or both of them, either in separate counts[21] or in one count.[22] An intent to defraud the principal may be alleged where the instrument names the agent as such;[23] but if an intent is alleged to defraud one described as "agent" merely, it is error to charge that defendant might be found guilty if he forged the order with intent to defraud the principal, who was disclosed on the trial.[24] Where a forged request for delivery of goods was addressed to a woman in her maiden name, who prior to the date of it had married, an intent to defraud the husband may be charged.[25] An averment that a note was forged with intent to defraud the United States is necessary to withdraw the case from the jurisdiction of state

the prisoner's name is the subject. Rex *v.* James, 7 C. & P. 553, 32 E. C. L. 755.

14. Zellers *v.* State, 7 Ind. 659.

15. State *v.* Stegman, 62 Kan. 476, 63 Pac. 746; Allen *v.* State, 44 Tex. Cr. 63, 68 S. W. 286, 100 Am. St. Rep. 839.

Where bank is defrauded.— If an indictment, founded on a statute containing a provision in regard to forgery with intent to defraud an incorporated bank in the state, charges an intent to defraud an incorporated bank, and its corporate name is set forth, it is sufficient if it appears to be an incorporate bank in the state. State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257.

16. Rex *v.* Lovell, 2 East P. C. 990, 1 Leach C. C. 248.

17. *Georgia.*— Brazil *v.* State, 117 Ga. 32, 43 S. E. 460; Dukes *v.* State, 94 Ga. 393, 21 S. E. 54.

Iowa.— State *v.* Maxwell, 47 Iowa 454.

Louisiana.— State *v.* Gaubert, 49 La. Ann. 1692, 22 So. 930; State *v.* Foster, 32 La. Ann. 34.

Maine.— State *v.* Kimball, 50 Me. 409.

Missouri.— State *v.* Turner, 148 Mo. 206, 49 S. W. 988; State *v.* Gullette, 121 Mo. 447, 26 S. W. 354; State *v.* Rowlen, 114 Mo. 626, 21 S. W. 729; State *v.* Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. Rep. 681; State *v.* Yerger, 86 Mo. 33; State *v.* Phillips, 78 Mo. 49.

North Carolina.— State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

Oregon.— State *v.* Lurch, 12 Oreg. 104, 6 Pac. 411.

Pennsylvania.— Com. *v.* McClure, 12 Phila. 579.

United States.— U. S. *v.* Jolly, 37 Fed. 108.

Canada.— Reg. *v.* Weir, 9 Quebec Q. B. 253, 3 Can. Cr. Cas. 499.

See 23 Cent. Dig. tit. "Forgery," § 62.

18. *Alabama.*— Williams *v.* State, 126 Ala. 50, 28 So. 632.

Florida.— Darby *v.* State, 41 Fla. 274, 26 So. 315.

Louisiana.— State *v.* Adams, 39 La. Ann. 238, 1 So. 455.

Minnesota.— State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

Missouri.— State *v.* Rucker, 93 Mo. 88, 5 S. W. 609.

New Jersey.— Rohr *v.* State, 60 N. J. L. 576, 38 Atl. 673.

New York.— People *v.* Martin, 2 N. Y. Cr. 51.

Oregon.— State *v.* McElvain, 35 Oreg. 365, 58 Pac. 525.

Texas.— Allen *v.* State, 44 Tex. Cr. 63, 68 S. W. 286, 100 Am. St. Rep. 839; Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812.

West Virginia.— State *v.* Tingler, 32 W. Va. 546, 9 S. E. 935, 25 Am. St. Rep. 830.

See 23 Cent. Dig. tit. "Forgery," § 62.

By 7 Geo. IV, c. 64, § 14, where the number of persons intended to be defrauded is large, the indictment may lay the intent to defraud one of them by name "and others" (Reg. *v.* Vaughan, 8 C. & P. 276, 34 E. C. L. 732), and the word "others" may be held to include or exclude the prisoner, according as it is necessary, to support the indictment, that his name should be included or excluded (Reg. *v.* Turberville, 4 Cox C. C. 13).

19. Denson *v.* State, 122 Ala. 100, 26 So. 119.

20. State *v.* Patch, 21 Mont. 534, 55 Pac. 108; State *v.* Cleavland, 6 Nev. 181; Harris *v.* People, 9 Barb. (N. Y.) 664; Reg. *v.* Dixon, 2 Lewin C. C. 178.

21. Selby *v.* State, 161 Ind. 667, 69 N. E. 463; Reg. *v.* Hoatson, 2 C. & K. 777, 61 E. C. L. 777.

22. Neall *v.* U. S., 118 Fed. 699, 56 C. C. A. 31.

23. State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257.

24. Phillips *v.* State, 96 Ga. 293, 22 S. E. 574.

25. Rex *v.* Carter, 7 C. & P. 134, 32 E. C. L. 537.

courts.[26] An intent to defraud a person named is supported by proof that as treasurer it would be his duty to pay genuine instruments in the form of the false one;[27] and in cases of forgery of certificates or vouchers calling for payment out of public funds, an intent to defraud the public corporation, from whose funds such instrument if genuine would be payable, is properly alleged.[28] An allegation of an intent to defraud one person is supported by proof of an intent to defraud a firm of which he is a partner.[29]

(IV) *Description of Instrument* — (A) *In General.* The description of the forged instrument is sufficient if it would sustain an indictment for stealing it, although not the subject of larceny,[30] and if described as it was at the time of the forgery, it is admissible, although it bears indorsements made afterward.[31] A charge of forging an indorsement on a bill of exchange need not allege the amount of such bill.[32]

(B) *Tenor or Copy of Instrument.* The tenor of an instrument means an exact copy thereof in words and figures,[33] and, unless the rule is abrogated by statute,[34] the indictment should set forth the tenor of the instrument alleged to be forged and purport to do so.[35] A *videlicet* clause likewise imports an exact copy.[36] Where from difficulty in ascertaining a particular word a *facsimile* is attempted it is sufficient.[37] If changes by or with the consent of defendant are made on the instrument after it is uttered its tenor may be set forth in its changed form;[38] or if an erasure has been subsequently made, but the words

26. State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

27. Reg. *v.* Turberville, 4 Cox C. C. 13.

28. Moore *v.* Com., 92 Ky. 630, 18 S. W. 833, 13 Ky. L. Rep. 738; Cunningham *v.* State, 49 Miss. 685; Gregory *v.* State, 11 Ohio St. 329; State *v.* Allen, 56 S. C. 495, 35 S. E. 204.

29. Veazie's Case, 7 Me. 131; State *v.* Hall, 108 N. C. 776, 13 S. E. 189; Stoughton *v.* State, 2 Ohio St. 562; Reg. *v.* Hanson, C. & M. 334, 2 Moody C. C. 245, 41 E. C. L. 185.

30. Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711; Cocke *v.* Com., 13 Gratt. (Va.) 750; State *v.* Duffield, 49 W. Va. 274, 38 S. E. 577; Reg. *v.* Sharpe, 8 C. & P. 436, 34 E. C. L. 823; Reg. *v.* Collins, 2 M. & Rob. 461.

31. Sampson *v.* People, 188 Ill. 592, 59 N. E. 427.

32. State *v.* Clement, 42 La. Ann. 583, 7 So. 685.

33. Com. *v.* Stevens, 1 Mass. 203; State *v.* Pullens, 81 Mo. 387; Fogg *v.* State, 9 Yerg. (Tenn.) 392; Edgerton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90; Roberts *v.* State, 2 Tex. App. 4.

34. See *infra*, XIII, A, 1, c, (IV), (C).

35. *Florida.*— West *v.* State, (1903) 33 So. 854.

Kentucky.— Hill *v.* Com., 33 S. W. 823, 17 Ky. L. Rep. 1135.

Louisiana.— State *v.* Sheldon, 8 Rob. 540.

Maine.— State *v.* Witham, 47 Me. 165; State *v.* Bonney, 34 Me. 383.

Nebraska.— Davis *v.* State, 58 Nebr. 465, 78 N. W. 930.

New Jersey.— State *v.* Gustin, 5 N. J. L. 744.

North Carolina.— State *v.* Dourdon, 13 N. C. 443; State *v.* Twitty, 9 N. C. 248.

South Carolina.— State *v.* Jones, 1 McMull. 236, 36 Am. Dec. 257.

Tennessee.— Croxdale *v.* State, 1 Head 139.

Texas.— Smith *v.* State, 18 Tex. App. 399; Thomas *v.* State, 18 Tex. App. 213.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

United States.— U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464; U. S. *v.* Smith, 27 Fed. Cas. No. 16,326, 2 Cranch C. C. 111.

See 23 Cent. Dig. tit. "Forgery," § 68.

In Iowa, while an indictment for forgery must set out a copy of the instrument, it need not be prefaced by any technical form of words to express that it is so set out; and the words "of the purport and effect following" are sufficient at least under our statute. State *v.* Johnson, 26 Iowa 407, 96 Am. Dec. 158.

36. McDonnell *v.* State, 58 Ark. 242, 24 S. W. 105; Com. *v.* Stow, 1 Mass. 54; Miller *v.* State, (Tex. Cr. App. 1896) 34 S. W. 267; Rex *v.* Powell, 2 East P. C. 976, 1 Leach C. C. 77, 2 W. Bl. 787.

An averment that the forged instrument was of the "purport and effect following, to wit," does not profess to give an exact copy. Dana *v.* State, 2 Ohio St. 91. But see State *v.* Johnson, 26 Iowa 407, 96 Am. Dec. 158.

37. State *v.* Sheldon, 8 Rob. (La.) 540.

Bad handwriting.— Although the date and signature of a forged paper may have been very badly written, yet if there was sufficient to make them mean what was charged in the indictment, it was for the jury to say whether defendant in uttering the paper did so as of the date and with the signature so charged. Hagar *v.* State, 71 Ga. 164.

38. People *v.* Frank, 28 Cal. 507; Huffman *v.* Com., 6 Rand. (Va.) 685.

erased are decipherable, they can be set forth.[39] If the instrument is set out in full other description is unnecessary,[40] and it is not necessary to allege facts which appear thereon.[41] So there is no variance if from any part of the instrument an allegation can be shown to be true.[42]

(c) *Purport of Instrument.* Purport means the substance of an instrument as it appears on the face of it,[43] and where an instrument is set forth according to its tenor it is not necessary to set it forth according to its purport also;[44] but it has been held that if the pleader assumes to set forth an instrument both according to its tenor and purport a variance between the tenor and purport clause will be fatal.[45] By virtue of express statutory provisions in many jurisdictions it is no longer necessary to set out the alleged forged instrument according to its tenor,[46] but it will be sufficient to set it forth according to its purport.[47] Statutes of this character, however, do not dispense with such certainty of description as will clearly identify the offense.[48] It is not requisite that the date[49] or the amount of the instrument,[50] the name of the drawee,[51] or the place of payment[52] should be alleged; and the omission from a promissory note of a power of attorney to confess judgment is not material.[53] Where a signature is forged, an indictment is bad which states that the instrument is signed by a certain person named, instead of stating that it purported to be so signed;[54] likewise if it includes in the purport something not apparent on the face of the instrument.[55] Notwithstanding

39. People *v.* De Kroyft, 49 Hun (N. Y.) 71, 1 N. Y. Suppl. 692.

40. Ashcraft *v.* Com., 60 S. W. 931, 22 Ky. L. Rep. 1542.

41. State *v.* Yerger, 86 Mo. 33; Huckaby *v.* State, (Tex. Cr. App. 1904) 78 S. W. 942.

42. Mee *v.* State, 23 Tex. App. 566, 5 S. W. 243.

43. Fogg *v.* State, 9 Yerg. (Tenn.) 392; Rex *v.* Jones, Dougl. (3d ed.) 300, 2 East P. C. 883, 1 Leach C. C. 204.

The term "purport" imports what appears on the face of an instrument and means the apparent and not the legal import. State *v.* Pullens, 81 Mo. 387.

"Value" and "purport."— Where a statute provides that it shall be sufficient to set forth the purport and value of the instrument alleged to be forged, the word "value" is not used in the sense of the worth of the instrument in money, but in the sense of the effect the instrument is intended to accomplish and hence as the synonym of "effect" or "import." Chidester *v.* State, 25 Ohio St. 433; Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

44. State *v.* Yerger, 86 Mo. 33; State *v.* Pullens, 81 Mo. 387; Fogg *v.* State, 9 Yerg. (Tenn.) 392; Rhudy *v.* State, 42 Tex. Cr. 225, 58 S. W. 1007; English *v.* State, 30 Tex. App. 470, 18 S. W. 94; Westbrook *v.* State, 23 Tex. App. 401, 5 S. W. 248; Labaitte *v.* State, 6 Tex. App. 483.

45. English *v.* State, 30 Tex. App. 470, 18 S. W. 94; Westbrook *v.* State, 23 Tex. App. 401, 5 S. W. 248; Roberts *v.* State, 2 Tex. App. 4. *Compare* State *v.* Yerger, 86 Mo. 33, in which it was said that where the tenor of the forged instrument is exact and complete and sufficiently gives the purport, the purport clause may be rejected as surplusage.

Where the instrument is stated according to its tenor the purport of it must necessarily appear. Fogg *v.* State, 9 Yerg. (Tenn.) 392.

46. *Alabama.*— Bostick *v.* State, 34 Ala. 266.

Louisiana.— State *v.* Gaubart, 49 La. Ann. 1692, 22 So. 930; State *v.* Sherwood, 41 La. Ann. 316, 6 So. 529; State *v.* Boasso, 38 La. Ann. 202; State *v.* Maas, 37 La. Ann. 292.

Missouri.— State *v.* Pullens, 81 Mo. 387; State *v.* Fay, 65 Mo. 490.

Ohio.— Chidester *v.* State, 25 Ohio St. 433.

Oregon.— State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

Washington.— State *v.* Wright, 9 Wash. 96, 37 Pac. 313.

West Virginia.— State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

Wisconsin.— See State *v.* Hill, 30 Wis. 416.

Wyoming.— Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

See 23 Cent. Dig. tit. "Forgery," § 69.

47. *Missouri.*— State *v.* Pullens, 81 Mo. 387.

Oregon.— State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

Washington.— State *v.* Wright, 9 Wash. 96, 37 Pac. 313.

West Virginia.— State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

England.— Reg. *v.* Davies, 9 C. & P. 427, 2 Moody C. C. 177, 38 E. C. L. 254.

48. Roberts *v.* State, 72 Miss. 110, 16 So. 233.

49. Rex *v.* Burgiss, 7 C. & P. 490, 32 E. C. L. 723.

50. State *v.* Gaubert, 49 La. Ann. 1692, 22 So. 930; Chidester *v.* State, 25 Ohio St. 433.

51. State *v.* Curtis, 39 Minn. 357, 40 N. W. 263; Santolini *v.* State, 6 Wyo. 110, 42 Pac. 746, 71 Am. St. Rep. 906.

52. Reg. *v.* Lee, 2 M. & Rob. 281.

53. Burdge *v.* State, 53 Ohio St. 512, 42 N. E. 594.

54. Carter's Case, 2 East P. C. 985.

55. Rex *v.* Reading, 1 East 180 note *b*.

a statute permits the instrument alleged to be forged to be set forth according to its purport, it may nevertheless be set forth according to its tenor.[56]

(D) *Translations.* If the instrument be written in a foreign language, an indictment setting it out in such language with a translation thereof is good;[57] but if there is no translation,[58] or if it is described wholly in English,[59] it is not sufficient, unless the rule has been changed by statute;[60] and the translation of it must include everything that is material.[61] Where the signature alone is forged, and is the same name in the foreign language as in English, it is not necessary to set it out in the foreign characters.[62]

(E) *Instruments Lost, Destroyed, or Withheld.* If the forged instrument has been lost or destroyed, or defendant refuses to yield possession thereof, the tenor need not be set forth;[63] but this will not excuse a full statement of the substance of the instrument,[64] so that the court may see that it was such an instrument that the forgery of it would constitute a crime.[65] So in the event of a partial destruction while in defendant's possession, it is sufficient to state the substance of the paper, although parol evidence could supply the missing part.[66] An indictment which describes the missing instrument and alleges the reason for not being able to give a more particular description is sufficient.[67] An allegation that an instrument is lost is not equivalent to an allegation that it has been withheld or destroyed by the acts of defendant.[68]

(F) *Repugnancy or Ambiguity.* Repugnant or uncertain allegations,[69] or those which are inconsistent with a copy of the instrument as set out, render an

56. State *v.* Pullens, 81 Mo. 389.

57. Rex *v.* Szudurskie, 1 Moody C. C. 429.

58. Rex *v.* Goldstein, 3 B. & B. 201, 7 Moore C. P. 1, 10 Price 88, R. & R. 473, 7 E. C. L. 685.

59. Rex *v.* Harris, 7 C. & P. 429, 32 E. C. L. 691.

60. People *v.* Ah Woo, 28 Cal. 205.

61. Rex *v.* Harris, 7 C. & P. 429, 32 E. C. L. 691.

62. Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431; Beyerline *v.* State, 147 Ind. 125, 45 N. E. 772. *Contra*, People *v.* Bennett, 122 Mich. 281, 81 N. W. 117.

63. *Indiana.*— State *v.* Callahan, 124 Ind. 364, 24 N. E. 732.

Iowa.— State *v.* White, 98 Iowa 346, 67 N. W. 267.

New York.— People *v.* Badgley, 16 Wend. 53; People *v.* Kingsley, 2 Cow. 522, 14 Am. Dec. 520.

North Carolina.— State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756.

Vermont.— State *v.* Parker, 1 D. Chipm. 298, 11 Am. Dec. 735.

United States.— U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464.

See 23 Cent. Dig. tit. "Forgery," § 74.

64. *Illinois.*— Wallace *v.* People, 27 Ill. 45.

Indiana.— Birdg *v.* State, 31 Ind. 88.

Kentucky.— Hill *v.* Com., 33 S. W. 823, 17 Ky. L. Rep. 1135.

Massachusetts.—Com. *v.* Spilman, 124 Mass. 327, 26 Am. Rep. 668.

Texas.— Pierce *v.* State, 38 Tex. Cr. 604, 44 S. W. 292.

Vermont.— State *v.* Briggs, 34 Vt. 501.

See 23 Cent. Dig. tit. "Forgery," § 74.

65. Wallace *v.* People, 27 Ill. 45.

66. Munson *v.* State, 79 Ind. 541.

67. West *v.* State, (Fla. 1903) 33 So. 854; State *v.* Imboden, 157 Mo. 83, 57 S. W. 536; State *v.* Clinton, 67 Mo. 380, 29 Am. Rep. 506; People *v.* Hertz, 35 Misc. (N. Y.) 177, 71 N. Y. Suppl. 489, 15 N. Y. Cr. 477; People *v.* Badgley, 16 Wend. (N. Y.) 53. In State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756, it is said to be unnecessary to allege the loss, although it would be better to do so.

68. Bench *v.* State, 63 Ark. 488, 39 S. W. 360.

69. *California.*— People *v.* Ellenwood, 119 Cal. 166, 51 Pac. 553; People *v.* Eppinger, 105 Cal. 36, 38 Pac. 538.

Indiana.— State *v.* Bracken, 152 Ind. 565, 53 N. E. 838; State *v.* Dufour, 63 Ind. 567; State *v.* Cook, 52 Ind. 574.

Missouri.— State *v.* Leonard, 171 Mo. 622, 71 S. W. 1017; State *v.* Chinn, 142 Mo. 507, 44 S. W. 245.

Texas.— Munoz *v.* State, 40 Tex. Cr. 457, 50 S. W. 949.

England.— Gillchrist's Case, 2 East P. C. 982, 2 Leach C. C. 657.

Allegations held sufficient.— A description of a lost note, that it was signed by "one Henry Wintrode or Henry R. Wintrode," is not equivocal. Hess *v.* State, 73 Ind. 537. An averment that an acceptance was "indorsed" on the face of an instrument is sufficiently intelligible. Com. *v.* Butterick, 100 Mass. 12. An allegation that defendant made a false instrument "purporting to be the act of another, to wit, the act of Clay Rollins, a fictitious person," does not charge that the instrument purported to be the act of a fictitious person, but merely that Clay Rollins was a fictitious person. Hocker *v.* State, 34 Tex. Cr. 359, 30 S. W. 783.

indictment bad,[70] although it was not necessary to set out the instrument.[71] An error in names,[72] such as incorrect spelling,[73] or the use of initials,[74] unless the names are *idem sonans*,[75] is fatal, although the omission of the middle initial is not.[76] So if the purport clause alleges the instrument to be the act of one person, and the tenor clause to be the act of more, it is fatal.[77] Likewise if the purport clause sets forth that the instrument was the act of a corporation, while the tenor clause sets out an instrument signed by the officers of the corporation.[78] A statement that a signature was made by defendant as agent[79] or partner[80] is not a variance, although the copy does not so indicate; nor is there any ambiguity if an inartificial instrument is set out according to its legal effect.[81]

(G) *Variances* — (1) MATERIAL VARIANCES. A variance between an instrument offered in evidence and a copy thereof set out in the indictment is fatal,[82] although a copy was not required to be set out in the indictment.[83] If words appear in the copy which are not in the instrument,[84] or if names in an instrument,[85] or words in the attestation clause of a deed,[86] or payments indorsed on

70. *Kentucky.*— Sutton *v.* Com., 30 S. W. 665, 17 Ky. L. Rep. 175.

Massachusetts.— Com. *v.* Ray, 3 Gray 441.

Tennessee.—State *v.* Shawley, 5 Hayw. 256.

Texas.— Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523; Booth *v.* State, 36 Tex. Cr. 600, 38 S. W. 196; Thulemeyer *v.* State, 38 Tex. Cr. 349, 43 S. W. 83; Fite *v.* State, 36 Tex. Cr. 4, 34 S. W. 922; Becker *v.* State, (App. 1892) 18 S. W. 550.

Vermont.— State *v.* Bean, 19 Vt. 530.

See 23 Cent. Dig. tit. "Forgery," § 71.

Allegations not inconsistent.— Where an indictment charged that the instrument purported to be drawn by Woord on Eslaps, and alleged that the name of the drawer was intended for Ward, and the name of the drawee for Islib, there is no inconsistency. Allen *v.* State, 44 Tex. Cr. 63, 68 S. W. 286, 100 Am. St. Rep. 839.

Variance as to dates.— Where the copy showed an instrument to be dated in 1884, but it was purported to be dated in 1885, the variance was not material. State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519.

71. English *v.* State, 30 Tex. App. 470, 18 S. W. 94; Westbrook *v.* State, 23 Tex. App. 401, 5 S. W. 248; Roberts *v.* State, 2 Tex. App. 4.

72. State *v.* Horan, 64 N. H. 548, 15 Atl. 20; Campbell *v.* State, 35 Tex. Cr. 182, 32 S. W. 899; Overly *v.* State, 34 Tex. Cr. 500, 31 S. W. 377.

73. State *v.* McCormick, 141 Ind. 685, 40 N. E. 1089.

74. Yount *v.* State, 64 Ind. 443; Shinn *v.* State, 57 Ind. 144; State *v.* Houseal, 2 Brev. (S. C.) 219.

What is not a variance.— Where the instrument as set out is signed "T. Tupper," an averment that it was made with the intention to defraud Tristam Tupper is not a variance. State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257.

75. Roberts *v.* State, 2 Tex. App. 4; State *v.* Bean, 19 Vt. 530.

76. People *v.* Ferris, 56 Cal. 442. And see Young *v.* State, (Tex. Cr. App. 1897) 40 S. W. 793, holding that where the tenor clause set out the signature as a firm-name with the letter "M" underneath, the omission of such letter from the purport clause was immaterial.

77. Crayton *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1046; Stephens *v.* State, (Tex. Cr. App. 1897) 38 S. W. 997, 36 Tex. Cr. 386, 37 S. W. 425; Gibbons *v.* State, 36 Tex. Cr. 469, 37 S. W. 861; Fite *v.* State, 36 Tex. Cr. 4, 34 S. W. 922; Campbell *v.* State, 35 Tex. Cr. 182, 32 S. W. 899.

If defendant signs his own name and the name of another, it is proper to charge that he forged a writing in the name of the other. Fogg *v.* State, 9 Yerg (Tenn.) 392.

78. Millsaps *v.* State, 38 Tex. Cr. 570, 43 S. W. 1015.

By virtue of statutory provisions in some jurisdictions, repugnancy in the allegations of a purport clause or a variance between such allegations and the tenor of the instrument as set out will not vitiate the indictment. Read *v.* State, 63 Ark. 618, 40 S. W. 85; Myers *v.* State, 101 Ind. 379; State *v.* Chamberlain, 89 Mo. 129, 1 S. W. 145; State *v.* Pullens, 81 Mo. 387; State *v.* Bibb, 68 Mo. 286.

79. State *v.* Gustin, 5 N. J. L. 744.

80. Davis *v.* State, (Tex. Cr. App. 1902) 69 S. W. 73.

81. Rountree *v.* State, (Tex. Cr. App. 1900) 58 S. W. 106; State *v.* Bean, 19 Vt. 530.

82. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; *Ex p.* Rogers, 10 Tex. App. 655, 38 Am. Rep. 654; Edgerton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 90; U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464.

An innuendo inserted in parenthesis in the copy of the instrument does not constitute a variance. Alexander *v.* State, 28 Tex. App. 186, 12 S. W. 595.

83. State *v.* Fleshman, 40 W. Va. 726, 22 S. E. 309.

84. State *v.* Fleshman, 40 W. Va. 726, 22 S. E. 309.

85. Com. *v.* Harrison, 30 S. W. 1009, 17 Ky. L. Rep. 343; Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760.

86. *Ex p.* Rogers, 10 Tex. App. 655, 38 Am. Rep. 654.

a note,[87] or notice of protest of a note,[88] or a clause showing that the instrument bore interest,[89] or a number on a check,[90] or a figure essential to an understanding of the instrument,[91] or a date stamp on the back of a railroad ticket,[92] or words material in the consideration of the apparent legality or validity of the instrument[93] are omitted, there is a material variance. So there is a material variance where there is an incorrect statement of the date of an instrument,[94] of the amount,[95] of the number of makers,[96] of the names,[97] or if the middle initial is omitted[98] or is incorrectly given.[99] So an error in the christian name is fatal.[1] If an instrument is alleged to be a joint obligation, when it is not,[2] or *vice versa*,[3] it is material. And the same is the case if an indictment alleges a signature to be in an official capacity when it is otherwise.[4] So an indictment which alleges forgery of a promissory note without a seal is not supported by evidence that defendant had committed forgery of a note under seal.[5] A demurrer on account of a variance cannot be considered unless oyer of the instrument is craved.[6]

(2) IMMATERIAL VARIANCES. An immaterial variance between the indictment and the paper alleged to be forged will not prevent the latter from being received in evidence.[7] Thus, it is held that mere clerical errors, such as the misspelling of

Seal.— The letters "L. S." in brackets following the signature in a copy of the forged instrument do not import that the instrument contained a seal, nor is it equivalent to an averment to that effect. Paige *v.* People, 6 Park. Cr. (N. Y.) 683.

87. Haslip *v.* State, 10 Nebr. 590, 7 N. W. 331.

88. Sharley *v.* State, 54 Ind. 168.

89. State *v.* Fay, 65 Mo. 490; Haslip *v.* State, 10 Nebr. 590, 7 N. W. 331.

90. Haupt *v.* State, 108 Ga. 53, 34 S. E. 313, 75 Am. St. Rep. 19.

91. State *v.* Street, 1 N. C. 98, 1 Am. Dec. 589.

92. Robinson *v.* State, 35 Tex. Cr. 54, 43 S. W. 526, 60 Am. St. Rep. 20.

93. Sutton *v.* State, 58 Nebr. 567, 79 N. W. 154.

94. Rooker *v.* State, 65 Ind. 86; Com. *v.* Harrison, 30 S. W. 1009, 17 Ky. L. Rep. 343.

Instrument containing two dates.— Where a bond is alleged to bear a certain date, and it is so dated, it seems that this is sufficient, although it bears another date at the close of the condition. Com. *v.* Hearsey, 1 Mass. 143.

95. State *v.* Handy, 20 Me. 81; State *v.* Smith, 78 N. C. 462; Shirley *v.* State, 1 Oreg. 269.

Illustration.— An allegation that defendant changed "4 1/2" to "5 1/2," is a material variance from a change of "4" to "5." State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

Where an instrument called for a certain named amount with interest, it can be described as calling for the amount of the principal without adding the amount of the interest. Reg. *v.* Atkinson, C. & M. 525, 2 Moody C. C. 278, 41 E. C. L. 287.

96. Com. *v.* Harrison, 30 S. W. 1009, 17 Ky. L. Rep. 343.

97. *Alabama.*— Leath *v.* State, 132 Ala. 26, 31 So. 108; Agee *v.* State, 113 Ala. 52, 21 So. 207.

Arkansas.— McClellan *v.* State, 32 Ark. 609.

Indiana.— Abbott *v.* State, 59 Ind. 70; Porter *v.* State, 15 Ind. 433; Zellers *v.* State, 7 Ind. 659.

Kansas.— State *v.* Woodrow, 56 Kan. 217, 42 Pac. 714.

North Carolina.— State *v.* Weaver, 35 N. C. 491.

Ohio.— Turpin *v.* State, 19 Ohio St. 540.

Tennessee.— Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 886, 4 Am. St. Rep. 760.

Texas.— Webb *v.* State, 39 Tex. Cr. 534, 47 S. W. 356; Potter *v.* State, 9 Tex. App. 55; Murphy *v.* State, 6 Tex. App. 554.

See 23 Cent. Dig. tit. "Forgery," § 95.

Corporate names.— The rule is the same as to errors in corporate names. Jackson *v.* State, 72 Ga. 28.

98. Gotobed's Case, 6 City Hall Rec. (N. Y.) 25.

99. State *v.* Pease, 74 Ind. 263; State *v.* Woodrow, 56 Kan. 217, 42 Pac. 714; State *v.* Chamberlain, 75 Mo. 382; Hanks *v.* State, (Tex. Cr. App. 1899) 54 S. W. 587. *Contra*, People *v.* Smith, 103 Cal. 563, 37 Pac. 516.

1. Brown *v.* People, 66 Ill. 344. If an indictment sets out the signature as having a christian name in full, it is a fatal variance if the signature is by initial only. State *v.* Fay, 65 Mo. 490; Murphy *v.* State, 6 Tex. App. 554. *Compare* State *v.* Thompson, 19 Iowa 299, holding that an indictment charging that an instrument purported to be signed by "F. B. Skiff" was sufficient, although the signature was "T. B. Skiff."

Effect of special statutory provisions.— Under Code (1886), § 4380, an indictment need not state the christian name of the person whose signature is forged. Lee *v.* State, 118 Ala. 672, 23 So. 669.

2. Glenn *v.* State, (Tex. Cr. App. 1901) 65 S. W. 368.

3. Booth *v.* State, 36 Tex. Cr. 600, 38 S. W. 196.

4. Roush *v.* State, 34 Nebr. 325, 51 N. W. 755; U. S. *v.* Keen, 26 Fed. Cas. No. 15,510, 1 McLean 429.

5. Hart *v.* State, 20 Ohio 49.

6. Butler *v.* State, 22 Ala. 43.

7. Butler *v.* State, 22 Ala. 43; People *v.*

words[8] or of proper names,[9] or the use of capital letters for small ones,[10] are immaterial variances. Likewise the abbreviation of words used in the instrument,[11] or writing out abbreviated words in full,[12] are not variances. So the addition of unimportant words, letters, or figures which do not affect the sense will not vitiate the indictment;[13] nor will the omission thereof.[14] Thus the omission of words or figures appearing in the margin of the instrument,[15] ornamental devices,[16] figures cut in,[17] or any other matter not a part of the instrument[18] will be treated as immaterial; nor is it necessary to set forth a revenue stamp.[19] Names of witnesses, where such are not necessary to the validity of the instrument, may be omitted;[20] so likewise as to indorsements,[21] memoranda,[22] or any other writing subsequently made,[23] or any matter not essential to the validity of the instrument and which is distinct from the instrument itself.[24] A word or

Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523; U. S. *v.* Hinman, 26 Fed. Cas. No. 15,370, Baldw. 292.

If a forged order which is not strictly a counterfeit is described as a forged and counterfeited order, it does not constitute a variance. Johnson *v.* Com., 90 Ky. 488, 14 S. W. 492, 12 Ky. L. Rep. 442.

8. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Myers *v.* State, 101 Ind. 379.

9. Parker *v.* People, 97 Ill. 32; State *v.* Morgan, 35 La. Ann. 293; Emmons *v.* State, (Tex. Cr. App. 1897) 43 S. W. 518.

Mere misplacement of the dot belonging to the letter "i" does not constitute a variance. Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215.

10. Emmons *v.* State, (Tex. Cr. App. 1897) 43 S. W. 518.

11. Sawyers *v.* State, 39 Tex. Cr. App. 481, 46 S. W. 814; Burress *v.* Com., 27 Gratt. (Va.) 934.

12. Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215; Burress *v.* Com., 27 Gratt. (Va.) 934.

13. People *v.* Phillips, 70 Cal. 61, 11 Pac. 493; People *v.* Cummings, 57 Cal. 88; Burlingim *v.* State, 61 Nebr. 276, 85 N. W. 76; May *v.* State, 14 Ohio 461, 45 Am. Dec. 548; Crayton *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1046.

14. Agee *v.* State, 116 Ala. 169, 23 So. 486; Com. *v.* Parmenter, 5 Pick. (Mass.) 279; State *v.* Donovan, 75 Vt. 308, 55 Atl. 611; State *v.* Poindexter, 23 W. Va. 805.

The omission of the letter "C" written under the signature is not a variance. Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

15. *Florida.*— Smith *v.* State, 29 Fla. 408, 10 So. 894.

Illinois.— Langdale *v.* People, 100 Ill. 263; Cross *v.* People, 47 Ill. 152, 95 Am. Dec. 474.

Maine.— State *v.* Flye, 26 Me. 312.

New York.— People *v.* Franklin, 3 Johns. Cas. 299.

North Carolina.— State *v.* Ridge, 125 N. C. 655, 34 S. E. 439.

Texas.— Dudley *v.* State, (Cr. App. 1900) 58 S. W. 111; Lovejoy *v.* State, 40 Tex. Cr. 89, 48 S. W. 520.

See 23 Cent. Dig. tit. "Forgery," § 94.

Instance.— Where the same words are printed both at the top and at the bottom of an order, a variance does not arise if those at the top are omitted. Smith *v.* State, 29 Fla. 408, 10 So. 894.

16. State *v.* Sheldon, 8 Rob. (La.) 540.

17. White *v.* Territory, 1 Wash. 279, 24 Pac. 447.

18. Adkins *v.* State, 41 Tex. Cr. 577, 56 S. W. 63; Burks *v.* State, 24 Tex. App. 326, 332, 6 S. W. 300, 303.

19. *Massachusetts.*— Com. *v.* McKean, 98 Mass. 9.

Missouri.— State *v.* Imboden, 157 Mo. 83, 57 S. W. 536.

New York.— Miller *v.* People, 52 N. Y. 304, 11 Am. Rep. 706.

Texas.— Beer *v.* State, 42 Tex. Cr. 505, 60 S. W. 962, 96 Am. St. Rep. 810.

Wisconsin.— State *v.* Hill, 30 Wis. 416.

20. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; State *v.* Ballard, 6 N. C. 186; Rountree *v.* State, (Tex. Cr. App. 1900) 58 S. W. 106; State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

21. *Massachusetts.*— Com. *v.* Adams, 7 Metc. 50.

Missouri.— State *v.* Yerger, 86 Mo. 33.

New York.— Miller *v.* People, 52 N. Y. 304, 11 Am. Rep. 706.

Texas.— Brady *v.* State, (Cr. App. 1903) 74 S. W. 771; Bader *v.* State, 44 Tex. Cr. 184, 69 S. W. 506; King *v.* State, (Cr. App. 1896) 38 S. W. 199; Labbaite *v.* State, 6 Tex. App. 257.

Virginia.— Perkins *v.* Com., 7 Gratt. 651, 56 Am. Dec. 123.

United States.— U. S. *v.* Peacock, 27 Fed. Cas. No. 16,019, 1 Cranch C. C. 215.

See 23 Cent. Dig. tit. "Forgery," § 90.

Where a note is made payable to the maker's order his indorsement must be set out. Com. *v.* Dallinger, 118 Mass. 439.

22. Robinson *v.* State, 66 Ind. 331; State *v.* Jackson, 90 Mo. 156, 2 S. W. 128.

23. Robinson *v.* State, 66 Ind. 331; Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215; Dunn's Case, 2 East P. C. 976.

24. Such as a certificate of acknowledgment (People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276; Lassiter *v.* State, 35 Tex. Cr. 540, 34 S. W. 751), a certificate of registration (Wilson *v.* People, 5 Park. Cr. (N. Y.) 178), or residence of drawee (Trask *v.* People, 151 Ill. 523, 38 N. E. 248).

letter, incorrectly given,[25] or the omission of a clause,[26] where the identity of the instrument is not affected, may be treated as immaterial. So there is no variance where the names in the indictments and those in the instruments offered in evidence are *idem sonans*,[27] nor does the addition of "Jr." after a name constitute a variance.[28] Where the forged instrument is difficult to decipher and the framer of the indictment has transcribed it according to his reading of the characters a doubtful variance in the name forged will not be fatal.[29] A variance as to a name in an indictment has been held not fatal if it is not the name averred to be forged;[30] nor where the jury are instructed to acquit if they find a variance and the proof showed that the name was fictitious in any event.[31] And where a check is charged to have been addressed to the cashier of a bank and the envelope in which it was inclosed is so addressed, there is no variance, although there is no direction inside the letter.[32] An instrument may be alleged to have been drawn upon or be the act of a corporation, although addressed to,[33] or signed by,[34] an officer thereof, and *vice versa*,[35] and there will be no variance. By statute a variance may be made material, which would not otherwise be so.[36]

(v) *Designation of Instrument.* In some states, by statute, it is sufficient to designate an instrument by name, without setting out its tenor;[37] and if a copy of the instrument is set out in the indictment, the omission of the designation,[38] or a misnomer,[39] constitutes no good ground for quashing the indictment. The same rules of construction prevail in the ascertainment of the legal import of the instrument as would prevail in a civil action founded thereon;[40] and indictments have been sustained where the instrument has been designated as a bill of

Name of drawee.— Where an indictment charges the indorsement of the name of the payee upon a check, it is unnecessary to give the name of the drawee. State *v.* Curtis, 39 Minn. 357, 40 N. W. 263.

25. Sutton *v.* Com., 97 Ky. 308, 30 S. W. 661, 17 Ky. L. Rep. 184; State *v.* Childers, 32 Oreg. 119, 49 Pac. 801; State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

Instruction.— Where an indictment for making a false entry in the state treasurer's books set forth one entry as having been made November 28, when it appeared upon the ledger as November 18, but this item was not the alleged false entry, a charge to the jury that if the prisoner was misled in preparing his defense they should acquit was sufficiently favorable to him. Phelps *v.* People, 6 Hun (N. Y.) 428 [*affirmed* in 72 N. Y. 365].

26. People *v.* Terrill, 132 Cal. 497, 64 Pac. 894; State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

27. *Alabama.*— Leath *v.* State, 132 Ala. 26, 31 So. 108.

Massachusetts.— Com. *v.* Woods, 10 Gray 477.

North Carolina.— State *v.* Collins, 115 N. C. 716, 20 S. E. 452; State *v.* Lane, 80 N. C. 407.

Vermont.— State *v.* Bean, 19 Vt. 530.

West Virginia.— State *v.* Duffield, 49 W. Va. 274, 38 S. E. 577.

See 23 Cent. Dig. tit. "Forgery," § 98.

28. Hanks *v.* State, (Tex. Cr. App. 1899) 54 S. W. 587; Lassiter *v.* State, 35 Tex. Cr. 540, 34 S. W. 751.

29. Greenwood *v.* Com., 11 S. W. 811, 11 Ky. L. Rep. 220; State *v.* Gryder, 44 La. Ann. 962, 11 So. 573, 32 Am. St. Rep. 358; Frazier *v.* State, (Tex. Cr. App. 1901) 64 S. W. 934; Emmons *v.* State, (Tex. Cr. App. 1897) 43 S. W. 518.

30. McGarr *v.* State, 75 Ga. 155.

31. Nichols *v.* State, 39 Tex. Cr. 80, 44 S. W. 1091.

32. People *v.* Gumaer, 9 Wend. (N. Y.) 272.

33. People *v.* Munroe, (Cal. 1893) 33 Pac. 776; U. S. *v.* Hinman, 26 Fed. Cas. No. 15,370, Baldw. 292.

34. Mee *v.* State, 23 Tex. App. 566, 5 S. W. 243.

35. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

36. People *v.* Terrill, 133 Cal. 120, 65 Pac. 303; State *v.* Ridge, 125 N. C. 655, 34 S. E. 439.

37. State *v.* Boasso, 38 La. Ann. 202; State *v.* Nelson, 28 La. Ann. 46; State *v.* Pons, 28 La. Ann. 43; Com. *v.* Beamish, 81 Pa. St. 389; Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 161. An indictment for the forgery of a note, "commonly called a promissory note for the payment of money," which sets out the instrument verbatim, is sufficiently certain. State *v.* Houseal, 2 Brev. (S. C.) 219.

38. Com. *v.* Castles, 9 Gray (Mass.) 123; Gray *v.* People, 21 Hun (N. Y.) 140; Com. *v.* Meads, 14 York Leg. Rec. (Pa.) 132; Reg. *v.* Carson, 14 U. C. C. P. 309.

39. People *v.* McGlade, 139 Cal. 66, 72 Pac. 600; People *v.* Ah Woo, 28 Cal. 205; Garmire *v.* State, 104 Ind. 444, 4 N. E. 54; Powers *v.* State, 87 Ind. 97; Harding *v.* State, 54 Ind. 359; Reg. *v.* Williams, 4 Cox C. C. 356, 2 Den. C. C. 61, 14 Jur. 1052, 20 L. J. M. C. 106, T. & M. 382.

40. Bland *v.* People, 4 Ill. 364.

exchange,[41] a warrant or order for money[42] or for goods,[43] a request for the delivery of goods,[44] a promissory note,[45] an indorsement,[46] a receipt or discharge for money,[47] a deed,[48] a lease,[49] or a will.[50] It is unnecessary to state that the instrument is in writing;[51] but if charged to be in writing the indictment is supported by proof of an instrument partly printed and partly written.[52] Nor is it necessary to allege that it contains a seal, when the designation so imports, as for instance where the instrument is described as a mortgage[53] or deed.[54] If a part only of an instrument is forged, the indictment may lay it to be a forgery

41. Com. *v.* Butterick, 100 Mass. 12; Reg. *v.* Kinnear, 2 M. & Rob. 117.

A check may be properly described as a bill of exchange. State *v.* Maas, 37 La. Ann. 292; State *v.* Crawford, 13 La. Ann. 300; People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201; Reg. *v.* Smith, 2 Moody C. C. 295.

What may not be designated as bill of exchange.— A writing requiring the addressee to pay the bearer on demand a sum of money cannot be designated as a bill of exchange. Reg. *v.* Curry, 2 Moody C. C. 218. Nor can a document in the form of a bill of exchange, but requiring the drawee to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee. Reg. *v.* Bartlett, 2 M. & Rob. 362.

42. *Alabama.*— McGuire *v.* State, 37 Ala. 161.

Massachusetts.— Com. *v.* Parsons, 138 Mass. 189.

Ohio.— Evans *v.* State, 8 Ohio St. 196, 70 Am. Dec. 98.

Vermont.— State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

England.— Reg. *v.* Kay, L. R. 1 C. C. 257, 11 Cox C. C. 529, 39 L. J. M. C. 118, 22 L. T. Rep. N. S. 557, 18 Wkly. Rep. 934; Reg. *v.* Vivian, 1 C. & K. 719, 1 Den. C. C. 35, 47 E. C. L. 719; Reg. *v.* Smith, 1 C. & K. 700, 1 Den. C. C. 79, 47 E. C. L. 700; Reg. *v.* Harris, 1 C. & K. 179, 2 Moody C. C. 267, 47 E. C. L. 179; Reg. *v.* Gilchrist, C. & M. 224, 2 Moody C. C. 233, 41 E. C. L. 126; Reg. *v.* Autey, 7 Cox C. C. 329, Dears. & B. 294, 3 Jur. N. S. 697, 26 L. J. M. C. 190, 5 Wkly. Rep. 737; Reg. *v.* Dawson, 5 Cox C. C. 220, 2 Den. C. C. 75, 15 Jur. 159, 20 L. J. M. C. 102, T. & M. 428; Rex *v.* Crowther, 5 C. & P. 316, 24 E. C. L. 583.

Canada.—Reg. *v.* Steel, 13 U. C. C. P. 619.

See 23 Cent. Dig. tit. "Forgery," § 70.

A check may be described as an order for money. State *v.* Maas, 37 La. Ann. 292; State *v.* Crawford, 13 La. Ann. 300; People *v.* Kemp, 76 Mich. 410, 43 N. W. 439; State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

A warrant which is not an order cannot be described as a "warrant and order." Reg. *v.* Williams, 2 C. & K. 51, 61 E. C. L. 51; Reg. *v.* Dixon, 3 Cox C. C. 289.

Instruments which cannot be described as orders.— If the person whose name is forged had no authority to order, the instrument is a request, and cannot be described as an order. Reg. *v.* Roberts, C. & M. 652, 2 Moody C. C. 258, 41 E. C. L. 353; Reg. *v.* Newton, 2 Moody C. C. 59; Rex *v.* Baker, 1 Moody C. C. 231. A writing directing the addressee to pay the bearer on demand a sum of money is not an order (Reg. *v.* Curry, 2 Moody C. C. 218); nor is one which is conditional (Reg. *v.* Howie, 11 Cox C. C. 320).

An instrument which is an order for money or for the delivery of goods, at the option of the holder, must be so described. State *v.* Stephen, 45 La. Ann. 702, 12 So. 883.

43. Reg. *v.* Illidge, 2 C. & K. 871, 3 Cox C. C. 552, 1 Den. C. C. 404, 13 Jur. 543, 18 L. J. M. C. 179, T. & M. 127, 61 E. C. L. 871; Reg. *v.* Smith, 2 Cox C. C. 358.

44. Reg. *v.* Walters, C. & M. 588, 41 E. C. L. 320; Reg. *v.* Robson, 9 C. & P. 423, 2 Moody C. C. 182, 38 E. C. L. 251; Reg. *v.* James, 8 C. & P. 292, 34 E. C. L. 740.

45. People *v.* Bennett, 122 Mich. 281, 81 N. W. 117.

A bank-bill may be described as a promissory note (Com. *v.* Thomas, 10 Gray (Mass.) 483), unless another section of the statutes expressly covers bank-bills (Com. *v.* Dole, 2 Allen (Mass.) 165; State *v.* Hayden, 15 N. H. 355).

A seaman's advance note cannot be described as a promissory note. Reg. *v.* Howie, 11 Cox C. C. 320.

46. The writing of another's name upon the back of a note is properly described as an indorsement, although the simulated liability would not be that of a technical indorser (Powell *v.* Com., 11 Gratt. (Va.) 822), and although the writing became a promissory note only by means of such indorsement (Com. *v.* Dallinger, 118 Mass. 439); but an acceptance cannot be described as an indorsement (Morel *v.* State, 74 Ga. 17).

47. Com. *v.* Brown, 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736, 1 L. R. A. 620; Reg. *v.* Pringle, 9 C. & P. 408, 2 Moody C. C. 127, 38 E. C. L. 243; Rex *v.* Martin, 7 C. & P. 549, 1 Moody C. C. 483, 32 E. C. L. 752; Rex *v.* Hope, 1 Moody C. C. 414.

48. State *v.* Fisher, 65 Mo. 437.

49. Folden *v.* State, 13 Nebr. 328, 14 N. W. 412.

50. Rex *v.* Birch, 2 East P. C. 980, 1 Leach C. C. 92, 2 W. Bl. 790.

51. Hawkins *v.* State, 28 Fla. 363, 9 So. 652; State *v.* Bibb, 68 Mo. 286; People *v.* Rynders, 12 Wend. (N. Y.) 425.

52. State *v.* Ridge, 125 N. C. 655, 34 S. E. 439; State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257.

53. People *v.* Dewey, 35 Hun (N. Y.) 308.

54. Page *v.* People, 3 Abb. Dec. (N. Y.) 439, 6 Park. Cr. 683.

of the whole;[55] thus, if a certificate be forged, the forgery of the document to which it is appended may be alleged;[56] and within the rule stated a jurat is part of an affidavit[57] and the certification of a check is a part of the check;[58] but an indorsement[59] or acceptance[60] is not a part of the instrument upon which it is placed. An instrument may be given two designations if it properly belongs to each class;[61] and if joint and several it may be described as being the act of one.[62] Where the false writing has been correctly designated, a subsequent erroneous description is immaterial.[63] An incorrect[64] designation, or one too indefinite,[65] renders the indictment bad; but where an indictment, based upon one section of a statute, is insufficient because of an erroneous designation, a conviction may be had under another section which because of its comprehensive language includes the instrument as designated.[66]

(VI) *AVERMENTS OF EXTRINSIC FACTS*—(A) *In General.* It is not necessary to set out matters which are extrinsic to the instrument, although referred to therein;[67] nor to allege the value of the property sought to be obtained by the forgery.[68] An indictment for forging an undated order addressed to no one need not state facts explanatory of those defects.[69]

(B) *Lack of Authority to Make or Alter.* An indictment which fails to allege that the making or alteration of the instrument was without authority is insufficient;[70] but it need not aver that the act was done without the knowledge of the person apparently made liable.[71]

(C) *Showing How Instrument Might Defraud.* Where the instrument alleged to be forged appears on its face to be valid and of legal efficacy, the indictment need not allege extrinsic facts to show how it might be used to defraud.[72] If it does not appear on the face of the instrument forged or uttered

55. Dawson's Case, 2 East P. C. 978, 1 Str. 19.

56. People *v.* Marion, 29 Mich. 31; State *v.* Haws, 98 Mo. 188, 11 S. W. 574, 12 S. W. 126.

57. U. S. *v.* Osgood, 27 Fed. Cas. No. 15,971*a*.

58. People *v.* Clements, 26 N. Y. 193 [*reversing* 5 Park. Cr. 337].

59. People *v.* Cole, 130 Cal. 13, 62 Pac. 274; Cosner *v.* State, 24 Ohio Cir. Ct. 734; De Lemos *v.* U. S., 91 Fed. 497, 33 C. C. A. 655; Reg. *v.* Wilton, 1 F. & F. 391. *Contra*, Strang *v.* State, 32 Tex. Cr. 219, 22 S. W. 680.

Forging the payee's name to a receipt on a money order is not a forgery of the order, and evidence of the former act does not sustain an indictment for the latter. Pierce *v.* State, 38 Tex. Cr. 604, 44 S. W. 292.

60. Rex *v.* Horwell, 6 C. & P. 148, 1 Moody C. C. 405, 25 E. C. L. 366.

61. State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257; State *v.* Holley, 1 Brev. (S. C.) 35; Thomas *v.* State, 18 Tex. App. 213; Dunnett's Case, 2 East P. C. 985, 2 Leach C. C. 581.

62. State *v.* Flora, 109 Mo. 293, 19 S. W. 95.

63. State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454.

64. State *v.* Leo, 108 La. 496, 32 So. 447; De Lemos *v.* U. S., 91 Fed. 497, 33 C. C. A. 655; Reg. *v.* Thorn, C. & M. 206, 2 Moody C. C. 210, 41 E. C. L. 116.

65. State *v.* Dalton, 6 N. C, 379; Rex *v.* Wilcox, R. & R. 37.

66. Johnson *v.* State, 62 Ga. 299; People *v.* Clements, 26 N. Y. 193 [*reversing* 5 Park. Cr. 337].

67. Testick's Case, 2 East P. C. 925.

68. Stewart *v.* State, 113 Ind. 505, 16 N. E. 186; State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

69. Dixon *v.* State, (Tex. Cr. App. 1889) 26 S. W. 500.

70. Com. *v.* Bowman, 96 Ky. 40, 27 S. W. 816, 16 Ky. L. Rep. 222, 3 L. R. A. 220; Snyder *v.* State, 8 Ohio Cir. Ct. 463, 4 Ohio Cir. Dec. 279.

71. Eldridge *v.* Com., 54 S. W. 7, 21 Ky. L. Rep. 1088.

72. *Alabama.*— Lee *v.* State, 118 Ala. 672, 23 So. 669.

California.— People *v.* Todd, 77 Cal. 464, 19 Pac. 883; *Ex p.* Finley, 66 Cal. 263, 5 Pac. 222.

Iowa.— State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454.

Massachusetts.— Com. *v.* White, 145 Mass. 392, 14 N. E. 611; Com. *v.* Costello, 120 Mass. 358.

Missouri.— State *v.* Fisher, 65 Mo. 437.

Nebraska.— Morearty *v.* State, 46 Nebr. 652, 65 N. W. 784.

New Jersey.— Mead *v.* State, 53 N. J. L. 601, 23 Atl. 264.

New York.— Paige *v.* People, 3 Abb. Dec. 439, 6 Park. Cr. 683; People *v.* Stearns, 21 Wend. 409 [*affirmed* in 23 Wend. 634].

North Carolina.— State *v.* Covington, 94 N. C. 913, 55 Am. Rep. 650; State *v.* Dourdon, 13 N. C. 443.

Pennsylvania.— Com. *v.* Bachop, 2 Pa. Super. Ct. 294; Com. *v.* Phipps, 16 Phila. 457.

that someone might be defrauded, extrinsic facts must be alleged to show its capacity to defraud.[73] In the case of deeds there must be an allegation that the property purported to be conveyed is in existence,[74] and that the purported grantor had title thereto;[75] and, if a mortgage, that there was some indebtedness secured thereby.[76] If the instrument be a bond which requires approval to give it validity, such approval must be alleged;[77] so if an instrument requires that it be accompanied by other writings the indictment must allege that it was so accompanied.[78] If the instrument is a waiver of a landlord's lien, an allegation of the tenancy and the existence of a lien must be alleged.[79] In the case of an order for the delivery of goods a power to dispose of the goods by the drawer and an obligation on the part of the drawee to obey must be alleged.[80] An indictment for a forged assignment of a note must show the existence of the note;[81] and in the case of the guaranty of a debt, the existence of the debt must be averred.[82] An indictment for forging instruments purporting to relate to a pending cause must show that such a case is pending;[83] and in the case of a will there must be an allegation that the purported testator was dead at the time of the forgery, and that he left an estate to be so disposed of.[84] An indictment for forgery of a request to let another have goods should allege that the addressee

Texas.— Horton *v.* State, 32 Tex. 79; Gray *v.* State, 44 Tex. Cr. 477, 72 S. W. 858; Morris *v.* State, 17 Tex. App. 660.

Vermont.— State *v.* Shelters, 51 Vt. 102, 31 Am. Rep. 679.

West Virginia.— State *v.* Tingler, 32 W. Va. 546, 9 S. E. 935, 25 Am. St. Rep. 830.

See 23 Cent. Dig. tit. "Forgery," § 78.

73. *Alabama.*— Burden *v.* State, 120 Ala. 388, 25 So. 190, 74 Am. St. Rep. 37; Fomby *v.* State, 87 Ala. 36, 6 So. 271; Dixon *v.* State, 81 Ala. 61, 1 So. 69; Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639.

Indiana.— Shannon *v.* State, 109 Ind. 407, 10 N. E. 87; State *v.* Cook, 52 Ind. 574; Reed *v.* State, 28 Ind. 396.

Louisiana.— State *v.* Leo, 108 La. 496, 32 So. 447; State *v.* Murphy, 46 La. Ann. 415, 14 So. 920.

Massachusetts.— Com. *v.* Dunleay, 157 Mass. 386, 32 N. E. 356; Com. *v.* Hinds, 101 Mass. 209; Com. *v.* Chandler, Thach. Cr. Cas. 187.

Minnesota.— State *v.* Goodrich, 67 Minn. 176, 69 N. W. 815; State *v.* Riebe, 27 Minn. 315, 7 N. W. 262; State *v.* Wheeler, 19 Minn. 98.

New York.— People *v.* Drayton, 168 N. Y. 10, 60 N. E. 1048 [*reversing* 41 N. Y. App. Div. 40, 58 N. Y. Suppl. 439]; People *v.* Savage, 5 N. Y. Cr. 541.

North Dakota.— State *v.* Ryan, 9 N. D. 419, 83 N. W. 865.

Ohio.— Henry *v.* State, 35 Ohio St. 128; Clarke *v.* State, 8 Ohio St. 630; Moore *v.* State, 13 Ohio Cir. Ct. 10, 7 Ohio Cir. Dec. 70.

Oregon.— State *v.* Gee, 28 Oreg. 100, 42 Pac. 7.

Pennsylvania.— Com. *v.* Mulholland, 12 Phila. 608.

Tennessee.— State *v.* Martin, 9 Humphr. 55.

Texas.— Wilson *v.* State, (Cr. App. 1903) 75 S. W. 504; Black *v.* State, 42 Tex. Cr. 585, 61 S. W. 478; Crawford *v.* State, 40 Tex. Cr. 344, 50 S. W. 378; Cagle *v.* State, 39 Tex. Cr. 109, 44 S. W. 1097; King *v.* State, 27 Tex. App. 567, 11 S. W. 525, 11 Am. St. Rep. 203.

See 23 Cent. Dig. tit. "Forgery," § 78.

Sufficiency of indictment alleging extrinsic facts.— Although the instrument is of such a character as not to import a legal liability on its face, an indictment alleging facts and circumstances which, when taken in connection with the instrument itself, invest it with apparent legal efficacy, and enable the court judicially to see that the instrument has a capacity to defraud, is good. Glenn *v.* State, 116 Ala. 483, 23 So. 1; Dixon *v.* State, 81 Ala. 61, 1 So. 69; Rembert *v.* State, 53 Ala. 467, 25 Am. Rep. 639; State *v.* Wills, 70 Minn. 403, 73 N. W. 177.

74. People *v.* Terrill, 127 Cal. 99, 59 Pac. 836; State *v.* Fisher, 65 Mo. 437; People *v.* Wright, 9 Wend. (N. Y.) 193.

75. People *v.* Wright, 9 Wend. (N. Y.) 193; Johnson *v.* State, 40 Tex. Cr. 605, 51 S. W. 382, 76 Am. St. Rep. 742. *Contra*, People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; People *v.* Van Alstine, 57 Mich. 69, 23 N. W. 594.

76. People *v.* Terrill, 127 Cal. 99, 59 Pac. 836. But if the indictment is based on a statute it may not be necessary to allege this. State *v.* Moore, 86 Minn. 418, 90 N. W. 786.

77. Crayton *v.* State, (Tex. Cr. App. 1903) 73 S. W. 1046.

78. Caffey *v.* State, 36 Tex. Cr. 198, 36 S. W. 82, 61 Am. St. Rep. 841.

79. Williams *v.* State, 90 Ala. 649, 8 So. 825; France *v.* State, 83 Miss. 281, 35 So. 313.

80. State *v.* Leak, 80 N. C. 403.

81. Simms *v.* State, 32 Tex. Cr. 277, 22 S. W. 876.

82. State *v.* Humphreys, 10 Humphr. (Tenn.) 442.

83. State *v.* Chinn, 142 Mo. 507, 44 S. W. 245; State *v.* Maupin, 57 Mo. 205, 210.

84. Huckaby *v.* State, (Tex. Cr. App. 1904) 78 S. W. 942. But if the indictment is

had the goods for sale.[85] If the instrument is conditional a compliance with the conditions must be shown.[86] However, it is unnecessary to allege that a bank upon which a check is drawn has an existence;[87] or the existence of a general usage among bankers, affecting the legal operation thereof;[88] or that a purported maker is a fictitious person.[89] Nor is it necessary to allege that a purported testator was of full age;[90] that a claimant possessed a valid claim;[91] that the parties to a divorce were married,[92] or how a marriage certificate might be used to defraud.[93] Likewise there need be no allegation that there is a crop growing to be affected by a landlord's lien,[94] or a debt to be discharged by a receipt,[95] or that a draft upon which is a forged indorsement is genuine;[96] and in an indictment for forging writings used in entering goods at the custom-house, it is unnecessary to aver the existence of the goods.[97] However, the general rule as to the necessity of averring extrinsic facts may be changed by statute.[98]

(D) *Authority of Apparent Parties to Instrument.* Where an instrument purports to have been executed in an official capacity, there must be an allegation that the person whose name is signed had authority to so act;[99] and where agency appears, the authority of the agent must be alleged.[1] However, if the signer would be liable individually, the fact that the signature is in an official capacity is immaterial;[2] nor need there be an allegation of facts to show the relation of the signer of a certificate of deposit with the bank in which the certificate recites the money has been deposited;[3] nor that the teller of a bank had authority to accept a check thereon.[4] The general rule may be changed by statutory provisions.[5] Where an indictment charges the uttering of an instrument which as set out was signed in an official capacity, and the name signed was the same as defendant's, and it is not charged that the person whose name

framed according to a statute such allegation may not be necessary. People *v.* Todd, 77 Cal. 464, 19 Pac. 883.

85. Crawford *v.* State, 40 Tex. Cr. 344, 50 S. W. 378.

86. Manaway *v.* State, 44 Ala. 375; Carder *v.* State, 35 Tex. Cr. 105, 31 S. W. 678. But this may be unnecessary if the indictment follows the wording of a statute. Billups *v.* State, 88 Ga. 27, 13 S. E. 830.

87. People *v.* Dole, 122 Cal. 486, 55 Pac. 581; State *v.* Pierce, 8 Iowa 231.

88. State *v.* Pierce, 8 Iowa 231; State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

89. Chapman *v.* State, (Tex. Cr. App. 1896) 34 S. W. 621; Johnson *v.* State, 35 Tex. Cr. 271, 33 S. W. 231.

90. Corbett *v.* State, 5 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 79.

91. People *v.* McGlade, 139 Cal. 66, 72 Pac. 600.

92. *Ex p.* Finley, 66 Cal. 262, 5 Pac. 222.

93. State *v.* Boasso, 38 La. Ann. 202.

94. Cagle *v.* State, 39 Tex. Cr. 109, 44 S. W. 1097.

95. Cox *v.* State, 66 Miss. 14, 5 So. 618.

96. State *v.* Pierce, 8 Iowa 231.

97. U. S. *v.* Lawrence, 26 Fed. Cas. No. 15,572, 13 Blatchf. 211.

98. Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Travis *v.* State, 83 Ga. 372, 9 S. E. 1063. And see cases cited *supra*, notes 76, 84, 86.

99. *Indiana.*— State *v.* Henning, 158 Ind. 196, 63 N. E. 207.

Minnesota.— State *v.* Wheeler, 19 Minn. 98.

New York.— Vincent *v.* People, 15 Abb. Pr. 234, 5 Park. Cr. 88.

North Carolina.—State *v.* Weaver, 94 N. C. 836, 55 Am. Rep. 647.

Texas.— Munoz *v.* State, 40 Tex. Cr. 457, 50 S. W. 949.

See 23 Cent. Dig. tit. "Forgery," § 80.

Contra.— People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50 (holding that where the forgery consisted in raising a certified check, it is not necessary to show that the person whose name was signed to the certification had any authority); People *v.* Bibby, 91 Cal. 470, 27 Pac. 781; Smith *v.* State, 29 Fla. 408, 10 So. 894; Neall *v.* U. S. 118 Fed. 699, 56 C. C. A. 31.

Where defendant is not indicted as clerk of court or for forging the name of the clerk, but is charged with forging a witness' pay certificate which he signed as clerk of court, the indictment is not invalid because it does not allege that he was clerk. State *v.* Bullock, 54 S. C. 300, 32 S. E. 424.

1. State *v.* Henning, 158 Ind. 196, 63 N. E. 207; State *v.* Thorn, 66 N. C. 644; Rex *v.* Barton, 1 Moody C. C. 141; Rex *v.* Wilcox, R. & R. 37. *Contra*, State *v.* Fay, 80 Minn. 251, 83 N. W. 158, holding that where the signature purports to be that of the principal by an agent, the authority of the agent need not be averred.

2. Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523.

3. State *v.* Patch, 21 Mont. 534, 55 Pac. 108.

4. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

5. State *v.* Maupin, 57 Mo. 205, 210.

purports to be signed is a different person from defendant, or that defendant did not hold the office as represented or have authority to make the instrument, no offense is charged.[6]

(E) *Explanation of Meaning of Instrument.* If the words of an instrument do not import that it would possess any validity if genuine, apt explanatory averments must be made as to their meaning;[7] and ambiguous words and those so badly misspelled as to be doubtful must be explained,[8] but if the meaning of a word is plain, notwithstanding the fact that it is misspelled, explanatory averments are unnecessary.[9] So the meaning of initials must be averred,[10] and the value of sums of money set forth in foreign denominations.[11] If parties referred to are not clearly indicated, the indictment should state who they are.[12] But expressions,[13] or facts,[14] the meaning of which are clearly apparent from the context, require no explanation. Where a dollar mark does not appear before numerals it may be implied,[15] and the meaning of words well known in law need not be explained.[16] An indictment containing the necessary explanatory averments is sufficient.[17]

(F) *Description of Person Defrauded.* Where a name might be that of a partnership or of a corporation, the indictment should allege which it is;[18] but it is not necessary to set out the names of the persons who compose it;[19] nor is it necessary to aver that a bank is incorporated;[20] nor that a public corporation is

6. Snyder *v.* State, 8 Ohio Cir. Ct. 463, 4 Ohio Cir. Dec. 279.

7. *Alabama.*— Nelson *v.* State, 82 Ala. 44, 2 So. 463.

Michigan.— People *v.* Parker, 114 Mich. 442, 72 N. W. 250.

Ohio.— Carberry *v.* State, 11 Ohio St. 410.

Texas.— Wilson *v.* State, (Cr. App. 1903) 75 S. W. 504; Head *v.* State, (Cr. App. 1903) 72 S. W. 394; Lynch *v.* State, 41 Tex. Cr. 209, 53 S. W. 693; Polk *v.* State, 40 Tex. Cr. 668, 51 S. W. 909; Womble *v.* State, 39 Tex. Cr. 24, 44 S. W. 827.

England.— Rex *v.* Cullen, 5 C. & P. 116, 1 Moody C. C. 300, 24 E. C. L. 481.

See 23 Cent. Dig. tit. "Forgery," § 79.

8. Polk *v.* State, 40 Tex. Cr. 668, 51 S. W. 909; Crawford *v.* State, 40 Tex. Cr. 344, 50 S. W. 378; Colter *v.* State, 40 Tex. Cr. 165, 49 S. W. 379.

9. Rountree *v.* State, (Tex. Cr. App. 1900) 58 S. W. 106 (so held with regard to the expression, "Payment for the ammonet due"); Hendricks *v.* State, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. St. Rep. 463.

10. Bynam *v.* State, 17 Ohio St. 142; Rex *v.* Barton, 1 Moody C. C. 141.

11. Sanabria *v.* People, 24 Hun (N. Y.) 270.

Where the forgery charged is the engraving of a plate, the meaning of words indicating amounts in foreign money need not be defined. People *v.* D'Argencour, 95 N. Y. 624 [*affirming* 32 Hun 178, and *distinguishing* Sanabria *v.* People, 24 Hun (N. Y.) 270].

12. Polk *v.* State, 40 Tex. Cr. 668, 51 S. W. 909; Colter *v.* State, 40 Tex. Cr. 165, 49 S. W. 379.

13. Rountree *v.* State, (Tex. Cr. App. 1900) 58 S. W. 106; Rex *v.* Martin, 7 C. & P. 549, 1 Moody C. C. 483, 32 E. C. L. 752.

14. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

15. State *v.* Schwartz, 64 Wis. 432, 25 N. W. 417.

16. Com. *v.* Phipps, 16 Phila. (Pa.) 457.

17. Rollins *v.* State, 22 Tex. App. 548, 3 S. W. 759, 58 Am. Rep. 659.

18. Moore *v.* State, 36 Tex. Cr. 574, 38 S. W. 209; Carder *v.* State, 35 Tex. Cr. 105, 31 S. W. 678.

Where the indictment is based upon a statute, an averment of this character is unnecessary. Denson *v.* State, 122 Ala. 100, 26 So. 119; Jackson *v.* Com., 34 S. W. 14, 17 Ky. L. Rep. 1197; Noakes *v.* People, 25 N. Y. 380 [*affirming* 5 Park. Cr. 291]; Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

19. State *v.* Fritz, 27 La. Ann. 360; People *v.* Curling, 1 Johns. (N. Y.) 320; Brod *v.* State, 42 Tex. Cr. 71, 57 S. W. 671; Howard *v.* State, 37 Tex. Cr. 494, 36 S. W. 475, 66 Am. St. Rep. 812; State *v.* Phelps, 11 Vt. 116, 34 Am. Dec. 672.

Limitations of rule.— Where the indictment proposes to set out by a purport clause the names of the parties whose names were forged it should set out their full name and, if a partnership, the names of the copartners should be stated as such. Labbaite *v.* State, 6 Tex. App. 483.

Where the instrument is directed to one partner, and it is alleged that it is drawn against a firm of which he is a member, the names of the other members must be given. Colter *v.* State, 40 Tex. Cr. 379, 49 S. W. 379.

20. *Mississippi.*— Gates *v.* State, 71 Miss. 874, 16 So. 342.

Nebraska.— Roush *v.* State, 34 Nebr. 325, 51 N. W. 755.

Nevada.— State *v.* McKiernan, 17 Nev. 224, 30 Pac. 831.

New York.— People *v.* Stearns, 21 Wend. 409 [*affirmed* in 23 Wend. 634].

Texas.— Lucas *v.* State, 39 Tex. Cr. 48, 44 S. W. 825.

See 23 Cent. Dig. tit. "Forgery," § 81.

such.[21] An indictment is not defective for failing to negative so remote a possibility as that a name, apparently that of an individual, is not a copartnership nor a corporation.[22]

(VII) *VENUE.* Where a statute provides that forgery may be prosecuted in any county where the instrument was used, the indictment may charge that it was made in the county where it was used and the case is tried.[23]

2. IN PROSECUTIONS FOR UTTERING FORGED INSTRUMENTS.[24] Indictments setting forth the essential elements of the offense are sufficient.[25] If based upon a statute, it is in general sufficient if it follows the wording of the statute;[26] but a variance from the language of the statute which does not change its meaning is not material.[27] The indictment must state that the instrument was forged.[28] It is not necessary to state when, where, how, or by whom it was forged, nor the intent of the maker.[29] It should state the facts constituting the uttering and not charge defendant with uttering merely.[30] It must allege that defendant had knowledge of the falsity of the paper,[31] although it is not necessary to charge

Sufficient showing of incorporation.— An indictment charging the forgery of a promissory note "payable to the order of the People's Savings Bank" at "the banking house of the People's Savings Bank" sufficiently shows incorporation of the bank. State *v.* Pullens, 81 Mo. 387.

Where the incorporation of a bank is necessary to make the offense forgery in the first degree, an averment to that effect is indispensable. Benson *v.* State, 124 Ala. 92, 27 So. 1.

21. Ball *v.* State, 48 Ark. 94, 2 S. W. 462.

22. People *v.* Nishiyama, 135 Cal. 299, 67 Pac. 776.

23. Hocker *v.* State, 34 Tex. Cr. 359, 30 S. W. 783, 53 Am. St. Rep. 716. And see Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370; Rex *v.* James, 7 C. & P. 553, 32 E. C. L. 755.

24. **Form of indictment for uttering forged note** see Reg. *v.* Lee, 2 M. & Rob. 281.

25. Harrison *v.* State, 36 Ala. 248; State *v.* Burling, 102 Iowa 681, 72 N. W. 295; State *v.* Webster, 152 Mo. 87, 53 S. W. 423; Leslie *v.* State, 10 Wyo. 10, 65 Pac. 849, 69 Pac. 2.

26. Espalla *v.* State, 108 Ala. 38, 19 So. 82; State *v.* Foster, 30 Kan. 365, 2 Pac. 628; State *v.* Stanton, 23 N. C. 424; Foute *v.* State, 15 Lea (Tenn.) 712.

Illustration.— An indictment under Mo. Rev. St. (1889) § 3634, providing that every person who shall sell any forged instrument with intent to have the same uttered and passed shall be guilty of forgery, which alleged that the instrument was sold with intent to injure and defraud, was insufficient. State *v.* Hesseltine, 130 Mo. 468, 32 S. W. 983.

27. State *v.* Walker, 167 Mo. 366, 67 S. W. 228. Thus where a statute prohibits the "passing, uttering or publishing" of forged paper, an indictment which charges "selling and delivering" is sufficient, as that is an uttering. State *v.* Mills, 146 Mo. 195, 47 S. W. 938; State *v.* Watson, 65 Mo. 115. But see Croxdale *v.* State, 1 Head (Tenn.) 139 (holding that the descriptive word "pass or transfer" used in the statute are essential to an indictment framed upon it), and State *v.* Petty, Harp. (S. C.) 59 (holding that the words "dispose and put away" in an indictment are not equivalent to "utter and publish" in an act).

28. Reg. *v.* Dunlop, 15 U. C. Q. B. 118.

What allegation sufficient.— The allegation of uttering a "false, forged, and counterfeit bank note" is not bad for repugnancy. Mackey *v.* State, 3 Ohio St. 362.

Description of altered instrument.— An altered instrument may be described either as "forged" or "altered"; but if described as both forged and altered an altered instrument only is designated. Bittings *v.* State, 56 Ind. 101.

29. Lockard *v.* Com., 87 Ky. 201, 8 S. W. 266, 10 Ky. L. Rep. 102; Eldridge *v.* Com., 54 S. W. 10, 21 Ky. L. Rep. 1087; State *v.* Goodrich, 67 Minn. 176, 69 N. W. 815.

Although not necessary to set out particularly in what the forgery consisted, yet where the prosecutor undertakes to do so he is bound to state it truly and prove it as stated. People *v.* Marion, 28 Mich. 255.

30. Powers *v.* Com., (Ky. 1892) 18 S. W. 357; Com. *v.* Williams, 13 Bush (Ky.) 267. *Compare* Selby *v.* State, 161 Ind. 667, 69 N. E. 463.

Surplusage.— Where an indictment charged that defendant did utter, publish, and show forth in evidence, the latter clause will be rejected as surplusage. State *v.* Jarvis, 129 N. C. 698, 40 S. E. 220.

Disjunctive averment.— An indictment charging that defendant did "utter, publish, and pass, or attempt to pass" is bad, as the averment should be in the conjunctive form. People *v.* Tomlinson, 35 Cal. 503.

31. *California.*— People *v.* Elphis, (1903) 72 Pac. 838.

Indiana.— Powers *v.* State, 87 Ind. 97.

Ohio.— Anderson *v.* State, 7 Ohio, Pt. II, 250.

Texas.— Henderson *v.* State, 14 Tex. 503.

Canada.— Reg. *v.* Weir, 9 Quebec Q. B. 253, 3 Can. Cr. Cas. 499.

What allegation sufficient.— An allegation that he "knowingly" uttered a forged note is equivalent to charging him with uttering

that he possessed this knowledge at the time he uttered it.[32] It should allege an intent to defraud.[33] And it is also indispensable that the indictment state the name of the person to whom the instrument was uttered, or else that such person is to the jurors unknown,[34] unless this averment is dispensed with by statute.[35] Where prejudice would arise only from uttering by the accused in an official capacity, a failure to charge the uttering in such capacity is fatal.[36] If the first part of an instrument charging the making sufficiently alleges the non-existence of the pretended signer such allegations need not be repeated in the second part charging the uttering.[37] Under an indictment charging forgery only, no conviction can be had for uttering a forged instrument;[38] and charging an absolute sale of a forged instrument is not supported by evidence showing only an offer to sell.[39]

3. In Prosecutions For Possession of Forged Instruments. An indictment for having in possession forged paper with intent to utter or pass it is sufficient if drafted in conformity with the statute on which it is based and need not allege that there was an intent to cheat or defraud any particular person,[40] nor that defendant intended to utter it for a consideration;[41] and there may be a conviction of a separate offense for each one of such instruments he keeps in possession.[42] An allegation that defendant had in his possession, on a certain day specified, ten false instruments is not equivalent to an allegation that he had possession of all at the same time.[43]

4. In Prosecutions For Feloniously Disposing of and Putting Away Forged Bank-Notes. In indictments for this offense, it is not necessary to allege to whom the note was disposed of.[44]

B. Joinder of Offenses. Where the making and uttering of a fictitious instrument is one continuous transaction, they may be properly charged in one count as a single offense;[45] and although an indictment charges in separate counts the forgery of an instrument and the uttering of the same, a conviction cannot

a note knowing it to be forged. State *v.* Williams, 139 Ind. 43, 38 N. E. 339, 47 Am. St. Rep. 255.

32. State *v.* Burgson, 53 Iowa 318, 5 N. W. 167.

33. Rex *v.* Rushworth, R. & R. 235, 1 Stark. 396.

34. McClellan *v.* State, 32 Ark. 609; Goodson *v.* State, 29 Fla. 511, 10 So. 738, 30 Am. St. Rep. 135.

If the utterance has been to an agent, it may be alleged to have been to his principal. State *v.* Allen, 171 Mo. 562, 71 S. W. 1000; Ellis *v.* State, (Tex. Cr. App. 1895) 22 S. W. 678.

Variance.— If the indictment charges uttering to a particular person, it must be proved that it was uttered to such person. Riley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 498.

In Virginia the omission of such statement is not ground for setting aside a judgment. Com. *v.* Ervin, 2 Va. Cas. 337.

35. State *v.* Hart, 67 Iowa 142, 25 N. W. 99; State *v.* Adams, 39 La. Ann. 238, 1 So. 455.

36. State *v.* Anderson, 30 La. Ann. 557.

37. People *v.* Ellenwood, 119 Cal. 166, 51 Pac. 553.

38. King *v.* State, 43 Fla. 211, 31 So. 254; State *v.* Snow, 30 La. Ann. 401; Luttrell *v.* State, 85 Tenn. 232, 1 S. W. 886.

39. State *v.* Walker, 167 Mo. 366, 67 S. W. 228.

40. State *v.* Turner, 148 Mo. 206, 49 S. W. 988.

Indorsement of forged instrument.— If the instrument described is a check payable to defendant's order, it is unnecessary to allege that he indorsed it. State *v.* Vincent, 91 Mo. 662, 4 S. W. 430.

Instruments of class excepted from operation of statute.— Where one section of the statutes makes it an offense to have possession of any forged instrument, except such as are enumerated in another section, and the description in the indictment clearly shows that the instrument is not one of those excepted, there need not be an averment that it does not belong to the class excepted. State *v.* Hathhorn, 166 Mo. 229, 65 S. W. 756.

41. State *v.* Eaton, 166 Mo. 575, 66 S. W. 539.

42. Logan *v.* U. S., 123 Fed. 291, 59 C. C. A. 476. In State *v.* Benham, 7 Conn. 414, there is a *dictum* to the contrary, although the instruments are not alike, and the intent was to defraud several different persons.

43. State *v.* Bonney, 34 Me. 223.

44. Rex *v.* Holden, R. & R. 115, 2 Taunt. 334.

45. People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; People *v.* Ellenwood, 119 Cal. 166, 51 Pac. 553; Selby *v.* State, 161 Ind. 667, 69 N. E. 463; State *v.* Greenwood, 76 Minn. 207, 78 N. W. 1044, 1117.

be had for both offenses, separate indictments being necessary for this purpose.[46] Although several drafts may be uttered as one indivisible act, the forgery of each is a separate offense.[47] Where a clause in an information alleges the possession of a false instrument, setting up a copy, which is followed by a clause charging the selling thereof, the latter clause should not be considered a separate count.[48] If there are two counts, in each of which a copy of the instrument is set out, and the copies are alike, it will not be presumed that each is a copy of the same original instrument, without an allegation to that effect in the second count.[49]

C. Election of Offense on Which to Base Prosecution. A person may be indicted for forgery, although he might upon the same transaction be indicted for another offense.[50]

XIV. DEFENSES.[51]

If a person use the name of another without authority, it is no defense that he thought the latter would pay rather than there should be a criminal prosecution;[52] or that he believed the latter would ratify his act;[53] or even that there has been ratification.[54] Likewise it is no defense that the purported drawer would have been willing, at the time of the forgery, to have indorsed paper for defendant to the same amount.[55] So if defendant afterward refunds the money, it does not constitute a defense.[56] Where the offense charged is the injury of a public record, the fact that a piece torn out has been pasted in, and the record is as legible as before, is insufficient to discharge defendant.[57]

XV. EVIDENCE.[58]

A. Burden of Proof — 1. IN GENERAL. The burden is on the prosecution to prove all the elements constituting the offense.[59] It is essential to prove the identity or non-existence of the person whose name is charged to be forged,[60] and an intent to defraud some person.[61] The prosecution must show that the signature is not that of the person it purports to be,[62] and that it was made by defendant,[63] without authority,[64] but if circumstances show guilty knowledge in uttering a forged check lack of authority need not be proved.[65] Slight evidence that a name is fictitious is sufficient to shift the burden of proof upon defendant.[66] Where it is shown that the purported maker of a note does not live at a particu-

46. Pitts *v.* State, 40 Tex. Cr. 667, 51 S. W. 906; Crawford *v.* State, 31 Tex. Cr. 51, 19 S. W. 766.

47. Barton *v.* State, 23 Wis. 587.

48. State *v.* Walker, 167 Mo. 366, 67 S. W. 228.

49. People *v.* Shotwell, 27 Cal. 394.

50. Scott *v.* State, 40 Tex. Cr. 105, 48 S. W. 523.

51. Defenses see CRIMINAL LAW, 12 Cyc. 155 *et seq.*

52. Reg. *v.* Beard, 8 C. & P. 143, 34 E. C. L. 656.

53. People *v.* Weaver, 81 N. Y. App. Div. 567, 81 N. Y. Suppl. 519, 17 N. Y. Cr. 291.

54. State *v.* Tull, 119 Mo. 421, 24 S. W. 1010; Countee *v.* State, (Tex. Cr. App. 1895) 33 S. W. 127; Malton *v.* State, 29 Tex. App. 527, 16 S. W. 423.

55. Colter *v.* State, 41 Tex. Cr. 78, 51 S. W. 945.

56. Williams *v.* State, 126 Ala. 50, 28 So. 632.

57. Reg. *v.* Bowen, 1 C. & K. 501, 1 Cox C. C. 88, 1 Den. C. C. 22, 47 E. C. L. 501.

58. Evidence see CRIMINAL LAW, 12 Cyc. 379; EVIDENCE, 16 Cyc. 821.

59. Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 803. See also in support of the rule cases cited *infra*, note 60 *et seq.*

60. Downes' Case, 2 East P. C. 997; Sponsonby's Case, 2 East P. C. 996, 1 Leach C. C. 332.

61. Reg. *v.* Hodgson, 7 Cox C. C. 122, Dears. & B. 3, 2 Jur. N. S. 453, 25 L. J. M. C. 78, 4 Wkly. Rep. 509.

62. Riley's Case, 5 City Hall Rec. (N. Y.) 87.

63. Horton *v.* State, 32 Tex. 79.

64. *California.*— People *v.* Lundin, 117 Cal. 124, 48 Pac. 1024.

Delaware.— State *v.* Pratt, 3 Pennew. 264, 51 Atl. 604.

Kansas.— State *v.* Swan, 60 Kan. 461, 56 Pac. 750.

Ohio.— Romans *v.* State, 51 Ohio St. 528, 37 N. E. 1040.

Texas.— Shanks *v.* State, 25 Tex. Suppl. 326.

65. Reg. *v.* Hurley, 2 M. & Rob. 473.

66. Watson *v.* State, 78 Ga. 349; Riley's Case, 5 City Hall Rec. (N. Y.) 87; Rex *v.* Brannan, 6 C. & P. 326, 25 E. C. L. 456.

lar place, and is not engaged in the business as represented by defendant, the burden is not shifted by proof by defendant of the existence of a person by the same name engaged in a different line of business.[67] On a trial for forging a check, the burden of showing guilty knowledge by defendant as to other forged checks is on the state;[68] but possession of such checks under suspicious circumstances must be explained by defendant.[69]

2. DESCRIPTIVE ALLEGATIONS. All descriptive allegations in the indictment must be proved,[70] although unnecessarily made,[71] unless they can be rejected as surplusage.[72] Where a corporation is alleged to have been defrauded, the organization of the corporation must be proved;[73] likewise it must be shown that the persons alleged to be defrauded composed the firm, the forgery of whose name is charged.[74]

3. PRODUCTION OF FORGED INSTRUMENT. The instrument alleged to be forged must be produced at the trial, or its absence satisfactorily accounted for before evidence is taken to prove the forgery.[75] If the instrument is in the hands of the accused sufficient notice must be given to him to produce it;[76] if this is done, and the instrument is not produced, secondary evidence of its contents is admissible.[77] The rule is the same if the instrument is beyond the jurisdiction of the court.[78] If the instrument has been destroyed by the prisoner,[79] or by someone without his privity,[80] its tenor may be proved by parol evidence after proof of such destruction or loss has been adduced,[81] even though the indictment does not count on a lost instrument.[82] A mutilated instrument is governed by the same rule.[83]

B. Presumptions. Possession of forged paper by defendant, with a claim of title thereunder, if unexplained, raises a conclusive presumption that he forged

67. Rex *v.* Hampton, 1 Moody C. C. 255.

68. People *v.* Bird, 124 Cal. 32, 56 Pac. 639.

69. See Barnes *v.* Com., (Ky.) 41 S. W. 772.

70. State *v.* Clark, 23 N. H. 429.

71. *Arkansas.*— McDonnell *v.* State, 58 Ark. 242, 24 S. W. 105.

Michigan.— People *v.* Marion, 28 Mich. 255.

Missouri.— State *v.* Samuels, 114 Mo. 68, 45 S. W. 1088.

North Carolina.— State *v.* Lytle, 64 N. C. 255.

West Virginia.— State *v.* Fleshman, 40 W. Va. 726, 22 S. E. 309.

See 23 Cent. Dig. tit. "Forgery," § 86.

72. Loehr *v.* People, 132 Ill. 504, 24 N. E. 68.

73. State *v.* Murphy, 17 R. I. 698, 24 Atl. 473, 16 L. R. A. 550.

74. State *v.* Harrison, 69 N. C. 143.

75. Manaway *v.* State, 44 Ala. 375; State *v.* Blodget, 1 Root (Conn.) 534; Dovalina *v.* State, 14 Tex. App. 312.

Where there are three counts for uttering three notes, and three notes are introduced in evidence, it is not necessary to show upon which of them each of the counts was found, each count being provable by either of the three notes. Com. *v.* Miller, 3 Cush. (Mass.) 243.

To sustain an indictment for forging a recorder's certificate of record upon a deed of trust, the deed must be produced in evidence, to show that it is such an instrument as may be recorded. State *v.* Tompkins, 71 Mo. 613.

Effect of substitution of deed.— Where, after a grantor has read a draft of a deed, defendant substitutes another for signature, it is not necessary to produce the first deed at the trial for forging the second one. State *v.* Shurtliff, 18 Me. 368.

Error in order of proof — How cured.— If the forged instrument is admitted in evidence before proof that the accused had written it, but that proof is subsequently made, no ground for reversal exists. Williams *v.* State, 24 Tex. App. 342, 6 S. W. 531.

76. Morton *v.* State, 30 Ala. 527; State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561; Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502; Reg. *v.* Fitzsimons, Ir. R. 4 C. L. 1, 18 Wkly. Rep. 763.

77. Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249; Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370; Rex *v.* Hunter, 4 C. & P. 128, 19 E. C. L. 439, 3 C. & P. 591, 14 E. C. L. 731.

78. Thornley *v.* State, 36 Tex. Cr. 118, 34 S. W. 264.

79. Ross *v.* Bruce, 1 Day (Conn.) 100; State *v.* Ford, 2 Root (Conn.) 93; U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464; Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502.

80. Com. *v.* Snell, 3 Mass. 82; Com. *v.* Hutchinson, 1 Mass. 7, 2 Am. Dec. 1; Pendleton *v.* Com., 4 Leigh (Va.) 694, 26 Am. Dec. 342.

81. State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756; Reg. *v.* Hall, 12 Cox C. C. 159.

82. Cross *v.* People, 192 Ill. 291, 61 N. E. 400; Mead *v.* State, 53 N. J. L. 601, 23 Atl. 264.

83. Thompson *v.* State, 30 Ala. 28.

it, or procured it to be forged;[84] and this is so, although the instrument is payable to defendant or bearer.[85] Nevertheless proof that defendant uttered a genuine instrument, with a forged indorsement in blank by the payee thereof, raises no such presumption.[86] If forged paper be uttered by defendant as true, the law will presume knowledge on his part of its character.[87] If the facts show that a forged instrument was made to be used as good an intention to defraud will be implied,[88] although mere proof of possession is insufficient;[89] and an intent to defraud the person whose name has been forged may be inferred, even though defendant in fact intended to defraud another.[90] The place of date is not *prima facie* the place of forgery;[91] but proof that defendant uttered or attempted to utter the instrument in the county where the prosecution is laid is presumptive evidence that he committed the forgery there,[92] although he resided in another county.[93] Where an instrument bears a forged indorsement, it will be presumed that the signatures necessary to give it validity were thereon at the time such indorsement was made.[94]

C. Admissibility—1. In General. Testimony is admissible to prove the innuendos and explanations as alleged in the indictment[95] and to show that a name partially obliterated by wear and tear was at the time of the execution of a note plainly written upon it.[96] Written testimony, on oath, given by defendant in prior proceedings, is admissible against him.[97] A requirement that instruments, to be admitted in evidence, must be filed before trial does not apply to forged instruments.[98] Parol evidence cannot be given to show that a document is a warrant for the payment of money if its form shows it to be otherwise;[99] and where a record in a suit before a justice of the peace on the forged instrument has been introduced in evidence, a juror in that suit cannot be asked if the genuineness of the signature was in issue.[1] A statute providing that a document shall not be introduced in evidence in any court without the proper internal revenue stamps thereon does not require a forged check to be so stamped before it is admissible in evidence in a criminal prosecution therefor.[2]

2. Falsity of Instrument — a. In General. On a trial for the forgery of a deed, testimony of qualified experts that such instrument was executed by defendant is competent proof that it was not executed by the person whose name was signed thereto.[3] So if the forgery of a deed is charged, proof that the certificate of

84. Hobbs *v.* State, 75 Ala. 1; State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836; State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; State *v.* Peterson, 129 N. C. 556, 40 S. E. 9, 85 Am. St. Rep. 756; State *v.* Britt, 14 N. C. 122.

85. People *v.* King, 125 Cal. 369, 58 Pac. 19.

86. Miller *v.* State, 51 Ind. 405.

87. Hagar *v.* State, 71 Ga. 164. This presumption cannot be overcome by testimony of defendant that his business was large, that he handled many notes of the same character as those alleged to be forged, and that he has no recollection as to how he obtained the notes in question. People *v.* Rathbun, 21 Wend. (N. Y.) 509.

88. *Arkansas.*— Bennett *v.* State, 62 Ark. 516, 36 S. W. 947.

Indiana.— Fletcher *v.* State, 49 Ind. 124, 19 Am. Rep. 673.

Louisiana.— State *v.* Hahn, 38 La. Ann. 169.

Maine.— State *v.* Kimball, 50 Me. 409.

Texas.— Henderson *v.* State, 14 Tex. 503.

England.— Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903; Reg. *v.* Hill, 8 C. & P. 274, 34 E. C. L. 730.

See 23 Cent. Dig. tit. "Forgery," § 103.

89. Fox *v.* People, 95 Ill. 71.

90. Bennett *v.* State, 62 Ark. 516, 36 S. W. 947; U. S. *v.* Brooks, 3 MacArthur (D. C.) 315; Rounds *v.* State, 78 Me. 42, 2 Atl. 673; Rex *v.* Mazagora, R. & R. 216.

91. Com. *v.* Fagan, 2 Pa. Dist. 401, 12 Pa. Co. Ct. 613.

92. Bland *v.* People, 4 Ill. 364. *Contra*, Com. *v.* Parmenter, 5 Pick. (Mass.) 279.

93. McGuire *v.* State, 37 Ala. 161; State *v.* Poindexter, 23 W. Va. 805.

94. Com. *v.* Butterick, 100 Mass. 12.

95. Daud *v.* State, 34 Tex. Cr. 460, 31 S. W. 376.

96. Inman *v.* State, 35 Tex. Cr. 36, 30 S. W. 219.

97. Rex *v.* Haworth, 4 C. & P. 254, 19 E. C. L. 502; Reg. *v.* Wheater, 2 Lewin C. C. 157, 2 Moody C. C. 45.

98. Caston *v.* State, 31 Tex. Cr. 304, 20 S. W. 585.

99. Reg. *v.* Ellis, 4 Cox C. C. 258.

1. State *v.* Thompson, 19 Iowa 299.

2. State *v.* Shields, 112 Iowa 27, 83 N. W. 807.

3. Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370.

acknowledgment is forged is allowable.[4] Evidence of the falsity of the seal to a certificate purporting to be under the seal of a court of record is relevant to the issue of the forgery of such a certificate, as the falsity of the seal raises a strong presumption that the signature to the certificate is also false; and proof of the seal by comparison is competent.[5] Upon the question whether a person signed his name as an indorsement of a draft or not, postal cards afterward written by such person to defendant, asking if such a draft had been received by defendant for such person, are admissible.[6] Where defendant admits the signing of some notes, and denies the execution of others, his declaration is inadmissible unless it is shown that the notes he admitted signing were a part of those claimed to be forgeries.[7] On a trial for forgery of a deed, it is competent to receive in evidence the original deed to the parties whose signatures are forged, with evidence that such owners did not sign or authorize the signing of the deed in question, that there were no other persons of the same names in the county, and that a person whose name was signed by mark in the forged deed is educated and able to write.[8] So the persons whose names appear as acknowledging officer and witnesses may testify that they did not sign.[9] In a prosecution for forging a will, the declarations of the decedent shortly before and after its date are admissible to show the truth or falsity of the recitals therein.[10] The death of an apparent party to an instrument prior to its date may be proved by repute and circumstantial evidence.[11] Testimony which is a mere expression of opinion is not admissible.[12]

b. Fictitious Parties to Instruments. Evidence as to the result of inquiries made for persons whose names appear on an instrument is admissible to show their non-existence,[13] although the person making the inquiries may have been unacquainted with the place,[14] or the search may not have been extensive.[15] Likewise evidence is admissible as to the result of an inspection of the assessment rolls of the town where such persons were alleged to live.[16] In the case of a check it may be shown that the drawer had no account with the bank on which it was drawn,[17] or that no one of that name lived at that place who was likely to keep an account with a banker.[18] But a letter from a cashier of a bank to whom a note was sent for collection is not evidence, nor is the protest of a notary.[19] Defendant has the right to offer testimony to show that the persons who could not be found had departed from the community on account of a threat of the prosecuting officer to prosecute them for perjury.[20]

3. Making of False Instrument. The crime of forgery is hard to prove, and hence is often made out partially by positive evidence, and partially by circumstantial evidence.[21] As in other cases the best evidence possible is required.[22] Evidence of false statements made by defendant in connection with the instrument is admissible,[23] as is evidence of all transactions connected with the forgery

4. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; Ham *v.* State, 4 Tex. App. 645.
5. People *v.* Marion, 29 Mich. 31.
6. State *v.* Hopkins, 50 Vt. 316.
7. Tyler *v.* Todd, 36 Conn. 218.
8. Espalla *v.* State, 108 Ala. 38, 19 So. 82.
9. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.
10. Corbett *v.* State, 5 Ohio Cir. Ct. 155, 3 Ohio Cir. Dec. 79; Breck *v.* State, 4 Ohio Cir. Ct. 160, 2 Ohio Cir. Dec. 477.
11. Henderson *v.* State, 14 Tex. 503.
12. Smith *v.* Holebrook, 2 Root (Conn.) 45; Walker *v.* Logan, 75 Ga. 759; Wiggins *v.* State, 1 Lea (Tenn.) 738; State *v.* Hopkins, 50 Vt. 316.
13. Williams *v.* State, 126 Ala. 50, 28 So. 632; People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; People *v.* Jones, 106 N. Y. 523, 13 N. E. 93; Rex *v.* King, 5 C. & P. 123, 24 E. C. L. 485.
14. Rex *v.* King, 5 C. & P. 123, 24 E. C. L. 485.
15. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168.
16. People *v.* Jones, 106 N. Y. 523, 13 N. E. 93.
17. Williams *v.* State, 126 Ala. 50, 28 So. 632.
18. Reg. *v.* Ashby, 2 F. & F. 560.
19. Farrington *v.* State, 10 Ohio 354.
20. Com. *v.* Costello, 119 Mass. 214.
21. Com. *v.* Bargar, 2 L. T. N. S. (Pa.) 37.
22. Reg. *v.* Harvey, 11 Cox C. C. 546.
23. Gardner *v.* State, 96 Ala. 12, 11 So. 402; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216; State *v.* Calkins, 73 Iowa 128, 34 N. W. 777; Com. *v.* Norris, 9 Montg. Co. Rep. (Pa.) 143.

showing a connected plan of fraud,[24] and evidence tending to show a benefit to be gained by defendant.[25] If a common purpose or conspiracy of defendants is shown, the acts and declarations of any one of them is admissible.[26] Defendant's connection with other forged instruments may be shown,[27] if they are in evidence,[28] and his connection with them is shown to be culpable;[29] and the fact that defendant yields up the advantage gained by the false instrument is relevant.[30] Testimony showing that defendant has practised imitating the handwriting forged is admissible.[31] Evidence that defendant knew the party whose name was forged to be a man of means is non-admissible.[32] Other facts which may be shown,[33] or which are irrelevant,[34] are given in the notes. Defendant

24. People *v.* Baker, 100 Cal. 188, 34 Pac. 649, 38 Am. St. Rep. 276; Womble *v.* State, 107 Ga. 666, 33 S. E. 630; Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249; Preston *v.* State, 40 Tex. Cr. 72, 48 S. W. 581.

25. People *v.* Phillips, 70 Cal. 61, 11 Pac. 493.

Indebtedness of prosecutor to defendant.— In a prosecution for forging a deed, evidence is properly excluded which shows the grantor's indebtedness to defendant, although a state's witness has testified to defendant's statement that he had loaned the grantor money, and did not have a scratch of a pen to show for it. State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836.

26. People *v.* Bassford, 3 N. Y. Cr. 219.

27. Williams *v.* State, 126 Ala. 50, 28 So. 632; Barnes *v.* Com., 101 Ky. 556, 41 S. W. 772, 19 Ky. L. Rep. 803; Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763; People *v.* De Kroyft, 49 Hun (N. Y.) 71, 1 N. Y. Suppl. 692; People *v.* Bassford, 3 N. Y. Cr. 219. But evidence that long after defendant's arrest a blank check was found in a desk said to be the one occupied by him, which check appeared to have been signed by the same name as the forged check, is incompetent, in the absence of evidence connecting defendant with the desk or the check. People *v.* Bird, 124 Cal. 32, 56 Pac. 639.

28. Anson *v.* People, 148 Ill. 494, 35 N. E. 145; State *v.* Saunders, 68 Iowa 370, 27 N. W. 455; Reg. *v.* Cooke, 8 C. & P. 586, 34 E. C. L. 903. But see Reg. *v.* Brown, 2 F. & F. 559.

29. State *v.* Lowry, 42 W. Va. 205, 24 S. E. 561.

30. Burdge *v.* State, 53 Ohio St. 512, 42 N. E. 594.

31. Com. *v.* Cowan, 4 Pa. Super. Ct. 579; Pennsylvania Co., etc. *v.* Philadelphia, etc., R. Co., 11 Pa. Co. Ct. 482.

32. People *v.* Lapique, 136 Cal. 503, 69 Pac. 226 [*reversing* (1901) 67 Pac. 14].

33. Where defendant in order to secure advances promised to transfer as security mortgages which he said he had, and among the mortgages afterward transferred was the one alleged to be forged, which bore a date subsequent to his promise, these facts may be shown. Curtis *v.* State, 118 Ala. 125, 24 So. 111. Where defendant had a memorandum book in his possession when arrested, and the forged instrument had been written on a leaf torn therefrom, and the dates in the book were in his handwriting, the dates and that part of the book from which the leaf had been torn were admissible. Koch *v.* State, 115 Ala. 99, 22 So. 471. Where a due-bill has been signed "Mr. Daniel Threet," it is competent for Daniel Thweat, who lives in the locality, to testify that many of his acquaintances pronounce his name as if spelled "Threet." Gooden *v.* State, 55 Ala. 178. Evidence that defendant had worked for the drawer of the forged check is competent. People *v.* Walker, 140 Cal. 153, 73 Pac. 831. It is not prejudicial error to admit testimony that defendant could not be found when it was desired to verify his orders, one of which was the one in question. State *v.* Prins, 117 Iowa 505, 91 N. W. 758. Evidence is admissible that defendant was in possession of the instrument on the day of its date and presented it in payment of goods. State *v.* Outs, 30 La. Ann. 1155. On trial for forgery of a check given in payment of property purchased, testimony by the complaining witness that he registered in a book kept for that purpose a name given by defendant at the time was admissible. Randolph *v.* State, 65 Nebr. 520, 91 N. W. 356. It may be shown that defendant claimed title to land through a different instrument from the one forged, before the uttering of it, and was informed that no such document was in existence. West *v.* State, 22 N. J. L. 212. It is competent evidence that defendant, meeting the maker of a note which he held, informed the maker that he needed money, and would sell the maker the note, which offer was accepted, and later a forged note was delivered. State *v.* Hastings, 86 N. C. 596. Evidence is competent that defendant, when notified to produce the instrument, remarked that he would not be fool enough to give it up. Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370. An original entry in a record book in the general land-office showing that the land-agency firm of which defendant was a member applied for a copy of the original title granted to the person whose name was subsequently forged to a deed is admissible. Rogers *v.* State, 11 Tex. App. 608.

34. The question asked the prosecuting witness on cross-examination as to whether defendant and other negroes in the neighborhood called him by his given name is properly excluded. Wright *v.* State, 138 Ala. 69, 34 So. 1009. The record of a mortgage

may show in his defense any matters which are relevant,[35] but immaterial facts will be excluded.[36]

4. INTENT TO DEFRAUD. Evidence of such of the surrounding circumstances as have a bearing upon the question of fraud is pertinent, and the proofs of fraud may be substantially the same in criminal and civil cases.[37] Acts of deception, declarations, and misstatements in connection with the false instrument are admissible,[38] as is also evidence of a scheme to defraud.[39] The benefit obtained by defendant,[40]

of part of the land covered by the discharged mortgage, and executed after the filing of the discharge, is inadmissible, without proof connecting it in some way with the transaction in question, as the jury might infer that an abstract similar to the one in evidence was given, or be prejudiced against the defendant as having wronged the mortgagee. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779. Where defendant was charged with altering an assignment of a mortgage, evidence is incompetent that he had applied for a loan on the land covered by such mortgage, which was declined until an examination could be made of the record with respect to the title. State *v.* Clark, 23 N. H. 429. Testimony as to transactions relating to certain debts of defendant, to secure which the notes were given, and as to dealings between defendant and her husband, requiring the execution of the note, is inadmissible. People *v.* Weaver, 177 N. Y. 434, 69 N. E. 1094 [*reversing* 81 N. Y. App. Div. 567, 81 N. Y. Suppl. 519].

35. The state having shown that defendant had filled out a note after it was indorsed in blank for a larger sum than he promised, an affidavit filed by the indorser in a civil action against him stating his defense is admissible in behalf of defendant. State *v.* Pratt, 3 Pennew. (Del.) 264, 51 Atl. 604. Where it is shown that the deed in question was a part of a double blank, defendant should be permitted to prove that the other part of the blank was genuine. People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578. Where on a trial for forging auditor's warrants besides proof of the handwriting of the prisoner, there was no positive proof of the forged warrant having been seen in the possession of or uttered by the prisoner, and the state proved that he was the clerk of the auditor, had custody of his books, free access at all times to the registry, and that the forged warrants in all material respects corresponded with the genuine ones in the register, the prisoner should be permitted to offer testimony that the registry was not always or generally in his custody, but was carelessly thrown about the office, accessible to all who might casually enter, and often with the office in the care of a single servant for a considerable time. Pagaud *v.* State, 5 Sm. & M. (Miss.) 491. Where the person whose name was signed to a note dated April 16 was at that time confined to his bed, having given up hopes of recovery on April 13, and having died on April 20, it is competent for the prisoner to prove that on April 18 he stated that he had signed the note. People *v.* Blakeley, 4 Park. Cr. (N. Y.) 176. In a prosecution for forging a note payable in lumber, given for the price of an organ, by changing the provision specifying the width of the lumber to be delivered, it is competent for defendant to show the usual price of the kind of organ sold, and the value of the lumber delivered. State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

36. Where it appeared that the consideration for a forged instrument had been paid by check, and that the maker generally destroyed his checks, it was not error to overrule a question as to why he destroyed them. State *v.* Olds, 106 Iowa 110, 76 N. W. 644. Where the supposed maker of a forged promissory note testified that he had never given any one his name in blank, testimony is not admissible that witness once saw a blank paper filled up, having such maker's name indorsed upon it, unless such indorsement is first proved to have been genuine. Com. *v.* Miller, 3 Cush. (Mass.) 243. Where the state has introduced evidence showing that defendant had forged the note and given it to an accomplice, it is not proper matter of defense to show that such accomplice frequently met another person at defendant's house. Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249. Where defendant represented to the person to whom he uttered a forged instrument that the maker lived at Cross Roads, it was not error to exclude testimony to show that a letter addressed to such maker was received at Red Lion, a post-office three miles from Cross Roads, where defendant did not offer to show that the letter was actually received, or that the maker was ever seen there. Com. *v.* Norris, 9 Montg. Co. Rep. (Pa.) 143. Where, in a prosecution for forging a note payable in lumber, the maker testified that at the time of executing the note there was no conversation as to the price of the lumber, it was not error to refuse to permit a question as to whether the maker did not guaranty that the lumber was worth five dollars per thousand. State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.

37. People *v.* Marion, 29 Mich. 31.

38. Butler *v.* State, 22 Ala. 43; Burks *v.* State, 24 Tex. App. 326, 6 S. W. 300; Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215; State *v.* Williams, 27 Vt. 724; Chahoon *v.* Com., 20 Gratt. (Va.) 733.

39. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

40. Murphy *v.* State, 118 Ala. 137, 23 So. 719; U. S. *v.* Brooks, 3 MacArthur (D. C.) 315; Anson *v.* People, 148 Ill. 494, 35 N. E. 145; Preston *v.* State, 40 Tex. Cr. 72, 48 S. W. 581.

or the injury occasioned to the party to whom the instrument was passed,[41] may be shown. Evidence of the making, uttering, or possession of other instruments is admissible to show guilty intent,[42] but they must be produced,[43] and shown to have been forgeries.[44] The uttering of the note charged to be forged is admissible to show the intent with which it was written;[45] and the prisoner's indorsement of fictitious paper is also admissible to show his intent to defraud by means of such writing, although the indorsement is not set forth in the indictment.[46] Evidence of other criminal acts by defendant, not immediately connected with the forgery, cannot be given;[47] and defendant should be allowed to offer evidence explaining and rebutting the facts which evidence his apparent fraudulent intent.[48]

5. **Efficacy of Instrument to Defraud.** In order to show that an apparent grantor had title to the land, it is proper to admit evidence of the record of a deed of the land to him, and the testimony of the register of deeds showing that a careful examination of the records fails to show any subsequent transfer except the alleged forged instrument;[49] but, with a view of showing that an auditor's warrant is a bill of credit, and therefore illegal, proof is inadmissible that when such warrant was issued there was no money in the treasury to take it up, that such warrants were not being redeemed, were under par, and circulated as money.[50]

6. **Authority of Defendant to Make Instrument.** Defendant should be permitted to offer testimony showing authority to make a signature;[51] but evidence of his hope that the person whose name was indorsed would ratify such use of his name is inadmissible.[52]

7. **Financial Condition of Accused or Party Apparently Liable.** Evidence as to the financial condition of defendant at the time of forgery is not admissible.[53] There is a conflict of authority as to the admissibility of evidence to show the financial condition of the party apparently liable.[54]

8. **Corporate Existence of Party Defrauded.** Evidence of the corporate existence of a company charged to have been defrauded is admissible, although the incorporation is not alleged in the indictment.[55] It is not necessary to produce a certified copy of its charter,[56] but parol testimony of the most general character may be given,[57] such as reputation,[58] or that the witness had seen the

41. People *v.* Phillips, (Cal. 1886) 9 Pac. 312.

42. *Alabama.*— Johnson *v.* State, 35 Ala. 370.

Illinois.— Anson *v.* People, 148 Ill. 494, 35 N. E. 145.

Indiana.— Robinson *v.* State, 66 Ind. 331.

Maryland.— Bishop *v.* State, 55 Md. 138.

Massachusetts.— Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763.

Missouri.— State *v.* Hodges, 144 Mo. 50, 45 S. W. 1093.

Texas.— Leslie *v.* State, (Cr. App. 1898) 47 S. W. 367.

Canada.— Reg. *v.* Bent, 10 Ont. 557.

43. Fox *v.* People, 95 Ill. 71. *Contra,* Martin *v.* Com., 2 Leigh (Va.) 745.

44. Fox *v.* People, 95 Ill. 71; State *v.* Prins, 113 Iowa 72, 84 N. W. 980; People *v.* Altman, 147 N. Y. 473, 42 N. E. 180.

45. Cohen *v.* People, 7 Colo. 274, 3 Pac. 385; Berrisford *v.* State, 66 Ga. 53; Hoskins *v.* State, 11 Ga. 92.

46. U. S. *v.* Peacock, 27 Fed. Cas. No. 16,019, 1 Cranch C. C. 215.

47. People *v.* Dickie, 62 Hun (N. Y.) 400, 17 N. Y. Suppl. 51.

48. State *v.* Bjornaas, 88 Minn. 301, 92 N. W. 980; Com. *v.* Misner, Add. (Pa.) 44.

49. People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.

50. Pagaud *v.* State, 5 Sm. & M. (Miss.) 491.

51. People *v.* Loew, 19 N. Y. Suppl. 360, 8 N. Y. Cr. 370; Reg. *v.* Clifford, 2 C. & K. 202, 61 E. C. L. 202.

52. People *v.* Weaver, 177 N. Y. 434, 69 N. E. 1094 [*reversing* 81 N. Y. App. Div. 567, 81 N. Y. Suppl. 519].

53. Leath *v.* State, 132 Ala. 26, 31 So. 108; State *v.* Tull, 119 Mo. 421, 24 S. W. 1010; Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249. But see State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.

54. That evidence is inadmissible.— People *v.* Lapique, 136 Cal. 503, 69 Pac. 226; People *v.* Stoddard, 19 N. Y. Suppl. 937.

That evidence is admissible.— Sands *v.* Com., 20 Gratt. (Va.) 800; Chahoon *v.* Com., 20 Gratt. (Va.) 733.

55. People *v.* Stearns, 21 Wend. (N. Y.) 409; State *v.* Shaw, 92 N. C. 768.

56. State *v.* Williams, 152 Mo. 115, 53 S. W. 424, 75 Am. St. Rep. 441; People *v.* Chadwick, 2 Park. Cr. (N. Y.) 163.

57. Dennis *v.* People, 1 Park. Cr. (N. Y.) 469.

58. People *v.* Ah Sam, 41 Cal. 645.

articles of incorporation, and had seen business being transacted by such corporation at its place of business.[59]

9. Copy of Forged Instrument. If a copy of the forged instrument is offered in evidence it must be shown to be a true one,[60] and it is shown to be such where the person making it testifies that it is a correct copy, which was compared by first reading the original to one holding the copy, and then by reading the copy to such person holding the original.[61]

10. Proof of Handwriting[62] — a. In General. Evidence that the alleged forged instrument is in the handwriting of defendant is competent,[63] and a witness who is familiar with such handwriting may state his opinion whether the signature of a fictitious person was made by defendant.[64] So it may be shown that the signature and body of an instrument were written by different persons.[65] Testimony of an engraver who has examined an alleged forged will with a mirror is admissible to show the existence of pencil marks which had been apparently written over with ink and then erased.[66]

b. By Comparison. On the question of the genuineness of a signature, it is the practice to allow it to be compared with others that are genuine,[67] where such genuineness is either admitted[68] or clearly proved.[69] However, writing made by defendant on request is inadmissible;[70] nor can the writing of parties whose names are forged be admitted,[71] unless made before the time of the forgery.[72] In some states the only writings which can be admitted for comparison are those forming a part of the files in the case or already in evidence,[73] and defendant is estopped from denying the genuineness of his signature to such papers.[74] Under the old common-law rule the testimony of experts was inadmissible,[75] but modern practice allows it.[76] Writings for comparison should have been made about the time of the alleged forged instrument,[77] and the condition of a party, whether drunk or sober, at the time he signed any paper properly in evidence in a forgery

59. People *v.* D'Argencour, 32 Hun (N. Y.) 178 [*affirmed* in 95 N. Y. 624].

60. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569.

61. Cross *v.* People, 192 Ill. 291, 61 N. E. 400.

62. Handwriting see Evidence, 16 Cyc. 821.

63. Richie *v.* Com., 70 S. W. 629, 24 Ky. L. Rep. 1077.

64. State *v.* Minton, 116 Mo. 605, 22 S. W. 808.

65. State *v.* Lurch, 12 Oreg. 99, 6 Pac. 408.

66. Reg. *v.* Williams, 8 C. & P. 434, 34 E. C. L. 821.

67. Tyler *v.* Todd, 36 Conn. 218; People *v.* Hewit, 2 Park. Cr. (N. Y.) 20; Heard *v.* State, 9 Tex. App. 1.

68. State *v.* Calkins, 73 Iowa 128, 34 N. W. 777; Mallory *v.* State, 37 Tex. Cr. 482, 36 S. W. 751, 66 Am. St. Rep. 808; Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481.

69. *Connecticut.*— Tyler *v.* Todd, 36 Conn. 218.

Iowa.— State *v.* Farrington, 90 Iowa 673, 57 N. W. 606.

Missouri.— State *v.* Tompkins, 71 Mo. 613.

Pennsylvania.— Lamberton *v.* Dunham, 165 Pa. St. 129, 30 Atl. 716.

South Carolina.— State *v.* Ezekiel, 33 S. C. 115, 11 S. E. 635.

See 23 Cent. Dig. tit. "Forgery," § 112.

70. State *v.* Fritz, 23 La. Ann. 55; Reg. *v.* Aldridge, 3 F. & F. 781. See, however, Reg. *v.* Taylor, 6 Cox C. C. 58. *Contra*, Sprouse *v.* Com., 81 Va. 374.

71. People *v.* Schick, 75 Mich. 592, 42 N. W. 1008.

72. State *v.* Hopkins, 50 Vt. 316.

73. Huston *v.* Schindler, 46 Ind. 38; State *v.* Fritz, 23 La. Ann. 55; People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578; Reg. *v.* Aldridge, 3 F. & F. 781.

Paper copied in indictment.— The mere fact that a genuine paper is copied in the indictment, there being no allegation respecting it, does not render it admissible. State *v.* Givens, 5 Ala. 747.

74. State *v.* Farrington, 90 Iowa 673, 57 N. W. 606; Froman *v.* Com., 42 S. W. 728, 19 Ky. L. Rep. 948.

75. People *v.* Spooner, 1 Den. (N. Y.) 343, 43 Am. Dec. 672; Reg. *v.* Coleman, 6 Cox C. C. 163.

76. People *v.* Bird, 124 Cal. 32, 56 Pac. 639.

Statutes relating to expert testimony.— Code Cr. Proc. § 216, requiring three witnesses as to the genuineness of any "note, bill, draft, certificate of deposit, or other writing," applies only to purely expert testimony. State *v.* Foster, 30 Kan. 365, 2 Pac. 628.

77. People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578. It has been held error to exclude testimony of a witness, if he knows what defendant's signature was at the time it purported to have been made, although he could not testify as to his handwriting at the date of the trial. Henderson *v.* State, 120 Ala. 360, 25 So. 236.

case, and which is sought to be used for the purpose of a comparison of handwriting, is competent evidence.[78]

11. ALTERATION OF EXISTING INSTRUMENT. On a prosecution for fraudulently altering an instrument a conversation had with defendant about the time it was charged that the alteration was made, in which defendant stated that he was then under arrest on account of some transaction in which he was short a certain amount of money for which settlement had been demanded, is admissible.[79] Likewise the chemical effect of a powder in the possession of defendant is admissible where the alteration is by erasure.[80] Evidence of matters explaining his motive in making an alteration is admissible.[81] Where an alteration of a settled book-account has been made by including a claim which accrued afterward, the existence of such a claim may be shown, although no entry thereof has been made.[82] Where a note, alleged to have been raised, was paid by the maker, he may show that he thought it was another note he was paying, and that defendant had no claim against him for the larger amount.[83] A copy of a chattel mortgage certified by the city clerk has no probative force as to the issue whether a clause was a part of the instrument when executed;[84] and the testimony of a witness who was not near enough to have seen what took place at the time of the execution of the instrument is properly excluded.[85]

12. UTTERING OF INSTRUMENT. Conversations, assertions, and statements of defendant tending to prove uttering are admissible,[86] also matters which show a motive;[87] and the record of a suit upon the forged instrument is admissible.[88] To prove the uttering of a forged receipt, the note which purports to have been paid by money for which such receipt was given, and a deposition by defendant in a chancery suit as to the genuineness of such receipt is competent evidence.[89] Redemption and destruction of the forged instrument by defendant, after he was accused of its forgery,[90] and contradictory statements in regard to a forged instrument, formerly seen in his possession,[91] are admissible. Other instruments in his possession or passed by him are admissible upon proof that they also are forged.[92] If the witnesses are not able to positively identify defendant as the person who presented a forged check, still their evidence is sufficient to go to the jury.[93] However, the fact that defendant was much interested in an account of a forgery by another person is not significant,[94] nor is the record of a suit to enjoin the escheating of land sold to satisfy a judgment obtained on a forged note.[95] Where the maker of notes has testified that all notes prior to the date of the forged one had been entered by his clerk, and defendant had testified that there were other notes relating to confidential transactions which had not been so entered, the maker may introduce evidence to show that all of these latter notes have been paid.[96]

13. KNOWLEDGE OF FALSITY OF INSTRUMENT. Evidence of false statements made by defendant is admissible to show knowledge of the falsity of the instrument uttered by him.[97] So the forgery, uttering, or possession of other instruments

78. People *v.* Parker, 67 Mich. 222, 34 N. W. 720, 11 Am. St. Rep. 578.
79. Haupt *v.* State, 108 Ga. 53, 34 S. E. 313, 75 Am. St. Rep. 19.
80. People *v.* Brotherton, 47 Cal. 388.
81. State *v.* Van Auken, 98 Iowa 674, 68 N. W. 454.
82. Barnum *v.* State, 15 Ohio 717, 45 Am. Dec. 601.
83. Surles *v.* State, 89 Ga. 167, 15 S. E. 38.
84. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.
85. State *v.* Donovan, 75 Vt. 308, 55 Atl. 611.
86. Sands *v.* Com., 20 Gratt. (Va.) 800; Reg. *v.* Nisbett, 6 Cox C. C. 320.
87. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.
88. Sands *v.* Com., 20 Gratt. (Va.) 800.
89. State *v.* Henderson, 29 W. Va. 147, 1 S. E. 225.
90. Riley *v.* State, (Tex. Cr. App. 1898) 44 S. W. 498.
91. Leslie *v.* State, (Tex. Cr. App. 1898) 47 S. W. 367.
92. State *v.* Rose, 70 Minn. 403, 73 N. W. 177; Reg. *v.* Green, 3 C. & K. 209.
93. State *v.* Eaton, 166 Mo. 575, 66 S. W. 539.
94. Huntly *v.* State, (Tex. Cr. App. 1896) 34 S. W. 948.
95. Sands *v.* Com., 20 Gratt. (Va.) 800.
96. Com. *v.* Miller, 3 Cush. (Mass.) 243.
97. State *v.* Williams, 66 Iowa 573, 24 N. W. 52.

may be given in evidence,[98] upon proof that they were forged,[99] and upon their production or upon a due accounting for their non-production.[1] It is impracticable to lay down any general rule as to the time within which such other utterings must have taken place,[2] but evidence of an uttering subsequent to the one charged is not admissible unless the latter is in some way a part of a connected scheme to defraud.[3] Another instrument passed by defendant may be shown to be a forgery, although he has been acquitted on an indictment for uttering it.[4] If a second uttering is made the subject of a distinct indictment, it cannot be given in evidence to show a guilty knowledge in a former uttering.[5] It may also be shown that the prisoner endeavored to procure counterfeit money, and his declarations that he intended to cultivate the acquaintance of a counterfeiter and move near to the latter's residence are admissible.[6] Where a false discharge of a mortgage has been recorded, it may be shown that defendant afterward mortgaged the land to another, furnishing an abstract showing such discharge, but the receipt of interest by the former mortgagee after such release is not relevant, unless it is shown that such interest came from the mortgagor;[7] nor is the fact that defendant may have purchased land at a sale to satisfy a judgment obtained by him upon a forged note relevant.[8]

14. Possession of False Instrument. Possession, by the wife of defendant, of bank-notes apparently cut for the purpose of making alterations similar to those made in a note found on defendant is not, without evidence of concert between them, competent evidence against defendant on an indictment for having such altered note with intent to pass it.[9]

15. Disposing of and Putting Away Forged Bank-Notes. On an indictment for disposing of and putting away a forged bank-note, knowing it to be forged, the prosecutor may show that other forged notes have been uttered by defendant, in order to prove his knowledge of the forgery.[10]

D. Weight and Sufficiency[11] — 1. In General. No greater strictness ought to be required in proving an offense than is required in charging it.[12]

2. Falsity of Instrument — a. In General. The falsity of an instrument must be shown as alleged;[13] but it has been held sufficient to show that a part only is

98. *Florida.*— Smith *v.* State, 29 Fla. 408, 10 So. 894.
Illinois.— Steele *v.* People, 45 Ill. 152.
Indiana.— Harding *v.* State, 54 Ind. 359.
Maryland.— Bishop *v.* State, 55 Md. 138.
Massachusetts.— Com. *v.* Russell, 156 Mass. 196, 30 N. E. 763.
Ohio.— Lindsey *v.* State, 38 Ohio St. 507.
Tennessee.— Foute *v.* State, 15 Lea 712.
Texas.— Fonville *v.* State, 17 Tex. App. 368; Heard *v.* State, 9 Tex. App. 1; Francis *v.* State, 7 Tex. App. 501.
England.— Rex *v.* Ball, 1 Campb. 324, 2 Leach C. C. 987 note, R. & R. 132, 10 Rev. Rep. 695; Reg. *v.* Salt, 3 F. & F. 834.
See 23 Cent. Dig. tit. "Forgery," § 114.

99. People *v.* Whitemen, 114 Cal. 338, 46 Pac. 99; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583; Reg. *v.* Moore, 1 F. & F. 73.

1. State *v.* Breckenridge, 67 Iowa 204, 25 N. W. 130; Rex *v.* Forbes, 7 C. & P. 224, 32 E. C. L. 583; Rex *v.* Millard, R. & R. 183.

2. Reg. *v.* Salt, 3 F. & F. 834.

3. Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249; Rex *v.* Taverner, Car. C. L. 195.

4. State *v.* Houston, 1 Bailey (S. C.) 300.

5. Rex *v.* Smith, 2 C. & P. 633, 12 E. C. L. 776.

6. Finn *v.* Com., 5 Rand. (Va.) 701.

7. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

8. Sands *v.* Com., 20 Gratt. (Va.) 800.

9. People *v.* Thomas, 3 Abb. Dec. (N. Y.) 571, 3 Park. Cr. 256.

10. Rex *v.* Wylie, 1 B. & P. N. R. 92, 2 Leach C. C. 938.

11. Weight and sufficiency of evidence see Criminal Law, 12 Cyc. 485; Evidence, 17 Cyc. 753.

12. State *v.* Thompson, 19 Iowa 299.
Corroboration in Canada.— By statute, in Canada, the evidence of any person supposed to be interested in respect of any instrument or other matter given in evidence on a trial for forgery must be corroborated (Reg. *v.* Rhodes, 22 Ont. 480; Reg. *v.* Selby, 16 Ont. 255; Reg. *v.* McDonald, 31 U. C. Q. B. 337); and evidence is not sufficient in the absence of such corroboration (Reg. *v.* McBride, 26 Ont. 639; Reg. *v.* Giles, 6 U. C. C. P. 84). The evidence of a person who is not interested at the time of the trial needs no corroboration, although he may have previously possessed some interest. Reg. *v.* Hagerman, 15 Ont. 598. See Criminal Law, 12 Cyc. 483 *et seq.*

13. *Ex p.* Brandau, 26 Fla. 142, 7 So. 528; Powell *v.* Com., 9 S. W. 245, 10 Ky. L. Rep.

forged,[14] or that some of the signatures are not genuine,[15] although the entire instrument has been alleged to be forged. Such falsity is shown by evidence that the person whose name is signed did not make or authorize the signature;[16] that such person could not write,[17] or that he was absent[18] or dead[19] at the date of the execution of the instrument. If there be more than one person bearing the name signed, and all but one testify that they do not know defendant, and that one testifies that he knows defendant, but never signed or authorized his signature to the instrument, it is sufficient.[20] That the instrument is forged is sufficiently shown by evidence contradicting its statements,[21] by the fact that a blank used was not in existence at its date,[22] that the signature had been traced from another,[23] and that defendant, after confessing to the forgery, had in his possession at the time of his arrest all the material for making such an instrument.[24] Where it is shown that a deed was actually executed twenty-seven years before, and the certificates of acknowledgment and authentication of the one offered in evidence are admitted to be genuine, evidence that a witness had signed by mark, which did not appear on the deed offered, is not sufficient to prove that it is a forgery;[25] nor is the probate of a will conclusive evidence of its validity.[26] A claim by defendant that he did not know who signed the maker's name to a note is not a concession that it is a forgery.[27]

b. Fictitious Parties to Instrument. Proof that no person bearing the name signed to a check has any right to draw on the party to whom it is directed is *prima facie* evidence that the name is fictitious;[28] and testimony by a person largely acquainted in the locality where defendant represents the maker of the instrument to live that he knows of no such person sustains a conviction, defendant offering no proof of the existence of such person;[29] so where a bill of exchange was addressed to a certain person, living at a designated town, and had been apparently accepted by him, and a person of the name and place designated testifies that the acceptance is not his, and that he has made personal inquiries and consulted a directory without being able to discover any other person of that name in the place designated, this is evidence for the jury that the name in the acceptance is fictitious.[30]

3. Making of False Instrument. That defendant made the instrument alleged to be forged need not be proved by eye-witnesses, but may be inferred from facts and circumstances.[31] The person whose signature is forged is not an indispensable

329; Wilson *v.* State, (Miss. 1892) 12 So. 332.

14. State *v.* Givens, 5 Ala. 747.

15. Duffin *v.* People, 107 Ill. 113, 47 Am. Rep. 431; People *v.* Rathbun, 21 Wend. (N. Y.) 509; State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; State *v.* Davis, 69 N. C. 313.

16. People *v.* Laird, 118 Cal. 291, 50 Pac. 431; Schrœder *v.* Harvey, 75 Ill. 638; Garrett *v.* Gonter, 42 Pa. St. 143; Williams *v.* State, (Tex. Cr. App. 1895) 32 S. W. 532.

17. Walker *v.* Logan, 75 Ga. 759.

18. Garrett *v.* Gonter, 42 Pa. St. 143.

19. Henderson *v.* State, 14 Tex. 503.

20. People *v.* Lundin, 120 Cal. 308, 52 Pac. 807. And see People *v.* McGlade, 139 Cal. 66, 72 Pac. 600, holding that where an address followed the signature to a demand on a city treasury for street labor, and there was some evidence that a person bearing the name signed had once lived at such address, but could not be found, and it appeared that he had never done any street work for the city, and the prosecution produced a person of the same name who had worked in such department at the time mentioned in the instrument, and who testified that he had not signed nor authorized the signature to the instrument, the falsity of the instrument is sufficiently proved. People *v.* McGlade, 139 Cal. 66, 72 Pac. 600.

21. Com. *v.* Stow, 1 Mass. 54; Day *v.* Cole, 65 Mich. 129, 31 N. W. 823.

22. Ryan *v.* Rockford Ins. Co., 85 Wis. 573, 55 N. W. 1025.

23. Day *v.* Cole, 65 Mich. 129, 31 N. W. 823.

24. Dunn *v.* Miller, 96 Mo. 324, 9 S. W. 640.

25. Hutcheson *v.* Meazell, 64 Tex. 604.

26. Rex *v.* Gibson, R. & R. 254; Rex *v.* Buttery, R. & R. 254.

27. People *v.* Schinck, 75 Mich. 592, 42 N. W. 1008.

28. State *v.* Allen, 116 Mo. 548, 22 S. W. 792; Rex *v.* Backler, 5 C. & P. 118, 24 E. C. L. 482.

29. State *v.* Allen, 116 Mo. 548, 22 S. W. 792.

30. Reg. *v.* White, 2 F. & F. 554.

31. State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836; State *v.* Gullette, 121 Mo. 447, 26 S. W. 354.

witness;[32] nor need the subscribing witnesses be produced.[33] Neither is it necessary in order to identify an instrument to produce all the persons through whose hands it has passed.[34] It is not indispensable to show that defendant was at some time in possession of the paper,[35] or that it is in his handwriting.[36] However, the guilt of defendant is established if the signature is proved to be in his handwriting.[37] The fact that defendant had received the fruits of a forged instrument, while not itself sufficient proof that the instrument was forged by defendant,[38] may when taken in conjunction with other circumstances in evidence be sufficient to warrant a conviction of defendant for forgery.[39] Possession of a forged instrument by defendant is strong evidence that he forged it or caused it to be forged.[40] Where defendant has represented himself as being the person whose signature is forged, his conviction of forgery is warranted;[41] so, where he has made other misstatements, and his actions in connection with the forged instrument are suspicious[42] or he has endeavored to afterward destroy it.[43] His admissions with reference to the forgery may show his connection therewith,[44] and where he is charged with

32. Anson *v.* People, 148 Ill. 494, 35 N. E. 145; Anonymous, R. & R. 281.

33. Simmons *v.* State, 7 Ohio 116.

Where the evidence whether a signature is forged is conflicting, and the names of witnesses appear on the instrument, which would not be valid without witnesses, such witnesses must be produced, if possible, in order to make out a case against defendant. People *v.* Swetland, 77 Mich. 53, 43 N. W. 779.

34. Commonwealth Bank *v.* Haldeman, 1 Penr. & W. (Pa.) 161.

35. Richie *v.* Com., 70 S. W. 629, 24 Ky. L. Rep. 1077.

36. Holdsworth *v.* Com., 6 Ky. L. Rep. 591.

37. Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370.

Forgery of acceptance.— If a bill is shown to the purported accepter thereof, and he declares it to be a good bill, it is sufficient proof that he wrote the acceptance. Hevey's Case, 2 East P. C. 856, 1 Leach C. C. 229, R. & R. 407 note.

Sufficiency of expert testimony.— Where expert testimony is all that is offered to prove that the handwriting is that of defendant, it must be very positive in order to sustain a conviction. People *v.* Lapique, 136 Cal. 503, 69 Pac. 226; People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597.

38. U. S. *v.* Brooks, 3 MacArthur (D. C.) 315.

39. Curtis *v.* State, 118 Ala. 125, 24 So. 111; Womble *v.* State, 107 Ga. 666, 33 S. E. 630; Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Allgood *v.* State, 87 Ga. 668, 13 S. E. 569; Anson *v.* People, 148 Ill. 494, 35 N. E. 145; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; State *v.* Lane, 80 N. C. 407.

Illustration of rule.— Proof of uttering and receiving money on a forged instrument taken in connection with evidence that defendant gave a false account of his connection with the transaction and that shortly before money was paid on the forged instrument he was seen inspecting printed blanks exactly like that on which the forged instrument was made out is sufficient to sustain a verdict against defendant of forging as well as uttering. Shope *v.* State, 106 Ga. 226, 32 S. E. 140.

40. Com. *v.* Talbot, 2 Allen (Mass.) 161; State *v.* Rucker, 93 Mo. 88, 5 S. W. 609; Reg. *v.* James, 4 Cox C. C. 90.

41. People *v.* Sharp, 53 Mich. 523, 19 N. W. 168; State *v.* Vineyard, 16 Mont. 138, 40 Pac. 173.

42. *Alabama.*— Gooden *v.* State, 55 Ala. 178.

California.— People *v.* King, 125 Cal. 369, 58 Pac. 19.

Georgia.— Shope *v.* State, 106 Ga. 226, 32 S. E. 140; Lascelles *v.* State, 90 Ga. 347, 16 S. E. 945, 35 Am. St. Rep. 216.

Illinois.— Howell *v.* People, 178 Ill. 176, 52 N. E. 873; Anson *v.* People, 148 Ill. 494, 35 N. E. 145.

Michigan.— People *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

Missouri.— State *v.* Gullette, 121 Mo. 447, 26 S. W. 354; State *v.* Rowlen, 114 Mo. 626, 21 S. W. 729.

North Carolina.— State *v.* Matlock, 119 N. C. 806, 25 S. E. 817.

Pennsylvania.— Com. *v.* Stone, 6 Lack. Leg. N. 241.

Texas.— Grooms *v.* State, 40 Tex. Cr. 319, 50 S. W. 370; Caston *v.* State, 31 Tex. Cr. 304, 20 S. W. 585; Barnwell *v.* State, 1 Tex. App. 745.

See 23 Cent. Dig. tit. "Forgery," § 117½.

43. State *v.* Matlock, 119 N. C. 806, 25 S. E. 817; Com. *v.* Stone, 6 Lack. Leg. N. (Pa.) 241.

44. Langdon *v.* People, 133 Ill. 382, 24 N. E. 874; Com. *v.* Stone, 6 Lack. Leg. N. (Pa.) 241; Smith *v.* State, (Tex. Cr. App. 1895) 32 S. W. 696.

Admission insufficient to connect defendant with forgery.— In the admission by defendant made long after the crime that he knew who committed the forgery in question and was informed as to some of the plans and devices used by the accomplice to deceive the bank, and that money had been produced from the bank on a forged draft, there is no fact confessed from which it could be fairly inferred that defendant did any act connected with the transaction or that he

having forged a check made payable to his order and there is evidence that the name of the drawer was that of a fictitious person the jury are authorized to infer that he forged it.[45] On the other hand the circumstance that articles of merchandise or coin similar to those obtained by means of the forgery were found several months later in the possession of one charged with the forgery is not sufficient to sustain a verdict of guilty.[46]

4. Intent to Defraud — a. In General. Evidence that the advantage which the instrument if genuine would have given has been obtained,[47] or that the injury which such an instrument could inflict has been accomplished,[48] sufficiently shows an intent to defraud. So evidence that defendant believed he could procure by means of his act that which he could not otherwise procure is ample.[49] Signing a fictitious name,[50] or the impersonation of another,[51] shows guilty intent and justifies a conviction.

b. A Particular Person. If the indictment charges an intent to defraud a particular person it must be proved;[52] but if an intent to defraud generally is charged, it is sufficient to show an intent to defraud any one.[53] An averment of an intent to defraud one person is sustained by proof of an intent to defraud a firm of which he is a member;[54] and a charge of an intent to defraud several is sustained by proof of an intent to cheat any one of them.[55] In order to find the intent to defraud a particular person it is not necessary that there should be evidence to show that the accused had that particular person in contemplation at the time of the forgery, if its effect would be to defraud him.[56] As everything which is the natural consequence of the act must be taken to be the intention of the prisoner, it is a consequence that he intended to defraud the person to whom he uttered,[57] or attempted to utter,[58] the instrument, and also the person whose name is used,[59] although there was no probability of his act being successful.[60] Where the name used is fictitious, the intent to defraud the person to whom the instrument was uttered can be inferred.[61] The oath of the person to whom the instrument was uttered that he believed the prisoner had no intent to defraud him will not repel the presumption.[62] The person to whom an instrument is passed by means of a forged indorsement cannot be said not to be defrauded because his agent saw defendant write the indorsement, and the agent knew that defendant had no interest in it, if the agent did not know whose names were written upon it.[63] On a prosecution for the forgery of a will, the indictment charging an intent to defraud a person or persons unknown, such intent is not made out

was aware that the crime of making and uttering a forged draft was meditated by any one. People *v.* Elliott, 8 N. Y. St. 223.

45. Williams *v.* State, 126 Ala. 50, 28 So. 632.

46. People *v.* Creegan, 121 Cal. 554, 53 Pac. 1082; McCombs *v.* State, 109 Ga. 496, 34 S. E. 1021.

47. State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53; Chahoon *v.* Com., 20 Gratt. (Va.) 733; Reg. *v.* Craig, 7 U. C. C. P. 239.

48. People *v.* Stork, 133 Cal. 371, 65 Pac. 822.

49. Reg. *v.* Geach, 9 C. & P. 499, 38 E. C. L. 294.

50. State *v.* Patterson, 116 Mo. 505, 22 S. W. 696; Johnson *v.* State, 35 Tex. Cr. 271, 33 S. W. 231.

51. State *v.* Patterson, 116 Mo. 505, 22 S. W. 696.

52. Colvin *v.* State, 11 Ind. 361; Com. *v.* Whitney, Thach. Cr. Cas. (Mass.) 588.

53. State *v.* Eaton, 166 Mo. 575, 66 S. W. 539; State *v.* Cleavland, 6 Nev. 181; State *v.* Cross, 101 N. C. 770, 7 S. E. 715, 9 Am. St. Rep. 53.

54. State *v.* Hastings, 53 N. H. 452.

55. McDonnell *v.* State, 58 Ark. 242, 24 S. W. 105.

56. U. S. *v.* Long, 30 Fed. 678.

57. Timmons *v.* State, 80 Ga. 216, 4 S. E. 766; Sampson *v.* People, 188 Ill. 592, 59 N. E. 427; Reg. *v.* Todd, 1 Cox C. C. 57; Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903; Rex *v.* Martin, 7 C. & P. 549, 1 Moody C. C. 483, 32 E. C. L. 752; Rex *v.* Shepherd, 2 East P. C. 967, 1 Leach C. C. 226, R. & R. 169.

58. Rex *v.* Crowther, 5 C. & P. 316, 24 E. C. L. 583.

59. Reg. *v.* Todd, 1 Cox C. C. 57; Reg. *v.* Cooke, 8 C. & P. 582, 34 E. C. L. 903.

60. Rex *v.* Crowther, 5 C. & P. 316, 24 E. C. L. 583.

61. Williams *v.* State, 126 Ala. 50, 28 So. 632.

62. Rex *v.* Shepherd, 2 East P. C. 967, 1 Leach C. C. 226, R. & R. 169.

63. State *v.* Childers, 32 Oreg. 119, 49 Pac. 801.

where the prosecution fails to show that there is any person in existence who might be defrauded.[64]

5. Efficacy of Instrument to Defraud. The instrument must appear to be a valid one, and if the evidence upon this point is vague it is not sufficient.[65] A register of a corporation is sufficient evidence that a person whose name is forged is a shareholder;[66] the muster-book of the navy office is good evidence to prove the identity of a supposed testator;[67] and an admission by defendant that he taught school in a certain year, which was prior to the expiration of a teacher's certificate, sufficiently discloses that the alteration of the certificate was made while it was in force.[68]

6. Authority of Defendant to Make Instrument. Authority to sign the name of another is sufficiently shown where such other person was informed at the time and did not repudiate the act;[69] or when on previous occasions the party whose name was used had paid the instrument without remonstrance.[70] Evidence that the party whose name is used does not recollect whether or not he gave authority will not support a conviction;[71] but if such party positively denies authority a verdict of guilty will not be set aside,[72] unless it is against the clear weight of evidence.[73] Authority in defendant is not shown by a belief that the person whose name is used will ratify the act,[74] nor by evidence showing the amount of attention given by defendant as agent to his principal's affairs,[75] nor by proving authority to have been given to others to make similar instruments,[76] nor by evidence that when defendant had previously made a similar alteration in a note other than the one alleged to be forged the party liable thereon had caused the note to be withdrawn as soon as he discovered the alteration and had paid no attention to notice of protest.[77] So evidence of agency for some purposes does not show authority to sign the principal's name to notes.[78] Nor does the evidence that an agent is entitled to compensation for his services, which his principal directs be obtained from a bank, show authority in such agent to sign his principal's name to a note;[79] nor does it avail defendant to show authority from one person, where he signed the names of two persons, and there is no question as to lack of authority from the other.[80]

7. Corporate Existence of Party Defrauded. It is not necessary to show that a corporation is one *de jure*; it is sufficient if it appears to be acting as

64. Reg. *v.* Tufts, 3 Cox C. C. 160, 1 Den. C. C. 319, 18 L. J. M. C. 36.

65. State *v.* Imboden, 157 Mo. 83, 57 S. W. 536.

66. Reg. *v.* Nash, 2 Den. C. C. 448, 16 Jur. 553, 21 L. J. M. C. 147.

67. Rex *v.* Fitzgerald, 2 East P. C. 953, 1 Leach C. C. 20; Rex *v.* Rhodes, 1 Leach C. C. 29.

68. The alteration consisted in changing "Mrs." to "Mr." before the name of the licensee, and the word "two" to "four" by which the number of years for which the certificate was given was increased. An admission by the husband that he taught during the original two years indicated that the alteration must have been made while the certificate was valid. Dudley *v.* State, (Tex. Cr. App. 1900) 58 S. W. 111.

69. Reg. *v.* Smith, 3 F. & F. 504; Reg. *v.* Beardsall, 1 F. & F. 529.

70. Reg. *v.* Beard, 8 C. & P. 143, 34 E. C. L. 656.

71. Roberts *v.* State, (Tex. Cr. App. 1899) 53 S. W. 864.

72. Aholtz *v.* People, 121 Ill. 560, 13 N. E. 524. On trial of an indictment charging forgery in engraving a plate for the printing of notes of a foreign bank, testimony of the resident agent of the bank to the effect that he had authorized no one except a certain company to do the engraving for the ba k and proof that such company retained in its possession the genuine plates engraved by them was sufficient to establish that defendant had no authority to engrave the plate. People *v.* D'Argencour, 32 Hun (N. Y.) 178 [*affirmed* in 95 N. Y. 624, 2 N. Y. Cr. 267].

73. State *v.* White, 98 Iowa 346, 67 N. W. 267.

74. People *v.* Weaver, 81 N. Y. App. Div. 567, 81 N. Y. Suppl. 519, 17 N. Y. Cr. 291.

75. State *v.* Rivers, 124 Iowa 17, 98 N. W. 785.

76. Colter *v.* State, 41 Tex. Cr. 78, 51 S. W. 945.

77. Towles *v.* U. S., 19 App. Cas. (D. C.) 471.

78. State *v.* Rivers, 124 Iowa 17, 98 N. W. 785.

79. State *v.* Rivers, 124 Iowa 17, 98 N. W. 785.

80. People *v.* Leyshon, 108 Cal. 440, 41 Pac. 480.

such.[81] Where the forgery consisted in the alteration of the findings in a civil suit, the pleadings in which assumed that the adverse party was a corporation, and the trial proceeded upon that theory, defendant, on the trial for forgery, cannot complain that the evidence failed to show the existence of any person, partnership, or corporation capable of being defrauded.[82]

8. ALTERATION OF EXISTING INSTRUMENT. Evidence that the instrument went into defendant's hands in its original condition and left his hands in its changed form is sufficient to show that he either altered it or caused it to be done;[83] but if it is not shown that it was altered when it left his hands evidence that he participated in the benefits derived from such alteration is sufficient to connect him with it.[84] So where defendant admits that all the writing is his own, evidence that a clause was not in the instrument when executed will justify a verdict;[85] but a verdict will be set aside which is against the preponderance of evidence.[86]

9. UTTERING FALSE INSTRUMENT — a. In General. Proof that defendant committed any of the acts which constitute uttering is sufficient,[87] especially if he has made false statements in regard to the instrument;[88] but proof merely that the prisoner had received the benefits derived from the uttering is not sufficient proof that he uttered it,[89] even though it be shown that he forged it.[90]

b. Knowledge of Falsity of Instrument. Misrepresentations made by defendant in uttering the instrument is sufficient evidence of his knowledge of its falsity;[91] but a conviction cannot be sustained where such knowledge is not shown.[92]

10. POSSESSION OF FALSE INSTRUMENT. On a prosecution for having in one's possession a forged writing with intent to fraudulently utter the same a conviction is unauthorized in the absence of evidence identifying the writing set out in the writing with the one found in defendant's possession,[93] and it must also be shown that defendant knew it to be a forged instrument.[94]

11. VENUE. Evidence of venue need not exclude every reasonable doubt, but it is sufficient if it can reasonably be inferred that the offense was committed within the jurisdiction alleged.[95] If the instrument purports to have been executed in a certain county, and defendant was there at that time, it is sufficient evidence of its execution therein;[96] and possession of a forged instrument in the county where the forgery is charged to have been committed is *prima facie* evidence that the forgery was committed in that county.[97] So in the absence of other proof, evidence that the instrument was uttered in a certain county is strong proof that it was forged there.[98] If a genuine instrument has

81. People *v.* Frank, 28 Cal. 507.

82. State *v.* Kidd, 89 Iowa 54, 56 N. W. 263.

83. Darby *v.* State, 41 Fla. 274, 26 So. 315; Com. *v.* Hide, 94 Ky. 517, 23 S. W. 195, 15 Ky. L. Rep. 264; State *v.* Burd, 115 Mo. 405, 22 S. W. 377; Mason *v.* State, 32 Tex. Cr. 95, 22 S. W. 144, 408.

84. People *v.* Ryland, 97 N. Y. 126 [*affirming* 28 Hun 568, 1 N. Y. Cr. 123].

85. State *v.* Adamson, 43 Minn. 196, 45 N. W. 152.

86. Sargent *v.* People, 64 Ill. 327.

87. State *v.* Caudle, 174 Mo. 388, 74 S. W. 621; Stroggins *v.* State, (Tex. Cr. App. 1902) 69 S. W. 510.

88. People *v.* Dane, 79 Mich. 361, 44 N. W. 617.

89. Reg. *v.* Johnson, 6 Cox C. C. 18.

90. Reg. *v.* Lines, 1 Cox C. C. 353, 2 Cox C. C. 56.

91. State *v.* Beasley, 84 Iowa 83, 50 N. W. 570; Rex *v.* Shepherd. 2 East P. C. 967, 1 Leach C. C. 226, R. & R. 169.

92. Garza *v.* State, 38 Tex. Cr. 317, 42 S. W. 563; Leeper *v.* State, 27 Tex. App. 694, 11 S. W. 644; Rex *v.* Watts, 3 B. & B. 197, 6 Moore C. P. 442, 9 Price 620, R. & R. 436, 7 E. C. L. 682.

93. Eldridge *v.* State, 76 Miss. 353, 24 So. 313.

94. State *v.* Hathhorn, 166 Mo. 229, 65 S. W. 756.

95. Smith *v.* State, 29 Fla. 408, 10 So. 894; Langdon *v.* People, 133 Ill. 382, 24 N. E. 874.

96. Smith *v.* State, 29 Fla. 408, 10 So. 894; State *v.* Blanchard, 74 Iowa 628, 38 N. W. 519; State *v.* Thompson, 19 Iowa 299; State *v.* Morgan, 19 N. C. 348; State *v.* Jones, 1 McMull. (S. C.) 236, 36 Am. Dec. 257.

97. Johnson *v.* State, 35 Ala. 370; Spencer *v.* Com., 2 Leigh (Va.) 751; State *v.* Poindexter, 23 W. Va. 805.

98. Bland *v.* People, 4 Ill. 364; State *v.* Morgan, 35 La. Ann. 293; State *v.* Yerger, 86 Mo. 33.

been altered, the place where it is first known to be altered, is *prima facie* the place where such alteration was made, although it was originally issued elsewhere;[99] and if the uttering was by mail the postmark is evidence of the place of uttering.[1]

XVI. TRIAL.

A. Conduct in General. Where three are jointly charged with procuring others to utter a forged will, the only evidence being of separate acts, at separate times and places, and one pleads guilty at the end of the evidence, the other two may notwithstanding be convicted.[2] Where several counts charge the forging and uttering of the same indorsement, which is set out in each count, it is proper to refuse to require the prosecutor to elect on which count he will proceed;[3] and on a count for uttering several forged receipts, the court will not put the prosecutor to his election on which receipt to proceed if all were uttered at one time.[4] If election be made to proceed on an indictment for a lesser offense, which is proved, it is not merged into a larger offense for which an indictment had also been found, although facts sufficient to support it were made out.[5] In any event the prosecutor will not be pressed to elect what particular fact he means to rely upon as an uttering, till the case for the prosecution is closed.[6]

B. Questions of Law and Fact. What is or what is not a false making is a question of law;[7] so is the interpretation of the writing.[8] The jury must determine whether there has been a forgery,[9] an alteration,[10] or an uttering,[11] or an intent to defraud;[12] likewise they must decide to whom the instrument has been passed;[13] whether it was so imperfect as not to deceive a man of ordinary prudence;[14] and whether an alteration was made with authority.[15] In case of uncertainty as to whether the paper offered in evidence is the one described in the indictment it may be submitted to the jury.[16] It is also for the jury to say whether the whole instrument was produced by the same hand that wrote the signature;[17] whether a signature was intended as an approval of an account as alleged;[18] whom defendant intended to represent by a signature;[19] whether

Evidence insufficient to show place of execution.— Where a deed purports to have been made in one county, representing the grantor as residing in another county, and the grantee, defendant, in a third, evidence that it was recorded in a fourth county is not sufficient to authorize a finding that it was forged in the latter county. Henderson *v.* State, 14 Tex. 503.

99. U. S. *v.* Britton, 24 Fed. Cas. No. 14,650, 2 Mason 464.

1. Rex *v.* Perkin, 2 Lewin C. C. 150.

2. Reg. *v.* Barber, 1 C. & K. 442, 47 E. C. L. 442.

3. People *v.* Kemp, 76 Mich. 410, 43 N. W. 439.

4. Thomas' Case, 2 East P. C. 934, 2 Leach C. C. 877.

5. Anonymous, R. & R. 281.

6. Rex *v.* Hart, 7 C. & P. 652, 1 Moody C. C. 486, 32 E. C. L. 805.

7. Reg. *v.* Bateman, 1 Cox C. C. 186; Rex *v.* Hart, 7 C. & P. 652, 1 Moody C. C. 486, 32 E. C. L. 805.

8. Lampkin *v.* State, 105 Ala. 1, 16 So. 575; Dotson *v.* State, 88 Ala. 208, 7 So. 259; State *v.* Anderson, 30 La. Ann. 557; Williams *v.* State, (Tex. Cr. App. 1895) 32 S. W. 544; Overly *v.* State, 34 Tex. Cr. 500, 31 S. W. 377; Burks *v.* State, 24 Tex. App. 326, 332.

9. Mosher *v.* State, 14 Ind. 261; State *v.* Nichols, 38 Iowa 110; Wiggins *v.* State, 1 Lea (Tenn.) 738.

10. McDonnell *v.* State, 58 Ark. 242, 24 S. W. 105; State *v.* Flye, 26 Me. 312.

11. Reg. *v.* McQuin, 1 Cox C. C. 34.

12. *Delaware.*— State *v.* Pratt, 3 Pennew. 264, 51 Atl. 604.

Illinois.— Kotter *v.* People, 150 Ill. 441, 37 N. E. 932.

New York.— Phelps *v.* People, 6 Hun 428 [*affirmed* in 72 N. Y. 365].

Texas.— Knowles *v.* State, (Cr. App. 1903) 74 S. W. 767.

England.— Rex *v.* Crocker, 2 B. & P. N. R. 87, 2 Leach C. C. 987, R. & R. 97.

13. Huntly *v.* State, (Tex. Cr. App. 1896) 34 S. W. 923.

14. State *v.* Warren, 109 Mo. 430, 19 S. W. 191, 32 Am. St. Rep. 681.

15. Towles *v.* U. S., 19 App. Cas. (D. C.) 471.

16. Baysinger *v.* State, 77 Ala. 63, 54 Am. Rep. 46; Turpin *v.* State, 19 Ohio St. 540; U. S. *v.* Hinman, 26 Fed. Cas. No. 15,370, Baldw. 292; Rex *v.* Hunter, 4 C. & P. 128, 19 E. C. L. 439.

17. State *v.* Scott, 45 Mo. 302.

18. Hennessy *v.* State, 23 Tex. App. 340, 5 S. W. 215.

19. Bench *v.* State, 63 Ark. 488, 39 S. W. 360.

words added to a receipt altered its effect;[20] whether an instrument was used to draw money;[21] and whether defendant tendered handwriting as his own or another's.[22]

C. Instructions — 1. In General. An instruction embodying a general statement of the facts necessary to constitute the offense is proper.[23] Where there are counts for forging, uttering, and having in possession, the court may submit the first count in his charge, omitting the remaining ones;[24] or if there is but one count for forgery of an instrument, which adds that defendant uttered it, he is not prejudiced by the alternative form of an instruction to find him guilty if it was believed that he forged "or uttered" it, where the evidence is sufficient to support a conviction for forgery, and the punishment for the separate offenses of uttering and forging are the same.[25] If the second count charges the uttering, and the third, possession with intent to pass, giving an instruction that if the jury find that defendant had possession with intent to pass they should find him guilty under the second count is reversible error.[26]

2. Defining the Offense. A definition of the crime of forgery in the language of the statute is correct;[27] and unless defendant asks a specific instruction it is not error to refer the jury to the indictment for a description of the crime alleged,[28] or give the ingredients of the offense applicable to the testimony.[29] Legal expressions must be explained,[30] but it is unnecessary to define words which are used in their ordinary sense.[31]

3. Explaining Meaning of the Instrument. Where words in the instrument charged to have been forged are awkwardly, unskilfully, or designedly inserted, it is the duty of the court to instruct the jury how it should be read;[32] but if it is ambiguous, it is proper to charge that if the instrument is other than that set forth in the indictment the jury must acquit.[33]

4. As to Making or Assisting in Making of False Instrument. If forgery and uttering are charged in a single count, an instruction that defendant could be convicted regardless of who made the instrument is erroneous;[34] so is an instruction that if defendant believed the instrument to be genuine he was not guilty if he is charged with the forgery and not with uttering it.[35] However, it is not improper to charge that defendant is guilty if he forged any part of the instrument;[36] nor is an instruction improper which permits the jury to consider another forgery in determining whether the instrument in question was also forged.[37] Where the time of the forgery becomes important, a charge on that point should be given.[38] An instruction that the jury must acquit unless they find that defendant forged the instrument, but ignoring the principle that he is alike guilty if he aids or abets in committing the act, is properly refused;[39] but an erroneous instruction upon this point may be cured by other instructions.[40]

5. As to Intent to Defraud. An instruction is erroneous which omits the

20. Reg. *v.* Milton, 10 Cox C. C. 364.
21. State *v.* Jefferson, 39 La. Ann. 331, 1 So. 669.
22. Reg. *v.* Inder, 2 C. & K. 635, 1 Den. C. C. 325, 61 E. C. L. 635.
23. People *v.* Phillips, 70 Cal. 61, 11 Pac. 493; Loehr *v.* People, 132 Ill. 504, 24 N. E. 68.
24. Adkins *v.* State, 41 Tex. Cr. 577, 56 S. W. 63.
25. Rawlins *v.* Com., 7 Ky. L. Rep. 595.
26. State *v.* Turner, 148 Mo. 209, 49 S. W. 1003.
27. People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50; Dudley *v.* State, (Tex. Cr. App. 1900) 58 S. W. 111.
28. Parker *v.* People, 97 Ill. 32.
29. Smith *v.* State, (Tex. Cr. App. 1895) 32 S. W. 696.
30. Ham *v.* State, 4 Tex. App. 645.
31. Peterson *v.* State, 25 Tex. App. 70, 7 S. W. 530.
32. Butler *v.* State, 22 Ala. 43.
33. McGarr *v.* State, 75 Ga. 155.
34. Com. *v.* Hall, 23 Pa. Super. Ct. 104.
35. State *v.* Grant, 74 Mo. 33.
36. People *v.* McGlade, 139 Cal. 66, 72 Pac. 600; Darbyshire *v.* State, (Tex. Cr. App. 1896) 38 S. W. 173.
37. State *v.* Pyscher, 179 Mo. 140, 77 S. W. 836.
38. Pitts *v.* State, 40 Tex. Cr. 667, 51 S. W. 906.
39. State *v.* Rucker, 93 Mo. 88, 5 S. W. 609.
40. People *v.* Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. Rep. 50, (1898) 51 Pac. 945.

qualification that the instrument must have been made with intent to defraud,[41] although not requested by defendant;[42] but if the jury is once informed on this point it is not necessary to repeat it in every part of the charge.[43] An instruction which presents the issue is sufficient.[44] Where other forged documents are admitted to show intent, the jury should be instructed as to the purpose of their admission;[45] but lack of evidence upon a certain point precludes giving an instruction in regard to it.[46] A charge that the word "another" includes all persons is not erroneous in not expressly excluding the alleged forger.[47]

6. As to Authority to Make Instrument. If there is any evidence to show that defendant was authorized to make an instrument alleged to have been forged by the person in whose name it was made, it is the imperative duty of the court to charge that the jury should acquit if they believe that defendant had such authority or if they entertain a reasonable doubt of such authority,[48] and it is error to charge the jury that the mere making of the forged instrument is sufficient without proving that there was no lawful authority.[49]

7. As to Uttering of False Instrument. Instructions asked by defendant, on points which are covered by those already given,[50] or upon which there is no evidence,[51] are properly refused; and error in rulings on a question whether the forgery was executed by defendant or by a third person is harmless where the conviction was for uttering and not for forgery.[52] It is error for the court to omit from its charge the question of scienter;[53] or if the instruction gives an impression that the burden of showing lack of knowledge was on defendant;[54] but where the offense charged could not have been committed without such knowledge, an express instruction upon this point is not necessary.[55] If defendant is charged with uttering the instrument by different acts, it is error to restrict knowledge of its falsity to only one of such acts.[56]

8. As to Possession of False Instrument. On a trial for unlawfully having in possession, with intent to pass, a forged check purporting to be signed by a fictitious person, an instruction that the state must show that the signature is fictitious is properly refused, where the instruction as given charged that the

41. Agee *v.* State, 113 Ala. 52, 21 So. 207; Claiborne *v.* State, 51 Ark. 88, 9 S. W. 851; People *v.* Wiman, 148 N. Y. 29, 42 N. E. 408 [*affirming* 85 Hun 320, 32 N. Y. Suppl. 1037].

Harmless error.— Under Pen. Code, art. 723, as amended by Laws (1897), p. 17, providing that no conviction shall be reversed unless the error was prejudicial to defendant, an instruction that it is sufficient to constitute forgery that some person might be injured or defrauded thereby is harmless error, where it is proved that defendant raised a check with the evident intent to defraud the bank or the drawer. Lucas *v.* State, 39 Tex. Cr. 48, 44 S. W. 825.

42. State *v.* Wolf, 122 N. C. 1079, 29 S. E. 841.

43. Plemons *v.* State, 44 Tex. Cr. 555, 72 S. W. 854.

44. Wolf *v.* State, (Tex. Cr. App. 1899) 53 S. W. 108.

45. State *v.* Prins, 113 Iowa 72, 84 N. W. 980.

46. State *v.* Poindexter, 23 W. Va. 805. And see Noakes *v.* People, 25 N. Y. 380 [*affirming* 5 Park. Cr. 291], holding that a refusal to instruct the jury to disregard the charge that the prisoner intended to defraud persons unknown for variance from the evidence is right when there is no evidence on the trial as to what the grand jury knew on the subject.

47. Frazier *v.* State, (Tex. Cr. App. 1901) 64 S. W. 934.

48. Williams *v.* State, 24 Tex. App. 342, 6 S. W. 531. And see People *v.* Loew, 19 N. Y. Suppl. 360; McCay *v.* State, 32 Tex. Cr. 233, 22 S. W. 974.

Charging special statutory provision.— If there is any evidence that defendant believed that he was acting under authority in making the alleged forged instrument the court should charge the statute which provides that when the person making or altering the instrument acts under authority which he has good reason to believe and does believe would be sufficient he is not guilty of forgery, although the authority be in fact insufficient or void. Sweet *v.* State, (Tex. App. 1889) 12 S. W. 590.

49. Shanks *v.* State, 25 Tex. Suppl. 326.

50. Stockslager *v.* U. S., 116 Fed. 590, 54 C. C. A. 46.

51. State *v.* Bowman, 94 Iowa 228, 62 N. W. 759.

52. People *v.* Hallen, 48 N. Y. App. Div. 39, 62 N. Y. Suppl. 573, 14 N. Y. Cr. 256 [*affirmed* in 164 N. Y. 565, 58 N. E. 1090].

53. Com. *v.* Hall, 23 Pa. Super. Ct. 104; State *v.* Hill, 30 Wis. 416.

54. Parker *v.* People, 97 Ill. 32.

55. State *v.* Williams, 66 Iowa 573, 24 N. W. 52.

56. Chahoon *v.* Com., 20 Gratt. (Va.) 733.

jury must find beyond a reasonable doubt that defendant knew it to be forged;[57] but an instruction which ignores knowledge of the falsity of the instrument is insufficient.[58]

D. Verdict. If defendant is charged with forgery and uttering, he may be convicted for the whole, or for but one of such acts,[59] but it is not proper to base a separate conviction on each count;[60] and if a verdict finds the accused guilty as to some of the counts, it is equivalent to a verdict of not guilty as to the others.[61] If one count is defective a verdict based upon a count which is good will be sustained,[62] but it will be set aside if it is impossible to say whether or not it is based upon a part of the indictment which is defective,[63] or if it is based upon a count for which no testimony was offered.[64] However, a judgment of conviction will not be reversed because the instructions and verdict erroneously designated the offense as forgery, if the indictment charged and the proof showed uttering, and defendant has not been prejudiced.[65] If the second count charges forgery, a verdict "on the second count" of uttering is invalid;[66] but if uttering is, by statute, made forgery, a verdict finding defendant guilty of uttering is sufficient to sustain a conviction for forgery.[67] The verdict should find that defendant, if charged with possession of a forged instrument, had knowledge that it was forged;[68] also that defendant passed it with intent to defraud,[69] although it need not specify the person intended to be defrauded;[70] nor need it recite that defendant acted knowingly, wilfully, and fraudulently;[71] nor that the instrument was apparently valid;[72] nor specify the degree, if he is found guilty as charged in the indictment;[73] nor, if the offense is specified, is it necessary to add, "as charged in the indictment";[74] likewise, it is not necessary to find that defendant received the instrument in good faith and for a valuable consideration, although essential elements of the offense charged.[75]

E. Sentence and Punishment. At common law one convicted of forgery was subject to corporal punishment;[76] but imprisonment is now very generally substituted by statute.[77] Making or altering an instrument not named in the statute is a misdemeanor at common law, but not punishable by confinement in the state prison.[78] If an indictment concludes *contra formam statuti*, it is proper to sentence the prisoner in accordance with the statutory punishment;[79] but if the offense is not punishable under the statute, but is at common law, the conclusion, "against the statute," may be rejected as surplusage.[80] If there are two counts, one charging forgery, and the other uttering, and a verdict of guilty is rendered on each, and it appears that both charges relate to the same instrument, a separate sentence on each is erroneous.[81] If forgery and uttering are by statute

57. State *v.* Allen, 116 Mo. 548, 22 S. W. 792.

58. Millsaps *v.* State, 38 Tex. Cr. 570, 43 S. W. 1015.

59. People *v.* Shotwell, 27 Cal. 394.

60. Parker *v.* People, 97 Ill. 32; Crawford *v.* State, 31 Tex. Cr. 51, 19 S. W. 766.

61. Page *v.* Com., 9 Leigh (Va.) 683; State *v.* Hill, 30 Wis. 416.

62. Foute *v.* State, 15 Lea (Tenn.) 712.

63. People *v.* Mitchell, 92 Cal. 590, 28 Pac. 597, (1892) 28 Pac. 788.

64. Owen *v.* State, 34 Nebr. 392, 51 N. W. 971.

65. State *v.* Burgson, 53 Iowa 318, 5 N. W. 167.

66. Buren *v.* State, 16 Lea (Tenn.) 61; Cocke *v.* Com., 13 Gratt. (Va.) 750.

67. State *v.* Malish, 15 Mont. 506, 39 Pac. 739.

68. O'Connor *v.* State, 37 Tex. Cr. 267, 39 S. W. 368.

69. Couch *v.* State, 28 Ga. 367. A verdict of "guilty of attempting to pass the note, knowing of the forgery" is sufficient without adding "with intent to defraud." State *v.* Fuller, 1 Bay (S. C.) 245, 1 Am. Dec. 610.

70. State *v.* Leak, 80 N. C. 403.

71. Stroggins *v.* State, 43 Tex. Cr. 605, 68 N. W. 170.

72. People *v.* Badgley, 16 Wend. (N. Y.) 53.

73. Wright *v.* State, 79 Ala. 262; Anderson *v.* State, 65 Ala. 553.

74. Lawrence *v.* State, 71 Ark. 82, 71 S. W. 263.

75. Scully *v.* State, 39 Ala. 240.

76. State *v.* Williams, 86 N. C. 671.

77. People *v.* Brigham, 2 Mich. 550; State *v.* Williams, 86 N. C. 671; Drew *v.* Com., 1 Whart. (Pa.) 279.

78. State *v.* Morton, 27 Vt. 310, 65 Am. Dec. 201.

79. State *v.* Bateman, 25 N. C. 474.

80. State *v.* Lamb, 65 N. C. 419.

81. Parker *v.* People, 97 Ill. 32; *In re*

made distinct offenses, the punishment designated for one cannot be inflicted by the other;[82] but if defendant is convicted for each offense the court may apply the sentence for one.[83]

XVII. REVIEW.

Defects which might have been cured at the trial will not be considered on appeal;[84] but the reviewing court will correct an error so as to make the sentence conform with the conviction,[85] or modify a sentence so that no more punishment will be imposed than is allowable.[86] If the punishment imposed by the sentence is not an abuse of the court's discretion, it will not be reviewed.[87] Nor will the appellate court interfere with the discretion of the trial court in imposing a sentence where all the evidence which was before the trial court is not before the appellate court.[88]

FORGETFULNESS. Negligence, careless omission.[1]

FORK. One of the parts into which anything is furcated or divided; a prong; a branch of a stream, a road, etc.[2]

FORM.[3] Constitution; established method of expression or practice; fixed way of proceeding; conventional or stated scheme;[4] a shape around which an article is molded, woven, or wrapped.[5] (See ESTABLISH.)

Walsh, 37 Nebr. 454, 55 N. W. 1075; Devere *v.* State, 5 Ohio Cir. Ct. 509, 3 Ohio Cir. Dec. 249.

82. Hatch *v.* State, 8 Tex. App. 416, 34 Am. Rep. 751.

83. Lovejoy *v.* State, 40 Tex. Cr. 89, 48 S. W. 520.

84. Com. *v.* Bachop, 2 Pa. Super. Ct. 294.

85. Peterson *v.* State, 25 Tex. App. 70, 7 S. W. 530.

86. State *v.* Henry, 59 Iowa 391, 13 N. W. 343.

87. State *v.* Newton, 29 Wash. 373, 70 Pac. 31.

88. State *v.* Buck, 59 Iowa 382, 13 N. W. 342.

1. Nye *v.* Sochor, 92 Wis. 40, 45, 65 N. W. 854, 53 Am. St. Rep. 896 [*citing* Century Dict.; Hurd *v.* Hall, 12 Wis. 112, 126], where it is said: "Failure to remember, entire forgetfulness to act as duty or interest requires, is so closely allied to laches or negligence that it is difficult, if not impossible, in a case like the present, to distinguish between them."

2. Webster Int. Dict. See also Kendrick *v.* Dallum, 1 Overt. (Tenn.) 489, 493.

3. "It is to be known that there are two manner of forms, *sc. forma verbalis & forma legalis; forma verbalis* stands upon the letters and syllables of the act; *forma legalis* is *forma essentialis*, and stands upon the substance of the thing to be done, and upon the sense of the statute, *quia notitia ramorum hujus statuti non in sermonum foliis sed in rationis radice posita est.*" Beawfage's Case, 10 Coke 99*a*, 100*a* [*quoted* in Smith *v.* Allen, 1 N. J. Eq. 43, 50, 21 Am. Dec. 33].

Distinguished from "substance" in pleading see Pierson *v.* Springfield F. & M. Ins. Co., 7 Houst. (Del.) 307, 310, 31 Atl. 966, per Camegys, C. J.

Matters of form and practice see 11 Cyc. 748.

4. Webster Int. Dict.

5. Northwood *v.* Dalzell, etc., Co., 100 Fed. 98, 99, 40 C. C. A. 295.

In connection with other words the word "form" has often received judicial interpretation; as for example as used in the following phrases: "Against the 'form' of a statute" (see U. S. *v.* Smith, 27 Fed. Cas. No. 16,338, 2 Mason 143, 151); "contrary to the form, force, and effect of the statute" (see State *v.* Amidon, 58 Vt. 524, 2 Atl. 154); "defect or want of form" (see Brown *v.* Pond, 5 Fed. 31, 40); "form and effect of executions" (see Koning *v.* Bayard, 14 Fed. Cas. No. 7,924, 2 Paine 251, 259); "for matter of form" (see Meath *v.* Mississippi Levee Com'rs, 109 U. S. 268, 274, 3 S. Ct. 284, 27 L. ed. 930 [*citing* Memphis, etc., R. Co. *v.* Orr, 43 Miss. 279]); "form of action" (see Truax *v.* Parvis, 7 Houst. (Del.) 330, 334, 32 Atl. 227); "form of bonds" (see Chamberlain *v.* Anthony, 21 R. I. 331, 332, 43 Atl. 646); "form of marriage" (see Matter of Criminal Code, 27 Can. Sup. Ct. 461, 465; Matter of Criminal Code, 1 Can. Cr. Cas. 172, 173); "form of the pavement" (see Reg. *v.* Eastern Counties R. Co., 2 Q. B. 569, 578, 2 G. & D. 1, 6 Jur. 820, 11 L. J. Q. B. 178, 3 R. & Can. Cas. 22, 42 E. C. L. 811); "forms and modes of proceedings" (see Lamaster *v.* Keeler, 123 U. S. 376, 387, 8 S. Ct. 197, 31 L. ed. 238; Nudd *v.* Burrows, 91 U. S. 426, 442, 23 L. ed. 286; Wayman *v.* Southard, 10 Wheat. (U. S.) 1, 28, 6 L. ed. 253; U. S. *v.* Sturgis, 14 Fed. 810, 811; Sage *v.* Tauszky, 21 Fed. Cas. No. 12,214; Schwabacker *v.* Reilly, 21 Fed. Cas. No. 12,501, 2 Dill. 127); "forms of proceedings," etc. (see Davison *v.* Gill, 1 East 64, 72); "form the basis of the contract" (see Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 472, 2 So. 125, 59 Am. Rep. 816); "in the form following" (see Munro *v.* Alaire, 2 Cai. (N. Y.) 320, 325); "in the form prescribed" (see

FORMA DAT ESSE. A maxim meaning "Form gives being."[6]

FORMAL. Done in due form, or with solemnity; according to regular method.[7] (Formal: Defects and Errors[8] — Amendments, see PLEADING; Review, see APPEAL AND ERROR; Waiver and Aider by Verdict, see PLEADING.)

FORMA LEGALIS FORMA ESSENTIALIS. A maxim meaning "Legal form is essential form."[9]

FORMALITY.[10] An established order; a rule of proceeding; a formal mode or method.[11]

FORMAL MORTGAGE. A conditional sale of personal property as security for the payment of a debt, or the performance of some other obligation.[12] (See, generally, CHATTEL MORTGAGES.)

FORMAL PARTIES. Parties who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter, which may be conveniently settled in the suit, and thereby prevent further litigation.[13] (See, generally, PARTIES.)

FORMA PAUPERIS. See IN FORMA PAUPERIS.

FORMATION. The manner in which a thing is formed; structure; construction; conformation.[14]

FORMEDON. An ancient writ in English law which was available for one who had a right to lands or tenements by virtue of a gift in tail.[15] (See, generally, REAL ACTIONS.)

FORMER. Preceding or going before in a series; antecedent in order of thought, of action, etc.[16] (Former: Acquittal, see CRIMINAL LAW. Convic-

Keniston *v.* Chesley, 52 N. H. 564, 566); "manner and form" (see Reg. *v.* Robinson, 12 A. & E. 672, 680, 40 E. C. L. 335).

"Form and similitude" see Minn. Gen. St. (1894) § 6693.

"Formed after the commencement of this Act" see Shaw *v.* Simmons, 12 Q. B. D. 117, 120, 53 L. J. Q. B. 29, 32 Wkly. Rep. 292.

"Formed design" see Lang *v.* State, 84 Ala. 1, 5, 4 So. 193, 5 Am. St. Rep. 324.

"Forming a part of this policy" (see Burritt *v.* Saratoga County Mut. F. Ins. Co., 5 Hill (N. Y.) 188, 190, 40 Am. Dec. 345); "so forming" "substantially as described" (see Lull *v.* Clark, 13 Fed. 456, 21 Blatchf. 95, 103); "the houses forming such street" (see London School Bd. *v.* St. Mary, 1 Q. B. D. 65, 72, 45 L. J. M. C. 1, 33 L. T. Rep. N. S. 504, 24 Wkly. Rep. 137).

6. Cyclopedic L. Dict.

7. Webster Int. Dict.

"Formal design" see Wilson *v.* State, 128 Ala. 17, 26, 29 So. 569; Amos *v.* State, 83 Ala. 1, 5, 3 So. 749, 3 Am. St. Rep. 682; Ake *v.* State, 30 Tex. 466, 473.

"Upon merits and not merely upon formal points" see North Staffordshire R. Co. *v.* London, etc., R. Co., 6 Wkly. Rep. 54, 55.

8. "Formal defect or irregularity" see *In re* Low, [1895] 1 Q. B. 734, 736, 59 J. P. 292, 64 L. J. Q. B. 362, 72 L. T. Rep. N. S. 450, 2 Manson 169, 43 Wkly. Rep. 405; *In re* Howes, [1892] 2 Q. B. 628, 632, 62 L. J. Q. B. 88, 67 L. T. Rep. N. S. 213, 4 Reports 4, 40 Wkly. Rep. 647; *Ex p.* Johnson, 25 Ch. D. 112, 116, 53 L. J. Ch. 309, 50 L. T. Rep. N. S. 157, 32 Wkly. Rep. 175; *Ex p.* Vanderlinden, 20 Ch. D. 289, 292, 51 L. J. Ch. 760, 47 L. T. Rep. N. S. 138, 30 Wkly. Rep. 930; *Ex p.* Coates, 5 Ch. D. 979, 982, 37 L. T. Rep. N. S. 43, 25 Wkly. Rep. 800.

9. Bouvier L. Dict.

Applied in Beawfage's Case, 10 Coke 99*a*, 100*a* [*quoted* in Smith *v.* Allen, 1 N. J. Eq. 43, 50, 21 Am. Dec. 33].

10. Distinguished from "form" see Seymour's Succession, 48 La. Ann. 993, 1001, 20 So. 217.

11. Century Dict.

Formalities in alteration of instruments see 2 Cyc. 170.

"The bishops may, by sentence and without any further formality, depose him" see Reg. *v.* Durham, [1897] 2 Q. B. 414, 422, 66 L. J. Q. B. 826, 77 L. T. Rep. N. S. 190, 46 Wkly. Rep. 36; 55 & 56 Vict. c. 32, § 8.

"The formalities for a will" see Ross *v.* Ross, 25 Can. Sup. Ct. 307, 346.

"The same formalities shall be observed in the taking of depositions in perpetual memory as in the taking of other depositions" see Remington *v.* Peckham, 10 R. I. 550, 552.

"Where the disavowal is made with sufficient formality" see Clark *v.* Cochran, 3 Mart. (La.) 353, 360.

12. Cone *v.* Ivinson, 4 Wyo. 203, 243, 33 Pac. 31, 35 Pac. 933 [*citing* Jones Chatt. Mortg. § 1].

13. Chadbourne *v.* Coe, 51 Fed. 479, 480, 2 C. C. A. 327.

14. Webster Int. Dict.

"Formation expenses" see Arkwright *v.* Newbold, 17 Ch. D. 301, 318, 50 L. J. Ch. 372, 44 L. T. Rep. N. S. 393, 29 Wkly. Rep. 455. See CORPORATIONS.

15. Now abolished. Black L. Dict. See also Orndoff *v.* Turman, 2 Leigh (Va.) 200, 242, 21 Am. Dec. 608.

16. Century Dict.

In connection with other words the word "former" has often received judicial inter-

tion, see CRIMINAL LAW. Action Pending, see ABATEMENT AND REVIVAL. Adjudication, see JUDGMENTS. Jeopardy, see CRIMINAL LAW. Recovery, see JUDGMENTS. Suit Pending, see ABATEMENT AND REVIVAL.)

FORMER ACQUITTAL. See FORMER JEOPARDY.

FORMER ACTION PENDING. See ABATEMENT AND REVIVAL.

FORMER ADJUDICATION. See JUDGMENTS.[17]

FORMER CONVICTION. See FORMER JEOPARDY.

FORMER JEOPARDY. See CRIMINAL LAW.[18]

FORMER RECOVERY. See JUDGMENTS.

FORM OF ACTION. See ACTIONS, and cross-references thereunder.[19]

pretation; as for example as used in the following phrases: "Former deceased husband" (see Anderson *v.* Gilchrist, 44 Ohio St. 440, 8 N. E. 242); "former husband or wife" (see Cropsey *v.* Ogden, 11 N. Y. 228, 231); "former owner" (see Burkett *v.* Burkett, 78 Cal. 310, 317, 20 Pac. 715, 12 Am. St. Rep. 48, 3 L. R. A. 781; Rich *v.* Braxton, 158 U. S. 375, 399, 15 S. Ct. 1006, 39 L. ed. 1022); "former suit" (see Folan *v.* Lary, 60 Me. 545, 546); "former trial" (see Koehler *v.* Schneider, 16 Daly (N. Y.) 235, 237, 10 N. Y. Suppl. 101).

Former balance see 1 Cyc. 367.

"Former tenant" see 59 & 60 Vict. c. 47.

17. See also 10 Cyc. 897; 9 Cyc. 33, 963 note 73.

Former determination see 6 Cyc. 814.

Former trial see 9 Cyc. 103, 131.

18. See also 12 Cyc. 259, 591; 8 Cyc. 1089.

19. See also 9 Cyc. 128, 691 note 31; 7 Cyc. 28; 2 Cyc. 671.

FORNICATION

By Henry H. Skyles*

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CROSS-REFERENCES

For Matters Relating to:
Abduction, see ABDUCTION.
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Disorderly House, see DISORDERLY HOUSES.
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As Consideration For Contract, see CONTRACTS.
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Incest, see INCEST.
Lewdness, see LEWDNESS.
Living in Fornication, see LEWDNESS.
Miscegenation, see MISCEGENATION.
Prostitution, see PROSTITUTION.
Rape, see RAPE.
Seduction, see SEDUCTION.
For General Matters Relating to Criminal Law and Criminal Procedure, see CRIMINAL LAW.

I. DEFINITION.

Fornication is voluntary unlawful sexual intercourse between persons of the opposite sex, under circumstances not constituting adultery,[1] and therefore varies as does the definition of adultery.[2] By the canon law it was the unlawful sexual intercourse of a single person with another of the opposite sex, whether married or not,[3] while by the common law it was such intercourse between a man, whether married or single, and an unmarried woman.[4] The statutes defining or recognizing the offense vary in the different jurisdictions.[5]

II. NATURE AND ELEMENTS OF THE OFFENSE.

A. At Common Law. Fornication, although cognizable in England under

1. Hood *v.* State, 56 Ind. 263, 271, 26 Am. Rep. 21, where it is said: "Fornication is sexual intercourse between a man, married or single, and an unmarried woman. Adultery is sexual connection between a married woman and an unmarried man, or a married man other than her own husband."

2. See ADULTERY, 1 Cyc. 952.

3. Banks *v.* State, 96 Ala. 78, 11 So. 404; Buchanan *v.* State, 55 Ala. 154; Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740; Black L. Dict.; Bouvier L. Dict.

4. State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21. See ADULTERY, 1 Cyc. 952.

Other definitions are: "The incontinence or lewdness of an unmarried person, male or female." Webster Dict.

"The carnal and illicit intercourse of an unmarried person with the opposite sex." Territory *v.* Whitcomb, 1 Mont. 359, 362, 25 Am. Rep. 740.

"Unlawful sexual intercourse, and open and unlawful living together of . . . unmarried persons, man and woman." Black L. Dict.; Territory *v.* Whitcomb, 1 Mont. 359, 362, 25 Am. Rep. 740.

"Sexual intercourse between a man, whether married or not, and an unmarried woman." State *v.* Chandler, 96 Ind. 591, 593; Hood *v.* State, 56 Ind. 263, 271, 26 Am. Rep. 21.

Sexual intercourse of a married man with a married woman is adultery, not fornication. State *v.* Pearce, 2 Blackf. (Ind.) 318. See also ADULTERY, 1 Cyc. 952.

It is incestuous fornication for a daughter to have criminal intercourse with her own father. Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410. See, generally, INCEST.

Fornication differs from rape in that both parties consent. De Groat *v.* People, 39 Mich. 124. If the act be accomplished with the female's consent, even though such consent be induced by the use of such a measure of force as might, under ordinary circumstances, seem to overcome her power of resistance, the offense is fornication, and not rape. Mathews *v.* State, 101 Ga. 547, 29 S. E. 424. See, generally, RAPE.

5. See *infra*, II, B, 2.

the ecclesiastical law,[6] is not punishable as a common-law offense unless accompanied by such circumstances as to render it a public nuisance.[7]

B. By Statute — 1. In General. In most of the states, however, statutes have been enacted punishing the offense of fornication, although not accompanied by circumstances constituting a public nuisance.[8] These statutes and the decisions thereunder do not agree as to what constitutes the offense. Under some of the statutes the canon-law definition is followed,[9] while under others the common-law definition is followed,[10] and under others the definition of the offense varies from both.[11] Where the statute does not define the offense, but merely prescribes a penalty therefor, the common-law definition is usually followed.[12] Birth of spurious offspring is required under some of the statutes.[13]

2. Open and Notorious Fornication. Under the statutory provisions of some jurisdictions the open and notorious living in fornication is punished as a distinct

6. Anderson *v.* Com., 5 Rand. (Va.) 627, 16 Am. Dec. 776; Caudrey's Case, 5 Coke 1*a*, 9*a*; Wheatley *v.* Fowler, 2 Lee Eccl. 376; 1 Bishop New Cr. L. § 38; Bishop St. Crimes, § 691.

7. *Arkansas.*—Crouse *v.* State, 16 Ark. 566.
Georgia.— Hopper *v.* State, 54 Ga. 389.
Indiana.— Lumpkins *v.* Justice, 1 Ind. 557.
Michigan.— Delany *v.* People, 10 Mich. 241.
Mississippi.— Brown *v.* State, (1890) 8 So. 257; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.
New Jersey.— State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 390; Smith *v.* Minor, 1 N. J. L. 16.
Texas.— State *v.* Rahl, 33 Tex. 76; State *v.* Smith, 32 Tex. 167; State *v.* Foster, 31 Tex. 578.
Virginia.— Com. *v.* Jones, 2 Gratt. 555; Com. *v.* Isaacs, 5 Rand. 634; Anderson *v.* Com., 5 Rand. 627, 16 Am. Dec. 776.
United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.
England.— Reg. *v.* Pierson, 1 Salk. 382.
See 23 Cent. Dig. tit. "Fornication," § 1.

When committed openly and publicly, so as to make the acts of incontinency injurious to public morals and society, it was indictable at common law. Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Living in open and notorious fornication is indictable at common law. Lumpkins *v.* Justice, 1 Ind. 557; Brown *v.* State, (Miss. 1890) 8 So. 257. See, generally, Lewdness.

8. State *v.* Cox, 4 N. C. 597; State *v.* Pierpont, 16 Utah 476, 52 Pac. 992; Com. *v.* Jones, 2 Gratt. (Va.) 555.

The word "man" as used in statutes punishing fornication means any male person of the age of puberty and capable of committing the offense, and is not limited to a male person over twenty-one years of age. State *v.* Seiler, 106 Wis. 346, 82 N. W. 167.

Conspiracy to commit fornication is also made an indictable offense in some states, but the mere consent of a man and woman to commit the offense is not a conspiracy to commit it. Miles *v.* State, 58 Ala. 390. See Conspiracy, 8 Cyc. 620.

9. Where one party is married and the other unmarried it has been held fornication in the unmarried person. Buchanan *v.* State, 55 Ala. 154; Com. *v.* Call, 21 Pick. (Mass.) 509, 32 Am. Dec. 284; Respublica *v.* Roberts, 1 Yeates (Pa.) 6, 2 Dall. (Pa.) 124, 1 L. ed. 316; Com. *v.* Kilwell, 1 Pittsb. Leg. J. (Pa.) 255; Com. *v.* Lafferty, 6 Gratt. (Va.) 672.

10. State *v.* Armstrong, 4 Minn. 335; State *v.* Taylor, 58 N. H. 331; State *v.* Wallace, 9 N. H. 515; State *v.* Searle, 56 Vt. 516. But see Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740.

11. Both parties must be unmarried under some statutes. Neil *v.* State, 117 Ga. 14, 43 S. E. 435; Bennett *v.* State, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77; Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120 [*overruling* Butt *v.* State, 33 Ga. Suppl. 56]; Bigby *v.* State, 44 Ga. 344; Cosgrove *v.* State, 37 Tex. Cr. 249, 39 S. W. 367, 66 Am. St. Rep. 802; Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098; Powell *v.* State, 12 Tex. App. 238; Wells *v.* State, 9 Tex. App. 160; State *v.* Shear, 51 Wis. 460, 8 N. W. 287; State *v.* Fellows, 50 Wis. 65, 6 N. W. 239.

In Georgia the statute, as construed by the decisions, provides for three distinct offenses: If both parties are married, each is guilty of adultery; if both are single, each is guilty of fornication; if one is married and the other single, each is guilty of adultery and fornication. Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120; Bigby *v.* State, 44 Ga. 344; Wasden *v.* State, 18 Ga. 264.

In Texas fornication is the living together and carnal intercourse with each other, or habitual carnal intercourse with each other without living together, of a man and woman, both being unmarried. Cosgrove *v.* State, 37 Tex. Cr. 249, 39 S. W. 367, 66 Am. St. Rep. 802; Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098; Powell *v.* State, 12 Tex. App. 238; Wells *v.* State, 9 Tex. App. 160.

Living together as man and wife is not an element of the offense under the Missouri statute relating to lascivious behavior. State *v.* Berry, 24 Mo. App. 466.

12. State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21; State *v.* Pearce, 2 Blackf. (Ind.) 318; State *v.* Lash, 16 N. J. L. 380, 32 Am. Dec. 397, where the question is fully discussed both under the canon and the common law.

13. Smith *v.* Minor, 1 N. J. L. 16. *Contra*, Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26.

offense, so that there must be a living together as distinguished from an occasional act of intercourse.[14]

3. Void Marriage. Under some statutes parties cohabiting under a void marriage are guilty of fornication,[15] or fornication and adultery.[16] It is no defense in such cases that defendant had received legal advice before entering into the marriage that it would be lawful.[17]

III. Indictment or Information.[18]

A. In General. As fornication is indictable only under statutory provisions, an indictment or information therefor should as a general rule follow the language of the statute so as to aver all the elements of the offense;[19] but it need not employ the precise words of the statute, if language of like import and equivalent meaning is used.[20]

B. Particular Averments — 1. As to Marriage. If terms negativing the marriage relation are used in the indictment, the fact that the parties were not married to each other, or to others, need not be expressly averred;[21] but it is

14. Searles *v.* People, 13 Ill. 597; Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; Lumpkins *v.* Justice, 1 Ind. 557; Delany *v.* People, 10 Mich. 241; Brown *v.* State, (Miss. 1890) 8 So. 257. See, generally, Lewdness. "Living together" means that the parties must dwell or reside together; abide together in the same habitation as a common or joint residing place. Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098; Bird *v.* State, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214. An undivorced husband marrying and openly living and cohabiting with an unmarried woman during the lifetime of his wife is guilty of living in open and notorious fornication. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21. And see Banks *v.* State, 96 Ala. 78, 11 So. 404.

15. Hoover *v.* State, 59 Ala. 57, holding that as a marriage between a negro and a white person is void their cohabiting is fornication under the Alabama statutes. Marriage and cohabitation between an undivorced husband and an unmarried woman is fornication. Banks *v.* State, 96 Ala. 78, 11 So. 404; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

16. State *v.* Fore, 23 N. C. 378. But where the parties leave the state to evade its laws in consummating such marriage and with no intention of returning, and they afterward do return and reside in the state, they are not guilty of fornication and adultery. State *v.* Ross, 76 N. C. 242, 22 Am. Rep. 678. See also Adultery, 1 Cyc. 954.

17. Hoover *v.* State, 59 Ala. 57.

18. Indictment or information generally see Indictments and Informations.

Forms of indictment or information see Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410; State *v.* Chandler, 96 Ind. 591; State *v.* Stephens, 63 Ind. 542; State *v.* Smith, 18 Ind. App. 179, 47 N. E. 685; State *v.* Tally, 74 N. C. 322; State *v.* Lyerly, 52 N. C. 158.

19. *Arkansas.*— Crouse *v.* State, 16 Ark. 566.

Georgia.— Bennett *v.* State, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77; Bigby *v.* State, 44 Ga. 344.

Indiana.— State *v.* Chandler, 96 Ind. 591; State *v.* Stephens, 63 Ind. 542.

North Carolina.— State *v.* Cox, 4 N. C. 597.

Texas.— Cosgrove *v.* State, 37 Tex. Cr. 249, 39 S. W. 367, 66 Am. St. Rep. 802; Jones *v.* State, 29 Tex. App. 347, 16 S. W. 189.

Virginia.— Com. *v.* Isaacs, 5 Rand. 634; Anderson *v.* Com., 5 Rand. 627, 16 Am. Dec. 776.

Wisconsin.— State *v.* Shear, 51 Wis. 460, 8 N. W. 287.

See 23 Cent. Dig. tit. "Fornication," § 1 *et seq.*

Criminal intent.— It is not necessary to charge a joint criminal intent in a prosecution for fornication and adultery, although the act must be shown to have been joint. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

Begetting of child.— It need not be averred that a child was begotten (Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26), unless the statute makes this an element of the offense (Smith *v.* Minor, 1 N. J. L. 16). See *supra*, II, B, 1.

20. *Georgia.*— Cook *v.* State, 11 Ga. 53, 56 Am. Dec. 410.

Indiana.— State *v.* Chandler, 96 Ind. 591; State *v.* Smith, 18 Ind. App. 179, 47 N. E. 685.

Montana.— Territory *v.* Corbett, 3 Mont. 50.

North Carolina.— State *v.* Tally, 74 N. C. 322; State *v.* Lyerly, 52 N. C. 158; State *v.* Fore, 23 N. C. 378.

Pennsylvania.— Gorman *v.* Com., 124 Pa. St. 536, 17 Atl. 26.

See 23 Cent. Dig. tit. "Fornication," § 1 *et seq.*

Charging that defendants, a man and a woman, "did live together in fornication" has been held sufficient. Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

21. State *v.* Stephens, 63 Ind. 542; State *v.* Gooch, 7 Blackf. (Ind.) 468; State *v.* Lashley, 84 N. C. 754; Heckman *v.* Swartz, 64 Wis. 48, 24 N. W. 473.

otherwise if there is nothing else in the indictment negativing the marriage relation ;[22] and it has been held in those jurisdictions where fornication is punished only when committed with a single woman, that the fact that the woman is not married must be alleged.[23]

2. As to Time of Offense. Although the indictment or information must allege the day upon which the offense was committed, it is sufficient if the evidence shows it to have been committed on any day within the statute of limitations.[24] The fact that the time laid in an information does not correspond with the time stated in the affidavit upon which the information is based does not make the information defective.[25]

C. Description of Parties. An indictment or information for fornication should so describe the parties as to bring them within the statute.[26] It has been held that describing a married woman as a "spinster" in an indictment under a statute for fornication and adultery is no ground for arrest of judgment.[27]

D. Joinder of Parties. As a general rule the participants may be indicted either jointly or severally,[28] although in some jurisdictions the statute is such as to require them to be indicted severally.[29] If jointly indicted it is within the discretion of the court whether they shall be tried jointly or separately.[30]

E. Joinder of Counts.[31] It has been held that a count for fornication may be joined with a count for rape,[32] or for adultery.[33]

F. Amendment. An information insufficiently charging the offense may be amended by making the necessary insertion.[34]

IV. EVIDENCE.

A. Competency of Witnesses. The general rules governing the competency of witnesses in criminal cases are applicable of course in prosecutions for fornication.[35] Thus the rule that a husband or wife cannot be a witness for or against each other in criminal cases applies in prosecutions for fornication.[36] A divorced husband is incompetent to testify against his wife and one jointly tried with her as to the adulterous intercourse or any other fact which occurred while the marriage subsisted.[37] But a husband may testify as to his wife's marriage to him,[38] or against the male defendant when tried separately.[39] A married woman

22. Crouse *v.* State, 16 Ark. 566; State *v.* Dickinson, 18 N. C. 349; State *v.* Aldridge, 14 N. C. 331.

23. Com. *v.* Murphy, 2 Allen (Mass.) 163; Cosgrove *v.* State, 37 Tex. Cr. 249, 39 S. W. 367, 66 Am. St. Rep. 802; Stebbins *v.* State, 31 Tex. Cr. 294, 20 S. W. 552. See State *v.* Searle, 56 Vt. 516, holding that an indictment failing to allege that the woman was unmarried was fatally defective.

24. Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138. See, generally, Indictments and Informations.

25. State *v.* Record, 16 Ind. 111. See, generally, Indictments and Informations.

26. See, generally, Indictments and Informations.

27. State *v.* Guest, 100 N. C. 410, 6 S. E. 253.

28. State *v.* Cox, 4 N. C. 597; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427.

Incestuous fornication is not a joint offense and one person may be indicted and convicted thereof. Powers *v.* State, 44 Ga. 209.

29. Foster *v.* State, 41 Ga. 582; Wasden *v.* State, 18 Ga. 264.

30. Stewart *v.* State, 64 Miss. 626, 2 So. 73. See Criminal Law, 12 Cyc. 505.

31. See, generally, Indictments and Informations.

32. Jackson *v.* State, 91 Wis. 253, 64 N. W. 838.

33. State *v.* Hinton, 6 Ala. 864.

34. Jackson *v.* State, 91 Wis. 253, 64 N. W. 838, holding that an information charging that defendant "did commit fornication and have sexual intercourse with . . . , a female of previous chaste character," fourteen years old, could be amended by inserting the word "single" before the word "female." See, generally, Indictments and Informations.

35. See, generally, Witnesses.

36. See, generally, Witnesses.

37. State *v.* Raby, 121 N. C. 682, 28 S. E. 490; State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656. Nor is such testimony made competent against the male defendant by the fact that it is received at the trial, over objection, and he alone appeals from the verdict. State *v.* Jolly, *supra*.

38. State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83.

39. State *v.* Guest, 100 N. C. 410, 6 S. E. 253, where the woman pleaded guilty and the male defendant was tried on the plea of not guilty.

is a competent witness to prove the criminal connection with her; but not the non-access of her husband.[40]

B. Presumptions and Burden of Proof — 1. In General. It is incumbent upon the state, in a prosecution for fornication, to prove affirmatively all the material elements of the offense as alleged in the indictment;[41] and the proof must make out a case within the statute defining or prescribing the penalty for the offense.[42]

2. Criminal Intent — a. In General. The general rule that to constitute a crime a criminal intent must be shown applies to prosecutions for fornication.[43] But where the acts constituting the offense are knowingly and intentionally committed, criminal intent will be presumed;[44] and the burden of showing any extenuating circumstances is on defendant.[45]

b. Unlawful Marriage. This intent will be inferred from marrying and cohabiting with one who at the time has a living spouse by a former marriage,[46] except where it is shown that the cohabitation followed a *prima facie* valid marriage; the burden in such case being on the state to prove guilty knowledge.[47]

c. Joint Intent. In a prosecution for fornication and adultery under the North Carolina statute, although the joint act must be shown, it is not necessary to charge or prove a joint intent. The absence of criminal intent may be shown in defense by either party, but when so shown it does not inure to the other's benefit.[48]

3. As to Death of Absent Spouse. The burden of proving the death of an absent husband in those jurisdictions in which the woman must be unmarried is on the prosecution.[49]

4. As to Marriage. In the absence of proof of marriage, it is generally presumed that the parties are single and unmarried, and the burden is on them to rebut that presumption.[50]

5. As to Continuance of Intercourse. Criminal intercourse, once shown, is presumed to continue, where the conditions remain the same.[51]

40. Com. *v.* Shepherd, 6 Binn. (Pa.) 283, 6 Am. Dec. 449; Com. *v.* Wentz, 1 Ashm. (Pa.) 269; Com. *v.* Connelly, 1 Browne (Pa.) 284. See, generally, Witnesses.

41. Neil *v.* State, 117 Ga. 14, 43 S. E. 435; Bennett *v.* State, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77; Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740; Mitchell *v.* State, 38 Tex. Cr. 325, 42 S. W. 989; McCabe *v.* State, 34 Tex. Cr. 418, 30 S. W. 1063; Wells *v.* State, 9 Tex. App. 160; State *v.* Shear, 51 Wis. 460, 8 N. W. 287.

42. Neil *v.* State, 117 Ga. 14, 43 S. E. 435; Bennett *v.* State, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77; Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; Wells *v.* State, 9 Tex. App. 160; State *v.* Shear, 51 Wis. 460, 8 N. W. 287.

43. See Criminal Law, 12 Cyc. 147.

44. Hoover *v.* State, 59 Ala. 57. See State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

Proof of habitual sexual intercourse is sufficient to show criminal intent. State *v.* Cody, 111 N. C. 725, 16 S. E. 408.

45. State *v.* Cody, 111 N. C. 725, 16 S. E. 408.

46. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

Where a husband marries and cohabits with an unmarried woman, knowing that his first wife is living and undivorced, criminal intent will be presumed. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

Lack of knowledge as a defense.— The woman may set up her lack of knowledge of a prior marriage of her husband, where she ceased to cohabit with him upon becoming aware of such marriage. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

47. Banks *v.* State, 96 Ala. 78, 11 So. 404.

48. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599 [*overruling* State *v.* Mainor, 28 N. C. 340].

49. Williams *v.* State, 86 Ga. 548, 12 S. E. 743, holding that on a charge of fornication with an unmarried woman, who appears to have had a husband living six or seven years before the offense, there can be no conviction without evidence of his death.

50. Territory *v.* Jaspar, 7 Mont. 1, 14 Pac. 647 [*distinguishing* Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740]; Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600 [*reversed* on other grounds in 52 N. J. L. 178, 19 Atl. 135]; State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83. *Contra*, under the Georgia statute. Neil *v.* State, 117 Ga. 14, 43 S. E. 435; Bennett *v.* State, 103 Ga. 66, 29 S. E. 919, 68 Am. St. Rep. 77.

Omission to prove the singleness of the woman on an indictment for fornication is not error. Gaunt *v.* State, 50 N. J. L. 490, 14 Atl. 600, 52 N. J. L. 178, 19 Atl. 135.

51. Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465, holding this to be true where the parties remain under the same roof.

C. Admissibility of Evidence — 1. In General. The general rules governing the admissibility of evidence in criminal cases apply of course in prosecutions for fornication.[52] Defendant's or the other party's prior reputation for chastity is irrelevant.[53]

2. Admissions and Confessions — a. Of Defendant. Voluntary admissions or confessions of guilt by defendant may be received in evidence as proof of the offense.[54]

b. Of Co-Defendant. The admissions or declarations of one defendant are not admissible in evidence against the other.[55] Such admissions, however, may be admitted on a joint trial, if the jury are instructed that they can only be considered in determining the guilt of the person making them.[56]

3. As to Intercourse. Since the nature of the offense is such that it can very rarely be directly proved, circumstantial evidence, such as the acts and conduct of the parties toward each other, is always admissible to prove their guilt.[57]

4. Other Offenses[58] — a. In General. Evidence tending to show defendant's commission of a similar but distinct offense with the same person is admissible for the purpose of raising an inference or presumption that he committed the particular act with which he is charged.[59] But evidence that the woman has had carnal intercourse with other men is immaterial,[60] except in rebuttal of her testimony.[61] Evidence admissible to prove the offense on general grounds is not inadmissible because it discloses another distinct offense.[62]

b. Prior Acts of Familiarity. Evidence of prior acts of familiarity between the same parties may be introduced as tending to show the probability of the

52. See Criminal Law, 12 Cyc. 87 *et seq.*; Evidence, 16 Cyc. 821.

Testimony on former trial.— Evidence as to what the prosecutrix testified before the justice in a trial for bastardy is properly rejected, unless the proper foundation is laid to impeach her by asking her whether she did so testify, as it is proposed to prove. The evidence for any other purpose would be hearsay. Hollis *v.* State, 77 Ga. 74.

Evidence of divorce.— Evidence that defendant, prior to a second marriage, obtained a decree of divorce from his first wife by a court having no jurisdiction of either the parties or the action is inadmissible. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

As to marriage.— It is competent to prove that defendant had a wife living at the time of the commission of the offense; and it is not error to admit proof of this fact, although it is not denied by defendant. State *v.* Manly, 95 N. C. 661. Admission of testimony that defendant was unmarried is not error, there being no issue as to his being married. McCamant *v.* State, (Tex. Cr. App. 1896) 34 S. W. 610.

53. Boatwright *v.* State, 42 Tex. Cr. 442, 60 S. W. 760.

54. State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512. See Burger *v.* State, 81 Ga. 196, 6 S. E. 282. See Criminal Law, 12 Cyc. 459 *et seq.*

55. State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512. See Criminal Law, 12 Cyc. 435, 440.

Declarations of the man with whom illicit connection is charged are not admissible against the woman, being but hearsay evidence. Spencer *v.* State, 31 Tex. 64.

To prove death of spouse.— Declarations of a married woman that she heard her husband was dead are not admissible to prove such fact on trial of a man for adultery and fornication with her as an unmarried woman, it not appearing from whom her information was derived. Williams *v.* State, 86 Ga. 548, 12 S. E. 743.

56. State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512.

57. Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; State *v.* Dukes, 119 N. C. 782, 25 S. E. 786; State *v.* Austin, 108 N. C. 780, 13 S. E. 219; State *v.* Eliason, 91 N. C. 564; State *v.* Poteet, 30 N. C. 23; Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138, holding that, upon a trial for fornication, it was proper to admit evidence of an alleged promise of marriage by defendant to the woman, and the giving of rings pursuant thereto, as it showed the acquaintance of the parties and the extent of their intimacy.

Hearsay evidence of the general reputation that defendant lived in fornication with a woman is inadmissible. Overstreet *v.* State, 3 How. (Miss.) 328.

58. See Evidence, 12 Cyc. 405.

59. State *v.* Guest, 100 N. C. 410, 6 S. E. 253.

60. Rodes *v.* State, 38 Tex. Cr. 328, 42 S. W. 990.

61. Gaunt *v.* State, 52 N. J. L. 178, 19 Atl. 135.

62. State *v.* Case, 93 N. C. 545, 53 Am. Rep. 471 (holding that evidence as to the marriage of the woman was admissible notwithstanding it disclosed an attempt to bribe a juror); Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123 (holding that in a prosecution for incestuous fornication evidence of prior acts between the parties is admissible, although it discloses another offense).

offense charged, and as corroborative of evidence indicating the commission of the alleged offense,[63] provided the prior acts were committed within the period prescribed by statute before the presentment of the indictment.[64]

c. Subsequent Acts of Familiarity. Evidence of acts that transpired since the finding of the indictment may be admitted as tending to show an illicit continuation of the conduct of the parties,[65] if such acts are not too remote in point of time to afford a reasonable inference of guilt.[66]

D. Weight and Sufficiency of Evidence — 1. In General. The evidence to sustain a conviction must be sufficient to support the charge alleged in the indictment beyond a reasonable doubt,[67] although it may be under oath of but one credible witness.[68] The weight to be given to the evidence is for the jury to decide, taking into consideration all the circumstances of the case.[69] It has been said that less evidence may justify a jury in finding either a single or married man guilty of fornication with another man's wife, than in finding a single man guilty of fornication with a single woman.[70]

2. Accomplice Testimony. The testimony of an accomplice may be sufficient to convict,[71] although as a general rule it must be supported by other evidence

63. Alsabrooks *v.* State, 52 Ala. 24; Bass *v.* State, 103 Ga. 227, 29 S. E. 966; State *v.* Dukes, 119 N. C. 782, 25 S. E. 786; State *v.* Wheeler, 104 N. C. 893, 10 S. E. 491; State *v.* Guest, 100 N. C. 410, 6 S. E. 253; State *v.* Pippin, 88 N. C. 646; State *v.* Kemp, 87 N. C. 538.

The fact that such evidence was not introduced before the grand jury does not render it inadmissible for this purpose. Bass *v.* State, 103 Ga. 227, 29 S. E. 966.

Incestuous fornication.— On a trial for incestuous fornication it is competent for the commonwealth to introduce evidence of prior illicit relations between the parties. Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

64. Stewart *v.* State, 64 Miss. 626, 2 So. 73; Com. *v.* Bell, 166 Pa. St. 405, 31 Atl. 123.

Acts beyond the statutory period.— Testimony that accused, charged with fornication, had had habitual carnal intercourse with the person with whom the offense was committed, during a period of eleven years previously, and that she had borne him six children, is inadmissible as covering a period of more than two years anterior to the presentment of the indictment. Duncan *v.* State, (Tex. Cr. App. 1898) 45 S. W. 921.

65. Alsabrooks *v.* State, 52 Ala. 24; Stewart *v.* State, 64 Miss. 626, 2 So. 73; State *v.* Raby, 121 N. C. 682, 28 S. E. 490.

66. Stewart *v.* State, 64 Miss. 626, 2 So. 73.

67. Mathews *v.* State, 101 Ga. 547, 29 S. E. 424; McCabe *v.* State, 34 Tex. Cr. 418, 30 S. W. 1063; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427. An indictment, charging in one count fornication and bastardy and in another adultery, is supported as to both counts by evidence of a single intercourse, as seduction, adultery, and incest each involve a fornication, and bastardy is one of the common incidents of fornication. Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138.

That the parties unlawfully lived together, not being married to each other, is sufficient to prove fornication, and it need not be shown that they were not married to other persons. Territory *v.* Jasper, 7 Mont. 1, 14 Pac. 647 [*distinguishing* Territory *v.* Whitcomb, 1 Mont. 359, 25 Am. Rep. 740].

Evidence so slight as to give rise to a mere suspicion or possibility of guilt is not sufficient. State *v.* Waller, 80 N. C. 401.

68. Com. *v.* Cregor, 7 Gratt. (Va.) 591.

69. Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Buchanan *v.* State, 55 Ala. 154; Means *v.* State, 99 Ga. 205, 25 S. E. 682; Musfelt *v.* State, 64 Nebr. 445, 90 N. W. 237; State *v.* Raby, 121 N. C. 682, 28 S. E. 490.

Evidence is insufficient to go to the jury, where, on the trial of a man for fornication and adultery with a woman who lived at his house, it does not appear that the woman was single, or that she was not defendant's wife, or that her child, born while she lived at defendant's house, was a bastard. State *v.* Pope, 109 N. C. 849, 13 S. E. 700.

The admissions or confessions of a defendant, if corroborated by other evidence, may authorize the jury to return a verdict of guilty. Burger *v.* State, 81 Ga. 196, 6 S. E. 282.

Evidence of prior acts of familiarity can be considered by the jury only as a mere circumstance in the case, to be taken together with other circumstances, and to show merely the relations between the parties. Bass *v.* State, 103 Ga. 227, 29 S. E. 966. And see *supra*, IV, C, 4, b.

70. Silvernail *v.* Westerman, 11 Luz. Leg. Reg. (Pa.) 5.

71. Com. *v.* Betz, 2 Woodw. (Pa.) 210, holding that evidence of a sworn statement made by the mother of a bastard child, in open court, is sufficient to convict the person, pointed out as the father of the child, of fornication, without proof of an antecedent charge against him.

Where the accomplice's testimony is unimpeached or undenied it will be sufficient, especially if there are some corroborative circumstances. Mitchell *v.* State, 81 Ga. 458, 8 S. E. 444.

corroborating it on such material facts as constitute elements of the offense charged.[72]

3. As to Carnal Knowledge. Carnal intercourse must in most cases be inferred from circumstances.[73] The circumstances, to warrant a conviction, must be such as to produce a belief or conviction that the parties have been cohabiting or have had sexual intercourse.[74]

E. Variance. The evidence adduced must correspond with all the essential allegations of the indictment, and any variance therefrom is fatal.[75]

V. INSTRUCTIONS.

A. In General. The court may properly instruct that a conviction for fornication may be had on circumstantial evidence, showing guilt beyond a reasonable doubt,[76] and that the jury cannot convict upon evidence alone of previous lascivious conduct, but shall consider it only as a circumstance in the case, where the state relies for conviction upon only one of a number of like offenses.[77] But it cannot properly give an instruction upon the weight of the evidence,[78] or an instruction expressing an opinion on a question of fact.[79] Nor can the court instruct for a conviction on proof of acts not alleged in the indictment or information.[80] Where corroboration of an accomplice is necessary,[81] a charge on

72. Mitchell *v.* State, 38 Tex. Cr. 325, 42 S. W. 989. It need not be corroborative of every material fact, but only of such as constitute a necessary element of the offense charged. State *v.* Collett, 20 Utah 290, 58 Pac. 684 [*following* State *v.* Spencer, 15 Utah 149, 49 Pac. 302].

As to chastity.— It is not necessary to corroborate the testimony of a female of previous chaste character and under eighteen years of age, as to her chastity, to sustain a conviction. State *v.* Seiler, 106 Wis. 346, 82 N. W. 167.

73. Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; Means *v.* State, 99 Ga. 205, 25 S. E. 682; Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440; State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512.

74. Davis *v.* State, 92 Ga. 458, 17 S. E. 336; Searles *v.* People, 13 Ill. 597.

Circumstances which raise such a presumption of guilt as to leave no reasonable doubt in that respect in the minds of the jury are sufficient. Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; State *v.* Dukes, 119 N. C. 782, 25 S. E. 786; State *v.* Eliason, 91 N. C. 564; State *v.* Poteet, 30 N. C. 23.

Living in same house.— It is not sufficient evidence to warrant a conviction of fornication that parties lived together in the same house, but in different rooms (Smelser *v.* State, 31 Tex. 95); or that they lived in the same house, and the woman gave birth to two children after her husband's death (Ham *v.* State, (Tex. App. 1890) 15 S. W. 405); or at common law that the parties lived together under the same roof as master and servant, and that there were only occasional instances of illicit intercourse between them (Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465).

75. State *v.* Summers, 98 N. C. 702, 4 S. E. 120, holding, however, that on an indictment for fornication and adultery, where the offense is proved, it is no bar to a conviction that the evidence also showed the accused to have been guilty of rape.

Time of offense.— Where the indictment does not aver the day on which the offense was committed, if the evidence shows it to have been committed within the statutory period there is no variance. Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138.

Arrest of judgment.— Where an indictment in one count charges fornication and bastardy, and in a second count incestuous fornication and bastardy, it is no ground for arresting the judgment after verdict of guilty that the evidence showed that the indictment should have been for adultery. Com. *v.* Kammerdiner, 165 Pa. St. 222, 30 Atl. 929.

76. State *v.* Dukes, 119 N. C. 782, 25 S. E. 786. And see Buchanan *v.* State, 55 Ala. 154.

Suspicious facts.— But a charge to the jury that they may convict unless they can reconcile all the suspicious facts proved, and make them harmonize with defendant's innocence, is erroneous. Buchanan *v.* State, 55 Ala. 154.

77. Bass *v.* State, 103 Ga. 227, 29 S. E. 966.

78. Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427. An instruction that certain circumstances are conclusive of guilt is erroneous. Ellis *v.* State, 20 Ga. 438.

79. Com. *v.* Betz, 2 Woodw. (Pa.) 210, holding that an instruction in a prosecution for fornication and bastardy that, if the jury find that declarations of the woman were made after the pains of labor had begun they would be justified in finding that they were made in the "extremity of labor" specified in the statute, was improper.

80. Powell *v.* State, 12 Tex. App. 238, holding that where one of the modes of committing the offense is charged, it is radical error to instruct for conviction if the other mode has been proved.

81. See *supra*, IV, D, 2. And see Criminal Law, 12 Cyc. 453.

accomplice testimony should instruct the jury that defendant can be convicted only where it appears that such testimony was corroborated by other testimony and define the nature of the required corroborative testimony.[82] The court in defining the offense must define it as alleged in the indictment or information.[83]

B. Directing Verdict. The court may direct a verdict of acquittal where the evidence is not reasonably sufficient to warrant an inference of guilt.[84]

VI. VERDICT AND JUDGMENT.

A. In General. Parties tried jointly on a joint indictment for fornication must be jointly acquitted or jointly convicted.[85] But this does not prevent them from being tried separately, although jointly indicted, and one convicted and punished or acquitted before the other is tried and convicted or acquitted.[86] A trial and conviction for fornication bars a subsequent trial for a larger offense with which it was joined,[87] and an acquittal or conviction on an indictment for another offense bars a subsequent indictment for fornication on the same acts.[88]

B. On Indictment For Another Offense. A conviction for fornication may be had under an indictment for any offense of which it is an element, if there are proper allegations in the indictment to include it;[89] but a conviction cannot be

82. Mitchell *v.* State, 38 Tex. Cr. 325, 42 S. W. 989, holding also that a charge merely that defendant could not be convicted upon the unsupported testimony of the accomplice was insufficient.

83. Mitchell *v.* State, 38 Tex. Cr. 325, 42 S. W. 989. But where living together as man and wife is not an element of the offense, it is not necessary to instruct the jury that they must find this fact. State *v.* Berry, 24 Mo. App. 466.

84. State *v.* Waller, 80 N. C. 401. But direction to acquit of the bastardy charge in a prosecution under an indictment charging fornication and bastardy in one count, and adultery in another, is properly refused, if the jury may find the fact of intercourse both before and after defendant's marriage to another person, and both intercourses were within the period of gestation so that either may have resulted in begetting the child. Com. *v.* Burk, 3 Lanc. L. Rev. (Pa.) 138.

85. State *v.* Bain, 112 Ind. 335, 14 N. E. 232; State *v.* Rinehart, 106 N. C. 787, 11 S. E. 512. But see State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599 [*overruling* State *v.* Mainor, 28 N. C. 340] (holding that, on a prosecution for fornication and adultery, one defendant may be convicted and the other acquitted, as the offense is joint in the physical acts only, and there is no necessity to prove a joint criminal intent); Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427.

Incestuous fornication is not a joint offense, and one person may be convicted thereof. Powers *v.* State, 44 Ga. 209.

Lewd and lascivious cohabitation is a joint offense of which both parties must be guilty or neither. Delany *v.* People, 10 Mich. 241. See, generally, LEWDNESS.

86. Delany *v.* People, 10 Mich. 241; State *v.* Parham, 50 N. C. 416. Where, on a joint indictment for fornication and adultery, one of the parties is not taken and a general verdict of guilty is found against the other, it is no ground for arrest of judgment. State *v.* Lyerly, 52 N. C. 158.

87. Com. *v.* Arner, 149 Pa. St. 35, 24 Atl. 83, holding that a trial and conviction for fornication and bastardy bars a subsequent trial for statutory rape charged in the same indictment. And see CRIMINAL LAW, 12 Cyc. 276.

88. Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542, holding that a party indicted and acquitted of seduction may plead such acquittal in bar of a subsequent indictment for fornication and bastardy founded on the same act.

89. State *v.* Shear, 51 Wis. 460, 8 N. W. 287. See, generally, INDICTMENTS AND INFORMATIONS. "Whether the charge be fornication and bastardy, adultery or seduction, the essential fact which constitutes the crime is fornication," and is necessarily embraced in them all. Gorman *v.* Com., 124 Pa. St. 536, 542, 17 Atl. 26.

A conviction for fornication may be had under an indictment for fornication and adultery (State *v.* Hinton, 6 Ala. 864; State *v.* Cowell, 26 N. C. 231), or under an indictment for seduction by promise of marriage, although it is not alleged that defendant is a single man (Hopper *v.* State, 54 Ga. 389; Dinkey *v.* Com., 17 Pa. St. 126, 55 Am. Dec. 542), or under an indictment for adultery (Respublica *v.* Roberts, 1 Yeates (Pa.) 6, 2 Dall. (Pa.) 124, 1 L. ed. 316; Crosgrove *v.* State, 37 Tex. Cr. 248, 39 S. W. 367, 66 Am. St. Rep. 802; Kelly *v.* State, 32 Tex. Cr. 579, 25 S. W. 425. But see Smitherman *v.* State, 27 Ala. 23), or although the indictment shows on its face facts increasing the crime of fornication to statutory rape (Com. *v.* Davidheiser, 20 Pa. Co. Ct. 200. But *compare infra*, note 90); but one cannot be convicted of adultery on an indictment for fornication, because marriage is not an element of the latter, while it is essential to the former offense (Kelly *v.* State, 32 Tex. Cr. 579, 25 S. W. 425).

had under an indictment for an offense to which the crime of fornication is not related or in which it is not included.[90]

C. Correction or Modification of Judgment. The rule that the court has power during the term to correct or modify an unexecuted judgment in criminal cases applies to judgments for fornication.[91]

VII. PUNISHMENT.

The punishment for fornication is always prescribed by statute, and is usually fine or imprisonment or both.[92]

FORSTELLARIUS EST PAUPERUM DEPRESSOR, ET TOTIUS COMMUNITATIS ET PATRIÆ PUBLICUS INIMICUS. A maxim meaning "A forestaller is an oppressor of the poor, and a public enemy to the whole community and the country."[1]

FORSWEARING. See PERJURY.

FORT. A fortification or a place protected from attack by some such means as a moat, wall, or parapet.[2]

FORTH. Out to view.[3]

FOR THAT. In pleading, words used to introduce the allegations of a declaration.[4] (See, generally, PLEADING.)

FOR THAT WHEREAS. In pleading, formal words introducing the statement of the plaintiff's case, by way of recital, in his declaration, in all actions except trespass.[5] (See, generally, PLEADING.)

FORTHCOMING BOND. A bond given for the security of the sheriff, conditioned to produce the property levied on when required.[6] (See, generally, ATTACHMENT; DETINUE; EXECUTION; GARNISHMENT; REPLEVIN; SHERIFFS AND CONSTABLES; TAXATION.)

FORTHWITH. In its ordinary signification, immediately;[7] as soon as by

One may be convicted of fornication, although, being a married man, he was also guilty of adultery. State *v.* Summers, 98 N. C. 702, 4 S. E. 120; Com. *v.* Kammerdiner, 165 Pa. St. 222, 30 Atl. 929; Com. *v.* Salman, 1 Leg. Chron. (Pa.) 320.

Question of allegation.— In Crosgrove *v.* State, 37 Tex. Cr. 249, 256, 39 S. W. 367, 66 Am. St. Rep. 802, the court says: "The question is not whether one offense includes another. It is a question of allegation. . . . In other words, all the elements of the offense must be charged, to support the conviction."

90. Thus it has been held that a conviction for fornication cannot be had under an information for rape. State *v.* Shear, 51 Wis. 460, 8 N. W. 287. See also Com. *v.* Murphy, 2 Allen (Mass.) 163.

91. State *v.* Manly, 95 N. C. 661. See also CRIMINAL LAW, 12 Cyc. 787.

92. *Georgia.*— Kendrick *v.* State, 100 Ga. 360, 28 S. E. 120.

Indiana.— State *v.* Bain, 112 Ind. 335, 14 N. E. 232; State *v.* Chandler, 96 Ind. 591; Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

North Carolina.— State *v.* Manly, 95 N. C. 661.

Virginia.— Com. *v.* Jones, 2 Gratt. 555; Com. *v.* Isaacs, 5 Rand. 634.

Wisconsin.— State *v.* Seiler, 106 Wis. 346, 82 N. W. 167.

Excessive punishment.— One hundred dollars' fine, or the alternative of five months' work, is not an excessive punishment for fornication by a young woman whose condition, pecuniary or physical, is not shown to be special or peculiar. Hunt *v.* State, 81 Ga. 140, 7 S. E. 142.

1. Bouvier L. Dict. [*citing* 3 Ins. 196].

2. U. S. *v.* Tichenor, 12 Fed. 415, 8 Sawy. 142, 153.

3. Seibs *v.* Engelhardt, 78 Ala. 508, 510, as used in the phrase, "setting forth the amount," etc., in a mechanic's lien statute.

4. Black L. Dict.

5. Black L. Dict. [*citing* Burrill Pr. 127]. See also Coffin *v.* Coffin, 2 Mass. 358, 359.

6. Bouvier L. Dict. [*quoted* in Nichols *v.* Chittenden, 14 Colo. App. 49, 59 Pac. 954, 956]. See also Downman *v.* Chinn, 2 Wash. (Va.) 189, 191.

"A forthcoming bond was duly executed by," etc., see Jones *v.* Myrick, 8 Gratt. (Va.) 179, 188.

7. *In re* Sharick, 1 Alaska 398, 400; Moffat *v.* Dickson, 3 Colo. 313, 314 [*quoting* Pybus *v.* Mitford, 2 Lev. 75, 77]; Whittemore *v.* Smith, 50 Conn. 376, 379; Continental Ins. Co. *v.* Lippold, 3 Nebr. 391, 395; Inman *v.* Western F. Ins. Co., 12 Wend. (N. Y.) 452, 460; Whitehurst *v.* North Carolina Mut. Ins. Co., 52 N. C. 433, 436, 78 Am. Dec. 246; McLain *v.* Warren, 3 Pa. Dist. 585, 586; Reg. *v.* Berkshire Justices, 4 Q. B. D. 469, 471, 48 L. J. M. C. 137, 27 Wkly. Rep. 798; Burgess *v.* Boetefeur, 8 Jur. 621, 624, 13 L. J. M. C. 122, 7 M. & G. 481, 8 Scott N. R. 194, 49 E. C. L. 481; Rex *v.* Francis, Lee t. Hardw.

reasonable exertion, confined to the object, it may be accomplished ;[8] as soon as is reasonably convenient ;[9] as soon as reasonably can be ;[10] as soon as reasonably possible ;[11] as soon as the thing may be done by reasonable exertion confined to that object ;[12] as soon as, with reasonable dispatch in the ordinary course of business, it can be done ;[13] by and by ;[14] *cito et celeriter* ;[15] directly ;[16] at the same point of time ; at one and the same time ; simultaneously ;[17] at once ;[18] now, as from this moment, henceforth ;[19] instanter ;[20] in the reasonable course of the orderly conduct of the business of an office ;[21] presently ;[22] with all reasonable celerity ;[23] with all reasonable dispatch ;[24] with all reasonable diligence and dispatch ;[25]

113, 114 [*citing* Cooper Dict.; Stephen Thesaurus, and *cited* in Grace *v.* Clinch, 4 Q. B. 606, 610, 3 G. & D. 591, 7 Jur. 576, 12 L. J. Q. B. 273, 45 E. C. L. 606]; Simpson *v.* Henderson, 1 M. & M. 300, 303, 22 E. C. L. 526; Thompson *v.* Gibson, 8 M. & W. 281, 288; Webster Dict. [*quoted* in Lincoln *v.* Field, 54 Ark. 471, 474, 16 S. W. 288; Sheldon *v.* Steele, 114 Iowa 616, 620, 87 N. W. 683; Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536; Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713]; Worcester Dict. [*quoted* in Lincoln *v.* Field, 54 Ark. 471, 474, 16 S. W. 288].

"Like the term 'immediately,' it is not in law to be necessarily construed as a time immediately succeeding without an interval, but an effectual and lawful time, allowing all the 'adjuncts and accomplements' necessary to give an act full legal effect to be performed." Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34.

8. Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34 [*citing* 3 Chitty Gen. Pr. 112]; Furber *v.* Cobb, 18 Q. B. D. 494, 504, 56 L. J. Q. B. 273, 56 L. T. Rep. N. S. 689, 35 Wkly. Rep. 398 [*citing* Burrill L. Dict.]; Bouvier L. Dict. [*quoted* in Howell *v.* Howell, 66 Cal. 390, 391, 5 Pac. 681; Moffat *v.* Dickson, 3 Colo. 313, 314; Freiberg *v.* Brunswick-Balke-Collender Co., (Tex. App. 1890) 16 S. W. 784, 785; Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 20 S. Ct. 311, 44 L. ed. 423]. See Parker *v.* Middlesex Mut. Assur. Co., 179 Mass. 528, 530, 61 N. E. 215 [*quoted* in Cook *v.* North British, etc., Ins. Co., 183 Mass. 50, 51, 66 N. E. 597].

9. Hudson *v.* Hill, 43 L. J. C. P. 273, 279, 30 L. T. Rep. N. S. 555.

10. Tennant *v.* Bell, 9 Q. B. D. 684, 10 Jur. 946, 16 L. J. M. C. 31, 58 E. C. L. 684; Spenceley *v.* Robinson, 3 B. & C. 658, 5 D. & R. 572, 27 Rev. Rep. 460, 10 E. C. L. 299; Hyde *v.* Watts, 1 D. & L. 479, 13 L. J. Exch. 41, 12 M. & W. 254; Reg. *v.* Price, 8 Moore P. C. 203, 213, 14 Eng. Reprint 78; Nicholls *v.* Chambers, 4 Tyrw. 836, 837.

11. *In re* Sillence, 7 Ch. D. 238, 240, 47 L. J. Bankr. 87, 37 L. T. Rep. N. S. 676, 26 Wkly. Rep. 129; Kenny *v.* Hutchinson, 8 Dowl. P. C. 171, 172, 9 L. J. Exch. 60, 6 M. & W. 134. See also Hyde *v.* Watts, 1 D. & L. 479, 487, 13 L. J. Exch. 41, 12 M. & W. 254.

12. *In re* Sharick, 1 Alaska 398, 401; Sheldon *v.* Steele, 114 Iowa 616, 620, 87 N. W. 683; Bouvier L. Dict. [*quoted* in Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713].

13. Hubbard *v.* Hennessey, 2 Nebr. (Unoff.) 816, 90 N. W. 220.

14. Cooper Dict. [*quoted* in Rex *v.* Francis, Lee t. Hardw. 113, 114; Thompson *v.* Gibson, 8 M. & W. 281, 288].

15. Stephens Thesaurus [*quoted* in Rex *v.* Francis, Lee t. Hardw. 113, 114; Thompson *v.* Gibson, 8 M. & W. 281, 288].

16. *In re* Sharick, 1 Alaska 398, 401; Burkett *v.* Clark, 46 Nebr. 466, 474, 64 N. W. 1113; Inman *v.* Western F. Ins. Co., 12 Wend. (N. Y.) 452, 460; President *v.* Elizabeth, 40 Fed. 799, 803; Rex *v.* Ouze Bank Com'rs, 3 A. & E. 544, 550, 30 E. C. L. 256; Webster Dict. [*quoted* in Lincoln *v.* Field, 54 Ark. 471, 474, 16 S. W. 288; Sheldon *v.* Steele, 114 Iowa 616, 620, 87 N. W. 683; Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536; Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713].

17. Webster Int. Dict. [*quoted* in Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536].

18. Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536.

19. Keith *v.* National Tel. Co., [1894] 2 Ch. 147, 155, 58 J. P. 573, 63 L. J. Ch. 373, 70 L. T. Rep. N. S. 276, 8 Reports 776, 42 Wkly. Rep. 380.

20. Hull *v.* Mallory, 56 Wis. 355, 356, 14 N. W. 374. But see Reg. *v.* Isle of Ely, 5 E. & B. 489, 496, 85 E. C. L. 489.

21. Leavitt *v.* S. D. Mercer Co., 64 Nebr. 31, 33, 89 N. W. 426; Snooks *v.* Smith, 7 M. & G. 528, 49 E. C. L. 528.

22. Minshew [*cited* in Rex *v.* Francis, Lee t. Hardw. 113, 114, and *quoted* in Thompson *v.* Gibson, 8 M. & W. 281, 288].

23. Moffat *v.* Dickson, 3 Colo. 313, 314. See also McLain *v.* Warren, 3 Pa. Dist. 585, 586; Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713.

24. Star *v.* Mahan, 4 Dak. 213, 30 N. W. 169, 170; Bennett *v.* Lycoming County Mut. Ins. Co., 67 N. Y. 274, 277; Van Wyck *v.* Hardy, 20 How. Pr. (N. Y.) 222 [*cited* in Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34]; Hudson *v.* Hill, 43 L. J. C. P. 273, 279, 30 L. T. Rep. N. S. 555.

25. Baker *v.* Smelser, 88 Tex. 26, 31, 29 S. W. 377, 33 L. R. A. 163 [*cited* in Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713] (where it is said that this term has been too often construed to require discussion"); Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881.

with diligence;[26] with due diligence;[27] with reasonable diligence;[28] with due and reasonable diligence;[29] with convenient speed and diligence;[30] with the least possible delay;[31] within a reasonable time,[32] to be determined by the court under the circumstances in each case;[33] within such convenient time as is reasonably requisite;[34] without delay;[35] without delay or without the loss of

26. Griffey *v.* New York Cent. Ins. Co., 100 N. Y. 417, 421, 3 N. E. 309, 53 Am. St. Rep. 202.

27. *Illinois.*— Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626.

Indiana.— Provident L. Ins. Co. *v.* Baum, 29 Ind. 236, 241.

Louisiana.— Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721.

Minnesota.— Rines *v.* German Ins. Co., 78 Minn. 46, 48, 80 N. W. 839.

New York.— New York Cent. Ins. Co. *v.* National Protection Ins. Co., 20 Barb. 468, 475; Haas *v.* Swick, 30 N. Y. Suppl. 145, 146, 23 N. Y. Civ. Proc. 397; Inman *v.* Western F. Ins. Co., 12 Wend. 452, 461; Cornell *v.* Le Roy, 9 Wend. 163, 165.

Pennsylvania.—Edwards *v.* Lycoming County Mut. Ins. Co., 75 Pa. St. 378, 380; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 298, 80 Am. Dec. 573.

Utah.— Munz *v.* Standard L., etc., Ins. Co., 26 Utah 69, 73, 72 Pac. 182, 99 Am. St. Rep. 830, 62 L. R. A. 485 [*quoting* 2 May Ins. § 462].

Vermont.— Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374, 380.

28. Central City Ins. Co. *v.* Oates, 86 Ala. 558, 567, 6 So. 83, 11 Am. St. Rep. 67; Insurance Co. of North America *v.* Brim, 111 Ind. 281, 286, 12 N. E. 315 [*cited* in Germania F. Ins. Co. *v.* Deckard, 3 Ind. App. 361, 28 N. E. 868, 869]; Bennett *v.* Lycoming County Mut. Ins. Co., 67 N. Y. 274, 277 [*cited* in Sweet *v.* Marvin, 2 N. Y. App. Div. 1, 3, 37 N. Y. Suppl. 442].

29. Harnden *v.* Milwaukee Mechanics' Ins. Co., 164 Mass. 382, 384, 41 N. E. 658, 49 Am. St. Rep. 467.

30. Blackiston *v.* Potts, 2 Miles (Pa.) 388, 389 [*quoted* in McLain *v.* Warren, 3 Pa. Dist. 585, 586].

31. Maxwell *v.* Scarfe, 18 Ont. 529, 531.

32. *Alaska.*— *In re* Sharick, 1 Alaska 398, 401.

Illinois.— Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553, 561.

Indiana.— Hartford Railway Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, 464.

Iowa.— Pennypacker *v.* Capital Ins. Co., 80 Iowa 56, 64, 45 N. W. 408, 20 Am. St. Rep. 395, 8 L. R. A. 236; Burchett *v.* Casady, 18 Iowa 342, 344 [*cited* in Tomlinson *v.* Litze, 82 Iowa 32, 33, 47 N. W. 1015, 31 Am. St. Rep. 458].

Kansas.— Capitol Ins. Co. *v.* Wallace, 50 Kan. 453, 454, 31 Pac. 1070.

Kentucky.— Phœnix Ins. Co. *v.* Coomes, 20 S. W. 900, 14 Ky. L. Rep. 603, 604.

Maryland.— Pennsylvania R. Co. *v.* Reichert, 58 Md. 261, 275.

Massachusetts.— See Cook *v.* North British, etc., Ins. Co., 181 Mass. 101, 105, 62 N. E. 1049, 1051.

Minnesota.— Sorenson *v.* Swensen, 55 Minn. 58, 60, 56 N. W. 350, 43 Am. St. Rep. 472.

New York.—Solomon *v.* Continental F. Ins. Co., 160 N. Y. 595, 600, 55 N. E. 279, 73 Am. St. Rep. 707, 46 L. R. A. 682; Bennett *v.* Lycoming County Mut. Ins. Co., 67 N. Y. 274, 277; Nimmo *v.* Harway, 23 Misc. 126, 127, 50 N. Y. Suppl. 686; Haas *v.* Swick, 30 N. Y. Suppl. 145, 146, 23 N. Y. Civ. Proc. 397.

North Carolina.—Whitehurst *v.* North Carolina Mut. Ins. Co., 52 N. C. 433, 436, 78 Am. Dec. 246.

Ohio.— Eureka F. & M. Ins. Co. *v.* Baldwin, 17 Ohio Cir. Ct. 143, 144, 9 Ohio Cir. Dec. 118; Kirk *v.* Ohio Valley Ins. Co., 8 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200.

Pennsylvania.— McLain *v.* Warren, 3 Pa. Dist. 585, 586.

South Dakota.— Woods *v.* Sheldon, 9 S. D. 392, 400, 69 N. W. 602.

Texas.— Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881 [*quoting* Webster Dict.]; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713 [*quoting* Bouvier L. Dict.].

Vermont.— Donahue *v.* Windsor County Mut. F. Ins. Co., 56 Vt. 374, 380.

England.— Furber *v.* Cobb, 18 Q. B. D. 494, 504, 56 L. J. Q. B. 273, 56 L. T. Rep. N. S. 689, 35 Wkly. Rep. 398 [*citing* Burrill L. Dict.; 3 Chitty Gen. Pr. 112]; Tennant *v.* Bell, 9 Q. B. 684, 690, 10 Jur. 946, 16 L. J. M. C. 31, 58 E. C. L. 684; Doe *v.* Sutton, 9 C. & P. 706, 38 E. C. L. 409 [*quoted* in Moffat *v.* Dickson, 3 Colo. 313, 314].

Canada.— Maxwell *v.* Scarfe, 18 Ont. 529, 531.

See 9 Cyc. 609 note 37.

33. Van Wyck *v.* Hardy, 39 How. Pr. (N. Y.) 392, 399 [*quoted* in Tousley *v.* Mowers, 14 Misc. (N. Y.) 125, 126, 35 N. Y. Suppl. 855]. See also Barnforth *v.* Raddin, 14 Allen (Mass.) 66, 67.

34. *Alabama.*— McLure *v.* Colclough, 17 Ala. 89, 100.

Colorado.— Moffat *v.* Dickson, 3 Colo. 313, 314 [*quoting* Pybus *v.* Mitford, 2 Lev. 75, 77].

Indiana.— Martin *v.* Pifer, 96 Ind. 245, 248.

Missouri.— State *v.* Clevenger, 20 Mo. App. 626, 627.

New Jersey.—Howell *v.* Gaddis, 31 N. J. L. 313.

Wisconsin.— See Richardson *v.* End, 43 Wis. 316.

England.— Pybus *v.* Mitford, 2 Lev. 75, 77 [*quoted* in Rex *v.* Francis, Lee t. Hardw. 113, 114; Thompson *v.* Gibson, 8 M. & W. 281, 288].

Canada.— McLaren *v.* Fisken, 28 Grant Ch. (U. C.) 352, 353.

35. *In re* Sharick, 1 Alaska 398, 401; Whittemore *v.* Smith, 50 Conn. 376, 379;

time;[36] without unnecessary delay;[37] without unreasonable delay;[38] without unreasonable or unnecessary delay;[39] without unnecessary procrastination and delay.[40] Such is the import of the term, but it varies with any particular case,[41] and will imply a longer or shorter period, according to the nature of the thing to be done.[42] It must receive a reasonable construction,[43] and in giving it a construction some regard must be had to the nature of the act or thing to be performed and the circumstances of the case.[44] In practice, moreover, this word

Burkett *v.* Clark, 46 Nebr. 466, 474, 64 N. W. 1113; Webster Dict. [*quoted* in Sheldon *v.* Steele, 114 Iowa 616, 620, 87 N. W. 683; Lewis *v.* Hojer, 16 N. Y. Suppl. 534, 536]; Van Wyck *v.* Hardy, 39 How. Pr. (N. Y.) 392, 399 [*quoted* in Tousley *v.* Mowers, 14 Misc. (N. Y.) 125, 126, 35 N. Y. Suppl. 855]; Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 881; Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713]; Worcester Dict. [*quoted* in Lincoln *v.* Field, 54 Ark. 471, 474, 16 S. W. 288].

36. Staunton *v.* Wood, 13 Q. B. 638, 642, 15 Jur. 1123, 71 E. C. L. 638; Roberts *v.* Brett, 11 H. L. Cas. 337, 355, 11 Jur. N. S. 377, 34 L. J. C. P. 241, 12 L. T. Rep. N. S. 286, 13 Wkly. Rep. 587, 11 Eng. Reprint 1363.

37. Central City Ins. Co. *v.* Oates, 86 Ala. 558, 567, 6 So. 83, 11 Am. St. Rep. 67.

"The term 'forthwith' is an 'imperative term, and certainly admits of no unnecessary delay'" (Hackney *v.* Schow, 21 Tex. Civ. App. 613, 615, 53 S. W. 713 [*quoted* in Austin *v.* Welch, 31 Tex. Civ. App. 526, 530, 72 S. W. 328]); but courts have considered that it contemplated reasonable delay (McCall *v.* Merchants' Ins. Co., 33 La. Ann. 142, 144).

38. Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626; Haas *v.* Swick, 30 N. Y. Suppl. 145, 146, 23 N. Y. Civ. Proc. 397.

39. Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721; Rines *v.* German Ins. Co., 78 Minn. 46, 48, 80 N. W. 839; Inland Ins., etc., Co. *v.* Stauffer, 33 Pa. St. 397, 400; Munz *v.* Standard L., etc., Ins. Co., 26 Utah 69, 73, 99 Am. St. Rep. 830, 62 L. R. A. 485 [*quoting* 2 May Ins. § 462].

40. Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236, 241.

41. Moffat *v.* Dickson, 3 Colo. 313, 314 [*quoting* Bouvier L. Dict.].

In connection with other words the word "forthwith" has often received judicial interpretation; as for example as used in the following phrases: "Forthwith certify" (see Chaplin *v.* Levy, 2 C. L. R. 1024, 9 Exch. 673, 675, 23 L. J. Exch. 200; Heden *v.* Atlantic Royal Mail Steam Nav. Co., 2 E. & E. 671, 6 Jur. N. S. 677, 29 L. J. Q. B. 191, 2 L. T. Rep. N. S. 170, 8 Wkly. Rep. 410, 105 E. C. L. 671); "forthwith declare" (see Reg. *v.* Wigan, 54 L. J. Q. B. 338, 339); "forthwith discharge" (see Lowe *v.* Fox, 15 Q. B. D. 667, 675, 50 J. P. 244, 54 L. J. Q. B. 561, 53 L. T. Rep. N. S. 886, 34 Wkly. Rep. 144 [*affirmed* in 12 App. Cas. 206, 51 J. P. 468, 56 L. J. Q. B. 480, 56 L. T. Rep. N. S. 406, 36 Wkly. Rep. 25]); "forthwith give" (see Spenceley *v.* Robinson, 3 B. & C. 658, 662, 5 D. & R. 572, 27 Rev. Rep. 460, 10 E. C. L. 299; *Ex p.* Lowe, 3 D. & L. 737, 738, 10 Jur. 595, 15 L. J. M. C. 99); "forthwith make out" (Hancock *v.* Somes, 8 Cox C. C. 172, 174, 1 E. & E. 795, 5 Jur. N. S. 983, 28 L. J. M. C. 196, 7 Wkly. Rep. 422, 102 E. C. L. 795; Reg. *v.* Robinson, 12 A. & E. 672, 673, 40 E. C. L. 335); "forthwith to assure" (see Kenny *v.* Hutchinson, 8 Dowl. P. C. 171, 172, 9 L. J. Exch. 60, 6 M. & W. 134).

42. Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34; Moffat *v.* Dickson, 3 Colo. 313, 314; Anderson L. Dict. [*quoted* in Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 20 S. Ct. 311, 44 L. ed. 423].

43. Leavitt *v.* S. D. Mercer Co., 64 Nebr. 31, 33, 89 N. W. 426; Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 407, 31 N. E. 231; Reg. *v.* Robinson, 12 A. & E. 672, 680, 40 E. C. L. 335; Spenceley *v.* Robinson, 3 B. & C. 658, 662, 5 D. & R. 572, 27 Rev. Rep. 460, 10 E. C. L. 299.

44. *Alabama.*— Central City Ins. Co. *v.* Oates, 86 Ala. 558, 567, 6 So. 83, 11 Am. St. Rep. 67.

California.— Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34.

Colorado.— Moffat *v.* Dickson, 3 Colo. 313, 315.

Illinois.— Scammon *v.* Germania Ins. Co., 101 Ill. 621, 626; Peoria M. & F. Ins. Co. *v.* Lewis, 18 Ill. 553, 561.

Indiana.— Hartford R. Pass. Assur. Co. *v.* Burwell, 44 Ind. 460, 464; Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236, 241.

Louisiana.—Konrad *v.* Union Casualty, etc., Co., 49 La. Ann. 636, 639, 21 So. 721.

Minnesota.— Rines *v.* German Ins. Co., 78 Minn. 46, 48, 80 N. W. 839.

Nebraska.— Burkett *v.* Clark, 46 Nebr. 466, 474, 64 N. W. 1113.

New York.—Haas *v.* Swick, 30 N. Y. Suppl. 145, 146, 23 N. Y. Civ. Proc. 397; Inman *v.* Western F. Ins. Co., 12 Wend. (N. Y.) 452, 461; Cornell *v.* Le Roy, 9 Wend. (N. Y.) 163, 166.

North Carolina.—Whitehurst *v.* North Carolina Mut. Ins. Co., 52 N. C. 433, 436, 78 Am. Dec. 246.

Ohio.— Kirk *v.* Ohio Valley Ins. Co., 8 Ohio Dec. (Reprint) 182, 6 Cinc. L. Bul. 200.

Pennsylvania.—Edwards *v.* Lycoming County Mut. Ins. Co., 75 Pa. St. 378, 380; West Branch Ins. Co. *v.* Helfenstein, 40 Pa. St. 289, 298, 80 Am. Dec. 573.

Utah.— Munz *v.* Standard L., etc., Ins. Co., 26 Utah 69, 73, 72 Pac. 182, 99 Am. St. Rep. 830, 62 L. R. A. 485 [*quoting* 2 May Ins. § 462].

United States.— Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 20 S. Ct. 311, 44 L. ed. 423 [*quoting* Bouvier L. Dict.].

is frequently used as meaning "within twenty-four hours."[45] (See, generally, PLEADING; PROCESS; TIME.)

FORTIOR ET POTENTIOR EST DISPOSITIO LEGIS QUAM HOMINIS. A maxim meaning "The disposition of the law is stronger and more powerful than that of man."[46]

FORTIUS SUNT FORIS ARMA, NISI EST CONSILIUM DOMI. A maxim meaning "The strongest arms in the field are weak, if there is not wisdom in the council at home."[47]

FORTNIGHTLY. Occurring or appearing once in a fortnight.[48]

FORTUITOUS COLLISION. In French marine insurance, a running foul (*abordage fortuit*) of ships, which is a peril insured against.[49] (See, generally, COLLISION; MARINE INSURANCE.)

FORTUITOUS EVENT. In the civil law, an event which happens by a cause which we cannot resist;[50] one which is unforeseen and caused by superior force, which it is impossible to resist;[51] a term synonymous with ACT OF GOD (*q. v.*) in the common law.[52] (Fortuitous Event: As Affecting Liability — For Flowage, see WATERS; For Negligence, see NEGLIGENCE; Of Carrier, see CARRIERS. See also ACCIDENT; ACT OF GOD; CASUALTY; CASUS FORTUITUS.)

FORTUNAM FACIUNT JUDICEM. Literally "they make fortune the judge."[53]

FORTUNE. Estate; possessions.[54]

FORTUNE TELLER. See VAGRANCY.

FORTY. A term sometimes used to designate either the north or the south half of a quarter section of land.[55]

England.— Furber *v.* Cobb, 18 Q. B. D. 494, 504, 56 L. J. Q. B. 273, 56 L. T. Rep. N. S. 689, 35 Wkly. Rep. 398 [*citing* Burrill L. Dict.]; *Ex p.* Lamb, 19 Ch. D. 169, 173, 51 L. J. Ch. 207, 45 L. T. Rep. N. S. 639, 30 Wkly. Rep. 126; Reg. *v.* Robinson, 12 A. & E. 672, 678, 40 E. C. L. 335; *In re* Sullivan, 36 L. J. Bankr. 1, 3, 15 L. T. Rep. N. S. 434, 15 Wkly. Rep. 185; Hudson *v.* Hill, 43 L. J. C. P. 273, 279, 30 L. T. Rep. N. S. 555 (per Lord Denman, C. J.); Simpson *v.* Henderson, M. & M. 300, 303, 22 E. C. L. 526.

"The word . . . has sometimes received a free construction, and sometimes a strict one, according to the circumstances under which it has been used." Maxwell *v.* Scarfe, 18 Ont. 529, 531.

45. *California.*— Anderson *v.* Goff, 72 Cal. 65, 73, 13 Pac. 73, 1 Am. St. Rep. 34.

Colorado.—Moffatt *v.* Dickson, 3 Colo. 313.

Missouri.— State *v.* Clevenger, 20 Mo. App. 626, 627.

New York.— Van Wyck *v.* Hardy, 39 How. Pr. 392, 399 [*quoted* in Tousley *v.* Mowers, 14 Misc. 125, 126, 35 N. Y. Suppl. 855]; Champlin *v.* Champlin, 2 Edw. 328, 329.

United States.— Dickerman *v.* Northern Trust Co., 176 U. S. 181, 193, 20 S. Ct. 311, 44 L. ed. 423; Empire Min. Co. *v.* Savannah Propeller Tow Boat Co., 108 Fed. 900, 905.

See also Abbott L. Dict.; Bouvier L. Dict.; Wharton L. Lex.

46. Bouvier L. Dict. [*citing* Broom Leg. Max. 697; Coke Litt. 234].

Applied in Mandlebaum *v.* McDonell, 29 Mich. 78, 91. See also State *v.* Homey, 44 Wis. 615, 618.

47. Morgan Leg. Max.

48. Webster Int. Dict. See The Melrose Abbey, 14 T. L. R. 202.

"Fortnight's notice" see Labouchere *v.* Wharncliffe, 13 Ch. D. 346, 353, 41 L. T. Rep. N. S. 638, 28 Wkly. Rep. 367.

49. Peters *v.* Warren Ins. Co., 14 Pet. (U. S.) 99, 112, 10 L. ed. 371, where the court said that in our policies such a risk "falls only under the more general head of 'perils of the sea.'"

50. Viterbo *v.* Friedlander, 120 U. S. 707, 727, 7 S. Ct. 962, 30 L. ed. 776 (where the term is given as one of the definitions of an "*cas fortuits*"); La. Rev. Civ. Code, art. 3556 [*quoted* in Eugster *v.* West, 35 La. Ann. 119, 120, 48 Am. Rep. 232].

51. Civ. Code, art. 17, par. 24 [*quoted* in Nordheimer *v.* Alexander, 19 Can. Sup. Ct. 248, 263; Joint *v.* Webster, 15 Quebec Super. Ct. 220, 223].

The term may include great floods (Sheldon *v.* Sherman, 42 Barb. (N. Y.) 368, 369 [*affirmed* in 42 N. Y. 484, 1 Am. Rep. 569]); and may be applied to the formation of ice from extreme and unusual cold, which prevents the unloading of a vessel (Houge *v.* Woodruff, 19 Fed. 136, 138).

52. 1 Cyc. 758 note 8. See also Nordheimer *v.* Alexander, 19 Can. Sup. Ct. 248, 263, where Gwynne, J., says that "a similar definition of the equivalent phrase 'act of God' was given" in Nugent *v.* Smith, 1 C. P. D. 423, 436, 437, 45 L. J. C. P. 697, 34 L. T. Rep. N. S. 827, 25 Wkly. Rep. 117.

53. Spoken of the process of making partition among coparceners by drawing lots for the several purparts. Black L. Dict. [*citing* Coke Litt. 167].

54. Century Dict. See Maitland *v.* Adair, 3 Ves. Jr. 231, 232, 30 Eng. Reprint 984, where the term was held to have the meaning of "money legacies."

55. Lente *v.* Clarke, 22 Fla. 515, 525, 1 So. 149.

FORUM. At common law, a place of jurisdiction; the place where a remedy is sought; jurisdiction; a court of justice.[56] (Forum: In General, see COURTS. Law of the, see CONFLICT OF LAWS.)

FOR VALUE RECEIVED. See FOR.

FORWARD. As an adjective, in the fore part.[57] As a verb, to send forward; send toward the place of destination; transmit;[58] to transport or to carry.[59]

FORWARDER. A person who receives and forwards goods, taking on himself the expense of transportation, for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight;[60] a person who for a compensation takes charge of goods intrusted or directed to him, and forwards them, that is, puts them on their way to their place of destination by the ordinary and usual means of conveyance, or according to the instruction he receives.[61] (See, generally, CARRIERS.)

FORWARDING MERCHANTS. A class of persons who usually combine in their business the double character of warehousemen and agents, for a compensation, to ship and forward goods to their destination.[62] (See, generally, CARRIERS; WAREHOUSEMEN.)

FOSSILS. Organic substances which have become penetrated by earthy or metallic particles, petrified forms of plants and minerals; ore, a compound of metal and some other substance.[63] (See, generally, MINES AND MINERALS.)

FOUL.[64] See FALL FOUL.

FOUND.[65] Ascertained to lie and be;[66] obtained; or supplied;[67] "reached," "got at";[68] seen or discovered.[69] As a verb, the term is often used as a synonym of ESTABLISH,[70] *q. v.* In criminal law the word has a well defined meaning

56. Bouvier L. Dict. See also Vose *v.* Philbrook, 28 Fed. Cas. No. 17,010, 3 Story 335, 347; 17 Cyc. 1068.

Forum ad alium examen see Shepard *v.* Wright, 35 Hun (N. Y.) 444, 446.

Forum domesticum see Rex *v.* Ely, 1 W. Bl. 71, 82.

Forum originis see Somerville *v.* Somerville, 5 Ves. Jr. 750, 760, 5 Rev. Rep. 155, 31 Eng. Reprint 839.

"The forum rei sitæ, the forum domicilii, the forum maleficii, &c." De Lavio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. (U. S.) 398, 440.

57. Webster Int. Dict.

"In the forward part of the vessel" see The Philadelphian, [1900] P. 43, 45.

58. Century Dict. [*quoted* in Reg. *v.* San Tana, 9 Hawaii 106, 109, holding that the term is not synonymous with "solicit" or "procure"].

59. St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505, 511; Davis *v.* Jacksonville Southeastern Line, 126 Mo. 69, 80, 28 S. W. 965. See also Colfax Mountain Fruit Co. *v.* Southern Pac. Co., 118 Cal. 648, 650, 50 Pac. 775, 40 L. R. A. 78 ("forward the property to the place of destination named"); Hooper *v.* Wells, 27 Cal. 11, 28, 85 Am. Dec. 211 ("forward to San Francisco and deliver to address"); Reed *v.* U. S. Express Co., 48 N. Y. 462, 469, 8 Am. Rep. 561 ("will forward bank-notes").

"Forwarded."— See St. Louis, etc., R. Co. *v.* Piper, 13 Kan. 505, 511 ("forwarded by defendant"); Buell *v.* Chapin, 99 Mass. 594, 97 Am. Dec. 58 ("forwarded the note to you for collection"); Blossom *v.* Griffin, 13 N. Y. 569, 574, 67 Am. Dec. 75 ("to be forwarded").

60. Schloss *v.* Wood, 11 Colo. 287, 290, 291, 17 Pac. 910 [*quoting* Bouvier L. Dict., and *citing* Hutchinson Carr. § 47], where the term is distinguished from "common carriers."

61. Place *v.* Union Express Co., 2 Hilt. (N. Y.) 19, 25 [*citing* Brown *v.* Denison, 2 Wend. (N. Y.) 593; Ackley *v.* Kellogg, 8 Cow. (N. Y.) 223; Platt *v.* Hibbard, 7 Cow. (N. Y.) 497, 499]. See also 31 & 32 Vict. c. 33, § 2.

62. Story Bailm. § 444 [*quoted* in Bush *v.* Miller, 13 Barb. (N. Y.) 481, 488].

63. Doster *v.* Friedensville Zinc Co., 140 Pa. St. 147, 151, 21 Atl. 251 [*citing* Webster Dict.].

"Lead ore and coal, ironstone and fossils, to be gotten thereout" as used in a statute see Rosse *v.* Wainman, 15 L. J. Exch. 67, 72, 14 M. & W. 859.

64. "Foul play."— See Thomas *v.* Blasdale, 147 Mass. 438, 439, 18 N. E. 214.

65. Distinguished from "frequent" in Reg. *v.* Clark, 54 L. J. M. C. 66, 68.

66. Jowett *v.* Spencer, 1 Exch. 647, 649, 17 L. J. Exch. 367, as used in an indenture conveying coal within and under the demised premises.

67. Smith *v.* Hickman, 14 Pa. Super. Ct. 46, 52, as used in the phrase "oil or gas is found in paying quantities."

68. As used with reference to the service of process see Steinhardt *v.* Baker, 20 Misc. (N. Y.) 470, 472, 46 N. Y. Suppl. 707. See also Carter *v.* Youngs, 42 N. Y. Super. Ct. 169, 173.

69. Atty.-Gen. *v.* Delano, 6 Price 383, 396, 397, 398, 400.

70. See Floyd *v.* Rankin, 86 Cal. 159, 168, 24 Pac. 936; Seagrave's Appeal, 125 Pa. St.

regarding indictments.[71] (See ENDOW; ESTABLISH; FOUNDATION; and, generally, CHARITIES.)

FOUNDATION. The space immediately beneath the footings of a wall;[72] also the incorporation or endowment of a college or hospital.[73] (See ELEEMOSYNARY; ENDOWMENT; FOUND; and, generally, CHARITIES; COLLEGES AND UNIVERSITIES.)

FOUNDATION OF A LIEN. An indebtedness existing on a contract by the person sought to be charged.[74] (See, generally, LIENS.)

FOUNDLING. A deserted or exposed infant; a child found without a parent or guardian, its relatives being unknown.[75] (See ASYLUMS; INFANTS.)

362, 375, 17 Atl. 412; Hartshorne *v.* Nicholson, 26 Beav. 58, 61, 27 L. J. Ch. 810, 53 Eng. Reprint 818; Hopkins *v.* Phillipps, 7 Jur. N. S. 1274, 1276, 30 L. J. Ch. 671, 5 L. T. Rep. N. S. 700; Tatham *v.* Drummond, 34 L. J. Ch. 1, 2; *In re* Hedgman, 8 Ch. D. 156, 159, 26 Wkly. Rep. 674.

In connection with other words the word "found" has often received judicial interpretation; as for instance in the following phrases: "Found and being" (see Tower *v.* Tower, 18 Pick. (Mass.) 262, 263); "found by the broker" (see Evans *v.* Gay, (Tex. Civ. App. 1903) 74 S. W. 575, 576); "found committing" (see Griffith *v.* Taylor, 2 C. P. D. 194, 197, 46 L. J. C. P. 152, 36 L. T. Rep. N. S. 5, 25 Wkly. Rep. 196; Downing *v.* Capel, L. R. 2 C. P. 461, 464, 36 L. J. M. C. 97, 16 L. T. Rep. N. S. 323, 15 Wkly. Rep. 745); Simmons *v.* Millingen, 2 C. B. 524, 532, 10 Jur. 224, 15 L. J. C. P. 102, 52 E. C. L. 524; Roberts *v.* Orchard, 2 H. & C. 769, 773, 33 L. J. Exch. 65, 9 L. T. Rep. N. S. 727, 12 Wkly. Rep. 253); "found due" (see Cooper *v.* Crane, 9 N. J. L. 173, 187); "found employed" (see State *v.* Canton, 43 Mo. 48, 53); "found in a state of intoxication" (see State *v.* Bromley, 25 Conn. 6, 8; Reg. *v.* Pelly, [1897] 2 Q. B. 33, 35, 18 Cox C. C. 556, 61 J. P. 373, 66 L. J. Q. B. 519, 76 L. T. Rep. N. S. 467, 45 Wkly. Rep. 504; Lester *v.* Torrens, 2 Q. B. D. 403, 404, 46 L. J. M. C. 280, 25 Wkly. Rep. 691); "found indorsed" (see Territory *v.* Pendry, 9 Mont. 67, 72, 22 Pac. 760); "found in the county" (see McNab *v.* Bennet, 66 Ill. 157, 160); "found" in the district (see McCoy *v.* Cincinnati, etc., R. Co., 13 Fed. 3, 4; Runkle *v.* Lamar Ins. Co., 2 Fed. 9, 13); "found in the possession or keeping of" (see Reg. *v.* Dennis, [1894] 2 Q. B. 458, 464, 18 Cox C. C. 21, 58 J. P. 622, 63 L. J. M. C. 153, 71 L. T. Rep. N. S. 436, 10 Reports 316, 42 Wkly. Rep. 586; Laws *v.* Read, 63 L. J. Q. B. 683, 685, 10 Reports 545); "'found' in this State" (see Merchants' Mfg. Co. *v.* Grand Trunk R. Co., 11 Abb. N. Cas. (N. Y.) 183, 185, 63 How. Pr. 459, 13 Fed. 358); "found offending against this Act" (see Horley *v.* Rogers, 2 E. & E. 674, 676, 6 Jur. N. S. 605, 29 L. J. M. C. 140, 2 L. T. Rep. N. S. 171, 8 Wkly. Rep. 392, 105 E. C. L. 674); "found on such premises" (see 35 & 36 Vict. c. 94, § 25); "found therein" (see Murphy *v.* Arrow, [1897] 2 Q. B. 527, 533, 66 L. J. Q. B. 865, 77 L. T. Rep. N. S. 435, 46 Wkly. Rep. 94); "found to be due" (see *In re* Crawshay, 39 Ch. D. 552, 555, 57 L. J. Ch. 923, 59 L. T. Rep. N. S. 598, 37 Wkly. Rep. 25); "found to be of unsound mind" (see *In re* Maltby, 1 Q. B. D. 18, 25, 14 Cox C. C. 609, 45 J. P. 681, 50 L. J. Q. B. 413, 44 L. T. Rep. N. S. 711, 29 Wkly. Rep. 678); "found" within the jurisdiction (see Reg. *v.* Lopez, 6 Wkly. Rep. 227, 230); "found within the state" (see Galvedon City R. Co. *v.* Hook, 40 Ill. App. 547, 556); "not found" (see Com. *v.* Hale, 2 Va. Cas. 241, 242); "found on the demised premises" (see Hammond *v.* Mather, 3 F. & F. 151).

"Founded in fact" see State *v.* Morgan, 40 Conn. 44, 46.

"Founded on a contract" see Wyman *v.* Fabens, 111 Mass. 77, 81; *In re* Morales, 105 Fed. 761; Pontifex *v.* Midland R. Co., 3 Q. B. D. 23, 27, 47 L. J. Q. B. 28, 37 L. T. Rep. N. S. 403, 26 Wkly. Rep. 209; Bryant *v.* Herbert, 3 C. P. D. 389, 391, 47 L. J. C. P. 670, 39 L. T. Rep. N. S. 17, 26 Wkly. Rep. 898.

"Founded on any indebtedness" see Fellows *v.* Brown, 38 Miss. 541, 543.

"Founded on tort" see Bryant *v.* Herbert, 3 C. P. D. 389, 391, 47 L. J. C. P. 670, 39 L. T. Rep. N. S. 17, 26 Wkly. Rep. 898.

"Founded upon the honest opinion of the neighborhood" see State *v.* Morgan, 40 Conn. 44, 47.

"Founded upon a grant" see Love *v.* Love, 2 Yerg. (Tenn.) 288, 289.

71. Territory *v.* Pendry, 9 Mont. 67, 72, 22 Pac. 760.

72. St. 41 & 42 Vict. c. 52, § 41, subs. 3.

73. Black L. Dict.

"In eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes and makes two species of foundation, the one *fundatio incipiens,* or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundation perficiens,* or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is, in the law the founder; and it is in this last sense we generally call a man the founder of a college or hospital." 1 Blackstone Comm. 480 [*quoted* in Trustees Union Baptist Assoc. *v.* Hunn, 7 Tex. Civ. App. 249, 251, 26 S. W. 755; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 673, 4 L. ed. 629]. To the same effect see Seagrave's Appeal, 125 Pa. St. 362, 375, 17 Atl. 412.

"To the foundation of a charitable school" see Salusbury *v.* Denton, 3 Jur. N. S. 740, 3 Kay & J. 529, 26 L. J. Ch. 851.

74. Hagan *v.* American Baptist Home Missionary Soc., 14 Daly (N. Y.) 131, 140, 6 N. Y. St. 212.

75. Black L. Dict.

FOUNDRY. Works for the casting of metals.[76]

FOUR CORNERS. The face of a written instrument.[77] (See, generally, DEEDS.)

FOUR-HORSE POWER PULLEY FACE. As used in a lease requiring the lessor to furnish such power, "four horse power at the lessee's pulley."[78]

FOURTEENTH AMENDMENT.[79] See CONSTITUTIONAL LAW.

FOURTH OF JULY. See HOLIDAYS.

FOWL. As a noun, any bird; especially any large eatable bird.[80] As a verb, to catch or kill wild fowl, for game or food, as by shooting, or by decoys, nets, etc.[81] (See, generally, ANIMALS; FISH AND GAME.)

FOX-HUNTING.[82] See ANIMALS.

FRACTION. A fragment; a separate portion; a disconnected part;[83] a fragment or broken part; a portion of a thing less than the whole.[84]

FRACTIONAL TOWNSHIP. A township where the outer boundary lines cannot be carried out in full because of a water course or some other external interference.[85]

FRACTIONEM DIEI NON RECIPIT LEX. A maxim meaning "The law does not regard a fraction of a day."[86]

FRAIL. Easily broken or destroyed; fragile;[87] the term is sometimes used to describe a certain class of goods in bills of lading.[88]

FRAIS JUSQU'A BORD. In French commercial law, a term which corresponds to the English term "free on board."[89] (See F. O. B.; and, generally, SALES.)

FRAME. As applied to a building, "wooden."[90]

FRAMEWORK. A structure or fabric for inclosing or supporting anything.[91]

FRANCES. A name universally applied to females only, indicating that the person to whom it is applied is a female.[92]

76. Benedict *v.* New Orleans, 44 La. Ann. 793, 795, 11 So. 41.

77. Black L. Dict.

78. Jourgensen *v.* Fraitel, 20 N. Y. Suppl. 33, 34.

79. See 2 Cyc. 89.

80. Webster Int. Dict.

Fowl as an estray see 2 Cyc. 358.

81. Webster Int. Dict. See Devonshire *v.* O'Connor, 24 Q. B. D. 468, 475, 54 J. P. 740, 59 L. J. Q. B. 206, 62 L. T. Rep. N. S. 917, 38 Wkly. Rep. 420.

Common of fowling see 8 Cyc. 349.

82. See 2 Cyc. 343.

83. Century Dict. [*quoted* in Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 199, 46 Pac. 786].

84. Black L. Dict. [*quoted* in Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 200, 46 Pac. 786].

The word is used to designate a fragmentary part of a whole, disconnected and distinct within itself, rather than an undivided interest; a several, not a joint, interest. Jory *v.* Palace Dry Goods Co., 30 Oreg. 196, 200, 46 Pac. 786.

"Fraction of a day" see Westbrook Mfg. Co. *v.* Grant, 60 Me. 88, 95, 11 Am. Rep. 181; Combe *v.* Pitt, 3 Burr. 1423, 1434; 8 Cyc. 744 note 13.

"Fractional" as used in describing a section of land see 5 Cyc. 900 note 18. See also Swayne *v.* Vance, 28 Ark. 282, 286; Tolleston Club *v.* State, 141 Ind. 197, 205, 38 N. E. 214, 40 N. E. 690; and, generally, TIME.

85. Goltermann *v.* Schiermeyer, 111 Mo. 404, 416, 19 S. W. 484, 20 S. W. 161.

86. Bouvier L. Dict. [*citing* Lofft Max. 572].

87. Century Dict.

88. Doherr *v.* Houston, 123 Fed. 334, 335, where the bill of lading contained the statement: "Pckgs. fire crackers frail."

89. Bouvier L. Dict., where it is said that the term includes such items as packing, porterage or cartage, commissions, etc. See Bartels *v.* Schell, 16 Fed. 341, 343; Bartels *v.* Redfield, 16 Fed. 336, 337.

90. Ward *v.* Murphysboro, 77 Ill. App. 549, 552, where it is said: "A wooden building is a frame building."

"Frame buildings" see Hannan *v.* Williamsburgh City F. Ins. Co., 81 Mich. 556, 557, 45 N. W. 1120, 9 L. R. A. 127; Sunderlin *v.* Ætna Ins. Co., 18 Hun (N. Y.) 522, 523.

"Frame house" see Mead *v.* Northwestern Ins. Co., 7 N. Y. 530, 536; Fowler *v.* Ætna F. Ins. Co., 6 Cow. (N. Y.) 673, 676, 16 Am. Dec. 460.

91. Century Dict.

Framework of a bridge construed to include the stringers sustaining the planking of the floor see Bush *v.* Delaware, etc., R. Co., 166 N. Y. 210, 225, 59 N. E. 838.

92. Taylor *v.* Com., 20 Gratt. (Va.) 825, 828.

FRANCHISES

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I. Definition.

The word "franchise" has various significations, both in a popular and in a legal sense, and there is some confusion arising from a failure to discriminate in

what sense the word is used.[1] It is used as synonymous with liberty,[2] freedom,[3] exemption,[4] immunity,[5] privileges and immunities of a personal character,[6] or in the sense of privileges generally.[7] Thus, in a broad and popular sense, it embraces the right of trial by jury,[8] the right of habeas corpus,[9] and political rights of subjects and citizens[10] like the elective franchise.[11] In a strict legal sense franchises are special privileges which are conferred by government on individuals, and which do not belong to the citizens of the country generally of common right.[12] The rule has been laid down that the expression "common

1. Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 266, 4 Am. Rep. 63; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575; People *v.* Ridgley, 21 Ill. 65, 69; Pierce *v.* Emery, 32 N. H. 484, 507; Morgan *v.* Louisiana, 93 U. S. 217, 223, 23 L. ed. 860.

Commodities as including corporate franchises see COMMODITY, 8 Cyc. 339 note 57.

2. 2 Blackstone Comm. 37 [*quoted* in Central, etc., R. Co. *v.* State, 54 Ga. 401, 409; People *v.* Holtz, 92 Ill. 426, 428; Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 468, 86 Am. Dec. 552; Reg. *v.* Halifax County Ct. Judge, [1891] 2 Q. B. 263, 266, 60 L. J. Q. B. 550, 65 L. T. Rep. N. S. 104, 39 Wkly. Rep. 545]. See also State *v.* Topeka, 30 Kan. 653, 657, 2 Pac. 587.

3. Evans *v.* Philadelphia Club, 50 Pa. St. 107, 113; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122.

4. Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122.

Exemption from taxation, being a special privilege granted by the government to an individual, either in gross or as appurtenant to his freehold, has been held to be a franchise. New Jersey *v.* Wright, 117 U. S. 648, 656, 6 S. Ct. 907, 29 L. ed. 1021; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 364, 25 L. ed. 185. On the other hand it has been held that immunity from taxation is not such a franchise of a railroad corporation as will pass by a sale under a mortgage "on the property and franchises of the company." Morgan *v.* Louisiana, 93 U. S. 217, 223, 23 L. ed. 860, where it is said: "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its road and works would be of little value. . . . Immunity from taxation is not one of them." See also Evansville, etc., R. Co. *v.* Com., 9 Bush (Ky.) 438, 442; Baltimore, etc., R. Co. *v.* Ocean City, 89 Md. 89, 98, 42 Atl. 922; Mercantile Bank *v.* Tennessee, 161 U. S. 161, 171, 16 S. Ct. 466, 40 L. ed. 656; Pickard *v.* East Tennessee, etc., R. Co., 130 U. S. 637, 641, 9 S. Ct. 640, 32 L. ed. 1051; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 509, 5 S. Ct. 1009, 29 L. ed. 244; Chesapeake, etc., R. Co. *v.* Miller, 114 U. S. 176, 185, 5 S. Ct. 813, 29 L. ed. 121; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 619, 5 S. Ct. 299, 28 L. ed. 831; Wilson *v.* Gaines, 103 U. S. 417, 421, 26 L. ed. 401 [*affirming* 9 Baxt. (Tenn.) 546]; East Tennessee, etc., R. Co. *v.* Hamblen County, 102 U. S. 273, 277, 26 L. ed. 152; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122.

Whether exemption of members of corporation from jury duty is a franchise see CORPORATIONS, 10 Cyc. 1086 notes 67, 68.

5. Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122.

6. Chicago Bd. of Trade *v.* People, 91 Ill. 80, 83; Phalen *v.* Com., 1 Rob. (Va.) 713, 724 (where it is said: "A franchise may consist in personal privilege or exemption, or in rights or privileges connected with personal or real estate"); Morgan *v.* Louisiana, 93 U. S. 217, 223, 23 L. ed. 860 (where it is said: "It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character"). See also *In re* White Plains, 71 N. Y. App. Div. 544, 552, 76 N. Y. Suppl. 11; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 364, 25 L. ed. 185; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122.

7. Fietsam *v.* Hay, 122 Ill. 293, 294, 13 N. E. 501, 3 Am. St. Rep. 492; Lawrence *v.* Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166. See also Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 365, 25 L. ed. 185; Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 334, 18 C. C. A. 122. "It is a liberty or privilege." State *v.* Topeka, 30 Kan. 653, 657, 2 Pac. 587. "The word 'franchise' is generally used to designate a right, or privilege, conferred by law." State *v.* Western Irrigating Co., 40 Kan. 96, 99, 19 Pac. 349, 10 Am. St. Rep. 166; Jersey City Gas Light Co. *v.* Union Gas Imp. Co., 46 Fed. 264, 265. "If there is anything peculiar in the word franchise it must include, in any definition that can be given it, this word 'privileges.'" Willamette Woolen Mfg. Co. *v.* Bank, 119 U. S. 191, 198, 7 S. Ct. 187, 30 L. ed. 384.

8. See Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575.

9. See Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575.

10. Pierce *v.* Emery, 32 N. H. 484, 507.

A franchise involving solely matters of pecuniary interest, or a privilege in respect to property, can in no just sense be called a political privilege. Atchison St. R. Co. *v.* Missouri, etc., R. Co., 31 Kan. 661, 666, 3 Pac. 284.

11. Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575; People *v.* Holtz, 92 Ill. 426, 429; People *v.* Ridgeley, 21 Ill. 65, 69; Pierce *v.* Emery, 32 N. H. 484, 507. See Union Water Co. *v.* Kean, 52 N. J. Eq. 111, 128, 27 Atl. 1015. And see ELECTIONS, 15 Cyc. 280 note 11.

12. *Illinois.*— Martens *v.* People, 186 Ill. 314, 318, 57 N. E. 871; Lasher *v.* People, 183

right" employed in the foregoing definition is intended to mean a right which

Ill. 226, 233, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 238, 91 N. W. 1081.

Maryland.— Baltimore *v.* Johnson, 96 Md. 737, 747, 54 Atl. 646, 61 L. R. A. 568; State *v.* Philadelphia R. Co., 45 Md. 361, 379, 24 Am. Rep. 511.

Minnesota.— International Trust Co. *v.* American Loan, etc., Co., 62 Minn. 501, 503, 65 N. W. 78, 632; Green *v.* Knife Falls Boom Corp., 35 Minn. 155, 157, 27 N. W. 924, 925.

Missouri.— St. Louis Gaslight Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52, 72.

New York.— Rhinehart *v.* Redfield, 93 N. Y. App. Div. 410, 414, 87 N. Y. Suppl. 789.

West Virginia.— Watson *v.* Fairmont, etc., R. Co., 49 W. Va. 528, 539, 39 S. E. 193.

United States.— Augusta Bank *v.* Earle, 13 Pet. 519, 595, 10 L. ed. 274 [*quoted* in Spring Valley Water Works *v.* Schottler, 62 Cal. 69, 106; Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673, 682; Maestri *v.* Board of Assessors, 110 La. 517, 525, 34 So. 658; Purnell *v.* McLane, 98 Md. 589, 592, 56 Atl. 830; *Ex p.* Burton, 3 Gill (Md.) 1, 11; Abbott *v.* Omaha Smelting, etc., Co., 4 Nebr. 416, 420; Smith *v.* New York, 68 N. Y. 552, 555; Curtis *v.* Leavitt, 15 N. Y. 9, 170; Thompson *v.* Tammany Soc., 17 Hun (N. Y.) 305, 313; State *v.* Scougal, 3 S. D. 55, 62, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; Sellers *v.* Union Lumbering Co., 39 Wis. 525, 527; People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 50, 19 L. ed. 844; Western Union Tel. Co. *v.* Norman, 77 Fed. 13, 22]; Jersey City Gas Light Co. *v.* United Gas Imp. Co., 46 Fed. 264, 265.

Other definitions are: "A royal privilege or branch of the King's prerogative, subsisting in the hands of a subject." 2 Blackstone Comm. 37 [*quoted* in Horst *v.* Moses, 48 Ala. 129, 146; State *v.* Moore, 19 Ala. 514, 520; Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19, 36; Central R., etc., Co. *v.* State, 54 Ga. 401, 409; Lasher *v.* People, 183 Ill. 226, 232, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; Belleville *v.* Citizens Horse R. Co., 152 Ill. 171, 185, 38 N. E. 584, 26 L. R. A. 681; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575; People *v.* Holtz, 92 Ill. 426, 428; Chicago Bd. of Trade *v.* People, 91 Ill. 80, 82; Chicago City R. Co. *v.* People, 73 Ill. 541, 547; Cain *v.* Wyoming, 104 Ill. App. 538, 540; Com. *v.* Frankfort, 13 Bush (Ky.) 185, 189; Louisville Tobacco Warehouse Co. *v.* Com., 48 S. W. 420, 423, 20 Ky. L. Rep. 1047; Maestri *v.* Board of Assessors, 110 La. 517, 525, 34 So. 658; Thompson *v.* Moran, 44 Mich. 602, 604, 7 N. W. 180; State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 225, 41 N. W. 1020, 3 L. R. A. 510; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345; State *v.* Weatherby, 45 Mo. 17, 20; Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 130, 84 N. W. 802; People *v.* Kerr, 37 Barb. (N. Y.) 357, 393; State *v.* Pittsburgh, etc., R. Co., 50 Ohio St. 239, 251, 33 N. E. 1051; Montgomery *v.* Multnomah R. Co., 11 Oreg. 344, 354; Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 468, 86 Am. Dec. 552; State *v.* Scougal, 3 S. D. 55, 62, 51 N. E. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 813, 15 S. E. 1000, 17 L. R. A. 385; Central Pac. R. Co. *v.* California, 162 U. S. 91, 124, 16 S. Ct. 766, 40 L. ed. 903; California *v.* Central Pac. R. Co., 127 U. S. 1, 40, 8 S. Ct. 1073, 32 L. ed. 150; Reg. *v.* Halifax County Ct. Judge, [1891] 1 Q. B. 793, 797 [*affirmed* in [1891] 2 Q. B. 263, 266, 60 L. J. Q. B. 550, 65 L. T. Rep. N. S. 104, 39 Wkly. Rep. 545]; Chitty Prerog. [*quoted* in Atty.-Gen. *v.* British Museum Trustees, [1903] 2 Ch. 598, 604, 72 L. J. Ch. 743, 88 L. T. Rep. N. S. 858, 51 Wkly. Rep. 582]; 3 Cruise Dig. 278 [*quoted* in State *v.* Real Estate Bank, 5 Ark. 595, 599, 41 Am. Dec. 109; Arnold *v.* Mundy, 6 N. J. L. 1, 87, 10 Am. Dec. 356; Thompson *v.* People, 23 Wend. (N. Y.) 537, 579; Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603, 614]; Finch 164 [*quoted* in State *v.* Real Estate Bank, 5 Ark. 595, 599, 41 Am. Dec. 109; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 387, 8 Am. Dec. 243; Com. *v.* Arrison, 15 Serg. & R. (Pa.) 127, 130, 16 Am. Dec. 531]; Miner's Ditch Co. *v.* Zellerbach, 37 Cal. 543, 590, 90 Am. Dec. 300; People *v.* Ridgley, 21 Ill. 65, 69; Farmer's Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 590, 21 Atl. 902.

"Certain privileges conferred by grant from government, and vested in individuals." 3 Kent Comm. 458 [*quoted* in Horst *v.* Moses, 48 Ala. 129, 146; State *v.* Real Estate Bank, 5 Ark. 595, 599, 41 Am. Dec. 109; *Ex p.* Henshaw, 73 Cal. 486, 493, 15 Pac. 110; Spring Valley Water Works *v.* Schottler, 62 Cal. 69, 106; Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189, 61 Pac. 494, 499; Londoner *v.* People, 15 Colo. 246, 247, 25 Pac. 183; Com. *v.* Frankfort, 13 Bush (Ky.) 185, 189; Louisville Tobacco Warehouse Co. *v.* Com., 48 S. W. 420, 423, 20 Ky. L. Rep. 1047; Thompson *v.* People, 23 Wend. (N. Y.) 537, 578; State *v.* Pittsburgh, etc., R. Co., 50 Ohio St. 239, 251, 33 N. E. 1051; Montgomery *v.* Multnomah R. Co., 11 Oreg. 344, 354; Sellers *v.* Union Lumbering Co., 39 Wis. 525, 527]; Bouvier L. Dict. [*quoted* in Higgins *v.* Downward, 8 Houst. (Del.) 227, 240, 32 Atl. 133, 40 Am. St. Rep. 141; Miller *v.* Com., 112 Ky. 404, 406, 65 S. W. 828; State *v.* Morgan, 28 La. Ann. 482, 493 (dissenting opinion); Kennebec, etc., R. Co. *v.* Portland, etc., R. Co., 59 Me. 9, 66; Milhau *v.* Sharp, 27 N. Y. 611, 619, 84 Am. Dec. 314]; Burrill L. Dict. [*quoted* in Crum *v.* Bliss, 47 Conn. 592, 602]; Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 143, 39 N. W. 234.

"A particular privilege conferred by grant from a sovereign or a government, and vested in individuals; an immunity or exemption

pertains to citizens by the common law, the investiture of which is not to be from ordinary jurisdiction; a constitutional or statutory right or privilege." Webster Dict. [*quoted* or *cited* in Crum *v.* Bliss, 47 Conn. 592, 602; Central R., etc., Co. *v.* State, 54 Ga. 401, 409; Louisville Tobacco Warehouse Co. *v.* Com., 48 S. W. 420, 423, 20 Ky. L. Rep. 1047].

"A certain privilege or exemption bestowed by grant from the government and vested in individuals — immunity." Worcester Dict. [*quoted* in State *v.* Morgan, 28 La. Ann. 482, 493].

"A special privilege existing in an individual by grant of the sovereignty and not otherwise exercisable." Thompson *v.* Moran, 44 Mich. 602, 604, 7 N. W. 180.

"Privileges derived from the Government, vested either in individuals or private or public corporations." California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398, 422.

"A grant of a right or privilege to an individual or individuals or a corporation by the Government or sovereign power." State *v.* New York, etc., R. Co., 2 N. Y. Civ. Proc. 82, 89.

"A right belonging to the government, as a sovereign, yet committed, in trust, to some officer, corporation or individual." Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603, 614.

"Rights and privileges acquired only by special grant from the public through the legislature which impose upon the grantee, as the consideration therefor, a duty to the public to see that they are properly used." St. Louis, etc., R. Co. *v.* Balsley, 18 Ill. App. 79, 82.

"A branch of the sovereign power of the State, subsisting in a person or a corporation by a grant from the State." Rochester, etc., R. Co. *v.* New York, etc., R. Co., 44 Hun (N. Y.) 206, 212 [*affirmed* in 110 N. Y. 128, 17 N. E. 680].

"A privilege of a public nature, which can not be exercised without a legislative grant." State *v.* Weatherby, 45 Mo. 17, 20 [*quoted* in St. Louis Gaslight Co. *v.* St. Louis Gas, etc., Co., 16 Mo. App. 52, 72].

"A privilege or immunity of a public nature, which could not be exercised without a legislative grant." People *v.* Ridgley, 21 Ill. 65, 69.

"A privilege or immunity of a public nature, which cannot legally be exercised without legislative grant." Thompson *v.* People, 23 Wend. (N. Y.) 537, 569; State *v.* Portage City Water Co., 107 Wis. 441, 450, 83 N. W. 697.

"A certain privilege of a public nature, conferred by grant from the Government, and vested in individuals." Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89, 91.

"A grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved." Southampton *v.* Jessup, 162 N. Y. 122, 126, 56 N. E. 538.

"Certain immunities and privileges in which the public have an interest as contradistinguished from private rights, and which cannot be exercised without authority derived from the sovereign power." Thompson *v.* People, 23 Wend. (N. Y.) 537, 569; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 387, 8 Am. Dec. 243 [*quoted* in Com. *v.* Frankfort, 13 Bush (Ky.) 185, 189].

"A privilege in which the public have an interest, and which can not be exercised without authority from the sovereign power." Cumberland River Lumber Co. *v.* Commonwealth, 6 Ky. L. Rep. 295.

"Something which the citizen can not enjoy without legislative grant." Chicago Bd. of Trade *v.* People, 91 Ill. 80, 83.

"A special privilege conferred by grant from the state or sovereign power, as being something not belonging to the citizen of common right." Hesing *v.* Atty.-Gen., 104 Ill. 292, 296.

"A special grant by the sovereign power of a peculiar privilege whereby the recipient may do or enjoy something which in the exercise of the general rights of a subject or citizen he could not do or enjoy." Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 590, 99 Am. Dec. 300.

"A privilege or authority vested in certain persons by grant of the sovereign to exercise powers or to do and perform acts which without such grant they could not do or perform." Lewis Em. Dom. § 135 [*quoted* in West Manayunk Gas Light Co. *v.* New Gas Light Co., 21 Pa. Co. Ct. 369, 378; Watson *v.* Fairmont, etc., R. Co., 49 W. Va. 528, 539, 39 S. E. 193].

"A privilege vested in certain persons by grant from the sovereign authority in the state, to exercise powers, or to perform acts, which, without such grant, they could not do or perform." Twelfth-St. Market Co. *v.* Philadelphia, etc., Terminal R. Co., 142 Pa. St. 580, 590, 21 Atl. 902, 989.

"A particular privilege conferred by the sovereign power of the state, and vested in individuals." Dike *v.* State, 38 Minn. 366, 367, 38 N. W. 95.

"A particular privilege conferred by grant from a sovereign or government, and vested in individuals or a corporation." Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 53, 22 N. E. 616; Chicago City R. Co. *v.* People, 73 Ill. 541, 547.

"A right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security." California *v.* Central Pac. R. Co., 127 U. S. 1, 40, 8 S. Ct. 1073, 32 L. ed. 157 [*quoted* in Ashley *v.*

looked for in any special law, whether established by a constitution or an act of the legislature.[13]

II. PARTICULAR FRANCHISES CONSIDERED.

Franchises are of various kinds,[14] and may include the right to establish or charge tolls for the use of public ferries,[15] public bridges,[16] wharves,[17] turnpikes and toll roads,[18] railroads,[19] the right to collect tolls upon logs put into a public river,[20] the right to construct and maintain waterworks,[21] gas-works,[22] electric lighting plants,[23] public markets,[24] and the power to exercise the right of eminent

Ryan, 153 U. S. 436, 441, 14 S. Ct. 865, 38 L. ed. 773].

"A privilege emanating from the sovereign power of the State, owing its existence to a grant, or, as at common law, to prescription, which presupposes a grant, and invested in individuals or a body politic something not belonging to the citizen of common right." Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 137 Ill. 231, 232, 28 N. E. 248.

"A privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment." Woods *v.* Lawrence County, 1 Black (U. S.) 386, 409, 17 L. ed. 122.

"A right which belongs to the government when conferred upon the citizen." Lasher *v.* People, 183 Ill. 226, 233, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802.

"A grant or immunity, privilege, or exemption by public or quasi-public authority." Lawrence *v.* Times Printing Co., 22 Wash. 482, 490, 61 Pac. 166.

A grant and not a prohibition.—"Franchise" is not a negative word signifying prohibition, but an affirmative word denoting a grant. Fresno Canal, etc., Co. *v.* Park, 129 Cal. 437, 442, 62 Pac. 87, where the court said: "The real meaning of 'franchise' is a privilege granted—not a right taken away."

13. Spring Valley Water Works Co. *v.* Schottler, 62 Cal. 69, 107. See also Curtis *v.* Leavitt, 15 N. Y. 9, 170; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 575, 10 L. ed. 274.

14. California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

15. **Ferry rights.**— *Alabama.*— Dyer *v.* Tuskaloosa Bridge Co., 2 Port. 296, 27 Am. Dec. 655.

Illinois.— Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587.

Massachusetts.— *In re* Fay, 15 Pick. 243.

New Jersey.— State *v.* Hudson County, 23 N. J. L. 206.

New York.— Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314.

Oregon.— Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652.

South Dakota.— Evans *v.* Hughes County, 3 S. D. 580, 54 N. W. 603.

See also FERRIES, *ante*, p. 491.

16. **Public bridges.**— Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89; Southampton *v.* Jessup, 162 N. Y. 122, 56 N. E. 538; Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 38 Am. Rep. 407; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 120, 9 L. ed. 773, 938. See also BRIDGES, 5 Cyc. 1069 *et seq.*

17. **Public wharves.**— Sullivan *v.* Lear, 23 Fla. 463, 2 So. 846, 11 Am. St. Rep. 388; Flandreau *v.* Elsworth, 151 N. Y. 473, 45 N. E. 853; Smith *v.* New York, 68 N. Y. 552; Pelham *v.* The B. F. Woolsey, 16 Fed. 418. See also, generally, WHARVES.

18. See, generally, TOLL ROADS.

19. See, generally, RAILROADS.

Street railway franchises see, generally, STREET RAILROADS.

20. Sellers *v.* Union Lumbering Co., 39 Wis. 525. See also, generally, LOGGING.

21. **Waterworks.**—A grant to a company to construct, maintain, and operate a system of waterworks and to use the streets and alleys of the city for that purpose is a franchise. Spring Valley Water Works *v.* Schottler, 62 Cal. 69; Frankfort *v.* Stone, 108 Ky. 400, 56 S. W. 679, 22 Ky. L. Rep. 25; State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697. See also, generally, MUNICIPAL CORPORATIONS.

22. See, generally, GAS.

23. **Electric light plants.**— The use of the streets of a municipality for delivering electricity to the consumer is a franchise. Purnell *v.* McLean, 98 Md. 589, 56 Atl. 830. But the right to produce and sell electricity as a commercial product is not a prerogative of government, but is open to all, and hence is not a franchise. Purnell *v.* McLean, 98 Md. 589, 56 Atl. 830. See also ELECTRICITY, 15 Cyc. 467 *et seq.*

24. **Establishment and maintenance of public markets.**— The exclusive privilege vested in one pursuant to a city ordinance and contract predicated thereon, made by him with a city to furnish the ground, build thereon a structure suitable for a public market, and then operate it for a specified period by renting stalls to those engaged in the market business, and collecting and appropriating to himself the revenues derived from the renting of the stalls, has been held to be a franchise. Maestri *v.* Board of Assessors, 110 La. 517, 34 So. 658. On the other hand it has been held that the right to maintain a market-house or to carry on the business of a market is not a right derived from the commonwealth, but is a right belonging to all citizens alike, and that a private company incorporated for that business is a private corporation and exercises no franchise except

domain.[25] So it has been held that the term "franchise" includes the power of appointment to public office,[26] an exclusive right of fishing in a public river,[27] patent rights,[28] although it has been held not to embrace trade-marks[29] or mere licenses.[30] Corporations or bodies politic, or the privileges conferred thereon, are the most usual franchises,[31] and such franchises are as varied as the purposes for which corporations are created.[32] The right to exist as a corporation is itself a

that of being a corporation. Twelfth-St. Market Co. *v.* Philadelphia, etc., Terminal R. Co., 142 Pa. St. 580, 21 Atl. 902, 989. See also, generally, MUNICIPAL CORPORATIONS.

25. **Eminent domain** being a governmental prerogative necessarily incident to every sovereignty cannot be exercised by any citizen of common right, and the privilege of exercising the power when granted to an individual or corporation is a franchise.

Georgia.—Butler *v.* Thomasville, 74 Ga. 570.

Illinois.— Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571. See also Highway Com'rs *v.* Chicago, etc., R. Co., 34 Ill. App. 32; Springfield, etc., R. Co. *v.* Peters, 8 Ill. App. 300.

Indiana.—Allen *v.* Jones, 47 Ind. 438.

Massachusetts.— Glover *v.* Boston, 14 Gray 282.

Michigan.— Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180.

Ohio.— Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603.

Pennsylvania.— Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

United States.— California *v.* Central Pac. R. Co., 127 U. S. 1, 8 S. Ct. 1073, 32 L. ed. 150.

See also EMINENT DOMAIN, 15 Cyc. 567 note 59.

26. Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843; McGrath *v.* People, 100 Ill. 464; People *v.* Holtz, 92 Ill. 426; Frey *v.* Michie, 68 Mich. 323, 36 N. W. 184; Knoup *v.* Piqua Branch Bank, 1 Ohio St. 603. *Compare* Morrison *v.* People, 196 Ill. 454, 63 N. E. 989, holding that a statute conferring upon the president of the county board power to appoint a civil service commission did not confer a franchise.

Whether a public office is itself a franchise see, generally, OFFICERS.

27. Arnold *v.* Mundy, 6 N. J. L. 1, 10 Am. Dec. 356; Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12.

28. Reg. *v.* Halifax County Ct. Judge, [1891] 2 Q. B. 263, 60 L. J. Q. B. 550, 65 L. T. Rep. N. S. 104, 39 Wkly. Rep. 545. See also Maginn *v.* Bassford, 196 Ill. 266, 63 N. E. 668.

29. Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248.

30. Chicago City R. Co. *v.* People, 73 Ill. 541.

A license to sell liquor has been held not to be a franchise. People *v.* Matthews, 53 Ill. App. 305. But see State *v.* Topeka, 30 Kan. 653, 2 Pac. 587; Miller *v.* Com., 112 Ky. 404, 65 S. W. 828; Redden *v.* Maddox, 1 B. Mon. (Ky.) 193.

A license to practise law has been held to confer a franchise. *In re* Attorneys' Oaths, 20 Johns. (N. Y.) 492.

31. *Alabama.*— Meyer *v.* Johnston, 53 Ala. 237.

California.— Spring Valley Water Works *v.* Schottler, 62 Cal. 69.

Colorado.— Londoner *v.* People, 15 Colo. 246, 25 Pac. 183.

Delaware.— Wilmington, etc., R. Co. *v.* Downward, (1888) 14 Atl. 720.

Illinois.— Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; People *v.* Ridgley, 21 Ill. 65.

Kentucky.— Louisville Tobacco Warehouse Co. *v.* Com., 48 S. W. 420, 20 Ky. L. Rep. 1047.

New Hampshire.—Pierce *v.* Emery, 32 N. H. 484.

New York.— Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

Wisconsin.— Sellers *v.* Union Lumbering Co., 39 Wis. 525.

32. State *v.* Anderson, 90 Wis. 550, 63 N. W. 746.

Banking.— At common law the right to receive money on general or special deposit, to lend money on securities, to discount or purchase bills, notes, or other evidences of indebtedness, is not a franchise, since no legislative authority is necessary to authorize a person or partnership to engage in this kind of business. International Trust Co. *v.* American L. & T. Co., 62 Minn. 501, 65 N. W. 78, 632; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477; Augusta Bank *v.* Earle, 13 Pet. (U. S.) 519, 10 L. ed. 274. See State *v.* Stebbins, 1 Stew. (Ala.) 299. And see BANKS AND BANKING, 5 Cyc. 433 note 13. *Compare* Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314. But the power or privilege of a bank to issue notes to circulate as money is a franchise. International Trust Co. *v.* American L. & T. Co., 62 Minn. 501, 65 N. W. 78, 632; Atty.-Gen. *v.* New York, 3 Duer (N. Y.) 119; Dearborn *v.* Northwestern Sav. Bank, 42 Ohio St. 617, 51 Am. Rep. 851; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

Power of the legislature to make banking an exclusive corporate franchise see BANKS AND BANKING, 5 Cyc. 433 note 14. See also Curtis *v.* Leavitt, 15 N. Y. 9; Myers *v.* Manhattan Bank, 20 Ohio 283.

Insurance.— It has been held, under statute in New York, that the business of insurance is one dependent upon the exercise of a franchise. People *v.* Loew, 19 Misc. (N. Y.) 248, 44 N. Y. Suppl. 42. See also, generally, INSURANCE.

franchise,[33] and in addition to this the different powers and privileges which may be exercised by the corporation are as a general rule also franchises;[34] but a corporation may possess powers which are not strictly franchises, such for instance

The right and privilege granted to a foreign insurance company of carrying on its business within the state is a franchise. Northwestern Mut. L. Ins. Co. *v.* Lewis, etc., County, 28 Mont. 484, 72 Pac. 982, 98 Am. St. Rep. 572; State *v.* Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298. See also, generally, INSURANCE.

The right to exercise municipal powers and privileges conferred by the legislature upon a city is a franchise. People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843; Thompson *v.* Moran, 44 Mich. 602, 7 N. W. 180 (holding that the right of a city to take possession of, and improve as a public park, lands lying outside of its limits, comes only by sovereign grant, and so far as concerns the city is a public franchise); Pierce *v.* Emery, 32 N. H. 484. See also, generally, MUNICIPAL CORPORATIONS.

So where the legal existence of a drainage district as a corporation, and its right through its commissioners to enjoy and exercise the franchises, powers, and privileges which the statutes give corporations of that character, is in issue, a franchise is involved. People *v.* Cooper, 139 Ill. 461, 29 N. E. 872.

Membership in club or society.— The right of membership in an incorporated club or benevolent society has been held to be a franchise. Thompson *v.* Tammany Soc., 17 Hun (N. Y.) 305; Evans *v.* Philadelphia Club, 50 Pa. St. 107. And the same has been held of membership in an incorporated medical society. State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408; People *v.* Erie County Medical Soc., 32 N. Y. 187 [*affirming* 24 Barb. 570]. In Illinois, however, it has been held that the right to membership in a board of trade is not a franchise within the meaning of the constitution and statutes of that state. Chicago Bd. of Trade *v.* People, 91 Ill. 80. But in Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571, 575, it was said: "In its broad and popular sense it [the word franchise] embraces . . . the right to membership in voluntary associations or corporations."

The power of educational corporations to appoint tutors and professors has been held to be a franchise. People *v.* Geneva College, 5 Wend. (N. Y.) 211.

33. *California.*— Spring Valley Water Works *v.* Schottler, 62 Cal. 69.

Colorado.— Iron Silver Min. Co. *v.* Cowie, 31 Colo. 450, 72 Pac. 1067.

Illinois.— People *v.* Cooper, 139 Ill. 461, 29 N. E. 872; Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248; People *v.* Spring Valley, 129 Ill. 169, 21 N. E. 843; People *v.* O'Hair, 128 Ill. 20, 21 N. E. 211; Drummond Tobacco Co. *v.* Randle, 114 Ill. 412, 2 N. E. 536; St. Louis, etc., Coal, etc., Min. Co. *v.* Edwards, 103 Ill. 472.

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 91 N. W. 1081. *Compare* Young *v.* Webster City, etc., R. Co., 75 Iowa 140, 39 N. W. 234.

Kentucky.— Louisville Tobacco Warehouse Co. *v.* Com., 48 S. W. 420, 20 Ky. L. Rep. 1047.

New Hampshire.— Pierce *v.* Emery, 32 N. H. 484.

New York.— People *v.* State Bd. Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; Atty.-Gen. *v.* New York, 3 Duer 119.

Pennsylvania.— Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989.

South Dakota.— State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.

Texas.— State *v.* Austin, etc., R. Co., 94 Tex. 530, 62 S. W. 1050.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

United States.— Central Pac. R. Co. *v.* People, 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903; California *v.* Central Pac. R. Co., 127 U. S. 1, 41, 8 S. Ct. 1073, 32 L. ed. 150, where it is said: "Corporate capacity is a franchise."

Compare Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603, 613, where it is said: "The right to be a corporation has sometimes been called a franchise, but this is a misapplication of terms. The right to create a corporation, assuredly, is a franchise."

Right to form corporation under general corporation laws.— In State *v.* Western Irrigating Canal Co., 40 Kan. 96, 99, 19 Pac. 349, 10 Am. St. Rep. 166, it is said: "What is called 'the franchise of forming a corporation,' is really but an exemption from the general rule of the common law prohibiting the formation of corporations. All persons in this state have now the right of forming corporate associations upon complying with the simple formalities prescribed by the statute. The right of forming a corporation, and of acting in a corporate capacity under the general incorporation laws, can be called a franchise only in the sense in which the right of forming a limited partnership, or of executing a conveyance of land by deed, is a franchise. (2 Morawetz Priv. Corp. § 923)."

34. *California.*—Spring Valley Water Works *v.* Schottler, 62 Cal. 69.

Colorado.— Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189, 61 Pac. 494.

Connecticut.—Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 266, 4 Am. Rep. 63, where it is said: "The better opinion, deduced from the authorities, seems to be that it [the term 'franchise'] consists of the entire privileges embraced in and constituting the grant."

Illinois.— Hazelton Boiler Co. *v.* Hazelton Tripod Boiler Co., 137 Ill. 231, 28 N. E. 248.

as powers which belong to individuals by common right,[35] or railroad privileges and immunities of a personal and temporary character.[36] The franchise of being a corporation belongs to the corporators, while the powers and privileges vested in and to be exercised by the corporate body as such are the franchises of the

Iowa.— Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 91 N. W. 1081.

New Hampshire.—Pierce *v.* Emery, 32 N. H. 484.

New Jersey.—Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134; State Bd. of Assessors *v.* Central R. Co., 48 N. J. L. 146, 4 Atl. 578.

New York.—People *v.* State Bd. Tax Com'rs, 174 N. Y. 417, 67 N. E. 69; Atty.-Gen. *v.* New York, 3 Duer 119.

Vermont.— Miller *v.* Rutland, etc., R. Co., 36 Vt. 452.

Wisconsin.— Sellers *v.* Union Lumbering Co., 39 Wis. 525.

United States.— Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 619, 5 S. Ct. 299, 28 L. ed. 837 (where it is said: "The essential properties of corporate existence are quite distinct from the franchises of the corporation"); Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185; Central Trust Co. *v.* Western North Carolina R. Co., 89 Fed. 24, 31 (where it is said: "A franchise to be a corporation is distinct from a franchise, as a corporation, to maintain and operate a railroad"); Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 18 C. C. A. 122.

A corporate right to select and acquire land for the authorized purposes of the corporation is a franchise. Turnpike Road *v.* Baltimore, etc., R. Co., 81 Md. 247, 31 Atl. 854; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1.

General and special franchises distinguished. —"There is a marked distinction between a franchise which is essential to the creation and continued existence of a corporation — a right to exist as an artificial being — a right conferred by the sovereignty of the state — and those rights subsidiary in their nature by which the corporation obtains privileges of more or less value, to the enjoyment of which corporate existence is not a prerequisite." State *v.* Topeka Water Co., 61 Kan. 547, 558, 60 Pac. 337. In People *v.* State Bd. Tax Com'rs, 174 N. Y. 417, 435, 67 N. E. 69, it is said: "The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the state. The general franchise of a street railroad company, for instance, is the special privilege conferred by the state upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions. Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the state, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railway thereon, the privilege is known as a special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass."

The word "franchise" is generic, covering all the rights granted a corporation by the legislature, and it is too narrow a definition of the word to hold that it means only the right to be a corporation. Wilmington City R. Co. *v.* Wilmington, etc., R. Co., (Del. 1900) 46 Atl. 12; State *v.* Berry, 52 N. J. L. 308, 19 Atl. 665; Atlantic, etc., R. Co. *v.* Georgia, 98 U. S. 359, 25 L. ed. 185.

Franchises acquired subsequent to organization of corporation.— In State *v.* Portage City Water Co., 107 Wis. 441, 446, 83 N. W. 697, it was held that a franchise granted to an organized corporation is not strictly a corporate franchise. The court said: "Much confusion often happens from a failure to distinguish between those franchises that are corporate in a strict legal sense and not really property of the corporation, and franchises acquired by a corporation after corporate existence commenced, that it may part with if they be assignable, or be deprived of without corporate existence being affected, and which may survive the death of the corporation."

35. International Trust Co. *v.* American L. & T. Co., 62 Minn. 501, 65 N. W. 78, 632; State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989; State *v.* Scougal, 3 S. D. 55, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477. See also State *v.* Boston, etc., R. Co., 25 Vt. 433, 442, where the court, however, said: "All the functions of a corporation are, in one sense, franchises." *Compare* People *v.* Geneva College, 5 Wend. (N. Y.) 211.

36. **As applied to railroad corporations the term "franchises" employed in a mortgage** by the railroad company has been held not to be synonymous with "rights, privileges and franchises," "rights, powers and privileges," and the like, but to signify rights or privileges which are essential to the operation of the corporation, and without which its roads and works would be of little value,— such as the franchise to run cars, to take toll, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. East Tennessee, etc., R. Co. *v.* Hamblen County, 102 U. S. 273, 26 L. ed. 152; Morgan *v.* Louisiana, 93 U. S. 217, 23 L. ed. 860. See also State *v.* Maine Cent. R. Co., 66 Me. 488; Baltimore, etc., R. Co. *v.* Ocean City, 89 Md. 89, 42 Atl. 922; Denison, etc., R. Co. *v.* St. Louis Southwestern R. Co., 30 Tex. Civ. App. 474, 72 S. W. 201; New Orleans, etc.,

corporation.[37] While franchises are usually conferred on corporations, they are not essentially corporate.[38]

III. CREATION AND SOURCE.

A. Necessity of Government Grant. It is essential to the character of a franchise that it should be a grant from a sovereign power.[39] A franchise may, however, in some cases, be held by prescription which presupposes a grant.[40]

B. Construction of Grant. The grant of a franchise, in so far as it is ambiguous, is to be strictly construed against the grantee and in favor of the public, and nothing will pass unless it is granted in clear and explicit terms.[41]

R. Co. *v.* Delamore, 114 U. S. 501, 5 S. Ct. 1009, 29 L. ed. 244.

37. Londoner *v.* People, 15 Colo. 246, 25 Pac. 183; Fietsam *v.* Hay, 122 Ill. 293, 13 N. E. 501, 3 Am. St. Rep. 492; Cedar Rapids Water Co. *v.* Cedar Rapids, 118 Iowa 234, 91 N. W. 1081; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 837. See also CORPORATIONS, 10 Cyc. 1086.

38. *Minnesota.*— Brady *v.* Moulton, 61 Minn. 185, 63 N. W. 489.

Vermont.— Middlebury Bank *v.* Edgerton, 30 Vt. 182.

West Virginia.—Watson *v.* Fairmount, etc., R. Co., 49 W. Va. 528, 39 S. E. 193.

Wisconsin.— Black River Imp. Co. *v.* Holway, 87 Wis. 584, 59 N. W. 126; Atty.-Gen. *v.* Chicago, etc., R. Co., 35 Wis. 425.

United States.— Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 619, 5 S. Ct. 299, 28 L. ed. 837, where it is said: "All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons."

39. *California.*— *Ex p.* Henshaw, 73 Cal. 486, 15 Pac. 110; Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89; California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

Colorado.— Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673.

Illinois.— Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; Belleville *v.* Citizens' Horse R. Co., 152 Ill. 171, 38 N. E. 584, 26 L. R. A. 681; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571; Chicago Bd. of Trade *v.* People, 91 Ill. 80; Chicago City R. Co. *v.* People, 73 Ill. 541; People *v.* Ridgley, 21 Ill. 65, 69 (where it was said: "There must be some parting of prerogative belonging to a king, or to the people, under our system, that can constitute a franchise"); Cain *v.* Wyoming, 104 Ill. App. 538.

Maryland.—Purnell *v.* McLane, 98 Md. 589, 594, 56 Atl. 830, where it is said: "The right to a franchise is no more to be presumed, than the exemption from taxation, and therefore every assertion of such right must, to be efficacious, be distinctly supported by clear and unambiguous legislative enactment."

Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510; Blake *v.* Winona, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

Missouri.— State *v.* Weatherby, 45 Mo. 17.

New York.— Southampton *v.* Jessup, 162 N. Y. 122, 56 N. E. 538; Greenwood Lake, etc., Co. *v.* New York, etc., R. Co., 134 N. Y. 435, 31 N. E. 874; Atty.-Gen. *v.* New York, 3 Duer 119.

Pennsylvania.— Twelfth-St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, 21 Atl. 902, 989.

West Virginia.—Watson *v.* Fairmount, etc., R. Co., 49 W. Va. 528, 39 S. E. 193.

Wisconsin.— State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697; Sellers *v.* Union Lumbering Co., 39 Wis. 525.

United States.— People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. 38, 19 L. ed. 844; Woods *v.* Lawrence County, 1 Black 386, 17 L. ed. 122; Augusta Bank *v.* Earle, 13 Pet. 519, 10 L. ed. 274; Western Union Tel. Co. *v.* Norman, 77 Fed. 13.

See 23 Cent. Dig. tit. "Franchises," § 1.

The fact that a party is a corporation with the right to exercise corporate powers does not establish the right to a special franchise. Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447.

40. 2 Blackstone Comm. 37; 1 Stephen Comm. (14th ed.) 404. See Metropolitan City R. Co. *v.* Chicago, etc., R. Co., 87 Ill. 317; Chicago City R. Co. *v.* People, 73 Ill. 541; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Sellers *v.* Union Lumbering Co., 39 Wis. 525. And see CORPORATIONS, 10 Cyc. 235, 236; FERRIES, *ante*, p. 491.

41. *California.*— Powell *v.* Maguire, 43 Cal. 11; Schierhold *v.* North Beach, etc., R. Co., 40 Cal. 447; Bartram *v.* Central Turnpike Co., 25 Cal. 283.

Connecticut.—Hartford Bridge Co. *v.* Union Ferry Co., 29 Conn. 210; Talcott Mountain Turnpike Co. *v.* Marshall, 11 Conn. 135.

Georgia.— Shorter *v.* Smith, 9 Ga. 517; McLeod *v.* Burroughs, 9 Ga. 213.

Illinois.— Mills *v.* St. Clair County, 7 Ill. 197.

Indiana.— Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369, 24 N. E. 1054, 26 N. E. 893, 8 L. R. A. 539.

Iowa.— Miners' Bank *v.* U. S., 1 Greene 553.

Maine.— Rockland Water Co. *v.* Camden, etc., Water Co., 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388.

Maryland.—Purnell *v.* McLane, 98 Md. 589, 56 Atl. 830.

C. Delegation of Power to Grant Franchises — 1. In General. It has been said to be doubtful whether the legislative department can grant to any other body or authority the power to grant franchises.[42]

2. Grant by Municipality. Accordingly some of the authorities lay down the rule that a municipal corporation cannot confer a franchise,[43] grants of privileges by municipalities being regarded by some of the courts as mere licenses[44] or contracts.[45] On the other hand it is held in some cases that the state may indirectly grant franchises, acting through the agency of a municipality.[46]

D. Certainty of Grantee. Like every other kind of property, a franchise must have a certain owner; it can exist only by grant, and a certain grantee is essential to a grant.[47]

IV. NATURE AND INCIDENTS.

A. In General. A franchise has the legal character of property or an estate, and is usually classed as an incorporeal hereditament.[48] But the pro-

Nebraska.— Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802.

Nevada.— State *v.* Dayton, etc., Toll Road Co., 10 Nev. 155; Lake *v.* Virginia, etc., R. Co., 7 Nev. 294.

New York.— Southampton *v.* Jessup, 173 N. Y. 84, 65 N. E. 949; New York *v.* Manhattan R. Co., 143 N. Y. 1, 37 N. E. 494.

Tennessee.— Clarksville, etc., Turnpike Co. *v.* Montgomery County, 100 Tenn. 417, 45 S. W. 345, 58 L. R. A. 155; Memphis Gayoso Gas Co. *v.* Williamson, 9 Heisk. 314.

Texas.— East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. 834.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

United States.— Covington, etc., Turnpike Road Co. *v.* Sandford, 164 U. S. 578, 17 S. Ct. 198, 41 L. ed. 560; Oregon R., etc., R. Co. *v.* Oregonian R. Co., 130 U. S. 1, 9 S. Ct. 409, 32 L. ed. 837; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 9 L. ed. 773, 938; Helena *v.* Helena Waterworks Co., 122 Fed. 1, 58 C. C. A. 381; Griffing *v.* Gibb, 11 Fed. Cas. No. 5,819, McAll. 212 [*reversed* on another point in 2 Black 519, 17 L. ed. 353]; Union Pac. R. Co. *v.* U. S., 10 Ct. Cl. 548.

England.— Stourbridge Canal *v.* Wheeley, 2 B. & Ad. 792, 22 E. C. L. 333.

See 23 Cent. Dig. tit. "Franchises," § 2. And see Corporations, 10 Cyc. 195 note 54 *et seq.*, 1088.

42. Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673; People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844.

43. Denver, etc., R. Co. *v.* Denver City R. Co., 2 Colo. 673; Lasher *v.* People, 183 Ill. 226, 55 N. E. 663, 75 Am. St. Rep. 103, 47 L. R. A. 802; Metropolitan City R. Co. *v.* Chicago West Div. R. Co., 87 Ill. 317; Chicago City R. Co. *v.* People, 73 Ill. 541; Cain *v.* Wyoming, 104 Ill. App. 538; People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844. See Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802. And see Corporations, 10 Cyc. 1086 note 65; and, generally, Municipal Corporations.

44. Chicago City R. Co. *v.* People, 73 Ill. 541; People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154.

45. Chicago Municipal Gas Light, etc., Co. *v.* Lake, 130 Ill. 42, 22 N. E. 616 (holding that the privilege of the use of the public streets of a city or town, when granted by ordinance, is not always a mere license and revocable at the pleasure of the municipality granting it, for if the grant is for an adequate consideration and is accepted by the grantee, then the ordinance ceases to be a mere license and becomes a valid and binding contract); People *v.* Detroit Mut. Gaslight Co., 38 Mich. 154; Commercial Electric Light, etc., Co. *v.* Tacoma, 17 Wash. 661, 50 Pac. 592. See also People's Pass. R. Co. *v.* Memphis City R. Co., 10 Wall. (U. S.) 38, 19 L. ed. 844.

46. *Alabama.*— Mobile *v.* Louisville, etc., R. Co., 84 Ala. 115, 4 So. 106, 5 Am. St. Rep. 342.

California.— Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89, grant by board of county supervisors.

Maryland.— See Purnell *v.* McLane, 98 Md. 589, 56 Atl. 830.

Missouri.— State *v.* East Fifth St. R. Co., 140 Mo. 539, 41 S. W. 955, 62 Am. St. Rep. 742, 38 L. R. A. 218.

Ohio.— State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262.

Wisconsin.— State *v.* Portage City Water Co., 107 Wis. 441, 83 N. W. 697; Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47; Ashland *v.* Wheeler, 88 Wis. 607, 60 N. W. 818; State *v.* Madison St. R. Co., 72 Wis. 612, 40 N. W. 487, 1 L. R. A. 771.

See also Corporations, 10 Cyc. 1086 note 66.

47. Sellers *v.* Union Lumbering Co., 39 Wis. 525.

48. *Alabama.*— Horst *v.* Moses, 48 Ala. 129; Lewis *v.* Gainesville, 7 Ala. 85.

Arkansas.— State *v.* Real Estate Bank, 5 Ark. 595, 41 Am. Dec. 109.

California.— Gregory *v.* Blanchard, 98 Cal. 311, 33 Pac. 199; Spring Valley Water Works *v.* Schottler, 62 Cal. 69; People *v.* Selfridge, 52 Cal. 331; Oakland R. Co. *v.* Oakland, etc.,

priety of classing incorporated franchises among hereditaments has been questioned by chancellor Kent, since they have no inheritable quality, inasmuch as a corporation in cases where there is no express limitation to its continuance by the charter is supposed never to die but to be clothed with a kind of legal

R. Co., 45 Cal. 365, 13 Am. Rep. 181; Truckee, etc., Turnpike Road Co. *v.* Campbell, 44 Cal. 89; California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398.

Connecticut.— Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

Delaware.— Wilmington, etc., R. Co. *v.* Downward, (1888) 14 Atl. 720.

District of Columbia.— Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey 376.

Florida.— Gibbs *v.* Drew, 16 Fla. 147, 26 Am. Rep. 700.

Georgia.— State *v.* Georgia Medical Soc., 38 Ga. 608, 95 Am. Dec. 408.

Illinois.— Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587; Porter *v.* Rockford, etc., R. Co., 76 Ill. 561. See also Maginn *v.* Bassford, 196 Ill. 266, 63 N. E. 668.

Iowa.— Lippencott *v.* Allander, 27 Iowa 460, 1 Am. Rep. 299.

Kansas.— State *v.* Topeka Water Co., 61 Kan. 547, 60 Pac. 337.

Kentucky.— Price *v.* Price, 6 Dana 107.

Louisiana.— State *v.* Morgan, 28 La. Ann. 482.

Maryland.— Jacob Tome Inst. *v.* Crothers, 87 Md. 569, 40 Atl. 261. See also Baltimore *v.* Johnson, 96 Md. 737, 54 Atl. 646; State *v.* Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511.

Michigan.— Billings *v.* Breinig, 45 Mich. 65, 7 N. W. 722; Chilvers *v.* People, 11 Mich. 43. See also Kitson *v.* Ann Arbor, 26 Mich. 325.

Minnesota.— State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

New Hampshire.— Piscataqua Bridge *v.* New Hampshire Bridge, 7 N. H. 35.

New Jersey.—Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134.

New York.— People *v.* O'Brien, 111 N. Y. 1, 18 N. E. 692, 7 Am. St. Rep. 684, 2 L. R. A. 255; Smith *v.* New York, 68 N. Y. 552; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365; *In re* Hamilton Ave., 14 Barb. 405; Thompson *v.* People, 23 Wend. 537; People *v.* Utica Ins. Co., 15 Johns. 358, 8 Am. Dec. 243.

North Carolina.— Biggs *v.* Ferrell, 34 N. C. 1.

Oregon.— Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652; Montgomery *v.* Multnomah R. Co., 11 Oreg. 344, 3 Pac. 435.

Tennessee.— State *v.* Staten, 6 Coldw. 233.

Virginia.— Phalen *v.* Com., 1 Rob. 713; Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

West Virginia.— Bellington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612.

Wisconsin.— State *v.* Anderson, 90 Wis. 550, 63 N. W. 746; Chapman Valve Mfg. Co. *v.* Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830; Fond du Lac Water Co. *v.* Fond du Lac, 82 Wis. 322, 52 N. W. 439, 16 L. R. A. 581; Sellers *v.* Union Lumbering Co., 39 Wis. 525.

United States.— Wilmington, etc., R. Co. *v.* Reid, 13 Wall. 264, 20 L. ed. 568; Veazie Bank *v.* Fenno, 8 Wall. 533, 19 L. ed. 482; Hamilton Mfg. Co. *v.* Massachusetts, 6 Wall. 632, 18 L. ed. 904; Provident Sav. Inst. *v.* Massachusetts, 6 Wall. 611, 18 L. ed. 907; Savings Soc. *v.* Coite, 6 Wall. 594, 18 L. ed. 897; Conway *v.* Taylor, 1 Black 603, 17 L. ed. 191; West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. ed. 535; Bowman *v.* Wathen, 3 Fed. Cas. No. 1,740, 2 McLean 376.

England.— Reg. *v.* Cambrian R. Co., L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, 25 L. T. Rep. N. S. 84, 19 Wkly. Rep. 1138.

Whether a franchise is real estate.—"All the elementary writers treat of franchises as real property, though incorporeal in their nature." Randolph *v.* Larned, 27 N. J. Eq. 557, 561. See also Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716; Thompson *v.* Schenectady R. Co., 124 Fed. 274. "A franchise may be considered where it relates to real property, as real estate." Alexandria Canal, etc., Co. *v.* District of Columbia, 5 Mackey (D. C.) 376, 383. In Reg. *v.* Cambrian R. Co., L. R. 6 Q. B. 422, 40 L. J. Q. B. 169, 25 L. T. Rep. N. S. 84, 19 Wkly. Rep. 1138 [*overruled* on another point in Hopkins *v.* Great Northern R. Co., 2 Q. B. D. 224, 46 L. J. Q. B. 265, 36 L. T. Rep. N. S. 898], a ferry franchise was held to be "lands" within the definition of section 3 of the Lands Consolidation Act. To the same effect see Great Western R. Co. *v.* Swindon, etc., Extension R. Co., 9 App. Cas. 787, 48 J. P. 821, 53 L. J. Ch. 1075, 51 L. T. Rep. N. S. 798. But in Gibbs *v.* Drew, 16 Fla. 147, 26 Am. Rep. 700, franchises were held not to be embraced within the meaning of the terms "lands or tenements," in an act regulating the proceeding of unlawful detainer. Whether corporate franchises are real estate within the meaning of taxation laws see, generally, TAXATION.

Whether a franchise is subject to partition. — In Rohn *v.* Harris, 130 Ill. 525, 22 N. E. 587, it was held that while strictly speaking a ferry franchise is not real estate, it partakes so far of the nature of real estate that it may be partitioned in judicial proceedings instituted therefor, in the same manner as real property. But in Donelly *v.* Vandenbergh, 3 Johns. (N. Y.) 27, the power of proprietors of a stage road to partition the privilege or franchise, or to divide the road among themselves so as to give exclusive

immortality.[49] While a grant of a franchise is in the nature of a vested right of property it is subject in most cases to the performance of conditions and duties on the part of the grantee.[50] Franchises being property are, like other property, subject to taxation,[51] to the exercise of the power of eminent domain,[52] to the exercise of the police power of the state,[53] and are entitled to the same protection under constitutional guaranties as other property.[54] It is sometimes said that a franchise may be transferred by sale or devise, and that it will descend to heirs like other property,[55] and the weight of authority seems to be in favor of the alienability of ferry franchises.[56] But as a general rule corporate franchises are not subject to sale or transfer,[57] unless authorized by statute.[58] A franchise may be lost by forfeiture[59] or voluntary surrender,[60] under proper conditions.

and independent rights in distinct parcels of the road, was questioned.

49. 3 Kent Comm. 459 [*cited* in State *v.* Anderson, 90 Wis. 550, 63 N. W. 746].

50. *California.*— California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 422.

Georgia.— Lamar *v.* McDaniel, 78 Ga. 547, 3 S. E. 409.

Illinois.— St. Louis, etc., R. Co. *v.* Balsley, 18 Ill. App. 79.

New York.— Beekman *v.* Third Ave. R. Co., 153 N. Y. 144, 47 N. E. 277; Rbinehart *v.* Redfield, 93 N. Y. App. Div. 410, 414, 87 N. Y. Suppl. 789 [*affirmed* in 179 N. Y. 569, 72 N. E. 1150] (where it is said: "The grant of a franchise presupposes a benefit to the public, and an equal right on the part of every member of such public, within the territory involved, to participate in this benefit upon the same terms and conditions, which terms and conditions are prescribed by the statute"); Thompson *v.* People, 23 Wend. 537. See also Rochester, etc., R. Co. *v.* New York, etc., R. Co., 44 Hun 206.

Ohio.— State *v.* Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

51. See, generally, TAXATION.

52. See CONSTITUTIONAL LAW, 8 Cyc. 975; EMINENT DOMAIN, 15 Cyc. 607, 647, 667.

53. See CONSTITUTIONAL LAW, 8 Cyc. 873 note 17, 902 text and note 1, 974 note 84 *et seq.*

54. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19. See also COMMERCE, 7 Cyc. 455 note 25; CONSTITUTIONAL LAW, 8 Cyc. 786 note 78, 814 note 59, 873 note 17, 902 note 99 *et seq.*, 943 note 67, 966 note 49 *et seq.*, 975 note 86, 985 note 48, 1138 note 9; EMINENT DOMAIN, 15 Cyc. 667 note 67 *et seq.*

55. Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19; Enfield Toll Bridge Co. *v.* Hartford, etc., R. Co., 17 Conn. 40, 42 Am. Dec. 716.

56. See CORPORATIONS, 10 Cyc. 1091 note 98; FERRIES, *ante*, p. 491.

57. Randolph *v.* Larned, 27 N. J. Eq. 557; Carpenter *v.* Black Hawk Gold Min. Co., 65 N. Y. 43; Bath Gas Light Co. *v.* Claffy, 26 N. Y. Suppl. 287; Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47; State *v.* Anderson, 90 Wis. 550, 63 N. W. 746; Gibbs *v.* Consolidated Gas Co., 130 U. S. 396, 9 S. Ct. 553, 32 L. ed. 979; Memphis, etc., R. Co. *v.* Berry, 112 U. S. 609, 5 S. Ct. 299, 28 L. ed. 831; Branch *v.* Jessup, 106 U. S. 468, 1 S. Ct. 495, 27 L. ed. 279; York, etc., R. Co. *v.* Winans, 17 How. (U. S.) 30, 15 L. ed. 27; McCutcheon *v.* Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415. See also CORPORATIONS, 10 Cyc. 282, 1090 *et seq.*; and, generally, RAILROADS.

Sale under execution see CORPORATIONS, 10 Cyc. 1094; EXECUTIONS, 17 Cyc. 947.

Power of corporations to mortgage franchises see CORPORATIONS, 10 Cyc. 1182 *et seq.*

Franchises passing under assignments for the benefit of creditors see CORPORATIONS, 10 Cyc. 1240.

Whether franchises pass to trustee in bankruptcy see BANKRUPTCY, 5 Cyc. 351 note 76.

58. A sale and transfer of a franchise may be authorized by statute. Wright *v.* Milwaukee Electric R., etc., Co., 95 Wis. 29, 69 N. W. 791, 60 Am. St. Rep. 74, 36 L. R. A. 47; Chapman Valve Mfg. Co. *v.* Oconto Water Co., 89 Wis. 264, 60 N. W. 1004, 46 Am. St. Rep. 830. See also CORPORATIONS, 10 Cyc. 1093 note 12.

When the legislature grants a franchise to a particular person, his associates and assigns, it delegates to him the right to select the person thereafter to be associated with him in the enterprise. Powell *v.* Maguire, 43 Cal. 11.

Statutory ratification of alienation.— So, although the alienation of franchises may be unauthorized, it may be subsequently ratified by the legislature. State *v.* Centreville Bridge Co., 18 Ala. 678; Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395. See also CORPORATIONS, 10 Cyc. 1093. In Carter *v.* Meuli, 122 Cal. 367, 56 Pac. 138, the requirement and acceptance by the board of supervisors of a bond from the assignee of a toll-road franchise, as owner of such franchise, which had been granted by the board, was held to constitute a sufficient approval of the assignment.

59. New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021. See also CORPORATIONS, 10 Cyc. 1087, 1272 *et seq.*

A franchise may be lost by non-user in twenty years — non-user being one of the common grounds assigned as a cause of forfeiture. New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021.

60. New Jersey *v.* Wright, 117 U. S. 648, 6 S. Ct. 907, 29 L. ed. 1021. See also CORPORATIONS, 10 Cyc. 1299 *et seq.*

B. Exclusiveness. The doctrine has been laid down that every franchise granted is in its nature, and in the absence of express provision to the contrary, exclusive,[61] except as against the government.[62] Moreover the term "franchise" is sometimes used to mean an exclusive right in the sense that the same right cannot be granted to another, without an invasion of the franchise of the first grantee.[63] But it may be stated as a general rule that while a franchise may be a monopoly,[64] a monopoly is not an essential feature of a franchise.[65]

C. Franchise Distinguished From Property Acquired by Franchise. The word "franchise" is sometimes used to signify all the property of a corporation.[66] But in a strictly legal sense the term "franchise" does not embrace property acquired by the exercise of the franchise.[67]

FRANKLINITE. The term does not mean the pure mineral of that name, which is never found except in small and detached specimens, but those veins or lodes in which franklinite predominates, and which is known and designated as "franklinite ore."[1] (See, generally, MINES AND MINERALS.)

FRANK-TENEMENT. Freehold.[2] (See, generally, ESTATES.)

FRATER. In civil law a BROTHER,[3] *q. v.* (See COUSINS GERMAN; FIRST COUSIN.)

FRATER CONSANGUINEUS. See FRATER.

61. Twelfth-St. Market Co. *v.* Philadelphia R. Co., 142 Pa. St. 580, 590, 21 Atl. 902, 989, where it is said: "A franchise is *jus publicum* and necessarily exclusive in its nature."

62. New Jersey Southern R. Co. *v.* Long Branch Com'rs, 39 N. J. L. 28; Jersey City Gas Co. *v.* Dwight, 29 N. J. Eq. 242; Raritan, etc., R. Co. *v.* Delaware, etc., R. Co., 18 N. J. Eq. 546. *Compare* Norwich Gas Light Co. *v.* Norwich City Gas Co., 25 Conn. 19.

63. See California State Tel. Co. *v.* Alta Tel. Co., 22 Cal. 398; Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571.

For a discussion of the validity of grants of exclusive franchises see CONSTITUTIONAL LAW, 8 Cyc. 1039; and, generally, MONOPOLIES.

64. Slingerland *v.* International Contracting Co., 43 N. Y. App. Div. 215, 60 N. Y. Suppl. 12; Reg. *v.* Halifax County Ct. Judge, [1891] 1 Q. B. 793 [*affirmed* in [1891] 2 Q. B. 263, 60 L. J. Q. B. 550, 65 L. T. Rep. N. S. 104, 39 Wkly. Rep. 545]. *Compare* Knoup *v.* Piqua Branch State Bank, 1 Ohio St. 603, 614, where it is said: "A monopoly is not a franchise — it is a thing disfavored in law; an abuse, a public nuisance."

65. Chicago, etc., R. Co. *v.* Dunbar, 95 Ill. 571; Milhau *v.* Sharp, 27 N. Y. 611, 84 Am. Dec. 314; Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420, 9 L. ed. 773, 938. See also Bartram *v.* Central Turnpike Co., 25 Cal. 283; Raritan, etc., R. Co. *v.* Delaware, etc., R. Co., 18 N. J. Eq. 546.

Presumption against exclusive franchises not expressly granted see CORPORATIONS, 10 Cyc. 195.

66. See Buchanan *v.* Knoxville, etc., R. Co., 71 Fed. 324, 18 C. C. A. 122.

67. *California.*— Miners' Ditch Co. *v.* Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Connecticut.— Bridgeport *v.* New York, etc., R. Co., 36 Conn. 255, 4 Am. Rep. 63.

Kentucky.— Bailey *v.* Kentucky Southern R. Co., 112 Ky. 424, 60 S. W. 631, 61 S. W. 31, 22 Ky. L. Rep. 1397.

New York.— Smith *v.* New York, 68 N. Y. 552; Evangelical Lutheran St. John's Orphan Home *v.* Buffalo Hydraulic Assoc., 64 N. Y. 561; Monroe County Sav. Bank *v.* Rochester, 37 N. Y. 365.

Pennsylvania.— Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552.

Virginia.— Tuckahoe Canal Co. *v.* Tuckahoe, etc., R. Co., 11 Leigh 42, 36 Am. Dec. 374.

West Virginia.— Belington, etc., R. Co. *v.* Alston, 54 W. Va. 597, 46 S. E. 612.

United States.— Thompson *v.* Schenectady R. Co., 124 Fed. 274.

Land not a franchise.— In Shamokin Valley R. Co. *v.* Livermore, 47 Pa. St. 465, 86 Am. Dec. 552, it was held that land in itself is not a franchise, and that it will not pass by the mortgage of a railroad company under the terms "corporate franchises" and "appurtenances."

1. New Jersey Zinc Co. *v.* New Jersey Franklinite Co., 13 N. J. Eq. 322, 344.

The term has been held to mean zinc and iron in chemical combination, and not properly either a metal or an ore. New Jersey Zinc Co. *v.* Boston Franklinite Co., 15 N. J. Eq. 418, 445.

2. See Hoge *v.* Hollister, 2 Tenn. Ch. 606, 610.

3. Black L. Dict. See also Tomlin L. Dict. [*quoted* in Bridgman *v.* London L. Assur. Co., 44 U. C. Q. B. 536, 540], where it is said: "*Frater Consanguineus* [is] a brother by the father's side. *Frater uterinus* [is a brother] by the mother's side. *Frater nutricius* [is] sometimes used for a bastard brother."

"Frater patruelis" see 11 Cyc. 1021 note 11 [*citing* Ainsworth Dict. (*quoted* in Saunderson *v.* Bailey, 4 Myl. & C. 56, 60, 18 Eng. Ch. 56)].

FRATER FRATRI UTERINO NON SUCCEDIT IN HÆREDITATE PATERNA. A maxim meaning "A brother shall not succeed a uterine brother in the paternal inheritance."[4]

FRATERNAL ASSOCIATION. See MUTUAL BENEFIT INSURANCE.

FRATERNAL INSURANCE. Temporary insurance; insurance from the maturity of one assessment to the maturity of another; and stipulations to insure promptitude in the payment of the assessments constitute both the substance and the essence of the contracts for it.[5] (See, generally, MUTUAL BENEFIT INSURANCE.)

FRATERNAL SOCIETY. As defined by statute any corporation, society or voluntary association organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with a ritualistic form of work and a representative form of government, providing for the paying of benefits in case of death.[6] (See, generally, MUTUAL BENEFIT INSURANCE.)

FRATERNITY. Some people of a place united together, in respect of a mystery and business, into a company.[7] Distinguishing "fraternity" from "corporation." (See, generally, ASSOCIATIONS; CLUBS; CORPORATIONS; MUTUAL BENEFIT INSURANCE; RELIGIOUS SOCIETIES.)

FRATER NUTRICIUS. See FRATER.

FRATER PETRUELIS. See FRATER.

FRATER UTERINUS. See FRATER.

FRATRICIDE. One who has killed a brother or sister; also the killing of a brother or sister.[8] (See, generally, HOMICIDE.)

4. Bouvier L. Dict. [*citing* 2 Blackstone Comm. 232; Broom Leg. Max. 530], where it is said: "This maxim is now superseded in England by 3 & 4 Wm. IV, c. 106, c. 9."

5. M. W. of A. *v.* Tevis, 117 Fed. 369, 372, 54 C. C. A. 293 [*citing* Carlson *v.* Supreme Council A. L. of H., 115 Cal. 466, 475, 47 Pac. 375, 35 L. R. A. 643; McMahon *v.* Supreme Tent K. M. of W., 151 Mo. 522, 527, 52 S. W. 384; Harvey *v.* Grand Lodge A. O. U. W., 50 Mo. App. 472, 479; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 258, 26 L. ed. 765; Klein *v.* New York L. Ins. Co., 104 U. S. 88, 91, 26 L. ed. 662; New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 30, 23 L. ed. 789].

6. Conn. Pub. Acts (1895), p. 592, c. 255, § 1 [*quoted* in Miles *v.* Odd Fellows' Mut. Aid Assoc., 76 Conn. 132, 134, 55 Atl. 607].

7. Coddon *v.* Eastwick, 1 Salk. 192, 193.

8. Black L. Dict.